Implementation of The Law of the Sea Convention Through International Institutions

Edited by
Alfred H. A. Soons

Implementation of The Law of the Sea Convention Through International Institutions

Proceedings of
The 23rd Annual Conference of
The Law of the Sea Institute

co-sponsored by
The Netherlands Institute for the Law of the Sea

June 12–15, 1989
Noordwijk aan Zee, The Netherlands

Co-chairmen:
Thomas A. Clingan, Jr. and Alfred H. A. Soons

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Alfred H. A. Soons

Published by
The Law of the Sea Institute
William S. Richardson School of Law
University of Hawaii • Honolulu

The Law of the Sea Institute is housed and sponsored by the William S. Richardson School of Law, University of Hawaii, and is a project (R/PP-2) sponsored by the University of Hawaii Sea Grant College Program under Institutional Grant No. NA85AA-D-SG082 from NOAA, Office of Sea Grant, Department of Commerce. The United States government is authorized to produce and distribute reprints for governmental purposes notwithstanding any copyright notations that may appear herein. This is Sea Grant publication UNIHI-SEAGRANT-CR-90-01.

International Standard Book Number: 0-911189-22-X.

Library of Congress Cataloging-in-Publication Data

Law of the Sea Institute. Conference (23rd : 1989 : Noordwijk, Netherlands)
Implementation of the law of the sea convention through international organizations : proceedings of the 23rd Annual Conference of the Law of the Sea Institute / co-sponsored by the Netherlands Institute for the Law of Sea, June 12-15, 1989, Noordwijk aan Zee, The Netherlands ; edited by Alfred H.A. Soons.
p. cm.
Includes bibliographical references and index.
ISBN 0-911189-22-X : $45.00 (est.)
1. Maritime law--Congresses. I. Soons, Alfred H. A.
II. Netherlands Institute for the Law of the Sea. III. Title.
JX4408.L373 1989
341.7'566--dc20 90-27882
CIP

This book may be ordered from:
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University of Hawaii at Manoa
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Cite as 23 L. Sea Inst. Proc. [page numbers] (1990).

PREFACE

The 23rd Annual Conference of the Law of the Sea Institute, co-sponsored by the Netherlands Institute for the Law of the Sea, could not have taken place without the support of numerous institutions and persons. The institutions which provided financial support for the Conference are mentioned on one of the next pages.

Of the many persons who contributed to the success of the Conference I would like to mention in particular the session chairs, speakers, and commentators who provided the substance -- and that is what it was all about.

I should like to thank Professor Thomas Clingan, Conference co-chair, and the staff of the Law of the Sea Institute for their very efficient cooperation at all stages.

Most of the work on NILOS' side was done by the Organizing Committee consisting of Gerard Peet, Annemiek Reijnders, Lieke Houttuin, Bert van Schalm, and Paul Ymkers. Barbara Kwiatkowska, Monique de Boer, and Ton IJlstra also contributed. Finally, during the Conference a number of students provided various services. They are: Godelieve Alkemade, Pascal Boymans, Nicolette van der Doe, Gerrit van Heyst, and Tanya Kreeftenberg. Their help is gratefully acknowledged.

Professor Alfred H. A. Soons, Director
Netherlands Institute for the
Law of the Sea
University of Utrecht

We gratefully acknowledge the support for this conference and proceedings from the following organizations:

AMOCO Netherlands Petroleum Company

Ford Foundation

M.A.O.C. Gravin van Bylandt Stichting

Koninklijke Nederlandse Akademie voor Wetenschappen

Koninklijke Nedlloyd Groep N.V.

Loeff en van der Ploeg Advocaten

Donald "Rusty" McGuire Memorial Fund

Andrew W. Mellon Foundation

Ministry of Foreign Affairs of The Netherlands

Mobil Producing Netherlands Inc.

Nationaal Steunfonds van den Berch van Heemstede Stichting

Nederlandse Aardolie Maatschappij B.V.

N. V. Nederlandse Gasunie

Produktschap Vis en Visprodukten

Sea Grant College Program, University of Hawaii

Shell Nederland B.V.

University of Hawaii

University of Hawaii Foundation

William S. Richardson School of Law, University of Hawaii

University of Utrecht

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OPENING CEREMONIES

Alfred Soons: Ladies and gentlemen, good morning. I would like to welcome you to the 23rd Annual Conference of the Law of the Sea Institute, co-sponsored by the Netherlands Institute for the Law of the Sea. I'm Fred Soons, one of the two co-chairmen of the conference; Tom Clingan, the other co-chairman, is sitting behind the table here. I'd like to welcome especially those of you who have come from abroad, and some of you have come from very far indeed, from the other side of the globe. I hope you will enjoy your stay in The Netherlands. It looks as if we will have nice weather, which is not, I'm afraid, typical Dutch weather, but let's hope we keep it for the rest of the week.

You have come to The Netherlands during election time. Those of you who come from countries outside the European Economic Community may be interested to know that on Thursday we will have elections for the European Parliament, and on Thursday evening after the final banquet you will be able to watch the first results on television.

Before we start with the first session we will have two speakers: Albert Koers, who will conduct the opening on behalf of the president of the University of Utrecht, and Ambassador Andres Aguilar, who is our keynote speaker. May I now invite Albert Koers to take the floor.

Albert Koers: Thank you, Mr. Chairman, Excellencies, ladies and gentlemen. Some of you may be somewhat surprised to see me standing here right at the beginning of the 23rd Annual Conference of the Law of the Sea Institute. After all, there have been rumors that I have left the law of the sea. I will, of course, not respond to rumors, but I must clarify my role here. Originally the task of opening this conference, as has already been mentioned by Professor Soons, would have been discharged by Mr. Veldhuis, the president of the University of Utrecht. However, when he fell ill I was asked to take his place as one of the two associate *rectores magnifici* of the University and it is in that capacity that I take the floor, but rest assured, for a few minutes only.

This is the second time that the Law of the Sea Institute Conference takes place in The Netherlands, and it is the second time that the University of Utrecht has acted as its co-sponsor. Some of you may remember the first conference in The Netherlands in 1978 and its venue, the famous Hall of Knights in The Hague.

That the second LSI conference in this country is held once again outside the city of Utrecht has several good reasons. And indeed, this is a very good place, so close to the sea, to host an LSI conference. However, I should also tell you that about a year ago I saw Professor Soons and the full staff of NILOS regularly walking the streets of Utrecht, each of them carrying on their shoulder something which, to my eye at least, clearly was the oar of a rowing boat. When I asked Professor Soons for the purpose of this physically quite strenuous exercise -- it was a hot day -- he mentioned something about a rather old joke to the effect that they were doing research to determine the landward limits of the coastal zone. However, I now suspect that this exercise had altogether a different reason, that it was part of a secret NILOS research program to determine the seamindedness of the citizens of the city of Utrecht, and that if too many questions were asked about what they were carrying, NILOS would hold the conference outside of Utrecht. Apparently the good citizens of Utrecht failed the test. However, if that test had been conducted not on the streets of Utrecht, but within the University of Utrecht, the results could have been quite different.

The University of Utrecht is not only one of the oldest such institutions in this country -- it was established in 1636 -- but it is also one of the largest. At present there are about 24,000 students, a total teaching and research staff of 8,000 individuals, and an annual operating budget slightly in excess of US$300 million. The University offers a broad spectrum of education and training in virtually all disciplines except technology, and its research efforts are equally broad and general.

The University of Utrecht is proud not only of its past but also of what it has to offer today. Although landlocked, the University is also proud of its many links with the sea. In the faculties of natural science, for example, there are research and teaching in such areas as marine geology, geophysics, meteorology, and physical oceanography. And then there is, of course, the long tradition in relation to the law of the sea.

This tradition started with Professor Verzijl and it was continued by Professors Bouchez, Koers (yes, the same person) and Soons. It led, in 1984, to the establishment of the Netherlands Institute for the Law of the Sea, and it is therefore not surprising that the second LSI conference in The Netherlands is co-sponsored by NILOS, and that the University of Utrecht did not need much convincing to contribute to this conference financially.

I hope that you will have a productive and enjoyable meeting, and I am sure the staff of NILOS has done everything within its power to

achieve this. It is, therefore, Mr. Chairman, with great pleasure that, on behalf of the University of Utrecht, I declare the 23rd Annual Conference of the Law of the Sea Institute in session. Thank you.

Alfred Soons: Thank you very much, Albert. I now have the great pleasure of introducing our keynote speaker, Ambassador Andres Aguilar, Permanent Representative of Venezuela to the United Nations. Ambassador Aguilar has had a very distinguished career representing his country, Venezuela, at various posts. He has been Permanent Representative of Venezuela before, he has been Ambassador to the United States and has had several other important appointments, but for us most important is that he has played a very prominant role at the Third United Nations Conference on the Law of the Sea as chairman of one of its main committees, the Second Committee. I would like also to add that I'm not only pleased that he is our keynote speaker because of his achievements in the law of the sea, but also for a totally different reason: because he comes from a country with which The Netherlands has a very special relationship since it is one of our neighbors. Not only Belgium, the Federal Republic of Germany, and, across the sea, the United Kingdom are our neighbors; we also have some other neighbors far away. The Kingdom of The Netherlands consists of three parts: apart from this part in Europe we have also two parts in the Caribbean: Aruba and the Netherlands Antilles. Venezuela, of course, is the major neighbor of the Caribbean parts of our kingdom, so there's one additional reason for us to be very pleased to have Ambassador Aguilar delivering the keynote address to this conference. Mr. Ambassador, you have the floor.

KEYNOTE ADDRESS

Ambassador Andres Aguilar
Permanent Mission of Venezuela to the United Nations
New York

Mr. Chairman, Excellencies, ladies and gentlemen, it is indeed a real privilege for me to participate in this 23rd Annual Conference of the Law of the Sea Institute. Because of my long and close association with the Third United Nations Conference on the Law of the Sea, I have a personal interest in all the developments in this field. But I must confess that due to my present obligations I have not been able to keep up with all the important things that have happened since the last session of the Conference in 1982. I am therefore very grateful to our co-chairmen, Professors Clingan and Soons, not only for their kind invitation to address this meeting but also for the opportunity to learn from you in this conference devoted to the implementation of the law of the sea through international institutions. As an additional bonus, this invitation gives me the great pleasure of meeting again highly-esteemed colleagues and friends of many years. In fact, when I see those who are present today, I am reminded of the old days in the 1970s and the 1980s of the UN Conference on the Law of the Sea.

The Convention adopted in Montego Bay in 1982 has not yet entered into force, but according to the latest published data, 39 states and Namibia have ratified the Convention. This means that two-thirds of the sixty ratifications or accessions needed have been reached. Furthermore, a number of very important provisions of the 1982 Convention are already considered to be rules of international customary law. In fact we must not forget that 159 states signed the 1982 Convention and that it was drawn up with the participation of practically all the members of the international community, including representatives of territories which were not sovereign at that time, some of which already have acceded to the Convention, as well as representatives of national liberation movements.

Unlike the four 1958 conventions which regulated specific maritime areas and the traditional activities of navigation, fishing, and laying of submarine cables and pipes, the 1982 Convention is very broad and comprehensive. Besides creating such important innovations as the exclusive economic zone and the zone of the seabed and ocean floor beyond the limits of national jurisdiction, the Convention not only regulates the traditional maritime spaces and activities but also such

important matters as the protection and preservation of the marine environment, marine scientific research, development and transfer of marine technology, and the settlement of disputes.

Yet in spite of its widest scope of application the 1982 Convention could not go into every detail. The Convention itself refers, more than once, to the competent or the appropriate international organizations in matters such as navigation, use of resources, the protection and preservation of the marine environment, marine scientific research, and the development and transfer of marine technology.

On the other hand, the Convention offers a wide range of means for the settlement of disputes. To quote from the sponsoring institutions, the 1982 UN Convention on the Law of the Sea attaches an important role to international organizations in the implementation of the provisions of the Convention. Many of its provisions refer to rules and standards to be adopted by or under the auspices of international organizations. The implementation of other provisions clearly calls for cooperation between states on a regional or global level. Still other provisions explicitly require the establishment of international organizations, including institutionalized mechanisms for dispute settlements. And, as it was pointed out, since the adoption of the Convention over six years ago a great amount of work has already been carried out by international organizations for the purpose of the future implementation of the Convention's provisions.

It is, therefore, very timely and important to review what international organizations have done and should do in the future before and after the Convention enters into force to assist states in dealing with law of the sea issues, particularly in the formulation of national policies and law, and to implement the principles and guidelines the Convention establishes.

It is fortunate that in the last few years there has been a favorable change in international relations as a result of the rapprochement between the superpowers, which has already been reflected in major disarmament agreements and in the ending of regional conflicts which are costly in terms of human suffering and material damages. This new atmosphere opens up possibilities for greater cooperation in every field, including matters and questions of such general and keen interest as those connected with the use of the sea and its resources. I must say also that at present we see a very healthy trend toward considering international problems according to their merits, setting aside traditional ideological tenets, the attitude of suspicion and second-guessing which has for so long been a barrier to international cooperation.

In this international climate there are better opportunities for initiatives on naval disarmament. There is likewise a more favorable environment for establishment of nuclear-free zones and zones of peace. Progress has been made, for example, in the process of setting up a zone of peace in the South Atlantic, and there have also been some tangible results such as the bilateral agreements between the United States and the Soviet Union as well as between the United Kingdom and the Soviet Union on the prevention of incidents beyond the territorial sea.

On the subject of navigation, which is the first that comes up on our agenda, there is a clear-cut need for the norms drawn up within the International Maritime Organization regarding, *inter alia*, the safety of life and navigation, offshore installations and structures, hijacking at sea, salvage, arrest and detention of vessels, and illicit traffic in drugs and psychotropic substances. One hundred countries have already ratified a very important international convention for the Safety of Life at Sea (SOLAS) and the Convention on International Regulations for Preventing Collisions at Sea. SOLAS, by the way, was amended recently, as you know, taking into account the disaster of the *Herald of Free Enterprise*.

No doubt one of the important features of the 1972 Collisions Regulations is the recognition given to traffic separation schemes mentioned in several articles of the Convention. Another very important project is the formulation of the new regimes for offshore installations and structures provided for in Articles 60 and 80 of the UN Convention on the Law of the Sea in connection with the safety zones and the removal of platforms which are no longer in use.

Coming now to living resources, the research and advisory services of the United Nations Food and Agricultural Organization (FAO) play a significant role. As you know, marine resources are becoming prominent in world nutrition. Hence the importance of ensuring the conservation and optimum use of these resources. The majority of the coastal states have already claimed jurisdiction over fisheries up to a 200-mile limit as exclusive economic zones, in most cases, or as fisheries or fishing zones. The assistance given by FAO in the developing countries to monitor the activities of foreign fleets in areas subject to their jurisdiction and in particular in the exclusive economic zone, and also in the assistance given to them to increase their fishing capabilities, is very important indeed. Also there is a need for the assistance and cooperation of FAO and other international organizations, global and regional, in the field of

fisheries management and research, both in the exclusive economic zone and in the high seas.

But it is, perhaps, on the subject of protecting the marine environment that there is a more deeply felt need to develop and apply the principles and guidelines that are laid down in the Convention. The overriding principle in Part XII of the Convention is naturally the obligation of states to protect and preserve their environment. The recent cases of pollution in such fragile zones as Antarctica and Prudhoe Bay in Alaska, in the Arctic polar circle, highlight the importance and urgency of standard setting and enforcement in this field. On the other hand, studies now underway on the greenhouse effect and the warming of the earth bring to light the effect of oceans on the world climate. This warming of the earth might result, *inter alia*, in a rise in the level of the seas and oceans and hence the disappearance of many cities and industrial installations. There is also an obvious need for control over the traffic in toxic and dangerous wastes, much of which is carried by sea and eliminated in the sea. This explains the special interest in the preparatory work of a new Convention on Liability for Maritime Transport of Dangerous and Harmful Substances, as well as on the procedures to determine liability and the settlement of disputes in connection with waste disposal and incineration operations at sea.

International world and regional organizations, as well as nongovernmental organizations, are performing a very important function in the development of marine science and technology. Special mention should be made of the work of the Intergovernmental Oceanographic Commission, of the World Meteorological Organization, of the Office of Analytical Reviews, of the World Council of Scientific Unions, and of the Committee on Oceanographic Research, especially on the World Ocean Circulation Experiment.

In this conference we will also have an opportunity to discuss settlements of disputes and, in particular, the role of the International Court of Justice -- we are privileged to have among us today distinguished members of the Court -- and also the role played by other tribunals in the development of the law of the sea.

In this matter the complex and delicate questions of setting maritime limits is of special importance. The best way to settle disputes is by agreement between states, which is one of the means prescribed in Articles 74 and 83 of the Convention, since it is the states concerned which know best the intricacies of the problem and are qualified to give the proper weight not only to the issues directly at stake in the delimitations but also to the overall relations between the two states.

In this connection I am pleased to point out that in the last year my own country, Venezuela, has entered into agreements on delimitation with several states, among them The Netherlands. In this agreement our maritime limits with The Netherlands Antilles were defined to the satisfaction of both parties, and, by the way, I am glad Professor Soons mentioned the proximity of our two countries in that area of the world.

More recently other agreements have been reached in this matter. Among them mention should be made of the agreement between the governments of France and Italy in drawing the limits in the zone on the Strait of Bonifacio in 1986; the agreement between Burma and India on the delimitation of the maritime boundary in the Andaman Sea, in the Coco Channel, and in the Bay of Bengal in December, 1986; the agreement between Sweden and the USSR on the principle for the delimitation of areas in the Baltic Sea, 1988; the agreement between the Solomon Islands and Australia on certain sea and seabed boundaries; the agreement between the governments of France and the United Kingdom on delimitation of the territorial sea in the Dover Straits, November, 1988; and the agreement between the governments of the United Kingdom and the Republic of Ireland regarding the delimitation of areas on the continental shelf between the two parties, also November, 1988. But as such agreements are not always possible, it is necessary to resort to other peaceful means for the settlement of disputes, and there are already a good number of cases which were solved by arbitration or by judicial decisions.

The International Court of Justice has already had occasion to rule on important cases regarding maritime limits, among others, the case of the continental shelf between Tunisia and the Libyan Arab Jamahiriya of 1982, the review and interpretation of this decision, the very important case of the delimitation of the maritime boundary in the Gulf of Maine area in 1984, and the delimitation of the continental shelf between the Libyan Arab Jamahiriya and Malta in 1985, to mention only the most recent cases.

There have also been arbitration awards in boundary disputes between the United Kingdom and France, between Guinea and Guinea-Bissau, and between Canada and France in the Gulf of St. Lawrence. The International Court of Justice also has some cases pending, including the dispute between El Salvador and Honduras regarding the land-island maritime boundaries and the dispute between Denmark and Norway about the delimitation of fishing zones in the continental shelf areas of these two countries in the waters between Greenland and Jan Mayen. Still pending is also the dispute

about maritime limits between Guinea-Bissau and Senegal, submitted to an arbitration tribunal.

It must be said that although the 1982 Convention has not yet entered into force, judicial and arbitration rulings do take into account its relevant provisions. In the continental shelf case between Tunisia and the Libyan Arab Jamahiriya the Court considered that it could not overlook the provision in the draft new Convention if, in its judgement, the substance of this provision "is binding on all members of the international community because it enshrines or crystallizes a rule of a prior or about-to-take-shape customary international law." And, three years later, in the continental shelf case between the Libyan Arab Jamahiriya and Malta, the court stated that "it is undeniable that since it was adopted by an overwhelming majority of states, the 1982 Convention is of major importance so that even if the parties do not evoke it, it is manifestly incumbent on the Court to examine to what extent any of its relevant provisions is binding on the parties as a rule of customary international law."

To bring this subject to a close it is appropriate to recall that in accordance with Article 38 of the Statutes of the International Court of Justice, judicial decision constitutes one of the auxiliary means to determine the rules of law, which the Court should apply without prejudice to the provision in Article 59 of the same statute.

Mr. Chairman, ladies and gentlemen, our agenda covers all these major areas of the law of the sea with the single exception of Part XI of the Convention on the zone and its resources, even though in this area, too, some important steps have been taken, among them the inscription of the applications submitted by India, France, Japan, and the USSR as first investors in accordance with Resolution II of the Convention. The Preparatory Commission established under Resolution I of the same Convention has been moving ahead in the work of preparing norms, regulations, and procedures regarding the various organs of the Authority. Progress has also been made in the work of preparing recommendations on the establishment of the International Tribunal of the Law of the Sea. Important as it is, as well the main encumbrance of the so-called package deal, we should not complain about this omission of Part XI. To deal with a topic as broad and complex as navigation by sea and air, living resources, protection of the marine environment, marine scientific research, and settlement of disputes in the limited time available is by itself a very audacious task. Fortunately we will be guided in this endeavor by a very knowledgeable and experienced group of people. I am sure that under the wise and able leadership of the chairmen and the learned contributions of the commentators on the working stations and the

workshops, we will have a lively and constructive exchange of views on the basis of the papers prepared by highly qualified experts.

To end these introductory remarks to our work, I should like to say that the choice of the venue for this meeting was highly appropriate. Few countries can offer better credentials than The Netherlands to host meetings on the law of the sea. The Netherlands and the sea are closely linked to the extent that its very name brings to mind not only a geographical reality but also the successful effort to master and benefit from the use of the resources proffered by nature in the sea. It is not surprising that The Netherlands has been the cradle of great navigators and also for outstanding specialists on the law of the sea, among whom the name of Hugo Grotius immediately comes to mind. The Netherlands' projection into the world through the sea is a very close reality for me. A short distance from Venezuela, in fact, lie the islands Curacao, Aruba, and Bonaire, with which we maintain as we do with the mainland, The Netherlands, close and cordial relations of friendship and cooperation. Thank you very much.

Alfred Soons: Thank you very much, Mr. Ambassador, for your comprehensive, very interesting keynote speech. This concludes the opening session of the conference. I think we should start immediately with the first plenary session, which will be chaired by Chris Pinto.

Panel I:

GENERAL ASPECTS OF THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE IMPLEMENTATION OF THE LAW OF THE SEA CONVENTION

Christopher Pinto
Secretary-General
Iran-United States Claims Tribunal
The Hague

Ladies and gentlemen, I would like to open our first panel meeting. Before I invite the three distinguished panelists and the three commentators to inform us of their views, I would like to take a few minutes to introduce the subject. I would like to explore with you the place of international organizations in the general conceptual framework which seems to be provided by the Convention on the Law of the Sea. In doing so, I would like to proceed from the feature of interdependence of states through the principle of cooperation to the role of the intergovernmental organization.

I think we should recognize two elements, in combination, as fundamental to our discussions. First, the fact of the interdependence of states, and second, the active principle derived from that fact, the principle of cooperation. I do not mean to assume here, as perhaps the preamble to the Declaration on the New International and Economic Order does, that interdependence of states is a feature of interstate relationships generally, but rather that in the area of interstate activity with which we are concerned, namely the law of the sea, the feature of interdependence was present.

I mean by interdependence the recognition by a state that for the realization of its policies with a minimum of costs it must rely or depend upon the uncoerced will of another state. Interdependence is recognizable, for instance, where states which claim global military responsibilities need freedom of transit through straits, or the technologically advanced countries need to establish a freedom to carry out marine scientific research, and where these needs are matched by the needs of other countries to protect their own interests through the claims of expanded national jurisdiction, or the recognition of common ownership of marine mineral resources so as to preclude their exploitation under the banner of freedom of the seas.

Evidence of such interdependence was acknowledged and is to be found in the statement so fundamental as to be included in the preamble to the Convention, namely, that the problems of ocean space are closely interrelated and need to be considered as a whole, and in the very first words of the preamble, which declares that State Parties are "prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea...". Recognition of the fact of interdependence is also found in the so-called "package deal" approach to the negotiations of the conference and in its verbal expression "the gentlemen's agreement." Finally, evidence of recognition of interdependence of states is to be found in the Convention's appeal in an extraordinary number of contexts to the principle of cooperation or working together, a form of activity that is the natural, inevitable, and perhaps even unique consequence of interdependence. If I remember correctly, the Convention enjoins cooperation or recommends it no less than 57 times, or in nearly one-fifth of its provisions.

As has been pointed out in recent studies, the two elements essential for the emergence and viability of a cooperative relationship are: first, reciprocity or mutuality of action and equivalence of the reward; and second, what one author describes as "the shadow of the future," or an awareness of the prospect of future interactions. The condition of reciprocity is often difficult to achieve as between states of unequal economic and political power because the cost of the relationship might appear excessive to one party. But interdependence and cooperation seemed assured in the context of the law of the sea through recognition from the outset of the fact of interdependence, and an awareness of the likelihood of future interactions seemed apparent in the acknowledgement of the interrelationship of the problems of ocean space.

It is at this point that we come to consider the role of institutions or organizations in implementing the Convention on the Law of the Sea, for just as cooperation is the consequence of interdependence, institutions and organizations are the natural, inevitable, and perhaps unique consequences of cooperation and indeed represent cooperation in its most developed and sophisticated form. Although the terms "institution" and "organization" are often used interchangeably, they are, of course, distinct concepts. According to one authority, institutions are social practices consisting of easily recognized roles coupled with clusters of rules and conventions governing relations among the occupants of those roles. By contrast, organizations are material entities possessing physical locations, offices, personnel, equipment, and budgets. Organizations generally possess legal

personalities. The term "regime" would presumably comprehend both institution and organization.

An international organization is thus a group of persons, representative at various levels of the states creating it. By binding such representatives together in a long-term relationship, the organization increases the number and importance of future interactions among participating states and is thus both the result of cooperation and the best guarantee of the continuance and progressive evolution of the cooperative relationship. We should note that where the prospect of frequent interactions between states arises not merely from the general awareness of the interrelationship of ocean space problems, but is reinforced by pre-existing and unchanging contextual factors such as geographical proximity and ethnic similarities, the objective conditions for cooperation are compelling and give rise to the regional organization, unless, of course, political considerations supervene.

We have with us today a panel that is eminently qualified to illuminate for us the many important aspects of implementing the Convention on the Law of the Sea through the medium of the cooperative mechanism of the international organization. As you will see from your program, Tullio Treves will deal with global organizations, Barbara Kwiatkowska with regional organizations, and Lee Kimball with nongovernmental organizations.

Tullio Treves will be the first to present his paper. Tullio is a veteran of the Law of the Sea Conference and is distinguished among his other achievements by an outstanding contribution he made to the work of the Drafting Committee. Tullio is professor of international law at the University of Milan and is currently legal advisor to the Permanent Mission of Italy to the United Nations in New York. I would invite Professor Treves to take the floor.

THE ROLE OF UNIVERSAL INTERNATIONAL ORGANIZATIONS IN IMPLEMENTING THE 1982 UN LAW OF THE SEA CONVENTION

Tullio Treves
Faculty of Law, University of Milano
and
Legal Adviser to the Italian Permanent Mission
to the United Nations

Introduction

Why is it interesting to study today the role of universal international organizations in the implementation of the United Nations Convention on the Law of the Sea? Is it not true that the main task in implementing this Convention belongs to States? Is not this study premature as the Convention is not yet in force?

There is no doubt that the main role in implementing the Convention will fall on the shoulders of States. They are the main parties to the Convention and the rights and obligations it provides for are mainly rights and obligations of States. This notwithstanding, the tasks international organizations are called to perform are important and worth exploring. The numerous references to international organizations that appear throughout the Convention indicate that the Convention and the States that negotiated it presupposed the existence of a highly organized international community. This emerges also from the numerous references to international conventions and other international rules (often prefaced by the expressions "generally accepted" or "applicable") as well as from the reliance on third party compulsory settlement of disputes to a degree which goes beyond what is customary in universal codification conventions adopted in UN-sponsored diplomatic conferences. The Convention seems to accept as a given that the international community is equipped with an organizational framework which permits the fulfillment of a variety of tasks.

It goes without saying that those international organizations whose creation depends on the Convention have no role before the Convention enters into force. This is, however, the case only for one such organization, the International Seabed Authority. All the other organizations mentioned in the Convention are already in existence now. Of course, for our present purposes we do not consider as "international organizations" the International Tribunal for the Law of

the Sea and the Commission on the Limits of the Continental Shelf whose creation depends also from the entry into force of the Convention.

The main interest in examining now the role of international organizations consists in ascertaining how the existing organizations react to the rules of the Convention whose correspondence to customary law is certain, and how they contribute to the consolidation -- or, as the case may be, to the undermining -- of the customary status of those rules whose customary status is uncertain. In order to examine this present role of international organizations in what, at least in many cases, could be called "implementation before entry into force" of the Convention, it seems necessary to review the role of international organizations in implementing the Convention according to the traditional meaning of this expression, namely implementation of the Convention when it will have become a binding legal instrument. I will thus devote the first part of this paper to an analysis of the relevant provisions of the Convention in order to study the role of universal international organizations after entry into force of the Convention, and move, in the second part, to the consideration of the role of universal international organizations before entry into force.

The Role of International Organizations According to the Convention

General observations

It is not interesting for our present purposes to dwell at length on the fact that, according to Articles 305 and 306 as well as to Annex IX of the Convention, certain international organizations can become parties to the Convention. These provisions are aimed at taking into account the fact that States can transfer certain aspects of their competence connected with the law of the sea to particular international organizations and that their participation in the Convention without the participation of these Organizations would not permit full compliance with the obligations ensuing from the Convention. This, so far, is the case only for the European Communities.

We shall mention only rapidly that the Convention provides for the creation of a very ambitious new international organization, namely the International Sea-Bed Authority, whose task is central to the implementation of the Convention as far as deep seabed mining is concerned. To describe in any detail this new organization would be going beyond the limits set to this paper, whose main concern lies in existing universal organizations. It is, however, worth noting that, by providing for the creation of the Authority, the Convention starts

from an assumption different from that it adopts in all its other provisions on international organizations: it assumes that the existing institutional framework is not sufficient for performing the very special tasks described in Part XI of the Convention. We should also recall that the Third UN Law of the Sea Conference set up an institutional framework, which is already in existence, the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea, in order to prepare the rules and regulations necessary for permitting the Authority to start functioning as soon as it will be constituted. Thus the PrepCom is a clear example of "implementation before the entry into force of the Convention."

The "competent" and the "appropriate" international organizations

If we consider now how international organizations are referred to in the Convention, we note that references to international organizations are very numerous and that the purposes of such references are various. Before going deeper into these references, it is worth noting that international organizations different from the Authority are, with very minor exceptions,[1] referred to as such, and not by name.

The Convention in most cases refers to "competent" or to "appropriate" international organizations.[2]

The references to "appropriate" international organizations are very few. They are in the provisions on highly migratory species (Art. 64), on marine mammals (Art. 65), on reporting by Conciliation

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[1]These exceptions are to be found in art. 39 (I.C.A.O), in art. 93 (I.A.E.A.), and in art. 3,par.2, of Annex II (International Hydrographic Organization). Of course, the International Sea-Bed Authority is also mentioned as such quite often.

[2]On this subject see: Kingham and McRae, Competent International Organizations and the law of the sea, 3 MARINE POLICY, pp. 106-132; PAOLILLO, The institutional Arrangements for the international sea-bed and their impact on the evolution of International Organizations 188 RECUEIL DES COURS,pp.139-337, at 164 (1984) and also Oxman, Institutional Arrangements and the Law of the Sea, 10 LAWYER OF THE AMERICAS, pp. 687-711 (1978) and Miles, On Roles of International Organizations in the New Ocean Regime, in PARK (ed.),THE LAW OF THE SEA IN THE 1980s, Honolulu, 1983, pp.383-485.

Commissions on disputes concerning marine scientific research (Art. 297, para. 3-d), and on consultation for the setting up of special arbitration panels (Annex VIII, art.3-e). The references to "competent international organizations" are dozens and can be found in many parts of the Convention.

The difference between "appropriate" and "competent" international organizations would seem to consist in that "appropriate" requires a judgement in terms of opportunity, while "competent" requires a judgement in terms of law. Taking into account the context, and the fact that references to "appropriate" international organizations are rare, the difference does not seem to be important. More important is to identify which organizations are referred to.

Even though the lack of precise indications on the organizations referred to can be explained historically in view of the hesitations of some delegations to give too important a role to some organizations which were perceived as biased in one way or another, the Convention gives considerable, although indirect, help through the provisions of Article 2 of Annex VIII. Annex VIII provides that disputes concerning the interpretation and application of the Convention in certain fields may be settled by a "special arbitral procedure." Special arbitral tribunals will be constituted on the basis of lists of experts established and maintained for each field by certain international organizations. These are, according to Article 2: for fisheries, the UN Food and Agriculture Organization (FAO); for the protection and the preservation of the marine environment, the UN Program for the Environment (UNEP); for marine scientific research, the Intergovernmental Oceanographic Commission of UNESCO (IOC); for navigation, including pollution from vessels and by dumping, the International Maritime Organization (IMO). One may draw the conclusion that, according to the Convention, the "competent" international organizations in the above-mentioned fields are those just indicated.

However illuminating, the indications in Article 2 of Annex VIII do not solve all the problems. For example, which is the competent international organization mentioned in various articles of Part XIV concerning the "development and transfer of marine technology"? And which is the competent international organization as regards matters straddling two or more of the fields mentioned in Article 2 of Annex VIII?

The answer to the second question seems already in the process of being given by practice. Article 60, para. 3, of the Convention provides that "any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation taking into

this regard by the competent international organization." These standards must, however, *inter alia*, "have due regard" to fishing and the protection of the marine environment. As we shall see later, IMO has taken the initiative in developing these standards. Before their final adoption, UNEP and FAO, the "competent" organizations for environmental protection and for fisheries, have however been called to consider them, so as the Contracting Parties to the London Dumping Convention, a grouping not mentioned in the Convention, but undoubtedly "competent" on the matter of the disposal of platforms.[3] So consultation between organizations seems the road chosen for cases straddling the competence of various competent international organizations.

As regards the first question, namely what about fields for which no organization is mentioned in Art. 2 of Annex VIII, such as, in particular, transfer of technology, the answer will have to be sought on a case by case basis. In the case of the transfer of technology, the most reasonable solution seems to lie in distinguishing the various fields to which technology would be applied. Consequently, for instance, the competent international organization on fisheries technology should be FAO, etc. Of course, not only the organizations mentioned in Art. 2 of Annex VIII need be considered, as the list, having being compiled for a different purpose, cannot be deemed exhaustive.

It is also worth noting that while in some cases the mention of the competent international organization seems to address one organization to the exclusion of others, in other cases the context is such that it is possible to include more than one organization in the reference made by the Convention. The first case seems to be, apart from the above-mentioned question of matters straddling two or more of the fields mentioned in Art. 2 of Annex VIII, that of the references the Convention makes to the legislative activity of the competent international organization. The second case seems to be that of the rules of the Convention that refer to cooperation through or between competent international organizations.

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[3]UN Doc. A/43/718 (Report of the Secretary General to the General Assembly on the Law of the Sea) para. 57.

The different groups of provisions dealing with international organizations

It is possible to classify the provisions of the Convention which give a role to universal international organizations in three groups:

1) Provisions on cooperation;
2) Provisions concerning the legislative activity of the international organizations in relationship with legislative and other action by States;
3) Provisions on rights and obligations of the organizations.

Various provisions of the Convention are included in each of these groups. The second group covers a variety of legal situations and is perhaps the most interesting from our point of view.

Provisions of the Convention Giving A Role to International Organizations in Its Implementation

Provisions on cooperation

According to a first group of such provisions, States are to cooperate[4] through the competent (or the appropriate) international organization. These provisions are found mostly in the fields of the preservation and protection of the marine environment, of the transfer of technology as well as in those of highly migratory species and of marine mammals.

Some of these provisions say explicitly that States shall cooperate through international organizations to perform certain tasks, such as, for instance, the conservation and promotion of optimum utilization of highly migratory species (Art. 64, para 1); the formulation and elaboration of international rules, standards, and recommended practices and procedures for the protection and preservation of the marine environment (Art. 197); or the promotion of the development and transfer of marine science and marine technology (Art. 266, para. 1). The language adopted, as well as the fact that cooperation "through" competent international organizations is usually indicated as

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[4]Interesting remarks on cooperation within the context of the 1982 Law of the Sea Convention are in Pinto, The Duty of Co-operation and the United Nations Convention on the law of the Sea, in BOS and SIBLESZ (eds.), REALISM IN LAW-MAKING, ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIPHAGEN, pp. 131-154 (1986).

an alternative to cooperation to be engaged in "directly" among States, seem to indicate that the role of the organizations is seen merely as that of a forum for inter-State cooperation. Nothing can, however, preclude the competent international organization to seek a wider role, if this is admissible according to its powers, explicit or implicit.

Other provisions, although they do not refer directly to "cooperation", seem equivalent in nature. These are the provisions according to which States in certain cases "shall endeavour to establish" and, in other cases, "shall establish" international (or global and regional) rules, standards and recommended practices for the preservation and protection of the marine environment from various sources of pollution, acting especially through the competent international organization.

A second group of rules to be examined here provides for cooperation of States not through the competent international organization, but with the competent international organization. The most important of these are Article 61, para. 2, and Art. 243. According to the first of these articles, the coastal State and the competent international organization "shall cooperate," taking into account the best scientific evidence, to ensure "that the maintenance of the living resources in the exclusive economic zone is not endangered by overexploitation." According to the second, States and competent international organizations shall cooperate to create favorable conditions for marine scientific research.

These provisions show a degree of reliance on international organizations that is higher than in the first group, as they envisage an activity of the competent international organizations as such in relation to States and not of States with one another through the competent international organizations.

As regards Article 61, para 1, the fact that the coastal State has taken its conservation measures in cooperation with the competent international organization would seem to have an interesting legal effect, namely that of making it more difficult for distant fishing States to argue, for the purposes of Article 297, para.3,b(i), that the coastal State has "manifestly failed to comply with its obligations" concerning the adoption of such measures.

Provisions concerning the legislative activity of the organizations

According to the provisions of a second broad grouping of articles of the Convention, the decisions, or the results of the rule-making activity, of the competent international organization become relevant for the decisions States are to take in exercising rights and fulfilling

obligations they have under the Convention.[5] I shall try to examine these rules moving from those in which the impact of the organizations' legislative activity is minimal up to those in which it becomes decisive. The examination will show that, although the degree of freedom States enjoy in conforming or not conforming to the decisions of the competent international organizations varies very much, in all cases the fact that States have or have not conformed is not devoid of legal consequences, especially from the point of view of international responsibility.

We shall mention first the rules providing that States shall implement international rules and standards established through the competent international organization in order to prevent, reduce, and control pollution from land-based sources (Art. 213) or from activities on the continental shelf (Art. 214) by adopting laws and regulations and taking other measures. Here the rules and standards made by the competent international organization require implementation by the States independently of their formal binding character.

More interesting are the rules of a second group. Here the rules and standards adopted by the competent international organization function, although in different ways, as a yardstick against which the exercise of the power of States to adopt their rules and regulations is to be measured.

So it is that, in relation to prevention of pollution by dumping, Article 210, paras. 2 and 6, provides that the national laws, regulations, and measures States can adopt "shall be no less effective" than the global ones adopted through the competent international organization. A similar formulation is in Article 208, paras. 2 and 5, regarding prevention of pollution from activities on the continental shelf. Moreover, the laws and regulations States can adopt for the prevention of pollution by their ships "shall at least have the same effect" than generally accepted rules and standards adopted through the competent international organization (Art. 211, para. 2). Similarly, coastal States have to make the laws and regulations they adopt for the purposes of enforcement as regards the prevention of pollution by their ships in their exclusive economic zone in such a way as to

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[5]For further developments on the subjects considered in this section, cf. Treves, La participation de l' "Organisation Internationale Competente" aux decisions de l'Etat cotier dans le nouveau droit de la mer, in INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION, ESSAYS IN HONOUR OF ROBERTO AGO, vol.II, pp.473-490 (1987).

conform to and to give effect to generally accepted international rules and standards established through the competent international organization (Art. 211, para. 5).

In the first cases just mentioned the result of the lawmaking activity of the competent international organization is set as a minimum limit against which to measure lawmaking by States: the adoption of national laws and regulations less effective than those adopted through the competent international organization would constitute a violation of the Convention. In the last case mentioned such result is set as a maximum limit: States are not allowed to adopt for enforcement purposes rules or regulations that go beyond, *i.e.*, that are more stringent or exacting than those necessary for giving effect to the rules and standards adopted through the competent international organization. If they were to adopt such rules or regulations, other States parties to the Convention would be entitled to claim that they have violated their international obligations.

According to a third group of rules, coastal States, when exercising certain rights or fulfilling certain obligations, must "take into account" the "recommendations" of, or the "generally accepted international standards" established by, the competent international organization. The first formulation applies, according to Article 22, para. 2, to the power of coastal States to designate sea lanes and to prescribe traffic separation schemes for the exercise of innocent passage by foreign ships through their territorial sea. The second, according to Article 60, para. 3, applies to the obligation of the coastal State to remove abandoned or disused installations in the exclusive economic zone or on the continental shelf.

To "take into account" does not mean that the coastal State cannot act unless recommendations or rules and standards have been adopted by the competent international organization. Nor does it mean that the coastal State is bound to follow these recommendations or rules and standards. The importance of these recommendations and rules and standards is not, however, to be underestimated. In the case of Article 22, para. 2, the fact that the recommendations of the competent international organization have been followed would seem to establish a presumption, albeit a rebuttable one, that the designation of sea lanes or the prescription of traffic separation schemes is in conformity with the criteria prescribed by the Convention, namely that they take into account the needs of safety of navigation, the channels customarily used for international navigation, the special characteristics of particular ships and channels, as well as the density of traffic. Conversely, sea lanes and traffic separation schemes adopted

without taking into account the recommendations of the competent international organization may be presumed, although proof to the contrary may be possible, to be in violation of the abovementioned substantive rules. The burden of proving conformity of these measures to the substantive prescriptions of Article 22 is thus shifted onto the coastal State that has not taken into account the recommendations of the competent international organization.

Similarly, if removal of abandoned or disused installations is effected, or not effected, by the coastal State following generally accepted international standards adopted in this regard by the competent international organization, it may be presumed that safety of navigation has been ensured and also that fishing and environmental concerns have been taken into account, as prescribed by Article 60, para. 3.

The rules in the fourth and last group in this category provide that coastal States cannot exercise sovereign rights or jurisdiction in certain cases unless the competent international organization takes parallel action. These rules are the result of compromises reached in negotiating the Convention between those who deemed that the coastal State had or should have certain sovereign rights or jurisdiction and those who wished to deny such rights or jurisdiction. The compromise consists in recognizing the sovereign rights or jurisdiction while providing that the coastal State cannot exercise them without the concurrent will of an entity that the international community trusts, namely the competent international organization.

A first provision to be mentioned is Article 60, para. 5, under which coastal States may establish safety zones exceeding the prescribed maximum breadth of 500 meters around artificial islands, installations, and structures in their economic zone or on their continental shelf only if "authorized by generally accepted international standards or as recommended by the competent international organization." Here the role given to the competent international organization (as well as to generally accepted international standards) is more decisive than in the cases considered before. The existence of the recommendations of the competent international organization or of the standards is a necessary precondition for action by the coastal State, and conformity to these recommendations and standards is also required. Safety zones exceeding 500 meters established by the coastal State when these recommendations and standards do not exist, or are not in conformity with them, would not be opposable by other States. Conversely, the burden of proving that these safety zones have been improperly established would fall on the other States if the recommendations or international standards have been followed by the coastal State.

A second provision to recall is Article 211, para. 6(a). It permits the coastal State that considers that a particular area of its exclusive economic zone presents special characteristics from the point of view of the prevention of pollution to adopt special mandatory measures for that purpose. In order to do so, it must address a communication to the competent international organization, submitting scientific and technical evidence in support of its contention that the particular area corresponds to the prescribed requirements. Only if the competent international organization determines, within twelve months, that the conditions of the area correspond to the requirements, will the coastal State be entitled to adopt specific laws and regulations. In adopting them, however, the coastal state encounters a further limit: these laws and regulations must implement "such international rules and standards and navigational practices as are made applicable, through the organization, for special areas." Thus, the coastal State has obtained the possibility of limiting freedom of navigation in the interest of prevention of pollution for areas where oceanographical, ecological, and traffic conditions make it necessary, but only within the limits set by rules already enacted by the competent international organization for "special areas" (even though the areas concerned may not be designated as such under the 1973 Marpol Convention, which is clearly the model the provision here considered has in mind). Moreover, such limitation cannot be effected without a decision (the "determination") by the competent international organization.

If the laws and regulations are adopted by the coastal State following the prescriptions of Article 211, para. 6(a), they will be fully opposable to other States who, it would seem, could then only question whether the coastal State has been faithful in implementing the international rules and standards and navigational practices adopted by the competent international organization for special areas. Conversely, the coastal State which, after addressing its communication to the competent international organization and receiving the requested determination by it, does not adopt the laws and regulations, may have to prove -- for instance, in case an incident occurs --that the area under consideration no longer has the characteristics requiring the adoption of particular implementing laws and regulations.

Article 211, para. 6, in its letter (c), adds however a further refinement to the above-mentioned provision, thus permitting an even more penetrating role for the competent international organization in order to counterbalance the very penetrating powers it recognizes to the coastal State in the above-mentioned particular areas of its exclusive economic zone. These powers consist in the possibility to adopt also "additional" laws and regulations -- namely laws and

regulations different and possibly more stringent than those necessary for implementing the rules, standards, and navigational practices established by the competent international organization. In order to adopt these additional laws and regulations, the coastal State must indicate its intention to the competent international organization with the communication mentioned above, and the competent international organization must "agree" within twelve months. It is also necessary that these rules and regulations do not impose design, construction, manning, or equipment standards of ships other than those provided in international generally accepted rules and standards.

The provision is not entirely clear, as one might wonder whether the competent international organization has to agree on the adoption of the additional rules in general or on additional rules with a specific content. The second interpretation would seem more logical because the paragraph provides that the additional rules and regulations become applicable to foreign ships fifteen months after the communication to the competent international organization, provided that they obtain its agreement within the above-mentioned twelve months. This would seem to imply that the additional rules and regulations must be included in the communication.

The competent international organization has, according to this provision, quite a penetrating role. The very content of the legislation to be enacted by the coastal State is submitted to its agreement. Laws and regulations adopted without such agreement cannot be opposed to other States. Conversely, objections by other States to laws and regulations adopted by the coastal State and agreed by the competent international organization can be only extremely limited.

The two last provisions to be mentioned in this context are Article 41, para. 4, and Article 53, para. 9. These provisions permit to States bordering straits used for international navigation and to archipelagic States to designate or substitute sea lanes or to prescribe or substitute traffic separation schemes in the strait or in the archipelagic waters, provided that "they refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits [or with the archipelagic State] after which" such States "may designate, prescribe or substitute them." The same procedure applies, according to Article 42, para. 1(a), for the adoption by the State bordering a strait of rules and regulations relating to transit passage in respect of safety of navigation and the regulation of maritime traffic.

In the provisions here considered the roles of the coastal State and of the competent international organization are even more tightly

intertwined. The exercise of the right of the State is conditional upon the will of the competent international organization. The competent international organization cannot, however, impose its will on the State. The State is free not to designate, prescribe, or substitute the sea lanes or the traffic separation schemes. If it, however, chooses to adopt them, there will be a strong presumption that the sea lanes and traffic separation schemes are consistent with the requirements set forth in the Convention.

It is interesting to note that, according to the Convention, a body of experts -- the Commission on the limits of the continental shelf -- has been entrusted with a task similar to that entrusted to the competent international organization by Articles 41 and 53 as regards the determination of the outer limit of the continental shelf beyond two hundred miles. The coastal State must submit a proposal to the Commission which makes recommendations to such State. If the coastal State follows the recommendations, the limits of the continental shelf it establishes "shall be final and binding." If the coastal State disagrees with the recommendations, it can only submit a new proposal to the Commission. Thus, without the concurrent will of the Commission and of the coastal State, no internationally opposable outer limits of the shelf can be established.

Provisions involving rights and obligations of the international organizations

Under this rubric we must mention first of all two provisions: Article 238, according to which competent international organizations "have the right to conduct marine scientific research" and Article 278, according to which competent international organizations referred in the Parts of the Convention on marine scientific research and on the development and transfer of technology (Parts XII and XIV) "shall take all appropriate measures to ensure, either directly or in close cooperation among themselves, the effective discharge of their functions and responsibilities under this Part" (namely Part XIV). Article 238 is completed by the articles that follow it in Part XIII, where the competent international organization is given the same treatment as researching States.

Their formulation notwithstanding, these rules do not attribute directly rights and obligations to the organizations, as the organizations are not parties to the Convention. Under the rules on the law of treaties, the competent international organizations may, however, accept the rights and the obligations that treaty parties intend to accord to them or to establish for them. According to Article 36 of the 1969 Vienna Convention on the Law of Treaties (as well as under

Article 36 of the 1986 Vienna Convention on the Law of Treaties between States and international organizations or between international organizations) such acceptance is presumed as far as rights are concerned, while obligations must be accepted expressly and in writing.

Consequently, the Intergovernmental Oceanographic Commission, as the competent international organization for marine scientific research, may, under the Convention, be presumed to have acquired the right to conduct marine scientific research. The exercise of this right may, however, not be possible unless also the connected obligations are accepted expressly, and in writing, according to the above mentioned Vienna Conventions on the Law of Treaties.

Independently of the competent international organization having acquired the rights and obligations, the above-mentioned rule of Article 238 has another penetrating effect: it binds States parties to the Convention to treat competent international organizations conducting marine scientific research in the same way as they are bound to treat States conducting such research. Of course, this obligation is assumed towards the other States parties to the Convention and not directly towards the competent international organization. If, however, the members of the organization will be parties to the Convention, the practical result would be almost the same.

As regards Article 278, unless express consent, possibly in writing, is given by the competent international organization, its effect will be that of binding States parties to the Convention to consider as legitimate initiatives and cooperative endeavors undertaken by the organizations mentioned in the provision.

Before concluding the examination of rules involving rights and obligations of international organizations, it seems useful to mention that in some cases the Convention (and also the customary rules that have emerged parallel to, or enhanced by, the Convention) has the effect of changing the scope of the competence of an international organization. Thus, fisheries commissions whose principal function used to be to allocate fishing rights in waters that, in whole or in part, are now included in exclusive economic or fishing zones, have lost, in whole or in part, this competence.[6] For instance, the Baltic Sea

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[6]See MILES, Changes in the Law of the Sea: Impact on International Fisheries Organizations, 4 OCEAN DEV'T & INTL. LAW, pp. 409-444 (1977); Carroz, Institutional Aspects of Fishery Management Under the New Regime of the Oceans, 21 SAN DIEGO LAW REV., pp.513-540 (1984); PAOLILLO, Institutional arrangements (quoted at

Fisheries Commission has seen its fishing rights allocation powers extinguished because the whole of the Baltic Sea is now part of jurisdictional waters of the coastal States. Conversely, Article 39, para.3, of the Convention, in prescribing that aircraft exercising the right of transit passage over straits shall observe the rules of the air prescribed by ICAO, widens the spatial scope of these rules and consequently the scope of the legislative power of the body, namely the ICAO Council, which is entitled to adopt them.[7] These rules and powers were, according to the 1944 Chicago Convention, limited to the high seas. The same applies, under Article 54, as regards overflight of archipelagic sea lanes.

The Role of International Organizations Before Entry into Force of the Law of the Sea Convention

The references to international organizations contained in the Convention that we have just considered, and the fact that the role of universal organizations they describe is often intertwined with that of "generally accepted" international rules and standards, which in most cases are already in existence and which in most cases also are elaborated by or within international organizations, have had a remarkable consequence: various international organizations have started to react to the provisions of the Convention containing these references and have taken action in various ways.

I shall mention only briefly the Preparatory Commission for the International Sea-bed Authority and the International Tribunal for the Law of the Sea. This entity, which has been meeting regularly since 1983, has an important role in preparing for the functioning of the International Sea-bed Authority through the elaboration of appropriate rules, regulations, and procedures. Moreover, it serves as the mechanism for the application of the provisional regime for the exploration of the deep sea-bed mineral resources provided for in Resolution II of the Third UN Law of the Sea Conference. The adaptations Part XI of the Convention will probably require in order to become more widely acceptable, and permit the universal acceptance of the Convention, might be pursued by States within the

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note 2), pp.162-163.

[7]Hailbronner, Freedom of the Air and the convention on the law of the sea, 77 AMERICAN JOURN. INT. LAW, pp.490-520 at 501 (1983); Treves, La Navigation (quoted at note 1), p.799.

PrepCom or at the margins of it. The PrepCom seems the forum that gives the best guarantees of avoiding reopening for discussion also the aspects of the Convention that are different from deep sea-bed mining.

Nevertheless, the PrepCom is more a conference of States than an international organization. However important, its role is different from that of the universal organizations mentioned in the Convention. Its purposes are connected with activities that the Convention, as mentioned above, decided could not be entrusted to existing organizations.

As regards existing international universal organizations, the first to be mentioned is, obviously, the United Nations. The U.N. deals with the Law of the Sea through its Office for Ocean Affairs and the Law of the Sea.[8] Apart from functioning as Secretariat to the PrepCom, the Office has the function "to facilitate widespread acceptance of the new regime for the oceans."[9] In doing so, not only does the Office conduct studies and publish relevant documents. It provides "States with information and support to facilitate the process of ratification"[10] of the Convention. As we read in one of the very informative reports submitted every year to the General Assembly, "the Secretary-General considers this an important function given the continuing need to strengthen the new regime of the oceans."[11]

This function has been performed in particular by helping States that require assistance in "planning and programming for maritime areas under national jurisdiction" and by assisting them "in the review

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[8]The most complete indications as to the activities of the Office are in the Reports on the Law of the Sea that the Secretary-General of the UN adresses every year to the General Assembly. So far the following have been published: A/39/647 (1984); A/40/923 (1985); A/41/742 (1986); A/42/688 (1987); A/43/718 (1988). For some comments made at the Cardiff Meeting of the LSI (1985), see Treves, The EEC, the UN and the Law of the Sea, in BROWN and CHURCHILL, The UN Convention on the Law of the Sea: Impact and Implementation, pp.518-526 espec.523-525 (1987).

[9]A/43/718 para. 180.

[10]A/40/923 para. 137.

[11]A/40/923 para. 137.

of the existing situation, identification of needed measures including the adoption of new legislation based on the Convention."[12]

Moreover, the Office has started convening meetings of experts with a view to develop advice on the implementation of certain aspects of the Convention "in order to promote a common approach to such matters." One such meeting has been held in 1988 on the drawing of baselines and its report has been recently released.[13] Another one will take place in September, 1989, on marine scientific research.

Finally, the Office ensures the coordination between the UN and other UN agencies (especially FAO, ICAO, ILO, UNESCO, UNCTAD, and UNEP). A consultative inter-agency meeting was held in 1988. It "emphasized that, even though the Convention was not yet in force, it nonetheless exerted a powerful influence on actions taken in international and regional forums." "International organizations were understood to be major players" in the ongoing relationship between scientific and technological development "and the evolution of ocean law and policy both by virtue of their mandates and by the extent to which they influence State practice...Emphasis was therefore placed on the need to ensure consistency and uniformity in implementation of the Convention, by States and also by International Organizations".[14]

As far as other universal organizations are concerned, it seems particularly interesting to consider FAO, IMO, IOC and ICAO.

FAO has convened in 1984 a World Conference on Fisheries Management and Development. The result of the Conference was a "Strategy for Fisheries Management and Development" containing a detailed set of guidelines and principles. Although it purports to be without prejudice to the provisions of the Law of the Sea Convention and it intends not to re-open issues that were settled at the Third UN Conference on the Law of the Sea, the strategy takes full account of the extension of national sovereign rights on fisheries resources enshrined in the Convention. Also, and perhaps even more so, in the assistance it gives to developing countries on fisheries matters FAO bases itself on the concept of the coastal State's sovereign rights on

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[12]A/43/718 para. 186.

[13]The Law of the Sea -- Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, New York,1989.

[14]A/43/718, para. 219.

living resources within economic or fishing zones and aims at exploiting the potential of these zones and overcoming the problems they give rise to.[15]

IMO is undoubtedly the competent international organization more often referred to in the Convention, as well as the Organization whose law-making activities are most decisive for determining the conduct of the coastal States. As we have seen above, IMO has been somehow made the custodian of freedom of navigation to counterbalance in many instances the new powers given to coastal States. This has certainly not remained unnoticed by IMO. The organization has conducted -- in cooperation with the UN Office for Ocean Affairs and the Law of the Sea -- an extensive "Study of the implications for IMO of the United Nations Law of the Sea Convention, 1982", which was published in 1987,[16] and also engaged in some specific action relevant for the Convention.

It is noteworthy that the above-mentioned study assesses the implications of the Law of the Sea Convention for IMO with respect to three main questions. The questions are the following:

1) Do certain provisions of the Convention make it necessary or desirable for IMO to consider amendments of revisions of any of the treaty or other instruments adopted within IMO or administered by it?
2) Do certain provisions of the Convention make it necessary or useful for IMO to develop new international regulations or rules on any matter within the competence of IMO?
3) Does IMO have to develop new procedures or revised machinery in order to undertake new or modified responsibilities assigned to it or otherwise assumed by it?[17]

The study envisages in detail the provisions of the Convention which may require action in each of the areas covered by the three

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[15]See UN General Assembly's Res. 39/225 of 18 December 1984 and the observations by PAOLILLO, Institutional Arrangements, quoted at note 2),p. 167.

[16]IMO Doc. LEG/MISC.1 of 27 July 1987, in 3 INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA: DOCUMENTARY YEARBOOK 1987, pp.340-474 (1989).

[17]LEG/MISC.1 para. 68.

questions. For our present purposes it is sufficient to focus especially -- although not exclusively -- on action already started or completed.

As regards amendments to treaties adopted within IMO made necessary by the Convention, a diplomatic Conference called by IMO adopted in 1984 amendments to the 1969 Civil Liability Convention and to the 1971 Fund Convention. According to the amendments adopted, the two Conventions now apply to damage caused not only in "the territory including the territorial sea" of a contracting State, as the original versions provided, but in its economic zone as well, and also in an area of 200 miles from the baseline which the coastal State may determine if it has not established an exclusive economic zone.[18]

While the exclusive economic zone has undoubtedly a customary status which made it necessary to adopt these amendments, it cannot be questioned that the adoption of the U.N. Convention on the Law of the Sea was the event that precipitated the conditions for calling the conference.

As regards possible new international rules and regulations whose adoption the Convention might require from IMO, the establishment of new sea lanes or traffic separation schemes in view of the responsibilities of IMO considered above is not deemed very urgent even though it is under consideration. In particular, there seems to be some hesitation in considering the subject of archipelagic sea lanes, as the very concept of archipelagic waters does not seem to have, so far, wide currency in IMO.[19]

Action has been taken concerning artificial islands, installations, and structures in the exclusive economic zone and on the continental shelf. With Resolution A.621 of 1988 IMO has adopted measures on action by coastal States against ships which are reported to have infringed safety zones around offshore installations and structures, as envisaged in Article 60, para.6, of the Convention.[20] As we have already mentioned, the guidelines and principles to be taken into consideration as regards removal of abandoned or disused installations, mentioned

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[18]LEG/MISC.1 paras. 82-84.

[19]See LEG/MISC.1 paras 92-93.

[20]A/43/718 para. 55.

in Article 60, para. 3, have been finalized and will be adopted in 1989.[21]

IMO has also considered the possibility of adopting rules on the requirements for establishing around installations safety zones of a breadth exceeding 500 meters, a possibility provided for in Article 60, para. 5, of the Convention. It has, however, decided not to proceed as strict enforcement of existing safety measures would, in its opinion, provide a better solution.[22]

As regards possible new responsibilities of IMO, two points are interesting to note. The first is that in the above-mentioned report IMO raises the question as to whether it should be "willing to accept the function assigned to it in respect of the maintenance of the list of experts" to be used for the special arbitration provided by Annex VIII to the Convention.[23] The second is that the report affirms that "IMO's involvement with the giving of publicity in the context of the Convention on the Law of the Sea may be deemed to be appropriate and legitimate even with regard to the Articles of the Convention which expressly assign responsibilities for such publicity to other named authorities."[24]

Thus IMO finds it possible to consider not assuming certain responsibilities assigned to it by the Convention and assuming responsibilities the Convention does not assign to it. This is, of course, perfectly consistent with the observations made above on the need for the organizations to accept obligations assigned to them by a treaty, and on the decisive role played by States which are members of the Organization, and the implied powers of the Organization.

UNESCO's Intergovernmental Oceanographic Commission (IOC), after about ten years of discussions, has recommended a reform of its statutes which was approved by UNESCO's General Conference in 1987.[25] The objective of the initiative of this reform was to take into account the new ocean regime and in particular the Law of the Sea Convention. It would seem fair to say that this objective has been

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[21]See supra note 5.

[22]A/41/742 para. 35.

[23]LEG/MISC.1 para. 102 (i).

[24]LEG/MISC.1 para. 118.

[25]A/43/718 para. 124.

reached only in part. In Article 2, para. 1(j), the new statutes, contrary to what could have been expected, do not accept the right and the consequential obligations concerning the conduct of marine scientific research conferred to IOC by the Articles of the Law of the Sea Convention quoted above. They only empower the IOC to "promote scientific investigation of the oceans for the benefit of mankind and assist, on request, member States willing to cooperate to these ends." The next sentence of the same provision would seem, however indirectly, to take into account provisions of the Convention, including in particular Article 247 on marine scientific research projects undertaken by or under the auspices of an international organization, as it provides that "activities undertaken under this sub-paragraph shall be subject, in accordance with international law, to the regime for marine scientific research in zones under national jurisdiction."

Apart from the question of the role of IOC, the extremely cautious and indirect language used is -- it would seem -- the reflection of the strong opposition of certain delegations in IOC in endorsing, before the entry into force of the Convention, its provisions on marine scientific research, provisions which many in the scientific community consider as unduly restrictive.

The International Civil Aviation Organization (ICAO) has engaged in a study,[26] upon which member States have made comments, of the implications, if any of the Law of the Sea Convention on the application of the 1944 Chicago Convention. The study, on which, as far as the present writer knows, no final action has yet been taken, concludes that, although the Chicago Convention does not take into consideration new concepts such as the exclusive economic zone, it is not necessary to change it in order to make it applicable to the new zones of national jurisdiction. Thus, for instance, when the Chicago Convention speaks of overflight in the high seas, it should be interpreted as including overflight of the exclusive economic zone, because according to Article 87 of the Law of the Sea Convention, the right of overflight

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[26]The ICAO Secretariat prepared a study in 1983 (C-WP/7777); on the basis of comments by States, a rapporteur (Mr. A.W.G. Kean) appointed by the Legal Committee prepared a report contained as attachment to Doc. no. C-WP/8077 (1 October 1985) to which I shall refer and which is in 2 INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA: DOCUMENTARY YEARBOOK 1986, pp.311-318.

is one of the high seas freedoms that apply to the exclusive economic zone.

The study notes also that, as we indicated above, the scope of the Rules of the Air -- and of the pertinent legislative powers of the Council of ICAO -- would be widened so as to include the overflight of straits used for international navigation by the rule in Article 39 of the Law of the Sea Convention. Moreover, the rules of the Convention dealing with the exclusive economic zone and on artificial islands and installations could imply, according to the study, the necessity of "special provisions for flight to, from, or over" such islands and installations.

Conclusions

It emerges from the observations made in this paper that universal international organizations have an important role to play in the implementation of the Convention both when the Convention enters into force and before. Many international organizations have such a role, even though it would appear that the most penetrating for the functioning of the Convention is that assigned to IMO.

As far as the role of international organizations before entry in force of the Convention is concerned, this role consists, in summary, first, in providing a forum for discussion and cooperation among States; second, in providing a mechanism for the production of international legislation relevant for the Convention; third, as a particularly relevant aspect of the role just mentioned, of functioning as an "agent" of the international community for moderating in some cases excessive exercise of the powers recognized to the coastal States.

All these functions tend to make of the international organizations entities that may help to a very important extent, on the one hand, in adapting the Convention to new circumstances without resorting to formal amendments, and, on the other hand, to ensure its uniform implementation. This should contribute to stability by discouraging and keeping under control centrifugal tendencies member States might develop in applying the Convention.

The functions described above will be mostly performed by the international organizations on the basis of the will of their member States and of the powers they have, explicitly or implicitly, under their constituent instruments and the implementing practice thereof. They can be based also on the rights and obligations conferred to the organizations by the Convention and accepted by them.

At least at the early stages after entry into force of the Convention, it is likely that its membership will be smaller than that of the main

universal organizations that have a role in its implementation. As the will of the States members of the organizations is, as said above, decisive for the performance of this role, the decision of the organizations to take up this role and play an active part in the implementation of the Convention will be a test of the attitude of States not parties to the Convention as regards the parts or rules of the Convention concerned. This action will certainly be a significant element of the practice of States relevant for determining whether these parts or rules of the Convention correspond to customary law, even though it might be going too far to assume that it can be considered as the decisive or the only element necessary for this purpose.

As regards the role of universal international organizations before the entry into force of the Convention, the observations made above make it clear that this role is important also.

Here, of course, there is no question of the organizations accepting rights or obligations "assigned" to them by the Convention, because the Convention does not produce, as yet, treaty rights and obligations. The role international organizations can play depends exclusively on their existing powers and on the will of their member States.

The way this role is performed by the organizations -- for instance, making or not making explicit references to the Convention -- is important for obtaining insights on the opinion of States on the Convention or on the parts or rules that are concerned. What we have said on recent practice in FAO and in the IOC would seem to give a good example of a case in which, although not mentioning the Convention, the States members of the organization are comfortable with the rules involved, and of a case in which at least some of them are not.

The fact that this role is performed at all permits us to make some interesting observations. First, it may be seen, exactly as seen above for the case when the Convention will be in force as regards non-member States participating in the universal organizations, as an element of State practice relevant for ascertaining the customary status of certain rules or parts of the Convention. Second, it evidences the will of States which are members of the organization to prepare the legal environment for entry into force of the Convention.

However important the steps already made, it seems however certain that more could be done. Failure to take action on certain areas where the Convention requests the organizations to play a role could have a destabilizing effect, permitting the development of divergent practices and, consequently, of an uncertain legal environment. An example would seem to be the lack of action in IMO on archipelagic sea lanes, if considered against the uncertainty of the law on this subject, as

shown by the interpretative declarations and replies thereto that have been occasioned by the Convention's provisions on archipelagic waters.

Christopher Pinto: I thank Professor Treves for an excellent introduction to his paper and also for making such an excellent beginning to our morning discussion. I would now like to call on Dr. Barbara Kwiatkowska. She is an Associate Professor of international law at the University of Utrecht and an Associate Director of the Netherlands Institute for the Law of the Sea, which has organized these sessions. She is a regular and most perceptive commentator on the law of the sea and a major work by her on the exclusive economic zone has been recently published by Martinus Nijhoff.

THE ROLE OF REGIONAL ORGANIZATIONS IN DEVELOPMENT COOPERATION IN MARINE AFFAIRS

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> Development is not a magic process, nor can it rely on charity; while each nation must do its utmost to raise its standard of living, this does not suffice -- a special task rests on the international community. While everyone will have to realize that they have a role in saving and protecting world resources, they will also have to share in a common effort towards the betterment of the life of those who are on the verge of starvation. Here, then, there is the legal basis for the development not necessarily of a new world economic order but of conditions in which the relationship between rich and poor, the industrialized and under-developed, may change radically in such a way as to enable the latter to be assured of an equitable share in the common meal of life. All that is required is the political will; ....
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> Judge Manfred Lachs, *Law in the World Today*, in A. Bos & H. Siblesz eds., REALISM IN LAW-MAKING, ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIPHAGEN 100, 105 (1986).

Preface

The needs and problems encountered by less developed countries (LDCs) -- forming a majority of a present international community of states -- in the implementation and application of the 1982 United Nations Convention on the Law of the Sea[1] are and will remain within at least a generation the central problems of implementation of the new legal regime for the seas and oceans as established by that Convention. Since those problems -- unlike the ones encountered by

[1]As of 30 March 1989, the Convention obtained 159 signatures and 40 ratifications. Cf. Satya Nandan, A Constitution for the Ocean, 1 MARINE POLICY REPORTS 1-12 (1989).

developed maritime states -- started only recently to gain wider attention, this contribution will focus on a systematic examination of the whole category of issues related to implementation of the new law of the sea through international institutions in developing country regions.

Such focus seemed particularly useful not only due to the importance of the LDCs' implementing efforts and their distinct nature from the implementing actions of developed states, but also due to, as this study will show, the particularly pronounced role (to be) played by international cooperation of developing states through regional organizations in effective implementation of the new law of the sea. The international community of states faces at present major difficulties in this respect, and as the late Judge Nagendra Singh emphasized while analyzing the question of sustainable development, "According to our ancient tradition, when humanity is in distress it must look to centres of learning."[2] Our conference seems to provide an excellent opportunity for activating and reinforcing the public opinion of lawyers, politicians, and other experts on the major issue of international cooperation for development in marine affairs.

The roles of international organizations in the new ocean regime set forth by the LOS Convention have already been extensively examined in three excellent studies by Edward Miles, Lee Kimball, and Edgar Gold, who attempted a general appraisal in this respect; a study by Lewis Alexander who specifically addressed the regional perspective; as well as in a number of studies focusing on individual or/and sectoral (fisheries, environment, etc.) organizations.[3] The present

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[2]Nagendra Singh, *Right to Environment and Sustainable Development as a Principle of International Law*, XLI STUDIA DIPLOMATICA 45, 61 (1988).

[3]*See* L.M. Alexander, *Regional Co-operation in Marine Science*, Report Prepared for IOC, OETO and FAO, December 1978; E. Gold, *Role of International Agencies*, A Paper presented at the SEAPOL Conference on Prospects for Implementation of the UN Convention on the Law of the Sea, Bangkok, Thailand, 26-30 April 1987; L.A. Kimball, *The New Law of the Sea and International Institutions*, and *The New Law of the Sea and Non-Governmental Organizations*, Papers presented at *Pacem in Maribus* XV Convocation, Malta, 7-11 September 1987; *Coastal/Ocean Management Opportunities and Trends*, A Report prepared for the World Wildlife Fund-US by the

contribution will discuss the operation of institutionalized cooperation in the developing country regions at first from the perspective of some fundamental principles and problems, to be followed by examination of the role and structure of institutionalized regional cooperation in general and in the wider Indian Ocean Region in particular.

Fundamental Principles, Rights, and Responsibilities Related to Development Cooperation in Marine Affairs Through Regional Organizations

Principle of International Cooperation for Development

As codified in the UN Charter and other multilateral instruments

The UN Charter establishes that one of the fundamental purposes of the United Nations is: "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character..." (art. 1, para. 3), and that the United Nations shall promote "higher standards of living, full employment, and conditions of economic and social progress and development", with a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations. (art. 55). To this end, all members pledge themselves by virtue of the Charter to take joint and separate action in cooperation with the United Nations (art. 56).

A general duty of states to cooperate with one another without any discrimination is further codified in the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, which expressly affirms that the principles of the Charter embodied in the Declaration constitute basic principles of international law. The Declaration specifies that states are obliged to conduct their international relations in, among others, the economic,

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Council on Ocean Law (COL), with assistance from N.L. Berwick, Conservation Systems, 1986 (obtained due to kindness of Dr. L.A. Kimball, Executive-Director COL); E. Miles, *On the Roles of International Organizations in the New Ocean Regime*, in Choon-ho Park ed., THE LAW OF THE SEA IN THE 1980s, PROCEEDINGS OF THE 14TH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE 1980 383-445 (1983). For works on individual or groups of organizations, *see* references elsewhere in this contribution.

social, and technical fields in accordance with the principle of sovereign equality and emphasizes the need for economic cooperation, especially in the promotion of economic growth of the developing states.

The emphasis on promoting economic and social progress of developing countries through international cooperation, whether directly between states or within the competent international organizations, is also reflected in the 1974 UN Declaration on the Establishment of a New International Economic Order (NIEO) and all other basic documents of NIEO.[4] In the light of these documents, international cooperation for sustainable development, both between industrialized and less developed states (North-South) and between the LDCs themselves (South-South), is -- next to equity, sovereign equality, and interdependence -- one of the basic principles on which the NIEO concept is based.

Under the LOS Convention

The abovementioned principles are reaffirmed in the preamble of the 1982 Law of the Sea Convention, a NIEO document par excellence, which is distinct from other multilateral legal instruments in that no one of them articulates further as many specific obligations to cooperate in such a variety of contexts as this Convention does. From amongst such obligations, those contained in Part XIV and related to cooperation in development and transfer of marine science and technology are perhaps most significant at the present stage of the Convention's implementation. This is because, while the majority of cooperative programmes in marine research were until recently concentrated in the developed states, most of the developing countries face serious shortages and weaknesses in respect of quality and

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[4]*Note* that since 1979 UN General Assembly adopts each year resolution on principles and norms of international law relating to NIEO. In 1990 the GA will adopt the strategy for the Fourth UN Development Decade, and will held special GA's session on international economic cooperation, in particular revitalization of economic growth in the developing countries. *Cf.* P. van Dijk, *Nature and Function of Equity in International Economic Law*, 7 GROTIANA 4, 28 *et seq.* (1986).

quantity of marine scientific and technical human resources and the lack of an appropriate infrastructure.[5]

The reason for this substantial gap between developing and developed states stems not only from differing levels of economic development but also from the fact that the great majority of developing states are only now starting to appreciate the benefits that could accrue to their economic development through management of their ocean resources and effective use of ocean space within their national jurisdiction. So far most of the developing states lack expertise in integrated marine planning and policy-making, and the marine component is either one of the least developed or simply non-existent in national development plans. Therefore, the development cooperation between technologically advanced states and the less developed countries, directly on a bilateral basis and through the competent international organizations, is a necessary condition before a developing state can overcome the major obstacles in the rational utilization of marine resources for the benefit of their economic development.

Although the provisions of Part XIV are -- unlike those of the UNCTAD International Code of Conduct on the Transfer of Technology --of a potentially binding nature, they only provide a framework for implementing the actions of states and international organizations. This is also evidenced by the Resolution on Development of National Marine Science, Technology and Ocean Service Infrastructures which is attached to the Final Act of the Third UN Law of the Sea Conference (UNCLOS III), and which further calls upon all states to determine priorities in this respect in their development plans, and the developing states to establish programs of technical cooperation among themselves. In addition, the Resolution urges the industrialized states and the competent international

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[5]*See* A.H.A. SOONS, MARINE SCIENTIFIC RESEARCH AND THE LAW OF THE SEA 11-41 (1982). *Cf.* H. Creech, *In Search of an Ocean Information Policy*, 6 OCEAN YEARBOOK 15-28 (1986). *See also* Development of Marine Areas under National Jurisdiction: Problems and Approaches in Policy-Making, Planning and Management, Report of the Secretary-General, UN Doc. E/1987/69, 8 May 1987; and ECONOMIC CO-OPERATION AMONG DEVELOPING COUNTRIES IN MARINE AFFAIRS, UN Sales No. E.87.II.A.12, Doc. ST/ESA/191 (1987).

organizations to expand programs for scientific and technological assistance to developing countries.

Since the Convention's adoption similar appeals are repeated each year in the law of the sea resolutions of the UN General Assembly and decisions of the UN Economic and Social Council inviting organizations and bodies of the UN system to continue to provide assistance to developing states in their assessment of the economic, scientific, technical, financial, and human resources aspects of marine affairs.[6] In 1987 the ECOSOC endorsed the conclusions of the UN Secretary-General's Report on Development of Marine Areas under National Jurisdiction, which recommended the development --in continuation of the 1984-1989 medium-term plan -- of a more integrated program of assistance to states during the next medium-term plan for the period 1990-1995.[7] To this end, the UN Office for Ocean Affairs and the Law of the Sea convened in 1988 a first consultation among the UN agencies dealing with ocean affairs which stressed the importance of consistent application and implementation of the LOS Convention not only by states, but also by international organizations, especially with regard to technical assistance in marine-related matters.[8]

As a legal means of building equitable economic relations

The significance of a principle of international cooperation for social and economic development and its important place in multilateral instruments in general, and in the LOS Convention in particular, is inherently linked with the crucial importance of building the equitable North-South relationship (dialogue) in the contemporary world. This is clearly reflected by the 1987 Report of the World Commission on Environment and Development (WCED) chaired by Norwegian Prime Minister Gro Harlem Brundtland and giving a central place to the need for increased international cooperation for

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[6]*See*, e.g., UN Docs. GA Resolutions 42/20 of 18 November 1987, and 43/18 of 1 November 1988; E/1987/84 of 8 July 1987.

[7]UN Doc. E/1987/181. For the Report, *see* UN Doc. E/1987/69, *supra* n. 5.

[8]*See infra* n. 59.

the purpose of achieving sustainable development.[9] Such need stems from the rapidly accelerating economic and ecological interdependence among states which, as an essential consequence, necessitates taking into account the interests of others. As Judge Manfred Lachs emphasizes, the awareness of such interdependence paves the way for the political will of states to cooperate with one another and to reach agreements in the areas concerned and, thereby, to create corresponding rules of law.[10]

The indispensability of shaping political will to this effect found also a pronounced expression in the views of Wilfred Jenks, who emphasized that only if mutual aid for economic stability and growth becomes "a consistent philosophy, vigorously applied in practice, can we hope to resolve the North-South tensions by comparison with which the East-West tensions ... may prove to have been an episode rather than a watershed of history."[11] The concept in question is not in fact new. As Jenks observes:

> Mutual aid is no new-fangled nostrum of rootless radicals; it is part of the imperishable tradition of western and eastern civilisation alike; ... but the importance and potentialities of the concept in contemporary society go far beyond anything which previous generations could have imagined. There is perhaps no single general idea which can exercise, and is exercising, so fruitful and fertilising

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[9]*See* OUR COMMON FUTURE, THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (1987). *Cf.* ONE EARTH - ONE WORLD, REPORT FROM A RESEARCH POLICY CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, OSLO, NORWAY, 22-23 MARCH 1988.

[10]M. Lachs, *Law in the World Today*, in A. Bos & H. Siblesz eds., REALISM IN LAW-MAKING, ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIPHAGEN 100, 111 (1986). *See* also, e.g., A.K. Koul, *The North-South Dialogue and the New International Economic Order*, 26 INDIAN JOURNAL OF INTERNATIONAL LAW 385 *et seq.* (1986).

[11]C. WILFRED JENKS, LAW IN THE WORLD COMMUNITY 66, 74 (1967).

an influence upon contemporary international law as that of mutual aid" (emphasis added).[12]

At the same time, as the argument is often made that the economic growth of industrialized states proves no need for (foreign) development assistance, it is important to emphasize that international law formerly governed the relationship between states with comparable industrial wealth and relatively secure access to the materials and products needed for the working of their economy.[13] Contrary to that, the less developed countries, which contributed to the increase in the number of states without precedent in the history of international relations, share at present many serious drawbacks of a financial, resource, and technological nature which account for the LDCs' poor progress towards industrialization and a continuing dependency on primary products. As a result, unlike ever in the past, the present-day international system is characterized by the extraordinary strength of the major powers and the extreme weakness of the vast majority of developing states which are deficient in the essential elements of economic viability, social cohesion, and political stability.

Moreover, while countries of the Group of 77 only now start to determine clearly what forms of international (economic) cooperation are desirable, and still have difficulties in pursuing shared goals, the industrialized states, by and large, oppose measures which detract from the central importance of the market mechanism for international economic relations. In addition specific and often underestimated problems are encountered by those developing states which were formerly colonies. Apart from the well-known question of national frontiers imposed by colonial powers without any regard for geographical and ethnic conditions to be found in precolonial traditions, perhaps the worst legacy of colonialism is, as Ambassador Pinto indicates:

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[12] *Ibid.*, at 67.

[13] *Cf.* I.L. Head, *The Contribution of International Law to Development*, 25 CYIL 29, 32 (1987); and H. MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 257 (1980).

> apathy and the failure of confidence in a colonized people: we may observe this in the absence of enthusiasm, an indolence established and encouraged by the paternalism of the metropolitan state.[14]

As the recent United Nations reports show, in the field of oceans policy and law, those drawbacks still amount to acute problems of implementation by the LDCs of the new legal regime for the seas and oceans.

The exceptional complexity and magnitude of issues involved makes the change effected by international cooperation for development a very gradual process despite the fact that the basis for it exists already in the UN Charter and many other multilateral instruments which only require elaboration. The experience of the past four decades shows that the process of reaching political (decisive) agreement on the areas of common goals, action, and restraint with regard to two complementary obligations -- for developed states to aid and for less developed states to use aid wisely -- inheres in serious obstacles on either part. Two decades ago it was rightly upheld that the future of development cooperation would depend on the extent to which it proves possible to emphasize and crystallize the element of mutuality which is involved; in particular: "If developed countries administer aid programmes as a charity or a bribe and developing countries claim them as a natural right, a substitute rather than an incentive for national effort, there will be no sufficiently solid basis for the continuity and increased scale of action which is required to meet the needs."[15] Today, it could not yet categorically be stated that both those basically wrong attitudes have already been adjusted, and many examples of misconceptions of the related issues by scholars from the developed[16] and sometimes also developing[17] states could be given.

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[14]M.C.W. Pinto, *Problems of Developing States and their Effects on Decisions on Law of the Sea*, in L.M. Alexander ed., THE LAW OF THE SEA, NEEDS AND INTERESTS OF DEVELOPING COUNTRIES, PROCEEDINGS OF THE 7TH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE 1972 3, 4 (1973).

[15]JENKS, *supra* n. 11, at 76.

[16]An example of a striking, often repeated misconception is an argument that foreign aid is not -- as development of Japan, the UK,

It is repeatedly emphasized that the key to development is education. In case of development cooperation we could add to it: education on both sides, as much that of developing as that of developed states. An awareness of this point was evidenced by a general agreement at the 14th session of the UNEP Governing Council in 1987 that the common responsibility for global environment could emerge only through a change in the values and perceptions of people which, in turn, had to be addressed by intensifying political will and educational efforts.[18]

In practical terms it seems that, for instance, the clear drawbacks suffered by the LDCs could more easily be overcome if industrialized states would -- as a result of adequate policy education -- take measures to cease continuing their paternalism under bilateral[19] and

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or the USSR evidences - a necessary element of economic growth. *See* M.A.G. VAN MEERHAEGHE, INTERNATIONAL ECONOMIC INSTITUTIONS 162 (1985), and reply to this argument in the main text accompanying n. 13 *supra*. VAN MEERHAEGHE, *ibid.* invokes also ridiculous arguments that the work of UNCTAD is an attempt by its LDCs' employees to keep their high salaries and of states for whom economic growth cannot be superseded by religious or other convictions (sacred cows, high birth-rate etc.).

Sometimes an argument is made that there is no general legal obligation of states to cooperate with one another in accordance with the UN Charter; this view is related to the misconception that the basic documents of NIEO provide for cooperation to the one-sided advantage of the developing states. *See*, e.g., WERNER LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 262-263 (1979).

[17]*See*, e.g., Koul, *supra* n. 10, at 386-387, invoking arguments of food production and various services for domestic animals in the North.

[18]*See* UN Doc. UNEP/GC.14/26 (1987) at 41. *Note* that in 1988 UNEP published the International Strategy for Action in the Field of Environmental Education and Training for the 1990s which replaced the Tbilisi Declaration (1977-1987).

[19]For an excellent criticism of the Netherlands development cooperation (amounting to 1% of the Dutch GNP), *see* J.J.A.M. van Gennip, *De organisatie van het ontwikkelingsbeleid* (Organization of

multilateral[20] development cooperation. As far as marine affairs are concerned, a desirable effect of such education would certainly be an extension of development cooperation programs to marine (resource) sectors, rather than continuing -- except in cases of strong pressure on the part of competent regional organizations -- to neglect them on the ground that developing states have no maritime traditions.

Furthermore, due to particular, already noted difficulties faced by the developing states in building and coordinating an ocean information base (infrastructure), a greater comprehension, especially by bilateral "donors," of the necessity of supporting such an information base could importantly contribute to diminishing the LDCs' drawbacks in this respect. Moreover, although we cannot expect to find uniformity of intention or expectation on the part of all "recipients" and "donors" of economic assistance -- and the differences in this respect can even be regarded as contributing to the dynamic of a process in question -- a greater measure of coordination between bilateral programs themselves, and between bilateral and multilateral cooperation would seem to be a useful means of improving effectiveness of such cooperation.[21]

Development Policy), ECONOMISCH-STATISTISCHE BERICHTEN, 19 October 1988, at 978-982; and for criticism of Norwegian state practice, *see* C.A. Fleischer, *Global Resource Management from the Viewpoint of International Law. Is there a Need for Research?*, in ONE EARTH - ONE WORLD, *supra* n. 9, at 69-78. *Note*, however, that paternalism and other negative practices of developed states are, to some extent, supported by the Third World governing elites. *Cf.* C.G. Weeramantry, *The Right to Development*, 25 INDIAN JOURNAL OF INTERNATIONAL LAW 482, 501 (1985).

[20]*Note* that, e.g., until 1986 (and partly even today) the large allocations of the EEC in support of South-South regional cooperation of ACP (African, Caribbean and Pacific) states were neither in form nor in substance linked to actual intra-ACP regional organizations, but unilaterally controlled from Brussels.

[21]In Netherlands practice such coordination is left basically for the LDCs concerned. *Note* the recent pioneer joint aid projects of the USA and Japan in Indonesia and India. *See* International Herald Tribune of 17 May 1989, at 7. *Cf.* OCEAN MANAGEMENT: A REGIONAL PERSPECTIVE, REPORT BY A COMMONWEALTH

Notwithstanding the rather gradual progress which is largely due to lack of experience, and serious educational effort required on the part of -- let us emphasize again -- both less developed and industrialized states, the political will to cooperate with a view to determining an adequate North-South relationship does undergo discernible changes and gradually affects the inevitable evolution of law.[22] The body of principles and rules governing equitable economic intercourse and cooperation between industrialized and developing states, although still limited, is gradually expanding and -- unlike some authorities maintain -- increasingly guides states in how the economic power should be better balanced.

Principle of Economic Cooperation Among Developing Countries

The principle of economic and technical cooperation among developing countries (ECDC/TCDC) originated at the 1955 Afro-Asian Conference held in Bandung, Indonesia, but it had been adopted for the first time by both industrialized and less developed states as a strategy for development during the 6th Special Session of the UN General Assembly in 1974 and, consequently, was reflected in all basic documents of NIEO. As a result, the ECDC/TCDC became one of the major issues in a number of programs both within and outside the United Nations system, including programs of the UN specialized agencies dealing with ocean affairs, such as FAO, UNEP, or UNC-

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GROUP OF EXPERTS, para. 4.15 at 60-61 (COMMONWEALTH SECRETARIAT 1984); and N. Tenzer and F. Magnard, *Coordinating Aid*, ACP-EEC THE COURIER 88-90 (1989 No. 113).

[22]Significantly, while in 1974 the United States and five EEC member states (Belgium, Denmark, Federal Republic of Germany, Luxemburg, and the United Kingdom) voted against the UN Charter of Economic Rights and Duties of States, in 1986 only the United States voted against the UN Declaration on the Right to Development which was adopted by a large majority of 146 votes, including that of France which abstained in 1974. *See* C.A. Colliard, *L'adoption par l'Assemblee Generale de la Declaration sur le droit au developpement*, 33 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 614, 622 (1987).

TAD.[23] The first extensive UN report on Economic Cooperation Among Developing Countries in Marine Affairs published in 1987 indicates that the ECDC/TCDC is the important means of implementing the new international economic relations and of enhancing capabilities of the LDCs in marine affairs.[24] The report emphasizes that the adequate support/participation of industrialized states and international organizations is and should continuously remain an essential element of promoting and expanding South-South cooperation in marine affairs.

The support from industrialized states mentioned above does not seem to detract from the significance of South-South cooperation. Such cooperation should not be conceived either as directed against the developed states or as a substitute for cooperation between developing and industrialized states. On the contrary, the ECDC/-TCDC would seem to be a necessary strategy at the present stage of the development process wherein some LDCs have emerged as newly industrialized countries with technological capabilities to transfer, and whereby all developing states can take advantage of the existing complementarities in their economies. At the same time, due to such nature, the principle of ECDC/TCDC should be construed as a kind of guidance for implementing by states of their basic duty to cooperate for social and economic development (or a corollary of this basic duty), rather than a separate (legal) principle.

Development Cooperation and International Peace

It is widely acknowledged that international cooperation for economic development (both North-South and South-South) on the one hand, and international cooperation for the maintenance of peace and security on the other hand, are complementary to each other. International development cooperation may, by facilitating national economic development, promote national political stability and, thereby, enhance the prospects for peace in international political

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[23]*See*, e.g., REPORT OF THE FAO WORLD CONFERENCE ON FISHERIES MANAGEMENT AND DEVELOPMENT, Resolution 9 (Rome 1984), and UN Doc. FAO COFI/87/5 (1987); UN Doc. UNCTAD TD/B/C.4(XIII)/Misc.2 (1988). On the EEC-ACP South-South cooperation, *see* R. Green, *Intra-ACP Cooperation*, ACP-EEC THE COURIER 70-72 (1988 No. 112).

[24]UN Doc. ST/ESA/191, supra n. 5.

relations.[25] And vice versa, international cooperation for the maintenance of world peace and security may facilitate or even be a necessary condition of a fuller development of mutual cooperation for economic stability and growth.

The contribution of international cooperation for development of world peace and security: *Pax justitiae opus* -- is one of the most prominent rationalizations of such cooperation, especially at the multilateral (global and regional) level. Bilateral cooperation is usually legitimized rather in terms of the criterion of national interest, although, e.g., the United States tends to justify expenditures for development programs on the grounds that they serve the national U.S. interest by strengthening the foundations of world order, and India tends to conceive the economic assistance it receives as serving values broader than only the welfare of India.

As the argument is sometimes made that underdevelopment of the LDCs cannot represent a threat to peace, because these states -- due to their underdevelopment -- are incapable of launching aggression, it should be emphasized that such argument fails to take account of an important point, namely that "starting a war is not the only way of causing a war".[26] The major issue is, in particular, that the developing states may endanger international peace and security and thus the stability of the global system, not by means of aggression but by "passive provocation"; in other words, not by posing threats/starting aggression but by presenting temptations to the outside powers as potential objects of rivalry and arenas for intervention and counter-intervention. It is such "passive provocation," clearly a major phenomenon of our time, that provides a key to the understanding of the relationship between national economic underdevelopment and international political stability and, consequently, to an appreciation of the indispensability of international cooperation for development from the viewpoint of maintenance of world peace and security.

An awareness on the part of less developed states of their (potentially) "passive provocation" role explains a particular sensitivity of

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[25]*Cf.* art. 55 of the UN Charter referred to earlier.

[26]See I.L. Claude, Economic Development Aid and International Political Stability, in R.W. Cox ed., THE POLITICS OF INTERNATIONAL ORGANIZATIONS 49, 55 (1970).

those states with regard to security matters.[27] The security concerns of the LDCs not only influenced to an important extent many new principles and concepts of the 1982 Law of the Sea Convention (with regard to issues such as straits, the archipelagic state regime, or scientific research and artificial islands in the 200 mile economic zone), but also continuously impact upon state practice. The necessity of understanding and proper accommodation of such concerns within the development of cooperation in marine affairs is also particularly pronounced in the Indian Ocean region discussed in detail below.

Development Cooperation and Environment

International marine affairs cooperation for social and economic development inheres, by its very nature, in the adequate accomodation of the relationship between environmental protection and sustainable development. This relationship is not only compatible but also interdependent and mutually supportive, since economic problems cause environmental degradation which, in turn, makes economic reform more difficult to achieve. In the long-term perspective, there can be thus no sustainable development without the rational management and protection of the environment. This is increasingly perceived both by developing states whose underdevelopment causes degradation of the environment and thereby obstructs economic development and by industrialized states whose overconsumption and wasteful use of resources pose a threat to the environment comparable with poverty. However, the global problems created by inequitable development go far deeper, with the demands of industrialized states for resources from developing countries adding to the pressures on environment of the latter states.[28]

The perception of a mutually reinforcing and compatible relationship between the environment and sustainable development is reflected in the growing number of international treaties and other instruments, including the 1982 Law of the Sea Convention, which envisage the strengthening of cooperation between states, directly and

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[27] *Cf.* Pinto, *supra* n. 14, at 6; and *infra* n. 39.

[28] *Note* the recent protest of the EEC and USA with regard to Indonesia's ban (as of July 1988) on exports of semi-finished rattan products which is based on Indonesia's concern over the conservation of its forests. *See* Jakarta Post of 16 January 1989, at 1. *See* also *infra* ns. 90-91.

through competent international organizations, with a view to ensure the protection of the environment and the sustainability of economic development. This approach found also a pronounced expression in the 1987 Brundtland Report of the World Commission on Environment and Development already referred to earlier. At the same time, the WCED's Experts Group on Environmental Law included the obligation of states to cooperate in good faith with other states or through competent international organizations, especially on transboundary environmental problems (arts. 8 and 14), as well as several specific obligations to cooperate, into its Draft Convention on Environmental Protection and Sustainable Development, indicating that those obligations find already substantial support in existing general international law.[29]

The UNEP Governing Council endorsed at its 14th 1987 session the anticipatory, preventive, and integrated approach of the WCED's Report dealing with environmental issues and adopted a decision on The Environmental Perspective to the Year 2000 and Beyond, as providing a broad framework to guide national action and international cooperation on policies and programmes aimed at achieving environmentally sound and sustainable development.[30]

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[29]ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT, LEGAL PRINCIPLES AND RECOMMENDATIONS, R.D. MUNRO, CHAIRMAN, J.G. LAMMERS, RAPPORTEUR, WCED JUNE 1986, 69-72, 90-119 (1987). *Cf. supra* n. 9.

[30]*See* UN Doc. UNEP/GC.14/26 (1987), Annex I and Annex II (Environmental Perspective to the Year 2000 and Beyond). Paras. 67-68 of Annex II contain Goal and Recommended Action for International Economic Relations. *See* also decisions of the UNEP Governing Council 15/2 of 26 May 1989, 15/3 and 15/21 of 25 May 1989. *Note*, that the UN GA plans to convene a UN Conference on Environment and Development no later than by 1992. *Note* further that the UN ECE endorsed at its 1989 (44th) session the conclusions of an *Ad Hoc* Meeting of Experts on the WCED Report (UN Doc. ECE/AC. 18/2), and welcomed preparations to the 1990 ECE Regional Conference in Norway which will identify further measures as a follow-up to the WCED Report.

Legal Nature of Obligation to Cooperate

The numerous obligations to cooperate, whether express or implied, formulated by the 1982 Law of the Sea Convention in a variety of context should, as was already noted earlier, be construed as having legally binding content. They are -- as Ambassador Pinto, one of the principal architects of the Convention, put it -- obligations to act:

> Interpretation of these provisions in good faith in accordance with the ordinary meaning to be given to terms in their context, and in the light of their object and purpose could hardly lead to the conclusion that action was not intended. On the contrary, the injunction to co-operate would seem necessarily to entail the obligation to enter into negotiations in good faith at the request of any interested party with a view to transforming a provision worded in general terms into specific units of obligations for the purpose of implementation susceptible of being monitored and, where necessary, subjected to dispute settlement procedures.[31]

One aspect of this opinion which is of particular interest for our considerations consists in regarding negotiations (in the sense of expression of a duty to act) as the means of resolving ambiguities in application of various cooperative obligations which are laid down throughout the LOS Convention. Such obligations, while remarkably numerous, offer usually no more than very general guidance as to the scope and frequency of cooperative (regional and global) interactions, and lack two important features: a manifest element of reciprocity or mutuality of benefit, and a specification of conduct required to fulfill given obligation.[32] In other words, the cooperative obligations under the LOS Convention seem at face to lack the textual determinacy (precision) in the sense of ability to convey a clear meaning, determinacy being perhaps the most self-evident of all characteristics making for legitimacy of a particular principle (rule).[33] As Thomas Franck

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[31]M.C.W. Pinto, *The Duty of Cooperation and the United Nations Convention on the Law of the Sea*, in REALISM, *supra* n. 10, at 131, 145. *Cf.* MOSLER, *supra* n. 13, at 251.

[32]*See* Pinto, *supra* n. 31, at 137-138.

[33]*Cf.* P. van Dijk, *Normative Force and Effectiveness of International Norms*, 30 GYIL 9, 20-21 (1987).

rightly ascertains, indeterminacy, while sometimes beneficial by permitting a flexible response to advances in technology, has also costs. In particular:

> Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance. Put conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify noncompliance."[34]

In the case of cooperative obligations under the LOS Convention, a very refusal to act, e.g., refusal to respond to a request to enter into negotiations with a view to agree on specific collaborative actions, could by itself be regarded as amounting to a breach of a legal rule (enunciated in the Convention) and justifying appropriate remedial action. However, due to the usual lack of clarity mentioned above, a proof of breach of a given obligation, i.e., conduct falling short of a minimum which could be considered cooperation, would not, according to Pinto, be free from difficulties. Should the burden of proof lie with the party alleging noncooperation, the lack of specificity as to the action required could obstruct a proof of noncompliance, except where the respondent has acted in a flagrant violation of good faith. Yet, this does not seem to imply a conclusion that cooperative obligations under the LOS Convention should be regarded as lacking the textual determinacy to a degree affecting their legitimacy. Such determinacy "depends" -- according to Franck -- "upon the clarity with which it is able to communicate its intent and to shape that intent into a specific situational command. This, in turn, can depend upon the literary structure of the rule, its ability to avoid *reductio ad absurdum* and the availability of a process for resolving ambiguities in its application."[35]

If we agree with the view of Ambassador Pinto quoted above that the injunction to cooperate entails the obligation to negotiate in good faith with a view to identify specific units of implementing obligations, we could argue that such negotiations provide the necessary and effective means for resolving ambiguities in application of usually

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[34]T.M. Franck, *Legitimacy in the International System*, 82 AJIL 705, 714 (1988).

[35]*Ibid.*, at 725.

vague obligations to cooperate under the LOS Convention, and thereby ensure a degree of determinacy sufficient for acknowledging the legitimacy of these obligations. At the same time, in case of obligations entailing global or regional undertakings, the competent international organizations -- when perceived by those they address as acting in accordance with their specific mandate and the general principles of fairness -- would seem to be the most appropriate and legitimate forum capable of mitigating the textual elasticity of obligations here under consideration.

Role and Structure of Institutionalized Regional Cooperation for Development

Role of Cooperation

In the present era of extensive jurisdiction of states, institutional cooperation at the regional level plays an increasingly important role. In 1984, a Report by a Commonwealth Expert Study Group on Maritime Issues, which was set up by the Commonwealth Heads of Government of the Asia/Pacific Region with a view to assess the implications of the LOS Convention for regional cooperation, emphasized that:

> The nature and distribution of the resources, the high cost of their management and the technological capability that is required, all strongly suggest that regional cooperation is the most viable vehicle for realising the long-term potential benefits of the oceans.[36]

The emphasis on regional cooperation can also be found in documents of the four UN principal and other organizations dealing with ocean affairs, as well as in many documents of various organizations of

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[36]COMMONWEALTH REPORT, *supra* n. 21, para. 1.8 at 29. The Report was followed by THE UN CONVENTION ON THE LAW OF THE SEA, 1982: A GUIDE FOR NATIONAL POLICY MAKING, LEGISLATION AND ADMINISTRATION, BOOK 1: GENERAL INTRODUCTION (COMMONWEALTH SECRETARIAT 1987). *Cf.* E. Gold and C.L. Mitchell, *The New Law of the Sea in the Eastern Caribbean*, in E. Gold ed., A NEW LAW OF THE SEA FOR THE CARIBBEAN, AN EXAMINATION OF MARINE LAW AND POLICY ISSUES IN THE LESSER ANTILLES 265, 269, and also at 274 (1988).

developing states which are concerned with economic cooperation in general.[37]

However, there exists a whole variety of features which make the operation of marine-oriented organizations in the developing country region -- in spite of obvious advantages -- a complex and a difficult process. First of all:

> These international organizations, like any bureaucracy, have their own internal dynamics, while their modes of operation are also shaped by external forces, which have nothing -- or very little -- to do with the ... Convention. This implies that any analysis of the effects of the new law of the sea on international organizations must reflect an awareness that this regime is only one of the forces shaping the future of international marine-oriented organizations" (emphasis added).[38]

In addition to and in connection with the complexity of the present North-South dialogue already referred to earlier, such external forces cover, among others, the position of the two superpowers and three other permanent members of the UN Security Council and often also an influence exercised by the most powerful of states bordering given region.[39] Moreover, in development cooperation (aid) issues the

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[37]*Note*, that Annex VIII of the LOS Convention implies principal responsibility of FAO, IOC, UNEP and IMO for ocean affairs. *See*, e.g., FAO World Fisheries Strategy, parts VII and VIII, in FAO REPORT 1984, *supra* n. 23, and UN Doc. FAO COFI/87/3 (1987); *supra* ns. 6-8, 23-24 and the main accompanying text. *Cf.* A. Tincani, *Regional Cooperation under Lome*, ACP-EEC THE COURIER 73-76 (1988 No. 112).

[38]A.W. Koers, *Introductory Remarks*, in THE LAW OF THE SEA IN THE 1980s, *supra* n. 3, at 382. *Cf.* Miles, *supra* n. 3, at 386-387 and 411-414.

[39]It could be even assumed that an increase -- through regional cooperation -- of the coastal states' control over some strategically important regions does not lie in the interest of the major powers. On the role played by great powers in the Indian Ocean, *see* M.C.W. Pinto, *Economic, Scientific and Technical Cooperation in the Indian Ocean*, in THE LAW OF THE SEA, ESSAYS IN MEMORY OF JEAN

Western powers and the Soviet Union compete for support from amongst developing states, with the Western powers largely divided between state members of the European Community and the United States. There exist also several other disintegrative factors in any regional organization, such as unequal costs and benefits to member states, or nonmembership of one or more states within the region. One of the most difficult aspects is perhaps that of the quality of governmental representatives. Since the rotation of governmental officials cannot be prevented, it is essential that the regional organizations' meetings are at least attended by the home-based officials involved in marine affairs and not only by staff members of the embassies, and that the officials joining for the first time a given organization are well prepared in advance of the meeting. This -- let us emphasize -- relates as much to the developing as to the developed states. In fact, all special advantages of nongovernmental organizations which are identified further by Lee Kimball are clearly disadvantages and sometimes even disintegrative factors in any governmental organization.

Bilateral development cooperation, designed to reinforce the foreign policy objectives of the "donors," is an important factor which parallels, and should be adequately coordinated with, multilateral programs within international organizations.[40] Although such bilateral cooperation is vastly superior in size to multilateral programs, the marine affairs programs (aid) are mainly promoted at the multilateral level. At the bilateral level, e.g., in the Netherlands, marine sectors are included in development cooperation to a very

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CARROZ 189, 191-196 (FAO 1987); and on the U.S. role in the Caribbean, *see*, B. Blake, *Whither Caribbean Integration?*, ACP-EEC THE COURIER 58, 59 (1988 No. 112). *Note* also the Commonwealth's activities aimed at the strengthening of economic independence and regional cooperation of small Indian Ocean, Pacific and Caribbean island states with a view to safeguard their security. *See* International Herald Tribune of 28 December 1988, at 4.

[40]*Cf. supra* ns. 19-21 and the main accompanying text. *Note*, e.g., negative effects of reversing by President Reagan of Carter's policy supportive for regional integration in the Caribbean, and of introducing a policy based on selective bilateral cooperation which spilled over to other "donors" (including Canada and the EEC) to this region.

limited extent.[41] Such sectors could presumably be covered by the element of "integrated environmental management" which was recently introduced in bilateral programs, and in the long term grow into a new sectoral program of "integrated ocean management." An alternative solution could be that applied by the U.S. AID (Agency for International Development) which since 1986 operates a special Coastal Conservation Department. Since one of the main objectives of bilateral program is usually the so-called "institution-building," the strengthening through such programmes of the institutional framework in marine sectors, including the information base[42] of bilateral "recipients," could contribute significantly to the development of individual capacities of developing states in marine affairs which are the necessary prerequisite of participation by these states in technology transfer and of effective promotion and operation by them of the relevant regional programs.

This is particularly important in view of the fact that developing countries have only recently begun to appreciate and to reach agreement on the areas of shared interests and a continuing common concern for their realization, being the necessary conditions of institutionalizing effectively regional approaches to solving ocean problems. Apart from the LDCs' numerous drawbacks of a technical, scientific, and financial nature already addressed earlier in this study, many LDCs were in the past reluctant to surrender their newly gained independence in favor of what they perceived as the uncertain benefits of participating in a wider regional framework. In addition, the related important reason for delayed progress in institutionalizing

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[41]*Note*, however, the recent report on *Expertise and Facilities in the Netherlands for Marine Education Projects in Developing Countries*, Netherlands Marine Research Foundation (1988). As regards the multilateral development programmes in marine affairs, they are particularly promoted by Canada and France, to a lesser extent by Scandinavian countries, and recently by the USA also.

[42]*Note* that building an information base is at present given no priority under the existing bilateral development cooperation of, e.g., the Netherlands and Canada. *Note* also, however, that information services are supported within the EEC-ACP regional programs, e.g., the Pacific Regional Marine Resources Programme aims at, among others, establishment of the Regional Tuna Fisheries Information Service (900.000 ECU). *Cf. supra* n. 5.

marine affairs (and any other) cooperation in developing country regions was a concern not to undermine the central (universal) role of the United Nations.[43]

However, both arguments specified above become at present less apparent. This is due to increasing acknowledgment of the theory of developmental functionalism equating international organization with a state-building (and not state-undermining, like under regulatory functionalism) enterprise which is aimed at assisting states in achieving effective statehood.[44] Yet, the flexible organizations designed mainly for the international coordination of various specific measures are -- especially in the case of newly established organizations -- comparatively the most successful in developing state regions, as such organizations do not represent general limitations on, or threats to, national policies of the participating LDCs.[45] And as regards the role of the United Nations, almost all non-UN regional organizations maintain, in one form or another, some functional relationship with the relevant bodies and organizations of the UN system, with such regional organizations operating in a manner complementary to, rather than in substitution for, the functioning of organizations of the UN system. In the field of ocean affairs some important, presently non-UN, organizations have even been -- as will be further discussed below -- initiated within the UN, and a leading role of the United Nations is clearly confirmed by the principal responsibility of the four UN organizations for ocean affairs, and by a central and coordinating role played by the UN Office for Ocean Affairs and the Law of the Sea.

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[43]For both arguments, *see*, e.g., S.P. Sharma, *Regionalism Versus Universalism in Institution Building*, in R.P. Anand ed., ASIAN STATES AND THE DEVELOPMENT OF UNIVERSAL INTERNATIONAL LAW 130, 137 and 139 (1972).

[44]*Cf.* Claude, *supra* n. 26, at 57; R.S. Pathak, *The Functioning of International Law in the International System*, 24 INDIAN JOURNAL OF INTERNATIONAL LAW 1, 6-7 (1984).

[45]*Note*, e.g., an unexpected collapse of the East African Community (EAC) and its East African Marine Fisheries Research Organization (EAMFRO) in the end of 1970s, and of African and Mauritanian Common Organization (OCAM) in 1985.

The emphasis on complementary functioning of UN and non-UN regional organizations has also an aspect opposite to that addressed above, namely that even the best functioning UN body or organization should not be perceived as capable of substituting effectively for the non-UN regional organizations specialized in ocean affairs. Furthermore, while collaborative undertakings in ocean affairs fall within the broader scope of regional economic cooperation and, as appropriate, integration, the effectiveness of such undertakings requires their promotion either through independent marine-oriented organizations or through specifically marine-oriented organs of the regional multipurpose or economic organizations. Generally, at the present stage of the LDCs' regionalism, a functional cooperation in marine affairs through specialized institutions is a preferable option to the ideal of a closer economic integration. For instance in the Caribbean, the establishment of a new Standing Committee on Fisheries of the CARICOM would be preferable to inclusion of fisheries into the CARICOM's Common Market.[46] Such specialized (functional) cooperation is not only easier to implement and coordinate for participating LDCs, but is also being supported more willingly by the foreign (bilateral and multilateral) "donors" of the necessary development aid. The feasibility of making practical use of these advantages is confirmed by an increasing effectiveness of cooperation of states through, e.g., the South Pacific Forum Fisheries Agency

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[46] *See* N. Chutkan, *CARICOM and the Law of the Sea: the Case for Extending Caricom to Fishing in the Caribbean*, 2 EMORY JOURNAL OF INTERNATIONAL DISPUTE RESOLUTION 385, 407-421 (1988); and UN Doc. FAO FL/WECAF/86/12 (1986). On fisheries activities within the OECS, *see* UN Docs. FAO FL/WECAF/83/7 (1983), FL/WECAF/83/8 (1983), FL/WECAF/84/9 (1983), and WFR:WP/5 (1983). *Note* that OECS is also involved in preparing guidelines for a coordinated approach of OECS countries to maritime boundary negotiations. *Cf.* general observations by B.M. Carl, *The European Economic Community as a Model for Developing Nations*, in EUROPEAN ECONOMIC COMMUNITY: TRADE AND INVESTMENT 22-1/22-43 (1986).

(SPFFA) or Indian Ocean Marine Affairs Cooperation Conference (IOMAC).[47]

Model of Cooperation for Integrated Ocean Management

The regional trans-sectoral organizations of developing states, such as the South Pacific Forum or IOMAC, provide moreover the most adequate model for cooperation in that such organizations can play a particularly pronounced role in activating, facilitating, and assisting its member states in their efforts to translate a perception of an integrated (trans-sectoral) concept of ocean development which is embodied in the 1982 Law of the Sea Convention into practical measures for ocean policy-making, planning and management.[48] The Convention now provides a foundation where interactive terrestrial/coastal/ocean uses may be taken into account.

The building and strengthening of national marine affairs capabilities of the developing states is the principal aim of regional cooperation for integrated ocean management whether within or outside the United Nations system. A regional institution becomes, therefore, a means of necessary, coordinated, and joint efforts of states aimed at the establishment, implementation, and consolidation

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[47]*Note* that none of the South Pacific island states that became independent succeeded to the IPFC (FAO), but instead all of them joined with Australia and New Zealand to form the SPFFA.

[48]*See* COMMONWEALTH REPORT, *supra* n. 21 which was the first report treating the issues raised by the LOS Convention in an integrated (trans-sectoral) manner; and also UN Doc. E/1987/69, *supra* n. 5. *Cf.* Hiran W. Jayewardene, *Law of the Sea Aftermath: Gearing for the Management of Marine Affairs*, in INSTITUTIONAL ARRANGEMENTS FOR MARINE RESOURCE DEVELOPMENT, UN Sales No. E.84.II.A.9, Doc. ST/ESA/144 (1984), at 42-46; J.P. Levy, *Towards an Integrated Marine Policy in Developing Countries*, 12 MARINE POLICY 326-342 (1988); E. Mann Borgese, *United Nations: Future Trends*, in THE ADAPTATION OF STRUCTURES AND METHODS AT THE UNITED NATIONS 373, 379-392 (1986); Nugroho Wisnumurti, *Regional Cooperation: Some Reflections on its Institutional Aspects*, in INTERNATIONAL SYMPOSIUM ON THE NEW LAW OF THE SEA IN SOUTHEAST ASIA 167-169 (DOSP 1983); 1986 COL Report, *supra* n. 3.

of required national marine affairs policies, which take due account of interactions between terrestrial, coastal, and ocean activities. Such process, while responding to expressed needs of the LDCs, has to be substantially supported by industrialized states and the competent international organizations. However, as the Secretary-General of IOMAC, Ambassador Jayewardene, emphasizes:

> Gearing a nation for effective marine affairs management in an integrated policy-making and organizational effort is not easily achieved."[49]

In particular, first, there must be adequate recognition of the significance of the marine resource potential which can only be based on appropriate information. Second, there must be at least general governmental acceptance of the concept of co-ordinated, if not integrated national policy-making in respect of marine affairs, as would bring about the most effective and efficient deployment of resources for ocean development. Third, there must follow a determined effort in developing skills and offshore research and development activities through investments in manpower and requisite finances. Usually such a national response can emerge and remain viable and dynamic not only through high level executive direction, but through the sustained commitment of concerned administrators at all levels, as well as scientific and technical personnel directly involved in the identification and execution of national plans and activities. The difficulties inherent in the development of this process are clearly evidenced by the fact that the national ocean affairs managerial and administrative machinery of most of the LDCs continuously reveals, except in a few sectors such as fisheries and the environment in some regions, a paucity or even non-existence of expertise and institutional infrastructure to absorb or implement program conceived in various regional fora. At the same time, whichever organizations are involved, it is often not possible to find all the coastal states in a region attaching the same level of priority to ocean affairs' management and administration.

A useful model for implementing an integrated ocean management and eliminating the existing deficiencies provides Jayewardene's

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[49]Building and Strengthening Marine Affairs Capabilities in the Indian Ocean Region Through a Programme of IOMAC, United Nations and Donor Country Collaboration, Presented by the Secretary-General, Doc. IOMAC-1/SC-3/4, November 1988, at 3.

concept of seven major stages in this process. These stages, which are assisted and coordinated by IOMAC in the wider Indian Ocean region and which may as well apply elsewhere, are: I - promoting awareness, assessment and plan; II - basic training; III - organization; IV - basic institutional support; V - direct country support; VI - secondary development; and VII - progressive development beyond phases III through VI.[50]

I. Adequate (initial and continued) awareness of the marine resources potential is of primary importance in view of the fact that its lack is one of, if not the main, reason for nonemergence of appropriate marine affairs capabilities in a majority of coastal states in the Indian Ocean and other developing state regions. Further, any effort to assist in the process of building national capabilities must be based on a proper assessment of the national context. Such assessment could eventually be achieved by joint national and international expert teams set up by a regional organization which may also provide an effective planning mechanism. Planning would necessarily reflect national priorities derived from the relevant policy guidelines, and where required, lead to the production of integrated management structures and/or coordinating mechanisms. Necessary provision would be made at this stage for traning of personnel, identification of sources of funding, technical and material assistance, and a nationally focused project of assistance, to be supported by multilateral or bilateral aid programs.

II. The assessment and planning stages would result in creation of a core group of administrators and experts who have gained exposure to current trends and approaches as well as potential constraints in gearing for marine affairs. Nevertheless, their efforts can be translated into real meaning only through emergence of a cadre of marine affairs oriented personnel who would man the second rung in the national organization. To this end it would be necessary to provide complementary, more focused training programs.

III. As envisaged above with regard to the planning process, the national strategy may encompass the necessary preliminary organization for marine affairs management (including establishment of the integrated institutional and/or coordinating national mechanism) which could be assisted, as necessary, through the regional program. Due to different socio-economic realities of states, and rapid transformations occurring in a complex ocean environment

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[50] *Ibid.*

through growth of ocean-related technology, there is no single model of institutional (regulatory) arrangements applicable to all countries. Such arrangements must be flexible enough to produce the coordinated management response corresponding to socio-economic requirements of particular states.

IV. Where states have designated the creation of national marine affairs institutions or the upgrading of existing institutions as part of their declared national strategies, accelerated development in the field may require support for the establishment of the basic infrastructure or primary strengthening of existing institutions to enable the early fulfilment of the new role. This basic institutional support could be channelled through a regional organization to a number of selected countries.

V. Once such basic infrastructure has been set up, direct bilateral or international support programs could be worked out for individual countries. Regional organization could continue to be associated in monitoring further development and harnessing additional support, as well as providing training facilities and opportunities for participation in cooperative activities.

VI. Varying levels of national capacities to participate in integrated marine affairs management would dictate that only a limited number of states (group A) would progress through phases I to V in a given period of time. Accordingly, those states which were not able to progress during stage I may be ready to embark on a program of development as a second group (group B) when the first group (group A) would, for instance, be passing through phase V of its development.

VII. In the last phase and beyond, there would be a repetitive cycle of states in groups A, B, etc., passing through the various phases of development, until the optimum attainable level of development is reached within the entire ocean basin in terms of realizing the fundamental objective of creating requisite marine affairs capabilities. In the wider and nonhomogeneous regions such as the Indian Ocean or Caribbean the ultimate achievement of this objective would at first occur in particular subregions and in a longer perspective in such entire regions.

Structure of Cooperation

The institutionalized regional cooperation in marine affairs is structured along a general framework of organizations within and outside the United Nations system. This framework evidences a diversity in the concept of region which is defined by Lewis Alexander as follows:

> A region is a geographical phenomenon -- an area of the earth surface which is differentiated from other areas by the existence within it of a certain feature or association of features. The distinguishing criteria for the region may be physical in nature, such as deserts or semi-enclosed seas, or they may represent demographic, economic, political, or other elements. There are, in fact, no limits to the categories of criteria which may be selected in determining a region, just so long as the criteria are valid ones and the areas in which the criteria occur can be differentiated geographically from other areas and can be represented on a map.[51]

The marine regions are usually of three kinds: geographical (defined in terms of ocean basins and semi-enclosed seas), institutional (defined by the limits of competence of a regional organization or by terms of international treaty), and functional (defined in terms of a particular management problem), but no standard classification system of geographical regions exists.

Once we identify regional organizations within and outside the UN system operating in a given region, we can distinguish further various marine sectors (fisheries, shipping, etc.) in terms of their coverage by the organizations concerned. A clear identification of such basic framework with regard to a particular region or subregion can be especially useful for developing states for the purpose of determining the possible institutional arrangements on which they can base in their cooperation. At the same time, an awareness of a framework in question in its complexity and in all other regions can be useful as providing evidence of solutions applied elsewhere which might, with appropriate adjustments, serve as models to be followed in a given region or subregion.

Regional organizations within the UN system

The framework of regional organizations within the United Nations system consists of[52]:

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[51] Alexander, *supra* n. 3, at 1-4 *et seq.*

[52] *See* Annotated Directory of Intergovernmental Organizations, UN Doc. A/CONF. 62/L.14 (1976). For more detailed review, *see* works of Alexander, Gold and Miles, as well as 1986 COL Report, *supra* n.

- five economic comissions of the UN Economic and Social Council (ECOSOC) which include: Economic Commission for Europe (ECE); Economic and Social Commission for Asia and the Pacific (ESCAP, until 1974); Economic Commission for Asia and the Far East (ECAFE); Economic and Social Commission for Western Asia (ESCWA until 1973); United Nations Economic and Social Office in Beirut (UNESOB); Economic Commission for Africa (ECA); and Economic Commission for Latin America and the Caribbean (ECLAC);

- regional bodies and projects of the United Nations Environment Programme (UNEP) and three UN specialized agencies, i.e., Food and Agriculture Organization (FAO), Intergovernmental Oceanographic Commission (IOC), and International Maritime Organization (IMO), which have principal responsibility in ocean affairs, and of other UN organs and specialized agencies concerned with ocean affairs; and

- bodies for inter-agency cooperation and coordination which include: Office for Ocean Affairs and the Law of the Sea (OALOS) which is a central coordinating agency headed by the UN Under-Secretary-General, Satya N. Nandan; Subcommittee on Marine Affairs of the Administrative Committee on Coordination (ACC) of the ECOSOC, participation in which is open to all UN organizations; Inter-Secretariat Committee on Scientific Programmes Relating to Oceanography (ICSPRO) with participation of UN/OALOS, FAO, UNESCO-IOC, WMO and IMO; Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP) which is sponsored jointly by UN, IMO, FAO, UNESCO, WMO, WHO, IAEA and UNEP; FAO Committee on Fisheries (COFI) which coordinates activities of the UN and non-UN fisheries organizations; and Environment Coordination Board of UNEP.

The United Nations economic commissions reflect a combination of universalism and regionalism. The activities of the five regional commissions have to fit into the overall economic and social policy of

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3; K.A. BEKIASHEV AND V.V. SEREBRIAKOV, INTERNATIONAL MARINE ORGANIZATIONS (1981); H.W. DEGENHARDT, MARITIME AFFAIRS - A WORLD HANDBOOK (A KEESING'S REFERENCE PUBLICATION 1985); ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, MAX PLANCK INSTITUTE VOL. 5 (1983); and *infra* ns. 53 and 64.

the United Nations, and the commissions report annually on their activities to the ECOSOC. The general purpose of regional commissions is to assist in raising the level of economic activity in their respective regions and to maintain and strengthen the economic relations of the countries in each region both among themselves and with other states of the world. The works of regional commissions must be coordinated with those of UN specialized agencies. In practice, the four commissions serving developing state regions share with those agencies the role of executing agency for the UNDP-funded projects, or develop their operational projects in concert with specialized agencies. Secretariats of these four commissions have joint divisions with FAO and UNIDO.

As the General Assembly has insisted upon decentralization of the economic and social activities of the United Nations, the regional commissions have assumed increasing importance and considerable autonomy from ECOSOC over recent years, as well as a central role in the United Nations efforts to promote economic development. ECA, ESCAP, and ECLAC showed also recently an increased concern with ocean-related matters which is further referred to below. The commissions could not be expected to establish and maintain effective relations with all non-UN economic and marine-oriented organizations in their regions, but there seems to exist potential for further expanding by ECOSOC's commissions of activities of their subregional offices, as well as assumption by these commissions of greater responsibility for the initiation of contacts with non-UN regional and subregional organizations.

From amongst four principal and other UN organizations concerned with ocean affairs, FAO has the longest tradition in promoting regional cooperation in marine affairs. FAO has nine regional fishery bodies which were established with the underlying reason to assist states in the improvement of conservation and management of their fisheries. All these regional (inland and marine) fishery bodies, except EIFAC, operate in tropical or subtropical areas, and the majority of their members are developing states. They are, therefore, like the four commissions of ECOSOC serving developing state regions, in a position to play a particularly active role in the promotion of economic and technical cooperation among developing countries (ECDC/TCDC).

The nine FAO fishery organizations and the tenth one to be

established include:[53] Regional Fisheries Advisory Commission for the Southwest Atlantic (CARPAS); Fishery Committee for the Eastern Central Atlantic (CECAF) and its Subcommittee on Management of Resources within the Limits of National Jurisdiction; Commission for Inland Fisheries of Latin America (COPESCAL); Committee for Inland Fisheries of Africa (CIFA); European Inland Fisheries Advisory Commission (EIFAC); General Fisheries Council for the Mediterranean (GFCM); Western Central Atlantic Fishery Commission (WECAFC) and its subregional Committee for the Lesser Antilles; Indian Ocean Fishery Commission (IOFC) and its subregional committees for: the Gulfs (Gulf of Oman and Gulf between Iran and the Arabian Peninsula), Southwest Indian Ocean (SWIOC), and the Bay of Bengal (BOBC), as well as the Committee on Management of Indian Ocean Tuna; Indo-Pacific Fishery Commission (IPFC) and its subregional Committee for South China Sea (CDMSCS), as well as special Committee on Management of Indo-Pacific Tuna; and the Indian Ocean Tuna Commission (to be established).

FAO has also three Regional Marketing, Information, and Technical Advisory Services for: Africa -- INFOPECHE (Ivory Coast), Arab states -- INFOSAMAK (Bahrain), and Latin America -- INFOPESCA (Panama). The fourth of such services, for Asia and the Pacific -- INFOFISH (Malaysia) transformed into presently independent intergovernmental organization. These services are coordinated by GLOBEFISH -- FAO Global System of International Fish Market Indicators. In addition, FAO/IOC Aquatic Sciences and Fisheries Information System (ASFIS) has established so far two Regional Centers: for Central and South America in Mexico, and for Southeast Asia in Thailand.

Moreover, FAO operates through, among others, its Regional Offices for: Africa, Asia and the Pacific, Latin America and the

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[53]For detailed analysis, *see* UN Docs. FAO COFI/85/INF.6 (1985), COFI/87/9 (1987), and COFI/87/INF. 7 (1987); and *infra* n. 102. *See* further A.W. KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES, A STUDY OF REGIONAL FISHERIES ORGANIZATIONS (1973); and also by this author *The European Economic Community and International Fisheries Organizations*, LEGAL ISSUES OF EUROPEAN INTEGRATION 1984/1, at 113-131; J.E. Carroz, *Institutional Aspects of Fishery Management Under the New Regime of the Oceans*, 21 SDLR 513-540 (1984).

Caribbean, and the Near East, as well as administers regional and inter-regional projects funded by UNDP and other organizations.

The areas covered by the regional (marine) fishery bodies do not always correspond to the regions defined by the FAO for its field activities. The former (functional) areas have in fact been defined in terms of oceans rather than continents. For instance, African states are concerned with three distinct FAO bodies dealing respectively with fisheries in the Mediterranean, the Eastern Central Atlantic, and the Indian Ocean. On the other hand, e.g., the IOFC area of competence is bordered by countries served by the three FAO Regional Offices (Africa, Near East, Asia and the Pacific). This approach is justified by the technical requirements of rational management of fish stocks. The socio-economic and other objectives of coastal communities have not, however, been overlooked, as evidenced by establishment of subsidiary subregional committees referred to above.

The 1984 World Fisheries Strategy attaches special importance not only to cooperation of states through FAO regional fishery bodies, but also to collaboration between these bodies and non-FAO regional organizations concerned with fisheries.

IOC, being a commission of UNESCO of basically coordinating and advisory character, has among its subsidiary bodies: Subcommission for the Caribbean and Adjacent Regions (IOCARIBE); Regional Committee for the Western Pacific (WESTPAC); Regional Committee for the Cooperative Investigations in the North and Central Western Indian Ocean (IOCINCWIO); Regional Committee for the Central Indian Ocean (IOCINDIO); Regional Committee for the Southern Ocean (IOCSOC); Programme Group for the Central Eastern Atlantic (IOCEA); Joint IOC-WMO-CPPS Working Group on the Investigations of El Nino; Joint CCOP (SOPAC)-IOC Working Group on South Pacific Tectonics and Resources (STAR); and Joint CCOP-IOC Working Group on Studies of East Asian Tectonics and Resources (SEATAR).

Moreover, IOC carries out numerous regional activities in the field of ocean science, e.g., ocean mapping in the Atlantic and Pacific Oceans (GAPA), the Mediterranean and Black Seas (IBCM), Caribbean (IBCCA), Western Indian Ocean (IBCWIO), and Central Eastern Atlantic (IBCEA), as well as in the field of ocean services, e.g., International Tsunami Warning System in the Pacific (ITSU).[54] All

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[54]For details, *see* Fourteenth Session of the IOC Assembly, Doc. SC/MD/86 12 June 1987, and UN Doc. IOC-XIV/11, 31 Dec. 1986.

regional activities contain a strong element of Training, Education and Marine Assistance in the Marine Sciences (TEMA), which is administered by a special Technical Committee for TEMA and covered by the IOC Voluntary Cooperation Programme (VCP).

The strengthening of the regional subsidiary bodies, integrated implementation at the regional level of the global program, and inter-regional cooperation and projects are continuously the important elements of IOC activities. Essential to the effective realization of those elements is an accelerated implementation and consolidation of the UNESCO-IOC Comprehensive Plan for a Major Assistance Programme to Enhance the Marine Science Capabilities of Developing Countries which aims at ensuring that coastal states will attain -- by the end of the century -- sufficient capability in marine research and ocean services to resolve the integrated management of their marine resources.

UNESCO itself does not have elaborated regional activities, but the Division of Marine Sciences within its Secretariat is responsible for, among others, assisting member states, especially developing countries, in strengthening regional cooperation in marine affairs. The Division concentrates on training and education, the development of the scientific basis for the understanding of marine coastal systems, and the development of national and regional infrastructures. To this end, the Division, among others, supported three regional biological centers: Indian Ocean Biological Centre which became a division of the National Institute of Oceanography in Goa, India; Regional Marine Biological Centre in Singapore which has been moved to Japan; and the Mexican Oceanic Sorting Centre. The Division also operates the UNESCO Major Inter-Regional Project on Research and Training leading to the Integrated Management of Coastal Systems (COMAR).

Regions defined by UNESCO for the purpose of its activities are: Africa, Arab States, Asia and Oceania, Europe, Latin America and the Caribbean. They are served by 23 Regional Offices.

IMO has no regional bodies or offices but it provides various marine regions with ship routing and traffic separation schemes, plays an important role in the establishment and operation of regional oil-combating arrangements (centres or coordination units) within the UNEP Regional Seas Programme, and works on establishment of an inventory of particularly sensitive areas in various marine regions.[55]

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[55]*See* IMO/UNEP MEETING ON REGIONAL ARRANGEMENTS FOR COOPERATION IN COMBATING MAJOR INCIDENTS OF

With UNDP support IMO operates the Maritime Training Institute in Alexandria, the Regional Maritime Training Academy at Accra, the Regional Academy of Sciences and Techniques of the Sea at Abidjan, and the International Maritime Law Institute at Malta. Moreover, IMO maintains Regional Advisers for Africa, Arab States, Asia, and South America.

UNEP is the only organization -- from amongst the four principally responsible for ocean affairs and all other UN organs and organizations -- which is based on an integrated trans-sectoral approach to regional cooperation in the ocean basins and semi-enclosed seas covered by its Regional Seas Programme (RSP), forming part of a wider UNEP Programme Activity Centre for Oceans and Coastal Areas.[56] A predominant feature of the RSP is its Third World (ECDC/TCDC) dimension in marine environment protection, as reflected by its geographical coverage of the following eleven regions: Mediterranean Sea, Persian Gulf (Kuwait Action Plan Region), Southeast Atlantic (West and Central African Region), Southeast Pacific, Red Sea and Gulf of Aden, (Wider) Caribbean Region, Central Western Indian Ocean (Eastern African Region), Southwest Pacific (South Pacific Region), East Asian Seas (under preparation), Indian Ocean (South Asian Seas, under preparation), and Southwest Atlantic (under preparation). Interest is also demonstrated in creating a twelfth, the Northwest Pacific region.

The regions are covered by the comprehensive Action Plans which are structured in a similar way and have five basic, closely interdependent components: environmental assessment, environmental management, institutional arrangements, financial arrangements, and regional legal instruments/framework Conventions and separate protocols which follow a highly uniform pattern. However, the specific activities for any region are dependent upon the needs and priorities of that region and are periodically reviewed and adjusted to the changing necessities.

MARINE POLLUTION 29 APRIL-3 MAY 1985 (IMO). For details on IMO's (MEPC) work related to special areas under the 1973/1978 MARPOL Convention, and works of the Working Group on Particularly Sensitive Areas, *see* UN Doc. IMO MEPC 26/WP.11, 8 September 1988.

[56]*See* UNEP ANNUAL REPORT OF THE EXECUTIVE DIRECTOR 1987 59-65 (1988) and 1988 39-44 (1989). *See* also *infra* n. 85.

The geographical selection of areas covered by RSP was to a large degree a matter of pragmatic considerations of political feasibility. Some of those regions reach across the geographical boundaries of a few of ECOSOC's regional commissions and all regions -- across the substantive jurisdiction of several UN specialized agencies on the one hand and the respective non-UN regional organizations on the other hand. This enables UNEP to play a unique role in the new intergovernmental programs.

In institutional terms, all of the RSP-sponsored instruments set up regular Conferences of the Contracting Parties as supreme policy-making bodies, and in most cases assign secretariat functions either to a small outposted UNEP unit or to organizations already existing in the region or established under a given Convention. Additionally, specific operational or technical functions with respect to marine emergencies are in some instances provided by a regional centre or coordination unit. The UNEP Regional Coordination Units operate in the Mediterranean (Athens), with a Regional Oil Combating Centre (ROCC) at Malta and Regional Centre for the Reduction of Seismic Risk in the Mediterranean Coastal Areas in Genoa, Italy, as well as in the Caribbean, West/Central African, and Eastern African Regions. The existing or newly established regional organizations are used in: the Red Sea and the Gulf of Aden, the Persian Gulf, the East Asian Seas and the South Asian Seas which are further discussed below, as well as in: the Southeast Pacific, in particular the South Pacific Permanent Commission (SPPC) and its national focal points in each of the coastal states; and the Southwest Pacific, in particular the South Pacific Regional Environment Programme (SPREP), Secretariat of the South Pacific Commission (SPC), and South Pacific Bureau for Economic Cooperation (SPEC) of the South Pacific Forum.

UNEP plays a catalytic and generally coordinating role by providing financial and institutional support in the initial stage of regional programs covered by the RSP, but its policy is that eventually the states concerned will take over responsibility for the implementation of the Action Plans.

UNEP has six Regional Offices for Africa, Asia and the Pacific, Latin America and the Caribbean, West Asia, Europe, and North America. The UNEP Governing Council emphasized in its decision 15/15 of 25 May 1989 the necessity to strengthen relationships between UNEP Regional Offices and the relevant offices of the UNDP, World Bank, the regional development banks as well as the regional commissions of ECOSOC in order to enhance immediate and sustainable development.

WMO has three Regional Offices for Africa, the Americas, and for Asia and the South-West Pacific, and six Regional Associations: Region I (Africa), Region II (Asia), Region III (South America), Region IV (North and Central America), Region V (South-West Pacific) and Region VI (Europe), which coordinate meteorological activity in the respective regions. Each of regions is covered by activities of the WMO Regional Meteorological Training Centres.

Moreover, WMO, jointly with the ESCAP Typhoon Committee and Panel on Tropical Cyclones, operates two Tropical Cyclone Committees for the South-West Indian Ocean and for the South Pacific, Commission for Atmospheric Sciences (conducting a long-term project on the Asian/African monsoon, with centers in New Delhi and Kuala Lumpur) and carries out regional studies within its World Weather Watch, e.g., the North Atlantic Ocean Stations (NAOS) scheme and Regional Meteorological Telecommunication Networks for six regions specified above; within Climatological Sea Surface Current Exchange System, e.g., upwelling areas in North Indian Ocean study; within Study of the Tropical Ocean and Global Atmosphere (TOGA) networks for the Pacific, Atlantic (almost completed) and the Indian Ocean; within Integrated Global Ocean Services System (IGOSS), e.g., in the Pacific and Indian Oceans, Caribbean and the Baltic; or a number of scientific experiments in the Atlantic and Pacific within its Global Atmospheric Research Programme (GARP). WMO also participates in regional projects of IOC and UNEP.

UNIDO cooperates closely with the ECOSOC's regional commissions in such marine-related problems as shipbuilding; the processing, packaging, and preservation of fish and fish products; and the contribution by industry to environmental pollution. It operates joint offices with ECA, ESCAP, ECLAC, and ESCWA, and cooperates with the UNEP Regional Seas Programme.

UNCTAD maintains, in coordination with GATT, International Trade Centers in Africa, Latin America, Asia, and Europe. UNCTAD is available as a center for harmonizing the trade and related development policies of states and regional economic groupings. In its works related to economic and commercial aspects of ocean shipping and ports, UNCTAD is involved with regional policy issues, e.g., in Central America and East Africa. It also cooperates with the UNEP Regional Seas Programmes.

ICAO convenes, whenever necessary, Regional Air Navigation Meetings to review regional plans of air navigation services at which member states of the regions and those whose aircraft fly within the regions are represented. There are nine such regions: African-Indian Ocean, Caribbean, European-Mediterranean, Middle East, North

American, North Atlantic, Pacific, South American, and Southeast Asia. Regional Offices provide advisory services.

In Europe and Africa there are separate organizations which were set up under the joint auspices of ICAO and ITU, i.e. the European Civil Aviation Conference and the African Civil Aviation Commission.

ILO, which is concerned with the problems of seafarers and fishermen, has established a body of organizational units grouped geographically for Africa, Asia, Europe, Latin America, and the Middle East, and has three Regional Offices in the field. The functions of those regional structures are subject to policy control and guidance by the ILO headquarters. It also cooperates with the UNEP Regional Seas Programme.

WHO has regional organizations (comprising a regional committee and an office) in six geographical areas: Africa, Americas, Eastern Mediterranean, Europe, Southeast Asia, and Western Pacific. The Pan-American Health Organization serves as the regional committee and the Pan-American Sanitary Bureau as regional office of WHO for the Americas. The regions are responsible for the application of overall strategy as determined by WHO's Assembly, for formulation of regional policy and strategy, and elaboration of regional inputs into world programs, including those concerning marine pollution and health aspects of coastal water quality. WHO also cooperates with the UNEP Regional Seas Programme.

ITU has no regional offices, but it has defined three main following regions demarcated in the Radio Regulations: Region 1 - Europe, parts of the Middle and Near East, Africa and parts of the Americas; Region 2 - the rest of the USSR not covered in Region 1, and of the Middle and Near East, and all of Asia and the Eastern Pacific; Region 3 - the Western Pacific and the greater part of the Americas.

UNDP has five regional divisions for: Arab States, Africa, Asia, Latin America, and Europe, as well as a global/inter-regional division and country offices in over 100 LDCs. It carries out, among others, regional and inter-regional assistance in the fisheries sector with a view to promote international cooperation and coordinate regional fishery development plans of the developing states, as well as strengthen the institutional infrastructure required for such cooperation.[57] UNDP is also involved in programs relating to shipping and ports, offshore prospecting, and marine education and

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[57]*See* Review of UNDP Support for Fisheries Development (1986).

training. In these activities it works through other agencies such as FAO, UNCTAD, WMO, IMO, or IOC-UNESCO and their regional bodies.

World Bank has four Regional Offices to assist states in project identification and management. The marine-oriented projects include those related to fisheries, mineral resources and energy, environmental protection, coastal development, aviation and shipping, as well as maritime communications and installations. The new environmental policy of the Bank which was stimulated by the 1987 Brundtland Report referred to earlier, includes, where appropriate, the environmental issues of an entire region and regional seminars conducted by the Economic Development Institute of the Bank.[58]

Due to the number of ocean-related activities of the UN organs and organizations reviewed above and to their interactions with regional organizations from outside the UN system, the continuous coordination of those activities, as effected by the UN Office for Ocean Affairs and the Law of the Sea and some other UN bodies referred to earlier, is an essential condition of the adequate functioning of the institutional framework here under consideration. Under the structural reform effected by the UN Secretary-General in 1987, OALOS combines its activities with most of those previously carried out by the former Ocean Economics and Technology Branch (OETB) of the Department of International Economic and Social Affairs (DIESA), as well as certain activities formerly carried out by the Sea and Ocean Affairs Section of the Department of Political and Security Council Affairs. Within the scope of OALOS' activities lies continuous cooperation with and assistance to the UN organs, agencies, and other bodies involved in ocean affairs.[59] The OALOS

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[58]*Cf.* Environment and Development: Implementing the World Bank's New Policies (1988). *Note* that in 1989 the UN ECA has questioned the conclusions of the World Bank's Report on Africa's Adjustment and Growth in the 1980s, emphasizing that the World Bank's findings (with respect to the programs of structural adjustment) were at variance with the authoritative assessments of the African economic situation.

[59]State membership in the UN and non-UN regional organizations is covered by the OALOS' computerized Law of the Sea Information System (LOSIS), in particular the Country Marine Profile Data Base (MARPRO). The OALOS' activities are reviewed in the Law of the

also assists the non-UN regional organizations in the effective implementation and application of the new ocean regime in their respective regions.

An Ad Hoc Inter-Agency Consultation on Ocean Affairs convened by the OALOS in 1988 recognized, among others, that international organizations are the major part of consolidation of the progress made in instituting the new ocean regime, and drew attention to problems associated with marine regionalism, noting that normal structures for regional cooperation seldom coincide with actual ocean areas. It also stressed the necessity of exploring more fully the questions of cooperation between international and regional organizations in the exchange of ocean-related information.

Regional organizations outside the UN system

The framework of regional organizations outside the United Nations system consists of:

- regional multipurpose organizations which include:

for Europe: European Communities consisting of European Economic Community (EEC) and also European Coal and Steel Community (ECSC), and European Atomic Energy (Euratom) Community, which have a common set of institutions, including European Parliament, Council of Ministers, Commission and Court of Justice; Council of Europe; and Nordic Council;

for North and Latin America: Organization of American States (OAS); subregional for Latin America: Organization of Central American States (ODECA), and Organization of Eastern Caribbean States (OECS),

for Africa: Organization of African Unity (OAU);

subregional for Asia: Arab League, and its specialized agency Educational, Cultural and Scientific Organization (ALECSO); Cooperation Council of the Arab Gulf States; Organization of the Islamic Conference (OIC); Association of South East Asian Nations

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Sea Reports of the UN Secretary-General which are submitted by OALOS annually to the UN General Assembly. For the recent review, *see* UN Doc. A/43/718 (1988), and on the first -- since 1982 -- consultation among UN agencies convened by OALOS in 1988, *see ibid.*, at 54-55 and OCEAN POLICY NEWS (COL), August 1988, at 1. *See* also UN Doc. A/44/6 (Sect. 2C) (1989).

(ASEAN); and South Asian Association for Regional Cooperation (SAARC);

subregional for South Pacific: South Pacific Forum (SPF) and its Secretariat, South Pacific Bureau for Economic Cooperation (SPEC); as well as South Pacific Commission (SPC);

- regional Development Banks and other major economic organizations which include:

for Europe: European Communities, in particular the EEC; European Free Trade Association (EFTA); Benelux Economic Union; Council for Mutual Economic Aid (CMEA);

for Latin America: Latin American Economic System (SELA); Latin American Integration Association (LAIA which in 1980 replaced Latin American Free Trade Association, LAFTA); Central American Common Market (CACM); Caribbean Community (CARICOM which in 1974 replaced Caribbean Free Trade Association, CARIFTA), Caribbean Common Market, and East Caribbean Common Market (ECCM); and Andean Common Market;

for Asia: Arab Common Market; Organization of Arab Petroleum Exporting Countries (OAPEC); ASEAN Preferential Trade Agreement; Bangkok Agreement on Tariff Preferences (1975);

for Africa: over thirty economic communities. The 1980 Lagos Action Programme of the OAU, as confirmed by the 1987 Abuja Conference of the ECA, anticipates the merger of economic communities into an African Common Market by 1990 and subsequent creation of a single African Economic Community by the year 2000. Such merge will at any event involve a few major organizations, namely Economic Community of West African States (ECOWAS), and Economic Community of West Africa (ECWA); Economic Community of Central African States (ECOCAS) and its Technical Fisheries Development Committee; Central African Customs and Economic Union (UDEAC); and Preferential Trade Authority for Eastern and Southern Africa (PTA).

- inter-regional organizations and bodies, which include: OAS; Organization for Economic Cooperation and Development (OECD); Asian-African Legal Consultative Committee (AALCC); European Economic Community - African-Caribbean-Pacific States (EEC-ACP) institutions; Afro-Asian Solidarity Conference; Organization of Petroleum Exporting Countries (OPEC); Colombo Plan for Economic and Social Development in Asia and the Pacific; and Commonwealth;

- regional sectoral marine affairs organizations, among which fisheries, marine environmental protection, marine scientific research, and maritime transport and communication organizations constitute the main groups;

- regional trans-sectoral marine affairs organizations, such as SPF, SPC, South Pacific Permanent Commission (CPPS) and Indian Ocean Marine Affairs Cooperation Conference (IOMAC);
- inter-regional trans-sectoral marine affairs organizations, of which the IOMAC is a notable and, so far, the only example; and
- institutional framework of Antarctic Treaty (1959) system, including Conventions on Conservation of Antarctic Seals (CCAS, 1972), Conservation of Antarctic Marine Living Resources (CCAMLR, 1980) and Regulation of Antarctic Mineral Resources (CRAMRA, 1988).[60]

The division between categories of organizations listed above is not of strict nature, as individual organizations could in several instances be qualified as falling under more than one of these categories. For instance, as indicated above, OAS, which is the most developed of the organizations outside Europe, is both a regional and inter-regional multipurpose organization of North and Latin America. Generally, the expansion of regionalism has enlarged the need for inter-regional cooperation, as reflected by marine-oriented activities of the OECD, Commonwealth, AALCC, and those under the EEC-ACP Lome Conventions.

Moreover, the regional multipurpose organizations as well as many economic organizations combine economic and political aims, e.g., the basis of the European Communities lies in furthering economic integration and, possibly, in the longer term, European (political) Union which was given a treaty basis in the 1986 Single European Act, and the Charter of ODECA perceives it as an "economic political community, aspiring to the integration of Central America." And vice versa, the Charter of OAS includes economic integration among its developing members as one of its main objectives, and the activities of OAU become increasingly economically oriented.

In addition, as indicated above, at least two of the regional multipurpose and economic organizations, namely the SPF and the SPC, can be also qualified as falling under the category of regional trans-sectoral marine affairs organizations and IOMAC as falling under categories of both regional and inter-regional trans-sectoral marine affairs organizations.

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[60]*See*, e.g., R.T. Scully and L.A. Kimball, *Antarctica: Is there Life after Minerals?*, 13 MARINE POLICY 87-98 (1989).

Some Observations

The review of presently existing organizations shows that, while almost all independent functional organizations in marine affairs are formed by the industrialized states, developing states, by and large, cooperate with regard to particular sectors of marine affairs and at a trans-sectoral level within the framework of regional bodies and programs of either the United Nations system or general multipurpose and economic organizations. This results from a substantial disparity between capacities of the developing and developed states at the present stage of the North-South relationship which, however, is meant to gradually evolve towards on the one hand greater, and in the long term ultimately full, independence of marine-oriented organizations of the LDCs, and on the other hand evolution of functional marine affairs bodies within the multipurpose and economic organizations of the LDCs. The institutional developments in the Caribbean, South Pacific, and Indian Ocean, or the detachment of NACA and INFOFISH from FAO and CCOP/EA and CCOP/SOPAC from ESCAP provide the instances of these processes.

The importance of the stimulating role of the multipurpose and economic organizations seems to be particularly pronounced in the developing state regions due to the fact that it inheres in an advantageous use of institutional machinery already existing within these organizations. The institutional linkages in political and economic fields between state members of such organizations can provide a very useful, if not necessary, basis for marine-related activities in general and can be a source of models for cooperative marine-oriented undertakings in particular. Moreover, although the political and economic organizations do not usually provide the adequate geographical (functional) framework for ocean management, they stimulate to an important extent the ocean development processes in their regions, as evidenced by the emphasis of, e.g., OAU, CARICOM or SPF on the significance of the Law of the Sea Convention as the basis for strengthening cooperation in their regions, or by fisheries initiatives undertaken by, e.g., ASEAN, CARICOM, or OECS. This can lead ultimately to establishment of a specialized marine affairs body, as was the case with, e.g., the Latin American Organization for the Development of Fisheries (OLDEPESCA) created under the auspices of SELA, or the Arab Maritime Petroleum Transport Company (AMPTC) established under the auspices of OAPEC.

The political and economic organizations can eventually also assist the geographically disadvantaged, especially land-locked states on matters pertaining to their access to fisheries in the 200 mile zones in

a given region or subregion, although there are a few instances of participation by land-locked countries along with coastal states in marine-oriented regional organizations, e.g., IOMAC. Yet, the membership of a land-locked state in a particular economic organization may eventually strengthen the basis for this state's access to fisheries in the 200 mile zone(s) of another state member(s) of such organization.[61]

However, as was already noted earlier, the effectiveness of cooperation within the framework of multipurpose and economic organizations requires possession by such organizations of the specialized marine-oriented organs focusing on promotion and supervision of various marine sectoral and trans-sectoral activities of their members. The establishment and strengthening of such organs by the existing multipurpose and economic organizations as well as promotion of the new independent regional organizations of the LDCs specialized in marine affairs will -- as was repeatedly emphasized elsewhere in this study -- continuously require within at least a generation support from industrialized states and the competent international organizations.

While the functions of marine-oriented and other regional organizations with respect to the new ocean regime have extensively been examined by many knowledgable scholars and commentators referred to elsewhere in this study, it might be recalled that these functions largely differ depending on a sector of marine activities. There are, however, several areas of activities which would seem to require at present the primary emphasis and further expansion in the work of any organization concerned with marine affairs in the developing state regions, and which include: collection, analysis, and dissemination of information; joint research programs; as well as technical assistance and technology transfer. At the same time, it is essential that the information base is provided to the developing states within well coordinated regional and bilateral programs securing not only a supply of information but also transfer of knowledge on how to use it. As regards the transfer of marine technologies, we are facing a new process which could be referred to as stressing software -- the human potential over hardware -- the capital-intensive technology. In

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[61] *See*, e.g., art. 71, para. 2 and Annex IX (art. 7) of the 1983 ECOCAS Treaty, in 23 ILM 945, 962, 995 (1984). *See* also reference *infra* to recognition of fishery rights of the land-locked states under the EEC-ACP Lome III Convention.

practical terms this means that if we include from the beginning the best trained experts from developing states in the development of marine technologies, we can avoid costs of later adaptations and reduce inefficiencies in technology transfer. The regional organizations can importantly accelerate transfer of marine technologies, being a commercial operation governed by the market mechanisms, through facilitating direct, mutually beneficial negotiations between the recipient developing states and the developers and transferers of technologies -- the transnational corporations. Such corporations, when seeking access to offshore resources under national jurisdiction, represent a potential source of training in exchange for access rights, and the UN Center on Transnational Corporations (UNCTC) has structured its training programs in joint venture negotiation for LDCs' nationals to include discussion of this consideration. The necessary requirement for any activity is, moreover, an increase of emphasis by both the "recipients" and the "donors" on not only -- as is presently most frequently the case -- short term undertakings, but also long term perspective and planning.

An important element of the process of transition towards the non-UN marine-oriented organizations of the developing states is an integrated and coordinated policy for regional cooperation constituting one of the imperatives of the effective implementation of the new ocean regime. At present, the developing state regions, except the Southwest and Central (SPF and SPC) and Southeast (CPPS) Pacific as well as the Indian Ocean (IOMAC), lack the intergovernmental consultative organizations at the trans-sectoral level establishing and supervising the implementation of policy guidelines to be taken into account by the existing regional organizations both within and outside the UN system. Such intergovernmental consultative organizations are essential for effective integrated ocean management already discussed earlier, in that they can review the existing regional organizations with a view to rationalizing their functions, as well as provide regional states with a forum for an exchange of experiences in implementation of the new ocean regime. Such organizations can also play an essential role in coordination of the regional multilateral and bilateral aid programs and, thereby, in elimination of the present wasteful duplication in ocean affairs by the international and regional institutions as well as by donor agencies. The optimum solution to the effect in question might be provided by either a new independent trans-sectoral institution such as the IOMAC, or by the use of existing multilateral or economic organizations as is the case with South Pacific Forum and Commission. The consultative mechanisms could also be

established within some existing organizations as appropriate, e.g., in the Eastern Caribbean a Marine Affairs Council could be established within the OECS.

It seems also worth emphasizing that institutionalized activities in marine affairs may in turn -- by establishing broader habits of cooperation -- have strengthening impact upon political and economic organizations, thus serving as a catalyst for increasing integration processes in general.

Development Cooperation in Marine Affairs Through Regional Organizations in the Indian Ocean Region

Structure of Cooperation as Related to the IOMAC

The Indian Ocean region is, next to the South Pacific, more advanced in institutional cooperation than other developing state regions in that, as was already noted above, it has a trans-sectoral marine affairs organization -- the IOMAC. IOMAC originated from the initiative undertaken by Sri Lanka at the 1981 session of the AALCC which as a result of extensive preparations led to the First Conference on Economic, Scientific and Technical Cooperation in Marine Affairs in the Indian Ocean in the Context of the New Ocean Regime held at Colombo on 20-28 January 1987 under the Presidency of Ambassador Hiran Jayewardene, now IOMAC's Secretary-General.[62] The basic objectives of IOMAC, as enshrined in the 1987 Colombo Declaration, include: creating an awareness regarding the Indian Ocean and its potential for economic development of states of the region and furthering cooperation among these states and industrialized states active in the region; adopting a strategy for enhancing national development of the Indian Ocean states and a policy of integrated ocean management through cooperative international and regional action, with the obligation to cooperate essentially understood as an obligation to act; as well as providing a

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[62]*See* Doc. IOMAC-1/A/27, 28 January 1987, *reprinted in* INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA, NILOS YEARBOOK VOL. 3, 1987 (1989); and IOMAC FIRST CONFERENCE CONSULTATIVE MEETING, COLOMBO, SRI LANKA, 15-20 JULY 1985, VOL. I - REPORT, Doc. IOMAC-1/A/22 Rev. 3. For detailed examination, *see* Pinto, *supra* n. 39, at 197-205. *Cf.* B. Kwiatkowska, *Indian Ocean Marine Affairs*, 12 MARINE POLICY 170-172 (1988).

consultative forum for the Indian Ocean and other interested states for reviewing the economic uses of the Indian Ocean and its resources and identifying fields of further cooperation.

For the purpose of meeting these objectives IOMAC is conceived as a consultative forum at the center of a network of institutions rightly described by the Colombo Declaration as "the preferred means of organizing and coordinating long-term regional cooperation in marine affairs." To identify the framework of such institutions at the international level we should -- due to the particular complexity of the Indian Ocean region -- identify first a structure of institutionalized cooperation in various (sub)regions which the wider Indian Ocean comprises. The difficulty is that, while the Indian Ocean itself is identifiable in geographical and functional terms as (one ecosystem) ocean basin which covers over 73 million square kilometers and is bordered by 38 coastal and island states, institutional cooperation in the Indian Ocean reaches across four continents -- Africa, Asia, Australia, and Antarctica -- and several major regions. As a result, IOMAC can, as was already noted earlier, be characterized as both a regional and inter-regional organization. At the same time, by bringing together states of so many regions and subregions as well as non-regional industrialized states participating in IOMAC, all of which are widely distributed in various global and regional bodies of the United Nations system and regional non-UN organizations, with part of those organizations also participating in IOMAC, IOMAC could emerge as an instrument of global significance for the development of marine affairs. The exceptionally broad inter-regional scope of IOMAC's operations is apparent from the number and variety of existing regional institutions with marine affairs potential with which IOMAC may be expected to interact:

Asia

ASEAN, SAARC, Arab League, OIC; UN ESCAP; UN Asian Regional Centre for Peace and Disarmament; AALCC

FAO Regional Office; UNESCO Regional Office; IMO Regional Advisers;
WMO Regional Office and Association; WMO/ESCAP Typhoon Committee and Panel on Tropical Cyclones; WMO Commission for Atmospheric Sciences (Asian/African monsoon project with centers in New Delhi and Kuala Lumpur); Meteorological Telecommunication Network; and Meteorological Training Centres
UNEP Environmental Training Network; and Regional Office

UNCTAD/GATT International Trade Center; UNIDO/ESCAP and UNIDO/ESCWA Joint Units; ILO Unit; ITU Region 2; UNDP Regional Division; WHO Regional Offices

Regional Marketing, Information and Technical Advisory Services for Asia and the Pacific (INFOFISH); Network of Aquaculture Centres of Asia (NACA); Agricultural Information Bank for Asia (AIBA)
AsDB; IsDB; Asian Productivity Organization; Bangkok Agreement on Tariff Preferences (1975); Organization of the Islamic Conference (OIC) and its Agreement for Economic, Technical and Commercial Cooperation; Colombo Plan institutions; Economic Cooperation Center for the Asian and Pacific Region; Registry of Scientific and Technical Services; Commonwealth

NGO: Asian Mass Communication Research and Information Centre (AMIC, Singapore); Asia Pacific Peoples Environment Network (APPEN)

Southeast Asia

ASEAN and its Council on Petroleum (ASCOPE), ASCOPE Experts Group on Marine Pollution, Fisheries Development Center (AFDC), Committee on the Environment, Experts Group on the Environment (AEGE), Oil Spill Contingency Plan and Working Group on Marine Science, as well as ASEAN Preferential Trade Agreement; ASEAN Port Authorities Association, Federation of ASEAN Shipowners' Associations (FASA), and ASEAN Cableship Private Ltd (ACPL)

UN ESCAP - Regional Mineral Resources Development Center (RMRDC)
FAO/IPFC - Committee for Development and Management of Fisheries in the South China Sea (CDMSCS); FAO/IOC/ASFIS - Regional Center in Thailand
IOC-CCOP Joint Working Group on Studies of East Asian Tectonics and Resources (SEATAR)
UNEP East Asian Action Plan and its Coordinating Body on the Seas of East Asia (COBSEA)
UNEP/IMO Sulawesi Sea Oil Spill Response Network Center (Davao, Philippines) and Action Plan
ICAO Region; UNDP projects; WHO Regional Organization
Southeast Asian Fisheries Development Centre (SEAFDEC) and its Southeast Asian Fisheries Information System (SEAFIS); Committee for Coordination of Joint Prospecting for Mineral Resources in East

Asian Offshore Areas (CCOP/EA); Southeast Asian Tin Research and Development Centre (SEATRADC); Malaysia-Thailand Joint (Continental Shelf) Authority (MTJA); Southeast Asian Agency for Regional Development of Transport and Communication (SEATAC); Council for the Safety of Navigation and the Control of Marine Pollution in the Straits of Malacca and Singapore; Revolving Fund Committee (RFC) for Straits of Malacca and Singapore; IHO Regional Commission for East Asia

NGOs: International Center for Living Aquatic Resources Management (ICLARM, Manila); Association of Southeast Asian Marine Scientists (ASEAMS); Southeast Asian Programme on Ocean Policy, Law and Management (SEAPOL, Bangkok); Centre for Asian Pacific Studies (CAPS, Hong Kong)

South Asia

SAARC

FAO/IOFC - Committee for the Development and Management of Fisheries in the Bay of Bengal (BOBC)
IOC - Regional Committee for the Central Indian Ocean (IOCINDIO)
UNEP South Asian Plan of Action

South Asian Cooperative Environment Programme (SACEP); Indo-Mauritius Shipping Venture

Arab States

Arab League; UN ESCWA

FAO - Regional Marketing, Information and Technical Advisory Services for Arab States (INFOSAMAK) and Regional Office; UNESCO Regional Office; IMO Regional Advisors and Training Centres; UNEP Environmental Training Network and Regional Office (West Asia); ICAO Region (Middle East); ILO Unit (Middle East); ITU Regions 1 & 2; UNDP Regional Division

United Arab Shipping Company (UASC); Arab Maritime Petroleum Transport Company (AMPTC); Arab Shipbuilding and Repair Yard Company (ASRYC); Union of Maritime Ports of Arab Countries; Council of Arab Ministers Responsible for the Environment

Arab Bank for Economic Development in Africa (Arab League); Arab Fund for Economic and Social Development; Arab Common Market; Organization of Arab Petroleum Exporting Countries (OAPEC); Organization of Petroleum Exporting Countries (OPEC); ARABSAT (to be established)

NGO: Arab Federation of Fish Producers

Gulfs/Red Sea

Cooperation Council of the Arab Gulf States; Arab Gulf Programme for UN Development Organizations (AGFUND)

FAO/IOFC - Subregional Committee for the Gulfs
UNEP Kuwait (Persian Gulf) Action Plan
UNEP Red Sea and Gulf of Aden Action Plan

Red Sea and Gulf of Aden Environmental Programme (PERSGA of ALECSO, Arab League); Regional Organization for the Protection of Marine Environment (ROPME) and Marine Emergency Mutual Aid Center (MEMAC); Saudi-Sudanese Red Sea Commission (SSRSC); Saudi Arabia-Kuwait Joint (Development) Committee (SKJC)

NGO: Gulf Area Oil Companies Mutual Aid Organization (GAOCMAO)

Africa

OAU; UN ECA; UN Regional Centre for Peace and Disarmament in Africa; AALCC

FAO - Committee for Inland Fisheries of Africa (CIFA), Regional Marketing, Information and Technical Advisory Services for Africa (INFOPECHE) and Regional Office
UNESCO Regional Office; IMO Regional Advisers and Training Centres
WMO Regional Office and Association; Meteorological Telecommunication Network; and African Centre for Meteorological Applications for Development (ACMAD)
UNEP Environmental Training Network; and Regional Office

UNCTAD/GATT International Trade Center; UNIDO/ECA Joint Unit; ICAO Region (African-Indian Ocean); ILO Unit; ITU Region 1; UNDP Regional Division; WHO Regional Organization and Offices

Committee on Seas of the African Ministerial Conference on the Environment (AMCEN); East African Marine Resources Development Center (Tanzania); East African Countries Intergovernmental Standing Committee on Shipping (ISCOS); Port Management Associations of North Africa, and of Eastern and Southern Africa; Southern Africa Subregional Environment Group (SASREG)
AfDB, IsDB, West African Development Bank, African Development Fund, Southern Africa Development Coordination Conference (SADCC); PTA; OIC; Coordination Authority of the Northern Corridor Transit Transport Agreement (NCTTA); African Civil Aviation Commission; African Telecommunications Union (PATU); African Union for Post and Telecommunications (PANAFTEL); Commonwealth; EEC-ACP institutions

NGO: African NGOs Environment Network (ANEN)

Western Australia

Indian Ocean south to Antarctica

Indian Ocean

UN Ad Hoc Committee on the Indian Ocean

FAO - IOFC and its Committees for the Development and Management of Fisheries in the South West Indian Ocean (SWIOC) and in the Bay of Bengal (BOBC) and the Tuna Committee; IPFC and its Tuna Committee; and Indian Ocean Tuna Commission (to be established)
IOC - Regional Committee for the Cooperative Investigations in the North and Central Western Indian Ocean (IOCINCWIO), and mapping of the Western Indian Ocean (IBCWIO); Regional Committee for the Central Indian Ocean (IOCINDIO)
UNEP Eastern African (Central Western Indian Ocean) Action Plan
WMO Tropical Cyclone Committee for the South-West Indian Ocean and the Regional/Specialized Meteorological Centre (RSMC) in Reunion (to be established); Tropical Cyclone Committee for the South Pacific and its Operational Plan for the South Pacific and South-East

Indian Ocean; Climatological Sea Surface Current Exchange System (upwelling areas in North Indian Ocean study); Tropical Ocean and Global Atmosphere (TOGA) (study on Indian Ocean); and Integrated Global Ocean Services System (IGOSS) (network Indian Ocean)
ICAO Region (African-Indian Ocean); UNDP projects

International Whaling Commission (IWC); EEC-ACP; Center for Research on Indian Ocean Mammals (CRIOMM, Colombo); Indian Ocean Island Commission (IOIC) [63]; IHO Regional Commission for the Indian Ocean (to be established)

NGOs: Issue-Based Indian Ocean Network (IBION, Nairobi); Centre for Indian Ocean Regional Studies (CIORS, Perth); International Ocean Institute (IOI, Malta)

Non-UN inter-regional: AALCC, Afro-Asian Solidarity Conference; OIC; EEC-ACP institutions, OPEC, Bangkok Agreement on Tariff Preferences (1975); Colombo Plan institutions, Commonwealth

Thus, IOMAC interacts with five major non-UN organizations (OAU, Arab League, Arab Gulf States Council, OIC, SAARC and ASEAN) as well as with three UN regional Commissions (ECA, ESCAP and ESCWA) and numerous other economic organizations functioning in these regions.

The region covered by ESCAP -- Asia and the Pacific -- is the most varied of all the regions in terms of geography, politics, and levels of economic development which make it in fact impossible to devise any general plan for economic development. For this reason ESCAP focuses on a selective approach to subregional cooperation and a sectoral approach to economic development. Since unlike Africa (OAU) and Latin America (OAS), Asia does not have a general multipurpose organization, ESCAP remains relatively free to develop its approaches. From amongst its activities related to ocean affairs, the most important are those of its Committee on Shipping, Transport and Communication, Committee on Trade, Committee on Agricultural Development (including transfer of technology in the field of fisheries), and the initiating by ESCAP of two, since 1987 independent, Committees on Offshore Prospecting in East Asia

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[63]IOIC comprises Madagascar, Mauritius, Seychelles, Comoros and Reunion.

(CCOP/EA) and the South Pacific (CCOP/SOPAC). ESCAP, in cooperation with the UNDP, has also assisted the establishment of SEATRADC and cooperates with WMO in regional activities related to tropical cyclones. ESCAP has rather small Division of Natural Resources comprising three sections for: mineral, energy, and water resources. Since 1986 the Division carries out the Marine Resources Programme of ESCAP which focuses on the strengthening of member states' capabilities with regard to management of offshore minerals and the effective implementation of the LOS Convention. The ESCAP experience differs from that of other regional Commissions in that ESCAP continues to have the largest non-regional representation and is the only Commission in which all the great powers being permanent members of the UN Security Council are represented. Under the relevant structural changes made on the initiative of regional states, the non-regional member states continue to play an important economic role in enhancing development cooperation within the region.

The experience of ECA is to some extent similar in that the changes in its structure reflect a conscious attempt to enhance ECA's effectiveness and create African self-reliance, although this process was somewhat affected due to ECA's original competition with the OAU. ECA's elaborated Natural Resources Division comprises units for marine, mineral, energy, and water resources, science and technology, environment and cartography. ECA has supported establishment of the East African Marine Resources Development Centre in Tanzania, and ECA's subregional offices (including in East Africa) are establishing cooperation with the corresponding UN Development Assistance Teams (UNDATS). In 1980, in a follow up to the 1979 OAU Monrovia African Development Strategy, ECA's Conference of Ministers Responsible for Economic Development elaborated the Addis Ababa Plan of Action which, with a few amendments, was adopted as the 1980 OAU Lagos Action Plan. The Monrovia Strategy set food and agriculture, including fisheries, as a field of first priority for African development that, as discussed further below, gave an important impetus to joint projects undertaken by ECA and UNESCO and to convening by ECA in 1984 in Addis Ababa of an Intergovernmental Meeting on Aspects of Application of the Provisions of the 1982 Law of the Sea Convention. Moreover, ECA supported the establishment of WMO meteorological centers in Africa, and both ECA and ESCAP (and likewise ECLAC) cooperate with the OALOS in convening of regional groups of experts on marine survey and technology.

ESCWA has, of all the Commissions, had to operate almost exclusively as a research institution, due to tensions in the area, and cooperates in the exchange of information with the Arab League.

From amongst the non-UN multipurpose organizations a more pronounced concern with marine affairs has been shown by two subregional Asian organizations, ASEAN and the Arab League, as a result of their cooperation with the UN organizations. The OAU has been somewhat less active, although it played an important role in consolidating the position of African states on law of the sea issues through Declarations of Addis Ababa (1973), Mogadishu (1974) and Kampala (1974). Moreover, the inclusion of fisheries in the food and agriculture sector under the 1980 OAU Lagos Action Plan accelerated, as was noted above, some important marine-oriented initiatives of ECA, while recently the OAU showed also concern with transboundary movement of hazardous wastes and their disposal in African states. In the field of environment the OAU continuously cooperates with UNEP in the implementation of the UN Programme of Action for African Economic Recovery and Development (1986-1990) as well as the Cairo Programme for African Cooperation which was adopted by the first African Ministerial Conference on the Environment (AMCEN) in 1985. The OAU and UNEP undertook preparation of the first pan-African summit on the coordination of major regional initiatives to address the African crisis in 1989.

The process of consolidation at the inter-regional Asian-African level takes place through the continuing activities of the AALCC which -- as was noted earlier -- contributed to the preparations for the establishment of IOMAC. The South and Southeast Asian (as well as South Pacific) regions were in 1984 provided with valuable recommendations for collaborative actions in an integrated ocean management by the Report of the Commonwealth Group of Experts referred to earlier. Given the immense complexity of implementing activities required to this effect, the Commonwealth Secretariat undertook preparation of a series of five Books guiding on various aspects of the LOS Convention with the first of such Books published in 1987. The Secretariat, and more specifically the Commonwealth Fund for Technical Cooperation (CFTC) and its Technical Assistance Group (TAG) provide also assistance to its African, South Pacific, Caribbean, and other developing member states in the areas of, among others, acquaculture development, fisheries access agreements, and offshore petroleum contracts.

The operational fisheries activities at the inter-regional level are pursued under the EEC-ACP 1984 Lome III Convention and will be continued under the next Lome IV Convention which is now under

preparation and which will additionally cover various environmental issues. The system of Lome Conventions provides certain mechanisms for promoting cooperation within and between the ACP regions, i.e. Africa (West, Central, East and South), Indian Ocean, Caribbean and Pacific, including measures for strengthening of the ACP regional organizations and for meeting special requirements of the land-locked and island ACP states. The regional ACP organizations, such as SADCC, IOIC, SPEC, CARICOM or OECS, become increasingly involved in coordination of programming with the Community on behalf of the ACP states, and further measures to this effect are envisaged under the Lome IV Convention.

The largest part of cooperative undertakings is, however, carried out through or in close cooperation with the relevant regional organizations and programs of the United Nations system and some non-UN organizations such as the International Hydrographic Organization (IHO). Significantly, in the preparatory stages of IOMAC, OALOS and many other UN organizations concerned with ocean affairs provided elaborate documentation on their activities in the Indian Ocean region[64] and, as further discussed below, continuously cooperate with IOMAC.

IOMAC as an Intergovernmental Regional Organization

Structure

IOMAC is an intergovernmental regional organization in an early stage of development and functions with a view to achieving the objectives formulated in the Colombo Declaration which was adopted -- along with the Programme of Cooperation and the Plan of Action -- at IOMAC's First 1987 Conference referred to above. The evolution of IOMAC has been characterized by a deliberate avoidance of premature or excessive formalization and institutionalization. Nevertheless, IOMAC operates through three principal organs which are characteristic of all organizations with a certain degree of sophistication. These organs are:

- the Conference, i.e., plenary meetings of all states and organizations participating in IOMAC, convened once every three years, with IOMAC II scheduled for 1990 in Tanzania;

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[64]*See* IOMAC FIRST CONFERENCE CONSULTATIVE MEETING, COLOMBO, SRI LANKA, 15-20 JULY 1985, DOCUMENTS, VOL. II, PARTS 1 and 2.

- the Standing Committee consisting of representatives of 17 Indian Ocean states, but open to all IOMAC participants, meeting annually and coordinating the establishment and strengthening of national institutions (focal points) for marine affairs development having the competence to plan and implement cooperative undertakings at the national and international level;[65] the Standing Committee has held already four meetings: the first and second in 1987, the third in 1988, and the fourth in 1989; and

- a small Secretariat which functions under the guidance of the Standing Committee and is assisted by the IOMAC Programme Development Group created in cooperation with Sri Lanka's focal point, the National Aquatic Resources Agency (NARA).

In addition, Working Groups for specific tasks, such as the IOMAC Technical Group on Offshore Prospecting for Mineral Resources in the Indian Ocean and a Technical Cooperation Group (TCG), are being established as necessary.

This institutional structure, deliberately limited to what appears essential, may develop in accordance with the needs and policies of the participating states. IOMAC's programs are, however, designed to obtain maximum efficiency in delivery of scarce resources for use at national recipient level, rather than have a major proportion thereof consumed by an extensive institutional framework. Such an approach does not exclude the evolution of a formal framework when viewed as useful in providing the basis for progressive development of IOMAC. Preparation of IOMAC Rules of Procedure and a Statute has been undertaken by the Standing Committee with a view to completion of a final draft for consideration by the Second IOMAC Conference in 1990.[66] The Statute is to provide for such essential

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[65] *Note*, that focal points are also characteristic for functioning of, e.g., ASEAN, SAARC or Regional Coordinating Units of the UNEP's RSP. For IOMAC's focal points, *see* Doc. IOMAC-1/SC-3/2 (1988).

[66] *See* Docs. IOMAC-1/SC-3/7 (1988) and Record of the Third Meeting of the Standing Committee of the IOMAC, Colombo, Sri Lanka, 22-24 November 1988, *reprinted in* NILOS YEARBOOK, *supra* n. 62, VOL. 4, 1988 (1990). Further works in this respect took also place at IOMAC Meeting of Legal and Fisheries Experts and Second Meeting of IOMAC Statute held in Jakarta on 20-24 January 1989.

elements as objectives, membership, functions, procedure and other related matters.

Such a flexible approach is not exceptional in the practice of international organizations which vary from what might be called a semi-institutionalized treaty to supranational institutions. Institutionalization may be brought about not only by constituent instruments but also through the adoption of separate agreements between states, as a result of custom, or on the basis of decisions of organs or conferences accepted by states. For instance, the General Agreement on Tariffs and Trade (GATT) originated as a multilateral treaty containing general principles and, by subsequent decisions of its state parties, has gradually been transformed into an international organization. Another example is ASEAN which, unlike OAS, OAU, or the Arab League, was established by a Declaration of Ministers of Foreign Affairs that needed no further ratification. As Syatauw remarks, under the political circumstances, this solution seemed preferable to a tightly formulated draft treaty, but this does not exclude that with an increased scope of activities, the characteristic flexibility of ASEAN organizational structure and the informality of its working methods may become in future more formalized.[67] Moreover, it seems also worth noting that, as is widely acknowledged, the statute of an international organization may be very brief and limited to an absolutely indispensable hard core of rules of a constitutional rank determining basic goals and aims of an organization as well as principles which are to be observed.[68]

The process somewhat similar to that which now occurs in case of the IOMAC took place with the SAARC when the 1983 ministerial meeting in New Delhi adopted the Declaration on South Asian Regional Cooperation and launched the Integrated Programme of Cooperation which gave the concept of cooperation a definite institutional framework before the formal establishment of SAARC by virtue of its 1985 Dhaka Charter. The SAARC Charter reflects the social and political realities of the South Asian region and lacks many

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[67]J.J.G. Syatauw, *ASEAN - Unexpected Progress in Asian Regional Organisation*, in R. Gutierrez Girardot *et al.* eds., NEW DIRECTIONS IN INTERNATIONAL LAW, ESSAYS IN HONOUR OF WOLFGANG ABENDROTH 514, 518-519, 533 (1982).

[68]*Cf.* W. Morawiecki, *Legal Regime of the International Organization*, 15 POLISH YIL 71, 82-83 (1986).

elements usually found in a constituent instrument of international organization, but as one Indian author observed: "The Association could not have come into being if it had not commenced in a very limited and tentative fashion, and if it had not taken special precautions to avoid rapid institutional and agenda-building escalation".[69]

Participation

The two main categories of IOMAC's participants are states and international organizations concerned with ocean affairs. The participation is open to: the regional Indian Ocean states, that is, both thirty-eight coastal and twelve (Asian and African) land-locked states constituting the first objective category of IOMAC participants determined by geo-political criteria; and the major maritime users (MMU), that is, states from outside the Indian Ocean region determined principally on the basis of global tonnage of shipping traversing the area.

The international organizations so far participating in IOMAC include, from within the UN system: a central coordinating body in marine affairs, OALOS, as well as ESCAP, ESCWA, FAO, IMO, UNEP, WMO, UNDP, World Bank, UN Outer Space Affairs Division (UNOSAD), UN Revolving Fund for Natural Resources Exploration (UNRFNRE) of UNDP, and UN University (UNU); and from outside the UN system: AALCC, Cooperation Council of the Arab Gulf States, SACEP, International Hydrographic Bureau, International Whaling Commission; as well as several nongovernmental organizations.

In the Standing Committee of IOMAC the regional Indian Ocean states have the status of members, while MMU and international organizations have that of observers. The Indian Ocean states do not make any financial contributions on a regular basis, but they provide host facilities for various IOMAC meetings, while Sri Lanka provides support for the Secretariat and administrative and logistic support for other IOMAC activities.

Since, as was mentioned above, IOMAC regards institutions as the preferred means of organizing and coordinating regional cooperation in marine affairs, the 1987 Colombo Declaration expresses the commitment of states to endeavor, acting directly or through

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[69]*See* Shah Alam, *Charter of the South Asian Association for Regional Cooperation: A Critique*, 26 INDIAN JOURNAL OF INTERNATIONAL LAW 452, 463 (1986).

competent international organizations of which they are members, "to support the strengthening of existing institutions in the region when feasible and appropriate, as well as the harmonization of the activities of such institutions." The Declaration provides for policy orientation to that end within international organizations, in particular through efforts by state members of international organizations to influence the policies of those organizations so that greater emphasis and priority are accorded to projects in the field of marine affairs. Moreover, states intending to participate in international conferences on subjects relevant to marine affairs should hold consultations prior to and during such conferences with a view to facilitating cooperation in support of each other's initiatives and, whenever feasible, formulating common positions. The 2nd Standing Committee of IOMAC indicated that the forming of IOMAC contact groups at international conferences should be pursued. The Committee also recognized the need for IOMAC representation in the relevant international organizations concerned with ocean affairs.

The inclusion of MMU category into IOMAC participating states follows a pattern of non-regional membership in several UN organizations, such as the UN Ad Hoc Committee on the Indian Ocean or ESCAP, and non-UN organizations and bodies, such as the Colombo Plan, the South Pacific Commission, or CCOP/EA and CCOP/SOPAC. To accelerate the necessary interaction between technologically advanced and regional states, a special IOMAC Technical Cooperation Group was set up which is further discussed below. As was observed earlier with regard to ESCAP, a non-regional representation enhances the basis for development cooperation between regional developing countries and non-regional industrialized states participating in various activities in the region which is a necessary element of the adequate South-South and North-South relationship. Significantly, the African states which were usually more reluctant to admit the non-regional membership in African organizations have in 1983 extended the membership of the African Development Bank to twenty-two non-regional members.[70]

In a follow up to preliminary consideration given to this question at its second 1987 meeting, the IOMAC Standing Committee considered at its third 1988 meeting the need to widen the criteria with regard to

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[70]For details, *see* M. Cogen, *L'admission non regionale a la Banque Africaine de Developpement*, 39 STUDIA DIPLOMATICA 713-734 (1986). *Cf.* also *infra* n. 71.

non-regional MMU participation beyond tonnage of shipping to include marine scientific research or fisheries activities in the area. The Committee was, however, of the view that careful attention should be paid to the standards to be used in determining marine scientific research and fisheries interests. In the case of global tonnage of shipping and fisheries the standards applied by organizations such as the IMO and FAO respectively could be the basis. However, in the field of marine scientific research which is an emerging area and which is yet to be formalized under a competent international organization, the Committee decided that caution should be exercised in determining the major maritime interest, and that the matter required further consideration.

Nonparticipation of India

Among the various reasons adduced for India's nonparticipation in IOMAC-I were that: IOMAC would duplicate activities of already existing marine affairs and other organizations; divert concentration from the work of the UN Ad Hoc Committee on the Indian Ocean and its Peace Zone concept; that cooperation should rather begin within a subregion, and then move to regional level; and that the great powers and other MMU should not have been invited at the early stage of attempts to develop a framework for regional cooperation.[71] While the usefulness of non-regional participation of major maritime users in organizations such as IOMAC was already addressed above, it should also be emphasized that the 1987 Colombo Declaration reaffirms the commitment of participating states to the early establishment of the Indian Ocean as a Zone of Peace under UN auspices, thus evidencing the essentially complementary and supportive objectives of the IOMAC in relation to the Peace Zone concept. In addition to its political and security connotation, a confirmation found in the Colombo Declaration referred to above is one expression of the broader issue already discussed earlier, namely that of the basically complementary character of activities of the non-UN organizations to

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[71] *Note* India's more general reluctance to non-regional representation, as reflected by its opposition in the past to non-regional participation in the Colombo Plan, and more recently to external funds for the SAARC's development or to cooperation of SAARC with pro-Western oriented ASEAN. *See* International Herald Tribune of 1 December 1987, at 8. *Note*, however, that India participated as observer in the meeting of IOMAC's Third Standing Committee.

those of organizations operating within the UN system. Significantly, such role of non-UN organizations finds reflection in India's and other Indian Ocean states' practice, e.g., in the 1987 Kathmandu Declaration of SAARC which expresses belief that through promotion of the South Asian cooperation, SAARC will reinforce the process of strengthening the United Nations system.[72]

Furthermore, there is in fact no question of duplication by IOMAC of the SAARC's activities as the 1985 Dhaka Charter of SAARC, while opting for a socio-economic approach to regional cooperation within SAARC, clearly stipulates that it shall complement other (bilateral and multilateral) cooperation and shall not be inconsistent with the international obligations of SAARC's members (art. II). Those provisions, and likewise an exclusion of bilateral and contentious issues from SAARC's jurisdiction (art. X), evidence a careful intention of limiting jurisdiction of SAARC as a forum of regional cooperation. It would, therefore, seem unlikely that this Association -- which focuses in practice on the questions such as food security or natural disasters -- would undertake any marine-related activities in the foreseeable future. Moreover, even if in the longer perspective this would take place (as in the case of ASEAN or the Arab League), it would not undermine the activities of IOMAC and vice versa, in the same way as is the case with a relationship between activities of IOMAC and those of organizations within the UN system.

At the same time, in spite of advanced sectoral activities, especially within the competent UN bodies and organizations on the one hand and the formidable demands of regional states for the food and mineral resources which are located in the Indian Ocean on the other hand, the individual coastal states only now start to proceed from general declarations to making a more full use of resource potential within the limits of their extended maritime jurisdiction.[73] IOMAC, through its cooperative trans-sectoral approach can, therefore, as it has already commenced, play a significant role in activating and

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[72]*See* 27 INDIAN JOURNAL OF INTERNATIONAL LAW 319-323 (1987). *Cf.supra* n. 44.

[73]*See* Hasjim Djalal, *The 1982 Law of the Sea Convention: A Southeast Asian Perspective*, 13 THE INDONESIAN QUERTERLY 59-73 (1985/1); T.L. McDorman, *Extended Jurisdiction and Ocean Resource Conflict in the Indian Ocean*, 3 INTERNATIONAL JOURNAL OF ESTUARINE AND COASTAL LAW 208-234 (1988).

strengthening of national and regional perceptions required for an integrated ocean management. As Indian authors acknowledge, the resolution of practical difficulties in implementation of the new ocean regime in the South Asian region requires not only determination by states of appropriate priorities in their development plans but also the establishment of programs for the promotion of technical cooperation among themselves.[74] A participation of India in the IOMAC could certainly support this indispensable process, as the effectiveness of the work of any international organization is likely to be influenced by the manner in which and the extent to which participation therein reflects the interests of states represented in the activities of the region. Not only has India an important interest of its own in ocean development and capacity to support the ECDC/TCDC among the Indian Ocean states, but its nonparticipation in cooperative efforts of IOMAC may diminish the effectiveness of concerted measures required for migratory species managament or marine environmental protection, as well as affect the willingness of foreign "donors" to provide the assistance needed by other Indian Ocean states, as such donors might be concerned not to impair their political relations with India. However, in view of the undoubted usefulness of IOMAC's activities for an effective, integrated management of the Indian Ocean and certain grounds for the assumption that India's nonparticipation might to an important degree be simply due to heavy bureaucratization and primary concern with the complex issues of India's economic development, it may not be excluded that the potential profits from cooperation will outweight in time its other concerns and will ultimately lead to India's participation. This would also seem to be supported by certain prospects for change which recently became apparent in the India's foreign policy in general.[75]

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[74]*See* P.C. Rao and Bhimsen Rao, *Outstanding Issues in South Asian Region*, a paper presented at the 21 Annual Conference of the Law of the Sea Institute in Honolulu in 1987.

[75]*Note* especially visits of Indian Prime Minister in 1989 to China (first time in 35 years) and to Pakistan (first time in 29 years). *Cf. Enter the Next Generation*, Asiaweek of 13 January 1989, at 20-21. At the same time, however, India pursues a consistent policy of developing its military force (including nuclear weapons power) and is believed to have spent at least US $ 300 million on its missile programmes. *See India Joins the Missile-Systems Club*, International

Programme of IOMAC's Cooperation

The 1987 Programme of Cooperation and the Plan of Action contained in the Final Document of IOMAC-I articulates an impressive range of activities to be carried out at national, subregional, and regional levels in application and implementation in the Indian Ocean region of the new ocean regime as laid down in the 1982 Law of the Sea Convention. In the Plan of Action, specific areas of cooperation are further preliminarily envisaged not only on a short, but also on medium and long term basis which is often underestimated by many other multilateral and bilateral programs. The IOMAC's approach, although requiring preparatory and organizational effort much more extensive than when commencing with limited undertakings in a particular field, provides an excellent and unprecedented model of how to proceed with an effective trans-sectoral ocean policy and management in the developing state region.[76] Once a wide range of relevant marine-oriented activities is identified, it is also easier for states to proceed with further assessment and determination of priorities according to their interests and needs, while keeping in mind the complexity of actions required for achieving an integrated ocean policy, law, and management. The particular actions in the Indian Ocean region will be reviewed below in the light of the up-to-date activities of IOMAC and with special emphasis on institutional aspects involved in marine affairs cooperation in this region.

Mineral resources

The offshore prospecting for mineral resources within the extended zones of maritime jurisdiction of states was recognized by IOMAC-I as one of the priority areas of regional cooperation on account of the

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Herald Tribune of 23 May 1989 at 1. *Note* also that security issues (in the context of Nepal's growing relationship with China) play a role in unresolved Indian-Nepalese dispute over trade and transit treaties which expired in March 1989. *See* International Herald Tribune of 12 April 1989, at 8, and of 26 May 1989, at 4. *Note* further that, due to deterioration of relations between India and Sri Lanka, a summit meeting of SAARC planned for Colombo in November 1989 has been postponed.

[76]*Cf. supra* ns. 48-50 and the main accompanying text.

potential of such resources for economic development of the Indian Ocean states. Consequently, in accordance with the decision of the IOMAC Second Standing Committee in 1987, the First Meeting of the IOMAC Technical Group on Offshore Prospecting for Mineral Resources in the Indian Ocean was convened in Karachi, Pakistan, on 11-14 July 1988 with a view to: review the Indian Ocean non-living resources; survey recent experience in offshore minerals prospecting; identify new directions for international cooperation and strengthening of national capabilities in this respect; and determine a framework for IOMAC activities in non-living resource exploration.

The identified more important marine mineral and energy resources being presently exploited in the region include: common salt, bromine, sand and gravel, mineral sands, iron sands, tin, phosphate, calcium carbonate, and hydrocarbons (oil and gas). These minerals are located in the continental shelf areas which are relatively narrow, while much of the Indian Ocean basin lies in water depths greater than 2500 meters where (between 3500 and 6000 meters) the polymetallic nodules are situated. Since 1987 India has been registered by Prepcom as one (next to Japan, France, and the USSR) of the pioneer investors in deep sea-bed mining, with India's mine site located in the Central Indian Ocean. As a result, the Indian Ocean states could look forward to collaborative efforts aimed at dissemination of knowledge and transfer of deep sea-bed mining technology, and India could presumably play in the future a leading role in forming a joint venture with the Enterprise (for which the other half of mine site in the Central Indian Ocean is reserved), so as to exploit the polymetallic nodules of this area for the benefit of the Indian Ocean region.[77]

The Offshore Prospecting Programme (OPP) formulated by the Karachi Meeting referred to above and endorsed the same year by the IOMAC Third Standing Committee comprises specific recommendations related to technical, organizational and training matters and is carried out at three interrelated levels: by IOMAC states within the TCDC; by IOMAC jointly with technologically advanced states and the competent organizations; and through the United Nations

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[77] *See* LAW OF THE SEA BULLETIN (OALOS), SPECIAL ISSUE II (APRIL 1988); and 2 BULLETIN OF NEWS ON IOMAC 24-26 (1988/1).

system supported projects.[78] In view of the relatively undeveloped or non-existent national capabilities in offshore exploration, a major UNDP technical support project is an important component of the OPP. At its Third 1988 meeting, the IOMAC Standing Committee indicated that the UNDP project should specifically provide for: offshore (continental shelf) surveys for mineral construction materials, phosphorites, and precious corals; research and compilation of a series of maps of the Indian Ocean; and expert working group meetings on geochemical investigations, safety regulations and marine environmental protection measures for offshore minerals exploration and exploitation.

A useful model for the IOMAC-OPP activities is provided by the two Committees, the CCOP/EA for East and Southeast Asia and the CCOP/SOPAC for the South Pacific, which promote and coordinate the investigation of marine mineral resources of their member states. The CCOP/EA, which directly contributes to institutional cooperation in the Indian Ocean region, operates (like CCOP/SOPAC) through a Technical Advisory Group consisting of experts mostly from developed countries but also from the UN and other international institutions.[79] The CCOP/EA program involves also the Regional Mineral Resources Development Centre (RMRDC) of ESCAP and the Southeast Asian Tin Research and Development Centre (SEATRADC). In recent years, while the activities of RMRDC declined, SEATRADC which is formed by Indonesia, Thailand, and Malaysia having an extensive tin potential off their coasts, has operated effectively.

Through its extensive activities the CCOP/EA contributed, among others, to increased offshore exploration for oil and gas and for tin, as well as to important studies on quaternary geology. The CCOP, in cooperation with UNEP, is also active in the environmental field. The CCOP/EA cooperates closely with the ASEAN Council on Petroleum (ASCOPE) whose all member states are members of CCOP/EA and

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[78]For the Report and list of documents of the Karachi Meeting, *see* Doc. IOMAC/TM-1/A/1 (1988). *See* also Docs. IOMAC./TM-1/6, 1/13, and 1/16.

[79]*Note* also that starting from 1989, the international experts serving as members of the UNDP/ESCAP Technical Support Team to CCOP will be gradually replaced by regional experts. For details, *see* Docs. IOMAC/TM-1/4, 1/INF.1, and 1/INF.2 (1988). *See* also 14 CCOP NEWSLETTER 8 (1989/1).

which presently co-sponsors all training seminars/workshops of CCOP in the petroleum field. A joint CCOP-ASCOPE Inter-Secretariat Steering Committee develops and coordinates the implementation of joint projects, such as those on ASCOPE Data Bank or Marine Environment. Moreover, the CCOP cooperates with IOC within their Joint Working Group on Studies of East Asian Tectonics and Resources (SEATAR). The objectives of SEATAR include, among others, determining the location and characteristics of the principal tectonic features of the continental margin of East and Southeast Asia and analyzing the characteristics of various types of sedimentary basins and their hydrocarbon deposits. Most of the studies carried out under SEATAR during the last ten years are nearing completion and the new projects are envisaged.

In addition, the petroleum policy and legislative schemes of some Indian Ocean states are assisted by the Commonwealth (CFTC and TAG), and the undertakings contributing to development of mineral resources in the Indian Ocean are carried out under various joint development arrangements, both institutionalized and not institutionalized. The former arrangements include two institutions with strong autonomy and authority, namely the Saudi-Sudanese Red Sea Commission (SSRSC) which is authorized to investigate and develop (including environmental studies) the metalliferous deposits of the common zone of the two states in the Red Sea, and the Malaysia-Thailand Joint Authority (MTJA) which assumed all rights and responsibilities of both parties related to development of the sea-bed area of overlapping claims of the two states, as well as one body having merely consultative status, i.e., Saudi Arabia-Kuwait Joint Committee (SKJC).

The existing institutions concerned with prospecting for and development of offshore mineral resources in the Indian Ocean region are thus at present operated by the Southeast Asian states and on a bilateral basis by some Arab states. The activities of the Indian Ocean related bodies of the IOC which will be referred to below may also contribute to development of offshore minerals. However, the basically insufficient state of knowledge on the Indian Ocean mineral resources potential and significance of this potential for economic development of states of the region, which will increase as land-based mineral deposits become exhausted and marine deposits become more economically competitive in relation to traditional sources, seem to make further concerted actions within the IOMAC Offshore Prospecting Programme an imperative.

Marine environment

The 1987 Programme of Cooperation and the Plan of Action adopted by IOMAC-I emphasize that the issues affecting the marine environment are of concern to the other areas of cooperation in the Indian Ocean region and recognize the mutually supportive relationship between environmental protection and sustainable development. The documents indicate that IOMAC should promote the strengthening of the existing mechanisms for environmental cooperation, with a view to gradual development of appropriate institutional coordination for the wider Indian Ocean region.[80]

A major part of existing program form those carried out within the RSP of UNEP already discussed earlier. Out of eleven regions covered by the RSP's comprehensive Action Plans and Conventions, five are situated in the Indian Ocean region, thus providing a basic framework and incentive for cooperation towards integrated environmental protection in these regions. The five regions, involving the regular meetings of Contracting Parties and, as appropriate, the activities of non-UN regional organizations, include:

1. The Persian Gulf (Kuwait Action Plan) where the institutional framework is provided by ROPME at Kuwait and MEMAC at Bahrain. The region enjoys also an unique nongovernmental arrangement of GAOCMAO which was adopted in 1972 by oil companies for the purpose of mutual assistance in oil pollution emergencies, including a voluntary liability scheme. Moreover, the Persian Gulf and the Gulf of Oman are designated as special areas (oil) under the 1973/78 MARPOL Convention.
2. The Red Sea and Gulf of Aden (Jeddah Action Plan) where the institutional framework is provided by PERSGA (Jeddah) of ALECSO, while MEMAC is yet to be established. PERSGA acts on an interim basis, i.e., until the establishment of the Regional Organization for the Conservation of the Marine Environment in accordance with the Jeddah Convention. Moreover, the Red Sea was designated from the beginning, and the Gulf of Aden since 1987, as special areas (oil) under the MARPOL Convention, and IMO traffic separation schemes are established in the Gulf of Suez and the Strait of Bab el Mandeb.
3. The Central Western Indian Ocean (Nairobi Eastern African Action Plan) administered through the UNEP Regional Coordination Unit.

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[80] *See* also Doc. IOMAC-1/A/SC/8 (1987).

4. The East Asian Seas (1981 Bangkok Action Plan) which include the marine environment of the ASEAN member states and where regional instruments are yet to be adopted.[81] The institutional framework is provided by the COBSEA (meeting annually) and the Interim Coordinator of the ASEAN Experts Group on the Environment which provides a channel of communication between UNEP and COBSEA. Moreover, the ASEAN Oil Spill Contingency Plan in force since 1976 and administered by ASCOPE Experts Group on Marine Pollution forms a general framework for cooperation in marine pollution emergencies, and UNDP funds at present the ASEAN project on Development of Cooperative Action Plan for Combating Oil Pollution. IMO traffic separation schemes are established for the Malacca and Singapore Straits and also for the Lombok/Makassar straits in the Celebes Sea. The Malacca and Singapore Straits are, moreover, subject to navigational and environmental regulations of the tripartite Council and Revolving Fund Committee of the bordering states.

The ASEAN's broader environmental concern may be a positive contribution towards further development of the above program. The ASEAN Environmental Programme (ASEP) carried out by the ASEAN Committee on Environment since 1981, regards the marine environment as one of its priority areas and has endorsed the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources (including the marine environment).[82] ASEP is at present in its Phase III (1988-1992) placing special emphasis on the strengthening of regional cooperation in relation to, among others, the

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[81]For evaluation, *see* UNEP REGIONAL SEAS REPORTS AND STUDIES No. 86 (1987) and No. 96 (1988), as well as earlier report No. 65 (1985). *See* also Komar Kantaatmadja, *Various Problems and Arrangements in the Malacca Straits*, in J.M. Van Dyke *et al.* eds, INTERNATIONAL NAVIGATION: ROCKS AND SHOALS AHEAD? A WORKSHOP OF THE LAW OF THE SEA INSTITUTE 1986 165-172 (1988).

[82]For the text of the 1985 ASEAN Agreement and other relevant documents, *see* ASEAN DOCUMENTS SERIES 1967-1986 (ASEAN SECRETARIAT 1986).

common seas, with a view to the integration of environmental conservation into the process of sustainable development.[83]

5. The South Asian Seas where, in cooperation with SACEP, the regional report on the state of the marine environment was completed,[84] to be followed by an Action Plan for this region. The UNEP's Regional Seas Programme is one of six major subject areas identified by SACEP as priority areas of regional cooperation. A general concern with continuing degradation of the environment in the South Asian region has also been expressed by the 1987 Kathmandu Declaration of SAARC, and the concern with a specific issue of sea-level rise by the International Conference on Global Warming and Climate Change from Developing Countries' Perspective, which was organized by the Tata Energy Research Institute (New Delhi) in association with the Woods Hole Research Center (USA), with cosponsorship of UNEP and the World Resources Institute (USA), in New Delhi in 1989. The Conference recommended, among others, the setting up by regional organizations such as SAARC or ASEAN of Regional Climate Monitoring and Management Boards.

To facilitate the implementation of the RSP of UNEP for East, West, and Central Africa, the African component of the Mediterranean Sea, as well as the Red Sea and Gulf of Aden, the first AMCEN held in Cairo in 1985 established a Committee on Seas, with UNEP serving as its Secretariat. The Committee undertook preparation of an inventory of expertise available at African institutions competent in the field of the marine environment as well as declared an African Decade for the Protection of the Marine and Coastal Environment in the years 1991-2000.

In the first three subregions specified above where the relevant Conventions have already been adopted, all three Conventions are accompanied by Protocols on Regional Cooperation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency, and the 1985 Nairobi Convention -- also by a Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, and the Kuwait Convention -- by the first 1989 Protocol Concerning Marine Pollution Resulting from Exploration and

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[83]*See* the 1987 Jakarta Resolution, in ASEAN Newsletter No. 23, October 1987, at 14.

[84]*See* UNEP REGIONAL SEAS REPORTS AND STUDIES No. 82 (1987); and also earlier reports Nos. 58 and 62 (1985).

Exploitation of the Continental Shelf. Other protocols yet to be adopted in accordance with the UNEP comprehensive approach are those on land-based pollution, dumping, environmental impact assessment, and responsibility for marine pollution damage.[85]

Some of those specific questions are in the meantime subject of work of regional organizations of the Indian Ocean states, e.g., ASEP's concern with heritage parks and reserves mentioned above is of direct relevance for marine protected areas in Southeast Asia. Activities in marine sciences are undertaken in the framework of the ASEAN Science and Technology Programme coordinated by the ASEAN Working Group on Marine Science.[86] ASCOPE, in cooperation with UNEP, CCOP/EA and bilateral donors, carries out various projects related to coastal zone management and to protection of the marine environment against pollution from sea-bed operations.[87] In 1985 a joint meeting of ASCOPE Study Groups on Environment and Safety (ASGES), CCOP and a Norwegian donor agency approved a formation of a Working Group on the Offshore Safety Programme which is restricted to CCOP's countries with established offshore production and aims at developing an oil (spill) drift model for the East Asia Seas.

The marine environmental issues are also subject of works of the AALCC that include: studying of major IMO Conventions with a view to promoting their wider acceptance in the Asian-African region; general legal framework for combating marine pollution from land-based sources at the level of subregional arrangements and guidelines

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[85]*Note* that, while all UNEP Conventions have Emergency Protocols, the Protected Areas Protocols are only adopted in the Mediterranean (1982) and Eastern African (1985) regions, but are under preparation in Southeast Pacific and Caribbean regions; Dumping Protocols are adopted in the Mediterranean (1976) and South(west) Pacific (1986) regions; Land-Based Pollution Protocols in the Mediterranean (1980) and Southeast Pacific (1983) regions; and the Continental Shelf Protocol, apart from the one adopted in Persian Gulf (1989), is under preparation in the Mediterranean region. The first Environmental Impact Assessment Protocol is under preparation in the Southeast Pacific region.

[86]For detailed projects, *see* THE ASEAN STANDING COMMITTEE 1986-1987 (ASEAN SECRETARIAT 1987), at 70.

[87]For details, *see* Doc. IOMAC/TM-1/4 (1988), at 33-35.

for national legislation; and measures for oil pollution emergencies, especially legal framework for establishment of subregional centers.

Furthermore, marine environmental protection is promoted through various regular program activities of UNESCO, in particular the major Inter-Regional Project on Research and Training on Integrated Management of Coastal Systems (COMAR) established in 1980. The COMAR in Asia and the Pacific concentrates essentially on mangroves, coral reefs, and related coastal marine systems,[88] which are also subject to activities of ESCAP's Environmental Coordinating Unit. The UNESCO Division of Marine Sciences undertook in addition, in cooperation with IOC and UNEP, numerous collaborative projects with PERSGA of ALECSO (Red Sea), ROPME (Persian Gulf), as well as IOFC and IPFC of the FAO. Some aspects of marine environmental protection are covered by activities of UNIDO and WHO. Moreover, within preparations to the Lome IV Convention (between the EEC and sixty-six African-Caribbean-Pacific states), African and European states, the EC Commission and UNEP expressed in the 1988 Dakar Declaration their readiness to better integrate the protection of the environment, including coastal and marine environment, into economic and social development, and to implement or continue the necessary process of adaptation within their national planning policies, as well as bilateral or multilateral development aid policies.[89]

At its third meeting in 1988, the IOMAC Standing Committee reconfirmed that the Indian Ocean Marine Environment is one of the main subject areas of IOMAC Programme of Cooperation and considered the specific issue of dumping hazardous wastes and toxic materials, noting that in recent times Indian Ocean states and other developing countries have encountered disposal of such substances in their adjacent offshore areas. The Committee emphasized the necessity

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[88]*See supra* n. 64, Part 2 (UNESCO and IOC); G.A. KNOX and T. MIYABARA, COASTAL ZONE RESOURCE DEVELOPMENT AND CONSERVATION IN SOUTHEAST ASIA (UNESCO 1984); THE MANGROVE ECOSYSTEM, UNESCO REPORTS IN MARINE SCIENCE No. 8 (1979); CORAL REEF MANAGEMENT IN ASIA AND THE PACIFIC, UNESCO REPORTS IN MARINE SCIENCE No. 18 (1982); CORAL REEF MANAGEMENT HANDBOOK (UNESCO 1988).

[89]*See* UN Doc. IMO MEPC 26/INF. 6, Annex (1988).

of taking stricter preventive and control measures with regard to hazardous waste disposal and envisaged the convening of a special workshop to facilitate the relevant action. Similar concern was recently expressed in several intergovernmental forums, including the OAU,[90] and the Lome IV Convention will presumably commit the EEC member states to provide the ACP states on a regular basis with list of dangerous chemicals and substances which are banned in their countries.[91] Given the enormous danger to the environment, the ACP states seek to have in the Lome IV Convention provisions resulting in a total ban on the export of such products to their countries. At the global level, this question has recently been subject to a new regulation under the 1989 (UNEP-sponsored) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

The Third IOMAC Standing Committee also took note of the concern expressed by the Indian Ocean states with regard to pollution of the sea by oil, especially noncompliance with the existing standards and rules, and recommended that Secretary-General identify an effective mechanism to monitor and develop regional capabilities of coastal states for prevention of such environmental hazards with assistance from the competent international agencies. In addition, the meeting discussed the potential adverse impact on the marine environment of the proposed deep sea-bed mining in the Indian Ocean and recommended that a team of experts from within and outside the region should begin consideration of this subject.[92] This initiative seems particularly important in view of the fact that environmental aspects have not so far been dealt with by Prepcom.

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[90]*See* OAU Resolution CM/Res. 1153 (XLVIII) (1988), in 28 ILM 567 (1989). *Cf.* UN Docs. GA Resolutions 42/183 of 1987 and 43/212 of 1988; ECOSOC Resolutions 1988/70 and 71; and UNEP Governing Council Decision 15/33 of 1989.

[91]*See Lome IV - The ACP Negotiating Position*, in ACP-EEC THE COURIER (1989 No. 113). *Note* that the 1988 Dakar Declaration *supra* n. 89, stressed the necessity to ensure an effective control of trade and movements of potentially dangerous substances, including toxic waste.

[92]*Cf. supra* n. 77 and the main accompanying text.

Living resources

While the 1987 IOMAC Programme of Cooperation and Plan of Action recognize that the existing institutional framework for fisheries in the Indian Ocean provides an appropriate basis for management, they also stress the necessity of further strengthening of this framework, especially in tuna management and enhancing of national capabilities and scientific infrastructure of states with regard to data collection and stock assessment systems.

In spite of impressive growth in the Indian Ocean commercial fishery, there is a lack of reliable data on fishery resources, the fisheries of coastal states (except India, Thailand or Pakistan) are still small scale fisheries based on artisanal methods of capture, and the relationship between fish supply and demand is that of a widening gap. In particular, when comparing the predicted population growth rates of the Indian Ocean region over the next two decades and the estimated potential of unexploited marine fishery resources for the same period, it seems unlikely that the past growth rates in marine production can be maintained and keep pace with the prospective population growth in the South and Southeast Asian states. For these reasons, the presently extended limits of fisheries jurisdiction up to 200 miles make it necessary to seek the improvement of exchange of fishery technical expertise, conservation measures, and control mechanisms to prevent overharvesting of the Indian Ocean fisheries by foreign fleets. Specific measures would be required to recognize access of the land-locked and geographically disadvantaged states to fishery resources as well as preferential access conditions between neighboring states, and possibly a regional cooperative use of fishery research vessels or other sophisticated technologies (space satellites), so as to reinforce solidarity and cooperation in the region. Taking those factors into account, the Second Standing Committee of IOMAC determined a schedule of priority activities in the fields of: technical cooperation among Indian Ocean states, cooperative use of fisheries research vessels, and development of an Indian Ocean tuna fishing fleet, to be further discussed by IOMAC participants and subsequently implemented in cooperation with the international organizations concerned.[93]

The existing institutions requiring further strengthening and/or use to these effects include in particular the regional bodies of FAO,

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[93] *See supra* n. 80.

International Whaling Commission (IWC), and several non-UN regional organizations. Specific fisheries-related issues are also covered by respective activities of UNIDO and ILO. The IWC provides an adequate cooperative framework for protection of marine mammals (whales) in the Indian Ocean, where north of 55 S. Lat. a whale sanctuary and prohibition of commercial whaling was declared in 1979, and the CRIOMM set up in Sri Lanka in 1983. At present, an extension of the duration of sanctuary beyond 1989 is considered.[94]

FAO has made a profound contribution to the development of fisheries in the region, particularly through the International Indian Ocean Fishery Survey and Development Programme (1972-1979) and is at present executing some sixty national and inter-regional projects in the wider Indian Ocean.[95] The regional organizations of FAO active in the Indian Ocean are the Indo-Pacific Fisheries (IPFC) and Indian Ocean Fishery (IOFC) Commissions and their subsidiary bodies, as well as two FAO Regional Marketing, Information, and Technical Advisory Services, INFOPECHE for Africa and INFOSAMAK for Arab states. A Service for Asia and the Pacific, INFOFISH forms at present, as was noted earlier, an independent regional organization.

The IPFC has operated since 1980 a subregional Committee for the South China Sea (CDMSCS) which has close contacts with other organizations concerned, such as INFOFISH, NACA (having regional lead centers in China, India, Philippines and Thailand), SEAFDEC and its Southeast Asian Fisheries Information System (SEAFIS) which provides a regional input to the FAO/IOC Aquatic Sciences and Fisheries Information System (ASFIS), as well as Asian Development Bank, ASEAN and nongovernmental ICLARM. Moreover, in cooperation with SEAFDEC and Canada, the Regional Center of ASFIS for Southeast Asia was established in Thailand. The cooperation between CDMSCS and ASEAN resulted in the establishment in 1986 of the ASEAN Fisheries Development Center (AFDC) in Thailand with subcenters in all other ASEAN states. These undertakings were -- apart from FAO support -- a result of ASEAN's earlier concern with marine fisheries as reflected by the 1983 ASEAN Ministerial

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[94]*See* Docs. IOMAC-1/SC-3/INF. 4, 5 and 6 (1988).

[95]*Cf.* B. Kwiatkowska, *FAO Implements the 1982 Law of the Sea Convention in the Indian Ocean Region*, 8 INDIAN OCEAN NEWSLETTER (1987/3).

Understanding on Fishery Cooperation, emphasizing the necessity of taking adequate measures for conservation and management of fisheries in the 200 mile zones and transfer of fishery technology among Southeast Asian states.[96] At their meeting in 1986 approving establishment of the AFDC, the ASEAN Ministers on Agriculture and Forestry endorsed three and subsequently two more new projects implementing the 1983 Understanding.[97]

The IOFC has three subregional Committees operating since 1980 in the Indian Ocean region, in particular in the Gulfs, Southwest Indian Ocean (SWIOC) and the Bay of Bengal (BOBC). The Bay of Bengal Programme of BOBC cooperates closely with INFOFISH, NACA, and SEAFDEC, and its ongoing activities include: the SIDA/FAO Development of Small-Scale Fisheries Programme, the UNDP/FAO Project on Marine Fishery Resources Management, and the ODA/FAO Postharvest Fish Technology Project. The SWIOC continues at present its UNDP/FAO Regional Fisheries Project (1987-1991), while the Gulfs Committee initiated, in cooperation with INFOSAMAK, the establishment of a computerized Regional Data Base (and National Fisheries Data Centers). The relevant institutions of some member states of the Gulfs Committee and of several other Arab states participate, moreover, in the nongovernmental Arab Federation of Fish Producers which, among others, proposes joint ventures among its members.

Apart from FAO and regional organizations mentioned above, various aspects of fisheries management form part of the activities of the AALCC which focuses on: guidelines for a model fishery legislation and joint ventures agreements (now completed) and promotion of regional and subregional fisheries cooperation. In the African region, which possesses the lowest share of scientific and technological capabilities of any region in the world and has the largest number of least developed and land-locked states, an important

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[96]For text, *see supra* n. 82.

[97]These are: Aquaculture Development and Coordinating Programme and Marine Resources Assessment in the ASEAN Region Project, both co-funded by the EEC; ASEAN-Canadian Postharvest Technology Project (Phase II); and two ASEAN/UNDP/FAO Projects on Monitoring, Control and Surveillance of Fisheries in the 200 Mile Zone, and on Coastal Fisheries Rehabilitation through Seagrass Restoration.

impetus for regional action was provided by the 1979 Monrovia African Development Strategy and the 1980 Lagos Action Plan of the OAU which, as was noted earlier, included fisheries as an area of the food and agriculture sector requiring first priority attention. Subsequently, the 1984 ECA's Intergovernmental Meeting on Aspects of Application of the Law of the Sea Convention urged African states to increase the priorities they accord to fisheries in their national development plans, and recommended the increasing of cooperation between land-locked and coastal states within existing regional bodies, and of subregional and regional cooperation in utilization of migratory stocks. Certain follow up actions on the LOS Convention were further included in 1986 by ESCAP into its Programme on Food and Agriculture, in particular preparation of a study on the law of the sea in respect of management of living resources and organization of a regional meeting on the implications of the Convention on fisheries in Asia and the Pacific. At the same time, ESCAP emphasizes the necessity of strengthening cooperation with other organizations such as FAO and SEAFDEC.

A particular importance is attached to fisheries by the 1984 Lome III Convention between the EEC and the sixty-six ACP states which recognizes the urgent need to promote the development and optimum utilization of fishery resources within the 200 mile zones of ACP states (art. 50). To this end, the parties committed themselves, among others, to apply to fisheries all mechanisms for assistance and cooperation provided for by the Lome Convention, and to respect "the rights of land-locked States to participate in the exploitation of sea fisheries." Within the framework of Lome III, the EEC cooperates with a number of LDCs in the Indian Ocean region under its standard fisheries agreements, but it also maintains the commercial and financial links with several Indian Ocean states which do not belong to the ACP Group, including South and Southeast Asian countries.[98] The

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[98]For the text of Lome III Convention, *see* 24 ILM 571 (1985). The EEC concluded Fisheries Agreements with, e.g., Madagascar, Seychelles and Mozambique, and is co-funding ASEAN projects referred to *supra* n. 97. *Cf.* T. Clarke, *EEC Fisheries Development Aid*, EEC-ACP THE COURIER 98-101 (1984 No. 85); C. Stevens, *The European Community and Africa, the Caribbean and the Pacific*, in J. Lodge ed., INSTITUTIONS AND POLICIES OF THE EUROPEAN COMMUNITY 142-153 (1983). *See* also C.W. Dundas, *Co-operation within the Commonwealth on Access to Marine Resources - with*

preliminary discussions between IOMAC and EEC focused on the objectives and developments concerning IOMAC, as well as growing EEC activities and interests in the Indian Ocean region.[99] A continuous emphasis on fishery management and development in the next Lome IV Convention which is now under preparation may further enhance the EEC's interest in the region. It may also be noted that the new fisheries regime in the 200 mile zone resulted in inclusion of fisheries management (especially foreign access) issues into the program of work of the Commonwealth.

In spite of these numerous activities and the fact that, as the first 1987 report on implementation of the FAO World Fisheries Strategy showed, Asia and the Pacific is the most advanced of all regions in the progress made in fishery development, it is clear that the present stage of fisheries development is far from meeting all the needs and demands of the wider Indian Ocean region.[100] At its third meeting in 1988, the IOMAC Standing Committee reconfirmed that one of the major problems confronting regional states was the non-availability of reliable estimates of fishery resources in the 200 mile zones which could not be obtained on an individual basis, and recommended exploring of possibilities for collaborative use of fisheries research vessels as it was the case with The Fridtjof Nansen Surveys (1971-1981).

A particular challenge for further development constitutes tuna fisheries which due to highly (trans-oceanic) migration of these species is subject to a special management of the two Indian Ocean

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Specific Reference to Fisheries Access Agreements and Offshore Petroleum Contracts, Commonwealth Secretariat (March 1986).

[99]*See* Doc. IOMAC-1/A/SC/4 (1987), at 4.

[100]*Note* that, e.g., out of 2.7 million tons of fish estimated as available annually in the Indonesian 200 mile EEZ, only about 2 percent is utilized. In 1987 Indonesia licensed 237 foreign ships (of Thailand, Australia and USA) to fish in its zone (for about US $ 4.7 million of license fees), while the capacity of Indonesian zone is estimated at 1700 ships. At the end of 1988, number of foreign fishing ships licensed to operate in Indonesian zone increased to 871. *See* Jakarta Post of 23 July 1987, at 7, and of 17 January 1989, at 1. *Cf. supra* n. 73.

Tuna Committees of the IPFC and the IOFC.[101] The trade aspects are, moreover, the subject of respective fish trade services, e.g., the 1985 Tuna Trade Conference of INFOFISH in Thailand has assisted the producers, mainly in the developing countries, to have a better understanding of the requirements of buyers, mainly in developed countries and of the related problems which need to be solved in tuna export and import.

Due to a significant increase in the tuna catch of the Indian Ocean region as a result of the growth of the distant water industrial fishery, IOMAC from its inception has emphasized the urgent need to promote regional cooperation with a view to develop tuna fisheries on the part of regional coastal states. As the IOFC Tuna Committee was found insufficient to respond to the growing demands of the region after the termination of the on-going Indo-Pacific Tuna Programme (IPTP), the tenth session of IOFC (in Mauritius) reviewed the various options for a new long-term institutional arrangements in this respect.[102] From among the possible options that included the establishment of: an independent body by a new treaty; a subsidiary body of a FAO Commission; or a FAO affiliated body (like IPFC and GFCM) under Art. XIV of the FAO Constitution, IOFC opted for this latter solution. A new Commission would cover all tuna and tuna-like species (listed in Annex I to the 1982 LOS Convention) in the Indian Ocean and adjacent seas, excluding Antarctica, with the membership in the Commission open to all coastal and fishing states, and with its powers including making of potentially binding recommendations. However, the FAO International Conference convened to this effect in Rome in April 1989 failed to establish a new Commission. While the efforts to this end are to be continued, an alternative on the part of FAO would consist in the initiation of a new IPTP.

Within the IOMAC's tasks mentioned earlier of promoting policy orientation within marine-oriented organizations and conferences, the Third Standing Committee of IOMAC in 1988 and the Jakarta Meeting of IOMAC Legal and Fisheries Experts in 1989 considered a number

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[101]It should, however, be noted that the merge of IPFC and IOFC could not in the future be excluded. *See* UN Doc. FAO COFI/87/9 (1987), at 5, and *supra* n. 47.

[102]*See* UN Docs. FAO IOFC/TML/88/INF. 5, IOFC/TM/88/6, and TM/88/INF. 6 and 7 (1988); Fisheries Report No. 404, FIPL/R404 (1988); and IOTC/89/3 (1989).

of important issues pertaining to the proposed new tuna management regime.[103] The Committee approved in principle the setting up of a new body within the FAO framework subject, however, to the understanding that such a new body would also take measures to enable all coastal LDCs in the Indian Ocean to participate more actively in tuna fisheries.[104] Similar concern was expressed at the 1989 Jakarta Meeting at which some reluctance to exclude Antarctica from the area of competence of a new Commission was also apparent. Certain consideration was given to the alternative solution of establishing a new organization independent from FAO. Some experts addressed the question of accommodation of the rights of land-locked and geographically disadvantaged states of the Indian Ocean under a new tuna arrangement. The latter question, according to Declaration of IOMAC-I that the interests of these states should be taken into account in cooperation in the region, forms part of IOMAC broader initiatives which are under preparation within the Group on Issues Relating to Land-Locked and Geographically Disadvantaged States coordinated by Nepal and Uganda.

Ocean science and services

The development of an ocean science and information base which is, as was emphasized elsewhere in this study, a necessary prerequisite of effective development of all marine sectors and, at the same time, perhaps the most pronounced lacuna of the Third World countries, is given a particular emphasis in the IOMAC Programme of Cooperation. The Programme recognizes that the cooperative activities which are at present promoted and coordinated by the various international organizations active in the Indian Ocean region can constitute a basis for the development of regional cooperation in marine science and ocean services, but to obtain optimal benefits the existing numerous and extremely diverse programs need to be intensified, expanded, and appropriately linked as necessary. To this end, there is a need to bring together groups of technical, legal, and managerial experts from

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[103]*See* Docs. IOMAC-1/SC-3/1/Add.2/Rev.1 and SC-3/5 (1988), and *supra* n. 66.

[104]*Note* that the UNDP Project endorsed by the Second Standing Committee includes a feasibility study on the establishment of a multinational tuna fishing fleet or consortium of the enterprises of IOMAC regional states. Doc. IOMAC-1/A/24/Rev.2 (1987).

regional states for the purpose of harmonizing scientific undertakings, promoting bilateral and multilateral cooperation among these states, and devising appropriate mechanisms for ensuring that such cooperation takes place in a mutually beneficial, economical, and non-dependent manner so as to promote self-reliance.

This process has already been commenced by IOMAC taking account of the existing activities of the relevant international organizations active in marine research and ocean services related to the fields examined above, i.e., exploration and exploitation of mineral resources and fisheries, as well as marine environmental protection.

In addition to, and in connection with, the three major fields specified above, an important contribution to development of marine sciences in the Indian Ocean region is provided by various programs of the IOC, e.g., the network of the Global Sea Level Observation System (GLOSS) and of the IOC's two regional Committees for the North and Central Western Indian Ocean (IOCINCWIO) and for the Central Indian Ocean (IOCINDIO). IOCINCWIO, as set up in 1979, held its two sessions in 1982 and 1987 at which the Committee adopted several projects within the major scientific and ocean services program of the IOC and decided to prepare an International Bathymetric Chart of the Western Indian Ocean (IBCWIO). Some regional states (Mozambique, Madagascar, Kenya, and Tanzania) expressed their reservation regarding the connection between charting the region and marine geological research.[105] IOCINDIO held its first session only in 1988 (Islamabad, Pakistan) and adopted eight regional projects in the areas of physical oceanography, living resources, geological surveys, and marine pollution. The developments in marine science of the North West Indian Ocean and adjacent seas, as commenced in the 1930s and enhanced through the 1959-1965 International Indian Ocean Expedition, were the subject of a special symposium held by UNESCO in Egypt in 1983,[106] while those in the Central Indian Ocean were reviewed at the IOC/UNESCO Workshop on Regional Cooperation in Marine Science in the Central Indian Ocean and Adjacent Seas and Gulfs held in Colombo in 1985. In addition, the UNESCO's input to cooperative undertakings in the region has -- apart from the COMAR already referred to earlier -- been channelled under the Arrangement adopted by UNESCO and

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[105] *See* Doc. IOMAC/TM-1/19 (1988).

[106] *See* UNESCO REPORTS IN MARINE SCIENCE No. 31 (1985).

ECA in 1979, of which the first project (UNDP-funded) was that on Development of Marine Science and Technology in Africa.[107] The project was designated to enhance the capability of marine-oriented institutions of the East (Central Western Indian Ocean) and West African states through the development of a regional and subregional program of research and training in the development of marine environmental services, shipping, coastal area development, and the protection of the marine environment.

In view of cumbersome and costly conventional techniques of acquisition of resource-related data, the IOMAC Programme of Cooperation emphasizes the usefulness of adoption of Remote Sensing Technology for Data Acquisition for Marine Resources Management and of the continuous development of applications of space technology to oceanographic and marine resource survey, maritime satellite communications, satellite search and rescue, and maritime weather and storm warning services.[108] For this purpose the IOMAC Plan of Action provides for the establishment of a Standing Group of Regional Experts in Space Technology Applications and preparation of a program of remote-sensing applications in the Indian Ocean for the next decade. This could be initiated in cooperation with the UN Outer Space Affairs Division and ESCAP Regional Remote Sensing Project dealing with training of personnel. In early 1988, the implementation of this work began in the form of a feasibility study funded by UNDP in Kenya, Indonesia, and Sri Lanka on the use of remote sensing for marine resource survey, while the detailed pilot projects are to be finalized in the near future.[109]

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[107]*See* UNESCO REPORTS IN MARINE SCIENCE No. 10 (1980).

[108]*Note* that India operates a geostationary meteorological satellite INSAT-1C (launched in 1988), with the transition to the second generation INSAT-2 planned in early 1990. *Note* also that ASEAN carried out a Regional Satellite Project based on the Indonesian Palapa system, and that a new program on the use of the SPOT satellite system by Thailand, Indonesia, Malaysia, Brunei, and the Philippines was launched in cooperation with France (70%) in 1989. *See* 1 BULLETIN OF NEWS ON IOMAC 6-7 (1987/1); International Herald Tribune of 30 March 1989, at 9.

[109]*See* UNDP Project, *supra* n. 104; and 2 BULLETIN OF NEWS ON IOMAC 15-16 (1988/1).

In the context of space technology applications the IOMAC Plan of Action also indicates the necessity of improving and extending the use of the International Maritime Satellite System (INMARSAT) in the Indian Ocean region, as well as various program of the WMO. The latter are carried out by the WMO/ESCAP Typhoon Committee and Panel on Tropical Cyclones, as well as the WMO Tropical Cyclone Committee for the South-West Indian Ocean and the Commission for Atmospheric Sciences carrying out an Asian/African monsoon project with centers in New Delhi and Kuala Lumpur.[110] In 1988 the ECA Conference of Ministers adopted a resolution on support to island states in the South-West Indian Ocean affected by tropical cyclones and other disasters, and the WMO Tropical Cyclone Committee for the South-West Indian Ocean undertook the establishment of a Regional/Specialized Meteorological Centre (RSMC) in Reunion. The WMO Tropical Cyclone Committee for the South Pacific adopted the same year an Operational Plan for the South Pacific and South-East Indian Ocean. ECA has also supported the African Centre of Meteorological Applications for Development (ACMAD) which was established in 1988 as the first phase of the proposed International Centre for Operational Meteorology and Hydrography in Africa (ICOMHA). Moreover, the Indian Ocean is covered by numerous broader programs of the WMO, such as: the Climatological Sea Surface Current Exchange System covering upwelling areas in the North Indian Ocean, the Tropical Ocean and Global Atmospere (TOGA) program, the Integrated Global Ocean Services System (IGOSS) having a network for the Indian Ocean and contributing its data to the IOC International Ocean Data Exchange (IODE), the WMO Voluntary Observing Ships' (VOS) Scheme by which ships of the Indian Ocean states transmit their meteorological observations, as well as World Weather Watch (WWW) that includes Meteorological Telecommunication Networks for Asia and Africa. WMO also operates Regional Offices and Associations as well as Meteorological Training Centers for Asia and Africa, and its activities will be the major contribution to the International Decade for Natural Disaster Reduction (IDNDR) proclaimed by the UN General Assembly for the 1990s.

An important lacunae identified by the IOMAC Plan of Action is the lack of a regional coordinating body in the field of hydrography

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[110]*See supra* n. 64, Part 2 (WMO) and ANNUAL REPORT OF THE WMO 1987 (No. 689 - 1988) and 1988 (No. 713 - 1989).

for the Indian Ocean region which could be established by Indian Ocean member states of the International Hydrographic Organization (IHO) in the form of an IHO Regional Hydrographic Commission for the Indian Ocean. Accordingly, the Third Standing Committee of IOMAC in 1988 recommended taking steps towards establishment of such body under the IOMAC Work Programme on Hydrography.[111]

Maritime transport and communications

Although the Indian Ocean has served as the major East-West trade route both in the past and today, for historical reasons, the development of shipping by the Indian Ocean states has occurred only relatively recently. This has been accelerated by support of the LDCs' initiatives in international organizations such as UNCTAD, IMO, or WMO which were partly referred to above in the context of space technology applications.[112]

To enhance these developments, the IOMAC Programme of Cooperation and Plan of Action identify several areas for further study and cooperative action, such as forming appropriate institutional arrangements in ship ownership and investment, rationalization of port investment, investigation of prospects for assistance to less developed countries, and setting up a regional shipping forum through which cooperation and in particular TCDC within the Indian Ocean region could be advanced. The cooperative activities in communication systems between oil rigs, installation of submarine fiber-optic cable (linking so far Europe, the USA, East Asia, and the South Pacific), and increase of the use of INMARSAT and other rescue satellite services in the Indian Ocean are also envisaged. Regional cooperation in shipping was subsequently indicated by the 1987 Second Standing Committee of IOMAC as one of the areas appropriate for drawing on UNCTAD's specialized competence, while the 1988 Third Standing Committee recognized that the subject of transportation should be included in the IOMAC Work Programme for consideration.

In pursuing work in this field, IOMAC -- apart from regional initiatives within the above-mentioned UN organizations concerned -

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[111]*Cf. supra* n. 64, Part 2 (IHO) and Doc. IOMAC/TM-1/INF.7 (1988).

[112]For detailed review, *see supra* n. 64, Part 2 (UNCTAD, IMO, WMO, ITU); and 1 BULLETIN OF NEWS ON IOMAC 16-18 (1987/1).

- will also be able to base on certain experience in the up-to-date cooperation within various Indian Ocean subregions. The shipping industry of Southeast Asian states is the best, and that of East African states the least, developed, while the Middle Eastern and the Gulf states are reasonably progressing in this field. The Arab states established in 1972 under the auspices of OAPEC the Arab Maritime Petroleum Transport Company (AMPTC), but due to the establishment by member states of their own national tanker fleets, the AMPTC proved rather unprofitable.[113] On the other hand, the Arab Shipbuilding and Repair Yard Company (ASRYC) in Bahrain, also established under OAPEC auspices, operates -- mostly due to its location as the only facility between Portugal and Spain capable of servicing large crude carriers --at nearly full capacity, and the same relates to the United Arab Shipping Company (UASC) formed in 1976 by Bahrain, Iraq, Kuwait, Qatar, and the United Arab Emirates.

The area of shipping and ports forms, moreover, part of the collaborative efforts promoted by the ASEAN Committee on Transportation and Communication (COTAC), presently under its Integrated Work Programme on Transportation and Communications (IWPTC), with a view to achieving regional self-reliance, particularly with regard to reasonable and stable freight rates, as well as adequate, efficient, and economic shipping services for the carriage of freight within and beyond the region. To this end COTAC has implemented a number of projects on, e.g., joint training and information exchange, port operation, and joint approaches to international shipping issues, including a feasibility Intra-ASEAN Shipping Study and Establishment of Joint Liner Service which was prepared by SEATAC. As regards this latter study, the COTAC is committed to complete it either through external financial assistance or within ASEAN. COTAC carries also out an Integrated Work Programme on Posts and Telecommunications (IWPPT), of which the most significant was the ASEAN Submarine Cable Project (1974-1986) which resulted in establishment in 1986 of the ASEAN Cableship Private Ltd (ACPL) in Singapore for the maintenance of a submarine cable network. The COTAC carries out its various projects in cooperation with UNDP, UNCTAD, ESCAP, IMO, EEC, as well as Canada, USA, and some other technologically advanced states. The cooperative activities of ESCAP in the Asian region are particularly extensive and are initiated and coordinated by the ESCAP Committee on Shipping, Transport,

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[113]For details, *see* UN Doc. ST/ESA/191, *supra* n. 5, at 42.

and Communication, and a special Working Party on Shipping and Ocean Freight Rates established by its Committee on Trade, with the period 1985-1994 declared by ESCAP to be a Transport and Communication Decade for Asia and the Pacific.[114]

A specific subregional arrangement represents the Malacca and Singapore Straits Council within which the three bordering states, Indonesia, Malaysia and Singapore, apply necessary measures with regard to navigational safety and environmental protection of particularly sensitive areas of these straits which are frequently used by international navigation. In a follow up to a major Japanese tanker (*Showa Maru*) accident, the Japanese tanker owners established a special Fund for the adequate maintenance of sea traffic and pollution combating in the Straits area. The Fund is administered by a Revolving Fund Committee which comprises representatives of the three coastal states and which has drawn up a Standard Operating Procedure for Joint Oil Spill Combat.

Marine affairs information system

Parallel to, and for the purposes of, all specific activities covered by the IOMAC's Programme of Cooperation and Plan of Action that were discussed above, a task of utmost urgency constitutes the establishment of IOMAC's Indian Ocean Marine Affairs Information Network (IO-MAARIS). The overall objective of IO-MAARIS, as undertaken by the First IOMAC Standing Committee in 1987 and outlined by the Joint IOMAC/UNCTAD/UNDP Mission at the Committee's second meeting held the same year, is to provide Indian Ocean states with the up-to-date information required for the enhanced use of marine technologies and the conduct of marine scientific research which are essential for building and strengthening of national institutions (educational, training, and professional) dealing with marine affairs.[115]

To attain these objectives, the three interrelated components of IO-MAARIS comprise:

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[114]*See* UN Doc. E/1986/32 - E/ESCAP/536 (1986). *Note* also that ECA declared the period 1978-1988 the First, and 1991-2000 the Second Transport and Communications Decade in Africa.

[115]*See* Docs. IOMAC-1/A/SC/3/Rev. 1 (1987) and SC-3/6 (1988), and the UNDP Project, *supra* n. 104.

- an institutional element, i.e., creation of three regional facilities (nodes) in three IOMAC LDCs, including the National Marine Affairs and Aquatic Resources Information System (MAARIS) now being established in NARA at Sri Lanka, as well as establishment of linkages between these three nodes and other pertinent centers within the region;
- a training and educational element, i.e., training of personnel in the Indian Ocean states in handling, dissemination, and management of marine affairs data for the purposes of economic development, including preparation of a manual of guidelines for the inputs to the data base; and
- an outputs element, i.e., handling/use of information products. This component consists of: a Country Profiles Project (IO-CPP); a compilation of specialized products (Register of Experts, Bibliography and Source Directory/holding of data sets); a Bulletin of News on IOMAC (already issued) and possibly Journal of Indian Ocean Affairs; as well as multi-media productions (documentaries, news clips, etc.) to be linked with the existing networks such as Asiavision, Depthnews, Earthscan, etc.

At the third 1988 meeting, the IOMAC Standing Committee recognized the need for a comprehensive analysis of the information needs of the Indian Ocean states among the first priorities and noted with appreciation the measures undertaken towards establishment of IO-MAARIS. These activities are of essential importance, since in spite of the noticeable increase in oceanographic data now available due to satellite and remote sensing as well as other activities, the relevant data are non-available or non-accessible to most of the countries of the Indian Ocean region on account of lack of capabilities in harnessing this data for its development process. Moreover, information in question is at present dispersed in a variety of sources (national and international) which are not easily available due to the simple fact that such sources are located in different states and specialize in various sectors of marine affairs. The two systems that are presently available and that permit the worldwide diffusion of marine affairs information are the ASFIS of FAO/IOC and the IODE of IOC, both already referred to earlier in this study. However, as the IOMAC Standing Committee emphasized, substantial financial support and training is necessary for most of the Indian Ocean countries to enable them to establish and develop efficient centers at the national

level providing input to those two systems.[116] At the same time, the IO-MAARIS could make use of the computerized Law of the Sea Information System (LOSIS) of the United Nations OALOS, in particular its Country Marine Profile Data Base (MARPRO), as well as several subregional systems, such as SEAFIS of SEAFDEC, AIBA, the Technical Data System of NACA, or two systems now under preparation, the ASCOPE Data Bank (minerals) and the Regional Data Base (fisheries) of the IOFC's Gulfs Committee referred to earlier.

Consequently, the Third IOMAC Standing Committee recommended on short term to: survey the existing institutional capabilities and expertise, as well as the level of training necessary for setting up of IO-MAARIS, to be undertaken by a team of experts; and to organize, based on the result of such survey, a Workshop with participation of all Indian Ocean states which would establish a strategy for Marine Affairs Information Management and Data Exchange.

Apart from its indispensability for an effective marine affairs management referred to above, the establishment of IO-MAARIS under IOMAC's auspices is also particularly desirable in view of the fact that the regional information system projects are apparently a preferable form for channelling the necessary assistance in this field by foreign "donors".[117]

Technical assistance and training

As virtually all activities examined above require technical (foreign) support and training, the IOMAC Programme of Cooperation and Plan of Action attach particular attention to activities necessary in this field, including the establishment in the future of a Regional Centre for Marine Technology. In 1988 the IOMAC Programme of Advisory Services, Cooperation and Training (ACT) for Marine Affairs Management to developing Indian Ocean states was established with a view to cover assistance in the following fields: preparation of a national policy on marine affairs; improvement in national institutional arrangements for marine affairs management; identification of national needs in basic and specialized education and

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[116]The National Oceanographic Data Centers providing input to IODE exist in Australia, Egypt, India, and Pakistan, while national coordinators for IODE have been nominated by Iraq, Madagascar, Tanzania, and Thailand.

[117]*See supra* ns. 5, 42 and the main accompanying text.

training requirements in marine affairs; and identification and exploration of prospects for basic institutional support for integrated marine affairs management and preparation of strategies for support in the context of long-term national objectives in marine affairs development.[118]

Transfer of technology has, for the time being, been given a lower priority in IOMAC. Immediate activities as such transfer may emerge only at the stage of acquisition of basic marine exploration capabilities. The ATC training program covers a broad spectrum of interdisciplinary interactions and conflicts of ocean space use, as well as specific skill oriented training. Although it is primarily directed at those in the decision and policy making sectors of marine affairs, it is useful to those in the scientific and technological fields as well, and it also covers the IOMAC Fellowship Programme. The education and training programs of IOMAC in various priority fields aim at the building of necessary manpower capabilities in the regional states through which the trained personnel can further contribute to the national development of these states and the strengthening of integrated marine affairs management institutions. The two first Indian Ocean Marine Affairs Training Programmes in Tanzania (1987) and Malaysia (1988), organized by IOMAC in cooperation with the International Ocean Institute (IOI), and the second of them also with the Netherlands Institute for the Law of the Sea (NILOS), have provided over fifty participants from the coastal and land-locked states with a trans-sectoral and inter-disciplinary approach to ocean management in the region. However, as such annual trainings meet only part of the extensive demands of the region, the IOMAC Secretariat seeks for additional possibilities in this respect in cooperation with international organizations and donor countries concerned.

A core support for training and other activities of IOMAC is being provided through a IOMAC-United Nations-donor country collaboration programme which is funded primarily by the UNDP and

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[118] *See* Docs. IOMAC-1/A/SC/7, and SC/WP.1 (1987); as well as IOMAC-1/SC-3/1/Add. 2/Rev.1; SC-3/2; and SC-3/WP.1, by C.C. Lindsay, ICOD Consultant to IOMAC (1988). *Cf.* 2 BULLETIN OF NEWS ON IOMAC 27-29 (1988/1). *Cf.* also the essential role of training in Jayewardene's concept of seven stages in the implementation of integrated ocean management addressed in the main text under *supra* n. 50.

UNCTAD and which -- as the Third 1988 Standing Committee of IOMAC reconfirmed -- should be given the highest priority. The international organizations concerned, both from within and outside the UN system, donor countries, and IOMAC continue to work on a coordinated program in order to harmonize the necessary efforts and channel the assistance required in the most effective manner. To this end, the Second Standing Committee in 1987 decided to establish a Technical Cooperation Group (TCG) along the lines of Technical Advisory Groups operating under the CCOP/EA and CCOP/SOPAC. The TCG -- comprising states with advanced technological capabilities and meeting in conjunction with the Standing Committee -- is meant to widen the participation of advanced states in IOMAC activities and to provide an opportunity for achieving a balancing of mutual interests, i.e., acknowledgment of certain external interests within the region and securing support for developing Indian Ocean states through assistance from their more advanced counterparts.[119] This is insofar essential that at present international support for marine activities is available mainly on ad hoc and often fragmentary basis.[120] Therefore, the IOMAC Secretariat has sought the assistance of the OALOS -- which supported IOMAC from the early preparatory stage and is a central coordinating body of the UN marine affairs activities -- with respect to streamlining and harmonizing the delivery of UN system support for IOMAC and the Indian Ocean region generally. In particular, the OALOS could be expected to help to focus through IOMAC the assistance of concerned UN agencies and other bodies. Moreover since, as was already noted earlier in this study, bilateral aid agencies and non-governmental institutions concerned do not have a mechanism for coordination of their marine-related aid programs, IOMAC -- through consultations within the TCG -- could

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[119]*Note* that, as Alexander, *supra* n. 3, at 5-14, indicates, the process of such mutual trade-offs between developing and developed states within any regional organization may also involve non-marine-related fields, such as trade concessions, support for industry or agriculture, or the funding of students from the LDCs for training in medicine, engineering or law.

[120]*Cf.* remarks on bilateral programs made in the main text accompanying *supra* n. 41. On technical assistance programs of the UN marine affairs organizations, *see* references *supra* n. 64; and Miles, *supra* n. 3, at 402-406.

fulfill the useful role of harmonizing those activities in the context of an overall plan of assistance to Indian Ocean states.[121]

The Third Standing Committee of IOMAC in 1988, during which a first TCG consultation was held, requested the Secretary-General to continue to take necessary measures in this respect and recommended that the respective governments should consider arranging for appropriate representation and expert participation so that there is effective interaction between technologically advanced states and the countries of the Indian Ocean region. The Standing Committee approved also the Report of the Secretariat related to the IOMAC Work Programme until 1990, which includes the relevant actions with regard to technical assistance, monitoring, assessment and research, training in offshore prospecting for mineral resources, training in marine affairs management, as well as workshops on the law of the sea and marine policy.[122]

Concluding Observations

As follows from this study, the institutionalized cooperation of states through regional organizations provides potentially excellent means for the attainment by the developing countries of requisite self-reliance in marine affairs and, thereby, the capacity to use effectively the opportunities for economic development offered by the new legal regime of the 1982 Law of the Sea Convention. In this way, the implementation and application of the Convention through regional institutions can essentially contribute to the equitable North-South relationship which -- in view of the growing interdependence of states and indispensability of maintaining international peace -- is one of the central objectives of modern international relations and international law.

At the present stage of significant scientific and technological disparity between developing and developed states which inheres in the necessity of support by technologically advanced states and international organizations of marine affairs development on the part of the LDCs, regional organizations can in particular play an important role in activating and coordinating the initiatives of developing countries with respect to integrated ocean management and

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[121] *Cf. supra* n. 21 and the main accompanying text.

[122] *See* Doc. IOMAC-1/SC-3/3 (1988).

in assisting this process through adequate programs of action and raising the necessary foreign assistance (aid) funds for their implementation. Such essential role of the regional organizations is widely recognized and promoted by the United Nations organizations and bodies concerned, with the necessary structural changes towards decentralization on the one hand, and a greater measure of coordination (through the OALOS) on the other, supporting the effectiveness of these actions. The decentralization and strengthening of the regional subsidiary bodies and programs of the UN organizations enables them to play an active role in enhancing the economic and technical cooperation among developing countries. Parallel, and often in extension, to the UN activities, developing states themselves increasingly undertake initiatives to promote marine affairs cooperation through their existing or newly created organizations and bodies, with some regions already possessing an impressive record of achievement in this respect. However, in a global perspective, all these undertakings amount to a relatively early stage of the effective use of the ocean and its resources for economic development of the developing countries, and a substantial effort is still required on the part of both developing and developed states in seeking more innovative structures of cooperation than those we have available at present.

The present stage of institutional marine affairs cooperation in the developing state regions is characterized by several features of a basically transitory nature. First of all, a major part of cooperative actions occurs through the organizations of the United Nations system and through the multipurpose and economic organizations of the developing states. The activities within the UN system are meant to increasingly stimulate -- and this gradually takes place in regions with more advanced cooperative traditions -- functional marine affairs cooperation within the framework of the existing multipurpose and economic organizations on the one hand, and within the independent LDCs' organizations specialized in marine affairs on the other hand. This relates both to the LDCs' sectoral organizations, the number of which is growing, and to the trans-sectoral ones, of which IOMAC, SPF, SPC and CPPS are the only notable examples. The South Pacific Forum and Commission are so far exceptional that they are formally the multipurpose organizations which -- due to the middle-oceanic location of their regional members -- are basically ocean-oriented. The stronger support for the existing and the establishment of new intergovernmental consultative organizations at the trans-sectoral level in regions which still lack such organizations is one of the imperatives for the effective implementation of an integrated ocean management

and for elimination of wasteful duplication of effort and resources by many existing international, regional, and donor agencies in particular marine sectors in certain regions.

Furthermore, a substantial support which is now required for cooperative undertakings of the LDCs, both within the North-South and the South-South cooperation is -- with the progress achieved -- to be gradually diminished and substituted by the LDCs' own capacities. This, however, is a long term perspective if only because a majority of the developing states face at present the necessity of building rather than strengthening their marine affairs capabilities. This is partly reflected by the non- or scarce inclusion of marine affairs component in the present bilateral development programs of industrialized states which are usually responsive only to explicit requests on the part of their developing counterparts. At the same time, once marine affairs are established as a part of national economic development plans, substantial support is continuously necessary for the purpose of strengthening the marine affairs capabilities to the full extent required for the effective operation of such plans. The medium and long term perspective -- and not only the short term one which is presently most often applied -- seems, thus, to be the necessary condition of improving the requisite national capabilities.

Moreover, the present stage is perhaps the most difficult in that elaboration of what is called "mutually beneficial terms and conditions of cooperation," especially with regard to technical assistance and transfer of technology in marine-related and likewise all other fields, is still in an experimental phase. This relates to the expectations and demands of both (recipient) developing states and the (donor) industrialized countries which in marine-related fields have to deal with the highly sophisticated technologies and application of the management concepts that -- due to the novelty of the present ocean regime -- are not always fully tested even by the developed states. In addition, the differences between the industrialized states themselves on a policy with regard to development cooperation (aid) in general have deteriorated an already difficult situation. As one authority observed: "US-EC agreement on Third World policy could be the key to improving the overall North-South relationship,"[123] and it seems

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[123]R.H. Ginsberg, *The European Community and the United States of America*, in INSTITUTIONS AND POLICIES, *supra* n. 98, at 168, 183. *Cf.* R. Yakemtchouk, *L'Europe face aux Etats-Unis*, 39 STUDIA

that such agreement could also have a beneficial impact upon the marine affairs development cooperation.

In view of the complexity of issues involved in institutional marine affairs cooperation for development, there seems to be neither better remedy nor other alternative than further enhancement by states of their cooperation in implementing in good faith a fundamental obligation under the new ocean regime -- that is, an obligation to act for social and economic development. At the same time, it seems of basic importance that the initiatives for such enhanced action originate from the developing states which should, therefore, mobilize and use all capacities they already possess to this effect. This means the necessity of a greater than presently takes place determination of the developing states towards achievement of the common goals in the respective marine regions which once put in motion can -- as the experience of various LDCs' organizations shows -- successfully prevail over varying national interests and perceptions. Such inventive determination and concerted action of developing states through regional institutions seems to be an indispensable condition of the adequate response on the part of industrialized countries in terms of the necessary support and aid. The industrialized states on their part should mobilize and use all possible measures with a view to adjust their still by and large inadequate attitudes to development cooperation, including measures for activating their response to the regional initiatives of the developing countries that, like those of IOMAC and other organizations, prove readiness of the latter states to assume the necessary responsibilities. To paraphrase the conclusion of Judge Lachs: "All that is required is more political will."

Acknowledgment

The author wishes to express her gratitude to Ambassador Hiran W. Jayewardene, the Secretary-General of the Indian Ocean Marine Affairs Cooperation Conference (IOMAC) and the Head of the National Aquatic Resources Agency (NARA), Colombo, Sri Lanka, for providing her with documents of IOMAC and other valuable materials for the purpose of preparation of this contribution. The author is also indebted to Mr. Carl W. Dundas, Special Adviser (Legal) at the Technical Assistance Group of the Commonwealth Secretariat, and to Mr. Salvano Briceno, Coordinator at the UNEP Regional

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DIPLOMATICA 337-541 (1986); and Financial Times of 8 December 1988, at 1 and 5.

Coordinating Unit of the Caribbean Environment Programme, for their stimulating comments on the first draft of this contribution. This contribution is partly based on the article by this author on Institutional Marine Affairs Cooperation in Developing State Regions, published in *14 Marine Policy* 1990/5.

ANNEX

BASIC INSTITUTIONAL COVERAGE OF DEVELOPING STATE REGIONS OTHER THAN THE WIDER INDIAN OCEAN[1]

Southeast Atlantic (West Africa)

OAU; UN ECA and its Natural Resources Division; UN Regional Centre for Peace and Disarmament in Africa; AALCC

FAO - Fishery Committee for the Eastern Central Atlantic (CECAF) and its Subcommittee on Management of Resources within the Limits of National Jurisdiction; Regional Marketing, Information and Technical Advisory Services for Africa (INFOPECHE, Ivory Coast); Committee for Inland Fisheries in Africa (CIFA); Regional Office (Africa)
UNEP Action Plan (West and Central African Region); Environmental Training Network (Africa); Regional Office (Africa)
IOC - Regional Committee for the Central Eastern Atlantic (IOCEA) and its International Bathymetric Chart of CEA (IBCEA)
UNESCO Regional Office (Africa); IMO Regional Advisers (Africa)
WMO Regional Meteorological Telecommunication Network (Africa); Regional Office, Association and Training Centres (Africa); African Centre of Meteorological Applications for Development (ACMAD)
UNCTAD/GATT International Trade Center (Africa); UNIDO/ECA Joint Unit; ICAO Region (African-Indian Ocean); ILO Unit (Africa); ITU Region; UNDP Regional Division (Africa); WHO Regional Organization.

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[1]When only a single or two state(s) of the subregion are members of a given organization, these states are indicated in brackets.

Regional Fishery (Gulf of Guinea) Committee (1984)[2]; Subregional Commission on Fisheries (1985)[3]; International Commission for the Conservation of Atlantic Tunas (ICCAT); International Commission for the Southeast Atlantic Fisheries (ICSEAF - Angola); Committee on Seas of the African Ministerial Conference on the Environment (AMCEN); West and Central African Ministerial Conference on Maritime Transport (MINICONMAR); Port Management Association of West and Central Africa; IHO Regional Commission (East Atlantic); Senegal River Basin Commission

African DB (AfDB), West African DB (WADB), African D Fund (AfDF); Economic Community of West African States (ECOWAS) and its Higher Fishery Science Institute, Economic Community of West Africa (ECWA); Economic Community of Central African States (ECOCAS) and its Fisheries Development Technical Committee; Central African Customs and Economic Union (UDEAC); Coordination Authority of Northern Corridor Transit Transport Agreement (NCTTA)[4]; African Civil Aviation Commission; African Center of Administrative Training and Research for Development (Arab and West Africa); African Telecommunications Union (PATU); African Union for Post and Telecommunications (PANAFTEL); Afro-Asian Solidarity Conference; Commonwealth; EEC-ACP institutions (West African region)

NGO: African NGOs Environment Network (ANEN)

Southwest Atlantic

OAS and its Multinational Marine Sciences Project; UN ECLAC and its Natural Resouces and Environment Division, Latin American Center for Economic and Social Documentation (CLADES), as well as Subregional Offices in Argentina, Brazil and Uruguay

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[2]Members are Congo, Gabon, Equatorial Guinea, Sao Tome and Principe, Zaire (not Nigeria and Ghana).

[3]Members are Cape Verde, Gambia, Guinea-Bissau, Mauritania, and Senegal.

[4]Members are Kenya, Uganda, Burundi, Rwanda, Zaire.

FAO - Regional Fisheries Advisory Commission for the Southwest Atlantic (CARPAS); Regional Marketing, Information and Technical Advisory Services for Latin America (INFOPESCA, Panama); Commission for Inland Fisheries of Latin America (COPESCAL); Regional Office (Latin America and Caribbean)
FAO/IOC Regional Center for Central and South America (Mexico) of Aquatic Sciences and Fisheries Information System (ASFIS)
UNEP Action Plan (under preparation); Environmental Training Network (Latin America and Caribbean); Regional Office (Latin America and Caribbean)
UNESCO Region (Latin America and Caribbean); IMO Advisers (South America)
WMO Regional Meteorological Telecommunication Network; Regional Office (Americas); as well as Association and Training Centres (South America)
UNCTAD-GATT International Trade Center; UNIDO/ECLAC Joint Unit; ICAO Region (South America); ILO Unit (Latin America); ITU Region; UNDP Regional Division (Latin America); WHO Regional Organization (Americas)

International Whaling Commission (IWC); International Commission for the Conservation of Atlantic Tunas (ICCAT - Brazil, Uruguay); FAO Western Central Atlantic Fishery Commission (WECAFC - Brazil); Argentina/Uruguay Joint Technical Commission for the Maritime Front (CTMFM) and its Subcommittee on Living Resources; Intergovernmental Coordination Committee for La Plata River Basin; Latin American Shipowners' Association (ALAMAR); Amazonian Cooperation Council

OAS/IDB/ECLAC Tripartite Committee on Coordination; Latin American Economic System (SELA), Latin American Integration Association (LAIA, formerly Latin American Free Trade Association, LAFTA); Inter-American DB (IDB); Pan-American Health Organization (PAHO); Latin American Energy Organization (LAEO)

NGO: Mutual Assistance Agency for Latin American State Oil Companies

Caribbean (Western Central Atlantic)

OAS and its Multinational Marine Sciences Project; Caribbean Community (CARICOM, formerly Caribbean Free Trade Association, CARIFTA) and its Committee of Experts on a common fisheries

policy (1988); Organization of Eastern Caribbean States (OECS) and its Fisheries Unit; Organization of Central American States (ODECA); UN ECLAC and its Caribbean Development and Cooperation Committee (CDCC), Natural Resources and Environment Division, Latin American Center for Economic and Social Documentation (CLADES), as well as Subregional Offices in Mexico, Trinidad and Tobago and Colombia; UN Regional Centre for Peace, Disarmament and Development in Latin America

FAO - Western Central Atlantic Fishery Commission (WECAFC) and its subregional Committee for the Lesser Antilles; Regional Marketing, Information and Technical Advisory Services for Latin America (INFOPESCA, Panama); Commission for Inland Fisheries of Latin America (COPESCAL); Regional Office (Latin America and Caribbean)
FAO/IOC Regional Center for Central and South America (Mexico) of Aquatic Sciences and Fisheries Information System (ASFIS)
UNEP Action Plan (Wider Caribbean); Environmental Training Network (Latin America and Caribbean); Regional Office (Latin America and Caribbean)
IOC - Subcommission for the Caribbean and Adjacent Regions (IOCARIBE, formerly Cooperative Investigation of the Caribbean and Adjacent Region, CICAR) and its International Bathymetric Chart of the CA Region (IBCCA)
UNESCO Region (Latin America and Caribbean)
WMO Regional Meteorological Telecommunication Network; Hurricane Committee; Regional Office (Americas); as well as Association and Training Centres (North and Central America)
UNCTAD/GATT International Trade Center; UNIDO/ECLAC Joint Unit; ICAO Region (Caribbean); ILO Unit (Latin America); ITU Region; UNDP Regional Division (Latin America); WHO Regional Organization (Americas)

Latin American Organization for the Development of Fisheries (OLDEPESCA); International Whaling Commission (IWC); International Commission for the Conservation of Atlantic Tunas (ICCAT - Cuba, Venezuela); Inter-American Tropical Tuna Commission (IATTC - Nicaragua, Panama); International Commission for the Southwest Atlantic Fisheries (ICSEAF - Cuba); FAO Fishery Committee for the Eastern Central Atlantic (CECAF - Cuba); Eastern Pacific Tuna Organization (to be established); Joint (Socialist States) Fishery Commission (JFC - Cuba); Caribbean Multinational Shipping Company (Naviera Multinacional del Caribe S.A. -NAMUCAR); the

West Indies Shipping Corporation (WISCO), and Leeward Islands Air Transport Ltd.; Latin America Shipowners' Association (ALAMAR); Central America Shipowners Association (ACAMAR); Commission of Maritime Transport in Central America (COCATRAM); Regional Port Authorities Association for Central America (COCAAP)

OAS/IDB/ECLAC Tripartite Committee on Coordination; Latin American Economic System (SELA), Latin American Integration Association (LAIA, formerly LAFTA), Andean Pact institutions (Colombia, Venezuela); Inter-American DB (IDB), Central American B (CAB), Caribbean DB (CDB), Caribbean Investment Corporation, Andean Development Corporation; Caribbean Food Corporation; Pan-American Health Organization; Latin American Energy Organization (LAEO); Organization of Petroleum Exporting Countries (OPEC - Venezuela); Council for Mutual Economic Aid (CMEA - Cuba); Commonwealth; EEC-ACP institutions (Caribbean) and EEC-Andean Pact Agreement (1983)

NGOs: Caribbean Conservation Association (CCA); Mutual Assistance Agency for Latin American State Oil Companies; Eastern Caribbean Natural Area Management Programme (ECNAMP); Council on Ocean Law (COL, Washington, D.C.)

Southeast Pacific

OAS and its Multinational Marine Sciences Project; South Pacific Permanent Commission (CPPS); UN ECLAC and its Natural Resources and Environment Division, as well as Latin American Center for Economic and Social Documentation (CLADES); UN Regional Centre for Peace, Disarmament and Development in Latin America

UNEP Action Plan; Environmental Training Network (Latin America and Caribbean); Regional Office (Latin America and Caribbean)
FAO - Regional Marketing, Information and Technical Advisory Services for Latin America (INFOPESCA, Panama); Regional Center for Central and South America (Mexico) of FAO/IOC Aquatic Sciences and Fisheries Information System (ASFIS); Commission on Inland Fisheries of Latin America (COPESCAL); FAO Regional Office (Latin America and Caribbean)
IOC/WMO/CPPS Working Group on the Investigation of El Nino; IOC ocean mapping in the Atlantic and Pacific Oceans (GAPA); and International Tsunami Warning System in the Pacific (ITSU)

UNESCO Region (Latin America and Caribbean); IMO Advisers (South America)
WMO Tropical Cyclone Committee for the South Pacific, Study on the Tropical Ocean and Global Atmosphere (TOGA); Regional Meteorological Telecommunication Network; Regional Office (Americas); as well as Association and Training Centres (South America)
UNCTAD/GATT International Trade Center; UNIDO/ECLAC Joint Unit; ICAO Region (South America); ILO Unit (Latin America); ITU Region; UNDP Regional Division (Latin America); WHO Regional Organization (Americas)

International Whaling Commission (IWC - Chile, Peru); Latin American Organization for the Development of Fisheries (OLDEPESCA - Peru); FAO Western Central Atlantic Fishery Commission (WECAFC - Colombia); Eastern Pacific Tuna Organization (to be established); Latin America Shipowners' Association (ALAMAR); Amazonian Cooperation Council

OAS/IDB/ECLAC Tripartite Committee on Coordination; Latin American Economic System (SELA), Latin American Integration Association (LAIA, formerly LAFTA), Andean Pact institutions and EEC-Andean Pact Agreement (1983); Inter-American DB (IDB), Andean Development Corporation; Pan-American Health Organization; Latin American Energy Organization (LAEO); Organization of Petroleum Exporting Countries (OPEC - Ecuador)

NGOs: Pacific Science Association (PSA); Mutual Assistance Agency for Latin American State Oil Companies

Southwest and Central Pacific

South Pacific Forum (SPF) and its South Pacific Bureau for Economic Cooperation (SPEC), as well as Fisheries Agency (SPFFA) and its Regional Register of Foreign Fishing Vessels; South Pacific Commission (SPC) and its South Pacific Regional Environment Programme (SPREP); UN ESCAP and its Typhoon, Natural Resources and Shipping Committees, as well as Marine Resources Programme

UNEP Action Plan (South Pacific); Environmental Training Network (Asia and the Pacific); Regional Office (Asia and the Pacific)
IOC Regional Committee for the Western Pacific (WESTPAC); mapping of the Atlantic and Pacific Oceans (GAPA); International

Tsunami Warning System in the Pacific (ITSU); Joint IOC-CCOP/SOPAC Working Group on South Pacific Tectonics and Resources (STAR)
UNESCO - Integrated Management of Coastal Systems (COMAR); Region (Asia and Oceania)
FAO - Indo-Pacific Fishery Commission (IPFC - Australia); Regional Office (Asia and the Pacific)
WMO/ESCAP Typhoon Committee and Panel on Tropical Cyclones; WMO Tropical Cyclone Committee for the South Pacific; Study of the Tropical Ocean and Global Atmosphere (TOGA); Regional Meteorological Telecommunication Network; Regional Office (Asia and the Southwest Pacific); as well as Association and Training Centre (Southwest Pacific)
UNIDO/ESCAP Joint Unit; WHO Regional Organization (Western Pacific); ICAO Region (Pacific); ITU Region

Committee for Coordination of Joint Prospecting for Mineral Resources in South Pacific Offshore Areas (CCOP/SOPAC); Regional Marketing, Information and Technical Advisory Services for Asia and the Pacific (INFOFISH, Malaysia); International Whaling Commission (IWC); Regional Shipping Council and its shipping line, Pacific Forum Line; Association of South Pacific Environmental Institutions (ASPEI); IHO Regional Commission (Southwest Pacific, to be established); EEC-ACP institutions, and Pacific Regional Marine Resources Programme (1989-1993)

Asian DB (AsDB); Organization for Economic Cooperation and Development (OECD - Australia); Asia-Pacific Telecommunity; International Telecommunications Satellite Organization (INTELSAT); Tourism Council of the South Pacific (TCSP); Pacific Islands Association of Chambers of Commerce (PIACC)

Commonwealth; Colombo Plan institutions

NGOs: Coral Reef Committees of Pacific Science Association (PSA) and International Association for Biological Oceanography (IABO); International Union for Conservation of Nature (IUCN); Centre for Asian Pacific Studies (CAPS, Hong Kong); Association of South Pacific Environmental Institutions (ASPEI)

Christopher Pinto: Thank you, Dr. Kwiatkowska, for a very interesting introduction to a very comprehensive paper which you have placed before us. I would now like to call on our third panelist,

Lee Kimball, to present her paper. She is the Executive Director of the Council on Ocean Law, which is based in Washington, D.C., and is concurrently responsible for public policy and analysis of Antarctic issues for the International Institute for Environment and Development. She is closely associated with the international programs for conservation and is a member of a select working group established jointly by the Scientific Committee on Antarctic Research and the International Union for the Conservation of Nature to draft a long-term conservation plan for the Antarctic.

THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN THE IMPLEMENTATION OF THE 1982 LOS CONVENTION

Lee A. Kimball
Executive Director
Council on Ocean Law

Introduction

My co-panelists Tullio Treves and Barbara Kwiatkowska have each taken a different approach to the topic of implementing the 1982 Law of the Sea Convention, Tullio from the point of view of fleshing out the law as called for in the Convention and the role of international organizations in that process, and Barbara from the point of view of deriving benefits from the 1982 Convention, exploring the role of regional organizations in particular in meeting the needs of the developing nations.

My task is to examine the role of non-governmental organizations (NGOs). The lens I will use is what I have defined as the special advantages of NGOs *vis-a-vis* intergovernmental organizations, and in some cases governments, particularly as NGOs have evolved during the 1980s. My premise is that the changing roles of NGOs place them in a position to be able to make significant contributions to the implementation of the LOS Convention. Most important in this regard is the NGO potential to integrate the further development of ocean law with ocean management techniques calculated to provide sustained benefit to coastal states.

Two years ago I was asked to prepare for the International Ocean Institute and Pacem in Maribus XV a basic discussion document on the implications of the new law of the sea for international institutions, comprising international, regional, and NGOs[1]. That

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[1] Lee A. Kimball, The New Law of the Sea and International Institutions, Project III, "Introduction" and "Non-Governmental Organizations", Pacem in Maribus XV, Malta, September 1987, hereafter cited as Pacem in Maribus. See also Lee Kimball, "The Role of Non-Governmental Organizations in Antarctic Affairs", *The Antarctic Legal Regime*, eds. Christopher C. Joyner and Sudhir K. Chopra (The Netherlands: Martinus Nijhoff Publishers, 1988), pp.

paper noted that the nature of coastal state requirements for assistance would be two-fold: on the one hand the acquisition of scientific and technical skills in order to manage and conserve offshore areas, and on the other the development of legal, institutional, and administrative mechanisms to give effect to the new ocean law regime. It stressed that:

> It is a fundamental proposition of this paper that the new ocean law regime calls for law and policy activities to be better integrated with the needs, concerns, and experience of those who must implement them at the practical, management level, both in initial formulation and as law and policy are reviewed and revised.[2]

One of the compelling aspects of the law of the sea today is the need to integrate the development of law and the mechanisms to implement it. Most of the nations of the world remain unable to assume many of their responsibilities under the LOS Convention, let alone their rights, without (1) the scientific data and analytical skills required to assess and manage marine resources and the impacts of ocean uses, (2) the institutional mechanisms to plan and oversee marine activities, and (3) the financial resources to undertake management and enforcement responsibilities.

Unless we devote more attention to integrating law and its implementation, we may have a lot of 'paper' laws on the books that accomplish little. Even worse, we may have a reaction against the role of international and regional agreements insofar as they are seen to intrude on national prerogatives without producing many tangible benefits.

Dr. Kwiatkowska's reference to the fact that international law formerly governed relationships between states with comparable industrial wealth is very relevant in this context. Her analysis points out that without international development cooperation, the developing states may endanger international peace and security not by means of active aggression but by that of passive provocation, presenting tempting arenas for rivalry and intervention by outside powers. I would add another danger: that if these states are unable to honor Convention obligations to protect the marine environment and

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33-63, hereafter cited as "Antarctic Affairs".

[2] Kimball, Pacem in Maribus, p. 9.

conserve marine species except in the breach, they pose a threat to the ocean environment worldwide.

I will come back to this point about the 'intrusiveness' of international law at the end of my presentation, because its implications reach well beyond ocean law to touch virtually every aspect of what is today referred to as 'global change.' The need to arrive at "mutually beneficial terms and conditions of cooperation," as Dr. Kwiatkowska states, is critical if we are to respond to threats to marine and other global environments.

NGOs: Definitions and Roles

But I stray from my assigned topic of exploring the role of NGOs in implementing the LOS Convention. First, I have used the following parameters (from the 1987 IOI analysis):

1. *Defined broadly, NGOs encompass the following private sector actors:*

   * Public interest/private voluntary organizations
   * Professional associations
   * Academic or research institutions
   * Industry or trade associations and private companies
   * Private consulting organizations
   * Private grants-giving foundations.

It should be borne in mind that insofar as NGOs are granted consultative or associated status with intergovernmental organizations, the latter two categories of actors for the most part do not qualify. Moreover, the six categories do not adequately reflect the complexity of private actors in international marine affairs, who at one time may work in the academic community, be members of professional organizations, advise public interest/PVOs, trade and professional organizations, private grants-giving foundations, or governments and international organizations, and be employed by a private consulting firm.[3]

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[3] For further discussion of these categories, see Kimball, Pacem in Maribus, pp. 2-6.

2. *NGO channels of access*

With respect to law and policy, NGOs may be organized to pursue their objectives at the national level and in multilateral settings such as the United Nations, the European Community, or the UNEP regional seas programs.[4] Depending on the structure of a given national government, they may work with government agencies, parliamentary bodies, and through the courts. They often form coalitions with other private sector constituencies to effect their objectives and may make substantial use of the media.

3. *NGO Functions*: (These functions are common to international and regional organizations, except for the "lobbying" activities in number seven.)[5]

1) Publication of general public education materials.
2) Preparation of detailed reports of a scientific or technical nature related to ocean management, or studies and analyses related to ocean law and policy.
3) Drafting legal agreements and codes or guidelines in marine law and policy.
4) Sponsoring education and training sessions or performing technical assistance services.
5) Funding ocean management and training/technical assistance efforts or studies of ocean law and policy.
6) Sponsoring consensus-building efforts to support or promote the development of bilateral, regional, or international agreements.
7) At the national level, NGOs seek to influence the formulation and implementation of national law and policy; the formulation of national positions for international legal/policy meetings, including as delegation members to those meetings; funding for

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[4] NGOs may utilize the official channel of consultative or associated status provided by many different international and regional institutions to gain access to meetings; they may serve as members or advisers on national delegations; or they may operate unofficially, outside the meetings, talking with delegates and providing them with position papers. See Kimball, Pacem in Maribus and "Antarctic Affairs".

[5] From Kimball, Pacem in Maribus, p. 6.

international organizations and programs; ratification of international agreements through educational and lobbying activities; and the implementation of international agreements through the drafting and approval of national implementing legislation, studies and analyses, and, in some cases, legal suits. At the international level, they may seek to influence delegations at meetings at which decisions are taken, and they may assist regional and international intergovernmental organizations in the preparation of discussion papers, reports, and draft agreements.

NGO Special Advantages

In addressing the special advantages of NGOs, I will be referring primarily to the public interest/advocacy NGOs, which I know best. To the extent that the other NGOs spawn individual actors who move easily from one hat to another, my comments apply to them as well, and in particular to a number of individuals from the academic and research institutions.

1. *Information Flow: NGOs have two advantages in this area -- their ability to collect and disseminate information quickly among a wide variety of sources, and their freedom to use it.*

The fluidity of individual NGOs noted above is also one of their unique strengths. Because of their varied contacts with intergovernmental organizations, governments, among private sector actors, and with the media, NGOs are often in the best position to keep on top of and make use of relevant information in their fields emanating from the full range of involved actors. Contact with a broad range of actors also contributes to a balanced and full understanding of events. Moreover, since their communications tend to be of a more informal nature than those between governments and between governments and international organizations, NGOs are likely to receive candid comments that flesh out understanding of a given situation or event.

The public interest NGOs also benefit from a practice substantially built up during the 1970s: networking and coalition-building; they are used to sharing information quickly to further their objectives. This is less true among other NGOs, where certain advantages may result from hoarding information. Public interest NGOs with affiliates in different countries may gain from them additional information and insights into events in these countries. NGO networks are also used to disseminate quickly and informally new ideas and information to key audiences around the world.

In practice, of course, the effectiveness of broad NGO access is only as good as the individuals involved. It is also influenced by the 'independence factor' described below. With respect to policy and law-making forums, it is affected in addition by the degree of NGO access to these forums, both at the national and at the international levels. As noted above, the rules governing NGO participation in intergovernmental institutions may restrict access. National governments vary in the degree to which they accord NGOs access to the policy process. Nevertheless, it has been demonstrated that access to policy-making forums vastly improves the contributions made by NGOs, because they are better able to tailor their recommendations to pending initiatives and the policy views expressed.[6]

In using information, NGOs have a special advantage with respect to raising public awareness. NGOs capabilities to mount campaigns through the media to focus public attention on a particular issue cannot be matched by the more cautious intergovernmental organizations. The direct action tactics of Greenpeace in this regard are renowned. Nor do NGOs generally have to conform to any pre-ordained rules in dealing with the media.

At the technical level, some of the large NGOs are better equipped with advanced computer and global electronic communications systems than any of the intergovernmental organizations and most governments. They have also been on the cutting edge of the development and application of computer modeling techniques and geographic information systems.[7]

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[6] Kimball, "Antarctic Affairs", p. 53. A recent UNEP working group report, in the context of a discussion of the treatment of confidentiality of information in the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, notes: "The constructive role that had been played by NGOs in the area of transboundary movement of hazardous wastes when they had proper access to information was emphasized." UNEP/WG.180/3, 30 October 1987, p. 15.

[7] James Dobbins Associates, Inc., of Alexandria, Virginia has applied these techniques in relation to coastal zone management and development. It worked with IUCN to develop a coastal zone management plan for Oman and has engaged in similar activities in Saudi Arabia. See Kimball, Pacem in Maribus, p. 13, footnote no. 19. See also presentation by Eric Carlson, James Dobbins Associates, Inc., to the 22nd Annual Law of the Sea Institute, University of Rhode

2. Concept Development: NGOs have been at the forefront of concept development in marine affairs for the last two decades.

During the 1970s there coalesced around UNCLOS III a network of 'ocean diplomats,' experts in marine affairs, who had a major influence on the development of concepts in ocean law and policy and oceans management. These included the annual Law of the Sea Institute meetings and the Pacem in Maribus meetings, as well as the large number of academic and technical forums at which ocean law and policy and ocean management topics were then considered and debated. Moreover, the network they formed was often able to effectively bypass formal channels of communication to get things done. As noted in an earlier paper:

> The think tank role of the universities combines with the advocates for change among the public interest NGOs to catalyze changes in national law and policy. Scientific and conservation NGO communities played a key role in debunking the "double standard" approach to protection and preservation of the marine environment, where the developing nations felt that environmental protection might be imposed on them with hindsight by those responsible for the vast share of global pollution, impeding their development goals. They have also been in the forefront of the trends in marine management ...: ecosystem management, marine regionalism, and integrated coastal/ocean management.[8]

Unlike government officials, the academic and research NGOs and some public interest NGOs may devote more time to research and specialize in particular subject areas. Through these specializations and the contacts they maintain with experts in their fields worldwide, they are able to build up a comprehensive picture of a particular field and to follow new developments in it. Government officials are more often compelled to confront immediate situations and problems, and in many countries they only remain in the same position for relatively short periods.

Island, June 1988.

[8] Kimball, Pacem in Maribus, p. 6.

The nature of NGOs is to pursue comprehensive, "ideal" objectives over the longer term,[9] which are aimed at the large public good, such as peace, social justice, and environmental protection and species conservation. Despite whatever short-term compromises they agree to in the context of specific policy agreements, they can persist in single-minded pursuit of the ultimate goal. For government officials, the nature of the quest is different: they must balance competing national interests.

3. *Agents of Change: NGO Credibility and NGO Activism*

Vis-a-vis intergovernmental organizations, NGOs have more freedom to 'weight' the information they collect from a variety of sources. That is, they can make judgments about the value and effectiveness of particular institutions and practices where intergovernmental organizations must maintain a more neutral posture. If an NGO can establish a reputation for accuracy and insightful commentary, this lends credibility to its reports and analyses.

A second aspect of NGO credibility is the 'independence' factor. For the public interest/PVOs and a number of private individuals working under a variety of hats, the fact that the objectives they focus on are aimed at the general public good gives them a standing devoid of 'national' or 'private' interest. To the extent that an NGO organization or individual is widely perceived as independent of national or private interests, this grants the NGO in question a strong advantage in pursuing its objectives. Private grants-giving foundations facilitate this independence by providing an 'untainted' source of support for a variety of NGO activities.

In what I have referred to as the 'catalyst' function elsewhere,[10] and drawing on their independent status, NGOs may be able to promote or facilitate agreement on either the formulation or implementation of ocean laws; that is, they can act as a kind of 'honest broker' to mediate compromises. Such meetings may also generate new ideas by bringing together individuals with varying specializations and

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[9] J. Barnes, "Non-governmental Organizations: Increasing the global perspective", *Marine Policy*, Vol. 8, No. 2, April 1984, p. 179.

[10] Kimball, Pacem in Maribus, p. 10, and "Antarctic Affairs", p. 50.

backgrounds.[11] This catalyst role is distinguished from the activist role below, in that it contributes not to a particular substantive outcome but rather to the process of reaching agreement or compromise *per se*. The wide range of NGO contacts contributes to this ability to facilitate agreement.

NGOs can act immediately on the information they receive and on new concepts and tools as they emerge. They can function as advocates in the strongest sense of the word, putting pressure on governments and intergovernmental organizations, as noted in point (7) above, to recast their policies or modify their practices. In this role they are truly unique, since intergovernmental organizations cannot act independently in this context but must serve the collective will of states members. NGOs with affiliates in different countries can amplify their effect by mounting coordinated lobbying campaigns in several different nations on the same issue. While national governments alone can actually make policy decisions and give effect to change, balancing national objectives as noted above, NGOs can operate as forcing factors to expedite, or increase the magnitude of, change.

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[11] In referring to the role of NGOs in his opening statement to the signing session of the Third UN Conference on the Law of the Sea, Conference President T.T.B. Koh stated: "they provided the Conference with three valuable services. They brought independent experts to meet with delegations, thus enabling us to have an independent source of information on technical issues. They assisted representatives from developing countries to narrow the technical gap between them and their counterparts from developed countries. They also provided us with opportunities to meet, away from the Conference, in a more relaxed atmosphere, to discuss some of the most difficult issues confronted by the Conference." UN Press Release SEA/MB/1/Rev.1, 6 December 1982.

NGOs in the 1980s

Law and Policy

1. Increasing scientific and technical contributions by NGOs to the development of law and policy.

With respect to numbers, NGO involvement in the areas of environmental protection and species conservation is growing significantly, not least as a result of the internationalization of the large, western environmental NGOs and also as a result of the growth in 'southern' NGOs, discussed below. One striking reduction is the number of NGOs participating in the Preparatory Commission for the 1982 Convention, due to its narrow focus on seabed mining matters. Professor Treves has pointed out that the International Maritime Organization (IMO) has the most penetrating role in the implementation of the LOS Convention. To this I would add UNEP's Oceans and Coastal Affairs Program for its role in elaborating generally accepted rules and standards in relation to land-based, offshore, and atmospheric pollution of the marine environment as well as protocols on designation of marine protected areas. Both IMO and UNEP have witnessed an increase in the NGOs taking part in their meetings. In the case of IMO, NGO growth has occurred both among the public interest/advocacy environmental NGOs and in the representation of shipping interests. In the United States, more environmental organizations are expressing interest in working on the negotiation of fishery agreements.[12]

The major change in NGO activity, however, has been in the nature of their contributions. Both IMO and UNEP are also relying increasingly on them to perform specific, technical functions. In the IMO, shipping NGOs are playing a larger role in drafting technical guidelines and operating manuals on specialized subjects, such as good management practices.[13] Under the IMO's Safety of Life at Sea

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[12] Personal communication from US organization.

[13] These include the International Chamber of Shipping, the International Shipping Federation, the Oil Companies International Marine Forum, the Society of International Gas Tanker and Terminal Operators, the International Association of Independent Tanker Owners, and the International Tanker Owners' Pollution Federation, all of which have consultative status with IMO. See IMO News, No. 3 (1988), p. 9.

Convention (SOLAS) and the Convention for the Prevention of Pollution from Ships (MARPOL), the American Bureau of Shipping has been accepted by several governments as the responsible body to certify specified technical qualifications.[14] Friends of the Earth International has been requested by the IMO to draft a manual on particularly sensitive (sea) areas.[15] Similarly, in UNEP, NGOs are more and more called upon to provide drafts guidelines, legal agreements, and technical studies.[16]

In another intergovernmental forum, at the initiative of UNCTAD, a Maritime Fraud Prevention Exchange was to be established in July 1988 as a focal point for information relevant to combatting maritime fraud. It is founded by the Baltic and International Maritime Council (BIMCO), the International Chamber of Commerce's International Maritime Bureau, and Lloyds Maritime Information Services.[17]

2. *Increasing Legal Activism among 'Southern' NGOs*

In the same way that since the 1970s northern NGO environmental advocates have taken governments to court to force compliance with environmental laws and regulations, there are increasing instances of 'southern' NGOs doing the same.[18] They are also becoming more

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[14] See Kimball, Pacem in Maribus, p. 21, which notes in addition that it has been suggested that NGOs could play a role in certifying the expert arbitrators required to be designated by states pursuant to Annex VIII of the 1982 LOS Convention.

[15] See Oceans Policy News, Council on Ocean Law, September 1988, p. 3.

[16] The IUCN's International Council on Environmental Law (ICEL) has played a substantial role in evolving 'soft' law and draft agreements in UNEP.

[17] Dr. Awni Behnam, "New Developments in Marine Science and Technology: Economic, Legal and Political Aspects of Change", 22nd Annual Conference of the Law of the Sea Institute, University of Rhode Island, June 12-16, 1988, pp. 25-26.

[18] For example, an environmental organization in Chile recently forced a change on environmental grounds in a major development project by relying on the new Constitution of Chile. Conversation with

active in effecting changes in government policies, particularly the incorporation of principles of conservation and 'sustainability' in national development policies and plans.[19] In the marine area, 'southern' NGOs are also playing a role. Fundacion Natura in Ecuador had a lot to do with the establishment of the Galapagos Marine Resource Reserve there in 1986.[20] The Southeast Asian Project on Ocean Law, Policy and Management (SEAPOL) also appears to be active in the formulation of marine law and policy. This is a trend which requires further research.

Ocean Management

During the 1970s and early 1980s, as offshore marine activities were intensifying, academic and research institutions as well as private consultants were becoming more involved in the conceptualization and implementation of ocean management strategies.[21] Public interest/

Rafael Asenjo, Chilean Association of Environmental Law, April 10, 1989.

[19] See World Resources Institute, Annual Report 1989, p. 19.

[20] In a discussion of the establishment and implementation of the Galapagos Marine Resources Reserve, decreed in 1986 by Ecuador, one of its prime movers noted that his efforts would not have been possible if it had not been for the active support of Fundacion Natura in Ecuador, and that NGOs in Ecuador will have to play a very active role to overcome legal obstacles posed by the Ecuadorian legal structure to its implementation. See Roque Sevilla, "A Promise to the Sea, and the Politics of the Decree", *Oceanus*, Vol. 30, No. 2 (summer 1987), p. 8.

[21] Several of the UN specialized agencies maintain registers of consultants and contract with them to undertake specific assignments of an advisory or training nature (FAO, IOC, UNDP). Similarly, public interest NGOs maintain and operate lists of consultants. The International Union for the Conservation of Nature and Natural Resources (IUCN) runs a computerized personnel bank of consultants and advisers in environmental planning and management, which is drawn on by NGOs, national governments, and international institutions. The World Resources Institute's Center for International

advocacy NGOs are a relative newcomer in this area, but they are more and more becoming involved in development activities.[22] This is taking place both at the level of influencing the policies of multilateral and national development agencies, and at the grassroots level in the actual planning and implementation of specific development programs. Finally, NGOs are more and more becoming a source of funding for resources management/conservation activities, both directly and indirectly.

1. *Increasing involvement by 'northern' public interest NGOs in development programs in the South*

This is a direct outgrowth of changing patterns in development assistance funding, both on the part of national and multilateral assistance agencies and on the part of private, grants-giving foundations, such as the Ford and Rockefeller Foundations. For one thing, government aid agencies have recognized the value of NGOs in actually implementing various kinds of training and assistance

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Development and Environment (CIDE, formerly the International Institute for Environment and Development-North America [IIED-NA]) and the World Wildlife Fund operate similar services of varying degrees of formality. See also Kimball, Pacem in Maribus, p. 12, and in particular footnote no. 18.

[22] The IUCN only established a marine program in 1985. See "Coastal/Ocean Management Oportunities and Trends: A Role for Guidelines in Multiple-Use Decision Making", A report prepared for the World Wildlife Fund-US by the Council on Ocean Law, with assistance form Nora L. Berwick, Conservation Systems, March 5, 1986, Annex III, p.7. Dr. Keckes of UNEP's Oceans and Coastal Affairs Program notes that IUCN has been "intimately linked with UNEP in the development of all [regional seas] actions plans." See IUCN Bulletin, Vol. 16 (7-9), July/September 1985, and Kimball, Pacem in Maribus, p. 14. IUCN has entered into a Memorandum of Understanding with the South, Pacific Commission to cooperate in coastal zone management and the development of a South Pacific system of protected areas. It is also helping to develop a system of protected areas in the South Asian Seas. See IUCN Bulletins, vol. 16 (7-9), July/September 1985, and Vol. 18 (4-6), April/June 1987. Cited in Kimball, Pacem in Maribus, p. 13, footnote no. 19.

programs and are funding them accordingly, as in some cases are the multilateral development banks and the private, grants-giving foundations. These funds go to 'northern' NGOs, both to directly oversee development projects and for them to assist indigenous 'southern' NGOs in developing their own capabilities. They also go directly to 'southern' NGOs to carry out development-related projects. In addition, some of the large membership NGOs in the North are funding development/conservation projects directly. The World Wildlife Fund, on the basis of funding obtained from its membership, supports conservation projects in a number of developing nations. An emerging trend in this area is that development assistance agencies are awarding grants to NGOs contingent on their obtaining their own matching funding.[23] Debt-for-nature swaps sponsored by northern NGOs are also providing new, if sometimes controversial, vehicles to fund sustainable development and to enhance conservation capabilities in the South.[24] The recently-announced Ecuadorian swap includes funds to help plan for the implementation of the Galapagos Marine Resources Reserve.[25]

2. *The growth of indigenous 'southern' NGOs and the increasing development of their skills.*

Southern NGOs are more and more involved in grassroots development programs. They can draw on direct knowledge of local conditions and their ability to communicate with local communities to

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[23] Interview with WRI/CIDE NGO project staff Laurie Greenberg, June 1, 1989. Among the US public interest NGOs, the four primary organizations providing grassroots assistance to conservation projects in the developing nations are Conservation International, The Nature Conservancy, the World Wildlife Fund/Conservation Foundation, and the World Resources Institute.

[24] Diana Page, "Debt-for-Nature Swaps: Fad or Magic Formula?", *Ambio*, Vol. 17, No. 3, 1988, pp. 243-44. Alvaro Umana, "Costa Rica's Debt-for-Nature Swaps Come of Age", *The Wall Street Journal*, May 26, 1989.

[25] "U.S. Conservation Groups and Banks Collaborate on Mammoth $9 Million Ecuadorian Debt-for-Nature Swap", The Nature Conservancy Press Release, April 5, 1989, and conversation with Diana Page, WRI staff, June 5, 1989.

plan and implement development-related programs and to mobilize local participation and resources to carry them out. They also have the flexibility to test and perfect innovative approaches through small, decentralized field activities. Moreover, as indigenous organizations they are able to emphasize long-term efforts and continuity so that local communities actually achieve a level of self-sufficiency.[26] In 1984 the FAO World Fisheries Conference report drew attention to the role that small fishermen's cooperatives and other NGOs could play in planning and implementing the development and management of small-scale fisheries.[27] In the establishment of the Galapagos Marine Resources Reserve in 1986, it was noted that:

> The work of such NGOs is above political and circumstantial pressures.... The presence of such organizations in the Third World is becoming ever more prominent; they have developed great skills in promoting change and many times have proven to be more efficient, effective, and flexible in dealing with problems than governments have. The main reason for this is that the men and women who create, sponsor, and work in NGOs are highly motivated and believe in their work. The protection of the seas and the conservation of the biosphere will be possible in the long run only through reliance on local communities and on these type of organizations."[28]

3. *New Partnerships: Industry/NGO*

Drawing on the NGO credibility factor, some industries have sought to collaborate with public interest NGOs in devising novel ways to

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[26] WRI project plans and discussions with WRI staff, 1989. WRI has developed programs and analyses to foster the role of indigenous NGOs in rural development and their collaboration with national governments and development assistance agencies.

[27] See Kimball, Pacem in Maribus, p. 14, which refers to the report of that meeting and notes in addition the report of a follow-up FAO meeting with NGOs in 1986 on collaboration in artisanal fisheries and aquaculture development.

[28] Roque Sevilla, President of the Fundacion Natura in Ecuador and member of the World Wildlife Federation International Council, *Oceanus*, *op.cit.*, p. 8.

contribute to environment/conservation objectives. In a unique test case, a Connecticut company will spend $2 million to plant 52 million trees in Guatemala to offset the carbon dioxide emissions of one of its coal-fired plants, which contributes to the greenhouse effect. The company worked with the World Resources Institute in Washington, DC to develop the program, which links alleviation of the greenhouse effect with the need to save tropical forests. CARE is involved in helping 40,000 smallholder farmers in Guatemala to plant the trees over a ten-year period.[29] Individual NGOs have explored collaborating with the tourism industry to promote conservation and environmental protection as well, for example in the Hol Chan Marine Reserve in Belize.[30]

An Integrated Approach

Since UNCLOS III ended, the impetus for the meetings that brought together a wide range of oceans specialists -- the 'oceans diplomats' referred to above -- has been withdrawn. The Preparatory Commission for the LOS Convention is too narrowly focused, and to the extent private groups sponsor meetings on a broad range of ocean law and policy subjects, they have not been very successful in reaching the generation of specialists that is succeeding those involved in UNCLOS III. Even less so the new generation of developing nation leaders in marine affairs.

Within the ocean management communities, the annual Coastal Zone Management (CZM) conferences continue to bring together specialists in this field, as do specialized conferences on marine parks and protected areas, artificial fisheries habitats and mangrove protection, the Offshore Technology Conference, and the Underwater Mining Institute. But these meetings have not drawn many specialists or government officials from developing nations. As a result, developing

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[29] "Power Company to Fund Reforestation to Offset Carbon Dioxide Emissions, Slow Greenhouse Effect", World Resources Institute Press Release, and Larry Tye, "Utility Planting Trees to Absorb CO2 its Plant Spews", *The Boston Globe*, April 10, 1989.

[30] NGOs were the National Audubon Society, the N.Y. Zoological Society, and the Center for Marine Conservation, who collaborated with a local association representing the tourist industry. Personal communicatinos.

nation representatives are minimally exposed to the spread of new ideas and information, let alone direct contact with specialists from other areas of the world. The problem, as always, is largely funding. But the need to concentrate first on more general education and training programs, as has been attempted by the International Centre for Ocean Development (ICOD) and the International Ocean Institute (IOI), is another important element in broadening the base of those who attend these meetings. The regional intergovernmental meetings covered by Dr. Kwiatkowska can also play an important role in this regard.

A different type of problem today is that individuals working in ocean law and policy are generally too far divorced from those working on the design and implementation of ocean management concepts, particularly the emerging trends. As ocean management concerns dominate the implementation phase of the Law of the Sea Convention, international ocean law and policy should be used to further that process, another point that I will return to.

But the future is not bleak. In the realm of intergovernmental organizations, the United Nations took a significant step when in 1987 sections of the old office of Ocean Economics and Technology were merged with Mr. Satya Nandan's Law of the Sea office at the United Nations to create the Office of Ocean Affairs and the Law of the Sea. This office now provides technical, management, and legal advisory services to governments and other intergovernmental organizations in the implementation of the LOS treaty. Moving from the management to the legal, the World Bank is beginning to provide more in the way of advisory services in marine law to nations contemplating offshore development projects.[31]

Room for Growth: The Role of NGOs

In my view, NGOs can make major contributions to integrating the elaboration of ocean law with its application in ocean management. By combining the special advantages of NGOs and drawing on their recent evolution in the context of international marine affairs, one might predict a renaissance of the old network of oceans diplomats, drawing on the computer revolution for improved international telecommunications and information flow. This is not to say that NGOs can do it alone. But as agents for change, they are better placed

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[31] Communications with IBRD staff, Environment Division, November 1988.

to initiate activities, some of which may ultimately be assumed or institutionalized by governments or intergovernmental organizations.

1. *Information Flow*

The information back-up required to support analysis and preparation of effective legal/management systems for the oceans, tailored to particular national and regional situations yet consistent with international ocean law, is not yet in place. We still need up-to-date, electronic communications of developments in national ocean law. The UN Office of Ocean Affairs and the Law of the Sea, national governments, and several university programs attempt to keep up with this information, but none fully succeeds. Similarly, in relation to ocean management and the application of ocean law, improvements in the flow of information are required. Several information programs that could facilitate cost-effective collaboration in marine management and development between NGOs, governments, international organizations, and funding institutions are listed in the Appendix to this paper.[32] Because of their special advantages in information flow and the networks they have already developed, NGOs, with adequate financial support, are in a good position to expeditiously launch and refine computer-based information systems.

At the same time, face-to-face exposure remains a vital element in the learning process and in establishing contacts that can lead to fruitful collaboration. For this reason we need to find new ways to

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[32] These suggestions emerged from the 1987 IOI project on international organizations. One recent development is the establishment of an International Marine Protected Areas Network, which includes development of a computerized directory of members and their expertise and provision of techical assistance to network members. See Douglas B. Yurick, "International Networking of Marine Sanctuaries", *Oceanus*, Vol. 31, No. 1, spring 1988, p. 85. This article notes that through the network, the US Government provided assistance to Ecuador and Thailand to help them develop management plans for new marine protected areas, as well as on-the-job training to Malaysian marine park staff.

At the same time, some of the intergovernmental organizations are greatly improving their communications with NGO actors. For example, UNEP now circulates to a list of interested NGO with relative expediency reports and drafts of legal documents.

facilitate contacts between those with the expertise and those in need of it. In my earlier paper I suggested that consideration be given to modifying intergovernmental organization requirements for consultative and associated status and to developing other appropriate mechanisms so that consultants and private industry could become more involved in the planning and implementation of international organization programs; it is less expensive to move the experts to the sites where country representatives meet than the reverse. During UNCLOS III, it was largely up to the public interest NGOs to arrange for and sponsor presentations by such experts.[33]

Today, although the rules have not changed, the intergovernmental organizations are relying more frequently on expert group meetings and are less circumspect about involving industry representatives. As noted by Professor Treves, the Office of Ocean Affairs and LOS is involved in convening expert group meetings on baselines and marine scientific research. In the Preparatory Commission it has brought in industry and other experts in the technology and economics of deep seabed mining. The regionalization of the intergovernmental organizations provides additional opportunities, as implied by Dr. Kwiatkowska, because regional meetings make it possible for more individuals from the region to participate and are more likely to contribute to the build-up of self-sufficiency in regional and national capabilities.

In the NGO world, the close of the Law of the Sea Conference has begun to spawn small NGOs that span law and policy and ocean management concerns in providing assistance to states in the implementation of the LOS treaty. These include Canada's International Centre for Ocean Development (ICOD), the International Ocean Institute (IOI) of Malta, the Southeast Asian Project on Ocean Law, Policy and Management (SEAPOL), the Netherlands Institute for the Law of the Sea (NILOS), and the International Union for the Conservation of Nature and Natural Resources (IUCN). In 1988 ICOD, IOI, and the World Maritime University (WMU) decided to develop cooperative training arrangements specialized in marine affairs. They maintain a personnel data bank of individual 'trainors' and cooperate in developing training materials that stress the integration of law and policy, institutional mechanisms, and technical needs within the

[33] For further discussion of this point, see Kimball, Pacem in Maribus, p. 17-18.

framework of the needs of the developing, coastal states.[34] IOI and NILOS have also been collaborating in the planning and execution of training programs in Southeast Asia. Forums like the LSI continue to strive to involve emerging specialists in law and policy from the developing nations. I hope this emphasis features prominently in the launching of a new organization devoted to the advancement of ocean and coastal resources management around the world.[35] Another option is the establishment of cooperative ventures in the marine area between 'northern' NGOs or academic and research institutions and those in the South.

2. *Concept Development*

Those of us working in law and policy should be using that vehicle to further the application of evolving ocean management techniques such as environmental impact assessment and monitoring; utilization of marine protected areas for conservation, scientific research, and other purposes; ecosystem management; and the adoption of more effective procedures for response actions and liability for marine environmental damage, for reporting, and for other means of enforcement to better guarantee compliance with the law.[36] To

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[34] IOI News, No. 3, Autumn 1988, p. 1.

[35] Letter from R. Delaney, May 1989.

[36] For example, see the inspection and reporting system established by the 1982 EEC Memorandum of Understanding on Port State Control; the notification and transmission of information provisions of the 1989 Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal; the liability provisions of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, which gives standing to an international institution to sue for environmental damages and requires states parties to ensure that this institution can appear in their national courts to do so; and the recent US law amending the Marine Protection, Research and Sanctuaries Act, which establishes a specific liability regime for damage to natural resources within marine sanctuaries and permits US Government agencies to retain damage awards to finance response actions, damage assessments, and improvements in the sanctuary program (Oceans Policy News, Council on Ocean Law, August 1988, p. 4).

become the oceans diplomats of the 1990s, we need to reinvigorate the promotion and application of new concepts.

For example, to advance the concept of environmental impact assessment and monitoring programs, they must not only be applied in law and practice in the marine area, they must also incorporate consideration of adverse effects both within national jurisdiction and beyond, in other nations' areas of jurisdiction or in the global commons, and they should include consideration of atmospheric pollution of the marine environment. We must also explore legal and institutional mechanisms that make it easier to revise and upgrade international agreements, as scientific research and monitoring programs reveal new information about the causes and effects of changing environmental systems.

To return to the theme of the 'intrusiveness' of international law, however, the legal/policy establishment must seek new mechanisms and new balances, to provide the financial and technical means for all nations to apply new concepts in sustainable ocean development. That is, we must shift our focus to include potential use of carrots as well as sticks in order to compel compliance with generally accepted international and regional environmental standards. For it is in all of our interest to avoid significant adverse effects to the global marine commons.

Some of the new developments in conservation funding and the possibility of new partnerships between private industry and NGOs bear further exploration in this regard. In another example, a proposal was put forward at the first meeting of experts on specially protected areas pursuant to the 1983 Cartagena Convention for the Caribbean, suggesting that parties cooperate in obtaining financing for conservation projects and utilize the regional organization as an intermediary between donors and recipients.[37] And lest you think all of my examples are in the environmental area, let me recall the argument made at last year's LSI conference by Dr. Awni Behnam of UNCTAD: He questioned whether in light of the need for ports to comply with applicable international rules and standards for vessel safety and pollution control, we could "afford to continue to treat port development in the third world as a national problem". Noting that ports are a service to the international community as a whole, he proposed the development of a model international agreement on port

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[37] Communication from Ms. Miranda Wecker, Council on Ocean Law, who participates in these meetings.

development as guidelines for investment in ports and port facilities in the developing nations.[38]

3. *Agents for Change*

As catalysts and purveyors of information, NGOs can help disseminate and promote agreement on the formulation and application of new concepts in ocean law and management.

As activists, they must continue to use their unique abilities to promote financial support for marine development projects funded by national and multilateral assistance agencies,[39] and that these incorporate sound management techniques and new concepts, such as consideration of adverse impacts on the marine environment both within and beyond national jurisdiction and mechanisms and institutions that can perpetuate compliance with and the beneficial results that flow from such assistance. They must also be prepared to halt practices that are not consistent with sound marine management. In this regard, greater collaboration could be developed between "northern" and "southern" NGOs in the marine area.

Conclusion

There are a lot of new ideas and new tools emerging that can contribute to the integration and advancement of marine law and policy and marine management. NGOs have a special role to play in furthering their application, including forums such as the Law of the Sea Institute. It's up to us to develop these concepts and to use the law to help apply them. Otherwise international law may become an empty vehicle to too many of the world's people, reducing support for international law and international institutions.

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[38] Behnam, *op.cit.*, p. 22.

[39] NGOs in the United States have been urging that in its revision of the Foreign Assistance Act its mandate in the area of marine development assistance be expanded. NILOS has been urging the Netherlands to give particular consideration and emphasis in their development assistance to marine affairs. See 'Memorandum on Significance of Marine Affairs for Economic Development', by Dr. Barbara Kwiatkowska, November 14, 1988.

APPENDIX

Mechanisms to Facilitate Communication and Collaboration among International/Intergovernmental Organizations (IOs/IGOs), National Development Programs, and Non-Governmental Organizations (NGOs) (from "The New Law of the Sea and International Institutions: NGOs", Lee A. Kimball, Project III, Pacem in Maribus XV, 1987, pp. 16-17).

* Create country- and region-specific data banks;
* Identify the specific needs of individual nations so that these may be readily known to donor agencies;
* Maintain a register of consultants' services and qualifications in a broad range of marine affairs, as well as an inventory of NGO programs, using the broad definition of NGOs;
* Create a list of NGOs, including consultants and private industry personnel, with expertise in the subjects considered by particular IOs/IGOs, and establish a mechanism, through national or regional centers, for them to receive notice of relevant IO/IGO programs and documents. This mechanism could also serve to ensure that NGO publications and documents are exchanged with relevant IOs/IGOs;
* Create a mechanism for exchange of information on successful marine development/management approaches applicable to particular marine conditions (*e.g.*, tropical ecosystems, tuna management, etc.); and
* Develop forums for periodic regional consultation on marine issues, sponsored by IOs/IGOs, that draw on the expertise of a wide range of NGOs. These should make use of and make available the results of meetings of oceans specialists on specific marine topics.

Christopher Pinto: I thank Lee Kimball for the introduction to her paper. The first of the three commentators is Dr. P.C. Rao. Dr. Rao was a member of the Indian delegation to the Conference on the Law of the Sea while he was serving as legal advisor to the Ministry of External Affairs. Among his many publications is one of particular interest to us, which is entitled *The New Law of Maritime Zones* (New Delhi 1983). He is currently occupying the very high office of Secretary-General of the Ministry of Law in the Government of India.

COMMENTARY

P. C. Rao
Secretary-General
Ministry of Law
Government of India

Thank you, Mr. Chairman. Excellencies, ladies and gentlemen. I am grateful to the organizers of this conference for giving me an opportunity to participate in the deliberations of the conference as a commentator on the subjects allotted to Panel 1. I have had the privilege of working under the chairmanship of Ambassador Pinto in Committee 1 of the Law of the Sea Conference. Besides being an outstanding international lawyer, Dr. Pinto is what the lawyers in the English-speaking world call "a reasonable man." It is a privilege to be associated with him again at this session. I'm here in my personal capacity and accordingly the views that I express do not necessarily reflect the views of the Government of India.

The authors of the papers presented to you have given detailed accounts of their perceptions of the role of international organizations in the implementation of the LOS Convention. The information they have furnished is very valuable and is not otherwise readily available. With your permission, Mr. Chairman, I propose to offer one or two general comments on the role of international organizations.

The UN Convention on the Law of the Sea offers a comprehensive legal framework governing all aspects of ocean space from delimitation to environmental control, scientific research, economic and commercial activities, technology, and the settlement of disputes relating to ocean space. Large areas of ocean space are now under national jurisdiction. Nevertheless, the need for international cooperation in realizing the objectives of the Convention cannot be underestimated. This point has been repeatedly emphasized by the Convention itself. More than sixty articles of the Convention refer to the role of international organizations in promoting the objectives of the Convention. The Convention assigns an important role to international organizations, especially matters relating to (1) designation of sea lanes and prescription of traffic separation schemes (articles 22, 41, and 53); (2) artificial islands, installations, and structures in the EEZ (article 60); (3) conservation of living resources (articles 61, 63 to 66 and 119); (4) protection and preservation of marine environment (Part XII); (5) marine scientific research (Part XIII); (6) development and transfer of marine technology (Part XIV).

The Convention envisages cooperation among states, cooperation between states and international organizations, whether subregional, regional, or global, and cooperation among international organizations, depending upon the functional requirements. Besides, the Convention itself establishes an International Sea-Bed Authority, with several organs of its own, for realizing the objectives enshrined in the Convention in relation to the International Sea-Bed Area, the area and resources of which are the common heritage of mankind.

The full effect of the role of various international organizations in the implementation of the Convention may unfold itself only when the Convention as a whole is universally accepted and brought into force. The role of international organizations arises directly as a consequence of the Convention. Perhaps not many states have carved out any role for international organizations in their nationals laws on maritime zones. The role of international organizations is thus Convention-based. If one were to leave the Convention aside, the institutional framework envisaged by the Convention may become optional for the states, a situation which may not be compatible with the new regime established by the Convention. It is therefore vital that the Convention as a whole is looked at with a positive frame of mind by the international community as a whole. The Convention is a complex document. In several countries, the negotiators of the Convention are no longer associated with law of the sea matters. National legislation on the subject enacted prior to the adoption of the Convention may have claimed wider powers and jurisdiction than is authorized by the Convention. Unless the Convention as a whole is brought into force soon, the so-called "hawks" within national jurisdiction may not feel accountable to the Convention and the conceptual underpinnings of the Convention may wither away. Yet another factor in determining the impact of the contribution of international organizations is the willingness of the states to abide by the decisions made by the international organizations. The management problems posed by internationally shared resources are complex in nature.

Optimum utilization of the new opportunities for social and economic development offered by the new regime will be facilitated through cooperation at the international level. Nevertheless, if the international organizations have to play an effective role in realizing the objectives of the Convention, it may be necessary for them to take adequate care of the legitimate concerns of the coastal states about their sovereign rights and national security. For example, the Convention allowed the coastal state comprehensive rights in the exclusive economic zone, especially over fishing and the exploitation of non-living resources. It requires the states to take into account a

complex set of factors in the conservation and utilization of the living resources. The Convention contains delicately balanced provisions and assigns a definite role for international organizations on the subject. It proclaims, and rightly so, that states shall fulfill in good faith their obligations and not abuse their rights. Insofar as the developing countries are concerned, the objectives of the Convention cannot be effectively realized unless their national capabilities in marine science, technology, and ocean services are strengthened. The major role of international organizations consists in promoting these capabilities. At the same time, international organizations, whether global, regional, or subregional, should avoid encroaching on the management rights conferred by the Convention on the coastal states.

In the post-Convention period, the provisions of the Convention on marine environment, marine scientific research, and marine technology have come to occupy an important place in the management of the ocean space. These provisions have to be given practical shape. Implementation of these provisions involves intense participation of international organizations. The importance attached to the role of international organizations in this regard by the founding fathers of the Convention can be seen from the fact that most provisions of Parts XI to XIV of the Convention involve international organizations in their implementation.

The Convention provides a framework for international organizations to take urgent measures to bridge the gap in the marine scientific and technological fields between the developed and the developing countries. International organizations have to take initiatives to promote and coordinate their international assistance programs aimed at strengthening the marine scientific and technological infrastructures and capabilities in developing countries. In this connection, attention may especially be drawn to the Resolution on Development of Natural Marine Science, Technology, and Ocean Service Infrastructures adopted by the Third UNCLOS.

Multilateral funding agencies should augment and coordinate their operations for the provision of funds to developing countries without which developing countries could be greatly inhibited in utilizing the new opportunities provided by the Convention. It is common knowledge that some of the international organizations actively associated with ocean-related activities have not been able to play any effective role due to absence of financial and other resources. It may be that some of the international organizations require to adapt themselves to the demands of the new Convention. Coordinated efforts may have to be made by the organizations to review their constituent

instruments as also the conventions adopted under their auspices with a view to blending them with the new regime of the LOS Convention.

Unless the International Seabed Authority is allowed to play the role assigned to it by the Convention, the common heritage of mankind may become the subject matter of appropriation by a few states. Efficient exploitation of common resources would also require effective international cooperation. However, in the absence of a sufficient "community of interest" among the concerned states, states may not readily look up to international institutions.

It is not my intention here to minimize the useful work being done by international organizations in promoting the objectives of the Convention. However, unfortunately the progress made in this regard has been rather slow. Despite the fact that the Convention has not entered into force, several organizations within the United Nations system have been striving to contribute to the implementation of the Convention in their respective field of competence -- IMO in relation to safety of navigation and marine pollution from ships, FAO in relation to living resources, UNEP in association with other bodies and through its Regional Seas Programme in the field of environmental pollution, and IOC in the sphere of marine research activities. Efforts at the regional level for the promotion of regional cooperation in marine affairs have also been initiated in some areas, including our own. I hope that these initiatives will bear fruit in time to come.

Non-governmental organizations (NGOs), of which an excellent account has been given today by the third speaker, seem to have a positive role to play in the field of dissemination of knowledge relating to marine affairs. Some of these NGOs have been quite active in articulating the environmental concerns.

Christopher Pinto: Thank you, Dr. Rao. I would now like to call on Dr. Jayewardene as our second commentator. Dr. Hiran Jayewardene is Special Legal Advisor to the Ministry for Foreign Affairs of Sri Lanka, and also Chairman of the Sri Lanka delegation to the Preparatory Commission (PrepCom). He is Chairman of the National Aquatic Resources Agency of Sri Lanka and Secretary-General of the Conference on Indian Ocean Marine Affairs Cooperation.

COMMENTARY

Hiran W. Jayewardene
Secretary-General
Indian Ocean Marine Affairs Cooperation Conference
Colombo, Sri Lanka

Thank you, Mr. Chairman. At the outset I would like to express my appreciation to LSI and NILOS for having kindly invited me to be present on this occasion. I see a number of colleagues who were with us during the Law of the Sea Conference and it is indeed a happy occasion for me.

Mr. Chairman, I would like to begin by referring to the opening remarks in the comprehensive paper by Professor Tullio Treves. Professor Treves refers to two important aspects. One is that the implementation of the 1982 Convention is essentially a task for governments. The second is that the consideration of the role of international organizations, be they universal or otherwise, would perhaps be premature as the 1982 Convention is not yet in force. I draw on these basic ideas merely to provoke some thought.

I would like to make reference to IOMAC, or Indian Ocean Marine Affairs Cooperation, which is something new to many of you and which, I believe, is the reason why I am here. IOMAC is an intergovernmental organization committed to cooperation in marine affairs in the Indian Ocean region. It is developing very rapidly. We believe, as Professor Treves has pointed out, that the task of implementing the Convention belongs to states. IOMAC is an example of such an initiative by states.

I would like to trace very briefly the history of IOMAC by way of giving you some background to what I would like to talk about. The concept of regional marine affairs institutions took shape in the closing stages of the Third United Nations Conference on the Law of the Sea. A number of delegates tried during these stages to project their thoughts beyond the closing of the Conference and to focus on matters of implementation and practical impact for their countries, a process we have come to call the integration of the marine sector in national development strategies. This has, as you know, a very special application to developing countries.

In this context I would like to make a reference to three fundamental objectives which have guided the development of IOMAC. First, creating an awareness regarding the Indian Ocean, its resources and potential for the development of the states of the region

and furthering cooperation among them as well as among them and other states active in the region, bearing in mind the new ocean regime embodied in the 1982 United Nations Convention on the Law of the Sea. Second, providing a forum where Indian Ocean states and other interested states could review the state of the economic uses of the Indian Ocean and its resources and related activities, including those undertaken within the framework of intergovernmental organizations, and identify fields in which they could benefit from enhanced international cooperation, coordination, and concerted action. And third, adopting a strategy for enhancing the national development of the Indian Ocean states through integration of ocean-related activities in other respective development processes and a policy of integrated ocean management through a regular and continuing dialogue and cooperative international regional action with particular emphasis on technical cooperation among developing countries (TCDC). Those are the three fundamental objectives which have guided the creation of IOMAC.

The development of IOMAC is interesting to trace because it provides an example of the evolution of an international organization. Although we have made considerable progress over the last few years with regard to a number of practical arrangements, holding of workshops and training programs, the organization itself is in the process of developing. I referred earlier to the discussions during the closing stages of the Third Conference on the Law of the Sea. To my mind the principal result of those discussions is twofold: first, in the recognition of the importance of national institutions, and second, the recognition of the importance of regional institutions. Both these results are important elements in the process of building national capabilities in marine affairs. Surprisingly, from the Indian Ocean come examples of two such approaches taken in the aftermath of the Law of the Sea Conference. National institutions were contemplated when Article 275 was formulated. I believe this was an amendment which was introduced by Pakistan in the late stages of the Law of the Sea Conference, and the two examples I would like to cite for the Indian Ocean region are the Department of Ocean Development of India and the National Aquatic Resources Agency of Sri Lanka. Both institutions were established in 1981.

For regional organizations Articles 276 and 277 of the Law of the Sea Convention contemplated the establishment of marine scientific and technological centers. The closest we have to that in the Indian Ocean region is IOMAC. The need for IOMAC emerged from requests made in 1981 by the government of Sri Lanka at the session of the Asian-African Legal Consultative Committee held in Colombo that

year. The proposal made by the government of Sri Lanka was for the study to be undertaken by the Secretariat of the AALCC on existing activities in the Indian Ocean region.

You may wonder why the forum of the AALCC was chosen for this purpose. At the time in Sri Lanka there was concern that something should be done about the development of national capabilities with regard to the marine sector. We looked for a forum which dealt with the Indian Ocean as a whole. The only body that we found with such a mandate was the Ad Hoc Committee on the Implementation of the Zone of Peace which was set up within the framework of the General Assembly. That dealt mainly with the prohibitive regime, the demilitarization aspects of the Indian Ocean through the declaration of a zone of peace, the reduction of tension in that area, tension brought about by military rivalries. We were anxious not to confuse our approach with that exercise in the U.N. General Assembly. What we had in mind was cooperation in the furtherance of the peaceful uses of the oceans. Therefore we had to find another forum.

The forum that we identified, as I said, was the AALCC, which spanned much of the Indian Ocean. Its membership extended from Africa through Asia. The AALCC had provided a good sounding board for law of the sea related concepts. In particular, the 1971 AALCC session at which our chairman Mr. M.C.W. Pinto served as a rapporteur was an occasion when concepts such as the archipelago concept and the straits issue were considered and endorsed and, as you know, were later carried successfully through the Third UN Conference and are now fully enshrined in the 1982 Convention.

The process that was initiated in 1981 in the AALCC led to discussion of Indian Ocean cooperation in the context of the AALCC at subsequent sessions in Tokyo and Kathmandu. However, the AALCC study did not provide information on what governments were doing in the region. As you know, sending out questionnaires is not a very effective way of gaining information. Most of you who are in government would appreciate that asking delegations to present country papers is also not very effective and we were to realize that later on when we convened the Conference.

We felt that there was a need to bring representatives from governments together face to face so that they could share their perceptions and priorities with regard to ocean management. Accordingly a preparatory meeting of Indian Ocean states was convened in June, 1985. This was followed by a consultative phase of the first IOMAC Conference in 1985. At the request of a number of Indian Ocean governments, Sri Lanka convened the first IOMAC Conference in July, 1985. Some of the concepts were new.

Governments wanted time to consider some of these ideas and therefore what we had intended to be one conference was in fact broken into two parts. The first phase was held in July, 1985, and the second phase at ministerial level was held in January, 1987. The title of the conference which we referred to as the IOMAC Conference is a long one. It was called "The First Conference on Economic, Scientific, and Technical Cooperation in Marine Affairs in the Indian Ocean in the Context of the New Ocean Regime."

Here I want to emphasize the reference to the new ocean regime. This underlines the creation of IOMAC in anticipation of the emergence of the regime of the law of the sea. Therefore the process which brought IOMAC into being was one which anticipated the development of this new regime, and it is a process which is well under way in terms of implementation. I do not want to dwell at length on the details of how IOMAC has been set up. Much of that has been covered very ably by Dr. Kwiatkowska in her very exhaustive paper on the subject. However, I would like to offer some brief comments that you may find interesting in the context of the subject that is under consideration.

We have heard some references to the role of the United Nations, and it would be of interest for you to note that, in 1985 as part of the preparatory process leading up to the first IOMAC Conference, we convened an interagency meeting which brought together a large number of organizations within the United Nations system in Geneva. What is significant is that that meeting was held under the chairmanship of the Special Representative of the Secretary-General for the Law of the Sea at that time. I believe that was the first interagency meeting to deal with marine affairs that had taken place. Since then, the Law of the Sea Office, as we had called it, has undergone considerable transformation. You have heard about the merger of the Ocean Economics and Technology Branch and the Law of the Sea Office which has today brought into existence the office of Ocean Affairs and Law of the Sea. We therefore see the 1985 interagency meeting as a precursor to what has happened today. And today we have almost as an annual event the Ad Hoc Interagency Consultation, which is chaired by the Ocean Affairs and Law of the Sea Office. However, absent from this process is direct government participation, and we see the role of the Ocean Affairs and Law of the Sea Office more as one of harmonization than coordination. It provides a forum which enables agencies to avoid duplication of effort and also to strengthen the delivery through joint efforts. What is interesting in this context is that, as Professor Treves pointed out in his paper, the principal institution that emerged from the 1982

Convention is the International Seabed Authority. As you know, it has a limited mandate. It is confined to Part XI of the convention and deals with the deep seabed areas. It does not, however, deal with the traditional areas of the law of the sea, areas of national jurisdiction, resource rights, etc., which are perhaps the more important areas, particularly to developing countries.

In the early stages leading up to the convening of the Third Conference on the Law of the Sea, there was some discussion with regard to convening a conference to create such an organization. I believe for political and other reasons in the very early stages this option was discarded and instead the focus was on the creation of a Deep Seabed Authority. What we see today emerging through the United Nations might be an institutional arrangement which goes some way towards creating a comprehensive ocean management organization at a global level. It remains to be seen how these developments will take shape, but I recall that in the closing stages of the Third Conference there were some attempts to give the conference secretariat a life beyond that of the conference. And it was resisted, perhaps for the very same reasons that a comprehensive management institution was rejected at the time the conference was convened. However, that office has gone on to acquire a different mandate, and we watch with interest its further development.

Another aspect that I would like to mention very briefly is what we call the continental bias which we have encountered. We see it as one of the major impediments in organizing ourselves for ocean affairs management. As you know, a large number of existing institutions are structured to deal with land areas. It is only in recent times that there has been a focus on the oceans. The United Nations, for instance, deals with the Indian Ocean region through a number of regional economic regions, ESCAP, the Commission for West Asia, and the Economic Commission for Africa. There is a need to bring these organizations together to deal with the ocean because mandates apply only to specific areas of IOMAC's region. In terms of geographical scope, there is therefore some difficulty for the organization in bringing together the existing international institutions to meet the needs of the countries of the region. There are some examples as to how some of these difficulties can be overcome. When we approached the United Nations Development Programme we encountered the same difficulty. There was a structuring on a geographical basis relating to land areas. There were the Asia-Pacific Bureau, the Arab Bureau, and the Africa Bureau. All three had to be brought together in order to provide assistance to the Indian Ocean region, and this was achieved by bringing these three regional desks under the Division of Global

and Interregional Projects. You can see that institutions are, in fact, capable of responding to ocean management needs, even on a regional basis.

The problem also exists with regard to national aid agencies which can provide considerable assistance to developing countries either through regional programs or bilateral aid programs, and recently we have encountered such difficulty. Again, if there is a will, I think these problems can be overcome.

With organizations like ICOD which are dedicated to ocean management, the difficulty does not arise, and it is heartening to see that the programs have led to the opening of desks dealing with the Caribbean, the Pacific, and I believe in the near future the Indian Ocean.

Recently the thesis has been advanced that the Law of the Sea Convention calls for cooperation, that the frequent references in the Convention can be interpreted as entailing an obligation to cooperate. This new line of thinking has found its way even into pronouncements at the level of heads of state. It is indeed very interesting and a principal advocate of this idea is no less than our chairman, Mr. Pinto, who has written on this aspect. This support certainly provides a very strong underpinning for international cooperative ventures like IOMAC and it gives a new impetus to the concept of cooperation enshrined in the United Nations Convention on the Law of the Sea and its translation into reality.

Professor Treves refers to the provisions of the convention dealing with cooperation, and I wish to make special reference to the section of his paper where he refers to organizations dealing with highly migratory species. This is a subject that has engaged the attention of decision makers in the Indian Ocean region in recent months. It is interesting to note that, despite the provisions of the convention, in a number of areas states have chosen to operate out of that framework, sometimes utilizing part of that framework but very often establishing independent arrangements. And this is one of the options that is presently under consideration in the Indian Ocean region.

With regard to the substantive scope of IOMAC activities, again Dr. Kwiatkowska in her paper has dealt with this exhaustively. She refers to it as a transsectoral of marine affairs organization, and in IOMAC we have described that same process, as representing the multidisciplinary integrated marine affairs management framework. Essentially what is does is bring together a number of disciplines in this integrated approach. There are a number of major sectors of activity that IOMAC has identified as spanning the marine affairs sphere as we are concerned. This relates to the peaceful uses of the

oceans, as I said. The first one would be marine science, ocean services, and marine technology. The second would deal with living resources. The third would deal with non-living resources. The fourth, what we call a central discipline, deals with the law of the sea, marine policy, and ocean management issues. The fifth one deals with transport and communications. And last, the marine environment.

I would like to say something with regard to participation, which is a very important issue within IOMAC. Before I go on to participation, I would like to say that IOMAC has come together in a very informal way, although we have high level governmental participation. As I said, the main conference concluded at ministerial level. We have so far not established statutes. However, we have been able to embark on a very ambitious program of activities over the last few years through workshops, training programs, etc., in the region. What it has demonstrated is that without a formal legal framework it is possible for states to come together to cooperate and actually implement activities. It does not mean that one can go on forever on an informal basis. There comes a time when the organization reaches a certain point of maturity at which there is a need for us to formalize, and it is that stage that we are approaching now.

In the context of preparing a statute for IOMAC we have had to examine very closely the issue of participation. At the time we convened the First Conference in 1985, we had to decide on what basis states were to be invited to this meeting. For obvious political and other reasons it was not possible to do this on a subjective basis. We had to determine objective criteria. We looked to the practice of states with regard to the Indian Ocean and the only body, as I said earlier, dealing with the Indian Ocean at that time was the Ad Hoc Committee in the General Assembly. We looked at the composition of that committee; it had several categories of members: first, the littoral and hinterland states of the Indian Ocean; second, the major maritime users identified by tonnage afloat globally; and third, the permanent members of the Security Council or the big powers. We have virtually subsumed those categories under IOMAC by providing for the participation of first the littoral states, second the hinterland states, and third the major maritime users.

Right now the discussion has focused on the definition of major maritime users. There is some thinking in several areas that the category of major maritime users should be widened on the basis of the sectors of activity of IOMAC. For instance, if a country has major marine scientific research activities in the Indian Ocean, should not that be a basis for providing for their participation? Secondly, if a state has major fishing activities in the region, should that state not be

included? And what exactly is the cut-off point? How many tons of fish do you have to take from the Indian Ocean before you qualify for participation? These are some of the issues that we are addressing. And again, Dr. Kwiatkowska has dealt with this very ably.

Another issue is the relationship between states of the region and states outside the region. This has very important implications for the future if IOMAC is to develop as an ocean management institution. You will see that three-fourths of the Indian Ocean lies beyond the limits of national jurisdiction. In that area of high seas other states have rights. If the coastal states were to make this an area of exclusive competence, then there would be an impingement on those rights. We would be very rapidly approaching the concept of *mare clausum* for the Indian Ocean. Therefore we have recognized the legitimate rights of states from outside the region in these areas beyond national jurisdiction, and what we may try to do is provide a two-tier system which caters to the interests of states from outside the region as well as take care of some of the apprehension on the part of the Indian Ocean countries. We have a similar model in the South Pacific in the context of the CCOP on which we might be able to base ourselves.

I don't want to take up too much time. I think much of the structure of IOMAC and description of our activities to date is to be found in Dr. Kwiatkowska's paper and I would like to conclude at this stage. Thank you.

Christopher Pinto: Thank you very much for a very thought-provoking statement. I have now to call upon our last commentator, Judge Jens Evensen. All of us are aware of Jens Evensen's outstanding contribution to the success of the Conference on the Law of the Sea. While he was leader of the Norwegian delegation to the conference he established and led a negotiating group that quite fittingly came to bear his name and which dealt from time to time with a variety of most difficult issues and often produced durable results. I call on Judge Jens Evensen.

COMMENTARY

Jens Evensen
Judge
International Court of Justice
The Hague

Thank you very much, Mr. Chairman. I feel that the theme of our conference, *Implementation of the Law of the Sea Convention through International Institutions*, is very interesting for one special reason. It seems to indicate that the Law of the Sea Convention may be applied and perhaps may take on a life of its own before it has reached sixty ratifications so as to enter into force. I really believe that this Convention is an example of how the United Nations may have certain law-creating effects and some law-creating force lying outside the traditional concept of treaties and conventions and their ratification.

I would like to look at the methods and procedures we used in the Law of the Sea Conference which may have attributed to the special nature of this enormous Convention. When the UN General Assembly at its 25th Session in 1970 decided to proceed with the Third UN Law of the Sea Conference, it was obvious that the Organization embarked on a gigantic attempt to create a modern international constitution for the oceans of the world. It was equally clear that these efforts were as much a daring venture of international politics and international relations as an exercise in international law. In my opinion it is certainly the most comprehensive political and legislative work undertaken by the United Nations during its forty-four years of existence. The Conference was able to create a new international order for five-sevenths of the surface of our globe. It is my opinion that, by achieving this result, the 1982 Law of the Sea Convention has become one of the main peace-promoting achievements of the United Nations. And I believe that we should have this in mind when we discuss, when we implement, and when we try to make effective the principles of this Convention. It was quite clear that through our work a centuries-old system relating to the oceans had been changed or fundamentally amended by the introduction of this Convention. I would also say that the elaboration of the Law of the Sea Convention is an example of how member states of the United Nations try to achieve the goals and purposes laid down in United Nations Charter. The Draft Convention was signed on 10 December 1982 and, as I said, in my opinion it establishes a modern constitution for five-sevenths of the surface of

our globe. On this background it may be interesting to look briefly at some of the methods and procedures that we applied both to better understand and to better implement the Convention in the future.

The Convention is also, in my opinion, an illustrious example of how the Conference was able to achieve an amalgamation of cultural, legal, and political concepts of the developing world with the more static concepts of international law held by the traditional Western European and Anglo-American states. In this respect I believe that the Law of the Sea Convention introduced something entirely new in the relations between states through the operations of the United Nations. Some of the main characteristics and procedures of the Conference were paramount in achieving these results.

As one of those who participated in this work from its start, I would like to mention some of the essentials with which we were faced when we commenced our work. First, it was obvious to us that we were faced with a task of enormous proportions. It was likewise clear that according to the agenda the scope of our Conference was comprehensive. Thirdly, it was also clear that the express goal of the Conference was to formulate succinct treaty texts, not loosely formulated legal/political, general principles or guidelines.

Another characteristic of the Conference was its duration and size. It lasted for almost a decade, and most of the time it had one or two sessions every year. Another interesting aspect was the stepwise procedures which were necessitated by the nature and volume of the task. We also had a special approach to preparatory work of the conference. We did not have work preceding the calling of the Conference itself. The preparatory work was undertaken by the Conference in its various committees or in special groups.

Among the procedural principles that formed this Conference, I should especially mention a few, mainly the consensus principle which is laid down in the Rules of Procedure, entailing that we should try to obtain the results by consensus of the whole Conference. It is obvious that this might influence not only the method of work but also the final outcome of the various texts. The second basic principle was the so-called 'gentlemen's agreement' which provided that we should not try to resort to vote unless all possibilities of consensus had been exhausted. And the third and perhaps most interesting aspect was the so-called 'package deal.' It was a working assumption that the whole Convention had to be seen as a package. If some countries gave up something on one part, they might be satisfied by certain formulations in other parts of the Convention.

I would also like to mention two other important factors. One was the Drafting Committee under its chairman, Alan Beesley, which at

the end of our work had an enormous task to do in trying to formulate, streamline, and reach agreement between countries in drafting the final text. Another was the novel approach of group activities and systems. In addition to traditional groups like the Group of 77 and other regional groups, a host of spontaneous interest groups emerged, playing an important role at certain stages of the Conference. These groups were often inter-regional, composed of individuals recognized in the Conference for their unique capacities. Among such groups were the Nandan Group of 21, the Castaneda-Vindenes Group, the Louis Sohn Group on settlement of disputes, the Coastal States Group, the Land-locked and Geographically Disadvantaged States Group, and perhaps also the Evensen Group.

Equally interesting is the importance which individuals played in contributing to the end result. It shows that personal initiatives in the United Nations are essential to solve delicate situations or to draft delicate texts. Here I would especially mention the two presidents we had in the conference: Shirley Amerasinghe from Sri Lanka and Tommy Koh from Singapore. I would also like to remind you of the personal prestige and dynamism of the three main committee chairmen: Paul Engo from Cameroon, Andres Aguilar from Venezuela, and Alexander Yankov from Bulgaria.

In concluding my brief intervention, let me dwell a bit on the law-creating effects of the 1982 Convention. I venture to suggest, in spite of the principle of the "package deal" where the whole Convention should be looked upon as a package, that a considerable number of the principles of the Convention have already acquired the force of international law. One reason may be that they merely express established principles of the law of the sea formulated over the centuries so as to make them part of the customary law of nations. This applies to a great bulk of the articles in Part II of the Convention dealing with the traditional aspects of the territorial sea and the contiguous zone, Part VII on the high seas, Part VIII on the regime of islands, and Part X concerning the right of access of land-locked states to and from the sea and the freedom of transit.

In addition, I would venture to propose that this law-creating effect of the Convention has been fortified by a rather unanimous state practice based on the principles of the Law of the Sea Convention. In this context it is important to note that this law-creating effect may have been enhanced by the fact that the articles of the Convention were formulated as legal principles and not as more general principles of the sea. Thus they may be easily included in national legislation, and many of them would fill a legal vacuum created by the almost rampant technological revolution, a void which needed to be filled for

political and legal reasons. I would conclude with a reference to Part XI of the Convention. It contains provisions concerning the international authority charged with the task of the administration and management of the natural resources of the common heritage of mankind. I believe that it would be difficult to conceive how these concrete provisions concerning the establishment of a new international organization endowed with supranational powers could be implemented without express treaty provisions. Thus it may be dubious whether Part XI of the Convention on these organizational aspects can be implemented without entry into force of the 1982 Convention. However, even here we have seen some developments recently, both with regard to the establishment of the headquarters of this future Authority in Jamaica and the establishment of the headquarters of the Law of the Sea Tribunal in Hamburg. These steps may lead to certain interesting developments even in regard to these organizations created by the Draft Convention. Thank you.

Christopher Pinto: Thank you, Judge Evensen, for a most interesting statement winding up our work for this morning. I must thank our panel members and our commentators on your behalf and on mine for the excellent work that they have done and close the meeting. Thank you.

LUNCHEON SPEECH

Satya A. Nandan
Under Secretary-General
Special Representative of the Secretary-General
for the Law of the Sea
United Nations

I am very pleased to be invited by the Law of the Sea Institute and the Netherlands Institute for the Law of the Sea to address this luncheon gathering. I am very grateful for this honor and also for the opportunity to meet so many old friends.

The 1982 United Nations Convention on the Law of the Sea has reached an important stage in that it has received two-thirds of the required sixty ratifications or accessions. The time is therefore closing in on us when the Convention will enter into force. At the present rate it is possible that the sixtieth instrument of ratification or accession will be deposited within the next two to three years. We are, therefore, at a very important crossroad.

It is not necessary for me to recount the achievements of the Convention and its global importance, since these are well known. It is, however, important to observe that a situation where some States are parties to the Convention and others, possibly a majority, are not, can only lead to a fragmentation of the law of the sea and the erosion of those parts of the Convention on which a broad measure of consensus was achieved during the Third United Nations Conference on the Law of the Sea. This should therefore be a period for reflection on the future of the law of the sea.

We cannot allow the world to go back to the instability and disorder that had developed in the law of the sea and which had precipitated the convening of the Third United Nations Conference on the Law of the Sea. The need for a comprehensive Convention to which all States subscribe as parties is self-evident. In the past the law of the sea as it had developed over four centuries could be readily implemented around the world because it was four or five key European powers that determined the law and were able to give effect to it in practice, not only as it applied to their European territories, but also in the far corners of the world that they governed. Today the situation has changed radically. There are over 160 States or territories that enact their own maritime legislation. The difficulty in applying a global system of law in a uniform and consistent manner has therefore multiplied a hundredfold. This difficulty is further compounded by

the fact that unlike the major powers of the past who had interests both as coastal States and as maritime powers, and therefore had the incentive to maintain a balance between the two interests, a vast majority of States of today do not have the same diversity of interests. Most coastal States primarily see their interests in terms of exercising sovereign rights over the resources in the widest possible maritime zones and in exercising control over such waters for security reasons. From an examination of their legislation it is not surprising to observe that most States when asserting their rights as coastal States often go beyond what is permitted in the 1982 Convention. There is, therefore, a constant danger of erosion through divergent State practice of the very delicate balance that was achieved in the Convention. To forestall this danger it is clearly necessary to strengthen the Convention regime.

Since 1982 new pressures against this balance have come from unexpected directions. Examples of these are to be found in the current heightened concern for the human environment and the marine environment in particular, in the need for the control of transboundary movement of hazardous wastes, and in the general desire among States for interdiction of vessels suspected of drug trafficking. In each of these cases there is pressure from coastal States to exercise greater control over vessels transiting maritime areas under their jurisdiction and also in adjacent seas. Therein lie the seeds for the resurgence of creeping jurisdiction which we had thought was put to rest when the Convention on the Law of the Sea was adopted in 1982. If we are to preserve the broad consensus on the Convention, then it is important that that instrument is universally supported, especially by the major maritime powers because in the end it is they, with their global trade and international security concerns, who have greater interest in preserving navigational rights around the world than those who own only a few ocean-going vessels, whether merchant or military.

It would be an absurd situation if the Convention should come into force on the strength of small States while larger States sit back and use the Convention as a reference point for their protests against the actions or omissions of others. They will have neither the legal nor moral authority to ask others to respect an instrument to which they themselves are not prepared to become parties. Moreover, it must be recalled that the Convention is one integral instrument and cannot be divided for the sake of convenience into two parts -- the deep seabed mining provisions on the one hand and the non-seabed provisions on the other. This artificial division can only result in the abuse of the concept of customary international law and at the same time delay the

search for solutions to the provisions of the Convention that have not received general acceptance.

Indeed, the time is now ripe to resolve the disagreement that exists with the few provisions of Part XI, the deep seabed mining part of the Convention.

We are all aware of the reservations regarding Part XI expressed by a number of industrialized countries. A careful examination of the matter reveals that there are only five or six issues. These can be identified as follows:

(1) The obligation on the contractor to sell technology in the last resort to the Authority (Annex III, Article 5);
(2) The production policy provisions (Article 151) (which is also referred to as the problem of access to sea-bed mining);
(3) A seat in the Council for the United States (Article 161);
(4) Decision-making procedures (Article 162); and
(5) The procedures for the adoption of amendments by the Review Conference (Article 155);
(6) More recently, the financial implications for States parties has also been raised as an issue.

I believe a satisfactory compromise can be found for all these issues.

On the question of sale of technology, the Preparatory Commission is already considering a set of regulations which, in the opinion of most, paves the way to a solution. The procedures that have been introduced in the implementation of this obligation substantially change its character from one of compulsion to one of cooperation. The automatic application of those provisions at the instance of the Enterprise alone has been removed. The burden of establishing that the required technology is not available on the open market is placed on the Enterprise. If the Enterprise is not able to find the technology it needs, then it is required to seek the voluntary assistance of all contractors to find that technology. If this fails, then States parties whose nationals might have the technology are invited to assist the Authority. It is only after this also fails that the Council of the Authority, where all interest groups are fully represented, will take the decision to invoke the obligation of a contractor. In this way the concern that there may be an abuse in the use of this provision of the Convention has been removed. This is a practical way of resolving a difficult problem.

As far as the production policy is concerned, it is clear to all that the economic situation prevailing in the last decade has considerably affected the statistics of metal consumption on which the production

policy formula was based. It is, therefore, necessary to make adjustments in that formula in a manner that would ensure that no contractor is denied the opportunity to mine in the deep seabed. This is possible. However, in order to do so, it will be necessary to address the problems of developing land-based producer States of the minerals affected by seabed mining. A possible solution for these States could be found by creating an economic assistance fund, rather than a compensation fund, from a percentage of the net proceeds of mining and by strengthening the anti-subsidy provisions for the commercial stage of sea-bed mining.

As regards decision-making, the question has already been elaborately dealt with in the Convention. Article 162 already identifies the most important decisions to be taken by the Council and provides that these should be made by consensus. For decisions on other matters there is a graduated system of majority required according to the importance of the subject matter. The remaining issues on decision-making relate to (a) the procedures that are to be adopted for the Legal and Technical Commission which, *inter alia*, will make recommendations on the approval of a plan of work, and (b) the procedures of the new Finance Committee which will oversee the fiscal responsibility of the Authority. In both these areas negotiations are under way in the Preparatory Commission and I believe that at the end of the day satisfactory solutions will be found for both.

States are sensitive to the problems raised as regards the procedure for the adoption of amendments at the Review Conference. I believe that here, too, a compromise could be achieved which would remove the obstacles that some countries perceive. This could be done by agreeing that where a consensus can be reached on any changes in the system of mining, those changes would come into effect automatically. If there is no consensus on an amendment, then the normal two-thirds majority would apply for its adoption, and such an amendment would be subject to the normal amendment procedures set out in the final clauses which provide, *inter alia*, that amendments require ratification by States (Article 315). This should eliminate the constitutional problems that some saw in Article 155 as it stands now.

As regards a seat for the United States in the Council, it was always intended that the U.S. would be included in either of the first two categories of membership of the Council, namely the largest consumers of minerals produced from the seabed and the largest investors in deep sea-bed mining. No one has disputed this fact and there should be no problem in finding appropriate language to clarify this.

With respect to the financial obligations of States parties to the Convention, given the fact that commercial deep seabed mining is now a distant prospect, the Preparatory Commission itself has decided that the initial secretariat of the Authority would be lean and cost-effective, implying clearly that the Authority's secretariat would be very much scaled down. Further, the Preparatory Commission is already discussing the establishment of a nucleus Enterprise which will consist of a very small monitoring unit within the secretariat since it is not expected that the Enterprise would enter into any operational activities for quite some time. Indeed, for the future if States including the pioneer investors and others who have the capacity and interest in the deep seabed mining were to agree to undertake a joint venture operation with the Enterprise, the cost implications for operating the first mine site for which States have obligations would be considerably reduced, and I may add, a number of other problems such as those relating to the transfer of technology would also be removed.

Finally, on the general issue of fiscal responsibility, the Preparatory Commission has already agreed to establish a Finance Committee which would oversee all matters having financial or budgetary implications. It is currently considering its composition and decision-making procedures. I am confident that a result satisfactory to all will be achieved on these issues.

Provided there is political will and a determination to find practical solutions, I believe there are ways by which they can be achieved. I have merely put forward some possible solutions. Any changes that have been agreed upon can be incorporated in a protocol which can come into force simultaneously with the Convention. This is why the time available to us between now and the deposit of the sixtieth ratification or accession has become of the essence.

The Preparatory Commission has been considering many of the issues I have referred to, but it has not yet reached a final conclusion on them because its members believe that the United States must be given an opportunity to participate in the negotiations. For there cannot be two different sets of negotiations on the same issues.

It is my assessment that there is a willingness among States to find an accommodation on remaining problems. The flexibility and pragmatism already demonstrated by the Preparatory Commission in resolving the difficulties that arose with respect to the registration of pioneer investors testify to the capacity of the international community to find ways to deal with difficult matters in a practical and equitable manner. The measures taken by the Preparatory Commission not only facilitated the resolution of conflicts in the

claims for mine sites of the Soviet Union and three of the four U.S.-based consortia, but also had the effect of making important changes to Part XI of the Convention.

The international community is hoping that the United States will return to dialogue with other States in order to help resolve its problems with the Convention. They have waited for the past seven years for this opportunity. The time is, however, limited as the date for entry into force draws close. Eventually each and every State, particularly the industrialized States of East and West Europe and Japan, will have to make their own determination as to whether the time has not come for them to proceed with the negotiations with a view to finding solutions which are generally acceptable and which will enable them to become parties to the Convention. Now is the time to give serious consideration to these matters since for practical, political, and legal reasons it is far easier to deal with the problems before the Convention enters into force, rather than afterwards when its institutional and other arrangements would become effective.

May I in conclusion congratulate the Law of the Sea Institute for convening this, its 23rd Annual Conference. Over the years the Institute has provided a valuable forum for an exchange of views on issues relating to law of the sea. It has provided an opportunity for individuals from all walks of life and from all disciplines to participate in these meetings to the benefit of all. I commend the work of the Institute and especially its director and his dedicated staff.

Panel II:

NAVIGATION (SEA AND AIR)

Edgar Gold: This is Panel II on Navigation. We are going to discuss one of the most traditional uses of the sea, navigation, although we are going to examine it in its broadest sense, that is, sea navigation's younger and, certainly today, more boisterous brother, air navigation, will also be included.

Due to its internationality, navigation can almost be categorized as another oceanic community property right. Accordingly, the modern law of the sea, and its implementation through international institutions, is probably nowhere more critical than in the maintenance of international navigation.

My name is Edgar Gold. I'm from the Oceans Institute of Canada at Dalhousie University in Halifax. I think it may be best to introduce all of the panel so that they will then lose little time in speaking one after the other.

Speaking on the subject of international maritime transportation will be Mario Valenzuela from Santiago, Chile. Mr. Valenzuela was, until last year, with the Legal Division of the International Maritime Organization, where he had special law of the sea responsibilities. However, those interests go back a long way, because before that he was legal advisor with the Foreign Ministry of the Government of Chile.

The second speaker, Mr. Ton IJlstra, is a research associate with the Netherlands Institute for the Law of the Sea, and thus one of our charming and genial hosts. He is a lawyer in the final stages of what I'm certain will be a very brilliant doctorate with the University of Utrecht, and he has specialized particularly in maritime safety and environmental issues in northern Europe.

My fellow countryman, Professor Armand de Mestral, is professor of international law and director of the Institute of Comparative Law at McGill University in Montreal, and he's also associated with that university's Institute of Air and Space Law. Professor de Mestral is also president of the Canadian Council in International Law and is a longtime member of the Canadian delegation to the Law of the Sea Conference.

The fourth speaker is one of our Soviet colleagues, Dr. Valery Andrianov from Moscow. He is a senior researcher with the Soviet Maritime Law Association and also a longtime friend of the Law of the Sea Institute and its annual conferences. He has specialized in

navigational aspects of the law of the sea, and also, I might add, participated in that extremely successful first American-Soviet symposium on the Law of the Sea hosted by his organization in Moscow last year, under the auspices of the Law of the Sea Institute.

Our first commentator will be His Excellency Ambassador Hasjim Djalal, very well known to all of you. Dr. Djalal is a senior member of the Indonesian law of the sea delegation and a participant in the PrepCom and is now head of the Research and Development Agency of the Ministry of Foreign Affairs of Indonesia. He is also a friend of Canada because his most recent diplomatic posting was that of Ambassador to Canada.

The last commentator will be Professor Alastair Couper of the Department of Maritime Studies of the University of Wales. He is the only non-lawyer on this panel but I know he's perfectly capable of holding his own amongst lawyers. He is a noted economic geographer and, I'm very happy to report, he is also a master mariner like myself and was until recently a full-time professor at the World Maritime University of Malmo, Sweden, where he is now a visiting professor.

Ladies and gentlemen, that is your panel, and without further ado, I would like to introduce our first speaker, Mr. Valenzuela.

INTERNATIONAL MARITIME TRANSPORTATION: SELECTED ISSUES OF THE LAW OF THE SEA

Mario Valenzuela
Santiago, Chile

Introduction

Reviewing the abundant bibliography on the subject of this paper,[1] the conclusion was clear to its author: it was not useful for a person with my particular qualifications and experience to undertake another systematic analysis of the many issues covered by the title in the program. The very pertinent expositions in works such as the one edited by Dupuy and Vignes in 1985, and that of Churchill and Lowe in their second edition of 1988, indicated to this author that the most useful contribution he could make, at this stage, was through a choice of a few significant issues for further exploration, taking into account the developments in IMO for the implementation of the Law of the Sea Convention.

It was considered that two issues could point to very significant conclusions or uncertainties, throwing light on the rapid evolution of international law -- customary and conventional -- and to some sociological implications for the future of this evolution.

Thus, risking unavoidable overlaps with other presentations to this Conference, I have selected two closely related issues which concern, not only the Law of the Sea Convention of 1982, but complementary

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[1]The principal general works consulted for the elaboration of this paper, sometimes directly quoted in these notes, were: D.P. O'Connell, *The International Law of the Sea*, Volume II, Oxford: Clarendon Press, 1984; R.R. Churchill and A.V. Lowe, *The Law of the Sea*, Second Edition, Manchester University Press, 1988; Rene-Jean Dupuy and Daniel Vignes, *Traite du Nouveau Droit de la Mer*, Paris-Bruxelles: Ed. Economica, 1985; R. Michael M'Gonigle and Mark W. Zacher, *Pollution, Politics, and International Law*, Berkeley: University of California Press, 1979; International Maritime Organization, *Implication of the United Nations Convention on the Law of the Sea for the International Maritime Organization* (IMO), Study by the Secretariat of IMO, LEG/MISC/1, 1987; Edgar Gold, *Maritime Transport, The Evolution of the International Marine Policy and Shipping Law*, Lexington, Mass. and Toronto: Lexington Books, 1981.

developments in other recent multilateral instruments and in the practice of the most important State actors in world shipping. Both issues point, according to my personal opinion, to the establishment of a quasi-international public order law of the oceans in matters concerning safety of navigation and vessel-source marine pollution.

The two issues are:

(1) flag State obligations in these two subjects, discussing the long-standing problems of application and enforcement by flag States; and
(2) norms relating to entry into ports and to control and enforcement by port States. For the consideration of both issues a chronological approach to the developments which have taken place will constitute the main thread of the exposition.

Part I -- Flag-State Obligations

1958 -- The High Seas Convention

As is well known, the principle of the genuine link applied to the nationality of ships was incorporated in conventional international law by the Geneva Convention on the High Seas, in force since 1962 and accepted by a good number of States. Furthermore, it must be recalled that the provisions of this Convention were adopted "as generally declaratory of established principles of international law." Article 5 of the Convention stipulated that "there must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

Churchill and Lowe[2] doubt that this requirement of a "genuine link" between the vessel and the State purporting to confer nationality represents customary international law. It is not the intention of this paper to discuss this fundamental statement of principle, reproduced in the Law of the Sea Convention of 1982 (Art. 91), and in the UN Convention on Conditions for Registration of Ships, of 1986 (preamble).

It is a fact that this requirement of a "genuine link" had small impact on State practice. It is significant in this context that Art. 91 of UNCLOS III does not link the concept to the effective exercise of

[2]Churchill and Lowe, *op. cit.* p. 206.

jurisdiction by the flag State. Thus, Article 94 and its antecedent, Article 10 of the High Seas Convention, might be analyzed separately from the contentious issue of "genuine link."

Article 10 contains the first expression of the applicability to "every State" of "generally accepted standards" to ensure safety at sea. This Article 10, of which Article 94 of the 1982 UN Convention on the Law of the Sea is an expansion, prescribes:

(1) Every State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard *inter alia* to:
   (a) The use of signals, the maintenance of communications and the prevention of collisions;
   (b) The manning of ships and labor conditions for crews taking into account the applicable international labor instruments;
   (c) The construction, equipment and seaworthiness of ships.

(2) In taking such measures each State is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance.

At the time of the 1958 Convention there were no generally accepted standards relating to the marine pollution from ships. Thus, Article 24 limits itself to stipulate that "Every State shall draw up regulations to prevent pollution of the seas. . .taking into account the existing treaty provisions on the subject."[3]

Developments after 1958

(1) 1960

The provisions on Article 10, on safety of navigation, had in 1958 small substantive input, if any. The Intergovernmental Maritime Consultative Organization was only established in the same year, and only in 1960 were the first International Regulations for Preventing Collisions at Sea elaborated (they entered into force in 1965). Also in

[3]See on this point Louis B. Sohn, "Implication of the Law of the Sea Convention Regarding the Protection and Preservation of the Marine Environment," *The Developing Order of the Oceans*, Proceedings of the Eighteenth Annual Conference of the Law of the Sea Institute, San Francisco, 1984, p. 103-116, and particularly p. 103.

1960 the second International Convention for the Safety of Life at Sea was adopted (which also entered into force in 1965).

With regard to manning of ships and labor conditions for crews, the explanation for the expression "taking into account the applicable international labor instruments," may lie in the circumstance that there were no international standards elaborated until 1976. On this date the International Labor Conference adopted the Convention concerning Minimum Standards in Merchant Ships, which will be examined further in this context.

What is more important, however, is to consider the tremendous pace of elaboration by IMCO -- since 1983, IMO -- of international technical rules and standards, and the notable increase in the "general acceptation" of the Conventions which contain the rules and standards as Annexes to them. It must be emphasized that since 1972, amendments to these Annexes enter into force through the procedure of "tacit amendment," whereby they require only approval by the IMO competent body and the lapse of a certain time for being considered accepted by all States Parties, with the exception of States which object to the amendments. This is an important development, as will be shown, because a system has been established for approving by general acceptance, rules and standards which remain abreast of rapid technical developments, for all maritime States.

(2) 1966

In 1966 the International Convention on Load Lines was approved and entered into force in 1968. By now,[4] this Convention is practically universally accepted, counting 114 States Parties, constituting around 97 percent of the world's merchant fleet. The importance of the introduction of the tacit amendment procedure can be appreciated by the fact that not one of the amendments adopted to this traditionally drafted convention has entered into force as yet, in spite of the period of eight years, in the case of the 1971 amendments, and shorter periods for the 1975, 1979, and 1983 amendments. For this reason, in 1988, a Protocol to the Convention had to be adopted.

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[4]IMO, Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General performs Depositary or other Functions, as at 31 December 1988, document J/2735/Rev.3, pp. 119-147 (subsequently, IMO, Status of Multilateral Conventions).

(3) 1972

In 1972, the Convention on the International Regulations for Preventing Collisions at Sea was approved. The Convention entered into force in 1977 and by now it has also practically universal acceptance, having 102 Parties which constitute 94 percent of the gross tonnage of the world merchant fleet.[5] Amendments to the Regulations were approved by the IMO Assembly in 1981, in accordance with the "tacit amendment" procedure. The amendments entered into force in 1983. The amendments to the Regulations approved in 1987 will enter into force later this year, according to the same system.

(4) 1973

Although the High Seas Convention did not mention the "generally accepted international standards" in relation to preservation of the marine environment, as already mentioned, the International Convention for the Prevention of Pollution from Ships, 1973, must be mentioned at this point. The provisions of this Convention played a large part in the discussions which preceded the elaboration of Part XII of UNCLOS III on the subject of vessel-source pollution. This in spite of the fact that by 1978, States had to decide in a Conference that the Convention was not intended to enter into force and be applied on its own, due to the incapacity of States to implement, as provided in the annexes, many important international standards. This point will be considered further when the 1978 Conference is referred to.

(5) 1974

In 1974, the International Convention for the Safety of Life at Sea was adopted. The Convention entered into force in 1980 and by now is also of universal acceptance, having 104 Parties, which constitute 96 percent of the gross tonnage of the world's merchant fleet.[6] With the entry into force of the SOLAS Convention, 1974, the SOLAS Convention, 1960 above-mentioned, was superseded. The IMO Status of Multilateral Conventions, when it states that the supersession of the 1960 Convention is "as between the States Parties" to the SOLAS 1974

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[5]IMO, Status of Multilateral Conventions, p. 50.

[6]*Ibid*. p. 18.

Convention, should have mentioned the 1960 Convention of those States which have accepted the latter Convention.[7]

After the entry into force of SOLAS 1974 in 1981, only a year later, amendments were adopted by the Maritime Safety Committee. These amendments entered into force in 1984. Numerous new amendments were adopted by the same Committee in 1983. They entered into force in 1986. The Maritime Safety Committee again adopted amendments to the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC), in 1987. These amendments entered into force in 1988.

Finally, in 1988, three sets of amendments were adopted by the MSC. The first set of amendments, (April 1988 ro-ro), entered into force in April this year. The second set (October 1988 ro-ro) will enter into force in April 1990, unless more than one third of Contracting Governments, the combined fleets of which constitute not less than fifty per cent of the gross tonnage of the world's merchant fleet, have notified of their objections to the amendments. The third set of amendments, concerning Radiocommunications for the Global Maritime Distress and Safety System (GMDSS), will enter into force in February 1992, under the same conditions, except for States which have not withdrawn their objections, if any.

Due to the firm attitude of many developing countries and of some maritime States, the Conference of 1988 on the Harmonized System of Survey and Certification adopted a Protocol to SOLAS 1974, subject to the classic form of acceptance by fifteen States, the fleets of which constitute not less than fifty per cent of the gross tonnage of the world's merchant fleet, through formal consent given in accordance with Article IV. There is a proviso, which is, in fact, the only guarantee of not having the Protocol implemented earlier by port States, as I will try to show in Part II of this paper. The proviso consists in the clause by which the Protocol shall not enter into force before February 1992.[8]

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[7] *Ibid.* p. 401. It is revealing to see which States Parties to the 1960 Convention have not ratified the 1974 Convention. These are: Cuba, Democratic Kampuchea, Democratic Yemen, Equatorial Guinea, Gambia, Haiti, Iran, Iraq, Kenya, Madagascar, Mauritania, Morocco, New Zealand, Nicaragua, Paraguay, Samoa, Senegal, Somalia, Syria, Vietnam and Yemen.

[8] *Ibid.* pp. 22-30.

(5) 1976

The next development took place in quite a different setting: in October 1976, the 62nd (Maritime) Session of the International Labor Conference adopted Convention No. 147 concerning Minimum Standards in Merchant Ships. This instrument has been described as a "significant breakthrough" in the control of sub-standard vessels.[9] According to Article 2 of the Convention, each Member which ratifies the Convention undertakes, *inter alia*, "to have laws and regulations laying down, for ships registered in its territory, safety standards, including standards of competency, hours of work, and manning, so as to ensure safety of life on board ship." The link with safety standards developed by IMO was made by means of making the ratification of the new Convention subject to prior ratification of certain basic IMO regulatory Conventions, or to an undertaking to ratify these Conventions in the future. Thus, the Convention provides in Article 5 that it is open to ratification by Member States which are:

(a) Parties to the SOLAS Convention 1960, or the SOLAS Convention 1974, or any Convention subsequently revising these Conventions;
(b) Parties to the Load Lines Convention, 1966, or any Convention subsequently revising that Convention; and
(c) Parties to or that have implemented the provisions of COLREG 1960, or the COLREG Convention 1972, or any Convention subsequently revising these instruments.

The Convention is further open to ratification to any Member which, on ratification, undertakes to fulfil the requirements to which ratification is made subject by the foregoing provisions and which are not yet in force.

In this conventional text, the first statement is made by States concerning what might be considered generally accepted international rules and standards on safety of navigation, developed by IMO.

However, there is a great difference between the international status of this ILO Convention and all the IMO conventions concerning standards on safety of navigation and/or prevention of pollution from

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[9]On this Convention, see Ebere Osieke, "The International Labor Organization and the Control of Substandard Merchant Vessels," in *The International and Comparative Law Quarterly*, Volume 30, Part 3, July 1981, pp. 497-512.

ships. The requirements for entry into force in the ILO Convention were much lower than those determined in the IMO conventions: Convention No. 147 entered into force after the ratification by only ten Members, with a total share in world shipping tonnage of 25 percent. This occurred in November, 1981, and it has now only twenty States Parties which represent around 50 percent of world shipping.[10]

For the purposes of this paper, it is useful to note that thirteen of the fourteen Parties to the Memorandum of Understanding on Port State Control (examined in Part II of this paper) are Parties to the Convention, and that also Japan and the United States are Parties. This leaves only five developing States which have ratified up to now this Convention (Costa Rica, Egypt, Iraq, Liberia, and Morocco). No socialist State has ratified the Convention. Under the circumstances, it is very doubtful whether the standards of this ILO Convention has the status of "generally accepted"[11] or that there is a solid assumption in this sense.[12]

(7) 1978

1978 marked a new impetus in the development of international rules and standards. First, under strong pressure from the United States government in the aftermath of the *Olympic Bravery* incident, the International Conference on Tanker Safety and Pollution Prevention (TSPP) took place at IMO Headquarters in February of that year. As the title of the Conference indicates, it was by then recognized that it was impossible to distinguish between the higher conventional rules and standards on design, construction, equipment,

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[10]Text of Ratifications of International Labor Conventions Document . . . ILO Status of Ratifications as at 1 January 1989 and Churchill and Lowe, *op. cit.*, p. 218.

[11]This was my opinion in respect of standards contained in IMO Conventions in force. See M. Valenzuela, "IMO: Public International Law and Regulation," in *The Law of the Sea and Ocean Industry: New Opportunities and Restraints*, Proceedings of the 16th Annual Conference of the Law of the Sea Institute, Halifax, 1982, pp. 141-151.

[12]This is the opinion expressed by Tullio Treves, in Dupuy and Vignes, *op. cit.*, p. 723.

and manning of ships, for safety of navigation purposes, or for marine pollution prevention purposes. This, in my opinion, has a major impact on the interpretation and application of the provisions of Part XII of UNCLOS III, which has the most elaborated set of norms on jurisdiction and enforcement.

The TSPP Conference adopted two important Protocols:

(1) The Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974, which entered into force in May 1981, at an amazing speed, just a few months after the entry into force of the parent Convention; and

(2) The Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL). This instrument has a very peculiar feature in international law because it is not really a Protocol in the traditional sense: MARPOL 1973 was considered to be not intended to enter into force and be applied on its own. In view of its lack of acceptance, it was to be applied as incorporated in the Protocol of 1978 and subject to the modifications in that Protocol. In spite of the extreme complexity of some of its technical rules and standards, the MARPOL Protocol entered into force in 1983, with respect to Annex I. The other mandatory Annex, Annex II, only entered into force in 1987. The Convention and these two Annexes, as amended, are now, in my opinion, generally accepted, having been ratified or acceded to by fifty-four States representing approximately 81 percent of the tonnage of the world's merchant fleet. The situation of the Optional Annexes will not be considered in this paper.[13]

The SOLAS Protocol of 1978 (referred to above) suffered amendments a few months after its entry into force. The Maritime Safety Committee adopted these amendments in November 1981. The amendments entered into force through the "tacit amendment" procedure in September 1984. A Conference of Parties to the Protocol took place in London in November 1988 and adopted amendments to the Protocol resulting from the introduction of the Global Maritime Distress and Safety System (GMDSS). These amendments should enter

[13]See IMO, Status of Multilateral Conventions, pp. 63-98.

into force in February next year, or in February, 1992, except for States which have not withdrawn their objections by that date.

The SOLAS Protocol of 1978, as amended, may also be considered generally accepted, as it has now 69 States Parties, representing 90 percent of the gross tonnage of the world's merchant fleet.

The MARPOL 1973/78 instrument (referred to above) has suffered already three sets of amendments. The Marine Environment Protection Committee of IMO adopted in September, 1984, less than one year after the entry into force of the instrument, amendments to the Annex to the 1978 Protocol. These amendments entered into force in January 1986. The same Committee adopted in December 1985 amendments to Protocol I to MARPOL 1973 and amendments to Annex II to MARPOL 1973/78. The amendments entered into force in April, 1987. Finally, up to now, in December, 1987, the MEPC adopted amendments to Annex I of the MARPOL 1973/78 instrument. These amendments entered into force in April this year.

Another Diplomatic Conference took place in IMO during the course of 1978. This Conference adopted an important convention both for safety of navigation and for prevention of pollution from ships, as maritime accidents evidence this on multiple occasions. This is the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, which entered into force in April, 1984. This Convention and its technical standards might be considered now also as generally accepted, having as at 30 December 1988 sixty-nine States Parties, the combined fleets of which constitute approximately 75 percent of the world's merchant fleet. In relation to the adoption of unilateral legislation and port State control, it may be noted here that the United States has not yet accepted this Convention.[14]

(8) 1982

New Provisions on International Law

(1) Article 94 and Article 212 (2) of UNCLOS III

It seemed necessary to examine in detail the rapid developments which took place and are taking place in the technical field, because the provisions of UNCLOS III "make the relevant regulations and

[14] *Ibid*, pp. 319-330.

standards of IMO an integral part of the guidelines by reference to which the Convention's provisions are to be implemented."[15]

What Professor Sohn states in relation to norms on pollution is in principle applicable also to the norms concerning the subjects covered by Article 94 of UNCLOS, which incidentally includes marine pollution (paragraph 4(c)). As indicated earlier, most rules and standards concerning navigation, especially those concerning design, construction, manning, or equipment of ships, serve also for preventing pollution and minimizing the threat of accidents which might cause pollution to the marine environment. Professor Sohn remarks that "the common, and rather surprising to a traditional lawyer, feature of these provisions is the universal applicability of the international rules and standard."[16] For him, once a rule or standard has been generally accepted, a State has a duty, imposed by the Law of the Sea Convention, to enact the necessary laws and regulations. This author agrees with him and with other writers that "this is the most dynamic feature of the Law of the Sea."[17] This explains the rather long exposition on the situation of the rapidly changing IMO rules and standards.

Some of the paragraphs of Article 94 on the duties of the flag State are practically identical to the provisions already quoted of the 1958 Convention on the High Seas (paragraphs 1 and 3), including the crucial expression "every State." This expression is in consonance with the statement in the preamble of the 1958 Convention that its provisions are declaratory of established principles of international law.

Paragraph 4 gives some details concerning the content of the measures which every State must take according to paragraph 3.

Paragraph 5 reproduces and expands the provision of Article 10(2) of the Geneva Convention using only a new and uncertain terminology in referring to "generally accepted international regulations, procedures and practices" instead of "generally accepted international standards." The thrust of the provision is maintained: "In taking the measures called for in paragraphs 3 and 4 each State is required to

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[15]IMO: Implications of the United Nations Convention on the Law of the Sea, for the IMO, *op. cit.*, p. 4.

[16]Sohn, *op. cit.*, in footnote (3), pp. 103, 104.

[17]*Ibid*, p. 109; see also Dupuy and Vignes, *op. cit.*, pp. 722-723.

conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance."

Article 211 (2) on pollution from vessels points in the same direction in terms even stronger in their import: "*States shall* adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations *shall at least* have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference."

Unfortunately, the general provisions on enforcement by the flag State remained extremely weak. They are contained in paragraphs 6 and 7 of Article 94, which read as follows:

> 6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.
>
> 7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

As already advanced, a strong case can be made for asserting that the more prolix, and in principle, more exacting provisions on enforcement by flag States in Part XII (Art. 217) are not restricted to the vessel-source marine pollution convention (MARPOL 73/78). If it were not so, UNCLOS III would be seriously flawed and inconsistent. There is another argument which can be added to that indicated earlier: measures for preventing accidents, for ensuring the safety of operations at sea, and for regulating the design, construction, equipment, operation, and manning of vessels, are mentioned in Article 194 (3)(b) of Part XII; and are also referred to in Article 94 (3) of duties of the flag State in general, as measures necessary to ensure safety at sea.

There is another point which requires interpretation in Article 217: It has been established that both by Article 94(5) and Article 211(2), flag States are obliged to conform and/or adopt generally accepted rules and standards. Article 217(1), however, provides that "States shall ensure compliance by vessels flying their flag or of their registry with *applicable* international rules and standards." Although paradoxical, for this author, in principle, the most consistent interpretation would be that the applicable rules and standards for the purpose of enforcement by flag States, are the generally accepted rules and standards which flag States are obliged to comply with. Otherwise, Article 94(5) and Article 211(2) would not be really mandatory for flag States.

However, with reference to the main "flag of convenience" States, the issue is not particularly important in practice: Liberia is Party to all IMO regulatory Conventions; Panama is Party to all but STCW 1978, and Cyprus to all but MARPOL 1973/78. The issue is really of control and enforcement and this is being solved by the application of general international law by port States of the major shipping nations, and will be examined in the second part of this paper, to follow immediately.

(2) The 1986 Convention on Conditions for Registration of Ships

It only remains here to mention the meager results in this respect of the UN Convention on Conditions for Registration of Ships of 1986.[18] After recalling the principle of the genuine link in the Preamble, Article 5 on National Maritime Administration contains, in paragraph 2, the basic principle that the "the flag State shall implement applicable international rules and standards concerning, in particular, the safety of ships and persons on board and the prevention of pollution of the marine environment." Paragraphs 3 and 5 set out in detail this obligation. If "applicable" would only apply to rules and standards in force for the flag State, the provisions of this Article would be superfluous, as already indicated.

Three years after its adoption, the 1986 Convention has been signed only by a dozen States (developing countries and two socialist states)

[18]Text in document TD/RS/CONF/23 of 13 March 1986.

and has only two Contracting States (Cote d'Ivoire and Mexico).[19] In the near future, no real influence can be expected regarding this Convention developed by UNCTAD on matters concerning safety of navigation and prevention of marine pollution, and their effective implementation and enforcement by flag States.[20]

Part II -- Conditions for Entry into Port and Control and Enforcement by Port States

The issue of the right of access to ports in general international law will not be considered in the present paper although it is closely connected with the question of the right to prescribe conditions for access to port by the sovereign State. There is an abundant bibliography on the first subject.[21] Recently, the International Court of Justice in the Nicaragua case stated that internal waters are subject to the sovereignty of the State and that it is "by virtue of its sovereignty that the coastal State may regulate access to its ports."[22] It is unquestionable that the coastal state may close all or some of its ports, or put special requirements for entry, for security reasons.

Consideration will be given to the present status of international law on conditions for entry into port under the provisions of the Law of the Sea Convention when there are special conventions in force reviewing the present practice of some maritime States. It is noteworthy to mention already an important principle submitted by Churchill and Lowe:

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[19]United Nations, Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1988, 3T/LEG/SER.E/6, p. 596.

[20]On this subject, see H.W. Wefers Bettink, "Open Registry, the Genuine Link and the 1986 Convention on Registration Conditions for Ships," in the *Netherlands Yearbook of International Law*, 1987, pp. 69-110.

[21]See general note quoted above under 1. Also V.D. Degan,"Internal Waters," in *Netherlands Yearbook of International Law*, 1986, Vol. 17, page 3-44.

[22](1986) International Court of Justice, *Reports*, pp. 111-112.

It is, however, possible that closures or conditions of access which are patently unreasonable or discriminatory might be held to amount to *abus de droit*, for which the coastal State might be internationally responsible even if there were no right of entry to the port."[23]

One must recall the considerable potential impact which the principle codified in Article 300 on good faith and abuse of rights of the 1982 UNCLOS Convention may have in this connection.

Of course, under customary international law, coastal States, in their internal waters and when foreign vessels are in their ports, are entitled to exercise jurisdiction in matters concerning safety of navigation and regulation of maritime traffic, marine pollution, and enforce their laws and regulations on these matters. The main issue which will be considered later is whether at present port States are entitled to establish and enforce more stringent requirements for foreign vessels in matters concerning design, construction, manning or equipment of vessels, in case the port State and the State the flag of which the vessel entering the port or in the port, are both Parties to the technical international conventions which lay down such rules and standards. This is said considering the previous examination in the first part of this paper of how in a period of fifteen years a whole corpus of generally accepted international rules and standards has been developed and is in a continuous process of updating through the tacit amendment procedure established in the modern IMO regulatory conventions.

Law of the Sea Conventions on the Subject

The first expression in general international law of the principle is contained in Article 16(2) of the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958, in force since 1964. It provides that "in the case of ships proceeding to internal waters, the coastal State shall have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject." The adverb "also" refers to paragraph 1 which stipulates that "the coastal State may take the necessary steps to prevent any breach passage which is not innocent."

The 1982 Convention on the Law of the Sea, practically without discussion, reproduced these two provisions. This was made in Article 25 on "rights of protection of the coastal State" (paragraphs 1 and 2).

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[23] *Op. cit.* above in Note 1, pp. 52-53.

The only modification to the 1958 test was in paragraph 2, so as to include "a call at a port facility outside internal waters," a matter which is irrelevant for the present analysis.

The main difference for the interpretation of both provisions derives from the new limitation introduced to the sovereignty of the coastal State for adopting laws and regulations relating to innocent passage (Art. 21). This crucial provision states in its paragraph 2 that "such laws and regulations (including those on navigation and marine pollution) shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards." One must add that there was no question in 1958 of generally accepted rules and standards on these matters.

Treves refers to the fact that when this provision was adopted the 1973 MARPOL Convention had not entered into force and that since 1983 -- the date of its entry into force -- it could be deemed that there are generally accepted rules and standards in design, construction, manning or equipment.[24] It might be added what was stated earlier in this paper: the other IMO Conventions which have rules and standards on these subjects entered into force respectively as follows: SOLAS 1974, May 1980; SOLAS Protocol 1978, May 1981; and STCW Convention 1978, April 1984.

These dates are important for considering the amendment adopted by UNCLOS III in 1978, on the aftermath of the *Amoco Cadiz* disaster. This amendment is now Article 211(3) of Part XII. Its test is as follows:

> States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. Whenever such requirements are established in identical form by two or more coastal States in an endeavour to harmonize policy, the communication shall indicate which States are participating in such cooperative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State participating in such cooperative arrangements, to furnish, upon the

[24] In Dupuy and Vignes, *op. cit.*, pp. 763-764.

request of that State, information as to whether it is proceeding to a State of the same region participating in such cooperative arrangements and, if so, to indicate whether it complies with the port entry requirements of that State. This article is without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2.

It does not seem according to the intention of the Parties to sustain as Treves does[25] that the most interesting example of such regional arrangement is the Paris Memorandum of Understanding on Port State Control of 26 January 1982. This Memorandum does not purport to establish particular requirements, as will be shown in section C.

Be that as it may, an examination of the summary records of the seventh session of UNCLOS in 1978 show no dissent on the interpretation given at the moment to this new provision. The United States delegate was the most explicit:

> Since there was, in any case, no doubt that a State had complete discretion to fix port entry requirements, his delegation agreed with that of France that clarification in the negotiating text of the right of neighboring States to take joint measures to prevent pollution in the territorial sea might better serve both environmental and navigational interests than would a situation in which conflicting interpretations could be advanced.[26]

It is my opinion such complete discretion does not now exist, vis-a-vis Parties to a special convention, on the part of the port State. The statement by the Canadian delegate at the same debate, although he was referring at this moment to the sovereign powers within the territorial sea, is interesting in this respect:

> Coastal States could not be denied the right to enact national standards for the design, construction, manning or equipment of vessels when the relevant international standards were non-existent

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[25] In Dupuy and Vignes, *op. cit.*, pp. 763-764.

[26] Third United Nations Conference on the Law of the Sea, Official Records, Volume IX, page 145.

or inadequate, or perhaps were contained in an international legal instrument which had not yet entered into force.[27]

There are no provisions on enforcement by port States in Part II, Territorial Sea and Contiguous Zone; and Article 218 of Part XII only deals with discharge violations. It is in Article 220, on enforcement by coastal States, where one finds the granting of broad powers of enforcement to a port State. Its paragraph 1 gives powers to the port State to institute proceedings in respect of any violation of its laws and regulations adopted in accordance with the Convention. It is to be remarked that the provision refers to "the Convention." The norm seems to be of general application also because, as it has already been pointed out, most rules and standards on the design, construction, equipment, operation, and manning of vessels serve safety of navigation, safety of life and property, and prevention of pollution purposes.

Article 220(1) reads as follows:

1. When a vessel is voluntarily within a port or at any off-shore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State.

The reference to the place of violation of the laws and regulations is somewhat confusing in this provision, however, because the standards already mentioned are violated wherever the vessel sails, and the port is only the place where the violation is ascertained when the inspection takes place.[28]

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[27] *Ibid*, at p. 147.

[28] The explanation seems to lie in the scope of the norm: it would apply only to violations of regulations concerning discharges. When a ship in port does not comply with provisions concerning structural or operational requirements, it seems that the drafters of UNCLOS understood that the port State has jurisdiction to institute proceedings. Article 5 of MARPOL 1973/78, on certificates and special rules on

This provision, read together with the preceding Article on measures relating to seaworthiness of vessels to avoid pollution, makes evident that the powers of the port State include full powers of physical inspection and also for the institutions of proceedings. Even assuming that the preceding provisions of UNCLOS form part of customary international law, it is necessary to examine the system of control and enforcement of IMO regulatory conventions in force.[29]

IMO Main Regulatory Conventions and ILO Convention No. 147 on the Subject

The most noteworthy feature of the new regulatory conventions is that they establish a system of universal application of State control for all ships by State Parties to those conventions.

The first provision adopted in this sense is included in MARPOL 1973, which antedates the convening of UNCLOS III. This revolutionary and potentially dangerous development in international law is based on the so-called "no more favorable treatment" clause. The application of the provisions of the Convention to third parties has been considered necessary for the international character of shipping. The new clause appears in Article 5(4) of the 1973 MARPOL Convention: "With respect to the ships of non-Parties to the Convention, Parties shall apply the requirements of the present Convention as may be necessary to ensure that no more favorable treatment is given to such ships."

SOLAS 1974 Convention, elaborated one year later, omitted this clause. This omission, however, was repaired when the SOLAS Protocol 1978 was elaborated. Its Article II (3) provides that "with respect to the ships of non-Parties to the Convention (SOLAS 1974) and the present Protocol, the Parties to the present Protocol shall apply the requirements of the Convention and the present Protocol as may be necessary to ensure that no more favorable treatment is given to such ships."

The STCW Convention, 1978 has a slightly different provision in its Article X, on control. Paragraph 5 prescribes that the Article -- not

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inspection of ships, seems to require prior notification to the national authorities of the ship.

[29]It is to be regretted that the IMO document on Implications of UNCLOS for IMO quoted above (Note 15), does not address itself to the question of the harmonization of both sets of provisions on jurisdiction and enforcement by the coastal State and the port State.

the requirements of the Convention -- shall be applied "as may be necessary to ensure that no more favorable treatment is given to ships entitled to fly the flag of a non-Party than is given to ships entitled to fly the flag of a Party."

Finally, as the ILO Convention Nr. 147 of 1976 is included among the instruments covered by the Memorandum of Paris, mention should be made of the similar, although not explicit, clause contained in its Article 4(1).

> 1. If a Member which has ratified this Convention and in whose port a ship calls in the normal course of its business or for operational reasons receives a complaint or obtains evidence that the ship does not conform to the standards of this Convention, after it has come into force, it may prepare a report addressed to the government of the country in which the ship is registered, with a copy to the Director-General of the International Labour Office, and may take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health.

Osieke notes that "with respect to the ships that would be affected by port control, it was explained that the provisions of Article 4 would apply to all vessels which arrived in the ports of States that had ratified the Convention, and an amendment to limit the application of the Article to vessels flying the flag of a State which had ratified the Convention was rejected."[30]

The only regulatory IMO Convention included in the Memorandum of Paris which has not this clause of universal port State control is the old Load Lines Convention of 1966. As recollected in the first part of this paper, the Load Lines Convention has now 114 States Parties, presenting around 97 percent of world shipping. Thus, the issue has now no practical importance. At any rate, it can very well be sustained for justifying its inclusion in the Paris Memorandum that this Convention on seaworthiness of ships is subject to the same regime as provided by the Parties to new conventions on the same subject, as are SOLAS 1974 and the SOLAS Protocol 1978; or that a new rule of customary international law has been developed.

The ILO Convention required for its entry into force ratification of only ten Members with a total share in world shipping gross tonnage

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[30] *Op. cit.*, above in Note 9, p. 56.

of 25 percent. Neither this provision nor the situation in practice makes its provisions indisputably generally accepted rules and standards, as it is argued in Part I of this paper for IMO regulatory conventions.[31]

The system for implementation of "generally accepted rules and standards" referred to in Article 94(5) and 211(2) of UNCLOS by port State jurisdiction and control would thus be made consistent with the new provisions of specific technical agreements. The system has been made effective indeed, as will be explained under the analysis of the Paris Memorandum.

Finally, on the IMO regulatory Convention and in relation to the Paris Memorandum, something should be said about the rules on inspection of ships. MARPOL 73/78 is to be used as a model, because the other conventions are by and large similar to this Convention.

The conventions give full validity to the certificates issued by the authority of a Party. According to Article 5(2) the inspections in ports "shall be limited to verifying that there is on board a valid certificate, unless there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate. In that case, or if the ship does not carry a valid certificate, the Party carrying out the inspection shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without presenting an unreasonable threat or harm to the marine environment" ("danger to the ship or persons on board" in the SOLAS Protocol; and "danger to persons, property or the environment" in the STCW Convention).

Another important feature of the IMO conventions and the ILO Convention No. 147 is one which shows clearly the contractual character of the provisions of the conventions on port State control. Article 5(3) of MARPOL 73/78 is quoted only as it is substantially similar to the provisions in the other conventions.

> (3) If a party denies a foreign ship entry to the ports or off-shore terminals under its jurisdiction or takes any action against such a ship for the reason that the ship does not comply with the provisions of the present Convention, the Party shall immediately inform the consul or diplomatic representative of the Party whose flag the ship is entitled to fly, or if this is not possible, the Administration of the ship concerned. Before denying entry or taking such action the Party may request

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[31]See above, pages 5 to 10.

consultation with the Administration of the ship concerned. Information shall also be given to the Administration when a ship does not carry a valid certificate in accordance with the provisions of the Regulations."

Now one must turn to the Paris Memorandum to examine its conformity with the regulatory system developed by IMO in its conventions.

The Paris Memorandum on Port State Control (MOU) of 1982

This regional arrangement of fourteen Western European countries is examined not only because it is the first of its kind. There is by now material available on its procedures and results. Bettnik[32] mentions similar developments which have taken place in the United States and Japan and notes that cooperation between the MOU States and these countries would increase their effects. Recent information mentions the fact that "certain Eastern European countries and Australia have also developed similar schemes."[33] Information also exists concerning Canada's involvement with the Paris Memorandum. These facts show a clear sociological trend behind these developments in advanced States for coping with the problem of substandard ships, in view of the lack of control and enforcement by many flag States.

These port States do this while claiming continued recognition in the preamble of the Paris Memorandum that "the principal responsibility for the effective application of standards laid down in international instruments rests upon the authorities of the State whose flag a ship is entitled to fly."[34]

Under the Memorandum each authority undertakes to maintain an effective system of port State control to ensure that all vessels visiting its ports comply with the main IMO safety conventions discussed above, ILO Convention No. 147 and MARPOL 1973/78, to the extent that such conventions are in force and the port State is a Party -- regardless of whether the flag State of the ship concerned is a Party -- all in agreement with the provisions of the relevant conventions

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[32]*Op. cit.*, p. 93.

[33]*Lloyd's List*, London, 11 May 1989.

[34]Bulletin officiel du Ministere de la Mer, Fascicule no. 19 bis, (special) novembre 1982 - 2, Paris.

examined earlier. Examination of the official status documents[35] show that thirteen of those States have ratified all the relevant conventions, becoming Parties to these and to all amendments thereto in force. Only Ireland is not yet Party either to the ILO Convention No. 147 or to the MARPOL 1973/78 instrument.

The MOU introduces guidelines for the inspections to be carried out and sets signatory administrations a target of 25 percent of all foreign merchant ships entering their ports to be inspected annually, within a period of three years (Section 1.3). As a consequence, ships sailing to any of the ports of these States are liable to be inspected once every six months.

Section 3.1. reproduces almost *verbatim* the provisions of the relevant conventions regarding valid certificates. It goes a step further in Section 3.2. establishing that the Authorities will regard as "clear grounds" *inter alia* the following:

- a report or notification by another Authority;
- a report or complaint by the master, a crew member, or any person or organizations with a legitimate interest in the safe operation of the ship, shipboard living and working conditions or the prevention of pollution.
- other indications of serious deficiencies, having regard in particular to Annex 1 (Section 3.2.).

The provision which seems to have no parallel in the relevant convention is that of Section 3.3 read in conjunction with Section 3.1 quoted above. It prescribed, with good judgment, considering MOU's approach, that:

3.3. In selecting ships for inspection, the Authorities will pay special attention to:

a) ships which may present a special hazard for instance oil tankers and gas and chemical carriers;
b) ships which have had several recent deficiencies.

Churchill and Lowe[36] maintain that the Memorandum "goes somewhat further than the Convention, but is still in accordance with

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[35] *Op. cit.*, note 4.

[36] *Op. cit.*, note 1.

customary international law." This fundamental question of the applicability of customary international law between Parties to a special convention is to be considered in the following section. Treves seems to be of a different opinion. He considers that one of the innovative aspects of the MOU is that it gives indications concerning the manner in which the more detailed inspections should be carried out when there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the prescriptions of a pertinent instrument, indications on which are these clear grounds and which categories of ships should receive "special attention."[37]

Provisions of the relevant conventions on notifications to the flag State are rigorously followed in Section 3.7 and 3.8 of the Paris Memorandum.

Moreover, relevant IMO resolutions are referred to in the guidelines to be observed in the foreign ships.

As far as I am informed, there has been general acquiescence by States Parties to the relevant IMO conventions concerning the compatibility of the MOU with the provisions in these conventions. It seems that there have not been objections to physical inspection of 25 percent of the estimated number of individual foreign ships, with a more or less discretionary power by the port States of the Memorandum to determine whether "there are clear grounds for believing that the ship does not substantially meet the requirements of a relevant instrument."

The concerns for maritime safety and protection of the marine environment and the importance of improving living working conditions on board ship seem to have weighed heavily in the minds of flag State governments for accepting a somewhat high-handed treatment for the validity of their certificates by authorities of the most important shipping nations.

It cannot be denied that these developments on port State control -- there is no question in the Memorandum of port State enforcement -- have had substantial impact in the acceptance by most flag States of IMO Conventions and in their implementation by flag States which

[37]In Dupuy and Vignes, *op. cit.*, pp. 763-764.

trade internationally and do not want to have these all-important ports of world shipping[38] closed to their substandard ships.

The position of IMO on the Memorandum has been stated in the following terms:

> We in IMO believe that the effective and proper implementation of the Paris Memorandum of Understanding constitutes an important, indeed essential, contribution to the effective implementation of IMO's international regulations and standards of safety at sea and the prevention of marine pollution. We, therefore, support the Memorandum of Understanding, as we support all other State action and inter-State arrangements to facilitate implementation of the international regulations and standards in other parts of the world. What we request -- may insist upon -- is that any such action or arrangements must genuinely be for the purpose of implementing the existing regulations and not used, wittingly or unwittingly, as a pretext to modify the international regulations adopted in IMO or to adopt new ones. Furthermore, we insist that measures taken for these purposes should be within the scope of the relevant international conventions, and they must follow the procedures which are laid down in those conventions or which have been duly elaborated in IMO. Above all the measures must conform to the letter and spirit of the internationally agreed procedures, and should be applied impartially and on a non-discriminatory basis to all ships, regardless of their flag states or states of registry.[39]

Be that as it may, port State control by some States which have the will, organization, and resources to proceed is now a feature of the present implementation of IMO regulatory conventions. The implementation through port State control of IMO Convention No. 147 to all ships by sixteen States Parties of a convention which has not been accepted but by four other States is really a matter of customary

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[38]See Ernest G. Frankel, "Shipping and its Role in Economic Development," in *Marine Policy*, Vol. 13, Nr. 1, January 1989, pp. 22-42, esp. pp. 22-26.

[39]Thomas A. Mensah, "The Paris Memorandum of Understanding on Port State Control and Maritime Safety: An IMO Perspective," in Conference of the Seamens' Church Institute Centre for Seafarers' Rights, unpublished address, 1987.

international law (Arts. 25(2) and 211(2) of UNCLOS III), except for those four States, which have also acquiesced to its application to ships flying their flag.

The Imposition of Special Requirements for Entry into Ports for Vessels Whose Nationality Is of Another State Party to a Special Convention

The scope of the MOU having been summarized, it must be said that there are not now well known instances of cases in which port States impose special more stringent requirements for entry into its ports on vessels flying the flag of another State Party to an IMO regulatory convention.

The matter had great importance in relation to innocent passage through the territorial sea during the 1970s before the adoption by the Conference on the Law of the Sea of the restrictive Article 21 (2) on rules concerning design, construction, equipment, and manning of ships at the end of the decade. It has been shown earlier that in 1978, the delegate of Canada still maintained that this limitation of sovereignty should be restricted to passage through the territorial sea (above, p. 153); and that the delegate of the United States considered discretionary the powers of the port State to establish special requirements for entry into ports (above, page 153).

The matter was much discussed during the 1970s in the United States,[40] with the approval of draconian provisions on navigation and on pollution control of the Acts adopted in 1970, 1972, and 1974, at a time when the main regulatory IMO conventions, with rules and standards on these matters, were not yet in force. I ignore the situation now in different countries, particularly in the United States and Canada, which also seemed to have special legislation on more stringent requirements for navigation in their territorial seas, including, of course, internal waters.

The subject is extremely complicated because of the technical character of the requirements included in the IMO regulatory conventions and in the national implementing legislation or in special legislation for different types of ships and equipments; also the specifications or the dates of application of different provisions has

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[40]David Allan Fitch, "Unilateral Action Versus Universal Evolution of Safety and Environmental Protection Standards in Maritime Shipping of Hazardous Cargoes," in *Harvard International Law Journal*, Volume 20, Nr. 1, Winter 1979, pp. 127-174.

varied with the approval of amendments by means of tacit amendment procedure for IMO technical annexes.

With the adoption of UNCLOS in 1982 and the entry into force of IMO conventions, the matter seems to be settled in respect of innocent passage through the territorial seas. The result has been the fulfillment of the main object of and purpose of these IMO Conventions: the establishment of uniform and universal rules of navigation for maritime trade in the world's oceans.

However, the mere possibility that such a giant in maritime trade as the United States[41] may impose special requirements which go beyond or are more stringent than those established in conventions of which the United States is a Party, for entry into its ports, makes the issue of great economic significance. Most foreign ships which navigate the North American territorial waters, do so in order to enter the ports of the United States or Canada.

Susan Strange, in her classical study, wrote in 1976 on the need to develop rules to ensure greater safety and less risk of harm to oceans and coasts throughout the world that "whether this need is met or not still depends more on the attitudes taken by the United States than on any other factor." She believed that "the United States could act most effectively by taking unilateral national action. Regulations that applied to all ships entering American ports regardless of ownership, flag registration or the crew's nationality would have the immediate effect of transnational regulation."[42] Her arguments did not consider the developments on international regulations since 1976.

The legal problem, likewise of considerable importance, touches upon fundamental issues of international law, particularly the law concerning the question between customary law and treaty law and the law of treaties.[43] I will try now to argue in favor of the thesis that the port States have not the powers granted under international customary law (Arts. 25(2) and 211 (2) of UNCLOS), or by general treaty law (Art. 16(2) of the Geneva Convention) when there is a special treaty relation with the flag State.

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[41]Susan Strange, "Who Runs World Shipping?", in *International Affairs*, Vol. 52, Nr. 3, July 1976, pp. 347-367.

[42]*Op. cit.* pp. 366-367.

[43]See in general Ian Brownlie, *Principles of Public International Law*, Third Edition, Oxford, 1979, pp. 600-632, esp. pp. 623-630.

(1) The main reason, of course, is expressed in the fundamental principle of international treaty law, codified in Article 26 of the Vienna Convention on the Law of Treaties, under the heading of "Pacta sunt servanda": "Every treaty is binding upon the parties to it and must be performed by them in good faith."

(2) UNCLOS III itself expands on this principle in Article 300 on good faith and abuse of rights:

> States Parties shall fulfil 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.

(3) It is true that in 1958 and during the negotiations up to 1978 within UNCLOS, the point was not mentioned and that the literal sense of Articles 25 (2) and 211 (2) seem to be unconditional; the right of the coastal State to establish special requirements for entry into its ports appearing as discretional. However, it has already been indicated, only from 1980 and fully from 1984 have there been IMO regulatory conventions.

(4) In this connection, Article 311 (2) of UNCLOS III, on the relation to other conventions and international agreements, is quite pertinent:

> 2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

(5) Article 30(2) of the Vienna Convention on the Law of Treaties corroborates the above principle. It states in respect of application of successive treaties relating to the same subject-matter;

> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

(6) The same Vienna Convention has as the first general rule of interpretation, that embodied in Article 31 (1):

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This rule is particularly pertinent for interpreting the IMO regulatory conventions which do not envisage any derogation for ports of States Parties. IMO conventions have precisely for object and purpose the universal application of its rules and standards, in order to facilitate world navigation.

(7) Even if these were not considered sufficient arguments, the rule in the Vienna Convention on supplementary means of interpretation could be adduced. According to Article 32, "recourse may be had to these means in order to determine the meaning when interpretation, according to Article 31 ... leads to a result which is manifestly absurd or unreasonable."

To conclude that a regulatory convention negotiated in good faith within an international organization can be derogated by a State Party in such a fundamental question (the purpose of free navigation and innocent passage is proceeding to or from a port) is manifestly unreasonable. The imposition of special requirements to other States Parties could be even considered against fundamental principles of the United Nations Charter.

(8) Finally, one finds another argument in the rule of international law of Article 27 of the Vienna Convention: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

I must put an end to this issue which I believe is hypothetical at present and which I hope will remain so in the future.

MARITIME SAFETY ISSUES UNDER THE LAW OF THE SEA CONVENTION AND THEIR IMPLEMENTATION

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Introduction

When the UN General Assembly adopted Resolution 2750 (c) convening a conference on the law of the sea, the subjects listed did not mention specifically that the legal regime relating to shipping should be reconsidered. The resolution does mention related subjects such as the regimes of the high seas, the continental shelf, the territorial sea, and the preservation of the marine environment. However, navigation as such was not mentioned. The reason for this omission probably lies in the fact that there was quite a large agreement on the technical and safety aspects of shipping in 1970. It should not be forgotten that with regard to the technical aspects the states concerned already possessed a forum within which these aspects were under discussion on a continuous basis -- *i.e.*, the International Maritime Organization (IMO). The legal regime of these technical aspects at the time was already to a very large extent laid down in the 1960 Safety of Life at Sea Convention, which also contained rules relating to collision avoidance measures. It is quite clear that the global negotiating forum which the conference would become was not the adequate forum in which the details of maritime safety issues were to be discussed. Furthermore, at the time UNCLOS III was to start, negotiations were going on a revision of the SOLAS conference and on a separate convention relating to collisions at sea.

However, the issue could not be totally avoided. Economic and strategic constraints forced the negotiating states to make some reference to these maritime safety issues to prevent coastal states from restricting access to maritime zones under their jurisdiction by the bias of setting safety standards for foreign vessels which would amount to a *de facto* closure of these waters.

The 1982 United Nations Convention on the Law of the Sea (LOS Convention) essentially serves to delimit clearly under which conditions coastal states can exercise certain prescriptive and enforcement competences and to what extent flag states have to respect norms in the field of maritime safety.

This, of course, is not to say that the legal regime of navigation has not undergone any changes. The introduction of new concepts like the exclusive economic zone (EEZ), the concept of archipelagic waters, and the revision of the rules relating to straits were followed by consequential adoption and changes with respect to the rules for vessels. However, these rules relate mainly to access to these zones.

IMO has a very important role in the field of setting standards with regard to collision avoidance measures and general safety norms. Taking into account the general theme of the conference, *Implementation of the Law of the Sea Convention through International Institutions*, and the global membership of IMO[1] it is obvious that this paper should also examine the role of IMO in this field.

The objective of this paper is to study the provisions of the LOS Convention relating to the safety of navigation and in doing so to identify the (potential) role of IMO as the most important institutional structure in this field. In doing so maritime safety will be restricted mainly to collision avoidance measures and safety standards. The paper will not deal *e.g.* with casualty investigations and some other aspects of maritime safety like reporting procedures.

In its first part the paper will examine the LOS Convention from the specific angle of maritime safety measures: collision avoidance measures and measures relating to maritime safety norms. Particular emphasis will be laid on the regime of "new" maritime zones like the EEZ and archipelagic waters. The role of IMO, in many instances the competent international organization, will be given special attention.

The second part the paper will deal with two case studies in which the implementation of maritime safety issues by IMO will be examined. These case studies relate to the implementation of the provision relating to safety zones with a radius larger than 500 meters, art. 60.5 LOS Convention, and the provision of art. 60.3 LOS Convention on removal of offshore installations.

Maritime Safety Issues Under the LOS Convention

The legal basis of IMO's involvement and the role of IMO

When examining the legal basis of IMO's involvement in the field of maritime safety, a distinction should be made between the

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[1]As from 19 January 1989 the IMO has 133 members and one associate member; See *IMO press release* IMO/1/89 of 3 February 1989, Malawi joins IMO, *also IMO NEWS* nr. 1 (1989) p. 5.

competence acquired on the basis of IMO's own constitution[2] and competence given to the organization in other instruments.

As to the IMO constitution, in its article 1 the purposes of the organization in the field of maritime safety are[3]:

(a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article;

(d) To provide for the consideration by the Organization of any matters concerning shipping and the effect of shipping on the marine environment that may be referred to it by any organ or specialized agency of the United Nations;

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[2]Convention on the Inter-Governmental Maritime Consultative Organization (as amended), 6 March 1948, 289 UNTS p. 3, also in D.C. Jackson (ed.), *World Shipping Laws* I/1/CONV. As of 22 May 1982 the name IMCO was changed in International Maritime Organization (IMO).

[3]On IMO see: K.A. Bekiashev, V.V. Serebriakov, *International Marine Organizations*, 1981, pp. 39-102; S. Mankabady, *The International Maritime Organization*, 1984, by the same author, *The International Maritime Organization* (2 vols.), 1986/7; P. Block *et al.*, *Die Internationale Seeschiffahrtsorganisation*, 1987; See in this respect also M. Valenzuela, IMO: *Public International Law and Regulation*, in: D.M. Johnston, N.G. Letalik (eds.), *The Law of the Sea and Ocean Industry: New Opportunities and Restraints, Proceedings of the Sixteenth Annual Conference of the Law of the Sea Institute*, Halifax, 1982, pp. 141-151; and F.L. Wiswall, *The IMO -- Private International Law and Regulation*, in: Johnston/Letalik, *op. cit.* pp. 183-189.

(e) To provide for the exchange of information among Governments on matters under consideration by the Organization.[4]

Most activities of IMO are based on this Article 1 but additional and more specific competences are attributed to the organization by special international instruments.

Thus the Safety of Life at Sea 1974/1978 (SOLAS) Convention recognizes the IMO as the only international body for establishing and adopting routing measures on an international level.[5] Furthermore the Collision Regulations 1972 (COLREG)[6] provide for the adoption of traffic separation schemes, which are to be considered as a particular form of routing, by IMO. In addition this competence is supplemented by IMO's Resolutions concerning the General Provisions on Ships' Routing (hereafter the General Provisions).[7] In para. 3.1 of Resolution A.572(14), IMO is recognized as "the only international body responsible for establishing and recommending measures on an international level concerning ships' routing." In the same vein the LOS Convention in many places points to the IMO as a competent international organization. Often this is the confirmation of an existing practice; in other cases new tasks are assigned to the organization.

Collision avoidance measures

The role of the IMO in the field of collision avoidance measures is of a relatively recent date. Only in the beginning of the 1970s were the first traffic separation schemes and other forms of routing adopted. IMO's role in this respect has been confirmed in the LOS Convention in the provisions relating to traffic separation schemes. Without pretending to exhaust the subject it may be useful in the context of this paper to summarize briefly IMO's role. This will be done by dealing with the relevant provisions along the lines of the evolution

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[4]The provisions dealing with the removal of discriminatory action Art. 1(b) and unfair restrictive practices by shipping 1(d) have been left out.

[5]See SOLAS 74/78, Ch. V reg. 8.

[6]As amended, see Rule 1(d) and 10.

[7]The most recent of which is Res. A.572(14) adopted on 20 November 1985 included as amdt. no. 7 to *Ships' Routing*, 5th ed., 1984.

with regard to traditional maritime zones like the territorial sea and the high seas, and in a second movement in relation to the "new" maritime zones like the EEZ, straits, and archipelagic waters.[8]

Traditional maritime zones

In its *territorial sea* the coastal state is exclusively empowered to designate traffic separation schemes. It is merely under an obligation to take into account the recommendations of the competent international organization. In art. 22 LOS Convention (Sea lanes and traffic separation schemes in the territorial sea) it is stated that

> 3. In the designation of sea lanes and the prescription of traffic separation schemes under this article, the coastal State shall take into account:
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> (a) the recommendations of the competent international organization; ...

It is generally recognized that where the text of the LOS Convention uses the singular with respect to the competent international organization, the IMO is meant.[9] The recommendations meant in this article seem to include the resolution concerning ships' routing (see above) and the recommendations concerning Guidelines for Vessel Traffic Services (VTS),[10] in the case of the establishment of VTS in the territorial sea.

The General Provisions request governments wishing to establish traffic separation schemes "no parts of which lie beyond their territorial seas" to design them in accordance with IMO criteria for

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[8]See also G. Plant, International Traffic Separation Schemes in the New Law of the Sea, *Marine Policy*, 1985 pp. 134-147, and by the same author, Update: Traffic Separation Schemes in the EEZ, *Marine Policy*, 1985 pp. 332-333.

[9]See *Implications of the United Nations Convention on the Law of the Sea, 1982 for the International Maritime Organization (IMO)*, Study by the Secretariat of IMO, LEG/MISC/1 of 28 July 1987, p. 2, para. 5, to be reproduced in *International Organizations and the Law of the Sea (IOLS)*, vol. 3 (1987) (forthcoming).

[10]Res. A.578(14) adopted on 20 November 1985, reproduced in *IOLS* vol. 2 (1986) pp. 366 *et seq.*

such schemes and to submit them to IMO for adoption (para. 3.12). The coastal state can request IMO to adopt the scheme but is under no obligation whatsoever to do so.

Given the fact the SOLAS 74/78 convention and the 1972 COLREG are applicable on the *high seas*, IMO's competence to adopt routing schemes on the high seas is subject to the limitations as laid down in the IMO resolutions in this respect.

Thus the General Provisions state that

> 3.4 IMO shall not adopt or amend any routing system *without the agreement of the interested coastal States*, where that system may affect:
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> (1) their rights and practices in respect of the exploitation of living and mineral resources;
> (2) the environment, traffic pattern or established routing systems in the waters concerned;
> (3) demands for improvements or adjustments in the navigational aids or hydrographic surveys in the waters concerned. (Emphasis added)

The interested coastal states possess a powerful weapon against unwanted routing systems. In many cases one of the three conditions mentioned will have to be considered. Thus in many cases the interested coastal states have a de facto veto in the adoption of routing systems on the high seas.[11]

Sometimes routing systems will encroach on the territorial sea and the high seas. In those cases the governments concerned "should consult IMO so that such system may be adopted or amended by IMO for international use."[12] This applies only in cases when new routing systems are *proposed* by the government. How to act in the case of routing systems not proposed by the coastal state is not clear in this respect, but it seems that coastal states do have the right of veto mentioned above, both on the basis of the rules relating to the territorial sea, like art. 22 LOS Convention, and on the basis of the General Provisions. Furthermore the duty to consult IMO and the

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[11]See however also in section 2.2.2., New maritime zones, the section relating to the EEZ.

[12]General Provisions *op. cit.* para. 3.8.

subsequent adoption by IMO are somewhat contradictory. Consultation clearly means that the consulting state remains free to do whatever it likes with the results, but the fact that the system may be "adopted" points to a more binding character of the system involved.

Once the system has been adopted, IMO acquires a veto itself, because such a system "shall not be amended or suspended before consultation with and *agreement* by IMO" (emphasis added).[13] Thus it seems that governments have to think twice before requesting the approval of IMO for this kind of routing scheme because "once within the IMO, always within the IMO" seems to be the motto.

In the case of conflicts of interpretation between the General Provisions and the LOS Convention, para. 3.16 of General Provisions gives priority to the LOS Convention since:

> Nothing in the general provisions on ship routing shall prejudice the provisions of the United Nations Convention on the Law of the Sea (1982) nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

Thus the provisions of the LOS Convention are supplemented by the provisions on ships' routing, save in the case of conflicting interpretations, in that case the LOS Convention clearly outweighs the resolution.

New maritime zones

So much for the traditional maritime zones such as the territorial sea and the high seas. However, the introduction of the concept of the EEZ and that of archipelagic waters, in combination with a revision of the rules relating to straits,[14] poses new problems with regard to measures relating to collision avoidance.

As for the establishment of routing schemes in the EEZ, there seems to be some disagreement on the question of who is competent and for

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[13] *Ibid.*

[14] Straits do not constitute a "new" maritime zone, since the 1958 Convention on the Territorial Sea already contained a provision, art. 16.4, on straits. However, given the substantial revision that has taken place in the LOS Convention, it seems appropriate to deal with straits in this section.

which purposes. The LOS Convention does not contain any specific rules in this respect. Which state is competent in respect of what, and to what extent states have to cooperate with IMO in the adoption of routing schemes must be derived from other provisions. In this respect reference must be made to two important provisions of the LOS Convention.

Most important of course is art. 56 LOS Convention on the competence of the coastal state in its EEZ. In particular, para. 2 of that article states that the coastal state shall have due regard to the rights and duties of other states and shall act in a manner compatible with the convention. In addition, art. 58 LOS Convention states that all states enjoy the freedoms of the high seas such as navigation and overflight. Given this residual high seas character of the EEZ with regard to navigation, it has to be assumed that the arrangements with regard to the establishment of routing schemes in the high seas would equally apply to the EEZ.

Coastal states always remain competent to propose routing measures in their EEZs. The question, however, is not so much whether the coastal state is competent but if and which procedures it should have to respect, and whether *other* states, the ships of which sail the EEZ of the coastal state, are competent to establish, through IMO, routing measures in the EEZ of the coastal state.

Looking at this problem from the point of view of freedom of navigation (art. 58 LOS Convention) the EEZ is subject to the high seas regime. However, it is submitted that this does not necessarily imply that the procedure as developed for the high seas applies. The interests protected by the establishment of routing measures have flag state *and* coastal state implications, flag state implications insofar the prescriptive competence is concerned and coastal state implications where the protection of the marine environment is concerned. See in this respect the preamble of the General Provisions which mentions both considerations. Art. 211 LOS Convention mentions explicitly the promotion and the adoption of routing measures "designed to minimize the threat of accidents which might cause pollution of the marine environment, *including* the coastline and pollution damage to the related interests of coastal States." (emphasis added).

Given the conflicting interests, one could make a case in favor of a procedural arrangement analogous to the situation of states bordering straits and archipelagic states (see above) in which coastal states and IMO (i.e., shipping interests) are under the obligation to propose and

to adopt.[15] No firm legal basis exists for such an arrangement, and its necessity is dictated by practice. However, whether IMO should not include in its work program the establishment of adequate international procedures to adopt routing measures in the EEZ[16] should be envisaged. States bordering *straits* may designate sea lanes and traffic separation schemes to promote the safe passage of ships through the strait (art. 41.1 LOS Convention). These states are subject to two restrictions.

The first restriction is that according to art. 41.3 LOS Convention sea lanes and traffic separation schemes in straits shall conform to generally accepted international regulations.

The second restriction is that proposals for the designation of schemes shall be referred to the competent international organization *with a view to their adoption*. The states bordering the strait have a formal right of veto since only schemes that are agreed to with the states bordering the strait can be adopted. Thus not only the state submitting the proposal has this right of veto but other states bordering the strait also are entitled to block the decision-making process in this respect, even if they did not participate in the preparation of the proposal (art. 41.4 LOS Convention, last sentence). Since the adoption by IMO is a *conditio sine qua non* for the validity

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[15]See in this respect B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, Martinus Nijhoff Publishers, Dordrecht, 1989, p. 175, who is of the opinion that in analogy to the provisions with regard to straits and archipelagoes the coastal state can only designate traffic separation schemes in its EEZ in conformity with generally accepted international regulations and under the condition of prior referral of its proposals to the IMO with a view to their adoption; Plant *op. cit.* p. 332, considers this a weak argument since in the case of straits the agreement is between two or more coastal states, not the coastal state and one or more other states.

[16]Kwiatkowska *op. cit.* p. 176, who restricts herself to VTS, but a broader scope should be envisaged. See in this respect also IMO/LEG/MISC/1 *op. cit.* Ann. p. 5 which does not specifically touch upon this question, but, referring to *i.e.* SOLAS, COLREG, states that IMO should consider whether and to what extent the current provisions in IMO's treaties applicable to "the territorial sea" or to "the high seas" are adequate in the light of the special status of the EEZ.

of the scheme, IMO also has a right of veto. If the proposed scheme is in the waters of both states, they have to cooperate in formulating proposals in consultation with IMO. Here is a double role for IMO. On the one hand IMO has to be consulted during the proposal formulating stage; on the other hand, IMO will adopt the proposed schemes.

What if disagreement emerges between the states bordering the strait? It seems that IMO does not have a role to play here other than to wait to be asked for advice in the disagreement. A conflict emerging between IMO and the states in the proposal-formulating stage will have its consequences for the final proposal to IMO. Since IMO's adoption is a necessary condition for the establishment of the scheme, the states are probably wise enough *not* to submit the scheme to IMO. This leaves open the possibility of establishing and enforcing a non-IMO scheme. In case these states insist on submitting it to IMO anyway, the negotiations between IMO and the states concerned will focus on the specific issues under conflict. It goes without saying that if we speak about IMO, in fact we are referring to the 133 states members of the organization which will negotiate in the framework of the organization.

The legal regime of *archipelagic sea lanes passage* is a compromise between international and national interests. International interests are safeguarded in the rules concerning the passage through archipelagic waters of all ships and aircraft in their normal mode. National interests with respect to navigation are safeguarded by the competence of the archipelagic state to designate sea lanes and to prescribe traffic separation schemes (art. 53 paras. 1, 3 and 6 LOS Convention).

The arrangements with regard to archipelagic states are very similar to those regarding straits. Archipelagic states are subjected to the same restrictions as states bordering straits.

Proposals to designate sea lanes or to prescribe traffic separation schemes shall be referred to the competent international organization with a view to their adoption. In contrast to states bordering straits, the archipelagic state has no duty to consult IMO *before* submitting a proposal to designate sea lanes and traffic separation schemes. In addition, archipelagic sea lanes and traffic separation schemes "shall conform to generally accepted international regulations" (art. 53.8 LOS Convention).

The archipelagic state, as is the case with states bordering straits, has a right of veto.[17] Adoption can only take place after agreement between IMO and the archipelagic state concerned (art. 53.9 LOS Convention). In practice it is probable that this mutual right of veto will weigh upon the negotiations between the archipelagic state and IMO. Both parties are aware that the result of these negotiations will have to be acceptable to the other.

If the archipelagic state does not designate sea lanes, ships may exercise their right of archipelagic sea lanes passage "through the routes normally used for international navigation." (art. 53.12 LOS Convention). This provision also applies if the archipelagic state and IMO have not reached agreement on the characteristics of the sea lanes and the traffic separation schemes. If a conflict materializes and the archipelagic state decides to act unilaterally, and it would not fulfill the conditions of art. 53.9 LOS Convention, para. 12 of art. 53 would continue to apply since art. 53 applies to sea lanes and traffic separation schemes which have been legally designated. Such a conflict would probably emerge in the framework of protracted negotiations in IMO, the organization in which the maritime powers are represented. If the competent (sub)committee of IMO does not agree on the proposal made by the archipelagic state, this state has two possibilities: either withdraw its proposal, in which case para. 12 of art. 53 continues to apply, or amend its proposal to the extent necessary to have the proposal approved by the subcommittee on safety of navigation or the Maritime Safety Committee.[18] To put this in the words of Mr. Wisnumurti:

> So, we have to reach a mutual agreement concerning the number of sea lanes and the areas where sea lanes will be established.[19]

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[17]Also: Wisnumurti in: J.M. Van Dyke, L.M. Alexander, J.R. Morgan (eds.), *International Navigation: Rocks and Shoals Ahead?*, Honolulu, 1988, at p. 264.

[18]In the same sense: Kantaatmadja replying to a question of Judge Oda in: Van Dyke *et al.* (eds.) *op. cit.* at p. 264 (although Kantaatmadja refers to "general navigation"); Also Busha *ibid.*

[19]Wisnumurti in: Van Dyke *et al.* (eds.) *op. cit.* at p. 264.

The question of whether the non-compliance with the obligation to submit proposals to IMO or any other competent international organization (if any) would result in a situation in which sealanes and traffic separation schemes have not been legally established should be considered. It seems that the aim of the provision is to guarantee passage through archipelagic waters, as before the designation of sealanes and traffic separation schemes, to merchant and military vessels. The procedural safeguard,[20] which in fact is the submission of proposals to IMO, serves to draw this submission into the sphere of international negotiations and consultations so that other interested states can influence the final result of the submission. Hence if an archipelagic state established sealanes or traffic separation schemes in consultation with interested states it seems that, at least materially, the aim of the provision has been reached. However, an essential point of the procedural safeguard is that interested states must have the possibility to block decisions in IMO if and when the proposals submitted do not match their interests. Negotiations and consultations outside the framework of the IMO/competent international organization would take this veto power out of the hands of the interested states. Hence the obligation to submit proposals for the designation of sealanes and traffic separation schemes to IMO is part and parcel of the provision.

A second question is to what extent the archipelagic state is allowed to define different sea lanes for different types of ships. The legal regime of the archipelagic state has a twofold aim. First, it enables the archipelagic state to manage the situation in its waters by extending sovereignty over the archipelagic waters. Secondly, the archipelagic legal regime aims at guaranteeing commercial and strategic interests of other maritime nations in the archipelagic area. As long as the archipelagic state respects the latter interests, there is no reason why it could not designate different sea lanes for different types of ships. In this regard the archipelagic state has to respect the conditions of innocent passage. Innocent passage, however, does not mean that a ship is entitled to take the shortest route, and to a limited extent the archipelagic state may ask a vessel to take a route which is longer than the shortest route without providing for any compensation for the additional costs the vessel may incur.

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[20]T. Treves, La Navigation, in: R-J. Dupuy, D. Vignes (eds.), *Traité du Nouveau Droit de la Mer*, 1985, pp. 687-808, at p. 795/4.

In the meantime, two major archipelagic states have ratified the LOS Convention, one of which, the Philippine ratification, was accompanied by a declaration.[21]

The following paragraph in the Philippine Declaration has caused quite some noise in the international community of states. In the Philippine Declaration it was stated that:

> 7. The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation; ...

The least one can say of this declaration is that it is not quite in line with the usual interpretations of the relevant provisions of the LOS Convention. In particular, the assertion that the concept of archipelagic waters is similar to the concept of internal waters seems in contradiction with art. 49.1 LOS Convention which states that "the sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines ...." Several protests have been filed against this declaration.[22] In a reaction to the Australian protest, the Philippine Government announced that "the necessary steps are being undertaken to enact legislation dealing with archipelagic sea lanes

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[21]The text of the declaration can be found in *LOS Bulletin* no. 5 (July 1985) p. 18 and in: *LOS Bulletin* no. 4 (February 1985) p. 20. The provision quoted here has also been reproduced in *Ocean Policy News*, November 1988, p. 3.

[22]Protests were filed by the Byelorussian Soviet Socialist Republic (*LOS Bulletin* no. 6 (October 1985) p. 9), Czechoslovakia (*LOS Bulletin* no. 6 (October 1985) p. 10), the Ukrainian Soviet Socialist Republic (*LOS Bulletin* no. 6 (October 1985) p. 11), the Union of Soviet Socialist Republics (*LOS Bulletin* no. 6 (October 1985) p. 12), Bulgaria (*LOS Bulletin* no. 7 (April 1986) p. 7), Australia (*LOS Bulletin* no. 12 (December 1988) p. 9) and the USA (*Ocean Policy News* (November 1988) p. 3).

passage and the exercise of Philippine sovereign rights over archipelagic waters, in accordance with the Convention."[23]

One is inclined to think that this latter declaration repeals the initial declaration made at the ratification and both declarations will have to be read in conjunction therefore.

Summarizing, it can be said that routing schemes in other maritime zones than the territorial sea are to be adopted by IMO and, save for routing schemes on the high seas, IMO cannot adopt these schemes without the agreement of the coastal state concerned. As for routing schemes in the territorial sea, the coastal state has to take into account IMO recommendations but does not need to consult the organization. With regard to the EEZ, IMO is competent from the point of view of art. 211 LOS Convention. As for routing measures other than those of art. 211 LOS Convention, a reasonable interpretation of the LOS Convention implies that the coastal state and competent international organization will have to cooperate analogously to the arrangement with regard to straits and archipelagoes.

Notwithstanding this conclusion, the General Provisions contain a clause which implicitly leaves open the possibility of *not* submitting a scheme to the IMO:

> 3.13 Where, for whatever reason, a Government decides not to submit a traffic separation scheme to IMO, it should, in promulgating the scheme to mariners ensure that there are clear indications on charts and in nautical publications as to what rules apply to the scheme.

This clause does not contain a geographical limitation with regard to the question what kind of routing schemes might not be submitted to IMO.

States should submit schemes to IMO in certain specified conditions, but if they don't, they should ensure that the technical data of the scheme are sufficiently known by its users. Schemes not adopted by IMO will not be published in *Ships' Routing*, the standard publication in this field, and consequently there is no international guarantee that the scheme can be known by vessels sailing the waters in which the scheme lies.

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[23] *LOS Bulletin* no. 12 (December 1988) p. 10, also *Ocean Policy News* (November 1988) p. 3.

Collision avoidance with regard to offshore installations

Another field of safety measures relate to collision avoidance measures with regard to navigation and offshore installations. In particular, the LOS Convention contains rules to solve this conflict between both uses. Especially the provisions relating to artificial islands, installations, and structures in the EEZ and on the continental shelf (respectively art. 60 and 80 LOS Convention) contain arrangements for safety measures. Similar arrangements were also included in the 1958 Geneva Conventions, although the 1982 LOS Convention deviates in certain respects from the provisions of the 1958 Geneva Conventions on the continental shelf and the high seas. Two major differences can be identified. The first new measure as contained in the LOS Convention is the one related to the obligation to remove abandoned or disused offshore installations, and the second relates to the breadth of the safety zones for offshore installations. First, however, attention will be paid to the establishment of offshore installations in sealanes.

Sea lanes and offshore installations

According to art. 5.6 of the 1958 Continental Shelf Convention, installations or devices or their safety zones "may (not) be established where interference may be caused to the use of recognized sea lanes essential to international navigation." The problem of interpretation here is: what are recognized sea lanes essential to international navigation? This is still a problem since the clause has been maintained *mutatis mutandis* in the LOS Convention. The conventions do not define the concept of "recognized sea lanes essential to international navigation." In more specialized instruments one cannot detect the term either. The IMO resolution on General Provisions[24] does not contain a definition, but it does contain a definition of "traffic lane." A traffic lane is "an area within defined limits in which one-way traffic is established. Natural obstacles, including those forming separation zones, may constitute a boundary." But such a traffic lane will form part of traffic separation schemes and as such cannot have an autonomous role. The aim of the provision of the LOS Convention is to avoid collisions between offshore installations and devices and vessels sailing in the vicinity of those installations. If we interpret the term in a too narrow sense, it may lose its effectivity.

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[24]See also COLREG 1972 as amended Rule 10 (b) (i); The Collision Regulations 1972 do not contain a definition of traffic lane.

Therefore, it seems that a sea lane in the context of the LOS Convention must be a formal (established by IMO) or a *de facto* (to be determined on the basis of, for example, traffic investigations) passage where international navigation takes place.

Safety zones

According to the Continental Shelf Convention of 1958, the coastal state is entitled to establish safety zones around offshore installations on its continental shelf. The breadth of these safety zones has been expressly limited to 500 meters. The LOS Convention states in this respect that the coastal state may, where necessary, establish *reasonable* safety zones in which it may take appropriate measures to ensure the safety both of navigation and of the installations. The breadth of these safety zones "shall be determined by the coastal State, taking into account applicable international standards." In addition, "they shall not exceed a distance of 500 meters around them, ... *except as authorized by generally accepted international standards or as recommended by the competent international organization.*" From the wording of this provision one can see that the 500 meter safety zone is the rule, but that there are numerous possibilities to design safety zones exceeding this radius. The primary condition in this respect is that generally accepted *international standards recommended by the competent international organization* will have to contain an express authorization to extend the safety zone in particular circumstances. In determining the breadth the coastal state has to *take into account* the applicable international standards.

Here again it can be seen that the coastal state has a broad margin of discretion to determine the breadth of these safety zones, the more so since these safety zones "shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations, or structures". It is up to the coastal state to determine what is reasonable in this respect and to take into account the applicable international standards, which have not yet been developed by the International Maritime Organization, the competent international organization in this respect.[25]

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[25]The USSR has expressed a different opinion as to the competence of IMO in this field. See the case study on safety zones, section 3.3.2. *infra.*

Removal of abandoned and disused offshore installations

Article 5.1 of the 1958 Continental Shelf Convention poses the principle that the exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing, or the conservation of the living resources of the sea. The Continental Shelf Convention contains the legal obligation to remove entirely any installations which are abandoned or disused (art. 5.3 CSC). The corresponding provision of the LOS Convention (art. 60.3 LOS Convention) contains a different legal obligation in this respect. The LOS Convention specifies this obligation in the sense that "any installations or structures which are abandoned or disused shall be removed *to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization*" (emphasis added).

The total removal obligation from 1958 has therewith been abolished since the LOS Convention qualifies the obligation with a view to the safety of navigation. In addition, the LOS Convention adds to this that "such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States."

From the wording of art. 60 para. 3 it can be concluded that this new obligation upon coastal states is by far more lenient than the initial "total removal obligation." This raises important theoretical questions with regard to the legal status of the LOS Convention and the standards and guidelines developed on the basis of its provisions. During the negotiations on these guidelines and standards an attempt was made to have these problems discussed, but the attempt failed[26] (see above section on case study of removal).

Safety norms

As was noted above, one of the main purposes of IMO is to provide machinery for cooperation among governments in the field of governmental regulations and practices relating to technical matters of all kinds affecting shipping and to encourage the general adoption of the highest practicable standards in matters concerning maritime

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[26]See IMO Doc. MSC/INF.8 of 30 May 1988, submitted by the observer delegation of the Friends of the Earth International (FOEI) the suggestions of which were only partly followed by IMO's Maritime Safety Committee, see MSC 55/25 pp. 65-67.

safety, efficiency of navigation, and prevention and control of marine pollution from ships.

With respect to the adoption of norms relating to the safety of vessels IMO has an impressive record. Many conventions relating to maritime safety matters have been adopted in the framework of IMO and with regard to other conventions IMO fulfills depositary functions.[27] Some of these instruments have attracted widespread ratifications, so many even that they have acquired a quasi-universal character.

In the framework of the LOS Convention these instruments are sometimes expressly mentioned and at other occasions one can sense them in the text of the provisions of the Convention.

This universal character of the norms relating to maritime safety has given to these norms an added value so that they are considered to be more fundamental than other norms. These "super norms" will be the object of this part of the paper and more specifically in relation to IMO's role.

In its *territorial sea* the coastal state may adopt laws and norms, in conformity with the provisions of the LOS Convention and other rules of international law, relating to innocent passage through the territorial sea with respect to the subjects expressly mentioned in art. 21 LOS Convention. However, an exception is made with regard to norms relating to the design, construction, manning, or equipment of foreign ships, "unless they are giving effect to generally accepted international rules or standards."

Ships exercising the right of *transit passage* or of *archipelagic sealanes passage* are obliged to comply with generally accepted international regulations, procedures, and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea (art. 39 LOS Convention). In addition to this, states bordering straits and archipelagic states are entitled to adopt laws and regulations in respect of the safety of navigation and the regulation of maritime traffic, as provided in art. 41 on sea lanes and traffic separation schemes.[28]

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[27]For overviews of these conventions see S. Mankabady, *op. cit.*, vol. I, p. 12 *et seq.*; P. Block *et al.*, *op. cit.* pp. 179 *et seq.*; Also *Publications of the International Maritime Organization*, Publications Section, 1988.

[28]By virtue of art. 54 *mutatis mutandis* applicable to archipelagic waters.

Since navigation in the EEZ is part of the high seas regime, it is appropriate to deal with the EEZ and the *high seas* at the same time. The key provision in this respect is art. 94 (Duties of the flag state) LOS Convention. In addition to the statement that every state shall effectively exercise its jurisdiction and control in administrative, technical, and social matter over ships flying its flag, the flag state has to take measures necessary to ensure safety at sea with regard to:

- the construction, equipment, and seaworthiness of ships;
- the manning of ships, labor conditions, etc.;
- the prevention of collisions (94.3 LOS Convention).

These measures include measures to ensure that the masters, etc., are "fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions" etc. The measures adopted by the flag state have to conform to generally accepted international regulations, procedures, and practices.

Much depends on what is to be understood by "generally accepted international regulations." Opinions in this respect differ, and it seems that this paper is not the right place to analyze the content of the concept.[29] The present author does not believe that the simple entry into force of an instrument that might contain generally accepted international regulations is a sufficient condition for these norms to be nominated as such.[30] The arguments of Professor Treves in this respect are convincing, *viz.* that a small but homogeneous group of states might not want to ratify an instrument for particular reasons and that it is inconceivable that states appertaining to such a group would be bound by the bias of the LOS Convention, when they expressly refuse to accept the same norms in a conventional instrument. Professor Treves' formulation that the entry into force of IMO instruments is a strong assumption that the convention in question is generally accepted is a more suitable thesis. It is evident

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[29]See in this respect W. van Reenen, Rules of Reference in the New Convention on the Law of the Sea, in particular in Connection with the Pollution of the Sea by Oil from Tankers, *Netherlands Yearbook of International Law* (NYIL), 1981, pp. 3-39, Treves, *op. cit.* pp. 722 *et seq.* for a different opinion M. Valenzuela, *op. cit.* pp. 141 *et seq.*

[30]Valenzuela *op. cit.*

that the more the instrument has been accepted by states, the stronger the assumption is.

The International Maritime Organization has not been given a formal role in the LOS Convention in the conception, the adoption, and the development of generally accepted international rules in respect of maritime safety. Practice, however, has shown that IMO is the only institution capable of accepting its potential role in this respect. Given the global character of shipping, it is not probable that regional organizations will include the development of these rules in their work program. This is in contrast to pollution regulations where, so it seems, regional organizations may have a role to play.

Implementation of Maritime Safety Issues Under the LOS Convention

Introduction

In the preceding pages of this paper the legal framework with regard to the institutional implementation of maritime safety issues under the LOS Convention was studied. As was shown, the competent international organization in the provisions that were examined proved to be IMO. It should not be excluded that some regional organization might take measures with regard to certain aspects of maritime safety. However, in doing so such organization may accept responsibilities which in the first place are meant to be exercised by IMO. Given the overriding role of this organization in this field and given its global scope, it seems particularly appropriate to examine the activities of IMO in the implementation of the LOS Convention. As will be shown below, these activities were limited to two subjects: discussions relating to the removal of offshore installations and an (aborted) attempt to implement the new rules with regard to the radius of safety zones around offshore installations.

These case studies relate to collision avoidance measures as they were discussed in the first part.

As for safety norms relating to the construction, design, equipment, and manning of ships, this is an ongoing activity of the organization and it seems that the update of these norms cannot really be seen as the specific implementation of the LOS Convention but as the implementation of the organization's mandate given to it by the treaty establishing IMO. The organization's activity to gain widespread acceptance of the instruments certainly contributes to the notion of "generally accepted international regulations."

The next section of this paper will deal with IMO's work program, subsequently followed by a case study on the first time IMO accepted its responsibilities under the LOS Convention: the removal of

abandoned and disused offshore installations. If this first attempt has been successful, the second case study, the extension of safety zones around offshore installations, will show that things do not always go as smoothly as one would wish.

Ongoing activities: Long-term work plan of the organization

The long-term work plan of the organization[31] is the aggregate of the long-term work plans of the main committees and it is an indicative list of subjects for consideration by the main committees of the Organization.[32]

The development of the rules as laid down in the LOS Convention and their effective implementation into rules and regulations of international maritime law does not as such form part of the long-term work plan. One does, of course, find all kinds of intersections between the work of the main committees and the LOS Convention. These references, however, are independent of the LOS Convention since they form part of the regular work of the committees. For example, in the objectives of the work of the MSC one finds such general statements as "to encourage the general adoption of the highest practicable standards in respect of matters concerning maritime safety and efficiency of navigation including any matter within the scope of the Organization."[33]

The objective coming most close to the LOS Convention is the objective

> to provide the necessary machinery for performing any duties assigned to it and to maintain such close relationship with other bodies as may further the purposes of the Organization.[34]

Under the heading of "specific subjects" in the long-term work plan, many different subjects are mentioned. The first of these is "the implementation, technical interpretation and improvement of

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[31]See Resolution A 15/Res.631 adopted on 20 November 1987, *Long-term work plan of the organization (up to 1994)*.(Res. A.631(15)).

[32]Res. A.631(15) *op. cit.* preamble.

[33]Res. A.631(15) *op. cit.* Ann., no. I, objective 1.

[34]Res. A.631(15) *op. cit.* Ann., no. I, objective 2.

conventions, codes, recommendations and guidelines."[35] and "co-operation with the United Nations and other international bodies on matters of mutual interest."[36] So much for the Maritime Safety Committee. The other lists of activities do not contain express references to the implementation of the LOS Convention either.

New activities: "case-studies"

Having assessed that the International Maritime Organization has not officially acknowledged that implementation of the LOS Convention could be one of its continuous activities, we will turn to the activities of the organization in order to find out if and to what extent it has accepted its new responsibilities assigned to it under the LOS Convention. In recent years two cases have come up which are worth studying. One case related to the role of the competent international organization with regard to the conditions under which coastal states may extend the breadth of safety zones around offshore installations; the other also related to offshore installations, in particular the criteria which have to be taken into account when they are to be removed.[37]

Removal of offshore installations

This case is a good example of how IMO accepted its responsibilities under the LOS Convention.[38] In the LOS Convention the obligation to

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[35]Res. A.631(15) *op. cit.* Ann., no. II, consideration 1.

[36]Res. A.631(15) *op. cit.* Ann., no. II, consideration 26.

[37]It has to be noted here that in this contribution only problems with regard to the *removal* of offshore installations will be dealt with here. Parallel to the discussion on the removal, a discussion on the *disposal* of offshore installations has taken, and at the time of writing this contribution, is still taking, place. For a summary of this discussion see by the present author, Removal or disposal of Offshore installations?, *Marine Pollution Bulletin* vol. 20 (1989) pp. 00-00 (forthcoming).

[38]Many articles have been published on the subject of the removal of disused and abandoned offshore installations; One of the earliest is P. Peters, A.H.A. Soons, L.A. Zima, Removal of Installations in the Exclusive Economic Zone, *NYIL* vol. XV, (1984) pp. 167-207. One of

remove totally an offshore installation has been watered down to the obligation to remove an offshore installation "to ensure safety of navigation." Other interests with respect to which "due regard" should be observed involve fishing, the protection of the marine environment, and the rights and duties of other States. The decision whether to remove or not and the removal itself have to take into account "any generally accepted standards established in this regard by the competent international organization" (being IMO). That IMO was considered the competent international organization was recognized by the Oslo Commission, established by the Oslo Convention on dumping.[39]

Towards the end of 1985 the Oslo Commission submitted a paper to the MSC relating to the work program of the Committee. The Oslo Commission requested the MSC to "consider the development of criteria for the extent of removal of abandoned or discussed platforms to ensure safety of navigation, in the light of the competence of IMO under Article 60 (3) of the UN Law of the Sea Convention."[40]

It is not a coincidence that the question of the disposal of offshore installations came up in the Oslo Commission. In the Oslo Convention area, covering the Northeast Atlantic Ocean, the exploitation of the oil and gas deposits had started in the 1970s. Most of the installations involved would reach the end of their working life towards the end of the 1980s. Given the fact that all contracting parties to the Oslo Convention are also contracting parties to the global London Dumping Convention (LDC), the disposal of offshore installations by means of dumping them in the Convention's waters under the regulatory regime of these instruments had to be considered.

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the most recent is by G. Kasoulides, Removal of offshore platforms and the development of international standards, *Marine Policy* no. 3 (1989) pp. 249-265, with extensive references; See also by the present author, Implementation of the United Nations Law of the Sea Convention: Removal of offshore installations, paper presented at the seminar *Law of the Sea: Five Years After Montego Bay*, Dubrovnik, 30 May - 4 June 1988, to be published in the proceedings of that seminar.

[39]Oslo, 15 February 1972.

[40]MSC 52/26/15 at p. 3.

The discussion in the Oslo Commission on this subject revealed a considerable difference of opinion between the Oslo partners.

According to most of them. art. 19 of the Oslo Convention embraces the dumping of offshore installations, notwithstanding that a literal interpretation of the text of that article would lead to a different conclusion.

The legal repercussions are clear. In this case the disposal of offshore installations was to fall under the Oslo Convention on dumping; its more stringent provisions with regard to the dumping of bulky wastes would apply[41] here in contrast to the more lenient provisions of the LDC in this respect.[42]

Referring to art. 60.3 LOS Convention the Oslo Commission was of the opinion that the primary discussions would better take place in other fora, in this case the competent international organization.

The MSC concurred with the Oslo Commission's opinion that IMO was the competent international organization in respect of the development of criteria for the removal of abandoned or disused offshore installations "to ensure safety of navigation."[43] Hence it instructed its subcommittee on safety of navigation to start working on this subject.

Subsequent developments show that the subcommittee limited its considerations, at least during its initial discussions, to the safety of navigation aspects. Although this is understandable, it sheds a new light on the role of the competent international organization when more interests are involved. IMO's main aim is safety of navigation. Thus certain aspects expressly mentioned in art. 60.3 LOS Convention do not fall or only fall partly under the competence of IMO. As was already referred to above, however, the LOS Convention also mentions the interests of other users like the fishing interests and the environmental interests and the rights and duties of other states. The disposal of chemicals aboard offshore installations is one example, but

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[41]See in this respect Ann II Oslo Convention para. 1.b. jo. 4 stating that "bulky wastes which may present a serious obstacle to fishing or to navigation" may only be dumped in water with a depth of not less than 2000 meters and that the distance from the nearest land is not less than 150 nm.

[42]See LDC Ann. III which only deals with "provisions to be considered."

[43]MSC 52/28, p. 69, point 26, 27.

one could think of more. Fisheries' interests per se, for instance, are not so well taken into account by IMO Committees. It is illustrative in this respect that the oil industry has an observer seat in the relevant committees (Oil Industry International Exploration and Production Forum (E & P Forum)), whereas fishermen cannot voice their ideas directly.[44]

Thus instructed, the subcommittee on safety of navigation started working on this topic from its thirty-third session. It can certainly be considered as a historic event: for the first time in the history of the LOS Convention a competent international organization accepted the responsibilities conferred to it by the Convention. Four papers were submitted to the thirty-third session of the subcommittee.[45] In its submission the Norwegian government drew the subcommittee's attention to its remission, which included the limitation "to ensure the safety of navigation." The Norwegian paper proposed that the subcommittee would only deal with the navigation aspects of the case. According to the Norwegian submission, the MSC's instruction was too meager to be able to proceed. The next step would have to be the establishment of a working group, working directly under the MSC. Such a closer proximity to the MSC "would seem necessary when broadening the mandate beyond safety of navigation, to also encompass matters related to environment, fishing, conservation of living resources of the sea and subsurface navigation." The papers of the E & P Forum and the U.S. contained proposals for the adoption of the standards.

The submission of the FRG criticized the E & P Forum's submission for not taking due account of the interests of shipping (fishermen and subsurface navigation), marine research, and of the protection of the marine environment. After pointing out the risks of the remainders of offshore installations to other users of the sea, the FRG submission stressed that the German law maintained the principle of total removal and that the dumping of installations on location is not allowed.

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[44]In this case the Advisory Committee on Pollution of the Sea (ACOPS) voiced the fisheries' interests.

[45]NAV 33/7, by the Oil Industry International Exploration and Production Forum (E & P Forum); NAV 33/7/1, by the USA (both papers have been reproduced in *IOLS* Vol. 3 (1987) (forthcoming); NAV 33/7/2, by the FRG; NAV 33/7/3, by Norway.

The working group established by the subcommittee decided to take into account the effect of the criteria on all types of ships[46] including submarines. In addition, no agreement could be reached on the question as to what extent other interests than safety of navigation had to be adopted by the working group. These interests were placed between square brackets. Although most problems were caused by the express reference in art. 60.3 LOS Convention to fishing and the marine environment, this does not mean that "the rights and duties of other States" did not cause specific problems. The strategic interests of the super-powers, especially with respect to subsurface navigation, required that more than once they defend common interests in that field.[47]

It is not the intention of this paper to deal with the contents of the guidelines and standards for the removal of offshore installations. The paper wants to underline those aspects in the process of the development and adoption of the guidelines which are interesting from the point of view of the implementation of art. 60.3 LOS Convention.

The view that the mandate of the subcommittee was too narrow and that a recommendation on this topic should cover a broader area than that falling within its purview was widely accepted by the subcommittee.[48] The question, however, was: which other organizations should have to be involved and to what extent and in which stage of the procedure? In submissions to the next session of the MSC, to which the subcommittee was to report, two NGOs made proposals in that respect.[49] They proposed that the Marine Environment Protection Committee (MEPC) and the Legal Committee of IMO and UNEP were to be involved for the environmental aspects and that the Food and Agriculture Organization (FAO) would be given

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[46]NAV 33/WP.4/Rev., para 5.

[47]Personal observation of the author during the thirty-third meeting of the sub-committee, see in this respect also NAV 33/WP.4/Rev. *op. cit.* para. 7 where the USSR stated that the total removal obligation should be maintained for installations in water depths of 300 meters or less.

[48]NAV 33/15, *Report to the Maritime Safety Committee*, p. 26.

[49]MSC 54/6/3, FOEI, and MSC 54/6/5 (+ Add.), by ACOPS.

the occasion to comment on the draft guidelines in respect of the fisheries interest. The Committee agreed that the draft guidelines should be sent to the MEPC but rejected the proposal to send them to the Legal Committee of IMO. In addition it reserved its position on the question as how to involve other (UN) organizations in the work.

The MEPC proposed several amendments and recommended to the MSC that FAO, LDC, and UNEP were to be consulted before the Assembly of IMO would finalize the topic.[50]

During its thirty-fourth session the subcommittee on safety of navigation was surprised by a common proposal of Norway, the U.K. and the U.S. drawn up on the basis of previous decisions by the subcommittee and the MEPC.[51] Notwithstanding the complaints of certain delegations that the proposal was submitted too late to study its implications, the subcommittee adopted the amended text of the guidelines and standards for the removal of offshore installations, thus rejecting a French amendment that included a specific reference to the position of fishermen. According to the subcommittee, it would not be appropriate to make any distinction between the various uses of the sea[52] likely to be affected by (non)removal of the installation.

The subject being completed, the subcommittee requested the Maritime Safety Committee to delete it from its work program.

During its fifty-fifth meeting the MSC made some editorial changes. At this meeting a greater involvement of other committees and organizations was advocated by an NGO.[53] In particular, a plea was made to involve the FAO, UNEP, and IMO's Legal Committee. In addition, it was stated that the legal status of the guidelines was not clear, given the fact that the LOS Convention had not yet entered into force and that states which have ratified the 1958 convention are still bound by that instrument. Finally the submission pointed to the fact that states which are neither parties to the LOS Convention nor to the 1958 Geneva Convention on the Continental Shelf are bound by the

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[50]MEPC 25/20, para. 19.23.

[51]NAV 34/5, see also G. Kasoulides, New Developments on Removal of Platforms, *Marine Pollution Bulletin*, vol. 19 no. 4 (1988) pp. 157-158.

[52]NAV 34/14, *Report to the Maritime Safety Committee*, at p. 16/17.

[53]MSC 55/INF.8, by FOEI.

rules of customary international law, the status of which is claimed to be highly controversial. On these points the MSC decided that the draft guidelines and standards should be conveyed to FAO, UNEP, and the Contracting Parties to the London Dumping Convention "for comments."[54] In the meantime and awaiting the formal adoption by the Assembly, the MSC decided to circulate the guidelines to member governments.[55] The comments of the organizations mentioned was to be received by the MSC before its fifty-seventh session in April, 1989, in order to be submitted to the sixteenth session of IMO's Assembly for formal adoption.[56] The FAO submitted a paper to the fifty-seventh session of the MSC[57] which seems to have had little influence. The same faith was reserved by the last minute intervention by UNEP[58] which came too late to be of any value to the considerations of the MSC. Consequently the MSC accepted the MSC circular letter as it stood and approved the Draft Assembly Resolution on Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the EEZ for submission to the sixteenth Assembly for adoption.[59]

Safety zones

As was mentioned above, the situation with regard to the establishment and the breadth of safety zones is one of the items in the LOS

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[54]MSC 55/25, *Report of the Maritime Safety Committee*, at p. 66/67.

[55]See MSC/Circ. 490 of 4 May 1988, *Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone.*

[56]MSC/Circ. 490 *op. cit.* p. 2.

[57]MSC 57/16.

[58]MSC 57/16/4.

[59]See MSC 57/27, *Report of the Maritime Safety Committee*, p. 78. This draft resolution was adopted by the IMO Assembly at its sixteenth session, 9 - 19 October 1989, A.672(16), *Guidelines and Standards for the removal of offshore installations and structures on the continental shelf and in the exclusive economic zone.*

Convention in which IMO might have a role to play,[60] especially in the development and adoption of generally accepted international standards in this respect. It was the North West European Conference on Offshore Safety which brought the matter of the infringement of safety zones around offshore installations to the attention of IMO's MSC[61] which referred the matter to its subcommittee on safety of navigation. The subcommittee decided to deal with this matter at its thirty-first session.[62] Canada expressed considerable concern on this issue and submitted two papers to the subcommittee. Especially the second paper was interesting from the point of view of implementation of the LOS Convention. This paper[63] proposed a draft Assembly resolution providing for *i.e.*:

- increasing the size of the permitted safety zones around offshore installations under certain conditions to provide a better margin of safety
- establishing "cautionary areas" around offshore installations in which navigation could be regulated.[64]

Especially the USSR appeared to be an adversary of the Canadian proposal insofar as it dealt with the extension of the safety zones. The USSR delegation pointed out that

> this matter should not be considered by the Subcommittee since it goes beyond the prerogative of the Organization and contradicts provisions of article 60 of the United Nations Convention on the

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[60]See in this respect also the Annex to IMO Doc. LEG/MISC/1 *op. cit.* at p. 6 which identifies as a possible implication for IMO: "(b) Measures taken by States in respect of the breadth of safety zones around artificial islands, installations or structures in the exclusive economic zone in order to ensure safety of navigation (Article 60, para. 5)".

[61]MSC 50/25/5.

[62]NAV 30/11, *Report to the Maritime Safety Committee*, p. 28.

[63]NAV 31/10/1.

[64]NAV 31/12, *Report to the Maritime Safety Committee.*

Law of the Sea, 1982 with respect to establishment of safety zones around installations, structures and artificial islands and additional requirements for passing ships.[65]

The Canadian delegation took the matter to the Maritime Safety Committee[66] and submitted a paper in which it contested the USSR's assertion that IMO would not be the competent international organization meant in art. 60.5 LOS Convention in this respect. Underscoring the usefulness of its proposal Canada stated that "more positive measures would be achieved if the most important provisions of NAV 31/10/1 were incorporated into a convention."[67] Admitting that the Geneva Convention and the LOS Convention 1982 would not be the appropriate instruments for this purpose, the Canadian government proposed an amendment of the 1972 Collision Regulations to that effect. COLREG 1972 deals with measures for the avoidance of collisions, and in the past it has been particularly successful in a similar situation by reducing infringements of traffic separation schemes.

The USSR delegate again raised objections against the Canadian proposal because it would be in contradiction of the provisions of art. 60 LOS Convention and it would exceed the mandate of the Organization.[68] The Canadian proposal as such was rejected by the MSC and it decided that appropriate practical and technical measures should be developed to allow ships approaching offshore areas to be warned to avoid the safety zones around them. From the report of the fifty-second session of the MSC it cannot be concluded to what extent the committee considered IMO as the competent international organization in respect of art. 60.5 LOS Convention. Apparently the committee was not in favor of amending the 1972 Collision Regulations, and this fact may have obscured the discussion on the question of the competence of the organization. During the discussion in the subcommittee on safety of navigation it became clear that most states preferred to develop rules for the enforcement of the existing

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[65]NAV 31/12, *Report to the Maritime Safety Committee*, p. 29.

[66]MSC 52/8/2.

[67]MSC 52/8/2.

[68]MSC 52/28, *Report of the Maritime Safety Committee*, p. 28.

rules more than creating a new set of rules. Thus the Committee confirmed an earlier resolution stating that IMO should work towards implementation and enforcement more than creating new rules.[69] In fact only the Australian delegation expressed itself in favor of the establishment of "cautionary zones" around offshore installations. The Soviet delegation was supported in its criticism of the concept of "cautionary zones" by the Federal Republic of Germany. The FRG delegation stressed that "under the current provisions of the law of the sea, it would not be possible either to increase the breadth of the 500 metre safety zones or to establish additional 'cautionary zones' according to the proposal of the Government of Canada."[70] According to this delegation the Canadian proposal would result in a restriction of the freedom of navigation, especially in the EEZ. From that moment on, the Canadian proposal disappeared and the subcommittee started working on the resolution on infringement of safety zones around offshore structures. This would lead to Res. A.621(15)[71] in which no traces can be found of these points of the Canadian proposal. The resolution does not mention cautionary zones nor make references to possible extensions of the breadth of safety zones. As for the future, the resolution requests the Maritime Safety Committee, "in consultation with the Legal Committee," to keep the resolution under review and to report to the Assembly as necessary. The reference to the consultation with IMO's legal committee may imply a promise that in the future certain aspects relating to the resolution could be discussed in relation to the LOS Convention.

From the outset the aborted attempt of the Canadian government would have seemed potentially successful. The competent international organization is supposed to develop generally accepted international standards. The competent international organization is used in the

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[69]Res. A.500(10).

[70]NAV 32/13, *Report to the Maritime Safety Committee*, p. 37.

[71]Resolution A.621(15) adopted on 19 November 1987, *Measures to prevent infringement of safety zones around offshore installations or structures*; reproduced in: IOLS vol. 3 (1987) (forthcoming), revoked by Resolution A.671(16), *Recommendation on Safety Zones and Safety of Navigation around Offshore Installations and Structures*, adopted by the IMO Assembly during its sixteenth session (9 - 19 October 1989).

singular in the context of safety of navigation. Consequently there should be no reason not to accept the assignment of the LOS Convention. If one would make the distinction in the Canadian proposal between the extension of the safety zones and the concept of cautionary zones, it would become clear that with respect to the former IMO seems to be the competent international organization. With respect to the latter, however, some doubt seems to be justified. The LOS Convention does not provide any clear provisions on the legal basis for this concept. In addition to this, however, practice has shown that especially in the case of clusters of offshore installations and structures it is not unusual to draw a line around the whole cluster, thus exceeding the internationally agreed standard for safety zones of a radius of 500 meters. Within this cluster but beyond the statutory safety zone, sometimes special rules are established with regard to fishing, cables, and anchoring. If a state is entitled to extend the offshore safety zones under the generally accepted international standards, there does not seem to be a reason why in a more restricted part of such safety zone navigation could not be made subject to less stringent rules beyond the radius of 500 meters, on the condition, of course, that such a "cautionary zone" would not extend beyond the safety zone.

Conclusions

Both case studies relate to the implementation by a competent international organization (IMO) of certain provisions of the LOS Convention. As was shown above, they did not, however, develop in the same way.

In the case of the safety zones, it seems that IMO did not want to assume its responsibilities -- that is, not yet. In the case of the removal of offshore installations IMO seemed to be very eager to deal with the subject matter. One cannot say that this difference in treatment is caused by the fact that the problems resulting from non-action would be more important in one case than in the other. The problem of the infringement of safety zones is very important from the point of view of maritime safety. On several occasions it has been demonstrated that there are numerous infringements of safety zones resulting in very dangerous situations and near misses.[72] Increasing the breadth of safety zones or setting standards and guidelines to do

[72]See in this respect NAV 34/INF.2, by E.& P. Forum on infringement of safety zones around offshore structures.

so would certainly result in an increase of these infringements, thus not solving the problem but optically aggravating it. An important point that was raised in this respect is the question whether IMO indeed is the competent international organization of art. 60 para. 5 LOS Convention, as was doubted by the USSR, and if, when dealing with the subject matter, IMO would not exceed its mandate. The Soviet delegate did not indicate which organization was, in his opinion, the competent international organization of art. 60.5 LOS Convention. One does have some difficulties in identifying organizations which might be competent in this respect. Important maritime interests are involved, and it is clear that these interests are best dealt with on a global level. One could understand the USSR's position if it were to be claimed that IMO is not *the only* competent international organization. Given the interests involved, in particular the fisheries interests, it would not be unprecedented if the *most competent* international organization would take the initiative to form a joint group of interested organizations in order to deal with the problem. Such cooperation is not rare, and it seems that the institutional structure is ready for this kind of action. In particular, one could think of a joint FAO/IMO meeting of consultants analogous to the Joint FAO/ILO/IMO Meeting of Consultants on Safety of Fishing Vessels under which guidance the Safety of Fishing Vessels Convention was elaborated.

In the case of the removal of offshore installations IMO worked relatively quickly, taking into account the fact that other organizations were to be involved. The removal case distinguishes itself from the safety zones insofar as the LOS Convention expressly makes a reference to other users of the sea. This is not the case with the safety zones. Nevertheless, one has to assess to what extent IMO is not only the competent international organization from the legal point of view, but also from the point of view of the subject matter dealt with. As a shipping organization IMO will voice the maritime interests of its members more than any other interest involved. However, these maritime interests do not coincide with other interests like fishing and the protection of the marine environment. As to the rights and duties of other states, it has become clear from the negotiations that these other states can use IMO to voice their interests. Environmental and fisheries interests certainly did not coincide with maritime (shipping) interests in the cases which have been discussed above. As was referred to above, UNEP, representing environmental interests, did intervene. At the very last moment it sent comments to the MSC, then discussing the question of the removal of offshore installations.

However, the intervention was badly prepared and was certainly too late to be influential. As to the influence of the Food and Agriculture Organization, its action was not well organized and thus had little influence.

As was the case with the offshore safety zones problem, here again some kind of inter-agency group of experts could have been set up. The interested organizations could have cooperated in a joint group of IMO/FAO/ UNEP/LDC. As was mentioned above, this is not unprecedented. One could say that the inter-agency cooperation failed in this case.

In the future, competent international organizations could be called upon to design standards. The standards mentioned in art. 60 LOS Convention (Offshore safety zones) will have to be developed, but also other standards in the field of marine pollution, etc., will be necessary. It is to be hoped that from the experience in the field of safety of navigation it will be learned that the organizations should not be afraid to coordinate their efforts so that the standards to be developed will have a genuine global basis, taking into account all relevant interests.

INTERNATIONAL CIVIL AVIATION: LAW OF THE SEA ISSUES

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Thank you very much, Mr. Chairman. May I say it's a very great pleasure to be here attending this conference and to have the opportunity to see many old friends from the Law of the Sea Conference, whom I've not seen for several years. As one who labored in the Canadian law of the sea delegation, particularly on environmental matters, and was therefore, quite wrongly I assure you, viewed as an opponent of the navigational interests, it's a great honor to be finally invited to address a panel on navigation questions. I feel somehow that a stigma has been finally removed.

When Edgar Gold first asked me to address this question of the relationship of the Law of the Sea Convention, particularly the implementation of the Law of the Sea Convention provisions in the field of international air law, I was not sure how significant a question it might be in the broader picture of navigational questions. But having examined it further, I've come to the view that it is indeed a very significant issue. To begin with, you simply cannot discuss implementation of the navigation provisions with respect to aircraft without addressing and possibly reopening some of the most sensitive questions involved in the Law of the Sea Convention. Secondly, any attempt to determine in the field of air law what rules of the Law of the Sea Convention now become binding in the field of air law involves one in an attempt to determine which rules of the Convention are in fact binding rules of international law, whether by custom from the past or from custom now emerging. Equally this attempt forces one to assess what other rules of international law address in a binding fashion the questions of air navigation. And thirdly, I would suggest as a comparative lawyer that it is also very useful for us as law of the sea lawyers to take a step back and to look and see how the air lawyers look at us and what they think of us, and what they think of the rules that we have been producing.

To begin, let us reverse the coin and ask, "What is the significance of this issue from the standpoint of international air law?" I think you can immediately pick out three reasons. Certain rules of the Convention explicitly create rules of international air law. Secondly, certain articles of the Convention implicitly change the rules of air law

and create new rules of air law. Thirdly, there are other parts of the Convention which in a systemic sense also have their effect on international air law. For these three reasons it is clear that the Law of the Sea Convention is having a profound effect upon international air law.

This being the case, what has the reaction been in the air law community since 1982? I have to say it has been fairly low key. There has been a very clear desire to avoid reopening controversial issues which were negotiated long and hard in the Law of the Sea Convention. There is, however, a concern to avoid potential interference by, if you will, what might be seen as foreign rules of law in the international air law system. But equally there is considerable interest in determining whether any of these new provisions of the Law of the Sea Convention do not in fact in some respects increase the ambit of the application of international air law and in some systemic sense reinforce and strengthen the mission of ICAO and indeed strengthen the whole Chicago system. I think that the Convention does all these things.

Finally, by way of introduction, if you will allow me a brief venture into futurology, we have witnessed the virtually complete extinction in international travel of passengers by ship. Consider a world where virtually all general cargo is carried by large aircraft. Consider a world where the Greens convince us to drive motorcars by electricity or something else and not by oil and where bulk carriage of oil at least, if not of many other commodities, ceases to be a major feature of maritime commerce. There will be a lot fewer ships plying the oceans. I will give you two statistics and then I will get on with it. There is a report, just two days old, which suggests that by the year 2005 gross revenues of airline companies will be in the area of 2500 billion dollars per annum -- only fifteen years away -- and that the market for new aircraft in those fifteen years is calculated to be in the area of 580 billion dollars.[1] That is a lot of aircraft. Therefore I would suggest to you that problems of air navigation and the legal problems related to them are certainly now a major issue and will become even more significant.

Time doesn't allow me to give you a complete assessment or a run-through of the Chicago system of air law, obviously. Let me just summarize three points. The Chicago Convention of 1944 and its

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[1]"Plane sailing for International Aviation" *The Guardian*, 10 June 1989, p. 21.

annexes which set up ICAO, the International Civil Aviation Organization, together with a number of other related international conventions are designed to promote and facilitate international civil aviation, including safety standards, routes and services to aircraft in international civil aviation. One therefore has an enormous body of law dealing with this question.

There are some fundamental postulates of law which were set up by the Chicago Convention. One of the most significant for our purposes is the sovereignty of the state overflown. In the final analysis, despite certain aspects of the Chicago system and related conventions, the overflown state -- not only in its land territory but in its territorial sea -- can regulate and indeed impede and refuse to permit overflight. Only over the high seas are the Chicago rules and related annexes fully mandatory, although indeed they apply very widely over national territories around the world. Also, the Chicago system deals with civil aviation; it does not deal with military craft. Article 3(d) of the Chicago Convention simply says that due regard shall be paid to the safety of civil aviation.[2] These are elements of the system in capsule form.

What parts of the Law of the Sea Convention address international civil aviation? I will not run through the convention as time does not allow me, but I can pick out as a minimum, an absolute minimum, forty articles of the Convention which address either explicitly or absolutely implicitly and directly questions of international civil aviation:[3] beginning with the Preamble, the articles on the territorial sea, transit passage through straits, archipelagic states and passage through archipelagos, rights enjoyed in the exclusive economic zone, high seas, including questions of piracy, hot pursuit, certain provisions dealing with protection of the marine environment, including atmospheric pollution, sovereign immunity questions, and not the least dispute settlement.

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[2]The best summary of international air law and the basic international conventions is found in Shawcross and Beaumont *Air Law*, Martin, McLean, Martin & Mango (eds.), (London: Butterworths, 1977).

[3]LOS Convention 1982: Preamble; Articles 1(5); 2.1.2; 18; 19.2(e); 38.1; 38.2; 39.1; 39.2; 39.3(a); 41; 42.5; 44; 49; 51; 53; 54; 55; 56; 58.1; 58.2; 60; 73; 86 definitions; 86(h); 102-107; 111.6; 135; 210; 212; 216; 222; 234; 236; 245; 286; 293; 297.1(a) & (b); 298.1(b).

This being the case, after the adoption of the convention in 1982, ICAO decided it was necessary to take a look at it to determine what the precise impact might be on international air law. A study was commissioned: "Law of the Sea Convention: Implications if any, for the application of the Chicago Convention, its Annexes, and other international air instruments."[4] This study was undertaken rather slowly and it was not in fact published until 1987[5] along with the comments of thirty-eight states,[6] a fairly representative group and the report of a rapporteur, Sir Arnold Keene.[7]

Time does not allow me to address all the issues discussed in this study but I would like to pick out some of the highlights. The first one addressed bravely by the ICAO secretariat in its study relates to the binding character of the Law of the Sea Convention itself. The study grasps the nettle and in its conclusion on this question states that "it may be suggested that most of the provisions of the Convention represent international customary law or will acquire that status in the future due to consistent and uncontested practice of States."[8] This proposition appears to have been accepted by the thirty-eight states commenting on the question, including major powers and a full range of other categories of states. So that is the position from which ICAO's secretariat starts and seems now to be operating. The Convention is something with which they have to deal; they cannot ignore it.

Time does not permit me to speak about the territorial sea and the contiguous zone. I think I will set these aside and go straight into the question of the impact of the straits regime. The first obvious impact is the extension of the territorial sea from three to twelve miles. In this case the Chicago system is in some sense restricted, because the

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[4]Documents of the 25th Session of the ICAO Legal Committee (Montreal, 12 to 25 April 1983), Decision 4/2.

[5]*Secretariat Study*, ICAO Doc. LC/26-WP/5-1, February 4, 1987. (Hereinafter "*Study*").

[6]*Comments*, ICAO Docs. LC/26-WP/5-2-42, February 4, 1987 - May 13, 1987.

[7]*Report by the Rapporteur*, ICAO Doc. LC/26-WP/5-41, February 2, 1987.

[8]*Study*, para. 5.4.

mandatory character of the Chicago system only exists over the high seas, not over the territorial sea. Therefore, ICAO air lawyers have been concerned to know exactly what is the implication of the extension of the territorial sea, particularly in straits.

The transit passage regime which explicitly applies to aircraft and is enjoyed by aircraft creates a new rule of air law. Not only does it create a new rule of air law, but Article 39(3)(a) states that the rules of the air -- that is, Annex II of the Chicago Convention -- are to be respected by aircraft in transit passage. These rules, which normally would not have been accorded mandatory character, although they are generally respected over a territory, now appear to have been accorded mandatory character over one part of national territory. The question of suspendability is addressed by the ICAO study; only one state, the Philippines, suggests that transit passage may in fact be suspendable.[9] The question also arises of the application of the regime to sovereign aircraft, where it is stated in Article 39 that the rules of the air will normally apply to sovereign aircraft -- this also is something of an innovation in air law because there appears to be at least some form of attenuated obligation to respect these rules of the air which under the Chicago Convention are not in any way binding on sovereign aircraft. Here there is a degree of obligation to respect them. Equally there is the question of responsibility for damage done by sovereign aircraft during transit passage and the related question of dispute settlement.

Finally, I simply flag but will not go into Article 39(3)(b). The ICAO study suggests that Article 39(3)(b) which requires that an aircraft in transit passage is free either to monitor a general frequency or an emergency frequency, but not necessarily to monitor both, is in fact a mistake of air law that was there and has persisted in the text since 1977, despite the fact that ICAO made quiet representations to have it removed.

Going on to the Archipelagic State rules, similar questions arise. There is in one sense a geographic restriction of the application of the rules of the Chicago system, since the sovereign territory of archipelagic states will be extended, thereby making the rules of the air no longer absolutely mandatory in those areas. Secondly, the archipelagic state becomes the responsible state having competence to apply in the first instance the rules of the Chicago and other

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[9]*Comments by the Philippines*, ICAO Doc. LC/26-WP/5-26, February 4, 1987.

conventions dealing with aerial piracy and other incidents, accidents, and investigations. So an expanded role is provided for the archipelagic states. On the other hand, as with respect to transit passage, there is a new role for the mandatory application of the rules of the air over some parts of national territory, namely over archipelagic sealanes. I note that the question of suspendability is somewhat differently addressed in Articles 52(2) and 44, and that was discussed in ICAO. Similar questions to those that I have mentioned already arise with respect to military aircraft. For reasons that are not known to ICAO, there is no role given with respect to the setting of rules governing passage through archipelagic sealanes or indeed in the straits articles to ICAO, comparable to the role implicitly given to the IMO with respect to setting rules governing navigation through straits or through sealanes. And the study concludes simply that this role does not exist.[10] Only one government, the government of the Netherlands,[11] commenting, suggests that this role should not be ruled out, and in fact argues that since the regional conferences on navigation and ICAO are in fact the bodies which set international air routes, if they are going to set routes through archipelagic sealanes or through straits, they will have to address the question directly. In any case, the recommendations of the regional conferences are in fact sent to ICAO Council for approval. So, indirectly ICAO will be involved.

A final point should be made with respect to straits or archipelagic sea lanes passage. Next time you are in an aircraft, open the map and look at the red straight lines on the map indicating major international air routes. You will see that very few of them are or indeed could be conveniently directed through straits or still less through archipelagic sealanes. I think most of us would get rather airsick flying around islands, and with respect to military aircraft I suspect that only for passage into enclosed seas like the Mediterranean will this become a major question. Most routes now ignore passing over archipelagoes and pass directly over land or sea as the route is set. I do not think that ICAO is in any way disposed or interested -- nor is it indeed commercially or technically viable -- to alter air routes to take into account, except in extreme cases, archipelagic sea lanes passage.

Now to conclude, the final point I should discuss is the status of the exclusive economic zone. This is the area where the ICAO study

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[10]*Study*, para, 10.5.

[11]ICAO Doc. LC/26-WP/5-22, February 4, 1987.

indicates and indeed where the reaction of states indicates that there is the greatest difficulty. Indeed the study itself suggests that ICAO ought to give some kind of formal interpretation as to the nature of the right of overflight over the exclusive economic zone. The example of whether states have a right to regulate flight to and from installations on the continental shelf is given, and in that case one has a breakdown of states answering. States like Canada[12] and the Netherlands, for instance, give very cautious approval to the suggestion that states do have a right to regulate. Others, including Uruguay, Brazil, and Mexico, unequivocally say they must have a right; while on the other side one finds a strong current of opinion, explicitly said in a number of the comments, that no economic rights are given above the waters of the economic zone with the possible exception, argues the Swiss delegation,[13] of the right to harness the winds. Therefore, if that is the case, then the regulation of flight around and into installations should be purely international. The majority of states appear to be very leery of the idea of having ICAO give any form of authoritative determination as to the nature of the right of overflight over the exclusive economic zone. The rapporteur suggests in a rather pragmatic fashion, and I paraphrase, "Simply read the language and you will see it says the same rights of overflight exist over the economic zone as exist over the high seas; let's leave it at that."[14] At this point, I think that is the general sentiment in ICAO.

I have to stop here. I cannot go into the questions of sovereign immunity or dispute settlement, which are indeed real.

I think, in conclusion, one can see that the present system of ICAO and the Chicago conventions can be adapted and indeed are gradually being adapted to the new realities created by the Law of the Sea Convention. Most of these changes, if not all, can be made -- and indeed this is explicitly said and accepted within ICAO -- without any attempt to amend the Chicago Convention. As I stated at the beginning, ICAO seems to start from the premise that much of the Law of the Sea Convention is in fact now binding customary international law. And it is indeed expressly stated in the Secretariat Study that the only major issue outstanding with respect to

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[12]ICAO Doc. LC/26-WP/5-5, February 4, 1987.

[13]ICAO Doc. LC/26-WP/5-26, February 4, 1987.

[14]*Supra* note 7, paras. 29 to 36.

implementation appears to be that of Part XI. However, if one considers the range of comments that have come in from states' delegations on such issues as the territorial sea, transit passage, archipelagic passage, and the nature of rights in the economic zone, there are major differences of perception of the nature of these rights. These perceptions may well foreshadow greater difficulties in the implementation of the Law of the Sea Convention than we have up to now foreseen. However, as far as the air law community is concerned, they have taken one trip on the rather stormy waters of the law of the sea, they have returned quite seasick, and as far as I know there is very little disposition to set out again. At this point it is not even clear that the legal committee is going to take up further study of this question. Thank you very much.[15]

[15]For an excellent review of these issues by the ICAO Legal Advisor see M. Milde, "United Nations Convention on the Law of the Sea: Possible Implications for International Air Law," (1983) 8 Annals of Air and Space Law 167.

LEGAL ISSUES OF THE INTERNATIONAL MARITIME ORGANIZATION'S ACTIVITIES RELATING TO THE PRESENT STAGE IMPLEMENTATION OF THE 1982 UN CONVENTION ON THE LAW OF THE SEA

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Theoretical conclusions based on the comparative analysis and interpretation of the 1982 UN Convention on the Law of the Sea, the 1982 Convention on the International Maritime Organization, and the amendments thereto lead to the conclusion that IMO can be considered a "competent international organization" dealing with the issues of navigation, safety at sea, prevention of pollution from ships, and other questions of the impact of navigation on the marine environment.[1]

In its turn, the IMO itself, having examined the conventional provisions, concluded that when the term "competent international organization" is used in the singular in provisions of the Convention relating to international regulations and uses applicable to navigation and the prevention, reduction, and control of marine pollution from vessels or by dumping, it refers to the International Maritime Organization, which is the agency of the United Nations with a global mandate to adopt international standards in matters concerning

[1]E. Miles, On the Roles of International Organizations in the New Ocean Regime, in Choon-ho Park, ed., *The Law of the Sea in the 1980s*, Honolulu: The Law of the Sea Institute, 1983, pp. 383-445; C.P. Srivastava, "IMO and the Law of the Sea", *The UN Convention on the Law of the Sea: Impact and Implementation*, Honolulu: The Law of the Sea Institute, 1985, pp. 419-425; T.A. Mensah, "The International Regulation of Maritime Taffic: IMO Approaches", *Ibid.*, pp. 483-489; T.S. Busha, "The IMO Conventions", *Ocean Yearbook* VI, University of Chicago Press, 1986, pp. 160-170; C.M. Young, "The Role of the International Maritime Organization in Navigation Matters Under the Law of the Sea Convention," *The Mediterranean in the Law of the Sea*, 23-24 February, Working Materials, pp. 1-16.

maritime safety, efficiency of navigation, and the prevention and control of marine pollution from ships."[2]

These conclusions are now being confirmed by the practical activities of the IMO with regard to elaboration and application of certain provisions of UNCLOS relating to its terms of reference.

In February, 1986, the Maritime Safety Committee (MSC) decided on the formulation of a legal Document for the removal of onshore installations and structures in the exclusive economic zone and on the continental shelf of the coastal States. The proposal on the adoption of such Document by the Organization was submitted to the Subcommittee on Safety of Navigation by a number of states including the United States, the Federal Republic of Germany, and Norway.[3]

The removal of artificial structures, installed in the coastal maritime areas, has acquired urgency due to the fact that, as a result of the exhaustion of oil and gas resources, the number of disused boring platforms is constantly increasing and their removal entails both technical difficulties and large costs.[4] In this connection the UN Secretary-General stated in his report that as certain old marine deposits are exhausted, the question of removal from exploitation of massive installations has become a serious problem with both international and national aspects. The international community is, in the first place, concerned with the safety of navigation, marine environmental protection, and maintenance of fisheries, while the governments of the countries involved in oil extraction and the oil companies carrying on such extraction, sharing this concern, are also interested in the dismantling technology, ensuring the safety of this

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[2]Implementation of the United Nations Convention on the Law of the Sea 1982 for The International Maritime Organization (IMO). Doc. IMO LEG/MISC/ I p. 2.

[3]Removal of Disused Offshore Platforms, Meeting of Sub-Committee on Safety of Navigation, thirty-third session, IMO Doc. NAV 33/WP/4/Rev.I p. 1987.

[4]Jim Redden. Platform removal becomes international issue. *Offshore*, vol. 48, No. II, November, p. 27-32.

technology, and avoiding extreme costs for themselves and their governments.[5]

While formulating the Draft Guidelines and Standards for the Removal of Offshore Installations and Structures, the Subcommittee on Safety of Navigation, the competent body in the IMO, thought it expedient to state its opinion with regard to the IMO competence to set generally accepted international standards relating to the removal of the abandoned and disused offshore installations and structures. Article 60(3) of the 1982 UNCLOS provides: "Any installations or structures which are disused or abandoned must be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization." On the other hand, in virtue of paragraph j, Article 15, of the IMO Convention, the Organization may have competence -- the competence which is entrusted to the Organization in compliance with international documents -- to issue recommendations to Organization members concerning the adoption of rules and guidelines, in particular with regard to safety at sea.

The above-cited provisions permit us to presume that the IMO has competence to adopt standards on legal issues relating to the ensurance of safe navigation in connection with the contemplated dismantling of offshore installations and structures. However, this question has emerged also from the necessity to delimit the competences of IMO and other international agencies acting on the basis of applicable international agreements whose Parties are the IMO member States.

The thing is that if the removal is effected by dumping, it is covered by two international agreements: the 1972 Convention on the Prevention of Marine Pollution of by Dumping of Wastes and Other Matters (LDC-72) and the 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (the Oslo Convention).

In this connection, the XIV Meeting of the Oslo Commission, which was held in June, 1985, examined the question of whether the issues of dismantling and removing offshore structures should further be considered within this Commission or finalized in some other form. The Commission has concluded that IMO is the competent international organization referred to in paragraph 3, Article 60, of the 1982 UNCLOS and agreed that the question at issue should be submitted for consideration to an IMO competent body.

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[5]Law of the Sea. Report of Secretary-General Doc. UN A/43/718, 20 October 1988, para. 56.

The Maritime Safety Committee followed suit and acknowledged the relevant competence of the IMO.[6]

Besides, during the debates on the Draft Guidelines and Standards for the Removal of Offshore Installations and Structures, an opinion was voiced that one of the aspects -- partial removal -- should be preliminarily discussed within the LDC-72 Consultative Meeting.[7]

Adoption of a special decision on IMO competence with regard to questions of the removal of offshore installations and structures should presumably be regarded as an indispensible legal element in specifying and determining the procedures in the implementation of the 1982 UNCLOS provisions. By paragraph 3, Article 60, of this Convention which mentions "a competent international organization," the IMO competence can only be implied. Therefore, this conventional provision cannot be regarded in the sense that it authorizes IMO or makes it liable to adopt any generally accepted international standards with respect to the removal of offshore installations and structures. Because IMO is not directly entrusted with such functions, it cannot, on its part, refer to paragraph J, Article 15, of the Convention on IMO, which provides it the right of functioning in compliance with other international documents relating to safety at sea and the effect of navigation on the marine environment.

In this connection, attention should be drawn to the fact that the UN Convention on the Law of the Sea, which has not entered into force, cannot be referred to as an international document in the meaning stated in the above-cited Article 15 of the Convention of the International Maritime Organization. As far as its terms of reference are concerned, the Maritime Safety Committee is authorized to consider all functions referred to its competence by the Convention of IMO. Besides, the Committee provides the instruments for the discharging of any duties laid on it, *inter alia*, by any other international documents or the basis of such international documents, and recognizes the Organization (paragraph B, Article 28). It appears from the above duties that the Committee discharges the function on the basis of an international document; the coincidence of its duties

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[6]Report of the Fifty-second Session of the Maritime Safety Committee (MSC 5228, para. 26-28).

[7]Report of the Tenth Consultative Meeting of Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter LDC 11/14 p. 49-50.

and statutory functions and obligations is not sufficient. Article 28 provides the necessity of recognizing such duties by the Organization as an indispensible condition.

The formulation of the Interim Draft Guidelines and Standards for the Removal of Offshore Installations and Structures in the Exclusive Economic Zone and on the Continental Shelf was initially limited to the elaboration of rules aimed mainly at the ensurance of safety of navigation. It appeared, however, that the legal problems of the removal of artificial installations are much broader, more complicated, and therefore are outside the MSC's competence. The all-around approach to the legal problems of removal is contained in the law of the sea itself. Paragraph 3, Article 60 of the 1982 UNCLOS provides, besides ensurance of the safety of navigation, that during the removal of such installations the interests of fisheries and the marine environmental protection rights and duties of the other states are also taken into account. In this connection it was considered expedient to submit the Draft Guidelines and Standards to FAO, UNEP, the Consultative Meeting of States' Members of the LDC-72,[8] and the Committee for Marine Environment Protection with the view of examining the ecological, fisheries, and technological aspects of the problem.

Besides the observations of the above-mentioned international bodies, observations were submitted by the Oil & Industry International Exploration and Production Forum, Friends of the Earth International Seminar, on issues associated with offshore installations and structures in the EEZ held at ESCAP.[9]

The Consultative Meeting of the Contracting Parties of the LDC-72 came to the conclusion that the rules formulated by IMO are acceptable from the view point of the LDC Convention.[10]

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[8]Law of the Sea. Report of Secretary-General Doc. U.N. A/42/688 5 November 1987, para. 57.

[9]Eleventh Consultative Meeting of Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. LDC 11/14 pp. 49-50.

[10]P.V. McDade. The Removal of Offshore Installations and Conflicting Treaty Obligations as a Result of the Emergence of the Law of the Sea. A case study. *San Diego Law Review* vol. 24, no. 3, (1987), p. 645-687.

Another problem that evolved during the formulation of the draft rules for the removal of offshore installations and structures concerns the determination of the legal basis for the Organization and States in the elaboration of relevant international standards. The legal situation on this issue is rather complicated and contradictory.[11] On the one hand, the 1958 Convention on the Continental Shelf, whose parties are 52 states, is still in force. According to paragraph 5, Article 5, of this Convention, abandoned or disused installations should be entirely removed.

The implementation of this norm in practice has not been widespread, in particular due to the limited number of member states concerned. Besides, states have not uniformly applied this rule of the law of the sea in their legislation. For example, the legislation of the U.S. and FRG provides for a duty to remove platforms entirely, but the laws of Great Britain, Norway, and France authorize the national competent bodies to decide on the issues of entire or partial removal of platforms. National legislation does not suggest that the rule established by the 1958 Convention has been altered by subsequent practice.

On the other hand, the UN Convention on the Law of the Sea, which is signed by 159 and ratified by 40 states, does not nullify the states' duties under the Convention on the Continental Shelf, which contains different rules.

In compliance with paragraph 3, Article 60, any abandoned or disused installations and structures should be removed to ensure the safety of navigation. Due notice is provided of the depth, location, and dimensions of any partially removed installations and structures. Therefore, the 1982 UNCLOS provides for partial removal of the offshore installations and structures.

Another distinction lies in the fact that the instrument of the States' implementation of their duties on the removal is established by a competent international organization, *i.e.*, IMO.

As far as the competence to adopt international standards is provided to IMO by the 1982 UNCLOS, there are good reasons to assume that the Organization should guide itself by the relevant provisions. Great Britain's representative emphasized this aspect when the question was discussed at IMO.

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[11]Removal of Disused Offshore Platforms. Meeting of Sub-Committee on Safety of Navigation 33rd Session IMO Doc. NAV 33/WP.4/Rev. I, para. 7.8.

The Draft Guidelines and Standards incorporate the following rule: the coastal state, having jurisdiction over the installation or structure, should ensure that it is removed in whole or in part in conformity with these standards. Although the rule proposed by IMO mentions the complete removal of platforms, the mandatory complete removal of platforms as provided for by paragraph 5, Article 5, of the 1958 Geneva Convention is nevertheless the duty of the state. The essence of changes provided for by the Draft Guidelines and Standards lies in the fact that the coastal States are authorized to determine, with due account taken of international standards, the question on the expediency of complete or partial removal of installations and structures. The Draft interprets the notion of the removal in the sense that it includes both complete and partial removal of the installation.

On the other hand, the Draft Guidelines and Standards establish conditions under which installations or parts thereof will be allowed to remain on the marine environment.

From the legal viewpoint the adoption of the Guidelines and Standards for the removal of Offshore Installations and Structures in the EEZ and on the Continental Shelf and their practical implementation will mean the beginning of the formation of a new rule of the law of the sea as a result of synthesing the content of the legal norm fixed in the Geneva Convention on the Continental Shelf while imparting the legal meaning of the provision of the new UN Convention on the Law of the Sea.

The contents of this new legal norm include the right of the coastal state to decide independently the question of complete or partial removal of platforms and other artificial structures under their jurisdiction with due account taken of generally accepted international standards, which will be adopted by the International Maritime Organization.

The legal significance of the international standards from the standpoint of the international law-making process can be defined as follows: the rules for the removal of installations and structures reveal that States are not convinced of their duty to completely remove artificial structures and confirm that the definition of new norms of international law on this question is underway.

COMMENTARY

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Ladies and gentlemen, in the short ten minutes that I have for commenting on the topics, I shall talk on two separate problems. First, I shall give general comments, and later, if time permits, I will try to express one or two opinions regarding papers that have been submitted.

By way of general comments, I would like to mention that the navigation issue was one of the most difficult subjects we considered in the conference. I am happy to see among us Ambassador Aguilar, who as Chairman of the Second Committee played a very active role in this part of the negotiations. I remember dealing with him quite extensively at the time. I am also happy to see here many of the Americans who participated in that negotiation. I am opening myself up to possible contradiction if whatever I say does not correspond to their understanding, especially from my old friend Myron Nordquist, who contradicts me on many things most of the time.

The major issue in that negotiation was always the contradiction between the need to protect the navigating vessels and the need to protect the coastal states. There was a lot of talk about international trade and so forth, but in the end it boiled down only to that particular issue. The problem is not at all international trade. I think this is the reason why the role of IMO is somewhat dubious, because the issue was warships. How are we going to handle the passage of warships, ships with nuclear weapons, and so forth? There has never been a problem with commercial vessels passing through the territorial sea or through archipelagic waters. In this difficult question of navigation, we tried to find a way to deal with the problem of warships and underwater passage for nuclear submarines in straits and archipelagic waters. I remember that the debate was very heated from time to time because a lot of people liked to confuse the need for international trade of commercial vessels with the needs of warships. In fact, I like to say now -- I could not say this ten years ago -- commercial navigation was used as hostage in order to gain concessions for the navigation of warships. In that context it was always projected that the interests of the international community were tied up with the interests of warships, as if the coastal states

were not part of the international community, and as if the coastal states were against international trade and communication. This was the situation.

Later, an understanding was reached on the two conflicting interests, and regimes were devised for straits and sea lanes. That is the first point that needs to be properly understood.

The second point is the confusion in equating straits with archipelagic sea lanes. We had a great deal of difficulty in trying to say that straits used for international navigation were not the same as archipelagic sea lanes. In fact -- Ambassador Aguilar will have to correct me here -- Indonesia did not like the rules *mutatis mutandis* because it suggested the notion that straits and archipelagic sea lanes are all the same. I negotiated with the American and some other delegation to write down exactly what was *mutatis mutandis*. Ambassador Aguilar told me that without *mutatis mutandis* the article would be too long, but we argued that *mutatis mutandis* confused the difference between the rules on straits with the rules of archipelagic sea lanes. And that confusion later turned out to be the crux of some of the difficulty we had.

What are the differences, then, between straits used for international navigation and archipelagic sea lanes as far as navigation is concerned? In our minds, when we negotiated those paragraphs, we were very clear: straits used for international navigation are those waterways outside of archipelagic waters. We will not accept the notion of straits used for international navigation inside the archipelagic waters. That's why we devised the notion of archipelagic sea lanes. So, for instance, we admit that the Straits of Malacca and Singapore are under the regime of straits used for international navigation, but the Sunda Strait between Sumatra and Java is not. You may ask me, "What is the difference?" The Convention itself defines the difference, but no one seems to refer to it, and that's why we have some confusion.

Let me elaborate on some of the differences. In the definition of straits used for international navigation, you will read about the "freedom of navigation," while in the definition of archipelagic sea lanes the words are "rights of navigation." To you the terms may sound the same, but to me they are very different. "Freedom of navigation" to us has the connotation of freedom of the high seas. That's why we do not want that word used in relation to archipelagic waters. "Rights of navigation" means that you may have the right but not necessarily total freedom; there are some rules and regulations that you have to follow. We recognize the right, but the exercise of that right must be

under certain rules and regulations which may or may not be different from the freedom of navigation that is in effect in the straits. That is one of the major differences.

To emphasize the differences, in the follow-up definition we also used different wording. We qualified "rights of navigation," for instance, with the words, "normal mode of navigation," which we do not find in the freedom of navigation. What does this phrase mean? In my mind, in the straits used for international navigation there is no classification of how you are going to transit, while in the sea lanes it must be in the normal way. That's why the words "normal mode" were insisted upon there.

There was a third difference. In the provisions regarding straits, for instance, there is no word "unobstructed." The coastal states are not supposed to hamper or impede navigation. But in the sea lanes we do use the word "unobstructed." I think Tom Clingan remembers the differences in the two regimes. People ask me, "What's the difference?" I don't know the difference, but they are different. The fact that different words are being used in our minds means that different notions are being discussed.

And there's the fourth one, which is a very fundamental difference. The sea lanes exist only on axis lines, and vessels cannot navigate closer to coastal states than 10 percent of the width of the waterways. That definition does not exist in the straits regime. In other words, one cannot equate the waterways of sea lanes with the waterways of straits used for international navigation because of this limitation.

Consequent to this, certainly the rights of states over the sealanes are very different from the rights and obligations of states in straits used for international navigation. Paragraph 4 in Article 49, which no one has quoted, is the crux of the whole issue in our mind. It states that archipelagic sea lanes passage "shall not in other respects affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic State of its sovereignty over such waters and their air space..." I think Ambassador Aguilar will remember that we inserted this paragraph with the agreement of all toward the last part of the negotiations. What does it mean? It means that archipelagic waters are under full sovereignty of the archipelagic state. So is its air space. The only exception is the recognition of the right of sea lanes passage, and sea lanes passage is determined by the axis line and not through the whole waterway of the strait in the geographical sense.

Out of this clarification comes the reason why in our minds the rule of air navigation as established by ICAO is not affected one way or another, because sea lanes and air routes must be concomitant. Article 53 paragraph 1 states very clearly that an archipelagic state may

designate sea lanes and air routes thereabove. One can never imagine air routes in an archipelagic state above land territory. There was a proposal, I remember, from the Federal Republic of Germany, to change "thereabove" to "above the archipelago." But that proposal was not accepted, because if you designate the air routes "above the archipelago" and the archipelago means land, water, and air space and the sea bed, the air routes provided in the Convention would also lie above land territory and would thereby totally confuse the notion of air navigation under ICAO rules. So the air routes that exist in the Convention as far as the archipelagic state is concerned are only those above water, above the sea lanes, and not at all intended for civil, scheduled commercial aircraft but only for military aircraft. In fact, the whole notion of sea lanes was devised for that purpose.

Finally, there was discussion about the role of IMO. Is the role of IMO determinant or not? When we started talking about sea lanes, no one knew exactly what IMCO (now IMO) had to do with them. In fact, at that time when we talked about competent international organizations, we asked ourselves, "Which ones?" No one said definitively who they were. We thought it might have been IMO. But then we checked and, as is very clearly stated in the paper by Mr. IJlstra, IMO had the function to determine safety for international trade and all related technical matters. Specifically, it was to address the need for establishing traffic separation schemes and routing systems. No mention was made of establishing sea lanes, much less establishing sea lanes under the Convention, which accommodated the needs not of commercial vessels but warships and submarines which have nothing to do with international trade. At one time we asked ourselves, "Are we going to give IMO this function or not? Before an archipelagic state designates sea lanes and refers its proposals to a competent international organization, we will have to agree first which international organization we are talking about here." IMO is simply, at this moment, the only one, but one does not preclude the possibility of referring a matter to IMO by an agreement between the coastal state and whomever may be interested.

One of the difficulties in referring proposals to IMO regarding the designation of sea lanes -- I think this is very crucial -- is that so many members of IMO have not even signed, much less ratified, the Convention. How can we, the archipelagic states, leave it to the non-parties through IMO to determine where the sea lane is? In fact, we are giving power to non-parties to decide what the Convention should do and what we should do under the Convention. This is difficult for some countries to do. It is difficult for Indonesia. We would like to implement the Convention, especially in the determination of the sea

lanes, in cooperation with the parties to the Convention, because we are sure that the parties will respect it. But if we give the authority to a non-party to decide, supposing later on non-parties don't respect it? Then what do we do? I raise the problem.

So far Indonesia has not yet established sea lanes under the Convention. We once established sea lanes for fishing vessels, but that is not the meaning intended here. We have been working on this issue for years, but we have a problem, as I explained to you. How do we establish sea lanes under the Convention? Do we have to discuss them with somebody else? And who is this somebody else? Do we have to discuss it through a competent international organization? Which one is it now? One alternative is, of course, to follow the Convention very faithfully. We would do so if we knew, as we understood when we negotiated it, that the Convention would be universal and that all states would abide by it. But now we face the reality that all states do not abide by it. So if we follow this Convention on the whole, we face a problem, as I explained.

The other alternative would be to establish sea lanes in accordance with our legislation of 1962 that gave authority to our Naval Chief of staff and our Minister of Defense to establish sea lanes. They have never done so, but under our law that can be done. And if we do so under our own law, then we don't have to ask IMO. But other states may not abide by the sea lanes based on our own legislation either. That is the catch.

COMMENTARY

FLAG STATE VERSUS PORT STATE IN MARITIME SAFETY

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Some of the main points in the papers by Professor de Mestral and Ton IJlstra relating to the legal regime of navigation in various zones, and especially the archipelagic question, were given exhaustive treatment by Ambassador Hasjim Djalal.

I wish to concentrate my comments on the other impressively argued paper by Mario Valenzuela. His paper deals with the intricacies of flag state jurisdiction and port state control. I refer to aspects which Dr. Valenzuela mentioned but did not elaborate on. These observations may reinforce the general view of the Valenzuela paper that more authority in terms of monitoring and taking action against substandard ships is passing from Flag States to Port States. I see problems in relation to Port State control with respect to ships' crews and certificates of competency under open registry flags. I would also like to briefly consider the effects of the new "offshore" registers and the implications they may have in terms of the implementation of safety conventions by Flag States and Port States.

Nationality and Registration of Ships

The modern background to the registration issues stems from the 1958 Convention on the High Seas, which laid down principles of nationality and registration of ships. These were further elaborated in the 1982 Convention. In both Conventions it was stated that a "genuine link" must exist between the state and the ship. More recently, in 1986, a draft international convention was signed at UNCTAD on the conditions for the registration of ships. This defined, in some ways, what is meant by a "genuine link."

The most obvious aspect of the registration of a ship is that the ship becomes a floating part of the territory of the Flag State. In accepting a ship into its register a state can lay down specific conditions on the construction, equipment, manning, operating, and social conditions. These may be determined by the international Conventions ratified by the state. The ship owners may also have to comply with national legislation relating to strategic and fiscal matters.

Shifts of Flags

It has long been customary for shipowners to register their ships under various flags. Recently the number of states offering their flags has increased. Currently, shipowners can choose from a "shopping list" of some 24 states which are trying to attract ships to their registry. Owners can pick a flag which allows them to escape certain requirements under their national flags or obtain certain advantages under other flags. These include the facility to reduce taxes, avoid social security and pension constrictions, minimize other crew costs, modify safety and social requirements, avoid training costs, facilitate loans and mortgages, obtain subsidies, improve access to cargo, engage in sabotage, circumvent flag boycotts and trade embargoes, avoid confrontation with national state protagonists, obtain protection of foreign naval forces, or simply reduce the costs of registration.

The owners in question may have little direct connection with shipping. The owner may be a bank or a vertically integrated multinational, the primary interest of which lies in a massive use of raw materials and the marketing of products. The management of the ships may be located in a different country from the parent company. Few shipowners are in fact managers and few managers are shipowners. At present about 30 to 36 percent of world merchant shipping flies flags different from the country of domicile of the owners.

There are now four basic types of registers in addition to the strictly national registers, namely (a) Open Registers (the traditional FOC, *e.g.*, Liberia), (b) New Open Registers (*e.g.*, Vanuatu), (d) Dependency Registers (*e.g.*, Gibraltar), (c) Flexible, International Registers (*e.g.*, the Norwegian International Register). In the near future possibly 50 percent of merchant shipping will be under these open registry flags.

Economic Basis for Flag Shifts and their Consequences

The factors of production in the shipping of the free enterprise economies can almost be described as "Flag, Labor and Capital." These factors may be combined internationally to produce the maximum economic advantages in ship operations. The increasing tendency to vary the flag arises from the more recent economic problems of shipping.

In brief, in the years following 1973 oil prices rose, massive ship orders were then in the pipeline, ship demand fell, freight rates fell, and there was a slowing down in economic growth. Shipbuilding

continued to be supported, there was an enormous ship surplus created, and competition became more intense.

Ship management found that practically all ships' costs, including capital, fuel, repairs, insurance, and port costs were common to most operators on the international market. Crew costs and office overheads were the only main variables. They were determined by flag and the location of management respectively. A British flag tanker with a full U.K. crew in the mid-1980s would, for example, have crew costs of around $1m. per annum. When the same ship was reflagged to Bermuda and a Philippine crew employed, crew costs were reduced to $0.5m. Had a PRC crew been obtained, costs would have gone to about $0.3m. In the competitive conditions that prevailed this order of saving could make the difference between laying up and continuing to operate. For old ships, which were fully depreciated under the Norwegian flag, about 50 percent of total costs were attributable to manning. Between 1985 and 1986 around 130 ships (14m. DWT) left the Norwegian flag and Norwegian shipping companies also located their offices and staff overseas.

Corresponding to the proliferation of competing state registrations there are competing Classification Societies. It may be possible to shop around about 50 societies to obtain an in-class certificate. Only nine of these societies belong to the International Association of Classification Societies.

In the case of non-domiciled labor for OECD-owned shipping, recruitment is mainly from developing countries, and some from Poland. Between 1980 and 1986 reductions of seamen employed in the countries of Western Europe were: Norway 35 to 25 thousand, Denmark 15 to 10 thousand, Italy 55 to 30 thousand, and U.K. 68 to 30 thousand. Japanese merchant seamen were also reduced by 60 percent. Over the same period Philippine seamen increased from 30 to 60 thousand and there were increases in seamen from South Korea, Hong Kong, Sri Lanka, PRC, and from small states in Central America and remote island states such as Kiribati, for whom this is a new and important source of income.

The recruitment of seafarers for several flags has often been conducted by Commercial Manning Agencies. Wages and social conditions quoted do not always correspond to what is actually provided. Similarly, certificates of competency issued by some flag states are often on the basis of previously held certificates; some at least are of doubtful validity. This is a problem which may be exacerbated by the shortage of officers which is emerging internationally as a result of the moratorium in cadet recruitment and

the closure of training establishments in Europe and elsewhere in the past ten years.

Another relevant feature of the past decade has been the aging of the fleets. There has been little new replacement of tankers and large bulk vessels in particular. Quite a number of these ships must be substandard in terms of the latest IMO and ILO Conventions and many of the flags they are sailing under lack adequate Maritime Administrations. The recent rise in freight rates has tended to bring laid-up ships back into operation rather than increase the stock of new vessels.

There is no doubt that the combination of several of these factors are reflected in casualties. The league tables of incidents show the flags of Cyprus, Maldives, Gibraltar, Honduras, Panama (and Greece also) above the world average as a percentage of the tonnage and ships at risk. When we look at the detentions of substandard ships in Europe most of the same states feature. Interestingly, Liberia now appears well down these casualty lists, but it has suffered a withdrawal of tonnage from its flag. Panama shows an increase in casualties and has gained tonnage, while Cyprus with the worst recent casualty record has been making very fast gains in registrations!

Reactions to Flag Shifts

There are several basic changes which may now be mitigating the more negative consequences of changes in flags. The first of these is Port State control. In Western Europe the Memorandum of Understanding enables Port States to implement international Convention standards on the no-more-favorable treatment basis. This ensures that the Conventions are applied to foreign vessels flying flags of states which are not parties to the conventions as well as to party state flags.

The Memorandum of Understanding provision is undoubtedly a major method of control. There are, however, some practical problems. If ships have classification and survey certificates, if officers have certificates of competency issued by the Flag State, and if Articles of Agreement with the crew contain all the acceptable ILO requirements, and in addition the ship has an ITF blue certificate, the surveyor, in spite of appearances to the contrary, has difficulty in not accepting these at face value. In the case of tankers, it is virtually impossible for port state surveyors to inspect tanks and pipelines in detail or examine the conditions of carriage of, say, dangerous chemicals. Nevertheless, the Memorandum is a major advance in

Western Europe towards the control of substandard ships, regardless of flags.

Another related improvement is the World Maritime University (WMU). This is a creation of IMO and is located at Malmo, Sweden. One of the major courses at WMU is a two-year MSc in Maritime Safety Administration (Engineering and Nautical). This is providing well-trained staff for the administration and implementation of Conventions on a world-wide basis.

A third measure is the 1986 United Nations Ship Registration Convention. The "genuine link" provisions in the Convention are not stringent requirements, but they have some substance. The Convention will enter into force when at least 40 states, accounting for 25 percent of world tonnage, become parties. This may take several years, but at least in the formulation of rules relating to the new "flexible" international registers of Norway and elsewhere several provisions of the Convention are evident.

Fourthly, the so-called international registers which have been opened by the U.K., France, Spain, Netherlands, West Germany, and Norway are partly attempts to achieve the manning economies of the traditional FOC while meeting Convention requirements.

Conclusion

The flag a ship flies is now largely a matter of commercial choice; however, it is probably necessary to continue having national registers and to fly national flags on merchant ships, even if many of these flags are no longer very meaningful and can be changed quickly. This ability to shift flag is in line with a form of globalization of shipping whereby owners, labor, capital, and managerial locations are increasingly geographically separated and mobile, but functionally combined.

As a balance to the variable standards arising from a diversity of registers, there are the minimal constraints which have appeared in the 1986 UNCTAD-sponsored Convention. More relevant for safety and environmental protection are the provisions for port state control in the 1982 Convention and the NW European Memorandum of Understanding. It would be sensible to extend the Memorandum and its data exchange system internationally, and, as Mario Valenzuela emphasizes, ensure that this is implemented in line with international conventions, not by national standards introduced unilaterally by states. It would also be valuable to have an international system of validating certificates of competency issued by flag states. Too often certificates have been issued by states on the basis of previously held

certificates, the origins of which may be dubious. This may be monitored more effectively under the new international registers, although in the process they may acquire a greater share of the most qualified staff trained in both developed and developing countries. It would be a much greater safeguard if IMO had the authority to validate training and examinations internationally on the basis of the STCW standards.

It would be useful, likewise, to have a means of monitoring and authorizing Classification Societies. In effect, with less meaning being attached to the flag of a ship, there should be less authority represented by the flag and more devolved to the world community through port state implementation of safety Conventions on an international basis.

DISCUSSION

Edgar Gold: Thank you, Professor Couper, for a rather sobering conclusion to this panel. Ladies and gentlemen, I hope you have some comments and questions. The floor is open.

Jean-Pierre Queneudec: Hasjim Djalal has emphasized the difference in terms used to define transit in archipelagic passage. He told us that in other pertinent provisions of the Law of the Sea Convention transit passage through international straits means freedom of navigation, while archipelagic sealanes passage through archipelagic waters means rights of navigation. I want to make two remarks and to ask a question on that subject.

My first remark is that, in my opinion, two meanings are to be attributed to the expression "right of navigation." One is the right of states to sail ships flying their flag on the high seas under Article 90 of the Convention, and the other is the right of ships to navigate through different maritime areas, in particular through archipelagic waters.

My second remark is that in several international straits, traffic separation schemes have been established through which ships are legally obliged to navigate in accordance with regulations establishing those sealanes, which are mandatory since the entry into force of the COLREG Convention. So their freedom of navigation is limited and very close to a right of navigation. My question is: is there really any substantial difference that might be derived from using the word "freedom of navigation" to qualify transit passage and the word "rights of navigation" to qualify archipelagic passage?

Edgar Gold: Hasjim, I think you've spoken on this already, but you might want to respond again.

Hasjim Djalal: The first remark is that rights belong to the state and rights belong to the ships. The Convention says in Article 53 that all ships and aircraft enjoy the right of archipelagic sealanes passage. It says, "all ships," so I shall leave you to determine whether states are mentioned or not. They are not mentioned. That's the first one. It refers only to all ships.

The second one is, you said that in the straits traffic separation schemes have been established. Yes, but not only in straits. Traffic separation schemes can be established anywhere -- in territorial seas, around promontories, anywhere as long as they are necessary for

navigation. But these are not necessarily sealanes. In fact, this is the confusion: as if traffic separation schemes are the same as sealanes. They are not. This is my point. Traffic separation schemes are technical matters of navigation for purposes of safety of navigation. Their designation is within the function of IMO. We established a traffic separation scheme in the Straits of Malacca and Singapore in 1973 or 1974. We did consult IMO and we did establish it and it is useful. Its whole function is for safety of navigation. You are right there. It is, of course, within the right of the coastal state to make rules and regulations with regard to the safety of navigation. But to my mind, sealanes are not established in the archipelagic waters for the purpose of a traffic separation scheme. One can establish the sealane without a traffic separation scheme, or one can establish a traffic separation scheme even outside of the sealanes. In other archipelagic waters where the regime of innocent passage is applicable, one can also establish sealanes. So I think it is important to avoid the confusion. The sealanes as they are intended in this Convention, as I explained, are how to traverse the archipelagic waters. In fact, under the innocent passage regime there is no problem whatsoever for commercial vessels.

The question arises that this innocent passage regime is not sufficient for warships. It is not sufficient for underwater navigation, to be very frank with you. In the innocent passage regime submarines will have to go on the surface and show their flags. No submarines like to go on the surface while passing through the archipelagic waters. They like to go underwater, and therefore you have to provide a special place for them, equally for the warships. That is the main function of the sealanes here.

Then you ask, "Is there any real difference between the right of navigation through the archipelagic waters and the freedom of navigation in the straits?" In my mind, yes, there is. I quoted an article saying that the right of archipelagic sealanes passage shall be exercised in a sealane which is fixed on an axis. Ships cannot go out of it. They can only go out within a definite framework, 25 miles to the left, 25 miles to the right, not closer than 10 miles from the coastline. You don't have that rule in straits. So there is a very clear definition.

The other thing is that this convention provided very clearly that sealanes do not affect whatsoever the archipelagic states' sovereignty over the sealanes and over the air space, over the seabed, over the resources. Sealanes do not affect at all international communication through ICAO, because ICAO routing always goes over the land somewhere. It would be very dangerous for airplanes to follow the sealanes through the archipelago, zig-zagging every five miles. It

would be incredible. In fact, in one of the paragraphs originally in the Convention there was an obligation that the sealanes we established must also be sufficient for *safe* passage. Ambassador Aguilar will correct me here. We agreed to drop that word "safe" because it would be argued that if aircraft had to zig-zag every five miles to follow above the waters, it might not be safe at all, and if something happened we would be blamed. That is why the air routes problem here is not intended at all to upset the ICAO routing system and ICAO system of international air navigation.

Edgar Gold: I'll take one further comment or question.

Constantinov: I wanted to make a brief comment on air flights above the high seas. The Law of the Sea Convention draws considerable interest not only from air lawyers but also from space lawyers. What I am thinking about is not the common heritage concept. I would like to draw your attention to the fact that, for the time being, there are no clear legal rules regulating transit passage flights of space objects over the high seas. I am thinking of space objects which are launched into orbit or are returning to Earth from space missions. The Chicago rules apply only to aircraft; they do not apply to outer space objects, which are on transit passage through the airspace over the high seas. These flights in outer space and in the air space above the high seas are absolutely free. They are not specifically regulated like, for example, air flights, the rules for which are enacted by ICAO according to Article 12 of the Chicago Convention. So if outer space activities continue to intensify, it will become increasingly necessary to regulate on a universal international legal base the transit passage of outer space objects through the air space of the high seas. This will be essential for the security of the air traffic above the high seas. You know that space objects are passing thousands of miles through the air space above the high seas when they are returning from space.

Edgar Gold: Thank you. Professor de Mestral?

Armand de Mestral: One or two remarks in reaction to that comment. I think we are seeing a resurgence of interest among a number of states with respect to the necessity, at some point, of determining the outer limits of national air space and setting thereby a limit to outer space. For some ten years this issue has been essentially moot, but it now seems to be coming back as an issue to be determined. There are certainly no clear answers at this point. I'm not sure that the concept

of transit passage is easily assimilable to the rapid rise towards space of a rocket or the turning of a communication satellite of any sort around the earth. Perhaps we'll need to develop some new concept to define that phenomenon. In practical terms, most -- although perhaps not all today -- of these movements, at least in the initial launching and indeed the return to land, involve military aircraft in one way or another and hence are not touched by the Chicago system. This explains why there is a fairly serious effort made, as the vehicles return to space or as they are immediately leaving, to aim them over the high seas. But I think your point is well taken that if this form of travel becomes more common we may well have to deal with it, and there does seem to be some new interest in the problem of setting limits to outer space and national jurisdiction in space at this point.

Edgar Gold: I think that concludes our very full session, ladies and gentlemen. I'm very grateful to you for staying with us on this beautiful, warm afternoon when the beach just across the road beckoned. My thanks to the panel, which attacked a very intricate and complex subject with great diversity and skill.

Panel III

LIVING RESOURCES

Thomas Clingan: It gives me great pleasure to chair this particular session on living resources. I think we've got some interesting problems here. The provisions on living resources in the 1982 Convention are quite extensive and innovative in many respects, but as in other sections of the treaty, some of the provisions are vague and uncertain. Indeed there are gaps not covered by those provisions. The uncertainties usually arose during the course of negotiations when agreement couldn't be reached. Vague and uncertain language was inserted to get agreement on both sides, and the gaps usually arose when certain situations were overlooked or in cases where no language could be agreed upon and the matter was just left open. These gaps have created situations that are now causing problems in regard to the management of living resources.

The basic question that will be addressed here this morning is the adequacy of international organizations and institutions to fill these gaps. We will take a look at certain organizations and see how they fit into the scheme of fisheries management of the 1982 Convention. We're going to look at four different issues. The first is one of these gaps which has caused a problem of considerable magnitude and therefore considerable urgency in several parts of the world. This is the problem of the so-called straddling stocks. The straddling stocks provisions, as you know, cover two kinds of situations. The first is where stocks are moving back and forth across boundaries between countries. I don't think we're going to be addressing that particular problem here. The second is where stocks move from the economic zone to the high seas and from the high seas to the economic zone; there are two kinds of jurisdictions in those areas. Addressing this question is someone who is highly qualified to do so: Bernard Applebaum, Director-General of the International Directorate in the Department of Fisheries and Oceans, from Canada. I now introduce Mr. Applebaum.

THE STRADDLING STOCKS PROBLEM: THE NORTHWEST ATLANTIC SITUATION, INTERNATIONAL LAW, AND OPTIONS FOR COASTAL STATE ACTION

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Canada

Introduction

In contemplating how to approach the scope of this subject, the author quickly concluded that he should focus on the geographical area he knows best, the Northwest Atlantic Fisheries Organization (NAFO), established by the convention on Future Multilateral Cooperation in the Northwest Atlantic done at Ottawa, October 24, 1978 and in force January 1, 1979.

It is well known that the straddling stock problem, in one form or another, affects a number of areas of the world. The recent study by Miles and Burke[1] performed a useful service in providing an overview of the problem from a world perspective. The focus in this paper on developments in the Northwest Atlantic provides a useful foundation for the analysis in this paper, in the broader perspective, of the issues, and the relevant legal questions and principles.

The straddling stocks which are the subject of this paper are stocks which straddle 200 mile limits, *i.e.*, their range extends from inside a coastal State's limits to the high seas area outside these limits. This paper does not deal with stocks which are entirely inside 200 miles, straddling the boundary between two coastal states.

As an additional element of definition, the straddling stocks which are the subject of this paper are coastal-related stocks, *i.e.*, they do not fall within the definition of highly migratory species that range widely

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[1]Edward L. Miles and William T. Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising From New Fisheries Conflicts: The Problem of Straddling Stocks", Paper presented to the Joint Soviet Maritime Law Association/Law of the Sea Institute Symposium on the Law of the Sea, Moscow, 28 Nov - 2 December, 1988.

over the oceans, diadromous species that range widely from a coastal state base, or sedentary and similar species of varieties of shellfish. Put in another way, the straddling stocks are fish for which there would be no special category or legal status if fishing zones followed continental shelf contours instead of being limited to 200 miles.

As the Law of the Sea Conference was drawing to a close, the few coastal states concerned about the straddling stocks issue grudgingly accepted the fact that the conference would not establish clear jurisdictions which would ensure that fishing on these stocks outside 200 mile zones would be constrained in accordance with the appropriate conservation limits.

The Canada-Argentine straddling stock proposal, tabled late in the conference, was withdrawn under pressure from the President of the Conference.

There is now a growing realization that the gap left in the international legal framework is a serious one affecting several types of fish stocks in a number of areas of the world, that major resources in these areas are being threatened by the legally ambiguous situation that exists, and that significant initiatives must be undertaken to bring the problems in these areas under control. One of the purposes of this paper is to indicate options open to coastal states, in the context of the straddling stocks problem, to take action to help international fisheries management organizations to meet their obligations and objectives in conserving the stocks under their authority. The overriding objective of this paper is to contribute to the development of norms of international law, for the same purposes.

Northwest Atlantic Fisheries Management from the NAFO Perspective

The fishing grounds off Canada's Atlantic coast extend beyond the 200-mile limit. These areas, outside 200 miles, known in Canada as the Nose and Tail of the Grand Banks, are accordingly classified as high seas. They are rich fishing grounds for a number of stocks which are also fished inside the Canadian zone. These are the straddling stocks which are the starting point for this paper.

Annex 1 provides the NAFO map, showing the 200-mile limit, the fishing ground contours, and the NAFO stock management areas. The area under the management authority of NAFO, referred to in the NAFO Convention as the NAFO Regulatory Area (NRA), is the area outside the 200 mile limit.

NAFO was established in the context of the international consensus that had been reached at that time on the Exclusive Economic Zone and fisheries articles of the developing Law of the Sea Treaty, and the

world-wide establishment of 200 mile limits pursuant to that consensus. More specifically, it was established to, *inter alia*, manage a number of fish stocks, identified as ten, which were not under the exclusive management control, within 200 mile limits, of the coastal states of the Northwest Atlantic. Of these ten stocks, seven are within the definition of "straddling stocks," as their biomasses "straddle" the 200-mile limit of one coastal state, Canada. Annex 2 is a table providing details on these seven straddling stocks.

The relevant LOS articles, as they were in 1978 and in their final form, left legal rights and obligations as regards these stocks -- and as regards other stocks not under the exclusive management of coastal states -- in an ambiguous condition. The result was that these stocks were vulnerable to the international pressures that had led to overfishing and depletion of the "landward" stocks that were now under the exclusive management of coastal states within their 200-mile zones. NAFO was an early effort to bring those pressures under control through a new international organization dedicated to conservation and comprising all the states then fishing in the particular area concerned, outside and adjacent to the Canadian 200-mile limit.

The NAFO Convention was also seen, by its Parties, as a substantive implementation of the relevant LOS articles, designed to reduce the ambiguities of the "outside 200 miles" situation and, through practical management measures, to avoid the conservation problems that could otherwise result from these ambiguities. As such, NAFO was seen as a natural transformation of its predecessor organization, ICNAF (International Commission for the Northwest Atlantic Fisheries) which had established a firm and detailed foundation in management principles and measures that NAFO inherited.

Basic elements of the NAFO Convention and management structure are summarized in Annex 3.

The optimism that initiated NAFO appeared to be justified in the immediately ensuing years. Two key principles, carried over from NAFO's predecessor, ICNAF, were adopted at the outset as the "pillars" of the conservation structure -- "conservative" conservation in the setting of total allowable catch limits (TACs) for the stocks, and maintenance of the traditional proportionate shares for the member countries. The "conservative" conservation principle was implemented in the form of "F0.1" or its equivalent -- a management approach that set TACs significantly below the "Maximum Sustainable Yield" (MSY) level, at 2/3 MSY in some cases -- in order to provide a significant degree of stability in annual catches, larger fish, more economic catch

rates, and also to minimize the dangers inherent in the possibility of errors in scientific assessments of the stocks.

This initial period was not entirely unmarred by problems.

In particular, one of the traditional fishing countries, Spain, did not join NAFO for several years, and operated a major fishery in the area outside the NAFO conservation framework, targeting one straddling stock in particular, 3NO cod. Even after joining NAFO, Spain continued to fish this stock in particular above the level set for Spain by the NAFO conservation framework. Perhaps not by coincidence, this particular straddling stock was, during the initial NAFO period described, the only straddling stock that proved to be a significant disappointment in failing to develop to the levels the scientists identified as possible under proper management.

The other disturbing development during the initial period was the appearance of "new flags" -- vessels flying the flags of countries with no traditional fishery in the Northwest Atlantic and operating outside the NAFO conservation framework.

These two problems -- Spain and the "new flags" -- were not, however, seen, during the period up to 1985, as being harbingers of serious problems for NAFO in the future. Most NAFO members considered the future in a positive light, as being one where the problems would be brought under control within the by now well-established NAFO management framework.

They had good reason to think so, and the good reason was the EEC. The EEC, a founding member of NAFO, had been a strong supporter of the NAFO conservation framework from the outset, supporting "conservative" conservation in the form of F0.1 management or its equivalent, and maintenance of traditional proportionate shares. With Spain about to join the EEC, it seemed clear that the Spanish problem would be resolved. As regards the "new flags," many were "joint venture" operations of one kind or another, connected to Spain, and to Portugal which was also about to join the EEC, and it seemed likely that these operations would, through the EEC, also be brought under control.

However, as of 1985, matters developed differently. With Spain and Portugal scheduled to join the EEC on January 1, 1986, the EEC came to the 1985 NAFO annual meeting with a radical new position for the 1986 fishing season and beyond. The EEC's position was that the previous management had been too conservative, as a result of which possible catches had been lost; accordingly, TACs should go up substantially, thus providing higher quotas for all. When the EEC's position was not accepted, the EEC made clear that it would no longer be bound by the NAFO conservation framework and would fish above

the quotas assigned to it in accordance with that framework. The EEC had the legal option, under the NAFO Convention, to take this action, as the Convention provides a procedure under which a Party may lodge formal written objections to management measures adopted by the NAFO Fisheries Commission with the result that it will not be legally bound, under the Convention, by such measures. In 1986 and in the ensuing years, the EEC had lodged objections to most of the management measures adopted annually by the NAFO Fisheries Commission.

In taking this action, the EEC has also operated a fishery on a major cod stock managed, not by NAFO, but by Canada. This is the 2J3KL cod stock, the biomass of which has been identified, by the scientists, as being 95 percent within the Canadian 200-mile limit. The 5 percent on-average over the year located outside Canada's 200-mile limit has become a target for EEC fisheries, which have thus undermined the conservation regime established by Canada for this stock. In response to this situation NAFO has, as of 1987, recognized that Canada is the manager of this stock and has had a moratorium in place on fishing for this stock outside 200 miles. However, the EEC has not complied with the moratorium.

EEC catches in the NRA in 1988, excluding the three discrete stocks and excluding 2J3KL cod, totalled about 37,400t, as compared with the EEC's total relevant NAFO quotas (16,000t). Fishing effort by vessels flying the flags of non-NAFO members has also been increasing in recent years, totalling about 34,000t in the NRA in 1988 excluding the discrete stocks and excluding 2J3KL cod. As compared with the total of the TACs established by NAFO for the relevant stocks, 125,000t (this does not include 2J3KL cod), the combined overfishing outcomes, 55,400t, are significant. Catches of the stocks normally targeted by these fleets, cod and flatfish, have of late declined so disastrously that the effort has shifted to the redfish stocks in the NRA, which have been stable up to now but will not continue in a stable state under the new effort being directed at them.

The resulting situation has cast doubt on the future viability of NAFO to provide for conservation in the area which is supposed to be under its control. This, combined with developments in other parts of the world, has also cast doubt on the viability of similar multilateral fisheries organizations, in place or being considered.[2] The issues

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[2]Similar fisheries organizations in place in other parts of the world include ICCAT (International Commission for the Conservation of Atlantic Tunas), NASCO (North Atlantic Salmon Conservation

involved are broad. They encompass international relations, fisheries management, approaches, and international law. The focus must, inevitably, return to international law, including the relevant texts of the Law of the Sea Treaty and corollary principles to be drawn from those texts, and from other sources of international law, to guide future developments.

The Law

LOS Treaty Texts

Central Position of Coastal State Duties, Rights, and Legal and Other Interests

The starting point for this analysis of the relevant legal questions and principles is the submission that, in the case of straddling stocks, the duties, rights, and interests of all states are centered on the predominant duties, rights, and interests[3] of the coastal states involved.

The following analysis supports the proposition that the LOS text provides for the coastal state, as regards straddling stocks outside 200 miles, substantive duties, rights and interests which have preferential status over those of other states.

It is essential at the outset to register the fact (though it should be self-evident) that the portion of a straddling stock that is inside a coastal state's 200 mile limit is, in terms of its legal status, a resource of the 200-mile zone, fully subject to the duties, rights and interests of the coastal state to which the zone belongs. Registration of this fact sheds an important light on the meaning of the LOS texts that are referred to below.

Article 61 gives the coastal state a duty to "ensure, through proper conservation and management measures, that the maintenance of the living resources in the exclusive economic zone is not endangered by

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Organization), IWC (International Whaling Commission), ICSEAF (International Commission for the Southeast Atlantic Fisheries), and IPFC (Indo-Pacific Fishery Commission). Consideration has been given to a NAFO-type organization for the "doughnut hole" fisheries in the North Pacific area.

[3]The word "interests" is used in this paper to denote two different kinds of interests involved -- legal interests similar to property rights, and other interests, of the nature of wants or needs.

over-exploitation." "As appropriate," the coastal state and competent organizations "shall cooperate to this end."

It is noteworthy that the duty of the coastal state described above is not limited, in the text, to the area inside its 200 mile zone. The relevance of this fact becomes obvious in the straddling stock context, bearing in mind the need, in the case of such stocks, for proper conservation and management measures both inside and *outside* the zone.

One way for a coastal state to carry out the duty to get the necessary measures in place outside its 200-mile zone, is by obtaining these measures through an international organization like NAFO, thus ensuring that the straddling stock resource in its zone is not endangered by over-exploitation. But what if this organization cannot "deliver the goods," so to speak? The coastal state continues to have the duty, and cooperation with the relevant international organization does not, any longer, appear to be "appropriate." Can the LOS Convention have created a duty without rights through which it can satisfy that duty? Whether or not this is so, it can certainly be argued that the duty of the coastal state creates a duty on the part of other states to make it possible for the coastal state to honor its duty. This is a point which will be picked up later in this section.

Article 62 requires the coastal state to promote the objective of optimum utilization of the living resources in its EEZ. The question arises, how does a coastal state do that as regards a straddling stock, when the fisheries of other countries outside its 200 mile zone undermine the productivity, and therefore the optimum utilization, of that stock, to the point where catches and catch rates decline, and fisheries become less and less viable?

While Article 62 creates a duty to "promote" rather than "ensure," as in Article 61, it is clear that Article 62 reinforces the duties, rights and interest of the coastal state.

Article 63 states that for straddling stocks, the coastal state and the states fishing outside the 200 mile limit "shall seek to agree" on conservation measures in the area outside 200 miles.

Two points require drawing out here.

The first point is that the coastal state is accorded, in this provision, a preferential position over other states outside 200 miles in two respects:

a) the obligation between the coastal state and the other states to "seek to agree" applies as regards the non-coastal state only if it is actually fishing outside the 200 mile limit, but it applies for

the coastal state whether or not the coastal state is fishing the particular stock inside *or* outside 200 miles, *i.e.* the obligation arises solely by virtue of the coastal state's legal status as such, with duties, rights and interests as regards this stock both inside *and* outside the zone;

b) the requirement to seek to agree is limited to the area outside 200 miles, *i.e.* there is no obligation for the coastal state to seek to agree on measures for the stock as a whole or to coordinate the measures it takes *inside* its zone with those to be applied outside its zone -- the measures inside its zone are in its sole discretion. This provision is one of the sources of the "consistency" principle[4] which will be explored further at a later stage in this paper.

The second point is the non-limiting effect of the obligation of the coastal state to participate in a process of seeking to agree on measures outside its limits. This is an obligation which logically follows, as a step in the process, from its duty under Article 61 to *ensure* the maintenance of the resources within its zone; however, the coastal state's obligations to "seek and agree" *in no way limits* the *rights* of the coastal state that flow from its duty to ensure the maintenance of the resources within its zone, or the obligations of other states that flow from the coastal state's rights, duties and interests. In other words, having sought to agree, and failed, the coastal state has the duty and the right to take other steps. Some suggestions as to what these steps might be are raised later in this paper.

Article 116 states clearly that the right to fish on the high seas is subject to "the rights and duties as well as the interests of coastal states provided for" in the Convention.

While the text makes specific reference to Article 63, paragraph 2, and Articles 64 to 67, the preceding "*inter alia*" makes clear that rights, duties and interests provided in other provisions are also applicable.[5]

The previous comments on Article 61 should be referred back to at this point.

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[4]*I.e.*, the principle that measures taken outside the zone must be consistent with the measures taken, entirely unilaterally, by the coastal state *inside* the zone.

[5]Miles and Burke, *op. cit.*, p. 22.

First of all, it should be noted that while Article 116 states that the right to fish on the high seas is subject to the rights and duties, as well as the interests, of coastal states, there is no similar "reciprocal" provision in Article 61 or 62 limiting the rights and obligations of coastal states in 200 mile zones. The preferential position of the coastal state in the management of the straddling stock as a whole, should, accordingly, be obvious.

Secondly, if there were any doubt that the coastal state's duty, under Article 61, to ensure that the maintenance of the living resources in its zone is not endangered by over-exploitation, together with its rights and interests, translates legally into a right outside its zone, that doubt should be resolved by Article 116, which makes clear that the right to fish on the high seas is subordinate to the preferential right of the coastal state.

Burke has made this point in the following manner[6]:

> Article 116 subjects the rights to fish to Article 63(2) and other articles establishing coastal State rights, duties and interests. It is plain that the coastal State has extensive rights over the EEZ portion of the stock and is legally competent to decide upon any necessary conservation measures as well as upon the extent and conditions of foreign access to the stock in the zone. *If fishing on the high seas is subject to the coastal State's right to establish conservation measures in the EEZ, this would appear to mean that others must recognize these measures as applicable wherever the stock in question is found on the high seas.* If the fishing State is not thus obliged to recognize and to observe coastal State measures, the prospect is that they would be made ineffective for the stock as a whole. *Whether or not failure to observe those measures on the high seas would have such an effect would depend on the extent, timing and methods of such fishing. If significant high seas harvesting occurs the probability is that coastal State measures would fail. Such an outcome seems to be inconsistent with Articles 116, 63(2) and other EEZ fisheries provisions* (emphasis added)."

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[6]William T. Burke, 'Convention on the Law of the Sea: provisions on conditions of access to fisheries subject to national jurisdiction, "Expert Consultation on the Conditions of Access to the Fish Resources of the Exclusive Economic Zone"', *FAO Fisheries Report* No. 213, FAO, Rome, 1982, p. 39.

Articles 117, 118 and 119 establish the general obligation, together with specific details, concerning conservation outside 200 miles. It is implicit, of course, that the portion of a straddling stock that is outside 200 miles has the legal status of a resource of the high seas, and that states fishing this resource on the high seas have substantive duties and rights as regards this portion of the straddling stocks.

However, as the preceding references and comments make clear, these rights and duties are of a secondary nature when compared to, and to the extent they come in conflict with, the rights and duties of coastal states as regards straddling stocks. Outside the 200-mile limit, states do not have the same freedom of action as regards straddling stocks as they do for discrete stocks. For straddling stocks, the sense of the LOS articles is that the measures they take outside the zone must conform, in some appropriate manner, to the measures established for these stocks by the coastal state concerned.

The Non-Discrimination Provision -- Legal Analysis and Implications

The non-discrimination provision at the end of Article 119 is of particular interest with regard to current problems in the Northwest Atlantic involving one member of NAFO and the non-members whose vessels also fish in the area.

Considering that one of the primary norms that have applied to the management of fisheries in the area has been the maintenance of proportionate shares in accordance with a long-established percentage share formula applied to each stock, certain implications flow from the Article 119 non-discrimination provision.

As regards the "NAFO member problem" it appears that the unilateral measures adopted by the member concerned, described by that member as conservation measures in accordance with the terminology of Article 119, discriminate severely against the fishermen of other states because these measures increase the proportion of the total catch for the fishermen of the NAFO member concerned, decreasing the proportionate share of the other members. Further, in depleting the stock through overfishing, the NAFO member concerned further discriminates against other members, who pay the price, in the long term, for the benefits obtained in the short term by the overfishing member.

As regards the non-member or "new entrant" problem, a similar analysis applies. Given the firm establishment of the proportionate sharing principle, and the fact that the total needs of the countries that traditionally fish in the area exceed the TACs that have been

established (as well as the TACs that would be established on the basis of rebuilt stocks) there would appear to be no "room," factually or legally, for any new entrant unless the NAFO members agree to reduce their proportionate shares to create a new share for the new entrant. Current catches by non-members of NAFO discriminate against NAFO members by reducing their proportionate shares of the total catch, and, through the resulting overfishing, by reducing their actual catches in the long term. Further, discrimination exists through the fact that the NAFO members have, over many years, restricted their catches in the interest of stock conservation, while the new entrants have paid none of the costs for the stocks they fish.

The contrary argument is, of course, that measures taken against new entrants amount to discrimination, contrary to Article 119, because the new entrant claims the right to fish in the high seas.

However, a strong counter-argument can be made that exclusion of new entrants is not discrimination in the Northwest Atlantic and in other similar circumstances. It should be noted, first of all, that all the NAFO members are themselves exercising their right to fish in the high seas, as the NRA is high seas. As TACs are distributed by NAFO in accordance with customary proportionate shares, the fact that the share for a specific NAFO member may be 10 percent or 5 percent or 2 percent cannot be considered as creating a situation of discrimination against that member. The corollary is that the fact that the customary proportionate share for a non-member is zero also does not create a discriminatory situation. In fact, the question may be asked of any non-member claiming the right to start a new fishery in the NRA -- what is the proportionate share claimed? There can, of course, be no rational answer to this question.

Reference should be made, at this point, back to Article 116, paragraph c), which states that the right to fish in the high seas is subject to "the provisions of this section." The analysis given above of the non-discrimination provision of this section of the LOS treaty supports the argument that:

a) states do not have the automatic right to enter into any high seas fishery that they choose, because in some cases, such entry discriminates against the fishermen of other states;

b) states that have a traditional presence in a high seas fishery may, in certain circumstances, have the right to take steps to exclude new entrants, and such steps do not constitute discrimination.

The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas

This Convention has not been ratified by any NAFO members.

The following majority of EC member states are Parties: Belgium, Denmark, France, Netherlands, Portugal, Spain, United Kingdom.

The U.S. and Mexico are also Parties (vessels flying the flags of these two non-members of NAFO fish in the NRA).

The relevance of most of the provisions of this Convention, in terms of providing binding rules applicable to the straddling stock problem described in the paper, is open to argument. This is because the 1958 Convention is written in terms of coastal state rights and interests in areas of the high seas adjacent to its territorial sea. The subject of this paper being an area of the high seas adjacent to the 200-mile limit, and therefore, by definition, not adjacent to the territorial sea, the difficulty in any direct application is clear.

However, an interesting counter-argument can be made that the rights of a coastal state under the 1958 Convention, as regards the area adjacent to its territorial sea, are not negatively affected by its extension of a 200-mile limit in conformity with UNCLOS.

The key provisions of the 1958 Convention would appear to be Articles 6 and 7 which provide *inter alia*, that a coastal state has a special interest in the maintenance of productivity in the area adjacent to its territorial sea, other states must not enforce conservation measures in the adjacent area opposed to those of the coastal state, and the coastal state may adopt unilateral measures in the adjacent area, subject to the requirements specified in the Convention.

The basis for the argument that the 1958 Convention may be applicable lies in Article 311 of UNCLOS. Article 311, paragraph 1 states:

> This Convention shall prevail, as between the States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.

The word, "prevail" would appear to denote that in any circumstance where there is a conflict between provisions of the 1958 Convention and UNCLOS, the latter overrides. The word "prevail" does not denote replacement, or lapse, of the 1958 Conventions.

This argument is reinforced by Article 311, paragraph 2, which states:

> This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

It may be argued that the Convention on Fishing and Conservation of the Living Resources of the High Seas is basically compatible with UNCLOS, and that therefore the provisions of the 1958 Convention specified above, which do not conflict with the provision of UNCLOS, remain applicable.

The underlying rationale for this argument is that it was the purpose of UNCLOS to expand the duties, rights, and interests of coastal states within a specified area, 200 miles, not to detract from what the coastal state already had under the 1958 Convention (except insofar as there is a clear conflict, in which UNCLOS prevails). Certainly in the case of straddling stocks it would be an odd conclusion to state that one result of UNCLOS was to undermine the very limited rights that coastal states had, prior to UNCLOS, with regard to straddling stocks adjacent to their coasts to the full extent of their migratory range.

One provision of the 1958 Convention is indisputably relevant in the sense of providing a binding obligation. Article 8 provides that any state with a special interest in the conservation of the living resources in an area of the high seas not adjacent to its coast may take certain action, including initiation of the compulsory dispute settlement provisions of the Convention. This clearly provides an avenue for a coastal state even if it has no fishery in the area concerned, to compel the adoption of appropriate conservation measures in the area beyond 200 miles for a stock which straddles its 200-mile limit.

The NAFO Convention as a Source of Norms of International Law

The possibility that the NAFO Convention contains norms of international law in the fisheries field should not come as a surprise. Born of the LOS treaty, the NAFO Convention represents a serious effort by key members of the international community to deduce, from the broad norms of the LOS treaty, subsidiary norms essential to "breathe life" into the LOS treaty texts.

Two provisions of the NAFO Convention, both contained in Article XI of the Convention, are particularly relevant in this context. Article XI is reproduced as an attachment to Annex 3.

Paragraph 3 of Article XI is the consistency provision, and requires the NAFO Fisheries Commission, in establishing management

measures for straddling stocks, to seek to ensure that such measures are consistent with those established by the coastal state inside the zone for these stocks. It has been submitted, in a previous section of the paper, that the consistency requirement is implicit in the LOS provisions. It appears that the fifteen parties that negotiated the NAFO Convention (which includes all the current Parties plus the U.S., which did not become a Party) may have thought so too, and decided to make this explicit in the NAFO Convention.

Paragraph 4 of Article XI recognizes the special interest of Canada in the stocks of the NAFO Regulatory Area (both the straddling stocks and the discrete stocks). The provision specifies the reasons for the recognition -- the surveillance and inspection activities. The special legal position of the coastal state, as described in this paper, was obscured to avoid prejudicing legal positions on this subject.

The consistency provision has been applied in NAFO in two ways.

First, the Fisheries Commission has followed the lead of the coastal state in adopting the FO.1 formula, or its equivalent, for the setting of TACs. As a result there has been a single TAC established for each straddling stock as a whole, with member quotas also applied to the stock as a whole, so there has been no need to consider the connection between two separate sets of measures.

Second, as regards the 2J3KL cod stock which is under Canada's sole management authority, the Commission has recognized that the TAC is fully subscribed by Canada and accordingly that the appropriate measure to adopt, for the purpose of consistency between the area outside and the area inside 200 miles, is a moratorium on fishing this stock outside 200 miles.

Arguments can, of course, be made that other approaches are possible for the NAFO-managed stocks and the Canadian-managed 2J3KL cod stock, within the concept of consistency. There is no doubt that this is true, as a hypothetical concept, though this does not detract from the validity of the current approach in NAFO as being considered, by the majority of its members, as valid applications of the consistency principle.

However, as regards the establishment of management measures for straddling stocks managed by NAFO, it appears that even if a different system applied, and separate management measures were implemented outside the 200-mile limit, the result would be the same in terms of the ceiling TACs for the stocks. The management strategy adopted by the coastal state, *e.g.* FO.1, would provide the overriding rule, and the Commission, to ensure consistency, could not adopt a management strategy that would provide a higher level of exploitation.

If the system produced, at the outset, separate FO.1 TACs, the net result would be a single FO.1 TAC.

Bilateral Treaties in the Northwest Atlantic as a Source of Norms of International Law

The relevant provisions of these treaties are reproduced in Annex 4. A review will quickly indicate that the norms that emerge are consistent with, and support, three of the norms described in this paper as implicit, and explicit, in the other relevant sources of international law, *i.e.*

a) the general obligation to ensure the conservation of the living resources in areas outside the jurisdiction of coastal states;
b) recognition of the special interest of the coastal state in the portion of a straddling stock outside its 200-mile limit; and
c) recognition of the requirement that measures adopted for the area adjacent to a coastal state's 200 mile limit are consistent with the measures adopted by the coastal state for the same stock within its zone.

Options for Action by Coastal States

There is a broad spectrum of options for action by coastal states to strengthen the conservation action of international fisheries management organizations. The options which can be based on coastal states' preferential rights outside 200 miles regarding straddling stocks may be reviewed for the purposes of this paper under four categories:

- incorporation in coastal state law of provisions related to preferential rights over straddling stocks, and their enforcement;
- action in conformity with international law relating to retorsion;
- dispute settlement;
- action in conformity with International Law relating to reprisals.

Incorporation in Coastal State Law of Provisions Related to Preferential Rights Over Straddling Stocks, and Their Enforcement

The starting point for this approach is provided by Miles and Burke:[7]

> 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 taken? Does the treaty permit further actions by the coastal state to seek recognition of its right to exercise sovereign rights over the straddling stocks? 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 observation by all who fish the straddling stocks, including on the high seas; demand that these states observe these measures; and if refused, seek a remedy through the compulsory dispute mechanism.

Miles' suggestion that "the coastal state might prescribe measures for observation by all who fish the straddling stocks, including on the high seas" leads, in his view, to dispute settlement, but there are other possibilities.

One possibility open to the coastal state is to incorporate, in its domestic legislation, in some manner consistent with its obligations under international law, provisions relating to its preferential rights over straddling stocks outside its 200-mile limit. Such incorporation could provide for regulations applicable outside its 200-mile limit and, for enforcement of these regulation outside 200 miles in, for example, cases where there are bilateral or multilateral agreements providing for such enforcement.

It should be noted that provision for non-flag state enforcement on the high seas has already been made in at least one international fisheries management convention, the International Convention for the High Seas Fisheries of the North Pacific Ocean in force 1953 (Article X).

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[7]Miles and Burke, *op. cit.*, p. 24.

Action in Conformity with International Law Related to Retorsion

Kelsen defines retorsion in the following manner:[8]

> the conduct by which a state violates some interest of another state may not be a delict, that is to say, the state whose interest is violated may not be authorized to execute a sanction by taking an enforcement action against the state which has violated its interest; but it may react by a similar violation of an interest of the latter state. Such a reaction is called a retorsion. It is no sanction, for it is not an enforcement action -- the employment of physical force in case of resistance not being permitted.

Elements of retorsion are included in the following list of recourses provided by Miles and Burke:[9]

> 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), international sanctions (remedies available under international agreements, including trade agreements) are all possible instrumentalities. Whether any of these are available and, if so, feasible to employ is another question -- the point is that a state whose interests are harmed by refusal of a high seas fishing state to take necessary conservation measures is not necessarily helpless.

In the Northwest Atlantic situation, Canada has employed the following:

- diplomatic action (protests) to the EEC and to the non-NAFO members fishing in the NAFO Regulatory Area;
- refusal of access to ports to the same parties, except in cases of *force majeure*.

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[8]Hans Kelsen, Principles of International Law (New York: Rinehardt and Company Inc., 1959), p. 25.

[9]Miles and Burke, *op. cit.*, p. 22.

Dispute Settlement

Quoting from Miles and Burke again:[10]

> If the 1982 Convention on the Law of the Sea were in force ... between the states concerned, disputes about the application of articles concerning high seas fishing would be subject to compulsory dispute proceedings in Part XV.

In the interim there are, of course, other possible approaches to dispute settlement. These are diverse and require no exhaustive commentary in this paper. Reference has already been made previously in this paper to the compulsory dispute settlement provision of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, and the fact that, at the present time, Canada is not party to this Convention.

In any event, governments are generally very reluctant to engage in compulsory dispute settlement processes for a number of reasons, including the heavy costs involved in personnel and money and the time required to obtain results.

Action in Conformity with International Law Relating to Reprisals

Kelsen's definition of the law relating to reprisals is as follows:[11]

> Reprisals are acts which, although normally illegal, are exceptionally permitted as reaction of one state against a violation of its request by another state. Typical examples are ... nonfulfillment of treaty obligations in relation to that state.

The starting point for consideration of this option is the submission that, under certain circumstances, a state which permits its nationals to fish straddling stocks outside the 200-mile limit of a coastal state has violated the rights of that coastal state and its own obligations under international law to that state and has thus committed an international delict.

The range of possible retaliatory actions by the coastal state is, of course, very broad in theory, but very limited in terms of practic-

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[10]Miles and Burke, *op. cit.*, p. 22.

[11]Hans Kelsen, *op. cit.*, pp. 23-24.

ability in situations where states try to minimize the disruptions to their normal relations.

Summary -- International Legal Norms Applicable to Straddling Stocks

The following is an attempt to articulate specific norms that may be deduced from the comments above and from texts referenced, with commentaries summarizing points made earlier in this paper.

1. *The right to fish on the high seas is subject to specific obligations and limitations, including the obligation to respect the duties, rights and interests of coastal states in stocks which extend, beyond their 200 mile limits, into the high seas.*

   These obligations include the following specifics:

   a) to take the necessary conservation measures (Article 117 LOS);
   b) to cooperate with other states in taking such measures (Article 117 LOS);
   c) to ensure that the measures adopted are non-discriminatory against the fishermen of any state (Article 119 LOS).

2. *States have the duty to take, or cooperate with other states in taking such measures for their respective nationals as may be necessary to ensure consistency between:*

   a) *the measures in place for their nationals regulating their fisheries on the high seas on stocks that occur both on the high seas and within an area under the fisheries jurisdiction of a coastal state, and*
   b) *any measures taken by the coastal state for the management and conservation of the same stocks with respect to fishing activities conducted within the area under its fisheries jurisdiction.*

3. *Where fisheries take place in an area adjacent to the 200 mile limit of a coastal state, the state whose nationals conduct such fisheries:*

   a) *shall not adopt for the regulation of such fisheries, measures which are opposed to those which have been adopted by the coastal state for a stock or stocks which extend beyond the*

coastal state's 200 mile limit, and which undermine the objectives of such coastal state measures;

b) *shall prevent fisheries by its nationals which undermine the objectives of such coastal state measures.*

While this provision would appear to be the logical obverse of the previous provision, it is a necessary re-statement of the primary norm, if only because the "consistency" concept in the previous text is open to distortive interpretation.

4. *States have an obligation to prevent harm to coastal states resulting from fishing on the high seas.*

It is a recognized principle of international law that no state has the right to use, or permit to be used, its territory in a way that causes environmental harm to another state (*sic utere tuo alienum non laedas*). This obligation is expressed in the pollution context in Article 194(2) of the LOS Convention.

In recent years, it has become clear that the obligation to prevent harm extends to activities under a state's control in any location (*e.g.*, liability for satellites falling from outer space).

In light of the above, it is submitted that a fishing state has an obligation to prevent fishing of straddling stocks to the extent that such fishing can be shown to damage a coastal state's ability to manage and conserve fisheries in its 200-mile zone in accordance with the LOS Convention.

5. *A state which permits its nationals to fish, in an area adjacent to the 200 mile limit of a coastal state, at levels in excess of those established for that state by the international organization established to manage fisheries in the relevant area, is engaged in a form of discrimination against other states fishing in accordance with the levels established for those states by the international organization concerned.*

LOSC Article 119(3) provides that "(s)tates concerned shall ensure that conservation measures (for high seas fisheries) and their implementation do not discriminate in form or in fact against the fishermen of any State." If any state takes straddling stocks in excess of agreed levels, while the catches of other interested states remain at the customary levels in accordance with conservation arrangements, then the "excess-fishing" state has discriminated in fact against the other states involved in the fishery. This is so because, if the other states are to adhere to their duty to conserve

the fishery, they are unable to increase their catch as the "excess-fishing" state has done.

6. *Where the nationals of a state fish, outside another state's 200-mile limit, a stock which occurs both inside and outside that limit, in the event of failure between the coastal state and the other state to reach agreement on management measures outside 200 miles for that stock, the coastal state has the right to take unilateral measures to conserve the stock.*

LOSC Article 118 calls for the establishment of subregional or regional fisheries organizations for the purpose of taking measures necessary for the conservation of high seas fisheries. LOSC Article 63(2) also refers to such organizations, as a mechanism to "seek ... to agree upon the measures necessary for the conservation of (straddling stocks)." These provisions leave in doubt the means by which conservation of stocks is to be ensured if direct negotiations between the coastal state and fishing states should fail, or if the (sub)regional organization is unable to agree on conservation measures.

The 1958 Geneva Convention gave coastal states the right, in certain circumstances, to adopt unilateral conservation measures (Article 7) in the area adjacent to its territorial sea. It could be argued that the circumstance dealt with in the Geneva Convention has been addressed by the extension of coastal state fisheries jurisdiction to 200 miles. This argument seems weak, however, since the nature of the problem, *i.e.* the fishing of stocks adjacent to the outer limit of coastal state jurisdiction, remains the same. In addition, the fundamental principle of fisheries conservation should not be limited by arbitrary geographical lines.

The provisions of the LOS Convention support the view that the duties, rights and interests of the coastal state with respect to straddling stocks are superior to those of other states. The Convention clearly defines the sovereign rights and duties of the coastal state in its 200-mile zone, with respect to fisheries (LOSC, Part V). The actions of other states beyond 200 miles should not be allowed to derogate, in terms of their effects, from the sovereign rights of the coastal state within its 200-mile zone.

In view of the above, it may be permissible for a coastal state, in the absence of agreed measures, to take unilateral measures for the conservation of straddling stocks. The nature of such unilateral measures might vary according to the circumstances. An argument can be made that such measures could not include enforcement

against foreign flag vessels outside the coastal state's 200-mile limit, such enforcement being reserved exclusively to the flag state under international law. The question may well be asked, however, whether such enforcement might be justified under customary international law, in circumstances equivalent to situations where a state faces a serious threat from action taken outside its boundaries where such action has the effect, in some way, of crossing these boundaries. Further analyses of this point would be useful.

7. *States have the duty to prevent their nationals from fishing in areas of the high seas for which international conservation regulations have been promulgated by an international organization established to manage the fisheries of the area concerned, and the available catches have been fully allocated to the members of the organization.*

There is clearly an international legal norm favoring, for states that have traditionally fished a particular area, priority over new entrants to the fishery. For example, under LOSC Article 62(3), "the need to minimize economic dislocation in States whose nationals have habitually fished in the (200- mile) zone" is a relevant factor to be taken into account by a coastal state in giving access to the fisheries in its 200-mile zone. This provision reflects the customary practice of "grandfathering" traditional fisheries when the coastal state extends its fisheries jurisdiction.

Traditional rights are also given recognition in other conventions. For example, Article XI(4) of the NAFO Convention obliges the Fisheries Commission to take into account the interests of Commission members whose vessels have traditionally fished in the Regulatory Area in allocating catches.

These examples, and the discrimination analysis provided previously in this paper, support the view that a fully subscribed high seas fishery, subject to internationally agreed conservation measures, is closed to new entrants unless the agreed measures are adjusted to provide an allocation to the new entrants.

Conclusion

The Law of the Sea Convention, in establishing an outer limit of 200 miles for coastal state jurisdiction over fisheries, has exposed major stocks, in a number of areas of the world, to international fishing pressures similar to those which affected, prior to the late 1970s, those stocks now under clear coastal state control. The straddling stocks in

a number of areas of the world are a significant sub-category of these exposed stocks because of their substantial volume and value. However, this significance extends beyond the level of economic analysis because the availability of these stocks outside 200-mile limits undermines, to a significant degree, the sovereign rights of coastal states with regard to the portions of these stocks inside their zones.

The international community, in developing the LOS Convention, knew that, as regards fisheries outside 200 miles, they were leaving a jurisdictional gap and an environmental protection gap which would have to be dealt with in some way at some point in the future.

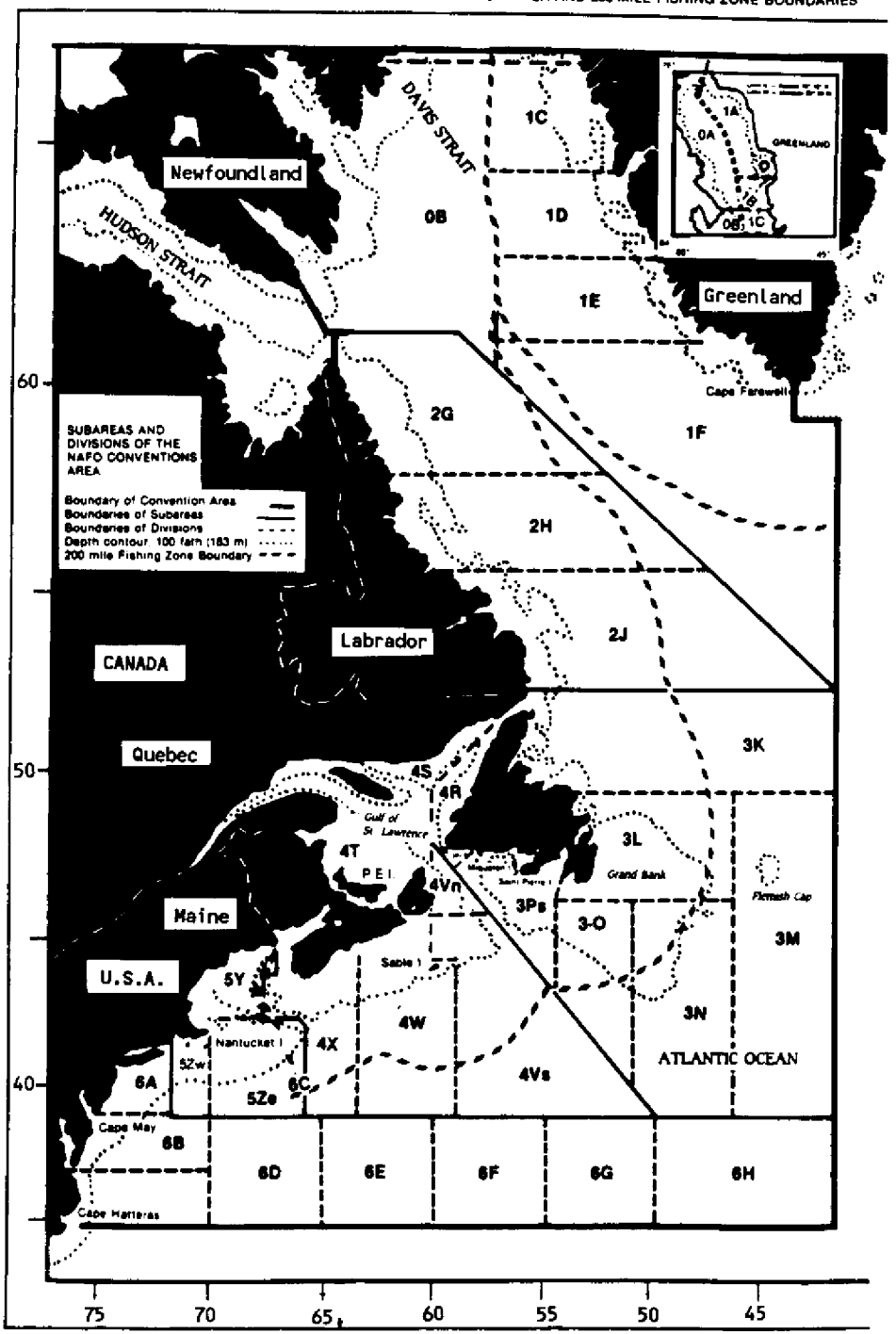
One way that looked promising at the outset was through international organizations that would establish sound conservation structures and make them work. This paper has shown how one such organization, NAFO, is now running into serious problems in this respect. The limitations of such organizations, dependent on international consensus among its members, and on the willingness of other countries to stay out of the fisheries concerned, undermine the ability of these organizations to do their job.

Current developments in a number of areas of the world suggest the possibility that the time has come for a reassessment of the international legal principles in play regarding fisheries conservation and environmental protection in order to determine if these principles can be developed so as to strengthen international institutions and make them more effective.

This paper, starting from a factual description of developments in one particular area of the world, the Northwest Atlantic, has attempted to grapple with the relevant law and the options open to coastal states to take initiatives of a unilateral nature which might support the objectives of international fisheries management organizations. The author cannot, however, help but wonder if a multilateral initiative is viable as the most desirable way of dealing with the problems of conservation of resources available in the high seas. The idea for such an initiative is bound to run into the normal opposition and, in particular, puzzlement regarding its viability in the situation where the Law of the Sea Convention itself is not yet in force. Nonetheless, it is plain that the current problems of overfishing on the high seas are such that steps must be taken for their resolution, through new and urgent international initiatives.

ANNEX 1

MAP ILLUSTRATING NAFO'S CONVENTION AREA AND 200-MILE FISHING ZONE BOUNDARIES



ANNEX 2

NAFO MANAGED STRADDLING STOCKS

STOCK	1986 TAC	1987 TAC	1988 TAC	1989 TAC
3NO Cod	33,000	33,000	40,000	25,000
3LN Redfish	25,000	25,000	25,000	25,000
3LNO A. Plaice	55,000	48,000	40,000	30,300
3LNO Yellowtail	15,000	15,000	15,000	5,000
3NO Witch	5,000	5,000	5,000	5,000
3NO Capelin	0	10,000	15,000	28,000
3+4 Squid	150,000	150,000	150,000	150,000

ANNEX 3

THE NAFO CONVENTION -- RELEVANT ELEMENTS

The NAFO membership comprises twelve Parties as follows: Bulgaria, Canada, Cuba, Denmark in respect of the Faroe Islands and Greenland, the EEC, the German Democratic Republic, Iceland, Japan, Norway, Poland, Romania, the USSR.

NAFO is composed of three bodies: a General Council, a Fisheries Commission, and a Scientific Council. The Fisheries Commission is the body that manages the NAFO Regulatory Area (NRA) and is composed of all the NAFO members except Iceland.

NAFO holds a regular annual meeting in September of each year, to establish the management measures for the NRA for the following year. This meeting is preceded by a regular annual meeting in June of each year of the Scientific Council, which provides scientific advice to the Fisheries Commission in accordance with the terms of reference previously specified by the Commission or on its own initiative under

certain circumstances. Additional meetings of any of the bodies can be and have been held at other times of the year as required.

The key guidelines for the adoption of management measures are contained in Article XI of the Convention (included). They comprise optimum utilization, management measures for straddling stocks outside 200 miles consistent with management measures inside 200 miles, respect for traditional fisheries, and special consideration for Canada in allocations.

The system for implementing management measures is as follows: the Fisheries Commission, based on the advice of the Scientific Council, adopts, by majority vote, TACs and other relevant measures for the NRA; it then adopts, by majority vote, the respective quotas for each stock for each of the NAFO members. Following the NAFO meeting the Executive Secretary mails the relevant texts to the members, who then have 60 days within which to lodge written objections to any or all of the measures adopted. When an objection is lodged, the member that lodges it is not legally bound by the relevant measures, and further objection periods are opened up for other NAFO members, within which they can lodge objection to the same measure.

Article XI

1. The Fisheries Commission, hereinafter referred to as "the Commission", shall be responsible for the management and conservation of the fishery resources of the Regulatory Area in accordance with the provisions of this Article.

2. The Commission may adopt proposals for joint action by the Contracting Parties designed to achieve the optimum utilization of the fishery resources of the Regulatory Area. In considering such proposals, the Commission shall take into account any relevant information or advice provided to it by the Scientific Council.

3. In the exercise of its functions under paragraph 2, the Commission shall seek to ensure consistency between:

a) any proposal that applies to a stock or group of stocks occurring both within the Regulatory Area and within an area under the fisheries jurisdiction of a coastal State, or any proposal that would have an effect of stocks occurring in whole or in part

within an area under the fisheries jurisdiction of a coastal State; and

b) any measures or decisions taken by the coastal State for the management and conservation of that stock or group of stocks with respect to fishing activities conducted within the area under its fisheries jurisdiction.

The appropriate coastal State and the commission shall accordingly promote the coordination of such proposals, measures and decisions. Each coastal State shall keep the Commission informed of its measures and decisions for the purpose of this Article.

4. Proposals adopted by the Commission for the allocation of catches in the Regulatory Area shall take into account the interests of Commission members whose vessels have traditionally fished within that Area, and, in the allocation of catches from the Grand Banks and Flemish Cap, Commission members shall give special consideration to the Contracting Party whose coastal communities are primarily dependent on fishing for stocks related to these fishing banks and which has undertaken extensive efforts to ensure the conservation of such stocks through international action, in particular, by providing surveillance and inspection of international fisheries on these banks under an international scheme of joint enforcement.

5. The Commission may also adopt proposals for international measures of control and enforcement within the Regulatory Area for the purpose of ensuring within that Area the application of this Convention and the measures in force thereunder.

6. Each proposal adopted by the Commission shall be transmitted by the Executive Secretary to all Contracting Parties, specifying the date of transmittal for the purposes of paragraph 1 of Article XII.

7. Subject to the provisions of Article XII, each proposal adopted by the Commission under this Article shall become a measure binding on all Contracting Parties to enter into force on a date determined by the Commission.

8. 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 and shall specify terms of reference for the consideration of that question.

9. The Commission may invite the attention of any or all Commission members to any matters which relate to the objectives and purposes of this Convention within the Regulatory Area.

ANNEX 4

FISHERIES

Agreement between Canada and the People's Republic of Bulgaria
New York, September 27, 1977
In force September 27, 1977

Article III

1. The Government of the People's Republic of Bulgaria and the Government of Canada affirm the need to ensure the conservation of the living resources of the high seas beyond the limits of national fisheries jurisdiction, and the special interest of Canada, including the need of Canadian coastal communities, in such resources in the area beyond and immediately adjacent to the area referred to in Article II. They accordingly undertake to cooperate in the light of these principles, both directly and through international organizations as appropriate, in order to ensure the proper management and conservation of these living resources.

2. Where the same stocks or stocks of associated species occur both within the area referred to in Article II and in an area beyond and adjacent to that area, and the nationals and vessels of the People's Republic of Bulgaria participate or wish to participate in fisheries for such stocks within the adjacent area, the two Governments shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks in the adjacent area, taking into account the need for consistency between the measures applying within the area referred to in Article II and within the adjacent area, as well as the principles set out in paragraph 1.

3. Where discrete stocks occur in an area beyond and adjacent to the area referred to in Article II, and nationals and vessels of the People's Republic of Bulgaria and Canada participate or wish to participate in

fisheries for such stocks, the two Governments shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks, taking into account the principles set out in paragraph 1, as well as Bulgarian interests with regard to these stocks.

Agreement between Canada and Cuba

City of Havana, May 12, 1977
In force May 12, 1977

1. The Government of Canada and the Government of the Republic of Cuba affirm the need to ensure the conservation of the living resources of the high seas beyond the limits of national fisheries jurisdiction, and the special interest of Canada, including the needs of Canadian coastal communities, in such resources in the area beyond and immediately adjacent to the area referred to in Article II. They accordingly undertake to cooperate in the light of these principles, both directly and through international organizations as appropriate, in order to ensure the proper management and conservation of these living resources.

2. Where the same stock or stocks of associated species occur both within the area referred to in Article II and in an area beyond and adjacent to that area, and the nationals and vessels of Cuba participate or wish to participate in fisheries for such stocks within the adjacent area, the two Governments shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks in the adjacent area, taking into account the need for consistency between the measures applying within the area referred to in Article II and within the adjacent area, as well as the principles set out in paragraph 1.

3. Where discrete stocks occur in an area beyond and adjacent to the area referred to in Article II, and nationals and vessels of Cuba and Canada participate or wish to participate in fisheries for such stocks, the two Governments shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks, taking into account the principles set out in paragraph 1, as well as Cuban interests with regard to these stocks.

Agreement between Canada and the Kingdom of Denmark

Ottawa, June 3, 1980
In force December 22, 1981

1. The two Parties affirm the need the ensure the conservation of the living resources beyond the limits of national fisheries jurisdiction and, accordingly, undertake to cooperate in the light of this principle, both directly and through appropriate international organizations, in order to ensure the proper management and conservation of these resources.

2. Where the same stock or stocks of associated species occur both within and beyond Canadian fisheries waters on the Grand Banks and Flemish Cap, and Faroese vessels participate or wish to participate in fisheries for such stocks within the area beyond Canadian fisheries waters, the two Parties shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks within the area beyond Canadian fisheries waters, taking in to account the need for consistency between the measures applying within Canadian fisheries waters and those applying beyond such waters.

3. Having regard to the proximity of the Grand Banks and Flemish Cap to the coast of Canada, the practice of ICNAF of granting special treatment for Canada as the coastal state with respect to the stocks of these areas,and the extensive responsibilities and tasks undertaken by Canada in providing surveillance and inspection of international fisheries on those stocks and ensuring their protection through international action, the two Parties shall, in their cooperation pursuant to the terms of this Article, take into account the special interest of Canada, based on the foregoing factors, in the conservation of these stocks beyond Canadian fisheries waters, and in allocations therefrom, as well as Faroese interests with regard to these stocks.

Agreement between Canada and the European Economic Community

Brussels, December 30, 1981
In force, December 30, 1981

Article IV

The two Parties shall co-operate, either bilaterally or through appropriate international organizations, to ensure the proper management and conservation of stocks occurring within the fishery zones of both Parties and stocks of associated species.

In particular, they shall endeavor to harmonize the regulatory measures applicable to these stocks, and shall consult frequently and exchange relevant fisheries statistics for this purpose.

Article VII

1. The two Parties reaffirm their attachment to the co-operation provided for in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, to which they are Contracting Parties and, in particular, in Article XI, paragraph 4, thereof.

2. In the event the third-party fishing causes a threat to the conservation of the living resources of the waters beyond and adjacent to the areas referred to in Article II, the two Parties agree to take co-operative action to overcome that threat.

Agreement between Canada and the German Democratic Republic

Berlin, October 6, 1977
In force, October 6, 1977

Article III

1. The Government of Canada and the Government of the German Democratic Republic affirm the need to ensure the conservation of the living resources of the high seas beyond the limits of national fisheries jurisdiction, and the special interest of Canada, including the needs of Canadian coastal communities, in such resources in the area beyond and immediately adjacent to the area referred to in Article II. They

accordingly undertake to cooperate in the light of these principles, both directly and through international organizations as appropriate, in order to ensure the proper management and conservation of these living resources.

2. Where the same stock or stocks of associated species occur both within the area referred to in Article II and in an area beyond and adjacent to that area, and the nationals and vessels of the German Democratic Republic participate or wish to participate in fisheries for such stocks within the adjacent area, the two Governments shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks in the adjacent area, taking into account the need for consistency between the measures applying within the area referred to in Article II and within the adjacent area, as well as the principles set out in paragraph 1.

3. Where discrete stocks occur in an area beyond and adjacent to the area referred to in Article II, and nationals and vessels of Canada and the German Democratic Republic participate or wish to participate in fisheries for such stocks, the two Governments shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks, taking into account the principles set out in paragraph 1, as well as the German Democratic Republic's interests with regard to these stocks.

Agreement between Canada and Japan

Tokyo, April 28, 1978
In force April 28, 1978

Article IV

The Government of Canada and the Government of Japan undertake to cooperate directly or through appropriate international organizations in order to ensure the conservation and optimum utilization of the living resources of the waters beyond the limits of Canadian fisheries jurisdiction. In such cooperation, the two Governments shall consider, *inter alia*, that Canada has the special interest in the conservation of the stocks of the Grand Banks-Flemish Cap area and in allocations therefrom, noting the proximity of Canada

to this area off its coast, the practice adopted in the International Commission for the Northwest Atlantic Fisheries of granting special allocations to Canada as the coastal state with respect to the stocks of the Northwest Atlantic Ocean including this area, and extensive efforts made by Canada in providing surveillance and inspection of international fisheries on these stocks and ensuring their protection through international action.

Agreement between Canada and Norway

Ottawa, December 2, 1975

Instruments of Ratification exchanged May 11, 1976
In force May 11, 1976

Article IV

The Government of Canada and the Government of Norway undertake to co-operate directly or through appropriate international organizations to ensure proper management and conservation of the living resources of the high seas beyond the limits of national fisheries jurisdiction, including areas of the high seas beyond and immediately adjacent to the areas under their respective fisheries jurisdiction, taking into account their interests in such resources.

Agreement between Canada and the Polish People's Republic

Ottawa, May 14, 1982
In force May 15, 1982

Article IV

1. The two Governments affirm the need the ensure the conservation of the living resources beyond the limits of national fisheries jurisdiction and, accordingly, undertake to cooperate to this end, both directly and through appropriate international organizations, in order to ensure the proper management and conservation of these resources.

2. Where the same stock or stocks of associated species occur both within and beyond Canadian fisheries waters on the Grand Banks and Flemish Cap, and Polish vessels participate or wish to participate in fisheries for such stocks within the area beyond Canadian fisheries waters, the two Governments shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks in the area beyond Canadian fisheries waters, taking into account the need for consistency between the measures applying within Canadian fisheries waters and those applying beyond such waters.

3. Where discrete stocks occur on the Grand Banks and Flemish Cap beyond Canadian fisheries waters and Canadian and Polish vessels participate or wish to participate in fisheries for such stocks, the two Governments shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks.

4. Having regard to the proximity of the Grand Banks and Flemish Cap to the coast of Canada, the practice of the Northwest Atlantic Fisheries Organization of giving special consideration for Canada as the coastal state with respect to the stocks of these areas, and the extensive responsibilities and tasks undertaken by Canada in providing surveillance and inspection of international fisheries on those stocks and ensuring their protection through international action, the two Governments shall, in their cooperation pursuant to the terms of this Article, take into account the special interest of Canada, based on the foregoing factors, in the conservation of these stocks beyond Canadian fisheries waters, and in allocations therefrom, as well as Polish interests with regard to these stocks.

Agreement between Canada and Portugal

Ottawa, July 29, 1976
In force July 18, 1977

Article IV

The Government of Canada and the Government of Portugal undertake to cooperate directly or through appropriate international organizations to ensure proper management and conservation of the

living resources of the high seas beyond the limits of national fisheries jurisdiction, including areas of the high seas beyond and immediately adjacent to the areas under their respective fisheries jurisdiction, taking into account their interests in such resources.

Agreement between Canada and the Socialist Republic of Romania

Bucharest, January 17, 1978
In force, January 17, 1978

Article III

1. The Government of Canada and the Government of the Socialist Republic of Romania affirm the need to ensure the conservation of the living resources of the high seas beyond the limits of national fisheries jurisdiction, and the special interest of Canada, including the needs of Canadian coastal communities, in such resources in the area beyond and immediately adjacent to the area referred to in Article II. They accordingly undertake to co-operate in the light of these principles, both directly and through international organizations as appropriate, in order to ensure the proper management and conservation of these living resources.

2. Where the same stock or stocks of associated species occur both within the area referred to in Article II and in an area beyond and adjacent to that area, and the nationals and vessels of the Socialist Republic of Romania participate or wish to participate in fisheries for such stocks within the adjacent area, the two Governments shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks in the adjacent area, taking into account the need for consistency between the measures applying within the area referred to in Article II and within the adjacent area, as well as the principles set out in paragraph 1.

3. Where discrete stocks occur in an area beyond and adjacent to the area referred to in Article II, and nationals and vessels of the Socialist Republic of Romania and Canada participate or wish to participate in fisheries for such stocks, the two Governments shall seek either directly or through appropriate international organizations to agree upon measures for the conservation and management of these stocks,

taking into account the principles set out in paragraph 1, as well as Romanian interests with regard to these stocks.

Agreement between the Government of Canada and the Government of Spain on Mutual Fisheries Relations

Madrid, June 10, 1976
In force June 10, 1976

Article IV

The Government of Canada and the Government of Spain undertake to cooperate directly or through appropriate international organizations to ensure proper management and conservation of the living resources of the high seas beyond the limits of national fisheries jurisdiction, including areas of the high seas beyond and immediately adjacent to the areas under their respective fisheries jurisdiction, taking into account their interests in such resources.

Agreement between the Government of Canada and the Government of the Union of Soviet Socialist Republics on Mutual Fisheries Relations

Moscow, May 1, 1984
In force May 1, 1984

The Government of Canada and the Government of the Union of Soviet Socialist Republics undertake to cooperate pursuant to the convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, in particular, Article XI, paragraph 4, thereof.

Thomas Clingan: Thank you very much. Your paper illustrates the kind of problems that we're still facing despite the new regime for fisheries in the treaty. Our next speaker is Judith Swan of the South Pacific Forum Fisheries Agency in the Solomon Islands, to speak to the problem of highly migratory species. We tried to address this problem in the Conference -- we have provisions on highly migratory species -- but the problem still exists, in part, because of different interpretations of those provisions. Judith?

HIGHLY MIGRATORY SPECIES THE SOUTH PACIFIC FORUM FISHERIES AGENCY

Judith Swan
South Pacific Forum Fisheries Agency
Solomon Islands

Background

Highly migratory species are listed in Annex I of the United Nations Convention on the Law of the Sea and include skipjack, yellowfin, and bigeye tuna. In the waters of the member countries of the South Pacific Forum Fisheries Agency (FFA), these species have been fished by distant water fishing nations including Japan, Taiwan, Korea, the United States, the Soviet Union, Indonesia, and the Philippines. Some FFA member countries, including Solomon Islands, Fiji, Kiribati, and Papua New Guinea, are developing their own fishing industry, but it is estimated that about 80 percent of the total catch is landed outside FFA member countries.

Over the years, 1983-1988, estimated annual averages have been calculated as follows: 515 vessels landed 206,000 metric tons of fish with a landed value of US$265 million, bringing revenues of US$10 million to FFA member countries. This is in an area which covers 1/12 of the earth's surface, but where land, means, and population are scarce.

One of the great challenges of FFA member countries is the management of these species. Factors in forming management principles include:

- maximization of benefits to coastal States
- the exploitation of the fishery by distant water fishing nations
- scientific data and conclusions
- medium-to-long terms plans to develop national fishing industries
- applicable provisions in the Law of the Sea Convention

These factors are enough to consume considerable time by government authorities in developed European, North American, or other countries which have been dealing with fisheries issues over the years. However, in FFA member countries the following factors provide additional overlay: for many countries, independence came during the 1970s, and this preceded only briefly the declaration of the

200-mile exclusive economic zones. Most important, the fisheries resource is vital to the developing economies of most Island countries.

Countries were left with a situation of newly formed bureaucracies and little expertise in dealing with their most significant resource. Before independence, administrations had often, on the European model, emphasized agricultural rather than fisheries training. With the advent of the era of the 200-mile zone, swift development of fisheries-related expertise was needed.

The South Pacific Forum, an annual meeting of heads of Government of independent South Pacific countries first established in 1971, formally recognized this need in its 1977 annual meeting in Port Moresby. It declared support for the developing Law of the Sea Convention and directed that a draft convention for a regional fisheries organization be drawn up for consideration at the next meeting of Forum. The beginnings of the new organization took place at a high political level with strong political will -- a key to its success and development of fisheries policy in the South Pacific.

In 1978, the draft convention that was presented to Forum provided for an organization along the lines of what would become an "Article 64" organization -- distant water fishing nations could participate as members in a management organization with jurisdiction over the exclusive economic zones of Pacific Island countries.

This concept was firmly rejected by Forum. The objective remained then, as it does now, the right to exercise sovereign rights over their most important resource, highly migratory species, without interference or direction from distant water fishing nations. However, their cooperation in another context -- access agreements -- would be realized.

At its 1979 meeting in Honiara, Forum accepted the revised draft convention establishing the South Pacific Forum Fisheries Agency (Annex I). Its membership, not including distant water fishing nations, would meet the needs of the countries and provide for careful management of highly migratory species.

Any debate that has taken place, since the Law of the Sea Convention was signed, in relation to the need for distant water fishing nations to be included in management,has not affected the operations and emerging law of the sea of the Pacific. Management of the species through coordination and cooperation facilitated by the Forum Fisheries Agency has been exemplary, and it is only a few powerful distant water fishing nations which, to meet their own needs, have supported the opposite interpretation. (A thorough legal analysis of Article 64 appears in the paper submitted by the author to the 20th Annual Law of the Sea Institute meeting, held in Miami, 1986).

There is direct cooperation through access agreements to ensure conservation and optimum utilization of highly migratory species, both within the exclusive economic zones and beyond. This is done, on bilateral and multilateral bases, with the multilateral access Treaty on Fisheries with the United States, which entered into force on June 15, 1986, including high seas areas for the first time.

The Forum Fisheries Agency (FFA)

The mandate of the FFA is to maximize the benefits from the living marine resources of the region for member countries, their peoples, and the region. The FFA Convention, which entered into force in 1979, has among functions of FFA the collection, analysis, evaluation, and dissemination of information relating to statistics, biology, law, management procedures, marketing elements, and fisheries development and establishing working arrangements with relevant regional and international organizations. A general description of FFA, its members, work, staffing, and funding appears in Annex II.

A Regional Research and Development Program was established in 1981 by member countries to act as a framework for the FFA Work Program (see Annex II). A Committee of member countries, called Forum Fisheries Committee, meets annually to review the work which was achieved over the past year within the Program and set new priorities for the coming year.

One key to the success of FFA is the Secretariat's responsiveness to its member countries both in the context of FFA meetings and in day-to-day operations. A range of requests, from establishing and funding a needed FFA position to assistance with bilateral access negotiations or legislative drafting, are actioned quickly and effectively.

In this way, the needs of countries from developing fishing industries to securing the greatest returns from access agreements can be met. Most important, there can be cooperation and coordination of management of highly migratory species.

While the FFA focusses on administration and management, the scientific analyses are done primarily by the South Pacific Commission. The SPC, headquartered in Noumea, New Caledonia, was established in 1947 to give technical assistance to South Pacific countries and includes as members the metropolitan powers.

SPC has carried out some important tagging and stock assessment programs on skipjack and yellowfin, which make up the preponderance of the total catch, and has concluded that fishing at present levels is generally safe. SPC scientists have done an important study showing that skipjack, which constitutes most of the annual tuna

catch, is not highly migratory but highly mobile. There is cooperation between SPC and FFA in data and analysis sharing, in the form of staff-to-staff and computer-to-computer communications.

Management by Access Agreement

Given the nature of the fishery, the tools that FFA member countries use to manage highly migratory species are legal and economic. By limiting the number and type of vessels permitted to fish, and in some cases the areas and time, effective management of the fishery can be carried out.

Economically, through data computerized from daily logsheets, checks on this by surveillance, enforcement observer, and other means, and regular computerized information on landing prices from over fifty ports in the world, economic assessments can be made on the optimum return for access. There have been many cases where access has been denied and negotiations broken off because the distant water fishing nation did not agree to a fair return.

Legally, the Regional Register of Foreign Fishing Vessels and minimum terms and conditions of access form the basis for fisheries access. These concepts were first embodied in the Nauru Agreement. They are incorporated in existing access agreements, including the existing multilateral Treaty on Fisheries with the United States, which pioneers international fisheries law and is likely only the forerunner of other multilateral access arrangements.

Nauru Agreement

Some FFA member countries recognized that some leverage would be needed against distant water fishing nations which were trying to play them off against each other. The seven northern countries, in whose waters most fishing was done, formed a sub-group which would present a unified front to distant water fishing nations by implementing minimum terms and conditions of access pursuant to the 1982 Nauru Agreement. These terms have since been approved by Forum and adopted on a region-wide basis.

One advantage of their adoption for foreign fishing nations is the simplification of procedure in following the fish from one jurisdiction to another. Progressive harmonization, initiated by the Nauru Agreement and extended by practice, is serving the interests of all parties.

The Nauru Agreement

One of the most important minimum terms of access is that a vessel must have "good standing" on a Regional Register of Foreign Fishing Vessels. The Regional Register is maintained on computer at FFA Headquarters in Honiara, Solomon Islands, and now consists of about 2,300 vessels.

Good standing, allowing vessels to fish in the waters of any member country pursuant to applicable laws and treaties, is automatically accorded upon application. The application form contains information about the vessel and its owners which is helpful in enforcement matters, and data is stored on the computerized Register at FFA Headquarters.

If a vessel has been involved in a serious offense and has not paid the compensation, fine or penalty requested or required, a country may request good standing to be withdrawn. (If a judicial or administrative determination on a fine has not been made, it has not been possible to effect legal process, and there is otherwise enough evidence to secure a conviction, it is sufficient to initiate withdrawal of good standing.) This will be done when ten countries agree, with no dissents. The vessel is then banned from fishing in the waters of any FFA member countries.

It is a tribute to the effectiveness of the consequences that, although "blacklisting" proceedings have been initiated or threatened on some occasions, the vessels have paid their fine or settlement rather than face the consequences.

Minimum Terms and Conditions of Access

The concept of minimum terms and conditions of access, first introduced in the Nauru Agreement, is being expanded to include the following:

1. Each foreign fishing vessel (ffv) must apply for and possess a license or permit.
2. Each ffv must have good standing on a regional register of foreign fishing vessels.
3. An access fee must be paid.
4. There must be compliance with applicable coastal State laws.
5. Flag State enforcement measures must be agreed.
6. Gear must be properly stowed when not fishing.
7. Reporting requirements must be set, including:
   a. timely reporting of entry, exit, periodic reporting while in the zone, before entry into port and other as appropriate;

b. standardized logbook form to be maintained on a daily basis, which must be produced at the direction of authorized officers and mailed to the coastal State at the end of the trip;
c. complete catch and effort data must be supplied for each trip; and
d. additional information as the parties may determine must be supplied.

8. Enforcement/observer requirements must be met, including:
   a. duty of vessels to take on board enforcement officers/observers in accordance with coastal State law; and
   b. rights of enforcement officers/observers and duties owed them by the master and crew.
9. An agent must be appointed to receive and respond to process.
10. There must be standardized identification of foreign fishing vessels.
11. There must be a standardized radio frequency for receiving transmissions.
12. True and complete information must be required at all times.

These minimum terms and conditions of access are crucial to small Pacific Island countries which place great value on managing highly migratory species through access. It represents development of international law, with harmonized State practice building on the Law of the Sea Convention principles to achieve a sound regime for foreign fishing.

Multilateral Access Agreements

Another management initiative for highly migratory species in the zones of FFA member countries is the multilateral access agreement. This also goes beyond the provisions of the Law of the Sea Convention and pioneers international law.

A multilateral Treaty on Fisheries between FFA member countries and the United States entered into force on 15 June 1988. Its genesis in 1984 was due in large part to economic and political considerations, and the South Pacific Forum directed FFA member States to go forward with negotiations. The result is a unique and highly complex treaty which is being used as a regional standard for a general trend towards multilateral arrangements with other countries, for bilateral agreements, and for domestic legislation.

A great advantage of this approach in the negotiating process was the collective strength it gave FFA member countries. Strategy and negotiating positions were established by consensus -- the Pacific Way

-- then presented by documentation to the United States. The negotiating rounds themselves led to better regional cooperation in general fisheries matters.

The background of the Treaty and a summary of its legal provisions are provided in Annex III. The United States and fifteen FFA member countries have ratified the Treaty.

Generally, it provides access to the richest tuna fishing grounds in the world for U.S. purse seine fishing vessels. The Treaty Area comprises an area including EEZs of FFA member countries and high seas areas; this means that reporting requirements, vital to good management, extend to the high seas. Coastal State sovereignty over highly migratory species is recognized, and compliance with applicable national laws is required. No economic sanctions are permitted under the Treaty. An access fee of US$60 million over five years is being paid.

Information obtained from the reporting, observer, and port sampling requirements will assist in long term management of the resource.

Forum has directed FFA member countries to proceed with discussions towards a multilateral arrangement with Japan. The first meeting between FFA member countries and Japan to discuss a multilateral access arrangement took place in Port Moresby, 8-9 June 1989.

It is expected that a proposed arrangement with Japan will not be similar to the Treaty with the United States because, *inter alia*, of the different fishery -- only 32 U.S. purse seiners are fishing under the latter, while Japan has had a longer presence in the region with four different vessel types (purse seine, group purse seine, pole and line, and longline).

The future trend is towards management by multilateral access agreement. The Soviet Union has requested talks on this basis, and it is likely that other countries will be invited to join such arrangements.

For the distant water fishing nations, guaranteed access under standardized terms and conditions to a large area of the world's richest tuna fishing grounds will be an advantage over the necessity to comply with a variety of rules. For FFA member countries, sovereignty can be maintained and the species can be managed in a coordinated manner with maximum data gained from the multilateral arrangement, including standardized reporting, high seas data, observers, port sampling, and unloading data as applicable.

Domestic Legislation

Domestic legislation provides the foundation for all fisheries activity and should be drafted comprehensively to cover all aspects of such activity and allow for future developments. FFA member countries are currently revising existing legislation with this in mind in order to promote better management of the resource.

The basic elements of fisheries legislation include licensing, foreign fishing, reporting, enforcement, prohibited acts, seizures, and judicial process. FFA member countries are strengthening provisions relating to foreign fishing in the interests of better management. This systematic review and reform of fisheries legislation has three approaches:

- strengthening existing framework provisions;
- including provisions which allow scope for future international or national developments; and
- strengthening evidentiary provisions, including new technological developments.

The framework areas of unrevised fisheries laws which are being strengthened are, in general, as follows:

a. Interpretation, which is essential for sound enforcement, is sometimes uneven. Such terms as fish, fishing and fishing gear must have precise and comprehensive definition (for a definition of "fishing" currently being included in legislation, and which was included in the Treaty on Fisheries with the United States, see Annex IV).
b. Licensing provisions should be flexible enough to cover a number of fisheries-related activities which, if they are not a current concern, may become so in the future, including: fishing by commercial national vessels, foreign fishing, test fishing, and marine scientific research.
c. Reporting requirements are crucial to management and enforcement and minimum standards are emerging with flexibility to strengthen the provisions.
d. The rights of observers and enforcement officers and the duties owed them by the master and crew are being detailed.
e. Seizure provisions are being expanded to include such non-traditional concepts as responsibility for the seized vessel as it returns to port and immobilizing the vessel.

In addition to the above, FFA member countries are incorporating provisions to allow scope for future developments as follows:

- multilateral fisheries agreements or arrangements;
- licensing by an administrator on a regional or sub-regional basis;
- reciprocal enforcement;
- regional (non-national) observers;
- coastal State benefits from marine scientific research;
- regulation of transfer of technology;
- admissibility of evidence from outside the jurisdiction; and
- requiring that certain provisions must be included in bilateral or multilateral agreements or arrangements (*e.g.*, requiring good standing on a Regional Register).

FFA member countries are strengthening the enforcement aspects of fisheries legislation. At the request of an FFA/ICOD Workshop on Fisheries Prosecutions, a Prosecutions Procedures Study has recently been completed. This has resulted in the preparation of a fisheries prosecutions manual which details all information and every step required in a prosecution, and model legislative evidentiary and offense provisions.

The manual is highly practical and advises the reader (who could be a legal officer or fisheries enforcement officer) on matters ranging from what to do before anything happens, to preparation for trial, and post-trial procedures.

A useful feature of the manual is the explanation of relevant technical matters with which the prosecutor must familiarize himself. These include position fixing, logs, navigation, fish, and fishing. International fisheries law and management and surveillance matters are also covered in the manual.

The model evidentiary provisions take into account the need for authorized enforcement officers to have very comprehensive and detailed powers, and incorporate technological developments in navigation (*e.g.*, satellite navigation systems) and enforcement (*e.g.*, transponders or mechanical observer devices).

Regarding admissible evidence, the model legislation allows certificate evidence as to the time, location, nature (commercial or not), and license of the vessel, whether a particular area is closed or otherwise controlled, the boundaries of the maritime zones, whether a piece of equipment is fishing gear, the cause and manner of death or injury to fish, a true copy of an access agreement, the vessel's call sign, and whether a vessel has good standing on a Regional Register.

The certificate evidence would be accepted unless the contrary is proved.

Presumptions are also included, relating, *inter alia*, to the accuracy of information from observer devices and catch on board (presumed to have been caught unlawfully unless the contrary is proved).

Apart from these model evidentiary provisions which countries may apply in accordance with appropriate circumstances, there is no one model fisheries act in the region due to the need to take into account specific needs of the countries. Considerable harmonization of fisheries legislation is occurring in FFA member countries due to several factors, including: the will to achieve a practical harmonization; standardization of access terms and conditions in the Nauru Agreement and their development in bilateral and multilateral access agreements and international fora; and requests by member countries for legislative assistance from the FFA Secretariat, which maintains some consistency.

Other Relevant Law of the Sea Convention Concepts

Fishing can be described as the most important element of the Law of the Sea Convention for FFA member countries, but other areas are no less important. In particular, archipelagic zones, maritime boundary delimitation, and high seas drift net fishing by distant water fishing nations warrant special mention.

Archipelagic Zones

Four FFA member countries have declared archipelagic zones: Fiji, Papua New Guinea, Solomon Islands, and Vanuatu. This has been done with a view to complying with the Law of the Sea requirements. However, it has been a matter of concern elsewhere in the region that inability to participate in the Law of the Sea Conference for financial reasons deprived some countries of their opportunity to express their special needs in forming an archipelagic zone. Because the 9:1 ratio established without their representation is not adequate to meet their needs, this could affect a final decision to ratify the Convention. It is an area where regional standards may emerge.

Maritime Boundary Delimitation

Although some boundaries have been agreed, maritime boundary delimitation generally has not been concluded in the region -- more than twenty boundaries need to be finalized. While negotiation can be a long and difficult process, a unique approach has been adopted for

delimitation for the purpose of the Treaty on Fisheries with the United States. This approach was developed in an FFA/ICOD Maritime Boundary Delimitation Workshop held in Apia in August, 1988.

The immediate reason for this step is linked to the distribution of access fees in the Treaty Area, but reporting and enforcement considerations also play a major role.

As noted above, the Treaty Area comprises an enclosed area which includes the EEZs of FFA member countries and high seas. Pacific Island parties have agreed to divide the access fees on a 15/85 basis: 15 percent in equal shares to all Pacific Island parties and 85 percent according to where the fish is caught. If lines are not drawn, fees cannot be distributed in areas subject to claims by more than one party. Also, FFA as administrator would not know where to send the daily logsheet reports, and enforcement jurisdiction is unclear in those areas.

For these reasons, Pacific Island parties have agreed to draw Provisional Treaty Lines (PTLs) based on the principle of equidistance. Legal and technical consultants will visit the Pacific Island parties and take instructions on the most advantageous basepoints countries may wish to use. A computer program, DELMAR, will then be used to establish the coordinates of the equidistance lines. These will be reviewed by a technical committee, then presented to a meeting of the Pacific Island parties for their adoption.

Although PTLs are only for the purposes of the Treaty, it is the first time in international practice such an arrangement is being implemented. It reflects a strong will to arrive at an equitable solution and avoid potentially lengthy and complicated proceedings which could affect otherwise friendly relations between countries.

Southern Albacore High Seas Fishing

A crisis has developed in the southern albacore high seas fishery due to the sudden and dramatic increase of drift net vessels from Taiwan, Japan, and South Korea. If fishing continues at levels reached in the 1988/89 season, it is expected that the stock will be depleted in two years.

There have been two regional meetings to consider the state of the fishery, and one regional legal consultation (May 29-31, 1989) to recommend management options for a high seas regime. A meeting between concerned countries in the region, including FFA member countries, France, and the United States, and Taiwan, Japan, and South Korea is scheduled for 25-26 June.

The Law of the Sea Convention provides authority for conservation of high seas species in Articles 117-120 and Article 64. The "preferential rights" doctrine would also apply to this situation, as would precedent of other international organizations such as the International North Pacific Fisheries Commission.

It is hoped that this body of international jurisprudence could form the basis for a high seas management regime including distant water fishing nations.

Law of the Sea Convention -- Implementation without Ratification

While Forum has endorsed ratification of the Law of the Sea Convention, many countries find that the considerable financial and legal commitments would be difficult to achieve in a short period of time. Ratification has, for this reason, not been a priority in countries which do not have the resources to devote to such a comprehensive exercise.

However, there has been the implementation of the fisheries provisions of the Convention without ratification. FFA member countries have respected and built upon its guidelines on a regional basis in response to their own circumstances. In the process, they have enhanced the customary international law in the Convention and have pioneered new international law which goes beyond the necessarily general terms of the Convention and meets the needs of the region.

In doing so, liaison has been established and maintained with other regional organizations. It is hoped that this will result in a more universal acceptance of the new regime and an improved and strengthened law of the sea for future generations.

Appendix A

SOUTH PACIFIC FORUM FISHERIES AGENCY

CONVENTION

THE GOVERNMENTS COMPRISING THE SOUTH PACIFIC FORUM

Noting the Declaration on Law of the Sea and a Regional Fisheries Agency adopted at the 8th South Pacific Forum held in Port Moresby in August 1977;

Recognising their common interest in the conservation and optimum utilisation of the living marine resources of the South Pacific region and in particular of the highly migratory species;

Desiring to promote regional co-operation and co-ordination in respect of fisheries policies;

Bearing in mind recent developments in the law of the sea;

Concerned to secure the maximum benefits from the living marine resources of the region for their peoples and for the region as a whole and in particular the developing countries; and

Desiring to facilitate the collection, analysis, evaluation and dissemination of relevant statistical scientific and economic information about the living marine resources of the region, and in particular the highly migratory species;

HAVE AGREED AS FOLLOWS:

Article I

Agency

1. There is hereby established a South Pacific Forum Fisheries Agency.
2. The Agency shall consist of a Forum Fisheries Committee and a Secretariat.
3. The seat of the Agency shall be at Honiara, Solomon Islands.

Article II

Membership

Membership of the Agency shall be open to:

(a) members of the South Pacific Forum

(b) other states or territories in the region on the recommendation of the Committee and with the approval of the Forum.

Article III

Recognition of Coastal States' Rights

1. The Parties to this Convention recognise that the coastal state has sovereign rights, for the purpose of exploring and exploiting, conserving and managing the living marine resources, including highly migratory species, within its exclusive economic zone or fishing zone which may extend 200 nautical miles from the baseline from which the breadth of its territorial sea is measured.
2. Without prejudice to Paragraph (1) of this Article the Parties recognise that effective co-operation for the conservation and optimum utilisation of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal states in the region and all states involved in the harvesting of such resources.

Article IV

1. The Committee shall hold a regular session at least once every year. A special session shall be held at any time at the request of at least four Parties. The Committee shall endeavour to take decisions by consensus.
2. Where consensus is not possible each Party shall have one vote and decisions shall be taken by a two-thirds majority of the parties present and voting.
3. The Committee shall adopt such rules of procedure and other internal administrative regulations as it considers necessary.
4. The Committee may establish such sub-committees, including technical and budget sub-committees as it may consider necessary.
5. The South Pacific Bureau for Economic Co-operation (SPEC) may participate in the work of the Committee. States, territories and other international organisations may participate as observers in accordance with such criteria as the Committee may determine.

Article V

Functions of the Committee

1. The functions of the Committee shall be as follows:
   (a) to provide detailed policy and administrative guidance and direction to the Agency;
   (b) to provide a forum for Parties to consult together on matters of common concern in the field of fisheries;
   (c) to carry out such other functions as may be necessary to give effect to this Convention.
2. In particular the Committee shall promote intra-regional co-ordination and co-operation in the following fields:
   (a) harmonisation of policies with respect to fisheries management;
   (b) co-operation in respect of relations with distant water fishing countries;
   (c) co-operation in surveillance and enforcement;
   (d) co-operation in respect of onshore fish processing;
   (e) co-operation in marketing;
   (f) co-operation in respect of access to the 200 mile zones of other Parties.

Article VI

Director, Staff and Budget

1. The Committee shall appoint a Director of the agency on such conditions as it may determine.
2. The Committee may appoint a Deputy Director of the Agency on such conditions as it may determine.
3. The Director may appoint other staff in accordance with such rules and on such conditions as the Committee may determine.
4. The Director shall submit to the Committee for approval:
   (a) an annual report on the activities of the Agency for the preceding year;
   (b) a draft work programme and budget for the succeeding year.
5. The approved report, budget and work programme shall be submitted to the Forum.
6. The budget shall be financed by contributions according to the shares set out in the Annex to this Convention. The Annex shall be subject to review from time to time by the Committee.
7. The Committee shall adopt financial regulations for the administration of the finances of the Agency. Such regulations may authorise the Agency to accept contributions from private or public sources.
8. All questions concerning the budget of the Agency, including contri-

butions to the budget, shall be determined by the Committee.

9. In advance of the Committee's approval of the budget, the Agency shall be entitled to incur expenditure up to a limit not exceeding two-thirds of the preceding year's approved budgetary expenditure.

Article VII

Functions of the Agency

Subject to direction by the Committee the Agency shall:

(a) collect, analyse, evaluate and disseminate to Parties relevant statistical and biological information with respect to the living marine resources of the region and in particular the highly migratory species;

(b) collect and disseminate to Parties relevant information concerning management procedures, legislation and agreements adopted by other countries both within and beyond the region;

(c) collect and disseminate to Parties relevant information on prices, shipping, processing and marketing of fish and fish products;

(d) provide, on request, to any Party technical advice and information, assistance in the development of fisheries policies and negotiations, and assistance in the issue of licences, the collection of fees or in matters pertaining to surveillance and enforcement;

(e) seek to establish working arrangements with relevant regional and international organisations, particularly the South Pacific Commission; and

(f) undertake such other functions the Committee may decide.

Article VIII

Legal Status, Privileges and Immunities

1. The Agency shall have legal personality and in particular the capacity to contract, to acquire and dispose of movable and immovable property and to sue and be sued.

2. The Agency shall be immune from suit and other legal process and its premises, archives and property shall be inviolable.

3. Subject to approval by the Committee the Agency shall promptly conclude an agreement with the Government of Solomon Islands providing for such privileges and immunities as may be necessary for the proper discharge of the functions of the Agency.

Article IX

Information

The Parties shall provide the Agency with available and appropriate information including:

(a) catch and effort statistics in respect of fishing operations in waters under their jurisdiction or conducted by vessels under their jurisdiction;
(b) relevant laws, regulations and international agreements;
(c) relevant biological and statistical data; and
(d) action with respect to decisions taken by the Committee.

Article X

Signature, Accession, Entry into Force

1. This Convention shall be open for signature by members of the South Pacific Forum.
2. This Convention is not subject to ratification and shall enter into force 30 days following the eighth signature. Thereafter it shall enter into force for any signing or acceding state thirty days after signature or the receipt by the depositary of an instrument of accession.
3. This Convention shall be deposited with the Government of Solomon Islands (herein referred to as the depositary) who shall be responsible for its registration with the United Nations.
4. States or territories admitted to membership of the Agency in accordance with Article II(b) shall deposit an instrument of accession with the depositary.
5. Reservations to this Convention shall not be permitted.

Article XI

Withdrawal and Amendment

1. Any Party may withdraw from this Convention by giving written notice to the depositary. Withdrawal shall take effect one year after receipt of such notice.
2. Any Party may propose amendments to the Convention for consideration by the Committee. The text of any amendment shall be adopted by a unanimous decision. The Committee may determine the procedures for the entry into force of amendments to this Convention.

IN WITNESS WHEREOF the undersigned, being duly authorised

thereto by their respective Governments, have signed this Convention

Opened for signature at Honiara this 10th day of July, 1979.

For the Government of Australia:

For the Government of the Cook Islands:

For the Government of Fiji:

For the Government of Kiribati:

For the Government of Nauru:

For the Government of New Zealand:

For the Government of Niue:

For the Government of Papua New Guinea:

For the Government of Solomon Islands:

For the Government of Tonga:

For the Government of Tuvalu:

For the Government of Western Samoa:

ANNEX

The following are the shares to be contributed by Parties to the Convention towards the budget of the Agency in accordance with Article VI(6):

Australia	1/3
Cook Islands	1/30
Fiji	1/30
Kiribati	1/30
Nauru	1/30
New Zealand	1/3
Niue	1/30
Papua New Guinea	1/30
Solomon Islands	1/30
Tonga	1/30
Tuvalu	1/30
Western Samoa	1/30

ANNEX II

Information About the Forum Fisheries Agencies

Introduction

The South Pacific Forum Fisheries Agency (FFA) traces its origin to the South Pacific Forum meeting in Port Moresby in 1977 which adopted a Declaration on the Law of the Sea and the establishment of a Regional Fisheries Agency. The decision to establish an Agency which would be restricted only to Forum Governments and would not include a wider range of distant water fishing countries was taken by the Forum at Niue in 1978.

A Convention implementing Forum's decision was signed by the twelve Forum members of the time and entered into force in October, 1979. The Convention established the FFA to promote regional cooperation in various aspects of fisheries with objective of securing the maximum benefits from the living marine resources of the region for their peoples, the region as a whole and in particular for the developing countries.

Membership (16 Countries)

Member Governments include Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

Work Program

The FFA Work Program is organized into sub-programs as follows:

- harmonization of fisheries regimes and access agreements
- fisheries surveillance and enforcement
- current information services
- tuna fishing development
- economic analysis
- fishing patterns
- fisheries training and administrative development
- regional register of fishing vessels
- delimitation of fishing and related zones
- evaluation of fisheries support services and facilities

Other work includes establishment, administration and coordination with other regional programs.

Staffing

The FFA has twenty-one professional staff, and seventeen office and maintenance staff. The professional staff consist of:

Executive Management - Director
- Deputy Director

Administration - Finance Administration Officer
- Trust Fund Administration Officer
- Finance Officer

Management - Legal Officer
- Surveillance Advisor
- Multilateral Treaty Manager

Development - Fisheries Development Officer
- Research Coordinator
- Project Development Officer
- Ocean Resources Management Program Director (USP)
- Ocean Resources Management Program Officer (USP)

Research - Senior Economist
- Statistical Coordinator
- Tuna Industry Adviser
- Marketing Adviser
- Information Officer

Computer - Computer Services Manager
- Senior Analyst Programmer
- Data Base Officer

Funding

The on-going operations of the Agency are funded largely by contributions from the Member Governments with support from the Commonwealth Fund for Technical Cooperation (CFTC), the Canadian International Development Agency (CIDA), the International

Center for Ocean Development (ICOD), the United National Development Fund (UNDP), and the United Nations Food and Agriculture Organization (FAO). Valuable support for specific projects is also received from a range of sources including the Australian Development Assistance Bureau (ADAB), the New Zealand Overseas Development Assistance (NZODA) program, the European Economic Community (EEC), and the United States Agency for International Development (USAID).

Funding for the on-going operations of the Agency under its general fund account is shared one-third each by Australia, New Zealand and Pacific Island members. Assistance for specific projects from the supporting organizations listed above are separated under the Agency's trust fund account. In 1988, the general fund budget totalled SBD$1.4 million, and the trust fund budget amounted to SBD$6.7 million (SBD -US$0.43, as of May, 1989).

ANNEX III

Multilateral Treaty on Fisheries with the United States - Background

The tenth and final round of negotiations on the Treaty on Fisheries with the United States took place in Nuku'alofa in November, 1986. The Treaty was signed on April 2, 1987, in Port Moresby and entered into force on June 15, 1988.

Other documents signed in Port Moresby and also in force are: (a) an internal agreement among FFA member countries on implementation of the Treaty (designating the Director of FFA as Administrator, describing the administrator's duties, and providing for information and fee distribution); (b) an Agreed Statement on an Observer Program to be implemented under the Treaty; and (c) an agreement between FFA and USAID setting out the framework for a mechanism for the transfer of funds to FFA under the Treaty.

Thirteen FFA member States are party to the Treaty: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Papua New Guinea, Palau, Solomon Islands, Tuvalu and Western Samoa. This exceeds the Treaty requirement that at least ten FFA member States, including Federated States of Micronesia, Kiribati, and Papua New Guinea must ratify before entry into force can occur.

The Treaty allows 35 United States purse seiners to fish in a designated Treaty Area over a five-year period for US$60 million. An

additional 15 vessels may fish at an agreed additional fee, and the payments by industry are indexed to a base price for fish. This means that an increase in fees could take place, but not a decrease. The fees are paid in three separate components:

- $10 million is paid annually by the United States Government. Of this, $9 million is a direct cash transfer by USAID and $1 million is given in USAID project assistance.
- $175,000 is paid annually by the industry as license fees.
- $250,000 is paid by industry or technical assistance by cash transfer for administration by the Treaty Administrator (FFA).

In order to facilitate smooth entry into force, three technical meetings were held with United States officials and industry representatives before June 15, 1988, covering such issues as the observer program and port sampling.

Meetings with USAID officials also took place in Suva and Washington to ensure acceptable financial mechanisms and smooth transfer of funds upon entry into force. Two agreements between FFA and the U.S., dealing with the $9 million and $1 million components respectively, have been implemented.

An observer training course was held in Western Samoa during September, 1987, and another planned for Federated States of Micronesia during June, 1988, had to be cancelled due to disruption of airline services by Air Nauru. The immediate objective is to cover 20 percent of the trips, and this can be increased in future.

Most parties to the Treaty have passed implementing legislation, main features of which are to recognize a license issued by a Treaty Administrator rather than their own authorities, incorporate provisions relating to non-national observers and enforcement, and recognize the precedence of Treaty provisions over domestic law.

Thirty-one United States vessels are now fishing under the Treaty, with most activity concentrating in the Northern area of the Treaty Area. Treaty requirements are on the whole being met, with reporting requirements developing according to available equipment. Some vessels do not yet have a telex, so have had to make arrangements for reporting which would utilize telexes of other vessels or the industry. As weekly telex reporting to the Administrator is required and compliance is initially very high, a flexible approach is being taken for the time being.

Treaty Provisions: Legal Aspects

The Treaty breaks new ground in international law in many respects, and is the most comprehensive fisheries access agreement in the region, and perhaps the world. Its genesis was the American policy of not recognizing coastal State jurisdiction over highly migratory species, with its highly punitive domestic legislation to give effect to that policy.

Negotiations were commenced in response to incidents which took place in Papua New Guinea and Solomon Islands and at the direction of Forum. The resulting Treaty marks a new era in fisheries relations and cooperation with the United States, and both sides look forward to continuing goodwill and mutual benefit.

The main features of the Treaty are, for the United States, that they have access to an expansive Treaty Area comprising the richest tuna fishing grounds in the world for a period of five years.

In return, Pacific Island parties have secured the recognition by the United States of their sovereign rights over highly migratory species, the undertaking that United States legislation based on the non-recognition of jurisdiction over highly migratory species will not be operative in the Treaty Area, there will be compliance with national legislation, reporting in high seas areas will be carried out, strict flag State enforcement requirements will be implemented and financial assurances will be provided in certain specified cases.

The main provisions in the Treaty, with a summary description of each, are as follows:

Interpretation - Article 1

Definitions more comprehensive than those found in existing agreements or legislation are given for many words used in the Treaty, in particular "fishing".

Broader Cooperation - Article 2

The Government of the United States is required to cooperate with Pacific Island parties in providing technical and economic support in fisheries and promoting the use of local goods and services and employment of Pacific Island nationals in fisheries activities.

Access to the Treaty Area - Article 3

United States fishing vessels may fish in accordance with conditions set out in the Annexes, which describe terms and conditions of licensing and license issuance. This provision also recognizes "side

deals" which may be made between Pacific Island Governments and the U.S. industry during the life of the Treaty.

Flag State Responsibility - Article 4

This is a unique and complex provision which recognizes the difficulty Pacific Island parties have had in the past enforcing access agreements. When the alleged offender departs the jurisdiction, there is usually no opportunity for compensation for the alleged offense due in part to the lack of resources in Pacific Island countries to serve the operators in another jurisdiction and bring them back to trial.

This provision requires that, under certain conditions the U.S. Government must take measures to ensure that a vessel suspected of an infringement leaves the Licensing Area and does not return except to submit to jurisdiction, or bring the appropriate persons through the U.S. legal process and hand the amount of the fine, penalty or other determination over to the Pacific Island party concerned.

Compliance Powers - Article 5

There are several compliance powers, the most important being the recognition that the Pacific Island parties will enforce the Treaty, including their national legislation. This, and many other Treaty provisions, verifies U.S. recognition of sovereign rights of Pacific Island parties to the Treaty over highly migratory species.

Another important provision in this Article prevents the United States Government from applying its punitive domestic legislation to a Pacific Island party if there is an arrest of a U.S. fishing vessel.

Consultations and Dispute Settlement - Article 6

Extensive provision was made for consultation and dispute settlement, with the view that any potential differences would be minimized if procedures are already agreed.

Review of the Treaty - Article 7

An annual meeting is to take place among parties to review the operation of the Treaty.

Amendment of Treaty, Annexes, Notification, Depositary, Final Clauses - Articles 8 - 12

These housekeeping matters are dealt with in the above-noted Articles.

Terms and Conditions of Licensing - Annex I

Extensive terms and conditions of licensing are given in Annex I, an integral part of the Treaty, including requiring that U.S. vessels comply with the applicable national laws (listed in a Schedule), certain prohibitions, reporting and enforcement requirements, observers rights and duties and miscellaneous requirements.

Annex I also defines the Licensing Area, which is the area within the Treaty Area where vessels are allowed to fish. They are excluded from fishing in designated Closed Areas and Limited Entry Areas under certain conditions. They may not fish in the zones of FFA member States which have not ratified the Treaty.

Licensing Procedures - Annex II

Annex II identifies the licensing procedures, including reasons for license denial. These include withdrawal of good standing on the Regional Register, failure to provide financial assurances if the owner or charterer is the subject of proceedings under United States bankruptcy laws and failure to satisfy a final determination for breach of the Treaty.

Summary

The Treaty provided precedent for the region in two aspects. One is the fee, which is estimated at 10 percent of landed value of the fish likely to be caught. Bilateral arrangements averaged in the 4-6 percent range.

Another precedent is provided by the comprehensive legal provisions. These are being incorporated into domestic fisheries legislation and other bilateral agreements. This can be seen as a continuation of the results achieved by the parties to the Nauru agreement.

Although the legal aspects were described above, it should not be forgotten that they will have a profound effect on management of the tuna resource in the Pacific. With increased reporting, including in high seas areas, observer coverage and port sampling, it is expected that management will be improved drastically.

ANNEX IV

The definition of "fishing", included in the Treaty on Fisheries with the United States and incorporated into many domestic fisheries laws, is:

"Fishing" means:

a. searching for, catching, taking or harvesting fish;
b. attempting to search for, catch, take or harvest fish;
c. engaging in any other activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fish;
d. placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons;
e. any operations at sea directly in support of or in preparation for any activity described in this paragraph;
f. aircraft use, relating to the activities described in this paragraph except for flights in emergencies involving the health or safety of crew members or the safety of a vessel.

Thomas Clingan: Thank you very much, Judith. We now have had two examples of regional organizations: Mr. Applebaum has talked about some difficulties with one organization, and Judith has shown us another which has been very effective in the management of highly migratory species. We now move on to two other arrangements, the first of which is the EEC, which is more in the position of a coastal state than of an international management scheme. To address us from this different perspective of the EEC fisheries regime we have with us Robin Churchill from the Cardiff Law School of the University of Wales. Robin?

EEC FISHERIES REGIME

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Introduction

The theme of this Conference is the implementation of the 1982 UN Convention on the Law of the Sea through international organizations. Many of the provisions of the Convention refer to rules and standards to be adopted by or under the auspices of international organizations or call for institutionalized cooperation between States on a global or regional level. As far as living resources are concerned, the main references made by the Convention to such cooperation through and within international organizations are in Articles 61 (cooperation over conservation in the EEZ), 63 (shared and straddling stocks), 64 (the management of highly migratory species), 65 (the management of marine mammals,), 66 (cooperation in relation to anadromous species) and 118 and 119 (conservation and management of high seas resources).

In looking at how the institutionalized cooperation referred to in these articles has so far been and may in the future be realized, it is not very helpful or realistic to consider the EEC as a relevant international organization. This is because in the fisheries context the EEC much more resembles a coastal State than an international organization: thus in terms of the implementation of the UN Convention it is more fruitful to study the EEC in the context of implementation of the Convention by coastal States, rather than in the context of implementation through international organizations.[1]

The reasons why in the fisheries sector the EEC resembles more a coastal State than an international organization are essentially two-fold. First, since 1979 the EEC has taken over from its Member States the competence to manage the fisheries resources found in the

[1]For such a study, see R.R. Churchill, "The EEC's Contribution to 'State' Practice in the Field of Fisheries" in E.D. Brown and R.R. Churchill (eds.), *The UN Convention on the Law of the Sea: Impact and Implementation*, 19 L. Sea Inst. Proc. 557-568 (1987).

200-mile economic or fishing zones of its Member States.[2] This competence is in principle exclusive: Member States have retained or been delegated only very limited competence, which relates mainly to the possibility of adopting urgently required conservation measures or local management measures (and such competence is subject to supervision by the EEC).[3] Secondly, since 1977 the EEC has had exclusive competence to negotiate and conclude treaties in fisheries matters with third States.[4] Thus, questions such as the access of third States' vessels to EEC waters and of EEC vessels to third States' waters, cooperation with third States over the management of joint stocks, and membership of international fisheries organizations are all matters exclusively for the EEC as such, and not its individual Member States.

Although it was suggested earlier that it is not particularly fruitful to look at the EEC in terms of the implementation of the UN Convention by international organizations, this paper will nevertheless consider the role played by the EEC in relation to each of the articles of the Convention which refer to institutionalized international cooperation in relation to living resources. Before doing so, the paper will consider in turn the characteristics of the EEC as an international fisheries organization, the institutional structure of the EEC, particularly as it concerns fisheries, and the fisheries management system adopted by the EEC. Finally, the paper will consider the role

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[2]This follows from the judgment of the European Court of Justice in Case 804/37, *Commission v United Kingdom* [1981] E.C.R. 1045; [1982] 1 C.M.L.R. 543.

[3]For a full discussion of the respective competences of the EEC and its Member States in relation to fisheries management, see R.R. Churchill, *EEC Fisheries Law* (Dordrecht: Martinus Nijhoff, 1987), pp. 85-110.

[4]This follows from the case law of the European Court of Justice. See, in particular, Case 22/70, *Commission v Council* [1971] E.C.R. 263; [1971] C.M.L.R. 335; Joined Cases 3,4, and 6/76, *Officier van Justitie v Kramer* [1976] E.C.R. 1279; [1976] 2 C.M.L.R. 440; and Opinion 1/76, *Re the Draft Agreement establishing a European Laying-Up Fund for Inland Waterway Vessels* [1977] E.C.R. 741; [1971] 2 C.M.L.R. 279. See also Churchill, *op. cit.* in n.3, pp. 169-176.

of the EEC in relation to one of the specific sub-themes of the Conference -- education, training, and the transfer of technology.

The Characteristics of the EEC as an International Fisheries Organization

Although the EEC is an international organization concerned with fisheries, it is very different from a traditional international organization.[5] The salient differences include the following.

1. Fisheries is not the only concern, nor even the main concern, of the EEC.

2. Whereas traditional international fisheries organizations are concerned very largely exclusively with questions of resource management, the EEC is concerned not only with such questions, but also with a number of other fisheries matters, including structural questions (which include *inter alia* the question of over-capacity), marketing, trade in fisheries products, and relations with third States.

3. Unlike a traditional fisheries organization, the EEC has its own legal system. This has several notable consequences as far as fisheries management is concerned. First, EEC management measures are normally directly binding on individual fishermen and do not require implementation by individual Member States. Secondly, unlike the position in most international fisheries commissions, it is not possible for individual Member States to opt out of particular management measures they object to (and such measures can be adopted by the EEC by majority vote). Finally, there are more effective mechanisms for enforcing management measures.

4. Because the area of fisheries management for which the EEC is responsible lies entirely within the 200-mile economic or fishing zones of its Member States, the EEC does not face the "free rider" problem experienced by most international fishery commissions which regulate high seas fisheries.

5. The EEC is the only international fisheries organization to which sufficient competence has been transferred by its Member States to allow it to sign the Law of the Sea Convention. (However, although

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[5]For a thorough, if rather dated, survey of international fisheries organizations, see A.W. Koers, *International Regulation of Marine Fisheries* (London: Fishing News (Books) Ltd., 1973). Cf. also J.E. Carroz, "Institutional Aspects of Fishery Management under the New Regime of the Oceans", 21 *San Diego Law Review* 513 (1984).

the EEC has signed the Convention, it is very unlikely that it will ratify the Convention unless and until its Member States have reconciled their diverging attitudes to the Convention.[6])

The Institutional Structure of the EEC as it Concerns Fisheries

The EEC has four principal institutions, three of which -- the Council, the Commission and the European Parliament -- are essentially political bodies, while the fourth -- the European Court of Justice -- is a judicial body. There is also a myriad of lesser bodies, a few of which are concerned with fisheries.

The Council consists of one minister from each Member State. Thus, when it is considering fisheries matters, it consists of the twelve fisheries ministers. It is the EEC's main decision-making body. The Commission consists of seventeen Commissioners (two from each of the five larger Member States, one from each of the smaller States), supported by some 12,000 officials. The latter are grouped into Directorates-General, each Directorate-General being concerned with one particular area of the EEC's activities. Directorate-General XIV is concerned with fisheries: in addition, the Commission's Legal Service and Statistical Office also deal with fisheries matters as part of their work. The Commission is completely independent of the national governments of the Member States, and is intended to be the guardian of the Community interest and the chief motor of integration. Finally, the European Parliament consists of 518 members directly elected every five years by all those having the vote in individual Member States. The members of the Parliament sit, not in national blocs, but in political groups.

All three political institutions are involved in the adoption of fisheries measures. In general the EEC does not have a single legislative process. It all depends on the provision of the EEC Treaty which authorizes adoption of the measure concerned. In the case of fisheries, the relevant provision is Article 43. This provides that fisheries measures are to be adopted by the Council, acting on a proposal from the Commission and after having consulted the

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[6]Ten of the EEC's twelve Member States have signed the Convention. The other two Member States -- the Federal Republic of Germany and the United Kingdom -- declined to sign because of objections to the Convention's regime for deep-sea mining. Nor are all the Member States that did sign particularly happy with this aspect of the Convention.

European Parliament. In other words, the Commission draws up a proposal for a particular measure and sends it to the Council. The latter then sends the proposal to the European Parliament for its opinion on the proposed measure. Having received the Parliament's opinion, which, it is important to note, is in no way binding on it, the Council then decides whether to adopt the proposal, with or without amendment. If the Council decides to amend the measure, unanimity is necessary. For this purpose the votes are weighted among Member States, very roughly in proportion to population. There is a total of 76 votes, of which 54 constitute a qualified majority. Qualified majority voting is, however, subject to a kind of constitutional convention known as the Luxembourg accords. This provides that where a Member State considers that "a very important interest" of that State is at stake, a decision must be taken unanimously.

Although the basic elements of the EEC's fisheries regime (to be discussed below) were adopted according to this procedure, routine management measures (such as the annual adoption of TAC's and quotas and the periodic modification of non-quantitative conservation measures) are adopted by a more streamlined procedure. Article 11 of Regulation 170/83[7] provides that such measures are to be adopted by the Council by a qualified majority vote, acting on a proposal from the Commission. In other words, there is no need to consult the European Parliament. While the European Parliament has not unnaturally objected to its exclusion from this area of decision-making,[8] the legality of this procedure has been upheld by the European Court.[9] In addition, the taking of some minor management powers has been delegated from the Council to the Commission.[10]

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[7]*Official Journal of the European Communities* (hereafter abbreviated to O.J.) 1983, L24/1.

[8]See, e.g., its Resolutions of March 16, 1984 and February 20, 1986, O.J. 1984 C104/153 and 1986 C68/108.

[9]Case 46/86, *Romkes v Officier van Justitie* [1988] 3 C.M.L.R. 524.

[10]For a fuller account of the EEC's legislative processes in relation to fisheries, see Churchill, *op. cit.* in n.3, pp. 31-44; and M. Leigh, *European Integration and the Common Fisheries Policy* (Beckenham, U.K.: Croom Helm, 1983), Chap. 8.

The concern of the Commission and European Parliament with fisheries is not limited to the legislative process. The Commission has an important executive role. This includes the collection and processing of vast quantities of information (*e.g.* relating to catch statistics), licensing various vessels, making grants under Community schemes for modernizing, converting, scrapping vessels etc., and ensuring that Member States fulfill their obligations under the Community's fisheries regime. It should be noted, however, that the Commission does not have a monopoly of executive powers. The national authorities of the Member States also have important executive functions, notably in enforcing the Community's management measures in their 200-mile zones (see below).

In addition to its very limited legislative role, the European Parliament has a supervisory role. Thus it can (and does) ask questions of the Commission and Council, it comments on and criticizes the functioning of the EEC's fisheries regime, and it makes proposals for improvement. Furthermore, through its role in the EEC's budgetary process, it has some influence on the amount and purpose of the money the EEC spends on fisheries matters.[11]

Finally, we come to the fourth principal institution, the European Court of Justice. This consists of thirteen judges (one from each Member State and one additional judge to make an odd number) and sits in Luxembourg. The Court does not have unlimited jurisdiction to hear cases involving points of EEC law. It only has such jurisdiction as is conferred -- on it by the EEC Treaty. As far as fisheries matters are concerned, there are three main types of case which may come before the Court. First, the Commission may bring an action under Article 169 (or very occasionally another Member State under Article 170) against a Member State which it considers to be in breach of its Community obligations. Secondly, a Member State, or possibly an individual, may under Article 173 challenge the validity of a measure adopted by the Council or Commission. National courts also hear cases involving EEC fisheries questions (*e.g.*, the prosecution of a fisherman for contravening an EEC conservation measure), and this provides the third way in which cases involving fisheries may come before the European Court. If the case before the national court raises a question over the meaning or validity of a piece of EEC fisheries legislation,

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[11]For a further discussion of the role of the European Parliament, see D.I.A. Steel, "Fisheries Policy and the EEC: the Democratic Influence" 8 *Marine Policy* 350 (1984).

then the national court may (and in certain circumstances must) ask the European Court to give a ruling on the point under Article 177 of the EEC Treaty. Once the European Court has given its ruling, the case returns to the national court for the ruling to be applied and the case disposed of.

It is interesting to note that the number of cases involving fisheries questions before the European Court has increased quite considerably in recent years. In the period 1976 (when the Court heard its first fisheries case) to 1985 inclusive, 36 cases were brought before the Court, *i.e.*, an average of 3.6 cases per annum. In both 1986 and 1987 eight cases were referred to the Court, and in 1988 no less than 13 cases were referred. This increasing litigation is probably due to the fact that a comprehensive EEC fisheries regime has been in place only since 1983, as well as to the fact that Portugal and Spain joined the EEC in 1986 on fairly restrictive conditions as far as fisheries are concerned.

The EEC's Fisheries Management System in Outline[12]

Although the EEC's first fisheries legislation was adopted in 1970, the first moves towards a comprehensive system of fisheries management by the EEC were not made until 1976, on the eve of the extension by Member States of their fisheries limits to 200 miles. Negotiations over such a comprehensive system were particularly tough and protracted because of the different and often conflicting interests of Member States, and agreement on an EEC fisheries management system was reached only in January 1983. This system has a number of different elements: (a) total allowable catches (TACs) and quotas; (b) access to such TACs and quotas; (c) conservation measures other than TACs; (d) enforcement; (e) adjustment of capacity. Each of these will be considered in turn.

TACs and quotas

The cornerstone of EEC fisheries management is a system of TACs divided up into quotas allocated to individual Member States. Each

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[12]For fuller accounts, see Churchill, *op. cit.* in n.3, Chaps. 4-6; Leigh, *op. cit.* in n.10, Chaps. 5-7; R.R. Churchill, "The EEC's Fisheries Management System: A Review of the First Five Years of its Operation" 25 *Common Market Law Review* 369 (1988). See also the bibliography in Churchill, pp. 285-9.

year the Council establishes by means of a regulation TACs for most stocks of commercial interest found in EEC waters (except the Mediterranean). Such regulations are usually adopted at the end of the year preceding the year to which they relate and are based on proposals put forward by the Commission. In making its proposals, the Commission is advised by its Scientific and Technical Committee for Fisheries (a body of 27 fishery experts sitting in an individual capacity); the Committee in turn bases its advice on the recommendations of the International Council for the Exploration of the Sea (ICES). Although scientific advice forms the basis for the Commission's proposals for TACs, the actual TACs proposed by the Commission and adopted by the Council are on occasion increased, for socio-economic reasons, above the figures recommended by scientists. On the whole this does not appear to have been done to such an extent as to prejudice the long-term well-being of fish stocks. Where fish stocks migrate between the waters of the EEC and third States (such as Norway), TACs are established by agreement between the EEC and the third State concerned.

Once the Council has established a TAC for a stock of fish, it then divides the TAC into quotas allocated to individual Member States. The criteria for such allocation are: past catches; the needs of certain regions particularly dependent on fishing (these include Ireland, Northern Ireland, Scotland and North-East England); and the loss of catches suffered by some Member States as a result of third States having extended their fishing limits to 200 miles. Obviously these criteria are not very precise, and from them one could not easily determine the exact allocation of any particular TAC. What happens in practice is that the quotas agreed for 1982[13] (which were derived from these criteria) are regarded as providing the "key" for future years. In other words, the proportions into which the 1982 TACs were divided have been used (in some cases with small modifications) when adopting quotas for later years. Although some people have sought to argue that such a quota system is incompatible with the fundamental principle in EEC Law of non-discrimination, the European Court of Justice has held that the system is not contrary to EEC Law -- see the Romkes case.[14] It should be noted, however, that the system is to be reviewed in 1992 and again in 2002.

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[13]See Reg. 172/83, O.J. 1983 L24/30.

[14]*Op. cit.* in n.9.

Not all stocks for which TACs and quotas are currently set were covered by the 1982 TAC and quota regulations. For such stocks either a "key" has been set subsequently, notably for North Sea herring, or allocation is based on recent past catches. In the case of certain stocks of fish which are fished mainly for reduction to meal and oil, although a TAC is set, it has not yet been found necessary to divide the TAC into quotas: the reason presumably being that in most cases these stocks are large and Member States' interest in them (apart from Denmark) limited. Finally, in the case of Spain and Portugal, which became members of the EEC at the beginning of 1986, special and highly complex transitional arrangements apply which are due to last until 2002.

Although the EEC simply allocates quotas to Member States, the latter are permitted, under Article 5(2) of Regulation 170/83[15] to refine the system, for example by dividing up a quota so that it is taken at different times of the year (in order to prevent a concentration of fishing effort at the beginning of the year, with the undesirable consequences that has), or by allocating a quota between different sections of the fleet. Regulation 170/83 also attempts to avoid the waste that would result from Member States' under-utilizing their quotas by allowing Member States to exchange unfilled quotas: in 1986, for example, 61 such "swaps" took place during the first 10 months of the year.[16]

A crucial question, of course, is how far Member States have observed the quotas allocated to them and what sanctions can be applied where a Member State has exceeded its quotas. As regards the first point, while most Member States have observed most of the quotas allocated to them, there have been quite a number of cases where Member States have significantly exceeded their quotas. As regards the sanctions that can be applied in such cases, there are a number of sanctions, of varying effectiveness, available. First, under Article 169 of the EEC Treaty, the Commission can bring the offending Member State concerned before the European Court of Justice (two such cases are in fact currently pending before the

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[15]*Op. cit.* in n.7.

[16]COM (86) 639.

Court[17]): the court, however, is limited to giving a declaratory judgment that the Member State concerned has broken its Community obligations. This would seem to be of limited effectiveness, because the quota having already been exceeded, there is no way in which the Member State concerned can remedy the breach (unless the Court's declaration took the form of saying, for example, that a Member State lacked an adequate catch reporting system).

A second possible sanction is the financial penalties that can be imposed under the Regulation on the Common Organization of the Market in Fishery Products.[18] Under the Regulation, Member States are required to expend money on various price support arrangements for fish. This expenditure is then reimbursable by the European Agricultural Guidance and Guarantee Fund (EAGGF). However, Article 26(2) of the Regulation provides that no such reimbursement is to be made in respect of fish from a stock for which a Member State has exceeded its quotas. This provision is less sweeping than may appear at first sight because it can only be applied if the quotas exceeded relate to species for which price support arrangements exist (and by no means all species are eligible for price support arrangements under the Regulation) and if such arrangements are actually utilized (which is not always the case). As far as the writer is aware, little use has so far been made of this provision in practice. Another possible financial sanction is withholding export refunds. Although the Regulation on the Common Organization of the Market in Fishery Products does not link the payment of export refunds to the observance of quotas, the European Court has nevertheless held that export refunds may be withheld if quotas are exceeded.[19] Again this is a sanction of limited practical utility. Export refunds have never been widely used for fishery products, and have in fact been in suspension since November 1983.

A final form of sanction for exceeding quotas is to reduce the quotas of the offending Member State for the following year. Such a

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[17]Case 290/87, *Commission v Netherlands*, O.J. 1987 C290/7; Case 62/89, *Commission v France*, O.J. 1989 C94/11.

[18]Reg. 3796/81, O.J. 1981 L379/1.

[19]Case 326/85, *Netherlands v Commission*, Judgment of December 15, 1987 (not yet reported); Case 332/85, *Federal Republic of Germany v. Commission*, Judgment of December 15, 1987 (not yet reported).

sanction was only introduced in early 1987,[20] and so far has been used sparingly.

A major reason why Member States exceed their quotas is the over-capacity in the Community's fishing fleets. Although some action has been and is being taken both by Member States and the Community to adjust the capacity of Community fishing fleets to catch potential (see below), until there is a better balance between catching capacity (at least in certain sections of the Community's fishing fleets) and the quantity of fish available, the exceeding of quotas is likely to continue as a feature of the Community' s fisheries management system.

Access

TACs and quotas are set in terms of the Statistical Areas of ICES and the Fisheries Committee for the Eastern Central Atlantic (CECAF). It follows from the originally very controversial principle of equal access (under which a Member State must admit the fishing vessels of any other Member State to its waters on the same conditions as its own vessels -- see Article 2 of regulation 101/76)[21] that the fishing vessels of one EEC Member State can fish for the quotas allocated to that particular Member State anywhere in the ICES or CECAF Area concerned, regardless of which Member State's (or States') fishing zone(s) that ICES or CECAF Area lies in. This is subject to three exceptions. The first exception is a 12-mile zone off the coast of Member States, which is reserved to local vessels save that within the outer six miles some States' vessels enjoy certain historic rights of fishing (which are listed in Annex I of Regulation 170/83). The second exception is the so-called Orkney/Shetland box, an area around the North of Scotland, Orkneys and Shetlands to which the access of larger vessels is restricted. These two exceptions are to be reviewed in 1992 to see what "adjustments" (if any) may be necessary, and are to be subjected to a more thorough-going review in 2002. Regulation 170/83 suggests that if no positive decision is taken in 2002 to renew these exceptions, they will lapse. Finally, the equal access principle does not apply at all to Portugal and Spain: the access of Portuguese and Spanish vessels to the waters of other Member States, and of the vessels of such State to Iberian waters, is strictly limited, at least until 2002.

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[20]Regs. 4027/86 and 493/87, O.J. 1986 L376/4 and 1987 L50/13.

[21]O.J. 1976 L20/19.

One particular problem raised by EEC rules on access and quotas experienced by some EEC Member States (particularly Ireland and the United Kingdom) is the phenomenon known as "quota hopping". This is where what are in reality foreign interests from other Member States register vessels in a Member State and fish for the quotas allocated to that Member State. For reasons of space and because it raises complex legal issues, this problem will simply be referred to here, and no attempt will be made to suggest how or whether the problem can be combatted: in any case the answer to these last questions is largely dependent on the outcome of litigation currently pending before the European Court.[22]

Conservation Measures other that TACs

Apart from TACs the Council adopts a variety of other conservation measures. These are contained partly in the annual TAC and quota regulations and partly in Regulations 3094/86 and 1866/86 (as amended).[23] These measures include minimum mesh sizes, other gear restrictions, minimum fish sizes, closed seasons and closed areas, and apply to all Community waters except those in the Mediterranean (for which no Community conservation measures have yet been adopted).

The EEC's non-quantitative conservation measures are largely based on ICES' recommendations, although they are not always as strict *e.g.*, in the North Sea. ICES has recommended a minimum mesh size of 120 mm, whereas the EEC has stipulated a minimum of 90 mm (increased from 80 mm at the beginning of 1989). The Council has made something of a habit, induced by political pressure from fishermen's organizations, of deferring and delaying decisions to adopt stricter conservation measures in line with scientific recommendations.

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[22]See Case 3/87, *R v Ministry of Agriculture, Fisheries and Food ex p. Agegate Ltd.*, O.J. 1987 C39/5; and Case 216/87, *R v Ministry of Agriculture, Fisheries and Food ex p. Jaderow Ltd.*, O.J. 1987 C223/5. See also *R v Secretary of State for Transport ex p. Factortame Ltd.*, where in March 1989 the English Divisional Court made a reference to the European Court under Article 177 (139 *New Law Journal* 540 (1989)).

[23]O.J. 1986 L288/1 and L162/1, respectively. Reg. 3094/86 is a measure of general application; Reg. 1866/86 applies only to the Baltic.

This problem is compounded by the fact that those measures which have been adopted are poorly observed. According to a Commission report of June 1986, breaches of EEC measures are frequent and in some cases "so widespread that they are endangering conservation."[24] Whether the position has improved since this report was published, the writer does not know.

Enforcement

It was stated near the beginning of this paper that the competence to adopt fisheries management measures vests in principle exclusively with the EEC. However the competence to enforce such measures lies largely with the Member States. This is because the EEC possesses no real law-enforcement machinery of its own. The EEC has, however, adopted a Regulation[25] which imposes certain duties on Member States relating to their law enforcement responsibilities. The main features of this Regulation are: (1) a general duty on Member States to enforce Community rules relating to TACs, quotas, and other conservation measures; (2) a duty on skippers and Member States to report catches; (3) the establishment of a group of Community fisheries inspectors to oversee the work of national fisheries inspectors. Although understaffed, the Community inspectorate has uncovered ineffective enforcement by some Member States, notably the "grey market" operated by the Dutch fishing industry. Furthermore Member States have been lax in establishing proper catch reporting systems and at sending details of catches to the Commission, both of which are required by the Regulation.[26]

Apart from requiring its Member States to take enforcement action, the EEC has sought to encourage effective enforcement by providing financial assistance. Thus, for the period 1977–82 the EEC reimbursed Greenland (now no longer part of the EEC) and Ireland for part of their expenditure on fisheries inspection and surveillance.[27] Since

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[24]COM (86) 301, p. 21.

[25]Reg. 2241/87, O.J. 1987 L207/1.

[26]See COM (86) 301.

[27]Dec. 78/640, O.J. 1978 L211/34.

1987 all Member States have been eligible for Community aid to modernize their monitoring and supervision facilities.[28]

Adjustment of Capacity

At the time of the extension of fishing limits to 200 miles in the late 1970s, there was considerable over-capacity in EEC fishing fleets. Although the Commission in 1976 proposed a package of structural measures whose aim *inter alia* was to adjust capacity to the EEC's new catch potential, it was not until 1983 that the Council finally reached agreement on a modified version of the Commission's proposals.[29] In the interim a good deal of restructuring of EEC fishing fleets took place, largely -- though not exclusively -- as a result of the operation of market forces. Larger distant-water vessels declined drastically, while there was some increase in the near and middle-water fleets. Overall, there was a decrease in capacity. Nevertheless, capacity was still considerably above the optimum compared with the catches available.

The measures adopted in 1983 are aimed *inter alia* at encouraging a reduction in capacity through the provision of financial aid to Member States. This aid includes grants for the scrapping and temporary laying-up of vessels; grants for deploying capacity through exploratory voyages for species or in areas which have previously been under-utilized and through joint ventures with third States; and financial aid for modernizing vessels provided that the aid forms part of a national program whose long-term objective is to balance capacity with catch potential. It is not very clear what the cumulative effect of these measures on capacity has been because of the rather limited statistics available: it seems unlikely, however, that there has been any marked reduction in capacity in EEC fishing fleets as a whole.

Having given this fairly brief outline of the EEC fisheries management system, this paper will now turn to examine the role of the EEC in relation to those matters where the UN Convention on the Law of the Sea calls for implementation through international

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[28]Dec. 87/278, O.J. 1987 L135/31. Dec. 87/279, O.J. 1987 L135/33, provides for additional aid for Portugal.

[29]Regs. 2908/83 and 2909/83 and Dir. 83/515, O.J. 1983 L290/1, 9 and 15. These measures lasted for three years, and were then renewed, in somewhat modified form, by Reg. 4028/86, O.J. 1986 L376/7. This Reg. is of 10 years' duration.

organizations. It is worth again stressing the point made at the outset of this paper that the role of the EEC in this area is much more akin to a coastal State than an international organization.

The EEC and Implementation by International Organizations of the Provisions of the UN Convention on the Law of the Sea Relating to Living Resources

There are seven main areas relating to living resources where the UN Convention calls for implementing action to be taken by international organizations. The role of the EEC in relation to each of these will be briefly considered in turn.

Co-operation over Conservation in the EEZ

Article 61(2) calls on the coastal State and competent international organizations to co-operate to ensure that living resources in the EEZ are not endangered through over-exploitation. Article 61(3) requires coastal States, in adopting management measures, to take into account "any generally recommended international minimum standards." Finally, Article 61(5) provides that States are to exchange scientific information and catch statistics "through competent international organizations."

From the description of the EEC's fishery management system above, it will be obvious that the EEC's performance of these obligations (assuming they were binding) relates more to the obligations placed on coastal States than on international organizations. In relation to Article 61(2) and (3), the EEC has cooperated with and taken into account the recommendations of various organizations, particularly ICES. While the EEC itself is not a member of ICES, most of its Member States are, and in 1987 the EEC signed a Co-operation Agreement with ICES.[30]

In relation to the obligations of Article 61(5), the EEC appears more like an international organization. First, as mentioned earlier, Member States share catch statistics and other data through the Commission. Secondly, in October, 1987, the Council adopted a Regulation providing for coordination of fisheries research undertaken

[30]O.J. 1987 L149/14.

by Member States and empowering itself to adopt Community research programs.[31]

Shared Stocks

Article 63(1) calls on coastal States to cooperate, either directly or through appropriate organizations, over the management of shared (or joint) stocks. Outside the Baltic, the EEC has cooperated directly with the States with which it shares stocks (principally the Faroes, Norway and Sweden), but the measures agreed have taken into account ICES' recommendations.[32] In the Baltic cooperation over the management of shared stocks takes place through the International Baltic Sea Fishery Commission, of which the EEC has been a member since 1984.

Straddling Stocks

Article 63(2) calls on the coastal State and States fishing the adjacent high seas for straddling stocks to cooperate over conservation of such stocks either directly or though appropriate organizations. The main area where EEC vessels fish for straddling stocks is in the Northwest Atlantic, where Canada is the coastal State and the EEC one of the States fishing on the adjacent high seas. Cooperation over the management of these stocks takes place through the Northwest Atlantic Fisheries Organization (NAFO), of which the EEC is a founder member. It has been suggested in a recent article that the cooperation through NAFO has not worked very well (at least as far as cod stocks are concerned), and that for this the EEC is largely to blame.[33]

Highly Migratory Species

Article 64 provides that the coastal State and other States whose nationals fish for highly migratory species shall co-operate over

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[31]Reg. 3252/87, O.J. 1987 L314/17. For the first program adopted under the Reg., See Dec. 87/534, O.J. 1987 L314/20.

[32]For further details of such co-operation, see Churchill, *op. cit.* in n.3, pp. 191-3; J. Farnell and J. Elles, *In Search of a Common Fisheries Policy* (Aldershot, U.K.: Gower, 1984), pp. 58-64.

[33]K.M. Sullivan, "Conflict in the Management of a Northwest Atlantic Transboundary Cod Stock" 13 *Marine Policy* 118 (1989).

conservation and optimum utilization of these species either directly or through appropriate international organizations. EEC waters which contain tuna fall within the area covered by the International Commission for the Conservation of Atlantic Tunas (ICCAT), and this is also the main area where EEC vessels fish for tuna. In 1984 a Protocol to the ICCAT Convention was signed which provides for the EEC to become a party to ICCAT. The EEC itself has adopted no management measures for tuna in its waters; presumably it regards the regulatory measures adopted by ICCAT as adequate.

Marine Mammals

Article 65 provides that "States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through appropriate international organizations for their conservation, management and study. Whether the EEC has the competence to regulate the catching of marine mammals is a controversial issue.[34] Because of this controversy the EEC has not sought membership of the International Whaling Commission (IWC) in place of its seven Member States which are members: the EEC does, however, have observer status with the IWC. For the same reason the EEC has not adopted any regulatory measures in respect of the catching of marine mammals, although some of its Member States (such as the United Kingdom) ban whaling in their 200-mile zones. However, the EEC has taken some steps to promote the conservation of whales by banning commercial imports of most primary whale products into the EEC.[35]

Anadromous Species

Article 66(5) provides that the State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of the preceding paragraphs of Article 66, "where appropriate, through regional organizations." The main anadromous stock of concern to the EEC is the North Atlantic salmon, in respect of which a number of EEC Member States (principally EEC vessels have also fished for salmon of non-EEC origin: this was particularly the case with vessels from Greenland

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[34]For a discussion of this question, see Churchill, *op. cit.* in n.3, pp. 54-5.

[35]Regs. 348/81 and 3786/81, O.J. 1981 L39/1 and L377/42.

before its departure from the EEC in 1985. Implementation of the provisions of Article 66 in respect of North Atlantic salmon has largely taken place through the North Atlantic Salmon Conservation Organization (NASCO), of which the EEC is a founder member.

Conservation of High Seas Resources

Articles 118 and 119 call on States fishing on the high seas to cooperate over the management of high seas stocks, where appropriate, through international organizations. EEC vessels fish on the high seas in a number of areas, and in these areas the EEC has become a member of the international organization concerned. These organizations include NAFO, the North-East Atlantic Fisheries Commission, and the Commission for the Conservation of Antarctic Marine Living Resources.

Education, Training and the Transfer of Technology: the Role of the EEC in the Fisheries Field

One of the sub-themes of the Conference is the role of international organizations in relation to education, training, and the transfer of technology. This section of the paper considers the role of the EEC in this matter as it relates to fisheries.

The EEC provides education and training in relation to fisheries and transfers fisheries technology on both a multilateral basis and a bilateral basis. The multilateral basis is the third Lome Convention,[36] which the EEC has concluded with some 66 developing African, Caribbean, and Pacific States (ACP States). Articles 51-53 of this Convention call on the EEC to provide the ACP States with financial and technical assistance to encourage them to develop their fishing industries, including training ACP nationals and developing ACP research capabilities. Acting under these provisions, the EEC has provided a considerable amount of financial and technical assistance to a variety of ACP States.

In addition to assistance under the Lome Convention, the EEC also provides considerable assistance under the provisions of a number of bilateral agreements with African States[37] concerned with the access

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[36]Text in O.J. 1986 L86/1.

[37]Morocco, Mauritania, Senegal, Gambia, Guinea Bissau, Guinea, Equatorial Guinea, Gabon, Sao Tome & Principe, Angola, Mozambique, Madagascar, Comoros, Mauritius and Seychelles.

of EEC vessels to the EEZs of these States. These agreements provide for access on conditions which include an obligation on EEC vessels to employ as crew fishermen from the State concerned and the payment of financial compensation which is to be used to finance the development of fisheries, fisheries research, education, and training in each of the States concerned.

Conclusions

It is regretted that this paper has probably shed little light on the main theme of the Conference, implementation of the UN Convention by and through international organizations. This is because, as suggested at the outset of this paper, as far as implementation of the Convention's provisions concerning fisheries is concerned, the EEC is more akin to a coastal State than an international organization. Nevertheless, it is hoped that the account in this paper of the EEC fisheries regime will prove to be of some interest in a broader context.

Thomas Clingan: Thank you very much, Robin. Our final speaker will address another area calling for international cooperation: the management of marine mammals. Judith Johnson is from the Secretariat to the Convention on Migratory Species of Wild Animals, United Nations Environmental Programme.

THE BONN CONVENTION AND THE LAW OF THE SEA CONVENTION: CONSERVATION OF MARINE MAMMALS

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The Bonn Convention

Scope of the Convention

The Convention on the Conservation of Migratory Species of Wild Animals (commonly called the Bonn Convention) covers all migratory species, including marine mammals, throughout the world over the whole of their migratory routes. A copy of the text of the Convention is at Annex 1. Definitions of "migratory species," "Range" and "Range States" are given in Article 1 of the Convention. At the second meeting of the Conference of the Parties guidelines were adopted for the application of the term "migratory species." The word 'cyclically' relates to a cycle of any nature, such as astronomical (circadian, annual,...), life or climatic, and of any frequency; the word 'predictably' implies that a phenomenon can be anticipated to recur in a given set of circumstances, though not necessarily regularly in time.

The Convention came into force in 1983 and, in May 1989, had 29 Parties (see list at Annex 2).

Subject matter and measures to be taken

The Convention provides a framework within which the Parties are urged to take action individually or in cooperation to conserve migratory species, particularly those the conservation status of which is unfavorable.

Species to which the Convention applies are listed in two Appendices. Different measures are to be taken. Appendix I includes migratory species that are endangered. Parties shall endeavor to provide immediate protection for them, such as to conserve and restore their habitats and prevent adverse effects of obstacles that impede the migration. More importantly the taking of animals listed on Appendix I must be in any case prohibited by Range State Parties. Exceptions may be made, but only under the assumption of Article III (5), for example for scientific purposes.

Marine mammals listed in Appendix I are *Balaenoptera musculus* (blue whale), *Megaptera novaeangliae* (humpback whale), *Balaena mysticetus* (bowhead whale), *Eubalaena glacialis* (black right whale), and *Monachus monachus* (Mediterranean monk seal).

Appendix II includes migratory species which have an unfavorable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from international agreement. Appendix II includes *Dephinapterus leucas* (white whale), *Phoca vitulina* (common seal) Baltic and Wadden Sea populations, *Halichoerus grypus* (grey seal) (Baltic Sea populations, *Monachus monachus* (Mediterranean monk seal) and to add *Dugong dugon* (sea cow). The last conference of the Parties decided to add also the North and Baltic Sea populations of *Phocoena phocoena* (harbor porpoise), *Tursiops truncatus* (bottlenose dolphin), *Delphinus delphis* (common dolphin, *Grampus griseus* (Risso's dolphin), *Globicephala malaena* (long-finned pilot whale), *Lagenorhynchus albirostris* (white-beaked dolphin) and *Lagenorhynchus acutus* (white-sided dolphin). A migratory species may be listed both in Appendix I and Appendix II.

The Convention provides for two forms of agreements for Appendix II species which should be concluded by the Parties.

First there are *Agreements* which should cover the whole of the range of the migratory species concerned and should be open to accession by all Range States of that species, whether or not they are Parties to the Convention. An *Agreement* should provide conservation and, where required and feasible, restoration of the habitats of importance in maintaining a favorable conservation status, and protection of those habitats from disturbances, including strict control of the introduction of, or control of already introduced, exotic species detrimental to the migratory species. The *Agreement* should establish, if necessary, appropriate machinery to assist in carrying out the aims of the *Agreement*, to monitor its effectiveness, and to prepare reports for the Conference of the Parties. With regard to a migratory species of the order *Cetacea*, an *Agreement* should, at a minimum, prohibit any taking that is not permitted for that migratory species under any other multilateral agreement. It should provide for accession even by states that are not Range States of that migratory species.

Apart from these formal *Agreements* actions can be taken by concluding more informal agreements for populations which merely periodically cross national jurisdictional boundaries. It was decided at the last Conference of the Parties in October 1988 that informal

agreements should provide for accession by all Range States whether or not they are Parties to the Convention.

Currently there are no *Agreements* under the Convention although Parties have directed that four *Agreements* should be concluded, including one for North and Baltic Sea populations of *Phocoena phocoena* and *Tursiops truncatus*. An agreement on the Wadden Sea populations of *Phoca vitulina* is also being prepared but it still has not been clarified whether the draft will become an agreement under the Convention and whether it will be open to accession by all Range States.

At the last Conference of the Parties in October 1988 the desirability of concluding formal and non-formal "agreements" under the Convention was expressed. Priority was also given to a global review of the conservation status of small cetaceans including fresh water species as a basis for proposals from Parties for additions to Appendix II. A working group, directed by the Scientific Council of the Convention, will over the next three years do this review.

Range States

A list of Range States is kept by the Secretariat which is informed by the Parties in regard of which migratory species listed in the Appendices they consider themselves to be Range States. This includes provision of information on their flag vessels engaged outside national jurisdictional limits in taking the migratory species concerned and, where possible, future plans in respect of such taking.

Conservation of species in the U.N. Convention on the Law of the Sea (UNCLOS)

The Law of the Sea Convention establishes a comprehensive framework for the regulation of all ocean space; the conservation of species is only one of the aspects addressed. However within its framework, it contains provisions, *inter alia*, with regard to the protection and preservation of the marine environment, conservation and exploitation of living resources, as well as scientific research. Furthermore Part V includes provisions relating to the conservation and utilization of living resources within the exclusive economic zone; Part VII deals with the conservation and management of the living resources of the High Sea; Part XI includes provisions beyond the limits of national jurisdiction within the "area."

However, of particular relevance to the Bonn Convention are Articles 64 (highly migratory species), 65 (marine mammals), and 66-67 (anadromous and catadromous stocks). Highly migratory species under UNCLOS are listed in its Appendix I, which includes dolphins and cetaceans, and therefore in part overlaps with Appendices I and II of the Bonn Convention. Coastal and other states that fish in the region for these species listed in Appendix I shall cooperate with a view to ensuring conservation and promoting the objective of optimum utilization of such species. Article 65-67 address to migratory species as well. The coastal states may adopt strict measures of conservation, such as to prohibit, limit, or regulate the exploitation of marine mammals. The provisions of Part V do not oppose these measures. In the case of cetaceans, States shall in particular work through the appropriate international organizations for their conservation, management, and study. For anadromous stocks, responsibility is primarily given to States in whose rivers the stocks originate; for catadromous stocks coastal States in whose waters these species spend the greater part of their life shall have responsibility for the management and shall ensure the ingress and egress of migratory fish. Other States concerned with anadromous stocks shall cooperate with the State of origin with regard to their conservation and management. In the case of catadromous fish migrating through the exclusive zone of another State, management, including harvesting of such fish, shall be regulated by agreement between the coastal State mentioned above and the other State concerned.

Relationship between the Bonn Convention and UNCLOS

Article XII, paragraph 1 of the Bonn Convention provides that nothing in the Convention shall prejudice the codification and development of the law of the sea, nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

At the same time, with regard to marine mammals Article 65 of UNCLOS, as mentioned above, states that nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit, or regulate the exploitation of marine mammals more strictly than provided for in this Part.

So, legally, conservation measures for marine mammals may be taken both under the Bonn Convention and UNCLOS, without conflict. The Law of the Sea Convention does not contain any exception for commercial purposes. States will be able to refuse any

access to cetaceans in their exclusive economic zone under a Bonn Convention *Agreement* or under an Appendix I listing of an endangered species. Strict conservation measures have also been adopted within the scope of the International Convention for the Regulation of Whaling by declaring particular species and stocks to be Protected Stocks. With regard to the Whaling Convention it has been suggested that Article 65 of the LOS can be taken to mean that Parties to the Law of the Sea Convention must abide by the regulations of the Whaling Convention. (Simon Lyster, International Wildlife Law (Llandysul, Grotius Publications Ltd, 1985) p. 36). This view, if accepted, would apply to the Bonn Convention and this point may be worthy of further discussions during the present Conference.

Relations Between the Bonn Convention and Other Conventions Relevant to Marine Mammals

Article XII, paragraph 2 of the Bonn Convention provides that the provisions of this Convention shall in no way affect the rights or obligations of any Party deriving from any existing treaty, convention, or agreement. There are many conventions dealing with living marine resources; some of them should be mentioned:

- The International Convention for the Regulating of Whaling, 1946;
- The Convention on the Conservation of European Wildlife and Natural Habitats, Berne 1979;
- The Convention on Wetlands of International Importance, especially as Waterfowl Habitat, Ramsar 1971;
- The Convention on the Conservation of the Antarctic Marine Living Resources, Canberra 1980;
- The Convention for the Conservation of Antarctic Seals, 1972
- The Convention on the Conservation of the Living Resources of the Southeast Atlantic, Rome 1969;
- The Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and Belts, Gdansk 1973
- The Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki 1974;
- The Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Abidjan 1981;
- The Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, Lima 1981;

- The Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena 1983;
- The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, Nairobi 1985;
- The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 1986.

If a Party of one of these Conventions, being at the same time Party of the Bonn Convention, intends to conclude *Agreements* under the Bonn Convention, it would have to be established in each case whether one of the above-mentioned Conventions provides for the adoption of stricter regional measures.

Coordination Between the Organs of the Bonn Convention and Other Organizations

The Bonn Convention requires the Secretariat to maintain liaison with and promote liaison between the Parties, the Standing Bodies set up under *Agreements*, and other international organizations concerned with migratory species.

The Secretariat maintains regular contact with the International Whaling Commission Secretariat as well as to the Ramsar Convention Bureau and also to other governmental and non-governmental organizations and to international programs involved with marine mammal conservation (such as the Marine Mammals Action Plan). It keeps them informed about the activities under the Bonn Convention, for example, the activities of the working group on small cetaceans which was established by the Conference of the Parties. The review of the conservation status of small cetaceans will be undertaken in consultation with experts also involved in the work of the IUCN Cetacean Specialist Group and the Commission of the Whaling Convention (IWC).

The Secretariat ensures close cooperation with any other related work such as the possible joint meeting to review the status and problems of small cetaceans worldwide being proposed between organizations such as UNEP, IUCN, and FAO under the Marine Mammals Action Plan.

In more general ways there have also been deliberate efforts over the past year to improve coordination and cooperation between the secretariats and other responsible bodies for various Conventions and

programs addressing nature conservation. For example, arising from a proposal by the Ecosystem Conservation Group (consists of FAO, UNEP, and UNESCO), IUCN hosted a meeting to which the Secretariats of the Bonn, Berne, CITES, Ramsar, and World Heritage conventions and the IWC were invited to discuss opportunities for closer cooperation between the secretariats in the interest of effectiveness and economy.

A second such meeting is expected to be held later in 1989. In addition, in the context of an *ad hoc* meeting of experts on biological diversity convened by UNEP between representatives of governments and relevant Convention secretariats and international organizations, detailed consideration was given to rational action of conventions on biological diversity, in particular ways to maximize the individual and collective potential of existing international conventions and the effectiveness, including joint and regular examination of problems of mutual concern and regular meetings of the secretariats.

Following these discussions, secretariats have given even more attention to facilitate coordination between their activities by scheduling meetings to allow common participation and by involving other secretariats in key meetings.

Furthermore, a number of interagency meetings to address particular aspects of marine mammals conservation have been scheduled for the coming months. For example, UNEP, as secretariat of the Marine Mammals Action Plan, is organizing a Planning and Co-ordinating committee meeting possibly involving UNEP, UNESCO, ICSU, IWC, IOC, IATTC, IFAW, CCAMLR and Greenpeace, *inter alia* to enhance the exchange of information between its member organizations about their activities relevant to the Action Plan. In addition, the Council of Europe, as secretariat to the Berne Convention, is organizing a meeting in association with the Portuguese Government, to discuss coordinating the activities of various bodies relating to the conservation of the Mediterranean monk seal (*Monachus monachus*).

However, experience has shown that often perceived conflicts between various Conventions and programs arise because of a lack of communication and coordination within organizations, governments, or even single ministries because their functional divisions do not encourage a holistic approach to a particular subject. Therefore, while secretariats must as a priority ensure good communication between all bodies involved with activities relating to a particular issue, governments, departments, and individual officers must also pay greater attention to effective liaison.

Of course, recognition must be given to the work of non-governmental organizations which are sometimes in a position to provide a critical bridge or focal point between diverse interests much more effectively than other intergovernmental and governmental bodies. In this regard the Netherlands Institute for the Law of the Sea has provided a very important vehicle for consultation between the various interests in marine mammals conservation.

CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS[76]

Bonn, 23 June 1979

The Contracting Parties,

Recognizing that wild animals in their innumerable forms are an irreplaceable part of the earth's natural system which must be conserved for the good of mankind;

Aware that each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely;

Conscious of the ever-growing value of wild animals from environmental, ecological, genetic, scientific, aesthetic, recreational, cultural, educational, social and economic points of view;

Concerned particularly with those species of wild animals that migrate across or outside national jurisdictional boundaries;

Recognizing that the States are and must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries;

Convinced that conservation and effective management of migratory species of wild animals require the concerted action of all States within the national jurisdictional boundaries of which such species spend any part of their life cycle;

Recalling Recommendation 32 of the Action Plan adopted by the United Nations Conference on the Human Environment (Stockholm, 1972) and note with satisfaction at the Twenty-seventh Session of the General Assembly of the United Nations,

Have agreed as follows:

Article I

INTERPRETATION

1. For the purpose of this Convention:

a) "Migratory species" means the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries;

b) "Conservation status of a migratory species" means the sum of the influences acting on the migratory species that may affect its long-term distribution and abundance;

c) "Conservation status" will be taken as "favourable" when:

(1) population dynamics data indicate that the migratory species is maintaining itself on a long-term basis as a viable component of its ecosystems;

(2) the range of the migratory species is neither currently being reduced, nor is likely to be reduced, on a long-term basis;

(3) there is, and will be in the foreseeable future, sufficient habitat to maintain the population of the migratory species on a long-term basis; and

(4) the distribution and abundance of the migratory species approach historic coverage and levels to the extent that potentially suitable ecosystems exist and to the extent consistent with wise wildlife management;

d) "Conservation status" will be taken as "unfavourable" if any of the conditions set out in sub-paragraph (c) of this paragraph is not met;

e) "Endangered" in relation to a particular migratory species means that the migratory species is in danger of extinction throughout all or a significant portion of its range;

f) "Range" means all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overlies at any time on its normal migration route;

g) "Habitat" means any area in the range of a migratory species which contains suitable living conditions for that species;

h) "Range State" in relation to a particular migratory species means any State (and where appropriate any other Party referred to under sub-paragraph (k) of this paragraph) that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species;

i) "Taking" means taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct;

j) "Agreement" means an international agreement relating to the conservation of one or more migratory species as provided for in Articles IV and V of this Convention; and

k) "Party" means a State or any regional economic integration organization constituted by sovereign States which has competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Convention for which this Convention is in force.

2. In matters within their competence, the regional economic integration organizations which are Parties to this Convention shall in their own name exercise the rights and fulfil the responsibilities which this Convention attributes to their member States. In such cases the member States of these organizations shall not be entitled to exercise such rights individually.

3. Where this Convention provides for a decision to be taken by either a two-thirds majority or a unanimous decision of "the Parties present and voting" this shall mean "the Parties present and casting an affirmative or negative vote". Those abstaining from voting shall not be counted amongst "the Parties present and voting" in determining the majority.

Article II

FUNDAMENTAL PRINCIPLES

1. The Parties acknowledge the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever

possible and appropriate, paying special attention to migratory species the conservation status of which is unfavourable, and taking individually or in co-operation appropriate and necessary steps to conserve such species and their habitat.

2. The Parties acknowledge the need to take action to avoid any migratory species becoming endangered.

3. In particular, the Parties:

a) should promote, co-operate in and support research relating to migratory species;

b) shall endeavour to provide immediate protection for migratory species included in Appendix I; and

c) shall endeavour to conclude AGREEMENTS covering the conservation and management of migratory species included in Appendix II.

Article III

ENDANGERED MIGRATORY SPECIES: APPENDIX I

1. Appendix I shall list migratory species which are endangered.

2. A migratory species may be listed in Appendix I provided that reliable evidence, including the best scientific evidence available, indicates that the species is endangered.

3. A migratory species may be removed from Appendix I when the Conference of the Parties determines that:

a) reliable evidence, including the best scientific evidence available, indicates that the species is no longer endangered, and

b) the species is not likely to become endangered again because of loss of protection due to its removal from Appendix I.

4. Parties that are Range States of a migratory species listed in Appendix I shall endeavour:

a) to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction;

b) to prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species; and

c) to the extent feasible and appropriate, to prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling the introduction of, or controlling or eliminating, already introduced exotic species.

5. Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species. Exceptions may be made to this prohibition only if:

a) the taking is for scientific purposes;

b) the taking is for the purpose of enhancing the propagation or survival of the affected species;

c) the taking is to accommodate the needs of traditional subsistence users of such species; or

d) extraordinary circumstances so require;

provided that such exceptions are precise as to content and limited in space and time. Such taking should not operate to the disadvantage of the species.

6. The Conferences of the Parties may recommend to the Parties that are Range State of a migratory species listed in Appendix I that they take further measures considered appropriate to benefit the species.

7. The Parties shall as soon as possible inform the Secretariat of any exceptions made pursuant to paragraph 5 of this Article.

Article IV

MIGRATORY SPECIES TO BE THE SUBJECT TO AGREEMENTS: APPENDIX II

1. Appendix II shall list migratory species which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international co-operation that could be achieved by an international agreement.

2. If the circumstances so warrant, a migratory species may be listed both in Appendix I and Appendix II.

3. Parties that are Range States of migratory species listed in Appendix II shall endeavour to conclude agreements where these should benefit the species and should give priority to those species in an unfavourable conservation status.

4. Parties are encouraged to take action with a view to concluding agreements for any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdiction boundaries.

5. The Secretariat shall be provided with a copy of each agreement concluded pursuant to the provisions of this Article.

Article V

GUIDELINES FOR AGREEMENTS

1. The object of each agreement shall be to restore the migratory species concerned to a favourable conservation status or to maintain it in such a status. Each agreement should deal with those aspects of the conservation and management of the migratory species concerned which serve to achieve that object.

2. Each agreement should cover the whole of the range of the migratory species concerned and should be open to accession by all Range States of that species, whether or not they are Parties to this Convention.

3. An agreement should, wherever possible, deal with more than one migratory species.

4. Each agreement should:

a) identify the migratory species covered;

b) describe the range and migration route of the migratory species;

c) provide for each Party to designate its national authority concerned with the implementation of the agreement.

d) establish, if necessary, appropriate machinery to assist in carrying out the aims of the agreement, to monitor its effectiveness, and to prepare reports for the Conference of the Parties;

e) provide for procedures for the settlement of disputes between Parties to the agreement; and

f) at a minimum, prohibit, in relation to a migratory species of the Order Cetacea, any taking that is not permitted for that migratory species under any other multilateral agreement and provide for accession to the agreement by States that are not Range States of that migratory species.

5. Where appropriate and feasible, each agreement should provide for but not be limited to:

a) periodic review of the conservation status of the migratory species concerned and the identification of the factors which may be harmful to that status;

b) co-ordinated conservation and management plans;

c) research into the ecology and population dynamics of the migratory species concerned, with special regard to migration;

d) the exchange of information on the migratory species concerned, special regard being paid to the exchange of the results of research and of relevant statistics;

e) conservation and, where required and feasible, restoration of the habitats of importance in maintaining a favourable conservation status, and protection of such habitats from disturbances, including strict control of the introduction of, or control of already introduced, exotic species detrimental to the migratory species;

f) maintenance of a network of suitable habitats appropriately disposed in relation to the migration routes;

g) where it appears desirable, the provision of new habitats favourable to the migratory species or reintroduction of the migratory species into favourable habitats;

h) elimination of, to the maximum extent possible, or compensation for activities and obstacles which hinder or impede migration;

i) prevention, reduction or control of the release into the habitat of the migratory species of substances harmful to that migratory species;

j) measures based on sound ecological principles to control and manage the taking of the migratory species;

k) procedures for co-ordinating action to suppress illegal taking;

l) exchange of information on substantial threats to the migratory species;

m) emergency procedures whereby conservation action would be considerably and rapidly strengthened when the conservation status of the migratory species is seriously affected; and

n) making the general public aware of the contents and aims of the agreement.

Article VI

RANGE STATES

1. A list of the Range States of migratory species listed in Appendices I and II shall be kept up to date by the Secretariat using information it has received from the Parties.

2. The Parties shall keep the Secretariat informed as to which of the migratory species listed in Appendices I and II they consider they are Range States; including provision of information on their flag vessels engaged outside national jurisdictional limits in taking the migratory species concerned and, where possible, future plans in respect of such taking.

3. The Parties which are Range States for migratory species listed in Appendix I or Appendix II should inform the Conference of the Parties through the Secretariat, at least six months prior to each ordinary meeting of the Conference, on measures that they are taking to implement the provisions of this Convention for these species.

Article VII

THE CONFERENCE OF THE PARTIES

1. The Conference of the Parties shall be the decision-making organ of this Convention.

2. The Secretariat shall call a meeting of the Conference of the Parties not later than two years after the entry into force of this Convention.

3. Thereafter the Secretariat shall convene ordinary meetings of the Conference of the Parties at intervals of not more than three years, unless the Conference decides otherwise, and extraordinary meetings at any time on the written request of at least one-third of the Parties.

4. The Conference of the Parties shall establish and keep under review the financial regulations of this Convention. The Conference of the Parties shall, at each of its ordinary meetings, adopt the budget for the next financial period. Each Party shall contribute to this budget according to a scale to be agreed upon by the Conference. Financial regulations, including the provisions on the budget and the scale of contributions as well as their modifications, shall be adopted by unanimous vote of the Parties present and voting.

5. At each of its meetings the Conference of the Parties shall review the implementation of this Convention and may in particular:

a) review and assess the conservation status of migratory species;

b) review the progress made towards the conservation of migratory species, especially those listed in Appendices I and II;

c) make such provision and provide such guidance as may be necessary to enable the

Scientific Council and the Secretariat to carry out their duties;

d) receive and consider any reports presented by the Scientific Council, the Secretariat, any Party or any standing body established pursuant to an agreement;

e) make recommendations to the Parties for improving the conservation status of migratory species and review the progress being made under agreements;

f) in those cases where an agreement has not been concluded, make recommendations for the convening of meetings of the Parties that are Range States of a migratory species or group of migratory species to discuss measures to improve the conservation status of the species;

g) make recommendations to the Parties for improving the effectiveness of this Convention; and

h) decide on any additional measure that should be taken to implement the objectives of this Convention.

6. Each meeting of the Conference of the Parties should determine the time and venue of the next meeting.

7. Any meeting of the Conference of the Parties shall determine and adopt rules of procedure for that meeting. Decisions at a meeting of the Conference of the Parties shall require a two-thirds majority of the Parties present and voting, except where otherwise provided for by this Convention.

8. The United Nations, its Specialized Agencies, the International Atomic Energy Agency, as well as any State not a party to this Convention and, for each agreement, the body designated by the parties to that agreement, may be represented by observers at meetings of the Conference of the Parties.

9. Any agency or body technically qualified in protection, conservation and management of migratory species, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference of the Parties by observers, shall be admitted unless at least one-third of the Parties present object:

a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

Once admitted, these observers shall have the right to participate but not to vote.

Article VIII

THE SCIENTIFIC COUNCIL

1. At its first meeting, the Conference of the Parties shall establish a Scientific Council to provide advice on scientific matters.

2. Any Party may appoint a qualified expert as a member of the Scientific Council. In addition, the Scientific Council shall include as members qualified experts selected and appointed by the Conference of the Parties; the number of these experts, the criteria for their selection and the terms of their appointments shall be as determined by the Conference of the Parties.

3. The Scientific Council shall meet at the request of the Secretariat as required by the Conference of the Parties.

4. Subject to the approval of the Conference of the Parties, the Scientific Council shall establish its own rules of procedure.

5. The Conference of the Parties shall determine the functions of the Scientific Council, which may include:

a) providing scientific advice to the Conference of the Parties, to the Secretariat, and, if approved by the Conference of the Parties, to any body set up under this Convention or an agreement or to any Party;

b) recommending research and the co-ordination of research on migratory species, evaluating the results of such research in order to ascertain the conservation status of migratory species and reporting to the Conference of the Parties of such status and measures for its improvement;

c) making recommendations to the Conference of the Parties as to the migratory species to be included in Appendices I or II, together with an indication of the range of such migratory species;

d) making recommendations to the Conference of the Parties as to specific conservation and management measures to be included in agreements on migratory species; and

e) recommending to the Conference of the Parties solutions to problems relating to the scientific aspects of the implementation of this Convention, in particular with regard to the habitats of migratory species.

Article IX

THE SECRETARIAT

1. For the purposes of this Convention a Secretariat shall be established.

2. Upon entry into force of this Convention, the Secretariat is provided by the Executive Director of the United Nations Environment Programme. To the extent and in the manner he considers appropriate, he may be assisted by suitable intergovernmental and non-governmental, international or national agencies and bodies technically qualified in protection, conservation and management of wild animals.

3. If the United Nations Environment Programme is no longer able to provide the Secretariat, the Conference of the Parties shall make alternative arrangements for the Secretariat.

4. The functions of the Secretariat shall be:

a) to arrange for and service meetings:

(i) of the Conference of the Parties, and

ii) of the Scientific Council;

b) to maintain liaison with and promote liaison between the Parties, the standing bodies set up under agreements and other international

organizations concerned with migratory species;

c) to obtain from any appropriate source reports and other information which will further the objectives and implementation of this Convention and to arrange for the appropriate dissemination of such information;

d) to invite the attention of the Conference of the Parties to any matter pertaining to the objectives of this Convention;

e) to prepare for the Conference of the Parties reports on the work of the Secretariat and on the implementation of this Convention;

f) to maintain and publish a list of Range States of all migratory species included in Appendices I and II;

g) to promote, under the direction of the Conference of the Parties, the conclusion of agreements,

h) to maintain and make available to the Parties a list of agreements and, if so required by the Conference of the Parties, to provide any information on such agreements;

i) to maintain and publish a list of the recommendations made by the Conference of the Parties pursuant to sub-paragraphs (e), (f) and (g) of paragraph 5 of Article VII or of decisions made pursuant to sub-paragraph (h) of that paragraph;

j) to provide for the general public information concerning this Convention and its objectives; and

k) to perform any other function entrusted to it under this Convention or by the Conference of the Parties.

Article X

AMENDMENTS OF THE CONVENTION

1. This Convention may be amended at any ordinary or extraordinary meeting of the Conference of the Parties.

2. Proposals for amendment may be made by any Party.

3. The text of any proposed amendment and the reasons for it shall be communicated to the Secretary at least one hundred and fifty days before the meeting at which it is to be considered and shall promptly be communicated by the Secretary to all Parties. Any comments on the text by the Parties shall be communicated to the Secretariat not less than sixty days before the meeting begins. The Secretariat shall, immediately after the last day for submission of comments, communicate to the Parties all comments submitted by that day.

4. Amendments shall be adopted by a two-thirds majority of Parties present and voting.

5. An amendment adopted shall enter into force for all Parties which have accepted it on the first day of the third month following the date on which two-thirds of the Parties have deposited an instrument of acceptance with the Depositary. For each Party which deposits an instrument of acceptance after the date on which two-thirds of the Parties have deposited an instrument of acceptance, the amendment shall enter into force for that Party on the first day of the third month following the deposit of its instrument of acceptance.

Article XI

AMENDMENT OF THE APPENDICES

1. Appendices I and II may be amended at any ordinary or extraordinary meeting of the Conference of the Parties.

2. Proposals for amendment may be made by any Party.

3. The text of any proposed amendment and the reasons for it, based on the best scientific evidence available, shall be communicated to the Secretariat at least 150 days before the meeting and shall promptly be communicated by the Secretariat to all Parties. Any comments on the text by the Parties shall be communicated to the Secretariat not less than 60 days before the meeting begins. The Secretariat shall, immediately after the last day for submission of comments, communicate to the Parties all comments submitted by that day.

4. Amendments shall be adopted by a two-thirds majority of Parties present and voting.

5. An amendment to the Appendices shall enter into force for all Parties 90 days after the meeting of the Conference of the Parties at which it was adopted, except for those Parties which make a reservation in accordance with paragraph 6 of this Article.

6. During the period of 90 days provided for in paragraph 5 of this Article, any Party may by notification in writing to the Depositary make a reservation with respect to the amendment. A reservation to an amendment may be withdrawn by written notification to the Depositary and thereupon the amendment shall enter into force for that Party 90 days after the reservation is withdrawn.

Article XII

EFFECT ON INTERNATIONAL CONVENTIONS AND OTHER LEGISLATION

1. Nothing in this Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

2. The provisions of this Convention shall in no way affect the right of Parties to adopt stricter domestic measures concerning the conservation of migratory species listed in Appendices I and II or to adopt domestic measures concerning the conservation of species not listed in Appendices I and II.

Article XV

SIGNATURE

This Convention shall be open for signature at Bonn for all States and any regional economic integration organization until the twenty-second day of June 1980.

organizations concerned with migratory species;

c) to obtain from any appropriate source reports and other information which will further the objectives and implementation of this Convention and to arrange for the appropriate dissemination of such information;

d) to invite the attention of the Conference of the Parties to any matter pertaining to the objectives of this Convention;

e) to prepare for the Conference of the Parties reports on the work of the Secretariat and on the implementation of this Convention;

f) to maintain and publish a list of Range States of all migratory species included in Appendices I and II;

g) to promote, under the direction of the Conference of the Parties, the conclusion of agreements,

h) to maintain and make available to the Parties a list of agreements and, if so required by the Conference of the Parties, to provide any information on such agreements;

i) to maintain and publish a list of the recommendations made by the Conference of the Parties pursuant to sub-paragraphs (e), (f) and (g) of paragraph 5 of Article VII or of decisions made pursuant to sub-paragraph (h) of that paragraph;

j) to provide for the general public information concerning this Convention and its objectives; and

k) to perform any other function entrusted to it under this Convention or by the Conference of the Parties.

Article X

AMENDMENTS OF THE CONVENTION

1. This Convention may be amended at any ordinary or extraordinary meeting of the Conference of the Parties.

2. Proposals for amendment may be made by any Party.

3. The text of any proposed amendment and the reasons for it shall be communicated to the Secretary at least one hundred and fifty days before the meeting at which it is to be considered and shall promptly be communicated by the Secretary to all Parties. Any comments on the text by the Parties shall be communicated to the Secretariat not less than sixty days before the meeting begins. The Secretariat shall, immediately after the last day for submission of comments, communicate to the Parties all comments submitted by that day.

4. Amendments shall be adopted by a two-thirds majority of Parties present and voting.

5. An amendment adopted shall enter into force for all Parties which have accepted it on the first day of the third month following the date on which two-thirds of the Parties have deposited an instrument of acceptance with the Depositary. For each Party which deposits an instrument of acceptance after the date on which two-thirds of the Parties have deposited an instrument of acceptance, the amendment shall enter into force for that Party on the first day of the third month following the deposit of its instrument of acceptance.

Article XI

AMENDMENT OF THE APPENDICES

1. Appendices I and II may be amended at any ordinary or extraordinary meeting of the Conference of the Parties.

2. Proposals for amendment may be made by any Party.

3. The text of any proposed amendment and the reasons for it, based on the best scientific evidence available, shall be communicated to the Secretariat at least 150 days before the meeting and shall promptly be communicated by the Secretariat to all Parties. Any comments on the text by the Parties shall be communicated to the Secretariat not less than 60 days before the meeting begins. The Secretariat shall, immediately after the last day for submission of comments, communicate to the Parties all comments submitted by that day.

4. Amendments shall be adopted by a two-thirds majority of Parties present and voting.

5. An amendment to the Appendices shall enter into force for all Parties 90 days after the meeting of the Conference of the Parties at which it was adopted, except for those Parties which make a reservation in accordance with paragraph 6 of this Article.

6. During the period of 90 days provided for in paragraph 5 of this Article, any Party may by notification in writing to the Depositary make a reservation with respect to the amendment. A reservation to an amendment may be withdrawn by written notification to the Depositary and thereupon the amendment shall enter into force for that Party 90 days after the reservation is withdrawn.

Article XII

EFFECT ON INTERNATIONAL CONVENTIONS AND OTHER LEGISLATION

1. Nothing in this Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

2. The provisions of this Convention shall in no way affect the right of Parties to adopt stricter domestic measures concerning the conservation of migratory species listed in Appendices I and II or to adopt domestic measures concerning the conservation of species not listed in Appendices I and II.

Article XV

SIGNATURE

This Convention shall be open for signature at Bonn for all States and any regional economic integration organization until the twenty-second day of June 1980.

Article XVI

RATIFICATION, ACCEPTANCE, APPROVAL

This Convention shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Government of the Federal Republic of Germany, which shall be the Depositary.

Article XVII

ACCESSION

After the twenty-second day of June 1980 this Convention shall be open for accession by all non-signatory States and any regional economic integration organization. Instruments of accession shall be deposited with the Depositary.

Article XVIII

ENTRY INTO FORCE

1. This Convention shall enter into force on the first day of the third month following the date of deposit of the fifteenth instrument of ratification, acceptance, approval or accession with the Depositary.

2. For each State or each regional economic intergration organization which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the fifteenth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the third month following the deposit by such State or such organization of its instrument of ratification, acceptance, approval or accession.

Article XIX

DENUNCIATION

Any Party may denounce this Convention by written notification to the Depositary at any time. The denunciation shall take effect twelve months after the Depositary has received the notification.

Article XX

DEPOSITARY

1. The original of this Convention, in the English, French, German, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Depositary. The Depositary shall transmit certified copies of each of these versions to all States and all regional economic integration organizations that have signed the Convention or deposited instruments of accession to it.

2. The Depositary shall, after consultation with the Governments concerned, prepare official versions of the text of this Convention in the Arabic and Chinese languages.

3. The Depositary shall inform all signatory and acceding States and all signatory and acceding regional economic integration organizations and the Secretariat of signatures, deposit of instruments of ratification, acceptance, approval or accession, entry into force of this Convention, amendments thereto, specific reservations and notifications of denunciation.

4. As soon as this Convention enters into force, a certified copy thereof shall be transmitted by the Depositary to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at Bonn, this 23rd day of June 1979.

APPENDIX I

INTERPRETATION

1. Migratory species included in this Appendix are referred to:

a) by the name of the species or subspecies; or

b) as being all of the migratory species included in a higher taxon or designated part thereof.

2. Other references to taxa higher than species are for the purposes of information or classification only.

3. The abbreviation "(s.l.)" is used to denote that the scientific name is used in its extended meaning.

4. The symbol (—) followed by a number placed against the name of a taxon indicates the exclusion from that taxon of designated geographically separate populations as follows:

— 101 Peruvian populations.

5. The symbol (+) followed by a number placed against the name of a species denotes that only designated geographically separate populations of that species are included in this Appendix, as follows:

+ 201 Northwest African populations

+ 202 African populations

+ 203 Upper Amazon populations.

6. An asterisk (*) placed against the name of a species indicates that the species or a separate population of that species or a higher taxon which includes that species, is included in Appendix II.

MAMMALIA	
Chiroptera	
Molossidae	*Tadarida brasiliensis*
Primates	
Pongidae	*Gorilla gorilla beringei*
Cetacea	
Balaenopteridae	*Balaenoptera musculus*
	Megaptera novaeangliae
Balaenidae	*Balaena mysticetus*
	Eubalaena glacialis
	(s.l.)
Pinnipedia	
Phocidae	*Monachus monachus**
Perissodactyla	
Equidae	*Equus grevyi*
Artiodactyla	
Camelidae	*Lama vicugna**
	(- 101)
Cervidae	*Cervus elaphus*
	barbarus
Bovidae	*Bos sauveli*
	Addax nasomaculatus
	Gazella cuvieri
	Gazella dama
	Gazella dorcas
	(+ 201)
AVES	
Procellariformes	
Diomedeidae	*Diomedlea albatrus*
Procellaridae	*Pterodroma cahow*
	Pterodroma phaeopygia
Ciconiiformes	
Ardeidae	*Egretta eulophotes*
Ciconiidae	*Ciconia boyciana*
Threskiornithidae	*Geronticus eremita*
Anseriformes	
Anatidae	*Chloephaga rubidiceps**
Falconiformes	
Accipitridae	*Haliaeetus pelagicus**
Gruiformes	
Gruidae	*Grus japonensis**
	*Grus leucogeranus**
	*Grus nigricollis**
Otididae	*Chlamydotis undulata**
	(+ 201)
Charadriiformes	
Scolopacidae	*Numenius borealis**
	*Numenius tenuirostris**
Laridae	*Larus audouinii*
	Larus relictus
	Larus saundersi
Alcidae	*Synthliboramphus*
	wumizusume
Passeriformes	
Parulidae	*Dendroica kirtlandii*
Fringillidae	*Serinus syriacus*

REPTILIA	
Testudines	
Cheloniidae	*Lepiodochelys kempii**
Dermochelidae	*Dermochelys coriacea**
Pelomedusidae	*Podocnemis expansa**
	(+ 203)
Crocodylia	
Gavialidae	*Gavialis gangeticus*
PISCES	
Siluriformes	
Schiibeidae	*Pangasianodon gigas*

APPENDIX II

Interpretation

1. Migratory species included in this Appendix are referred to:
   (a) by the name of the species or subspecies; or
   (b) as being all of the migratory species included in a higher taxon or designated part thereof.

Unless otherwise indicated, where reference is made to a taxon higher that species, it is understood that all the migratory species within that taxon could significatly benefit from the conclusion of agreements.

2. The abbreviation 'spp.' following the name of a family or genus us used to denote all migratory species within that family or genus.

3. Other references to taxa higher than species are for purposes of information or classification only.

4. The abbreviation '(s.l)' is used to denote that the scientific name is used in its extended meaning.

5. The symbol (+) followed by a number placed against the name of a species or higher taxon denotes that only designated geographically separate populations of that taxon are included in this Appendix as follows:

+ 201 Asian populations.

6. As asterisk (*) placed against the name of a species or higher taxon indicates that the species or a separate population of that species or one or more species included in that higher taxon, are included in Appendix I.

MAMMALIA	
Cetacea	
Monodontidae	*Delphinapterus leucas*
Proboscidae	
Elephantidae	*Loxodonta africana*
Sirenia	
Dugongidae	*Dudong dugon*
Pinnipedia	
Phocidae	*Monachus monachus (*)*
Artiodactyla	*Vicugna vicugna (*)*
Camelidae	*Oryx dammah*
Bovidae	*Gazella gazella* (+ 201)
AVES	
Pelecaniformes	*Pelacanus crispus*
Pelecanidae	
Ciconiiformes	
Ciconiidae	*Ciconia ciconia*
	Ciconia nigra
Theskiornithidae	*Platalea leucorodia*
Poenicopteridae	spp.
Anseriformes	spp.*
Anatidae	
Falconiformes	spp.
Cathartidae	*Pandion haliaetus*
Pandionidae	spp.*
Accipitridae	spp.
Falconidae	
Galliformes	*Coturnix coturnix*
Phasianidae	*coturnix*

Gruiformes	
Gruidae	*Grus spp.**
	Anthropoides virgo
Otididae	*Chlamydotis undulata**
	(+ 201)
Charadriiformes	
Charadriidae	spp.
Scolopacidae	spp.*
Recurvirostridae	spp.
Phalaropodidae	spp.
Passeriformes	
Muscicapidae (s.l.)	spp.
REPTILIA	
Testudines	
Cheloniidae	spp.*
Dermochelidae	spp.*
Pelomedusidae	*Podocnemis expansa**
Crocodylia	
Crocodylidae	*Crocodilus porosus*
PISCES	
Acipenseriformes	
Acipenseridae	*Acipenser fulvescens*
INSECTA	
Lepidoptera	
Danaidae	*Danaus plexippus*

Resolution on financial matters

The Conference,

Referring to Article VII and NOTING that Article IX of the Convention on the Conservation of Migratory Species of Wild Animals indicates that the United Nations Environment Programme shall provide a Secretariat upon the entry into force of the Convention;

Recognizing that the Parties to the Convention shall bear responsibility for the financing of the administration of the Convention;

Welcoming the offer by the United Nations Evironment Programme to provide a Secretariat and to make an initial contribution, as appropriate, in order to meet the expenses of the Secretariat during the first four years after the entry into force of the Convention;

Expressing the view that it would be useful for the Secretariat to co-operate closely with the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora in order to benefit from the experience already gained by said Secretariat;

Aware of the fact that a final decision on the catalytic role which may be conferred on the United Nations Environment Programme in starting up a Secretariat for the Convention has to be taken by the Governing Council as its eighth session in the spring of 1980,

1. Requests the Depositary to fulfil interim Secretariat functions until the entry into force of the Convention;

2. Requests the Executive Director of the United Nations Environment Programme to consider the inclusion within the frame of the limited initial contribution from the United Nations Environment Programme, and in line with its catalytic role, of the funds required to finance a first meeting of the Conference of the Parties;

3. Decides, in the event that the United Nations Environment Programme cannot provide a Secretariat;

a) to invite the Parties to the Convention to communicate to the Depositary alternative proposals for consideration at the first meeting of the Conference of the Parties;

b) to request the Depositary to transmit to the Parties such alternative proposals at least ninety days in advance of the first meeting of the Conference of the Parties;

c) to invite the Depositary to continue fulfilling interim Secretariat functions pending consideration of this matter at the first meeting of the Conference of the Parties;

4. Decides that the Depositary, in fulfilling interim Secretariat functions, may request the assistance of intergovernmental or non-governmental, international or national agencies and bodies technically qualified in the protection, conservation and management of wild animals.

Parties	*Date of entry into force of the Convention*
Niger	1.11.83
Portugal	1.11.83
Netherlands	1.11.83
Cameroon	1.11.83
Chile	1.11.83
Egypt	1.11.83
India	1.11.83
Denmark	1.11.83
Luxembourg	1.11.83
Israel	1.11.83
Sweden	1.11.83
Hungary	1.11.83
European Economic Community	1.11.83
Ireland	1.11.83
Italy	1.11.83
Germany, Federal Republic of	1.10.84
Spain	1.05.85
Norway	1.08.85
United Kingdom	1.10.85
Somalia	1.02.86
Benin	1.04.86
Nigeria	1.01.87
Tunisia	1.06.87
Mali	1.10.87
Pakistan	1.12.87
Ghana	1.04.88
Senegal	1.06.88
Finland	1.01.89
Panama	1.05.89

On 1 June 1989 there were also 13 Signatories to the Convention which had not deposited an instrument of ratification, *i.e.*, the Central African Republic, Chad, France, Greece, Ivory Coast, Jamaica, Madagascar, Morocco, Paraguay, Philippines, Sri Lanka, Togo and Uganda.

Thomas Clingan: Thank you, Judith. Our first commentator is Michel Savini, Fishery Liaison Officer at the Fishery Policy and Planning Division of the Food and Agriculture Organization in Rome.

COMMENTARY

Michel Savini
Fishery Policy and Planning Division
Food and Agricultural Organization
Rome

I would like first to make a very brief comment on one aspect of one problem which is raised by Mr. Applebaum's paper. My comments are not directly related to the problem of straddling stocks to which he mainly referred but to a more general problem, the use of the right of objection. This procedure exists in many regional fishery bodies: in the International Commission for the Conservation of Atlantic Tunas (ICAT), in the International Whaling Commission (IWC), in the North East Atlantic Fisheries Commission (NEAF), in the Northwest Atlantic Fisheries Organization (NAFO), etc. Under this procedure, countries that object to recommendations adopted by a regional fishery body are not obliged to comply with such recomendations. The problem dealt with by B. Applebaum's paper arose because within the framework of NAFO, one contracting party has objected several times in the last few years to the recommendations formulated by this international body. In recent years there has been a tendency to consider that when a contracting party uses this objection procedure, it is guilty of not complying with a "decision" taken by the body concerned. You will remember that this was the case in the context of IWC when some countries objected to the moratorium on commercial whaling adopted some years ago. These countries were accused of not complying with a decision taken by an international body, although legally they had the right to object to it. Therefore the question is: is it legally acceptable to take retaliatory measures against a country which has just exercised its legal right, a right which is specifically envisaged in the Convention? On the other hand, the systemic use of this procedure might also be questioned. Can we speak of abuse of right in that case? I am not sure, but I think this is an aspect of the functioning of international fisheries bodies that merits further detailed study.

Coming now to the papers on the EEC fishery policy and on highly migratory species by R. Churchill and J. Swan, I would like to complement what has been said by providing some information on what is happening in the Indian Ocean with regard to the management of tuna. First, I would recall that there is already an intergovernmental mechanism covering the entire Indian Ocean which, *inter alia*, is

concerned with the management of tuna stocks. This is the Indian Ocean Fishery Commission (IOFC). The IOFC is a FAO body created in 1967 by a decision of the FAO Council under Article VI of the FAO Constitution. The IOFC has established four subsidiary bodies. Three were established on a subregional basis covering the Bay of Bengal, the Gulfs, and the Southwest Indian Ocean, respectively, and one on an oceanwide basis covering tuna.

The latter is called the IOFC Committee for the Management of Indian Ocean Tuna. It comprises all the countries fishing significantly for tuna in the region except the USSR, which started fishing recently and which is not a member of FAO and therefore cannot be a member of this kind of body. The Committee was somewhat dormant, I must confess, for some years but with a dramatic increase of tuna fishing in the mid-1980s in the Indian Ocean it was reactivated and now meets regularly. Its tenth session in July 1988, for example, was attended by countries accounting for about 80 percent of the catches of tuna in the Indian Ocean.

The Committee is funded by the FAO regular budget, and this covers meeting costs, documents, and so on. Such funding, however, is not sufficient to cover the inter-sessional activities. Therefore, the Committee has received the support of an FAO-executed project based in Colombo, Sri Lanka, which collects and disseminates tuna statistics and which organizes each eighteen months a meeting of scientists prior to each session of the Committee. This project is called Indo-Pacific Tuna Program (IPTP). It is funded by participating countries, the EEC, and up to this year by UNDP. On the basis of the advice given by the scientists, the IOFC Tuna Committee may formulate management measures for tuna in the region which are transmitted to member countries by the Director General of FAO for appropriate action. This Committee does not have the power to formulate potentially binding recommendations with the objection procedure referred to above. At its ninth session, in 1986 in Colombo, some countries expressed concern about the adequacy of these institutional arrangements, particularly after the termination of the IPTP project which was to take place at the end of 1989.

Since then, things have changed. In 1987 a small group of five countries was set up to review during the intersessional period all the available options to improve the existing framework and to report to the tenth session of the Committee. This group was made up of France, (an EEC country), Japan, (a long-distance fishing country), Seychelles, (which has many bilateral fishery agreements), Sri Lanka, (which has an important artisanal fisheries), and Thailand, (which has an important tuna processing industry). The group met twice: in May,

1987, and in February, 1988. The IOFC Tuna Committee discussed the conclusions of this Group in July, 1988, and considered the following seven main issues: (1) legal framework; (2) area of competence; (3) species to be covered; (4) membership; (5) functions; (6) powers; and (7) funding.

Let us start with the legal framework, which was the most difficult problem. The Group of five identified three options: first, the continuation and the strengthening of the present arrangements within the framework of FAO; second, the creation of a new structure, still within the framework of FAO but with different modalities; and third, the establishment of a new tuna management body outside the framework of FAO. The Committee discussed these various options, and bearing in mind the consequences of the options available to it and their financial implications, it decided to adopt the solution whereby the new body would be established within the framework of FAO under Article XIV of the FAO Constitution. This article provides for the setting up of a semi-autonomous bodies by a treaty (and not by a resolution of the Council of FAO as it is the case for Article VI bodies). These Article XIV bodies are mixed entities in that, legally, they are distinct from FAO since they are based on a treaty which is different from the treaty establishing FAO, but they are not completely independent from the Organization in that (a) the establishment of such bodies must be approved by the Conference of FAO, and (b) FAO continues to fund part of their activities. That was the decision taken by the IOFC Tuna Committee in July, 1988. This decision was taken by consensus, including the three EEC member countries who attended the session.

The second problem was the area of competence of the new body, and there the Group of five countries identified two options. The first was to use a well-defined area used by FAO for many years as a basis for the collection and reporting of statistics. The second was to define the area of competence of the new body as "the Indian Ocean and adjacent seas, excluding the Antarctic area." This is the definition used for the IOFC Tuna Committee. The Committee favored the first solution on the grounds that it would facilitate the statistical work which was essential for the functioning of a tuna management body.

The third problem was the species of tuna to be covered. It was agreed to draw up a list enumerating the species to be covered on the basis of the list appearing in Annex I of the Law of the Sea Convention, with suitable amendment, of course, to take care of the specificity of the Indian Ocean tuna populations. I must add that, at the beginning of the negotiations, some countries suggested the exclusion of one important species of tuna, the southern bluefin tuna,

which migrates also outside the Indian Ocean. These countries did not insist, given the understanding that a suitable system of specialized panel (with a reasonable degree of autonomy) could deal with this species.

Concerning membership, the Committee agreed that membership in the new body should be open to all coastal States and to States whose nationals fish for tuna in the Indian Ocean. These are the two criteria which are embodied in Article 64 of the Law of the Sea Convention. In this respect we had to face a problem: What happens should a non-Coastal member country stop its fishing activities in the region? We had to find a solution to implement correctly Article 64. In the Draft Agreement which was prepared later on, we inserted a paragraph saying that if any member of the Commission ceased to meet the above-mentioned criteria for two consecutive calendar years, it would be deemed to have withdrawn from the agreement. The main problem concerning membership was the EEC, which has been given competence in fisheries management by its member countries but which cannot become a full member of an Article XIV body because it is not a State, and because the FAO Constitution refers only to States and not to other entities. It was interesting to hear Mr. Churchill say this morning that sometimes the EEC appears more like a coastal country than an international organization, but within the legal system of the UN we cannot, for the moment, assimilate EEC to a State. Nevertheless, at its 1988 Session the IOFC Tuna Committee recommended to set up the new body under Article XIV.

Coming to the functions, the Committee agreed to give what I would call "classical management functions" to this new body: to collect statistics, to foster cooperation, to make recommendations on research, to make management recommendations, and so on. In addition, several developing coastal States wanted the new management body to deal also with development aspects, to help them to participate more actively in the tuna fishery in this region, and this met some reluctance from a few countries.

Concerning the powers of the new body, the Committee agreed that it should be given the power to formulate recommendations of a potentially binding nature consistent with the objection procedure to which I already referred.

Concerning funding, several options were reviewed and two of them were retained for further consideration. The first one consisted of grouping countries in different categories on the basis of their development and their fishing activities. There would be three or four categories and each category would fund a given percentage of the budget. The second solution was to take into account (i) the value of

the fish caught, (ii) the weight of the fish caught, and (iii) the GNP, *i.e.*, the richness, the capacity to pay of the countries concerned, and to apportion the financial burden proportionately. To conclude, the Committee recommended the convening of a conference to prepare a draft agreement which would be submitted for the approval of the FAO Conference at its next session. This is the procedure which is provided for in Article XIV. A draft agreement was therefore prepared by the legal office of FAO and a Conference was convened by the Director General in April, 1989. The Conference was attended by some thirty countries, but no agreement could be reached at that stage. The Conference agreed that there was a need for further consultations before a draft agreement could be adopted. Such consultations are presently in progress.

Thomas Clingan: Thank you very much, Michel. I would like to introduce as our next commentator Mr. Barney Rongap, who is secretary of the Department of Fisheries and Marine Resources of the Government of Papua New Guinea and, as Judith has already mentioned, he has been very active in regional arrangements.

COMMENTARY

Barney Rongap
Secretary for Fisheries and Marine Resources
Government of Papua New Guinea

Thank you, Mr. Chairman. Ladies and gentlemen, consistent with the theme of this 23rd Conference of the Law of the Sea Institute, which is the implementation of the provisions of the law of the sea through international organizations, this morning we heard from four such organizations, three in fisheries management regimes and one in the protection of marine mammals. As fisheries resource managers, we in our part of the world are familiar with the saying that all fishermen should be flying a skull and a crossbones, but in many jurisdictions piracy is a hanging offense.

With that introduction, I first wish to focus on a regional organization that I am particularly familiar with, the Forum Fisheries Agency. As you heard this morning from Judith, this organization was established as a result of the discussions that emanated from the Law of the Sea Convention itself, in particular discussions about the rights of coastal states over the EEZ. With these new responsibilities the Pacific island states became aware that they did not have the means nor expertise to give adequate consideration to the fisheries resources and their jurisdiction over those resources. So there was a need for an organization to help in managing the fisheries resources and to ensure that the island states received adequate returns from exploitation of those resources.

I would emphasize from the outset that in the Pacific there is the political good will and common sense to look at the mutual interests of all parties. Individually we are very small countries. However, we have jurisdiction over a large area of land surface. In the initial discussions to establish the agency there was quite clearly fear that with this new jurisdiction over the 200-mile EEZ we are at the mercy of distant-water fishing nations which could come and divide and conquer us. However, as I said, the positive political will at that time was to have an organization that would exercise and respect the rights of coastal states over the EEZ.

As we are aware, Article 64 of the Law of the Sea Convention defines how those nations should behave and what sort of organizations can be formed. The Forum Fisheries Agency restricted its membership to the island countries in a way that was inconsistent with Article 64, but as we heard this morning, at least in the Pacific

island states, the consensus or will to read innovations into the interpretation of Article 64 makes the Forum Fisheries Agency a competent authority, we believe. It is an authority to exercise the rights of coastal states over the 200-mile EEZ and then to accommodate the distant-water fishing nations through arrangements, either bilateral or multilateral, to manage the highly migratory species.

The main migratory species are the skipjack tuna and the yellowfin tuna. Although they are defined as highly migratory, studies from our research organizations and from catch records lead us to believe that the greater population remains in the 200-mile EEZ. As I suggested, the establishment of the Forum Fisheries Agency in a way was not consistent with Article 64 of the Law of the Sea Convention. But arguments that we have heard from learned people like Professor Burke lead us to the conclusion that the Forum Fisheries Agency is a legitimate and a competent authority. More recently, in the last week we received a completely new interpretation from the Japanese delegation on Article 64 in respect to highly migratory species. We don't believe it, but they claim that the coastal states have no jurisdiction over the EEZ. The other innovations that we are taking in the South Pacific, as Judith has mentioned, are real and practical interpretations of the Law of the Sea Convention.

A couple of other things that are happening in the Pacific besides the multilateral treaty arrangements with the United States are possibly the ersatz arrangement with Japan, the interest of the Soviet Union in an arrangement such as this. We are also working on a bridge between the Pacific, the ASEAN, and the Pacific Latin American states. To this end we are discussing amongst ourselves the development of fisheries management regimes. We believe that in the establishment of minimum terms and conditions of access a way has been found to accommodate distant-water fishing nations. We have submitted those terms and conditions to the ASEAN group through the Western Pacific Fisheries Consultative Committee and to the Latin American group in Chile last year.

Apart from that I would also like to make a couple of comments on straddling stocks, as discussed by Bernard in his presentation this morning. It is quite clear that the Law of the Sea Convention was not definitive in its conclusions on straddling stocks. However, a framework does exist for nations to participate in fisheries management and to cooperate in the utilization and conservation of stocks. I think the underlying point is the goodwill that is required in managing resources.

Finally, Mr. Chairman, I would like to make a brief comment on the conservation of marine mammals. Conservation *per se* is an admirable commitment to preserve and maintain the world's heritage. It is a commitment and conviction that should be encapsulated in all mankind to take stock of what is left and actions and options that are available in order to perpetuate species. This soul-searching audit calls for a balance between human consumption patterns and resource availability. As the most intelligent animal in the biological kingdom aware of its own vulnerability, is man prepared to be a custodian of his heritage and coexist with species that are less able to manipulate the environment? Disasters and potential disasters have prompted some action. However, much remains to be done. The biggest obstacles to total commitment and concerted and tangible action are man's own greed and vanity. The conservation of any species calls for scientific, legal, and human actions sufficient to enable the species to survive and reproduce itself and maintain population integrity. I believe that the Convention on the Conservation of Migratory Species of Wild Animals, or the Bonn Convention, is an international action to protect migratory species that live within or pass through states' national jurisdictions. It is quite clear that the objectives of the Bonn Convention are consistent and overlap with the law of the sea arrangements. Again, it is the will that is required to enhance the protection of these species. Thank you.

DISCUSSION

Thomas Clingan: Thank you very much, Barney. Before going to the floor I would like to ask if the panel would like to make any responses or additional comments. Bob?

Bernard Applebaum: Mr. Savini's comments on the objection procedure lead me to further reflections on what has happened in NAFO and its implications in other areas. In my paper I indicate that the European Community's use of the objection procedure in NAFO to free itself of the obligations that are there for TACs and quotas for most of the NAFO-managed stocks is unprecedented in both ICNAF and NAFO itself and possibly in other organizations. I am certainly not aware of any precedent for it. It is most unusual. As a result of this continued use of the objection procedure, NAFO took the unprecedented step (for ICNAF and NAFO) of passing a resolution which, while formed in polite language, by implication really said that the Community was abusing the objection procedure. Some of us who have been involved with this have tried to remember what concept underlay the first arrangements for the objection procedure in ICNAF, because it's the same one that was put into NAFO. It seemed to me that the concept was, for all those years before this recent development, that the objection procedure would be used in rather unusual circumstances when the NAFO organization did something that was discriminatory against a member. Say a measure was adopted to reduce a TAC or change a distribution formula which really affected only one member, without its consent. Those would seem to be the logical situations in which recourse to the objection procedure was contemplated. Certainly not this kind of wholesale use of the objection procedure. If Canada were participating now in any kind of redoing of the NAFO Convention, there is no doubt that she would try to write the objection procedure differently. I make this point because those who are now revising this convention certainly shouldn't feel locked into the standard objection procedures that have been used up to now. There are other ways of writing them. There are many possibilities. Some kind of weighted majority override could come into play at a certain point. Or the membership of a particular country or party could be automatically terminated at a certain point -- two or three years -- if its objections were excessive. There are ways of devising objection procedures that would narrow their scope in a way that wasn't done and wasn't foreseen as a problem under the NAFO Convention.

Thomas Clingan: Any additional comments from the panel? If not, then we will go to the floor.

Ivan Shearer: I would like to make a brief comment on the drift net fishing in the South Pacific referred to by Judith Swan. With surprising restraint she outlined the problem. We have been receiving news reports recently in Australia that the albacore tuna will become extinct within the next three years if the present level of overfishing in the high seas is allowed to continue. I am interested to hear from her that a conference will occur very soon between the Forum Fishery Agency members on the one side and the countries most concerned, namely Japan, Republic of Korea, and Taiwan, on the other. What happens if this conference fails to apply restraining measures to the nationals who are fishing in the high seas for this endangered stock?

This situation would then relate to the point Mr. Applebaum made near the end of his paper about the possibility of unilateral conservation measures when agreements have failed. I think the situation in the South Pacific is such a circumstance where appeal could made to a residual doctrine of international law that we usually refer to in the books as self-preservation. Although I would prefer some form of international legitimacy to arise from concerted action by the most concerned states, collective or individual states in circumstances of extreme gravity can take measures of enforcement on the high seas, on the basis of this residual doctrine of self-preservation. It is not surprising that that doctrine does not appear in the Law of the Sea Conference. It would be impossible to get an international conference to agree on the conditions of such a right. So it remains in that misty realm of general principles of international law which could be invoked and which one should not be over-reluctant to invoke in circumstances such as these. Some parallel work is being done in the International Law Commission on the state's responsibility in relation to the notion of necessity. I think it is in these areas that we should seek solutions to this problem, but I would be very grateful to hear other comments from the floor from some of our generalist international lawyers.

Judith Swan: I think the countries of the South Pacific would welcome as many thoughts as they could possibly get. They have had two preliminary meetings to consider what has become a very difficult situation. At their first meeting in November, 1988, they considered the situation so severe that an action plan had to be formed. They set about making a fairly comprehensive plan which would involve unilateral action against the offending countries. They agreed not to

allow vessels to make port calls to supply, to transship, and so on, through the zones of countries; not to buy any of the fish; not to allow any of the fish onboard to be stored. These were just the first steps in what would be a greater issue if it were not able to be controlled. South Pacific leaders have expressed political commitment at the highest level since that time and some of them have indicated that they would be raising this issue at Forum this year.

In addition to the unilateral action plan which has been agreed, at this next internal meeting the countries will consider the legal basis for action -- and I would thank you for any submissions you may have. They will consider Law of the Sea Treaty Articles 117 to 120, Article 64, preferential rights, doctrines, precedents in international practice such as the IMPFC and other international commissions which manage resources on the high seas. They may consider enforcement action on the high seas, but they also may consider other measures to be taken in the event their attempts at bringing these three countries to some sort of agreement are not successful. These other measures, which have no official status, might be to extend EEZs or create special purpose zones, or create a management for that stock among themselves. This sort of thinking would have to be developed and extended to cover any situation which would arise in the event the next meeting is not successful.

Thomas Clingan: Gunnar Schram?

Gunnar G. Schram: We have been concentrating on the South Pacific, and I would like to move northward to the North Atlantic. We have various agreements and international treaties covering the fish stocks of the North Atlantic, both in the northwest and northeast, but we tend to overlook the relevant provisions of the Law of the Sea Treaty. We have two remarkable articles that are printed together, one after the other, Articles 61 and 62. One provides very sensible and detailed provisions concerned with the preservation and the conservation of ocean resources. The next one, no less important, is concerned with the utilization of ocean resources. This is the article that is sometimes overlooked in the discussion at international gatherings.

We live in a world which is plagued by hunger and malnutrition. We know for sure that in the ocean there are a number of underutilized marine resources to which we have given hardly any heed so far. I would like to mention two highly migratory species in the North Atlantic which have been a cause of controversy.

One is the seal. A big problem has occurred in the last couple of years in the fisheries of Norway, Iceland, and other Nordic countries

by huge southward migrations of the Greenland and other seal stocks. This has caused great havoc in the traditional fisheries of these countries and reminds us that the seal is by no way an endangered species, does not merit protection, and should be utilized on a much greater scale than we now do, especially after these last events.

Another species which is commonly thought of to be in great danger of extinction -- again a great fallacy -- is the whale, particularly stocks of the North Atlantic. I am excluding from my remarks the whale stocks of other oceans, especially the Antarctic. It so happened that, a few years ago, nations that had previously had no interest in whaling, nations like (to mention only two) the Seychelles and Sweden, and that had hardly any whaling boats at all, joined the International Whaling Commission and pushed through a ban on commercial whaling until 1990. However, whaling for scientific purposes was allowed. This is what my country, Iceland, has been doing, simply because we are in dire lack of knowledge about the biological condition of the whale stock of the North Atlantic. Norway and some other nations have done the same. This is the basis of scientific whaling, the results of which are given to the International Whaling Commission. Scientific whaling has caused great havoc in the international press and we have come under attack by international groups of fanatics, which have come to our countries, sunk our ships, destroyed property, and brought much damage in other ways. We think this is most unfair.

My point in taking the floor this morning is simply to underline that while conservation and proper management of highly migratory stocks are necessary and most useful, we must not forget the other article of the Law of the Sea Convention which underlines the necessity of utilizing, in a sensible way, the marine resources of the world's oceans. Thank you.

Thomas Clingan: Would anyone from the panel care to respond? Our next speaker, then, is Armand de Mestral.

Armand de Mestral: Bob Applebaum and other members of the panel have alluded to the overfishing on the Grand Banks beyond 200 miles, and I have a question in relation to this.

By way of introduction I will simply expand a little on the present situation faced by Canada and others fishing in the area. In the last two and a half months there have been no less than two major scientific reports calling for an immediate cutback of at least 50 percent in the cod fishery in the Canadian zone. The last report was only ten days ago. Within the last two weeks there have been layoffs

of 1,500 people in the industry and six plants have been closed. More layoffs, more plant closures are expected all along the Canadian east coast in the near future. For whatever reason, we in Canada appear to be facing a crisis in the cod stocks of proportions almost equal to those encountered in the early 1970s. I think the word 'crisis' is justified in this circumstance.

Inevitably the first parties who have to examine their consciences and methods of management are the Canadian government and the Canadian fishing community, and I understand this is being done. The Canadian government has already called for and imposed a 15 percent reduction in existing Canadian quotas, and further reductions are doubtless to follow shortly for Canadian fishermen in the Canadian zone.

But beyond the 200-mile limit on the Canadian Grand Banks the European Community consistently refuses to abide by internationally established quotas. At least two countries consistently overfish, and in that regard I note that Robin Churchill alluded to certain restrictions placed upon Portugal and Spain in their entry into the Common Market. I presume that these measures have the indirect effect of restricting their access to other areas of the Common Market fishing zone and hence of sending them across the Atlantic. This problem is compounded by surrogate fishing. We now have a flag of convenience problem in the fishing industry, at least off the Grand Banks.

My question to both those who presented papers and commentators is: Are we dealing simply with a local problem, a passing problem, probably created by mismanagement within the Canadian zone? Are we dealing with essentially a bilateral problem between Canada and the EEC or between Canada and Spain-Portugal? Or -- and here we come to the general theme of this conference -- are we dealing with the realization that some of the fisheries provisions of the Law of the Sea Convention, mainly those dealing with high seas fisheries immediately beyond the economic zone where the shelf extends, are almost impossible to implement because they do not create an adequate regime?

Bernard Applebaum: That question covered a lot of ground, so in my response I'll start from the end of it. Are we dealing with a local problem, a bilateral Canada-EEC problem -- there are two countries involved: Spain and Portugal -- or dealing with a situation of wider proportions?

I think the gist of my paper indicated that the problem is of wider proportions. I would comment that this should not be seen as a Canada-EEC problem but a NAFO-EEC problem, because the

Community has taken a position against the other eleven members of the international organization. However, it is a local problem in the sense that the decline of stocks in Canadian waters is not entirely related to foreign overfishing, and I certainly did not mean to suggest that. It is a problem of management inside the zone and of scientific advice that has been revised lately. Still, there's no doubt that for stocks beyond 200 miles the major problem appears to be, for most of them, overfishing.

Moving to the beginning of Professor de Mestral's comments and Mr. Shearer's earlier, the kind of disastrous effects that are now being seen in the Canadian fishing industry on the east coast do raise this problem of self-preservation.

A final point that I wanted to make, if it isn't obvious already, is that when we talk about the European Community fishing in the area we are in fact talking about Spain and Portugal. Yes, in reference to Mr. Churchill's comments, there does seem to be that effect, not entirely unforeseen, that Spain and Portugal have been directed to an unrestricted fishery in the Northwest Atlantic. I would note that the other Community members -- France, The Federal Republic of Germany, Italy -- who used to fish in the area are not part of this problem. But it is going to be called an EEC fishing problem.

Patricia Birnie: I have a number of interrelated points that I've picked up from both speakers and commentators.

The first point occurs in relation to the objection procedures which were referred to by both Mr. Applebaum and Michel Savini. The reason for objection procedures was to get other states to cooperate in these international conventions. It is interesting that, after the shake-up of all the fishery commissions when ICNAF changed into NAFO and so on following the advent of 200 mile zones, objections procedures were not abandoned. Some of them were tightened up slightly as far as time limits and so on were concerned, but there were no conditions imposed. The objective surely remains the same: to encourage other states to participate, and they will not do so if they feel their vital interests might be inhibited by joining and having to allow somebody else, a majority of the commission, to determine what those vital interests are. I'm not saying there isn't a problem here, but I think we ought to remember that aspect of it.

To deal with this problem of overfishing, perhaps we ought to discuss it more widely in the context of general international law. What measures are permitted? Michel raised some, Ivan Shearer raised some. This issue has also arisen, we should recall, in connection with pirate whaling, which undermined the IWC, and with pirate

broadcasting. Various techniques, such as depriving the offending members of certain sources of supply, were used to solve those problems. Should we explore those more? Judith Swan mentioned some techniques that have been used in her part of the world.

I am also very interested in the point Michel Savini raised about what states can do nationally. Leaving aside possible international cooperative measures, can states take retorsive measures themselves? A prime example is what has happened in the International Whaling Commission, whereby the United States -- uniquely, I think, in this respect -- has amended national legislation to allow it to take economic sanctions in relation to access to fisheries and import of fish products, etc., against states that in the determination of the United States are undermining the conservation objectives of particular conventions. I have always had some hesitation about how far states should go in that direction, and perhaps this is something that we ought to consider. Do we wish to encourage this kind of development or not?

Bernard Applebaum: Ms. Birnie commented that one reason for an international organization to have an objection procedure is to get states to join. She is right, of course, that that was an essential option under these conventions when they were first developed. Though having been party to the plenipotentiary meetings on the NAFO Convention, I don't remember any great discussion on this; it seemed to be obvious that you had to have an objection procedure at that point. But I am not sure that in the present context it is still important to have an objection procedure to get other states to join. Certainly in the Northwest Atlantic -- and this is something I have touched on in my paper -- the fisheries are fully subscribed by the parties to the NAFO Convention, which are traditional fishing countries in the area. Having an objective procedure in place in order to encourage other countries to join is not the relevant issue. There are not enough fish for the members of NAFO, and accordingly, there is nothing to share with new entrants. What would they accomplish by joining, since no quotas can be given to them? What we want them to do is to stop fishing because the area is fully subscribed. There are aspects of discrimination and LOS obligations to consider, but the NAFO membership wants them to stop fishing, and then the question of joining is irrelevant.

Hasjim Djalal: First, I would like to inform the conference here that the issue of drift nets was also discussed during the last meeting of the Fisheries Task Force of the Pacific Economic Cooperation Conference

in Vancouver, about two or three weeks ago. A very strong concern about the continued use of drift nets was raised, especially by the countries of Southeast Asia and the South Pacific. Further studies were recommended to examine the immediate impact of drift nets and to find ways to overcome and, if necessary, to prohibit them.

Second, I'd like to mention that the ASEAN countries have been working very hard to develop links with the South Pacific island nations as well as with the Latin American Pacific countries within the framework of the Pacific Economic Cooperation Conference. These links have been very fruitful in promoting cooperation among the developing countries in the southern part of the Pacific and in gaining support from the more developed countries in the northern part of the Pacific.

Here I would like to pose a question to my colleague from the South Pacific. There has been some talk within the last few years about the need for more policy coordination on access to tuna resources. Judith Swan explained that it is difficult to get better terms and conditions for access because if one island nation raised the conditions of access, the distant-water fishing nations would simply go to another island nation to get new terms. My question is: What is the possibility now for a more coordinated policy on conditions of access to tuna between the three groups in the South Pacific: Southeast Asian countries, South Pacific island nations, and Latin American countries?

Third, some time ago there was quite a lot of discussion about the possibility of cooperation on fisheries resources between the South Pacific island nations and the Soviet Union, but lately we don't hear very much about it. Could you explain what the situation is, and what the prospects are now?

Barney Rongap: As you are aware, the Soviet Union did have fishing arrangements with two of the countries in the region, namely Kiribati and Vanuatu, but those agreements have been terminated. However, more recently, the Soviet Union has come back to some of us in the South Pacific: Papua New Guinea, the Solomon Islands, and Vanuatu. They have mentioned to us that they would like a fisheries arrangement to cover those three countries, and they have indicated that they will come at the end of this month to have those discussions with us. At this stage we're happy to talk about access arrangements but we'd like to see firm proposals with benefits that will entice us to enter into fisheries arrangments.

Louis Sohn: I would like to clarify the issue that was raised about the retaliation or retorsion. What is prohibited by international law is the

use of force in the retorsion or retaliation, and that's very clear. On the other hand, there are many generally accepted international conventions in which retaliation or retorsion -- short of use of force -- in certain cases is permissible. As you know, in the General Agreement on Trade and Tariffs are very elaborate provisions about the right to retalitate and the right to check whether this retaliation was excessive, and so on. I think this kind of approach might be necessary here. Perhaps some general organization like FAO could establish some kind of a system in which, if somebody retaliates, consideration could be given to whether the retaliation were excessive or not. If it's not excessive, I suppose there would be no objections to it.

Thomas Clingan: Judith, did you want to make an additional comment?

Judith Swan: I would like to respond to Ambassador Djalal's question about mechanisms for cooperation on minimum terms and conditions of access among the three regions: the South Pacific, the ASEAN group, and the South American group. In the meeting in Lima in October, 1988, the South Pacific delegation introduced a fairly extensive list of minimum terms and conditions to countries for their consideration. My most recent information is that these countries received this proposal and were going to take it back to governments for consideration in a future meeting. Perhaps it was considered at the most recent meeting in Vancouver or will be carried forward to a future meeting. It is through PECC and other mechanisms that FFA is working to try to establish some collective strength in the world for coastal states to deal with the distant water fishing nations. We also see some advantage to distant water fishing nations in standardized or at least harmonized minimum terms and conditions of access: it will confuse the captains of their vessels far less than they would be if they had a variety of terms and conditions to comply with.

Thomas Clingan: Thank you very much. I hope you all will join me in expressing appreciation to the panel for the excellent work that they have done.

LUNCHEON SPEECH

Jaap A. Walkate
Ministry of Foreign Affairs
The Hague

Ladies and gentlemen. It is with great pleasure that I accepted the invitation by Professor Soons to speak to you today: pleasure because I expected to have a highly qualified audience, amongst which are many good friends and colleagues, pleasure because it concerns the law of the sea, and special pleasure because it would have to be a brief speech.

The program of our Conference is entitled "The Implementation of the Law of the Sea Convention through International Institutions". Almost all parts of the Convention are covered by the program except one: Part XI, concerning the international Area, *i.e.*, the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. A deliberate omission, I presume, probably because Part XI deserves a conference on its own merits.

Nevertheless, the attitude of many states towards the contents of Part XI influences to a large extent their decision on becoming a party to the Convention and, thus, affects the degree of implementation of the other parts or the Convention. Part XI is in this respect crucial, because, as we all know, the convention is not an *a la carte* menu from which one can pick and choose.

The third Conference on the Law of the Sea established by its Resolution I the Preparatory Commission for the preparation of the entry into effective operation "without undue delay" of the International Seabed Authority and the Tribunal on the Law of the Sea. Among a lot of other things, that resolution mandates the PrepCom to "prepare draft rules, regulations and procedures, as necessary, to enable the Authority to commence its functions" (para. 5(9)).

During its first year PrepCom decided that a Special Commission 3 would be entrusted with the special task to draft the rules, regulations and procedures for the exploration and exploitation of the international seabed area, or, shorter, the deep sea-bed mining code.

The Netherlands has occupied the Chair of Special Commission 3 ever since the PrepCom established it. An honorable, but at the same time responsible, task which my predecessor, Dr. Hans Sondaal, and I have always fulfilled with the greatest pleasure. So far Special

Commission 3 has been making good, though slow, progress in its first readings of a set of working papers prepared by the UN Office for the Law of the Sea. These texts reflect in an orderly and conscientious manner the operational provisions of Part XI, the contents of Annex III concerning the basic conditions of prospecting, exploration, and exploitation of the International Seabed Area and, to a limited extent, of Annex IV concerning the Statute of the Enterprise. These secretariat papers also anticipate, where possible, problems which some states have with the text of the Convention and Annex III. As Mr. Satya Nandan said, the working paper on the transfer of technology introduces procedures in the implementation of Annex III, Article 5, that take away many of the sharp edges and substantially improve on the system.

Special Commission 3 has decided, as its course of action, to consider the secretariat drafts in a first reading on the basis of which its Chairman prepares revised texts to be submitted to a second reading at sometime in the future.

Up until now the Special Commission has considered in a first reading:

1. Parts I-IV of the draft code dealing with prospecting and applications for approval of plans of work for exploration and/or exploitation activities;
2. Part VI on financial terms of contract and financial incentives; and
3. Part VII on transfer of technology until ten years after commencement of commercial production by the Enterprise.

This Summer the Special Commission will begin to consider draft articles on production policies, more in particular the procedure to be followed after the submission of applications for production authorizations (Part V of the Code). This is not one or the easiest parts of the conventional system and also a bit outdated, since, as Mr. Nandan pointed out, "the economic situation prevailing in the last decade has considerably affected the statistics or metal consumption on which the production policy formula was based." It is, therefore, encouraging to note the Under-Secretary-General's statement that adjustments in that formula must be made so that no contractor will be denied the opportunity to mine the deep sea-bed. As far as the work that is now behind us is concerned, during the first reading of the financial provisions and of the provisions on transfer of technology, many written amendments have been submitted by the industrialized countries on the one hand and the developing countries

on the other. For practical purposes these are the two groups with opposing views: the Group of 77, the developing countries, which is attached to the Convention as it is, on the one hand, and the Group of Six industrialized states (Belgium, Italy, The Netherlands, Federal Republic of Germany, United Kingdom, and Japan) supported by the Group of Eastern European States which would like to see changes made, on the other hand. In between is the group of the so-called Friends of the Convention which at moments submits conciliatory proposals. Proposals by the industrialized countries do not always meet with approval from the other side, but they are never rejected out of hand. The debate unrolls in a businesslike and professional manner. It is clear that everybody realizes that States that come up with proposals to improve the system, take the system seriously, or they would not propose amendments.

When revising the secretariat drafts on the basis of the first reading, I take into account all amendments submitted, although it is, of course, quite impossible to inject all of them into the revisions. It is my endeavor to make those countries which submit amendments less unhappy with the basic text and the other countries less unhappy with the amendments used in the revised text.

So far I have been able to revise Parts I-IV and Part VI. The revision of the draft articles on prospecting and the applications for approval of plans of work was published in June, 1988 (Doc. LOS/PCN/SCN.3/WP.6/Rev.l), and I am happy to announce that the revision of the draft articles on the financial terms of contract and financial incentives will be published on 21 June 1989 (Doc. LOS/PCN/SCN.3/WP.6/ Add.2/Rev.l including -/Add. 3/Rev.I).

Let me emphasize that the drafting of the code should be done in phases, step by step. Let us take the small things first and leave the bigger issues for a later stage when overall negotiations will be required anyway.

When writing the revisions with the support of Nandan's very competent staff, my primary concern is to draft a technically workable text, *i.e.*, a code with which the experts in the field of mining and taxes will be able to work and which will enable commercially viable exploration and exploitation to take place sometime in the future. My hope is that a technically workable text will enjoy universal acceptability at the same time.

My other major concern is the legal consistency of the new code with the Convention and Annexes. If the revised text would seem to go in the direction of universal acceptability but would at the same time seem to be legally inconsistent and the two requirements could

for the time being not be reconciled with one another, I tend to give priority to the requirement of universal acceptability. We should not look at the Convention and Annex III as sacrosanct texts from which we should under no circumstances deviate. We should take the spirit of Part XI as a firm guideline, not the letter. We should gear the mining code to the technologies of the future, not to those of the past. We should take into account the economic needs of the developing countries and at the same time the needs for legal security and protection of investment of the industrialized countries. If this all would lead to a draft mining code that would in the end fail the tests of judicial review, we should perhaps think of casting the code in the form on an additional protocol to the Convention, as I suggested last December at the Asser Institute Colloquium. The text of such a protocol was to be submitted by the Preparatory Commission to the competent organs of the future International Seabed Authority and to be concluded by the future States Parties to the Convention.

As I have said in the Special Commission in August, 1986, it would be senseless to stick to the literal wording of the Convention and Annexes when we know that the system will not work and will remain a dead letter. I do not consider that in the interest of the parties concerned, neither the industrialized countries nor the developing countries as a whole. I emphasize developing countries because I strongly believe that it is a major obligation for the PrepCom to work towards full implementation of Article 140 of the Convention, which stipulates that the mining activities shall be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing states. For the Authority to be able to provide for the equitable sharing of financial and other economic benefits derived from such activities, as Article 140, para. 2 stipulates, there must be first of all profitable mining activities. It is the duty the PrepCom to see to it that the implementation of the Convention will allow for such activities by private investors, State enterprises, and the Enterprise of the Authority to take place in reality.

Panel IV

PROTECTION OF THE MARINE ENVIRONMENT

Patricia Birnie: In this panel we shall be discussing Part XII of the Law of the Sea Convention and the cross references that pertain to many other articles in the Convention, because many other topic headings also deal with matters of pollution. I would like to stress that Part XII aims not only at being part of the package deal of the Law of the Sea Convention as a whole, but also at presenting a holistic approach to the preservation of the marine environment. That is to say, it brings together an obligation to preserve the marine environment and to protect it against all the possible sources of marine pollution.

Having planned to just mention the need for a holistic approach, and presumably to apply it to our examination of the implementation and coordination of the activities of the relevant international institutions, I have unfortunately to draw attention to the fact that we not only have holism this afternoon but we have holes in our panel.

Two members of the panel will not be with us this afternoon. Professor Martine Remond-Gouilloud was going to talk to us about the EEC's role in this field, and Professor Charles Odidi Okidi was going to talk about the regional approach in its more general aspects. Fortunately, other panelists will be able to pick up some if not all of these points. Professor Odidi Okidi's paper is in your volume of documents.

I now want to introduce my panel. First we have Professor Vukas from the University of Zagreb Faculty of Law. He is speaking on generally accepted rules and standards that are required to be instituted and implemented through international organizations. He is not only a professor eminent in international law fields, but he's been a member of the Yugoslavian delegation to the Law of the Sea Conference and is currently a member of the delegation to the Preparatory Commission. He is well known to some of you here for his courses at Dubrovnik University.

The next speaker will be Dr. George Kasoulides from the London School of Economics, who recently completed a thesis on the topic of port state jurisdiction, his topic here today. Port state control is a little wider than the jurisdictional question in Part XII. He will deal with the role of the port state in general in this field. He is currently a research officer at the London School of Economics, but he is about

to become a part of the legal advisor's department in his home country of Cyprus.

He will be followed by Professor Yankov, who hardly needs any introduction. He is not only a professor international law at the University of Sofia in Bulgaria, he is also vice-president for the Bulgarian Academy of Science. He was ambassador of Bulgaria to London, permanent representative to the United Nations, and deputy minister for Foreign Affairs. He was chairman of the Third Committee of UNCLOS, and he is currently vice-chairman of the International Oceanographic Commission, to mention just a few of his many qualifications. He will act as the commentator on the first two papers.

We will then have Dr. Salvano Briceno, who comes from Venezuela. He is a lawyer by profession and is now coordinator of the Caribbean Environment Programme at its headquarters in Kingston, Jamaica. He was previously an executive officer with the Commission of the International Union for Conservation of Nature, and he participated in creating a ministry of environment in his own country. He has specialized in public law and management questions in both Paris and Boston. So he will not only deal with problems of coordination but of actual implementation through one of these regional programs. He is also going to take up some of the points from Professor Odidi Okidi's paper, which relates very closely to his own.

I call on Professor Vukas now to introduce his paper.

GENERALLY ACCEPTED INTERNATIONAL RULES AND STANDARDS

Budislav Vukas
University of Zagreb
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Rules of Reference in the LOS Convention

The United Nations Convention on the Law of the Sea (LOS Convention), as well as the Geneva Conventions in an earlier stage of the development of the law of the sea, contain only the main legal norms forming the law of the sea. The LOS Convention, once it enters into force, will represent the basic, constitutional treaty of the international legal order of the oceans which, in addition, includes other treaties, customary international law, and national legislation. For this reason, the provisions of the LOS Convention often refer to other legal norms, international as well as municipal.

The interdependence of Part XII of the LOS Convention (Protection of the Marine Environment) with the rest of the legal rules regulating the protection of the seas is particularly accentuated. The provisions of this part of the Convention represent the codification and progressive development based on the previously concluded treaties (*e.g.*, the 1954 International Convention for the Prevention of Pollution of the Sea by Oil) and general international law (customary international law and general principles of law) and the principles and recommendations of the 1972 Stockholm Declaration on the Human Environment. On the other hand, the Convention itself (Article 197) establishes the duty of States to adopt additional provisions in the field:

> States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

Apart from the further development of international law, the LOS Convention (Article 194, paragraph 1) envisages the duty of States to

take measures -- including the adoption of appropriate national legislation -- in order to implement its provisions. In cases when the Convention refers to the duty of States to take legislative measures to prevent, reduce, and control pollution of the environment from different sources the terms 'laws and regulations' are used.[1] According to Timagenis, 'the term 'regulations' seems to mean secondary national norms in contrast to 'laws' denoting principal national norms.'[2]

These two terms will probably cause no serious problems of interpretation, although they do not cover all the relevant sources of law in different internal legal systems. Be that as it may, the relation between the LOS Convention and internal law is not a subject to be discussed in this paper.

'International Rules and Standards': Drafting History at UNCLOS III

Besides the general provision concerning the cooperation of states in formulating and elaborating 'international rules, standards and recommended practices and procedures' (Article 197), the LOS Convention refers to the establishment and enforcement of international rules with respect to particular sources of pollution. Moreover, many provisions refer to other international rules with respect to questions connected with the protection and preservation of marine environment (safety at sea, sea lanes and traffic separation schemes, removal of abandoned or disused installations or structures, etc.). Due to the different contexts in which the Convention's provisions refer to other international rules, the drafters of the LOS Convention were not able to use a uniform terminology in that respect.

In 1978 the UNCLOS Draft Committee drew a list of terms used in the informal draft convention (the Informal Composite Negotiating Text -- ICNT).[3] Under the heading 'international rules and standards' twenty-one expressions used in the draft convention were classified,

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[1]LOS Convention, Articles 207(1); 208(1); 210(1); 211(2), 212(1).

[2]Gregorios J. Timagenis, *International Control of Marine Pollution*, Volume 2 (Dobbs Ferry, New York: Oceana Publications Inc., 1980), note 44 at p. 603.

[3]Informal Composite Negotiating Text, Doc. A/CONF.62/WP. 10 (15 July 1977).

out of which eighteen were used in provisions directly or indirectly dealing with the protection of the marine environment.[4] A multitude of terms was used in order to denote international rules relative to the prevention, reduction, and control of the marine environment to which they refer. The terms 'rules,' 'standards,' 'regulations,' 'procedures' and 'practices' were used in different combinations and they were characterized as 'generally accepted,' 'international,' 'applicable,' 'internationally agreed,' 'global,' 'regional,' 'relevant,' and 'specified.' These adjectives were also combined in different ways; most often were used the combinations 'generally accepted international' and 'applicable international.'

As harmonization was a proclaimed purpose in the further work of the Drafting Committee, several approaches were suggested in order to reduce the number of the words used.

The English language group considered two approaches for international measures:

a) The number of different words appearing in the text could be reduced and the use of one or more of these in various articles could be harmonized;
   (i) There would be no need to refer both to 'rules' and 'regulations' in the same provision. Many preferred 'rules', on the understanding that the inclusion of the idea of 'regulations' in the word 'rules' would be made clear;
   (ii) In addition to one of the words in (i), it would be desirable to choose one word from among 'standards', 'practices' and 'procedures' making clear that the words deleted are deemed to be included in those retained...
b) A reasonably brief term could be defined in the Convention to include rules, regulations, practices and procedures...[5]

Three weeks later, the coordinators of the language groups recommended that the following questions be referred to the language groups:

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[4]Drafting Committee, Informal Paper 2 (8 August 1978), A preliminary list of recurring words and expressions in the Informal Composite Negotiating Text which may be harmonized, pp. 26-30.

[5]Drafting Committee, Informal Paper 4/Rev. 2 (5 August 1980), Some notes on the preliminary reports of the Chinese, English, French, Russian and Spanish language groups on Informal Paper 2, p. 17.

a) whether it was desirable that the number of different words appearing in the text should be reduced;
   (i) by the use of a term which could be defined in the Convention to include rules, standards, regulations, practices and procedures;
   (ii) by choosing one or more words from among those which now appear in the text.

With respect to (ii), it has been suggested that either the word 'standards' or 'norms' be used, or that the word 'standards' be used in English and the word 'normes' and 'normas' be used in French and Spanish.

b) whether a distinction should be made between words such as rules, regulations and standards and other words such as practices and procedures.[6]

All the quoted questions and suggestions demonstrated the conviction of the drafters of the LOS Convention that the multitude of words used correspond to the existing variety of international measures to which the Convention refers. The quoted initiative within the Drafting Committee intended only to simplify the terminology by reducing the number of terms used. However, according to all the quoted suggestions, the terms used were to be defined in such a way as to make clear that the words deleted were deemed to be included in those retained.

The eventual result of this approach was that not a single word from the ICNT was omitted in the final text of the LOS Convention and the long list of expressions with respect to 'international rules and standards' was not simplified. On the contrary, even a new expression was inserted regarding enforcement with respect to polluting from activities in the Area. (Article 215)!

The varied terminology used in the rules of reference in the environmental provisions of the LOS Convention caused problems of interpretation even with the participants in the UNCLOS

[6]Drafting Committee, Informal Paper 15/Rev.1 (26 August 1980), Draft Recommendations of the Co-ordinators of the Language Groups for the purpose of Consideration in the Language Groups, p. 3.

negotiations.[7] Much worse is the position of commentators who did not have the opportunity of participants in the mostly unofficial negotiations at UNCLOS III. Thus, Alan Boyle claims that the rules of reference are 'with no obvious uniformity in terminology or clarity of meaning'.[8]

However, it is not only the variety of the used terminology that causes confusion; there are cases of different expressions used with respect to the same source of pollution in different articles of the LOS Convention. Thus, stating the duties of ships during transit passage, the Convention provides that they shall

> comply with *generally accepted international regulations, procedures and practices* for the prevention, reduction and control of pollution from ships. (Article 39(2)(b)). (emphasis added)

On the other hand, in Part XII with respect to pollution of ships the duty of States to 'establish *international rules and standards* to prevent, reduce and control pollution of the marine environment from vessels...' has been provided for (Article 211(1)) (emphasis added). 'Rules and standards' are the only terms used also with respect to enforcement with respect to polluting from ships (Articles 217, 218 and 220).

Unnecessary differences are also created between the UNCLOS III rules and the corresponding provisions in the Geneva Conventions. Thus, *e.g.*, the 1958 Convention on the High Seas provides that in taking measures for ships under their flag necessary to ensure safety at sea, States are required to conform to "generally accepted international standards" (Article 10). The corresponding provision in the LOS Convention requires conformity of national measures to 'generally accepted international regulations, procedures and practices...' (Article 94).

Indecisiveness in drafting and arbitrariness of the final solutions is even more transparent with respect to the adjectives used to characterize the terms used for differences between the ICNT and the final text of the LOS Convention. But in the course of negotiations

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[7]Timagenis, *loc. cit.*

[8]A.E. Boyle, "Marine Pollution Under the Law of the Sea Convention", *American Journal of International Law* 79, no. 2 (April 1985): 347-372 at p. 355.

and in the work of the Drafting Committee many of these solutions were questioned.

In August 1980 the English language group proposed the substitution of the words "generally accepted" for the word "applicable"1 in the references to "international regulations" or "international rules and standards" in Articles 42(1)(b), 94(4)(c), 218(1) and 219. Moreover, it was suggested that the words "generally accepted" be added to Articles 208(3) and 210(6) before the respective references to "international rules" and "global rules".[9] The coordinators of the language groups invited all language groups to give their views on the proposals of the English group.[10] The proposals were still under consideration by the Drafting Committee at the beginning of 1981,[11] but the final result was negative, and nothing has in this respect been changed in the Convention's text.

Taking into account the drafting history of the expressions concerning 'international rules and standards' it is clear that it would be a vain attempt to try to comment on all these expressions we find in the UNCLOS provisions on the protection and preservation of the marine environment.

Thus, the scope of the present paper is limited to the 'generally accepted international rules and standards'. This expression is contained in four provisions dealing with the law-making and enforcement with respect to pollution from ships in Articles 211(2), 211(5), 211(6) and 226(1)(a). In a slightly different variant ('generally accepted international rules *or* standards' (emphasis added)) we find it in Article 21(2), dealing with norms concerning design, construction, manning, or equipment of foreign ships. This difference is irrelevant; namely, the first variant is used in Article 211(6)(c) in respect to the same subject as the one dealt with in Article 21(2).

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[9]Drafting Committee, Informal Paper 4/Rev.2, p. 17. For some other suggestions see: W. van Reenen, "Rules of Reference in the new Convention on the Law of the Sea, in particular in connection with the pollution of the sea by oil from tankers", *Netherlands Yearbook of International Law* 12 (1981): 3-44 at pp. 10-11.

[10]Drafting Committee, Informal Paper 15/Rev.1, p. 3.

[11]Drafting Committee, Informal Paper 18 (16 January 1981), Specific Items still under the consideration by the Drafting Committee, pp. 1-2.

Article 211 of the LOS Convention deals with international rules and national legislation to prevent, reduce and control pollution of the marine environment from vessels. It proclaims the obligation of States to "establish international rules and standards" for this purpose (Article 211(1)). According to this Article, States shall accomplish this duty "acting through the competent international *organization* or *general* diplomatic conference" (emphasis added). The intention of UNCLOS III to have only one, global international legal order with respect to pollution from vessels is obvious, as with respect to other sources of pollution the international legislative activity of States is envisaged "through competent international *organizations or diplomatic* conference" (emphasis added). Here, with respect to pollution from vessels only "general diplomatic conference" is foreseen and, on the other hand, it is common knowledge that the singular used instead of 'competent international organizations' meant the reservation of the international legislation for the International Maritime Organization (IMO).[12] The confirmation of this conclusion is to be found also in

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[12]See: E. Miles, "On the Roles of International Organizations in the New Ocean Regime", *The Law of the Sea in the 1980s*, Proceedings of the Law of the Sea Institute Conference (October 20-23, 1980, Kiel, Germany): 383-445 at pp. 425 and 427; O. Rojahan, "National Jurisdiction and Marine Pollution from Ships: The Future Role of IMCO Standards", *Ibid.*, pp. 464-482 at p. 465. The exclusive competence of IMO in respect of all the questions related to navigation was proved also in respect of Art. 22(3)(a) of the Convention. Namely, the ICNT/Rev.2 (Doc. A/CONF. 62/WP. 10/Rev.2 of 11 April 1980) provided that in the designation of sea lanes and the prescription of traffic separation schemes the coastal State shall take into account the recommendations of "competent international organizations". In its letter of 23 May 1980 (A1/B/1.02 CPS/TAH/aj) IMO (IMCO at the time) criticized this formulation stating that "...the nature of the problem is such that it can safely be dealt with by only one organization. IMCO has always been recognized as the competent body for this function, and it would be unfortunate if the use of the plural term "organizations" were to give the impression that other organizations are also expected to adopt such schemes". After this intervention, in the next version of the ICNT, the Conference changed the plural for singular (Art. 22(3)(a) of Doc. A/CONF/62/WP. 10/Rev.3 of 27 August 1980). See also: IMO Doc. Implications of the United Nations Convention on the Law of the Sea, 1982 for the

Article 2 of Annex VIII (Special Arbitration) to the Convention, where it is said that the list of experts in the field of navigation, including pollution from vessels and by dumping shall be drawn and maintained by the International Maritime Organization.

However, it should be borne in mind that the expression 'generally accepted rules and (or) standards' is used also with respect to "the design, construction, manning or equipment of foreign ships" (Article 21(2) and 211(6)(c)). At least with respect to the manning of ships another international organization is also competent. We have in mind the International Labor Organization, whose conventions and recommendations deal with issues relevant to maritime safety and, indirectly, with the prevention of pollution (*e.g.*, Convention (No. 147) concerning Minimum Standards in Merchant Shipping, 1976, and Recommendation (No. 155) concerning the Improvement of Standards in Merchant Shipping, 1976).[13]

It goes without saying that the treaties to which refer the provisions of the LOS Convention may be applied as between States Parties to this Convention -- once it enters into force -- only in accordance with its general provisions on its relation to "other conventions and international agreements" (Article 311). Moreover, in respect to the performance of the duties under other conventions on the protection and preservation of the marine environment, paragraph 2 of Article 237 should be applied:

> Specific obligations assumed by States under special conventions with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.

Indirect reference to IMO resolved at least the problem of the legislative authority with respect to pollution from vessels. However, the terms 'rules' and 'standards' remain to be interpreted. Even more complicated is the task of finding a sound interpretation of the expression "generally accepted", used in paragraph 2 of Article 211

International Maritime Organization (IMO), Study by the Secretariat of IMO, Doc. LEG/MISC/1 of 28 July 1987, p. 2 (para. 5), p. 34 (para. 72).

[13]See: van Reenen, *op. cit.*, pp. 34-36.

with respect to "rules and standards". Namely, Article 211(2) provides that laws and regulations adopted by States "shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference."

'Rules and Standards' and the Legislative Activity of IMO

The drafting history of the rules of reference and the final text of the LOS Convention caused uncertainties even in the comments of the participants at UNCLOS III. Thus, Timagenis admits:

> The difference between "rules" and "standards" is not absolutely clear.[14]

However, Timagenis and some other commentators are not eager to engage in the analysis of the difference between the two terms.[15] Van Reenen concludes that "standards are a special sort of binding rule".[16] He draws this conclusion from the habitual structure of IMO Conventions:

> A characteristics of most of these conventions is that the substantive rules, *in casu* technical provisions, are laid down in annexes. In general, the rules concerned with the scope of the treaty, those regarding the legal consequences of violation of the substantive rules and the provisions on supervision are found in the main body of the treaty. It is submitted that these latter rules may appropriately be qualified as 'international rules', and the technical provisions as 'international standards'.[17]

Boyle poses the question of the distinction between 'rules' and 'standards' in the framework of the IMO legislative activity:

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[14]Timagenis, *op. cit.*, note 44 at p. 603.

[15]See also: Rojahan, *op. cit.*, pp. 474-480.

[16]Van Reenen, *op. cit.*, p. 12.

[17]*Ibid.*, p. 25.

> The meaning of "rules" as a form of potentially binding obligation is clear enough, but are "standards" intended to refer, by contrast, to resolutions of the International Maritime Organization (IMO) and other such non-binding instruments, or is the distinction merely descriptive of different categories of obligation?[18]

His answer is that 'standards', like 'rules', should be restricted to those laid down in instruments intended to be binding, as "States should be allowed the freedom to make collective recommendations without their becoming instantly and indirectly a form of binding obligation."[19]

Under the Convention of the International Maritime Organization, IMO is entrusted with the drafting of "conventions, agreements, or other suitable instruments" and with the making of recommendations upon, *inter alia*, the encouragement of "the general adoption of the highest navigation and the prevention and control of marine pollution from ships..." (Article 3, Article 1(a)).

These constitutional rules as well as the following quotation from a paper presented by the Secretariat of IMO to UNCLOS III may leave the impression that 'standards' are not to be found in treaty instruments adopted within the framework of the Organization, but in non-treaty instruments which do not have a binding force:

> IMCO's work in the various fields within its competence consists of the preparation and adoption of Conventions and other appropriate multilateral treaty instruments in cases where governments consider that the issues involved require, or are suitable for, regulation through formal treaty provisions. Where the adoption of the treaty instruments is not considered to be either appropriate or timely in a particular case, IMCO promotes the adoption and implementation of recommendations, codes, uniform standards, recommended practices, etc. While not legally binding on governments, these recommendations, codes, etc., represent agreed international standards which governments find both acceptable and useful for

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[18]Boyle, *op. cit.*, pp. 356-357.

[19]*Ibid.*, p. 357.

incorporation, in whole or in part, in their national regulatory regimes.[20]

However, the instruments passed in IMO prove that standards, *i.e.*, technical norms, are contained both in non-treaty instruments as well as in the IMO Conventions. E.g., standards are contained both in the Recommendation on International Effluent Standards and Guidelines for Performance Tests for Sewage Treatment Plants (Resolution MEPC.2(VI)) as well as in Annex I (Regulations for the Prevention of Pollution by Oil) to the 1973 International Convention for the Prevention of Pollution from Ships.

The particular case of IMO is just but an example of the general situation with respect to the international standards which, according to Contini and Sand, may be divided into three categories: strictly mandatory standards, non-mandatory standards, and potentially mandatory standards.[21] These two scholars stress also the variety of international instruments in which 'standards' can be incorporated:

> Yet technical standards have long (indeed, since the 19th century) been a part of numerous multilateral agreements ranging from telecommunications, aviation, health and meteorology to marine resources and wildlife conservation. Under various names and titles, international "standards" or "practices" -- their quasi-binding force often vaguely and misleadingly couched in terms of "recommendations" or "international legislation" -- have emerged as a distinct type of norms, characterized by a high degree of

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[20]Work of the Inter-Governmental Maritime Consultative Organization (IMCO) Regarding the Development and Adoption of International Standards in Shipping and Related Matters, Doc. 08849 Presented by the Secretariat of IMCO, p. 2. It is interesting to note that in its title the document uses the term "standards" as embracing all the norms (binding and nonbinding) adopted within the framework of IMCO.

[21]P. Contini, P.H. Sand, "Methods to Expedite Environment Protection: International Ecostandards", *American Journal of International Law* 66, no. 1 (January 1972): 37-59 at pp. 47-53.

flexibility and adaptability in line with their predominantly technical-operational objectives.[22]

This historical summary as well as the particular situation in IMO brings us to the conclusion that the term 'standards' should be understood as having an extra-legal meaning of a level of quality or achievement; it can be contained both in a convention (including its annexes) as well as in a non-treaty instrument -- an instrument not having a binding force.

The term 'rule', on the other hand, should be interpreted as meaning all the international norms which determine the duties and rights of States with respect to the protection of the environment. We share the interpretation of the term 'rule' given by van Reenen:

> ...when word "rules" is used in a rule of reference, there is no possible doubt that the rules in question are rules of positive public international law, *i.e.*, treaty rules which are in force, or rules of customary law. In addition, the word "rules" covers decisions of international organizations which are binding on the member states pursuant to the constitution of the organization in question, or decisions which are not binding initially but have become binding as customary law.[23]

The above meaning of the terms 'standards' and 'rules' for which we have opted, brings us to the conclusion that the two notions will in some cases overlap; *i.e.*, in cases where 'standards' have been a binding force. However, there are similar situations of vagueness and overlapping with respect to other terms used in this field. *E.g.*, there is no clarity in the use of the terms 'practices' and 'procedures'.

The Enigma of General Acceptance

I venture to call the expression 'generally accepted' an enigma as it was very much so even for the IMO -- the organization designated as being competent with respect to pollution from vessels. In an Annex to the letter sent by C. P. Srivastava, Secretary-General of IMO to

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[22]*Ibid.*, p. 40. In the same sense see: Environmental Law -- An In-Depth Review, UNEP Report No. 2 (1981), p. 234.

[23]Van Reenen, *op. cit.*, p. 8.

J. Alan Beesley, Chairman of the UNCLOS III Drafting Committee, the following question was posed:

> In particular it would be helpful if further clarification could be given to make the distinction between the expressions "generally accepted" and "applicable" when used to refer to international rules and standards. In this connection it would be useful if it would be clearly indicated whether the term "generally accepted rules and standards" is intended to refer to international standards which have received sufficient international endorsement in an appropriate international forum, for example, by their adoption by the competent international body or by a diplomatic conference for generally application or, alternatively, whether rules and standards would be considered as being "generally accepted" only if they are contained in formal treaty instruments which are in force.[24]

Ignoring the problem of the distinction between 'rules' and 'standards', scholars try to find a single explanation for the expression 'generally accepted' used with respect to the IMO instruments.

Daniel Vignes considers as 'generally accepted' not only customary rules and *jus cogens*, but also technical and specific rules on navigation and pollution to which the international community has given "a consent at the same time diffuse and general".[25]

Timagenis is mainly concerned with the interpretation of the term 'international rules' itself, and he discusses the problem only in terms of treaty law. He opts for a solution in which a conventional rule could be considered as being 'international law', thus applicable to all States,

> when the rule is ratified not only by the minimum number of States required for its entry into force but by a greater number of States, thus obtaining a wider acceptance, without, necessarily, becoming customary law.[26]

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[24]Letter dated 23 May 1980 (A1/B/1.02 CPS/TAH/aj).

[25]D. Vignes, "La valeur juridique de certaines regles, normes ou pratiques mentionnees au TNCO comme "generalement acceptees", *Annuaire Francais de Droit International* 25 (1979): 712-718 at p. 718.

[26]Timagenis, *op. cit.*, p. 605. See also pp. 606-607.

From his point of view, the addition of 'generally accepted' to 'international rules' serves only the purpose of reducing the uncertainty concerning the acceptance of an 'international rule'.[27]

Van Reenen submits that the meaning of 'generally accepted' corresponds to the criteria established by the International Court of Justice (ICJ) for determining whether certain treaty rules have become world-wide rules of customary law. He arrives also to the tentative conclusion that rules of general customary law can be based not only on treaty rules, but also on non-binding decisions of the competent international organization.[28]

O. Rojahan, impressed by the advantages of standard-setting with IMO over the procedure of treaty negotiation, bases his interpretation of the general acceptance test on the recognition of technical standards as practical and feasible:

> ...to become generally accepted, a technical standard must be carried by a consensus relating to its technological justification and economic feasibility. The test of general acceptance requires a technology-related judgment. This judgment must not be confused with the acceptance of a technical standard as legally binding...[29]

However, in order to become generally accepted, even according to Rojahan, a technical standard must have won the acceptance of "something more than a simple majority of participating States" including "the major maritime States".[30] The approval of technical standards may be expressed in the official adoption of a resolution dealing with technical regulations, the entry into force of technical annexes following simplified amendment procedures, the signature of a convention by a qualified majority of States or its adoption by a qualified majority.[31]

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[27]*Ibid.*, p. 607.

[28]He refers to the *North Sea Continental Shelf* cases; van Reenen, *op. cit.*, pp. 11-12.

[29]Rojahan, *op cit.*, p. 474.

[30]*Ibid.*, p. 476.

[31]*Ibid.*, pp. 467-478.

For Mario Valenzuela, a representative of IMO at UNCLOS III, the most reasonable interpretation is that the 'generally accepted rules and standards' are those embodied in relevant IMO conventions in force. He bases his conclusions on the fact that these Conventions (*e.g.*, the 1973/78 MARPOL instrument) provide stringent conditions for their entry into force (acceptance by a substantial number of States, having among them more than half of the tonnage of the world's merchant fleet). This author shows a great deal of sympathy for the conclusions of K. Hakappa, for whom international rules and standards having sizeable support among the maritime States most affected by their implementation could be characterized as 'quasi-customary' law. However, Valenzuela did not dare to answer the question whether such conventions are applicable to all States, or only to those for whom they are in force.[32]

For Alan Boyle, as "the object of the pertinent provisions of the Law of the Sea Convention is to bring about the widest possible application of international rules", the traditional freedom of States to refuse to ratify or apply relevant multilateral conventions should be limited. Thus, conventions intended to represent the international community's most recent formulation of relevant rules and standards, should receive the ratification of enough States for their entry into force.[33]

Final Remarks

In the variety of meanings attributed to the expression 'generally accepted', flexible interpretations going beyond the parameters given by Article 38(1) of the Statute of the ICJ for the creation of customary law prevail. The reason for this flexibility is obvious: in order to increase the number of applicable 'international rules and standards' for the protection and preservation of the marine environment, the

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[32]M. Valenzuela, "IMO: Public International Law and Regulation", The *Law of the Sea and Ocean Industry: New Opportunities and Restraints*, Proceedings, Law of the Sea Institute Sixteenth Annual Conference (June 21-24, 1982, Halifax, Nova Scotia): 141-151 at pp. 143, 144-145, 151. See also: K. Hakappa, *Pollution in International Law* (1981), p. 121.

[33]Boyle, *op. cit.*, p. 356.

rigid limits of applicable treaty law and the problems of ascertaining the existence of customary law are to be avoided.

Such extensive interpretations are plausible in this case, taking into account the intentions of the drafters[34] and the texts of the corresponding provisions of the LOS Convention dealing with other sources of pollution, where no extensive application was envisaged and the habitual terminology was used ('intentionally agreed rules...', 'global and regional rules...', 'international rules...'). However, the diversity and vagueness of the tests of general acceptance submitted by the quoted authors give an idea of the problems the international community will incur in applying the rules of reference which include the criterion of general acceptance. The reasonableness of the introduction of this new source of uncertainty in a legal order which is traditionally handicapped by the non-existence of an objective test for the establishment of rules of customary law and the newly invented notion of "soft law" is doubtful.

In this perspective, the suggestion of Mario Valenzuela is both understandable and wise:

> Since the Law of the Sea Convention does not clarify the interpretation of the terms "generally accepted" and "applicable" used to qualify "international rules and standards", it is likely that states, either through IMO or by means of their practice at the national or regional levels, will have to determine their own interpretation.[35]

A recent study by the Secretariat of IMO also suggests that it would be necessary for the appropriate bodies of IMO to consider what guidelines IMO can usefully provide to States in regard of rules and regulations which are deemed to be 'generally accepted'.[36]

I do agree that the appropriate bodies of IMO should indicate to the world community the level to which the IMO Conventions and IMO non-treaty instruments are formally accepted by States and applied in their practice. However, the expression 'generally accepted international rules and standards', and particularly its first part,

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[34]See: Timagenis, *op. cit.*, p. 606.

[35]Valenzuela, *op. cit.*, p. 151.

[36]See: IMO doc. LEG/MISC/1, p. 52 (para. 122).

require a thorough analysis and a more general answer. In this respect the already mentioned IMO study should be quoted again:

> It is... to be noted that formal and authoritative interpretations of the 1982 Convention's provisions can only be undertaken by the States Parties to that Convention or, in appropriate cases, by judicial or arbitral tribunals provided for that purpose in the Convention itself.[37]

All the questions raised in this paper and in previous articles on this topic deserve an answer which will have a durable value with respect to the problem of the sources of international law. It would, therefore, be preferable to have an interpretation of all the questions related to the unclear expression 'generally accepted international rules and standards' by an organ of such an authority as the United Nations International Law Commission or the International Court of Justice.

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[37] *Ibid.*, p. 3 (para. 10).

THE PORT STATE ENFORCEMENT REGIME THROUGH INTERNATIONAL ORGANIZATIONS

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Definition of the Port State's Enforcement Powers

Customary international law does not seem as a rule to provide the port state with jurisdiction over foreign vessels in its internal waters regarding polluting activities attributed to these concerned. In this sense port state jurisdiction was first introduced for detailed international consideration at the 1973 IMO Conference on Marine Pollution.

Formulation of the port state authority of a coastal state is now included in a number of maritime conventions such as the 1966 International Convention on Load Lines,[1] the 1973 International Convention for the Prevention of Pollution from Ships as amended in 1978;[2] the 1974 International Convention for the Safety of Life at Sea as amended in 1978;[3] the 1976 Merchant Shipping (Minimum Standards) Convention (No. 147);[4] the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers;[5] the Dumping Conventions;[6] the 1969 International

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[1]Art. 21, 640 UNTS 133, [hereinafter cited as the 1966 Load Lines Convention].

[2]Art. 5(2); reproduced in International Legal Material 17, (1978):546 [hereinafter cited as the MARPOL 73/78].

[3]Regulation 19 of Chapter I; Regulation II of Chapter VII; reproduced in International Legal Material 17, (1978): 579; 1981 UKTS 40, [hereinafter cited as SOLAS 74/78].

[4]Art. 4; reproduced in International Legal Material 15, (1976): 122, 1984 UKTS 22 (Cmnd. 9186), [hereinafter cited as the ILO Convention No. 147].

[5]Art. X(1); 1984 UKTS 50; (Cmnd. 9266), [hereinafter cited as the 1978 STCW].

Convention on Civil Liability for Oil Pollution Damage,[7] and the 1986 United Nations Convention on Conditions for Registration of Ships.[8]

However, it must be emphasized that implementation of these conventions does not imply an extension of the port state's enforcement authority over violations on the high seas or in foreign coastal waters, only control of ships and their equipment; control of discharge at sea; control of crew competence and working conditions; and other requirements present in the ship as it enters the port in question. The rectification of these conditions are well within the jurisdiction of the port state since they are "present" whilst the vessel lies in its waters. Port state jurisdiction on the other hand means that a state may exercise enforcement jurisdiction over foreign ships in its ports with respect to offenses against international rules and standards committed in sea areas beyond its coastal jurisdiction. Even if the violations were committed on the high seas (or foreign waters) and they did not in any way affect the port state the latter would be entitled to take enforcement action against the vessel.

Development of the "Port State Enforcement" Regime

Coastal state concern for the environmental impact of vessel- source pollution is a quite recent development. Exclusive flag-state enforcement has been reaffirmed over the years in maritime conventions and bilateral agreements. The enforcement regime

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[6]Art. VII(1)(b) of the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, reproduced in International Legal Material 11, (1972): 1302; 26 UST 2403; Art. 15(1)(b) of the 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 1975 UKTS 119;Art. 9(3)(b) of the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), reproduced in International Legal Material 13, (1973): 544; Art. 11(1)(b) of the 1976 Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, reproduced in International Legal Material 15, (1975): 306.

[7]Art. VII(11), reproduced in International Legal Material 9, (1970): 45; 1975 UKTS 78 (Cmnd. 6183).

[8]Art. 6(4), reproduced in International Legal Material 26, (1987): 1229 [hereinafter referred to as the 1986 UNCCORS].

envisaged by the 1954 International Convention for the Prevention of Pollution of the Sea by Oil[9] is based on flag state jurisdiction. Any discharge in contravention of the convention, wherever it occurs, is an offence punishable only under the law of the flag states.[10]

The 1954 OILPOL provisions were soon proved inadequate and the subsequent amendments did nothing to improve the situation. The *Torrey Canyon* disaster and an accumulating number of other accidents, however, gave rise to a number of questions of a legal character, especially concerning the extent to which a state directly threatened or affected by a casualty which takes place outside its territorial sea can, or should be allowed to take measures to protect its coastline, harbors, territorial sea or amenities even when such measures may affect the interest of shipowners, salvage operators and other flag states.

The 1973 IMO Conference on Marine Pollution failed to adopt a port state enforcement provision but it, nevertheless, strengthened the enforcement system. Article 6(2)[11] provides that port officials in the contracting parties may inspect a foreign vessel in order to verify whether it has discharged in any sea area harmful substances in violation of the Regulations annexed to the convention. Moreover, according to Article 6(5), a right of inspection applies to cases where port officials receive from any other party to the convention a request for an investigation together with "sufficient evidence that the ship has discharged harmful substances or effluent containing such substances in any place."[12]

However, these provisions meant that the traditional port/flag state separation of prosecuting authority still remained unchanged. Even if the inspection disclosed adequate evidence for prosecuting, the port state would not be entitled to institute legal proceedings; such

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[9]327 UNTS 3; 1958 UKTS 56 (Cmnd. 595), [hereinafter cited as the 1954 OILPOL].

[10]Art. VI(1). The only exception is the internal waters of a state.

[11]*Op. cit.*, ref. 2.

[12]*Ibid.*

measures may be taken only by the flag state or the state within whose jurisdiction the violation has occurred.[13]

Developments During the UNCLOS III Conference

At the same time as the adoption of MARPOL,[14] the United States introduced into the Seabed Committee, which was preparing for the third UN Conference on the Law of the Sea, a number of draft articles on the "Protection of the Marine Environment and the Protection of Marine Pollution."[15]

The first official proposal to UNCLOS was submitted by a group of maritime states to the Third Committee in March 1975.[16] This document provided both for port state inspection and port state enforcement. According to this proposal, port state inspection could be conducted irrespective of where the suspected discharge violation has occurred but only if the offence was committed within the proceeding six months. Nevertheless, no duty was imposed on the port state which "may undertake an immediate and thorough investigation."[17] A stronger obligation is imposed on the port state if the information is received from another party to the convention or the competent international organization.

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[13]*Ibid.*, Art. 4(2).

[14]*Op. cit.*, ref. 2.

[15]U.N. Doc. A/AC.138/SC.111/L.40/ 1973, rep. in S. Oda (ed.), *The International Law of the Ocean Development - Basic Documents*, Vol. 1, (The Netherlands: Sifthoff Noordhoff, 1975), M.H. Nordquist and C. Park (eds.), *Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea*, Occasional Paper No. 33, (University of Hawaii, Honolulu: Law of the Sea Institute, 1983).

[16]Draft Articles on the Prevention, Reduction and Control of Marine Pollution, Doc. A/CONF. 62/C.3/L.24, 4 Official Records, p. 210, 21 March 1975 sponsored by Belgium, Bulgaria, Denmark, Democratic Republic of Germany, Federal Republic of Germany, Greece, Netherlands, Poland and the United Kingdom.

[17]*Ibid.*

The enforcement powers of the port state, however, were more restricted. Port state proceedings could be instituted only on condition that "as a result of the violation, damage has been or is likely to be caused to the coastline or related interests of that state" or where the port state is requested to prosecute by another state having "reasonable grounds" to believe that it is the victim of similar damage or threat of damage.

The coastal group's attitude to the port state provisions, although opposing strongly the proposal as a whole, was mainly positive. Article 27(1) of the Single Negotiating Text[18] gave wide jurisdictional powers to any port state that had "reasonable grounds" to believe that a foreign vessel "voluntarily within one of its ports or at one of the offshore terminals, has violated the international rules and standards *regardless* of where the violation occurred." The port state has the duty to undertake an immediate and thorough investigation and notify the flag state and any other states concerned of the results. Even more interesting was the proposal that the universal duty of inspection is not limited to discharges but covers any violation of international rules and standards. A foreign vessel might also be detained if it represented an excessive danger to the marine environment.

In comparison the enforcement powers of the port state were curtailed. The text adopted a zonal approach and provided that proceedings can be instituted only if the vessel has violated international rules and standards on discharges in an area extending to a number of miles from its coastal baselines. Otherwise the port state could do so only if requested by another state, if both the violation occurred off the latter's coast and the requesting state was a party to the violated convention containing these standards.

These suggested provisions, though, were not generally acceptable and the port state provisions were altered substantially. The text did not distinguish between port state inspection and other enforcement powers. The port state had the right to "undertake investigations" and "cause proceedings to be taken" in case of a discharge violation. Therefore, the port state had only a discretionary power, and even if a request was made by a third state for investigation of discharge violations within the territorial limits, the port state was required only to "endeavour to comply with the request". The port state was also obliged to transfer any proceedings to the coastal state when the violation has occurred within the jurisdiction of that state. This is an

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[18]U.N. A/CONF.62/WP.8/ 7 May 1975.

improvement upon the previous formulations since the coastal state could only institute proceedings if the violation was committed in an area close to its coast. Article 218 of the United Nations Law of the Sea Convention[19] reads as follows:

Enforcement by Port States

1. When a vessel is voluntarily within a port or at an offshore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international law and standards established through the competent international organization or general diplomatic conference.
2. No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings.
3. When a vessel is voluntarily within a port or at an offshore terminal of a State, that State, shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag State for investigation of such a violation, irrespective of where the violation occurred.
4. The records of the investigation carried out by a port State pursuant to this article shall be transmitted upon request to the flag State or the coastal State. Any proceedings instituted by the port State on the basis of such an investigation may, subject to section 7 (safeguards), be suspended at the request of the coastal State when the violation has occurred within its internal waters,

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[19]U.N. Doc. A/CONF.62/122; reproduced in International Legal Material 21, (1982): 1261 [hereinafter referred to as the LOS Convention].

territorial sea or exclusive economic zone. The evidence and records of the case, together with any bond or other financial security posted with the authorities or the port State, shall in that event be transmitted to the coastal State. Such transmittal shall preclude the continuation of proceedings in the port State.[20]

Safeguards are provided in section 7. These include, *inter alia*, the facilitation of hearing of witnesses and the admission of evidence;[21] the specification that measures can only be enforced by officials or government vessels;[22] the need to take due care not to endanger the safety of navigation, create a hazard to a vessel, "or bring it to an unsafe port or anchorage or expose the marine environment to an unreasonable risk."[23]

The convention also reaffirms the duty not to discriminate against foreign vessels[24] and to suspend legal action "upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag state within six months of the date on which proceedings were first instituted."[25] However, there are two significant exceptions to this. A coastal state has precedence in the case of major pollution of

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[20]*Ibid.*, Article 219, on measures relating to seaworthiness of vessels to avoid pollution, also provides that: "Subject to section 7, States which upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and upon removal of the causes of the violation, shall permit the vessel to continue immediately."

[21]*Ibid.*, Art. 223.

[22]*Ibid.*, Art. 224.

[23]*Ibid.*, Art. 225.

[24]*Ibid.*, Art. 227.

[25]*Ibid.*, Art. 228(1).

its coast and the port state can refuse to transfer the proceedings if "the flag state in question has repeatedly disregarded its obligations to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels." The latter is an obvious effort to provide a port state with an effective jurisdictional power if the flag state proves powerless or indifferent to its international obligations.

Proceedings must not be duplicated, but can be initiated any time within three years from the day of the violation. Only monetary penalties may be imposed[26] and states are liable for damage or loss if their enforcement measures are unlawful or unreasonable.[27]

Main Characteristics of the Port State Enforcement Regime

The main characteristics of the port state enforcement can be summarized as follows:

a. "*Voluntariness*": This is an essential element of the new regime. A port state cannot compel a vessel on the high seas or even its own territorial waters or EEZ to proceed to its ports and face proceedings.
b. "*Ports or offshore terminals*": The exercise of this power is restricted to these areas and does not include the functional internal waters area.
c. "*Investigative and adjudicative powers*": The jurisdiction is engaged solely by reason of the voluntary presence of a delinquent or suspect vessel in its ports. The enforcement prerogative, therefore, is primarily investigative and only secondarily adjudicative.
d. "*Any discharge*": The enforcement powers are restricted to discharges from ships. These include accidental and "intentional" discharges of oil; noxious and hazardous substances in bulk or packaged form; sewage and garbage (*i.e.*, discharges such as reballasting, tank cleaning activities, and leaking from engines).
e. "*International waters*": This procedure is to be followed only in the case of an incident with no "territorial link" to the port state.
f. "*Applicable international standards*": The port state may only enforce standards that are either part of customary international law or laid down in maritime conventions on the related issue (*e.g.*,

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[26]*Ibid.*, Art. 230.

[27]*Ibid.*, Art. 231.

MARPOL discharge standards). This provision excludes resolutions, guidelines and codes that are not already incorporated in customary international law.

g. "*Competent international organization*": This is generally accepted to be the IMO.

h. "*A right to enforce*": The port state has only a discretionary power to enforce and may decline to do so.

i. "*Discharges in foreign waters*": No investigation may be undertaken except if the port state is so requested by another interested LOS Convention party. Even then, the port state must comply "as far as practicable" with a request. The coastal state could also ask for the suspension of such proceedings.

j. "*The role of the flag state*": It may request the investigation of discharge violations by its vessels on the high seas or foreign waters. It might also decide to pursue legal proceedings in its national courts. The port state must interrupt its own proceedings if a flag state decides so to do, subject to the safeguards of Article 228.

k. "*Penalties*": Although the LOS Convention specifically refers to monetary penalties, Article 230(2) further suggests, by implication, that imprisonment can be ordered as sanction in the case of willful and serious pollution of the territorial sea.

Evaluation of the Port State Regime in the LOS Convention

Port state enforcement jurisdiction in the LOS Convention is an innovative expansion of jurisdiction in international law. Prevention and punishment of marine pollution incidents left exclusively to the discretion of the flag state are now delegated to a truly universal system of control and surveillance. Nevertheless, the restricted area of implementation and enforcement makes the system more effective and avoids the difficulties, hazards, and psychological barriers involved in interference with foreign vessels out in the open sea.

The existing regime of registration of vessels allows registration in states with no genuine link with the vessels and no real powers of enforcement, since those vessels hardly ever call at a national port or their registering state, nor does that state have the necessary infrastructure, administrative power, and resources to implement and enforce existing international obligations or punish offenses committed elsewhere. Immobilizing tankers at sea for purposes of boarding and inspection is a very complex and dangerous enterprise, especially in certain routes used intensively for navigation. Coastal jurisdiction is also a very precarious and to a certain extent undefined

field, and precise rules need to be adopted for different jurisdictional zones, *e.g.*, territorial waters or EEZs.

Nevertheless, the proposed regime is an imperfect one and there are a number of negative aspects counterbalancing the positive ones. It is questionable, for instance, whether port states will prove sufficiently motivated to exercise an effective and thorough surveillance, inspection, and punishment of violations not affecting their own interests. The lack of an international body to supervise and regulate the regime, to adopt technical guidelines, publish statistics, adopt measures, report deficiencies, and provide for the detention of vessels is another handicap.

Another controversial issue is whether national authorities will comply with the applicable international legal standards or will implement their own national legislation, which might prove different in its application. The new regime could also cause unreasonable hardship to shipowners and crew by subjecting them to a multitude of jurisdictions exercised by port states having different cultures and judicial systems. Coastal or even flag states will face a number of administrative difficulties, especially in the determination of the next port of call. Due to the high speed of turnover, especially for tankers, the vessel might depart from a port before the request for the exercise of port state jurisdiction is forwarded, processed, and implemented by the interested authorities. A possible solution to this problem is the establishment of a computerized system for all member states, updated on a daily basis, listing the names and identification numbers of all suspected vessels. The cost of such an enterprise is substantial and there are a number of difficulties in providing adequate evidence of violations or alleged violations occurring in some instances thousands of miles away from the port of prosecution.

The port state would also face a conflict of internal interests, especially economic ones concerning its exports and imports if it becomes a "tough prosecutor" and punishes vessels that call at its ports to deliver or export goods. The system could very easily lead to the establishment of "ports of convenience" and it could be hard for port authorities to justify the loss of revenue from pressing charges against a vessel for violations and intentional discharges in areas beyond national jurisdiction.

The best solution is to establish an international regulatory authority with primary responsibility for enforcement and for monitoring

compliance.[28] Detection and the obtaining of evidence of violations will require considerable resources and sophisticated equipment. For port state jurisdiction to be fully effective, all flag and coastal states should also ratify the LOS Convention and implement its provisions. Since there is a serious risk that individual states will not commit the substantial resources needed to develop the requisite fleet of vessels, aircraft, or other facilities, an international monitoring system should be established, including satellites and an international inspection force with the necessary expertise and training.

Nevertheless, it is highly unlikely that such a body will be established within the foreseeable future. It also appears that, although the national regulatory and enforcement arm in relation to vessel source pollution has been strengthened, "the scope of unilateral action independent of regime rules has been contained." It might be desirable to use the existing IMO enforcement regime, adapted to include violations in international waters with the supervision of the Marine Environment Protection Committee (MEPC) or a special subsidiary body thereof, for the adoption of guidelines, institution of a uniform inspection system and to receive reports on incidents or suspected violations.

Enforcement measures should be consistent and non- discriminatory in relation to nationality or class of ship. Moreover, not only the applicable laws but also the procedures and penalties employed should be consistent with these values.

It appears that it would also be possible for regional cooperation systems to co-exist with the international regime to accommodate regional requirements, with a centralized information structure.

Surveillance by aircraft or patrol vessels could cover specially designated areas to avoid duplication of efforts, and inspection procedures in ports, if uniform, could give the inspected vessel a "clean" certificate for a limited period of time facilitating unobstructive entrance in all ports.[29] The ability to impose effective

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[28]See Cheng-Pang, Wang, "A Review of the Enforcement Regime for Vessel-Source Oil Pollution Control, *Ocean Development and International Law* 16, no. 4 (1986): 305-339, at 310-311.

[29]T. IJlstra, Enforcement of International Instruments in the North Sea - The Missing Link, in Reasons for Concern, Proceedings of the 2nd North Sea Seminar 1986, (Amsterdam: Werkgroep Noordzee, 1987): 287-313, at pp. 293-295.

sanctions upon violators of relevant accepted practices is, however, paramount. The existence of an international monitoring mechanism to report and, in exceptional circumstances, sanction non compliance could improve this. This body could also assure the adoption of equitable enforcement measures and deter excessive surveillance, unreasonable inspection efforts or procedures, prolonged judicial or administrative proceedings, or unduly severe penalties.

The following analysis will concentrate on the contribution of a number of international governmental and non-governmental organizations in implementing the port state provisions and their role in the strengthening, coordination, and harmonization of the port state regime.

International Labor Organization

One of the main criticisms levelled against substandard vessels is that the social and working conditions and the level of safety are lower than on other vessels.[30] The 62nd Maritime Conference of the ILO in 1976[31] considered a convention creating legal obligations but limited in substance to standards which have attained fairly wide acceptance in maritime countries.

Port State Jurisdiction

The keenest debates in the conference took place after the Government member of France submitted a proposal for a new article suggesting that port authorities should be empowered to check any vessel against which a complaint had been lodged or which had been proved not to meet the standards of the convention. A number of states supported the view that port authorities should be able to intervene and also that this was not a question of an innovation in

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[30]E. Osieke, "The International Labour Organization and the Control of Substandard Merchant Vessels", International and Comparative Law Quarterly 30, no. 3, (1981): 497-512, at p. 497; E. Argiroffo, The International Labour Organization, in M.B.F. Ranken, ed., Greenwich Forum VI - World Shipping in the 1990s, (Surrey: Westbury House, 1981), pp. 160-165.

[31]International Labour Conference, 62nd Session 1976, Record of Proceedings.

international law but was based on the exercise of the port state's existing jurisdiction over its territory.[32]

Strong opposition was voiced by several delegates, who claimed that draft Article 4 contradicted the principles of international law, represented an intolerable interference in the jurisdiction and sovereignty of the flag state and constituted a threat to the merchant marines of developing states. The Government of India stressed in this context that it was not possible for the developing countries to attain the social standards proposed by the convention and that although some IMO instruments envisage port state control the relevant standards are precisely defined in the instrument concerned.[33] Finally, an amended text proposed by the Government members of the European Communities (EC) was accepted. Article 4 provides that:

1. If a Member which has ratified this Convention and in whose port a ship calls in the normal course of its business or for operational reasons receives a complaint or obtains evidence that the ship does not conform to the standards of this Convention, after it has come into force, it may prepare a report addressed to the government of the country in which the ship is registered, with a copy to the Director-General of the International Labor Office, and may take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health.
2. ...It shall not unreasonably detain or delay the ship.
3. For the purpose of this Article, "complaint" means information submitted by a member of the crew, a professional body, an association, a trade union, or generally any person with an interest in the safety of the ship, including an interest in safety or health hazards to its crew.

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[32] *Ibid.*, see especially the views expressed by Egypt, *ibid.*, p. 186; Finland, *ibid.*, pp. 188-189; the Netherlands, *ibid.*, pp. 192-193; France, *ibid.*, p. 193; United States, *ibid.*, p. 193; Employers, *ibid.*, pp. 246-247; Workers, *ibid.*, pp. 247-248; European Communities, *ibid.*, p. 248; Italy, *ibid.*, p. 249; Canada, *ibid.*, p. 259.

[33] *Ibid.*, India, pp. 192, 251; USSR, *ibid.*, pp. 193, 250; Panama, *ibid.*, p. 193; Sri Lanka, *ibid.*, pp. 250-251; Indonesia, *ibid.*, p. 251; Poland, *ibid.*, p. 255; Bulgaria, *ibid.*, p. 255; Cuba, *ibid.*, pp. 252-253; German DR., *ibid.*, p. 253; Philippines, *ibid.*, p. 253; Hungary, *ibid.*, p. 257; Mexico, *ibid.*, pp. 257-258.

The Government representative of the Netherlands, speaking on behalf of the EC countries, defined "measures necessary" in the light of the standards included in the Appendix to the proposed convention and therefore in terms of their internationally accepted standards and not according to the standards in force in a certain state.[34]

It is interesting to note that the ILO Secretariat clarified *inter alia*, that

> [F]or the purpose of the concern of the port state to keep substandard ships out of its territory, the convention provides an internationally agreed standard of reference. This standard is not binding on non-ratifying states -- which can always avoid the ports of ratifying states -- but such states are on notice that ships which are clearly substandard in relation to the convention might be subject to port state control and that the port state may take measures necessary to rectify any conditions on board which are 'clearly hazardous to safety or health.'[35]

Therefore, the formulation adopted is strengthening the role of the port state but, as in the case of the relevant IMO conventions, it does not imply an extension of the port state jurisdiction over violations on the high seas or foreign coastal waters but the rectification of conditions "present" whilst the vessel lies in its waters.

Application of the ILO Convention No. 147 and Further Developments

The ILO Convention No. 147 came into force in November, 1981.[36] It has so far been ratified by 20 countries. The ILO Constitution imposes certain obligations on ratifying states and Article 22 imposes the obligation to make an annual report on the measures taken to give effect to the provisions of the convention. Its Committee of Experts has devoted special attention to, and requested information on, the following subjects: (i) the clarification of "effective control or jurisdiction" with special reference to Open Registries (OR) (Article 2(a)(b)(c); (ii) the question of verification by inspection or other appropriate means of compliance with international labor conventions

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[34]*Ibid.*, at p. 193.

[35]ILO, JMC/24/3, at p. 7.

[36]*Op. cit.*, ref. 4.

(Article 2(f); (iii) information on the arrangements for the investigation of any complaints made in connection with the employment of a state's nationals on foreign ships and any complaints concerning the engagement of foreign seafarers on such ships (Article 2(d) (ii); (iv) to indicate whether reports into serious marine casualties are made public (Article 2(9); (v) compliance with Article 3.[37].

Reports submitted by a number of countries indicate that there have been no objections to the application of the convention and that no cases have been brought before courts of law or other tribunals involving questions of principle relating to its application.[38]

ILO's last maritime session was held in October 1987 in Geneva, eleven years after the adoption of the minimum standards convention. The unique character of this organization especially in the verification and implementation of its conventions make these delays unfortunate in a fast changing environment where action is needed on a continuous basis. A possible solution would have been more frequent meetings of the Joint IMO/ILO Committee. ILO's role on maritime affairs should be strengthened and continued uninterrupted on the fields of welfare and the social conditions of seafarers. The port state has a unique role to play in the implementation and enforcement of these provisions.

The Role of the International Transport Workers' Federation (ITF)

The ITF has been active on the issue of international standards for seamen from a very early date. Through its participation in the ILO it was one of the main forces for the adoption of the thirty-one conventions pertaining to conditions of work in ocean transport. ITF's interest has been mainly concentrated on the employment of seamen from developing countries at lower rates of pay. Nevertheless, despite occasional boycotting activity taken against traditional maritime flag operators, the major thrust of the ITF's campaign has been directed

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[37]ILO, JMC/23/3, p. 8.

[38]Annual Reports were submitted to the ILO by the following countries: Belgium (29.11.84); Costa Rica (7.11.83); Denmark (10.1.83); Egypt (15.11.85); Finland (3.12.82); France (27.9.82); Germany F.R. (30.6.82); Greece (30.12.82); Italy (9.12.83); Japan (10.2.86); Liberia (26.1.83); Morocco; Netherlands (11.1.83); Norway (21.2.83); Spain (9.12.82); Sweden (14.12.82); United Kingdom (31.10.84); Hong Kong (9.12.82).

toward open registries (OR) and operators employing crews of convenience.

The boycotts, however, failed to attract sufficient support and the ITF concentrated its efforts on conclusion of collective agreements through the affiliated unions of the country in which actual control of the shipping operation is vested. The main focus was placed on ensuring that wages and conditions of seafarers on OR ships were adequate and no less than those provided by ILO Recommendations and on forcing all ships to register under the flag of countries in which the genuine control lies.

Nevertheless, its critics emphasized that the ITF's policies, from the 1970s to the present day, have almost exclusively directed pressure against the OR ships, regardless of conditions thereon, when the vessel in question does not hold a blue ITF certificate, and have almost equally ignored national flag ships even when conditions on such ships are decidedly inferior to those on comparable OR ships that have been boycotted.[39] The ITF action also alienated affiliated unions in the Indian subcontinent and from several other Asiatic countries.

ITF and the 1986 UNCCORS

In recent years the ITF has been very active in the United Nations Conference on Trade and Development (UNCTAD) drive to phase out OR shipping and to transfer vessels to the developing countries.[40] In statements made to the United Nations Conference on Conditions for Registration of Ships[41] it supported proposals that ships should be manned in such a way as to ensure safety at sea; that the conditions of employment should be those obtaining in a bona fide flag state and should also conform to generally accepted international rules and standards; that bilateral agreements between flag states and labor-supplying countries must ensure proper treatment for seafarers

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[39]H.R. Northrup & R.L. Rowan, The International Transport Workers Federation and Flag of Convenience Shipping, Industrial Reseach Unit, (Philadelphia: Wharton School, Univ. of Pennsylvania, 1983; M.L. McConnell, "'Darkening Confusion Mounted Upon Darkening Confusion': The Search for the Elusive Genuine Link," Journal of Maritime Law and Commerce 16, no. 3 (1985): 365-396, at 385.

[40]See analysis in S. 6.

[41]UNCTAD, TD/RS/CONF. 3 - TD/RS/CONF/PC/4, 3 January 1984, at pp. 18-19.

and a sizeable proportion of development aid funds should be used to train marine surveyors in developing maritime countries to enable them to play a full part in the international or regional control of port states. The ITF has also alerted its inspectors to the need to ensure the effective enforcement of the 1982 Paris Memorandum.[42]

Assessment

ITF has devoted its campaign to improving the conditions of seafarers and to the elimination of the OR fleets. There is no question that the ITF actions have forced OR countries to raise their standards, legislate on safety issues, participate in international conventions on marine safety and prevention of pollution, and take measures to impose the training and well-being of seafarers. However, ITF has from the inception of its campaign equated OR shipping with substandard shipping. The ITF focuses on the flag, a policy which some times has little regard for the rates of pay, the conditions of work, or the desires of the affected employees. Moreover, it ignores the fact that substandard conditions exist aboard a number of vessels irrespective of their flag.

The ITF suffered a major set-back in its long campaign against the OR with the conclusion of the 1986 UNCCORS.[43] UNCCORS provisions were strongly criticized on the ground that they failed to identify and establish the genuine link. The ITF Seafarers' Section met in Venice in March 1986 and adopted a resolution recognizing that this convention, if ratified, would legitimize OR operations; it therefore, adopted a campaign of non-ratification.[44] Following these developments and the growth of new offshore registers the ITF decided to review its campaign against FOC vessels in a move which should result in a stronger more unified campaign.[45]

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[42]ITF Newsletter, no. 3 (March 1983), p. 23. For an analysis on the Paris Memorandum see *infra*, s. 5.

[43]See *op. cit.*, ref. 8.

[44]ITF, 86/FP 2(a), Annex.

[45]Lloyds List, 11 Jan. 87, p. 1.

The Enforcement Regime of the Marine Pollution Conventions

Articles VI(3) and X of the 1954 OILPOL[46] provided for an obligation of the contracting parties to submit information on contravention of the convention, investigations of alleged violations, the outcome of proceedings, and the penalties imposed. Until the Fifth Meeting of the MEPC, though, these reports were only distributed to IMO members as circular letters. Enforcement proved in practice to be the stumbling block in implementing even the moderate requirements of this convention.

The MEPC accepted that one of its responsibilities was to identify matters requiring improved control of enforcement measures, reasons for infringement, and ways to eliminate them. Accordingly, it included the reporting of these incidents as a regular item in its agenda.[47] Reports of this nature can be classified as follows:

1. Reports by coastal states to flag states under Article X(1) on alleged violations which occurred within or outside the territorial waters of the coastal state. There is no obligation on the coastal states to submit these reports to IMO;
2. Reports submitted by the flag states under Article X(2) on the action taken on the alleged violations reported by the coastal states. The flag states must furnish reports to the coastal states and IMO;
3. Reports submitted by port (or coastal) states under Article VI on violations of OILPOL which occurred within the territorial waters of these states and on the penalties imposed by them. Port states must submit reports to IMO on the penalties actually imposed, but do not have to inform the flag states.

This action was supplemented by a decision by the Maritime Safety Committee (MSC) to adopt a method of collecting information from administrations regarding the enquiries held into casualties and their findings.[48] The MEPC discussed this action and decided to prepare

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[46]See *op. cit.*, ref. 9.

[47]MEPC V/19, para. 71, 2 June 1976.

[48]MEPC VII/18, 10 May 1977; see also Res. A.322(IX).

a separate list of incidents involving significant spillage of oil.[49] This list included incidents characterized as significant spillage (*i.e.*, a spillage of 100 tons or more) and governments were requested to provide information on their investigations.

Nevertheless, these reports were submitted to the MEPC only for consideration without the establishment of a formal procedure for analysis and evaluation. Only in 1983 did the Secretariat attempt a statistical analysis of the reports submitted from 1977 to 1981.[50] What was made obvious from an analysis of these reports is that the number of states submitting reports is very limited. While the reports cover a wide range of flags (85 flags) there were only 27 states reporting in the years 1977 to 1981. This analysis included 2,451 reports, 1,640 of which led to the conviction of the master, shipowner, and the crew; 128 were found not guilty because of proof of innocence or lack of evidence.

A close analysis of the reports submitted by the port/coastal states on violations committed within their territorial waters and convictions and penalties thereof reveals a higher percentage of convictions and investigations. Flag states are, however, very slow to follow relevant reports and only a few states take any action and punish infringements. These results also indicated that even states with a very good tradition in reporting violations to flag states and stringent regulations for infringements within their own territorial waters are very reluctant to punish violations in foreign waters or the high seas.

States that submit reports on port state enforcement are mainly members of Group B (according to UNCTAD's classification) with a few exceptions from Group D. Even if some states that belong to the Group of 77 exercise some kind of port state jurisdiction, the figures reveal either that they are very few or that they have no administrative capabilities to establish an effective system of inspection of vessels calling at their ports or polluting their territorial waters or for dissemination of information -- both to states concerned and the relevant organization. Therefore, they restrict themselves to investigating or penalizing their own vessels for offenses committed in international or foreign waters.

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[49]MEPC VII/19, Annex II, Section I, 29 June 1977.

[50]MEPC 19/13/7, 6 Sept. 1983.

Evolution of the Mandatory Reporting System or the Pollution Conventions

The shortcomings of the reporting system provided by the OILPOL were recognized during the negotiations for the MARPOL convention. The provisions of the latter convention provide for the following three categories of reports:

a) deficiency of ships and certificates (Art. 5);
b) discharges in contravention of the convention (Art. 6);
c) incidents involving harmful substances (Art. 8);

Article 11(e) empowered IMO to prepare a standardized annual statistical report of penalties actually imposed for infringements of the MARPOL convention. Furthermore, Protocol I included detailed provisions on the duty to report, methods of reporting, contents of reports, and reporting procedures. States were obliged to make reports whenever an incident involved discharges other than those permitted under the MARPOL convention and covered all its Annexes. Reports are forwarded in a standardized format also adopted by the MEPC at its 21st Session.[51] States are requested to submit the required annual summary reports by 30 June each year. These reports must include:

1. Annual summary reports to IMO by the administration of incidents involving oil spillage of 100 tons or more.
2. Annual enforcement reports: (i) reports by the coastal state of alleged violations referred to the flag state; (ii) report by the flag state of actions taken on alleged violations of the discharge provisions referred to that state; (iii) report by the flag state of alleged inadequacy of reception facilities referred to the port state; (iv) report by the port state of actions taken on alleged inadequacy of reception facilities referred to that state.
3. Annual assessment reports: (i) report by the port state of the MARPOL effectiveness; (ii) report by the port state of MARPOL violations resulting in detention or denial of entry; (iii) statistical reports of penalties imposed for MARPOL violations.

[51]MEPC 21/19, 16 May 1985, Annex 14.

An analysis of the reports submitted during the first year of application[52] indicates that only 23 states submitted reports of some kind, and even if it is not possible to assess the effectiveness and usefulness of the new system, these reports present a clear indication of the future trends. The picture is not very promising.

Only five states and one territory (Hong Kong) have returned full and comprehensive reports including all appropriate sections. Some states continue to send information along the lines of the old system and do not report on all sections but only on a selective few. Some states may not report simply because there have been no actions or violations under these sections, but their reticence might also imply a lack of the appropriate mechanisms to enforce the relevant pollution regulations.[53]

This is only the beginning of implementing the new system, and there is always the hope that, given time, more administrations will be able to better respond and fulfil their obligations. However, the IMO and leading maritime states should intensify their efforts to provide training, technical assistance, and financial aid for poor regions or states with no proper infrastructure to inspect vessels and inform the appropriate authorities.

Simultaneously IMO should adopt a policy of vigorous analysis, proper investigation, and publication of trends present in the information provided. This information should also be made readily available to interested administrations and publicized, along with assessments, evaluation, and recommendations.

An ad hoc Working Group could meet annually or biennially and prepare a comprehensive report along with recommendations and suggestions to facilitate the work of the MEPC and to give the governments, industry, scientific groups, and environmental organizations the opportunity to comment or take action according to a long-term plan and prospective. The quite flexible way of revising

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[52]This isbased on the following documents: MEPC 23/13, MEPC 23/13 Rev. 1, MEPC 23/13/1, MEPC/13/1/Corr.1, MEPC 23/13/Rev. 1, MEPC 23/13/2-3; MEPC 24/14, MEPC 24/14/1-8.

[53]*Ibid.*, see also G.C. Kasoulides, Port State Control and Jurisdiction: Evolution of the Port State Regime, unpublished Ph.D. thesis, London University, 1988, Annex 2, Table 7.

MARPOL and its Protocols[54] would also allow the development of the system, the adoption of new enforcement technology; facilitate its economic and technical feasibility; and prevent new polluting activities by introducing economic aid programs to induce states' compliance and enhance their capabilities.

What is most important from the port states' point of view is that the implementation of the MARPOL[55] regime should prepare the ground for the extension of their authority to investigate and punish infringements in foreign and international waters. This could result from an amendment of the MARPOL rules,[56] or from the coming into force of the LOS Convention[57] for its Contracting Parties. The latter might also provide the justification for amendment of the MARPOL regime to include the new contractual rights and duties of its member states.

Deficiency Reports at the Maritime Safety Committee

Parallel with the other activities concerning the control of discharges from ships, the MSC started considering the question of substandard vessels in 1974, noting that Port State Control (PSC) was directed primarily to preventing the operation of substandard vessels regardless of their flag.[58] As a first step the MSC decided to deal with the question from the technical point of view and principally in terms of the measures and procedures necessary to ensure that international regulations and standards laid down in relevant international instruments are enforced. Procedures for the control of vessels in conformity with the requirements of SOLAS 74 and 1966

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[54]See *op. cit.*, ref. 2.

[55]*Ibid.*

[56]*Ibid.*

[57]See *op. cit.*, ref. 19.

[58]Report on the Practical Application of Res. A. 466 (XII) and A. 481 (XII) on the Control of Ships by the Port State, IMO Doc. C.50/II, 25 Feb. 1983, para. 3.

Load Lines conventions were adopted by the IMO Assembly at its 9th regular session in 1975 and incorporated in Res. A.321 (IX).[59]

According to these provisions, states exercise PSC in their ports for the purpose of inspecting foreign ships and "where appropriate" submitting deficiency reports and reports on measures taken to the MSC.[60] These reports give specific details of the name of the ship, year of build, and other technical specifications and the action taken by the port state. Flag states are notified of the deficiencies if further action is required, and their comments also are inserted on the inspection documents.[61]

The MSC also publishes a list of all outstanding deficiency reports. According to this information, at the end of December 1986 there were still 129 deficiency reports pending.[62]

From the information provided in *Table 1*, it is obvious that the MOU partners contribute the bulk of information on PSC since their combined reports constitute an estimated 85.4 percent of the reports received. Other states with a good record on PSC are Australia, Canada, the United States, Kuwait, Japan, and the USSR.

A striking feature of these reports is that port states provide detailed information on specific ships, action taken by the port state (including detention), and requests to the flag state to remedy and rectify deficiencies still present on the vessel.[63]

The information available on flag states whose comments remain outstanding also reveals that a wide range of flag states do not reply

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[59]The MSC adopted guidelines on control procedures under Res. A. 466 (XII) to give effect to this resolution; see also MSC/Circ. 219.

[60]Deficiency Reports are submitted in compliance with Reg. 19 of Chapter I of the 1974 SOLAS, *op. cit.*, ref. 1.

[61]The information was included in the following MSC Documents: MSC XLI/4, 19 July 79; MSC XLII/4, 24 Jan 80; MSC XLIV/4, 13 Jan. 81; MSC 46/15, 3 Dec. 81; MSC 48/19, 25 Feb. 83; MSC 49/13; MSC 50/16, 15 Aug. 84; MSC 52/19, 15 Aug. 85; MSC 54/12, 12 Dec. 86.

[62]See *Table 1*, List of Outstanding Flag State Comments on Deficiency Reports. *Table 2* is a list of the outstanding reports within this period.

[63]Cf. the Paris Memorandum of Understanding at S. 5.

promptly to these reports. Even whether they actually investigate these incidents is not easily verifiable.

Table 1
Deficiencies from 1979-86

Period	No. of Reports	MOU Reports	Outstanding Reports
11/78 - 3/79	43	28	
4/79 - 12/79	84	58	6
7/80 - 9/80	18	10	1
10/80 - 10/81	194	170	9
10/81 - 12/82	438	413	37
1/83 - 10/83	281	236	40
11/83 - 6/84	187	140	18
7/84 - 6/85	186	157	18
9/85 - 11/86	179	163	--
Total	1610	1375	129

Table 2
List of Flag States with Outstanding Comments on Deficiency Reports

Cuba	2	Malta	3
Ecuador	1	Panama	50
Egypt	5	Philippines	11
Ethiopia	1	Rep. of Korea	1
Ghana	1	Rumania	2
Grenadines	1	Saudi Arabia	6
India	7	Spain	3
Indonesia	2	Surinam	1
Iran	1	Tanzania	1
Italy	1	Turkey	8
Ivory Coast	4	Vanuatu	1
Lebanon	5	Venezuela	3
Madagascar	2	Yugoslavia	3
Malta	3	Zaire	1
Malvines	2		
Total			132

Inspections and Penalties as Deterrents

Over a long period IMO has adopted a number of measures to assist in the identification of ships that do not fully comply with conventions related to prevention of pollution from ships and maritime safety measures. Resolution A.391(XI) adopted in 1977 deals exclusively with prevention of marine pollution and was concerned with OILPOL, as amended. A similar resolution relating to Annex II of MARPOL was adopted by the 23rd Session of the MEPC.[64]

Most national legislation provides for monetary sanctions for infringement of marine pollution conventions, in compliance with their provisions. Figures released by administrations, though, reveal that in some instances the fines imposed are not severe enough to discourage violations of such requirements. This is especially so in cases where flag administrations are penalizing their vessels for violations in international or foreign waters.

In 1981 the Assembly of IMO adopted Resolution A.499(XII) on penalties for violations of convention requirements relating to the prevention of marine pollution from ships.[65] This resolution, *inter alia*, urged governments of states which are parties to pollution prevention conventions to take all necessary legislative steps to ensure as a matter of higher priority that penalties, particularly financial sanctions against those who operate polluting vessels, are severe enough to discourage violations of such requirements.

Nevertheless, the preceding analysis of the existing enforcement regime of the marine pollution conventions in force proved that very few states actually comply strictly with them except in a minority of developed western countries with the facilities and the infrastructure to carry out such a policy. The existing regime, therefore, is in need of drastic improvements and developing states should also be given incentives to implement the conventions both as flag and port states. This will prepare the ground for a gradual introduction and implementation of the most radical LOS Convention's provisions.

Paris Memorandum of Understanding

At the same time and for the last seven years, fourteen European states are participating in a regional agreement with the objective to

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[64]Res. 26/23, MEPC, 8 July 1986.

[65]MEPC XVI/20, 24 Dec. 1981, paras. 15.11-15-12.

strengthen and reinforce exactly the same principles advocated by the IMO. These fourteen countries are: Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Ireland, Italy, The Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom.

In December 1980 the French Minister for the Sea convened a conference in Paris, where the competent Ministers of thirteen countries met together with representatives from the Commission of the European Communities (EC), the IMO, and the ILO. The Ministers decided to increase the effectiveness of control of foreign ships in their ports. The text of the Paris Memorandum of Understanding (MOU) was adopted in January 1982.[66] In the meantime Finland has joined as the fourteenth partner. The MOU took the place of the Hague Memorandum which had been adopted by the maritime authorities of eight North Sea countries in 1978. The designation of the MOU in the form of a Memorandum and not a convention and the fact that it was concluded among maritime authorities and not states indicates the willingness of the cooperating states to participate in a harmonized system of port state control (PSC) and exchange of information but not to enter into new contractual and binding obligations.

The Preamble of the MOU[67] recognized that its principal elements are: (a) the responsibility for the effective application of standards lies with the flag state; and (b) the supremacy of the rights and obligations of the participating states under any international agreement. Authorities are also obliged to apply those relevant instruments which are in force and to which they are parties.

The relevant instruments for the purpose of the Paris MOU are:
the 1966 Load Lines Convention;[68]
the SOLAS 74/78;[69]

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[66]Memorandum of Understanding on Port State Control, reproduced in International Legal Material 21, (1982):1, [hereinafter cited as the Paris MOU].

[67]*Ibid.*

[68]*Op. cit.*, ref. 1.

[69]*Op. cit.*, ref. 3.

the MARPOL;[70]
the 1978 STCW;[71]
the 1972 COLREG;[72]
the 1976 ILO Convention No 147.[73]

Organizational structure under the Memorandum

(i) *Port State Control Committee*: This is the executive body of the MOU composed of representatives from each of the fourteen participating maritime authorities and a representative from the EC Commission. The Committee has the task of carrying out and promoting the specific assignments allocated to it under the MOU, including the holding of seminars for surveyors, the harmonization of procedures and practices relating to inspection, rectification, detention, and the application of the so-called no more favorable treatment clause.

(ii) *Administration*: Secretariat facilities are provided by the Netherlands and its functions, under the guidance of the Committee, include, amongst others, the preparation of meetings and reports and facilitation of the exchange of information.

(iii) *Computer Center*: The third institution within the organizational structure under the MOU is the computer center. It is located in France, and here all inspection records are inserted into a common inspection file. Daily reports of the inspections undertaken are sent to St. Malo Computer Center -- the Centre Administratif des Affaires Maritime -- and this information is accessible for verification and updating by means of on-line terminals in the PSC countries. At regular intervals statistics are processed from the inspection data stored in the computer. The aim is to develop the system in such a way that in the future surveyors in the various countries will be able to communicate from terminal to terminal on all levels.

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[70]*Op. cit.*, ref. 2.

[71]*Op. cit.*, ref. 5.

[72]Convention for the International Regulations for Preventing Collisions at Sea, 1977 UKTS 77; reproduced in International Legal Material 12, (1973): 734.

[73]*Op. cit.*, ref. 4.

Inspection procedures

Inspection procedures are included in Annex I of the MOU, supplemented by guidelines adopted by IMO. These guidelines include the Procedures for the Control of Ships, IMO Resolution A.466 (XII), containing an amplification of the control principles set out in the SOLAS and Load Lines convention; procedures for the control of ships and discharges, and Principles of Safe Manning, IMO Res. A. 481 (XII) and its Annexes which refer to the contents of Minimum Manning Document (Annex 1) and Guidelines for the application of Principles of Safe Manning (Annex 2) Section 3 of the MOU provides that:

3.3 In selecting ships for inspection, the Authorities will pay special attention to:
   a) ships which may present a special hazard, for instance oil tankers and gas and chemical carriers;
   b) ships which have several recent deficiencies.

3.4 The Authorities will seek to avoid inspecting ships which have been inspected by any of the other Authorities within the previous six months, unless they have clear grounds for inspection.

An inspector should also take into consideration: a report of notification by another Authority; a report or complaint by the master, a crew member, or a person or organization with a legitimate interest in the safe operation of the ship, shipboard living and working conditions or the prevention of pollution, unless the Authority concerned deems the report or complaint to be manifestly unfounded; other indications of serious deficiencies, having regard in particular to Annex I.[74]

An inspector must use his so-called professional judgement on these matters; the parties have explicitly decided against the use of check-lists during inspections but they organize yearly seminars, arrange for the exchange of surveyors between different maritime authorities, and are planning joint training on certain aspects of the MOU and meetings of officials responsible for on-line communication.

So far no uniform inspection routines have been worked out, though the PSC Committee agreed at its meeting in November 1983 to observe the IMO standards as guidelines for surveyors. When the inspection is

[74] *Op. cit.*, ref. 66.

concluded, the inspector provides the vessel with a document giving the results of the inspection and details of any action taken. At the same time the findings enter the computer system of the region. All other surveyors consult this data base before going on board a ship.

If the ship is found to be in order, then in principle it should be immune from further inspections in PSC countries for the next six months. However, if clear grounds are present of substandard conditions, the surveyor can overrule this restriction and go ahead with a thorough and detailed inspection. Similarly, if the required certificates are not on board or are not valid, or often in cases where all certificates are impeccable but the condition of the ship does not correspond substantially with the particulars of the certificate, the inspection conducted is thorough in all fields covered by the "relevant instruments" and such inspection might establish the vessel's substandard condition.

Inspection of "Non-convention" Vessels

The application of the "no more favorable treatment" formula, *i.e.*, inspection of *all* foreign vessels irrespective of ratification, is a standard practice in recent IMO conventions and the MOU is no exception. Nevertheless, the relevant section of the MOU is rather ambiguous. According to it:

> In applying a relevant instrument for the purposes of port state control, the Authorities will ensure that no more favorable treatment is given to ships entitled to fly the flag of a State which is not a Party to these instruments.[75]

This formulation could be interpreted as allowing the enforcement of standards contained in conventions even if those conventions do not include a relevant provision to this effect. This provokes a number of objections from shipowners and other states and the governments of the USSR and the German Democratic Republic, in particular, in replies to a *note verbale* from UNCTAD, insisted that inspection of vessels sailing under the flags of states not parties to the international

[75] *Ibid.*, Section 2.4 and Annex, para. 1.3.

conventions could be carried out by a port state only when control provisions were specifically provided for in such conventions.[76]

This point, however, has been clarified in repeated statements from the MOU Secretariat. According to it:

> Certain conventions relevant for the Memorandum contain a "no more favorable treatment clause" (SOLAS Protocol 78; MARPOL; STCW 78; and ILO convention No. 147). This implies that ships flying the flag of a state that is not a party to these conventions will be inspected in such a way that no more favorable treatment of such ships is ensured.[77]

According to the Secretariat, no complaints have been directed against the MOU concerning improper use of its jurisdiction and inspection procedures. On the other hand, surveyors are obliged not to impose stricter requirements on the foreign vessels that they would impose on ships flying their national flag.

Enforcement Powers

If deficiencies are found, the master will have to complete the required adjustments or repairs before the ship leaves that port. In principle, this means that most vessels can follow their schedule without unnecessary and costly delays. However, between four and six percent of vessels inspected were delayed or detained during the first six years of the MOU operation owing to serious deficiencies. According to the MOU:

> In the case of deficiencies which are clearly hazardous to safety, health or the environment, the Authority will ... ensure that the ship is not allowed to proceed to sea and for this purpose will take appropriate action, which may include detention.[78]

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[76]UNCTAD, International Maritime Legislation: Treatment of Merchant Vessels in Ports at the Regional Level, TC/B/C.4/275, 1 October 1984.

[77]Information booklet on Port State Control.

[78]*Op. cit.*, ref. 66, Section 3.7.

This is the ultimate "preventive" sanction imposed by the MOU. No penalties are imposed on the master or the crew of the vessel, but it should be emphasized that a port state may impose penal sanctions and fines in compliance with its other international obligations or national requirements, a right well within its competence to enforce its legislation inside its territory. Vessels, however, must not be unduly detained or delayed, and a port might be forced to pay compensation in such instances. No claims of such a nature have been reported during the six-year existence of the MOU.

In cases where the port lacks the appropriate facilities for repairs, the authority "may allow the ship to proceed to another port subject to any appropriate conditions determined by the Authority with a view to ensuring that the ship can so proceed without unreasonable danger to safety, health or the environment." The next port of call in the region, the flag state, and other interested authorities should also be notified. Another important element in the inspection procedures is that MOU partners regard the ships of another MOU partner as foreign ships for the purpose of their inspections. Figures released indicate that a great percentage of inspections are actually executed on ships of other PSC parties.

The first two Annual Reports[79] did not elaborate on either the detentions or delays in relation to the flag state concerned, but from 1984/85 the Annual Reports include a breakdown of deficient vessels in relation to their flags. What is apparent from these evaluations is that with minor exceptions substandard conditions were present mostly in a number of vessels registered in developing countries. Another conclusion is that traditional flag of convenience vessels were not predominant in the list with the exception of Honduras, which maintained a steady record of having around 28 percent of its vessels detained or delayed during this period, except 1987 when the percentage was reduced to 3.54 percent; Cyprus had a 13.46 percent in 1985 (reduced to 4.16 percent in 1987), Panama 10.85 percent (reduced to 4.08 percent in 1987); surprisingly, Liberia had no vessels delayed or detained in these three years.

No firm conclusions can be drawn concerning other countries, but an encouraging factor is that a number of states evidenced a better record during the last, *i.e.*, 1987 period (*i.e.*, Malta 37.18 percent (1985), 15.60 percent (1986), 9.56 percent (1987); Lebanon 23.08 percent (1985), 6.90 percent (1986), 4.00 percent (1987); Gibraltar,

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[79]Annual Reports for 1982/83, 1983/84.

27.73 percent (1985), 10.53 percent (1986), 12.50 percent (1987); Algeria, 20.00 percent (1985), 7.50 percent (1986). Some countries did not appear in the 1987 figures at all (Algeria, Bahamas, Republic of Korea, Yugoslavia) but there were a number of newcomers (Cayman Islands, Ireland, and Saudi Arabia) and an increase was actually reported in the cases of Honduras, Egypt, Morocco, Rumania, and Turkey.

Inspection Results

The MOU imposed on its parties a quantitative criterion.

> Each Authority will achieve, within a period of three years from the coming into effect of the Memorandum, an annual total of inspections corresponding to 25 percent of the estimated number of individual foreign merchant ships ..., which entered the ports of its State during a recent representative period of 12 months.[80]

The significance of this target is not obvious at first glance. Since, however, a vessel visiting a European port should be inspected in principle once in six months and most of these vessels call frequently at a selection of European ports in the course of their trade patterns, and since also vessels of other MOU partners are treated as foreign vessels, the cumulative effect of these factors is that a respectable 90 percent of ships calling at European ports would be inspected if the 25 percent target was met by all states.

According to the information released by the Secretariat, a number of states have not met this objective and the average percentage of inspections has stabilized at around 20 to 23 percent. The main reasons for this is either a shortage of personnel in the national inspection services or, according to some authorities, a shortage of non-inspected vessels visiting their ports. Another handicap is the lack of evidence on the performance of individual states, since the Secretariat releases information only in relation to the region. The achieved percentage is, on most accounts, a satisfactory one, but the MOU partners would benefit from a more detailed and vigorous investigation of the existing information files in order to establish the emerging trends relating to the inspections by each country and, if possible, by individual ports, and the type and condition of vessels inspected in each area.

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[80] *Op. cit.*, ref. 66, Section 1.3.

This should enable the MOU parties to pinpoint its less effective sub-regions and to consider the kind of services needed and the nature of training offered. The result would be a better management and allocation of resources, individual parties might offer training facilities and improve the system of exchanging information. Even if the achieved percentage of inspections can be accepted as "satisfactory," a more comprehensive evaluation of the existing information would improve their quality.

This need was highlighted by requests from representatives of the shipping industry for the release of more information on the seriousness of certain deficiencies and the specification of more technical details in order to assist the efforts being made to improve safety conditions.

The reply of the MOU was that its present system was focused mainly on the exchange of information on the results of inspections and the series of deficiency codes that had been developed was more directed to reduction of transmission costs than statistical purposes. The PSC Committee, however, accepted that in order to evaluate adequately the qualitative aspects of PSC under the MOU a more detailed differentiation of deficiency aspects should be considered. This will eventually lead to an improvement of the description of the deficiency and the specification of the deficient item.

In October 1987, the PSC Committee at its 11th Meeting in Hamburg approved the development of a new deficiency coding system that, once operative, will enable the member states to derive specific information as to the nature, frequency and seriousness of deficiencies found upon inspection. This development is expected to take some years.

Statistical Data on Deficiencies and Detentions

The annual Reports of the MOU include a considerable amount of statistical information derived from the inspection files stored in the computer. This information includes the number of inspections carried out; number of delays and detentions; number of inspections per flag state; major categories of deficiencies, with a breakdown of most common deficiencies (*i.e.*, in ship's certificates, life saving appliances; fire-fighting appliances, safety in general, navigational aids, marine pollution).

In 1987, 280 ships (1982/83;271, 1983/84:436, 1984:476, 1985:356, 1986:307) were detained or delayed due to serious deficiencies. This amounts to 2.71 percent of the ships inspected, a gradual decline compared with previous years, *i.e.*, 4.52 percent for 1985, 6.19 percent

for 1984 and 3.52 percent for 1986. A different picture appears from an examination of the range of deficiencies which shows that in 1987 (16,566 deficiencies) there was a proportional rise in the number of deficiencies compared to previous years: 15,709 for 1986, 13,342 for 1985; 14,811 for 1984.

A possible interpretation of the decline in delays and detentions or both is that fewer substandard vessels visit the region whereas the increase in deficiencies might be attributed to the more detailed and sophisticated inspection routine. Nevertheless, it is submitted that no firm conclusion can be drawn from an examination of these factors since, as was explained earlier, the present system of recording information on the computer is simply informative and descriptive and is not sufficiently detailed to allow comprehensive technical analysis.

A question frequently asked is whether the introduction of the MOU has had any real effect on substandard shipping and thus improved the quality of vessels visiting the European ports. The statistical data provided by the Secretariat do not produce any clear evidence of this but officials in a number of ports were satisfied that there is an apparent improvement in the condition of vessels even if this is a very slow process.

No information is disclosed on individual vessels but information is provided on the number of inspections and the flag states of the vessels concerned. Vessels from 114 flag states were inspected in 1987, predominantly those from other participating countries. Other states with a significant percentage of inspected vessels are Cyprus, Honduras, Hong Kong, Japan, Liberia, Malta, Panama, Singapore, Turkey, the USSR, Poland and Yugoslavia.

These figures are still not very reliable but in the light of them a number of interesting observations can be made, *viz.*:

1. The number of ships calling at European ports come from virtually all areas of the world but the greater percentage is "regional shipping", *i.e.*, from neighboring countries.
2. Substandard conditions and deficiencies appear in great number of vessels from different states but serious examples of such conditions occur and recur mainly in vessels registered in developing states (including open registries).
3. Some open registries have an exceptional good record (compared with other developing states), while others evidence a percentage of detentions or delays that is fairly similar to the record of other developing states.

4. Conditions vary from year to year so that it is not possible, as yet, to evaluate the impact of the inspection results.
5. There is no firm information on the movement and trends of shipping on a global basis from which it could be established whether substandard shipping is simply transferred from the European region to other less regulated areas. The confidentiality surrounding information on individual vessels also does not allow such an evaluation.

Cooperation with other Interested Parties

The establishment of the MOU was followed closely by a number of other states interested in such an institution, especially by Australia, Canada, Japan, and the United States, which exercise a strict PSC in their own ports.

The 1987 saw the establishment of the first official cooperation of the MOU with the United States and Canadian Coast Guards. This arrangement is based on general guidelines of cooperation between MOU members and non-member Maritime Administrations which had been adopted in April 1987. This cooperation includes the mutual exchange of information on PSC and especially guidelines, inspection reports, etc., and the reciprocal participation in seminars, conferences, technical meetings and other activities. Observers from Japan and the United States also attend the annual seminars of surveyors.

This development should be encouraged and the PSC parties should also invite observers from developing states to participate to demonstrate the effectiveness of the PSC on a national or regional level, offering at the same time an opportunity to exchange information and attend training seminars.

A keen interest in establishing formal arrangements for cooperation has been expressed by parts of the shipping industry, especially charterers and insurance companies. They have suggested to the MOU on a number of occasions that the identity of ships repeatedly categorized as substandard should be disclosed to benefit environmental protection and the image of the shipping industry. The PSC Committee, however, continued to maintained that publication of a "black list" could be misconstrued and interference with sovereignty would not in itself eliminate the operation of substandard vessels. The MOU is now negotiating a formal agreement for cooperation with the International Association of Classification Societies. If successful, such close cooperation with parts of the industry might lead to a code of practice emerging and exchange of confidential information on "unrepentant" vessels.

Assessment

The MOU was clearly perceived by the relevant maritime administrations as a formal cooperative regime on enforcement issues but not as an international regime creating new legal rights and obligations for its parties. The preceding analysis has shown this to be the case and the regime is managed by the administrations concerned.

It can, therefore, be concluded that the MOU is an informal international instrument but that it nonetheless has considerable effect. Only the future will show whether the regime will remain within the narrow domains originally envisaged by its parties or will grow to encompass other issues related to the jurisdiction of the port state.

There is no question that in its present form the MOU allows the maritime authorities to concentrate on technical and other serious topics adopting a realistic and pragmatic approach. The ratification of conventions by participants was speeded up and some of its parties improved their inspection rates to an unprecedented level. The method of processing the information and the low cost incurred is also another incentive for administrations which demand a high return but on a very tight budget.

The pragmatic and conservative approach adopted allayed the fears of the industry and the rest of the world since the application of the regional measures are well within the existing international requirements and standards and every precaution was taken not to delay vessels unnecessarily or to interfere with the internal order of a foreign vessel.

The analysis provided for the IMO instruments[81] revealed that submitted reports give specific details on the ship and the action taken by the port state. Flag states are notified of the deficiencies and their comments are also inserted on the inspection documents. In contrast this type of information is not provided in the MOU statistics and the PSC Committee has resisted all efforts to persuade it to publish the name of the ships detained. Flag states are not informed of the deficiencies present in their vessels and there is no follow-up of these cases in any way.

The PSC should reconsider these gaps in the reporting practice of its participating administrations and adopt a more open approach on the lines of the practice of the IMO, reports to which on discharges and deficiencies contain specific information concerning the vessels inspected, not merely information under impenetrable abstract

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[81]See *supra*, S. 4.

statistical categories. Most administrations already comply with the IMO requirements and as European states have a very good record in both the MEPC and MSC this should not involve any unreasonable cost for the administration; indeed it might actually curtail expenses if the MOU simply transferred its own statistical information to the appropriate IMO Committee for appraisal.

The very sensitive issue of emergence of a "black list" of vessels could be avoided if information were provided on all the vessels inspected and on the action taken by the flag state to remedy and rectify the deficiencies.

UNCTAD -- Recent Developments on Conditions for Registration of Ships

A vessel derives its nationality from the country under whose flag is registered. Under the terms set down by the 1958 Geneva Convention on the High Seas[82] each state is left to decide its own conditions of registry. Until 1986 there was no international convention on the registration of, or on the granting of nationality to, merchant vessels. This lack of any direct international legislation and control has been largely instrumental in allowing a number of small countries to set up their open registry (OR) fleets and attract considerable tonnage without adequate administrative or governmental facilities for regulation and enforcing the necessary standards at sea.

The failure of the law of the sea conventions to address this matter satisfactorily and the assimilation of open registries with substandard conditions led UNCTAD which has assumed a leading role on this issue to organize a diplomatic conference which resulted in the adoption of the 1986 United Nations Convention on Conditions for Registration of Ships.[83]

Objectives of the Convention

The conference identified a set of basic principles concerning the conditions upon which vessels should be accepted on national shipping registers as the following: (a) the manning of the vessels; (b) the role of the flag countries in the management of shipowning companies and

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[82]450 UNTS 82, Art. 5.

[83]*Op. cit.*, ref. 8.

vessels; (c) equity participation in capital; and (d) identification and accountability of owners and operators.

While the whole purpose of the UNCTAD conference was to identify and establish the genuine link between the state and the ship flying its flag, the essential concern of most of the participants remained shipping competition and this obscured the issues of marine pollution and safety. The main provisions on the role of the flag state are identical with provisions in the UNCLOS III which are recognized as being declaratory of established principles of international law.

The Port State Jurisdiction

The draft proposals before the Preparatory Committee contained a number of proposals providing for the cooperation of the flag and port states for the implementation of a new convention regulating the conditions of registration of vessels.[84]

The Group of 77, nevertheless, retained its reservations on the institution of this regime. Their representative stated during the first session of the UNCTAD conference that

> In the absence of an international convention on conditions for the registration of vessels, several states had begun to exercise port state control over vessels calling at their ports, but by its very nature such control was only a temporary remedy and could never be a substitute for flag state responsibility. Above all; port state control did not tackle the basic economic and social problems created by the OR system.[85]

Group B on the other hand, insisted on institution-alization of the port state's extended powers.[86] The Group of 77's opposition to port

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[84]See compromise text/PG: Draft Art. I(9); draft Art. III(2)(a); Art. VI(3)(4); draft basic principles proposed by the chairman, Art. B(II)(12); draft basic principles submitted by Group D, Art. 2(13); Art. 5(9).

[85]The first session of the conference was held from 16 July to 3 August 1984, see the Report of the United Nations Conference on Conditions for Registration of Ships, TD/RS/CONF/10, 12 Oct. 1984, at p. 11.

[86]For Group B's proposals, TD/RS/CONF/10/Add.1, 16 Aug. 1984, preamble, para. 8.

state control continued during the second session where their representative argued that it could never be more than a supplement to proper flag state control and could not be a useful substitute to it.[87]

Draft Article 1 *bis* on maritime administration provided for cooperation between flag and port states while a draft paragraph proposed by Group D and accepted by the Group of 77 and China provided that the state of registration would supply the maritime administration of the port state with "all the information which is relevant and necessary to unable to carry out its obligations in accordance with this agreement."[88] Group B, though, suggested a stronger formulation, adding that "(a flag state) shall upon notification by the port state, take appropriate action with respect to any breaches of generally accepted international rules and standards."[89]

The compromise arrived at during the third session of the Conference included, *inter alia*, an agreement to address the convention exclusively to the flag state. As was pointed out by the representative of Group B in his closing statement, the Conference had concluded that the agreement addressed the responsibilities of the flag state: "It was for the flag state alone to set the conditions on which it would accept ships on its register and to ensure that those responsible for its vessel were readily identifiable and accountable."[90]

Consequently, the 1986 UNCCORS omitted all references to the port state except in Article 6(4), which provides that:

> A State should ensure that ships flying its flag carry documentation including information about the identity of the owner or owners, the operator or operators or person or persons accountable for the

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[87]Report of the United Nations Conference on Conditions for Registration of Ships on its Resumed Session, 28 Jan. - 15 Feb. 1985, at p. 5.

[88]*Ibid.*

[89]*Ibid.*

[90]Report of the United Nations Conference on Conditions for Registration of Ships, TD/RS/CONF/19, 18 Oct. 1985, at p. 22; see also the Report to the First Committee of the chairman of the Working Group on maritime Administration, *ibid.*, at pp. 14-15; Israel, *ibid.*, at p. 26.

operation of such ships, and make available such information to port state authorities.

Assessment

It is worth pointing out that the Group of 77 and Group D have viewed with suspicion and open hostility the introduction of any PSC provisions, and Group B used their own proposals only as a negotiating leverage. This is unfortunate especially since the enforcement on international rules and standards could not materialize without the existence of an effective enforcing mechanism, especially in the implementation of such controversial provisions as the ones incorporated in the 1986 UNCCORS.[91]

It is obvious that the 1986 UNCCORS reaffirmed the flag state's supremacy and institutionalized the status quo, leaving the concept of "genuine link" still nebulous and controversial. Only one country has ratified the convention, Cote d'Ivoire, and eleven states have signed it up to December, 1988, subject to ratification at a later stage.[92] It also appears to have influenced the recent establishment or activities leading to the establishment of international registers in developed countries and a number of developing countries are considering the advantages of open registries. Moreover, it has been criticized by shipping interests as imprecise[93] and by the ITF as an unacceptable compromise. It is not expected that the number of ramifications necessary to bring the convention into force will be reached for several years yet. Nevertheless, there is the hope that it will lead to more realistic and pragmatic relations among developed and developing countries in the sphere of international maritime transport and to strengthening the role of the flag state in matters of maritime safety, pollution, manning of crew and labor conditions.

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[91]S.G. Sturmey, "The United Nations Convention on Conditions for Registration of Ships", Lloyds Maritime and Commercial Law Quarterly, no. 1 (1987): 97-117.

[92]These are Algeria, Bolivia, Cameroon, Czechoslavakia, Egypt, Indonesia, Libya Arab Jamahiriya, Mexico, Morocco, Poland, Senegal and the USSR.

[93]INTERTANKO reviewed the convention and concluded that "there was no urgent need for an early ratification", see Lloyds List, 25 Feb. 1987, at p. 1; see also International Chamber of Shipping, Annual Report 1986-87, at p. 11 for similar views.

Conclusions

The enforcement powers of the port state are undergoing a vigorous and dynamic transformation in all fields. Although its customary competence is not extended to incidents preceding the entry of the vessel into any state's jurisdictional zones, a sequence of drastic changes in law and practice has contributed in fact to an enhancement of its authority. The most interesting innovation has been the inclusion in the LOS Convention of a port enforcement provision allowing its parties to investigate and prosecute offenses committed outside areas of the state's coastal jurisdiction. Implementation of these innovative provisions will have to await the coming into force of the LOS Convention or their gradual entry into the realm of customary international law.

In the meantime, a number of international organizations have introduced a number of provisions intending to reinforce and strengthen the regime and cooperation amongst its members. Implementation of this regime is still in an embryonic stage but their vigorous efforts in vetting and encouraging compliance should be commented and developing states should be given incentives to implement them both as port and flag states. Modern technology, if rightly used, could be an additional and effective way to curtail unlawfulness and punish offenders.

The IMO and Paris MOU should also make better use of the information provided to assist the maritime industry to rectify deficiencies and identify the most common factors in collisions and accidents. The existing enforcement regime, therefore, is in need of drastic improvements, such as provisions of training, technical assistance, and financial aid for poor regions or states to prepare the ground for a gradual introduction and implementation of the most radical LOS provisions.

There is a natural mistrust of provisions curtailing the state's sovereign prerogatives, but as the MOU experiment has proved, a non-discriminatory implementation of the regime will be positively accepted both by industry and states. On the other hand, if port enforcement is used by the developed states as a leverage, *i.e.*, the case of the 1986 UNCCORS, its application will remain fragmented with very few prospects to emerge into the universal regime envisaged by the LOS Convention.

COMMENTARY

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Ladies and gentlemen, dear colleagues, and friends -- some are young veterans from the early days of the Sea-Bed Committee, some from the Conference -- I'm so pleased to be here today. On this occasion I would like to express my most sincere thanks and gratitude to the Law of the Sea Institute and to the Netherlands Institute for the Law of the Sea for their warm hospitality in giving me this opportunity to be here with you today.

Within the framework of our agenda, we have basically two areas, one of a general nature and the other of a regional character. I say this without expressing any specific view of which one is more important, for I would like to say from the outset that in my concluding words I would emphasize the regional arrangements. Nevertheless, I would like to offer some remarks on the general and global problems.

I recall the last conference of this kind that I attended in Oslo. At that time our efforts were directed toward explaining and convincing of the *raison d'etre* of the Convention. Now we have reached the stage at which we see this not-ratified Convention as a reality. We see how it will function and how it will be implemented. This is a significant moment for the development of the international law of the sea, particularly with regard to the protection and preservation of the marine environment. In this audience, nobody doubts the significance of this topic. Today it would not be an exaggeration to say that the protection of the global environment, including the marine environment, is even more urgent than the nuclear arms race and any other problems that we face today, for if some of the other dangers facing mankind are within the realm of politicians or political regimes or governments, the environment is affected by all of us. The environment faces hazards from any human activities.

On the valuable papers submitted by Professor Vukas on the general legal framework and Dr. Kasoulides on the novel concept of port state competence, I would like to say that the critical assessment of the rules of the Law of the Sea Convention calls for adequate comprehensive remedies to overcome existing loopholes and ambiguities. Those who were involved in the negotiations know that these ambiguities have

arisen not because the delegates were not intelligent enough to detect them. These "constructive ambiguities," to use United Nations jargon, created a lawyer's paradise of various interpretations.

But we had our limitations. I say this not in self-defense of the critical remarks, which are well justified, about some loopholes and ambiguities. There are even gray areas in the framework of the rules contained in the Convention. For instance, on the control and regulation of the protection of the marine environment on the high seas, we would not find very meaningful provisions in this umbrella convention. This was not by chance nor was it a mere omission. Or, on land-based sources of pollution, we have just one article, Article 207, which expresses in such a soft manner that states shall endeavor to adopt national laws and regulations for the protection and preservation of the marine environment from land-based sources of pollution. The Conference delegates considered that this obligation was within the sovereignty of the state and that they should not go further than that. I realize that this is a serious loophole. Other examples are the two provisions, among the 320 articles of the Convention, on pollution from or through the atmosphere. I think that our efforts should now be directed toward identifying vulnerable areas and areas which need further action.

The implementation of an integrated environmental law and policy requires identification of these deficiencies, the harmonization of international rules and national legislation in view of the alarming degradation of the marine environment. There is a pressing necessity to highlight critical problems and identify vulnerable areas of the existing legal regime, not only in terms of interpretation of one or another term but also of their meaning, their legal implications, and the ways and means to give effect to these rules and regulations. Of course, we have to consider how to provide the conceptual basis for adequate preventive measures and an appropriate institutional framework on global and regional levels.

The examination of the provisions of the Law of the Sea Convention in the papers submitted by our colleagues is very valuable. They are very lucid papers, providing a wealth of grounds for thought about what should be done in the field of implementation, what should be the guidance for an integrated environmental policy and coordinated action relating to all sources of pollution and covering all marine areas. This comprehensive approach corresponds to the integrity of the marine ecosystems and the significance of Article 192 which states for the first time in an international instrument of this kind that states have the obligation to protect and preserve the marine environment. So the legal rules and enforcement measures -- national, regional, or

global -- for the protection and preservation of the environment should strike a proper balance between the conflicts of use and collision of interests, taking into account the interaction between onshore activities affecting the marine environment and offshore activities affecting the coastal environment. From this point of view the provisions in the Law of the Sea Convention, particularly with regard to pollution from land-based sources and pollution from the atmosphere, as I pointed out a while ago, are too general and inadequate, constituting as they do the main factors of marine pollution. They do, however, provide a meaningful basis for further codification and development of environmental law and the law of the sea particularly.

In this situation we should look for remedies which are within the general framework of the Law of the Sea Convention. I would like to dwell on the two notions of the "generally accepted" rules to which Professor Vukas referred and, for that matter, the "applicable" rules. The general framework of the Convention, without unnecessarily overestimating its advantages, is a unique achievement in the field of the development of international law. But it could evolve further. It could provide guidance for governments in areas which are not covered by existing regional or specific global agreements. For example, the Law of the Sea Convention has been used in national legislation and also in several other instruments. The Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-based Sources elaborated by UNEP and adopted on 24 May 1985 are based on this Convention and on the generally accepted rules and applicable rules to which Professor Vukas has referred. Some of these instruments even reproduce articles verbatim from sections of the Convention. And this fact is very indicative.

So from this point of view I would like to express my views on some of the main features of the provisions of the Law of the Sea Convention with regard to the protection and preservation of the marine environment, having in mind the papers that have been submitted. I have already emphasized the comprehensive concept of protection and preservation of the marine environment as a system of general principles and legal rules governing the lawmaking and enforcement measures with respect to all major sources of marine pollution. Article 194 of the Convention deals with all major marine activities which may cause hazards to the marine environment in all maritime areas. The functions of these provisions are expressed in various formulations and could be considered under two major categories. First are binding provisions referring to the application of international rules and standards and recommended practices and procedures, which are

expressed in a traditional form of obligation: states "shall comply" or "shall conform to." Second are law-making and standard-setting provisions which are aimed at harmonization and unification of policy in national laws and regulations. Various formulae conform to and give effect to these general international rules when states elaborate their national legislation or adopt national laws and regulations which shall have at least the same effect as the generally accepted or applicable rules, etc. National rules, laws, and regulations should give effect to international rules, etc. as provided in Article 211 on vessel-source pollution, etc. Then you move to less rigid formulas, Article 207 on land-based sources of pollution and Article 212 on atmospheric sources, which say that "should take into account" or "shall endeavour to harmonize" their policies. These formulae are used to express the legal relationship between international rules, standards, and recommended practices and procedures and international laws.

I for one, dear colleagues, do not think this to be a deficiency of the Convention. It may sound strange, but I think this is the advantage of a convention of this kind, because it should have all the ways and channels of relationship between national rules and regulations, and this convention provides such a general framework.

Those who were at the Conference, and especially those on the Third Committee, will feel nostalgic about the long discussions of those terms, 'generally accepted' and 'applicable.' I agree with Professor Vukas that the multitude of words used corresponds to the existing variety of international measures to which the Convention refers and that they create problems of interpretation. Of course, some terms -- global, international, regional, law -- are of common sense and we do not need definitions of them. Such terms are terms of art and are adopted. I think his criticism is well justified, though I don't think that these problems are fatal for the effectiveness of the Convention. At the very last moment the delegations were so eager not to renegotiate anything that they would not accept some meaningful suggestions from the Drafting Committee for the unification of language, etc.

At least in the Third Committee we had these two standard expressions. Whenever it referred to national legislation, the expression 'national laws and regulations' is used, and by 'regulations' we understand -- I personally understand -- traditional bylaws and legal norms under the constitution or under the practice of states, not laws *strictu sensu* but normative regulations. For international rules the standard formula is 'international rules, standards, and recommended practices and procedures.' Of course, Professor Vukas was so scrupu-

lous that he discovered some inconsistencies here and there even in this. Now I agree with his interpretation about 'rules,' that these are the conventional rules and customary rules.

As far as the decisions of international organizations are concerned, most of them are simply recommendations. It is only if normative significance is attached by the competent body that we could accept them as 'standards' used in the practice of IMO and the special conventions. As to their legal nature, they could be embodied in a legal instrument which is a treaty or agreement or a convention or annex or appendix or in manuals. IMO has a
number of such manuals or technical codes in which are found these rules of a technical nature.

I have recently noticed that in UNEP they have added yet another word, 'criteria' -- 'standards, criteria, and recommended practices and procedures.' Here I think that only sometimes might there be difficulties of interpretation, because this Convention is a general convention and it should always be considered whenever a case has arisen in connection with these specific areas of implementation and the pertinent instruments to this specific area and specific case.

Turning to the other question of 'generally accepted' and 'applicable' rules, which of course creates some difficulties, I think that 'generally accepted' rules were conceived as rules embodied in conventions with universal or quasi-universal participation and customary rules. I would not go so far as to consider these *jus cogens* provisions within the protection and preservation of the marine environment. These are the generally accepted rules generally accepted by the international community at large, while the expression 'applicable' rules is mostly in Part XII, starting from all the provisions on enforcement. There are roughly speaking two dozen of such applicable rules. Those are rules binding the states concerned, and they could be rules derived from bilateral, regional, global, or universal instruments. So they are applicable rules in this specific situation.

I would like to say a few words on this novel concept of port state jurisdiction or the competence or the functions of the port state. The paper submitted here by Mr. Kasoulides is indeed a very valuable source of information and assessment. I have only a few observations. First of all, we should have in mind the limitations of this novel concept. Those who were involved in the negotiations know that this idea was suggested for the first time by the United States delegation as early as in the Sea-Bed Committee. At that time it was considered to be a very strange creature. Some were looking with apprehension,

some with misunderstanding, because flag state jurisdiction was the traditional concept. Port state jurisdiction, as Mr. Kasoulides has explained, was novel to some of us who were not very well acquainted with some previous instruments because it did not exist in such an elaborate and comprehensive form as it does now in this convention.

But it has its limitations. The port state may only undertake investigations and institute proceedings against discharge violations of the vessel which voluntarily calls on the port. The port state jurisdiction, important as it might be by its very purpose, has a residual character, at least at this stage of the development of international law. I have some doubts as to the feasibility of setting up an institutional mechanism for port-state jurisdiction. The scheme suggested by Mr. Kasoulides indeed looks very attractive, but from a realistic point of view I would have some doubts as to whether states will proceed to implement it.

In conclusion, I would like to say that all this proves that international institutions of global and regional character have a very important role to play in the research and assessment of pollution. For instance, the MARPOL I program, which is a joint program of IOC, UNEP, WMO, and other organizations, has proven to be very useful. These institutions also provide the technical assistance to enhance the technological capabilities, especially of developing states, and not only in the field of sophisticated marine protection technology. The number of developing states is very large, but the number of developed states that possess know-how and technology is very limited.

It is very important, I think, to make proper use of existing institutions and enhance their management capabilities rather than trying to establish new institutions. Whenever a problem appears, it has been a routine practice, especially in the United Nations, first to pass a resolution and second to establish a respective institution or organization. I would say that the number of international organizations global and regional is quite significant, and they should be properly used to strengthen the coordination among themselves, training their personnel to carry out joint programs together.

As my final words I would like to suggest that the board of the Law of the Sea Institute consider in one of its future conferences the comprehensive subject of regional approaches to marine activities, including marine scientific research, protection of the marine environment, and management of marine resources. Regional approaches look to me like the more accessible way to achieve immediate goals.

Patricia Birnie: Now I would like to call upon the paper-givers to comment on the comment.

Budislav Vukas: Thank you, Chairlady. I am really glad that, not being a participant in the Third Committee but in the Second Committee, I can agree with Professor Yankov in the majority of the questions raised in his commentary. Just a few words concerning what may be a misunderstanding. I haven't dealt at all with the different relations between national and international law. I do accept that with respect to some sources of pollution, national legislation should only take into account international rules; with respect to other national laws, regulations and measures should be no less effective than international rules, standards, and recommended practices and procedures, etc. It was not I who criticized this diversity in the Convention.

Taking the position of somebody who has to interpret the Convention, not only taking into account all the developments and problems of environmental law but particularly looking at the Convention as part of general international law, the two main points of my criticism are the following: (1) Is it possible to understand the term 'generally accepted' within the usual notions of the sources of international law? (2) Is it possible to give binding force to standards which are contained in non-treaty instruments just by referring to them in a Convention which is not yet in force and which will never bind all the states? These are points of crucial importance in the general theory of international law.

George Kasoulides: Thank you very much, Madame Chairperson. I'm afraid I have very little to add to the subject of port state control, and in reality I welcome most of these remarks as very constructive and more or less adding to what I have already said. I want just to point out that port state jurisdiction, as I tried to distinguish, was first introduced in 1973 under the IMO conferences and at the time was not accepted, due to the number of marine pollution accidents. Then we reproduced it again during the Conference negotiations for adoption into the convention.

As far as the regime is concerned, I tried in my paper to make it obvious to most people that a port state regime exists even if it is just for the application and enforcement of existing instruments. Its application is very limited because of the existing infrastructure and the inability of most countries to adopt and enforce these provisions. As far as the 1982 Convention is concerned, and I can myself see all the problems of enforcing it, we must not forget that this regime is very limited in scope.

If there is some kind of cooperation, I myself would welcome either the adoption of a new organization or the use of the existing ones, and I absolutely agree that there are a number of organizations that are ready and able to take over this task. But if the system is going to be effective, it cannot be used simply as a provision for states that can afford to enforce a very expensive and sophisticated regime. Then the whole purpose behind it, the prevention of marine pollution, is lost.

EEC COMPETENCE AND ACTIVITIES IN THE FIELD OF MARINE POLLUTION

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Because of the unfortunate absence of Professor Remond-Gouilloud, we are left without any reference to the rather unique and unusual role of the European Community in this field, and I thought I would do my best in an impromptu fashion to at least say a few words about that role.

The European Community is a party to the Law of the Sea Convention, as we have heard in connection with fisheries. However, its relation to the Convention in respect of the marine environment is rather different from that in relation to fisheries. The Convention provided for the adherence of the Community, or similar organizations, as long as they had competence in the subject matter concerned and a majority of their members were parties to the Convention. On signing the Convention, the Community declared that although it had full competence in fisheries under the common fisheries policy, in relation to the marine environment it had only certain competences. This was because, at that time particularly, the legal basis of the Community's competence under the Treaty of Rome was contested by many commentators, and it was proceeding extremely slowly. It was quite arguable that it did have some competence, but it wasn't derived from a specific article as in the case of the agricultural policy.

As a result and on signing the Convention, the EC announced that it was party to certain marine pollution conventions, notably the Paris Convention on Land-Based Pollution. It had adopted certain regulations and directives, and it gave a list of a limited number of these, but not all the directives that it might possibly have put in. The reason for this rather limited approach was because the member states had been cautious in proceeding in this direction. Since then we have had the Single European Act, which has made the Community's competence in this field much clearer, and one hopes that as a result there will be far more activity.

Meanwhile, the Community had adopted a series of Action Plans over the years, going back to the time of the Stockholm Conference on the Environment, and marine pollution and preservation of the marine environment was one of its priority areas in these plans. The plans, as they have been refined, indicate that in proposing certain actions the Community should indicate the appropriate level

on which to proceed: the international, the regional, or the national level. The plans also indicate that the action should be taken at the level appropriate to the particular subject matter in issue, and that also, of course, narrows the field of action within the European Community as a community.

The methods by which it proceeds to implement its obligations under the Convention, insofar as it can do this, relate to the mechanisms available to it. They are the same mechanisms that are available in relation to fisheries; that is to say that they can adopt regulations which become immediately effective in member states' legal systems, or they can adopt directives which allow some time for member states to conform, to change their laws and practices to meet these requirements. This requires, of course, that these regulations and directives be adopted by the Council of Ministers. In the case of the marine environment it will generally be the Council of Environment Ministers, and this means that you have to have a certain degree of political accord, consensus, and will to adopt a regulation on a particular topic.

As a result, even now the list of regulations and directives is an extremely *ad hoc* one. It is not really possible to have a comprehensive implementation, which requires consideration of a particular directive or regulation and the building up of the political support necessary to adopt it. There are, for example, appropriate regulations or directives on things like the quality of the water in the aquatic environment which limit the discharge of certain substances -- titanium dioxide, for example -- into it. Because I was not really expecting to speak on this I have not got a handy checklist with me, but am sure some of you will be more familiar than I am with the details at the moment.

The Commission, because it doesn't have a full competence as it does in fisheries, has not been able to become a party to every marine pollution convention. It has been able to become a party in this limited way to the Law of the Sea Convention, but there are a lot of other conventions which implement the Law of the Sea Convention. The European Community can only become a party, of course, if the convention actually provides for adherence of a regional organization, and not all do, particularly if they were concluded before 1972. Sometimes it cannot join a convention because it cannot commit the whole community at the moment. It therefore becomes a party alongside its member states and, as I understand it, casts its vote in relation to the number of states who support it on a particular issue, rather than voting as the Community, as it does in the fisheries conventions.

I hope that that will give you some idea of the very special way in which the European Community is implementing to the best of its ability under its treaties the various aspects of the Law of the Sea Convention. One hopes that it will be able to expand its role.

Now I want to proceed with a really authoritative account of the implementation of the Law of the Sea Convention through the Cartagena Convention and through the UNEP Regional Seas Programme, and for a commentary on Professor Okidi's paper. I shall call upon Salvano Briceno.

PROTECTION OF THE MARINE ENVIRONMENT THROUGH REGIONAL ARRANGEMENTS

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Introduction

From 1972, regional arrangements for the purposes of protection of the marine environment strongly emerged, in theory and in practice, as a plausible approach. This trend gathered momentum even though the Third United Nations Conference on the Law of the Sea (UNCLOS), was still in its preparatory phases. By 1982 when the Convention resulting from the UNCLOS III was signed at Montego Bay, Jamaica, there were already about ten regional agreements already signed specifically to protect different regions of the oceans in one way or another. Today, such regional agreements number fifteen, some with additional implementing protocols.

On the specific question of regional approaches, the Montego Bay Convention ended up with a specific provision, Article 197, calling for "Cooperation on a global or regional basis" whose specific details read thus:

> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating rules, standards and recommended practices and procedures consistent with this Convention, for the protection of the marine environment, taking into account characteristic regional features.

Ordinarily, international lawyers would prefer that on the standards for the control of marine pollution, global institutions and activities should dictate rules to be implemented at the regional levels. In this case, the issue of the "regional approaches" in the implementation of the 1982 Convention would follow after the adoption of the Convention. In the present context, however, it may appear that the 1982 Convention actually codified an existing practice, given that there were a number of regional agreements along the line called for in Article 197 of the Convention.

In the request for this paper, the topic presupposes that the 1982 Convention is actually the leader instrument whose provisions are being implemented. Indeed, this presents the image of the clever politician who watches which way the crowd/majority is running, then runs ahead of them to be declared the leader. So, in fact, this paper seeks to examine the trends in the establishment of regional arrangements for the protection of the marine environment in a manner consistent with the provisions of the 1982 Convention.

The section that follows will review the background of the concept of regional arrangements for the protection of the marine environment. In the process we shall review the rationale for the regional approaches and ascertain if the reasons are still valid post-Montego Bay.

In the following section we shall outline what has actually happened in the establishment of regional institutions. As stated in Article 197, some of the regional initiatives will have been taken through competent international organizations.

The final section will briefly give statements of appraisal of the trend, including the contribution of these practices to the development of international law relevant to the protection of the marine environment.

Background and Rationale for Regionalization

In November, 1977, the Law of the Sea Institute chose the theme of regionalization of the law of the sea for its Eleventh Annual Conference in Honolulu.[1] Presumably, they were motivated in part by the popularity of the views of commentators of that time and the few actual instances of regional agreements. Partly, too, they might have been motivated by the views of some skeptics that UNCLOS III might not succeed, leaving no clear options. At that time the UNCLOS III was simply midway in its proceedings, having gone to the Sixth, out of what were to be Eleven, Sessions which ended in September, 1982.

So, in fact, the issue of regional arrangements was largely at the conceptual level, in that very little was actually known about how, in practice, the regional approaches would actually work in various parts of the world. But in his introductory comments Professor Douglas

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[1]The Proceedings of the Conference were edited by Professor Douglas M. Johnston, *Regionalization of the Law of the Sea.* (Cambridge, Mass. Ballinger Publishing Co., 1978).

Johnston asserted that the Board of the Institute was unanimous "that whatever the outcome of that global Conference is likely to be, we can be sure that much will remain to be done at the regional level."[2] Following on that argument, Professor Lewis Alexander reflected on the various possibilities for the concept and reality of the ocean regions for various functions. To pursue these lines of argument Professors Johnston and Alexander presumed certain acceptable arguments supporting the regionalization of the oceans for various purposes, including environmental protection. So today we can assess the trends in the implementation of UNCLOS III through regional approaches.

The implementation of a treaty provision, as in Article 197 of the Montego Bay Convention, may entail one or both of two specific perspectives. First, the implementation may be determined by how many instruments have been adopted to establish and operate the regional arrangements as anticipated. Second, the implementation may be assessed on the basis of the actual measures carried out to achieve the ultimate goal, namely, protection of the marine environment. The former may be considered the primary perspective in the assessment because it testifies to the acceptance by the states that they will adopt the given approach in their effort to protect the environment. It presupposes that the party states accept the rationale for the approach or that they recognize the actual benefit as distinct from other alternatives. Thus, the rationale for regional approaches must provide the motivating factors for implementation through that approach. And therefore, we must delineate them and determine their validity.

For the purpose of the specific function of protection of the marine environment, this author made an attempt in 1975 to appraise the various options and reaches the conclusion that regional arrangements as the dominant approach had greater merit than either unilateral state action or a globally based superagency.[3]

Thus, even though there would be specific roles for global national institutions, regional arrangements would play a dominant role.

Before we turn to a survey of the trend in the adoption of various regional agreements, we should review the basic arguments in favor

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[2]*Ibid* p. 1.

[3]See Okidi, C.O. "Toward Regional Arrangements for the Regulation of Marine Pollution: An Appraisal of Options" in 4 *Ocean Development and International Law* 1-25 (1977).

of regional approaches as developed in 1975 and see if they are still valid today.

The first reason was that there are different degrees and kinds of pollution in the various regions; thus the strategies required for the protection of the environment would be correspondingly different. States in the various regions of the world would be preoccupied only with their special problems. Thus, the highly industrialized countries in the North Atlantic and North Pacific would preoccupy themselves with loads of industrial and municipal wastes reaching the oceans through outfalls and dumping. Similarly, the states whose coasts are exposed to the oil tanker routes would initiate measures to combat deliberate and accidental discharges. Each country on heavy tanker routes had its own view. Malta, for one, was particularly anxious about the situation in the Mediterranean Sea and called for a regional center with equipment to combat accidental spillage.[4]

This is probably one of the most basic arguments in favor of regional arrangements and is as true today as it was before the beginning of UNCLOS III.

The second argument was that regional mechanisms lead to distribution of the remedial technology and facilities close to where incidents may occur, making them accessible in cases of sudden ecological catastrophes. In the event of a pollution disaster, speed is of greatest essence. One of the criticisms levelled at the United Kingdom in their handling of the *Torrey Canyon* incident was that the extent of environmental damage would not have been so vast if they had acted promptly.[5] But Britain had the technology to deal with the spills. On the other hand, such an incident off the coast of East Africa would be a disaster indeed, for there is at present very little or no preparedness in the busiest oil tanker traffic route in the world. Perhaps India and some Gulf States have equipment, but that is not East Africa either.

Very often, it is only after the disaster has struck that the necessity for technological preparedness becomes evident. Thus the grounding of the Dutch tanker *Metula* in the Strait of Magellan in 1974 prompted the Chilean delegation at the UNCLOS III, during the first substantive session in Caracas, to call for the establishment of a regional organiza-

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[4]UN Press Release HE/232 on 5 February 1975, p. 6.

[5]See L.F.E. Goldie "Book Review Note" in 1 *Journal of Maritime Law and Commerce* 155, 158 (1969).

tion and pollution control equipment to deal with pollution incidents promptly.[6]

This argument is still true of any part of the world. And, indeed, states that have experienced a pollution disaster are more likely to move expeditiously than those which have not been exposed.

The third argument is that the regional approach is likely to encourage the participation of a larger number of states. The regional organization is for the regional states, developing or developed. They are compelled to put time and resources into its creation and operation. If the organization is global, most of the developing states would very likely leave its creation and operation to the club of the rich. But as has been evident, states often take seriously only environmental matters that affect their territories and/or nationals.

The fourth argument is that as the developing countries get immersed in their own regional activities they will, perforce, train their own manpower and acquire technology at the local levels. This then is a mechanism for transfer of technology. As has been suggested, the regional organizations are expected to establish regional marine technology institutes which would use combined resources and capabilities to build up equipment and machinery for the needs in marine activities.[7]

This is the most critical and lasting need in most regions. As the regional institutions evolve, especially among the developing countries, this should be a vital goal of the organization.

The fifth rationale is that regional activities are less expensive. Participation is cheaper because the activities are closer to home, thereby requiring shorter travel distances and less time away from home offices for technical officials. Moreover, discussions are more focused because participating countries see their immediate interests at stake.

This argument should be valid still, at least in theory. Stated interests may only be doubted where the states fail to follow up on the decisions taken at the regional forum. But that may be partly due to

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[6]Chile's working papers on "Regional Organization to Provide Assistance in Case of Accidents Resulting in Pollution of the Marine Environment" UN Doc. A/CONF.62/L/28.

[7]See Okidi, C.O. *Regional Control of Ocean Pollution: Legal and Institutional Problems and Prospects* (Alphen aan den Rijn, The Netherlands: Sijthoff & Noodhoff, 1978) p. 218.

a shortage of manpower to handle and follow up on the issues with determination.

The sixth argument is that attempts to set up global agencies have been considered either futile or illusory, while unilateral procedures as a means of developing new custom have been found objectionable. In the global regimes, complexity is the critical factor in that there is a diversity of problem regions. Very often, the idea of a global superagency meets with immediate objections.

On the other hand, unilateral state action, especially to cover areas beyond limits of national jurisdiction, is often controversial, whatever is the level of apparent propriety. The last major example under this category was the Canadian Arctic Waters Pollution Prevention Act in 1970 which stirred stern objections from the United States.[8]

Regional approaches still seem the midway path acceptable for purposes of enforcement of mutually accepted standards. The compromise is that the regional forum permits adoption of standards more stringent than the global ones. But in their adoption there is a chance of participation in the regional conferences by nonregional states. This would not be feasible in a national legislative process. Besides, regional enforcement permits effective mechanisms such as the port state option by which a persistent polluter may be totally excluded from an ocean region. It seems clear that a regional option is preferable to unilateral state action or the global superagency. States should continue to seek the precise modalities for perfecting it.

The seventh argument is that a regional arrangement allows the regional states to permit only principles and activities in their own interest. That is, while the regional forum permits participation by states not geographically located there, the regional states may reject inclusion of provisions which would undermine the goals within the region even if such provisions interest the nonregional participants. For instance, France, participating in an Indian Ocean conference because of its interests in Reunion, would not be successful in its attempts to permit provisions allowing for nuclear tests in the region.

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[8]L.C. Green "International Law and Canada's Anti-Pollution Legislation" 50 *Oregon Law Review* 462 (1971), J. Alan Beesley, "The Arctic Pollution Act: Canada's Perspective" 1 *Syracuse J. International Law and Commerce* 226 (1973); Louis Henkin, "Arctic Anti-Pollution: Does Canada Make --or Break -- International Law?" in 65 *American Journal of International Law 131* (1971).

These then are some of the reasons which were advanced in favor of regional approaches, before the Montego Bay Convention was actually adopted. All of them still seem valid today. That is, states should have good reasons to implement the provisions of the 1982 Convention that call for regional approaches to the protection of the marine environment. At least the establishment of the institutions should be found to proceed at a reasonable pace.

Trends in the Adoption of Regional Agreements

The adoption of regional agreements for the protection of the marine environment is the primary perspective in the implementation of Article 197 of the Montego Bay Convention. But as noted earlier on, some of the regional agreements were created at about the same time as the substantive sessions of the UNCLOS III. Therefore it is decided herein that the essay should simply outline those agreements which are consistent with the purposes of the Convention. What we have to do, however, is to distinguish between those agreements adopted directly by the regional states from those that are done through competent international organizations, as specified in Article 197.

The discussion in this paper is limited only to a review of instances where the regional institutions have been set up in accordance with Article 197. It often takes some time before such institutions actually mature and make notable impact in the implementation of actual protection measures. Moreover, these institutions will not have been set up simultaneously with UNCLOS III. Therefore, it will be some time before they are ripe for detailed assessment to ascertain their effectiveness.

Direct Regional Initiatives

There may well be more, but we have identified four regional organizations created specifically for the protection of the marine environment. All the four are in the northeastern Atlantic and the Baltic Sea, in other words, western Europe. They are the Bonn Agreement of 1969, Oslo Convention of 1972, the Helsinki Convention of March 1974, and the Paris Convention of June 1974.

Each of these is outlined briefly to indicate the party states, area of application, and the subjects of application.

Bonn Agreement, 1969

The Agreement for the Cooperation in Dealing with Pollution of the North Sea by Oil was adopted at Bonn on the 9 June 1969 by eight western European states, namely: Belgium, Denmark, France, Federal Republic of Germany, Netherlands, Norway, Sweden and the United Kingdom. As specified in the title, its area of application was the North Sea, defined by specific coordinates. The agreement entered into force on 9 August 1969.

This agreement was actually prompted by the horrors of the *Torrey Canyon* disaster of 1967. The coastal states of the semi-enclosed North Sea resolved that they should never be caught unprepared by similar accidents in the future. For they believed that such a disaster in the semi-enclosed sea would cause drastic environmental injuries. So the agreement was subject specific: it anticipated oil pollution accidents.

The three modes of cooperation by the parties were that they allocated to one another various zones of responsibility for purposes of surveillance and patrol of the area; the parties agreed to exchange information on their national preparedness to combat pollution accidents; and they undertook to give assistance to one another irrespective of where the spillage occurs.

The Oslo Convention, 1972

The Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft was adopted at Oslo on 15 February 1972, by Belgium, Denmark, Finland, France, Federal Republic of Germany, Iceland, Ireland, Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. It entered into force on 7 April 1972.

The area of application includes Atlantic and Arctic Oceans, north of latitude 36 degrees North and east of longitude 42 degrees West and west of longitude 51 degrees East, excluding the Baltic and Mediterranean Seas. Essentially, the area covered actually falls within the jurisdiction of the coastal states and is once more confined to Western Europe.

The treaty was a result of the increasingly stringent national regulation on the disposal of industrial and municipal wastes in Western Europe. Disposal of such wastes on land or in the rivers such as the Rhine was no longer permissible. As a result, a new industry was created for those with ships or aircraft which could carry the wastes for dumping at sea. Examples of instances which became

controversial and sources of diplomatic embarrassment include[9] the Dutch ship *Stella Maris* which in 1971 was loaded with 600 tons of toxic chemical wastes for dumping in the northeastern Atlantic but was recalled after a series of protests from Norway, Denmark, Sweden, Ireland, and the United Kingdom. Another one was the Finnish tanker, *Enskeri*, which was in March 1975 loaded with 16,000 pounds of toxic arsenic wastes for dumping at sea but again was recalled after protests from western European states as well as from Brazil, Uruguay, Argentina, and South Africa.

The Convention vests the enforcement powers in the flag state, port states, and the coastal states under different circumstances, and regardless of the intended dumping site at sea.

The Helsinki Convention 1974

The Convention on the Protection of the Marine Environment of the Baltic Sea Area was adopted at Helsinki on 22 March 1974 by Denmark, Finland, German Democratic Republic, Federal Republic of Germany, Poland, Sweden, and the USSR. It entered into force on 2 May 1980.

The area of application is the Baltic Sea, a semi-enclosed sea with considerable danger of accumulation of pollution.

The Convention applies to all sources of pollution and to all hazardous and noxious substances, including from land-based sources. The need for such marine protection measures had been recognized over a long time. However, the adverse diplomatic relations among the states in the region, especially between East and West Germany, had restrained opening up of negotiations.[10]

The adoption and actual entry into force of the Convention is one indicator of the commitment by the states to protect the marine environment within their region. They agreed to take all appropriate legislative, administrative or other relevant measures to prevent and abate pollution. The Baltic Marine Environment Protection Commission was also established to keep the Baltic under review and to ensure efficient implementation of the Convention and its annexes.

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[9]See discussion in Okidi, *supra* note 3, pp. 18-19.

[10]Robert E. Stein, "The Potentials of Regional Organization in Managing Marine Environment" in Hargrove, (ed) *Law, Institutions and the Global Environment* (Oceana, 1972) p. 257.

The Paris Convention, 1974

The Convention on the Prevention of Marine Pollution from land-based sources was adopted at Paris on 4 June 1974 by twelve western European countries and the EEC. The precise signatories were Belgium, Denmark, France, Federal Republic of Germany, Iceland, Ireland, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom, and the EEC. It entered into force on 6 May 1978.

The area of application is the northeastern Atlantic, nearly coinciding with the area of application of the Oslo Convention discussed above. In fact, the membership is nearly identical with the exception of Finland and the EEC. Finland signed the Oslo and not Paris Convention while the EEC adopted the reverse.

The Convention is specifically concerned with marine pollution from land-based sources, evincing the concern of the industrialized countries with the abundant industrial and municipal wastes often drained into the sea either through rivers or through outfalls. While they agree to apply individual initiatives to forestall new sources and to reduce existing discharges, the parties established a Commission, comprising their representatives, to supervise the implementation of the Convention.

Initiative Through the United Nations

The second alternative procedure provided for by Article 197 is for the regional states to work through the competent international organizations in formulating and elaborating international norms, taking into account characteristic regional features. A number of regional agreements have been negotiated with the joint participation of a number of agencies within the United Nations system working in concert with the respective coastal states. Such negotiations have been conducted under the leadership of the United Nations Environment Programme, under the aegis of its Regional Seas Programme. Other agencies with competence in various aspects of marine environmental matters and which have participated in the technical guidance over the preparation for the convention are UNIDO, FAO, UNESCO, WHO, IMO, the UN proper. The one global NGO which is prominent in the exercise is the IUCN.

The process always begins with a decision of the UNEP Government Council, where at the request of the coastal states, the specific ocean region is declared to come within the regional seas programme of UNEP. Usually, UNEP will then send a mission to study the region, assess the key environmental problems, in fact, and as viewed by the coastal states. Such mission reports are the subjects of meetings of national experts who eventually propose an action plan for consider-

ation of their governments. Thereafter, if the states agree, the core convention and any other agreed protocols are drafted, all for a formal negotiation at a conference of plenipotentiaries, as soon as the experts agree. Thereafter, the instruments are adopted.

It is that background negotiation which is critical, and the experts may never reflect any general agreement of the member states. They consider the detailed reports comprising sectoral reports, submitted by the experts from the cooperating agencies, on the health of the ocean and the ecological conditions, taking into account the critical problems and pressure points. The IMO submits reports on the situation on shipborne pollution; the WHO examines the public health aspects; UNIDO issues reports on the location and operation of industries and the discharges of industrial effluents; the FAO usually examines the impact of pollution on the marine living resources, especially fisheries. Very often the FAO also does the legal preparatory studies. Often, the IUCN has an input examining the vitality of the flora and fauna and determines the necessity for adoption of a protocol of exemplary protection to general or specific species in the region.

Depending on the outcome of these studies as well as agreement among the national experts, the basic convention and the respective protocols are drafted. So far ten regions have been identified and adopted under the regional seas programme of UNEP. (See *map.*) But out of that number agreements have been adopted for eight regions. (See *Tables 1 & 2.*)

The foregoing discussions and tables offer some important generalizations on the concept and practice of regional arrangements for the protection of the marine environment.

1. That the expertise of the competent international organizations can be brought to the regional level to efficiently usher in the creation of regional arrangements for the protection of the marine environment.
2. That through the initiative of the international institutions, the broad competence at the regional level, as in the Mediterranean and South Pacific or, on the other hand, the limited competence as in the Eastern Africa region may be mobilized to create the regional arrangement rather speedily and competently.
3. That the regional agreements under the UNEP Regional Seas Programme are unanimous on the general obligation to protect the marine environment from all sources.
4. That in terms of details, the states see the problem of marine pollution by oil and other hazardous substances from ships is

considered the foremost and general problem in all ocean regions. This is evidenced by the development of a detailed protocol on that subject in all the regional agreements. Where the core convention is in force, the protocol is also in force.

5. That from the experience in the Mediterranean, the other protocols evolve with time, and according to the local peculiarities, as envisaged in the Article 197.
6. That concepts of development and management of the marine resources are covered by nearly all the regional agreements under the Program. The idea makes sense for the developing countries which would want to see direct socio-economic benefits in their involvement in the protection of the marine environment.[11]

The notion of regional peculiarities expressed in Article 197 is clear from the range of implementing protocols. Thus, protected areas are a priority in Eastern Africa and the Mediterranean where pollution has been known to threaten marine flora and fauna and where there may be an impact on tourism.

The rate of ratification and entry into force is high for the agreements under the program. This is probably a function of the discrete process of initiation and of negotiations of the agreements, involving the national experts in the process from the beginning. The case of the Eastern Africa region is peculiar, perhaps because of the role of Kenya at the adoption of the convention and thereafter. Kenya, the depository state, did not sign the convention and protocol and still has not. Lately, however, the issue has been taken up at the highest level with the promise that accession is coming up soon.[12]

The entry into force of these connections will have entailed a very large number of international legal acts performed in diverse areas of the world within just about one decade.

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[11]For the significance of the concepts, see Okidi, C.O. "Nairobi Convention: Conservation and Development Imperatives" in 15 *Environmental Policy and Law* 43-51 (1985).

[12]In his Opening Address to the 15th Session of UNEP Governing Council the President of Kenya told the Council that arrangements were under way to ratify the Convention and the protocols thereunder.

General Comments

It can be said generally that the regional measures being taken for the protection of the marine environment in conformity with the 1982 Montego Bay Convention are reaching the proportions of a movement. The origins of these agreements seem to have been the same concerns which gave the issue of the protection of marine environment a prominent place at the UNCLOS III. For instance, by the beginning of 1975 a document comprising fourty-four draft articles on marine pollution was tabled at UNCLOS III.[13]

Presumably, these were indeed the reflection of the concerns which had led to the 1969 Bonn Agreement with the participation of eight states; the 1972 Oslo Convention with the participation of thirteen states; the Helsinki Convention with the participation of yet another thirteen states; the 1974 Paris Convention, also with thirteen contracting states. Thus, before the crystallization of the provisions at the UNCLOS III, four agreements in Western Europe had mobilized fourty-four commitments by states to the concept of regional arrangements.[14]

In addition, the UNEP Regional Seas Programme, with eight agreements in place, mobilized another 107 commitments in areas that cover all regions of the world except the coasts of North America. This leaves Canada, China, the Koreas, and Japan perhaps the only maritime states which are not parties to any regional marine protection arrangement.

There is, therefore, an overwhelming international support for the concept and practice of regional approach to the protection of the marine environment. And, indeed, the number may be increasing soon, with further negotiations in the East Asian Seas and South Asian Seas as regions already identified and in preparatory phases. The East Asian Seas would add five more states, namely Malaysia, Indonesia, Philippines, Thailand, and Singapore. Similarly the South Asian Seas,

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[13]UN Doc. A/CONF.62/WP.8/Part III of 6 May 1975. Indeed, the concerns with marine pollution, especially ship-borne sources, started much earlier and led to a number of global conventions with amendments. The emergence of the regional arrangements, also urged in these draft articles, is the concern of this paper.

[14]The straight addition of the parties to the four Conventions totals 44, even though the majority of the parties are members of each of the four regions. They committed themselves four times.

with Bangladesh, India, Maldives, Pakistan, and Sri Lanka, will bring in five more. That would bring in an additional twenty commitments to the family of the Regional Seas Programme.

As it is now, with 151 commitments to it, regional arrangements for the protection of the marine environment, as expressed in Article 197 of the Montego Bay Convention, can be assumed to have gained consensus under international law.

Each regional organization operates with its own secretariat and budget. The clear anomalies are the Eastern African Region and the West and Central Africa regions which are still administered from Oceans and Coastal Areas Programme Activity Center (OCA/PAC) at the UNEP Secretariat. In the case of the former, that may be understood in view of the fact that the convention, and protocols under it, have not entered into force. In the case of the West and Central African Convention, the program with recognized activities should actually develop some autonomy from the UNEP secretariat. The African states should now be developing their own staff and mobilizing resources for the regional functions.[15] Only recently has it become clear to UNEP that running detailed programs of marine environment in Western Africa from UNEP headquarters has conceptual and practical difficulties.[16]

The detailed operation of the regional organizations should be a subject of a separate paper with a detailed field study. However, it is already reported that most of the regional institutions are involved in the detailed studies of second level implementation. The activities include consolidated and expanded monitoring and control of coastal waters, promotion of national environmental legislation, establishment

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[15]OCA/PAC has not shown much keenness to employ nationals of African states to participate in the management of marine environmental affairs. That process should have started with at least adopting of the Abidjan Convention so that the preparation is gradual and phasing out effective, with higher chance of continuity.

[16]See "UNEP's Regional Office System" in UNEP/GC/15/5Add 3 of 21 March 1989, p. 4 where it is suggested that the six Arab Speaking African States should be transferred to West Asia Regional Office in Bahrain; in addition to that, sub-regional office for Africa be established to serve 20 West African States.

They did not point out that it is time the Regional Office for Africa moved from the UNEP headquarters so that it develops its own identity.

and equipment of regional pollution emergency centers, coastal zone planning and management, elaboration of protocols in specialized areas, as in *Table I*; and the mobilization of national and international funding for further implementation measures.[17]

A number of broad issues remain for the regional organizations. But one of the critical ones is their coverage of ocean space. As they are, these arrangements cover largely the areas under the jurisdiction of the coastal states. The map shows actually the strip within the coastal zone. The rest of the ocean is not fully covered. We note that in some of the conceptual works the regions were thought to appropriately cover halves or quarters of the respective oceans.[18] It seems, though, that the actual practice will have to evolve further.

[17]See instances outline in 40 *The Siren*, pp. 1-3 (March 1989).

[18]See Okidi, *supra* note 7 pp. 165-179.

Table 1

Instrument Adopted Under Regional Seas Programme
(f = in force; n = not yet in force)

	Convention	Oil Pollution	Land-based Pollution	Protected Areas	Waters of Shores	Dumping
Mediterranean	16.02.76 (f)	16.02.76 (f)	17.05.80 (f)	03.04.82 (f)	10.05.76 (f)	16.02.76 (f)
Kuwait	24.04.78 (f)	23.04.78 (f)				
W/C African	23.03.81 (f)	23.03.81 (f)				
SE Pacific	12.11.81 (f)	12.11.81 (f)	23.07.83 (f)			
Red Sea and Gulf of Aden	14.02.82 (f)	14.02.82 (f)				
Caribbean	24.03.83 (f)	24.03.83 (f)				
Eastern Africa	21.06.85 (n)	21.06.85 (n)		21.06.85 (n)		
South Pacific	24.11.86 (n)	25.11.86 (n)				25.11.86 (n)

Table 2

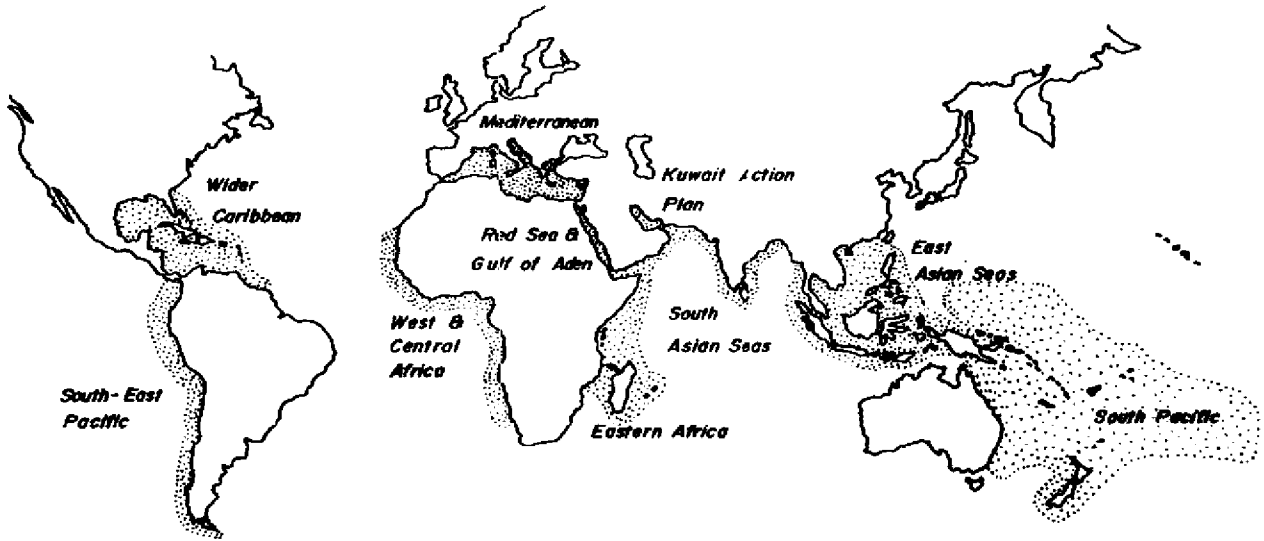
Regional States under the Regional Seas Programme (107)

Medit.	Kuwait	W/C. Africa	SE Pacific	Red Sea
Algeria	Bahrain	Angola	Chile	Palestine
Cyprus	Iran	Benin	Colombia	(PLO)
Egypt	Iraq	Congo	Ecuador	Saudi
France	Kuwait	Cape Verde	Panama	Sudan
Greece	Oman	Equatorial		Yemen
Israel	Saudi	Guinea		
Italy	Arabia	Gabon		
Lebanon	United	Gambia		
Libya	Arab	Guinea-Bissau		
Malta	Emirates	Ghana		
Monaco		Guinea		
Morocco		Ivory		
Syria		Coast		
Tunisia		Liberia		
Turkey		Mauritania		
Yugoslavia		Namibia		
EEC		Nigeria		
		Sao Tomo		
		& Principe		
		Senegal		
		Sierra Leone		
		Togo		
		Cameroon		
		Zaire		
17	8	21	4	4

Table 2 (cont'd)

Caribbean	E. Africa	South Pacific
Antigua & Barbuda	Comoros	Australia
Bahamas	France (Reunion)	Cook Islands
Barbados	Kenya	Micronesia
Belize	Madagascar	Fiji
Colombia	Mauritius	France
Costa Rica	Mozambique	Kiribati
Cuba	Seychelles	Marshall Islands
Dominica	Somalia	Nauru NZ
Dominican Republic	Tanzania	Niue
EEC	EEC	Palau
France		Papua New Guinea
Grenada		Solomon Islands
Guatemala		Tonga
Guyana		United Kingdom
Haiti		United States
Honduras		Vanuatu
Jamaica		Western Samoa
Mexico		New Zealand
Nicaragua		
S.V. & The Grenadines		
St. Lucia		
Trinidad & Tobago		
United Kingdom		
United States		
Venezuela		
25	10	18

THE REGIONAL SEAS: INITIATIVES THROUGH UNEP



COMMENTARY

Salvano Briceno
United Nations Environment Programme
Caribbean Action Plan

Thank you very much, Madame Chairperson. I want to thank you for having invited me to attend this meeting. It is really a great pleasure to be here. It is my first time in one of the Law of the Sea Institute annual conferences and I want to thank very much both the Institute and the Netherlands Institute for the Law of the Sea for making it possible for me to be here.

I would like to comment on Professor Okidi's paper. It would be impossible for me to disagree with what he says about the relevance of regional organizations, since I am responsible for conducting one of them. Nor will I consider the legal basis, which has been clearly explained and analyzed by not only Professor Okidi but various other participants throughout the conference. I want to focus rather on the managerial and political elements, as well as on the new approaches required for implementation of such programs. My basic comments are the following.

First, regional arrangements provide for a decentralized implementation of marine programs which allows for greater participation and wider responsibility of states in the management of the marine resources that are of common interest. This approach is valid not only for environmental purposes but could eventually be applied to the implementation of the whole new ocean regime. In analyzing the Regional Seas Programme supported by UNEP, the Brundtland Report recently prepared by the UN recognizes that the political strategy behind the program and the requirement that management and financing be undertaken by participating countries have clearly been crucial to its success.

The case of the Caribbean Environment Programme, which I conduct, is illustrative in that sense. It has been the smaller countries which have been more active and more ready to contribute than the larger ones. I must say that the United States has not yet contributed to the program, although they have finally accepted the idea of contributing and most likely they will contribute soon. But countries like France also took some time to decide on their contribution while the smaller states of the region were putting their money up front. That is a clear refutation of the perception that the poor countries passively expect the rich ones to provide the resources, as is mentioned in some of the papers. So that principle of the greater the participation

the states have in the conduct and financing of the regional programs, the greater their responsibility, is the first notion I wish to highlight.

Second, the approach to the environmental issues has evolved during recent years, as you very well know, from a basic understanding of the natural ecological processes to the more comprehensive notion of sustainable development. This notion requires that the developed as well as the developing worlds introduce drastic changes in their styles of development to allow for sustainability rather than depletion of resources, as is now the trend. With regard to marine issues, the change in approach implies that problems such as pollution control or protection of species can no longer be dealt with in separation from the development goals motivating the exploitation of the sea, the use of technologies, or the equitable distribution of the resources, among others. The new approach implies additionally that programs will now need to address the issues with a longer-term involvement and with greater clarity of sustainable development goals and vision. So when we talk about environment nowadays it is with a very different perspective than when the Convention was drafted. The requirement that international and regional organizations cooperate for the implementation of the new ocean regime in the light of sustainable development certainly becomes of greater relevance.

Thirdly, as Professor Okidi and various other speakers throughout the conference have expressed, there are already in place regional structures with various degrees of effectiveness that have been developed prior to or during the development of the Law of the Sea Convention. These structures provide, despite regional differences, a basis for increased participation and cooperation among states having common interests in the protection of the resources. These regional programs provide a valuable forum for coordination among national and international organizations as well as governmental and non-governmental. For a detailed description of all of these programs the paper of Dr. Kwiatkowska from the first session of the conference is really very complete.

Although in several cases the catalytic role of UNEP was crucial in their development and still provides for some of them the management of the program, the participating states have become involved at a high political, financial, and managerial level. Though there is still the clear image that these are UNEP programs, most of them have become autonomous, and even those that are handled still by UNEP are provided policy guidance by the participating governments. The organizational structures in place, which have emerged in many cases from lengthy processes of negotiation, are most suitable to provide the coordination required for programs implementing the provisions of

various regional and international conventions, and it is important that these programs be utilized by all relevant organizations for the wider purposes of sustainable development. In our case, for example, through the regional coordinating unit of the Caribbean Environment Programme, we are at present providing support to various regional initiatives of other organizations such as IOC, IMO, WHO, PAHO, as well as regional ones of CARICOM, OAS, OECS, etc. They are using our office as a base for implementing their regional programs.

With regard to the Law of the Sea Convention and the use of the regional programs, Professor Okidi compares the situation to that of a clever politician who watches which way the crowd is running and then runs ahead of it to be declared the leader. Although I am sure this perception is valid in the mind of many leaders, I would like to suggest that there are various institutional frameworks available which require working together and exercising leadership rather than competing. Although we could easily expand on the relationship between legal provisions and organizational responses, I will leave it at this time with the agreement that leadership among organizations to carry out marine environment programs at the regional level is to emerge from open dialogue and consensus through cooperative efforts rather than from an *a priori* definition.

Fourth, when talking of regional approaches, it is essential to be fully aware of the diversity of contexts in which the programs are being developed. To illustrate, I would like to use the case of our region. In Latin America and the Caribbean, we have two regional programs for protection of the marine environment. While the Southeast Pacific Action Plan carried out by the CPPS, the Permanent Commission for the South Pacific, addresses the issues of just five countries: Panama, Colombia, Ecuador, Peru, and Chile -- all with the same language, comparable levels of development, and working together for thirty-five years in that effort, the Caribbean Environment Programme, on the other hand, on the other side of the region encompasses thirty-five states and territories and the EEC, with not only four major languages but with a great variety in many ways. We have the richest and the poorest countries of the world: United States and Haiti; we have some of the largest and many of the smallest countries of the world. We have extreme capitalism and extreme communism with the United States and Cuba, and we have economic activities that are of global relevance such as the Panama Canal, the oil production of Venezuela and Mexico, and one of the most developed tourisms in the world. In my view the Caribbean provides a wonderful

opportunity for addressing at a smaller scale issues that are of a global nature.

Fifth, in the process working towards sustainable management of the oceans, the coordination at the regional level of marine environment programs urgently requires the active participation of all sectors that utilize the marine and coastal resources; in particular, the business sector is extremely important. Sixth, the renewed priority given to environmental problems in international cooperation, globally and regionally as well as locally, which is already attracting larger investments from donor agencies in particular and which is considered second only to the debt problem of the Third World, provides an additional reason for advancing rapidly on the strengthening of regional mechanisms that are still weak and largely underutilized.

Seventh, a global or holistic approach to the development of regional programs requires increased attention to the managerial and organizational elements. These elements constitute, in my view, one of the main obstacles to a more effective regional cooperation on the marine environment at present. Although it is clear that substantially increased capital flows are necessary to cope with the investments required for protection of the marine environment, particularly with respect to control of land-based sources of pollution, as the Brundtland Report very well describes in Chapter 10, it is also true that the strengthening of the managerial capabilities of regional organizations can greatly contribute to the more effective management of the marine environment.

Eighth, one particular obstacle to greater funding to regional seas programs at present, for example, is the perception by some donor agencies, especially bilateral ones, that these are purely UNEP programs. They consider that their contributions to UNEP should be enough to cover these programs, failing to recognize their extraordinary potential as regional initiatives for an improved coordination of the technical assistance funds. Because of the involvement of the participating countries, these programs certainly provide an opportunity for an increased and improved coordinated effort.

Finally, ninth, I would like to inform you that at our regional office in the Caribbean plans are being discussed with the UN Law of the Sea Secretariat to join efforts in several aspects of common interest in our work in the region, including the promotion of both the Law of the Sea Convention and the Cartagena Convention for protection of the marine environment in the wider Caribbean, to join support in assisting the governments and the academic institutions to develop marine policies in the region, and to elaborate jointly additional

protocols to our Cartagena Convention, particularly in the fields of land-based sources of pollution and dumping.

I think that it is very important to analyze experiences such as ours with a holistic view, where the legal elements are integrated with all the policy and organizational and administrative aspects, and to use them as case studies in subjects for future conferences.

DISCUSSION

Patricia Birnie: Before we turn the floor over to your questions I know that Professor Yankov would like to respond to the remarks made by Professor Vukas.

Alexander Yankov: On the concept of the so-called "generally accepted" rules, I have no substantive difference in views with Professor Vukas. I think that these are rules in conventions of universal or quasi-universal adherence and customary rules of international law, or rules as recognized under Article 38 of the Vienna Convention on the Law of Treaties in regard to the binding force of a treaty on third states. Explicit recognition may be realized through national legislation, state practice, or international treaties.

If we look through the provisions of the Convention where this expression is used, perhaps our drafting is not perfect. If we have to start again, perhaps we will introduce many improvements to this text. Nevertheless, in most instances these provisions refer to rules which are otherwise generally recognized. For instance, Article 21, paragraph 4, states that "foreign states shall comply with the laws and the regulations of the coastal State in innocent passage relating to the prevention of collision." I think this is, in my humble submission, a generally recognized rule. Article 39, paragraph 2, contains about fourteen or fifteen provisions in which reference is made to generally accepted rules. Article 41, paragraph 3 asserts that "sea lanes and traffic separation schemes shall conform to generally accepted regulations" for the safety of navigation. These and other examples are basically related to navigation and considered as integral. Any dichotomy created because of more stringent laws and regulations in one place than in another may affect the integrity and the normal functioning of the global system of navigation. Other provisions relate to the flag state's traditional rights, the rules on vessel-source pollution, and safeguards such as the procedure of instituting proceedings and fair trial conditions, which are also generally accepted rules. So there will not be very much for the lawyers to work on here, to discover what is the meaning.

I admit that there might be ambiguity in Article 60 on artificial islands in the exclusive economic zone, but if the question is then addressed to the subject matter and the specific case, we may discover that behind this term we find customary rules, though there may be exceptions which will create difficulties or interpretations.

I admit that Professor Vukas' remarks are well justified, but at the same time I would like to say that the importance attached to

semantics should be measured within the general framework of the Covention; otherwise we would be going to different dictionaries to discover or disclose the meaning of the rule. This we did sometimes in the International Law Commission at certain stages, but then we abandoned the practice because it didn't always help.

Patricia Birnie: Well, I am now going to ask for questions from the floor. Alan Boyle.

Alan Boyle: I have a few brief comments. We have had some very interesting papers this afternoon, but it seems to me that we do need to elevate our perspective slightly on at least three points. One is that we ought to bear in mind on this question of what constitutes generally accepted rules the important judgement of the International Court in the Nicaragua case. This case tells us something about the status of UN resolutions, although I think by implication it also tells us something about the possible status of resolutions of other international bodies, so it may be that customary law itself is developing in that context.

A second point that we should bear in mind when it comes to considering questions of port state jurisdiction is that the law of jurisdiction is also developing. We should note that the International Law Commission has to consider the possibility of treating serious pollution as an international crime, and that may have implications for the jurisdiction of states which will affect the marine environment.

My third comment is to support the point that Professor Yankov very aptly made: to stress that land-based pollution is the major problem that we ignore at our peril if we simply concentrate on the marine environment, if we do not place the protection of the marine environment within the broader field of international environmental law and the global environment. There have been some very important developments in relation to the control of dumping, to the control of land-based sources of pollution, to transboundary transport of hazardous wastes, and also to the control of airborne pollution. These developments suggest the emergence of an attempt to regulate what some commentators have described as the hydrologic cycle, in which air, rivers, and the marine environment are considered a unity. Really, that is the only sensible way to approach the control of all of those issues. In this context, once again the work of the International Law Commission on international water courses is of some significance because the Commission has taken up the point in its draft articles that there is a relationship between international rivers, air pollution, and

pollution of the marine environment. They have, in fact, drawn on the work of the UNEP.

But coming back to this question of what "generally accepted" is, I think the crucial point is that many of these standards will only have practical significance when we can actually decide what quantities of what substances we're talking about and in what circumstances they can be discharged into the marine environment. It is not sufficient to talk in generalities; we need to be able to say, for example, that sulfur emission should be reduced by a certain proportion or that the discharge of certain specified toxic chemicals will be prohibited. We're actually to make programs.

Within the International Law Commission, there is a general principle which has to be resolved before we can successfully relate the water course law to the law of the sea. Within the ILC some states take the view that it is permissible to pollute the water course to the extent that it is not inequitable to do so. In other words, there is a balance of equities between the states concerned, and pollution is regarded as a legitimate use to that extent. I find that difficult to reconcile with the basic underlying principle in the Law of the Sea Convention that there is an obligation to protect and preserve the marine environment which is not dependent on a balance of equitable factors. Until those two principles are sorted out there will be some difficulty in actually reconciling these two elements and the total hydrologic cycle.

Patricia Birnie: Although that was not put in the form of a question, I think that it does require a response, in particular the terminating remarks. Would a member of the panel like to comment on the point of the inequities?

Alexander Yankov: On this question of inter-relation I agree with the previous speaker that we have to see the relationship between the offshore activities vis-a-vis their impact on land and vice versa, and conflicts of uses are sometimes the source of hazards and pollution. Priorities must be attached to the chemical industry and other kinds of activities. I agree that it is time now and that this question should not be considered within the confines of the marine environment *strictu sensu* -- that is, the water, the atmosphere, the seabed, and the subsoil -- but also with the other related parts of the environment. We come to the conclusion that the law of the protection of the environment of the sea may become part of the general environmental law.

Thomas Busha: I too want to comment on the points that were so ably clarified by Professors Vukas and Yankov and to comment on the nature of the enforceability through the 1982 Convention of generally accepted standards. The 1982 Convention, as everyone here knows, represents much that is novel both in the process of treaty-making and in treaty law itself. It was plainly impossible to encompass through the umbrella treaty every conceivable rule to protect the marine environment. To some of us, the 1982 Convention is therefore undergoing an ongoing legislative process within the international community, and notably through its existing bodies such as the specialized agencies.

I'm very grateful to Ambassador Yankov, in particular, for replying in such helpful detail to Professor Vukas on this matter, and my purpose in asking for the floor was to add a single comment. When the Secretariat of IMO took up the study of the 1982 Convention and its impact upon that organization, particularly upon the regimes for the protection of the marine environment -- a study for which a great deal of credit is owed to our colleague, Mario Valenzuela, if that is not breaching the traditional anonymity of documents that issue from the secretariats of international organizations -- there was speculation within the legal office as to the consequences of giving treaty force to standards not only of non-binding character, as has been mentioned this afternoon, but to treaties that were not otherwise binding on the parties to the 1982 Convention when it comes into force. Perhaps some of our discussions in IMO became rather fine-spun and philosophical, because it could be argued that parties to the 1982 Convention, after its entry into force, of course, would become bound by that Convention to the SOLAS, MARPOL, and other regimes of IMO, irrespective of the consent of those states that would be bound to those treaties by means of ratification or accession to them. If an IMO treaty provision was at variance with the 1982 Convention provision, as for example, Article 221 differs from Article 1 of the 1969 Intervention Convention in respect of what are now the high seas, clearly the 1982 Convention would government the matter among its parties, but what about the *pacta tersis* rule? Do we have a situation in which the 1982 Convention extends the scope of IMO pollution regimes because of the generally accepted standards concept, even though the states have deliberately refrained from giving their consent to be bound by the MARPOL and other regimes?

I would welcome any comment on this. We have among us one of the world's great experts on treaty law, Professor Rosenne, and as far as I remember our talks went only to the point of agreeing that the

1982 Convention once in force would not leave a party to it free to legislate nationally in a manner totally at variance with the IMO conventions in respect to those generally accepted standards. But we didn't go as far as to think that by the 1982 Convention itself, states would be bound to the MARPOL, SOLAS, and other conventions of IMO.

Patricia Birnie: Any other questions? Mario, I know you want to make a comment.

Mario Valenzuela: Professor Yankov and Mr. Busha have said practically all that I wanted to say. I am only wondering whether I interpreted correctly Professor Vukas, when he said that he understood that "standards" refers to non-mandatory provisions. I know that, as Professor Yankov has sustained, it is a matter of interpretation for each clause. But it is important to recall that this term was first used during the conference in connection with Article 21, paragraph 2, which was dealt with in the Second Committee. Article 21(2), which refers to innocent passage, started a trend to limit the sovereignty of states for purposes of navigation. It was clear that the generally accepted rules and standards refer exclusively to provisions of treaties in force in the world community. This is the first point.

The second point is an argument of text. The Second Committee looked at this matter precisely at the moment when the International Labor Organization developed the 147th Convention. In this Convention it is precisely mentioned that states should set down laws and regulations on safety standards, including standards of competency, etc., for ships registered in their territories. And not only that, but this Convention was the first time that all the regulatory conventions of IMO were mentioned. As Mr. Busha has stated, it was already 1976 and this was considered a process of development of law, so there was mention of the SOLAS Convention, or any convention subsequently revising this Convention, the Load Lines Convention, and any future convention, and the COLREG regulation which Ambassador Yankov has mentioned.

Patricia Birnie: Professor Vukas, I know you want to respond briefly.

Budislav Vukas: To respond to Professor Yankov: perhaps we deal sometimes with semantics, but such a notion as "generally accepted" has to be clarified within the framework of the generally accepted terms and notions relative to the sources of international law.

I did not invent the problems I raised here; scholars from all over the world have had these problems and have analyzed the different standards and rules. For example, non-binding standards were claimed in this very LSI meeting some years ago by one of the commentators. On the other hand, Mario Valenzuela claims that the standards are only those included in treaty provisions. The problem of "generally accepted" really comes to the main principle of *pacta tersis nuc nocent nuc procent*, and here again, we see different interpretations. Some of the commentators claim that this is only general customary international law. My colleague from Finland, Mr. Hakafaa, defines a new term when he speaks of quasi-customary law, and others speak about the vague consent given to such law. So we see that students and international tribunals will really have problems when they have to deal with something that is "generally accepted."

I know that, considering our wish to have environmental protection strengthened and taking into account the point of view of international organizations, we would prefer to have as many "generally accepted" rules as possible, but to have a real test we need an authoritative interpretation of that term.

Patricia Birnie: Judging by the intricacies of this debate, I imagine we are all going to discuss it outside this hall, and I am sure that the participants in this panel would be only too happy to continue. But I must close the proceedings, and I ask you to thank the panelists. We have had an extremely interesting debate, touching the fundamentals of international law of the sea, and I am most grateful to them all for stimulating such a wide range of questions and discussion. Thank you very much.

RECEPTION SPEECH

N.H. Biegman
Director General for International Cooperation
Peace Palace
The Hague

Ladies and Gentlemen, on behalf of the Minister of Foreign Affairs who personally could not be present at this reception, I would like to welcome you all to The Hague and to the Peace Palace which is so closely associated with the work of international lawyers.

The Law of the Sea Institute of the University of Hawaii has over the years become a familiar name to all of us who have worked in the field -- the vast field of the law of the sea. It has provided the legal and diplomatic profession with plenty of advice, expertise, and studies by eminent scholars at the right moments and the right places.

As such the Law of the Sea Institute has set an excellent example for our own Netherlands Institute for the Law of the Sea of the University of Utrecht. This 23rd annual conference is the fruit of the effective cooperation between these two academic institutions.

The law of the sea has been always close to the heart of The Netherlands, for commercial, for legal, and for development cooperation purposes. The Netherlands Government believes that a comprehensive universally acceptable legal system is conducive to an orderly and equitable use of the seas, the oceans, and the ocean floor and its subsoil. It has always given priority to the progressive development and codification of international law. In this regard the UN Convention on the Law of the Sea is an impressive accomplishment in itself. Many parts of this Convention are not perfect and need some adjustment -- in the field of the exploitation of the deep sea-bed minerals -- to make the Convention acceptable on a universal basis, to industrialized and developing countries alike. Such acceptability is a must for the successful implementation of all parts of the Convention.

Let me say a few words on the two subjects which you considered during today's session of the Conference: the exploitation of the living resources and the protection of the marine environment. The need for international and regional cooperation in these fields is evident, both for the developing countries in order to optimize the economic opportunities offered by the Convention and for the coastal states. A clear challenge in this respect is the worldwide recognition of the 200-mile exclusive economic zone. Here the difficulty is to strike a balance between the interests of the coastal states and the equally legitimate

interests of the other members of the community of states in realizing an optimum utilization of the living resources. Fish should play a greater role in the world food supply and could alleviate malnutrition and increase food security. Industrialized nations and international organizations should actively promote and assist in the development of integrated ocean management programs, thus helping developing states in the exploitation and management of their ocean resources.

Another area which calls for urgent international cooperation is the marine environment. It is interesting to see that the 1982 Convention already serves as a model for national marine environmental legislation. The marine environment, however, deserves a more global approach. Nineteen eighty-nine could well be called the year of the environment, in view of the many initiatives taken in this field. I would like to recall at this occasion that in March of this year in this very Peace Palace the Declaration of The Hague was signed by twenty-four Heads of State and Government who committed themselves to develop in the framework of the United Nations new principles and mechanisms to protect the atmosphere. My Government hopes very strongly that this initiative will lead to the worldwide effective cooperation between states, intergovernmental organizations, and non-governmental organizations which is so badly needed.

Let me say once again how happy I am that you have come to The Netherlands to discuss some of the problems involved and wish you a very successful outcome of your Conference.

Panel V

MARINE SCIENTIFIC RESEARCH

Warren Wooster: The topic this morning is marine scientific research and, in the implementation of the Law of the Sea Convention, the role of international institutions as related to marine scientific research. While the Convention on the Law of the Sea presumably resolved various legal questions concerning jurisdiction and use of the oceans and its resources, the jury is still out on whether it did more harm or good with respect to marine scientific research. On the positive side, the Convention did elaborate a set of rules that might serve to regularize state practices in dealing with management of research by foreign scientists. It also contains exhortations to promote marine scientific research and suggests possible supporting actions by the competent international organizations. On the negative side, the Convention extends essentially total coastal state control of marine scientific research over the broad expanse of coastal ocean, and neither scientists, other states, or the collective of other states can do very much about arbitrary coastal state acts against research. This is at a time when the needs for scientific understanding of ocean processes are sharply increased as ocean resources, the quality of the marine environment, and the ocean's role in climate become more central to the future of human society.

This meeting is concerned with the role of international organizations in implementing the Convention. In the case of marine scientific research, you should keep in mind that *implementing* means installing the mechanisms, the processes, and regulations prescribed for the governance of marine scientific research. It doesn't mean performing those acts that most effectively cause or help needed scientific research to be done. A cynical marine scientist, if there were such a thing, might suspect that the Convention provisions concerning the assistance of competent international organizations like those promoting marine scientific research were introduced more for symmetry or for the perception of equity than as serious propositions. But at least with respect to international organizations, there are important ways that they can assist marine scientific research, and these will be discussed by the speakers on this panel.

Before calling on them, I'd like to suggest some general considerations. First, marine scientific research like any other scientific research is done by individual scientists with the help, usually

national, of financial and other resources and institutional arrangements. Science isn't done by organizations; it's done by individuals. The work of scientists usually benefits from cooperation with other scientists on the national or international level. The arrangements for such cooperation range from informal through increasingly formal steps ultimately to that of global intergovernmental organizations. The efficacy and efficiency of arrangements for getting the scientific work done usually vary inversely with the degree of formality, so scientists tend to prefer the least formal arrangements that will do the job.

When the Convention refers to competent international organizations, it means those that are competent legally, not scientifically. Many of the organizations that scientists find useful in assisting their work are of limited or perhaps no competence in the eyes of the Convention. Yet there are clearly problems where the scope of universal intergovernmental organizations can be brought usefully to bear in support of marine scientific research -- for example, in mobilizing the support of governments and in providing services and training. It must be recognized, however, that the transaction costs of working with large governmental apparatus are not trivial.

Now having said that, let me introduce the panel and we'll get on with this. The panel includes Professor Henk Postma, who is Director of the Netherlands Institute of Sea Research and former president of SCOR (Scientific Commission on Oceanographic Research); Lee Stevens, who is with the Joint Oceanographic Institutions in Washington; Dr. Aprilani Soegiarto from the Indonesian Institute of Science and also Vice-chairman of the Intergovernmental Oceanographic Commission; Professor William Burke, Professor of Law at the University of Washington; Dr. Jan Stel from the Dutch Commission on Oceanography; Professor Gunnar Kullenberg, who is Secretary of the Intergovernmental Oceanographic Commission; and Professor R. P. Anand from Jawaharlal Nehru University in India. Our first speaker is Professor Postma.

MARINE SCIENTIFIC RESEARCH PROJECTS UNDERTAKEN BY OR UNDER AUSPICES OF INTERNATIONAL ORGANIZATIONS

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Texel

Until just a few years ago, oceanographers met few geographical restrictions in carrying out their investigations. The jurisdiction of coastal states was, with few exceptions, limited to a few miles offshore. This author met for the first time with such an exception in 1952 when participating in an expedition in the Gulf of Paria, which was then already divided between Venezuela and Trinidad, then still a British colony. Permission to enter one section of the Gulf was given only after some delay, and the expedition had to be arranged accordingly.

The Convention on the Law of the Sea, as adopted in 1982, states that a coastal nation can regulate and authorize marine scientific research on its continental shelf and in its exclusive economic zone, which extends to 200 miles from the coast. Not only the marine research itself but also the publication of its results has to have the consent of the coastal nation.

These restrictions now apply to about one third of the surface area of the world oceans and hold for some key areas such as passages from one ocean to another and connections between a number of important sea basins. The possible consequences for the conduct of marine research under the new international law of the sea were vigorously discussed. The general opinion that resulted from these discussions was that it was not so much the total volume of research that would suffer, but that this research would be forced into scientifically less exciting directions.

The optimistic view on the volume of research was based on the consideration that a coastal state, having become aware of the economic value of the sea area now under its control, would have to increase its exploratory efforts as a basis for efficient exploitation. Another consideration was that this state would become responsible for the protection of the area against destruction of its environment, especially by overfishing and pollution.

This effect has certainly occurred, especially in developing countries where several new research and survey vessels have been built and additional staff has been trained, frequently with the assistance of

developed countries. It has led to more applied, but also fundamental, research, especially on the continental shelf and in coastal waters. Another positive effect is that marine scientists from a larger number of countries have become involved in ocean affairs than would otherwise have been the case. Development of cooperative regional programs has strongly been promoted, through UNESCO and with support of UNEP, by a SCOR (Scientific Commission on Ocean Research)-UNESCO-IABO (International Association for Biological Oceanography Commission). This matter will be discussed below.

The developments mentioned above relate mainly to nearshore and continental shelf research. Whether "blue ocean" investigations have also been intensified by the new international legal regime of marine scientific research is more difficult to evaluate. Such investigations are chiefly carried out by developed countries, and the total effort varies with the amount of money allocated to them from year to year. It seems quite certain, however, that the direction of this effort has changed. To begin with, in the Indian Ocean Expedition held in the 1960s on the initiative of SCOR, multi-national expeditions were strongly emphasized. These expeditions aimed at the study of large ocean regions for which a cooperative effort was necessary. In fact, they formed the primary reason for the establishment of the IOC (Intergovernmental Oceanographic Commission) in 1960.

The draft convention has caused a decrease in multinational regional "expeditions" under the auspices of an international organization since it is difficult for a host state to refuse access to waters under its jurisdiction to only some of the participating states. In fact, such states may be from the other side of the globe. For this reason a host state now tends to prefer separate bilateral agreements with interested governments, each of which specifies its requirements and assures mutual benefits.

A shift has taken place from expeditions to regional programs such as WESTPAC (Western Pacific), CINCWIO (Cooperative Investigation in the North and Central West Indian Ocean) and CCOP-SOPAC (Committee for Coordination of Joint Prospecting for Mineral Resources in the South Pacific), etc., which lead a more or less continuous existence and serve as a framework for smaller exercises, eventually even on a national basis. The increase of research in the still international Antarctic region may be partly caused by the wish to avoid difficulties with governments.

More important, however, is increased stress on problem-oriented programs such as CCCO (Commission for Climate Changes and the Ocean), WOCE (World Ocean Climate Experiment), TOGA (Tropical Oceans and Global Atmosphere), JGOFS (Joint Global Ocean Flux

Study), and, in the near future, IGBP (International Geosphere-Biosphere Project). This change is not primarily caused by the new regime but by scientific demands (although these programs, one more than the other, are also sensitive to access restrictions). Instead of discussing these programs separately, it is better to put them first into the perspective of the development of oceanography as an earth science.

An important characteristic of this development is the growing awareness of the global connection of processes. This trend reflects the present state of our knowledge, but is in addition stimulated by the insight that the impact of human activities is causing changes in a number of these processes on a global scale or can be expected to cause such changes in the future. Also, refinement of techniques of observation plays an important role in this respect: phenomena that could not even be seen in the past can now often easily be measured.

Most phenomena that have to be measured on a global scale are obviously sensitive to access restrictions, although this will hold more for one kind than the other. To place the above-mentioned programs in this perspective, and to trace possible additional ones, it is sensible to discuss them for each scientific discipline separately.

In physical oceanography ocean-atmosphere interaction and climate change are two closely connected subjects now vigorously studied in WOCE (World Ocean Climate Experiment). Of course, the influence of the ocean on climate has been realized for a very long time: classical studies have already been conducted in the beginning of the century on changes in the strength of the Gulf Stream in the North Atlantic and the climate of Scandinavia. More recently the insight has been sharpened that air-sea interaction in tropical latitudes has a decisive role in determining the global weather. Programs like, in the seventies, GATE (GARP Atlantic Tropical Experiment) and now TOGA (Tropical Oceans and Global Atmosphere) have been generated by this insight. Temporary changes in strength and even direction of winds and currents, and in sea level, appear to be phenomena simultaneously occurring in the whole equatorial belt of the ocean. Most spectacular, and of great economic importance, are variations in magnitude of coastal upwelling along the west coast of South America (El Nino effect). Strategic parts of this belt are in areas under jurisdiction of states as, for example, Indonesia and Peru. Consequently, a fully satisfying program that includes long-term observations can only be carried out with their consent.

A second phenomenon that today calls the attention of physical oceanographers is the so-called "greenhouse effect" caused by the increase of carbon dioxide in the atmosphere. The excess CO_2

produced by the burning of mainly fossil fuel is roughly equally divided over the atmosphere and the upper few hundred meters of the ocean. To understand this, to evaluate the effect of a continuing increase on ocean circulation, and to follow penetration of CO_2 into the deep sea, various programs are in progress in addition to WOCE and TOGA. All are coordinated by CCCO (Commission for Climate Changes and the Ocean). A connected problem is that of volume change of glaciers and ice-caps which may cause sea level change. Obviously a program of this kind will have to be continued over several decades.

For climate predictions computer models have been developed; the quality of prediction depends on the quality of the model and of the data input. A relatively weak part of the model is still the oceanic component. The importance of knowing in advance what will happen with climate, ocean circulation, and sea level is so great that full international cooperation is an absolute must.

Carbon dioxide is only one of a number of "greenhouse gases" recycled between the land, the ocean, and the atmosphere and of which the concentration is globally increased by human activity. Among these substances are methane, carbon monoxide, and nitrogen compounds. Together, they are responsible for about half the greenhouse effect. Their behavior is less well known than that of CO_2. The topic of cycles or rather "fluxes" of gases and other chemical substances -- often indicated together in the literature as "chemical species" -- belongs to the field of chemical oceanography. Progress in this field is closely linked to progress of analytical chemistry. The latter has in recent years rapidly advanced, and today concentrations of chemical substances can be measured in very minute amounts.

These sensitive and sophisticated analytical techniques spread only slowly over the globe. As a result there is still a scarcity of information from tropical regions. International cooperation consists mainly in the exchange of expertise and, for pollutants, on the establishment of agreements for maximum allowable levels of pollutants. International organizations which have an important function in this respect are GESAMP (Group of Experts on the Scientific Aspects of Marine Pollution) and GIPME (Global Investigations of Pollution in the Marine Environment).

A very important subject in marine chemistry is the input of chemical substances from the land, especially through rivers. SCOR has for more than a decade promoted an international program called RIOS (River Inputs into Ocean Systems). Recently SCOPE (Scientific Committee on Problems of the Environment) has joined in this activity with part of its program on biogeochemical cycles. Interna-

tional participation, also of developing countries, is quite good. Much of this research takes place in river mouths and estuaries which have always been under national jurisdiction and is therefore not impeded by the new law of sea. It must be stressed, however, that as investigations continue, studies of cross-shelf transport will become more and more important. This is now already happening for the very large rivers as the Amazon and Congo and those in Southeast Asia. Chemical oceanography has always been strongly integrated in the other disciplines, especially marine geology and biology.

In marine geology two main fields of study can be distinguished. The first is classical geology which in the marine environment stresses sedimentology. As in chemistry a main subject is transport of sediments from the land to the sea. The second is geophysics, specifically the formation of the ocean crust. In both fields of study a sharp separation between land and sea geology is difficult.

Transport of sediment from the land to the sea has changed drastically in the last decades. Building of fresh water reservoirs and sand excavation have in many places strongly decreased sediment supply to coasts. In the opposite direction, changes in land use and increase of bottom erosion have in other coastal stretches increased this supply. Patterns of coastal transgression and regression have, therefore, changed, but world-wide coastal erosion clearly prevails. Important factors of this erosion are subsidence by extraction of water, oil, and gas and the slow but steady rise of sea level. If this rise, as many expect, accelerates in the next century, the problem of coastal erosion will rapidly become worse. International attention to this problem is given by CCCO and SCOPE. The problem of coastal defense, now still mainly a matter for each state separately, will certainly require more international cooperation in the future, in the first instance regional cooperation. For example, the dune barrier and its islands along the continental side of the North Sea function as one geomorphological unit but belong to four nations which would have to decide on common action for these defense. For global problems OSNLR (Ocean Science in relation to Non-Living Resources) of IOC might be developed into a useful mechanism for promoting research.

In marine geophysics the main international project is the Deep Ocean Drilling Program which is now carried out by an international consortium supported by national foundations that decides on the best locations to drill holes down to a few kilometers in the ocean bottom. Although this project has been going on for about two decades, there are at present still sufficient interesting spots that can be chosen outside internationally awkward regions, but this may become more and more difficult in the future.

In the realm of marine biology two complexes of research require special attention. One is marine productivity, including fisheries; the other biologically generated particle flux in the open ocean. Although research on marine productivity has been going on for a century our insight into, for example, global primary production and its variability is still rather poor. Comparative investigations on the productivity of continental shelves, which are the most productive areas, become more and more urgent, also because of changes in the ecosystems by eutrophication. This effect is caused by the supply of fertilizers from the land. Obviously, support of coastal states is essential since all activities have to be carried out in waters under their jurisdiction.

This holds, in fact, also for secondary production in which fisheries is the most important component. Internationally, fisheries research has already been organized on a regional basis successfully for a long time in the North Atlantic by ICES (International Council for the Exploration of the Sea). Because of standing agreements its activity has not been influenced by the new law of the sea regime. The ICES example has served as a useful guideline in some other areas. Elsewhere FAO (Food and Agricultural Organization) has much improved regional cooperation. Generally, fisheries are in bad shape because of overfishing, but even in the North Sea international agreements to improve this situation have not been very succesful.

A program of IOC, called OSLR (Ocean Science in relation to Living Resources) will deepen our insight into ecosystem mechanisms, provided it can obtain full international support. The point is here that, as already mentioned, the potential of research of many states in the form of more research ships and personnel has much improved. A full use of this potential requires international cooperation between these states that should not be hampered by the new jurisdiction. Fish migrate over long distances and recruitment mostly takes place from other areas than where they are caught. One program in OSLR with the name of IREP (International Recruitment Program) will certainly make states more aware of this fact.

For a number of nearshore ecosystems (coastal lagoons, mangroves, coral reefs, and sea grass beds) the UNESCO Division of Marine Sciences, in cooperation with SCOR and IABO and with the support of UNEP, has developed a program under the name of COMAR (Coastal Marine Research) that has been quite successful in generating international cooperation on the level of research institutions, especially in developing countries. This effort has been particularly useful in defining common problems of the ecosystems mentioned, which are nearly all under stress. As it now develops, it is not influenced by the new jurisdiction.

A second field of investigation that requires our attention is concerned with particle flux in the ocean. The organization responsible, known under the name of JGOFS (Joint Global Ocean Flux Study), has recently started its activities on the initiative of SCOR and has the support of IOC and GIPME (Global Investigation of Pollution in the Marine Environment). Its main aim is to study the processes controlling the fluxes of carbon and other biologically important elements in the oceans. As such it is related to the global carbon cycle. The mechanisms of vertically downward fluxes of particles will get special attention, because they help to store CO_2 in the deep ocean. Participants are at present chiefly from developed countries, but one might expect a wider participation in the future, especially if it could be proven that, on the long term, these fluxes would be modified by climate change. Although the program starts in the open ocean, it will later on also have to consider fluxes arriving in the deep sea from the continental shelves and then become sensitive to the law of the sea regime.

This review will be concluded with a few words about an all -- encompassing program of ICSU (International Council for Scientific Unions) that will start in this decade. It is called IGBP (International Geosphere-Biosphere Project) and is also known as the Global Change Program. Its intention is to examine the man-made and natural changes that are taking place on and around the earth. Because of this wide scope it could act as an umbrella for many global programs. The IGBP planning group has already defined WOCE and JGOFS as important parts of its activity.

This selection of programs is obviously made because of their importance for the greenhouse effect and climate change, which is in line with the present IGBP policy to tackle first these aspects in order to improve numerical climate modelling. It does not yet consider other, especially man-made, changes which deteriorate the environment on much shorter time scales. The present program is scientifically most interesting for developed countries, although of course important for all nations. However, considering here only the marine environment, a fully satisfactory IGBP program on global changes must include those taking place on continental shelves and in coastal waters as well as in connected river basins and should thus also involve the developing countries. As demonstrated on preceding pages, full attention is already given to such problems by the oceanographic community. It is too early to say whether an IGBP stamp will help in smoothing procedures to obtain the consent of coastal states to carry out research in regions under their jurisdiction.

Warren Wooster: Thanks, Henk. We'll go on now with Mr. Lee Stevens, from the Joint Oceanographic Institutions, on development of general criteria and guidelines.

THE ROLE OF INTERNATIONAL ORGANIZATIONS IN DEVELOPING GENERAL CRITERIA AND GUIDELINES FOR MARINE SCIENTIFIC RESEARCH

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The United Nations Convention on the Law of the Sea prescribes significant new roles for international organizations in the area of marine scientific research. While these roles take a variety of forms, in general they fall into three distinct categories:

(1) international organizations as providers of oceanographic services, including advice, expertise, program coordination, and data. Although the convention envisions additional efforts in this category, the role itself is not new for inter-national organizations.

(2) international organizations as entities which themselves are capable of conducting marine scientific research. Although international organizations have traditionally approved of or endorsed national research programs, it has not been common in the past for international organizations to undertake research themselves.

(3) international organizations to facilitate implementation of the law of the sea by developing procedures and guidelines for marine scientific research.

It is the objective of this paper to analyze the latter of these three roles, focusing on the following key questions:

(a) what kind of criteria and guidelines need to be developed?

(b) which international organizations are best suited to play the roles defined by the Convention?

(c) what are the potential practical implications if international organizations play such a role? (*i.e.*, what difference will it make?)

Need for Criteria and Guidelines

The marine science provisions of the Convention are being interpreted by States in a variety of ways. In some instances coastal States are regulating marine science in ways that go significantly beyond what is permitted by the Convention. General criteria and guidelines could be of assistance to both coastal States and researching States as one step toward the implementation of the marine science regime elaborated in the Convention. By helping to eliminate

divergent State practice in regulating marine scientific research, international organizations could help to prevent future conflict and foster expanded understanding of the oceans, which is beneficial to all States.

The problem

In many respects the Convention is not sufficiently clear regarding major practical aspects of the marine scientific research regime. If this regime is to be viable, it is important that scientists clearly understand the practical effect of Part XIII while planning and conducting their research. At present, most scientists do not have the expertise to discern fully the legal and political nuances of operating under the Convention. Community interests in the efficiency of scientific endeavor are not well served by the existing situation in which scientists frequently plan, develop, and obtain funding for projects which ultimately fail to obtain coastal state consent.

The difficulty in developing general criteria and guidelines is to determine exactly what, in Ambassador Nandan's words, "is permitted under the Convention," and to preclude onerous conditions and restrictions on scientific inquiry that are outside the bounds of the Convention. The danger in such a process is that attempts might be made to alter the nature of Part XIII, effectively subjecting the marine science provisions of the Convention to renegotiation. To say the least, this would create a highly unstable situation.

There has never been a greater need for improved understanding of the marine environment and of the importance of the oceans in larger processes of global change. Ambassador Aguilar made eloquent mention of the importance of global warming and sea level rise to future rational use and development of ocean space, clearly implying the importance of these issues to the quality of the global environment. Only through concerted scientific research programs can these and other issues important to global changes be adequately understood.

What criteria and guidelines are most needed?

Although it is not possible here to elaborate a comprehensive list of criteria and guidelines that might be developed, it is possible to identify several of the principal areas of the Convention that would benefit from criteria and guidelines. International organizations would be required to play a determinative role in each of these areas.

The first general area in which criteria and guidelines are needed is the implementation of the general framework in which marine science is to be conducted in accordance with the Convention. The Convention prescribes that all States have the right to conduct marine scientific

research (Art. 238), that States and international organizations shall promote and facilitate the development and conduct of marine scientific research (Art.239), that States and international organizations shall agree to create favorable conditions for the conduct of marine scientific research (Art. 243), and that coastal States shall, in normal circumstances, grant their consent for marine scientific research projects (Art. 246(3), and that States shall adopt reasonable rules, regulations, and procedures to promote and facilitate marine scientific research conducted in accordance with the Convention (Art. 255). These provisions form the philosophical framework underpinning the Convention's marine scientific research regime, yet in many instances the Articles mentioned above are not observed by coastal States.

A useful initial step, suggested by Professor Soons and others, would be agreement on a standard form, consistent with the Convention, particularly Art. 248, to be used for submission of requests to the coastal State. The use of such a form by researching States, and its acceptance by coastal States, would serve as tangible evidence of commitment to the Convention's marine science regime. Such a form would also be of considerable help to scientists in reducing ambiguity about the information to be provided to coastal States concerning their projects. This form should be as brief and straightforward as possible, requiring a minimum of interpretation to be used successfully. This would be the most basic type of guideline that might be established.

Criteria for implementation of Art. 246(5), which contains the bases for a coastal State to withhold its consent, could also help to ensure that the Convention is implemented reasonably. For example, with respect to subparagraph (a), international organizations could play a useful role in establishing panels of experts to assist coastal States in ascertaining whether a specific project could have implications for exploration and exploitation of marine resources. These experts could review the information provided by the researching State and advise the coastal State, or suggest additional information that would be needed to make an informed determination as to the possible resource implications of a project. A mechanism such as this would offer both parties an objective basis on which to evaluate the nature of a project.

International organizations could play a similarly valuable role in clarifying the circumstances in which Article 247 can be invoked. This Article presumes that a State having previously approved a project in the context of an international organization will ultimately grant consent if that project entails research in that State's exclusive economic zone or continental shelf. Is a general endorsement, for example, sufficient for a project to qualify as being "under the auspices" of an international organization, as has commonly been done

by IOC and other marine science organizations? What is the nature of the "notification" to be provided by the organization to the coastal State? In light of the requirement that the coastal State must have previously approved the detailed project, is it necessary for the organization to provide the same level of detail as required by Art. 248? These issues are not directly addressed in the Convention, and there is little state practice on which to rely.

Art. 249 specifies conditions to be complied with when research is undertaken in the exclusive economic zone or on the continental shelf of a coastal State, but additional clarification of the meaning of this Article would be useful to scientists. In particular, consistent with Article 249(1)(a), guidelines should be developed for participation or representation of the coastal State in the research. What representation should normally be sufficient, and should this vary according to the capacity of the vessel or other platform on which research is conducted? What should be the nature of such representation? Is it legitimate, for example, for the coastal State to assign armed military personnel as "representatives" in the research when vessels themselves are normally unarmed?

In the area of publication and availability of data and results, what is a reasonable timeframe for sharing such information, recognizing that the process of interpretation may vary considerably from project to project? How much information can usefully be provided? (Art 249(1)(b) and (c)).

What is the extent of the obligation to provide the coastal State with an assessment of data or assistance in their assessment or interpretation (Art. 249(1)(d))?

Of particular importance to this discussion is Art. 251, which provides that "States shall seek to promote through competent international organizations the establishment of general criteria and guidelines to assist States in ascertaining the nature and implications of marine scientific research." By "nature of marine scientific research," it must be assumed that the Convention refers first to the issue of consistency with the general principles of Art. 240: conduct of research for peaceful purposes, use of appropriate scientific means, no unjustifiable interference with other uses of the sea, and general conformity with the Convention. Second; it would be useful for the coastal State to know whether the research is basic or applied, and what specific problems the research is intended to address. This may not always be apparent from the initial description of research. For example, geochemical studies are frequently undertaken not as studies of chemical oceanography *per se*, but use ocean chemistry as a tracer

for physical oceanographic processes or analysis of biogeochemical fluxes in the ocean. Third, it is important that the coastal State be able to confirm that research is, in fact, marine science and therefore subject to Part XIII of the Convention.

In the area of "implications of marine scientific research," a State may require assistance in understanding the full scope of a program of research. As an example, the information provided pursuant to Art. 248 may be entirely adequate in terms of describing a specific project, but may not necessarily provide the full context in which that project exists. In marine science it is frequently difficult for technical reasons to address certain questions directly, and it often becomes necessary to find analogues elsewhere which either duplicate important aspects of a problem under conditions more amenable to study or provide contrasts of use to the scientist in clarifying and delimiting the problem of interest. It is not uncommon for two parts of the same problem to be addressed in widely divergent geographical settings. A good example is the Cariaco Trench off Venezuela, which is unique in the world as a deep anoxic basin. To undertake fundamental research on anoxic processes in the deep ocean, there simply is no alternative to the Cariaco Trench, and this may even be true when the ultimate purpose of such research may be to further refine the understanding of anoxic processes in shallow-water environments. International organizations can play a useful role in providing coastal States with a fuller understanding of such implications.

Finally, there is a great deal that could be done by international organizations in developing guidelines and criteria to assist States in adopting reasonable rules, regulations and procedures to facilitate marine scientific research consistent with Article 255. Creation of a central repository for such rules, regulations, and procedures is a necessary and overdue first step in this direction. International organizations can also provide an informal forum for discussion of issues relevant to implementation of Part XIII.

Which international organizations?

With one narrow exception (Annex II(3) the Convention does not identify which international organization should perform the numerous roles it specifies. Rather, the Convention prescribes that "competent" international organizations should carry out the various roles. The Convention does not require that an international organization be global, part of the UN system, or even a governmental organization to qualify as "competent." In addition, the Convention refers to international organizations in the plural, indicating that more than one

organization can appropriately be called upon to perform a given role -- providing, of course, that the organization is "competent."

In the area of marine science, the single organization that meets the competency criterion for most purposes of Part XIII is the Intergovernmental Oceanographic Commission. But as Professor Treves has pointed out, IOC appears to have been reluctant to assume the roles available to it under the Convention. Other "competent" global international organizations in marine science could be the UN Office of Ocean Affairs and Law of the Sea, and the Division of Marine Sciences of UNESCO.

Also at the governmental level, there are a variety of regional organizations which could play a useful role in the development of criteria and guidelines, including IOCARIBE, CCOP, WESTPAC, and ICES. The principal challenge for these organizations in developing broad criteria and guidelines is to avoid conflict with such criteria and guidelines developed by competent international organizations elsewhere.

An important issue is whether non-governmental organizations can be "competent" for the purposes of the convention. Lee Kimball has identified the useful roles that NGOs can play in the area of public interest advocacy. A similarly useful role can be played by international non-governmental organizations, particularly those within the global framework of the International Council of Scientific Unions. In contrast to the organizations Lee Kimball describes, in marine science there are no organizations intended to advocate particular public policy positions. Instead, the utility of NGOs would be to allow scientists a much-needed voice in identifying the practical implications of any criteria or guidelines that might be implemented.

One of the useful roles which is being played particularly by regional international organizations is that of "honest broker" between coastal and researching States. In such instances the staffs of international organizations lend their expertise to assist coastal States in evaluating requests for their consent, while in no way prejudicing the right of the coastal State to reach its own determination. One organization that has been particularly successful in this regard is the Committee for Coordination of Joint Prospecting for Mineral Resources in the South Pacific (CCOP-SOPAC), which has frequently lent its expertise in the evaluation of basic science projects which have no immediate relevance to resource prospecting. This approach could productively be extended to other areas as well, recognizing that effectiveness is ultimately dependent upon a staff of the organization whose competence is held in high regard by both coastal and researching States.

More problematic is the role of referee to ensure that the marine science provisions of the Convention are applied properly. It is not clear that IOC could successfully take on such a role, or that such a role is consistent with IOC's principal mission as an organization "to promote scientific investigation with a view to learning more about the nature and resources of the oceans through the concerted action of its members." Many in the scientific community believe that IOC has already become too heavily politicized, and the role of referee may cause further politicization and ultimately organizational dysfunction. IOC is better suited to fostering general agreement on research projects, and helping such projects to be carried out under its auspices.

A more likely organization to play the role of developing criteria and guidelines to ensure conformity with the Convention's marine science provisions is the UN Office of Ocean Affairs and Law of the Sea. This organization has already proposed a workshop to include major researching and coastal States, which is understood to include discussion of rules, regulations and procedures for marine science. If successful, this workshop would represent a major step toward implementation of the Convention's marine science regime.

There are, however, significant dangers to be avoided. Could such a workshop reopen issues thought to have been resolved by the Convention? Many in the scientific community already regard the Convention as unduly restrictive of marine scientific research and are highly suspicious of further actions that might result in increased restrictions on science. Adding to these suspicions is the apparent intention of the workshop organizers to focus on representation by States, with no apparent opportunity for participation by the scientific community. In light of the fact that scientific organizations were admitted as observers during the negotiation of the Convention, it would not seem inappropriate to offer similar status at the proposed workshop to bona fide representatives of the scientific community.

Potential Practical Implications of Development of Criteria and Guidelines

If general criteria and guidelines can be established through international organizations, what practical effect is this likely to have on marine scientific research, and the functioning of the Convention? Much would depend, of course, on the nature of criteria and guidelines to be established. But to many in the scientific community, the recent changes in the international legal regime for marine scientific research, as reflected by the Convention, have yet to fulfill their

promise of enhanced scientific understanding for the benefit of mankind.

For example, the U.S. State Department reported that, for 1988, nearly one-third of U.S. requests for coastal state consent were either denied or did not receive a response from the coastal state in sufficient time for the research to proceed. Virtually all of the U.S. requests were submitted in accordance with the relevant provisions of the Convention and contained all of the information required therein. Virtually all were basic scientific projects with no significance to the exploration or exploitation of natural resources, nor did the requests pose other problems that would invoke the Convention's provisions for discretionary denial of consent, yet in the majority of cases no reason was given by the coastal state for denial of consent. Information available from other researching States indicates that this experience is by no means unique to the U.S., although the incidence of denial appears to be higher.

Even had the Convention been in force, and had the U.S. been a party, it is not clear whether performance would have been significantly better. Despite the numerous favorable statements in the Convention regarding marine scientific research and the duty of States to facilitate and promote such research, the Convention contains virtually no enforceable constraints on unreasonable coastal State actions. It seems unlikely that a solution lies within the terms of the Convention itself. States which foster and promote marine science will continue to do so, and States which decide, for whatever reasons, to impede research would find little even in a universally-ratified Convention to prevent them from doing so.

Much the same can be said of any criteria or guidelines established in accordance with the Convention. States are determined to be recalcitrant and choose to ignore the regime set forth in the Convention will find little to stop them.

Does this imply that the Convention itself or criteria and guidelines established through international organizations are a wasted effort? Fortunately, there is reason to believe that efforts at regime-building can have a positive effect. In an interdependent world, even recalcitrant States are not wholly immune to the force of international opinion. If clear guidelines can be established that are capable of being tested against performance, there is a good prospect that the result will be to strengthen the regime. At present, the best hope for such action rests with Ambassador Nandan's workshop. In many instances it has appeared that projects have failed to obtain consent not because of actual antipathy on the part of the coastal State, but due to internal struggles within the State to determine national lines of authority

regarding marine science. In such instances a clearer elucidation of the obligations under the Convention to promote marine science might be of real benefit in overcoming other competing factors.

It is important not to lose sight of the stakes involved. Marine scientific research has advanced markedly over the last few decades and is now capable of a greatly enhanced level of understanding of fundamental ocean processes. Advances in scientific research, when disseminated openly, provide inclusive benefits for mankind and cause no detriment. With a new realization of the interrelatedness of the global environment, encompassing the earth, oceans, and atmosphere, the international community cannot afford to forego significant advances in scientific understanding that can be achieved through marine research. Considering the inclusive benefits that are possible, a fair and reasonable international legal regime is the least that States can provide toward this end.

Warren Wooster: Thank you, Lee. I now call on Dr. Aprilani Soegiarto from the Indonesian Institute of Science in Jakarta.

INTERNATIONAL COOPERATION IN MARINE SCIENTIFIC RESEARCH

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Introduction

Seventy percent of the earth's surface is covered by the ocean. This tremendous amount of water mass has influenced the planet Earth and its inhabitants in many ways. Its interaction with the earth's atmosphere has controlled the global weather, the regional and local climates. For thousands of years the human race has utilized the ocean for various purposes, the oldest one probably as a source of inexpensive fish protein. In recent decades we have also tapped petroleum, natural gases, and various minerals from the shallower parts of the seas. In addition, the ocean is also used for shipping and trades, be it inter-insular, regional, or international. In recent years marine recreation and tourism have also been developed in some coastal areas. Many coastal and archipelagic States depend very much on the seas for their economy, their ability to meet the increasing demands for food and raw materials, their position and influence in the regional community of nations, their national resilience, and the environmental quality of the country as a whole (Soegiarto, 1983).

It is fully realized that marine scientific surveys and research are prerequisite for the overall and rational development of marine resources and the protection of the marine environment. Conflicts between and among countries on the use of the seas should also be resolved. It is for the above reason that the 1982 Convention on the Law of the Sea was heralded as a landmark achievement of the international community. The Convention not only establishes the legal framework for all activities in the marine environment but also represents one of the most important conflict-prevention measures adopted by the international community (Nandan, 1987), since it establishes clearly for States the extent and nature of their rights and obligations in the various maritime zones. The Convention also provides a unique procedure for the settlement of disputes which may arise from the application or interpretation of the various provisions of the Convention. The provisions on marine scientific research and transfer of marine technology express the growing perceptions as to the prominent role of ocean science and its application in the effective

utilization and management of the seas and their resources (Yankov, 1985).

This paper outlines the programs, problems and constraints, and institutions responsible for planning, implementing, and coordinating the various aspects of international marine scientific research.

Provisions on Marine Scientific Research in the Convention

The Convention, being a comprehensive instrument, covers all uses and resources of the seas. It integrates within it the regimes that would apply to navigation, marine transportation and communication, exploitation of both living and non-living resources, the prevention of marine pollution, marine science and technology, and the settlement of disputes. In its preamble the Convention recognizes that all activities in the ocean space are interrelated. This is only logical since activities of one kind in the marine environment have direct or indirect impacts on other activities in the same environment. The recognition of this fact calls for an integrated system of ocean management on the part of States.

It is recognized that knowledge and information derived from marine scientific research play a key role in the successful management of the ocean. They are also a prerequisite for resource exploitation and control of marine pollution. This is particularly true for the proper management of the exclusive economic zone which is a new concept created under the Convention. This new concept extends the jurisdiction of States over the resources of the zone up to 200 nautical miles from their coast. It is in these areas of ocean space that more than 90 percent of the living resources and all of the presently exploitable non-living resources of the oceans are to be found. Marine scientific research is therefore of particular importance to the development of the Exclusive Economic Zone.

Beyond its value as means for mankind's understanding of the global environment, marine scientific research provides the necessary data and information on which the uses of the sea and its resources are based. It is with this awareness that Part XIII of the Convention dealing with marine scientific research was drafted and has now to be implemented. The centerpiece of these provisions is what is now called the "consent regime"; *i.e.*, the need for the scientific community to obtain authorization from the coastal State whenever research activity in its exclusive economic zone or its continental shelf is envisaged (Nandan, 1987).

Coastal States shall in normal circumstances grant their consent for marine scientific research projects to be carried out in accordance

with the Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit for all mankind. Coastal States are also required to establish rules and procedures to ensure that such consent will not be delayed or denied unreasonably. However, provision is also made for the possibility of withholding such consent in certain specific circumstances. These are outlined in Article 246 of the Convention. Researching States or institutions are also obliged to provide relevant information to the coastal States and to comply with certain conditions including participation of personnel from the coastal State in any research project. Therefore, the Convention is not only all-encompassing from the point of view of the substantive matters it covers; it also requires universal participation. It calls for cooperation in its implementation among all States and at all levels, whether bilateral, subregional, regional, or global. Cooperation among States contributes not only to their economic development and the enhancement of the quality of life of their peoples, but also to the maintenance of peace and security among nations.

The functions of the new regime of marine scientific research can be viewed not only as a framework defining the rights and obligations of researchers and coastal States but also as a legal set-up for effective partnership and mutual confidence in the conduct of ocean investigation, enhancing the scientific and technological capabilities of the partners, particularly those from the developing countries.

The International Marine Scientific Programs

The organizations and bodies within the United Nations system have a collective responsibility in matters relating to the oceans, and each institution in its own field of competence has to fulfill part of this responsibility. The issue of marine scientific research is central to the mandate of the IOC (Intergovernmental Oceanographic Commission) as contained in its statutes (IOC, 1985), in particular Article 1 to Article 3, which read:

Article 1

1. The Intergovernmental Oceanographic Commission, hereafter called the Commission, is established within the United Nations Educational, Scientific and Cultural Organization.
2. The purpose of the Commission is to promote scientific investigation with a view to learning more about the nature

and resources of the oceans through the concerted action of its members.

3. The Commission shall seek to collaborate with all international organizations concerned with the work of the Commission and especially closely with those organizations of the United Nations system which are prepared to contribute to the Commission's Secretariat, to sustain the work of the Commission through the relevant parts of the programs of such organizations, and to use the Commission for advice and review in the area of marine science.

Article 2

The functions of the Commission shall be to:

a. define those problems the solution of which requires international cooperation in the field of scientific investigation of the oceans and review the results of such investigations;
b. develop, recommend, and coordinate international programs for scientific investigation of the oceans and related services which call for concerted action by its members;
c. develop, recommend and coordinate with interested international organizations, international programs for scientific investigation of the oceans and related services which call for concerted action with interested organizations;
d. make recommendations to international organizations concerning activities of such organizations which relate to the Commission's program;
e. promote and make recommendations for the exchange of oceanographic data and the publication and dissemination of results of scientific investigation of the oceans;
f. make recommendations to strengthen education and training programs in marine science and its technology;
g. develop and make recommendations for assistance programs in marine science and its technology;
h. make recommendations and provide technical guidance as to the formulation and execution of the marine science programs of the United Nations Educational, Scientific and Cultural Organization;
i. promote freedom of scientific investigation of the oceans for the benefits of all mankind, taking into account all interests

and rights of coastal countries concerning scientific research in the zones under their jurisdictions.

In carrying out its functions, the Commission shall bear in mind the special needs and interests of developing countries, including in particular the need to further the capabilities of these countries in marine science and technology.
Nothing in this Article shall be construed as implying the expression of a position regarding the nature or extent of the jurisdiction of coastal States in general or of any coastal State in particular.

Article 3

The commission shall give due attention to supporting the objectives of the international organizations with which it collaborates and which may request the Commission to act, as appropriate, as an instrument for discharging certain of their responsibilities in the field of marine science. On the other hand, the Commission may request these organizations to take its requirements into account in planning and executing their own programs.

The marine scientific programs coordinated by IOC are comprehensive in nature and far-reaching. They could be classified into two major groups: the ocean sciences and the ocean services. Each group is further divided into several programs, as follows:

Ocean Sciences

1. Ocean Science in Relation to Living Resources (OSLR)
2. Ocean Sciences in Relation to Non-Living Resources (OSNLR)
3. Ocean Mapping
4. Ocean Dynamics and Climate
5. Marine Pollution Research and Monitoring

Ocean Services

1. Integrated Global Ocean Service System (IGOSS)
2. Ocean Observing System
3. International Oceanographic Data Exchange and Marine Information Management
4. International Tsunami Warning System in the Pacific

Many of the major programs of the IOC have taken ten years or longer to be well established, after having passed through the stage of planning, acceptance and active implementation. Examples of those long term programs are the Global Investigation of Pollution in the marine environment and Ocean Mapping. The newer programs, such as Ocean Dynamics and Climate, Ocean Science in Relation to Living Resources and Non-Living Resources, are now maturing at a much faster pace than the earlier and older programs.

The Ocean Services programs have been pioneers in their respective fields and are unique in many respects. They are now entering a period of considerable acceleration. Some are approaching the operational level. Budgetary constraints and unavailability of badly needed staff at IOC sometimes hinder progress on the implementation of program activities.

Another major important program of IOC that enjoys strong support from developing countries is TEMA (Training, Education and Mutual Assistance in the Marine Sciences). As the name implies, this popular program provides training and education to enhance capabilities in the field of marine science to developing countries.

In addition, IOC also establishes a number of regional subsidiary bodies. They are appropriate mechanisms for dealing with specific regional marine scientific problems and in implementing regional components of the major global programs. The IOC regional subsidiary bodies are:

- Sub-Commision for the Caribbean and Adjacent Regions (IOCARIBE);
- Regional Committee for the Western Pacific (WESTPAC);
- Regional Committee for the Central Eastern Atlantic (IOCEA);
- Regional Committee for the Cooperative Investigation in the North and Central Western Indian Ocean (IOCINCWIO);
- Regional Committee for the Central Indian Ocean (IOC-INDIO);
- Joint IOC-WMO-CPPS Working Group on the Investigations of El Nino;
- Joint CCOP (SOPAC)-IOC Working Group on South Pacific Tectonics and Resources (STAR) and the Joint CCOP-IOC Working Group on POST-IODE Studies of East Asian Tectonics and Resources (SEATAR).

In planning and implementing its programs, IOC could not work alone. It has to cooperate with other UN specialized agencies and other international and regional bodies. In order to promote and strengthen

cooperation and to avoid unnecessary duplication among the relevant agencies, an inter-agencies body was established. It is called "Inter-Secretariat Committee on Scientific Programs Relating to Oceanography" (ICSPRO). This Committee meets regularly, at least once a year.

In dealing with scientific matters of the oceans, IOC enjoys the benefits of strong cooperation and advice from many international associations and committees, such as the Scientific Committee on Oceanic Research (SCOR).

Problems and Constraints for Implementation

It is gratifying to note the overwhelming support given to the Convention by States from all regions as illustrated by the fact that at the closing date for signature there were 159 signatures, in itself a remarkable achievement. As of March, 1987, it had already received 32 ratifications (Nandan, 1987). While the Convention will enter into force one year after the sixtieth instrument of ratification or accession has been deposited, we are already witnessing that States have begun to implement its provisions. Most States have adapted, or are in the process of adapting, their national legislation to reflect the provisions of the Convension. Unfortunately, however, there are still a number of major maritime power States that were not signatories to the Convention. In term of capability and programs, some of these States are advanced and strong supporters of international marine scientific research. An example of such major maritime states is the United States of America (USA). This problem could hinder the desire and full participation of many developing countries in international marine scientific programs, in particular if the programs require entrance into the territorial waters of their 200-mile Exclusive Economic Zone (EEZ). The withdrawal of the U.S. and Great Britain from UNESCO, to which IOC belongs, has compounded the problem further.

The new concept in the Convention of extending the jurisdiction of States up to 200 nautical miles from their coastal baseline has created another problem. At the positive end, island and coastal States could claim, develop, and exploit their renewable and non-renewable resources in the EEZ. Many States have claimed the 200-mile EEZ. The Law of the Sea places approximately 35 percent of the world's oceans under some forms of national control. In the Asia-Pacific region, for example, there are virtually no unclaimed areas in the Yellow Sea, East China Sea, Sea of Japan, or the South China Sea, and many claims overlap. Vast areas of the Central and South Pacific fall within the EEZs of tiny island nations (Anon, 1987). Indonesia and the Philippines qualify under the Convention as archipelagic states and

now have recognized control over the sea space and resources within their archipelagic waters, in addition to extensive EEZs.

At the other end lies the provision of "consent regime" of the Convention. In normal circumtances coastal states grant their consent for marine scientific research activities carried out in their EEZs or on their continental shelves. However, there are cases where States have not always cooperated in giving the necessary consent to requests for carrying out research activities by certain States or even by international scientific institutions. In some cases, data and information resulting from the research activities have been interfered with or put under a "classified" category. Thus, they are useless or unavailable to the international marine scientific community.

It is, therefore, essential that practices by States in coping with such problems should be studied in order to develop appropriate guidelines that can be adopted by States to facilitate the implementation of the consent regime. It has been noted that IOC in cooperation with the United Nations and other international agencies is planning to organize a series of workshops in order to find solutions to the above problems in a mutually beneficial manner for the Coastal States and other States.

Most of the international marine scientific programs are comprehensive and take more than ten years to plan and implement. Therefore, they are very costly and require a substantial amount of resources, facilities, and trained manpower. Those resources are not readily available in most of the developing countries. This is another serious problem that has to be resolved. It is obvious that only developed States with adequate resources, facilities, and able manpower could participate fully in so many international marine scientific studies, whereas the developing States could only take part partially or not at all. The IOC's TEMA program tries to alleviate this problem. However, it will take time and a concerted international effort before this disparity could be resolved.

ACKNOWLEDGEMENTS

The author is greatly indebted to the organizers of the 23rd Annual Conference of the Law of the Sea Institute and the Netherlands Institute for the Law of the Sea for the invitation and financial support that enable him to participate in the Conference. The author is also grateful to the Chairman of the Indonesian Institute of Sciences for allowing his participation in the Conference.

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Warren Wooster: Thank you, Dr. Soegiarto. Now, I'd like to ask Dr. Jan Stel, the Executive Secretary of the Dutch Commission on Oceanography, to speak.

PARTNERS IN SCIENCE

Jan H. Stel
Dutch Commission on Oceanography

Indonesia and the Netherlands are countries of the sea. Two-thirds of the Netherlands is reclaimed from the sea and is, as a consequence, situated below sea level. The over 13,000 Indonesian islands have a total coastline of over 81,000 kilometers. The population of 160-180 million is largely dependent on food provided by the sea, which also serves as a major means of communication between the numerous islands. But what do we really know about the ocean, its resources, its influence upon life and climate?

Marine research is of vital importance to Indonesia. Because the country is struggling with overwhelming development problems, it cannot afford the luxury of purely basic research only. Any marine research has to be of practical use, resulting in, for example, more productive fishing methods, a sound management system for coral reefs that are in jeopardy, and an improved insight into the level of pollution.

In the last hundred years many scientific expeditions have sailed the Indonesian seas. Amongst them was Darwin's famous exploratory voyage around the world, during which the basis for marine research was laid. In 1929-30 the Dutch navy vessel *Willebrord Snellius* carried out a major scientific expedition in the waters of East Indonesia. Fifty years later the Indonesian government announced its intention to organize, in cooperation with the Dutch government, a new expedition to East Indonesia: The Snellius-II Program, a five-year program of marine exploration.

In Indonesia the program was organized by LIPI (Lembaga Ilmu Pengetahuan, the Indonesian Institute of Science) and in the Netherlands by the Netherlands Council of Oceanic Research of the Royal Netherlands Academy of Science and Arts, now the Netherlands Marine Research Foundation of the Dutch national science foundation. An important part of the program was, besides the expedition itself, the training of Indonesian marine scientists at Dutch universities and research institutes.

The Snellius-II Program started in November, 1982, and ended exactly five years later with the scientific symposium in Jakarta. The most spectacular phase of the program was the expedition itself. On May 28, 1984, the Dutch research vessel *Tyro* left Den Helder in the

Netherlands for a voyage of sixteen months. In Indonesia *Tyro* was accompanied by five smaller Indonesian research vessels, a helicopter, and a small plane.

The expedition was subdivided into five major research themes: (1) geology and geophysics of the Banda arc and adjacent areas; (2) ventilation of deep-sea basins; (3) pelagic systems; (4) coral reefs; (5) river input into ocean systems. The results of the expeditions are currently published as the Proceedings of the Snellius-II Symposium in the *Netherlands Journal of Sea Research.*

Containerization

Marine research in the Netherlands is executed by small academic institutes and some larger governmental or semi-governmental research institutions like the Netherlands Institute for Sea Research (NIOZ). In order to stimulate ocean-going research, a national pool of oceanographic equipment was established in the early eighties. Standard twenty-foot containers serve as (trans)portable biological, physical, chemical, and geological laboratories, workshops, electronic shops, storage rooms, etc. The present pool contains about thirty containers, several containerized winches, small cranes, and the 84-meter RV *Tyro*, a former cargo vessel with accommodation for twelve passengers. *Tyro* was adjusted for her new task by the construction of container lockers, connecting bridges between containers, central supplies for power, sea and fresh water, etc., and an enlargement of the passenger accommodations. Now *Tyro* carries eighteen crew and twenty-two scientists and technicians.

The concept of containerization was very successful. During *Tyro's* one-year voyage in the Banda Sea, thirteen different research cruises were executed. A simple reshuffling by the ship's deck cranes of the containers, set aboard in the Netherlands, quickly allowed for a cruise change. Moreover, unused equipment could be maintained in the ship's holds or, if necessary, at a research station. A highly successful innovation was the use of half a dozen air-conditioned containers as a shore-based lab at Grezik, 40 km north of this city. For the execution of the research program on the rivers Solo and Brantas the availability of these shore-based containerized laboratory "villages" was essential.

Containerization and Developing Countries

In the near future the implementation of the Third UN Convention on the Law of the Sea will bring marine science in a large part of the ocean under the control of various nations through its exclusive economic zone (EEZ). The effect of the new EEZ is immense. Consider, for example, Japan, which with its new EEZ is now about one part land and twelve parts water. Full application of UNCLOS III will bring approximately 42 percent of the ocean under coastal nations' jurisdiction. The ocean "promise" is especially attractive to developing countries, which foresee a major economic potential in their new marine territories. However, it is also apparent that most developing countries have little or no marine science and technology capabilities with which they could undertake the necessary studies for exploring the potential of their new territories. On the other hand, the study of many oceanic processes and phenomena has to cross the imposed national boundaries. Under the new regime, marine research requires close cooperation between scientists from industrialized and developing countries. Transfer of knowledge will be essential in the establishment of a local marine scientific infrastructure. In this process the application of containerization is a promising feature. Firstly, it allows developing countries to establish small facilities at a low cost by using converted commercial ships as research vessels. Secondly, it allows developing countries to develop their facilities step by step and in balance with the growing intellectual community. Thirdly, it allows industrialized countries to give on-site training and demonstration of their equipment. Fourthly, maintenance or breakdown of oceanographic equipment has little or no effect on shiptime; and lastly containerization leads to a more efficient and cost-beneficial use of marine scientific equipment.

Sharing Knowledge

Transfer of knowledge and educational assistance were given much attention during the Snellius-II Programme. Before the actual expedition, many junior and senior Indonesian scientists were given the opportunity to prepare themselves in Dutch laboratories. During the expedition, junior scientists and technicians were trained in the use of sampling equipment, preserving samples, data recording, etc. Guest lectures were given by Dutch scientists at Indonesian universities and scientific institutions. After the expedition sixty-three Indonesian scientists came on a special fellowship program to the Netherlands for analyzing samples, data handling, and the preparation

for the publication of numerous joint reports and manuscripts. This fellowship program was financed by the Dutch Ministry of Science and Education. Within the program a distinction was made between:

- Visits of one to three months for sample and data analysis and the preparation of internal reports. The number of visitors was thirty-three.
- Trainees who came to the Netherlands for a period of up to half a year. If necessary a second period could be applied for. This was done by two out of eighteen trainees. One trainee obtained a masters (Drs.) degree at a Dutch university.
- Ph.D.'s who came to the Netherlands for some years. They wrote theses and obtained their Dr. degrees at a Dutch university. Seven Indonesian scientists used this possibility.

The so-called "sandwich model" in which an Indonesian fellow is educated at a foreign university but obtains his Ph.D. at an Indonesian university couldn't be applied, mostly because an Indonesian counterpart was not available. Most visitors and trainees went to this institute. The three Ph.D.'s listed at NIOZ are scientists who conducted their research at the institute. However, their Ph.D.'s were obtained from a Dutch university.

The core of the Snellius-II Programme was formed by the marine geosciences, again indicating the important role of the geoscientific institutes of the State University of Utrecht and the Free University of Amsterdam and NIOZ.

The results of this joint endeavor of Indonesian and Dutch scientists were overwhelming. About 130 Indonesian and Dutch participants reported during the Snellius-II Symposium (23-28 November 1987) in Jakarta. Reporting on a one-of-a-kind bilateral endeavor, they informed the international community about their scientific results as well as the possible applications of the results for fisheries, nature management, environmental policy, and the use of non-living resources.

At present plans are developing for ongoing cooperation in marine sciences between both countries. The film *Partners in Science*, shown during the symposium, gave an overview of this one-of-a-kind endeavor between Indonesia and the Netherlands.

Warren Wooster: Thank you, Dr. Stel. Our first commentator is Professor William Burke from the University of Washington School of Law.

COMMENTARY

William Burke
School of Law
University of Washington

The stakes involved in achieving improvements in knowledge and understanding of the ocean, its characteristics, prevailing conditions, and contents, and its relationship to other spheres and systems, and the changes in these, are becoming increasingly higher. It is evident to nearly everyone that, whatever the specific situation now being widely discussed about changes in global climate and the global environment, the human capacity to affect the ocean is not lessening, it is expanding. This follows because the uses of the ocean are increasing and changing over time.

In this century, the ocean has become a significant source of energy, it is used to transport previously unknown hazardous materials that can do serious harm to the environment, radioactive materials are now commonly deposited in the ocean, and the life styles of humans at this stage of history have significant effects on it (agricultural practices, dietary habits, mode of transportation). The impact of these events confirms, in turn, the need to study the marine environment in order to understand what is happening to it in specific locales and what impact human activities have on the ocean as a whole and, through the links involved, on the global environment, including climate.

In contrast to these trends that place a premium on the process of investigating the marine environment, the political and legal context for that investigation has been significantly degraded over the past two or three decades. This has occurred because of the perceptions by many states that the ocean areas involved contain resources, living and nonliving, that can or do provide important benefits to them and, in addition, may be the locale of military activities that could threaten their security. The view is that controls over marine scientific research are required to safeguard rights over resources and to avoid threats to national security.

My view is that while the new regime may safeguard the coastal state marine resources, which it enjoys as a result of the continental shelf and EEZ regimes, the actual threat to coastal states from MSR is far less than that perceived and, therefore,that the losses imposed on knowledge and understanding because of interference with the process of scientific investigation outweigh the supposed benefits. The main protection for the coastal state on the resource side derives from the

monopoly rights of exploitation that have been established. Control over MSR adds little or nothing to that protection. Insofar as national security is concerned, the consent regime for MSR has virtually no contribution to make. Any investigation that a researching state wishes to conduct for its own security purposes will not be impeded by the new regime and the security of the coastal state will incur whatever effects might flow from that. With only slight exception, there is no evidence known to me that suggests any coastal state has suffered because of activities that are considered research for scientific or military purposes. It is possible that such evidence might include the recent U.S. decision to classify certain detailed maps of the ocean floor within its EEZ. However, so far as I know the United States has not restricted foreign vessels from conducting the research operations which compile the information for such maps.

Far from MSR being a threat to national security, I believe the collective impact of restricting marine scientific investigation contributes to the threat to the common security resulting from the degradation of the global environment that is the consequence of the modern technological society. When national controls are extended to 35 percent of the ocean and in this regime the decisions of over 100 independent states about the conduct of MSR are substantially discretionary, and in any event mostly nonreviewable, can it really be a surprise that the conduct of science is changed for the worse?

In this context, it is not enough that refusals of consent to research are infrequent. This measures only a part of relevant experience, and it wholly fails to take account of changes in plans in order to maximize the chance for securing consent, *i.e.*, the consent requirement itself skews scientific judgment and decision-making. If threats to the global environment are indeed serious national security threats to all nations, then this attitude toward science at sea should be condemned and replaced.

The general process of scientific investigation which is, by definition, aimed at the production of shared knowledge and which contributes to the understanding needed for protecting humankind and the marine environment, is more or less seriously disadvantaged at the very time that its significance and value for everyone is increasing.

The situation we now face, therefore, is to develop techniques, modalities, and mechanisms which will facilitate the conduct of MSR under the contemporary regime. A first alternative is an obvious one and that is to conduct MSR to the degree feasible in a way which does not encounter coastal state authority at all. This route has not escaped the early attention of the scientific community and it has led to the

employment of remote sensing techniques for ocean investigation. Remote sensing methods might be cost effective and useful in any case, given the enormous size of relevant areas to investigate, but part of their justification (and this is expressly acknowledged by scientists) is the avoidance of coastal state jurisdiction over the areas concerned.

Another approach is to devote effort to the use (including the creation) of international mechanisms by which the problem of securing consent and performing the necessary obligations can be handled with minimum costs. The LOS treaty contains particular provisions that assist this effort, specifically including those addressed to the role of international organizations. As has been discussed, IOs may be helpful as a means of gaining the advance approval of projects, obviating the necessity for another approach to gain consent. Assisting coastal states to develop scientific skills and resources is an especially valuable means for facilitating interactions with coastal states that will diminish the perceived need, and the likelihood, to interfere with MSR. IOs may also be useful in other indirect ways by assisting coastal states to establish rules and regulations that are reasonable and do not threaten or at least minimize undue interference, while at the same time accomplishing coastal objectives. I believe various activities are underway in these directions.

Another possibility here is that coastal states may change their views about the value to them of MSR. That is, if the changes noted above in use of the sea begin to change the ocean environment in ways that are directly harmful to coastal interests, conceivably the feelings of hostility toward MSR may begin to diminish and change. While the jury is certainly still out on the so-called greenhouse effect, whatever might be responsible for changes in the ocean, some states may suffer more than others because of their particular location and characteristics. For example, if significant sea level rise does occur, low-lying islands or other states may incur substantial damage. It may occur to such states that it is inadvisable to encourage or support placing restrictions on the conduct of research at sea when that research may contribute to knowledge that could benefit these states.

Warren Wooster: Thank you, Bill. We pass to the second commentator now. I suppose that if there's one thing that is clear in this business, it is that, of the competent international organizations, the IOC, Intergovernmental Oceanographic Commission, is so designated. And for that reason it is particularly helpful to have with us the new Secretary of the Intergovernmental Oceanographic Commission, Dr. Kullenberg.

COMMENTARY

Gunnar Kullenberg
Intergovernmental Oceanographic Commission
Paris, France

The papers that have been given in the conference and the discussions this morning certainly have highlighted a number of things. First, international organizations are there because they are needed for international cooperation. In relating international organizations to global problems, one can see a trend going from local to regional to global. You might argue that the global-type problems require global solutions. Global solutions to global problems imply that one has to look at all the scales -- local, regional, and global.

The other obvious thing is that one has to look at the environment from a holistic view, as an interacting system. If we then look at the interface between the continent, the land, and the sea, it is the coastal zone and shelf areas where many activities occur and many resources are available, where the effects of human interaction on a local, regional, and global scale are perhaps most evident. Events or the effects of events also occur there. Reference was made to the El Nino event which occurs off and on in the Southeast Pacific. Other types of events also occur. Events in the North Atlantic shift the distribution of living resources over time scales of several years to several decades. What does this mean?

One significant aspect of the ocean environment is that it is dynamic and in motion all the time. It is influenced by the continent. Obviously there is a need for international cooperation if one is going to find out how the system works both on a regional and a global scale. Locally, the activity may be truly national, but again the local conditions are influenced not only by local actions by also by regional and perhaps global actions.

With respect to the role of the international organizations here, there are many different types. You might look at an organization that has been reasonably successful -- ICES, the International Council for Exploration of the Sea. It is a regional organization of seventeen or eighteen member states covering the North Atlantic. It was started in the early nineteenth century. Why is it successful? I think it is successful partly because it involves in all its activities the human resource required to solve its problems, namely the marine science community. The chairman of this session started out by saying that science is done by individuals, and that's very true. Now it is

necessary, if we are going to succeed in developing the cooperative international regional to global research of the ocean, to involve the scientific community from the start, not only from the countries where the marine science is the leading factor but from all the involved member states or countries. However, the scientific community also needs to realize that the results, the use of science is also necessary. We are developing scientific research in order to solve certain types of problems.

An important action of international organizations is to facilitate the involvement of the different parts of the community. The task of the Intergovernmental Oceanographic Commission should be to involve the scientific community in developing international cooperative scientific programs and to facilitate their implementation. Other organizations use the results of the scientific research, and others specifically deal with the legal parts. The UN has been mentioned, and IMO is a very important mechanism in this complex. UNEP and FAO and others use the results of various types of scientific endeavors. The dialogue between these organizations is not good enough and it should be increased. Each of them should contribute to the community the parts that are the basis for their existence.

If we can get that to work on the international scene, then perhaps we could get that to work on the national scene, where we face the problem of compartmentalization of management. This is evident if you participate in different meetings and listen to what the national delegations are saying; in UNEP they say one thing, in IOC they'll say another thing, in FAO they'll say a third thing. If you ask why, they say, "Well, I take care of you and somebody else takes care of somebody else. I have my little corner, and I don't want to share it with anybody else." This attitude again is contrary to the holistic view and something one must come to grips with. How? Various types of problems have been discussed here; the focus seems to be on a regional scale. That means that one selects one part of the spectrum and works through that and then knits together the activities, the actors, the countries involved, and the various organizations involved. This requires a forum where the countries can debate and discuss and can exchange views on the different aspects, including research, data acquisition, delivery, and exchange, including what kind of monitoring is going to be done. In the IOC, as I said, the basic element is the scientific community, and then there are other organizations specifically addressing other parts of the community. But there has to be a dialogue between these different elements. This meeting is an attempt in that direction.

Warren Wooster: Thank you, Gunnar. We'll go on then to the last commentator, Professor Anand from the School of International Studies at Jawaharlal Nehru University.

COMMENTARY

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I'm not a scientist; I'm a lawyer and therefore don't understand much about science. But what I do know is that scientific knowledge is in the interests of everyone, the developed and the developing countries. Marine scientific research, there is no doubt, should be encouraged as much as possible. I think this is well understood by everybody. Developing countries need it as much if not more than the developed countries, as Professor Burke just emphasized.

The consent regime for the conduct of scientific research in the EEZ and on the continental shelf as it is provided in the 1982 UN Convention on the Law of the Sea is no doubt a constraint and has been very strongly criticized -- in fact, some scientists have called it a disaster. Although the evils of the consent regime are thought to be mitigated by implied consent under certain conditions, they are not deemed sufficient. Thus where the proposed research project is to be carried out by an international organization of which the coastal state is a member, or where the coastal state does not respond within four months of being furnished with the necessary advance information by the researching state, it is presumed that the coastal state has no objection and its consent is implied. It is interesting to note, however, that the refusals are increasing. Between 1979 and 1984 the United States had made 590 requests for consent to do marine scientific research in maritime zones of 62 states. In 27 cases the request was denied completely, in 19 cases it was so delayed that the projects could not be carried out, in 11 cases no answer was received and the project had to be cancelled, and in 5 cases permission was granted on unacceptable terms. Thus in about 62 cases or 10.5 percent of cases, requests were unsuccessful, and we are told that this percentage of refusals has increased recently. All of us know that much of the scientific research now is likely to be conducted or carried out by remote sensing by satellites, and you don't need any consent for that purpose. However, it is still very important to have consent as there is no substitute for on-site scientific research.

There is always a dichotomy of interests and clash between the coastal and the long-distance states which has led to numerous conflicts throughout history. Sometimes there is the danger that

scientific research is being conducted for military purposes which would have a serious impact on the defense of the coastal states, although I believe what Professor Burke just said: that they do not have to worry about it too much because there is more danger if scientific research is not done. So-called applied research can also have adverse consequences on their interests. The safeguards provided in the Convention are perhaps not sufficient, especially for most of the developing countries who have no means or trained manpower to check the true nature and purpose of research conducted off their coasts.

But even more important is the fact that coastal states know that they cannot get benefits of research without paying an adequate price for it. It is well known that most of the research is conducted by multinational corporations, and these multinational corporations are not charitable institutions. They will not provide the results of their research without due returns. Provisions relating to the development and transfer of marine technology in the Convention -- namely Article 266 to 277 -- are merely hortatory. They are too vague to be useful. States *shall cooperate* or *shall promote* research or *promote favorable conditions* for transfer of marine technology, and so on. These words can be interpreted in many ways, as all lawyers know, and cannot be enforced. Article 267 clearly provides for protection of the rights and interests of the holders and suppliers of technology. There is no real transfer of technology envisaged or possible under the provisions of the Convention. Even under the deep seabed mining provisions, only first generation technology is supposed to be transferred by the contracting state or company. The International Sea-Bed Authority is supposed to buy technology generated elsewhere and is condemned therefore to perpetual dependency. Why it was not provided funds or why it was not even laid down that it should have its own technology or do its own research are questions that sometimes lurk in my mind. The clause regarding mandatory transfer of technology declared it valid until ten years after the Enterprise has begun commercial production of minerals. There is little doubt that the multinational corporations and the countries that are in this business believe in their technological innovations and need control over them. There is no obligation to transfer the latest technology developed after ten years of commercial production by the Enterprise. Even this first generation technology, it may be noted, is expected to be transferred only on fair and reasonable commercial terms and conditions. Now what do these clauses mean? These are elusive terms, again subject to different interpretations. Where the contractor is not

the owner of technology he must try to acquire technology on behalf of the Enterprise, as the Convention provides, without substantial cost to the contractor.

In any case, even these comparatively minor obligations for transfer of technology have been rejected by the industrialized countries most actively engaged in marine scientific research. Everybody knows that the seabed mining provisions were accepted as a compromise, that the developed countries received concessions on several other issues. In spite of this, the developed countries want to keep their freedom now and have rejected this Convention because of that reason.

Therefore I submit that there is a lack of trust between the developed and the developing countries, and unless and until this trust is established, all will suffer, most of all the scientists who honestly want to do scientific research for the furtherance of knowledge.

What is the choice therefore? Trust has to be established by increasing cooperation between technologically developed and developing states, especially by increasing the capacity of the developing states to do research for themselves and helping them in the training of their manpower. If activities such as these could be conducted much more, I'm sure that these refusals would not be there.

Another choice is international cooperation through international organizations, as we have just heard from the previous speaker. International law is developing -- but perhaps not fast enough -- from the old law of coexistence to the new law of cooperation. And unless it develops fast enough, we are going to continue to have these kinds of problems. Don't forget, it is well known that once bitten, twice shy. And these developing countries have been bitten many times. Therefore they are shy. They have got to understand that it is in their interests, but they are unable to understand how they can develop their own technology unless help comes. I hope that help will come which will create confidence, which will help in the furtherance of science and technology and the knowledge about oceans and everything that goes with them.

DISCUSSION

Alfred Soons: I would like to make one brief comment. Professor Anand just said that it is well known that most research is conducted by multinational corporations. I think that is a very confusing statement, because the research that is carried out by multinational corporations usually is not marine scientific research as it is understood in Part XIII of the Convention, and it is extremely important to distinguish between the various kinds of activities. Multinational corporations are mainly conducting resource exploration, and that comes under the full sovereign rights of a coastal state, so it is subject to an entirely different regime.

William Burke: Fred Soons just made one of the main points I wanted to make. I was never aware that most scientific research is conducted by multinational corporations. That is commercial exploration, proprietary research, a totally different activity. There is no question about the controls over such activity, and nobody has contested it, at least with respect to nonliving resources on the continental shelf, for the last thirty years or longer. The point Fred makes is absolutely essential.

The obvious distinction between the two is that proprietary research produces data that is not available, that is held closely and is only made available in return for something else. The research we're talking about by definition involves the production of data and results that are shared. That's the definition of the subject as I understand it. The same thing applies, by the way, to the problems of deep sea technology transfer, again a commercial operation that does not involve scientific investigation in the terms that we are discussing here today.

Henk Postma: If I walk through my old institute in Texel, there are many faces I don't know, but one thing is sure: that there is a large number of Indonesians, Chinese, Africans, and so on working together with the Dutch scientists. In general, coming into scientific institutions in developed countries you see a very large number of people from -- well, let's say, less developed countries. I have the feeling that they are always very welcome there and also in the universities, partly because of the realization that they are responsible in developing countries for part of the sea. So I haven't seen any difficulty at the moment. A lot is done for developing countries in the transfer of knowledge.

R.P. Anand: I do take this point that most of the multinational corporations are involved only in what is called proprietary research. But I have never been able to understand the difference between what is called applied research and pure research. There are 159 states, out of which more than 120 are developing states. Most of them need to develop expertise in science and technology, and once they have got their own scientists and scientific labs, they will be able to understand the great importance of cooperation with other countries in conducting marine scientific research. Many refusals stem from a lack of understanding which leads to lack of trust.

Peter Allen: I should announce myself as one of the villains because in a previous job I used to administer the research vessel guidelines for applications into Australian waters for marine research. My question to the panel follows closely from the comments made by Professor Burke and Professor Anand. I agree with Professor Burke that when the balance is struck between protection of national security interests and the need for research, perhaps the balance comes down too strongly on the side of national interests. But the point has to be made that this situation will always exist. Explain to your navy, as I did, that a research vessel chock full of finely calibrated instruments will sail through the middle of the fleet exercise and see what their reaction is. But the regime under the Convention is basically fair in balancing the two interests. My question to the panel is: Is the problem more in the conduct of the states under the regime rather than the regime itself? Do practicing ocean scientists see the prospect for more enlightened self-interest to prevail on the part of coastal states? Do they see value in allowing more research in their waters to go ahead?

Warren Wooster: I'm not entirely sure how to change the world. I've been working on this for some time; I'm beginning to run out of steam. It is certainly true that some element of mutual understanding about research is a prerequisite to full cooperation. Full understanding requires that everyone has had the same opportunity for preparation in thinking about these questions. We know that's not true within any country. I appreciate the comment about the navy because we've had a little trouble educating our United States Navy about science and the utility of it and the fact that scientific knowledge is more useful when it is widely known than when it is held tightly. It may be indeed that the biggest contribution the international organizations can make -- and certainly one they have been making for as long as I've had experience with them -- has been in the educational side of training and the achievement of mutual understanding of the importance of

science and scientific findings to the issues that are paramount in the eyes of governments all over the world.

The thing that isn't so widely understood perhaps and needs to be is the mutual dependence on knowledge for achieving national interests, the fact that scientific understanding elsewhere is important to the coastal state. For example, the southwest monsoon that is so vital to India, Pakistan, and the other countries in the subcontinent is not predictable at the present time, but the timing and intensity of the monsoon and the precipitation associated with it are of vital importance to those countries. Now it is highly likely from what I know of the oceanographic regime there that that monsoon is conditioned by ocean conditions in the Arabian Sea. It seemed very likely a few years ago that the prediction of the monsoon might depend on an intimate knowledge of the ocean circulation on the western side of the Arabian Sea, say, off the coast of Somalia. At that time it was impossible for anybody to get permission to go into the waters off Somalia -- that condition has since changed -- which meant that the access to understanding that was central to predicting a monsoon that affected roughly a billion people was dependent on permission to do research, permission that wasn't granted.

It seems to me that the interconnectedness of all of us on such questions, particularly as they relate to global warming, to the possibility that human activity has changed and will change the climate in ways that are difficult to predict -- although none of the predictors seem to be very optimistic that this is going to be good for us -- will require a level of cooperation in research that is unprecedented.

It is that kind of problem that Professor Burke alluded to in his comments, that we're all stuck on this planet and stuck with what we've done to it and we're going to have to work together to figure out where we go from here. An important element in that plan is marine scientific research, done by individual scientists supported as best they can be nationally and internationally. We're going to have to find ways to facilitate that plan to make it work. I guess that's the challenge that is before you. Professor Burke?

William Burke: On the point that Dr. Anand raised, the notion that one of the big constraints here is insecurity and apprehension because of the lack of capability -- I think that is a major factor. One of the problems is in attempting to address one hundred and some coastal states, but not all coastal states can begin to develop, nor should they even try to develop, the range of capabilities that are involved in ocean science. The Convention does not anticipate that that will

necessarily happen either. It speaks of representation -- that is, that they are able to get access to the capabilities involved. It is anticipated that there will be need for assistance, and I don't see how anybody could disagree about that. The problem is in mounting the assistance. In the United States in the late 1960s when we were preparing to attack these problems, our first priority in trying to get responses from the government was in the area of training, education, and mutual assistance. It was obvious that, in order to open communications to build the trust that was necessary, you had to have some basis for communication. And that priority really ought not to have changed because it is a problem that will endure.

The other point that was raised was a question of whether the problem is the implementation of the agreement or the agreement itself. Under customary law, the decision making is now totally decentralized. Nobody controls anybody else. The effect of this is to place decisions in the hands of coastal states. I work for my own state, and though I don't consider myself a bureaucrat, I'm aware of what happens when bureaucrats are asked to make decisions. There's no antipathy necessarily to a scientific project, but as soon as the decision making gets underway, as Mr. Kullenberg has already pointed out this morning, you have different agencies talking different language and different policies. The responses to requests for consent become enmeshed in that web and the result is that nobody has any control over what happens. The consent is not given, cruises have to be changed or terminated, and that's a necessary result, it seems to me, of what has been set in motion unless international mechanisms are used to avoid some of this. We anticipated with apprehension that the consent regime would be placed in decision structures that involve national bureaucracies, that a dozen different agencies would attempt to have a voice, that the outcomes would be uncertain and likely to be unproductive for science. And I think that that's happened already.

Henk Postma: I would like to ask a question. UNCLOS III has not been ratified, but everybody is applying it. As a marine scientist I'm seriously asking myself if it is still possible to have an exclusive economic zone without yielding it as an exclusive science zone. Marine scientists are new to these questions because they don't like to be involved too much in all the lawyers' discussions. gain more money. I would also say, especially now, if so many cruises cannot go on and developing countries have to find their way through, that people who go into the field of marine science should at the same time become lawyers in international law.

A lot of discussion goes on over terms like pollution. We have had for a long time an international body in the UN family of the Group of Scientific Experts on Marine Pollution which discriminated from the beginning between pollution and contamination. We hardly know about ecosystems, since we don't know what is special about them, how you define them, and how you do things legally with them, naturally we do have developments in the direction of national parks. I would like to suggest that international bodies pay attention to this direction and to the language difference between marine science and lawyers. Only when there is education can we solve these problems of whether we can come in or not with a research vessel.

Lee Stevens: I don't think I can respond to the totality of your intervention, but let me take the issue of the status of the Convention and the arguments for trying to abide by its rules. I think from the view of the United States as a nonparty there is a very considerable concern that without any kind of regime the kinds of conditions, restrictions, difficulties to be imposed on marine science could in fact be even greater than what is possible under the rather slight regime that exists in the marine science provisions of the Convention. I think that, although the Convention itself doesn't provide as many protections for science as scientists would like, the alternative is continuation of some very difficult and onerous procedures from the standpoint of the scientist. I have just recently received copies of national legislation from several countries. Even countries that purport to abide by the rules of the Convention are adopting legislation for marine science that is going to impose very serious constraints -- for example, requiring in a couple of instances that formal cooperation be established with an institution in the host country before they will even begin to look at a request for access. That is clearly beyond the bounds of the Convention as I understand it, and other similar requirements might come down. So I think that's the answer to your first question.

Let me go back to the previous question for a moment if I may, because I must confess that in a previous life I too was a bureaucrat. In the United States for a period of about five years, I had responsibility for acting on requests from foreign states to work in U.S. waters. One of the things the U.S. did, which I think partly responds to the second question, was to decide not to extend jurisdiction within the exclusive economic zone over marine science. The U.S. jurisdiction over marine science for most purposes basically remains at twelve nautical miles and on the continental shelf. There is nothing that

requires a coastal state to impose difficulties for marine science, so the U.S. has taken that action.

I had to deal with a fairly large number of requests for access, including requests, for example, from the Soviet Union at a time when my administration was not very kindly disposed towards requests from that country. I can say happily that virtually all of those requests were approved. As a matter of fact, I don't know of any instance in which the United States has disapproved a request for access. There have been some port call problems, which is a slightly different issue. But there is a battle that needs to be fought within a government in a coastal state. You know, I certainly had some difficult knock-down, drag-out arguments with the United States Navy.

I think there is a key issue here and it gets back to a point that Professor Anand made. He said that developing countries are once bitten and twice shy. I think there's a perceptual problem that somehow marine science is closely linked with other activities that clearly are not science. To echo Professor Burke's comment, science is fundamentally and determinably distinct from other activities. I don't know of any example where marine science has really bitten anyone, and I would challenge anyone who makes that assertion to come up with an example of where it has. Perhaps the United States practice towards requests was different because there was an assumption that marine science is innocent until proven guilty, whereas in most coastal states marine science is presumed to be harmful and somehow has to prove itself worthy. That is the wrong approach.

R.P. Anand: When I said, "Once bitten, twice shy," I didn't mean to say that the scientists are doing any harm. But there is no question that for a long time scientific and other investigations have been going on just off the shores of the coastal states. These coastal states have known, for instance, that all sorts of military research was going on there which they did not understand much, which they could not control at all, and which led to results which they never liked. For that reason these countries have felt -- and you are right; it is a question of perception -- that they have suffered under the so-called freedom of the seas doctrine, which had been used for a very long time for the interests of the developed states and not for the developing states. That is why they are shy.

Warren Wooster: I'd like to thank the members of the panel and the audience.

SOME RECOLLECTIONS OF THE DEVELOPMENT OF THE NEW LAW OF THE SEA AND, IN PARTICULAR, ITS RESOURCE ASPECT

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Foreword

It is a great pleasure to be given a chance to speak at this Conference, especially as it is more than twenty years since I took the floor at the first and second Annual Conferences held in 1966 and 1967 at Kingston, Rhode Island.

Some twenty years ago, I was probably one of the most active negotiators on the law of the sea. Yet I must confess that since I left the forum of the law of the sea to join the International Court of Justice in 1976, my knowledge of the subject has been fading rapidly, although I still retain a personal interest in it. I do not now have any precise idea of the current status of the 1982 United Nations Convention on the Law of the Sea, of events in the Preparatory Committee, or even of the principal subjects of current concern to international lawyers today.

I certainly lack any qualification to participate in this Conference, and when I was asked to address it (probably for the sole reason that I now reside in this country), I agreed to deliver a luncheon speech -- having misunderstood the "luncheon speech" concept which, to my way of thinking involved nothing more than a mere address of welcome! As I was given thirty minutes in which to speak and do not know a great deal about the contemporary law of the sea, I spent much of the past month wondering what I could say, before coming to the conclusion that I could probably talk about what the law of the sea has meant to me, from a personal viewpoint.

My Interest in the Resource Aspect of the Law of the Sea in the Early 1950s

During my time as a graduate law student at Yale in the United States nearly forty years ago, specializing in international law and coming from a country still under military occupation after the war, I was looking for the most suitable subject on which to write a doctoral thesis. One day my most esteemed professor, Myres S.

McDougal, took up his usual yellow note-pad and wrote down an outline of the law of the air and sea, based upon his well-known "eight-value" or "policy-oriented" approach.

I then examined a number of monographs and articles on air law in the library. At that time, the *Saturday Evening Post* carried an article: "Who owns the moon?" This was, of course, many years prior to man's first landing on the moon. I felt that the subject of outer space was too remote and, for that reason, beyond the range of my thinking.

Turning then to a study of the law of the sea, I soon became aware that, while the navigation aspect had been almost exhausted, the future importance of the sea would lie in its resources. It was not so difficult, in those early days, to carry out an exhaustive examination of the relevant documents and academic works, which were naturally limited at that time. Apart from publications on the limit of the territorial sea, particularly relating to the work of the 1930 League of Nations Codification Conference, there were Fulton's *Sovereignty of the Sea* (1911), Gidel's three-volume *Le droit de la mer* (1932/34), Jessup's lecture at the Hague Academy of International Law in 1929 and, if I may add further, Professor Riesenfeld's work on the law of fisheries, prompted by the United States' fishing activities in the northeast Pacific.

Of course, there had already been the two declarations of the United States' ocean policies, issued only several weeks after the cease-fire in August 1945. These two Truman Proclamations, in September of that year, had very different impacts. The one relating to offshore mining was really a starting line for the present regime of the continental shelf. Apart from its concerns in the Middle East, the United States was the only country that was then able and willing to develop resources of that kind. However, by the early 1950s the offshore exploitation of petroleum had gradually become an important part of the law of the sea. A debate in 1950 between Hersch Lauterpacht of Cambridge and Humphrey Waldock of Oxford (who were both involved in an arbitration case in the Middle East) concerning the legal status of the continental shelf is worthy of mention and, in 1952, a book by Captain Mouton of the Royal Dutch Navy was awarded the first prize in a competition run by the Institut de Droit International on the theme of the continental shelf.

On the other hand, the Truman Proclamation on the United States' fishing policy was in fact made in response to the United States' fear that Japanese fishing fleets might soon return to its northwest Pacific coasts. Knowing that an extension of the coastal jurisdiction beyond the established three-mile territorial sea limit would not be permitted,

the United States sought to prevent the reinstatement of the Japanese fishing industries which they saw as likely to operate to the particular detriment of the Alaskan fishing industries. This Truman Proclamation, carefully drafted to avoid the issues of jurisdiction, can only be understood against this background.

The United States' aim was eventually achieved in 1952 by the conclusion with Japan of the International Convention for the High Sea Fisheries in the North Pacific Ocean. The significance of this 1952 Fisheries Convention cannot be overemphasized because it contained the so-called "principle of abstention" and the concept of the so-called "nationality" of anadromous species (that is, salmon) which spawn in rivers.

At the same time, Australia, by making a proclamation in 1952 relating to the continental shelf, attempted to exclude Japanese fishing vessels from returning to collect pearl shell in the Arafura Sea off its northern coast. This brought into being the concept of sedentary fish as a resource of the continental shelf, which needed to be dealt with in the same manner as mineral resources.

In the early 1950s, the International Law Commission of the United Nations initiated the drafting of some rules for the law of the sea, with the late Professor Francois of The Netherlands acting as special rapporteur.

As far as the subject of the continental shelf was concerned, it might have sufficed to provide for the exclusive competence of coastal States to explore and exploit their continental shelf areas without interfering in the traditionally established regime of the high seas applicable to their superjacent waters.

With regard to fisheries, the main issue discussed was the concept of conservation of living resources, which remained unchallenged. On the other hand, the concept of sedentary fisheries as a resource of the continental shelf was growing rapidly, apparently due to appeals by Australia regarding its problem with Japanese fishing vessels, as I mentioned before.

It was under these circumstances that, in the Spring of 1953 at Yale, I completed my dissertation entitled *The Riches of the Sea and International Law* and returned to Japan. In my 1955 article, entitled "The Territorial Seas and Natural Resources," published in London (*International and Comparative Law Quarterly*, Vol. 4), I was arguing that the difficulties in laying down a uniform limit for the territorial sea resided in the fact that that limit was significant as restricting the fish resources of the offshore area for the monopoly or the exclusive use of coastal States.

On the other hand, the importance of the 1952 North Pacific Fisheries Convention lay in the implication that the really significant issue that would be bound to arise before long was the sharing of limited fish resources among the nations whose efforts to maximize their own benefits within the conservation limit might give rise to conflicts, rather than the mere conservation of fish resources. In 1957, at Heidelberg, I published "New Trends in the Regime of the High Seas," which I subtitled "A consideration of the Problems of Conservation and Distribution of Marine Resources" (*Zeitschrift fur auslandisches offentliches Recht und Volkerrecht*, Bd. 18).

Towards the 1958 and 1960 Geneva Conferences on the Law of the Sea

The International Law Commission continued its deliberations on the law of the sea. The concept of the continental shelf had already been crystallized by 1953 but still remained an issue of relatively academic interest and had not yet given rise to any conflict of opposing interests.

On the other hand, the issues relating to fish resources of the sea reached a turning point around 1955, when a conference on the living resources of the sea was convened in Rome in April, 1955, by the FAO. The issue of the ways in which each nation could maximize its own share of fish resources under the long-established social policy of laissez-faire, or the legal principle of the freedom of fishing, had been emerging, although its significance was not as yet fully recognized by most of the delegates present at that Conference, probably because the Conference was described as a "Technical" Conference. Among the delegates, Garcia Amador of Cuba came to play a leading role; and he took the initiative in the International Law Commission in its 1955 and 1956 sessions which followed the Rome Conference and prepared a basis for the new draft concerning the law of fisheries.

In 1956, the International Law Commission, having concluded its six-year debate, completed its final draft consisting of 73 articles on the law of the sea. I was critical of this rather hasty work of the International Law Commission, particularly in relation to (i) the as yet ambiguous concept of the continental shelf, (ii) the mistreatment of the concept of sedentary fisheries when it was combined with the mineral resources of the continental shelf, and (iii) the apparent lack of observance of the most crucial issues of the high seas fisheries regulations, that is, either the retention of laissez-faire or the adoption of the new system of artificial sharing of fish resources. In the United

States in 1957, I thus appealed for "A Reconsideration of the Continental Shelf Doctrine" (*Tulane Law Review*, Vol. 32)

In 1956, I went back to Yale University at the invitation of Professor McDougal who wanted to write a book on the law of the sea in collaboration with his former student. After a few months had passed by, "Mac" may have become aware of my inability to adapt myself to his basic approach -- the "eight-value" or "policy-oriented" approach I have previously mentioned -- and, accordingly, my role was taken over by Bill Burke. In fact, two separate books came out at almost the same time in 1962/63; namely, McDougal and Burke on *The Public Order of the Ocean* from Yale University Press and my own work, *The International Control of Sea Resources*, from Sijthoff, now Nijhoff, in this country.

In the spring of 1958, the first Law of the Sea Conference was convened in Geneva for an eleven-week period. I am pleased to see here today Mochtar Kusumaatmadja of Indonesia and Shabtai Rosenne of Israel, old friends of mine since that Conference. As legal advisor to the Japanese delegation to that Conference, I was assigned to the Third and Fourth Committees dealing with high-seas fisheries and the continental shelf and was very pleased to be present "on the spot," so to speak, at the drafting of the new resource aspect of the law of the sea. There was one great issue which the 1958 Conference failed to resolve, and that was undoubtedly the uniform limit of the territorial sea. Different nations adopted very different approaches to the limit of the territorial sea. Yet the navigation of commercial vessels, which were at any rate given the right of innocent passage even in the territorial sea, did not then constitute a factor of any significance to the determination of its limit. Some developing States simply wanted to widen their maritime jurisdiction to incorporate offshore resources, thus increasing their national wealth. On the other hand, an argument for a narrower limit of the territorial sea was advanced by a small number of nations, like Japan, which wanted to maintain the greatest possible area of high seas, where they knew they could rely on their advanced technology in fishing to enable them to compete freely with foreign countries.

The position of the United States was quite different. That country's main interest in the oceans was governed by factors relating to military security. In other words, the territorial seas should, in the United States' view, have been kept narrow -- not more than three miles -- so that it could retain freedom of maneuver for its naval fleets on the vast high seas. It was particularly essential for the United States to keep open certain strategically important straits, like

Gibraltar, or the straits in archipelagic areas like the Aegean Sea and the seas around the Philippines and Indonesia. The voice of the fishing industry in the United States was suppressed, and United States national policy was to keep the territorial seas as narrow as possible, mainly for military and security reasons.

In spite of its failure to determine the uniform limit of the territorial sea, the 1958 Conference was successful in adopting the four conventions on the law of the sea. However, the Conference did leave some important issues unsolved.

In the first place, the highly ambiguous concept of "exploitability," in connection with the other limit of the continental shelf, was rather thoughtlessly incorporated into the Convention on the Continental Shelf. As I interpreted it, that concept would in practice have led to a division of the whole of the world's ocean seabed among the coastal States! I suggested, as dividing lines, the deepest trenches occurring on the seabed, while Francis Christy advanced the idea of using the median lines for that purpose. Neither I nor Christy were proposing that these ideas should be seriously implemented; we were simply suggesting that this would be an inevitable outcome of any attempt to apply the ambiguous concept of "exploitability."

Secondly, another point of failure of the 1958 Geneva Conference, if I may say so, was the misconception of the term "sedentary" fisheries, which came to be seen as completely independent of living fish resources and were lumped together with petroleum resources for the sole reason that they were to be found on the surface of the seabed.

Thirdly, the most crucial issue in the high seas fisheries was not in any way resolved. The Convention on Fishing and Conservation of the Living Resources of the High Seas was still solely concerned with the conservation and preservation of fish resources but did not include any guiding principle relating to the sharing of those fish resources among those nations which naturally wished to maximize their own shares within the limits laid down for conservation purposes. On the other hand, the Conference, while not accepting the concept of a coastal fishery zone, cleared the way for that concept by incorporating the idea of preferential fishing rights for the coastal state.

In the United States some years later, I published a "Proposal for Revision of the Continental Shelf Convention" (*Columbia Journal of Transnational Law*, Vol. 7), in which I called for the revision of this outmoded Convention, and I also protested forcefully against the current lack of recognition of the sharing aspect of the high seas fish resources in an article on "Recent Problems of International High Seas

Fisheries," subtitled "Allocation of Fishery Resources" (*Philippine International Law Journal*, Vol. 1).

The second UN Conference on the Law of the Sea in 1960 failed, as there could be no compromise between the absolute requirement of the United States that the territorial seas should be kept narrow in some critical straits for the sake of passage of warships and military aircraft, and the demands of most developing nations, who wished to enlarge their jurisdiction.

The Dawning of the Era of the New Law of Ocean Resources

The period of several years after the Second Conference on the Law of the Sea witnessed the publication of a number of books on the subject, such as Douglas Johnston's *The International Law of Fisheries* in 1965, Lew Alexander's *The Offshore Geography of Northwest Europe* in 1966 and Derek Bowett's *The Law of the Sea* in 1967, in addition to the book published by McDougal and Burke, and my own which appeared in 1962/63.

There were no remarkable developments in the law of the sea and no major events occurred during that time. I do, however, wish to mention that, from 1961 to 1963, the International Atomic Energy Agency in Vienna convened a legal panel for the disposal of radioactive wastes in the sea, on which some lawyers, including myself, Riphagen of The Netherlands, and Manner of Finland served as members, and Chris Pinto served as a young staff of the Secretariat. I mention this because that gathering appears to be the first which dealt with the problem of the marine environment and pollution.

It is, moreover, to be noted that the twelve-mile fishery zone, once rejected in 1958 and 1960, was gradually gaining a great deal of support among nations. In 1964 the European Convention on Fisheries which, by implication, recognized the competence of each coastal State to establish the twelve-mile fishery zone, was signed by nearly ten West European nations and Poland. Japan, which in the mid-1960s challenged New Zealand's claim to the twelve-mile fishery zone and secured that country's consent to the referral of that issue to the International Court of Justice, had to recognize the general trend towards the twelve-mile fishery zone and to withdraw the case in 1966.

Consequently, if there was any reason to continue to retain the three-mile limit for the territorial sea, this could only relate to the military and security aspect, as stressed by the United States, in order

to maintain the uninterrupted passage of military vessels and aircraft through some critical straits.

In the 1960s, the exploration for hydrocarbons in the continental shelf had become a matter of reality and the exploitation of petroleum, even beyond the agreed 200-meter isobath, was seen as feasible in the not too distant future. Two different schools of though were gaining ground in the United States in the light of the fact that petroleum, as a hydrocarbon resource, would only be found in the sediments ringing the continents or, in other words, in areas limited by the continental margin and slope.

One school of thought was represented by governmental organizations like the National Petroleum Council, which favored the incorporation of areas of continental slope or margin into the regime of the continental shelf, while the other, to some extent motivated by idealism, was in favor of international control and management, and manifested itself by the appearance of non-governmental organizations in which Louis Sohn played an important role. This meant that the need to reexamine the 1958 Conventions on the Law of the Sea was, at that time, being translated into action.

At the same time, the United Nations became interested in the question of sea resources and started a new project involving the establishment, in 1967, of the Group of Experts on Marine Science and Technology. That group, which included me as the only lawyer and Warren Wooster as a marine physicist, first met in Geneva at the Headquarters of the World Meteorological Organization. Jean-Pierre Levy, who had just joined the UN Secretariat, became involved in the group by serving as its Secretary. I mention this because that 1967 group was one of the first to take up the subject of scientific research of the ocean.

It was just around that time, or just before it, that the University of Rhode Island tried to launch a project on the new law of the sea to provide a forum for the exchange of ideas and information about ocean management and utilization. Unlike most other state universities in the United States, the University of Rhode Island does not have a law school; and three scientists in the University took the initiative of forming this Institute. They were, of course, John Knauss (a geologist), Lew Alexander (a geographer) and Dale Krause (an oceanographer). After meticulous preparations, its first Annual Conference was convened in June 1966, in the beautiful university campus at Kingston, Rhode Island.

There were more than 100 invitees in all, including leading international law professors and well-known practicing lawyers, fisheries scientists and oceanographers. Nearly twenty reports were

submitted to the Session. Christy was one of the first to advocate a new era for the regime of the deep ocean floor, suggesting the concept of international control. On the other hand, Bill Burke was among those opposed to the idea of international management of these resources. I myself commented on the questions of the "principle of abstention" in the fisheries regulations and the outer limit of the Continental Shelf and put forward some ideas on sedentary fisheries. In fact, these were three aspects of the subject of ocean resources on which I had been reflecting in the meantime.

This first Annual Conference of this Institute in 1966 really marked the start of the new direction taken by the law of the sea in the mid-1960s. It was followed by some academic gatherings; one, the Symposium on the Continental Shelf at Cambridge in England in April 1967, organized by the British Institute of International and Comparative Law, and presided over by Lord McNair, Professor Robbie Jennings of Cambridge, Professor Humphrey Waldock of Oxford, and Director Simmonds of the Institute; the other, the Colloquium organized in June 1967 at Long Beach in California by the American Bar Association and, more particularly, by Robert Krueger of Los Angeles.

At Cambridge, I spoke on my concept of the unrestricted outer limit of the continental shelf as defined by the 1958 Continental Shelf Convention; while at Long Beach I again called for revisions of the 1958 Geneva Conventions on the Law of the Sea (*Natural Resources Lawyer*, Vol. 1). It was in that 1967 meeting at Long Beach that Mr. Mero (who would later become the pioneer of manganese nodules mining) using slide pictures, gave us our first glimpse of the manganese nodules on the deep sea bed. It was the first time that most of the participants had heard the words "manganese nodules" or had been able to see what these were. I must add that at Long Beach I first met Tom Clingan who was, at that time, at George Washington University in Washington, D.C.

The Second Annual Conference of the Law of the Sea Institute was held a few weeks later in June 1967, again in Rhode Island. Mr. Mero suggested the license system for the deep ocean at that meeting. I myself gave a paper on the "Question of the High Seas Fisheries Resources -- Free Competition or Artificial Quota."

It was several weeks after the Long Beach and Rhode Island meetings that Ambassador Pardo, Permanent Representative of Malta to the United Nations, proposed that an item on the peaceful use of the deep ocean floor should be added to the Agenda of the forthcoming session of the General Assembly. In the accompanied memoran-

dum, Arvid Pardo for the first time used the words "the common heritage of mankind" to refer to the mineral resources of the deep ocean floor. On 1 November 1967, Ambassador Pardo, addressing the First Committee of the General Assembly, spoke on the new era of the development of the deep ocean floor, in a statement which lasted for nearly four hours and which will be remembered forever in the history of the law of the sea.

His statement thus ushered in the new era of the law of ocean resources. The Ad Hoc Committee of the Deep Ocean Floor was convened in March 1968, in the United Nations Headquarters with the participation of 35 member nations. Alexander Yankov of Bulgaria, Jens Evensen of Norway, Jose Marie Ruda of Argentina, and myself, of Japan, were among the representatives. Jean-Pierre Levy was on the staff of the Secretariat. This was the beginning of the fifteen-year negotiations on the new law of the sea, which finally led to the conclusion of the 32-article UN Convention on the Law of the Sea, signed in December 1982 at Montego Bay, Jamaica.

One of my main concerns about the resource aspect, relating to the ambiguous concept of exploitability of the outer limit of the continental shelf, certainly no longer exists now that the new international regime for the international seabed has been implemented. With the adoption of the concept of the exclusive economic zone, the issues of sharing fish resources has been largely solved but, as so often happens once a concept has been put into operation, a great many ambiguities still remain. With regard to the regulations of fisheries, including the capture of marine mammals, the basic question of sharing, which I have been arguing since the 1950s, was not solved and the treatment of sedentary fisheries separately from living resources but together with the mineral resources of the continental shelf, remained unchanged in the 1982 Convention.

I am afraid that I have spoken at undue length about my personal experiences. I do, however, consider that the time in which I devoted myself fully to the question of the resource aspect of the new law of the sea, during the two decades after the war, still counts as one of the most significant parts of my life. I hope that you will forgive me for having harked back to "the good old days." It is my humble wish that my recollections will help those who belong to the "next generation," and who have joined us recently in a study of the law of the sea, by enhancing their understanding of the background to present-day issues.

EUROPEAN WATER POLICY: WATER QUALITY AND QUANTITY ASPECTS IN AN INTERNATIONAL SETTING

F. Plate
Director of the Legal Department of the
Rijkswaterstaat

Ladies and gentlemen, on behalf of the Minister of Transport and Public Works I welcome you on board and hope that you have had a pleasant afternoon in the vicinity of the sea, a natural resource which is close to both your daily work and the work of the Rijkswaterstaat. Rijkswaterstaat is the name of an almost 200-year-old agency in the Netherlands; at the national level it is responsible for the protection of the land against floods, water quality management, and also for the main road system of the country. You may call it the department of water management and public works.

As specialists in ocean management and the law of the sea you are undoubtedly aware of the intense relationship between the Netherlands and the sea. The history of the Netherlands has to a great extent been determined by efforts to protect the land against the sea and by efforts to reclaim land from the sea. In fact, these tasks were among the first taken up by public authorities in the Netherlands. The main functions of the Rijkswaterstaat, when established in 1798, were concerned with water quantity management. Water quantity management remains an important issue in the Netherlands today. However, in the last two decades water quality management has increasingly demanded our attention. The manner in which we deal with the water quality problems that we now face will determine our future and thus eventually our history.

Integrating water quantity and water quality management

That both water quantity and water quality management are important issues in the Netherlands is demonstrated most accurately by the Eastern Scheldt Dam. This dam is a unique example of how water quantity and water quality management have been integrated in the Netherlands. I shall briefly explain to you how the integration of these two aspects of water management was brought about.

After the flood of February, 1953, (1,835 people drowned and 72,000 were evacuated) the Netherlands decided to strengthen its coastal defence works and the so called "Delta Plan" was adopted. This

plan provided for the building of barriers in most estuaries and rivers and for increasing the height of the dikes along the coast. The Eastern Scheldt was one of the estuaries, which according to the plan would be closed by building a dam across its mouth.

In the first half of the 1970s, however, the awareness arose that the Eastern Scheldt was an area of exceptional natural value and that the construction of a solid dam would completely change its characteristics. What had once been a tidal area with salt marshes and the accompanying flora and fauna would become a sweet water basin in which, for example, shellfish and seals would no longer occur. Environmental advocates and understandably the fishing industry protested against the plans. At first, politicians were reluctant to agree to a reevaluation of the project. A very understandable reaction, as in the Netherlands politicians on many occasions had expressed their unconditional support for the Delta Plan and its goal to protect the people of the southwestern part of the Netherlands against floods. However, in 1974 Parliament agreed to a revision of the Delta Project. It was decided that the Eastern Scheldt would remain a tidal area and that a flood prevention mechanism would be installed. A half-open dam thus would need to be constructed, a demand which at that time was at the very limits of the technical know-how available.

Many difficulties were overcome, and in 1986 a unique work was completed; a work which illustrates that sustainable development in water management policy is possible. On average, the barrier is closed once a year, thereby providing the required safety. During the remainder of the year the tide continues to move in and out of the Eastern Scheldt, thereby providing the essential conditions for the tidal environment and for the shellfish industry to flourish.

European water quality policy

Given the position of the Netherlands on the North Sea and Wadden Sea and at the mouths of several major European rivers (*e.g.* Rhine, Western Scheldt, Meuse and Eems), water quality management is per definition an international issue. The Netherlands thus cannot hope to attain its goals in water quality management through only national financial and technical commitments: international cooperation is essential.

As a result of this position the Netherlands has played an important role in stimulating the development of a better water quality policy in Europe. We have whole-heartedly supported the preparation and implementation of the Rhine Action Program. At present the Nether-

lands is preparing for the Third North Sea Ministers Conference, to be held in The Hague in March 1990.

The role of the Rhine and North Sea Ministers Conferences

Both the Rhine Ministers Conferences and the North Sea Ministers Conferences play an important role in shaping European water quality policy for the 1990s. The Conferences have:

1) generated political commitment for water quality management in Europe;
2) provided more flexible international policy instruments required to deal with the serious problems we face; and
3) provided an impetus for the work of existing commissions (*e.g.* the International Rhine Commission, the Oslo Commission, the Paris Commission, and the Bonn Commission).

I shall briefly elaborate these points.

The *political commitment* generated by the Ministerial Conferences has had a significant effect on the speed of work. Within the framework of existing conventions, delegations often have to go back home for further instructions, especially if new and innovative proposals are presented. As a result issues are postponed until the next meeting. This usually involves a time lapse of a year. At the North Sea Ministers Conferences, Ministers are there to do business and as a result of their commitment cannot be seen to postpone dealing with pressing environmental problems. New and innovative proposals get the attention they deserve. An example of the results that can be achieved through this mechanism is the acceptance of the precautionary principle at the Second North Sea Conference.

In order to illustrate the *flexibility* introduced by the Ministers Conferences a comparison with existing international conventions in the field of land-based pollution is illustrative. In the 1970s several agreements and directives of the European Community concerned with water quality policy in Europe were concluded (Paris Convention on Land-Based Pollution, Directives of the European Economic Community on the reduction of surface water pollution, and the Rhine Treaty against Chemical Pollution). These agreements have a very precise but also rigid structure of black and grey list substances and require the adoption of detailed reduction programs at the international level. As a result, decisions are often not taken until programs have been drawn up that satisfy the requirements of all the national implementation

mechanisms -- an exercise which takes a considerable amount of time. At the recent ministers conferences, given the urgency of the problem and given the diversity in national legal systems, it was agreed not to spell out the details of how reduction measures should be effected nationally, but rather to decide that each state would reduce river inputs within its territory by 50 percent, via its own national instruments. Thereby the Ministers introduced a degree of flexibility in European water quality policy that was hitherto unknown. At the Third North Sea Ministers Conference an assessment will be made of whether the goal agreed upon will be met within the time frame set, *i.e.* by 1995.

The *impetus to the work of existing commissions* has been evident. The Oslo Convention after several years of discussion was able, after the decision of the North Sea Ministers to terminate incineration at sea by 1994, to take a similar decision. The parties to the Bonn Agreement agreed to develop a system for airborne surveillance, after North Sea Ministers established the desirability thereof. Likewise the work of the Paris Commission and the International Rhine Commission has been stimulated by the industrial sectors and best available technology approaches adopted by Ministers.

Policy instruments required for the future

A question prominent in the mind of policy makers in the Netherlands is, "Where do we go from here?" For although the North Sea Ministers Conferences and Rhine Ministers Conferences have given a tremendous boost to European water quality policy, they have also given rise to questions, especially as to the policy instruments required for future European water quality management. In a forum of law of the sea and ocean management specialists I would like to present some of these questions. For we at the Rijkswaterstaat believe that the European water quality policy would be well served with academic consideration on these points.

Regulation on civil liability for the carriage of hazardous and noxious substances

It is clear that some matters cannot be solved adequately at the regional level. Especially, the work of the IMO on a convention regarding civil liability for the carriage of noxious and hazardous substances requires urgent attention. Several ships containing hazardous substances have stranded or sunk off the Dutch coast and

the government of the Netherlands has paid for the removal costs. If the "polluter-pays" principle is to be taken seriously, it has to be implemented also in the field of shipping, and situations as mentioned should be prevented. Agreement as to the nature of the required legal instruments has, however, not been reached, and requires further consideration. However, if no results are achieved at the international level, the development of regional instruments may have to be considered as a second best option.

There are other matters that can and should be dealt with at the regional level; I refer to three of these matters.

Harmonization of work of the different regional fora

The harmonization of the Ministerial North Sea Conference with the work of the Oslo, Paris, and Bonn Commissions. This question is especially pertinent in light of the Ministerial Conference of the Oslo and Paris Commissions to be held in 1992. The main issue here is whether the Oslo and Paris Commissions enable the taking into account of subregional considerations. A first positive step in this direction was set in 1988. In 1988, upon the proposal of the Netherlands, both the Oslo and Paris Commissions adopted a decision which allows for the differentiation of policy by subregions. In short the decisions amount to the following: decisions adopted by the Commissions should set a single goal, thereby recognizing the interrelationship between the different sea areas involved. However, decisions may differentiate for different subregions as to the time path or measures to be taken to achieve that common goal -- thereby recognizing regional differences.

The role of the European Community

The role of the European Economic Community, especially in the field of land-based pollution. At present the fact that Community water quality measures do not recognize regional differences, except in that states may take further measures, in our opinion hampers the role that the EEC can play. If the European Economic Community is to have an important role in European water quality policy, which in our opinion it should, policy instruments will have to be developed which recognize that the rivers Rhine and the Ebro and the North Sea and the Mediterranean are different water systems, located in areas with different levels of industrialization, and that consequently may require distinct policies.

Increased coastal state jurisdiction

In the North Sea, so far, only France and Norway have established exclusive economic zones. The Netherlands government has come to the conclusion that exclusive economic zones offer coastal states additional possibilities to protect the marine environment. However, in a semi-enclosed sea such as the North Sea, the government felt it inappropriate to establish such a zone prior to discussion of the matter with other states. As a result, the Netherlands has submitted a proposal to the Preparatory Working Group for the Third North Sea Ministers Conference that North Sea states through concerted action consider the establishment of exclusive economic zones. If such zones are to be established in the North Sea, the Netherlands has advocated that the regime as contained in the United Nations Law of the Sea Convention should be used.

Ladies and gentlemen, I tried to give you a short overview of some of the matters which are prominent in our minds at the Rijkswaterstaat. Perhaps I have also provided you with some food for thought. I would like to conclude with an old story from the Netherlands:

In the year 1421 the Netherlands suffered from a terrible flood known as the St. Elizabeth Flood. As a result of this flood, many dikes broke and houses and fields were inundated. Both men and animals had to swim to save their lives. But not all could swim. A little child in a cradle floated in the wild water. It would have disappeared in the waves, had not a cat -- who could not swim either -- jumped on the cradle and kept the balance by moving from one side of the cradle to the other as the waves and wind required, until both safely landed on the dike that since is known as "Kinderdijk," which means child's dike.

The story is 500 years old, but the basic issue of water management that we face today is still the same. Just as the cat in the fifteenth century, we have to restore the balance each time conditions require it. That is what we did in the past. That is what we did in the Eastern Scheldt. And it is also what together we will have to do to protect and preserve the seas of the world.

Panel VI

SETTLEMENT OF DISPUTES

Richard Bilder: Our particular subject this morning is the role of international institutions in implementing the dispute settlement provisions of the Law of the Sea Convention. But we may well find ourselves drawn into a broader and more far-reaching issue: Are the Convention's dispute settlement institutions and arrangements likely to be adequate, or will we need to improve them or to provide supplementary or alternative ways of resolving ocean disputes?

To put our topic in a broader context, let me briefly mention several other questions which seem to me interesting and relevant to our discussion. First, what kinds of disputes are we talking about? Do different sorts of ocean disputes -- for example, those involving navigation, resources, or boundary delimitation -- require different kinds of dispute settlement approaches and institutions, and, if so, what kinds and why? Indeed, are there special characteristics of law of the sea disputes that may suggest a need for dispute settlement arrangements and institutions different from those we use to resolve international disputes more generally? Why do we have these special kinds of arrangements that we are in fact putting into place?

Second, it is well recognized that the best way of settling disputes is usually for the parties concerned to do it themselves, and that third-party assistance, particularly compulsory binding adjudication, should be resorted to only when negotiation fails. The Convention's dispute settlement provisions provide for dispute avoidance techniques such as notice and consultation, for non-binding dispute settlement methods such as negotiation and conciliation, and also for compulsory binding third-party adjudication and arbitration. But is the balance struck by the Convention in this respect in fact the best or most appropriate way of solving these kinds of problems? How important really is compulsory binding dispute settlement under the Convention? And are the provisions for compulsory binding adjudication or arbitration likely to be effective in furthering voluntary settlements and "bargaining in the shadow of the law"? That is, should we perhaps think and do more about trying to develop effective non-binding dispute avoidance and dispute management processes under the Convention?

Third, as among the alternative kinds of compulsory third-party dispute settlement techniques provided in the Convention, what are their respective advantages and disadvantages, when are states likely

to choose one rather than the other, and how are such choices likely to affect the law of the sea? For example, could one argue that the broad flexibility provided by the Convention system -- and in particular the possibility that similar issues may be decided by a variety of different, often ad hoc bodies -- may obstruct the likelihood of developing a consistent jurisprudence and long-term uniformity and predictability in the law of the sea? This question is implicit in Professor Queneudec's paper and has also been raised by Judge Oda and others.

Fourth, how can we best handle disputes between states that are parties to the LOS Convention and those that are not? Are there likely to be inconsistencies or problems between intra-Convention and extra-Convention procedures, and are there ways in which we may be able to accommodate or mesh these kinds of processes? Some interesting suggestions have been made in this respect by, among others, Professor Sohn, the Henkin Panel on the Law of Ocean Uses, which delivered a 1986 statement on this subject, and by Willy Ostreng's panel at last year's LSI Conference. Of course, one interesting question is what the U.S. attitude in this respect is likely to be, and in particular whether the U.S. government's strongly negative reaction to the International Court's ruling in the Nicaragua case will have any effect on long-standing U.S. support for, and indeed insistence on, compulsory dispute settlement under the LOS Convention itself. Finally, what does the rule of law mean in the context of third-party settlement of law of the sea disputes? As perhaps raised most interestingly in the boundary delimitation cases and Professor Orrego's paper, how much and what kind of constraints or limits on a tribunal's discretion is necessary for it to retain its legitimacy and character as a court of law, rather than something else? More broadly, what's so bad about decisions *ex aequo et bono* or so-called "compromise decisions"? And even more broadly, could one argue that the apparent tendency of states to move away from entrusting cases to the ICJ as a whole and what seems to be a recent trend instead toward dispute settlement through ad hoc arbitration or special chambers of the Court, may suggest a turning-away, at least by many states, from faith in a genuinely impartial global tribunal administering a uniform global body of international law? If so, what are its implications for the law of the sea?

Now let me now introduce our very distinguished panel in the order in which they will speak. All of them are eminent scholars; all of them have published extensively in the law of the sea as well as other fields, and almost all have participated in very important positions, either as

chairmen, legal advisors, or in other significant ways to the UNCLOS III negotiations. So I'll only say a few things about each of them.

Our first speaker is Professor Jean-Pierre Queneudec, who will speak on "The Role of the International Court of Justice and Other Tribunals in the Development of the Law of the Sea." Professor Queneudec is professor of international law at the University of Paris I. Among many other things, he was counsel for Guinea in the Guinea/Guinea-Bissau Maritime Boundary Arbitration, he was counsel for Libya in the Libya/Malta Delimitation Case before the International Court, he was a member of the arbitration tribunal in the Canada/France Gulf of St. Lawrence Filleting Dispute, and is Counsel for France in the Canada/France Maritime Boundary Arbitration.

Our second speaker is Professor Francisco Orrego Vicuna, who will speak on "The Role of the International Court of Justice and Other Tribunals in the Development of the Law of Maritime Delimitation." Professor Orrego Vicuna is professor of international law at the School of Law and Institute of International Studies at the University of Chile. Among other things, he participated in the Commission for Papal Mediation of the Boundary Dispute between Chile and Argentina.

Our third speaker is Dr. Renate Platzoeder, who will speak on "The Preparation for the International Tribunal of the Law of the Sea." Dr. Platzoeder is on the Faculty of Law of the University of Munich and is a senior staff member of the Institute of International Affairs in Ebenhausen. She was also a member of the UNCLOS III dispute settlement group and she has been very heavily involved in the establishment of the Law of the Sea Tribunal both as a legal advisor to the German delegation to Prepcom and in work in Bonn and Hamburg.

Our first commentator is Professor Bernard Oxman, who is professor and Associate Dean at the University of Miami School of Law. Among many other things he has been a leading commentator on the Convention, and he also assisted in the preparation of U.S. arguments in the U.S./Canada Gulf of Maine case.

As our final commentator, we're privileged to have with us Judge Sir Robert Jennings, who is a distinguished member of the International Court of Justice. Before his election to the Court he was Whewell Professor at Cambridge University. He is a leading scholar on the law of the sea, dispute settlement, and many other international law subjects.

Jean Pierre?

THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AND OTHER TRIBUNALS IN THE DEVELOPMENT OF THE LAW OF THE SEA

Jean-Pierre Queneudec
University of Paris I

Introduction

In recent years has emerged a general trend which leads to the consideration that the law of the sea today is henceforth entirely contained in the 1982 United Nations Convention. This trend may be reinforced by the first paragraph of the Preamble of the Convention, according to which the States Parties declare themselves "prompted by the desire to settle ... all issues relating to the law of the sea."

It cannot, however, be reasonably supported that the 1982 Convention is so complete that it embraces the whole law of the sea, for that would be disregarding the preponderant place still occupied in this field by customary rules, chiefly as applied by international courts and tribunals.

Whatever may be the importance of the UN Convention, since it is not yet in force, the role played by international courts and the tribunals remains a fundamental one in the development of the law of the sea. This assumption is likely to be verified through the pronouncements delivered up to now by the International Court of Justice and other tribunals.

The present contribution, devoted to a tentative appraisal of the role of the ICJ and other tribunals in the development of the law of the sea, will focus on three major points. It purports, first, to outline the importance of judicial precedents in the law of the sea; secondly, to appraise the role of those judicial bodies in relation to what can be called the clarification of the Law of the Sea Convention; and thirdly, to evaluate in which manner they fulfill a function of consolidation as regards customary law of the sea.

The Importance of Judicial Precedents in the Law of the Sea

It is undoubted that the international law of the sea, when looked in the long run, is above all of pragmatic character. It is so mainly because its content has always been drawn from two sets of basic practical considerations embodying the competing, and sometimes conflicting, objectives of members of the international community,

namely: the essential needs of international communications for commercial and strategic purposes, and on the other hand, the economic and security interests of the coastal States.

On those bases, the rules governing the different uses of the sea have progressively emerged from State practice, with a large part of unilateral action by way of claims and counter-claims or protests, the cumulative effect of which has tended either to reinforce the existing rules of law or to bring about changes in the law.

However, on several occasions, such an achievement was made possible only through the intervention of an international arbitral or judicial organ which facilitated the appearance, the consolidation, or the development of rules applicable to maritime areas and activities. Thus, international courts and tribunals have played the role of "revealer" in this field, because their decisions not only were regarded as evidence of the existing rules of the law of the sea but have been regarded also as a source of law for the future.

Moreover, a number of these judgments and awards have exerted a direct influence on the codification process undertaken in the 1950s within the International Law Commission and achieved at the First United Nations Conference on the Law of the Sea.

Once the Geneva Conventions entered into force, it has been the function of the International Court of Justice, as well as of arbitral tribunals established in relation with specific disputes, not merely to clear up dubious points of that text, but also to make a significant contribution to the development of the law of the sea by taking into account the new trends appeared in State practice and, after the opening of the Third United Nations Conference on the Law of the Sea, the accepted trends in that Conference.

The practice of international tribunals, and more particularly of the ICJ, has not really resulted in the formulation of a comprehensive and organized body of principles of international law of the sea. But a number of specific or even fundamental rules having been applied repeatedly in various cases, the outcome has been therefore the development of a kind of well-established jurisprudence with regard to different issues relating to the law of the sea.[1]

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[1]At the First United Nations Conference on the Law of the Sea, a document prepared by the U.N. Secretariat mentioned 54 decisions of international tribunals in the field of the law of the sea: *Repertoire des decisions des tribunaux internationaux relatives au droit de la mer*, doc.A/CONF.13/22 et Corr.1 (not reprinted in the *Official Documents*

General overview of the development of the law of the sea through international jurisprudence

It is obviously beyond the province of this paper to give a detailed exposition of the evolution of the case law in that matter. Nevertheless, the broad features of this case law are to be pointed out, at least in a succinct manner.

In this respect the main issues involved in the different cases decided up to now may be identified as those dealing with the following items: the delimitation of territorial and internal waters, the coastal State's jurisdiction beyond the territorial sea; the rights of navigation; the jurisdiction over shipping; the delimitation of maritime boundaries between States.

(i) The problems arising out of *the delimitation of territorial and internal waters* led very early the international tribunals to an examination of some basic concepts on which is founded the measurement of the territorial sea. Among them, the concept of *coast* has been discussed and specified on several occasions, particularly in the *Alaska Boundary* case where the Anglo-American arbitral tribunal, which was required to interpret this word as used in the Anglo-Russian Treaty of 1825, considered that no constant meaning was attributable to the expression since its use was in each case a matter of construction.[2] The question arose again, within a different framework, in the *Grisbadarna* case, where the Permanent Court of Arbitration brought into existence the principle of the general direction of coasts.[3]

Concerning the juridical notion of *bays*, the Court of Commissioners set up by Agreement of 1882 between Great Britain and the United States encountered the problem in *The Allegean* case when determining if Chesapeake Bay qualified for incorporation in the U.S. waters.[4] In this connection, the *North Atlantic Coast Fisheries* arbitration was of particular importance, as it constituted the first step

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of the Conference).

[2]*Alaska Boundary* case, GB/USA (1903), *Reports of International Arbitral Awards*, XV, p. 481.

[3]*Grisbadarna* case, Norway/Sweden (1909), *Reports of International Arbitral Awards*, XI, p. 147.

[4]J.B. Moore, *History and Digest of International Arbitrations*, vol. 4, p. 4332.

arbitration was of particular importance, as it constituted the first step in identifying the criteria to be applied in order to define a bay and, according to the Tribunal, the only test was that of relative dimensions and configurations of bays considered in relation to the interests of the coastal State concerned with the control of the waters penetrating its national coastline.[5]

However, it is generally agreed that the Judgment of the ICJ in the *Anglo-Norwegian Fisheries* case has been the most important contribution to subsequent developments in the scope of territorial waters delimitation. The Court's decision in this case was regarded by Sir H. Lauterpacht as "a significant contribution to the theory and practice of judicial legislation".[6] In fact, it introduced some flexibility within the rules dealing with the drawing of baselines when it substituted for the predominant rule of the low-water mark another rule of a general character based on a combination of elastic tests, altogether subordinated to the principle of the general direction of the coast from which the drawing of straight baselines must not depart to any appreciable extent.[7] This decision was certainly one of a general nature and of apparent novelty and it is why perhaps that ICJ did not hesitate to deliver the famous *dictum* very often quoted afterwards:

> The delimitation of sea areas has always an international aspect; it cannot depend merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is

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[5]*North Atlantic Coast Fisheries* Arbitration, GB/USA (1910), *Reports of International Arbitral Awards*, XI, p. 167. The celebrated dissenting opinion delivered in this case by Dr. Drago raised the controversial point of "vital interests" of the coastal State and the related question of "historic bays", two problems afterwards submitted to the Central American Court of Justice in the *Gulf of Fonseca* case between El Salvador and Nicaragua; *American Journal of International Law* 11 (1917), p. 674.

[6]Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens and Sons, 1958), p. 199.

[7]*Fisheries*, Judgment, *ICJ Reports* 1951, p. 116.

competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[8]

(ii) The case law relating to *the coastal State's jurisdiction beyond the territorial sea* has developed essentially during the last twenty years, because of the quite recent extension of claims by coastal States to areas which were previously part of the high seas.

It is needless to emphasize the fundamental place occupied in this field by the ICJ's Judgment in the *North Sea Continental Shelf* cases, which has certainly represented the key decision in the subsequent evolution of the continental shelf regime in international law.[9] Some years later, in the *Aegean Sea Continental Shelf* case, the International Court was then able to go further into the juridical nature of the shelf, when it stated that

> a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status.[10]

The reason put forward by the Court lies in the fact that, as the Judgment said,

> continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.[11]

With respect to the extent of the continental shelf, it is enough to recall that the *Tunisia/Libya* and the *Libya/Malta Continental Shelf* cases have more recently provided the Court with the opportunity of introducing a certain relativity in the application of the principle of

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[8] *Ibid.*, p. 132.

[9] *North Sea Continental Shelf*, Judgment, *ICJ Reports* 1969, p. 3.

[10] *Aegean Sea Continental Shelf*, Judgment, ICJ Reports 1978, p.3 (at p. 36).

[11] *Ibid.*

natural prolongation,[12] as was already partially done in the *Anglo-French Delimitation* arbitration a few years before.[13]

Concerning the other maritime zones under national jurisdiction and in particular the fishery zones, the apparent poorness of the international jurisprudence must be recorded. Since the *Behring Sea Fur Seals* arbitration, where the absoluteness of the freedom of the seas reached an apogee,[14] the international tribunals have pronounced their opinions about the exclusive fishing zones only on two occasions.

The *Fisheries Jurisdiction* cases affected the international legality and validity of such zones with regard to third States and, excepting the notion of "preferential rights" that the Judgment examined at length, the ICJ recognized solely the concept of a 12-mile fishery zone "as a *tertium genus* between the territorial sea and the high seas".[15] Such a solution, which was regarded as out-of-date by several Governments at the moment it was delivered, has become in any case totally obsolete within a very short period of time.

In the *Canadian-French Dispute concerning Filleting*, the question put before the arbitral tribunal was that of the scope of the coastal State's regulatory authority in its fishing zone with respect to foreign trawlers exercising there a fishing right recognized by treaty on an equal footing with national fishermen. In this case, the tribunal held that Canada could only use its regulatory powers *vis-a-vis* French fishing vessels without subjecting to unreasonable requirements the

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[12] *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), Judgment, *ICJ Reports* 1982, p. 18; *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment, *ICJ Reports* 1985, p. 13.

[13] *Arbitration on the Delimitation of the Continental Shelf*, France/United Kingdom (1977), *International Legal Materials* 18 (1979), p. 397.

[14] *Behring Sea Fur Seal* Arbitration, GB/USA (1893), J.B. Moore, *International Arbitrations*, vol. 1, p. 755.

[15] *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, *ICJ Reports* 1974, p. 3 (at p. 24); *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, *ICJ Reports* 1974, p. 175 (at p. 192).

exercise of the fishing right enjoyed by those vessels under a bilateral treaty.[16]

(iii) *The rights of navigation* were the subject of the important and well-known *Corfu Channel* case, where the International Court was led not only to specify the rule of innocent passage through international straits, but also to determine the characteristics of such straits.[17] And one cannot ignore that the ICJ has not long ago reaffirmed the customary character of the right of innocent passage in territorial waters, in the *Military and Paramilitary Activities* case.[18] In this last Judgment, the Court also gave its attention to the right of access to ports, which it identified as implied by the freedom of communications and of maritime commerce when foreign vessels are enjoying such a right.[19]

In this connection, one may be reminded of two late arbitrations delivered in the 19th century, which laid down the rule of free access to foreign ports under *force majeure* or in case of distress. In *The Creole* case, the umpire decided that

> The right to navigate the ocean, and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers, the laws of her own country -- must be respected.[20]

The same solution was then applied in *The Enterprise* case by the British-U.S. Claims Commission, on the ground that a vessel driven by

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[16]*Dispute concerning Filleting within the Gulf of St. Lawrence*, Canada/France (1986), *Revue Generale de Droit International Public* 90 (1986), p. 713. For a critical comment of this award, see William T. Burke, *San Diego Law Review* 25 (1988), pp. 495-533.

[17]*Corfu Channel*, Merits, Judgment, *ICJ Reports* 1949, p. 4.

[18]*Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), merits, Judgment, *ICJ Reports* 1986, p. 14 (at p. 111).

[19]*Ibid.*, pp. 128-129.

[20]*The Creole*, GB/USA (1853), J.B. Moore, *International Arbitrations*, vol. 4, p. 4375.

a stress of weather into a foreign port could not be punished for a breach of the foreign laws and regulations regarding access to ports.[21]

(iv) The international tribunals dealt on a few instances with the question of *jurisdiction* over shipping and, in particular, jurisdiction on the high seas. Thus. F. de Martens, appointed as arbitrator in the *Costa Rica Packet* case, applied the principle of the law of the flag and gave an award based upon the proposition that events which had occurred on the high seas were justifiable only by the national jurisdictions of the flag State.[22]

The Judgment delivered by the Permanent Court of International Justice in the *Lotus* case adopted also, as previously de Martens' award, the territoriality theory of ships and laid down the rule that jurisdiction

> cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.[23]

As a result, the Court considered that a collision occurred on the high seas between a French and a Turkish ship was taken for having produced consequences in a place assimilated to the Turkish territory, *i.e.*, on the Turkish vessel.

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[21]*The Enterprise*, GB/USA (1855), J.B. Moore, *International Arbitrations*, vol. 4, p. 4349.

[22]*Costa Rica Packet* Arbitration, GB/The Netherlands (1897), J.B. Moore, *International Arbitrations*, vol. 5, p. 4948. Other arbitrations have still applied this principle; see for example the awards delivered in 1921 by the GB/US Arbitral Tribunal set up by special agreement of 18 August 1910, in the case of the *Owners of the "Jessie", the "Thomas F. Bayard" and the "Pescawha"* and in the *"Wanderer"* case, *Reports of International Arbitral Awards*, VI, p. 58 and 69.

[23]*Lotus*, Judgment no. 9, 1927, *PCIJ Series A* no. 10 (at p. 18).

The *Lotus* Judgment has been an illustration of the negative influence of international case law on the development of the law of the sea. Indeed, the rule of the jurisdiction of the flag State of the damaged ship in case of collision at sea, as applied by the PCIJ, was then changed by the 1952 Brussels Convention for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collision or other Incidents of Navigation,[24] and by Article 11 of the 1958 Geneva Convention on the High Seas.[25]

The same can be said with regard to the decision of the U.S.-Panama General Claims Arbitration Tribunal in *The David* case concerning the jurisdiction over foreign ships navigating within the territorial sea. The Tribunal held that a coastal State was not prevented by international law from asserting the right to arrest, on civil process for previous liability, foreign merchant vessels passing through its territorial waters.[26] But the Geneva Convention on the Territorial Sea and the Contiguous Zone has overruled that decision in its Article 20.[27]

In relation to the jurisdiction over shipping, the question of the effective flag was twice over an underlying question before an international tribunal. In the *The I'm Alone* case, the registration of a Canadian vessel was considered as not necessarily reflecting a true link with the flag State, because the ship "was *de facto* owned, controlled, and at critical times, managed, and her movements directed and her cargo dealt with and disposed of" by several U.S. citizens.[28]

The International Court of Justice, as for its part, missed the opportunity of settling the question of the real nationality of ships in

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[24]*UNTS*, vol. 439, p. 233.

[25]*UNTS*, vol. 450, p. 82. This provision is now included in Article 97 of the 1982 LOS Convention.

[26]*Compania de Navegacion Nacional (Panama) v. United States* (1933), *Reports of International Arbitral Awards*, VI, p. 382.

[27]*UNTS*, vol. 516, p. 205. This text has been reproduced without any alteration in Article 28 of the 1982 LOS Convention.

[28]*The I'm Alone*, Canada/USA (1935), *Reports of International Arbitral Awards*, III, p. 1609 (at p. 1618).

the *IMCO Maritime Safety Committee* case.[29] Expressing his dissent, Judge Moreno Quintana criticized the Court's Opinion on the ground that it did not in fact reflect the requirement of a genuine link between the ship and the flag State, as provided for by Article 5 of the High Seas Convention which was then just signed by almost all States represented at the Geneva Conference.[30]

(v) Finally, the evolution of the case law in the matter of *delimitation of maritime zones between States* is perhaps one of the most significant contributions of international jurisprudence to the development of the law of the sea. Apart from the fact that the ICJ and other tribunals have drawn some general principles and criteria applicable in this field,[31] one of the main problems rests today that of establishing a single maritime boundary line concerning both the continental shelf and the superjacent waters, as has been already the matter of two litigations in the *Gulf of Maine* case[32] and in the *Guineas'* arbitration,[33] and as it is now expected in the current

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[29]*Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, *ICJ Reports* 1960, p. 150.

[30]*Ibid.*, p. 178.

[31]See the contribution of F. Orrego Vicuna, "The role of the ICJ and other tribunals in the development of the law of maritime delimitation." It may be noted that the PCIJ, unlike the present Court, has never had the opportunity of settling a maritime boundary case, since the *Delimitation of the Territorial Waters between Castelloriza Island and Anatolian Coast* case was not examined on the merits, as the Italian and Turkish Governments agreed not to go further in the proceedings, and the Court made an Order recording the discontinuance on 26 January 1933 (*PCIJ Series A/B* no. 51, p. 4).

[32]*Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, *ICJ Reports* 1984, p. 246.

[33]*Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *International Legal Materials* 25 (1986), p. 251.

arbitration between Senegal and Guinea-Bissau,[34] in the *Denmark-Norway Maritime Delimitation* case concerning the areas between Greenland and Jan Mayen Island,[35] and in the maritime delimitation arbitral procedure initiated by Canada and France with regard to their respective maritime zones in the region of Saint-Pierre et Miquelon Islands.[36]

The practice of international courts of referring to previous decisions

Through almost all the decisions just reviewed above, a conspicuous feature stands out in relief: namely the consistent reference to previous judicial or arbitral decisions. This regular feature, which meets more particularly in the ICJ's pronouncements, is not clearly specific of the law of the sea cases, but it holds here an importance derived from the primarily customary character of the law of the sea.

Frequently references are done by the International Court or by arbitration tribunals as mere illustration. For example, in the *Fisheries Jurisdiction* case, the ICJ limited itself to saying: "As the Court stated in the *Fisheries* case ...".[37] The *Tunisia/Libya* 1982 Judgment did likewise: "As the Court explained in the *North Sea Continental Shelf* cases ...".[38] In the same way, the *Guinea/Guinea-Bissau* arbitration cited several times the Judgments of the International Court in the *North Sea*, the *Tunisia/Libya* and the *Gulf of Maine* cases, as well as

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[34]Special Agreement signed on 12 March 1985, *Revue Generale de Droit International Public* 92 (1988), p. 449.

[35]On 16 August 1988, the Danish Government has addressed to the Registrar of the ICJ an application instituting proceedings against Norway and requesting the Court to carry out a single delimitation line between the fishing zones and the areas of continental shelf appertaining to the two States in the waters dividing Greenland and Jan Mayen (*ICJ Communique* no. 88/18, 18 August 1988).

[36]Special Agreement signed on 30 March 1989, *Revue Generale de Droit International Public* 93 (1989), no. 2, p. 480.

[37]*Fisheries Jurisdiction*, *supra* note 15, p. 22.

[38]*Continental Shelf* (Tunisia/Libya), *supra* note 12, p. 61.

the *Anglo-French Delimitation* arbitration.[39] Such quotations essentially aim at giving substance to the decision that contains them.

On some occasions, however, reference may be done in such a way that the pronouncement referred to is given an authoritative character. Thus in the *North Sea Continental Shelf*, "the Court follows the view adopted by the Permanent Court of International Justice in the *Lotus* case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case ...".[40] The Chamber constituted by the ICJ in the *Gulf of Maine* case seemed to go even further when it stated: "The Chamber need not comment on the assertion that such a rule exists, since the Court refused in the *North Sea Continental Shelf* cases ...".[41]

In relying upon and following previous decisions, the International Court, while not adopting the Common Law doctrine of judicial precedent, nonetheless has largely accepted as its own the substance of that doctrine, so going ostensibly beyond the letter of Article 38 of its Statute. As a matter of fact, this Article, when mentioning "judicial decisions ... as subsidiary means for the determination of rules of law" does that "subject to the provisions of Article 59" and leads apparently to a limitation on the Court's freedom to use its previous decisions as precedents. Furthermore, Article 59 of the ICJ Statute, as well as Article 84 of the 1907 Convention for the pacific settlement of international disputes, formulate in negative form the *res judicata* principle and seem accordingly to forbid Judges or arbitrators respectively to lay down general principles in connection with the cases submitted to them.

However, this is not the interpretation usually placed upon those provisions that make it impossible for the Court or arbitral tribunals to determine general legal principles going beyond the decision in a peculiar case.[42] Therefore, the decisions delivered by international tribunals have some value as precedents, and "judicial decisions, least

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[39]*Guineas* case, *supra* note 33, at pp. 289, 292-294, 296, 299-302.

[40]*North Sea Continental Shelf*, *supra* note 9, p. 44.

[41]*Gulf of Maine*, *supra* note 32, p. 297.

[42]See the address delivered by the President of the ICJ on the 40th anniversary of the PCIJ's inauguration, *ICJ Yearbook*, vol. 16 (1961-1962). p. 1.

of all those of the International Court, cannot be relegated to any subsidiary position."[43]

The recognition of the persuasive force of judicial precedents involves the important following consequence: the constant accumulation of decisions is not only an evidence of what international tribunals consider to be the law, but it is becoming also a genuine source of law through an imperceptible process which has been said to look like "a religious mystery into which it is unseemly to pray."[44] This does not mean of course that all judgments and awards give rise to such a result. Account has still to be taken of two significant facts.

The first one lies in the different behavior of the Judges of the ICJ and of members of *ad hoc* arbitration tribunals. While reliance on previous decisions of the International Court and other tribunals is a strongly marked feature of the latter, the former seem more reluctant to use arbitral awards as precedents. The cases in which the PCIJ or the ICJ has referred to an award of an international arbitral tribunal are rather sparse. Thus in the *Lotus* case, the PCIJ pointed out the precedent of the *Costa Rica Packet* arbitration in order to support the territoriality theory of ships[45] and in the *Gulf of Maine* case, the Chamber of the Court mentioned the *Grisbadarna* case but considered however that the relevance of that case was debatable.[46] The *Anglo-French Delimitation* arbitration appears as the award the most frequently referred to in the last Judgments delivered by the Court in matter of delimitation between States, *i.e.*, the *Gulf of Maine*,[47] *Tunisia/Libya*[48] and *Libya/Malta*[49] cases.

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[43]Shabtai Rosenne, *The Law and Practice of the International Court* (Leyden: Sijthoff, 1965), vol. II, p. 612.

[44]Sir Hersch Lauterpacht, *op. cit., supra* note 6, p. 21.

[45]*Lotus, supra* note 23, p. 26.

[46]*Gulf of Maine, supra* note 32, p. 309.

[47]*Ibid.*, pp. 293 and 324.

[48]*Continental Shelf* (Tunisia/Libya), *supra* note 12, pp. 57 and 79.

[49]*Continental Shelf* (Libya/Malta), *supra* note 12, pp. 44-45.

In some instances, the International Court has preferred to make only a general reference to other international decisions without citing a particular award. It did so in the *Fisheries* case, where the Court mentioned "certain arbitral decisions" but repudiated the solution adopted by those arbitrations concerning the ten-mile rule for the closure of bays.[50] The Advisory Opinion in the *Maritime Safety Committee* case referred also very broadly to "the language of international jurisprudence" when it appreciated the method of evaluating the ship-owning rank of a country.[51]

The second fact arises from the different degree of "authority" which is attached to the type of court or tribunal delivering the decision. Even if it is not a question of giving undue reference to decisions of some tribunals as authoritative expression of international law, in the line of the "incidents genre",[52] it may happen that a greater weight will be attached to a decision of the ICJ, because of its organic permanence, than to a decision of an *ad hoc* tribunal. As far as that perspective is concerned, one can wonder whether it is not the kind of relationship that might exist between the Court itself and a Chamber of the Court constituted for dealing with a particular case. It is not certain, for example, that it was quite by chance that the Chamber's decision in the *Gulf of Maine* case was not quoted or referred to by the plenary Court in the *Libya/Malta* Judgment delivered nearly nine months later, whereas that decision was widely used in the separate and dissenting opinions of several Judges.[53]

If a leading role is played at present by the ICJ, the question will perhaps rise alike with respect to the International Tribunal for the Law of the Sea, after the entry into force of the 1982 Convention, in

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[50]*Fisheries, supra* note 7. p. 131.

[51]*Maritime Safety Committee, supra* note 29, p. 169.

[52]See Michael Reisman, "International Incidents: Introduction to a New Genre in International Law", *Yale Journal of International Law* 10 (1984), p. 1.

[53]Separate opinions of Vice-President Sette-Camara (*ICJ Reports* 1985, p. 60), of Judges Ruda, Bedjaoui and Jimenez de Arechaga (*ibid.*, p. 76), and of Judge Valticos (*ibid.*, p. 104); dissenting opinions of Judges Mosler (*ibid.*, p. 114), Oda (*ibid.*, p. 123) and Schwebel (*ibid.*, p. 172).

spite of the unambiguous terms of the text on that point. Indeed, the four means for the settlement of disputes, which are enumerated at Article 287 of the Convention, are placed theoretically on an equal footing: no priority is in principle recognized between the compulsory procedures entailing binding decisions. In particular, such a priority cannot be implied from the order in which they are listed in that Article, and a signatory or ratifying State, when making its choice of procedure under Article 287, is entirely free to modify that order, as did the Belgian Government, for example, by its declaration of 5 December 1984.[54]

Nevertheless, it might not be impossible that the procedures for the settlement of disputes, as provided for in the Law of the Sea Convention, would lead towards the establishment of a hierarchy between international courts and tribunals having jurisdiction under this Convention. It is well-known that, for practical reasons easily understandable, Article 290(5) of the Convention grants jurisdiction to the International Tribunal for the Law of the Sea in order to prescribe provisional measures pending the constitution of an arbitral tribunal in accordance with Annex VII or VIII of the Convention. From this procedural priority could originate of course a supremacy of the decisions made by the International Tribunal, at least over the awards of arbitral tribunals. Such a prospect would be all the more possible because the Tribunal would strive for uniformity in the jurisprudence dealing with the interpretation or application of the Convention.

Yet the essential problem will remain that of the respective role of the International Court of Justice, as the principle judicial organ of the United Nations, and of the International Tribunal for the Law of the Sea, the latter having been designed as a direct competitor of the Court in the field of the law of the sea. And it can be expected that the Court and the Tribunal will effectively compete with each other in this field.

The Clarification of the Law of the Sea Convention

Since the adoption of the 1982 Convention, the performance of their traditional interpretative task by the ICJ and other tribunals ought to be enhanced, when one looks at the uncertainty which may affect both

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[54]United Nations, *Law of the Sea Bulletin* no. 5, July 1985, p. 3 (at p. 5).

the coming into force of the Convention itself and the viability of some legal regimes defined by it. Indeed, it would be undoubtedly erroneous or even dangerous to think that the transformations of the law of the sea have come to an end with the adoption of the Convention. Many elements enclosed in it may be deemed to lead to a breaking of the balance that States have reached through this conventional text. The contradictions which emerged between the participating States and the different groups of interests during the negotiations at UNCLOS III have not merely disappeared. On the contrary, because of the consensus procedure which implied that precision and clarity had at times to be sacrificed in order to gain general acceptance, those contradictions have been often concealed behind some textual artifices or void formulas, the content of which will come into light only through their implementation in State practice or, more likely, through the interpretation given by international tribunals.

For the moment, so far as the Convention is not yet in force and its text not legally binding, there is no question of interpretation *stricto sensu*. Nevertheless the ICJ and other tribunals have already begun to clarify the meaning and scope of specific provisions and thereby contribute to the implementation of the Convention. On that ground, what will be tried hereafter is identifying at once some of the subjects concerned by this clarification and the means through which the process of clarification may be conducted.

Subjects concerned by the clarification

Such a clarification not only deals with several matters covered by vague or ambiguous provisions, but also concerns some basic rules enacted or institutions built up by the Convention.

Among the points already totally or partly clarified by judicial decisions intervening at the end of UNCLOS III or after the formal adoption of the Convention, the new definition of the continental shelf is one of first importance. As early as its 1982 Judgment in the *Tunisia/Libya* case, the ICJ delivered a tentative interpretation of Article 76(1) of what constituted at that moment the Draft Convention and stated:

> That definition consists of two parts, employing different criteria. According to the first part of paragraph 1 the natural prolongation of the land territory is the main criterion. In the second part of the paragraph, the distance of 200 nautical miles is in certain circum-

stances the basis of the title of a coastal State. The legal concept of the continental shelf as based on the 'species of platform' has thus been modified by this criterion.[55]

Later on, in the *Libya/Malta* case, the Court construed the definition laid down in this Article and was of the opinion that the two concepts of natural prolongation and distance from the shore should be considered as complementary:

> ... where the continental shelf does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil.[56]

At the same time, after having ascertained the fact that both notions "are linked together in modern law", the International Court determined in this Judgment the relationship existing between the exclusive economic zone and the continental shelf, saying that

> Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the regime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.[57]

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[55] *Continental Shelf* (Tunisia/Libya), *supra* note 12, p. 47.

[56] *Continental Shelf* (Libya/Malta), *supra* note 12, p. 33.

[57] *Ibid.*

From that acknowledgement, the Court then inferred that, "for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone.[58]

In the Canadian-French *Dispute concerning Filleting*, the arbitral tribunal, for its part, has not hesitated to establish a relative equivalence between the concepts of exclusive economic zone and exclusive fishery zone, from the point of coastal State's fishing rights:

> ...the Tribunal believes that it may legitimately consider that between the Parties the concepts of economic zone and fishing zone are regarded as equivalent with respect to the rights exercised therein by a coastal State over the living resources of the sea.[59]

Apart from that, many other provisions of the 1982 Convention need to be clarified in the future. And it will be precisely the role of the ICJ and other tribunals to construe, for example, the scope of coastal State's powers in the law enforcement activities within its exclusive economic zone. When speaking of the coastal State's right to "take such measures ... as may be necessary to ensure compliance with the laws and regulations adopted by it", Article 73 of the Convention lets open the question of the use of weapons at sea in relation to the enforcement of laws and regulations of the coastal State. To have recourse to force in putting fishing laws into operation is a difficult question to solve in an abstract manner, as is the question of "reasonable bond" for the prompt release of arrested vessels and crews under Article 73(4) and 292 of the Convention. It remains a matter which can only be decided by the activity of judges and arbitrators drawing the line in each particular case, in order to verify if the opening of fire by a patrol vessel in law enforcement is or is not beyond question in the peculiar instance.

Evidently, this kind of problem could not be submitted to an international tribunal when the coastal State concerned would have made a declaration by which it did not accept the compulsory procedures with respect to disputes concerning law enforcement activities in regard to the exercise of its sovereign rights, under Article

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[58] *Ibid.* In its previous decision in the *Tunisia/Libya* case, the Court had recognized the customary character of the EEZ in the contemporary law of the sea (*ICJ Reports* 1982, p. 74).

[59] *Dispute concerning Filleting*, supra note 16, par. 49 of the Award.

298 paragraph 1(b) of the Convention. But if the question were referred to an international tribunal, it would be able to rely upon *The I'm Alone* case, where the Commission said that the United States was entitled

> to use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purposes, the pursuing vessel might be entirely blameless.[60]

The question whether use of weapons at sea is excessive or unreasonable is closely linked to that of abuse of rights and to the principle relating to the duty of States to act in good faith in the fulfillment of their obligations and the exercise of their rights, as provided for in Article 300 of the 1982 Convention. Undoubtedly the international tribunals would have also to appreciate those concepts, as well as to determine the meaning of an "abuse of legal process" on the basis of Article 294 dealing with preliminary proceedings to be applied upon the receipt of an application.

Means of clarification

Much of the work of international courts and tribunals is concerned in one way or another with the interpretation of treaties. In so doing, they are sometimes confronted with the problem of the place to be given to the preparatory work or the documentary background of negotiations leading up to the conclusion of a particular treaty or agreement. Although Article 32 of the Vienna Convention on the Law of Treaties has put down the preparatory work to the level of a complementary means of interpretation, the possibility of the considerable volume of documentation of the Law of the Sea Conference being used for interpretative purposes cannot *a priori* be excluded, on account of the numerous ambiguities contained in the text of the Convention, as was indicated earlier. It has even been assessed of the documentation emerging from the transactions of the Conference Drafting Committee covering almost all the provisions contained in the Convention that "it is almost inconceivable that the documentation of

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[60] *The I'm Alone*, *supra* note 28, p. 1615.

the Drafting Committee will not play a part in the interpretative process.[61]

Meanwhile, the International Court feels some reluctance to use preparatory work, particularly in relation to multilateral conventions. As it stated in the *Fisheries Jurisdiction* case, the various proposals and preparatory documents produced in the framework of the preparation of the Third Conference on the Law of the Sea, and especially those produced in the Sea-bed Committee, must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law.[62]

It is noteworthy that the Court, in the *North Sea Continental Shelf* cases, while it examined the preparatory work within the International Law Commission dealing with the provisions of Article 6 of the Continental Shelf Convention, did not refer to the *travaux preparatoires* at the Geneva Conference. In a similar manner, though it was invited by the Parties in the *Tunisia/Libya* case for account to be taken of "accepted trends" at UNCLOS III, the ICJ did not really examine the preparatory work at the Conference and took only into consideration the result of the negotiations as expressed in the successive negotiating texts produced by the Conference. It referred just to "the history of Article 83 of the Draft Convention" and said that this history "leads to the conclusion that equidistance may be applied if it leads to an equitable solution".[63]

The view that, once adopted, a multilateral convention possesses a life of its own independent of the intentions or even of the common intention of the participating States was expressed very strongly by Judge Alvarez in his dissenting opinion on the *Genocide Convention*

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[61]L.D.M. Nelson, "The Drafting Committee of the Third United Nations Conference on the Law of the Sea: the Implications of Multilingual Texts", *British Yearbook of International Law* 57 (1986), pp. 169-199 (at p. 190).

[62]*Fisheries Jurisdiction, supra* note 15, p. 23.

[63]*Continental Shelf* (Tunisia/Libya), *supra* note 12, p. 79.

Advisory Opinion,[64] and this view has been resumed recently in the *Dispute concerning Filleting* arbitration.[65]

The preparatory work may nevertheless be used in another context, that is, in the context of the interpretation of the Convention as a multilingual instrument, the text of which is equally authentic in Arabic, Chinese, English, French, Russian, and Spanish languages, according to Article 320. Even if a good deal of the negotiations at UNCLOS III have been conducted in English and if all the negotiating texts produced by the Conference, from the 1975 Single Negotiating Text onwards, have always been presented originally in English, the final text in other languages is not a mere translation from the English text, as revealed by the procedure followed within the Drafting Committee. The latter text cannot accordingly enjoy a special status. Therefore, the comparison of the six authentic texts may be an important means of interpretation, though the 1969 Vienna Convention does not treat the question of comparing authentic texts and stated only, in Article 33(3), that "the terms of the treaty are presumed to have the same meaning in each authentic text".[66] From this point of view, it is significant that the Canadian-French arbitral tribunal in the *Dispute concerning Filleting* has resorted to such a comparison with respect to the interpretation of the words "fishing equipment" used by subparagraph 4(a) of Article 62 of the 1982 Convention: in a footnote, the tribunal devoted itself to compare the wording "fishing vessels and equipment" in the six languages to support its interpretation under which the word "fishing equipment" did not cover filleting equipment.[67]

Thus, step by step, the case law originating in particular international disputes involving different subjects dealt with by the Law of the Sea Convention may certainly introduce some clarity in various controversial provisions, and it can reasonably be expected that States

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[64]*Reservations to the Genocide Convention*, Advisory Opinion, *ICJ Reports* 1951, p. 53.

[65]*Dispute concerning Filleting*, *supra* note 16, par. 30 of the Award.

[66]See Mala Tabory, *Multilingualism in International Law and Institutions*, (Aalphen aan den Rijn : Sijthoff and Noordhoff, 1980), pp. 190-216.

[67]*Dispute concerning Filleting*, *supra* note 16, par. 52 of the Award.

will look more and more for guidance to the progressive clarification so elaborated by judicial or arbitral decisions.

The Consolidation of Customary Law of the Sea

In the field of customary law, the freedom of the ICJ and other tribunals is assuredly greater than it may be in relation to interpretation or clarification of conventional provisions. There is in fact a discretionary element which is inherent to the judicial determination of custom, where the judge cannot "escape from the frustrating tyranny of a certain 'praetorian subjectivism.'"[68] This does not mean, however, that international tribunals are entirely free to give a label of customary rule to any likely usual practice or conduct. For that reason, "it is incumbent upon courts to examine all available evidence in a manner revealing the factual links of juridical reasoning resulting in the acceptance or rejection of practices as constituting binding custom".[69]

This kind of judicial caution facing the customary process comes to light essentially when the judge or arbitrator has to make a decision about new customary rules, because in such a case its decision will sanction or consecrate the existence of that rules as part of positive law. And from now, this role is particularly delicate with regard to the "new" law of the sea. On the contrary, when dealing with "old" customary rules, it has just to restate them, a function which, for all that, is not less important, owing to the large part laid by international customary law of the sea.

Restatement of existing customary rules

Numerous provisions of the 1982 Convention follow very closely the corresponding provisions in the 1958 Conventions, which were by and large declaratory of the traditional customary law of the sea as it stood at that time. Several other provisions of the new Convention set forth rules that became customary law since the 1958 Conference, where they have crystallized, and that "evolved through the practice of States

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[68]Joint separate opinion of Judges Ruda, Bedjaoui and Jimenez de Arechaga in the *Libya/Malta* case, *ICJ Reports* 1985, par. 37 of the Opinion.

[69]Sir Hersch Lauterpacht, *op. cit., supra* note 6, p. 387.

on the basis of the debates and near-agreements at the Conference".[70] Further rules, appearing after the Geneva Conference, were accepted by express or tacit agreement at UNCLOS III and came to reflect the practice of States. The twelve-mile rule for the outer limit of the territorial sea represents assuredly one of them.

In some recent cases, the customary character of this kind of rules has been restated. In the *Military and Paramilitary Activities* case, for example, the International Court of Justice said that

> ... foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph 1(b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point.[71]

In the *Dubai/Sharjah Arbitration*, from the similarities existing between Article 8 of the 1958 Territorial Sea Convention and Article 11 of the 1980 Draft Convention on the Law of the Sea, dealing with the possibility of using outermost permanent harbor structures as basepoints for the delimitation of territorial waters, the tribunal inferred:

> This confirms the complete agreement recorded 50 years earlier at the Hague Codification Conference of 1930 that outermost permanent harbour structures should be considered as part of the land for the purposes of drawing coastal base lines.[72]

The importance of such judicial statements is accentuated by the fact that the incorporation of a customary rule into the conventional provision does not affect the autonomy of the said custom. For, as it was emphasized by the International Court in the *Nicaragua* case,

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[70] *Fisheries, supra* note 7, p. 23.

[71] *Military and Paramilitary Activities, supra* note 18. p. 111.

[72] *Arbitration concerning the border between the Emirates of Dubai and Sharjah*, Award of 19 October 1981, p. 233.

> ... customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content.[73]

However, this does not imply that, when applying a well-established customary rule, like those just mentioned above, the international tribunals have to consider the 1982 Convention as irrelevant. This means only that

> ... the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.[74]

Consecration of new customary rules

One of the most important results of the Third United Nations Conference on the Law of the Sea, independently of the adoption of the 1982 Convention, lies certainly in the development of a new customary international law. As a matter of fact, during the negotiations of the Convention, there has been, on the part of the different States, an anticipation of the final result of the work of the Conference, so that it produced legal rules accompanied by consistent practice, before producing a conventional instrument. And States have generally accepted the substantive provisions containing these rules, at least as guidelines for their internal and external practice.

The question arises, however, of determining the actual juridical status of those provisions, which are not necessarily statements of customary law binding upon States apart from the conventional text itself. The role of the ICJ and other tribunals consists precisely in settling this question.

Among the provisions eligible as customary law, those relating to the exclusive economic zone are frequently mentioned. According to a former President of the International Court:

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[73] *Military and Paramilitary Activities*, *supra* note 18, p. 95.

[74] *Continental Shelf* (Libya/Malta), *supra* note 12, par. 27 of the Judgment.

> The provisions of the Conference texts, and the consensus which emerged at the Conference have had in respect of the exclusive economic zone a constitutive or generating legal effect, serving as the focal point for and as the authoritative guide to a consistent and uniform practice of States. The proclamation by 86 coastal States of economic zones, fishery zones or fishery conservation zones, made in conformity with the texts of the Conference, constitutes a widespread practice of States which has hardened into a customary rule, an irreversible part of today's law of the sea.[75]

Until now, the International Court of Justice has not had the occasion to decide on that point. It has just considered that "the concept of the exclusive economic zone ... must be regarded as part of modern international law".[76]

The recognition of the customary character of the exclusive economic zone as a concept or an institution is one thing; the acknowledgement of the legal regime of the EEZ as provided for in the 1982 Convention being binding under customary law, is quite another. It is necessary here to use discretion, because there is a new delusion consisting in assimilating too quickly under customary law the whole Part V of the Convention, which enters into detailed provisions when fixing the regime of the economic zone. But it is not certain that this regime is entirely part of customary law from now onwards, for the concrete regulation of details is not generally the peculiarity of customary international law, which seldom provides a ready-made set of rules. As was stated by the Chamber of the Court in the *Gulf of Maine* case:

> A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for assuring the co-existence and vital co-operation of the members of the international community.[77]

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[75]E. Jimenez de Arechaga, "Customary Law and the Law of the Sea", in: *Etudes de droit international en l'honneur du Juge Manfred Lachs* (La Haye: Martinus Nijhoff, 19984), pp. 575-585 (at pp. 584-585).

[76]*Continental Shelf* (Tunisia/Libya), *supra* note 12, p. 74.

[77]*Gulf of Maine, supra* note 32, p. 299.

Therefore, the international tribunals have to proceed with great care before admitting the birth of a new customary rule of the law of the sea, based on the relevant provisions of the 1982 Convention, whatever importance may have a text adopted by an overwhelming majority of States. The ICJ insisted on that point in the *Libya/Malta* case, when saying:

> ... it is the duty of the Court ... to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law.[78]

In addition, the new ascertained youthfulness of the customary law of the sea does not necessarily allow the international tribunals to fix definitely rules which have just emerged a few years ago. Judge Lachs accentuated this point in his dissenting opinion in the *North Sea Continental Shelf* cases:

> One should of course avoid the risk of petrifying rules before they have reached the necessary state of maturity and by doing so endangering the stability of and confidence in law. It may, however, be advisable, without entering the field of legislation, to apply more flexible tests, which, like the substance of the law itself, have to be adapted to changing conditions.[79]

In the future, one cannot exclude that some international tribunals, in addition to laying down existing rules or consecrating new customary rules, might also deem themselves to formulate solutions *de lege ferenda*. Reference may be made, in this connection, to the possibility of a conferring upon special arbitration tribunals the powers of recommendation in addition to legal decisions delivered by them. According to Article 5(3) of Annex VIII of the Law of the Sea Convention, an arbitral tribunal would be at liberty, if so requested by the parties to a dispute submitted to it, to make no binding recommendations, as was already done in the *Bering Sea* and in the *North*

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[78] *Continental Shelf* (Libya/Malta), *supra* note 12, par. 27 of the Judgment.

[79] *ICJ Reports* 1969, p. 232.

Atlantic Fisheries arbitrations.[80] There is no doubt that, in such a system, the arbitrators would go far beyond the strict application of the existing law and decide (under recommendatory formula) solutions of a practical nature, which would perhaps contribute in return to restarting a new development of the law of the sea.

[80] *Supra* note 14 and note 5.

THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AND OTHER TRIBUNALS IN THE DEVELOPMENT OF THE LAW OF MARITIME DELIMITATION

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For the past twenty years the law of maritime delimitation has been rapidly developing, a process in which the International Court of Justice and other tribunals have had a leading role. This proposition, however, implies a rather fundamental question: is there really a *corpus juris* of maritime delimitation or are we dealing in fact with the very old problem of the "Chancellor's foot"?[1] In other words, does the so called "law" of maritime delimitation have the characteristics of precision and certainty which is expected of legal rules or do we have a situation of arbitrariness and uncertainty in which equity will vary accordingly with the size of the Chancellor's foot at the ICJ and the other tribunals intervening in the matter?

These are the basic questions to which this contribution purports to outline an answer, not in terms of a highly abstract debate in jurisprudence but in terms of the issues and outcomes arising from the various cases decided in the last two decades and, above all, in terms of what can be reasonably expected in the years ahead.

The Frame of International Law and the Limits to Judicial Equity

A unique characteristic of the process relating to maritime delimitation is that its most significant legal aspects have been the work of the

[1]For a discussion of this expression of Lord Eldon in the context of maritime delimitation, see Eduardo Jimenez de Arechaga, "The conception of equity in maritime delimitation", in *International Law at the time of its codification*, Essays in honour of Roberto Ago (Milano: Dott A. Giuffre Editore, 1987): 229-239, at 239; Paul Bravender-Coyle, "The emerging legal principles and equitable criteria governing the delimitation of maritime boundaries between States," *Ocean Development and International Law* 19, No. 3 (1988): 171-227, at 199-204.

judiciary.[2] States have not been successful in legislating the law of maritime delimitations, with the exception of some specific rules embodied in multilateral conventions concerning the question of baselines, seaward limits of maritime areas, and the lateral delimitation of the territorial sea.[3] Article 6 of the 1958 Convention on the Continental Shelf, which could have provided a clear rule based on equidistance and its correction in the light of special circumstances, was never to the liking of the ICJ. The 1969 *North Sea Continental Shelf* cases[4] and the *Gulf of Maine*[5] decision, as well as every other judgnent on the matter, bear witness to this point. In fact such rule was judicially knocked down.

The fate of Articles 74 and 83 of the Law of the Sea Convention does not seem to be very promising either, having already been condemned by almost every writer commenting upon them.[6] This

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[2]Prosper Weil, *Perspectives du droit de la delimitation maritime* (Paris: Editions A. Pedone, 1988), pp. 11-13.

[3]For an overview of the efforts undertaken at the First and Third United Nations Law of the Sea Conferences, see generally Budislav Vukas, "The LOS Convention and sea boundary delimitation", in Budislav Vukas (ed.), *Essays on the new law of the sea* (Zagreb: 1985): 147-185.

[4]International Court of Justice, *North Sea Continental Shelf Cases*, Judgment, *Reports*, 1969, 3.

[5]International Court of Justice, *Delimitation of the maritime boundary in the Gulf of Maine area (Canada-United States)*, Judgment, *Reports*, 1984, 246.

[6]See, for example, David Attard, *The Exclusive Economic Zone in international law* (Oxford: Clarendon Press, 1987), pp. 224, 238; on the process of negotiation of the articles on delimitation and its legal implications, see also generally E.D. Brown, "The continental shelf and the exclusive economic zone: the problem of delimitation at UNCLOS III", *Maritime Policy and Management* 4 (1977):377-408; A.O. Adede, "Toward the formulation of the rule of delimitation of sea boundaries between States with adjacent or opposite coasts", *Virginia Journal of International Law* 19 (1979):207-255; E.D. Brown, "Delimitation of offshore areas: hard labour and bitter fruits at UNCLOS III", *Marine*

writer, however, takes exception to such generalized criticism:[7] although it is true that no clear cut rules are defined in these provisions, the fact alone of having identified international law as the controlling element of maritime delimitation is a contribution of importance in terms of preventing the recourse to equity of becoming the source of a *contra legem* development, or in other words in terms of limiting the risk of decisions dictated by the Chancellor's foot. On the other hand, it ought have been futile to define very precise rules of law at a moment in which the process has not yet consolidated and is in full development, an effort that would have been surpassed by events in the short term. It is not therefore unrealistic to expect that Articles 74 and 83 will have a bearing in the judicial or arbitral settlement of maritime delimitation disputes in the not too distant future, as there is already some evidence in the decisions of Courts.[8]

While States have not been altogether successful in enacting rules of maritime delimitation of general application, the situation is different in the light of bilateral agreements, regional arrangements, and other manifestations of State practice. This aspect of the *corpus juris* is indeed quite developed and it is only surprising to observe that little or no attention has been paid to it in the decisions of courts and

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Policy 5 (1981): 172-184.

[7]On the origins of the reference to international law in the articles on delimitation, see Francisco Orrego Vicuna, "The Law of the Sea experience and the corpus of international law: effects and interrelationships", in Robert B. Krueger and Stefan A. Riesenfeld (eds.), *The Developing Order of the Oceans* (Honolulu: Law of the Sea Institute, 1985), pp. 9-11. For a comprehensive discussion of delimitation in the light of the 1982 Convention and related developments, see Lucius Caflisch "La delimitation des espaces entre Etats dont les cotes se font face ou sont adjacentes", in Rene-Jean Dupuy and Daniel Vignes (eds.), *Traite du Nouveau Droit de la Mer*, 1985, 375-440.

[8]*Gulf of Maine* cit., supra note 5, par. 95; *Award on the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 14 February 1985, *International Legal Materials* 25 (1986): 251-307, par. 88; and their discussion in Weil, op. cit., supra note 2, pp. 160-161.

scholarly works,[9] to the point that there has not been a systematic analysis of its contents and legal implications. Whether customary rules could have already emerged from this practice is also a point to be kept in mind in the future. In any event trends are flowing from State practice and given aspects of consistency can also be noted, all of which should be kept under consideration in the context of this evolving law.

The state of customary international law as a source of general rules applicable to maritime delimitation is also uncertain. The incorporation of the basic concepts of the Continental Shelf and later of the Exclusive Economic Zone into customary international law has had a strong influence in this process, but as we shall examine further below, this relates to the question of coastal state entitlement over maritime areas and not to rules of delimitation as such, which have been affected by way of consequences. The substantive provisions of the Law of the Sea Convention with particular reference to the question of distance have strongly influenced this aspect of customary

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[9]For comments on contemporary practice relating to delimitation, see Attard, op. cit., supra note 6, pp. 213, 250-253; Haritini Dipla, *Le regime juridique des iles dans le droit international de la mer* (Paris: Press Universitaires de France, 1984), pp. 224-225; Paul Reuter, "Une ligne unique de delimitation des espaces maritimes?", *Melanges George Perrin* (Lausanne: Payot, 1984), p. 260; Gilbert Guillaume, "Les accords de delimitation maritime passes par la France", in Societe Francaise pour le droit international, *Perspectives du droit de la mer a l'issue de la 3e. conference des Nations Unies* (Paris: Pedone, 1984), pp. 276-292; Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and legal nature in international law* (Cambridge: Cambridge University Press, 1989), Chapter 7. See also from a geographical perspective J.R.V. Prescott, *The maritime political boundaries of the world*, 1985; and from a technical perspective Robert D. Hodgson, "The delimitation of maritime boundaries between opposite and adjacent states through the Economic Zone and the Continental Shelf: selected state practice", in Thomas A. Clingan Jr. (ed.): *Law of the Sea: State Practice in Zones of Special Jurisdiction* (Honolulu: Law of the Sea Institute, 1982) pp. 280-316.

law, a point which has of course been duly noted by the ICJ.[10] All of it forms also a part of the international law referred to by Articles 74 and 83 regarding maritime delimitation.

Because of the different role played by the various sources of the law of maritime delimitation at different points in time, it has become a common opinion that equidistance and equity are antagonistic concepts, particularly in the light of the ICJ decisions.[11] However, this is not what the Court said in the *North Sea Continental Shelf* cases[12] nor the tribunal in the Anglo-French arbitration.[13] In fact equidistance could well apply when ensuring the attainment of an equitable result in the specific circumstances of each case.[14] From this perspective, in practical terms the rules laid down in Article 6 of the Continental Shelf Convention might not differ greatly from those under Article 83 of the Law of the Sea Convention, the continental shelf being an area the delimitation of which can be compared in terms of those treaties. The "equidistance-special circumstances" rule could have been a more straightforward route to achieve an equitable delimitation, while the "equitable solution" rule is more circular; but nothing prevents the latter from reaching the same result as the former. There is a structural difference between both treaties in regard to the continental shelf, but as we shall comment further below, this relates not so much to delimitation as to the relationship between the continental shelf and the EEZ.

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[10]International Court of Justice, *Continental Shelf (Libyan Arab Jamahiriya-Malta)*, Judgement, *Reports*, 1985, 13, para. 34. On this case see generally Ted L. McDorman: "The Libya-Malta Case: opposite States confront the Court," *Canadian Yearbook of International Law* 1986: 335-366.

[11]For the discussion of this issue at the Law of the Sea Conference, see Adede, loc. cit., supra note 6, 211-217.

[12]*North Sea Continental Shelf* cases, cit., supra note 4.

[13]*Channel Continental Shelf Arbitration*, Decisions of 30 June 1977 and 14 March 1978, *Reports of International Arbitral Awards* XVIII, 3.

[14]Attard, op. cit., supra note 6, pp. 229-234; Weil, op. cit., supra note 2, pp. 28-29.

Be that as it may, the question has become today rather rhetorical after a constant line of ICJ decisions founded on the rejection of equidistance. The point could still be relevant, however, in the case of two States parties to the 1958 Convention and signatories to the 1982 Convention, in which case a tribunal could have two routes, or sets of rules, to decide the dispute; but here again the *Gulf of Maine* decision has evidenced a strong reluctance to apply the 1958 rules in any circumstances whatsoever.[15] It is also quite apparent that the ICJ will in any event apply a reasoning in equity, regardless of the status of the 1982 Convention in relation to the parties or otherwise. Based on these alternatives a major dichotomy of points of view has arisen in relation to how a Court should approach the issue of delimitation. On the one hand, Professor Prosper Weil has applied his excellence at legal logic to pursue the argument that equidistance ought to be the starting point for an equitable delimitation, particularly since distance itself has become the fundamental element governing the process.[16] But, on the other hand, Judge Jimenez de Arechaga, based on his first hand experience in the way the ICJ reasons in the matter, has concluded that equity does not apply ex-post in the settlement of maritime delimitation disputes since it constitutes a starting guide for seeking an equitable result, applicable since the very outset of the process.[17] In the light of that discussion it does not seem probable that equidistance might re-emerge as a general rule of conventional or customary international law, although it may well be recognised as an equitable result in the settlement of given cases. Once the ICJ and other tribunals have embarked on the exercise of reasoning in equity this is the likely course to be followed in the future.

Judicial-made law by means of the application of equity has been the natural consequence of not having States fill the framework of international law with specific general rules in the matter either through conventions or customary law. Given that the time span involved in this process is a relatively short one and that the consoli-

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[15]*Gulf of Maine*, cit., supra note 5, pars. 115-121.

[16]Weil, op. cit., supra note 2, pp. 54, 179-181. See also International Court of Justice, *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, Reports, 1982, 18, dissenting opinion by Judge Gros, par. 12-13.

[17]Jiminez de Arechaga, loc. cit., supra note 1, 231-238.

dation of such process has not yet been attained, it is also natural that rules might still be uncertain and predictability difficult to ascertain.[18]

This does not mean of course that courts may do as they please, for as already explained the overall frame of international law does set a limit to the role of equity. The degree of discretion that might be attained through equity cannot amount to arbitrariness. From this point of view the present uncertainty and lack of predictability in the applicable rules of law can only be considered a relative phenomenon, not an absolute one. To the extent that the process consolidates certainty and predictability will become more readily available, and as we shall examine next, this consolidation has already made considerable progress. The role of the ICJ and other tribunals has been decisive in this progress, which means in fact that equity has begun to yield rules of general application, albeit still few, but enough to make a big difference in the present state of the law as compared to that existing twenty years ago.

Principles of Legal Entitlement and Their Evolving Expression

Perhaps the most important contribution made by the ICJ and other tribunals to the consolidation of this particular aspect of international law lies in the clarification of the question of the basis of entitlement to maritime areas. This is indeed the cornerstone on which rests a complex structure of principles, criteria and methods of delimitation. Today it is a well known and accepted fact that the basis of legal title to maritime areas has evolved from natural prolongation to distance.[19] After the strong endorsement of natural prolongation

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[18]Bravender-Coyle, loc. cit., supra note 1, 200. See also generally L. A. Willis: "From precedent to precedent: the triumph of pragmatism in the Law of Maritime Boundaries," *Canadian Yearbook of International Law* 1986: 3-59.

[19]On the transition from natural prolongation to distance as the basis of entitlement, see Barbara Kwiatkowska, "Equitable maritime boundary delimitation - A legal perspective", *International Journal of Estuarine and Coastal law* 3, No. 4 (1988): 287-304, at 294-298; Weil, op. cit., supra note 2, 25-68; Francisco Orrego Vicuna, "The contribution of the Exclusive Economic Zone to the law of maritime delimitation", *German Yearbook of International Law*, 1989.

in the *North Sea Continental Shelf* cases,[20] the question was somewhat qualified in the *Anglo-French* arbitral award;[21] the *Tunisia-Libya Continental Shelf* case clearly anticipated the trends of change by means of the appended opinions of Judges Oda, Jimenez de Arechaga and Evensen,[22] all of which led to the express recognition of distance as the controlling foundation of title in the *Libya-Malta Continental Shelf* case.[23]

It has been appropriately commented that distance *per se* is not really the basis of entitlement for this is linked to the principle of

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[20]See generally Etienne Grisel, "The lateral boundaries of the continental shelf and the judgement of the International Court of Justice in the North Sea Continental Shelf Case", *American Journal of International Law* 64 (1970): 562-593; D.N. Hutchinson, "The concept of natural prolongation in the jurisprudence concerning delimitation of continental shelf areas", *British Yearbook of International Law*, 1984: 133-187.

[21]See generally D.W. Bowett, "The arbitration between the United Kingdom and France concerning the continental shelf boundary in the English Channel and southwestern approaches", *British Year Book of International Law*, 1978: 1-30; David A. Colson, "The United Kingdom-France continental shelf arbitration", *American Journal of International Law* 72 (1978): 95-112; Jean-Pierre Queneudec, "L'affaire de la delimitation du plateau continental entre la France et le Royaume-Uni", *Revue Generale de Droit International Public* 83 (1979): 53-103.

[22]See generally Jens Evensen, "The delimitation of Exclusive Economic Zones and continental shelves as highlighted by the International Court of Justice", in C.L. Rozakis and C.A. Stephanou (eds.), *The New Law of the Sea* (Amsterdam: North Holland, 1983), pp. 107-154; Emmanuel Decaux, "L'arret de la Cour Internationale de Justice dans l'affaire du plateau continental (Tunisie-Lybie)", *Annuaire Francais de Droit International*, 1982: 357-391; E.D. Brown, "The Tunisia-Libya continental shelf case: a missed opportunity", *Marine Policy* 7 (1983): 142-162; Mark B. Feldman, "The Tunisia-Libya continental shelf case: geographicial justice or judicial compromise?" *American Journal of International Law* 77 (1983): 219-238.

[23]See the literature cited supra note 19.

appurtenance and adjacency, however largely understood.[24] In fact distance is the expression of such basis or the specific determining factor. The same could be held true of natural prolongation, which in its time was the expression of the principle of appurtenance.[25] From this point of view, what has really changed is not the basic principle of international law but its expression. In the light of this further clarification it is possible to correctly understand the *Libya-Malta* decision and realize that the Court is today reasoning on the basis of four conceptual categories: (i) basis of entitlement; (ii) principles of delimitation; (iii) criteria for delimitation; and (iv) methods of delimitation. Until recently it was thought that only the three latter had a role to play in the process of delimitation.

The rationale for this evolution is important to bear in mind since it provides evidence that the judicial reasoning is not independent or separate from the substantive rules of international law at a given moment. While the continental shelf was the main maritime area appurtenant to coastal State jurisdiction beyond the territorial sea, it was only logical that natural prolongation be considered the expression of the basis of entitlement since it corresponded to the nature of the shelf. Geological and geomorphological criteria were then used for its delimitation. The logic of the process was well founded at the time and it could be compared in general terms to the delimitation of land territory.

But when the concept of the Exclusive Economic Zone began to emerge in international law the whole approach had to change significantly. Natural prolongation was not longer appropriate -- not even for the definition of the continental shelf -- and distance became the principal expression of the basis of title. The change that took place in the reasoning of the ICJ was triggered not by equity arbitrarily understood, but by the very change that had occured in the substantive content of the rules of international law, which was thus confirmed as the controlling frame of the process of delimitation as a whole. The abandonment of geology and geomorphology as pertinent criteria for delimitation was a consequence of the change in international law and, again, not an arbitrary decision made by the Chancellor's foot. Mention should be made in passing to the fact that the evidence introduced by parties to disputes before the ICJ and other

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[24]Weil, op. cit., supra note 2, p. 55.

[25]Ibid.

tribunals did apparently exaggerate the emphasis on the technical aspects of geology and geomorphology, thus leading to incomprehensible conclusions for the legal mind and as a result weakened the link with the legal principles such evidence was supposed to support.

Because the continental shelf and the exclusive economic zone came to have the same basis of entitlement, and this was expressed through the common denominator of distance, great legal confusion followed. It is in this confusion that the view arguing that the continental shelf was assimilated into the EEZ originates.[26] The *Gulf of Maine* decision was not entirely clear on the issue,[27] but fortunately this was clarified beyond doubt by the ICJ in the *Libya-Malta* case.[28] The trend towards a single maritime boundary is also the consequence of the common elements shared by the continental shelf and the EEZ, not affecting, however, the individuality of such concepts.

The Law of the Sea Convention reflects well the changing state of international law in the field. Besides the changes of substance in the law there is a structural change interesting to note: the continental shelf is no longer identified with the territorial sea in relation to the rules on delimitation, as was the case under the 1958 Conventions, but is identified with the EEZ in terms of the parallel Articles 74 and 83.[29] This is also a very logical approach since it evidences the difference between the delimitation of areas closely associated with the State land territory and areas which today extend vastly into the oceans.

However dramatic and reiterated the dismissal of natural prolongation might have been, this writer is of the unorthodox opinion that such concept is not entirely dead. In fact it could still well apply to the

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[26]For a discussion of this issue see Jean-Francois Pulvenis, "Zone economique et plateau continental: unite ou dualite", *Revue Iranienne de Relations Internationales* 11-12 (1978): 103-120; Francisco Orrego Vicuna, "La Zone Economique Exclusive: regime et nature juridique dans le droit international", *Recueil des Cours de l'Academie de Droit International* 199 (1986-IV): 9-170, pp. 65-67.

[27]Weil, op. cit., supra note 2, 132-136; and Dissenting Opinion of Judge Gros, source cit., supra note 5, pp. 376 et seq.

[28]*Libya-Malta* case, cit., supra note 10, par. 33.

[29]Reuter, loc. cit., supra note 9, p. 253.

delimitation of narrow maritime areas and other circumstances. No such case has been yet the subject of judicial or arbitral settlement, perhaps with the only exception of the North Sea Continental Shelf cases, where natural prolongation was of course paramount; most submitted disputes have dealt with rather large ocean areas, where distance is always significant. The resurrection of natural prolongation, however, would probably be founded on very different grounds: not as the basis of entitlement or the expression thereof, but as an equitable criteria in the light of the circumstances. Just as equidistance has been downgraded by the ICJ from the status of principle to that of method of delimitation, so natural prolongation could descend from basis of title to criteria of delimitation. It would be paradoxical that the very two concepts which were so central in 1969 would find themselves twenty years later in the last or next to last rank of conceptual categories of the ICJ reasoning.

When the question of entitlement became clear, so did some of the principles and criteria applicable to maritime delimitation. The specificity of the pertinent rule of international law is not to be found in the field of delimitation strictly speaking but in the evolution of the conceptual elements of international law relating to title and its legal expression. Neither the rule nor its consequences for delimitation have any relationship whatsoever to arbitrariness but correspond faithfully to the law as it evolves in time.

An important conclusion follows: the kind of equity with which the ICJ and other tribunals have been working is certainly not *contra legem*, however scarce such *legem* might have been up to now. It is also evident that this is not an exercise in *ex aequo et bono*[30] to the extent that this other category involves discarding the law, besides the fact that no such power has been granted to the ICJ by the parties to delimitation disputes. This conclusion in itself narrows down considerably the discretionary ambit that might be available to the ICJ in this matter.

This was of course the very understanding with which the ICJ set off the process of delimitation in 1969,[31] but it is relevant to corroborate that this reasoning was kept with until now in spite of the important changes that have taken place. This is a most significant role of the ICJ and other tribunals in the matter, to which the opinion of

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[30]Kwiatkowska, loc. cit., supra note 19, p. 289.

[31]*North Sea Continental Shelf* cases, cit., supra note 4, pars. 85, 88.

influential writers of international law has not been alien. This being an equity within the law or in any event not against the law, it is still to be inquired whether we are facing an *infra legem* or a *praeter legem* situation, and in either case whether general rules of the *corpus juris* delimitations might have been formed.

Identifying Principles and Criteria: *infra legem* and *praeter legem* Equity

If the question of entitlement has become clear, this is not quite so with regard to the other conceptual categories mentioned, namely the principles and criteria applicable to maritime delimitation. Here again the problem lies in whether such principles and criteria have a specific content such as is necessary for the formation of a general rule of law or whether it shall be the role of equity to fill in the substance of the matter on a case-by-case basis.

The discussion referred to above in relation to the role of equidistance-special circumstances and of equity has a close connection with this other question. In the first option equidistance is identified as the principle to be applied from the outset, subject to such corrections as may be justified in view of the circumstances of the case, such circumstances becoming a function of equity and leading to an equitable result; the process as a whole develops in two stages, the first associated with the principle and the second related to the pertinent criteria.[32] In the second option equity perform a single stage autonomous function, guiding the court towards an equitable result from the very first step without any reference to equidistance whatsoever, in which case equity identifies simultaneously with both the principle and the criteria; the fundamental content of the equitable principle is to reach an equitable result.[33]

The decisions of the ICJ and other tribunals have been on occasion confusing in their response to the problem. At an early stage the first option was clearly followed since equidistance was a point of reference, even if it was corrected or discarded in the light of specific circumstances as evidenced by the 1969 *North Sea Continental Shelf*

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[32]Weil, op. cit., supra note 2, 179-191.

[33]Jimenez de Arechaga, loc. cit., supra note 1, 238-239.

cases[34] and the 1977 *Anglo-French* arbitration.[35] The *Tunisia-Libya*,[36] *Gulf of Maine*[37] and *Guinea-Guinea Bissau*[38] decisions meant a complete reversal in this reasoning and opted for the second approach, but its legal justification was not easy to grasp, particularly in the *Gulf of Maine* Chamber decision. The *Libya-Malta* case to some extent reintroduced the two-stage approach but did not reach a conclusion on this ground.[39]

The winding path followed by the ICJ decisions, however, does not mean that there has been a lack of progress in the clarification of the role of principles and criteria. It can be observed indeed that the Court has been seeking to develop a coherent approach. While at the beginning there was a highly abstract rationale of equity, lacking a precise juridical definition, a more specific content is apparent in later cases providing a gradual but more straightforward answer to the issues raised. In *Tunisia-Libya*, for example, the need to avoid abstractions and to refer to the appropriate rules for attaining an equitable result was expressly mentioned, with particular reference to geographical factors and the configuration of coasts;[40] similarly, in *Libya-Malta* there was an emphasis on the functional content of

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[34]*North Sea Continental Shelf* cases, cit., supra note 4. par. 92.

[35]*Channel Continental Shelf* arbitration, cit., supra note 13, par. 240.

[36]*Tunisia-Libya*, cit., supra note 16, par. 71.

[37]*Gulf of Maine*, cit., supra note 5, par. 81, 111, 114; it is in this context that the Chamber expressed its opinion to the effect that "the error lies precisely in searching general international law for, as it were, a set of rules which are not there", par. 110. However, as argued in this article, the role of international law in the matter of delimitation has been far more active than the Chamber assumed it to be.

[38]*Guinea-Guinea-Bissau*, cit., supra note 8, par. 89.

[39]*Libya-Malta*, cit., supra note 10, par. 76, and comments by Weil, op. cit., supra note 2, 190-191; see also Jimenez de Arechaga, loc. cit., supra note 1, 236-238.

[40]*Tunisia-Libya* cit., supra note 16, par. 70.

equitable criteria.[41] The distinction between principles and criteria, however, continues to be somewhat blurred.

Various theoretical models have been proposed in order to channel the reasoning of tribunals, but none has been successful. Charney has suggested in this regard an interesting scheme for the balancing of interests;[42] Conforti has advocated that the ICJ should limit itself to the identification of principles and applicable rules, not going into the determination of the actual boundary.[43] Some submissions to the ICJ have requested only the declaration of principles and rules, what might be appropriate if what is sought is the clarification of the law and general standards; other cases have specifically requested the drawing and delimitation of the boundary, this being the approach favoured in submissions to arbitration, what will naturally lead to a specific discussion of the applicable criteria and justifying circumstances. The fact is, however, that judicial reasoning is a complex exercise and that it cannot normally be subject to a straightjacket.

It is interesting to note in this connection that the clarification and specific content of principles and criteria for delimitation, to the extent that it has taken place, is closely linked to the development of international law in relation to the exclusive economic zone. Besides having introduced distance as the expression of title to maritime areas, this development has resulted in a greater availability of equitable criteria and new approaches to the matter, such as the single maritime boundary. The greater precision of these criteria has led to a higher degree of legal certainty since flexibility, which is always a function of equity, need not fluctuate heavily in order to reach the desired equitable result. The extreme rigidity and extreme flexibility of the

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[41] *Libya-Malta*, cit., supra note 10, par. 48.

[42] Jonathan I. Charney, "Ocean boundaries between nations: a theory for progress", *American Journal of International Law* 78 (1984): 582-606, pp. 596-602, 606.

[43] Benedetto Conforti, "L'arret de la Cour Internationale de Justice dans l'affaire de la delimitation du plateau continental entre la Libye et Malte", *Revue Generale de droit international public* 90 (1986): 313-343, and comments by Weil, op. cit., supra note 2, 306-307.

law and pertinent principles are thereby avoided by means of a balanced approach.[44]

In examining the present state of principles and criteria for delimitation, or the more generic category of factors influencing delimitation, one can realize that the listing is long and their meaning or extent reasonably clear. The real problem is not the lack of principles and criteria, but the manner in which a Court will assign weight to the pertinent elements influencing the delimitation and balance them up in order to reach an equitable result. On this point is where some decisions of the ICJ and other tribunals are opened to criticism. The attitude of the Court has generally been to consider that there is no limit to the circumstances that can be taken into account to ensure an equitable delimitation, or as put by Judge Jimenez de Arechaga equity seeks "an equitable result based on the balance of all the relevant circumstances of each case."[45]

Although there can be no guarantees about which will finally be the relevant circumstances the Court will balance, the reasoning is fair enough since it ensures that all circumstances reasonably pertinent will be examined. This line of reasoning, however, was abandoned by the ICJ Chamber in the *Gulf of Maine* case and in the *Guinea-Guinea Bissau* arbitration; neutral criteria were introduced in excluding other pertinent criteria -- or circumstances -- such as economic considerations, activities and conduct of the parties, historic rights and other which perhaps ought not to be excluded *a priori*.[46] While it is true that circumstances and criteria are technically different, in practice they are closely bound together since the latter have evolved from the former and many times cannot apply independently.

On this point it could be argued that the Chamber has applied equity in a *praeter legem* manner, that is, beyond the law. Indeed, as far as the law stands at present one could understand it as compelling

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[44]See generally Orrego, loc. cit., supra note 19. See also Daniel Bardonnet, "Equite et frontieres terrestres", *Melanges Paul Reuter* (Paris: Pedone, 1981), p. 42, with particular reference to the balance of facts and interests as an essential function of equity.

[45]Jiminez de Arechaga, loc. cit., supra note 1, 238.

[46]For a criticism of this approach, Jan Schneider, "The Gulf of Maine case: the nature of an equitable result", *American Journal of International Law* 79 (1985): 539-577, pp. 565 et seq.

to take into account all relevant circumstances and related criteria, without exclusions which could introduce a measure of arbitrariness, uncertainty, and confusion. It would appear as if the Chamber had a preconceived approach to the matter submitted before it. Because of this situation the Chamber also altered the categories of conceptual reasoning of the ICJ already mentioned, and introduced a three stage process in which equity appears in three different roles: first, the determination of the boundary in application of equitable criteria; second, the adjustment of the line in the light of relevant circumstances; and third, checking the equitableness of the result by examining still other factors.[47] In this large use of equity the risk of having the Chancellor's foot is of course enormous.

The single maritime boundary approach and the use of geographical criteria are of course a main trend in the law of maritime delimitation and are here to stay. However, it is likely that the ICJ and other tribunals will rely on a more balanced approach in their reasoning and conclusions than was the case in the disputes mentioned. At any rate this is what can be gathered from the later *Libya-Malta* case, although the issue involved was of course quite different.

The actual weighing of delimitation criteria is also influenced by other considerations which are directly related to the role of international law in the matter, thus providing new evidence about the rule of law and the limits of equity in the delimitation process. These other aspects will be examined next.

Functional Nature of Maritime Areas and the Influence on Applicable Criteria

International law has not only provided the conceptual frame for the development of the *corpus juris* delimitations but has also influenced, albeit indirectly, the content and the greater weight of some of the applicable criteria. The continental shelf and EEZ regimes being the fundamental basis on which the whole process of maritime delimitation has been built, and both these regimes having a functional nature by definition, it is only natural that the rules, principles, and criteria derived therefrom shall share the same functional scope.

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[47]Ted L. McDorman, Phillip M. Saunders and David L. VanderZwaag, "The Gulf of Maine boundary: dropping anchor or setting a course?", *Marine Policy* 9 (1985): 90-107, p. 100.

Geological and geomorphological factors on which entitlement and delimitation criteria were based were retained insofar as they were functional to continental shelf delimitation, but later dismissed when functionality became associated with distance and the EEZ and the new continental shelf regimes. The former criteria may still be relied upon for continental shelf delimitation beyond the 200-mile distance and other particular circumstances. When this change in orientation took place, delimitation criteria came to be identified with the functional nature of the new regimes as they developed under international law, thus leading to the emphasis on distance and geographical criteria generally. Configuration of coasts, coastal projection, islands, third party interests, and proportionality are, among others, criteria of a geographical nature which has come to the fore as a consequence of the new functional link.[48]

The most important consequence, however, has been that this new functional relationship has led to an entirely different approach to maritime delimitation in terms of the single maritime boundary for both the EEZ and the underlying continental shelf.[49] Once the continental shelf and EEZ regimes were harmonized in terms of sharing the same basis of entitlement and its expression by means of distance, the single maritime boundary would be following shortly. As a matter of fact the single maritime boundary approach had been established in State practice since the very outset of claims to extended maritime areas, and has been constantly applied by means of a combination of equidistance and equity.[50] It would have been

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[48]For a recent discussion of these criteria see Attard, op. cit., supra note 6, 253-275; Weil, op. cit., supra note 2, 223-285; Bravender-Coyle, loc. cit., supra note 1, 181-198; Gunther Jaenicke, "The role of proportionality in the delimitation of maritime zones", *Realism in Law-Making* (The Hague: Nijhoff, 1988), pp. 51-69.

[49]On the single maritime boundary as a new approach to maritime delimitation, see Weil, op. cit., supra note 2, 128-146; Reuter, loc. cit., supra note 9; K.wiatkowska, loc. cit., supra note 19, 298-299; Orrego, loc. cit., supra note 19.

[50]Orrego, loc. cit., supra note 19, with particular reference to the 1952 Santiago Declaration on the enactment of national maritime zones by Chile, Ecuador, and Peru.

extremely difficult for Courts to ignore this trend of State practice even in the absence of a specific agreement among litigants.

The *Gulf of Maine* decision is of course the leading judicial contribution in this matter,[51] but by no means the only one. Suggestions to this effect can already be found in the *Tunisia-Libya* continental shelf case.[52] The *Guinea-Guinea-Bissau* arbitration also elaborates upon the concept,[53] and given applications can be noted

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[51]On the *Gulf of Maine* decision, with particular reference to the single maritime approach, see generally D.M. McRae, "The Gulf of Maine case: the written proceedings", *Canadian Yearbook of International Law* 21 (1983): 266-283; L.H. Legault and Blair Hankey, "From sea to seabed: the single maritime boundary in the Gulf of Maine case", *American Journal of International Law* 79 (1985): 961-991; D.M. McRae, "The single maritime boundary: problems in theory and practice", *Law of the Sea Institute Proceedings* 19 (1987): 225-234; Davis R. Robinson, David A. Colson, Bruce C. Rashkow, "Some perspectives on adjudicating before the World Court: the Gulf of Maine Case", *American Journal of International Law* 79 (1985):578-597; L.H. Legault, "A line for all uses: the Gulf of Maine boundary revisited", *International Journal* 40 (1985): 461-477; John Cooper, "Delimitation of the maritime boundary in the Gulf of Maine area", *Ocean Development and International Law* 16 (1986): 59-90; see also Schneider, loc. cit., supra note 46, and McDorman et al., loc. cit., supra note 47.

[52]*Tunisia-Libya*, cit., supra note 16, with particular reference to the question put in this regard by Judge Oda and the replies by the litigants, at 221, 232, 247, and the Opinion of Judge Oda, par. 126; see also the question by Judge Schwebel as commented by Weil, op. cit., supra note 2, p. 131.

[53]*Guinea-Guinea-Bissau* arbitration, cit., supra note 8, par. 87.

in the *Dubai-Sharjah* arbitration,[54] the *Jan Mayen* area conciliation,[55] and the *Argentine-Chile* mediation by the Holy See.[56]

While in legal theory it is generally admitted that the continental shelf and EEZ regimes continue to be independent and separate one from the other, and that no merger has occurred, the practical inconveniences of having separate boundaries and jurisdiction for overlapping maritime areas has resulted in a strong argument in favor of the utilization of the single maritime boundary approach. It is very likely that this reason will be reflected in the decisions of courts in the future, unless specific circumstances could justify a departure from such a trend. Because of the same reason it is equally predictable that continental shelf delimitation alone, without reference to the delimitation of superjacent waters, will be submitted to adjudication less often than is the case today, at any rate in relation to vast ocean expanses.

In view of the greater uniformity of international law in connection with the EEZ and the continental shelf regimes and the bases of entitlement, it is not to be expected that Courts and tribunals will find major difficulties in dealing with the single maritime boundary at the conceptual level or with regard to the applicable principles for delimitation. Although there were major conceptual differences between a continental shelf delimitation under the natural prolongation approach and a delimitation done under the new approach adopted by the ICJ, these have already been subsumed under the

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[54]Award concerning the border between the Emirates of *Dubai and Sharjah*, 19 October 1981; a single boundary was drawn for the continental shelf and other maritime areas, but an EEZ was not involved in the case, on which see Reuter, loc. cit., supra note 9, 256, note 13.

[55]*Report and recommendations of the conciliation commission on the continental shelf area between Iceland and Jan Mayen 1981, International Legal Materials* 20 (1981): 797-842; *Agreement between Iceland and Norway on the continental shelf*, 22 October 1981, *International Legal Materials* 21 (1982): 1222-1226. See also R.R. Churchill, "Maritime delimitation in the Jan Mayen area", *Marine Policy* 9 (1985): 16-38; Elliot L. Richardson, "Jan Mayen in Perspective", *American Journal of International Law* 82 (1988): 443-458.

[56]*Treaty of Peace and Friendship between Argentina and Chile*, 29 November 1984, *International Legal Materials* 24 (1985): 11-28.

present orientations. Furthermore, distance and its associated functional links with the EEZ have contributed a greater flexibility to delimitation, being more detached from territorial sovereignty than natural prolongation.

The problems that Courts and tribunals are likely to face lie, once again, in the applicable criteria for the single maritime boundary delimitation, as has already been evidenced by the cases cited. The wide variety of interests associated with the continental shelf or more so with the superjacent waters render the exercise of choosing pertinent criteria a rather difficult one. Indeed, as has been aptly commented by Churchill, criteria which are equitable for an EEZ delimitation might not have the same effect for a continental shelf delimitation or vice versa.[57] State practice indicates that many times EEZ criteria have influenced the delimitation of the underlying continental shelf, but there are also instances in which continental shelf criteria have influenced the delimitation of the superjacent waters of the EEZ.[58]

Because of this very difficulty the ICJ Chamber had recourse to neutral criteria in the *Gulf of Maine* case, deliberately avoiding to choose among criteria pertinent for either the EEZ or the continental shelf. While this approach might have facilitated the actual delimitations, it will not necessarily be kept with in future cases before the ICJ or other tribunals. As with delimitation in general, criteria will be subject to an increasing refinement, and it can be expected that the role of Courts and tribunals will concentrate heavily on this point. As a consequence of this, all pertinent interests will be duly weighed and none rejected *a priori*, thereby allowing EEZ criteria to influence continental shelf delimitation and vice versa, depending on the specific circumstances, just as it happens in State practice and other arrangements. The end result could well be that rules of law and stable criteria might be adapted to the *unicum* of the case by the operation of equity, strictly understood within the law. If so, the process of delimitation will reach a stage of legal consolidation.

While the single maritime boundary approach might facilitate the process of delimitation, it will no doubt prompt the emergence of other problems associated with the complex relationship between the

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[57]Churchill, loc. cit., supra note 55, 26-27.

[58]See generally Hodgson, loc. cit., supra note 9; and Orrego, loc. cit., supra note 19.

question of whether a request for EEZ delimitation involves necessarily the delimitation of the underlying continental shelf. This question has been addressed in detail elsewhere,[59] but it should be noted that it will pose a new task to the Courts and tribunals dealing with such issues, involving occasionally the Law of Treaties and even problems of intertemporal law.

The Choice of a Forum and Its Influence on Substance

The examination of the role of the ICJ and other tribunals in the field of maritime delimitation still requires some procedural considerations in the light of the experience gathered thus far. A first point is concerned with the advantages or disadvantages of having a dispute submitted to the ICJ, to a Chamber of the Court, or to arbitration. Although the ICJ has made some rather dramatic shifts in its line of decisions on the matter, it has been explained above that there is an overall orientation which follows closely the changes taking place in international law. It could therefore be expected that a recourse to the ICJ will have the advantage of counting on a judicial reasoning and decisions more closely linked to law in general. This is not to say that further changes in the line have been foreclosed, but that the frame of international law will always be present in the decisions, including its limits to the role of equity.[60]

A Chamber of the ICJ will probably share with the full court its attachment to international law, although this was not entirely evident in the *Gulf of Maine* decision. However, because a Chamber will have been chosen with a view to ensure a greater flexibility in its composition, it is quite likely that this very factor will result in a greater weight being assigned to the circumstances of the case, or an increased utilization of equity, to which the *Gulf of Maine* also bears witness. This is perhaps a thought to be borne in mind in choosing the judicial forum.

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[59]Attard, op. cit., supra note 6, 224-226.

[60]See, for example, the very specific references to the subjection of equity to international law made by the ICJ in various decisions: *North Sea Continental Shelf cases*, cit., supra note 4, pars. 85, 88; *Tunisia-Libya*, cit., supra note 16, par. 71; *Libya-Malta*, cit., supra note 10, pars. 45, 46.

Arbitration is of course more varied in this regard. The *Anglo-French* arbitration, for example, while keeping strictly within the law, qualified some aspects of natural prolongation, took a more balanced approach to the equidistance-equity relationship, and even hinted at the future role of the EEZ in the matter.[61] The *Beagle Channel* award was also strictly attached to international law.[62] The *Guinea-Guinea Bissau* arbitration is comparable to the *Gulf of Maine* Chamber approach. In this regard, law and equity can be well combined, but the actual weight to be given to these elements will depend on the terms of the *compromis* and the composition of the tribunal.

Conciliation and mediation have recently appeared as added alternatives, being highly successful in the *Jan Mayen*[63] and the *Argentine-Chile*[64] situations, respectively. A greater degree of flexibility and innovation can be expected in these procedures, but this will not necessarily be in keeping with the pertinent rules of law. Equity will have a main role in these alternatives. Because of this, the approach might not be suitable for all types of situations, but rather for highly politicized cases.

A second procedural aspect involves important questions of substance. The requests by third parties to intervene in maritime delimitation disputes before the ICJ have not been successful so far. Although third party intervention in general has not been favored by the Court, with regard to maritime delimitation the test of admissibility seems to be more stringent than the need to prove a legal interest as defined in the *South West Africa* decision.[65] In fact, there would seem to be a strong legal interest involved if a delimitation could impinge on other States' claimed areas, or if the failure to put forward such State's rights might be construed as acquiescence in the delimitation effected. The fact that Italy was prepared to accept the Court

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[61]See generally Orrego, loc. cit., supra note 19.

[62]*Award on the Beagle Channel Arbitration*, 18 April 1977, par. 7.

[63]See supra note 55 and associated text.

[64]See supra note 56 and associated text.

[65]International Court of Justice, *South West Africa cases*, Second phase, Judgment, *Reports*, 1966, pp. 22, 18-23, 31-33, 37-40, 51.

ruling on the merits, but not so Malta, was not decisive in the ruling of the ICJ.[66]

However, the requests to intervene in themselves called the attention of the Court to such interests, and this fact was influential in the decision about the geographical extent of the delimitation. From this point of view, it would appear that third party interests will be considered as a circumstance to be taken into account, particularly as they involve geographical circumstances of relevance. Irrespective of a right of intervention usually provided for under the Statutes of institutionalized courts, such circumstances have also been considered in arbitral procedures, as evidenced by the *Guinea-Guinea Bissau* award.[67] To the extent that delimitation criteria are further refined by Courts and tribunals this particular circumstance is likely to become more influential, above all if third parties themselves make their interests clearly known.

The Consolidation of the Legal Process of Maritime Delimitation: a Conclusion

The past twenty years have witnessed a gradual legal process which has led to the emergence of the law of maritime delimitation and its clarification step by step. General rules of international law have established a frame within which the *corpus juris delimitationis* can develop and evolve, particularly noteworthy being the rules relating to the continental shelf and EEZ regimes, the basis of legal entitlement to maritime areas and their specific expressions. The ensuing principles of maritime delimitation are few but rather straightforward, and these have also become established, particularly insofar as an equitable result ought to be attained; how to reach such a result is still a matter of controversy, where the dichotomy of views mentioned plays a leading role in the discussion. The rules and principles indicated are stable, certain, and predictable in terms of how the ICJ reasoning will deal with them.

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[66]See generally Gerald P. McGinley, "Intervention in the International Court: the Libya-Malta Continental Shelf Case", *International and Comparative Law Quarterly* 34 (1985): 671-694.

[67]*Guinea-Guinea Bissau*, cit., supra note 8, par. 109, with reference to the delimitations existing among third parties in the area.

The listing of the pertinent criteria for delimitation is also well known and can always develop further in accordance with new circumstances of disputed boundaries. To this extent it is also generally predictable. However, what is not at all stable, certain, or predictable is the manner in which a tribunal will weigh and balance these various criteria in order to reach a settlement. It is on this point that no general rules of law can be readily identified and that tribunals tend to draw the balance largely relying on equity. It can also be concluded from the foregoing that equity is normally of the *infra legem* kind, but *praeter legem* situations seem also to have occurred.

It can be expected that the role of the ICJ and other tribunals in the years ahead will concentrate with greater emphasis on the clarification of the balancing process of criteria, attaching it more closely to the rules and principles and eventually contributing to the formation of new rules of law which States might deem appropriate to enact. The ICJ is of course well aware of this need and has often referred to the identification of criteria in connection with the emergence of general rules, but success has not always been attained in this effort.[68] Equity will necessarily become more strictly *infra legem*, while always ensuring the needed flexibility to attend to the particular realities of each case. In this way the *unicum* of each controversy will become compatible with and not opposed to the rule of law.

This process as a whole is not too different from the process of consolidation which Sir Robert Jennings and Charles De Visscher so well explained in the context of titles and claims to territory. Indeed, referring to the ambiguity of actual cases, Jennings raised the question of "whether the various factors contributing to building a title cannot usefully and instructively be subsumed under the one heading of a process of 'consolidation', and regarded as being for essential purposes all part of one legal process... ."[69] Or, as put by Charles De Visscher, this process represents "a complex of interests and relations which in

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[68]See decisions cited in supra note 60; and see also the refusal by an ICJ Chamber to consider *praeter legem* equity: *Burkina Fasso-Mali, Reports*, 1986, par. 28. On the need to develop legal rules in order to limit the current uncertainties, see also generally Jonathan I. Charney: "The delimitation of ocean boundaries", *Ocean Development and International Law*, Vol. 18, 1987, 497-531.

[69]R. Jennings, *The acquisition of territory in international law* (1963), pp. 23-24.

themselves have the effect of attaching a territory or an eclipse of sea to a given State", all of what is taken into direct account by the judge in order to decide *in concreto* a dispute.[70]

In the matter of maritime delimitation it might not be today a question of title as it was in the past, but it is certainly a question of how this title will be applied in practice to determine the attachment of an area to a State, and in so doing which will be the specific factors or criteria that the judge will take into account, or, in other words, how the complex of interests and relations will actually be weighed and balanced up. There can be no doubt that the aggregate of aspects is constitutive of a legal process. It is the consolidation of this process that is presently being pursued by the role of Courts and tribunals.

[70]Charles De Visscher, *Theory and Reality in Public International Law* (1968), p. 209.

THE ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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The History

Considerations on the creation of a new international tribunal of universal character date back to the days of the UN Sea-Bed Committee. In 1973, the United States submitted "Draft articles for a chapter on the settlement of disputes" and proposed a "Law of the Sea Tribunal."[1] These draft articles contained a provision that disputes relating to the interpretation or application of the future law of the sea convention were to be submitted to compulsory dispute settlement procedure on the application of one of the parties and that the decisions of that tribunal would be binding upon the parties.

This initiative by the United States may be seen as the first decisive step towards the establishment of the International Tribunal for the Law of the Sea as provided in the United Nations Convention on the Law of the Sea.

In this context, two other proposals have to be mentioned. In 1970, the United States put forward the "Draft United Nations Convention on the International Sea-Bed Area" suggesting the International Sea-Bed Authority.[2] According to this proposal, the Authority had three main organs: the Assembly, the Council, and the Tribunal. This draft provided that entities other than States would have access to that Tribunal. In other words, a privilege hitherto reserved to States was to be extended to natural and juridical persons engaged in deep sea-bed mining activities.

This proposal was not only reflected in the "Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil

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[1] A/AC. 138/97, 21 August 1973.

[2] A/AC. 138/25, 3 August 1970.

thereof, beyond the Limits of National Jurisdiction"[3] but led to the Sea-Bed Disputes Chamber as contained in the Convention.

In 1971, Malta submitted a "Draft Ocean Space Treaty."[4] It was suggested to establish so-called "International Ocean Space Institutions" having as the principal judicial organ an "International Maritime Court." This Maltese initiative did not attract much attention because the maritime nations found it was too revolutionary and the coastal States felt it was very conservative.

In the early 1970s, not many States were enthusiastic about international litigation. The International Court of Justice was generally criticized and the UN General Assembly called for a review of its role in 1970 and 1971. The Court was asked to contribute ideas but held the view that nothing was wrong with it, that the States were to be blamed for not making use of the Court and not accepting its compulsory jurisdiction.

In my recollection several factors were favorable to the creation of the International Tribunal for the Law of the Sea in those days.

First, the judgments of the Court concerning the *Icelandic Fisheries* Cases did not help to restore its shaky reputation. The judgments were seen by many as a first class funeral of the traditional law of the sea and a further sign that the Court was not able to cope with the progressive development of international law taking into account the needs and interests of developing countries.

Second, the United States had formulated seven issues to be covered by the future convention, the last being compulsory dispute settlement. This list was also referred to as the "Nixon Ocean Policy."

Third, the Soviet Union was not yet ready to discuss dispute settlement procedures going further than Article 33 of the UN Charter. In addition, the Soviet Union had only reluctantly agreed to the Third United Nations Conference on the Law of the Sea. Against this background, it is evident that there could not have been better incentives to elaborate a comprehensive dispute settlement system.

Already at the Caracas Session in 1974, action was taken. Among the large number of delegates not all wanted to have a good time only. Especially the legal experts starved to do some useful work. Many of

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[3]U.N. Res. 2749 XXV, 17 December 1970.

[4]A/AC. 138/53.

contribute towards the general confusion on what was really going on. Only a very small number of delegations had knowledge of and access to some private gatherings such as the "Group of Juridical Experts," which was also called the Evensen Group. In this situation, the activities of the United States delegation to assemble a group on dispute settlement could not be but successful. I remember very well Professor Louis Sohn working in the corridors and at dinner parties. He spread the message that the work on a chapter on dispute settlement was a matter for the legal profession and should not be left to diplomats if the complete failure of the Geneva Conference on the Law of the Sea of 1958 was not to be repeated in this respect. It was true that such danger was around the corner. The General Committee decided that "item 21" of the program of work, namely "settlement of disputes," was left to all Main Committees in so far as they are relevant to their mandate.[5] Such approach, of course, did not give priority to the issue of dispute settlement so that the "Informal Working Group on Settlement of Disputes" had not to compete with the activities of the chairmen of the Main Committees at that stage. Widely unnoticed, the Group elaborated its first official working paper.[6] At the Geneva Session in 1975, the first informal "Draft Statute of the Law of the Sea Tribunal" was issued.[7]

In the introductory note to that draft, an explanation was given why the Group promoted the establishment of a Law of the Sea Tribunal:

> The accompanying draft is based on the Statute of the International Court of Justice (ICJ), a document which has functioned well over a period of more than fifty years. It has the advantage of the familiar and its acceptance as the basis of the draft might help to avoid reopening of too many issues which have been satisfactorily settled in 1920 and 1945.

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[5]A/CONF. 62/28, 20 June 1974.

[6]A/CONF. 62/L. 7, 27 August 1974.

[7]See, Renate Platzöder, Third United Nations Conference on the Law of the Sea: Documents, Vol. XII, p. 23.

Nevertheless, there might be some advantage in departing quite drastically from this model when building a new judicial institution for the new regime of the oceans. There should be not only a new tribunal but also a new approach to many crucial issues, which should not be crippled by too strict adherence to an old statute, however venerable it might be.

Should a new approach be preferred, it is still quite likely that many provisions of the ICJ Statute would be retained as they present an adequate solution for problems old and new. Two important changes might, however, be considered.

In the first place, a simplification of the procedure for the election of members of the Tribunal, and separating it from the political organs of the United Nations. Instead, the members of the Tribunal might be elected by a meeting of the States parties to the Law of the Sea Convention by a procedure similar to that envisaged for the Human Rights Committee by the 1966 Covenant on Civil and Political Rights and for the Committee on the Elimination of Racial Discrimination by the 1965 Convention on the Elimination of All Forms of Racial Discrimination. Alternatively, the members of the Tribunal might be elected by the International Court of Justice from among candidates nominated by States and appropriate international organizations.

In the second place, it might be desirable to shorten the draft statute considerably by omitting many procedural details which belong appropriately to rules of procedure of the Tribunal. Many of the articles could thus be relegated to rules of procedure, giving the Tribunal more flexibility in formulating procedural arrangements especially suitable for the new law of the sea regime.

In very short time, the Group presented a substantial informal working paper on a "Chapter on Settlement of Disputes."[8]

In 1976, the President of the Conference was entrusted to draft the Chapter on "Settlement of Disputes," Part IV, of the Informal Single

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[8]SD.Gp/2nd Session/No. 1/Rev. 5, 1 May 1975 and A/CONF. 62/Background Paper 1, 6 August 1976.

Negotiating Text,[9] which included a Statute of the Law of the Sea Tribunal. However, the Revised Single Negotiating Text contained in Part I, drafted by the Chairman of the First Committee,[10] a separate Statute for a Sea-Bed Dispute Settlement System. From discussions of the informal Plenary in 1976, the proposal surfaced to merge the Sea-Bed Tribunal and the Law of the Sea Tribunal.[11]

In Part IV of the Revised Single Negotiating Text[12] an Annex II was included containing the Statute of the Law of the Sea Tribunal comprising the Sea-Bed Disputes Chamber which later became Annex VI of the Convention, the Statute of the International Tribunal for the Law of the Sea.

The Statute

The Tribunal is constituted by the Convention. Within six months of the date of its entry into force, the Secretary-General of the United Nations will convene a meeting of the States Parties to elect twenty-one judges. The Tribunal will elect its President and Vice-President and will appoint the Registrar. The Sea-Bed Disputes Chamber will be established by the Tribunal and shall be composed of eleven judges. The Chamber will form *ad hoc* chambers for dealing with particular disputes. The Tribunal may form special chambers for dealing with particular categories of disputes. There will be a chamber to determine disputes by summary procedure.

The Tribunal is open to States Parties of the Convention and to others, if such cases are submitted pursuant to any other agreement conferring jurisdiction on the Tribunal. The Tribunal is open to entities other than States in cases provided for in the deep sea-bed regime.

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[9]A/CONF. 62/WP. 9/Rev. 1, 6 May 1976.

[10]A/CONF. 62/WP. 8/Rev. 1, 6 May 1976.

[11]*Op. cit.*, Documents, Vol. XII, p. 221.

[12]A/CONF. 62/WP. 9/Rev. 2, 23 November 1976.

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement. The Tribunal shall apply the Convention and other rules of international law not incompatible with the Convention. In the case of the Sea-Bed Disputes Chamber the applicable law includes also the mining code of the International Sea-Bed Authority and the terms of contracts concerning deep sea-bed activities.

The Tribunal shall frame rules for carrying out its functions, including in particular the rules of procedure. The decisions of the Tribunal are final and binding upon the parties to the dispute. The expenses of the Tribunal shall be borne by the States Parties and by the International Sea-Bed Authority. The parties to a dispute will bear their own costs.

The Tribunal is not the only court or tribunal having jurisdiction over disputes concerning the interpretation or application of the Convention. The Tribunal will have to compete with the International Court of Justice, with an arbitral tribunal constituted in accordance with Annex VII of the Convention, with special arbitral tribunals constituted in accordance with Annex VIII of the Convention and, of course, with the principle of free choice of peaceful means. It is only the Sea-Bed Disputes Chamber which is not affected by the provision on choice of procedure as contained in article 287 of the Convention. One can only but hope that the notion of competition is not only healthy for economic growth and development but also for the promotion of settlement of disputes by judicial means to the effect that the quality and quantity of judgments by international courts and tribunals will increase steadily.

It falls within the mandate of the "Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea" to make such practical arrangements for the establishment of the Tribunal that it will be in a position to stand such kind of competition. But it is also the host country of the Tribunal which has undertaken appropriate efforts to provide for the Tribunal a respectable home and such facilities needed that this new World Court will have a good start and will be able to contribute to the settlement of disputes by peaceful means arising from the traditional and future uses of the oceans.

The Seat and Site

The question of the seat was decided by the Conference on 21 August 1981. There were three candidates: the Federal Republic of

Germany, Portugal, and Yugoslavia. The vote was taken by secret ballot and two secret ballots were needed. In the first, none of the candidates received the required majority of 71. The Federal Republic of Germany received 67 votes, Yugoslavia 59 and Portugal 15. In the second ballot, the Federal Republic of Germany received 78 and Yugoslavia 61 votes.[13]

Prior to the voting of the Conference, the President of the Conference undertook private consultations with the delegations of the six candidates, three for the Tribunal and three for the Authority (Fiji, Jamaica, Malta). Two results emerged from it.

First, the decisions on the seats would be taken by the informal Plenary of the Conference. The votes would be indicative rather than formal, the six candidates would agree to abide by the results, and the outcome would be taken into account in any future revision of the draft Law of the Sea Convention prepared by the President and the other main officers of the Conference.[14]

Second, the President reported in the "Introductory Note" to the Draft Convention on the Law of the Sea "that the decisions on the sites of the Authority and the Tribunal were taken by the informal Plenary subject to the requirement that the States specified should have ratified the Convention by the time of its entry into force and should remain Parties to it thereafter."[15]

In paragraph 38 of the Final Act of the Conference reference is made to the "Introductory Note":

> At the resumed tenth session, the Conference decided that the decisions taken in the informal plenary concerning the seats of the International Sea-Bed Authority (Jamaica) and the International Tribunal for the Law of the Sea (the Free and Hanseatic City of Hamburg in the Federal Republic of Germany) should be incorporated in the revision of the draft Convention and that the introduc-

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[13]UN Press Release SEA/145, 21 August 1981.

[14]UN Press Release SEA/145, 21 August 1981.

[15]A/CONF. 62/L. 78, 28 August 1981.

tory note to that revision should record the requirements agreed upon when the decision concerning the two seats was taken.[16]

The Final Act was signed by 140 States and four entities other than States, including the European Economic Community. The Final Act was not signed by all States which signed the Convention. But the Final Act was also signed by States which did not sign the Convention, such as the United States, United Kingdom, Venezuela, Equador, the Federal Republic of Germany.

The Federal Republic of Germany submitted Hamburg as candidate for the seat of the Tribunal in 1980,[17] which was confirmed by a letter dated 17 March 1981 from the Head of the Delegation of the Federal Republic of Germany.[18] Together with this application, an impressive park area of some 36,000 square meters was offered as site for the Tribunal situated on the north bank of the River Elbe in the district of Altona-Nienstetten.

According to article 1, paragraph 2, Annex VI of the Convention, "The seat of the Tribunal shall be in the Free and Hanseatic City of Hamburg in the Federal Republic of Germany". This rather complicated wording has an interesting legislative history.

As I have pointed out already, the decision of the seat was taken in an informal meeting of the Conference, where no written proposal was presented to amend or rather to fill in the relevant articles of the draft Convention. The drafting of those articles was done by the President and the Chairmen of the Main Committees. In the case of the seat of the Tribunal, a rather peculiar wording, also grammatically wrong, was suggested: "The seat shall be at, Germany, Federal Republic of."[19]

I do not think that any member of the delegation of the Federal Republic of Germany was consulted. In any case, it was not just a

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[16]A/CONF. 62/121, 21 October 1982.

[17]A/CONF. 62/SR. 135, 25 August 1980.

[18]A/CONF. 62/111, 18 March 1981.

[19]A/CONF. 62/L. 78, 28 August 1981.

mere drafting problem to straighten out such wording. There exists an old quarrel over the Russian translation of "Bundesrepublik Deutschland." The Chairman of the Drafting Committee suggested saying simply: "The seat of the Tribunal shall be in Hamburg". There are many precedences in international treaties not to name the host country but the city of the seat and site, for instance the Statute of the International Court of Justice. Certainly, this would have been an elegant solution.

But considering the political, legal and financial implications of the decision on the seat, it was not a very good idea to substitute Hamburg for Federal Republic of Germany. Article 1, paragraph 2, Annex VI was re-drafted by the Delegation of the Federal Republic of Germany in all six UN languages, introduced to the Drafting Committee and finally accepted by the Plenary of the Conference on 24 September 1982.[20] The solution to the German-Soviet problem was found by exploring and exploiting the Russian grammar. The Russian language offers six cases. In translating "Bundesrepublik Deutschland" the Soviet Union will not accept the first case ("Federativnaja Respublika Germanija") and the Federal Republic of Germany cannot accept the second case ("Federativnaja Respublika Germanii"). Acceptable for both countries is either to have all three words in the second case ("Federativnoj Respubliki Germanii") as used in Conference Resolution II, or to use the sixth case ("Federativnoj Respublike Germanii"). In the Russian language the sixth case is used to make reference to a location. And this sixth case could only be used by a combination of Hamburg and the Federal Republic of Germany.

I am not only explaining the history of the provision on the seat of the Tribunal for the sake of completeness or perhaps to amuse friends and colleagues but also to report that this linguistic struggle had such positive results. The originally rather pragmatic co-sponsorship of the Federal Government and the City of Hamburg concerning the seat of the Tribunal was written into the Convention and formalized, if I may say so.

The first offspring from this happy match was a working group under the auspices of the Federal Minister of Transport. The group administered the affairs connected with the seat and site until 1986. During this period the Federal and Hamburg authorities developed

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[20]A/CONF. 62/SR. 184, 11 October 1982.

activities on how to make the best use of the site taking into account the relevant reports of the Secretary-General.[21]

A first assessment on space requirements were drawn up by German authorities and UN officials in 1983. A group of prominent Hamburg architects was commissioned to design a plan and model for the Tribunal. In 1984, the Mayor of Hamburg invited Under-Secretary General Mr. Nandan and other UN officials to visit the site and to see the plans and the model for the building of the Tribunal.[22]

Soon the preparations for the establishment of the Tribunal in Hamburg had reached a stage when further actions had to be taken.

In 1986, the Mayor of Hamburg invited the Chancellor of the Federal Republic of Germany for dinner. Subsequently, a decision of the Federal Government was taken that the establishment of the Tribunal will fall within the competence of the Federal Minister of Justice. On 17 December 1986, the Federal Government decided, in view of its commitment to ensure that the Tribunal can start to work in Hamburg from the date of its establishment, to erect the office building at its own expense, including a substantial contribution by the City of Hamburg, and to make it available in accordance with the international practices that have evolved in connection with the provision of premises for United Nations bodies by industrial countries.[23] It was further decided that, in the event that the Tribunal will be established before the completion of the new office building, the Federal Republic of Germany will ensure adequate temporary accommodation for the Tribunal in Hamburg.

In August 1987, the Chairman and the Vice-chairmen of the Special Commission 4 of the Preparatory Commission as well as Mr. Nandan

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[21]A/CONF. 62/L. 65, 20 February 1981; A/CONF. 62/L. 76, 18 February 1981.

[22]LOS/PCN/SCN. 4/L. 6, 2 September 1986; LOS/PCN/SCN 4/L. 8, 13 March 1987.

[23]LOS/PCN/80, 12 March 1987.

and Mr. Chitty from the UN Secretariat visited Hamburg and Bonn.[24]

Although the plans and the model were well received, the idea was developed to hold an international architectural competition for the construction and design of the building for the Tribunal. It was felt the Tribunal would deserve a building chosen from designs submitted by a number of foreign and German architects. The Members of the United Nations were informed by the Secretary-General through his Report on the Law of the Sea to the General Assembly.[25]

In March 1989, the competition was formally announced by the Federal Minister for Regional Planning, Building and Urban Development. Twenty architects, ten from the Federal Republic of Germany and ten from abroad, were invited, and an international jury of twenty-five persons was set up. The jury met in Hamburg in April 1989, to answer questions of the architects. The competition is carried out according to the "UNESCO Recommendations for international architectural and urban planning competitions" and to the relevant national principles and guidelines.

The scope and modalities of the competition are based on the results of consultations between German authorities and the relevant offices of the United Nations. Agreed was a list of personnel of 113, including the twenty-one judges and the registrar. The concept and size of the building was considered. The space requirement of about 9,000 square meters is based on the assumption that the Tribunal will use a limited number of working and official languages taking into account that no decision has been taken yet by the Preparatory Commission.

The scope and modalities follow also the provisions of the Convention, the draft Rules of the Tribunal,[26] the revised draft Headquarters Agreement between the International Tribunal for the Law of the

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[24]LOS/PCN/SCN. 4/L. 12, 21 March 1988.

[25]A/43/718, 20 October 1988, p. 46.

[26]LOS/PCN/SCN. 4/Rev. 1/Part I, 30 June 1986; LOS/PCN/SCN. 4/Rev. 1/Part II, 24 March 1987;LOS/PCN/SCN. 4/Add. 1, 25 March 1985.

Sea and the Federal Republic of Germany,[27] the draft Protocol on Privileges and Immunities of the International Tribunal for the Law of the Sea,[28] and the future Relationship Agreements between the International Tribunal for the Law of the Sea and other international organizations.[29]

One might wonder why all these instruments would have an effect on the concept and construction of the building. The most evident example for a provision having a direct impact on the planning of the building is article 2, paragraph 1 of the Statute (Annex VI of the Convention): "The Tribunal shall be composed of 21 judges." It is obvious that twenty-one offices and meeting rooms large enough for twenty-one judges are required. But here already a number of questions arise: Are the private sittings of the Tribunal restricted to the twenty-one judges or will other persons have access to such meetings, such as the registrar, other officials, secretaries, interpreters, technicians? For some of these rather important questions answers were found in the draft Rules of the Tribunal. Looking at the draft Rules you will discover two persons the Statute of the Tribunal does not mention: the senior judge and the assistant registrar. In the draft Headquarters Agreement one finds quite a number of provisions relevant in the construction and design of the building, for instance the articles on inviolability and protection of the headquarters district, on public services, on communications facilities, on the flag and emblem. According to the preliminary considerations on the relationship agreements, the Tribunal will be well connected to the UN system, to the Secretariat, the Security Council, the International Court of Justice, the International Sea-Bed Authority, and to other international organizations. Such co-operation will take place on different levels. It follows from this that adequate meeting rooms and other facilities have to be provided. The Presidency will reside in an already existing villa built in 1871. When restored it will be a quite suitable place for meetings with the Secretary-General, other prominent persons of the UN family, and heads of State. There will

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[27]LOS/PCN/SCN. 4/WP. 5/Rev. 1, 8 August 1988.

[28]LOS/PCN/SCN. 4/WP. 6, 23 March 1988.

[29]LOS/PCN/SCN. 4/WP. 7, 10 March 1989.

be a special dining room. Its size is limited to about fifty persons. This room will be large enough for the twenty-one judges, the senior officials of the Tribunal, and their spouses. In cases the President of the Tribunal wishes to entertain more people, such lunches or dinners would have to take place outside the Tribunal. There is a first-class restaurant nearby. The restaurant has been visited by many official guests of the City of Hamburg, including Mr. Nandan, Mr. Chitty, the Chairman of Special Commission 4. No complaints were heard.

As to the meeting rooms of the Tribunal, there will be a Main Room for public sittings of the Tribunal as a whole and the Sea-Bed Disputes Chamber. The Main Room will be constructed in such way that it can be enlarged so it may serve also for meetings of the States Parties of the Convention and for public events.

There will be two chambers for public sittings of the Special Chambers and the ad hoc Chambers. Directly adjacent to the Main Room and to the Chambers there will be meeting rooms for private sittings. The building will have also adequate facilities for the use of so-called "visiting judges". Thus, the Tribunal will be in a position to host international courts or tribunals which have no seat and site as the tribunals provided for in Annexes VII and VIII of the Convention and in other international agreements.

To attract cases and visiting judges it is surely not enough to provide rooms for the Presidency, the judges, the registrar, the officials, and the staff as well as a restaurant and a cafeteria. There has to be also an excellent library. The Library of the Tribunal will be its "academic heart and legal conscience." When the document for the international architectural competition was drafted different views were expressed on the size of the Library. German and UN officials came to the conclusion that the books and documents on the law of the sea fit easily in a room of sixty square meters. This assessment is, of course, questionable.

My dear friends and colleagues, here is your chance to influence the planning and construction of the building of the Tribunal. I invite you to donate a book or two for the Tribunal. I am sure we will be able to show that the Library will have to be enlarged considerably. I shall keep the books in good custody and will transfer them to the first elected President of the Tribunal. I shall draw up a "List of Donors" and shall report from time to time on the results of this project.

There are two more activities concerning the seat and site of the Tribunal I should like to report on. The prizes of the architectural competition will be awarded in September, 1989 by the jury. Then, the follow-on work will commence, and the Federal Minister for Regional Planning, Building, and Urban Development will award the

contract for the implementation of the design recommended by the jury.

The host country of the Tribunal does not limit its activities to the construction of the building in Hamburg. In 1988, considerations concerning the intellectual, social, and cultural environment of the Tribunal began to take shape. In 1989, the Federal Minister of Justice initiated the foundation of a "Curatorium." There is no English word for it. The Mayor of Hamburg has invited some twenty-five persons from Hamburg and other regions of the Federal Republic of Germany to establish themselves as the "Friends of the Tribunal."[30] The "Friends" will assist in many ways to make the Tribunal a success and to make the judges, the officials, and the staff feel at home in the Federal Republic of Germany and in Hamburg which is a city committed by its long maritime tradition, its geographic location, and its Constitution, in the spirit of peace, trade and commerce, and understanding, as a mediator between all regions of this planet.

The Work of the Preparatory Commission

The mandate of the Preparatory Commission concerning the establishment of the Tribunal is stipulated in paragraph 10 of Conference Resolution I:

> The Commission shall prepare a report containing recommendations for submission to the meeting of the States Parties to be convened in accordance with Annex VI, article 4, of the Convention regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea.

In March 1984, the Secretariat issued a working paper in which the mandate of the Preparatory Commission with respect to the Tribunal was elaborated.[31]

In paragraph 2 of this working paper, arguments were put together to extend the mandate of the Preparatory Commission: "the report should be as comprehensive as possible and should cover all the practical arrangements that are necessary for establishing the Tribu-

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[30]See, DIE WELT, 30 May 1989.

[31]LOS/PCN/SCN. 4/WP. 1, 16 March 1984.

nal." The Chairman of Special Commission 4 identified several items to be considered:

(i) the elaboration of a draft headquarters agreement with the host country;
(ii) preparation on an agreement relating to the privileges and immunities of members and other officers of the Tribunal as well as the representatives of parties, witnesses, and the staff of the Authority;
(iii) arrangements for the initial and subsequent financing of the Tribunal;
(iv) the preparation of draft rules and regulations for the staff of the Tribunal;
(v) preparation of the internal administrative and financial rules of the Tribunal;
(vi) the preparation of the site of the Tribunal with related buildings and other facilities; and
(vii) the consideration of procedural rules.

The working paper also mentions the relationship agreements and the general organizational structure. In other words, the list of items of Special Commission 4 covers nine points.

After almost six years of negotiations, considerable progress has been made. However, only two items have been settled, the preparation of the site of the Tribunal and the general organizational structure.

The revised draft Headquarters Agreement will have to be considered again after the conclusion of the debate on the draft Protocol on Privileges and Immunities. Special Commission 4 has spent quite some time on the privileges and immunities. From the standpoint of a lawyer or an official having experience in handling those matters one cannot but wonder why the proposed privileges and immunities were not extended to the pets of the houshold of judges, officials, exports, witnesses, advocates and counsel. So far, the majority of delegates are convinced that privileges and immunities should be granted also for personal purposes, honors, and distinctions and should not be limited to what is necessary to fulfil only those functions strictly related to the work of the Tribunal. During the last session of the Preparatory Commission this functional approach was discussed and defended by only some delegations. Hopefully, the redraft will reflect at least to some extent the concerns of the experts on privileges and immunities. I do not wish to go into details on the problems of spouses, dependent relatives, personal baggage, sealed bags, and correspondence by

courier; I only want to state that the world we live in is sometimes quite a dangerous place. And whether the majority of the delegates of the Preparatory Commission like it or not, the Protocol on Privileges and Immunities will have to take into account that there is illicit trade in narcotic drugs and weapons and that there have been cases of terrorism where innocent people were used to carry plastic bombs into airports and in planes. Some delegations have made statements to the effect that their countries will not become parties to the Protocol if privileges and immunities will not be restricted accordingly.

The work on the draft Rules of the Tribunal has not yet been completed. No agreement has been reached on the procedure concerning prompt release of vessels and crews. The matter is certainly complicated but has been also mishandled, for instance, by sudden and unexpected changes in the program of work. It happened at least twice that the maritime experts had either not come or had come too early and had already left when the issue on prompt release of vessels was to be discussed by Special Commission 4.

The draft Rules of the Tribunal are otherwise completed and follow as closely as possible the Rules of the Court. Personally speaking, I had hoped that Special Commission 4 would follow the advice of the "Informal Working Group on Settlement of Disputes" that a new tribunal calls for new rules. For instance, nobody questioned the rule of the Court that only the President and the Registrar shall reside at the seat of the Tribunal. Could not one have thought of the old navy rule "a third at sea, a third on its way, and a third in port"? By judges at sea and on their way I mean the judges on duty to acquire cases for the Tribunal by speaking to government officials, consulting with the UN Secretariat, the Security Council, the other organs and specialized agencies of the United Nations and the International Sea-Bed Authority. By judges in port I mean, of course, the judges in Hamburg working on the cases. I had also hoped that Special Commission 4 would have interpreted the meaning of the "Bench of the Tribunal." When one looks at judgments of the Court one gets easily the impression that the judges sit hardly on the same bench but mostly in their rooms at home.

Should not judges put their heads together and discuss the matter until a plausible and thus generally acceptable conclusion is found? Is it really enough to produce heavy compilations of separate and dissenting opinions when States seek to settle disputes by judicial means? Is it not true that different from national courts which have a vast number of potential plaintiffs and defendants, international courts and tribunals have to face the situation that their clients or customers are limited in number? Taking into account that States have

long memories, one cannot afford to frustrate and disappoint the international community so that many States refrain from settling their disputes in court and resort to other means of settlement of disputes.

In the Preparatory Commission no discussions have taken place yet on the relationship agreements. No papers have been prepared on the financing of the Tribunal, the draft rules and regulations for the staff of the Tribunal, and its internal administrative and financial rules.

During the last session of the Preparatory Commission, the Chairman suggested that the work be concluded in summer 1991. If Special Commission 4 wants to conclude its work as set out in its mandate, not to mention its ambitious extended mandate, the work of the Commission will have to be intensified and speeded up.

There is also an issue, not explicitly cited in the program of work of Special Commission 4, to which much time and effort were devoted over the years. And this is the question of the seat.

It is known that the Federal Republic of Germany did not sign the Convention. Although her reasons were stated at various occasions and the delegation of the Federal Republic of Germany participated actively in the deliberations of the Preparatory Commission to make the Convention generally acceptable, the approach taken by the host country of the Tribunal caused much excitement, especially in the Group of Eastern Socialist States and in the Group of 77.

In 1985, the Chairman of the delegation of the Federal Republic of Germany submitted a letter to the Chairman of the Preparatory Commission from which I quote:

> The Federal Government does not seek a completely different sea-bed mining regime from that drafted in the Convention. The problems which the delegation of the Federal Republic of Germany has consistently highlighted relate to certain specific elements of that regime, in particular to certain aspects of the transfer of technology, the financial arrangements, the resource and production policy, the composition and voting procedure of the Council, and the review conference. The Federal Republic of Germany remains committed to all possible efforts to find consensus-based solutions to these problems. ... As in the past, the delegation of the Federal Republic of Germany will put forward and support specific proposals with a view to developing a viable and generally acceptable system. ... The Federal Government is prepared to explore all avenues which might lead to general consensus on a sea-bed mining

regime and eventually make the Convention on the Law of the Sea acceptable to the community of nations.[32]

Delegations from the Group of Eastern Socialist States and from developing countries had and have problems with that position and became quite active in a "corridor operation" which could be described as an attempt to change the rules during the game.

In 1986, an informal proposal of the Bureau of Special Commission 4 surfaced and was issued as a conference room paper:

1. If, at the latest, by receipt of the 60th instrument of ratification or accession to the Convention, the Federal Republic of Germany has not acceded to it, the Preparatory Commission will take the necessary decisions that would enable it, in accordance with Resolution I, to make all practical arrangements for the establishment of the Tribunal in a State that has ratified the Convention or acceded to it.

2. These arrangements will be incorporated in the report containing recommendations of the Preparatory Commission to the Meeting of States Parties to be convened in accordance with Annex VI, article 4 of the Convention.[33]

This proposal was not accepted by Special Commission 4. Several delegations expressed strong objections. Nevertheless, the Chairman of Special Commission 4 continues to engage himself in extensive informal consultations to achieve a generally acceptable solution to change the content of the Introductory Note and the Final Act of the Conference in respect of the seat of the Tribunal.

However, the Group of 77 started their own activities on the question of the seat. In 1987 and 1989, letters were written by the Chairman of the Group of 77 and addressed to the Chairman of the Preparatory Commission.[34] The view was stated that the Preparatory

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[32]LOS/PCN/57, 20 March 1985.

[33]LOS/PCN/SCN. 4/CRP. 21, 4 September 1986.

[34]LOS/PCN/85, 28 April 1987; LOS/PCN/107, 22 March 1989.

Commission should make appropriate contingency arrangements concerning the establishment of the Tribunal if the Federal Republic of Germany is not in a position to accede to the Convention by the receipt of the 60th instrument of ratification or accession.

The Chairman of Special Commission 4 reacted by informing the Preparatory Commission that he intends to convene, at an appropriate time, an informal meeting open to all interested delegations with a view to formulating a common proposal that is likely to be adopted by the Preparatory Commission.[35] So far, no such meeting took place.

With respect to the approach taken by the Group of 77, the Chairman of the delegation of the Federal Republic of Germany made a statement in the Plenary of the Preparatory Commission on 8 April 1988. I shall quote from a Press Release by the UN Department of Public Information since there are no official records:

> The mandate of the Preparatory Commission was to submit a report to the meeting of States Parties that would contain recommendations regarding practical arrangements for the establishment of the Tribunal. It had to do so on the basis of the Convention, which stated that the seat of the Tribunal shall be in Hamburg. He was aware of the provisions of the Convention concerning the hosting of institutions of the law of the sea. The Introductory Note to the draft Convention, which spoke of those requirements, only referred quite clearly to the time when the Convention enters into force. That important moment was not around the corner; much important work remained to be done. Many countries were working towards a universally accepted Convention. In the light of the provisions of the Convention, the Group of 77 statement that the Federal Republic of Germany had not fulfilled its obligations was "a bit off the mark". There was no time frame, whether in one year or two years, for fulfilling those requirements. All the same, the Federal Republic of Germany had taken note of the interests of the Group of 77 in discussing the question. His Government was prepared to take part in informal consultations on the subject. If the Chairman of the Preparatory Commission wished to follow up on the Group

[35]LOS/PCN/L. 66, 31 August 1988.

of 77 letter, the Federal Republic of Germany was ready to co-operate in any manner he deemed appropriate.[36]

It follows from this that the delegation of the Federal Republic of Germany continues to work for a generally acceptable Convention, notwithstanding it has been pressed for many years to accede to the Convention much sooner than is required by the Introductory Note and the Final Act of the Conference.

At least in my humble thinking, the activities of the Chairman of Special Commission 4 and the groups and delegates supporting him do not make much sense, unless those persons have in mind to contribute to the failure of the Convention, the Preparatory Commission, the Authority and the Tribunal.

Or can anybody see a real future for the Convention if its States Parties will be very limited in number, not comprising major maritime nations and major contributors towards the budget of the Authority and the Tribunal.

There are only forty ratifications to the Convention as of 17 March 1989, the negotiations on the obligations of pioneer investors are still in progress, and the hard core issues of the deep see-bed mining regime have not even been identified by the Preparatory Commission. In addition, none of the industrial countries, whether they have signed or not signed the Convention, have become parties to it.

In this context, it should be mentioned that the Chairman of Special Commission 4 stated in his report on his visit to Hamburg and Bonn, in August 1987, that the Federal Republic of Germany was encouraged by recent achievements of the Preparatory Commission towards developing an acceptable sea-bed mining regime.[37]

The delegation of the Federal Republic of Germany reports regularly on the progress concerning the planning for the Tribunal.[38] In spring 1989, the Preparatory Commission was informed that the Federal Republic of Germany is holding an international architectual

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[36]UN Press Release SEA/KIN/56, 8 April 1988.

[37]LOS/PCN/SCN. 4/L. 12, 21 March 1988.

[38]LOS/PCN/SCN. 4/L. 6, 2 September 1986; LOS/PCN/SCN. 4/L. 8, 13 March 1987.

competition for the construction and design of the building to house the Tribunal in Hamburg.[39]

In December 1988, the question of timely accession of the Federal Republic of Germany was raised in the Bundestag and published in the Official Gazette.[40] There it is stated that the decision by the Third United Nations Conference on the Law of the Sea on the seat of the Tribunal in Hamburg followed the expectation that the Federal Republic of Germany should have ratified the Convention by the time of its entry into force and should remain party to it, and that the Federal Government will consider the question of accession in time.

I may add that the required decision of the Bundestag on the accession of the Federal Republic of Germany to the Convention will not be necessarily a time-consuming process, especially since there is already an official German translation of the Convention which took several years to prepare.[41]

Having said all this on the question of the seat, one may conclude that the approach followed by the Federal Republic of Germany can be best described as the pragmatic traveller's advice: "cross the bridge when you come to it!"

And, being an optimist, I cannot but say as a concluding remark, dear friends and colleagues, I would not bet that the Federal Republic of Germany will not be a party to the Convention in time.

Let us hope the best for the Convention and the development of international dispute settlement by judicial means. And please, don't forget to donate books for the International Tribunal for the Law of the Sea in Hamburg.[42]

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[39]LOS/PCN/106, 17 March 1989.

[40]Deutscher Bundestag, 11. Wahlperiode, Drucksache 11/3793, 23 December 1988.

[41]Renate Platzöder/Horst Grunenberg, Internationales Seerecht, München 1990.

[42]All documents issued by the Third United Nations Conference on the Law of the Sea are contained in Renate Platzöder, Third United Nations Conference on the Law of the Sea: Documents 1973-1982,

The views expressed are solely my own.

New York 1981-1988 (*Oceana Publications*, Inc.), 18 Vol.; all documents issued by the Preparatory Commission for the International Sea-Bed Authority and for the International Tribinal for the Law of the Sea are contained in Renate Platzöder, The Law of the Sea: Documents 1983-1989, New York 1990 (*Oceana Publications*, Inc.), 10 Vol.

COMMENTARY

Bernard H. Oxman
Law School
University of Miami

As many of you know, it is fashionable in some circles to argue that the significant benefits of the Law of the Sea Convention can be achieved without its widespread ratification, and thereby states can avoid the burdens of Part XI. The argument that you can achieve the benefits of the Convention without ratification rests on two assumptions: (1) that customary international law is and will remain substantially identical to the non-deep-seabed mining portions of the Convention, and (2) that customary international law will have the same restraining impact on the behavior of governments that a widely ratified convention would have.

These assumptions are debatable in and of themselves. For example, the benefit of the Convention's rules regarding compulsory arbitration and adjudication are not likely to be available in the absence of a widely ratified convention. Express agreement is generally required to subject a state to the jurisdiction of an international tribunal. With regard to the settlement of disputes, the most significant aspect of the Convention is that it subjects all parties to compulsory arbitration or adjudication of a substantial range of law of the sea disputes. This includes coastal state failure to respect the rights and freedoms of navigation and overflight, flag state failure to respect environmental, safety and other duties, and coastal state failure to respect specified international environmental rules and standards.

In this regard, I might respond parenthetically to one of Professor Bilder's questions in his introduction. Article 298, paragraphs 1(b) and (c) of the Convention would seem to reflect the concerns of many governments, including the United States Government, regarding the role of international tribunals in dealing with matters of international security and self-defense. In addition, the Convention contains a special third-party procedure for prompt release of arrested vessels upon posting of reasonable bond. Not only is this procedure unavailable without the Convention, as Dr. Platzoeder points out in her paper, but such a rapid procedure cannot work unless the tribunal is in effect agreed or established beforehand and the judges are available quickly. This procedure was designed to protect against overly enthusiastic implementation of coastal state enforcement powers.

The question we must therefore ask is not only whether the rules of customary law are, or are likely to remain, substantially the same as those set forth in the Convention. Even if the answer is "yes," we are faced with yet another question. Is the impact of those rules the same without the compulsory dispute settlement required by the Convention? Indeed, is the balance among those rules the same? I believe the answer to these questions is, "no." The substance of the Convention without compulsory dispute settlement is not the same. The reason lies in the intimate relationship between compulsory arbitration or adjudication and the balance achieved between coastal state interests, flag state interests, and universal environmental and human rights interests in the Convention.

The Convention uses essentially two major techniques to accommodate these interests. First, it accords the coastal state legislative or enforcement powers in broad areas in order to protect coastal state interests. Those powers include certain enforcement powers over navigation. But the Convention at the same time places important limitations and qualifications on both the scope and exercise of those coastal state powers. Second, while the Convention denies the coastal state certain powers, notably unilateral prescriptive powers with respect to navigation in the exclusive economic zone, the Convention places obligations on the flag state to respect certain international rules such as navigation safety and anti-pollution rules that are designed to protect the interests of the coastal state, among others.

The stability of this system requires means to assure three things: (1) that coastal states are encouraged to respect the detailed limitations and qualifications on their powers; (2) that flag states are encouraged to respect their detailed obligations; and (3) that an authoritative iterative process exists to refine and apply the complex balance set forth in the Convention. Compulsory arbitration or adjudication can make a significant contribution to achievement of these objectives. The very possibility of being sued may discourage some governments from acting in questionable ways at least some of the time. Governments that do act, if they are sued and found to have acted illegally, are afforded a graceful means of retreat rooted in respect for law and international institutions. Over time, the opinions of tribunals will produce a corpus of doctrine that fills the gaps, clarifies the ambiguities, and adjusts the rules to evolving circumstances.

The importance of this third function of tribunals cannot be minimized. One of the paradoxes of law is that long-term stability can be achieved only if the rules are permitted to evolve flexibly. An immutable treaty, like an immutable national code, is an illusion. To the extent one wishes to avoid the risks and costs of formal amend-

ment or revision, one must look to judges and arbitrators to keep the law stable by gradually changing it, or, if you prefer, by gradually adapting its application to fit new circumstances and new priorities. Dr. Orrego's and Dr. Queneudec's papers both illustrate the way this process might work.

The absence of compulsory dispute settlement in and of itself belies the argument that one can achieve the benefits of the Convention without widespread ratification, even if all the substantive rules are apparently identical. In this regard one need look no further than the provisions regarding coastal state powers with respect to the prevention of pollution from ships in the exclusive economic zone. Those powers are carefully circumscribed by the details of the Convention. Few of those details have found their way into coastal state legislation. Yet, if those detailed restrictions are not respected and enforced, freedom of navigation in the exclusive economic zone, and therefore access to straits and vast areas of the ocean, becomes subject to potentially unlimited coastal state regulation in the name of environmental protection. In this way the exclusive economic zone gradually becomes a functional territorial sea.

Similarly, from a different perspective, what is a coastal state to do if it believes that flag states are not respecting their duties? Earlier this week, Mr. Applebaum outlined the problem of foreign fishing for stocks that straddle the outer limits of the exclusive economic zone. Under the Convention, the coastal state can force arbitration or adjudication of disputes regarding foreign fishing beyond 200 miles, and thereby seek to enforce the limitations on such fishing set forth in the Convention. There can be little doubt that the availability of compulsory dispute settlement on this issue increases the bargaining leverage of the coastal state. At the same time, it better enables the government of the coastal state to resist pressure either to make assertions of jurisdiction exceeding those permitted by the Convention or to take other measures of self-help that may have undesirable consequences.

It is of course possible to argue that one can have the benefits of compulsory arbitration or adjudication without ratifying the Convention. States are free to enter into agreements accepting compulsory jurisdiction. But here we encounter a different dilemma. If one accepts compulsory jurisdiction for law of the sea disputes without accepting the Convention, the Tribunal may have to proceed under customary international law. At that point, one risks a decision, such as the decision in the North Sea Continental Shelf cases, in which a respected tribunal declares that a detailed provision of the Convention is not declaratory of existing customary international law. At that

point, states would be encouraged to carve out additional exceptions to the absorption of the Convention into customary international law, each of course according to its own perceptions of its own interests at a particular moment in time. The Convention's prohibition on reservations would be a dead letter, and as predicted by those who negotiated the prohibition on reservations, the entire structure of the Convention would gradually come undone.

As Dr. Queneudec points out, it is possible that a tribunal would find that the exclusive economic zone concept in general has moved into customary international law but that the details have not. Yet, the details are crucial to the overall balance. Without the details, what precisely are the limits on coastal state power set forth in Article 56 to protect and preserve the marine environment in the exclusive economic zone? What precisely are the flag state duties? For example, Article 211, paragraph 6, represents a fundamental compromise regarding coastal state prescriptive powers over navigation in the exclusive economic zone. That article is riddled with complexity and substantive and procedural technicalities. Is a court likely to find that it is of a fundamental norm-creating character? If not, what is the role of customary law? The Convention itself addresses this critical problem in Article 55, which is the very first provision on the exclusive economic zone. Article 55 makes clear that the exclusive economic zone is defined by the specific legal regime set forth in the Convention including all relevant provisions. Without the details one no longer has an exclusive economic zone as defined by the Convention itself.

In brief, the full realization of the objectives of the Convention depends on agreement both to the rules set forth in the Convention and to compulsory arbitration or adjudication. The first without the second risks destabilization of the Convention system by unilateral action and the absence of agreed authoritative collective mechanisms for interpretation and adaptation. The second without the first risks a formal authoritative decision that courts, and by implication states, are free to pick and choose between broad principles and detailed restraints in the Convention.

If we wish to preserve the integrity of the Convention system, two things are therefore essential. First, means should be found to overcome the obstacles to widespread ratification posed by differences with regard to Part XI. Both Mr. Nandan and Mr. Walkate among others have addressed the prospects for this. Second, in the interim, states must make clear that their law of the sea rights and obligations, at least with respect to traditional uses of the ocean, are based on the rules set forth in the Convention and other rules of international law

that are consistent with the Convention. If they are before international tribunals, states must emphasize their adherence to those rules and avoid the temptation to invite the judges to find a discrepancy between the Convention and customary international law.

As to the second point, one can find some encouragement in the approach taken by a number of governments in cases before the International Court of Justice and arbitral tribunals. Tunisia and Libya perhaps set the standard for this conduct when they asked the Court to take into account the emerging rules of the Convention even before the text was completed. I might also note, for example, that in response to a question posed by Judge Gros during the proceedings in the Gulf of Maine case, the United States declared that President Reagan's exclusive economic zone proclamation and oceans policy statement were to be understood in light of the provisions of the Convention, notwithstanding the fact that the United States had not signed the Convention.

The alternative to these policies is a gradual breakdown in the Convention system with no clear path to stabilization of the law of the sea other than an eventual Fourth Comprehensive Conference on the Law of the Sea after much unnecessary friction in the interim. There are, I know, some ardent nationalists and some ardent internationalists who would prefer to see the Convention system collapse in the hopes that they would benefit from the outcome of a new struggle for law either as a matter of state practice or at a new Law of the Sea Conference. But I cannot believe that the overwhelming majority of governments would really prefer this outcome. If I am right, then the time has come for states to commit themselves to the goal of overcoming the national and international obstacles to widespread, and one may hope universal, ratification.

COMMENTARY

Sir Robert Jennings
Judge, International Court of Justice
The Hague

Mr. Chairman, ladies and gentlemen, the comments are allotted a necessarily limited time, and it is clear that it would be impossible to make an adequate critique of the most excellent main papers we have heard this morning. The Convention questions have been extremely ably dealt with by Professor Oxman, so in the remaining time I would like to throw out some more or less provocative ideas more or less connected with the subject of our discussion.

First, a general remark about our syllabus and here, Mr. Chairman, I want to pick up something you began with, to emphasize the extreme importance, especially in the matter of marine boundaries and the disputes connected with them, of the primary obligation of states to agree if possible in the course of diplomatic negotiation. There is still a tendency among professional international lawyers to regard recourse to an international court by a government as being a good in itself, a sign of good behavior. International law in the recent decades has really grown up, and one doesn't need to manufacture cases for tribunals. Even the International Court is busier now by a very long margin than it has ever been in the course of its whole existence. So we can afford to recognize that the primary way of settling these disputes is to reach agreement by diplomatic negotiation in exactly the same way as in a developed municipal law system. One supposes that where the law is operating smoothly and well, recourse to the courts will not be a routine matter but will be resorted to only when there are special reasons. We still have a remnant of that curious attitude between the wars when it was supposed by many international lawyers that recourse to an international court was a sort of alternative to war, and that if one had universal compulsory jurisdiction there would be no wars. We have grown out of that attitude a bit, but even so, looking at the jurisprudence of court decisions on, for example, marine boundaries, the importance attached to previous judicial decisions is striking compared with state practice, as demonstrated in the superb material collected by the geographical department of the Department of State. The primacy of agreement was recognized expressly in Article 6 of the 1958 Geneva Convention and in the new Convention.

I want just to call attention to the curious gloss on that obligation, which was invented in the *North Sea* cases and is apparently accepted,

though I know no previous authority for it: negotiating parties are to act in such a way that equitable principles are applied. On the face of it, that looks very reasonable indeed; one would assume that parties ought to act fairly and to try to achieve a fair result. That is the purpose of a negotiation. But when one considers, as Professor Orrego stated, the chancellor's foot problem in connection with equitable principles, questions arise that certainly provide material for a profitable discussion. For example, if one were examining a young candidate for qualification as a government legal advisor, a very useful question and test to ask might be in the following terms: Your minister is about to negotiate a marine boundary agreement. Brief him concisely and clearly on what he must do to ensure in the course of negotiations that both parties act in such a way that equitable principles are applied. And then there are further questions that arise. Would it be possible, when agreement has been reached, for one of the parties to challenge the boundary agreement in the courts because, according to its allegations, equitable principles have not been applied?

One needn't belabor the doubts that exist concerning the meaning of equitable principles. I'll just pick up one point in passing because it was mentioned again this morning: the oft-quoted passage from the *North Sea* cases that there is no legal limit to the considerations which states may take account of for the purpose of making sure that they apply equitable procedures. I merely mention that in the course of precisely the same case, it was very clear indeed that the court was not prepared to consider at all the size of the German hinterland in relation to the marine boundary. Of course, the rejection of that aspect was part of the rejection of the case for an equitable allotment, which the Germans had rather wanted. But it does perhaps show that there may be legal limits to the considerations which can be taken by a court in applying equitable principles.

I was very much interested in what Professor Queneudec had to say about the place of jurisprudence in the development not merely of the settlement of disputes but of the general law of the sea. Here the jurisprudence of the International Court of Justice is particularly interesting precisely because there *is* a jurisprudence. Most cases before international tribunals and certainly before the International Court of Justice in the past have been, so to speak, one-off, isolated cases. But there are really so many cases extending over such a period of time on marine boundaries that for the first time we have got a jurisprudence and not merely a single precedent.

I want to call attention to the need for instilling some sort of discipline into the citation of precedence as a source of international law. The International Court practice is in one respect anomalous. According to Article 38 of the Statute of the International Court of Justice there are two subsidiary means for the ascertainment of the law: the decisions of international courts and the writings of commentators. The judgments of the Court -- I'm not talking about separate opinions -- according to a sort of convention that has grown up, do freely use previous decisions as authority but never actually cite writings. There are obvious reasons why it might be difficult to do so. But it is an anomaly, as both sources are supposed to be equal under the terms of Article 38. What troubles me is that previous decisions are cited as if they were actually writings, but they happen to be by the Court. They are cited almost as if they were passages from Holy Writ; one gem of wisdom can be cited out of context in support of whatever one wants to decide.

The common lawyer is constantly astonished at the suggestion that the system of precedent used in international tribunals has something to do with the common law tradition of the use of precedents. In the common law, as we all know, the matter is very different; there is a proper scientific discipline. One considers the claims and especially the facts of the case to extract the principle of decision, the *ratio decidendi*, of that case, and that is the precedent. One discards *obiter dicta* which, however interesting and however useful in later cases, are not actually authority. As far as I know, nobody has ever suggested that this would be useful in dealing with precedents in the International Court of Justice or in international tribunals generally. So I'm suggesting it. Discipline of that kind is very necessary because it does mean that one doesn't regard previous cases as something one automatically has to respect. It makes sense of what the International Court of Justice has clearly done: in the course of this jurisprudence on marine boundaries it has moved considerably from its original position in the *North Sea* cases, for example.

I have just two things to say about the new court at Hamburg when it is established. The word *competition* has been used once or twice, but I'm not sure that we need think of it in those terms. As I've said, I believe international law has grown up. Any decently developed system has many kinds of courts and tribunals for different functions, and I would have thought there was room for more courts in the international field without necessarily competing with what is already there.

On the other hand, I was really dismayed to hear that in considering the size of the library the question determinative of the matter apparently was the volume of works on the law of the sea. What about the works on general international law? The danger in specialized tribunals is that they may become divorced from the general law of which they are administering part. Human rights is a very good example: many specialists in human rights don't really know any international law and apparently don't even see the reason to learn any. We don't want that to happen with the law of the sea, and I would hope that room would be found in the library for some good general works on international law that have nothing directly to do with the law of the sea. Indirectly they have a great deal to do with the law of the sea, and not only in relation to this question of sources.

The other point is the fascinating difference between the way we as international lawyers tackle questions of land boundaries and the way we tackle the question of sea boundaries. In land boundaries, it is very clear that there is a complete difference between questions of title and questions of boundary. Questions of title are decided largely by history, geography, and certain sorts of conveyancing rules that are supposed to confer title. Boundaries are a different matter. In the law of the sea, the situation is completely different. You have a set of principles by which title is given to states for certain areas of the sea. The original territorial sea is the prime example; not only is title conferred but it can't be avoided. It is generally agreed that a coastal state has a territorial sea whether it likes it or not, because it includes certain obligations. The *North Sea* cases judgment tries to suggest that there must be a way of finding out boundary questions, distinguishing those marginal areas from the question of title. But it is difficult because these basic principles from which we deduce answers to boundary questions are really also principles which confer title. I obviously can't elaborate on that, but I do throw it out as a suggestion.

DISCUSSION

Richard Bilder: Thank you very much, Bernie and Sir Robert. Some of you may not know that among many other things Sir Robert published a seminal work entitled, *The Territory*.

That concludes our formal presentations. We now have time for questions. Professor Vukas?

Budislav Vukas: Thank you, Mr. Chairman. I have just a brief comment concerning the paper of Ms. Platzoeder. I am very grateful for all the useful information she has provided us. However, I have to react when she speaks about delegations who are worried by the fact that, notwithstanding all the preparations of Germany for this seat, Germany for the time being shows no indication of its willingness to accede to the Convention. These delegations are characterized in her text as people who perhaps would like to see the failure of the Convention, the Preparatory Commission, the Authority, and the Tribunal. How can she characterize as such me, a Yugoslav professor and delegate from a country which ratified the Convention in 1985, although it is obvious that not all the provisions are in our favor? We didn't like the institution of the exclusive economic zone and many other provisions but we thought it was a useful undertaking for the legal order of the oceans. The whole paper leaves an impression that those who are sincere in respect to the integral text and ratified the text made a scene, and that it's a real virtue not to be willing to accept the Convention and trying to amend it. She also describes *corridor operation* as "an attempt to change the rules during the game," but in earlier sessions we have heard that almost all of the main solutions were agreed upon in the corridors and she herself quotes the efforts of Professor Sohn in the corridors. So I do think that the worries that Germany might not accede or perhaps accede at the last moment are legitimate, because she explains here in great detail all Germany has done for the seat of the court. But in case the Convention is not acceptable for Germany at the last moment, how will the other candidates -- Portugal, Malta, Yugoslavia, and the others -- have time to have international competitions, to ask for books, etc.? So I like all my colleagues will collect books not only on the law of the sea but on general international law, but for the time being I will not mail them to Hamburg, I will await forthcoming events. And I do hope to be a judge in Hamburg.

Richard Bilder: Would you like to respond to that, Renate?

Renate Platzoeder: It is difficult to give a good answer. I have participated in the Preparatory Commission almost since its beginning. I think that we who are engaged in the law of the sea and we who agree that the best achievement in the law of the sea is the Convention should rather concentrate on the work of the Preparatory Commission in accordance with its mandate. I am criticizing all these other activities because they take away so much effort and so much good will from making the Convention generally accepted.

I cannot agree that so far the Federal Republic of Germany has made no indication whether she will accede or not. This is not true. There are so many documents -- I cited some of them in my paper -- in which my delegation made our position clear from the very beginning of the Preparatory Commission. We have said what we don't like about the deep seabed regime; we have never said it should be amended. We use different language; our approach to it is in conformity with the position of the other members of the European Economic Community, and here the word *rectification* is used. We have never proposed a protocol or to amend something. The Federal Republic of Germany is moving together with the other countries which try to rescue the Convention. There is quite of number of countries, however, which have ratified the Convention, but do not share our view that the Convention should be fixed. Here, I just cannot go along with what Professor Vukas has said. When some of us from the Law of the Sea Institute were in Moscow last December, I told a German joke to describe the situation we are facing in the Preparatory Commission. A mother of a teenage girl is worring about her future, and so she asks her daughter: "What will you be doing after high school?" The daughter replies very firmly: "Well, first I will get a child; second, I will go to university; then I will become a grandmother; and finally, I will get married." Of course, the mother replies: "Very well, my good girl, but can't you do it in the right order!" Now, this is certainly not the approach taken by the Federal Republic of Germany. But, as in a personal life, also international negotiations have their irregularities. There are just situations where you can't do things in the right order, and then after some years everything settles all right. Now, this might not satisfy Professor Vukas, but I must say he has not participated regularly in the Preparatory Commission. If he had, and if he had seen how seriously the delegation of the Federal Republic of Germany is working towards a universally acceptable Convention together with others, I do not think he would be seriously

worried. The Federal Republic of Germany will not disappoint the international community.

I started my paper by saying that the concept of the International Tribunal for the Law of the Sea came from Washington. The United States is the major ally of the Federal Republic of Germany and we owe it to the United States to preserve a positive approach towards the Convention. It is not only that the Federal Republic of Germany would like to have that institution. It's more than that. It is to implement ideas which were accepted in the Law of the Sea Convention by the majority of states. One does not understand what the Federal Republic of Germany is doing in the Preparatory Commission if one limits it to the question: Will you or will you not?

Richard Bilder: Thank you. Dr. Schneider?

Jan Willem Schneider: I would like to say a few words about the paper of Professor Queneudec. Three times in my life I have been confronted with the problem of two tribunals, courts which it was feared might compete with one another, get in one another's way, upset the beautifully constructed jurisprudence that was coming out. The first was the Council of Europe, which was upset when the covenants of the United Nations on human rights were being ratified, and before that, a protocol for the settlement of disputes. The wording of those United Nations covenants was broader than those of the Rome Convention, and it might have been difficult to bring into accord two diverging instances of jurisprudence. In actuality, however, no such difficulty has occurred, and as far as I know they live happily and separately.

A second instance of two courts, usually not so well known, is that of the Benelux and the Community. There you have an even stranger example because the two often have to decide about the same rules. The Benelux, after all, cannot separate itself from the Community, it has to respect the objectives of the Community, and one might think that there is a hierarchy between the court in Luxembourg and the court of the Benelux in Brussels. But, again, the Benelux court has been amazingly busy, and there has been not the slightest indication of competition or friction in the development of the jurisdiction of both courts. Also, the situation suggests that frequency of cases influences the development of a distinct jurisprudence.

A third example is the International Court of Justice itself. It was once suggested that the International Court of Justice had a rather unlucky hand at international economic law. Be that as it may, it is clear that there have been other instances -- here I think particularly

about the International Center for Settlement of Investment Dispute (ICSID) arbitrations -- in which the authority comes from general rules of international law, often those of the International Court. So there seems to be a quite happy division of labor. I think Judge Jennings has spoken correctly. One has to respect the way states go about it. States do not go to the courts because they are there, but because they have to suit their own needs. If states bring forth cases, accept declarations of compulsory jurisdiction and the like, and feel that it is better to go to the one than to the other, the courts themselves cannot say that they ought to do differently. The courts are, after all, servants in justice to the states and not the other way around. Thank you, Mr. Chairman.

Richard Bilder: Does any panel member want to respond to that? Dr. Shabtai Rosenne?

Shabtai Rosenne: I would like to take advantage of the presence of Sir Robert here to make a very short comment. When I learned law, I was taught several things about going to court. One was that you don't earn money hanging around the court. Another was that a good attorney tries to keep his clients out of court. And I'm wondering why the same rules do not apply in international relations *au fond*. Sir Robert, your comment on the need for intellectual and scientific discipline in citation, not only in decisions of the International Court but also other international tribunals and in organs like the International Law Commission, diplomatic correspondence, and writings of publicists and so on, is extremely real and difficult. But when you mention the well-known common law distinctions between *ratio decidendi* and *obiter dicta*, I have great difficulty in seeing how they really apply in international jurisprudence. They are intimately connected with the whole concept of *stare decisis* as I see it. When I read judgments in cases in which I have been concerned and therefore know the pleadings, know the issues firsthand, I am sometimes puzzled by half a sentence or even a word which has found its way into the pronouncement of the court. I am by no means convinced that there are such things as *obiter dicta*, certainly in the International Court, because I have a feeling -- you can correct me if I'm wrong -- that sentences, phrases, words often get in because one of the judges producing the collegiate decision felt it was necessary and there was no strong opposition amongst his colleagues to having these expressions of his put in. The common lawyer might say these are *obiter dicta* -- they are not necessary --but I don't think that's the way

international judgments are really written. If someone thought it was necessary, then it cannot be an *obiter dictum.*

Richard Bilder: Sir Robert, would you like to reply?

Robert Jennings: I entirely agree that the common law vocabulary and method may not be transferrable to international law. It is difficult to compare cases because though one knows how international tribunal judgments are devised, one doesn't always know how municipal judgements are devised. In my own country, in the House of Lords, I wouldn't be surprised if sometimes words were inserted because some judge feels a bit happier if they were. The system may not be entirely transferrable. I'm very happy that Dr. Rosenne agrees with me that something ought to be done and that it is worth looking at again.

Richard Bilder: Thank you, Sir Robert. Yes, sir?

Manohar Lal Sarin: Thank you, Mr. Chairman. My remarks relate to the paper by Dr. Platzoeder. I think her paper was very informative as well as provocative, I share the thoughts of Professor Vukas, and I wish Dr. Platzoeder were the foreign minister of the Federal Republic of Germany, as she has been trying to put her country right in the circle of those states which have signed and ratified the Convention. I do not comprehend why the Federal Republic of Germany does not sign and then ratify the Convention before trying to get the seat in Hamburg. The process should be the other way around, because not signing and ratifying the Convention appears to subvert if not to kill the Convention. The Convention is a package deal; states cannot pick and choose. As an international lawyer I do not understand.

Concerning competition between the court supposedly in Hamburg and the International Court of Justice in The Hague, maybe it is a duplication, but in the provision on the settlement of disputes in the Convention it is one of the options. Dr. Platzoeder mentioned that the fundamental difficulty is that only states can be parties before the ICJ, whereas in the other court there are other legal entities. If the ICJ statute could have been amended, perhaps the problem of the International Law of the Sea Tribunal would not have arisen. But the situation is quite different now.

I support the remarks of Sir Robert Jennings that not only works on the law of the sea but also works on general international law and other legal systems should be there in the library in this Tribunal of the Law of the Sea.

Richard Bilder: Does anyone wish to respond?

Renate Platzoeder: I guess there is a misunderstanding. The Federal Republic of Germany does not want to pick and choose. The Federal Republic of Germany is fulfilling its obligations. I only can ask you to read the introductory note of 1981. There is a second understanding that the candidates for the seats had agreed to abide by the results. What I was saying that you call perhaps provocative is that certain states and groups in the Preparatory Commission are trying to change the rules during the game. The Federal Republic of Germany does not want to change the rules during the game. The game will come to a decisive stage when the Convention enters into force and not before. As an Indian, and a colleague, from a developing country you may perhaps have different interests, but the political and legal situation concerning the seat was agreed upon in 1981 and at least my country is adhering to it. And that's all I have to say here.

Richard Bilder: Professor Treves?

Tullio Treves: I would like to make just two short points on two different reports. The first is the report of Professor Orrego. I was a bit struck by his remark according to which the full ICJ is the most faithful to international law, chambers are a little more flexible, and the arbitral tribunals are still a still a little less flexible. If we look at the cases already decided by arbitrators in the *Gulf of Maine* chamber, I don't think you can see there any more perceptible deviation from the jurisprudence than, for instance, in the *Libya/Malta* case of the full court as compared to previous cases of the full court.

The second point I would like to make concerns Dr. Platzoeder's report in its written form. I have some hesitation about her conception of the task of judges, that they have the duty to acquire cases for the Tribunal by speaking to government officials, consulting with the UN Secretariat, the Security Council, the organs and specialized agencies. Second, she considers that judges should put their heads together and discuss the matter until a plausible and thus generally acceptable conclusion is found. I do not think that judges should go around peddling cases, and I think that in the ICJ and certainly in arbitral tribunals they already try to find the best solution together, not in their own separate rooms. But if this were to be an indication that the Hamburg Tribunal would somehow reproduce negotiating procedures such as those we experienced at the Law of the Sea Conference, then have already been lost by the Hamburg Tribunal.

Richard Bilder: May I move on, Renate?

Renate Platzoeder: Yes. Tullio, I think you picked the two really provocative passages in my written statement. I tried to describe the attitude taken back in the early 1970s by the International Court of Justice. The Court, a main organ of the United Nations just sat back and said: "Well, we are sitting comfortably at The Hague, where are your cases? We are waiting". Maybe the words I used in my statement were a little bit strong but I simply wanted to initiate discussion. I think the Tribunal and also the International Court of Justice should promote their own role within the international system and should attract suitable cases for judicial settlement. Take the judgment in the *Nicaragua* case. Is that the way to keep up the eminent reputation of the International Court of Justice? For me it is obvious that the two judges have not discussed the matter among themselves. From my training as a lawyer in Germany I believe, the shorter a judgment is, and by avoiding dissenting and separate opinion, the better it is, even if you have to deal with very complicated cases. The rule "publish or perish" should not apply to Courts and Tribunals.

Richard Bilder: Francisco?

Francisco Orrego: Just one short response to Professor Treves' interesting point. Perhaps none of these trends should be understood in absolute terms; things are always relative in human reasoning. But if one looks, for example, at the concern of the full International Court of Justice always to subject equity to the role of law in statements and in practical results, one can fairly think that the Court is more attached to law. For example, cases like the *North Sea Continental Shelf*, the *Libya/Malta* itself, the *Tunisia/Libya* also heavily emphasized that attachment to law. If one takes, for example, the ICJ Chamber decision in the *Gulf of Maine*, one sees the kind of liberalization in which the Chamber tries to bring in other elements which were not clearly found in the law at all. So from there I gather that the Chamber tends to be a bit more flexible.

I agree entirely with Professor Treves that arbitration is much more varied. There you have cases that have been very attached to the law, like the *Beagle Channel* arbitration, cases which being attached to the law have opened the door to further evolution, like the *Anglo-French Channel* arbitration, or others that have been very similar to the *Gulf of Maine* decision, like the *Guinea/Guinea-Bissau*. Probably it all composition of the tribunal, and so on.

As for the Court, I think my reference holds, as far as the problem goes today. In fact, as Professor Treves noted, in the *Libya/Malta* case, it is true that the ICJ made a very important change in introducing the whole concept of economic zone and other criteria. But that change in turn was a reflection of the change that had already taken place in international law at the conceptual level both in the Convention and in customary law. So in that regard also the change was keeping within the law. That's the kind of reasoning I used to try to figure out.

Richard Bilder: Our final comment.

Gerald Graham: I have two points. The first concerns the customary status of the general aspect of the Convention on the Law of the Sea but the possible novel aspect of a particular aspect of that Convention. The second point concerns a possible example of the movement from the law of co-existence to the law of cooperation. The specific article I refer to is Article 74 on delimitation of EEZ boundaries. I think it's important to note that in this article there's an obligation to negotiate not just where there is a dispute concerning a boundary. In effect, in contrast to the customary fundamental right of the state to determine its territorial boundaries unilaterally, the EEZ boundary itself must be negotiated. One wonders, therefore, whether the boundary exists in the absence of negotiation and whether a coastal state is precluded as a preliminary step in negotiations or prior to negotiations from adopting its EEZ boundary unilaterally. If it fails to do so, would a tribunal not have difficulty in determining what in fact the state's position is in the negotiations, and would that state not be in an unfavorable position if it hadn't through its practice adopted the boundary unilaterally? In short, whereas the EEZ concept itself through the Convention and state practice has probably entered customary international law, the determination of the boundary by negotiation rather than unilaterally may be an example of this emerging law of cooperation.

Richard Bilder: Thank you very much. Sir Robert?

Robert Jennings: It was suggested that in the *Nicaragua* case the judges had not discussed matters among themselves. May I may it very clear indeed -- and the internal judicial practice of the Court is available and published -- that in the *Nicaragua* case as in every case every judge is required to take a full part in the fashioning of the

judgment right to the last moment of voting. I dissented in the *Nicaragua* case. I with all my colleagues worked not only on a separate opinion but on the judgment of the Court itself to the very last stop and comma. We may not always get it right, but we do work together as a team throughout any case. I just wanted to make that very clear.

Richard Bilder: Thank you, Sir Robert. I would like to thank our panel here for their very thoughtful contributions.

IMPLEMENTATION OF THE MARINE ENVIRONMENT PROVISIONS OF THE LAW OF THE SEA CONVENTION THROUGH INTERNATIONAL INSTITUTIONS

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Introduction

Recently Canada was reminded of the fragile nature of the marine environment. On December 22, 1988, a U.S. barge, the *Nestucca*, spilled part of its cargo of bunker-C oil in U.S. waters off the coast of Washington State. Some of this oil washed ashore on the west coast of Canada's Vancouver Island, causing considerable damage to the shoreline, including national parks. It also damaged the local shellfish fishery and killed many aquatic birds and marine mammals. While the spill was a relatively small one, its long-term effects on the environment of the west coast of Canada cannot yet be fully assessed. They could be considerable as could the financial implications. For example, some oil entered major herring spawning grounds, and it will be some time before experts can determine how much damage was caused.

On March 20, 1989, a devastating accident, with which we are all familiar, occurred in Prince William Sound, Alaska. The extent and effect of the *Exxon Valdez* catastrophe have not yet been fully determined. While prevailing north-westerly currents have tended to move the oil away from Canada, its effect on migratory species of fish and marine mammals could, in the future, have a direct impact on Canada.

The sheer magnitude of the *Exxon Valdez* disaster, coming, as it did, so close on the heels of the *Nestucca* spill, sharply focussed Canadian thinking on the marine environment. Questions are now being asked concerning Canada's ability to meet marine environmental catastrophes and about the availability of adequate liability and compensation schemes. This has prompted Canadian officials to look closely at both Canadian and international marine environmental legislation.

Incidents such as the *Nestucca* and the *Exxon Valdez* remind us of the fragility of marine ecosystems. We can see the globules of tar on the beach. We can observe the dead fish floating in the oily water. We

can watch the dying marine mammals and aquatic birds. Other consequences, such as the longer-term effects on the food chain, the closure of fisheries and curtailment of tourism, and the exorbitant cost of clean-up operations, we see only later. Nonetheless these are all directly linked to a particular spill, the responsibility of an identifiable polluter under the jurisdiction or control of a particular state.

And yet incidents such as these represent merely the tip of a marine pollution iceberg whose bulk, like an iceberg's, is mostly invisible to casual observation. As our various ecosystems are actively interrelated, it has long been an accepted fact that many forms of pollution will eventually migrate from one system to another. This is especially true in reference to the oceans, which are the ultimate receptacles of mankind's wastes.

It is in the context of this global view of marine environmental law that I propose to address the theme of this year's conference: *The Implementation of the Law of the Sea Convention through International Institutions*. After commenting briefly on the development of international law in this field, I will discuss the impact of the LOS Convention on this body of jurisprudence. In this regard, I propose to cite a few recent examples of post-convention activity by international institutions. I will also draw your attention to some gaps that, in my view, require immediate attention.

Pre-LOS Convention

Before 1982, marine environmental law was reflected in various international instruments. These included both global and regional conventions addressing a range of marine pollution issues. The timing of international attention and the type of action taken depended on how serious a particular problem was perceived to be. Indeed, the pioneering decades of marine environmental regulation are noteworthy for a tendency to tackle issues on an *ad hoc* basis, as and when they become serious problems. As a corollary to this approach, diverse international organizations, under the auspices of both the UN and non-governmental bodies, came into existence. While enforcement remains in the hands of national authorities, the international institutions like the International Maritime Organization (IMO) have been instrumental in developing global marine pollution standards.

One of the first concrete acts by the international community addressed the most obvious source of marine pollution. *The 1954 International Convention for the Prevention of Pollution of the Sea by Oil* was the first global marine pollution instrument. It was designed

to regulate the deliberate operational discharge of crude oil and oily mixtures in certain sensitive zones in the sea. Its provisions have now been largely superseded by the *1973/1978 International Convention for the Prevention of Marine Pollution from Ships (MARPOL 73/78)*, which aims at the elimination of international pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge. This is achieved mostly through the regulation of building and operating standards and norms which become more stringent in "sensitive areas."

Another good example is the international community's reaction to the disastrous oil spill caused by the wreck of the *Torrey Canyon*. This disaster led to the development of the *1969 Civil Liability and the 1971 Fund Conventions for Oil Pollution Damage*. These reflect the global community's efforts to establish a liability and compensation regime for damages from oil spills by seagoing vessels carrying persistent oil in bulk as cargo. The 1979 *Amoco Cadiz* spill revealed the regime's inadequacy to cover mega-spills and led to the adoption, in 1984, of a protocol raising the limits of coverage and providing for other important environmental revisions. It will be interesting to see whether the *Exxon Valdez* spill will result in calls for new revisions.

While the international community has adopted a global approach to ship-source pollution, other forms of pollution have drawn regional attention. Land-based and atmospheric pollution, for example, have proven to be more easily dealt with on a regional basis. This, in part, is due to the unique characteristics and varied uses of the many regional seas as well as to the differing stages of industrial development of states bordering such seas. A regional approach also encourages a higher level of participation among nations that might otherwise be reluctant to join global schemes.

Like the global conventions, regional agreements are also to be found under a variety of institutional auspices. The most famous are perhaps those associated with the regional seas programs of the United Nations Environmental Programme (UNEP). Others are under the auspices of various existing regional and sub-regional groups of countries, or new groupings established specifically to address a particular pollution issue. Still others, such as the Canada-United States Great Lakes Water Quality Agreement, are bilateral arrangements.

Some regional agreements have tackled marine environment problems in a piecemeal fashion. Examples of this early approach are the regional conventions in the Northeast Atlantic. Many of the action plans sponsored by UNEP, on the other hand, could best be described

as framework or umbrella agreements, where specific sources of pollution are dealt with by special protocols or annexes which have to be adopted by countries joining the agreement. Together, they form a comprehensive regional marine pollution regime dealing with all forms of marine pollution. To complete the picture, one operating region is unique in having taken a comprehensive approach from the outset. I am referring to the 1974 Helsinki Conference, which produced the *Baltic Regional Agreement*, a regime that deals with pollution from all sources.

The LOS Convention should be seen in the light of the variety of approaches and the interrelationships between both global and regional, as well as functional and geographic, imperatives which have, over the last few decades, dictated the course of the development of international marine environmental law. UNCLOS was the first attempt at a global, comprehensive regime, designed to deal with marine pollution from all sources. The resulting convention, I would suggest, contains a flexible framework which allows for environmental regimes to develop in the ways most suited to addressing the challenges posed by the pollution of the marine environment.

The LOS Convention

Where then does the Law of the Sea Convention fit into the highly diffuse field of marine environmental law? The Convention lays down fundamental principles and a series of specific treaty provisions establishing a comprehensive legal regime for the protection and preservation of the marine environment. The drafters of the Convention recognized the diversity of international marine environmental legislation and the historic reasons for it. They therefore designed Part XII of the Convention in such a way as to ensure that it will be an aid in the development of new agreements in this field.

To accomplish this, the Convention does not show any special preference for any single approach. It explicitly endorses both global and regional cooperation, directly or through international organizations. In particular, Article 197 places a duty on states to cooperate in the protection and preservation of the marine environment, either globally or regionally, as appropriate.

In further recognition that some marine pollution problems may best be dealt with on a regional basis, Part IX of the Convention dealing with *enclosed or semi-enclosed seas* encourages the cooperation of states bordering such seas in the performance of their duties under the Convention.

There is also Article 237, dealing with the obligations under other conventions on the protection and preservation of the marine environment. This article is the thread which ties the past to the future, using the Convention as the focal point.

In this way, the LOS Convention acts as a flexible, expandable framework under which basic principles of marine environmental law may evolve in the manner most suited to the solution of the problem at hand. The choice of action is left to the discretion of the state parties, which must in any event provide the political will to take the initiative.

Actions by International Organizations

In keeping with the theme of this conference, an examination of a few recent instances where international institutions have helped to expand the envelope of marine environmental law is germane.

My first example is highly illustrative of the global/regional interrelation that has been achieved in marine environmental law. In 1975, the UNEP-sponsored *Mediterranean Action Plan* was adopted to coordinate efforts to protect the Mediterranean Sea against pollution. One of the Plan's protocols deals with pollution from land-based sources. This reflected the practice of treating land-based pollution problems at the regional level, because of its more direct applicability to localized pollution. Nevertheless, there remained a gap at the global level in marine legislation concerning this type of pollution.

Taking the direction offered by Article 197 of the LOS Convention, the "Montreal Guidelines" for the protection of the marine environment against pollution from land-based sources were adopted in 1985. The guidelines and three annexes on control, classification, and monitoring of land-based sources of marine pollution are the first global standards in this field. Although they are non-binding, the governing council of UNEP has urged states and international organizations to take the Montreal Guidelines into account in the process of developing bilateral, regional, and global agreements. This is a prime example of how an international institution, in this case, UNEP, has been instrumental in implementing a fundamental principle of the LOS Convention.

Another example, in this case dealing with pollution by hazardous wastes, is the *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal*, signed by 34 states plus the European Economic Community on March 22, 1989. During the negotiations, a number of states, including Canada, sought to

ensure that coastal states be notified of the shipment of hazardous wastes prior to their passage through their territorial seas even when the destination is not a port in that coastal state. This is consistent with the LOS Convention, in line, for example, with Article 211 which calls on states, *inter alia*, to establish rules to prevent pollution of the marine environment from vessels. To meet this concern, the Basel Convention provides for the parties, at their first meeting, to consider any additional measures needed to fulfil their responsibilities with respect to the protection and preservation of the marine environment. Although not stipulated in the Convention text, such additional measures are to be recommended by a Joint UNEP-IMO Working Group.

Thus, we can see another function of international institutions in implementing the LOS Convention, not only as agencies under whose auspices conventions are born, but as technical forums from which innovative approaches to delicate political problems can be solved. As new problems, such as hazardous wastes, challenge the built-in flexibility of the LOS Convention, states will increasingly rely on the expertise of organizations such as UNEP and the IMO.

Another convention with ramifications on the marine environment was recently concluded under IMO auspices. The IMO diplomatic conference on salvage was mandated to replace the *1910 Convention on Salvage and Assistance*, and it concluded its work just over a month ago. A great advance was made over the previous convention, which included giving consideration to the preservation of the marine environment. Now, for the first time, salvers will be able to be compensated for efforts taken to preserve the marine environment, even if they are unsuccessful in saving either the ship or the cargo. Here, therefore, is another example where an international organization, this time the IMO, was instrumental in helping entrench, as a norm of international law, UNCLOS Article 221 dealing with measures to avoid pollution arising from maritime casualties.

In this brief review of recent events, I also want to touch on activities in the field of atmospheric pollution, which is now recognized as a major source of marine pollution. As you may know, in June, 1988, Toronto was the venue for the *International Conference on the Changing Atmosphere: Implications for Global Security*. One of the major conclusions of the conference was to urge the international community to initiate the development of a comprehensive global convention as a framework for protocols on the protection of the atmosphere. A follow-up meeting of legal and policy experts held in Ottawa in February, 1989, recommended an international convention

or conventions with protocols as a means to ensure rapid international action to protect the atmosphere.

One beneficiary of such a convention would be the marine environment, through the eventual reduction of atmospheric pollution. Implementation of these recommendations would likely fall to international organizations such as UNEP and the World Meteorological Organization. They would provide the forum and some of the expertise to carry out the purpose of Article 212 of the LOS Convention.

Another area in which international institutions have a vital role to play is in assistance to developing countries to meet their obligations under the LOS Convention. The Brundtland Commission identified and highlighted the importance of marine environmental protection in oceans management. As part of this approach, strengthening the capacity for national action by developing countries was seen as an important element in striving for sustainable development.

UNEP is already active in this field with its very successful regional seas programs. Specific institutions, inspired by and created to implement the LOS Convention, have also begun to play a role. Canada's International Center for Ocean Development (ICOD), was established in 1983 primarily to support, through cooperative ventures, developing countries in the management of their ocean resources. In Canada's view, institutions like ICOD are an appropriate vehicle for the provision of scientific and technical assistance to developing states, as provided by Article 202 of the LOS Convention.

Gaps in Marine Environmental Law

Having reviewed some of the recent developments affecting marine environmental law, I now want to draw your attention to some gaps that, in my view, require immediate attention.

When Canadians speak of environmentally sensitive areas, our tendency is to think of ice-covered regions. It will not surprise you then that the environmental problems confronting the two polar regions are high on my list of priorities.

The protection of the Antarctic marine environment has for some time been on the agenda at Antarctic Treaty Consultative Meetings. A serious oil spill this past austral summer has prompted some parties to the treaty to undertake, within the consultative meeting framework, to ensure that necessary steps are taken to prevent pollution of Antarctic waters.

These actions would include, *inter alia*, legal measures, such as steps to build on and strengthen the provisions of relevant international conventions through the appropriate international organizations. An example of this would be concerted action by treaty members within the IMO to secure "special area" designation for waters *below 60 degrees south* under the appropriate annexes to *Marpol 73/78*. By thus strengthening the marine environmental protection provisions of existing conventions through international organizations, states would be successfully implementing and entrenching the principles enshrined in the LOS Convention.

There are also moves afoot to take further steps to protect the Arctic environment. Circumpolar states recognize that the unique nature of this area warrants a collective regional approach to the preservation of its environment. Of particular concern to Canada is the contamination of the Arctic food chain. At a recent meeting in Ottawa on the scientific evolution of contaminants in the north, attended by experts from several circumpolar countries, Canada decided on a number of international initiatives to combat this form of pollution which is thought to enter the marine environment through atmospheric pollution. These include the intensification of international consultation and the co-sponsorship with Norway of an international meeting of scientists on Arctic pollution. Canada's scientific findings will be brought to the attention of other Arctic governments and the executive body of the ECE's Convention on Long-Range Transboundary Air Pollution.

Conclusions

Since the signing of the LOS Convention, we have witnessed a concentration of institutional marine environment activity around UN agencies with a proven record in this field. States increasingly rely on, and more importantly make use of, the services of such key institutions as the IMO, UNEP, and the ECE, to name just three.

The results are evident. The basic provisions and principles of the LOS Convention are being considered and incorporated into many new marine environmental agreements. This, in turn, is helping to strengthen the LOS Convention. (While certain aspects of the Convention remain controversial, no state has rejected Part XII. On the contrary, even non-signatory states have declared that it reflects customary international law.)

The UN Law of the Sea Secretariat has started to convene meetings of international experts to consider various maritime law issues. It may

be timely for such a meeting of experts to be convened to examine the marine environment measures adopted by states. This would be a further but essential step in focussing international attention on the need to deal with the pressing issues of the marine environment.

We do not need reminders more galvanizing than the *Exxon Valdez* catastrophe. If *international reaction* to this disaster follows the usual historic trend, it could lead to a call to fill any gap revealed by it, in this case, perhaps stricter enforcement of rules regarding navigation and personnel. If it does, it will face the long road of international negotiation. It will, however, have the international institutions and Part XII of the LOS Convention for assistance and support. And that will make the road ahead a lot easier to negotiate.

WORKSHOP I

GENERAL ASPECTS OF THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE IMPLEMENTATION OF THE LOS CONVENTION

Chair:
Christopher Pinto
Iran-U.S. Claims Tribunal
The Hague

Special Commentators:
Mochtar Kusuma-Atmadja
Indonesian Center for the Law of the Sea Padjadjaran University
School of Law
Bandung

Francis Njenga
Asian-African Legal Consultative Committee
New Delhi

Rapporteur:
Alex Oude Elferink
Netherlands Institute for the Law of the Sea

General Remarks

The workshop addressed general aspects of the role of international organizations in the implementation of the 1982 Law of the Sea Convention (the Convention). The workshop discussed the role of universal and regional intergovernmental organizations as well as nongovernmental organizations (NGOs).

Although there is no doubt that states parties to the Convention are the primary agents in implementing its provisions when it will come into force, international organizations have an important role to play in this regard. Though the Convention has not yet come into force, organizations seem to take the relevant provisions of the Convention into account in their deliberations. Whether this amounts to the acceptance by organizations of the rights and duties conferred upon them by the Convention is not completely clear. One participant stressed the existence of practice to indicate this acceptance, while

another view was that the acceptance of rights is to be assumed. The acceptance of duties should be explicitly made. The importance given to IMO in implementing the Convention was stressed. IMO is the only organization apart from UNEP with the task of setting standards with which state parties have to comply. IMO has by far the widest range of responsibilities. Discussion on the role of IMO showed the differences of opinion on the exact tasks given to international organizations under the Convention. One of the participants questioned the possible role of IMO in establishing sealanes through archipelagic waters.

The Role of International Organizations under the Articles of the LOS Convention

The role given to international organizations under the numerous articles of the Convention forms an indissoluble part of the compromise that makes up the Convention. This was illustrated by the following example. During the negotiating process certain rights were granted to the coastal state on the understanding that international organizations would exercise some form of control over the rules adopted by the coastal state.

It was further noted that international organizations could play an important role in assisting developing states in the implementation of the Convention. An example was the assistance that should be given to developing states in order to determine a strategy guaranteeing the optimum benefits from the exploitation of their Exclusive Economic Zones.

International organizations were seen as an important instrument in furthering the development of the rules contained in the Convention. The preceding observation commented on the remark that the 1982 Convention not only codifies rules of customary international law, but also progressively develops new rules, thus providing the basis for the further development of the law. International organizations can give guidelines, which elaborate on the compromise contained in the Convention, without these being "hard" law. These rules can gradually be transformed into binding law. It was remarked that this is the way most of the non-traditional part of the law of the sea is developing.

A number of questions were raised with regard to the difficulties international organizations concerned might encounter in the implementation of the Convention. One of the questions was whether the division of competence between different organizations under the Convention would not lead to undermining the package deal concept. Not all universal organizations have the same membership or interests. The difficulties which might arise because of different membership

and interests were not seen as fundamental problems, though it was acknowledged that continuous coordination between the United Nations organizations was a necessity, especially because every organization has its specific interests. Differences in the actions taken by international organizations up till now stem from the diverging urgency of the problems confronting them rather than diverging views on the substance of the Convention's rules. Differences in membership of international organizations and state parties to the Convention will exist also after the Convention's entry into force which will take place after the sixtieth ratification or accession. Since international organizations are bound to express the view of the majority of their member states, some divergence between the action taken by organizations and the standards set by the Convention is not to be excluded.

Intergovernmental Organizations and NGOs and the Developing Countries

During the discussion on regional intergovernmental organizations and NGOs, emphasis was placed on the contribution these organizations could make to the economic development of the developing states. Just as is the case with universal international organizations, regional organizations and NGOs command expertise which can assist developing states in implementing the Convention to their full benefit.

There seemed to be a general feeling that an optimum result in this area as yet has not been attained. Two reasons were identified to explain this. On the one side there was felt to be a lack of coordination between organizations operating at a regional level. Most organizations are solely concerned with their specific field of action. This leads to an overlap of activities and the absence of an overall approach for working out a strategy for ocean resources management. This problem could be remedied by better coordination on a regional level. Increased coordination between bilateral and multilateral cooperation was also thought necessary. More emphasis should be placed on multilateral cooperation to accomplish a more effective use of resources. It was indicated that a reason for the effectiveness of international organizations lies in the flexibility with which they can respond to changing circumstances and demands. Another reason for not reaching an optimum result in ocean development policies was thought to be the unfamiliarity of government officials of developing countries with the benefits that could accrue to the socio-economic development of their country through projects of international organizations for developing ocean resources. This could be remedied by increased efforts to raise the awareness required.

The role of NGOs in assisting developing countries in implementing and applying the Convention was generally viewed positively. However, some of the participants voiced doubts with respect to:

- a proliferation of NGOs active in the same field, thus creating overlap in efforts,
- some Western NGOs viewing Third World NGOs as their junior partners and paying more attention to fulfilling their own objectives than those of their Third World counterparts.

In connection with the last point it was noted that in some instances there is a lack of Third World counterparts altogether. This is a factor contributing to the sometimes difficult cooperation of NGOs with the developing states. In connection with these last points it was remarked that governments or intergovernmental organizations decide on the credibility of NGOs and are in a position to regulate the modes of cooperation. It was suggested that it would be worthwhile to consider the drafting of a procedure to better evaluate the activities of NGOs.

The most important contributions of NGOs in assisting developing nations in managing their ocean resources were thought to lie in the following areas. NGOs can contribute to raising the awareness of the concerned government officials of the problems involved in ocean development, among others through assisting the training of government cadres. It was remarked that certain NGOs -- Greenpeace was mentioned as an example -- possess valuable information on matters relevant to the implementation of the Convention. They can help in attaining a higher quality in the implementing instruments. A further possibility for the use of NGOs, such as *e.g.* SEAPOL, because of their flexible structure, is the starting up of activities on a regional level, which later can be further developed on an intergovernmental basis, if need arises.

WORKSHOP II

NAVIGATION

Chair:
Edgar Gold
Oceans Institute of Canada
Dalhousie University

Special commentators:
Rainer Lagoni
Law of the Sea and Maritime Law Institute
Hamburg

Thomas Mensah
International Maritime Organization
London

Rapporteur:
Ellen Ninaber
Netherlands Institute for the Law of the Sea

Competent International Organization

It was stated that the competence of international organizations is based either on their constitution or on the explicit wishes of States; *e.g.* as in the case of the 1954 OILPOL Convention.

Although initially it was doubtful that IMO possessed constitutional competence in this matter, it nevertheless was given this competence by the member States in practice, as the organization was also involved in the implementation of the LOS Convention. In some cases an international organization might possess constitutional competence to act in certain fields but would not wish to take up that responsibility. In some cases the competence remains a dead letter. IMO's constitution gives some examples of competence in certain fields which IMO has never taken up, *e.g.* because other organizations like UNCTAD had already developed activities in those fields. Until 1982 there were doubts as to IMO's competence with respect to marine pollution, even though IMO itself was of the opinion that its competence was unequivocal. One should, however, always bear in mind that the legal

competence of the organization and the activities it actually engages in should be compatible.

The LOS Convention assigns functions to certain organizations. Those organizations may perform functions that implement the LOS Convention even though the Convention did not explicitly assign those competences to a particular organization. Thus IMO took up its responsibility for the adoption of traffic separation schemes and started its work on the development of guidelines for the removal of offshore installations on the basis of Art. 60(3) of the LOS Convention. Doubts have also been raised as to which is the competent international organization. In cases where the LOS Convention refers to the competent international organization in the singular, only IMO could be meant, not in the least because it would be difficult to identify other organizations having a competence in the field of shipping (*e.g.* the designation of archipelagic sealanes). In all cases it is the organization which has to decide whether it is competent or not. In most cases the addressee is not explicitly mentioned, in rare cases (see *e.g.* Annex VIII, LOS Convention) it is.

The question of the implementation of the LOS Convention is dealt with in all international organizations. In answering the question as to its competence, the organization should always answer in accordance with its proper field of expertise in response to the requirements of the LOS Convention.

Implementation Through International Institutions

The question was also raised how implementation by international organizations is to be assessed and evaluated. In the case of two organizations with concurrent competence, it is up to these organizations to decide on their actions, which can be either separate or in cooperation. In making their assessment the organizations should realize that they will contribute, in many cases, to the development of generally accepted rules and standards of international law. Thus in taking up their responsibilities they might well adopt rules and standards which will be binding for States Parties to the LOS Convention, not so much by means of conventional law, but directly through the provisions of the LOS Convention, where it is stated that these states have to comply with generally accepted rules and standards. Subsequently the question was raised as to the interpretation of this concept of generally accepted rules and standards.

Port State Control

It was noted that PSC, by means of the MOU (the Hague Memorandum on Port State Control) is growing rapidly. Even Eastern European countries have shown a willingness to be involved in the expansion of PSC in Europe. Soon the developing countries would be left to develop it further. If a port state would exercise its right of inspection of ships in ports, it would be bound by the provisions of the LOS Convention with respect to penalties and the so-called procedural safeguards of section 7 of Part XII of the LOS Convention. Another example to which explicit reference was made in this respect is Art. 292 LOS Convention (prompt release of vessels and crews) as a means of settlement of disputes in cases where vessels or crews were detained.

One of the important features of PSC, in the framework of the MOU, relates to the uniform and harmonized inspections of vessels in ports. For that reason more attention should be paid to the common education of port inspectors (possibly as a joint undertaking).

Environmental Interests

It was noted that there is tension between environmental interests and the principle of the freedom of navigation and that this tension is likely to increase. This is caused in part by the emergence of the concept of the EEZ, which gives coastal states jurisdiction with regard to the protection and preservation of the marine environment. At the same time, inherent to the concept of the EEZ is the freedom of navigation in that maritime zone. It is in the interest of the international community that States comply with the provisions of the EEZ in order not to disturb the delicate balance between rights and duties of flag states and coastal states. This common interest ensures that coastal States will operate within the Convention's framework. However, it is unlikely that States will infringe upon the freedom of navigation in their application of the Convention. Many states will not be able to live up to the expectations of environmentalists because they are not able to apply the environmental provisions of the EEZ. Even though it may happen at some place at some time that States bend the rules to suit their own wishes, it is contrary to all reasonable expectation that creeping jurisdiction will become a threat to navigation. A prerequisite, however, is that no ambiguity about which rules are to be applied occurs. As to the enforcement of these rules, both within and outside the LOS Convention, the attention of the meeting was drawn to the fact that recent research has shown that States do not always comply with the IMO reporting requirements with

respect to vessel-source pollution. In addition, it appears from this research that flag-state enforcement is deficient, *e.g.* cases of vessels reported to have violated MARPOL 73/78 discharge rules were rarely brought before domestic courts and, if they were, the fines administered were frequently too low to have any deterrent effect. Thus from the point of view of enforcement of environmental instruments the establishment of an EEZ might well be of some use.

Rules and Reality

It was noted that there was a considerable difference between the law and its application in day-to-day practice on board vessels. Every day rules are infringed on board vessels. Although this happens unintentionally, this is an important source of accidents and human error. Questions were also raised as to the value of seafarer's certificates of obscure origin resulting in low standards of certain crews. This is an important loophole in safeguarding the marine environment and lives of seafarers. Most accidents are caused by human error in combination with a lack of expertise and the careless attitude of seafarers. IMO already has an important role in the education and training of seafarers, but the people on board have to make the rules work by applying their skills. Ship management has an important role to play in stimulating their crews to follow the training and to make them comply with the rules, even though there may be conflicting interests in this respect. The example was given of captains not using tank cleaning facilities in ports because of their costs in combination with the relatively low fines, mentioned earlier. German courts seem to show a tendency not to impose fines but to send masters to prison. This jurisprudence is not only doubtful in terms of international law of the sea but has raised concern with flag states and with P & I Clubs who will have to bear the costs.

At present IMO is developing activities in the field of casualty investigations with a view to establishing a data base which may be of use to the member States.

Archipelagic Sealanes

The last issue that was discussed concerned the establishment of archipelagic sealanes and IMO's role therein. A comparison was made with the discussion involving IMO's competence in the field of marine pollution. It was stressed that IMO is offering a facility which places expertise and know-how at the disposal of archipelagic states. IMO

does not wish to supervise these states but to assist them in the designation of the archipelagic sealanes. As to IMO's competence in this field, the question was raised that if archipelagic States do not consider IMO to be the competent international organization in respect of the adoption of these sealanes, it should be indicated which other organization is meant in the relevant provisions of the LOS Convention.

WORKSHOP III

LIVING RESOURCES

Chair:
Thomas Clingan
School of Law
University of Miami

Special Commentators:
Lee Anderson
Department of Marine Studies
University of Delaware

Phipat Tangsubkul
Southeast Asian Program on Ocean Law
Bangkok

Rapporteur:
Elisabeth Minnema-van Dijk
Netherlands Institute for the Law of the Sea

Introduction

Discussions in the workshop were based on two introductions by the special commentators. In the first introduction the thesis was elaborated that fisheries management problems will not be solved through international institutions. The second introduction dealt with a case study concerning governmental and organizational action with regard to fishery policy in Southeast Asia. In addition to discussions on these two introductions, some remarks about marine mammals were also made.

Implementation of Fisheries Management Agreements

With respect to this topic, there was general support for the conclusion from the discussion that the implementation of the agreements concerning fisheries management through international organizations always showed some defects. It was noted that the papers presented at the plenary session support this view.

Many participants of the workshop felt that while agreements among more developed states, such as NAFO (North Atlantic Fisheries Organization) and the EEC (European Economic Community), had more or less failed, some among less developed states, such as FFA (Forum Fisheries Agency), had been rather more successful.

It was, however, noted that the success of the FFA, which gained some positive results with its access agreements, is not due to the success of the international organization as such, but to certain unique features and circumstances. The FFA, being an organization with competence in the South Pacific, does not have to discuss how to cut back catches, because the South Pacific is not a region with an extensive fisheries history or an existing fisheries industry. Access agreements can be concluded relatively easily for areas where there are no historic rights of states, and where economic factors do not play a significant role. The opinion that no single organization dealing with fisheries could be classified as successful was not shared by every participant. It was stated that the practice of African coastal states points to the contrary.

It was noted that despite the current practice of international organizations, fisheries management will become more difficult without international organizations. The fact that activities of international organizations are not always as effective as expected does not indicate that international organizations do not play a significant role in the field of fisheries or that they are totally unworkable. International organizations can at least facilitate negotiations and can influence public opinion on certain subjects.

Several questions have to be answered to determine what went wrong with management agreements, concluded through or within international organizations. The causes have to be sought in:

- enforcement problems of states;
- problems with new entrants to the agreements;
- the determination of and the number of states maintaining or receiving the right to fish.

With regard to the enforcement of agreements by states, the opinion was voiced that states only cooperate if there is a need to do so. Only if a state in its own opinion gains something by implementing an international fisheries agreement will it cooperate.

Attention was also paid to the implementation of fisheries management agreements through participating international organizations, in this case especially the EEC. The participants in the workshop nearly all agreed that the EEC hampers the implementation of international

fisheries agreements, especially those in the framework of NAFO. The EEC does not adhere to the standards as set up by NAFO, and therefore the management of, for example, straddling stocks is made difficult.

An additional remark was made on the enforcement problems of developing countries. The bureaucratic system of developing states is usually very complex and difficult to understand. Questions may emerge such as which ministry is competent to adopt a specific law.

Finally, it was remarked that numerous bilateral agreements on fisheries have been concluded. But bilateral agreements can hardly ever provide for a multi-species approach. Therefore, agreements on fisheries management should in general be concluded within the framework of international organizations.

On the problem of new entrants to agreements, no remarks were made.

With regard to the third question, it was argued that the EEC plays a significant role in determining access to the fishing grounds of its member states and in obtaining access to the grounds of third states. The EEC sometimes links access to the fish stocks of a certain non-member country to that country's access to the Common Market. The opinion was shared by several of the participants that this is inconsistent with the system of the 1982 Law of the Sea Convention and the world trade system. It was also mentioned, however, that this is not true for every country concerned. For example, Canada was never threatened with impeded market access by the EEC.

The Case-Study of Southeast Asia

The situation in Southeast Asia was dealt with extensively. It was explained that in a less developed region such as Southeast Asia, neither the governments nor the public are generally fully aware of the existence of an international law of the sea. The 1982 Convention was "very nicely made in New York," but in Southeast Asia few people know about it or can accept it. The Convention does not take into account the special problems of the most involved states in the region, such as Thailand, India, and Malaysia.

The problems in these countries are far more serious than those in developed countries, because in the case of fisheries the dependency of fishermen on fisheries is a matter of life and death. Most ships are owned by relatively rich traders, who do not inform the fishermen working on their ships about the allowed volumes of catches. In this region, the problems with implementation of fisheries regulations through international organizations shift from problems such as

enforcement to more primary problems, such as provisions of information and education of people dealing with fisheries.

With regard to the case study of Thailand, the main conclusion seemed to be that serious problems for fishermen in the area arose from lack of regional coordination (including unawareness of international regimes, but also ruthless competition within the regional community). Some comparisons were also made with other countries, in which the situation is also of an alarming nature.

Among others, Spain was mentioned several times in this respect. Before Spain became a member of the EEC, it violated several international fisheries agreements or refused to take part in these agreements. It was stated that when Spain became a member of the EEC in 1986, the fisheries policy of the Community was modified in such a way that Spain was not obliged to change its practice.

Marine Mammals

With respect to marine mammals it was stated that during this Conference they were discussed less than other marine species. The main reason was thought to be that they are of less commercial interest.

Bearing in mind Part VII Section 2 of the UNCLOS but also provisions of other conventions such as the Bonn Convention, remarks were made on the duty of states to cooperate in the conservation of living resources, including marine mammals, on the high seas. This duty of cooperation exists even though UNCLOS does not elaborate more specific rules.

There was agreement that more attention should be paid to the specific problems of marine mammals. In particular, there is a need for a common approach to these problems by the specialized agencies of the United Nations. At the moment, indeed some cooperation between UN bodies already occurs. An example is the Global Plan of Action for the Conservation, Management and Utilization of Marine Mammals (a joint UNEP/FAO initiative).

In the present situation, also under the Bonn Convention on the Conservation of Migratory Species of Wild Animals of 1979, an attempt to address the problems is made. This Convention is not limited to the territory of the States Parties, but applies to all ships sailing under the flag of one of the States Parties. Unfortunately, only a limited number of states have become party to the Bonn Convention up to now.

WORKSHOP IV

PROTECTION OF THE MARINE ENVIRONMENT

Chair:
Patricia Birnie
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Special Commentators:
Jon Van Dyke
William S. Richardson School of Law
University of Hawaii

Alan Boyle
Queen Mary College
London

Rapporteur:
André Nollkaemper
Netherlands Institute for the Law of the Sea

Introduction

On the basis of the contributions by the Special Commentators, in the Workshop three themes were discussed which were explicitly related to the papers presented at the Conference: the concept of generally accepted rules, port state control, and regional approaches to marine pollution control. In addition, three topics not dealt with in the papers were also the subject of discussion: specially protected areas, the question of liability for environmental damage, and the interconnectedness of different environmental problems.

The Concept of Generally Accepted Rules and Standards

The first theme dealt with was the concept of generally accepted rules and standards as contained in the 1982 Law of the Sea Convention. In various provisions in Part XII of the Convention, this and cognate concepts are used. The discussion focussed in particular on two questions relating to the concept: the legal effect of the use of the concept and the content of the concept.

With respect to its legal effect an important question is whether provisions of the Law of the Sea Convention can give binding force to standards which are not binding in themselves, for instance those contained in recommendations. The question is whether they can give binding force to standards that are otherwise not binding upon the parties to the 1982 Convention, *i.e.* whether they can make standards binding upon states not party to the agreements containing these standards.

In one view this question has to be answered in the affirmative. The formulation of, for instance, Art. 211 of the 1982 Convention, makes clear that states have to adopt rules not less stringent than those contained in, among other instruments, the MARPOL or the SOLAS Conventions. A literal interpretation of the relevant provisions leaves little room for discussion.

This view was contested, however. Some considered it to be impossible that, without express ratification by the states concerned, standards contained in, for instance, the MARPOL Convention, could acquire binding force for those states. As a counter-argument, reference was made to the undisputed rule that a state cannot invoke against another state provisions of its own constitution in order to evade obligations it has accepted under a treaty.

Another aspect of the legal effect of the use of the concept of generally accepted rules and standards in the 1982 Law of the Sea Convention was noted, namely that the attitudes of third states must be taken into account. The developments concerning port state control may be considered as a major example of this. In cases where flag states do not accept the international norms as such, but do accept port state control, this acceptance can be considered as evidence of state practice in favor of generalization of the international norms. It was doubted, however, whether acceptance of port state control is sufficiently widespread to be regarded as a basis for generalization of rules.

With respect to the content of the concept of generally accepted rules and standards, it was noted that in a large number of cases it will not be difficult to identify them. Nevertheless, the question was raised concerning when rules and standards can considered to be generally accepted. Several cases might be envisaged in which rules become generally accepted: cases in which they are contained in draft texts, or are contained in draft texts which are signed by one or a limited number of states, or these texts are ratified by a large enough number of states to enter into force, or they are ratified by a very large number of states, or, finally, only cases where they can be put on the same level as customary international law.

Special attention was paid to the last case. It was agreed that there is a close relationship between, on the one hand, generally accepted international rules and standards and, on the other hand, the process of international law making. In this context, attention was paid to the relation between generally accepted rules and customary international law. Although the differences are clear, it was noted that there have been some developments recently which may bring the concepts closer to each other. Amongst others, the recent case law of the International Court of Justice, for instance in the *Nicaragua-U.S.* case, was thought to provide possibilities for relating the two concepts. In this view, the translation of generally accepted international standards into customary international law is made easier by this decision.

In cases where standards are considered to be generally accepted, the question arises concerning whether states can opt out of these generally accepted rules. The opinion was expressed that as, a rule, this question has to be answered in the negative. State cannot unilaterally opt out of these rules. At most, states could create a "counter-regime," for instance for a specific region.

Ending the discussion on generally accepted rules and standards, the view was expressed that a clear interpretation of the term, for instance by the International Court of Justice or the International Law Commission, would be highly desirable. As long as a clear interpretation is lacking, the danger exists that states may plead that rules are not generally accepted and that consequently there is no obligation to implement them.

Port State Control

The second topic, port state control, was in particular discussed in relation to the issue of generally accepted rules and standards. As noted above, in general the system of port state control was considered to provide one possibility for the generalization of international rules and standards.

In a description of the functioning of the Memorandum of Understanding on Port State Control in Western Europe, it was pointed out that, although the system of the MOU provides only for the enforcement of treaty obligations, every state is free to enforce also recommendations and other non-binding instruments against ships in their ports. In a number of states, *i.e.* the Netherlands, such non-binding standards are indeed enforced in practice.

It was also noted that although port state control has become an important means of enforcing international rules, in practice port state

control is not yet enforced as envisaged in Art. 218 of the Law of the Sea Convention, providing for port state jurisdiction for offenses against international standards committed on the high seas or in exclusive economic zones under the jurisdiction of other states. In this respect, there is a close link with the exercise of jurisdiction on the basis of the universality principle. Although the application of this principle had been mentioned as a basis for exercising jurisdiction over, for instance, hijacking or terrorism, states appear to be reluctant to extend the universality principle beyond such offenses as piracy.

Cooperation at the Regional Level

The third subject related to cooperation at the regional level. It was agreed that regional approaches in general can be considered an effective strategy of cooperation. Nevertheless, in the discussion some problems of cooperation at the regional level were touched upon.

For example, it was noted that it cannot *a priori* be assumed that regional approaches guarantee effective cooperation. An important obstacle to effective regional cooperation can be considered to be the financial implications. For instance, with respect to cooperation under the Helsinki Convention in the Baltic Sea area and in the Caribbean within the framework of the Cartagena Convention, it was noted that though all conditions for an effective regional cooperation were present, owing to a lack of financial resources the results of the cooperation were limited.

Besides, depending upon the specific circumstances, in some cases even the regional level must be considered as too large scale. The potential importance of sub-regional approaches was emphasized. Among other areas sub-regional approaches have proven to be necessary in the Mediterranean. The question of sub-regionalization has arisen also in the European Community as an important issue.

Attention was also paid to the question of the extension of the regional approach to adjacent areas. In this respect the discussion focussed on a specific category of regional cooperation, port state control. The 1982 Memorandum on Port State Control came into being as a regional effort. In this case a conscious choice was made in favor of regional cooperation in order to utilize its advantages. In practice, the question has subsequently arisen concerning whether or not there should be also cooperation with individual states outside the region. The main view expressed was that such cooperation, *i.e.*, beyond the region, only is useful if it takes place with other regions, not individual states.

Regarding the question concerning the choice of criteria for identification of regions or sub-regions, various factors were mentioned. Among others referred to were language links and similarities in legal systems. The view was expressed that states with a similar legal system may be able to cooperate more effectively. In this respect, however, opinions differed concerning whether or not common law systems might be more capable of adaption to new technology or the enhancement of knowledge.

As an example, reference was made to the opinions of states with different legal systems on the topic of dumping of low-level radioactive waste under the London Dumping Convention, and more particularly on the adjustment of existing rules to the development of new scientific knowledge.

In general it was agreed, however, that other criteria may be of more importance. In particular it was emphasized that environmental issues require a geographical approach; an important criterion was considered to be "ecological unity."

The discussion on regional approaches was concluded by paying attention to the close link between environmental and economic policy. In this respect, the view was expressed that, in the long run, states should try to attain uniform norms. This was deemed necessary since, in case of different norms for different regions, industries will move from regions with stringent norms to regions with less stringent norms. The states in the latter regions could then be characterized as "states of convenience."

Specially Protected Areas

Fourthly, some attention was paid to "specially protected areas." With respect to this concept, it was stressed that the terms used in denoting this concept differ between various conventions and fora. The central idea, however, is in all cases identical: special areas are areas that have to be in one way or another specially protected.

The question was raised as to the implementation of specially protected areas and more specifically what the most appropriate level is in this respect: the national or the international level. In this respect as well, it was noted that one should distinguish between different types of specially protected areas. Consequently, the elaboration and implementation will have to proceed along different lines.

As a generally applicable statement, it was noted that the implementation in practice may cause some difficulties, among others the lack of sufficient resources in certain regions.

The Question of Liability

Fifthly, the question of liability was discussed. It was noted that in practice, rather than dealing with the question of state responsibility themselves, states seem to prefer to pass it on to the private level. On both the national and the international level, some results have been attained as far as private liability is concerned. This is especially true for Western Europe. At state level however, developments proceed very slowly. Comments were made on the developments in various regions. Among others within the framework of the London Dumping Convention, the Barcelona Convention, and the Helsinki Convention the establishment of a regime for liability has been discussed, but in all cases developments proceed very slowly and little has been accomplished thus far. It was noted that in this respect the treaty-legislation process is in a deadlock.

As one of the greatest stumbling blocks, the question of the amount of compensation required is very difficult to settle. More in particular, the problem of the assessment of accountability for environmental damage has not yet been solved in a satisfactory manner. Among others, the question if and to what extent the interests of future generations should be regarded in this respect was considered as a question hard to answer.

As a potential useful development, reference was made to the developments within the International Law Commission with respect to responsibility for acts not prohibited by international law. Although the results of this undertaking are not yet clear, a major conclusion that was already drawn is that the carrying out of lawful acts should in some cases be accompanied by the establishment of a liability regime.

Although the record achieved thus far in practice looks poor, it was pointed out that it is to a certain extent a matter of time. The awareness of the problems is only of very recent origin. Consequently, only very recently attention has been paid to the ascription of economic value to the environment. The process should be regarded as an evolution which needs to be passed. This will take time, but -- in this view -- in the long term results may be expected.

The Interrelationship Between Marine Pollution and Other Forms of Pollution

Finally, attention was paid to the close interrelationship between on the one hand marine pollution and on the other hand other forms of pollution. In particular, the necessity of control of -- as it was called -

- the hydrological cycle was stressed. This concept refers the relation between river pollution, air pollution, and marine pollution. Although the provisions of the 1982 Law of the Sea Convention were generally considered as a useful codification of general principles in this respect, it was also agreed that they only provide a minimum basis.

Consequently, these provisions require a more detailed elaboration on regional levels. For instance, with respect to land-based marine pollution, since 1982, growing attention for the establishment of rules and standards is to be seen. Examples are the North Sea Ministers Conferences of 1983 and 1987, the extension of the Paris Convention for the prevention of marine pollution from land-based sources to air pollution and the development of the Montreal Guidelines within the framework of UNEP. Also, the developments within the International Law Commission on the use of non-navigable international water-courses were considered as an important development.

WORKSHOP V

MARINE SCIENTIFIC RESEARCH

Chair:
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Special Commentators:
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UNESCO

Philomene Verlaan
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Rapporteur:
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The Consent Regime

The Third UN Conference and the Convention on the Law of the Sea, along with other international actions such as the 1972 UN Conference on the Environment, have had a major impact on marine science through:

- the establishment of Exclusive Economic Zones (EEZs), archipelagic waters, and coastal State jurisdiction over research;
- the establishment or reinforcement of marine science infra structure and human resources in most coastal developing countries.

As a consequence, marine research by coastal States within their EEZs has been greatly stimulated while foreign research in EEZs under the consent regime has sometimes been stifled. Under Art. 246 of the Convention, the researching country can undertake marine scientific research in the EEZ and on the continental shelf only with

the consent of the coastal State. While this consent should not normally be withheld, four circumstances are foreseen in which coastal states may in their discretion do so.

Neither scientists, other States, or the collective of States can do very much about arbitrary coastal State action against research. Participants emphasized that some countries systematically refused consent because they saw no benefit or even some risk if permission were granted. Until now, coastal State benefit has been used as a principal criterion for granting consent. Experience with some projects shows difficulties in identifying specific benefits.

However, when the benefit of scientific research is obvious, coastal State suspicion can be removed. In any case, it is important to:

- improve communication with the host country, and
- seek systematic and familiar mechanisms that will eventually bring results to application in the host country.

Problems also arise from the obligation of the researching vessel to receive coastal State observers during the research operation. How many observers can be accommodated is a function of space availability and the ship's schedule. It is advantageous for all when the observers are trained scientists and familiar with the basic concepts of the Law of the Sea.

In implementing Art. 248, there are sometimes difficulties with the amount of information furnished by the researching State. Some developing countries have no possibility to work on large global projects, and it is sometimes difficult for small countries fully to comprehend proposals for research in their EEZs.

Often timing problems arise. According to Art. 248, those intending to conduct marine scientific research should provide the coastal State with all relevant information not less than six months before the expected starting date of the project. Approval is sometimes delayed until the starting date, causing great inconvenience for budgeting, scheduling, and personnel assignment.

International Cooperation

In implementation of Part XIII of the Convention, the mutual cooperation of States in research is essential. Experience has shown that the present system works when countries work together on common problems, and that it is difficult for a developed researching country when there are no common goals. Fruitful cooperation was

exemplified in the film of the *Snellius II* Expedition which emphasized the importance of the partnership forged by Indonesia and the Netherlands in marine scientific research and development. On the other hand, marine scientific research is conducted with the help, usually from national sources, of financial and other resources and of institutions and organizations. The work of scientists benefits from cooperation with other scientists on the national and international level. Arrangements for such cooperation range from informal contacts through increasingly formal steps. The efficiency of such arrangements tend to vary inversely with the degree of formality, and scientists usually prefer the least formal arrangements that will do the job. As one participant pointed out, when difficulties of access are too great, work is often done elsewhere, and requests for consent are sharply reduced.

Arrangements between the governments concerning scientific research are usually made by ministries of foreign affairs which often have little understanding of the scientific questions under consideration.

A recurrent theme of the workshop was that a gap often exists between scientists and decision makers, both nationally and internationally. It is a major challenge to establish fruitful procedures and mechanisms to ensure adequate feedback. Attention was drawn to the paper of Lee Stevens concerning the role of international organizations in developing general criteria and guidelines for marine research, and to the paper of Lee Kimball describing the important influence that non-governmental organizations could have in finding solutions to some of these problems.

The Role of International Organizations

International organizations have the role of promoting and facilitating research. According to Article 251, they should establish general criteria and guidelines to assist States in ascertaining the nature and implications of marine scientific research. A likely organization to undertake this task to ensure conformity with the Convention's research provisions is the United Nations Office of Ocean Affairs and Law of the Sea. That Office might come up with a pragmatic set of recommended uniform rules. The idea of such a set of rules was attractive to participants, although it was recognized that countries have their own domestic laws and it seemed unlikely that these would always be changed to conform to the proposed rules, especially if the latter were developed without participation of the country concerned.

Other ideas, rather than attempting to produce uniform rules, were to put the provisions of the Convention text into simple language and to adjust them for practical use, or to collect existing procedures and to compile and distribute national regulations on the matter. Participants agreed on the value of standardization of approaches through manuals, protocols, etc. and thought it would be useful to discuss this issue at the forthcoming Group of Experts Meeting on Marine Scientific Research being organized by the UN in September. Since one of the tasks of international organizations is to facilitate the conduct of marine research under the new legal regime, instances were noted where the scope of universal intergovernmental organizations could usefully be brought to bear, for example in mobilizing the support of governments in providing services and training. In marine science, perhaps the most effective means of technology transfer occurs through training, for example for advanced degrees abroad, and through joint research and the study and publication of research results and technology in journals and books. However, a major problem now facing many countries is the lack of adequate foreign exchange to purchase relevant publications.

As participants were aware, questions relating to marine scientific research are often controversial. But this is a time when the need for scientific understanding of ocean processes is particularly urgent as ocean resources, the quality of the marine environment, and the ocean's role in global climate become of even greater importance. For this reason, strengthening the role of international organizations -- whether governmental, non-governmental, or regional -- is so important for implementation of the marine science provisions of the Convention.

WORKSHOP VI

SETTLEMENT OF DISPUTES

Chair:
Richard Bilder
University of Wisconsin Law School
Madison

Special Commentators:
Jonathan Charney
School of Law
Vanderbilt University

Shabtai Rosenne
Jerusalem

Louis B. Sohn
School of Law
University of Georgia

Rapporteur:
Marietta Storm
Loeff en van der Ploeg Advocaten
Rotterdam

Introduction and General Remarks

First of all, a prepared statement was provided on the settlements of disputes under the 1982 Law of the Sea Convention. It was noted that despite the contributions of international courts and the advances represented by the dispute settlement provisions of the Law of the Sea Convention, it was important to remember that there were real limits to the authority of international tribunals. International courts have no independent power to compel compliance with their judgments. They are dependent upon the willingness of states to abide by their judgments and the support of members of the international community which encourages states to do so. As a consequence, these courts can not diverge significantly from the political will of the international community. Courts independently cannot make new law or impose norms on states that are not acceptable to the political community.

In the past, significant divergence from that political will has had adverse implications for international courts. This certainly can be found in the history of the *South West Africa* cases. The *Icelandic Fisheries Jurisdiction* cases may present another relevant example.

Law of Maritime Boundaries

On the subject of the law of maritime boundaries between opposite and adjacent states, it was indicated that, absent significant international developments, this law is unlikely to be made more normative by the courts than it is now. Today, maritime boundary law is hardly normative; it is indeterminate. One cannot consider any factual situation and use the current law to identify, with any reasonable degree of certainty, the location of the boundary line the ICJ would find. The law does not provide states with any reasonable guide which enables them to identify the line that would conform to the law. Outside of court the law does not serve to resolve disputes. It is hard to consider this law.

Unfortunately, the ICJ must maintain the appearance of pronouncing on a norm of international law in order to maintain its legitimacy. In the *Tunisia/Libya* case the Court was most explicit about the *ad hoc* nature of its determinations in maritime boundary cases. The negative reaction to this caused the ICJ to restate its position in the *Libya/Malta* case. In that judgment the Court emphasized the view that it was applying law that has a degree of predictability.

At the same time, it sought to reinforce this idea by appearing to limit the most relevant considerations in cases within 200 miles of the coasts to facts of geography and distance. Notwithstanding these statements, the Court did not change the indeterminate nature of maritime boundary law. No maritime boundary ever has been located by the ICJ through the use of considerations other than geography. Despite the limitation to geography, the Court has articulated no rule that would limit the Court's ability to locate the line as it pleases.

It comes as no surprise, however, that a more deterministic rule has not evolved. Judges seeking evidence of the will of the international community will read the records of UNCLOS III and find discord. The provisions of the 1982 Convention provide further evidence of the unsettled situation. The evidence of state practice, however, has not been studied. That evidence might yield proof of more agreement than the UN processes appear to suggest. This possibility is among the goals of the ASIL Maritime Boundary Project study that is examining the 110 or so maritime boundary agreements since 1940 to determine

whether there is a common state practice. In the absence of an appearance of greater consensus, however, the Court only may move the law in this area incrementally.

The Law of the Exclusive Economic Zone

Comments were made also on the law of the exclusive economic zone (EEZ). Unlike the articles on maritime boundaries, the LOS Convention does provide normative rules for the EEZ. Some articles, of course, are not ambiguous. It was pointed out during the Conference that states are not necessarily behaving in complete consistency with the Convention's articles on marine scientific research in the EEZ. Similar divergences are found in other parts of the EEZ regime.

It was believed that, if a court were called upon to pronounce on a detail of EEZ law prior to entry into force of the Convention, the relevant state practice would be considered in the context of customary law analysis. The Convention and its history also would be relevant but would not be determinative. Unfortunately, customary law may not be found to be identical to the 1982 LOS Convention.

Even if the Convention were in force for the states before the Court, a different state practice might loom large enough to cause the Court to find law at variance from the understanding reached in 1982. In the future a new state practice may create a strong political consensus within the international community that may not be ignored by the Court. This conclusion might be reached despite apparent limiting rules found in the Vienna Convention on the Law of Treaties. The state practice might have created supervening customary law similar to the new fisheries zones that seemed to prevail over the 1958 LOS Conventions.

It was concluded that international courts and the dispute settlement provisions in the 1982 LOS Convention are not a panacea. They will not automatically reaffirm the rules of the LOS Convention as understood in 1982 if the community consensus has shifted. The lengthening delay in the entry into force of the Convention and the increasingly common divergent actions of states that are unchecked by other states and the LOS dispute settlement system make it possible that the understandings of 1982 will not be maintained.

The sooner the Convention enters into force, of course, the greater the likelihood that these developments will be slowed. They will not, however, be checked.

Significant Aspects to the Settlement of Disputes Provisions

Three significant aspects to the settlement of disputes provisions of the United Nations Convention of the Law of the Sea were noted. The first important element is the deliberate effort to head off disputes, to provide for a system of dispute prevention. Art. 285 is particularly significant in this respect since its effect is to make the dispute prevention provisions applicable to all disputes concerning the interpretation or application of the Convention. Other provisions with the same general objective are found, for example, in Part XII (on the protection and preservation of the marine environment), section 7, and Articles 223-233. These articles clearly aim at the prevention or at least minimization of international disputes.

A second significant element is a certain timidity shown in linking the substantive provisions of the Law of the Sea Convention with the dispute settlement provisions. This is particularly evident as regards the extension of coastal states resource jurisdiction embodied in the concept of the Exclusive Economic Zone. Thus, by virtue of Art. 297, para. 2, concerning the settlement of disputes relating to marine scientific research in the EEZ, and para. 3 with regard to fisheries in that zone, the exercise by the coastal state of its discretion is all but excluded from the sweep of the dispute settlement provisions of the Convention. Although this was to a considerable extent due to the political pressures dominant in the Conference, another major contributing factor was the general inadequacy of available remedies in present-day international law.

A third significant element is that, especially in Annexes V and VII, there is now an up-to-date, practical, and diplomatically accepted codification for international conciliation processes and for international arbitration procedures. These two annexes, which were quite carefully negotiated and drafted, will come in the course of time to serve as models for these two essential procedures. Moreover, Annex VI, on the Statute of the Law of the Sea Tribunal, contains several important departures from the Statute and the Rules of the International Court of Justice. However, at the same time it contains several defects. The Drafting Committee, especially through a working party established within the French Language Group, tried to remedy these but was unsuccessful primarily because of lack of time at the end.

Comments on the Settlement of Disputes Papers

The papers presented during the morning session on the settlement of disputes were commented upon. The paper of Jean-Pierre Que-

neudec presented some history. It showed that there had been many cases of great importance for the Law of the Sea decided by the International Court. It also made clear that a new role is reserved for the International Court: implementing UNCLOS provisions and crystallizing new rules of customary law.

The paper of Francisco Orrego Vicuna showed that in the jurisprudence of the International Court, equity plays an increasing role. It was thought that there is a difference between the basis of application of the rules of equity in international law and in domestic law. This is caused by the fact that only 160 states form the subjects of international law; each case is *sui generis*. Although an International Court applies equitable rules, states sometimes object that these rules are not equitable in a particular situation. The objective is to reach "an equitable result."

The paper of Renate Platzoeder showed the difficulties of creating a new tribunal. These difficulties are understandable. In past times other international tribunals have been created and the tribunals were dissatisfied with their treatment by the states of the seat of the tribunal. Anxious to prevent making the same mistakes, the international community applies various restrictive rules when creating new ones.

With regard to dispute settlement in general it was emphasized that there is plenty of state practice. The international community should pay more attention to precedents. Other examples that should be taken into consideration by the Law of the Sea lawyers are bilateral treaties of commerce and their solutions for dispute settlement. Recent free trade agreements, for instance, contain some novel dispute settlement provisions.

General Discussion

In the general discussion one asked for comments regarding the Federal Republic of Germany's effort to serve as the site of the Law of the Sea Tribunal, despite its delay in ratifying the Convention. None in the workshop, however, had any suggestions in this respect.

The issue of *lis pendens* and the possibility of "forum shopping" among the various tribunals dealing with Law of the Sea disputes was raised. The consensus was that this was unlikely in practice to be a real problem. The parallel situation of the United States, for example, which had both federal and state courts, had raised few difficulties. It seemed likely that the various international tribunals involved would themselves find ways of handling any problems that might arise.

There was considerable discussion whether the existence of a variety of competent tribunals might interfere with the development of uniformity in the Law of the Sea. It was noted that, while uniform rules might be very desirable in certain areas, such as coastal states rights, there were other areas, such as delimitation, where appropriate solutions turned on the particular facts and uniformity was not possible. It was also pointed out that there was no necessary relation between the number of tribunals dealing with ocean disputes and uniformity in the Law of the Sea; even with a single Law of the Sea Tribunal, uniformity might not be achieved, and even with several, uniformity in the most important areas might still be attained.

There was also extensive discussion concerning the purpose of the dispute-settlement provisions in the Convention. It was suggested that one of the most important functions of these provisions was to prevent disputes from occurring; this seemed the case, for example, with the provisions regarding conciliation, which were likely to be more effective in avoiding disputes than in resolving them. It was also pointed out that states were generally reluctant to sue one another in international tribunals and preferred to use non-judicial dispute settlement techniques. However, several people noted that there might nevertheless be serious incidents, such as seizures of ships or unpermitted intrusions into territorial waters, in which the possibility of recourse to some international tribunal might be the only way of avoiding situations in which a state might feel that it had no alternative but to resort to force.

BANQUET SPEECH

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It is now the conventional wisdom that the Convention on the Law of the Sea represents stability and order, which everybody prizes, while customary law processes -- the assertion of state claims to exercise authority over events at sea and the responses to those claims, plus the inferences that are drawn about these behaviors -- are disruptive and productive of unnecessary and politically costly controversy.

There are two points about this view that interest me most. The first is the apparent emphasis on the utility and therefore the overall value of the LOS treaty because of its contribution to stability and order, and the second is the de-emphasis of the actual effects of this agreement on the other values at stake -- access to valuable resources, access to significant decision processes, the contribution to the well-being of people generally, and the new regime's impact on the most vital resource we have, the store of knowledge and understanding of the ocean system (including the means of expanding this store).

I have a somewhat different point of view on both these scores.

It seems to me that the claim that the treaty is the answer to orderly ocean use and development is only partly correct. Relative to the development of law solely by customary means, explicitly agreed arrangements are surely more likely to avoid excessive uncertainty and disruptive controversy. However, it is also true that the treaty provisions are often so general and vague that they cannot, standing alone, always provide helpful guidance to States. Accordingly the situation is often not substantially different from what prevails under customary law. It will continue to be necessary to look to State practice to determine what is lawful.

What I think this means is that customary law processes may be expected to operate even after the LOS treaty comes into force, and certainly this is the pattern in this lengthening period prior to force. I mean that the nature of a treaty document concerning a subject matter as dynamic as technology development and the use of the ocean will require consideration of state practice in order to determine the meaning of the treaty in application over time. Even if the parties to the treaty were in perfect agreement with treaty provisions at the time of its conclusion and those provisions adequately provided for the

problem addressed, the changes that can be expected to occur over time in ocean use will require that the treaty principles be interpreted and re-interpreted to address the new situation that arises. This process will involve individual state appreciation of issues and the assessment of the principle, if any, which should be applicable. States may very well differ initially over how the treaty deals with problematic situations and advance different interpretations of the applicable treaty provision. Over time the views of states are likely to coalesce about one or the other of the prevailing views.

There is, unfortunately, no way that will necessarily resolve these differences, unless there is a good possibility of a dispute settlement procedure that will produce a choice to which states generally are attracted. It is in this sense, I believe, that the achievement of the compulsory dispute provisions acquires greatest importance. These provisions are important, of course, for avoidance of conflicts that might escalate to violent contention, but they are even more important in my view for their potential to produce agreed interpretations of the treaty.

These thoughts are rudimentary, I concede, but they lead me further to the view that a substantial failure of the Third United Nations Conference on the Law of the Sea was in the development and creation of institutions for making initial regulatory decisions. By this I mean that the Conference very nearly left the scene as it found it in terms of structures for making these decisions or assisting in the making of them.

It is true that potential deep seabed mining occasioned the creation of a very elaborate institutional setup for dealing with that activity. But it is no coincidence that institution-making prospered in relation to an activity which at the time was extremely unlikely to require the making of substantive decisions. In a sense the political system was content to manufacture castles in the air when there was really no serious current prospect that the castles would be occupied.

I do not mean to imply that the Conference was a total failure in this regard, for it was not. But in the sense that there was any overall assessment of the needs for better institutions, the Conference neither tried nor accomplished much. The gains were isolated, such as the Commission on the Limits of the Continental Shelf. It only partially affects this negative assessment that the Conference delegated tasks to existing international organizations. These were already available for use and their overall role in making timely decisions, however valuable they might have been in particular situations, does not inspire confidence. The specialized agencies are not exactly a recipe for improvement of institutions on the international level. These bodies

undoubtedly serve valuable purposes, but they are mainly useful as centers for the deposit and dissemination of information (which is a vital function) but not often for making substantive decisions to prescribe regulations. However, I am mindful that there may be positive developments in this regard, arising from the delegations of authority to international agencies by the Third UN Conference on the Law of the Sea.

The most hopeful development in my opinion has come from initiatives taken by the United Nations Secretariat, perhaps suggested by recognition of the scope of the tasks that needed to be undertaken by some centralized unit to facilitate implementation of the treaty. That recognition, however, is very imperfectly recorded in the proceedings or resolutions of the Conference. What appears to have happened, rather, is that initiatives have been undertaken and pressed within the Secretariat. The creation and continued operation of the Office of Ocean Affairs and the Law of the Sea is an extremely important development in implementation of Article 319, in my opinion probably more important than any by the Conference with the exception of the articles on dispute settlement. The importance consists of a means and mechanism for calling attention to developments in the ocean and the responses of states to those developments. This means that there is a means for focussing on issues arising from changes in the demands society makes on the ocean. This focus means, in turn, that perhaps states generally will not allow the system of international law to get seriously out of touch with the need for better regulation of events at sea.

Since writing these words, I have read Ed Miles' comments about the significance of Article 319(a) of the LOS treaty in which he refers to the view that the Secretary General has the exclusive authority vis-a-vis the specialized agencies to interpret the LOS treaty. As impressed as I am with the critical role that this Office plays and can play, I must say that this understanding of Article 319 is not self-evident and there appear to me to be good reasons for doubt about the validity of such an interpretation of Article 319. Having already acknowledged that the UN Office on the Law of the Sea has a most significant role to play, it still does not follow that other UN entities, created by different states and operating under different constitutional documents, are without authority to interpret the LOS treaty as appears to them to be required by their missions.

The second point above is that the treaty should also be assessed for its substantive impacts on important social questions. Regarding access to resources, surely a most important issue is the relative distribution of resources as between developed and developing states. On this

score, the treaty receives failing marks when assessed on a macro scale. A number of individual developing states benefit from resources now within their control through the exclusive economic zone, but overall the biggest winners are developed states. The treaty is not a mechanism for improving general wealth distribution.

Regarding the structure of decisions about the ocean and the distribution of participation in them, which is labelled power in political terms, it seems to me the score is much more even. Those who were formerly without any significant chance to participate have gained a good deal even if the treaty itself never comes into force. The price of this, however, is in some respects very high. The decentralization of decisions to coastal states does enlarge the power of these states and diminishes the power of a smaller group of flag states, but it does not follow that the general community, or even these coastal states, always and necessarily benefits. On balance, the resources they have gained in decision-making authority do not match the gains of developed coastal states. The gain in power is not at all matched in the gain of wealth, except in limited specific instances.

An area of significant loss, for all states, is in the means for improvement of knowledge and understanding of the ocean. This is perhaps most clearly seen in the context of the current agitation about global change, and specifically of global warming.

What does the law of the sea have to do with global change? What occurs most quickly to me is that marine scientific research is the prime ocean activity bearing on the processes that lead to change -- changes in temperature, both of water and atmosphere, changes in circulation, changes in abundance, quality and distribution of living matter in the ocean, changes in the materials that are added to or taken from the marine environment. These changes require observations in the marine environment, including the emplacement of platforms and instruments, the collection of materials, and perhaps the introduction of materials for experimental purposes.

What this suggests is that we need a legal regime for marine scientific research that facilitates the scientific activities that are and will be of substantial help in the studies that will assist in understanding the process of global change and in taking whatever actions can be taken to intervene to promote a benign process. Does the LOS treaty provide such a regime? My answer is negative. I do not believe the treaty was designed to facilitate marine scientific research and that it can be shown now not to do so nor is it likely to do so. The facilitation of such research will require actions to avoid the constraints and opportunities for obstruction that the treaty permits.

However, if one looks to the medium long future, it seems to me possible that the treaty may come to be interpreted so as to promote effective research. It will become apparent, if it has not already, that many island communities and areas of mainland States on low-lying coasts may be severely harmed by the rise in sea level accompanying global warming, should such transpire over the next quarter century. (We are talking here about a point in the future about the same distance as the initiation of the Law of the Sea Institute in 1965 from the present moment, i.e., well within the lifetime of most of those present.) A considerable rise in sea level comes under the guise of drastic change, in my view, and the prospect of such change may well have an impact on views about the utility of promoting ocean investigations that might help to anticipate changes or with the introduction of measures to slow if not eliminate the condition. Higher sea levels threaten more than simply reduced land area, which may be minimal in any case, to include lower water quality as salt water invades water tables, interference with sanitary conditions, including septic systems, encroachments upon roadways and communication systems, and, not least, alterations in the coastal environment that is vital for coastal ecosystems which, in turn, influence ocean populations. What all of this may do to nations, island or not, significantly relying on tourist income need only be mentioned.

Global warming is expected to have other significant effects as well that may work selective deprivations of serious consequence. Some of these include significant changes in the land-water interface so that previous delimitations of boundaries no longer are accurate on existing charts or cannot even be depicted on a chart.

In total, the changes that may be coming over the next decades counsel the facilitation of ocean research that is relevant to improved knowledge of the process of change. A system that impedes the development of improved understanding of planetary processes of air-sea interaction is not in the interest of any community and it may result in unnecessary loss to mankind as a whole and to particular territorial units, including those imposing restrictions.

The burden of the above comments is that the new treaty provisions concerned marine scientific research are not a gain for states generally. In this instance the drive to condition the freedom of use of the high seas has not been successful, when measured in terms of the conditions required for facilitating scientific inquiry. In another area, however, it seems to me probable that the treaty places too few limits on freedom of use; I refer to the continued viability of the notion of freedom of fishing on the high seas.

It does not take any foresight to see that continued freedom of fishing on the high seas is creating serious problems for which the LOS treaty has no easy or obvious solutions. Several problems are immediately apparent. One is the current difficulty arising from the problem of straddling stocks -- as now evident especially off the eastern coast of Canada in the instance of EEC excessive fishing for cod beyond Canada's 200-mile fishing zone, in the central Bering Sea pollock fishery prosecuted by a number of states in the area beyond and enclosed by the EEZs of the USSR and the U.S., in the southeast Atlantic off the coast of Argentina, in the southeast Pacific off the coast of Chile. Thus far, the standard mode of coping with high seas problems, the conclusion of an international agreement among those involved, has not done the job. An argument can be made for an interpretation of the LOS treaty that might help resolve these difficulties, and it involves serious modification of freedom of high seas fishing.

Another and not less serious problem arises from the increasingly widespread use of drift net fishing gear in very large areas of the high seas: fishing for tuna, for squid, for salmon, for sharks, for swordfish, for whatever yields an adequate return for the effort. The trouble with this gear is that it is wholly non-selective and in addition to the target species, it take absolutely anything that can be ensnared. The result of this is extremely large, allegedly incidental, catches of other commercially valuable species and, in any event, an unknown but possibly large and important disturbance of very large ecosystems.

Drift net fishing is a common gear in many fisheries that are prosecuted within 200 miles, but there it is susceptible to regulation about length of net, time in the water, specific locations, and seasons. In the high seas region, only the flag state may regulate, and most often this means no regulation at all; indeed that is the point. The consequences of the use of this gear in the North Pacific are nearing catastrophic. Enormous areas are targeted by drift nets and they destroy a great deal of wildlife simply because they are there. In addition, in this instance they take large quantities of valuable anadromous species (salmon). One recent estimate is that, in the past three years, enforcement activities in the United States have managed to seize about 25,000 tons of salmon caught in drift nets and illegally imported into the U.S. This is only a portion of the amount thought to have been taken. It is not difficult to document that this method of fishing for salmon is highly wasteful and destructive. The wider ecosystem impacts are harder to document, but the range of use of the drift nets is so large that it is believed they are significant. Adequate investigation of this is hardly underway. This method of fishing is not

confined to the North Pacific and it is known to be increasing in both the southern Pacific and the Indian Ocean.

The answer here is to abolish the use of this gear except under carefully regulated conditions. The LOS treaty does not even begin to address this problem, except under the rhetoric of the obligation of states to conserve on the high seas and under Article 66 on anadromous species which might allow the host state to take action to protect its fisheries while on the high seas. In either event, freedom to fish on the high seas must be restricted if rational use is to prevail.

Among other current problems arising from freedom of fishing on the high seas, and which result in political disruption, are the impact of certain types of fishing gear on the take of marine mammals. Because this has not yet been dealt with successfully by conventional means, it is leading to unilateral measures that increase political discord.

I do not pretend to have solutions to these problems, at least none to bore you with now. They are mentioned to remind us that while overall assessment of the 1982 Convention is justifiably positive, it does not follow that all serious problems were resolved. Nor can it be blinked that the treaty itself has serious flaws when appraised in terms of its overall impact on widely shared objectives. In other words, there is still much to do in addressing problems of the international law of the sea post UNCLOS III. Unless some means are found to resolve some of these difficulties, there may be damage to the structure and the balance of interests sought in the 1982 Convention.

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