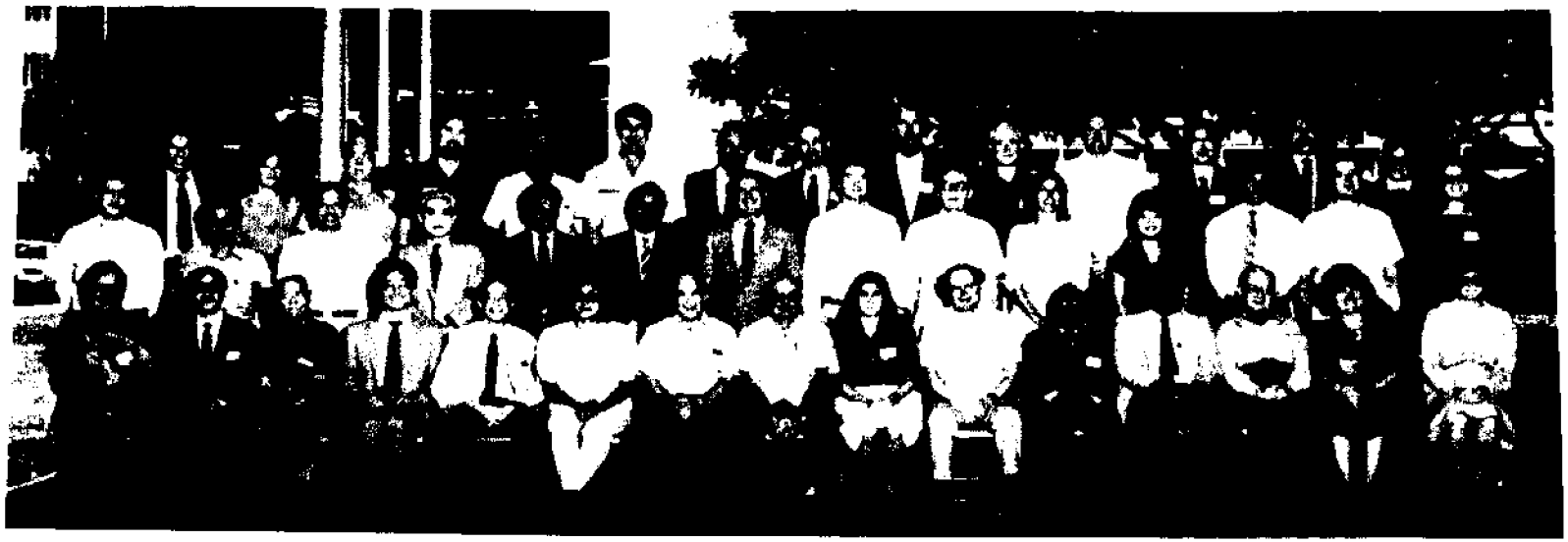
International Navigation: Rocks and Shoals Ahead?

Edited by
Jon M. Van Dyke
Lewis M. Alexander
Joseph R. Morgan

International Navigation: Rocks and Shoals Ahead?



Front row (left to right): Thomas A. Clingan, Jr., Nugroho Wisnumurti, John Bardach, Sang Myon Rhee, Norton Ginsburg, Gracie M. Fong, Bernhard J. Abrahamsson, Joseph R. Morgan, Miranda S. Wecker, William T. Burke, R.P. Anand, James Anthony, Louis B. Sohn, Renate Platzoeder, Michele R. Wallace.

Second row: Victor Hao Li, Atji Misbach Muhjiddin, Choon-Ho Park, Judge Shigeru Oda, Camillus S.N. Narokobi, Komar Kantaatmadja, Harvey W. Dalton, Jon Van Dyke, Scott Allen, Carol Stimson, Linda Nihei, Jan de Werd, J. Peter A. Bernhardt, Mendl Djunaidy.

Third row: John P. Craven, Maivan Clech Lam, Lewis M. Alexander, Edgar Gold, Iosefa Maiava, Bruce Harlow, Thomas Busha, Charles M. Keever, Morris M. Sinor, Horace B. Robertson, Jr., Richard Grunawalt, Jin ZuGuang, Scott A. Hajost, Elizabeth Ng.

International Navigation: Rocks and Shoals Ahead?

A Workshop of
The Law of the Sea Institute

Co-sponsored by
The University of Hawaii Sea Grant College Program

Resource Systems Institute
of the East-West Center

The William S. Richardson School of Law, University of Hawaii at Manoa

January 13–15, 1986
Honolulu, Hawaii

Edited by
Jon M. Van Dyke
Lewis M. Alexander
Joseph R. Morgan

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

This volume is the result of a cooperative project co-sponsored by:

The Law of the Sea Institute
The University of Hawaii Sea Grant College Program
The Resource Systems Institute
of the East-West Center
and
The William S. Richardson School of Law,
University of Hawaii at Manoa

This work is the result of research ("The Freedom of Navigation and Ocean Security" project, Project No. PM/M-2b) 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-88-03.

Funding support was also provided by:

The Ford Foundation
The Andrew W. Mellon Foundation
The University of Hawaii Foundation
Alcantara and Frame

Library of Congress Cataloging-in-Publication Data

International navigation : rocks and shoals ahead? : a workshop of the Law of the Sea Institute, January 13-15, 1986, Honolulu, Hawaii / co-sponsored by Resource Systems Institute of the East-West Center, the University of Hawaii Sea Grant College Program, the William S. Richardson School of Law, University of Hawaii at Manoa : edited by Jon M. Van Dyke, Lewis M. Alexander, Joseph R. Morgan.
p. cm.
Bibliography: p.
Includes index.
ISBN 0-911189-17-3 : $35.00 (est.)
1. Maritime law--Congresses. I. Van Dyke, Jon M. II. Alexander, Lewis M., 1921- . III. Morgan, Joseph, 1927- . IV. Law of the Sea Institute.
K4182.A55 1986
343'.096--dc19
[342.396]

88-4010
CIP

This book may be ordered from: The Law of the Sea Institute, William S. Richardson School of Law, University of Hawaii at Manoa, 2515 Dole Street, Room 208, Honolulu, Hawaii 96822.

Cite as J. Van Dyke, L. Alexander, and J. Morgan (eds.), *International Navigation: Rocks and Shoals Ahead?* [page numbers] (1988)

CONTENTS

5 . ARCHIPELAGOES AND ARCHIPELAGIC SEA LANES PASSAGE

6 . ENVIRONMENTAL ISSUES

7 . NATIONAL SECURITY INTERESTS

THE LAW OF THE SEA INSTITUTE

1986 STAFF

John P. Craven, Director
Scott Allen, Associate Director
Maivan Lam, Assistant Director
Carol Stimson, Administrator/Editor
Elizabeth Ng, Publications Manager

1986 EXECUTIVE BOARD

International Navigation: Rocks and Shoals Ahead?

CHAPTER 1

THE PROBLEMS AND THE PARTICIPANTS

Introduction

Although the great majority of the world's nations signed the Law of the Sea Convention[1] in December 1982, a body of agreed principles that can truly regulate navigation on the high seas and in the various jurisdictional zones of the oceans is still in an evolutionary stage. A number of reasons explain this phenomenon: the Convention has not yet been ratified by enough nations to come into force and some nations may never ratify it; the ambiguous wording in critical provisions of the Convention pertaining to navigation will be subject to varying interpretations even after the Convention comes into force; and many nations consider the Convention to be largely a set of guidelines, with the actual rules and regulations to be established by a lengthy period of state practice.

Some coastal nations tend to interpret the navigation articles differently than do the maritime powers. The former are generally interested in imposing controls in waters under their jurisdiction for purposes of national security and environmental protection. The latter tend to interpret the rules to permit a maximum degree of navigational freedom.

What can we expect in the evolving customary law of the sea of the future? Will international navigation enjoy more or less complete freedom of the seas or do some political rocks and shoals lie ahead? The papers and discussions in this volume, based on a conference held in Honolulu in January 1986, explore many of the questions and potential problems that can be foreseen.

The "SLOC," the essential pathway for navigation, formed the unifying theme for this conference. The acronym "SLOC" represents "Sea Lanes of Communication" for commercial shipping and "Strategic Lines of Communication" when referring to military strategy. Whether for commercial or military transit, a vessel proceeding in a SLOC crossing the ocean from its port of origin to the final destination may find itself in another nation's internal waters, territorial sea, contiguous zone, exclusive economic zone, strait, or archipelagic waters. As they navigate the various marine areas, ship captains are subject to differing rules or prohibitions which are sometimes dependent on controversial interpretations. To discern hazards that threaten passage along a SLOC, the astute navigator must come to grips with the 1982 Law of the Sea Convention which contains rocks and shoals in the form of ambiguities and compromises which will be given different interpretations by nations with conflicting interests.

One of these problems, in a phrase coined by Lewis Alexander during this conference, is "creeping uniqueness," the feeling by many nations that their geographic circumstances are somehow unique and therefore that they are not bound to a strict interpretation of the Convention in one or more respects. The idea of "creeping uniqueness" became an

important and useful focal point for discussions that explored many of the potential problems that lie ahead for global navigation. This volume captures the essential views expressed in these presentations and workshop discussions.

Chapter Highlights

Chapter 2, *Freedom of Navigation: Some Basic Views* provides a historical and factual perpective on high seas navigational freedoms and describes the interests of the commercial shipping industry and of military navigators who have traditionally exercised those freedoms. This chapter also discusses the erosion of traditional high seas immunities -- warship immunity and the immunity of commercial vessels from search and seizure -- because of coastal state environmental and resource management regulations.

The role of commerical shipping in distributing economic resources is intrinsically intertwined with political and military considerations, both in peacetime and in wartime. This chapter describes operational characteristics of the commerical shipping industry and the role of navies in protecting commercial shipping. Keeping strategically important supply lines open to insure the survival of nations at war illustrates the intimate association of commercial and military navigation. In this chapter some issues discussed in greater detail in later chapters first appear: what do innocent passage, transit passage through straits, and archipelagic sea lanes passage really mean to the navigator or military strategist?

The third chapter shifts the frame of reference from the navigator to the coastal nation and its territorial sea. *Baselines, the Territorial Sea, and Innocent Passage*, focuses on delimitation of boundaries within territorial waters through unique claims and baselines. This chapter analyzes factors that determine the validity of claims to rights of passage using mathematical models and the Convention's legal language. When a maritime boundary has been chosen or agreed on, what is the nature of the maritime nation's right to pass through the zone? Not only do states assert geographic "uniqueness" to pose favorable claims to territorial waters, but also coastal nations interpret passage rights restrictively to suit their needs. This chapter considers Germany's roadstead claims, unique circumstances in China, and disputed claims in the Canadian Arctic.

Chapter 4, *International Straits and Transit Passage*, considers the substantive nature of transit passage, innocent passage, and archipelagic sea lanes passage as the 1982 Convention intended these rights to be put into practice. In this chapter, R.P. Anand, Louis Sohn, and Shigeru Oda offer scholarly insights into the concept of transit passage and its evolution from innocent passage regimes. Among the specific straits discussed are the Malacca and Korea Straits. The material in this chapter, along with the commercial navigational material explored in Chapter 2, will aid understanding of recent Soviet and U.S. actions to keep open the Strait of Hormuz.

Chapter 5 concerns archipelagoes and archipelagic sea lanes passage. Building upon concepts developed in Chapter 4, this chapter explains how rights of archipelagic sea lanes passage evolved from innocent passage and how archipelagic nations came to accept the demands of maritime nations for limited navigational freedom through archipelagoes. This chapter presents the coastal state viewpoints of Papua New Guinea and Indonesia and includes extensive discussion of the role of the International Maritime Organization (IMO). Thomas Busha's

paper on the IMO shows why agreements like the 1982 Convention are difficult to apply to specific geographic circumstances when parties from different nations attempt to interpret treaty language in their own favor. One participant admits "total confusion" on the *role* of the IMO. Others suggest alternatives for representing the interests of archipelagic and maritime nations in the process of designating sea lanes.

Chapters 3, 4, and 5 focus on regulatory regimes determined by the geographic location in the ocean. Chapters 6, 7, and 8 move from this spatial approach to a functional approach where regulation corresponds to the type of activity taking place. Chapter 6 addresses environmental issues, and Thomas Clingan's paper discusses two problems that give coastal nations good reason to regulate the activities of maritime powers -- vessel-source pollution and hazardous cargo. Also in this chapter, Scott Hajost provides an overview of U.S. legislation designed to create marine sanctuaries and to protect fishery resources.

Chapter 7 on military and security issues begins with Louis Sohn's survey of international navigational interests that relate to national security. This chapter explores differences in the impact of efforts to maintain world public order on naval powers and on the coastal state. Naval powers resist unwarranted limits on freedom of military navigation that coastal state regulatory regimes might impose. U.S. Navy commentators describe, for instance, how regulatory schemes and resource management and development plans may constrain military operations.

This chapter also covers issues created by nuclear-free zones and security zones, which many states have sought to establish because of concerns about military activities near their coasts. The chapter includes excerpts from nuclear-free zone treaties and the negotiating history of the 1985 South Pacific Nuclear Free Zone Treaty. The paper on geographical disputes near Korea, China, and Japan explains security issues of the Northwest Pacific region from Korea's standpoint.

Chapter 8 provides an overview by William Burke on the challenge of balancing coastal and maritime states' interests and Edgar Gold's observations about the future of maritime transit. Professor Burke describes the balancing process through which coastal states and flag states give due regard to one another's competing resource and navigational needs, and he analyzes perceived threats to world order and stability, providing examples of security issues left unresolved by the 1982 Convention. Professor Gold then addresses the question whether a new maritime convention is needed to protect commercial shipping. Finally, the editors provide a set of conclusions, summarizing areas in which a consensus has been achieved and explaining other areas where problems remain unresolved.

Recent Controversies Involving the Freedom of Navigation

The problems that brought together this group of scholars and government officials remain very much in the news. This section describes four recent incidents in which U.S. vessels deliberately exercised "freedom of navigation." These incidents demonstrate the links between the "real" and "academic" worlds of the law of the sea. Three of these actions challenged other nations' legal positions on the status of waters near their coasts. The United States justified the presence of the destroyer *Caron* and the guided missile cruiser *Yorktown* in Soviet territorial waters of the Black Sea as an exercise of innocent passage. In the Gulf of Sidra, the aircraft carriers Saratoga, America, and Coral Sea challenged Libya's claims that this gulf is a historic bay and thus internal waters of Libya. In the Northwest Passage, after the U.S. Coast

Guard ice breaker Polar Sea made a transit without requesting Canadian permission, Canada declared the Northwest Passage waters to be internal waters of Canada. In a fourth incident, in the Persian Gulf, the United States justified the presence of the guided missile frigate Stark as an exercise of freedom of navigation, necessary to assure the free flow of oil through the Strait of Hormuz.

The Black Sea Maneuver

In August 1979, the United States announced plans to challenge openly other nations' jurisdictional claims that restrict free navigation because, according to U.S. policy, "rights which are not consistently maintained will ultimately be lost."[2] Pursuant to that policy, on March 13, 1986, two U.S. warships, the guided missile cruiser *Yorktown* and the destroyer *Caron*, entered Soviet territorial waters, and sailed within six nautical miles of the Crimea, home to the Soviet Union's Black Sea Fleet at Sevastopol. Although Department of Defense officials insisted that the transit was "consistent with relevant Soviet law,"[3] early reports suggested that the vessels had been carrying out intelligence activities in the region because the *Yorktown* carried electronic sensors capable of tracking hostile planes, ships, and submarines, and the *Caron*, later dispatched to gather intelligence off Central America, also was loaded with sensors and listening devices.[4]

Because U.S. warships pass through the Turkish Straits two or three times annually to enter the Black Sea and show the U.S. flag, the presence of the two ships in the Black Sea from Monday, March 10 to Monday, March 19 was unremarkable. After the ships entered Soviet territorial waters and lingered two hours, however, the Soviets claimed that a serious breach of international law had occurred. Pentagon officials stated that the vessels were there to test Soviet defenses, to exercise the right of innocent passage, and merely to go "from point A to point B."[5] The Soviet command put its Black Sea air and naval forces on combat readiness status[6] and, in a note to the U.S. Embassy, the Soviet Foreign Minister protested that the American action was "of a demonstrative, defiant nature and pursued clearly provocative aims." The note warned of "serious consequences" if U.S. naval ships ever again "deliberately failed to comply with the laws and rules of the USSR concerning the regime of Soviet territorial waters."[7]

In May 1987, the Soviets again protested U.S. Naval maneuvers, this time denouncing actions of the nuclear-powered cruiser *Arkansas* when it entered Avacha Bay near Petropavlovsk, site of an important Soviet naval base on the Kamchatka Peninsula adjacent to the Bering Sea. The U.S. spokesperson said that the U.S. vessel was engaged in "normal operations in the Northwest Pacific."[8]

Over the years, the United States and the Soviet Union have differed on the nature of innocent passage of warships in territorial waters. What conditions render the passage of foreign vessels not innocent? Can a foreign vessel properly assert a right to "traverse" territorial waters which contain no basic sea routes of international significance? Should warships have the same rights as merchant ships, so long as they commit no unfriendly acts? Can the Soviets require prior notification before a foreign ship may exercise innocent passage?

In 1983, the Soviets enacted the Soviet Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the USSR[9] stating that this measure implemented the 1982 Convention, which the Soviet Union has signed. In this domestic legislation, the Soviets interpreted innocent passage differently from

other nations, including the United States. Most nations have interpreted the 1982 Convention to permit unrestricted passage thoughout the territorial sea so long as such passage is innocent. The 1983 Soviet Rules do not reflect the kind of unrestricted freedom of innocent passage permitted by the United States when foreign warships are in U.S. waters.

According to Article 17 of the 1982 Convention, all states enjoy the right of innocent passage through the territorial sea. "Passage" is defined as continuous, expeditious navigation. This passage can be either to enter or leave internal waters (Article 18(b)) or to cross territorial waters laterally without entering or leaving a port or internal waters (Article 18(a)). Passage is "innocent" if not "prejudicial to the peace, good order or security of the coastal state" (Article 19). For safety purposes, the coastal state may designate sea lanes through the territorial sea (Article 22).[10] Warships may be required immediately to leave the territorial sea for failure to comply with coastal state regulations concerning passage through the territorial sea (Article 31).[11]

In many respects the Soviet regulations are consistent with the 1982 Convention. Under the 1983 Rules "continuous and expeditious" passage not prejudicial to the "peace, good order, or security" of the Soviet Union is innocent.[12] Foreign warships engaged in innocent passage must follow certain procedures: flying the flag, navigating on the surface, and following navigational rules.[13]

On the other hand, foreign warships exercising innocent passage to enter or depart from Soviet internal waters or ports do not have freedom of mobility because they must transit either in designated corridors or "by way of a previously agreed sea lane."[14] Because Article 22 of the 1982 Convention permits coastal states to require foreign vessels to remain in designated sea lanes or traffic separation schemes for safety reasons, the Soviets consider their 1983 Rules to be consistent with the 1982 Convention.[15] The U.S. view is, however, that these regulations are too restrictive and are not justified by safety considerations. The 1983 Soviet Rules establish traffic separation schemes in the Sea of Japan and two each in the Sea of Okhotsk and the Baltic Sea.[15] Because U.S. naval freedom-of-navigation exercises in the Soviet territorial sea are at odds with the Soviet view of proper conduct, the U.S. action in the Black Sea could lead to trouble ahead.

The Gulf of Sidra: Operation Prairie Fire

In October 1973, Libya declared to the United Nations that it considered the Gulf of Sidra to be a historic bay and thus that its waters were internal waters of Libya. The United States rejected Libya's claim that this Gulf is a historic bay, because Libya did not meet the usual international-law requirements that it had exercised open, effective authority over the region continuously over time with the acquiescence of foreign nations. The U.S. protest note called Libya's declaration "an attempt to appropriate a large area of the high seas by unilateral action, thereby encroaching upon the long established principle of freedom of the seas."[17]

When Libyan President Moammar Khaddafi proclaimed a "line of death" across the Gulf of Sidra, extending roughly from the western shore city of Misurata to the eastern city of Bengazi, in January 1986, U.S. officials responded that the line is "manifestly illegal" under international law and that the United States had "a perfect right to cross it, which means a perfect right to fire back if Khaddafi were to attack

us."[18] The U.S. position was that "the security of the free world depends on ships being able to travel."[19]

Some strategists believe the Gulf of Sidra contains the best region in the Mediterranean in which to conduct missile-firing exercises because of its relative freedom from ocean traffic.[20] Following the Black Sea maneuver, Pentagon officials announced plans to assert the right to sail in international waters off the coast of Libya by sending fighter planes into the airspace over the Gulf of Sidra from three aircraft carriers.[21]

On March 24, 1986, the Saratoga, the America, and the Coral Sea entered the Gulf of Sidra.[22] In response to the American incursion into the disputed region, the Libyans fired SAM-5 missiles. For nearly 24 hours the American warplanes continued their scheduled training flights, taking off from the warships and fighting when they had to. American electronics jammed the Libyan defenses, and the Sixth Fleet fired its missiles and dropped its bombs from the relative safety of "standoff" range, killing an estimated 150 Libyans.[23] Although most commentators agree that the Libyan claim that the Gulf of Sidra is a "historic bay" cannot be supported under international law,[24] some international lawyers have pointed out that the U.S. policy of challenging disputed claims has a dangerously unstabilizing effect on world order[25] and might create precedents that could ultimately be used against U.S. interests.[26]

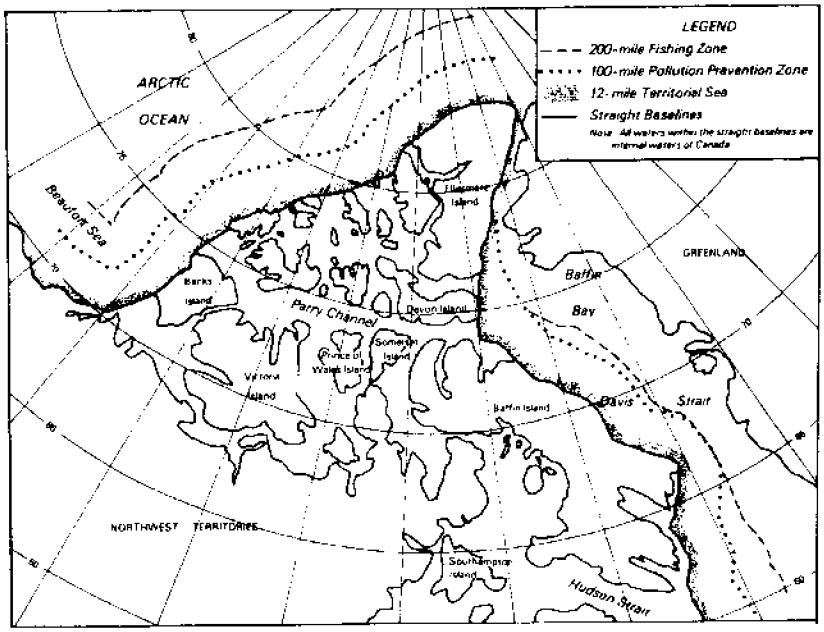
Canada's Arctic Archipelago: The Northwest Passage

In 1969, the U.S. flag vessel Manhattan demonstrated the feasibility of oil tanker travel through the frozen waters of the Northwest Passage. Canada soon declared a 100 nautical mile wide pollution prevention zone around the Arctic archipelago.[27] The Canadian legislation and the American protest it engendered fueled a growing dispute between the two countries over the legal status of Northwest Passage waters.

During the 1970s, Canada took steps to insulate itself from opposition to its unique interpretation of the law. Canada reserved any jurisdictional dispute concerning environmental protection of Canada's coastline from the compulsory jurisdiction of the International Court of Justice (ICJ) in 1970. During negotiations of the Law of the Sea Convention, Canada supported the inclusion of Article 234, which enables coastal states in ice-covered areas to impose and enforce environmental laws in the exclusive economic zone (EEZ) that are more stringent than international standards.

Early in 1985, the United States notified Canada that the U.S. Coast Guard ice-breaker Polar Sea would travel through Canadian Northwest Passage waters in August of that year. The ice-breaker had traveled from the West Coast through the Panama Canal to Greenland. The vessel needed to refuel in the Beaufort Sea because its refueling vessel had broken down. The Northwest Passage route would be $500,000 cheaper and 30 days faster than retracing the route through the Panama Canal.[28] The U.S. Government assured Canada that the Polar Sea's voyage would not prejudice Canada's legal rights to waters in the archipelago, but the United States refused to ask Canadian permission to make the voyage. Soon after the Polar Sea incident, Canada announced plans to adopt straight baselines around the Arctic archipelago effective January 1, 1986, and reinstated the compulsory jurisdiction of the ICJ over jurisdictional disputes.

Canadian claims that Arctic waters are internal waters are based on two alternative legal theories: (1) that the waters are historic



MAP 1: The Canadian Straight Baseline Claim in the Canadian Arctic

internal water, or (2) that they are internal waters because of straight baseline claims. The United States has responded by saying that the waters of the Arctic archipelago are international straits through which U.S. ships may exercise transit passage, consistent with customary international law.[29]

U.S. submarines routinely pass through Arctic waters without seeking Canadian permission.[30] Forays by Soviet submarine into deep Arctic regions where the subs are difficult to locate have prompted the U.S. Navy to practice operations in the "most hostile sea on earth" by sending attack submarines to search for the Soviet vessels.[31] On the safest of the three routes to the Arctic, the route between Canada and Greenland, U.S. subs are less exposed to Soviet submarines.[32] Apparently

because the United States refuses to recognize Canadian sovereignty over these waters, the Canadians decided in May 1987 to acquire ten nuclear submarines of their own to patrol the region.[33]

Freedom of Navigation in the Persian Gulf

U.S. and Soviet efforts to keep Persian Gulf supply lines open for the transport of oil from Kuwait in the midst of the war between Iran and Iraq have turned the Persian Gulf region into a center for intense East-West rivalry. Since early 1987, a Soviet frigate has accompanied each Soviet merchant ship that travels from the Strait of Hormuz to Kuwait, where Soviet arms, provided to help Iraq in its war against Iran, are unloaded.[34] Iraq attacks tankers carrying Iranian oil. Commercial shipping vessels from Kuwait have been the target of Iranian rockets and artillery fire. To retaliate for Kuwait's support of Iraq, Iran attacked Kuwaiti vessels repeatedly in 1987.[35] Kuwait asked both superpowers for protection, and in July 1987, the United States began to lease tankers in Kuwait's fleet to give them the protection of the U.S. flag.

On May 18, 1987, while the guided missile frigate U.S.S. Stark was patrolling in the Persian Gulf, two Exocet antiship missiles launched from Iraqi fighter bombers 20 miles away struck the vessel, disabling the Stark and killing 37 Americans. The U.S. State Department was quick to justify the surprise attack as a case of mistaken identity. "The logical assumption is that they thought they were shooting at an Iranian ship -- it was dark, over the horizon," explained the Pentagon spokesperson.[36]

Following this attack, all U.S. military vessels in the Persian Gulf were put on higher alert. Iran and Iraq were notified that either country's aircraft would be attacked if its flight pattern indicated hostile intent.[37] Despite Congressional concern, the Pentagon began providing air cover with U.S. planes to protect Kuwaiti tankers, in a significant escalation of U.S. involvement in the region.[38]

****

These incidents suggest that disputed claims to internal waters, rights of passage through territorial waters, archipelagic waters, and straits can escalate to widescale military conflict if left unresolved in our volatile and unstable world. In the dramatic context of real life misunderstandings, the dry words of international treaties and conventions spring to life. In today's world, a working knowledge of the law of the sea is of vital significance to international cooperation and world peace, and clarifications of the ambiguities in the rules that govern are necessary in order to build a stable world order. This volume is designed to spread the knowledge of these principles and to assist policymakers in their efforts to address the many disputes that remain unresolved.

FOOTNOTES

1. United States Convention on the Law of the Sea, *done* at Montego Bay, December 10, 1982, 21 I.L.M. 1261 (1982) [hereinafter 1982 Convention].
2. Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 Ocean Dev. & Int'l L. J. 65, 80 (1983), citing N.Y. Times, Aug. 10, 1979, at 1, col. 3.

3. Butler, *Innocent Passage and the 1982 Convention: the Influence of Soviet Law and Policy*, 81 Am. J. Int'l L. 331, 344 (1987).
4. Halloran, *2 U.S. Ships Enter Soviet Waters Off Crimea to Gather Intelligence*, N.Y. Times, Mar. 19, 1986, at A1, col. 5. On Feb. 12, 1988 the *Caron* and the *Yorktown* again passed through the Soviet territorial sea and this time were bumped by two Soviet military vessels. San Francisco Chronicle, Feb. 13, 1988, at 1, col. 1.
5. *Id.*; United Press International, March 18, 1986 (reported on XPRESS Information Service).
6. Butler, *supra* note 3, at 344.
7. Schmemann, *Soviet Lodges a Protest*, N.Y. Times, Mar. 19, 1986, at A11, col. 4.
8. Honolulu Advertiser, May 21, 1987, at A17, col. 3, quoting Robert Sims.
9. Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) of the USSR and the Internal Waters and Ports of the USSR, confirmed by Decree of the USSR Council of Ministers No. 384 (Apr. 28, 1983), *reprinted in* W. Butler (ed.), *The USSR, Eastern Europe and the Development of the Law of the Sea* Booklet C.2 at 8 (May 1986), 24 I.L.M. 1715 (1985).
10. Article 22 of the 1982 Convention provides:
    1. The coastal State may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.
11. Article 30 provides:
    If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which it made to it, the coastal State may require it to leave the territorial sea immediately.
    Id., art. 30.
12. Franckx, *The USSR Position on the Innocent Passage of Warships through Foreign Territorial Waters*, 18 J. Maritime L. & Commerce 33 (1987).
13. Butler, *supra* note 3, at 338.
14. See *infra* note 16 for the text of Article 12 of the 1983 Soviet Rules.
15. Butler, *supra* note 3, at 339.
16. Franckx, *supra* note 12, at 44. Article 12 of the Soviet Rules, Sea Lanes and Traffic Separations Schemes, provides:
    1. Innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR for the purpose of traversing the territorial waters (territorial sea) of the USSR without putting in to internal waters or ports of the USSR is permitted by way of sea lanes, customarily used for international navigation:
    in the Baltic Sea, by way of the traffic separation scheme in the area of the Kyru peninsula (Hiiumaa island) and in the area of the Porkkal lighthouse;
    in the Sea of Okhotsk, by way of the traffic separation scheme in the area of Cape Aniv (Sakhalin island) and the Fourth Kuril strait (Paramushir and Makanrushi islands);
    in the Sea of Japan, by way of the traffic separation scheme in the area of Cape Kril'on (Sakhalin island).

2. Innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR for the purpose of passage into internal waters and ports of the USSR, or departing from them for the high seas, is only permitted in accordance with the provisions of part III of the present Rules with the use of sea corridors and traffic separation schemes or by way of a previously agreed sea lane.

reprinted in Franckx, *supra* note 12, at 64-65.

17. Francioni, *The Status of the Gulf of Sidra in International Law*, 11 Syr. J. Int'l L. & Com. 311, 313 (1984).
18. Watson, *Khaddafi's Crusade*, Newsweek (Australia ed.), April 8, 1986, at 102.
19. United Press International, March 19, 1986 (reported in XPRESS Information Service), quoting Adm. John Poindexter.
20. Spinnato, *supra* note 2, et 66.
21. Halloran, *supra* note 4.
22. Watson, *supra* note 18, at 98.
23. *Id.* at 102.
24. Goshko, *Scholars Say U.S. Action Seems Legal*, Washington Post, Mar. 25, 1986, at A12, col. 1.
25. See e.g., Partan, *Letter to the Editor*, N.Y. Times, Apr. 3, 1986, at 24, col. 4.
26. George Washington University International Law Professor W. Thomas Mallison noted that the rationale advanced by the White House ultimately could be used against the United States:

> Suppose the Soviet Union came into the Gulf of Mexico with a squadron similar to the one we sent to the Gulf of Sidra and came just over 12 miles from our southern states ... We would regard that as an outrageous act of provocation, while they would make the same 12-mile limit claim that we are making now. In other words, we're creating a precedent that could be used against us.

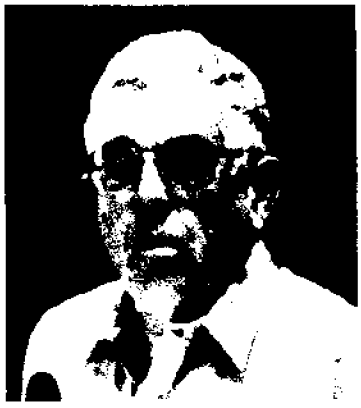
Honolulu Advertiser, Mar. 25, 1986, at A1, col. 1.

27. McDorman, *In the Wake of the Polar Sea: Canadian Jurisdiction and the Northwest Passage*, 10 Marine Policy 243, 245 (1986).
28. *Id.* at 243.
29. See, *e.g.*, McDorman, *supra* note 27, at 251.
30. Halloran, *Canada's Plan for Nuclear Submarines Raises U.S. Suspicion*, N.Y. Times, May 4, 1987, at 10, col. 1.
31. *Id.*
32. *Id.*
33. Burns, *Canada Considers 10 Nuclear Subs to Patrol Arctic*, N.Y. Times, May 3, 1987, at A1, col. 4.
34. Halloran, *Superpowers Maneuver at Sea Off Iran Coast*, N.Y. Times, May 3, 1987, at E2, col. 4.
35. Kifner, *Iran Raids Tanker in the Gulf and Again Threatens Kuwait*, N.Y. Times, May 12, 1987, at 4, col. 4.
36. Gross (UPI), *Iraqi Jets Hit U.S. Frigate; Three Killed*, Honolulu Advertiser, May 18, 1987, at A1, col. 5, quoting Robert Sims.
37. Black (AP), *U.S. Ships in Gulf on a Higher Alert*, Honolulu Star Bulletin, May 18, 1987, at A6, col. 1.
38. Honolulu Advertiser, May 21, 1987, at A1, col. 5.

Bernhard J. Abrahamsson is Professor and Head of the Department of Marine Transportation at the U.S. Merchant Marine Academy in Kings Point, New York. Professor Abrahamsson was a staff economist for the International Monetary Fund in Washington, D.C. from 1965-68, and from 1968-69 was Associate Professor of Economics and Business Adminstration at the University of Alaska in Fairbanks. From 1969 to 1986 he was Associate Professor of International Economics at the Graduate School of International Studies at the University of Denver.

Professor Abrahamsson has published and lectured extensively, specializing in shipping, maritime economics, energy, and the international monetary system. His books include *International Ocean Shipping: Concepts and Principles* (1980), *Conservation and the Changing Direction of Economic Growth* (ed. 1976), and *Strategic Aspects of Seaborn Oil* (co-author 1974).

Professor Abrahamsson received his B.B.A. in International Trade from the Bernard Baruch School of Business Administration at City College of New York (1962). He received his M.Sc. (1964) and Ph.D. (1966) in Economics from the University of Wisconsin at Madison.



Lewis M. Alexander currently serves as the Director of the Center for Ocean Management Studies and is Professor of Geography at the University of Rhode Island. Professor Alexander served as Director of the State Department's Office of the Geographer from 1980 to 1983 and continues to consult on issues of marine affairs and geography for the U.S. government. From 1975 to 1981, he was a member of the U.S. delegation to the Third UN Law of the Sea Conference. Professor Alexander was one of the founders of the Law of the Sea Institute and is now again a member of its Executive Board.

He has authored or edited over 25 volumes and has written more than 60 scholarly articles on maritime topics.

Professor Alexander received his A.B. degree in geography from Middlebury College and his M.A. and Ph.D. from Clark University.

R.P. Anand is a Professor in the International Legal Studies Division of the School of International Studies at the Jawaharlal Nehru University in New Delhi. He has been a consultant to the UN Secretary General and was a research associate at the East-West Center from 1978-82. Among Professor Anand's numerous law of the sea publications are *Origin and Development of the Law of the Sea: Caracas and Beyond* (ed., 1978), and *Legal Regimes of the Sea-Bed and the Developing Countries* (1975). He has also written on other international law subjects, such as *International Law and the Developing Countries: Confrontation or Cooperation?* (1984) and *Cultural Factors in International Relations* (ed., 1981). He participated in the 1984 workshop that produced the publication *Consensus and Confrontation: The United States and the Law of the Sea Convention* (J. Van Dyke ed., 1985).

After obtaining his B.A. (1951), LL.B. (1953), and LL.M. (1957) from Delhi University, Professor Anand studied at Colombia University under a Rockefeller Foundation Fellowship (1960-61), at Yale University where he received an LL.M. (1962) and J.S.D. (1964).

James Anthony has written widely on Pacific island affairs and has been active on many issues affecting this region. He is from Fiji and now resides in Hawaii. From 1984 to 1987, he served as consultant to the United Nations University and as director of the Pacific Research and Information Network. His recent areas of concern have focused on security issues, communications issues, and ocean resource development issues in the Pacific.

Dr. Anthony received his B.A. (1964) and M.A. (1966) in political science from the University of Hawaii, and his Ph.D. in Pacific history and politics from the Australian National University in 1971.

J. Peter A. Bernhardt has been Deputy Director of the Office of Ocean Law and Policy in the U.S. State Department's Bureau of Oceans and International Environmental and Scientific Affairs since 1982. Mr. Bernhardt was an attorney at the National Oceanic and Atmospheric Administration in 1973 and 1974, and attorney-adviser for the U.S. State Department Office of the Law of the Sea Negotiations from 1974 to 1978. Also between 1973 and 1977 he was an adviser to the U.S. Delegation to the Third United Nations Conference on the Law of the Sea.

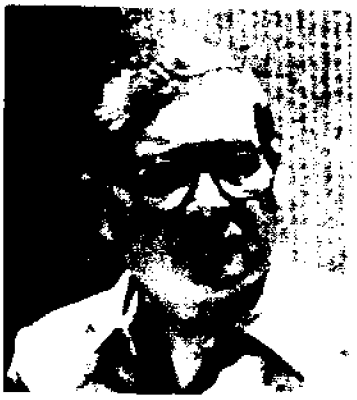
Between 1978 and 1980 Mr. Bernhardt was a lecturer in oceans law and policy and international law at the University of Virginia School of Law. There he served as Associate Director of the Center for Oceans Law and Policy and as the editor of the *Oceans Policy Study Series*. Between 1980 and 1982 he was attorney-adviser for the State Department, representing the United States at the International Maritime Organization's Fund Assembly and Executive Council in London. Mr. Bernhardt has published many articles related to ocean jurisdictional issues, enforcement measures, and dispute settlement procedures under international law.

Mr. Bernhardt received his B.A. in European history and languages at Dartmouth College in 1968, and his J.D. from the University of Virginia School of Law in 1973.

William T. Burke is Professor both at the School of Law and at the Institute for Marine Studies at the University of Washington in Seattle. An internationally recognized expert in fisheries and ocean law, Professor Burke was a visiting professor at Peking University during the spring of 1986. From 1962-68 he taught at the Ohio State Law School. His extensive list of publications includes *National and International Law Enforcement in the Ocean* (with Legatski and Woodhead, 1975), *Contemporary Legal Problems in Ocean Development* (1969), *Ocean Sciences, Technology and the Future of the Law of the Sea* (1966), and *The Public Order of the Oceans* (with M.S. McDougal, 1962). He participated in the 1984 workshop that led to the publication of *Consensus and Confrontation: The United States and the Law of the Sea Convention* (J. Van Dyke ed., 1985).

After receiving his B.S. from Indiana State University (1949) and J.D. from Indiana University School of Law (1953), Professor Burke obtained a J.S.D. from Yale Law School in 1959, and was a research associate and lecturer at Yale University from 1956-62. He taught at Ohio State Law School from 1962-1968.

Thomas Busha was until recently the Deputy Director of the Legal Division of the International Maritime Organization (IMO) located in London. Mr. Busha began working with this organization (then known as the Inter-Governmental Maritime Consultative Organization) in 1961, representing it at numerous diplomatic conferences, including sessions of the Third UN Conference on the Law of the Sea and the UN Seabed Committee. He also has served as a member of the International Ocean Institute Planning Council.



Thomas A. Clingan, Jr. is Professor at the Miami School of Law and President of the Executive Board of the Law of the Sea Institute. He is also on the U.S. State Department Advisory Committee on Antarctica. Professor Clingan was Deputy assistant Secretary of State and Ambassador of the United States for Oceans and Fisheries Affairs in 1974-75, and continues to be a consultant for the U.S. Department of State. A specialist in energy and natural resources law, environmental law, and ocean law, he was a member of the U.S. delegation at numerous sessions of the Law of the Sea Convention and chaired the delegation at the final session in December 1982. He chaired the 1986 annual meeting of the Law of the Sea Institute in Miami and edited the proceedings of the 1979 annual meeting in Mexico City with the publication *Law of the Sea: State Practice in Zones of Special Jurisdiction* (13 L. Sea Inst. Proceedings, 1982). Professor Clingan's article *Freedom of Navigation in a Post-UNCLOS III Environment* appeared in the 1983 Duke University Law and Contemporary Problems symposium on "The Law of the Sea -- Where Now?"

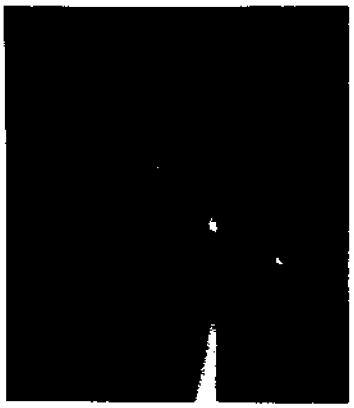
Professor Clingan received his B.S. from the U.S. Coast Guard Academy in 1950 and a J.D. from George Washington Law School in 1963. He served in the Coast Guard from 1946 to 1962, attaining the rank of Lieutenant Commander.

John P. Craven is Professor of Ocean Law at the University of Hawaii and Director of the Law of the Sea Institute. He was Chief Scientist at the U.S. Navy Special Projects Office from 1959-71, was the Project Manager for the Deep Submergence Systems Project, and received numerous awards for distinguished service in the Navy. From 1951-59 Dr. Craven was a hydrodynamicist at the David Taylor Smith Model Basin. His publications include *The Management of Pacific Marine Resources: Present Problems and Future Trends* (1982) and *Alternatives in Deep Sea Mining* (ed., 1979). He participated in the 1984 workshop that led to the book *Consensus and Confrontation: The United States and the Law of the Sea Convention* (J. Van Dyke, ed., 1985), and chaired the 1987 annual meeting of the Law of the Sea Institute in Honolulu.

Dr. Craven received his B.S. from Cornell University in 1946, his M.S. in Civil Engineering from the California Institute of Technology in 1947, his Ph.D. at the University of Iowa in 1951, and his J.D. at George Washington University in 1959.

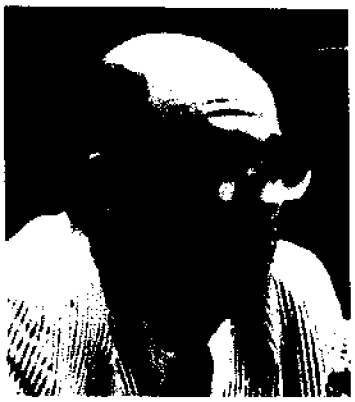
Harvey W. Dalton is Deputy Assistant Judge Advocate General for International Law for the U.S. Navy. From 1974-77 he served as the environmental lawyer for the Office of the Judge Advocate General of the Department of the Navy in Washington, D.C. He entered the Navy in 1965, serving in Japan, Newport, and Hawaii, where he was Executive Officer at Pearl Harbor.

Captain Dalton graduated from the University of North Carolina in 1952 and received his law degree from the University of North Carolina in 1965. He received his LL.M. in ocean law from the University of Miami in 1973 and is a 1983 graduate of the National War College. Captain Dalton is the recipient of numerous awards including the Defense Meritorious Service Medal and the Navy Achievement Medal.



Gracie M. Fong is currently on leave from the Crown Law Office of the Government of Fiji. Ms. Fong represented the Government of Fiji at the negotiations on the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region and the negotiation for the South Pacific Nuclear Free Zone Treaty.

Educated in Fiji and New Zealand, she received her B.A. and LL.B. from the University of Auckland. In 1987, Ms. Fong completed her reading for a Masters in Philosophy in International Relations at the University of Cambridge in the United Kingdom.



Norton Ginsburg is the Director of the Environment and Policy Institute at the East-West Center in Honolulu and a member of the editorial boards of Economic Development and Cultural Change, Asian Survey, and The Chinese Concise Encyclopedia Britannica. He also serves as one of the editors of *The Ocean Yearbook*. Dr. Ginsburg was an intelligence officer for the U.S. Army, U.S. Navy, and the State Department between 1942 and 1950. He served in the U.S. Army Map Service Target Coverage Section and the U.S. Navy Joint Intelligence Center, Pacific Ocean Areas. In 1946 he joined the Department of State as a Map Intelligence Officer for the Far East and Chief of the Interim Research Intelligence Center in Shanghai.

In 1950-51 he was a Fulbright Research Scholar at the Universities of Hong Kong and Malaya. From 1951 to 1986 Professor Ginsburg was a member of the faculty of the Geography Department of the University of Chicago. He was Chairman of the Geography Department from 1978-84. Between 1979 and 1984, Dr. Ginsburg visited the University of Hawaii, as an East-West Environment and Policy Institute Fellow and as the Arthur Lynn Andrews Distinguished Visiting Professor of Asian and Pacific Studies. He became the Director of the Environment and Policy Institute in 1986.

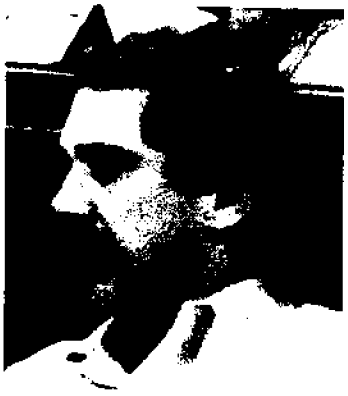
Dr. Ginsburg received his B.A. from the University of Colorado in 1941, and completed studies of Japanese at the Language Training School of Colorado in 1944. He received his M.A. (1947) and Ph.D. (1949) from the University of Chicago.

Edgar Gold is Professor of Maritime Law at Dalhousie University (Halifax, Nova Scotia) and Associate Director of the International Institute for Transportation and Ocean Policy Studies. He is a practicing lawyer and marine consultant who participated in the Third UN Conference on the Law of the Sea as well as many other ocean-related conferences. From 1952-67 Dr. Gold served in the merchant marine in a variety of world-wide trades, achieving the status of Master Mariner. His fields of specialization are the development of maritime law and policy and management for less-developed countries. Among Dr. Gold's many publications are *International Maritime Law: Basic Principles* (author/editor, 1986), *Handbook on Marine Pollution* (1985), and *Marine Transport: the Evolution of International Marine Policy and Shipping Law* (1981; reprinted 1984, 1986). He is a member of the Executive Board of the Law of the Sea Institute.

Dr. Gold received his undergraduate degree in political science (1970) and his LL.B. (1972) from Dalhousie University, and a Ph.D. in International Maritime Law from the University of Wales. He also pursued professional studies at the Nautical Academy (Newcastle, Australia), Nautical School (New South Wales, Australia) and School of Navigation (University of Southhampton, U.K.).

Richard Grunawalt has been a member of the faculty of the Naval War College in Newport, Rhode Island since 1986. From 1959 to 1985, he served in the Navy's Judge Advocate General offices. From 1976 to 1980 he was counsel to the Chief of Naval Operations and helped develop the Navy's positions relative to the negotiations at the Third UN Law of the Sea Conference during that period. In 1987, Captain Grunawalt completed work on the *Commander's Handbook on the Law of Naval Operations*, which supercedes earlier volumes on the laws of naval warfare.

Captain Grunawalt earned both his B.A. (1956) and his J.D. (1959) from the University of Michigan.



Scott A. Hajost is Attorney Adviser for Oceans, International Environment and Scientific Affairs, Office of the Legal Adviser, U.S. Department of State. He has participated as legal adviser in the negotiation of numerous treaties including the Convention for Protection and Development of the marine Environment of the Wider Caribbean Region (1983), the Vienna Convention for Protection of the Ozone Layer (1985), and the Convention on Protection of the Natural Resources and the Environment of the South Pacific Region (1986). He has written articles on and participated in conferences on international, environmental, and ocean law and on Antarctica.

Mr. Hajost received his B.A. in history from the University of Dallas in 1976, an M.A. in medieval history from the University of Miami in 1982, and his J.D. from the University of Toledo College of Law in 1980 (where he was the top scholar in his class).

Bruce Harlow is a consultant to the U.S. Air Force in international law and a retired Rear Admiral in the U.S. Navy. Since 1965, Admiral Harlow has participated in maritime policy formulation at the Department of Defense. He was an Assistant Judge Advocate General and Deputy Commander for the Navy Services Command, where he developed and coordinated U.S. policy and legal positions on maritime and military issues. Admiral Harlow represented the Defense Department during the negotiations of the Law of the Sea Convention and he has written widely on law of the sea issues.

Admiral Harlow received his law degree from the University of Washington School of Law. Admiral Harlow lectures at the Naval War College on issues related to the law of the sea and the law of war.

Jin Zu Guang is Vice Dean of the Department of International Shipping at the Shanghai Maritime Institute in the People's Republic of China. In addition to lecturing at Shanghai Maritime Institute, Mr. Jin handles marine cases in his practice of law and serves as one of the heads of the Shanghai Lawyer's Office for Maritime Affairs.

Mr. Jin has written textbooks, reference books, and articles on marine law and insurance in China, including *Elements of the International Law of the Seas* (1982), *Principles of Marine Insurance* (1983), *Marine Insurance in the U.K.* (3 volumes, 1983), *International American Shipping Operation and Management* (translation, 1987), and *Carriage of Goods by Sea* (translation, 1987).

Mr. Jin received his B.A. from the Shanghai Maritime Institute in 1968 and worked as a seaman for four years after graduation. In 1972 he returned to the Shanghai Maritime Institute as a lecturer. In 1979 he completed further studies at the University of Wales Institute of Science and Technology. Mr. Jin has the distinction of being the first person in China since 1949 to obtain an M.A. in the field of law.

Komar Kantaatmadja is professor of international law at Padjadjaran University in Bandung, Indonesia, and is the director of the recently formed Indonesian Center for Law of the Sea, which is undertaking a wide range of projects associated with the development of Indonesia's ocean resources. He has had a distinguished career in academic and government service and has focused in particular on environmental issues affecting the law of the sea.

Iosefa Maiava has been a Lecturer in Political Science at the University of the South Pacific, Suva, Fiji, specializing in political and economic development in the South Pacific, and is currently working on a Ph.D. in political science at the University of Hawaii as a grantee at the East-West Center. He has worked at the Pacific Islands Development Program, and as a member of the Publications Commission at the East-West Center is creating a journal by East-West Center participants entitled Horizons: Issues in the Asia Pacific Region. His publications include a report on *Transnational Corporations in the Pacific Islands* (1984) for the Economic and Social Commission for Asia and the Pacific (ESCAP), and frequent contributions to Pacific Perspectives, Islands Business, and Pacific Magazine. He participated in the 1984 workshop that led to the publication of *Consensus and Confrontation: The United States and the Law of the Sea Convention* (J. Van Dyke, ed., 1985).

Mr. Maiava received his B.A. in political science from the University of Papua New Guinea in 1980 and an M.A. in international relations in 1982 from the Australian National University in Canberra.

Joseph R. Morgan is an Associate Professor of Geography at the University of Hawaii and a Research Associate at the Environment and Policy Institute a the East-West Center in Honolulu. He has previously taught oceanography at Chaminade University and geography at Honolulu Community College. Before turning to teaching, Professor Morgan served in the U.S. Navy for 25 years. His duties included assignments aboard three destroyers, a guided missile cruiser, a minesweeper, and hydrographic survey ships. He served in Antarctica as a Hydrographic and Oceanographic Officer in the U.S. Naval Support Force, conducted oceanographic research, and was Chief of the Mapping, Charting and Geodesy Division for the Staff of Commander in Chief, Pacific.

Dr. Morgan's extensive publications include *Local Tsunamis in Hawaii: Implications for Warning Systems* (with D. Cox, 1985), *Hawaii: A Geography* (1983), *Atlas for Marine Policy in Southeast Asian Seas* (with M. Valencia, 1983), and contributions to the *Atlas of Hawaii* (1983). In addition he has published numerous articles on maritime jurisdiction and naval defense issues.

Dr. Morgan received his B.A. in chemistry (1949) from the University of Pennsylvania, and a B.S. in oceanography (1957) from the University of Washington. He received his M.A. (1971) and Ph.D. (1978) in geography from the University of Hawaii at Manoa.

Atje Misbach Muhjiddin is Lecturer in Public International Law, specializing in the law of the sea, at the Faculty of Law, Padjadjaran University, Bandung, Indonesia, and at the Bandung Islamic University, where he also serves as Dean of Faculty of Law. Mr. Muhjiddin is a member of the Expert Group of the Indonesian Aviation Council and is a doctoral candidate at Padjadjaran University investigating the rights of passage of ships through coastal state waters. He was a Fulbright scholar at the University of Hawaii Law School in 1985-86 and has conducted research on a variety of issues, including marine pollution, delimitation of the continental shelf, water resource management, air law, and archipelagic principles.

Mr. Muhjiddin graduated from the Faculty of Law, Padjadjaran University in 1968, in Public International Law, attended the Law and Economic Development Program at the University of California School of Law at Berkeley in 1973-74, and received advanced training in mining law (1966) and environmental law (1977) at Bandung University.

Camillus S.N. Narokobi is the Assistant Secretary of the International Law Branch of the Department of Justice in Waigani, Papua New Guinea. He has represented the governemt of Papua New Guinea at international conferences, including the Preparatory Commission, and at many South Pacific negotiations. He has, for instance, participated in the negotiations that produced the 1987 tuna treaty between the United States and the Pacific nations and also the 1986 Convention for the Protection of the National Resources and Environment of the South Pacific Region. Prior to his present position, Mr. Narokobi was legal adviser to the Ministry of Foreign Affairs and Trade in Papua New Guinea.

Mr. Narokobi received his education in Papua New Guinea and at the University of Washington in Seattle. He participated in the 1984 workshop that produced the publication *Consensus and Confrontation: The United States and the Law of the Sea Convention* (J. Van Dyke, ed. 1985).

Shigeru Oda has been a Judge on the International Court of Justice since 1976. Before being elected to the Court, Judge Oda was an associate professor of law at Tohoko University, Sendai, Japan from 1953 to 1959 and a professor from 1959 to 1976. In 1985 he was named professor emeritus. From 1973 to 1976 he served as a Special Assistant to the Minister for Foreign Affairs.

Judge Oda is the author of many books and articles on international law and the law of the sea. He received his LL.B. from Imperial University in Tokyo in 1947, an LL.M. in 1952 and J.S.D. in 1953 from Yale University, and an LL.D. from Tohoku University in 1962. In 1980 he was awarded an honorary LL.D. from Bopal University in India, and in 1981 he received an LL.D. from New York Law School.

Choon-Ho Park is Professor of Law at the College of Law at Korea University and Director of the East Asia Law of the Sea Institute in Seoul. From 1977-82 he was a research associate at the East-West Center, and also served as an Adjunct Professor at the University of Hawaii School of Law and as an Executive Board Member of the Law of the Sea Institute. He was previously a Senior Researcher in East Asian Legal Studies at the Harvard Law School. His publications include *East Asian Law of the Sea Issues* (1983), *Law of the Sea in the 1980's* (14 L. Sea Inst. Proceedings, ed., 1980) and *Continental Shelf Issues in the Yellow Sea and the East China Sea* (1972). He participated in the 1984 workshop that produced *Consensus and Confrontation: The United States and the Law of the Sea Convention* (J. Van Dyke ed., 1985).

Dr. Park earned a B.A. from Seoul National University in 1959, and received a Ph.D. in public international law from Edinburgh University in 1969.

Renate Platzoeder is a senior staff member at the Stiftung Wissenschaft und Politik, Institute for International Affairs, Ebenhausen-Munich in the Federal Republic of Germany. In addition, she is a lecturer in international law at the University of Munich and has been a member of the Executive board of the Law of the Sea Institute. From 1974 to 1982 Dr. Platzoeder was a member of the delegation of the Federal Republic of Germany to the Third United Nations Conference on the Law of the Sea. She is the author of many publications on the law of the sea, disarmament treaties, and settlement of disputes.

She received her law degree from the University of Munich in 1963 and was admitted to the bar of the Bavarian High Court in 1967.

Sang Myon Rhee has been Professor of Law at the Seoul National University Law School in Korea since 1982, specializing in international law, comparative law, and jurisprudence. Prior to this assignment, he was a research fellow at the Harvard University Law School (1975–82), and a junior officer at the South Korean Ministry of Foreign Affairs. In 1982–84, he served as legal consultant at the U.S. State Department.

Professor Rhee earned an LL.B. (1973) and an LL.M. (1975) at the Seoul National University and an LL.M. (1977) and an S.J.D. (1987) at the Harvard Law School.

Horace B. Robertson, Jr. has been Professor of Law at Duke University School of Law since 1976. He was Special Counsel to the Secretary of the Navy from 1964-67. In 1970-71 he was Special Counsel to the Chief of Naval Operations in Washington. He was Deputy Judge Advocate from 1972-75 and Judge Advocate General from 1975-76. Professor Robertson's areas of specialization include international law, international organizations, the law of the sea, and personal injury law. In 1983 he was co-editor of Duke University's Law and Contemporary Problems symposium issue on "The Law of the Sea - Where Now?"

Professor Robertson received his B.S. from the U.S. Naval Academy in 1945, his J.D. from Georgetown University in 1953, and his M.S. from George Washington University in 1968.

Morris Sinor is the Legal Advisor to the Commander of the U.S. Pacific Fleet in Pearl Harbor, Hawaii. He has been stationed in Hawaii off and on since 1975. Prior to accepting his present position in September 1985, Captain Sinor was the Legal Adviser to the Deputy Chief of Naval Operations in Washington, D.C., and was the Assistant Legal Adviser to the Unified Commander in Chief of the Pacific. A specialist in military operational law, Captain Sinor has lectured at the Naval War College and elsewhere on the law of armed conflict, the law of naval warfare, and the law of the sea, particularly navigation and overflight issues.

Captain Sinor received his B.S. in business administration in 1961 and his J.D. in 1964 from the University of Nebraska. In 1978 he received an LL.M. in Marine Affairs from the University of Washington.

Louis B. Sohn has been the Woodruff Professor of International Law at the University of Georgia since 1981. For the 35 previous years, he had been a member of the faculty of the Harvard Law School. He is an honorary Vice President of the American Society of International Law, Chairman of the Commission to Study the Organizations of Peace, and the Associate Reporter for Foreign Relations Law of the American Law Institute. He was a member of the U.S. delegation to the Third UN Conference on the Law of the Sea (1974-82). A noted authority on international law, Professor Sohn specializes in the law of the sea, international organizations, and the international protection of human rights. Among the books he has written are *The Law of the Sea* (with K. Gustafson, 1984), *International Protection of Human Rights* (with T. Buergenthal, 1973), *Cases on United Nations Law* (1956, 2nd. ed. 1967), and *World Peace Through World Law* (with G. Clark, 1958, 3rd. ed 1966).

Professor Sohn received his Dipl. Sc. M. and LL.M. from the John Casmir University (Poland) in 1935, and an LL.M. and S.J.D. from Harvard in 1940 and 1958.

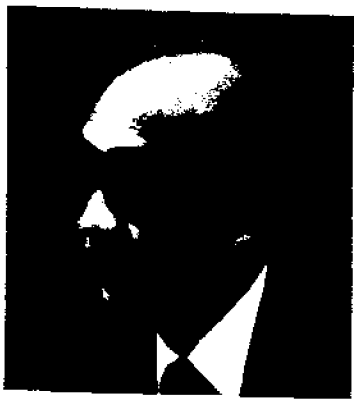
Jon M. Van Dyke is Professor of Law at the University of Hawaii School of Law, a member of the Executive Board of the Law of the Sea Institute, and an Adjunct Research Associate at the Resource Systems Institute of the East-West Center. From 1980-82 Professor Van Dyke served as Associate Dean of the University of Hawaii Law School. Before joining the University of Hawaii faculty in 1976, he taught at the Hastings College of Law (University of California) (1971-76), was a fellow at the Center for the Study of Democratic Institutions in Santa Barbara, California (1970-71), and taught at the Catholic University Law School in Washington, D.C. In 1987, he received a University of Hawaii Presidential Citation for Excellence in Teaching. In addition to *Consensus and Confrontation: The United States and the Law of the Sea Convention* (ed., 1985), Professor Van Dyke's books include *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* (1977), and *North Vietnam's Strategy for Survival* (1972). He has published numerous articles on ocean law issues related to marine mining, fishery resources, and ocean boundaries.

Professor Van Dyke received his B.A. in English from Yale University (1964), and his J.D. from Harvard University (1967).

Michele R. Wallace is a 1987 graduate of the University of Hawaii's Richardson School of Law, where she was President of the Board of Directors of Advocates for Public Interest Law and Comments Editor for the University of Hawaii Law Review. Ms. Wallace is serving as a Law Clerk for Chief Justice Herman Lum of the Hawaii Supreme Court in 1987-88. She served as a law clerk for for Justice Edward Nakamura of the Hawaii Supreme Court during the summer of 1986.

In 1978-79, Ms. Wallace was a member of the Board of Directors and the Coordinator of the Student Rights Project for the Minnesota Civil Liberties Union. She was also a member of the Minnesota Juvenile Justice Advisory Commission. In 1981-82, she was an Assistant Investigator for the Pima County Public Defender. From 1979-83, Ms. Wallace was an Investigator for the Arizona Civil Liberties Union and in 1983-84 she was Intake Coordinator for the American Civil Liberties Union of Hawaii. She has served on the Legislative and Education Committee of the League of Women Voters of Hawaii and on the University of Hawaii Legal Forum Committee.

Ms. Wallace received her B.A. from the University of Arizona in 1982 and her J.D. from the William S. Richardson School of Law in 1987.



Nugroho Wisnumurti is Director of Legal and Treaties Affairs with the Indonesian Department of Foreign Affairs. Mr. Wisnumurti served with the Indonesian Mission to the United Nation (New York) from 1972 to 1977 and with the Indonesian Mission to the United Nations (Geneva) from 1982 to 1986.

He has represented Indonesia at many international conferences and negotiations including maritime boundaries negotiations. He was a member of the Indonesian Delegation to the UN Seabed Committee and the Third UN Conference on the Law of the Sea. Mr. Wisnumurti served as Deputy Chairman of the Indonesian Delegation to the Conference on Disarmament from 1982 to 1986. He also was the Deputy Chairman of the Indonesian Delegation to the UN Preparatory Commission for the International Seabed Authority and the International Tribunal on the Law of the Sea.

Mr. Wisnumurti has published several articles on international law and politics. He holds a Master of Law degree from the Faculty of Law, University of Indonesia, Jakarta (1965) and from Columbia University School of Law (1973).

ACKNOWLEDGMENTS

This book is dedicated to *Francell Marbeth Mokihona Marquardt Lasley* a law student at the University of Hawaii Law School who died of cancer shortly after this meeting took place. Fran had been active at the Law of the Sea Institute and the East-West Center and was an inspiration to all she had contact with. She wanted to focus in her career on the needs and concerns of Pacific islanders and saw the appropriate development of ocean resources as a way to assist island communities without disrupting their traditions and values. As a person of Hawaiian and Samoan ancestry who had spent much of her life in California, she had a quality of being able to link the old and the new together in a mix that retained the best of both worlds. She also had humane qualities that we all remember -- always supportive, always upbeat, always trying to find the way to resolve problems and then encouraging others to press on to solve the next problem. Although we all feel a deep sense of loss that she was not permitted to go forward in her mission to serve the Pacific community, everyone who had contact with her retains a strong sense of having been enriched by knowing her and a commitment to address ocean and Pacific island issues with the positive spirit she shared with us.

* * * * *

The funding for this workshop came from the University of Hawaii Sea Grant College Program, the Resource Systems Institute of the East-West Center, and the Law of the Sea Institute through funding obtained from the Ford and Mellon Foundations.

Among the persons who should receive specific mention for the support and encouragement they provided throughout the project are *Jack R. Davidson* and *Rose T. Pfund*, director and deputy director of the University of Hawaii Sea Grant College Program; *Victor Hao Li*, president of the East-West Center; *Seiji Naya*, director of the Center's Resource Systems Institute; *Jeremy Harrison*, dean of the William S. Richardson School of Law at the University of Hawaii, and *John P. Craven*, *Scott Allen*, *Maivan Lam*, and *Carol Stimson*, director, associate director, assistant director, and administrator at the Law of the Sea Institute. *Mendl Djunaidy* assisted with all the practical arrangements at the East-West Center, where the meetings took place. Special thanks go to *Elizabeth Ng*, director of publications at the Law of the Sea Institute, who played a central role in preparing the manuscript for publication.

She also took many of the photographs that appear in this volume, along with *Ida Yoshinaga*. *Ralph Colling* assisted with the indexing of this book. Helping with the typing were *Alyson Nakamura*, *Linda Nihei*, and *Ida Yoshinaga*.

Law students at the University of Hawaii played central roles in helping to edit the papers and comments for publication and thanks must be expressed to *Jan de Werd* and *Michele Wallace* who attended the sessions and then undertook editing assignments and to *Carolyn Nicol* who helped with many editing and drafting projects associated with this volume. *Michael Reveal* also helped with some of the final matters.

CHAPTER 2

FREEDOM OF NAVIGATION: SOME BASIC VIEWS

Introduction

This chapter contains three introductory papers that describe basic navigational uses of the seas. In *Freedom of Navigation for War, Commerce, and Piracy*, John Craven discusses the cyclical nature of the law of the sea through history. As eras of maximum freedom of navigation have alternated with periods when various restraints were in force, nations have negotiated on critical issues affecting navigation, but have generally agreed on two nonnegotiable items: 1) the immunity of warships, and 2) the freedom of commercial navigation on vital sea lanes of commmunication (SLOCs).

Today, however, according to Dr. Craven, coastal state regulations are creating pressures he calls "creeping constraints" that may have a serious effect on the basic tenet of freedom of navigation. He argues that permitting U.S. Coast Guard officers to board fishing vessels in the U.S. exclusive economic zone (EEZ) and to board ships on the *high seas* when they have a reasonable suspicion that illicit substances are being transported, for example, prove that *traditional* freedoms of navigation are in danger of being seriously eroded. Although the desire to ensure that nuclear weapons do not proliferate has produced a number of oceanic arms control treaties and conventions that tend to restrict freedom of navigation, Dr. Craven argues that thus far the principal maritime nations have resisted pressures on navigational rights.

Dr. Craven's treatment of the topic of arms control raises thought-provoking possibilities. How does warship immunity square with the need for on-board, random inspection at sea to verify compliance with arms control agreements? Can nations monitor and enforce large ocean zones required by treaty to be entirely free from storage or deployment of nuclear weapons? Are coastal state resource and environmental protection zones akin to nuclear free zones? These issues are introduced in this chapter and explored more extensively in chapters 6 and 7.

Bernhard Abrahamsson focuses on commercial aspects of navigation in his paper *Commercial Sea Lanes of Communication*. He discusses the relationship of trade routes and SLOCs, pointing out that trade routes produce SLOCs. Changing conditions and trade flows determine the location of SLOCs, with general cargo vessels, either containerized or break bulk, engaged in liner trades plying established sea routes on regular schedules and bulk carriers, either liquid or dry bulk, normally operating in nonscheduled service. As a result there are "different configurations of sea lanes used by the different types of operations." Abrahamsson emphasizes the economic importance of SLOCs and the changing nature of SLOCs caused by institutional and technological changes in the structure of the shipping industry. Institutional changes may involve changing ownership of vessels, maritime boundaries, environmental issues, and the UNCTAD Code, which entitled

developing countries to a larger share of shipping to and from their ports. Changes in the locations of SLOCs can also be caused by technological changes to ships. For example, container ships replace break bulk vessels in dry cargo trades and SLOCs change because new ports with specialized facilities are established to handle the containers. Old ports that are not improved cease to operate as termini for important commercial SLOCs.

Joseph's Morgan's paper on *Strategic Lines of Communication: A Military View* emphasizes the relationship of commercial sea lanes and naval missions, pointing out that historically the principal function of navies was the protection of a nation's commerce in both peacetime and war. During wartime, navies acquired the additional mission of destruction of an enemy's commercial shipping. Although modern technology has enabled the navies of the maritime powers to project great power from sea to the shores of an enemy, and thus although power projection rather than sea control has become the prime function of powerful navies, naval forces also exist even today to protect merchant shipping and to have the capacity to destroy an enemy's commercial fleet. Professor Morgan offers a number of examples drawn from history to reinforce his contention that the concept of SLOCs as *Strategic*-Lines of Communication is still important. In the discussion following Professor Morgan's paper, the participants discuss the relationship between commercial and military lanes of communication in waters frequently used by Soviet vessels.

FREEDOM OF NAVIGATION FOR WAR, COMMERCE, AND PIRACY

John P. Craven
Professor of Law
University of Hawaii School of Law
Honolulu, Hawaii

Krieg Handel und Piraterie
Dreienit Sind Sie, nicht zu trennen
(Goethe - Faust)[1]

The scope and limitation of "Freedom of Navigation" has been a recurring issue of the Law of the Sea ever since technology made it possible to intercept, disable, arrest, board, and capture a ship on the high seas. As each new technology developed (bireme, trireme, quinquereme, sail, corvus, grapple, cannon, steam, submarine, satellites), maritime states were tempted to employ the new technology, not only to control the sea on their own behalf, but to deny the sea to competitors and enemies. Each technological generation saw the promotion of naval power, of exclusive commerce, and of legal subterfuge for the promotion of various forms of privateering and piracy. Each assertion of control of the sea was met by resistance from less powerful maritime states and organizations who waged campaigns of attrition with their own naval forces, commercial ventures and legal subterfuges for privateering and piracy, until the costs of control on the part of the dominant maritime powers was unacceptable as compared with a shared use of the sea.

The history of freedom of the sea has thus been a cycle of Phoenecian freedoms and Carthaginian defeats, of Roman declarations of *Mare Nostrum*, and successful Muslim resistance, of Papal Decrees and Spanish Armadas, of treatises on *Mare Liberum* and on *Mare Clausum*, of privateering and anti-privateering, of free ships and free goods, of submarine and anti-submarine warfare, of 1958 Geneva legal freedoms and UNCLOS III constraints. In each of these cycles those maritime powers seeking absolute control of the seas having overreached and of necessity fallen back, have set as their nonnegotiable minimum warship immunity and freedom of commercial navigation along the vital sea lanes of commerce. Capitalizing on these retreats, coastal states and nonmaritime powers have implemented policies of 'creeping constraints' for purposes of environmental control, exclusive access to ocean resources, control (or promotion) of illicit freights and cargoes (drugs, illegal aliens,

weapons), protection of offshore structures and installations, control of scientific exploration, and control of traffic. The maritime powers themselves have resorted to and accepted a number of these 'creeping constraints' on navigation for the same purposes. The resulting erosion in absolute freedom of navigation is thus a threat to that nonnegotiable minimum asserted by the maritime powers. The geographic locus of these nonnegotiable minimums have been identified as the Sea Lanes of Communication (SLOCs).

In the past the resolution of this conflict between freedom and constraint has been resolved by the development, implementation, assertion, and reassertion of a customary rule of law of the sea, which has been embodied in many, if not most international sea codes. For didactic purposes this rule will be called 'The International "Fourth Amendment" of the Sea' which (paraphrasing the fourth amendment to the U.S. Constitution) may be stated as follows: "The right of ships to be secure in their transit from port to port against unreasonable inspections, searches, arrests and seizures shall not be violated and no inspection, search, arrest or seizure shall be permissible except upon probable cause and in accordance with international law."[2]

This principle was most succinctly stated in the Treaty of Paris of 1857 as:

> 1st, Privateering is and remains abolished;
> 2nd, The neutral flag protects the enemy's goods, except contraband of war;
> 3rd, Neutral goods, except contraband of war, are not subject to seizure under the enemy's flag.[3]

These principles of commercial immunity when coupled with warship immunity have been reiterated, together with an enumeration of the international laws of arrest, search, and seizure in the 1982 Law of the Sea Convention.[4]

Against this hypothetical statement of the customary norm of the international law of navigational freedom we can measure the pressures exerted on this law by new uses and misuses of the sea. Three areas are chosen for examination as most illustrative of the pressures on freedom of navigation: fishing, control of illicit cargo, and arms control.

Regulation of Fishing

The establishment of the exclusive economic zone (EEZ) as a regime recognized in international law allows a coastal state to control and regulate fishing within its two hundred mile claim. An internationally accepted right associated with the zone is the right identified in Article 73(1) of the 1982 Convention "to take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations..." The United States Magnuson Act[5] is demonstrative of the means whereby this regulatory right within a clearly defined region of the ocean may be extended to deny the "International Fourth Amendment" to fishing ships of other nations throughout the high seas. The Magnuson Act requires that nations desiring access to the U.S. 200-mile zone negotiate a "Governing International Fisheries Agreement" (GIFA) having specific provisions that include among others: (a) acknowledgment of the right of the United States to fish for tuna as a species exempt from EEZ jurisdiction, (b) acknowledgment of the right of the United States Coast Guard to board and inspect a fishing vessel of the GIFA nation anywhere,

anytime, and (c) acknowledgment that the presence of undocumented unauthorized fish aboard such a vessel is prima facie (although rebuttable) evidence that the fish were illegally caught in the U.S. EEZ.[6] This presumption thus constitutes a legal basis for seizure outside of the exclusive economic zone and on the high seas. These provisions are certainly valid under international law since they have been voluntarily agreed to by the GIFA nation. There is, however, a coercive element in these agreements in that economic sanctions apply to non-GIFA nations (even those who do not intend to fish in U.S. waters) who do not acknowledge the U.S. highly migratory species claim, who refuse to negotiate a GIFA, or with whom such negotiations have been unsuccessful. This sanction is in the form of determination by the Secretary of Commerce that the fish and fishing products of such nation may not be exported to the United States.

It is certainly within the right of other nations to negotiate similar agreements as a basis for access to their economic zones and access to their markets. Thus in the limit, and presuming reciprocal duties, the negotiated law (and therefore in time the customary law) of the sea for shipping vessels would be one of regulated navigation throughout the voyage, in transit on the high seas, as well as during the process of fishing and discharge of cargo.

Control of Illicit Cargo

Equally strong regulation and control of navigation on the high seas for all nonmilitary vessels appears to be the end point of the current trend of law for the control of the international traffic in illicit substances or the transport of refugees or illegal emigrants. 14 U.S.C. section 89(a) gives the United States Coast Guard authority to:

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

This authority has been employed by the Coast Guard to make searches and seizures of foreign flag vessels in those circumstances where permission to inspect for the purposes of determining a ship's documentation has been granted by the flag state either on a case-by-case basis or on the basis of a continuing agreement. Under this authority and pursuant to such permission, the Coast Guard has made random inspections and arrests of American and foreign flag vessels.[7] The federal courts have almost uniformly and with only occasional dissent upheld all of these searches and seizures as nonviolative of the Fourth Amendment.

The most intrusive case in point is that of *United States v. Streifel*.[8] In this instance, on the basis of reasonable suspicion, but admittedly without probably cause, the U.S. Coast Guard obtained permission from Panama to board and inspect a Panamanian flag ship and to seize the ship if it contained contraband. The court, relying on the land-based decision in *Terry v. Ohio*,[9] ruled that the search and seizure was not in violation of the Fourth Amendment. It is significant

to note that many substances that are illegal in the United States (e.g., coca beans, heroin for medicinal purposes) are not illegal in other jurisdictions, and that application of *United States v. Streifel* throughout the high seas could result in the arrest and seizure of foreign flag vessels on the high seas that are in fact legally engaged in the transport of cargo between ports where such cargoes are not contraband. The current history of legitimate and understandable attempts to prevent the import of illegal substances is thus creating pressures on freedom of navigation on the high seas which could in their ultimate extension impinge on the nonnegotiable minimum which maritime states will demand.

Arms Control

An as yet resisted pressure on freedom of navigation is inherent in the world desire for arms control. It is a universally accepted international goal that nuclear weapons should not proliferate, that the number and types of nuclear weapons that are permitted be limited to those that are in fact required for national security and that their geographic spread should be contained. To that end, a number of international, regional, bilateral, and unilateral treaties and laws have been enacted. Many of these impose limitations on the transport and deployment of nuclear weapons on or under the sea or on the seabed. To date, none of these treaties authorizes or asserts the right to inspect nuclear-armed ships on the high seas in order to ascertain compliance or to arrest and seize such ships found to be in violation of the laws and treaties. It has been very difficult, however, to conceive of enforceable and effective arms control agreements that do not ultimately require some form of high seas inspection and enforcement. An examination of the major documents in this regard reveals the dilemmas.

Perhaps the first of the oceanic nuclear arms control treaties was the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof.[10] This treaty outlaws the emplacement of nuclear weapons and other weapons of mass destruction on the seabed beyond the limits of national jurisdiction. Violation of this treaty would most probably require transport of the weapon by ship or submarine to the seabed site. Article III(2) states that "In order to promote the objectives of and to ensure compliance with the provisions of this Treaty, each State Party to the Treaty shall have the right to verify through observation the activities of other States Parties to the Treaty on the seabed and the ocean floor and in the subsoil thereof...provided that observation does not interfere with such activities." This provision suggests that parties have a right to observe investigatively the installation of military arrays, deep seabed mining operations, deep tow operations, seabed disposal operations, etc.

This Article is, however, almost completely vitiated by Article III(6) which states that "Verification activities pursuant to this Treaty shall not interfere with activities of other States Parties and shall be conducted with due regard for rights recognized under international law, including the freedoms of the high seas and the rights of coastal States with respect to the exploration and exploitation of their continental shelves." In other words, no new observational or investigatory rights over and above those normally incident to the freedom of the seas is conferred by this treaty. The technical ability of nations to violate this treaty without detection by observation or search of the seabed is beyond question. It is technically possible for a nation to

design and deploy a seabed system whose location was unknown to an inspecting nation and whose appearance on the sea floor would be virtually indistinguishable from the seabed itself except by close examination (distances on the order of 1000 feet or less). It must be concluded that verification and enforcement of this treaty is not technically feasible and that its viability is based solely on international trust.

A similar situation has arisen with respect to the Salt I and Salt II Treaties.[11] Although the Salt II Treaty is unratified, both parties averred compliance through 1986. Verification of compliance in both instances rests on each party employing its own "national technical means," operating "in a manner consistent with generally recognized principles of international law." Accordingly, provisions related to limitations in deployment of missiles at sea are not verifiable by any currently permissible technique while missile-launching submarines are deployed in a submerged condition on the high seas.

Thus the protagonists in the bilateral and multilateral arms control agreements, having a vested interest in verification, have, to date, sacrificed that capability to the preservation of warship immunity. This unsatisfactory trade-off may not be maintainable for the indefinite future. From the first days of the establishment of the Arms Control Agency, numerous apparently workable schemes of onboard inspection or random inspection at sea, verifiable area and range deployment limitations, and verifiable geographic limitations have been proposed[12] which would provide mutual security against surprise attack. As the balance of terror increases and when world leaders appreciate that sea-based systems are not vulnerable to systems that might be deployed in connection with the strategic defense initiative, these proposals, now rejected out of hand, may become much more palatable.

The nature of the dilemma is most recently illustrated by the action of the New Zealand government to declare its territory and its territorial waters a nuclear-free zone. This declaration is now being implemented by domestic legislation. The United States has elected to terminate visits by its warships in support of the ANZUS alliance in order to maintain the ambiguity of definition as to which of its naval vessels are nuclear capable and which are not. At least three other treaties - the South Pacific Nuclear Free Zone Treaty (the Rarotonga Treaty),[13] the Treaty for Prohibition of Nuclear Weapons in Latin America (the Treaty of Tlatelolco),[14] and the Antarctic Treaty[15] impinge on the deployment and transit of nuclear weapons at sea. The area of the nuclear-free zone defined in the Rarotonga Treaty encompasses a vast expanse of high seas, but prohibitions with respect to the deployment of nuclear weapons in the area are limited to the contracting parties, except for a prohibition against the stationing of any nuclear explosive device in the territorial sea and archipelagic waters and the seabed and subsoil beneath. The prohibition against stationing does not prohibit port calls or transits of territorial and archipelagic waters of ships of noncontracting parties that contain nuclear weapons.

As in the Rarotonga Treaty, the zone of application of the Tlatelolco Treaty encompasses a vast expanse of high seas, but the high seas prohibitions in this area apply only to the contracting parties. In a protocol signed by the United States, the United Kingdom, France, and the Netherlands, the parties to the protocol agree to "undertake to apply the statue of de-nuclearization in respect of warlike purposes" in territories within the zone for which de jure or de facto they are internationally responsible. In an additional protocol ratified by the United States, the United Kingdom, France, China, and the Soviet Union

(the admitted nuclear weapon states), these governments undertake not to contribute in any way to the performance of Acts involving a violation of the obligations of Article I of the treaty in the territories to which the treaty applies.

Insofar as freedoms of the sea are concerned, an enigma is raised by the Inspections Article (Article 16) of the treaty. In this article, "The Contracting Parties undertake to grant the inspectors... full and free access to all places and all information which may be necessary for the performance of their duties and which are directly and intimately connected with suspicion of violation of the Treaty." Considering that the territories include territorial waters of the contracting parties, and that a "place of violation" could conceivably be a ship or warship, there would be implied consent for inspection of a warship of a contracting party and possibly of warships of the nuclear powers whose warships are located in the ports or territorial waters of a contracting state.

The zone of the Antarctica Treaty also includes substantial regions of high seas, and this treaty contains prohibitions against military maneuvers, military bases, nuclear explosions, and the disposal of radioactive waste, but Article VI of the Treaty states that "nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights of any State under international law with regard to the high seas within that area."

We may conclude that these treaties demonstrate a strong desire on the part of nations and regional organizations to have large zones which include substantial areas of high seas which are entirely free from "the receipt, storage, installation, deployment and any form of possession of any nuclear weapon," but that they are precluded from concluding such treaties because such treaties would impinge upon the nonnegotiable minimum requirements of the nuclear maritime powers for warship immunity in the SLOCs and in the areas deemed necessary for deployment of strategic nuclear weapons. The situation is not static, and it can be expected that regional states will maintain continuous political pressure toward the achievement of their ultimate goal of a nuclear-free region.

Given appropriate safeguards, the nuclear maritime powers should welcome the creation of such zones, minimizing as they will the perceived need for strategic defense coverage of these zones, providing welcome steps toward arms limitation and non-proliferation, and simplifying the negotiations required for detente. If, on the other hand, the nuclear maritime powers perceive the spread of nuclear-free zones as a threat to the security of their SLOCs and the deployment of their strategic forces, then the resistance to accommodation of the needs of non-maritime coastal states for protection of environmental control, exclusive access to ocean resources, control of illicit cargoes, protection of offshore structures, control of science, and control of traffic will be heightened. It is within the context of these nonnegotiable minimum security requirements of the maritime powers and the desire of other nations for regulated uses of the seas that a new International "Fourth Amendment" of Navigational Freedoms appears to require reformulation.

Footnotes

1. War, Commerce, and Piracy; Triune are they, never to be parted.
2. In recent years, the struggle to maintain this nonnegotiable minimum freedom of navigation has concentrated on the choke points and in

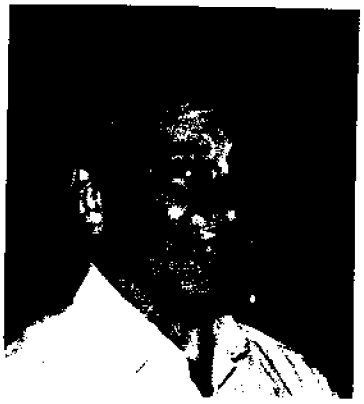
particular the straits. An acceptable solution, which presumes good will and cooperation on the part of signatory and nonsignatory states, is found in the concept of transit passage. Further discussion and debate on this issue is probably either moot or redundant. Of greater interest is the larger issue of the nonnegotiable limits which major maritime powers will tolerate on freedom of navigation for their military and commercial ships: what constraints the major maritime powers will accept in order to accommodate the perceived needs, rights, and interests of less powerful states, and what constraints the major maritime powers will promote in their own self interest.

3. C.J. Columbos *International Law of the Sea* 481-82 (1968).
4. United States Convention on the Law of the Sea, *done* at Montego Bay, December 10, 1982, 21 I.L.M. 1261 (1982) UN Pub. E. 83. V. 5 (1983). See Pt. II, sec. 3, Innocent Passage in the Territorial Sea; Pt. III, sec. 2, Transit Passage, Straits Used for International Navigation, Sec. 3, Innocent Passage; art. 53, Right of Archipelagic Sea Lane Passage; Pt. V, Exclusive Economic Zone; art. 73, Enforcement of Laws and Regulations of the Coastal State; Pt. VII, High Seas; art. 87, Freedom of the High Seas; art. 90, Right of Navigation; art. 95, Immunity of Warships on the High Seas; art. 96, Immunity of Ships Used Only on Government Non-Commercial Service; art. 105, Seizure of a Pirate Ship or Aircraft; art. 111, Right of Hot Pursuit; Pt. XII Protection and Preservation of the Marine Environment, sec. 6, art. 220, Enforcement by Coastal States; art. 226, Investigation of Foreign Vessels; art. 236, Sovereign Immunity; Pt. XIII, Marine Scientific Research, sec. 3, art. 253, Suspension or Cessation of Marine Scientific Research Activities.
5. Magnuson Fishery Conservation and Management Act, 16 U.S.C. secs. 1801 et seq. (1976 and Supp. IV 1982).
6. *Id.* 16 U.S.C. secs. 1822(e)(2), 1821(c)(2)(A)(i), and 1859(e).
7. Arrests have been made on the high seas for safety and document checks in the complete absence of suspicion of criminal activity, Warren v. United States, 340 U.S. 523 (1951); after the seizure of a foreign flag vessel on the high seas on the basis of reasonable suspicion, United States v. Williams, 589 F.2d 210 (5th Cir. 1979); after the stopping and inspecting of a U.S. flag vessel without probable cause or reasonable suspicion, United States v. Clark, 96 U.S. 37 (1877); after justifying the search of a U.S. flag fishing vessel 800 miles at sea as a systematic border stop, United States v. Harper, 406 U.S. 940 (1972); and after seizing a U.S. flag vessel in foreign territorial waters absent statutory authority, Conroy v. United States, 444 U.S. 831 (1979). See Marks, *The Fourth Amendment: Rusting on the High Seas*? 34 Mercer L. Rev. 1537 (1983).
8. 665 F.2d 414 (2d Cir. 1981). The ship was first observed 50 miles outside of U.S. waters and intercepted (requiring a shot across the bow) 200 miles outside of U.S. waters. The documentation was found to be in order and the captain averred that he had no cargo in the hold. The hold was nonetheless inspected and substantial quantities of marijuana were found. The ship was seized and escorted to the U.S. contiguous zone, where four Americans on board the Panamanian ship were arrested and transferred to the custody of the U.S. marshal. See Stetter, *Coast Guard Boardings of Suspected Drug Smuggling Vessels on the High Seas and the Fourth Amendment: United States v. Streifel*, 3 Cardozo L. Rev. 607 (1982).
9. 392 U.S. 1 (1968).

10. *Done* Feb 11, 1971, T.I.A.S. 7337. *See* Dore, *International Law and the Preservation of the Ocean Space and Outer Space as Zones of Peace: Progress and Problems*, 15 Cornell Int'l L. J. 1 (1982).
11. *See* Note, *Problems in the Verification and Enforcement of Salt Agreements in Light of the Record of Soviet Compliance with Salt I*, 22 Harv. Int'l L. J. 379 (1981).
12. *See* Craven, *Ocean Technology and Submarine Warfare*, in *The Implications of Military Technology in the 1970s* (Adelphi Paper No. 46, Institute for Strategic Studies, 1968).
13. South Pacific Nuclear Free Zone Treaty, *adopted* at Raratonga, Aug. 6, 1985, 24 I.L.M. 1440(1985).
14. Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), *signed* at Mexico City, Feb. 14, 1967, 22 U.S.T. 762, T.I.A.S. No. 7137, 634 U.N.T.S. 281.
15. The Antarctic Treaty, *signed* at Washington, D.C., Dec. 1, 1959, T.I.A.S. No. 4780, 402 U.N.T.S. 71, 54 Am. J. Int'l L. 476(1960).

COMMERCIAL SEA LANES OF COMMUNICATION

Bernhard J. Abrahamsson
U.S. Merchant Marine Academy
King's Point, New York



Commercial SLOCs

Trade necessitates seaborne transportation. Although the two aspects are related, this paper makes a distinction between trade routes and sea lanes of communication (SLOC) because the latter are derived from the former. Trade routes refer to the flow of commodities between regions, countries, or ports. SLOCs refer to the paths used by the ships as they cross the seas between trading areas.

It follows that although a trade route can exist without sea lanes, an existing sea lane is always part of a trade route, and, in many cases, the sea lane *is* the trade route; as trade routes change, so do the sea lanes. It also follows that there is a large, but finite, number of trade routes but an infinite number of potential sea lanes. The latter is important when considering military SLOCs, but for commercial sea lanes there are economic and operational factors that define their location and use. These factors pertain to trade flows, their volume, composition, and direction; and these, in turn, determine what ships will be used -- i.e., types, size, and speed. Market forces, or the needs of the trade, and operational aspects of ships' characteristics will determine scheduling and choice of sea lanes. Politics, domestic shipping policies, trade agreements, and market forces determine who uses particular sea lanes.

The purpose of this paper is to reflect on the above relationships. Because trade is dynamic and changing, details of trade routes must be seen in a temporal context. Therefore, only general features and aspects can be considered here.

Trade Flows and SLOCs

Potential sea lanes are permanent but their actual use is derived from trade. World seaborne trade consists of two main groups: general cargo and bulk cargo; the latter divides into dry and liquid (mainly crude oil and products). Each type of cargo is carried in specific ships with distinct characteristics in terms of operations and management. General cargo is carried in liners with cargo handling facilities ranging from conventional break-bulk to containers and barges. These ships operate on fixed schedules in terms of both ports and times. Bulk is in nonscheduled service and is carried to and from ports as needed. As a

result we have different configurations of sea lanes used by the different types of operation.

SLOCs

An impressionistic view of the location of established commercial sea lanes can be obtained from numerous maps and atlases.[1] More detailed, and usable, information is to be found in the *Sailing Directions*, published by U.S. authorities.[2] The *Planning Guides* in this series include a route chart for the relevant area together with textual descriptions of the routes.[3] For illustrative purposes, Table 1 lists the main lanes across the North Pacific as abstracted from the applicable "Guide."

One salient feature of commercial sea lanes is that transoceanic lanes converge on certain points from which they then diverge for the final destination ports. It is these latter routes that are of primary importance in terms of the 1982 Law of the Sea Convention because they lead into EEZs, territorial waters, straits and canals, and through archipelagoes. It is impossible, though, to deal with these routes within the scope of this paper -- be it enough to say that many of them are subject to various traffic separation schemes with well defined sea lanes and rules for transit.

On the North Atlantic, some converging points are, in the eastern part, Pentland Firth (north of Scotland), Fastnet (south of Ireland), Scilly Island (south of Land's End, England), and Gibraltar. In the western part there is the entrance to the Panama Canal, and several points along Longitude 50 degrees W between 42 degrees N and 46 degrees N for dispersion to North American ports.

Similar points in the North Pacific are at the Juan de Fuca Strait (outside Seattle), the mouth of the Columbia River (Portland), and Oakland, all three of which are coupled to a point outside Yokohama. Other points are from the Panama Canal to a point west of Cape Corrientes (20 degrees N; 107 degrees 30'W) from where the lanes disperse to points along the North American west coast and to San Bernardino Strait in the Philippines where there is further dispersion. Similarly, several lanes converge on Honolulu from both east and west; the obverse is, of course, that lanes disperse fron Honolulu toward Japan and other areas in the Far East and South East Asia via San Bernardino as well as to North and South American points.

As mentioned, the needs of trade determine the types of ships and services. Assuming that the trade and the resulting ships are given, the choice of sea lane is dependent on season and weather, distance, size of ship, its draft, and other dimensions. That is, will the ship use weather routing; can it follow a great circle or rhumb line route; can it use existing canals and straits? Economic factors such as need for speed and concern for fuel costs also affect the choice of passage.

Because ships are dependent on trade needs, changing trade volumes or transport distances will affect the ships. An increase in volume, given the distance, will necessitate more ships; and an increase in distance, with the volume given, will generally result in the use of larger ships. Transit speeds can offset some of these effects -- i.e., higher speeds means that we do not need as many, or as large, ships as would otherwise be the case. Changing volumes, distances, and direction imply not only changes in the types and sizes of ships, but also that the relative importance of trading areas change. This is particularly important in bulk trades where trade routes often shift rapidly and frequently -- e.g., oil, coal, and grains in the last few years. As

trade routes change so does the use of established sea lanes. That is, the *locations* of sea lanes remain basically unchanged, but their *use* varies substantially. Even if a trading area does not change in importance, the use of relevant SLOCs may change because of ships' characteristics, as mentioned above. For example, the coal exports from the United States and Australia to Japan and Northwest Europe have been substantial and economically important for many years leading to an established route problem. As an increasing proportion of these exports goes in ships in excess of 100,000 deadweight tons (dwt.), these ships may use different sea lanes as they "disperse" from the "converging points."

It should also be noted that trade flows are rarely balanced. As a consequence, shipping companies try to plan the routing of their ships to minimize ballasting (in bulk trades) and unused cargo space (in general cargo trade). This leads to the use of flexible ships, sometimes multi-purpose, to be used in triangular voyages and cross trading -- all of which contribute to today's intricate pattern of sea lanes.

An example of triangular voyages with a multi-purpose ship -- an oil/bulk/ore (OBO) vessel -- would be from Long Beach to Indonesia with grain; from there to India with oil; and iron ore from India to Japan, ballasting back to the United States. A liner route with cross trading is illustrated by the United States Lines' round-the-world service which employed twelve "super container ships" of 4400 TEUs to maintain a weekly departure from each port.[4]

Trade Areas

As mentioned, three types of cargo move by sea: general cargo, dry bulk, and liquid bulk. The areas generating these cargos determine the sea lanes used. To obtain a sense for magnitudes, total world seaborne trade in 1984 is estimated at 3,320 million tons (mt). Oil accounted for 1,427 mts, and dry cargo for 1893 mt. Of the latter figure, dry bulk was 833 mt. with general cargo at 1060 mt -- that is, almost one third of the total.[5]

General Cargo

The main areas for general cargo are the Far East, Europe, and North America. Therefore, the main sea lanes go across the North Atlantic, North Pacific and through the Mediterranean. Less important, but still significant, are the other continents; Africa, South America, and Australia-New Zealand. A major part of general cargo trade is now containerized. This development tends to emphasize the importance of select ports with high rates of cargo accumulation and, therefore, the importance of the corresponding SLOCs. More specifically, the main generators of general cargo on the North Pacific are the United States, Japan, Singapore, Hong Kong, Taiwan, and South Korea. On the North Atlantic, cargo is generated at the ports of the United States, the U.K.-Continent, and the European Mediterranean. Because of intermodality, much of the European Mediterranean trade goes overland to North-European ports, and vice versa, so that the most active sea lane is from these ports to Northern U.S. or Canadian ports. The picture is less concentrated on the North Pacific, but on both oceans, the sea lanes carry cargo destined beyond North America. That is, some cargo from Europe to the Far East and vice versa goes via U.S. or Canadian landbridges. This affects the route via Panama Canal. Similarly, a substantial part of the Europe-Far East trade uses the Trans-Siberian railroad and this affects both the

Suez and Panama routes as well as trade that would be carried to the Mediterranean on the way to the Far East through the Suez Canal.

Dry Bulk[6]

The most important seaborne bulk cargos are iron ore, coal, grain, bauxite and phosphate rock, in this order. The general, major movements of iron ore originate in South America, mainly Brazil, Australia, Liberia, and India for delivery to Western Eurpoe and Japan. These destinations also apply to the coal trade, the major sources of which are the United States, Australia, South Africa, and Poland. Grain moves primarily from the United States, Canada, Argentina, and Australia to the Far East, Eastern Europe, and West Africa. The main bauxite trades are from Australia, West Africa, the Caribbean, and northeastern South America to Canada, the United States, and Europe. Phosphate rock is transported from Africa, mainly Morocco, and the United States to Europe, the Mediterranean countries, and Australia.

Oil

The volume of seaborne oil has declined substantially in the last five years from a peak of 2,038 million tons in 1979. The reasons are decreased overall demand for oil, new resources that are closer to consumption centers -- i.e., oil from the United Kingdom, Norway, and Mexico -- and the incrased use of the Suez Canal as well as pipe lines. These changes have had an effect on the sea lanes used as well as the intensity of that use.

The main importing areas are the United States, Japan, and Europe, notably Italy, France, and Germany. The main exporting area is still the Persian Gulf, but the North Sea and Mexico are prominent as are West and North Africa. What will affect sea lanes used in oil trade is the relative importance of crude versus products. Crude moves in larger volumes and requires larger ships than does the product trade. Hence, whether, for example, the Suez Canal or the Cape route will be used is a matter of trade developments. These developments, in turn, are linked to existing refinery capacities, inland pipeline systems, and various domestic and international trade and energy policies.

Economic Importance

It is difficult to say anything general about the economic importance for any particular country of a particular sea lane, because it depends on the volume, composition, and value of the country's trade on that lane, *and* on the participation of its ships on the route. A country may have no trade of its own on a particular route, but may employ its ships there; an example would be Greek ships in the Pacific trade. Conversely, it may have substantial trade, but no ships to carry it; Canada is a good example. On the whole, participation in carriage is a grey area because flag does not necessarily indicate national ownership -- e.g., flags of convenience. Hence, each sea route must be examined and assessed separately in terms of both trade content and its carriage.

Although the U.S. scene is not representative of other major trade routes, a look at it will give some generally valid impressions -- also, the country accounts for some 20 percent of world seaborne trade. MARAD data identify 57 trade routes for the United States; of these 36 are "essential".[7] In 1983, 630 mt valued at $268B moved on these routes. The volume was almost equally divided between exports (303 mt) and imports

(327 mt). By value, imports ($165B) substantially exceeded exports ($103B) -- this imbalance has increased in the last two years.

In general, all types of cargoes move on all of these routes. Tables 2, 3 and 4 give the breakdown of the total volume into liner, dry bulk, and oil as well as to the participants in the carriage. U.S. ships carry the largest proportion of liner cargo (25 percent) but are small participants in bulk and oil (1.5 percent and 7 percent respectively). On the whole, U.S. ships are minor users of the sea lanes, and, in the overall economy, the ships are minor factors. Yet, the lanes are of high economic value to the country. Conversely, the lanes are of major importance for the other carrier nations because they offer shipping opportunities.

In general, these features are likely to be found on most trade routes, although protectionism and the UNCTAD Code[8] may affect the pattern of participation.

Structural Change

In essence, we have an established network of transportation that connects resources with production and consumption centers. But economic and technological developments result in growth, expansion, and redistribution of these centers, with complex effects on trade, ships, and sea routes.

First, there has been far-reaching structural change in the institutional setting of the industry as political concerns have become more pronounced, have effected shifts in the patterns of ownership of shipping and have promoted various measures for international regulation of operations and cargo allocations. Second, there has been, and will continue to be, structural changes in the shipping industry itself because of technological change which will affect, and be affected by, changes in world trade. Third, change is occuring in the volume, composition, and direction of trade; this will affect shipping directly as there may be fewer and different cargoes available for sea transport.

Institutional change is seen mainly in four areas: new *de facto* maritime boundaries; a shifting pattern of tonnage ownership and consequent measures for international regulation and cargo allocations; safety issues; and environmental issues.

New maritime boundaries have been established in accordance with the 1982 Law of the Sea Convention even though the Convention has not been globally accepted and is not likely to enter into force soon. The extended jurisdictional powers of coastal states carry some implications for navigation, particularly in terms of vessel traffic separation schemes, safety, and pollution.

Safety and environmental issues are manifested in various international conventions formulated in the International Maritime Organization (IMO), such as the Conventions for Safety of Life at Sea (SOLAS),[9] LOADLINE,[10] Standards for Training, Certification, and Watchkeeping (STCW),[11] and Maritime Pollution (MARPOL),[12] all of which are in force. These conventions affect both shipboard procedures and operating costs.

The shifting pattern of ship ownership is the most significant and sensitive of the structural changes that have taken place in the last twenty years because these changes are more political than market-induced developments; they constitute a focal point in the North/South dialogue related to the call for a New International Economic Order and have brought national security concerns into the shipping debates.

The general pattern of ownership shows a significant decline in the share of world tonnage registered in the countries in the Organization

of Economic Cooperation and Development (OECD) -- almost 65 percent in 1970 compared to 47 percent in 1983. Tonnage under open registeries gained as did the registries of the socialist countries and the less developed countries (LDCs). The latter group accounted for only 8 percent in 1975 but had raised its share to almost 17 percent by 1983, close to UNCTAD's declared target of a 20 percent share by 1990. The distribution of tonnage among LDCs is uneven; the bulk is accounted for by a few major shipping nations, such as India, South Korea, Brazil, China, Singapore, Saudi Arabia, and Kuwait.

The growing tonnage under LDC flags has been accompanied by measures to secure cargoes, resulting in the UNCTAD Code.[13] The Code is an important element in the changing liner market. It calls essentially for a system of international regulation of conference trade. It accepts the conference system as a proper mechanism to render efficient service, but establishes the principles that (1) governments will have a role in relations between shippers and carriers; (2) conference membership shall be granted on the basis of some noncommercial criteria, one of which is the development of national shipping lines; and (3) cargo allocations to aid national lines are acceptable -- i.e., the 40-40-20 guideline.

Several countries have not signed the Code, notably the United States; and others, notably the European Economic Community (EEC), will do so only with reservations expressed in the so-called Brussels Package. Under these reservations, the LDC partner's appropriation of its 40 percent share is accepted, but the EEC partner's share is left free for competition among other EEC members. This free access is extended to any OECD member that offers reciprocity.

With the Code in place, UNCTAD concerns and efforts have turned to achieving a similar convention for bulk cargoes, so far without notable success. The scheme is coupled with the closing of the open registeries and some moves have been taken toward an international convention for the registry of ships.[14] The importance of these developments for sea lanes is that the relative importance of them may change in terms of who uses them.

Technological change has resulted in larger and faster ships, and new cargo handling techniques. In addition to effects on manpower, management, ports, and trade flows, four major consequences have followed. First, flexible combination carriers, such as the oil-bulk-ore ships, have made the carriage of dry and liquid bulk cargoes interchangeable, thus allowing for more efficient routing which affects the choice and use of sea lanes. The second consequence refers to the use of containers. In the early stages, the use of containers differentiated very clearly between the carriage of general cargo and bulk. At a later stage, however, it brought the two sectors closer together as general cargo put into containers became homogeneous and some bulk commodities were also moved in containers. As a result, liner conferences are today meeting increased competition from bulk operators using bulk-container ships; this is in addition to the growing competition from independent liner operators. The final result is oversupply of container tonnage. On balance, traditional competitive relationships between the various shipping markets have been sharpened by technological change. The whole industry is closely tied together so that all major types of carriage -- dry and liquid bulk, conference liners and independents -- affect each other competitively, but they do so on higher levels of technological sophistication and efficiency than was previously the case.

The third consequence has been that the efficiency, or operational capacity, of ships has increased dramatically, thus allowing for more

cargo to be carried in fewer ships. The result, even with growing trade, is surplus tonnage, a situation that is exacerbated by the continuous improvement in the efficiency of these ships. In this situation, operators see the capturing of cargo share as a zero sum game and there is a distinct movement toward mergers and increasing scale of operations -- a trend particularly noticeable in, but not limited to, liner trade. To keep at the forefront of the containerization movement and to organize services on a large international scale in a highly competitive environment requires large capital resources as well as extraordinary management expertise. Because few individual companies have sufficient amounts of such resources, they have resorted to cooperation. Consortia, joint services, joint ventures, space charters, and mergers are common; and leasing arrangements for major pieces of equipment, including ships, are increasingly part of the scene. Demands on managerial ability are heavy as we are rapidly moving to a situation in which high technology shipping will be concentrated in a few very large and financially strong operators. Although most of these are from the advanced industrial countries, such as the U.S. Lines and Sealand from the United States, at least one major operator, Evergreen, comes out of the newly industrialized countries, namely Taiwan.

By necessity, these large liner operations will be focused on a few high volume trade routes with feeder services, e.g., the round-the-world services by U.S. Lines, Evergreen, and K-Line. Known as "the load center" system it is likely to spawn new services to and from intermediate volume ports in competition with the feeder services. That is, cargo from a feeder port in one range destined to another feeder port in another range would move directly from the former to the latter, bypassing their respective load centers. The analogy is the "hub-and-spoke" system versus the "point-to-point" system in U.S. air transportation. These feeder services may be with smaller ships of either the full container or combination ship configuration. In any event, new sea lanes will be established and new users will emerge.

The fourth consequence of technological change was that conditions for intermodalism were created. This development has had far-reaching and long term effects on shipping and sea routes, and is closely tied to changes in world trade.

The proximate cause of the developments in trade is the generally sluggish state of the world economy. Although world trade will revive, it is not likely that we will see the sustained high growth rates of the past. The composition of trade has shifted in favor of more manufactured goods and partially processed raw materials, that is, higher value added goods. The oil trade, in particular, has seen dramatic changes in volume, product mix, and trade routes. High prices and the economic slump have cut demand in a general sense, i.e., there has been a move along the demand curve. Conservation efforts and technology have changed demand in a fundamental sense, i.e., the demand curve has shifted to the left. On balance, renewed growth will start from a lower level and is not likely to proceed at the high rates of the past.

New sources of supply have shortened and changed the sea routes. The overall result is a large surplus of tonnage, particularly in Very Large Crude Carriers (VLCCs) and similar vessels. Demand for smaller tankers is being bolstered by producers' supplying products rather than crude -- an example of of the general shift to more value-added commodities in trade, but also an example of other structural market changes. In the wake of the 1974 oil crisis, the oil shipping market changed rapidly. As producer governments took control of the supplies, they

encouraged the entry of numerous buyers in order to free themselves from dependence on the few major oil companies. The large number of new buyers resulted in many relatively small shipments to many destinations and voyage charters became more important than the long-term charters previously demanded by the large oil companies. The new needs were met by these companies' letting go of the major part of the fleet under their control. That is, the tanker fleet, which previously had been largely controlled centrally by the major oil companies through ownership and long-term charters now reversed its composition: a major part of the fleet was free for the spot market. The market has been fragmented and remains essentially so today, although there is a tendency toward some concentration in producing countries, particularly Kuwait and Saudi Arabia which act for the whole of the Organization of Petroleum Exporting Countries (OPEC). Given the sensitivity of having secure oil transport and the need to draw upon several sources for that very reason, plus the control the buyer has in designating the flag of transport, we should expect more importers to carry oil in their own tankers.

The tendency toward more finished goods trade favors liner and neo-bulk shipping; most bulk trades tend, however, to be hurt by this development. Also, the growing use of recycled scrap, particularly in steel, copper, and alumninum, will affect bulk trades in these ores and in metallurgical coal. Steam coal may be a growth area, depending on how oil prices develop.

In addition to these changes in traded products, there is a major development in the process of trading. Barter, or counter-trading, is rapidly becoming an important trade feature. Although it has always been the preferred arrangment in East-West trade, it has in recent years gained popularity also in other trades, specifically LDC trades. Detailed data are not available, but volumes appear to be small, although rapidly growing (estimates range from 1% to 20% of world trade). The effects of these arrangements are the same as those of any bilateral agreement, and, if shipping services are specified as counter purchase, we have in essence a cargo reservation scheme, thus affecting who uses particular sea lanes. To the extent that counter trading opens up new trade routes, sea lanes are affected as well.

Although these trends have had, and will continue to have, heavy impacts on shipping, intermodalism gives broader, and bolder, insights into the current situation and future prospects. The post-war period has seen a vast development and expansion of roads and railroads throughout the world. Together with the technological developments in shipping, transport became intermodal. In the past there was little competition between ships and land based transport systems; even the shortest sea trade flourished. With intermodal transport, these trades are increasingly replaced by ferries which are basically parts of highway or railroad systems. In other words, intermodalism has brought shipping and land based transportation into competition in ways never seen before. The phenomenon is evident in many, if not most, parts of the world in the concept of the land-bridge. The effects are far-reaching. Intercoastal seatrade in North America is virtually gone. The same holds for Europe where the British short-sea trades are severly affected; British trade with the Continent is largely by land based transport, the trucks using the ferry services across the Channel. Also the Scandinavian trade with the Continent is by land as is the area's trade with the Mediterranean and the Near East. Much European trade with the Far East is by rail through the USSR via the Trans-Siberian Railway and the Baikal-Amur-Magistral Railroad. In short, what were once major traditional liner

routes have largely disappeared as the cargoes increasingly move by land facilitated by the intermodal nature of transport. The areas where shipping encounters competition from land based transport are growing as technology makes the system increasingly intermodal. Although in the past the growth in world trade has been a good indicator of seaborne trade, intermodalism has weakened this relationship. In the short term, therefore, although world economic recovery will result in a resurge in international trade, it may not have as strong an impact on seaborne trade as expected.

There are some very broad policy implications in this view. First, as mentioned, growing international trade need not, as in the past, result in a commensurate growth in seaborne trade. Much depends on where the growth occurs. Second, intermodalism brings international shipping into the domestic scene; domestic economic and development policies *must* consider the interface with international shipping. Third, we need to give attention to the identification of areas, be they geographical or economic, where there is still scope for sea transport. Clearly such areas exist where there is no contiguous landmass allowing for land transport -- i.e., the U.S. trades, Pacific and Atlantic, will continue to rely on shipping. The same is true for Australia, Japan, New Zealand, and other island nations (the latter may be geographic or political). Sea transport will also prevail where land transport is not, or cannot be, sufficiently developed, to provide competition. This may apply to at least some LDC countries or regions. The same holds where the trade is not suited for land transport -- this would seem to apply to major bulk cargoes.

In order to say something specific beyond these broad, common sense, statements, we need in-depth analyses of world trade trends and its relationship to seaborne trade. These must be complemented with studies of specific countries, commodities, and trade routes. It seems certain, though, that there will be changes in trade routes and this will impact on sea lanes, their location, use, and importance.

* * * * *

The research for this paper was partly supported by the Pew Memorial Trust and the Woods Hole Oceanographic Institution's Marine Policy and Ocean Manpower Center.

Footnotes

1. See, for example, Office of the Geographer, U.S. Department of State, *World Straits and Shipping Lanes* #504911 (545037)(Dec. 1981); A. Couper, (ed.), *The Times Atlas of the Oceans* (1983); and *The World Atlas of Shipping*. A good summary is given in the monthly *Pilot Charts* of the North Pacific and North Atlantic, published by the Defense Mapping Agency.
2. These are published by the Defense Mapping Agency, Hydrographic Center.
3. For example, *Sailing Direction (Planning Guide) for the North Pacific*, (Pub. 152). Pubs. 140, 160, 170, 180 and 190 are the guides respectively to the North Atlantic, SE Asia, Indian Ocean, Arctic Ocean, and the North and Baltic Seas -- and there are others.

4. The US Lines went into bankrupcy at the end of 1986 -- almost a year after this paper was first written.
5. Derived from UNCTAD, *Review of Maritime Transport, 1984* (TD/B/C.4/289) and Fearnley, *World Bulk Trades, 1984* (Oslo, Nov. 1985).
6. This section draws on Fearnley, *supra* note 5.
7. MARAD, *U.S. Oceanborne Foreign Trade Routes* (June 1985).
8. UNCTAD, Convention on a Code of Conduct for Liner Conferences, entered into force in 1983 (TD/CODE/11/Rev., April 6, 1974).
9. 1974 International Convention for the Safety of Life at Sea, *done* Nov. 1, 1974, T.I.A.S. 9700, 14 I.L.M. 959(1975).
10. 1966 International Convention on Load Lines, *done* Apr. 5, 1966, T.I.A.S. 6331.
11. IMCO, International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, entered into force in 1984 (STW/CONF/13, July 5, 1974).
12. 1973 Convention for the Prevention or Pollution from Ships, *done* Nov. 2, 1973, T.I.A.S. 10561, 12 I.L.M. 1319(1973).
13. See note 8, *supra*.
14. Such a convention was accepted by UNCTAD at the end of 1986.

Table 1 - North Pacific

Converging Points	Distance (nm)	Remarks
Seattle - Yokohama	4257	Northern route via Unimak Pass; this combines great circle and rhumb line; route fairly close to maximum extent of sea ice.
"	4276	
Portland - Yokohama	4323	
"	4328	
San Francisco - Yokohama	4536	Great circle.
Los Angeles - San Bernardino Str.	6186	"
Los Angeles - Surigao Str.	6189	"
San Francisco - Honolulu	2091	"
"	2112	Rhumb Line.
Los Angeles - Honolulu	2227	Great Circle.
Balboa - Honolulu	4686	"
Balboa - Cape Corrientes*	1685	Rhumb Line.
Cape Corrientes - Los Angeles	1032	"
Cape Corrientes - San Francisco	1315	"
Cape Corrientes - San Bernardino Str.	7164	Great circle.
Honolulu - Yokohama	3703	"
"	3522	Rhumb
Honolulu - San Bernardino Str.	4454	Great circle.

* Cape Corrientes is actually at the point of 20 degees N, 107 degrees 30' W

Source: *Sailing Directions* (Pub 152).

Table No. 2
U.S. Oceanborne Foreign Trade
Top Fifteen Flags of Registry
Liner Service
Calendar Year 1983
(Thousands of Long Tons)

Rank	Flag of Vessel	Total Tonnage	% of Total	Import Tonnage	% of Total	Export Tonnage	% of Total
1	United States	13,965	24.6	7,110	26.5	6,855	22.9
2	Panama	4,613	8.1	1,723	6.4	2,890	9.6
3	Japan	4,612	8.1	2,155	8.0	2,457	8.2
4	West Germany	3,730	6.6	2,000	7.4	1,730	5.8
5	United Kingdom	2,611	4.6	1,387	5.2	1,224	4.1
6	Denmark	2,579	4.5	1,327	4.9	1,252	4.2
7	Singapore	2,557	4.5	1,211	4.5	1,346	4.5
8	Liberia	2,233	3.9	854	3.2	1,379	4.6
9	Norway	1,966	3.5	796	3.0	1,170	3.9
10	Greece	1,838	3.2	415	1.5	1,423	4.7
11	Rep. of China (Taiwan)	1,672	2.9	782	2.9	890	3.0
12	Rep. of Korea	1,239	2.2	536	2.0	703	2.3
13	Sweden	1,238	2.2	681	2.5	557	1.8
14	Netherlands	1,229	2.2	521	1.9	708	2.4
15	Israel	1,168	2.0	567	2.1	601	2.0
	All Other Flags	9,525	16.8	4,745	17.7	4,780	16.0
	Total	56,775		26,810		29,965	

Source: MARAD, *U.S. Oceanborne Foreign Trade Routes* (1985).

Table No. 3
U.S. Oceanborne Foreign Trade
Top Fifteen Flags of Registry
Non-Liner Service
Calendar Year 1983
(Thousands of Long Tons)

Rank	Flag of Vessel	Total Tonnage	% of Total	Import Tonnage	% of Total	Export Tonnage	% of Total
1	Liberia	71,678	22.6	16,189	22.0	55,489	22.7
2	Panama	40,399	12.7	11,273	15.3	29,126	11.9
3	Greece	36,231	11.4	5,474	7.4	30,757	12.6
4	Japan	21,937	6.9	4,023	5.5	17,914	7.3
5	United Kingdom	18,748	5.9	5,229	7.1	13,519	5.5
6	Canada	13,565	4.3	9,725	13.2	3,840	1.6
7	Norway	12,452	3.9	1,554	2.1	10,898	4.5
8	Rep. of Korea	9,371	2.9	1,673	2.3	7,698	3.2
9	Italy	8,176	2.6	975	1.3	7,201	2.9
10	Singapore	6,646	2.1	1,818	2.5	4,828	2.0
11	Spain	4,984	1.6	896	1.2	4,088	1.7
12	Belgium	5,347	1.7	1,106	1.5	4,241	1.7
13	India	5,079	1.6	387	0.5	4,692	1.9
14	United States	4,770	1.5	1,377	1.8	3,393	1.4
15	Philippines	4,208	1.3	1,415	1.9	2,793	1.1
	All Other Flags	54,093	17.0	10,415	14.2	43,678	17.8
	Total	317,684		73,529		244,155	

Source: MARAD, *U.S. Oceanborne Foreign Trade Routes* (1985)

Table No. 4
U.S. Oceanborne Foreign Trade
Top Ten Flags of Registry
Tanker Service
Calendar Year 1983
(Thousands of Long Tons)

Rank	Flag of Vessel	Total Tonnage	% of Total	Import Tonnage	% of Total	Export Tonnage	% of Total
1	Liberia	103,579	40.5	94,677	41.6	8,902	31.0
2	Greece	26,840	10.5	25,060	11.0	1,780	6.2
3	Panama	23,101	9.0	20,347	9.0	2,754	9.6
4	Norway	19,059	7.4	14,900	6.6	4,159	14.5
5	United States	17,927	7.0	16,866	7.4	1,061	3.7
6	United Kingdom	13,484	5.3	11,907	5.2	1,577	5.5
7	Singapore	8,480	3.3	7,328	3.2	1,152	4.0
8	Japan	7,394	2.9	5,426	2.4	1,968	6.9
9	Denmark	4,697	1.8	3,993	1.8	704	2.4
10	Bahamas	3,412	1.3	3,388	1.5	24	*
	All Other Flags	27,980	10.9	23,385	10.3	4,595	16.0
	Total	255,953		227,277		28,676	

* - Less than 0.5 percent.

Source: MARAD, *U.S. Oceanborne Foreign Trade Routes* (1985).

DISCUSSION

Ship Traffic Patterns

John Bardach: A good way to observe changes in intensity of ship traffic along particular sea lanes is to monitor oil pollution patterns, that is, ship residues of all kinds. In the past ten years, oil pollution patterns in oceans have reflected shifts in sea lane usage. In the future, those residues might be tracked by satellite to indicate changing maritime traffic patterns.

Bernhard Abrahamsson: That is a good suggestion but it may be economically impractical. Coastal states observe discharges in order to control pollution related to traffic patterns in a particular sea lane. An alternative is to track daily changes in ships' positions provided in Lloyd's shipping data, which indicates the position of ships around the world's oceans on any particular day.

Coast Guard Boardings

Peter Bernhardt: To my knowledge the U.S. Coast Guard has never boarded a foreign flag ship on the high seas or the EEZ waters or the territorial sea of another country in the drug traffic situation -- absent an agreement so providing.[1]

John Craven: There is a question which the courts have always resolved in favor of the federal government as to whether or not the Fourth Amendment was violated by those particular boardings. In a number of situations the Coast Guard admitted that there was no probable cause and that the boarding was done on a statistical basis to check documentation.

Footnote

1. *See* the discussion of this issue in J. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* 306-11 (1985).

STRATEGIC LINES OF COMMUNICATION: A MILITARY VIEW

Joseph R. Morgan
Department of Geography
University of Hawaii
Honolulu, Hawaii

It is hard to imagine a coastal nation that does not in some important way depend on the sea to carry out its essential trade, and even landlocked states usually attempt to establish sea-going communications by making arrangements with nearby countries which have access to the sea. The idea that the seas are of vital importance to nations has been expressed eloquently by many scholars and writers. John Moore, a highly respected analyst of naval affairs and associated strategy of sea-power wrote, "For many centuries the majority of countries in the world have depended on the free passage of goods across the sea for their existence".[1] The use of the sea for overseas trade is so well known that it only provokes the attention of governments or the general public when it suffers interference or is threatened. When that happens a major crisis or perhaps even conflict occurs, involving action by naval forces.[2] Despite the generally accepted importance of trade by sea and the use of some form of sea power to protect it, a general theory of national growth through overseas trade and expansion, under the protection of an "adequate fleet" was not articulated until the latter decade of the nineteenth century, by the American naval officer and exponent of seapower, A. T. Mahan.[3]

Island States

Nations surrounded by water are dependent on the sea for their trade; they obviously cannot establish overland trade routes with other countries. Other nations, even some of quite large size and with considerable resources, can be thought of as "islands" if they depend on sea-going trade for a large proportion of their needs. Even a state as well endowed with natural resources as the United States has been described by many writers as an "island nation." John F. Lehman, Jr., in an essay describing the need for American sea power, referred to the United States as "an island nation traditionally and increasingly dependent on the seas for economic and thus national survival."[4]

Trade Routes

Admiral Mahan wrote of the sea as a "great highway" and a "wide common," but nevertheless one with "well worn paths," or trade routes.[5] He strongly advocated the establishment of foreign trade among nations, preferably in the merchant ships of the important trading nations. He went so far as to base his strong recommendations for a Central American canal on the desirability of establishing a Caribbean trade route, which the United States could then control. His underlying motive was to put the United States in a position analagous to that of the United Kingdom; England controlled the English Channel and trade routes to the Mediterranean through its control over the Strait of Gibraltar and the Suez Canal, while the United States could exercise authority in the Caribbean by controlling the recommended canal over the Cental American isthmus.[6]

Modern students and writers about seapower have recognized the importance of the trade routes through the Dover Strait and the English Channel during the 1500-1900 period, and in what have been referred to as virtual overseas lakes: the Baltic Sea, the Mediterranean, and the Caribbean.[7] The trade routes in peacetime were so important to maritime nations, particularly those with overseas colonies, that these states were willing to employ force if necessary to protect the routes. When piracy was more commonplace on the high seas it was the maritime nations that were generally responsible for the maintenance of a degree of order and the suppression of lawlessness on the oceans. "Maritime powers, vulnerable to external pressures on their food supply, raw materials and power sources and thus primarily interested in maintaining their economic wealth through overseas trade, have therefore sought to enforce a reasonable state of international order on the high seas, so that the economic lifeblood of the merchant economy should not be interrupted or threatened."[8]

Times have not really changed, for although piracy on the high seas is less common and does not normally endanger overseas trade, the world's maritime powers, large and small, seem determined to continue ocean-going trade routes. Evidence of the importance of oil trade routes, for example, is abundant. Despite the fact that Iran and Iraq attacked 40 merchant ships in the Persian Gulf during the March 1 to December 1, 1984 time period, including damage to tankers as large as 392,000 DWT,[9] shipping from the region continues.

Some trade routes, referred to as sea (or strategic) lines of communication, are more important to the welfare of a nation than are other routes. The United States classifies trade routes as "essential" or "non-essential",[10] although it is unclear whether all essential trade routes will be defended with naval force if interfered with by a potential adversary. According to Ackley, "American sea lines of communication for the movement of oil are worldwide, extending from the Persian Gulf across three oceans to the United States. Additionally, Alaskan oil must transit the Pacific Ocean, often continuing through the Panama Canal to Gulf Coast refineries; and Indonesian oil must be hauled across the entire Pacific Basin. Without a modern global (three-ocean) navy, protection of these sea lanes becomes problematical if challenged."[11]

The use of navies to protect trade routes has a long history, but the relationship of naval power to merchant shipping was not clearly and eloquently articulated until 1890 when Mahan published his famous book, *The Influence of Sea Power upon History, 1660-1783*.[12] In his introduction he wrote, "The profound influence of sea commerce upon the wealth and strength of countries was clearly seen long before the true principles which governed its growth and prosperity were detected. To

secure one's own people a disproportionate share of such benefits, every effort was made to exclude others, either by the peaceful legislative methods of monopoly or prohibitory regulations, or when these failed, by direct violence."[13] Mahan went on to emphasize that the only legitimate use of a navy was to protect a nation's commerce: "Sea power in the broad sense includes not only the military strength afloat, that rules the sea or any part of it by force of arms, but also the peaceful commerce and shipping from which alone a military fleet naturally and healthfully springs."[14] Others have expressed similar thoughts. Potter and Nimitz wrote: "Thus navies came into being to protect sea commerce, and the history of sea power is to a great extent the story of rivalries among nations resulting from their conflicting commercial interests."[15] They elaborated on this theme by stating that the principal function of navies is to protect one's own shipping and to deny an enemy the use of the sea for his merchant fleet.[16] There are certainly other functions of modern navies, but sea control, or the protection of merchant shipping and the denial of the uses of the seas to an enemy's commercial fleet, remains an important mission of powerful navies. A number of scholars have expressed this view:

> Interdiction of enemy trade has always been the great weapon of sea power.[17] Sea control refers to assuring that the seas remain free for commercial and military navigation. It also includes the freedom to support military forces engaged overseas.[18]

Among the important functions of the navies of maritime powers is to

> Protect maritime commerce. Also a defensive need, this requires the fleet to keep open its own sea lanes for its merchant ships ... and the seas around the enemy coast must be denied the enemy for the use of his merchant marine, neutral vessels trading with him and for his own vessels of war.[19]

Despite the often declared essential relationship between merchant shipping and navies and the classical function of the combatant fleets of important maritime nations to protect the merchant fleet and keep the sea lanes open, there is considerable evidence that in the modern world large navies have been built for purposes unrelated to protection of commerce, and countries without large navies nevertheless have large merchant fleets. Martin wrote:

> The protection of shipping is frequently spoken of as a vital function of a navy and one of the main justifications for affording one. It is quite commonly asserted that one cannot have a large merchant marine without a large navy and that such a navy requires a large merchant marine. Neither proposition appears to be true ... and the United States and, to a lesser degree the Soviet Union demonstrate the possibility of having a large navy combined with a modest merchant fleet. Conversely, such countries as Norway and Greece manage to operate very large merchant fleets protected by only modest navies.[20]

Japan seems to be even more vulnerable than Norway and Greece to interdiction of its trade routes and destruction of its very large merchant fleet. Although the Japanese Maritime Self Defense Force is not

exceptionally small, its size does not seem commensurate with the needs of the nation to exercise control over essential sea lanes. According to Roy:

> Perhaps the strongest argument for a measure of armament being part and parcel of the legitimate pursuit of self-interest is that which takes note of Japan's immense vulnerability to interdiction of its sea lanes, along which travel veritable argosies of tankers and cargo vessels, bringing fuels and raw materials, from which it manufactures the goods, which are then transported to customers all over the world.[21]

Japan, of course, is an island, and islands have always needed the sea to survive. Many students of sea power have pointed to the example of the British empire. Mahan said it in 1890 when he expressed the view that England's prowess on the oceans was due principally to its insular status and strategic location.[22] Potter and Nimitz wrote, "Even more important, England's position flanking the North Atlantic sealanes had enabled her to dominate the lines of sea communication between the countries of Western Europe and the resource areas of America, Africa, and Asia that were opened up by the explorers of the 15th and 16th centuries."[23] According to many historians it was seapower that made the British empire work, and it was control of sea routes that made it last as long as it did. One such historian wrote, "Through it all, the oceans tied them together, ruled by the British flag, whether red duster for the thousands of humble merchant ships, or white ensign for the Royal Navy. British ships and British sailors from Blake to Nelson to Jellicoe made the seas safe for those who pursued 'their lawful occasions upon the waters'."[24]

Trade routes frequently pass through narrow straits, referred to as "choke points" by naval strategists. Contributing to the vulnerability of Japan's long trade route from the Persian Gulf is the fact that naval vessels can attack tankers most easily in the narrow straits -- Hormuz, Malacca-Singapore, and perhaps Lombok. Other potential choke points are the Suez and Panama canals; Gibraltar, control of which by an enemy would put all Mediterranean nations in economic jeopardy; the English Channel; and the straits guarding the entrance to the Baltic Sea. Harassment of shipping by a relatively weak coastal state is entirely possible,[25] particularly if the coastal nation is equipped with small, fast, well-armed patrol craft. These vessels, although they have limited utility in the open sea due to poor sea keeping qualities and lack of range, can be quite effective in controlling passage through choke points.

According to Martin, "The most frequently cited examples of how a war might arise at sea are those involving the use of Western seapower to squeeze the communications of the communist powers. It has to be recognized, however, that there exist extensive opportunities for the opposite to occur."[26] Western maritime nations are concerned over the establishment of Soviet bases or port facilities near choke points and along important western trade routes. Soviet facilities have at times been located in "Algeria, Egypt, Syria, the Yemens, Cuba, and Indonesia -- all situated close to the world's shipping bottlenecks."[27] Japan and the United States have been concerned that Soviet use of Cam Ranh Bay as a naval base and Da Nang as an air base might someday threaten Japan's important trade route for the transport of oil from the Middle East. These bases on the coast of Vietnam are "within easy striking

distance of Japan's long readily interdictable sea lanes, on which her very existence as an economic entity exists."[28]

Wars between smaller nations can begin over the issue of free passage through narrow passages such as canals and straits. Israeli shipping was denied use of the Suez Canal for long periods of time, when a state of war technically existed between Egypt and Israel. In 1967, when Egypt declared a blockade of the Strait of Tiran, which guards the entrance to the Gulf of Aqaba and therefore to the Israeli port of Elat, Israel was left without access to the sea; the Six Day War resulted. Israeli air and land power were instrumental in winning the war, but it was a maritime issue, interdiction of essential trade routes, that was the direct cause of the hostilities.

There is a long history of wars that began over interference with seagoing trade. Restrictive laws against Dutch shipping, enacted by England, led to the first and second Anglo-Dutch Wars.[29] Francis Drake, who destroyed Spanish shipping from 1570 to 1580, as pirate or patriotic Englishman, depending on one's point of view, returned to Plymouth on his ship the *Golden Hind*, "her holds full of Spanish treasure."[30] Drake's personal war subsequently became a general English war with Spain, resulting in the destruction of the Spanish Armada and Spanish shipping, as well as the acquisition of colonies by England.[31]

Although international trade by sea is important to coastal states, for some nations *intranational* ocean trade routes are even more vital. Archipelagic countries, such as Indonesia and the Philippines, must maintain trade routes with all the islands in their archipelagoes. There are also nations with peculiar geographic configurations, requiring the use of the sea for communications; Malaysia, with its territory and population divided between Peninsular Malaysia and the states of Sabah and Sarawak, on the north coast of the island of Borneo, is a good example. Mahan recognized the influence of geography when he wrote, "When the sea not only borders, or surrounds, but also separates a country into two or more parts, the control of it becomes not only desirable, but vitally necessary."[32]

Trade routes change as nations establish new industries and seek new outlets for their products. Moreover, formerly self-sufficient nations now find that they need raw materials from abroad to provide for expanding industries, which produce ever more sophisticated products. There was a time when the United States was not only self sufficient in petroleum but an important exporter as well. Now, of course, oil imports are an important part of U.S. seaborne trade. It is not only trading partners that change, but sometimes the navigational routes themselves, even when the same nations are trading with each other. Before the construction of the Panama Canal ships rounded Cape Horn or sailed through the Strait of Magellan on important trading voyages. The building of the canal opened a new line of communications between the U.S. east and west coasts, and, as Mahan predicted, new routes in the Caribbean. More recently, changes in the status of the Suez Canal have caused important new routes to develop. Prior to the closing of the canal in the Six Day War between Egypt and Israel in 1967 most oil shipments from the Persian Gulf to Western European countries went via Suez and the Mediterranean. When the canal was closed the shipping industry responded by routing ships south of the Cape of Good Hope, an immensely longer route. To compensate for the much longer distances to be steamed larger tankers were built, which could carry crude oil at a lower cost per ton-mile than the older, smaller tankers. The Suez Canal was reopened, widened, and deepened; consequently the Very Large Crude Carriers and Ultra Large Crude

Carriers, built as a partial response to the canal's closing, are now in less demand than smaller tankers that can safely navigate the Red Sea-Mediterranean route.

Trade Routes Become Strategic Lines of Communication (SLOCs)

The U.S. Maritime Administration identifies 93 oceanborne foreign trade routes, 31 of which are classed as essential.[33] Certainly not all of the essential routes are truly strategic or essential to U.S. security. In peacetime we speak of trade routes and sometimes of sea lanes or navigational routes. In wartime "the whole complex of routes and transport is called communications",[34] and "communications dominate war".[35] Mahan referred to communications as the stream of supplies and reinforcements used in modern war.[36] It is not hard to imagine a peacetime trade route becoming a wartime SLOC. The petroleum route from the Persian Gulf to Japan via the Strait of Hormuz, Indian Ocean, Straits of Malacca and Singapore, and South China Sea is extremely important to Japan's peacetime economy and would become even more important in the event of war, for in addition to providing fuel for homes and factories it would be needed to support a large, active military establishment. It is likewise easy to envision Atlantic trade routes between the east coast of the United States and western Europe becoming wartime SLOCs. Indeed, this is precisely what happened during World War II when the United States supplied the western allies with food, fuel, ammunition, and spare parts to support allied efforts against the Germans.

Military SLOCs

War creates its own trade routes, or SLOCs, in addition to creating SLOCs out of peacetime trading patterns. When the United States decided to intervene on the Korean peninsula in 1950, it, in effect, went to war with North Korea and subsequently with the People's Republic of China. A logistic trade route, or SLOC, had to be established quickly to insure that U.S. and allied forces would be kept supplied with the necessities of war. Admiral Arleigh Burke, then Chief of Naval Operations, put it this way: "Combatant ships, oilers, supply ships, ships loaded with troops, ammunition, guns, tanks, and aircraft; ships from the South China Sea, the Indian Ocean, the Pacific, the Atlantic, and the far-away Mediterranean"[37] supported our forces in Korea. Control of the seas by the U.S. Navy made it possible. Much earlier in world history the failure to establish a SLOC, due to control of the intervening seas by an enemy, resulted in the ultimate loss of a war. Command of the sea by Rome during the Second Punic War prevented Carthage, which had established a secure foothold in Spain, from supplying its troops in Italy by sea. Consequently, Carthage resorted to an overland line of communication, which necessitated the transport of men, animals, and supplies through Spain and France, thence over the Alps and southward down the Italian peninsula. The overland route was difficult and inefficient, and, more important, it resulted in the loss of 33,000 out of a total of 60,000 of Hannibal's troops.[38]

The foregoing are examples of SLOCs that are, in essence, trade routes in which a nation supplies itself; they are one-way routes. When allies are involved, such as in World War II, nations with stronger economies frequently provide for their economically weaker partners. The United States provided some of Britain's wartime needs even before officially declaring war on Germany, and the trickle of supplies became a torrent after the U.S. officially entered the Atlantic war. The SLOC

was vital to Britain's survival and ultimate victory. As one naval historian wrote:

> With only the resources of the home islands, the British were not strong enough to defeat a Germany that could call on the entire continent for supplies. Britain must have raw materials for her industries, aluminum for aircraft, iron for tanks and ships, oil for fuel, food to keep everyone going, rubber for tires, manganese and phosphate, beef and cotton! Even in the old days of the mercantile empire, when her population fed itself and when technology was far less complex, Britain had to import and export to live. Now with a worldwide interdependent economy and advanced technology, it was even more imperative that her access to the outside world be maintained.[39]

Germany, of course, tried to interdict the SLOC between the United States and Britain, and the eventual outcome of the war depended on the allies' success in keeping the SLOC open.

In the Revolutionary War, when Britain and the American colonies were adversaries, the maintenance of sea communications played a vital role in the outcome of the hostilities. For many years, although the colonies had some successes on land, British control of the SLOC from Europe to the American seaboard permitted the landing and resupply of troops without serious interference. According to Stokesbury, "The Americans could never challenge the general British control of North American waters. It was general British control of the sea lanes and the routes to North America that preserved Nova Scotia for the crown and allowed the British to hold and operate south from Quebec."[40] The eventual success of the colonies was aided immensely by the intervention of French seapower. At the Battle of the Chesapeake Capes the French under De Grasse defeated a British fleet. Once again Stokesbury maintains that control of the sea dictated the eventual outcome of the war. Although the French returned to the West Indies and the British could presumably reclaim command of the American seaboard, "having lost it once, they had lost the war."[41]

The most recent example of the establishment of a SLOC took place in the Falklands War in 1982. British ships, some hastily assembled and converted for wartime duties, maintained communications over the thousands of miles separating the British and Falkland Islands. The United Kingdom transported troops, ammunitions, supplies, fuel, and a host of other wartime necessities successfully, and although a number of ships succumbed to air attacks by Argentine forces, the British success in regaining the islands was aided greatly by command of the sea and maintenance of the long, vulnerable SLOC. Poor performance by the Argentine navy, coupled with the ability of the British to shift their seagoing forces from a peacetime to a wartime footing rapidly, enabled the United Kingdom to land troops, keep them supplied, and subsequently recapture the islands.

SLOCs and Naval Strategy

Protection of one's own SLOCs and destruction of an enemy's is now, as in the past, a principal mission of navies. Consequently, there has been much thought given to the appropriate strategy for both the defensive and offensive aspects of this important function of a navy. Complete defeat of the enemy's fleet, which would establish command of the sea, will, of course, insure complete safety for a friendly or allied

SLOC, while at the same time permitting subsequent destruction of the merchant shipping of an adversary. But achieving complete command of the sea is difficult, even for greatly superior fleets. It is not always easy to lure the enemy into a large scale fleet engagement in which the winner so completely dominates the battle that thereafter the issue of protection of a SLOC or severing one of the enemy's is settled. Weaker fleets will decline to do battle and will remain in port as a "fleet in being." The most likely strategy for a smaller, weaker navy is to avoid large-scale battles and use its ships as raiders, to roam the seas and destroy or capture unarmed merchant shipping. This strategy, termed *guerre de course* by the French,[42] could be effective but could not in the long run win a naval war. Mahan particularly criticized the strategy when he wrote, "It is not the taking of individual ships or convoys, be they few or many, that strikes down the money power of a nation; it is the possession of that overbearing power on the sea which drives the enemy's flag from it, or allows it to appear only as a fugitive; and which by controlling the great common, closes the highways by which commerce moves to and from the enemy's shores."[43]

There is a good deal of more recent evidence, primarily from World Wars I and II, that a *guerre de course* strategy carried out by submarines as the raiders can be very effective and might in fact tip the scales in favor of the nation that uses commerce raiding as a principal strategy. In the World War II Battle of the Atlantic, for instance, German submarines sank 2,603 merchant ships, totalling 23,351,000 tons[44] and might have won the war against Britain if the Germans had begun the war with a larger submarine fleet.

An effective blockade of an enemy's ports is an offensive strategy that will prevent his use of the seas as SLOCSs. Achievement of a blockade depends on a number of factors: the number of ports to be blockaded, the length of coast, the size of the enemy combatant fleet capable of attacking the ships of one's own navy, and the number of blockading ships that can be mustered by friendly or allied navies. In short, achieving an effective blockade really entails achieving command of the sea, at least in certain limited but strategically crucial areas. Declaration of a blockade may have important international implications, since the vessels of neutral nations may be prevented from plying their lawful trade routes. Blockades frequently have the undesired result of widening a war, by bringing additional nations into it. The same can be true of a strategy of unrestricted submarine warfare, in which the ships of neutral nations are sunk, because they are carrying cargoes destined for an enemy.

Defensive strategy is concerned with protecting one's own SLOCs against an enemy force. Since ships carrying troops, ammunition, or essential cargoes are generally unarmed or at best very lightly armed, they are easy targets for naval combat vessels. It is sensible, therefore, to provide unarmed ships with some sort of protection. This can be most readily done by forming them into convoys, which then can be escorted by appropriately armed warships. The escort vessels should be equipped with anti-submarine warfare equipment and armament as well as be capable of protecting the convoy against air attack. Rarely in modern warfare will convoys be threatened by surface raiders. The great increase in numbers and capabilities of modern submarines makes the anti-submarine threat to SLOCs particularly worrisome. Nuclear submarines, which can remain submerged indefinitely and travel underwater at high speed, are a potent weapon against a SLOC. Anti-submarine technology, which generally depends on detection and tracking by underwater

sound, has lagged behind submarine developments, despite research and development efforts by the major maritime powers. The most effective anti-submarine ships are submarines themselves, but using submarines as convoy escorts presents problems in coordination between the surface ships and the escorts, which must operate submerged to be effective.

SLOCs are most vulnerable when they pass through narrow straits, the so-called "choke points." Shallow water and confined channels prevent the ships from evasive maneuvers, and an enemy in control of the choke point can be expected to attack a convoy with land-based air power or perhaps even with small but well armed surface ships. Therefore, control of strategic straits is an important mission for navies; if the coastal states bordering the straits are allies the job is much easier.

Complete command of the sea, achieved by destruction of the enemy's navy, is of course, the best defense for SLOCs. It is difficult to envision a large-scale fleet engagement taking place in a future conventional war, however; hence command of the sea, as envisioned by Mahan, probably cannot be achieved. There are naval strategists who argue that defense of SLOCs is a more important naval mission than the more highly publicized power projection function, which employs battle groups formed around large aircraft carriers or missile-firing battleships. They also point out that the greatest fleet engagement of World War I, the Battle of Jutland, was inconclusive in determining whether Britain or Germany had achieved command of the sea. Consequently, the *guerre de course* carried out by German submarines against British SLOCs was of prime importance in the naval war. A similar argument is made by some about World War II; some strategists maintain that the American victory over the Japanese fleet at the Battle of Midway did *not* achieve command of the sea by the United States in the Pacific, and that the less dramatic efforts of the Japanese and American navies to keep SLOCs open were of paramount importance.

There is no question that neither the allied nor axis forces achieved command of the sea in the Atlantic theater by means of a single dramatic victory. The World War II Battle of the Atlantic lasted for five years and eight months, the entire length of the European war.[45] The battle involved convoys at sea, which were attacked by German U-boats, land-based air, and even surface raiders. Allied shipbuilding efforts were also part of the fight, since the allies built 42,485,000 tons of shipping, which more than replaced the 23,351,000 tons destroyed by the German forces.[46] "The Atlantic lifeline was then, as it still is today, the foundation of Western security and defense."[47]

Current U.S. military policy is to provide military and logistics support to NATO, and the primary mission of the U.S. Navy in the event of a general war fought without nuclear weapons is to maintain SLOCs with our overseas allies.[48] In addition to NATO countries we certainly should consider Japan as an ally, since we count on Japan to engage in combat against Soviet naval units as they attempt to deploy into the Pacific through the straits guarding the Sea of Japan. The Battle of the Atlantic should have demonstrated to the United States the capability of submarines to interfere with essential SLOCs. The Soviet Union, with more than 300 submarines -- even the non-nuclear ones can be very effective in some ocean areas -- can be a far more formidable foe than Germany was in World War II.[49] "The Soviet Union openly admits that a primary mission of its undersea fleet is the same as Germany's (in World War II): interdiction of the SLOCs between the United States and its allies."[50]

U.S. experience since the end of World War II has neither confirmed nor denied the importance of control of the sea and the protection of SLOCs. In both the Korean and Vietnamese wars the U.S. Navy had little opposition. In Korea the threat of mines and the sinking of American minesweepers delayed some planned operations, but before long concentrated minesweeping efforts made and kept essential sea lanes safe for American forces. In Vietnam there was only token opposition to the U.S. Seventh Fleet. In both wars American shipping provided adequate logistic support to ground and air forces. However, in the Korean conflict the Chinese entered the war on the side of North Korea and established overland communications, making the absence of a SLOC terminating in North Korean ports of little consequence. In the Vietnam war it was also overland logistic routes that kept the enemy supplied plus the fact that for most of the war the United States made no attempts to interfere with foreign shipping to the principal North Vietnamese port of Haiphong. The mining of Haiphong harbor in the latter part of the war had some effect, but American forces never completely interfered with Vietnamese supply lines.

In North Korea, however, American control of the sea (after the mine threat had been alleviated) was so complete that the U.S. Navy completely blockaded the port of Wonsan, at the time the most important North Korea shipping terminus. U.S. command of the sea was so effective that not only were North Korea SLOCs interdicted, but the city was under an actual siege, which lasted for 861 days.[51] Shipping into the port came to a virtual standstill, and U.S. Navy destroyers and cruisers attacked shore facilities with frequent bombardments. The siege almost certainly shortened the war, but despite its effectiveness it did not completely cut off essential supplies to North Korea.

No matter what basic strategy is employed for protection of one's own SLOCs and attack on the enemy's, there is a clear need for secure bases out of which both naval and merchant ships can operate, refuel, replenish, rearm, and undergo needed repairs. If the bases are near choke points, so much the better. The bases themselves will need to be supplied; they will become termini for SLOCs. The location of bases will depend on the availability of friendly territory, as well as the effective range of ships and the routes in general use. When Mahan wrote, "Thus arose the demand for stations along the road, like the Cape of Good Hope, St. Helena, and Mauritius, not primarily for trade, but for defense and war ...."[52] he was referring to particular trade routes or SLOCs; the "stations along the road" would be handy for the trade route that went from India to Britain around the Cape of Good Hope. Bases at Oman, Diego Garcia, and Singapore would be valuable today to protect the oil SLOC across the Indian Ocean from the Persian Gulf through Southeast Asian waters to Japan. In World War II, bases at the Azores, Gibraltar, and Malta were prized for the protection of important SLOCs supplying allied forces in the Mediterranean, and Iceland was an important base for North Atlantic convoys enroute to the Soviet port of Murmansk.

SLOCs and International Law

On December 10, 1982, 119 nations signed the United Nations Convention on the Law of the Sea (Convention), but despite this seemingly overwhelming support for the new law of the sea, international law regarding many facets of ocean use, including navigation, is still vague. For one thing, the Convention will not come into force until one year after it has been ratified by 60 nations. Even with ratification

there will be considerable doubt concerning the precise rules for governing navigation at sea, since true international law depends on the actions of sovereign states, and we are as yet unsure how the nations of the world will interpret and accept the new regulations. A contributing factor to this uncertainty is the fact that a number of powerful maritime nations have not signed the convention and are opposed to some of its important provisions. Even with an internationally accepted Convention the non-signers are bound to be influential in establishing customary law of the sea.

During the course of the lengthy negotiations maritime nations with powerful navies insisted that a number of safeguards be written into the navigation provisions of the Convention, particularly to provide for the maximum degree of freedom of navigation for naval vessels. They were anxious to insure that SLOCs not be interdicted, since they had invested so much in navies to keep the SLOCs open. Much concern was expressed that powerful navies would be hampered in carrying out their missions by the actions of coastal states acting in accordance with the provisions of the Convention. John F. Lehman, Jr., U.S. Secretary of the Navy, wrote, "Unfortunately, our future strength on the seas -- and our ability to preserve those vital seabridges to friends and allies and to maintain lifeblood trade -- is also dependent on other factors external to military balance. One of these is the legal environment of the world's oceans -- the treaties and agreements and the codification of maritime and sovereign usage. It has always been the Navy's mission to defend our freedom of navigation, to hold open our vital sea lanes and to maintain our transit rights through the straits and narrows."[53] Naval strategists and students of ocean policy have had similar ideas. Thus, Martin commented, "Indonesian claims over straits intersecting its archipelago have inhibited Western naval movements. Should an extension of sovereign claims over high seas be pursued for other reasons ..., this might facilitate a wider range of harassing manoeuvers within a pretext of legality."[54] Laursen, in discussing U.S. ocean policy regarding naval missions, had this to say:

> To carry out these conventional missions (exercising control of the sea to insure freedom of transit for both commercial and military vessels) the navy depends on the right to pass through straits. The Sixth Fleet depends on the right to pass through the Strait of Gibraltar to be present in the Mediterranean and the Seventh Fleet depends on the right to pass through the Indonesian straits of Malacca, Sunda, Lombok, and Ombai-Wetar to pass from the Pacific to the Indian Ocean, and back."[55]

Three specific categories of navigational controls -- innocent passage, transit passage, and archipelagic sea lanes passage -- designed to balance the rights of maritime nations to a reasonable degree of freedom of the seas with the interests of coastal nations to protect and safeguard their soverignty, marine resources and environment, have been included in the Convention. In the protracted compromises; the Convention's navigation provisions are presumably agreeable to all. However, it is possible that coastal nations may interpret the provisions of the Convention in a way that is objectionable to maritime powers. For instance, it is not uncommon for countries to claim that prior notification is required before warships enter territorial seas on innocent passage, despite the fact that nothing in the Convention seems to make this mandatory.

Innocent passage, which is guaranteed to the ships of all states while on passage through territorial seas (Article 17), has a number of specific prohibitions. These include several that relate specifically to warships or similar type vessels. Submarines are required to navigate on the surface (Article 20), and all vessels are prohibited from use of any weapons; launching, landing or taking off of aircraft; launching, landing or taking on board any military device; and any threat or use of force against the coastal state (Article 19 (2)(a), (b), (e), (f)). There are also some related activities that are prohibited, including collection of information prejudicial to the defense or security of the coastal state and acts of propaganda affecting the defense or security of the coastal state (Article 19(2)(c) and (d)). In the great majority of foreseeable circumstances maritime powers can operate their navies effectively while obeying the pertinent innocent passage rules; but there may be times when important SLOCs traverse territorial seas of non-combatants during limited wars, and force is required to keep the sea lanes open. In such cases there can be a clear conflict of interest, between coastal states' rights and the need to employ force by maritime nations.

In straits used for international navigation (Article 37), the transit passage regime applies. There are fewer specific prohibitions against the activities of naval vessels: nothing is said about submarines being required to navigate on the surface, and there is no mention of use of weapons, employment of aircraft, taking on or landing of military devices, or intelligence collecting activities. There is, of course, a prohibition against the use of force against the coastal state. A strict reading of the applicable Convention provisions would permit a naval power to protect a military SLOC with ship-based airpower, guns and missiles, and submarine-launched weapons, as long as no harm comes to the countries bordering the strait. However, since a naval battle in an international strait would certainly disrupt ordinary shipping, fishing, and other peaceful marine activities, it is hard to imagine coastal states permitting such interference without protest. A complaint might very well be made on the basis of the Convention provisions that prohibit "any activities other than those incident to their normal modes of continuous and expenditious transit unless rendered necessary by *force majeure* or by distress" (Article 39(1)(c)).

The Convention permits archipelagic states to designate sea lanes through their archipelagic waters (Article 53(1)) and states that ships enjoy the right of archipelagic sea lanes passage on the designated routes (Article 53(2)). The designated sea lanes "shall include all normal passage routes used as routes for international navigation" (Article 53(4)). Ships using the routes are not to deviate more than 25 nautical miles to either side of the axis of the route (Article 53(5)). The provisions seem straightforward, but there are a number of possibilities for conflict between the archipelagic state and a maritime power protecting a SLOC transmitting an archipelago. The first of these is in the designation of the route; archipelagic states may select routes based principally on the desire to avoid ocean pollution by large ships, particularly tankers. By so doing they interfere with SLOCs by requiring them to follow less desirable tracks, which traverse either longer distances or are less easily defended. For instance, the Philippines may choose not to designate the San Bernardino-Verde Island Passage route, which is frequently used by U.S. naval vessels, as an archipelagic sea lane.[56] Indonesia "is planning to designate some lanes for all types of vessels, some for all types except foreign fishing vessels and some for all types except foreign military vessels."[57] Such choices certainly

will be protested by nations currently using routes through the archipelagoes for naval vessel transits.

Another possible source of conflict is the requirement that transiting ships navigate within 25 nautical miles of the axis of the designated sea lane. If it became necessary to defend a convoy, for instance, naval forces might require more maneuver room particularly with today's long range missiles and aircraft. In any case, an archipelagic nation is not liable to stand by without protest while two combatant forces use its archipelagic waters as a battleground.

Although there will probably be a generally agreed set of rules for navigating the oceans after the Convention comes into force, the *de facto* law of the sea is defined by what sovereign states *do* in regulating uses of the seas, not by what they *say* when they agree to a complex set of regulations. Military uses of the oceans, particularly those associated with defense of or attacks on SLOCs, will probably be at odds with what some nations maintain is the *real* law of the the sea for some time to come.

Military SLOCs: Some Concluding Thoughts

There are a number of different circumstances affecting military SLOCs, ranging from problem-free peacetime situations to all-out nuclear war. In between these extremities we can envision three different scenarios: coastal nations interfere with free transit of naval ships under the guise of specific interpretations of the Convention; war that is limited both in number of combatants and weapons employed; and a general war fought with conventional rather than nuclear weapons. Problem-free peacetime situations are the rule in many areas. The U.S. Sixth Fleet regularly steams through the Strait of Gibraltar without complaint from Spain, Morocco, or the United Kingdom, the countries with an interest in the coastal waters. Soviet naval ships have passed through the channels separating some of the Hawaiian Islands, without comment from the United States, because the ships remained outside the three nautical mile territorial sea boundary. All-out nuclear war, the other extreme, also presents no particular problems for military SLOCs, since destruction of the contestants' territories is so complete and rapid that supply of materials by sea is of no consequence.

The three intermediate situations present policy makers and military forces with problems. If peace prevails, yet one or more coastal states objects to passage of naval vessels through a strait used for international navigation or a territorial sea, the maritime power has a choice of making the transit despite the objections or respecting the interpretations of the law by the presumably weaker coastal country. I suspect that most big powers would choose the former option, since to recognize interpretations of the Convention that interfere with the rights of innocent and transit passage sets a precedent, which could be troublesome in the future. There is a risk involved in making the passage without permission, however, since by so doing a degree of good will is lost, which could create future problems.

Limited wars occur frequently. Iran has been at war with Iraq for several years, and although the hostilities are limited to the two combatant nations, SLOCs important to non-combatants are threatened. Israel has been involved in limited wars with its Arab neighbors, and some of these have affected non-belligerent SLOCs, particularly in instances where the Suez Canal has been closed for long periods of time. When the activities of combatants in limited wars have an unacceptable effect on the freedom of the seas for maritime states, powerful nations are some-

times tempted to intervene and thereby cause an end to the hostilities. The danger of this course of action is that intervention sometimes widens the war by bringing into it other, more militarily competent nations. Both the United States and the Soviet Union are suspicious of each other's intentions when they threaten to intervene to stop a limited war. Rarely have both big powers been inclined to intervene solely for the purpose of stopping the war; they usually tend to take sides with one belligerent or the other. For this reason there is a strong tendency to put up with a certain degree of inconvenience in the use of the oceans for navigation rather than risk involvement in a larger war.

The final scenario to be considered is a World War fought with conventional weapons. If the idea of nuclear deterrence through the certainty that each power has the ability to destroy the other, no matter which country launches the first strike, works, it is entirely possible that such a war will occur. If it does the lessons of World War II wil be well worth reviewing. Another Battle of the Atlantic, fought by numerous ships and aircraft struggling to keep SLOCs open or to severe them, will be fought. Although weapons have changed, the overall strategy for fighting such a battle remains the same as it has been through centuries of maritime warfare.

A new Law of the Sea is evolving; it will be influenced by what is written in the Convention, but its ultimate shape will be determined by the interpretations and actions of the nations of the world. The use of the seas for shipping, both commercial and naval, is an important freedom for all countries. It would be tragic if it suffered interference due to irrational interpretations of the Convention. Let's hope that this is not the case.

Notes

1. J. Moore, *Seapower and Politics from the Norman Conquest to the Present Day* 1(1979).
2. *Id.*
3. *Id.* at 70.
4. Lehman, *The Law of the Sea* in *Jane's Naval Review*, 121 (J. Moore ed. 1982).
5. A. Mahan, *The Influence of Sea Power upon History: 1660-1783* at 25 (1890).
6. *Id.* at 26.
7. C. Reynolds, *Command of the Sea: The History and Strategy of Maritime Empires* 2 (1974).
8. *Id.* at 4.
9. Breemer, *The Tanker War: Not Quite a Full-Blown Crisis* in Navy League of the U.S., *The Almanac of Seapower*, 28 *Seapower* 50, 54 (1985). By mid-June 1987 the total of tanker attacks had reached 314, yet the oil flow through the Gulf continued unabated. See Jeffrey Record, *The President and the Persian Gulf: Big Risk, Little Payoff*, Honolulu Star-Bulletin and Advertiser, June 14, 1987 and Jim Hoagland, *The Silkworm Smokescreen: the Oil Keeps Flowing*, in *id.*
10. See Maritime Administration, U.S. Dept. of Commerce, *United States Oceanborne Foreign Trade Routes*, 19-128 (1978) for essential trade routes; *id.* at 132-258 for non-essential trade routes.

11. Ackley, *National Defense at Sea* in *The Yankee Mariner and Sea Power: America's Challenge of Ocean Space*, 133, 135 (J. Bartell ed. 1982).
12. Mahan, *supra* note 5.
13. *Id.* at 1.
14. *Id.* at 28.
15. E. Potter & C. Nimitz, *Seapower: A Naval History* 2 (1st ed. 1960).
16. *Id.*
17. W. Stevens & A. Westcott, *A History of Sea Power* 393 (1942).
18. F. Laursen, *Superpower at Sea: U.S. Ocean Policy* 34 (1983).
19. Reynolds, *supra* note 7, at 13.
20. L. Martin, *The Sea in Modern Strategy* 135-36 (1967).
21. Roy, *The Japanese Phoenix* 2 Int'l J. on World Peace 34, 40 (1985).
22. Potter & Nimitz, *supra* note 15, at 341.
23. *Id.* at 342.
24. V. Stokesbury, *Navy and Empire* 404 (1983).
25. Martin, *supra* note 20, at 83.
26. *Id.* at 82.
27. *Id.* at 84.
28. Roy, *supra* note 21, at 35.
29. Stokesbury, *supra* note 24, at 69.
30. *Id.* at 19.
31. *Id.* at 30.
32. Mahan, *supra* note 5, at 40.
33. See *supra* note 10.
34. Potter & Nimitz, *supra* note 15, at 2.
35. *Id.*
36. Mahan, *supra* note 5, at 16.
37. M. Cagle & F. Manson, *The Sea War in Korea* at v (1957).
38. Mahan, *supra* note 5, at 15.
39. Stokesbury, *supra* note 24, at 374.
40. *Id.* at 164.
41. *Id.* at 172.
42. Mahan, *supra* note 5, at 132.
43. *Id.* at 138.
44. T. Hughes & J. Costello, *The Battle of the Atlantic* 9 (1977).
45. Stokesbury, *supra* note 24, at 374.
46. *Id.* at 375.
47. Hughes & Costello, *supra* note 44, at 304
48. Bowling, *Keeping Open the Sea-Lanes* 111/12/994 U.S. Naval Inst. Proc. 92, 93 (1985).
49. *Id.*
50. *Id.*
51. Cagle & Manson, *supra* note 37, at 398 39.
52. Mahan, *supra* note 5, at 27.
53. Lehman, *supra* note 4, at 121.
54. Martin, *supra* note 20, at 83.
55. Laursen, *supra* note 18, at 35.
56. Morgan, *Marine Regions and Regionalism in South-east Asia*, 8 Marine Policy 299, 303 (Oct. 1984).
57. *Id.*

DISCUSSION

Representing the Soviet Point of View

John Craven: I do want to note that we did our best to bring people from every area of concern and we did indeed invite representatives from the Soviet Union to come to this Workshop. It would be important for this workshop to keep in mind the Soviet military view of strategic lanes of communication. I assume, Professor Morgan, that the nuclear powers insist upon deployment in certain ocean areas for the purpose of strategic deterrence. Is it possible the parties could agree to limit those ocean areas in order to promote arms control?

Joseph Morgan: The U.S. forces regularly transit into the Black Sea, despite the consistent Soviet claim that it is a virtual Soviet lake. We want to contest any restrictive claim beyond the twelve mile territorial sea. The Soviet fleet similarily comes close to Hawaii's shores, and this maneuvering off Waikiki becomes a tourist event which we do nothing to discourage. So I do not know of any implied ground rules.

Military Choke Points

Jim Anthony: Professor Morgan, you identify only "trade" choke points. There are also military choke points, for example, the three straits north of Japan. (See Map 9 on page 332 and the discussion on page 327 below). With the change from the Carter to the Reagan administration, an American forward defensive policy became a "forward offensive policy," designed to put pressure on Soviet navigation from Petropavlovsk and Vladivostok, through the three choke points north of Japan into the Pacific.

Craven: Certainly all nations have military and commercial areas and lanes of communication. Commercial sea lanes are becoming more webike than linelike, partly because of instantaneous and reliable communications that allow the revectoring of cargo. This development changes the whole nature of the military problem.

CHAPTER 3

BASELINES, THE TERRITORIAL SEA, AND INNOCENT PASSAGE

Introduction

The geographer's contribution to a real understanding of the Law of the Sea Convention emerges in this chapter, which contains one paper on the delineation of maritime jurisdictional zones and another on technical problems of drawing straight baselines. The chapter also provides a rationale for the 16-mile territorial sea claim of the Federal Republic of Germany and presents the Chinese perspective on innocent passage. The chapter concudes with comments on "creeping uniqueness".

In *Geographical Perspectives on International Navigation*, geographer Lewis Alexander discusses territorial claims in excess of twelve miles, unusual placement of baselines, historical claims, closed seas, restraints on innocent passage, and transit passage through international straits. Describing specific locations where the Convention creates unexpected results, Professor Alexander suggests that "creeping jurisdiction" will be a problem in the future, because some nations' regulatory responses to environmental dangers and security risks in their EEZs will naturally restrict freedom of navigation. He also shows how geographers can contribute to a real understanding of the effects of the Law of the Sea Convention on navigation, because they bring a real world perspective to the problem. The basic concept of marine regions, each with its own unique characteristics, and the idea that the world is an endlessly complicated place making the application of general laws and principles difficult are contributions that geography as an academic profession has made to the evolving international law of the oceans.

Professor Alexander's paper raises several unresolved issues involving unusual claims. Should a nonconforming rock generate an EEZ the size of the state of Montana? Should the Sea of Okhotsk be considered a "closed sea" from which foreign warships are excluded? Is Vietnam's claim to internal waters 80 miles offshore valid? Is Canada's 1985 claim that the entire Arctic Archipelago -- including the Northwest Passage -- is within Canada's internal waters legal? Following Professor Alexander's presentation, participants discussed the legitimacy of the Canadian claim and the practical implications of Article 234 on ice-covered areas.

Professor Alexander's paper discusses ambiguities in the phrase "used for international navigation" which qualifies straits for transit passage. The paper also points out that under Article 35, straits in which long-standing international conventions enforce regulated passage, in whole or in part, remain subject to legal regimes in effect before the Convention. Article 35 applies to the Turkish Straits, but whether it also applies to the Danish Straits and the Straits of Tiran, Gibraltar, or Magellan are unsettled questions that later arise in Renate Platzoeder's discussion of the Danish Straits.

The second paper, *Straightjacketing Straight Baselines*, by J. Peter Bernhardt of the Bureau of Oceans and International Environmental Affairs at the U.S. Department of State,describes an ambitious unofficial project. Geographers in several U.S. government agencies, familiar with straight baseline practice, pooled their experience to draft a set of guidelines for determining the legitimacy of baseline claims without resorting to complex mathematical calculations. The geographers compared legitimate and illegitimate claims to straight baselines in relation to the criteria set forth in Article 7 of the Convention and in the 1951 ICJ *Norwegian Fisheries* case. Separate sets of guidelines were derived for deeply indented coastlines and for coastlines fringed by islands. Mr. Bernhardt views the guidelines as a potential point of departure for agreement among interested states "in uhe hopes of favorably influencing straight baseline practice while there is still time to do so." After this paper, the participants discussed how these guidelines might apply to specific geographical situations.

The Regimes of the Territorial Sea of the Federal Republic of Germany and the German Democratic Republic was presented by Renate Platzoeder, an active participant in the law of the sea delegation of the Federal Republic of Germany (F.R.G.). Her paper explains the historical background of territorial sea areas claimed by the F.R.G. and by the German Democratic Republic (G.D.R.). Specifically, she explains why the G.D.R. does not claim as wide a territorial sea as it could in the area of the Kadet Channel between the F.R.G. and Denmark.

Following Dr. Platzoeder's presentation, workshop participants discussed the validity of the extension of the German territorial sea based on roadsteads located in the North Sea. Dr. Platzoeder explains the interpretation of Article 12 of the 1982 Convention (Article 9 of the Territorial Sea Convention) that the F.R.G. relies on to justify its territorial sea claims, and she argues that the F.R.G. was faced with a unique geogaphical situation that required attention. Peter Bernhardt and Shigeru Oda provide insight into the drafting history of Article 12. The history of the roadstead, and practical problems of traffic in the region are discussed, with Lewis Alexander concluding that "this is another case of creeping uniqueness," thus coining a phrase that the other participants used throughout this conference.

Conflicts Between Foreign Ships' Innocent Passage and of the Coastal States by Jin Zu Guang of the Shanghai Maritime Institute traces the development of the doctrine of innocent passage in customary international law, in the 1958 Convention on the Territorial Sea and Contiguous Zone, and in the 1982 Law of the Sea Convention. Professor Jin provides examples of how China's 1984 Marine Traffic Safety Law and 1983 Marine Environmental Protection Law differ from international laws and regulations in defining such terms as "oils" and "appropriate anti-pollution equipment and facilities."

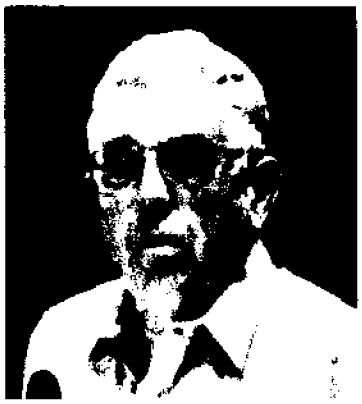
Professor Jin examines the divergence of opinion on the necessity for a warship to notify a coastal state prior to exercising innocent passage, and offers his personal views on the way China's policymakers may resolve this issue. Following his paper, participants discuss distinctions among innocent passage, transit passage, and archipelagic sea lanes passage, as well as the notification requirments for innocent passage of warships.

Chapter Three ends with comments by Duke University Professor Horace Robertson on *The Effects of National Claims*. Professor Robertson concludes that the territorial sea claims in Germany's roadsteads, in Canada's Arctic region, and in the U.S. marine sanctuaries program are

to be expected as part of the process of the development of international law. In the discussion, Professor Louis Sohn comments on the value of Arcticle 300's abuse of rights provision to counterbalance coastal state claims.

GEOGRAPHICAL PERSPECTIVES ON INTERNATIONAL NAVIGATION

Lewis M. Alexander
Department of Geography and Marine Affairs
University of Rhode Island
Kingston, Rhode Island



Introduction

I am very happy that geography has its proper place in this workshop because frequently geographers are left out. Some years ago for a short time, I had the honorific title of being the Geographer of the State Department and I had an office of about eight to ten people with me. One of my colleagues, who was teaching at Princeton during this time, was at a dinner party and he found himself sitting next to General Alexander Haig who had previously been the Secretary of State. General Haig turned to this gentleman during the course of the evening and said, "What do you do?"

He said, "I'm a geographer."

General Haig said, "What do geographers do?"

My colleague told him what geographers do as only Princeton professors can and after a while General Haig looked at him thoughtfully and said, "We should have people like that in the State Department."

There is a fundamental difference between the perspectives held by geographers and those of lawyers concerning issues of international navigation. Lawyers tend to think of features such as international straits, bays, or islands in terms of abstract units -- of models toward which a particular juridical regime can universally apply. They dislike exceptions to rules and agree only reluctantly to modify existing regimes in order to take into account variations in form or function.

Geographers, on the other hand, seem to emphasize differences among phenomena because, in the real world, these differences are facts of life. Geographers may classify fringing forms of variations into groups, such as islands with fringing reefs or double-mouthed bays, and they are also concerned with the definitional limits of particular categories as, for example, at what point precisely does a rock become a drying rock? They are sometimes called upon to identify which specific ones, among a series of partiular features, would qualify within the guidelines laid down by the lawyers. This difference of perspective is particularly important today because even though the 1982 Law of the Sea Convention has been signed for several years many uncertainties and differences of opinion remain -- and these variations and unique claims are likely to continue.

An early contribution which geographers made to the study of international straits was to classify the world's straits in terms of least breadths. Later, through use of the semicircle test, they provided a means for distinguishing juridical bays from mere indentations of the coast; still later, they suggested mathematical formulae for determining which island nations could qualify as archipelagic states.

Navigational Issues

Issues of international navigation involve (1) offshore juridical zones and (2) international straits, which must, of course, be approached through all or some of these juridical zones. When we consider the two types of features, we are dealing with two separate levels of abstraction. There are in the world today nearly 140 coastal states as well as many overseas territories, each with its own patterns of territorial seas, exclusive economic or fisheries zones, maritime boundaries, etc. There are, then, a great many potential variations in the nature of offshore zones and in the claims to competence within them. Countries may make sweeping assertions to 200-mile territorial seas or to nuclear-free zones, but the implied restrictions to navigation resulting from such claims may be difficult, if not impossible, to enforce. As a result most claims to coastal state rights in offshore zones which are at variance with the Convention's provisions have not had much impact, up to now, on international navigation and overflight.

In the case of narrow water bodies, it is much less difficult to interfere with international navigation and overflight, and this is why the details of the regimes of straits and international canals tend to be studied much more intensely. Here is where the dangers of restriction are likely to be concentrated, although any particular waterway should be seen within its total geographical context, including the approaches to it through offshore juridical zones.

Maritime Zones

Let us start this exercise with the offshore zones, which, regarding navigation, consist of four types: internal waters, the territorial sea, archipelagic waters, and the exclusive economic zone (EEZ).

Within a coastal state's internal waters, foreign vessels have no guaranteed right of passage nor do foreign aircraft have a right of overflight. Internal waters are those landward of the baseline used for measuring the breadth of the territorial sea. Where the state places these baselines is a matter to be covered shortly.

Seaward of the baseline is the territorial sea, where foreign vessels enjoy the right of innocent passage, but again there is no right of overflight for foreign aircraft. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state, and Article 19 of the Law of the Sea Convention spells out in detail the activities of a vessel transiting the territorial sea which could be considered in violation of innocent passage.

Beyond the territorial sea is either the exclusive economic or exclusive fisheries zone. Sixty-three states currently claim an EEZ, and 32 others an exclusive fishery zone. The waters of the exclusive fishery are considered high seas and thus the zone has no potentially adverse impact on international navigation. Within the EEZ, the waters are not high seas, but the high seas freedoms of navigation and overflight are retained. In the landward portions of these zones is the contiguous zone, measuring out to 24 miles from the baseline of the territorial sea. Within this contiguous zone the coastal state may exercise the con-

trol necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws within its territory or territorial sea; except for this restriction, the high seas freedoms of navigation exist in the contiguous zone as they do in the rest of the exclusive economic or fisheries zones.

Finally, there are the archipelagic waters enclosed within the baselines of archipelagic states. Within such waters there is a right of innocent passage for foreign vessels, but no corresponding right of overflight. But archipelagic states must designate sea lanes, together with air routes above them, including "all normal passage routes used as routes for international navigation or overflight" (Article 53(4)). Through such sea lanes foreign vessels have a right of continuous, expeditious, and unobstructed passage, a right which extends also to aircraft overflying the sea lanes and to submarines traveling submerged along the lanes between one part of the high seas or an EEZ and another part of the high seas or an EEZ.

Baselines

So much for the juridical patterns. What are the differences that may emerge? Let us start with the baselines for measuring the breadth of the territorial sea. The Convention provides for two systems of baselines: normal baselines which follow the sinuousities of the coast and straight baselines for use along coasts that are deeply indented and cut into or where there is a fringe of islands along the coast in its immediate vicinity. Most coastal states adhere rather well to the provisions of the Convention in delimiting these baselines, but there are exceptions. For example, in its 1982 straight baseline delimitation, Vietnam used individual baselines more than 160 miles in length, and connected basepoints located more than 80 miles from the Vietnamese shore, claiming all the waters inside the baseline as internal waters.

The straight baseline concept took an even more bizarre turn late in 1985 when the Government of Canada announced that it was closing off its entire Arctic Archipelago with what are presumably coastal baselines, within which all the waters (including those of the Northwest Passage) would be considered as internal.[1] It is hard to imagine that the straight baselines can be seen as following the general direction of an otherwise west-to-east coast, because at one point the baselines are about 600 miles due north of the mainland coast.

When it comes to baselines closing off the mouths of bays the Convention has detailed provisions both for defining "juridical" bays and for delimiting their closing lines. But then the Convention also refers to "historic" bays, without otherwise defining them. There are grounds for considerable diversity of opinion among nations over the validity of "historic" bay claims. Sometimes these claims seem like "instant history." At least two dozen water bodies have, at various times, been claimed as "historic," including Hudson Bay, the Gulf of Fonseca, the Sea of Azov, the Gulf of Manaar, and the Gulf of Panama. Historic bays are important not only because within them there are no freedoms of navigation or overflight, but also because such freedoms do not exist in the straits which connect these water bodies with the high seas or an EEZ.

The Convention makes no provisions for the closing lines of estuaries, other than to note that the baseline shall be a straight line across the mouth of the river between points on the low water line of its banks. What may look like a bay is treated as an estuary if it has a river behind it. Venezuela, for example, has closed off the mouth of

the Orinoco River with a 99-mile wide line across the river claiming that all waters inside the line are internal, even though the principal mouth of the river is in fact some 30 miles upstream from the baseline.

Other Problems

"Nonconforming" rocks are another problem. Article 121 notes that "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." How are these rocks to be identified, and will countries, in fact, abide by such restrictions? A single rock, located more than 400 miles from its nearest neighbor, can close off an area measuring 125,000 square nautical miles, about the size of the state of Montana.[2]

State practice varies with respect to the territorial sea. One variation concerns the breadth claimed. The Convention sets a limit of 12 nautical miles to the breadth of the territorial sea, but some 26 states claims breadths in excess of this, 15 of them to 200 miles. There are also box-like outer limits to territorial waters, extending well beyond 12 miles, for the Maldives and the Philippines.

Within the territorial sea, over two dozen countries require prior notification and/or aproval for the passage of foreign warships, although this requirement is a variance with the Convention. Three states require prior notification of the passage of nuclear-powered vessels or vessels carrying nuclear or other radioactive materials through their territorial waters, and one state adds foreign supertankers to the list of vessels requiring prior notification. Immediately beyond the territorial sea, over a dozen states have adopted special security zones, in one case -- that of North Korea -- extending to 50 miles offshore in the Sea of Japan.

There are other variations in the claims to competence by states in their EEZ. Nine states, in their EEZ proclamations or national laws, explicitly allow the government to regulate the passage of foreign vessels in the EEZ or in specially designated zones of the EEZ. Seven states claim exclusive jurisdiction over environmental protection, including vessel-source pollution, within their EEZ. At least one state has forbidden foreign warships to hold military maneuvers while passing through its EEZ.[3] These claims constitute new forms of "creeping jurisdiction" which may now exist only on paper, but which could become troublesome if they were to be seriously enforced. How do we reverse the trend and make national practice conform to the Convention?

Another uncertainty concerns the principle of "closed seas." To date, this concept has principally involved the Soviet Union. There have been assertions made particularly since World War II, both by Soviet officials and in Soviet writings, to the effect that the Sea of Okhotsk should be considered a "closed sea" in which the warships of nonlittoral states would be excluded. References to a similar status have also at times been made regarding the seas north of the Soviet Union, that is, the Kara, Laptev, and East Siberian Seas. Soviet writers have, at times, made reference to the desirability of a "closed sea" status for both the Black and the Baltic Seas. But it should be noted that no such claims have ever been put forward in an official declaration from Moscow.

International Straits

Let us turn now to a consideration of international straits. Here, I believe, geographers have at least four types of contributions to make. One is to consider the differences as well as similarities among straits. Where are the ones for which there are no alternative water-

ways, or alternatives which would only be extremely costly? Which are the straits whose depths preclude their use by fully-loaded Ultra Large Crude Carriers?

A second contribution is to provide "flesh and bones" to the legal distinctions which have been established. For example, what straits, other than Messina, would qualify for a nonsuspendable innocent passage regime under the so-called "Sicily exception" in Article 38? Which straits are governed by long-standing international conventions in force?

A third contribution geographers can make is to consider the regional patterns of international straits and canals, as well as the claimed status of the water bodies they connect. How many usable waterways are there through the Philippines or Indonesia? To what extent can the Kiel Canal serve as an alternative to the Danish Straits? How many transit routes are there available for vessels leaving Vladivostok?

Finally, geographers, as well as others, can assess the potential impacts of real or proposed restrictions on transit passage through particular straits or canals. These impacts may, of course, weigh more heavily on some countries' interests than on those of others. Tiran, Hormuz, Malacca-Singapore, the Suez Canal, the Northwest Passage -- these and other waterways may be subject to regimes of restricted passage, either long-term or short-term. What would be the consequences of such restrictions to the United States, the Soviet Union, Israel, or some other country or group of countries?

Physical Factors

As concete examples of these types of issues, let us consider some of the basic characteristics of international straits. First, what is a strait? One definition is that it is a naturally-formed body of water linking two larger water bodies with one another. It may be less than a half a mile wide, as with the Dardanelles or Denmark's Little Belt. Mozambique Channel, on the other hand, is over 200 miles in least width. Sometimes it is difficult to distinguish a strait from a sound (which presumably has straits at either end). The Danes call their easternmost strait the "Sound" or "Oresund." Within a strait there may be periodic changes of direction of current; New York's East River is, in reality, a strait.

The Convention speaks of straits connecting two parts of the high seas or an exclusive economic zone with one another as qualifying for a transit passage regime. It further notes that the strait must be used for international navigation. In this paper, such straits are referred to as "international straits" -- an appellation which also applies to those few straits which connect the high seas or an EEZ with the territorial sea of a third state (and again which are used for international navigation).

One of the basic features of a strait is its least width. This, of course, determine whether or not a belt of high seas or an EEZ exists within the strait, in which case the regime of transit passage need not apply. There are two aspects here. One is, where are the innermost points within the strait from which to measure the least breadth? In some straits this is not readily discernible. Balabac Strait, for example, has five channels, separated from one another by reefs, drying rocks, and islets. Bass Strait also has rocks and islets in the channel. The Strait of Hormuz is either 21 miles or 5 miles across, depending on which sector one chooses to measure. Particularly in tropical and subtropical waters containing atolls and reefs, reported least-breadth

measurements vary considerably, depending on who picked the base points from which to measure the territorial sea.

There is also the problem of overlapping territorial seas. If all coastal states claimed a 12-mile territorial sea, all straits less than 24 miles in least breadth would be completely within territorial waters. But some 25 countries still claim less than 12 miles. In the Strait of Juan de Fuca, which is nine miles wide at its narrowest point, the four-and-a-half mile wide Canadian portion north of the median line is entirely within territorial waters; but on the American side, there exists a mile and a half wide belt of high seas/EEZ just south of the boundary. Similarly, in the Strait of Dover, the 9-mile belt to the south of the median line is French territorial waters, but only 3 of the 9 miles north of the line are in the British territorial sea.

From least breadth we turn to least depth. The draft of a fully-loaded 100,000 dwt tanker is about 50 feet; that for a 550,000 ton tanker is over 95 feet. In the Malacca-Singapore Straits the controlling low-water depths are about 72 feet. Tidal heights, which vary from 2 to 5 feet, may be used to increase these minimum depths, but the advantages of this "tidal window" may be offset by the factor of "squat," whereby ships of over 200,000 dwt may have their draft increased by three to four feet when they are underway.

It is possible, of course, to increase opportunities for use by dredging and deepening the channels; on the other hand, straits states may set underkeel clearance requirements, thereby affecting the passage of vessels. For Malacca-Singapore, the underkeel clearance requirement is 3.5 meters at all times, thereby limiting the passage to fully-loaded tankers of about 230,000 dwt or less.

Many compendiums of straits also show length, although I am not certain why this is important. Certainly the negotiators at the Third Law of the Sea Conference did not, I am sure, envision one regime of passage through international straits and another for passage through territorial waters or the EEZ to and from the strait. The depth of straits is critical, however, for the safe passage of submarines. In water over 200 feet deep the submarines are generally safe, but there are many straits less than 200 feet deep which create problems for submarines.

The status of the water bodies connected by the strait may be significant, particularly if one of the bodies is claimed to have a status other than that of high seas or an EEZ. China's Gulf of Pohai is claimed as an historic bay; Indonesia has straits, not located on an archipelagic sea lane, which connect the high seas/EEZ with archipelagic waters. Australia has closed off its coastal indentations, such as Shark Bay and Spencer Gulf, behind straight baselines. The Soviets, as noted earlier, appear to look upon the Sea of Okhotsk as having a "closed sea" status. This, of course, brings up the problem of acquiescence in such claims by other states.

One other basic characteristic is that of alternative waterways. For the Turkish Straits, Hormuz, and Tiran there are no maritime alternatives. For Gibraltar, Malacca, and the Bering Straits the alternative is an extremely costly one. Kiel Canal is an alternative to the use of the Danish Straits, assuming the vessel has no more than a 31 foot draft.

Economic Factors

From physical factors we move to those of an economic nature. How many vessels per year pass through the strait or canal? Are there any

particular types of cargo in transit? Are there countries whose economies are dependent upon the use of the waterway?

Statistics on the number of passages through straits (as contrasted with inter-ocean canals) are often difficult to obtain. The four most heavily-used straits appear to be Dover, Malacca-Singapore, the Danish Straits, and Gibraltar. Other important ones would certainly include Bab el Mandeb, Hormuz, Lombok, Luzon, and Osumi-kaikyo. So far as cargo types are concerned, one could certainly note the movement of oil through Hormuz, Bab el Mandeb, and Malacca-Singapore. Japan and a number of West European countries are heavily dependent on Hormuz for their oil imports.

Some straits, of course, are located far away from the major ocean routes and thus handle little, if any, international traffic within a given year. This bears on the meaning of the phrase "used for international navigation," which is part of the definition of straits qualifying for the transit passage regime. How many crossings must there be by nonlittoral state vessels in order for the strait to be "used for international navigation"?

There seems to have been an almost deliberate absence of pronouncements on this subject. What official of a major maritime power wants to see a definitive list of proscribed straits? Donat Pharand, a Canadian writer, in considering the international use made of the Canadian Northwest Passage, found that 23 complete transits by non-Canadian vessels through the passage had been recorded during the twentieth century. He suggested that the number of crossings per year through a strait in order for it to qualify as used for international navigation should approximate the number through the Corfu Channel at the time when the ICJ reached its historic decision[4] -- a number equal to about 2,800.

In the absence of any guidelines, the phrase "used for international navigation" itself appears to be almost meaningless. Perhaps a more viable wording, a term that also appeared in the ICJ decision,[5] would be "useful" for international navigation -- that is, that the physical conditions of the strait, connecting two parts of the high seas or an EEZ with one another, would render it useful for such navigation, should the demand arise.

Legal Factors

Another set of considerations are those of a legal nature. Article 35 notes that the transit passage regime as outlined in the Convention does not affect the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force, specifically relating to such straits. Other than the Turkish Straits, it is unclear to which waterways this provision applies: the Danish Straits, Tiran, Gibraltar, Magellan?

Article 36 exempts from the transit passage regime those straits through which there exists a belt of high seas or EEZ of similar convenience. For these there is no apparent juridical problem. Article 38 refers to straits connecting two parts of the high seas or an EEZ, thereby raising the questions of (1) which straits do not connect two such zones with one another; and (2) what are the regimes of passage for such straits?

Straits may connect the high seas or an EEZ with the territorial sea of a foreign state, in which case a regime of nonsuspendable innocent passage prevails. But other than the Strait of Tiran (which is otherwise covered by the Camp David Accords) where are these straits?

One is Head Harbor Passage, connecting Passamaquoddy Bay with the Gulf of Maine. But there are very few others.

Straits may connect the high seas or an EEZ with a state's archipelagic waters, and not be included as part of an archipelagic sea lane. In this case a suspendable right of innocent passage would seem to exist. Or a strait may connect the high seas or an EEZ with a claimed historic bay (as in the case of Pohai or Kerch Straits) and there would be no right of passage whatever for foreign vessels. But again the question of recognition of the historic claim becomes important.

Finally, in Article 38 there is the exception to the transit passage regime for straits formed by an island of a state and the mainland, if there exists seaward of the island a route through the high seas or an EEZ of similar convenience. Through such straits a regime of nonsuspendable innocent passage prevails. But which straits would be affected, other than the Strait of Messina for which the provision was originally designed? And how does one identify routes "of similar convenience"? These are both questions which must be worked out carefully. Obviously Zanzibar or Pemba Channels would apply, as would Argentina's Estrecho de la Maire. How about Hainan Strait or Canada's Queen Charlotte, Johnstone, and Georgia Straits east of Vancouver Island?

Other Restrictions

We come now to what might be termed "extra-legal" restrictions on navigational freedoms in international straits. Fortunately, at present there are relatively few. We all know of the earlier problems with respect to the Strait of Tiran and the Suez Canal regarding Israeli shipping, but now these difficulties seem to be in abeyance. There were restrictions in 1973 on the movement of aircraft through the Strait of Gibraltar bringing supplies to Israel in its war with its Arab neighbors, but this too was short-lived. At present the status of foreign vessels moving across the Soviet's Northeast Passage is unclear; in 1967 two U.S. Coast Guard cutters, seeking to pass eastward through Vilkitsky Straits, were turned back by the Soviet government on grounds which are still not understood. No further attempts at passage by U.S. vessels have been made. And, as noted earlier, the Canadians have formally declared that the waters of their Northwest Passage are internal in nature.

Looking to the future, there are various grounds for states to assert special rights within international straits. One is perceived or actual environmental danger, which is going to be a very important issue in the next decade. A new *Torrey Canyon* or *Amoco Cadiz* disaster might pressure certain straits states to adopt stricter vessel-source pollution control measures than are authorized in the Convention. A second concern is that of security. Socialist countries, in particular, seem especially anxious about what they perceive to be potential threats to their security, and as a consequence, they may seek modifications of the transit passage regime in certain straits in the interests of security.

Along with security is the factor of limited wars, be they Israeli-Arab, Iran-Iraq, North-South Korea, or some other conflict. Such wars may lead to at least temporary closings of certain waterways, particularly through the use of mines. There are literally thousands of mines available today to any nation wishing to employ them. This brings up the whole question of terrorism. What better way to attack the normal mode of international activities than to mine, or otherwise inflict damage on

foreign vessels in passage through narrow international waterways? We saw this happen in the southern approaches to the Suez Canal and as yet nobody seems to know who planted the mines there.

The point here is not to highlight the "horribles" which might come to pass, but to point out that the relatively secure world in which we have lived for the past forty years is subject to all manner of shocks. We should not equate one incident, or a seemingly-related set of incidents, with the end of an established order for international navigation. We have survived Suez, Tiran, Gibraltar, and other setbacks; surely we can survive an array of future incidents, but we must have faith in the system. It is clearly in the interests of all countries - North/South or East/West - to promote the freedoms of international navigation and overflight, wherever threats to them may occur.

I spoke earlier of the various "regions" into which the international straits and canals can be grouped. Let us consider briefly one of these regions -- that of the Southeast Asian Seas. How many ocean navigation routes are there between the Pacific and Indian Oceans? How many of these cross the Philippines and/or Indonesia? What provisions have these countries made for archipelagic sea lanes passage? What impacts might there be on navigational freedoms in the eastern South China Sea as a result of the territorial disputes between the Philippines and other countries over certain South China Sea islands? What effect may the boundary dispute between the Philippines and Taiwan have in terms of the passage of third flag vessels through Bashi Channel of the Luzon Strait?

Conclusion

What is needed is some sort of broad perspective on international navigation issues, which, on the one hand, retains a global view of the issue, and, on the other, permits detailed analyses of specific issues. The regional approach used by geographers may not be the only useful one; indeed, it may not, in the long run, prove to be the most effective. But at present, it seems to be the only hopeful means of addressing world-wide issues of international navigation.

Footnotes

1. Statement 85/49 of the Secretary of State for External Affairs in the Canadian House of Commons (Sept. 10, 1983), *reproduced in* 24 I.L.M. 1723 (1985). See Map 1 on page 7 *supra*.
2. See generally Van Dyke and Brooks, *Uninhabited Islands and the Oceans' Resources: The Clipperton Island Case* in T. Clingan (ed.), *Law of the Sea: State Practices in Zones of Special Jurisdiction*, 13 L. Sea Inst. Proc. 351 (1982); Van Dyke and Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources*, 12 Ocean Dev. & Int'l L. J. 265 (1983); Van Dyke, Morgan, and Gurish, *The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?* (publication forthcoming in the San Diego Law Review).

3. See statement of Brazil issued at the time of signing the Law of the Sea Convention, Dec. 10, 1982, reprinted in J. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* 304-05 n. 17 (1985).
4. Corfu Channel (U.K. v. Alb), 1949 I.C.J. 4.
5. *Id.* at 28-29.

DISCUSSION

Louis Sohn: Is the Canadian system of drawing baselines legal? (See pages 6-8 above).

Lewis Alexander: I do not think it is legal. It is understandable. And personally, I am not particularly worried about what Canada has done regarding rights of passage. Both under Article 234 and under the defense arrangements the United States has with Canada, this claim will not present a serious problem for the United States. But it is a precedent. The Canadians say they acted in the interest of environmental protection. Think of everybody else who may have perceived or real environmental problems, particularly in the tropics and sub-tropics, where they can see danger or damage to their ecology. They are going to say they have special needs too. The whole idea of these special circumstances, this uniqueness, must bring terror to the lawyers, because anybody can think up some uniqueness. If Canada can make a claim based on its unique case, then the door is open to all other countries as well.

Sohn: Article 234 of the Convention has special provisions on Arctic Waters -- does it apply in this case?

Alexander: Article 234 (Ice Covered Areas) was known as the Canadian provision, but it did not authorize Canada to claim those baselines.

Sohn: They can regulate passage, but they cannot regulate baselines.

Alexander: As I understand it, Article 234 would apply only in Arctic conditions, not in other conditions.

Thomas Clingan: There has been some misunderstanding over the last couple of years between Canada and the United States on this issue. It was always our position that Article 234 and the straits regime were in no way incompatible, and the straits provisions applied through the northwest passage. Actually, there is not just one northwest passage, but whatever passage you identify as the northwest passage is viewed by the United States as an international strait. The special regulations under Article 234, which are limited to Arctic circumstances, enable Canada to enact special regulations for the protection of the environment. Unfortunately, certain people in the Canadian government seem to be under the impression that the United States has rejected Article 234. If that is true, it certainly explains the impetus behind this new strait baseline situation because the Canadians are extremely sensitive about those waters and, if they feel they cannot regulate them any other way, they will do it this way.

:r **Bernhardt**: The United States in no instance ever said we
t stand behind Article 234. The main reasons the Canadians did
: political, as a result in large part of the polar seas transit
S. Coast Guard which was orchestrated with full advance knowl-
concurrence by the Canadian government; it was a very coopera-
rt marked by good will on both sides all the way through. I do
: the source of Tom's information, but it is completely without
)n to say the United States rejected Article 234.

STRAIGHTJACKETING STRAIGHT BASELINES

J. Peter A. Bernhardt
Deputy Director
Office of Ocean Law and Policy
Bureau of Oceans and International
Environmental and Scientific Affairs
U.S. Department of State
Washington, D.C.

Introduction

Straight baseline practice may well be the single most potentially harmful threat to high seas freedoms in state practice today. It is no exaggeration to state that the majority of maritime claims protested and currently the subject of protest during the past three years by the Department of State consist of questionable delimitations of straight baselines. The principle that states have a right to invoke straight baselines is itself well established, having been included both as Article 4 in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and as Article 7 in the 1982 Law of the Sea Convention. These articles are based in large measure on the 1951 *Anglo-Norwegian Fisheries Case*[1] in which the International Court of Justice (ICJ) articulated straight baseline criteria.

The invocation of the straight baseline regime by coastal states does not give rise to the notoriety that, for example, a 50-mile territorial sea would engender. Because the focus in territorial sea cases is on the allocation of ocean space seaward of straight baselines it is often forgotten that landward of the straight baselines, waters previously territorial or high seas become internal waters, albeit subject to a continuing right of innocent passage (if such had previously existed in the waters, Article 8(2)).

A number of other factors are also relevant. Few states are equipped with the facilities necessary to plot the claimed baselines on charts and to evaluate their effects, an analysis which, if done correctly, must involve lawyers as well as geographers. Another problem is the attempt by some countries to apply archipelagic straight baselines principles to continental coastlines.

But by far the most difficult - and dangerous - aspect of the issue is the absence of clear international legal rules regularizing Article 7 straight baseline practice. Given that the United States has protested questionable straight baseline practice for which no universally

accepted international rules of law exist, some of us in the Department have, during the past year, attempted to draft a set of uniform, easily applied, readily understandable rules or guidelines reflecting what we believe represents legitimate state practice. Let me stress at the outset that these draft rules are still under review at the working level of the Department; they are informal, and constitute neither an official U.S. position on the issue nor a Department of State position. The exercise was not exclusively produced within the State Department, but was carried out in informal collaboration with a number of representatives of other concerned departments of the executive branch. If the executive branch endorses the draft rules or some modification of them, then the Department will probably solicit the views of other interested nations, in the hopes of favorably influencing international straight baseline practice while there is still time to do so. I hope to give you a brief appreciation of the why and wherefore of these proposed rules, or objective criteria, for the evaluation of straight baseline systems.

Interpreting Article 7

The basis of the rules is contained in Article 7 of the 1982 Law of the Sea Convention. As we understand it, a coastal state can legitimately invoke straight baselines (and remember we are not talking of archipelagic straight baselines) in two instances: (a) if the coastline is deeply indented or cut into; or (b) if there is a fringe of islands along the coast in its immediate vicinity (Article 7(1)). In either situation the straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. (Article 7(3)).

Because the criterion, "sufficiently linked to the land domain" does not lend itself to "objective" quantification, the guidelines we developed only address the first three criteria: deeply indented coastlines; fringing islands; and general direction of the coast. Moreover, satisfaction of the general direction criterion has been treated as a prerequisite to fulfilling the first two.

In the beginning of the study, because Article 7 affords no indication as to what constitutes fringing islands or the general direction of the coast, we had recourse to the works of recognized authorities in the field, the text itself, and current state practice, and the 1951 *Norwegian Fisheries Case*. The principal authorities consulted - Hodgson and Alexander,[2] Prescott,[3] and Beazley[4] - while each helpful in their presentation of the problems and in tentative isolated discussions of ratios, fell short of proposing self-sufficient, comprehensive rules such as we envisaged. Analysis of the 1951 *Norwegian Fisheries Case* was itself inadequate, because although it gave rise to the three criteria that are the subject of the study, it provided little insight into what the judges thought were the prerequisites to a holding that the criteria were satisfied. This (from our view) apparent difficulty is compounded in applying Article 7 to other factual situations by the very unique geographic configuration of the Norwegian *skjaergaard* and fjords, which led to the enunciation of the straight baselines theory in the first instance. Because the majority of straight baseline systems claimed around the world do not constitute nearly as compelling a set of geographic circumstances, the *res inter alios acta* nature of the case is underscored. Given this dilemma we decided to approach the problem in the following manner.

Our Approach to the Problem

Charts, all on the scale of 1:1,000,000, of coastal states claiming a straight baselines system were selected on a representative worldwide basis. The baseline systems were drawn on the charts and analyzed. At the same time, again on a representative basis, we selected coastlines to which we believed legitimate straight baselines could be applied. We constructed straight baselines in a number of ways, including turning points along these coastlines, and noted such data as length of lines, maximum distance to shore, and depth of penetration ratios. Similarly, we constructed lines representing the general direction of the coast, this being perhaps the most subjective of the three criteria developed. Finally, to give the cartographic exercise another perspective, we compared our results to the U.S. protests of straight baseline claims and those claims previously examined and not protested. A pattern emerged that was expressed in approved criteria such as penetrations and area ratios. These criteria would not require elaborate mathematical skill to apply and were, in short, ones in which even the lawyers could find some shred of sense. The following remarks describe the salient aspects of the pattern's criteria.

Deeply Indented Criteria

Depth of Penetration

The first criterion considered was "how deep is deep". In this query, we had reference to a universally accepted rule applicable to juridical bays; namely the semi-circle test. In order to qualify as a juridical bay, the area of the bay must be greater than or equal to the area of a semi-circle whose diameter is the same distance as the width of the bay at its closing line. Such a bay must be at least one-half as deeply indented as it is wide, yielding a penetration-to-width ratio of 1:2. Referring (as did Prescott[5] and Beazley[6]) to 1951 *Norwegian Fisheries Case*, it was evident that the fjords were in all cases deeper than 1:2. We hypothesized that indentations could occur in two geometric forms other than semi-circles -- triangles and rectangles -- and compared the penetration-to-width ratios for semi-circular areas (1:2) to those of a triangular and rectangular areas. Comparable ratios for a triangle and a rectangle were found to be 8:10 and 4:10 respectively. As "deeply indented" connotated to us something greater than 1:2, and as the average of 8:10 and 4:10 was 6:10, we decided the latter was a reasonable ratio and one not so high as to burden unduly reasonable state invocation of straight baselines under this rule. Application of the rule to the representative charts not protested by the United States indicated in almost all situations that a 6:10 penetration-to-width ratio was satisfied. (Figure 1).

Part of this first criterion was difficult to apply because it was uncertain how one should measure the penetration. We decided for simplicity's sake that it should be measured by a *perpendicular* from the baseline segment or theoretical extension of the segment drawn to the coastline at the deepest point of penetration.

Percentage of Indentation in a Locality

Article 7(1) requires the coastline to be indented deeply in a *locality*. What, indeed, constitutes a locality? In the *Norwegian Fisheries Case*, as analyzed by Hodgson and Alexander,[7] only 94 of the 160 nautical miles of baselines along the fjord indented northern coast actually traversed fjords. We believed that the resulting ratio, approx-

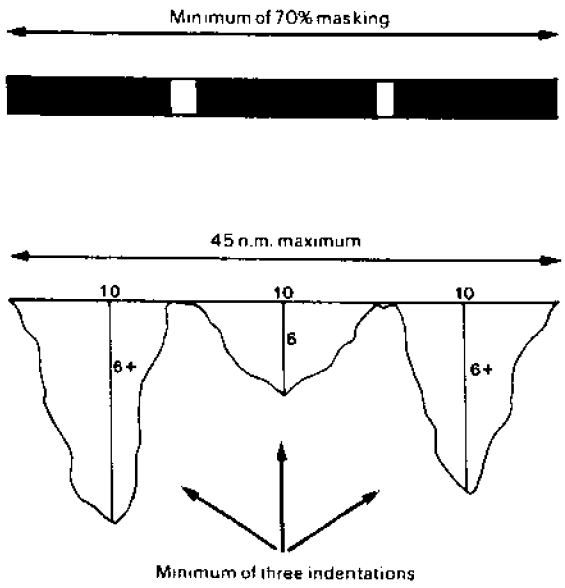


FIGURE 1:

DEEPLY INDENTED

COASTS

imately 6:10 in a given locality, should be increased, as the area in question in the *Norwegian Fisheries Case* was indented with fjords of which the most shallowly indented yielded a ratio of 3:2, or 15:10. In lieu of 6:10 we ascribed 7:10 as a minimum. The merit of this ratio was endorsed in that the remaining 40 percent of coastline not deeply indented in the *Norwegian Fisheries Case* included juridical bays, which also constituted considerable indentations. Thus we arrived at the conclusion that 70 percent of the straight baselines in a given locality must mask deeply indented coastlines. (Figure 2). As to what constitutes a locality, we concluded that any number of straight baselines, including legitimate lines such as juridical bay closing lines, constitute a locality so long as such lines are contiguous.

Length of Line

Having arrived at the percentage of indentation necessary in a locality, we had to decide on the maximum length that straight baselines could comprise. Failure to place a maximum length on baselines would distort the configuation of the coastline, although this would also be taken care of, as will be discussed, under the general direction criteria. It is clear that whatever the figure arrived at, it would of necessity be less than that ascribed to general direction lines, the latter addressed below in the section on General Direction of the Coastline.

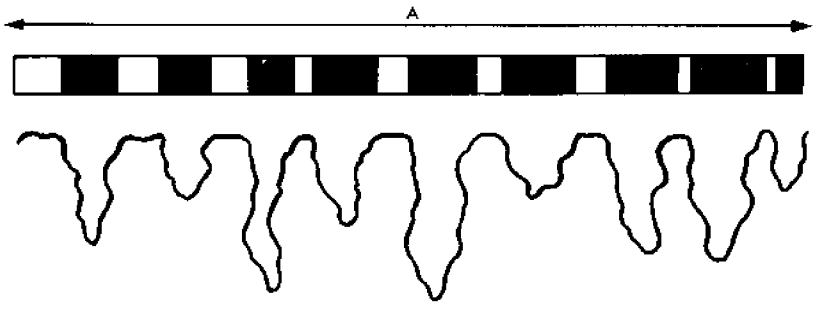
Other guidance was hand. Beazley[8] and Hodgson and Alexander[9] recommended 45 and 40 nautical mile closing lines respectively. We also took into account the ICJ's *dicta* included as a facultative and not mandatory consideration in Article 7(5), i.e., that account may be taken of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage. Putting this into traditional law of the sea concepts it was evident, in the case of a state having a 12-mile territorial sea plus an additional 12-mile contiguous zone, that two 24-mile areas could be swung from headlands at the entrance to the bay, located as much as 48 miles from one another. Within the intervening waters the coastal state would exercise all economic and certain socio-economic competences. Given the above considerations, we arrived at a slightly more conservative figure, that of 45 nautical miles, as the maximum permissible straight baseline in the deeply indented situation. (Figure 1).

Frequency of Indentation

We concluded somewhat arbitrarily that in order for a coastline to be indented deeply and cut into, at least three indentations must be present in any given locality. The only clear guidance, of course, is derived from the 1951 *Norwegian Fisheries Case*, in which a minimum requirement of three is in all areas easily satisfied. (Figure 3).

To recapitulate, we concluded that in order to constitute a locality deeply indented and cut into for the purpose of drawing straight baselines, the following rules should apply:

i) a penetration-to-width ratio of at least 6:10 should exist;
ii) baseline segments constituting at least 70% of the total length of the relevant baselines should each satisfy the 6:10 ratio;
iii) the maximum closing line lengths should not exceed 45 nautical miles;
iv) at least three indentations should exist in any locality.

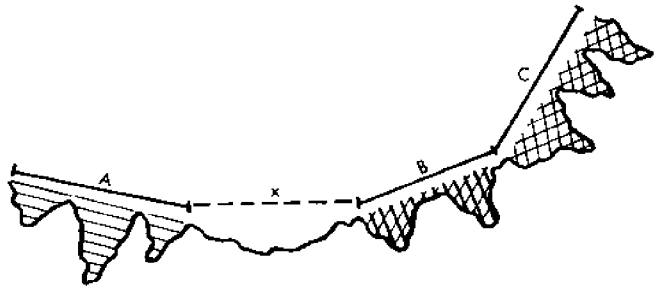


70% (MINIMUM) OF LENGTH OF LINE A (REPRESENTED BY BLACK PORTIONS OF THE LINE) MUST BE OPOSITE DEEP INDENTATIONS

FIGURE 2:

PERCENTAGE OF INDENTATION

IN A LOCALITY



LINE A: OK, THREE DEEP INTENTATIONS.

LINE B: NOT OK BY ITSELF, TWO INDENTATIONS ONLY.

LINE C: OK,THREE DEEP INDENTATIONS.

LINES B AND C: TOGETHER OK AS THEY 1) ARE CONTIGUOUS AND 2) COMPRISE FIVE DEEP INDENTATIONS.

FIGURE 3:

FREQUENCY OF INDENTATIONS

Fringing Islands Criteria

As was the case in the general direction criteria just discussed, the purpose behind these criteria is to approach the straight baselines phenomenon - a departure, it is to be remembered, from the basic rule that the low-water mark constitutes the territorial sea baseline - in a pincers movement from several directions in order to control what otherwise could soon become exponential aberrations easily applied by all. It is submitted that of the two bases for straight baseline invocation, fringing islands is far more worrisome. For whereas deep coastal indentations "normally" enclose as inland waters those water areas occurring "within" the main coastline, fringing islands, by inciting states to leapfrog leagues seaward, could well lead to uncontrollable mischief.

Masking the Coast

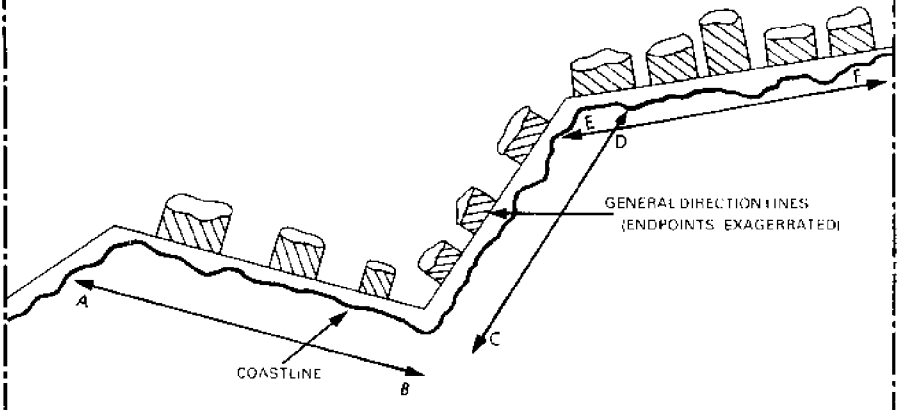
The most important limitation is to ensure that fringing islands effectively fringe, or mask, the coast. Hodgson and Alexander[10] noted that in the Norwegian situation the *skjaergaard* masked two-thirds of the mainland coastline. Prescott[11] talked of masking from the optic of the mariner, i.e., obscuring his view of the mainland coast in such a way that for practical purposes the fringing islands became the coastline. The ICJ noted this aspect of the relationship when it stated that for practical purposes the *skjaergaard* was considered to be the coastline.[12]

In trying to quantify these observations, it is difficult to find many geographic situations worldwide in which the mainland coastline is so heavily masked, or fringed as in the *Norwegian* example, as to mask two-thirds of the mainland. As a matter of common sense we believed on the other extreme that something would not be fringed or masked unless at least 50% of its length were screened. This being the case, and again in order to make the test reasonable enough so as to encourage broad acceptance of the rules developed, we concluded that at least 50% of the coastline must be masked by fringing islands from the vantage point of the mariner at sea. (Figure 5).

To calculate this percentage, we decided, having determined the general direction lines of the coast and in order to avoid becoming mired in coastline sinuosities, that perpendiculars be drawn from each of the general direction lines. A point along the coastal general direction line will be considered to be masked if it lies on a perpendicular that intersects a fringing island. Thus a point on the general direction line is masked if it has on it a perpendicular that: (a) crosses an island somewhere between the baseline and the mainland; or (b) terminates on an island or constitutes part of the baseline, even if the perpendicular touches no other island seaword of the coast. Point (a) is designed to take care of staggered, or multi-layered, islands lying inland of the straight baselines system, thus giving the coastal State the benefit of their additional fringing or masking effect in arriving at the calculation. By tallying up the percentage of perpendicular crossings of the general direction lines under (a) and (b), it should be a straightforward matter to calculate the percentage and, hence, whether the islands in fact constitute a fringe. (Figure 4).

Deviation from Coast

Although a chain of islands may indeed constitute a masking fringe, Article 7(1) also requires that the fringe of islands be *along* the coast. This then implies that a parallel and not athwart relationship



LINE A-B: DOES NOT QUALIFY (<50%)

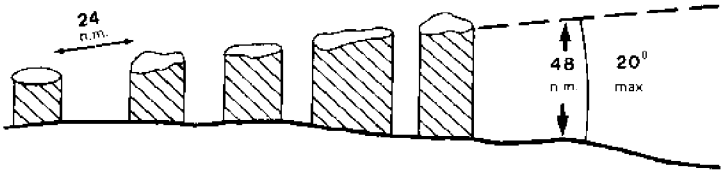
LINE C-D: QUESTIONABLE

LINE E-F: QUALIFIES (>50%)

FIGURE 4:

MASKING THE COAST

(NOTE PERPENDICULARS)



24 n.m. maximum between islands.

48 n.m. maximum from general direction of the coastline

50% minimum must mask general direction of the coastline.

20% maximum deviation from general direction of the coastline.

FIGURE 5:

FRINGING ISLANDS

exists. If the mariner's line of sight from sea to land is again remembered, the sense of this relationship is more readily apparent.

Again, various authorities have discussed this requirement. Hodgson and Alexander,[13] in analyzing the *Norwegian Fisheries Case*, observed that with but few exceptions the *skjaergaard* does not deviate more than 15 degrees from the general direction of the coastline, and therefore recommended that figure as the maximum deviation. Prescott[14] is less specific, rejecting a 90 degree deviation, finding as incontrovertible a 10 degree deviation, but failing to categorize the azimuth in between. After having gone through several other geometric enquiries, we arrived at a slightly greater percentage than that which Hodgson and Alexander recommended, that of 20 degrees, with a few minor exceptions tolerated, such as that of allowing for greater deviations in the case of islands connecting fringing island chains at either end to the mainland coastline. (Figure 6).

Maximum Distance from Opposite Mainland Coast

Considerations similar to those mentioned under the deeply indented discussion are equally pertinent to this criterion and the following one. In this instance, Prescott, Beazley, and Hodgson and Alexander offered no guidance. Article 7(1) simply states that the fringing islands exception may be invoked if they lie within the immediate vicinity of the coast.

We took as a departure that if islands were within 24 nautical miles of the mainland coastline, an overlapping 12 nautical mile territorial sea situation would not be objectionable, given the additional prerequisite to drawing straight baselines that the intervening sea area must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. Overlapping contiguous zones would result in a maximum distance of 48 nautical miles. In the *Norwegian* situation in no instance was the *skjaergaard* more distant than 48 nautical miles from the coastline. We therefore allowed a maximum distance of 48 nautical miles measured from the island coast closest to the mainland.

Maximum Distance Between Islands

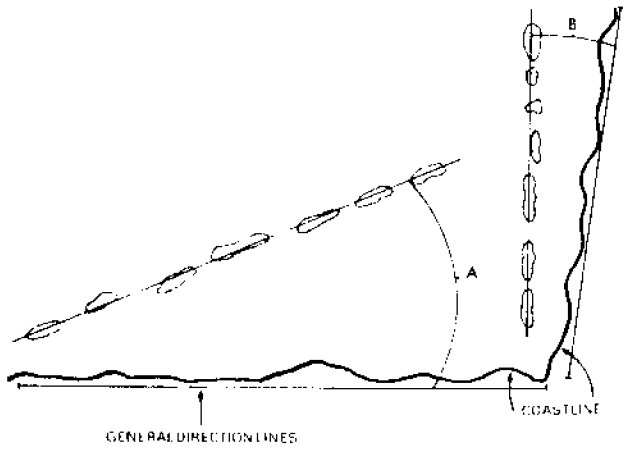
Using a similar approach, we concluded that in order to draw straight baselines between fringing islands they must be no further apart than 24 nautical miles. Forty-eight nautical miles was rejected in that the masking aspect would be affected adversely.

In summary we found the following objective criteria should be satisfied in order to claim a straight baseline system based on the fringing island exception:

i) the islands should mask 50% of the opposite mainland coastline;
ii) straight baselines constructed between the islands should not deviate more than 20 degrees from the general direction of the coast;
iii) the islands should be no further seaward than 48 nautical miles from the opposite mainland coastline;
iv) the islands should be no further apart from each other than 24 nautical miles.

General Direction of the Coastline

As stated earlier, satisfaction of this set of objective criteria should be a prerequisite to legitimate invocation of the first two sets.



A. A >20° deviation from general direction lines; straight baseline is unacceptable.

B. B <20° deviation from general direction line; straight baseline is acceptable.

FIGURE 6:

DEVIATION OF STRAIGHT BASELINES

FROM THE COAST

Parallelism to Coast

It should be taken as axiomatic that a line conforming in broad brush to the general direction of the coast be generally parallel to it.

Maximum Length of General Direction Line

Given the normal sinuous nature of coastlines, the greater the length of a general direction line segment, the greater the probable deviation from the actual coastline. Although individual segments need not be as short as the maximum distance (24 nautical miles) permitted between fringing islands in that the *general* direction of the coast is indicated here, some length limit must be achieved, striking a balance between the need to avoid paralleling a plethora of sinuosities and the need to refrain from deviating too far from the trend of the general direction. Hodgson and Alexander suggested a maximum length of 40 nautical miles.[15]

In order again to encourage eventual coastal state acceptance of the recommended criteria, we assigned, somewhat arbitrarily, a limit of one degree of arc, or 60 nautical miles. In addition to the artificial attraction of ascribing 60 nautical miles, however, we concluded that utilization of general direction lines of 60 nautical miles in length in lieu of 40 resulted in no undesirable excesses of any consequence when applied in conjunction with either the fringing islands or deeply indented situations. (Figure 7).

A special subsidiary provision was made, in the case, of smooth, long coastlines, to permit general direction lines exceeding 60 nautical miles in length, providing that the coastline does not at any point change direction by more than 20 degrees.

Maximum Distance from the Coastline

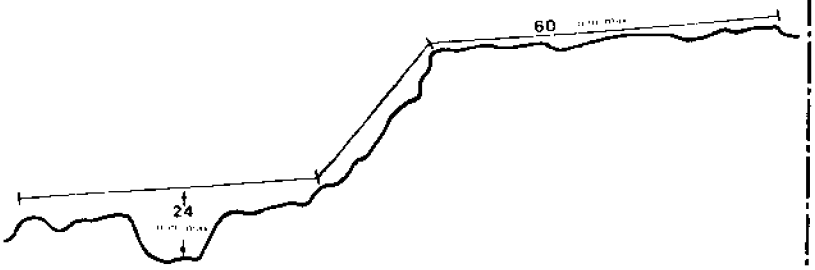
We ascribed, again somewhat arbitrarily, a maximum distance of 24 nautical miles from the coastline as the applicable criteria, with two caveats. First, general direction lines could fall landward of the coastline with no length limitation, no doubt a rare phenomenon, as it generally works to the disadvantage of the coastal state to utilize such lines. Second, a coastal state need not hew to the low-water mark of the coastline in instances in which it is permitted to deviate therefrom, e.g., enclosed or encloseable juridical bays, river mouths, etc., but would be permitted to take advantage of the closing lines in order to measure the general direction lines therefrom.

Endpoints

In order to promote adherence to the general direction of the coast in establishing general direction lines, it was decided to require that the endpoints of such lines be points, generally along the low-water mark, from which the baselines of the territorial sea can be measured.

In summary, general direction lines should meet the following objectives:

i) They should generally parallel the coastline;
ii) They should not exceed 60 nautical miles in length unless the coastline does not at any point change direction in excess of 20 degrees;
iii) They should be no greater than 24 nautical miles from the coastline; and
iv) They should have as endpoints points along the low-water mark from which territorial sea baselines may be measured.



Must be parallel to the coast

24 n.m. maximum from the coast.

60 n.m. maximum length of individual lines.

Endpoints of lines on territorial sea baseline points.

FIGURE 7:

GENERAL DIRECTION LINES

Conclusion

In closing, I would mention that in order to standardize application of the above objective criteria and in order to avoid their distortion, charts of a scale of 1:1,000,000 should be used.

To our knowledge this is the first attempt to establish a comprehensive, relatively easily applied and self-contained set of "rules" or guidelines by which straight baseline practice can be, and in our view should be, applied and, it is hoped, be tested by foreign offices. The twelve objective criteria in and of themselves are of course neither perfect nor immutable; they are in some instances arbitrary and may in certain geographic circumstances lead to inequitable results. We found that they do, however, materially assist in objectively approaching the problem. Given the present inadequate guidance in the law on the subject, an attempt to quantify an approach to the problem in reasonable terms had to be made. It seemed proper to us that we should make such an attempt. As the State Department and other agencies evaluate these criteria it would be useful to have the views of others on the proposals which have been outlined. Although we believe the percentages and ratios important, we believe the "pincers" approach to each of the three situations most important.

Note

The views expressed are those of the author and do not necessarily represent the views of the United States Government. These ideas have also been developed in somewhat different form in U.S. Dept. of State Bureau of Oceans and International Environmental and Scientific Affairs, *Developing Standard Guidelines for Evaluating Straight Baselines* (Limits in the Sea Series, No. 106, 1987).

Footnotes

1. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116.
2. R. Hodgson & L. Alexander, *Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls*, L. Sea Inst. Occasional Paper No. 13, at 8 (1972).
3. V. Prescott, Straight Baselines: Theory and Practice 4 (Monograph, 1985).
4. P. Beazley, *Maritime Limits and Baselines: A Guide to Their Delimitation*, Spec. Pub. No. 2 (the Hydrographic Society, 2nd ed., 1978).
5. V. Prescott, *supra* note 3.
6. P. Beazley, *supra* note 4, at 8.
7. R. Hodgson & L. Alexander, *supra* note 2, at 29, 36, and 41.
8. P. Beazley, *supra* note 4, at 9.
9. R. Hodgson & L. Alexander, *supra* note 2, at 42.
10. *Id.* at 60.
11. V. Prescott, *supra* note 3, at 10-11.
12. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116.
13. R. Hodgson & L. Alexander, *supra* note 2, at 37-40.
14. V. Prescott, *supra* note 3, at 10.
15. R. Hodgson & L. Alexander, *supra* note 2, at 42.

DISCUSSION

Applying Archipelagic Straight Baseline Principles:

Peter Bernhardt: Although mainland states have tried to apply archipelagic closing lines to their own continental coasts, we do not regard straight baselines in the context of Article 7 as having anything to do at all with archipelagic closing lines. As far as we are concerned they are "apples and oranges," and it is very illegal to apply archipelagic straight baselines principles to continental coastlines of mainland states.

U.S. Government Protests Against Illicit Claims

Horace Robertson: Peter, will these criteria, assuming approval within the Department of State, be the basis on which you render protests against other claims?

Bernhardt: If the executive branch of U.S. government does formally approve these criteria, they certainly are going to be invoked, along with other bench marks such as claims protested in the past to help us to arrive at what we should and should not protest. Of course these criteria sound very specific, but when we invoke them there are going to be situations in which they cannot be applied as tightly as this -- there will be elbow room. The baselines claims of some of our allies, for instance, (and I will not mention which ones) would not comply with these criteria if they were invoked with particularity in each situation.

Robertson: If these criteria are not going to be used objectively -- and I assume the purpose of this is to create some uniformity of practice -- then it seems to me that you wasted your time.

Bernhardt: We intend to use them objectively if they are approved. And, in every instance we will use them in formulating protests by the U.S. government in what we consider illicit claims.

Robertson: Except with our friends, I understand.

Bernhardt: No. Everybody, friend or foe, will be entitled to the same consideration with regard to very small aberrations from these indicia. But, there are cases we know of that you just cannot take care of in advance. We hope to invite comment by other interested states about which claims they feel are of merit or are lacking in merit, and later on to enter into some sort of negotiation to develop a consensus on criteria that everybody can apply.

Louis Sohn: How do you apply these guidelines in practice? Is it possible for you to distinguish friendly situations from others. When you made a protest to Libya recently, you sent a copy of that to the

United Nations and everybody knew about your protest and it became part of the record. On the other hand, with a very friendly nation, I think you can simply say *sotto voce* "We have some problems about these baselines, and it might be very useful if you would reconsider them and here are some guidelines that we thought you should take into account." Of course, that would be easier if you would consult everybody you can about these guidelines before applying them and get their advice and, if possible, follow them evenhandedly.

Bernhardt: We have never formally protested to a government that has indicated to us or to our embassies that they are willing to reconsider things that we find objectionable. We have only protested after they state either that they are not going to reconsider their claim or that they have reconsidered it and they find their claim to be legitimate. In that case, of course, we will go ahead with the protest. I think that is is easier in the case of allies or friendly nations to complain *sotto voce* and give them a chance to make curative amendments to their straight baseline practice. But if they will not make such changes we will publicly protest *fortissimo*, as we have with Denmark and other countries that border on the Baltic Sea. I can say with complete equanimity, that allied or not, we will register public protests, and will file them all with the United Nations Law of the Sea Secretariat, whenever we determine that baselines are illegitimate, regardless of the political complexion of the country involved.

THE REGIMES OF THE TERRITORIAL SEA OF THE FEDERAL REPUBLIC OF GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC

Renate Platzoeder
Institute of International Affairs
Munich-Ebenhausen, Federal Republic of Germany

Before the Federal Republic of Germany (F.R.G.) and the German Democratic Republic (G.D.R.) came into being as separate nations, Germany recognized the three-mile territorial sea and the regime of innocent passage as customary international law. Germany had never enacted legislation concerning the breadth or the regime of her territorial sea. Consequently, the law inherited by the F.R.G. and the G.D.R. was nothing more than the practice of a traditional seafaring nation.

Once these two Germanies came into existence, however, their territorial sea policies differed, even before the Third United Nations Conference on the Law of the Sea commenced in 1973. The F.R.G. had neither signed nor acceded to the 1958 Geneva Convention on the Territorial Sea[1] when on December 1973, the G.D.R. became a party to that Convention. Prior to accession, the G.D.R. enacted legislation concerning the presence of foreign warships in her territorial waters and the status of these waters as state territory.

Further measures were taken after the Law of the Sea Conference ended. On May 1, 1982, the Law on the State Frontier of the G.D.R. entered into force, and like the Soviet law on the State Frontier of November 24, 1982, it defined the outer limit of the territorial sea as the state frontier. The law also contains provisions on the presence of foreign vessels and on innocent passage in the territorial sea. Although the breadth of the territorial sea is three nautical miles, an ordinance of December 20, 1984 amended the regime of the territorial sea with respect to its breadth and the presence of foreign warships, sporting boats, and other government ships operated for noncommercial purposes. The ordinance entered into force on January 1, 1985. Unlike the twelve-mile territorial sea of the Soviet Union, the G.D.R. territorial sea is not of uniform breadth; instead its boundary is defined by lines connecting fourteen points.

Points one to five exist in a 1974 fisheries agreement concluded between the F.R.G. and the G.D.R. The sea lane in the Byte of Lubek was established after the Second World War to provide access to the ports of Lubek and Travamurdefrie or Mine. The breadth of sea line number three ranges between three and about six nautical miles. That sea line

is neither in the territorial waters of the F.R.G. nor on the high seas, although it does approach the outer limit of the territorial sea of the G.D.R. At points six to eleven, the territorial sea is between six and nine nautical miles. Here the outer limit of the territorial sea is approximately parallel to the median line between Denmark and the G.D.R. and almost parallel to a traffic separation scheme established by the International Maritime Organization (IMO). It is only between points eleven and twelve that the territorial sea of the G.D.R. extends to twelve nautical miles.

Two questions arise: first, why did the G.D.R. extend its territorial sea and second, why did the G.D.R. not extend its territorial sea to its maximum breadth? First, the G.D.R. signed the 1982 Law of the Sea Convention on January 30, 1984 and wants to benefit from its application. Second, we must note that it is unclear when the convention will enter into force; that Denmark signed the Convention (July 1, 1983) and that the F.R.G. has not done so; and that neither Denmark nor the G.D.R. have ratified the Convention. By not extending her territorial sea to the limit, the G.D.R. avoids the following problems: which provisions of the 1958 Geneva Convention on the Territorial Sea still prevail; which provisions of the 1982 Law of the Sea Convention have become customary international law; and, which rules apply to the Kadet Channel.

The Kadet Channel is relatively deep and about 20 to 23 nautical miles wide between Denmark and the G.D.R. The Channel is used by about 60 to 70 nations for international navigation. The water depth allows submerged passage of conventional submarines operated by the German navy in the Baltic. If the G.D.R. had extended its territorial sea to the median line of the Kadet Channel, would that sea area be treated as an international strait and what regime would govern? The Kadet Channel is either a separate strait or part of the Baltic approaches -- a continuation of the Great Belt and the Fehmarn Belt. The Great Belt not only lies in Danish waters but Denmark has enacted legislation based on the regime of innocent passage and, at UNCLOS III, declared that Article 35(c) of the Convention applies to the Danish straits, specifically, the Belt and the Sound. The Fehmarn Belt is bordered by Denmark and the Federal Republic of Germany. Thus, if the high seas status of the Kadet Channel changes, the G.D.R. may have to negotiate from a position possibly unacceptable to others. To avoid controversy, the G.D.R. simply refrained from extending her territorial sea into potentially very troubled waters.

On October 12, 1983, the F.R.G. decided to extend her territorial sea to protect against tanker accidents and oil pollution. The F.R.G. territorial sea conforms generally to three miles, but was extended to include the island of Helgoland and three roadsteads. Two of the roadsteads lie outside the territorial sea. Included also are sea lanes established by IMO and a precautionary area. With the exception of this extended area, the F.R.G. maintains a three-mile territorial sea. Although the extended area reaches 16 nautical miles, the government considers the extension to be within international law. Article 9 of the 1958 Territorial Sea Convention concerning roadsteads was interpreted to allow the extensions of straits and baselines such that the deepwater roadstead is not included in the territorial sea.

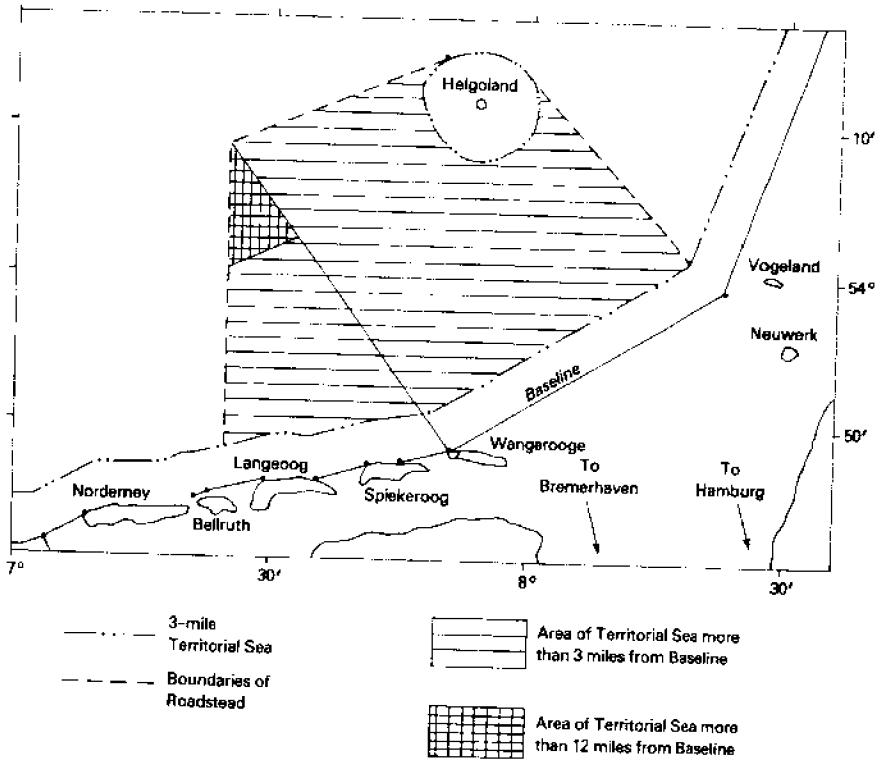
According to the United States, Article 9 does not allow roadsteads situated wholly outside the territorial sea to be included by drawing so-called closing lines. Despite consultations with the United States, the F.R.G. reaffirmed its position on November 12, 1984. The extension

entered into force on March 16, 1984. Concurrently, the German traffic regulations for navigable waterways were amended to contain special provisions concerning the safe passage of vessels constrained by their draft. Any vessel navigating in the area of extension is obliged to avoid impeding the safe passage of vessels constrained by their draft. This provision designates Rule 18(d) of the 1972 Convention on the International Regulation for Preventing Collisions at Sea [2] to which the F.R.G. is a party.

The extension of the territorial sea, combined with the application of the International Collision Regulations and amended traffic regulations, enable Germany to control and monitor maritime traffic through means similar to airport traffic control. In this area approximately 100,000 movements of ships occur annually. Among these ships are tankers carrying dangerous substances such as oil, gas, and chemicals. In the event of a major tanker accident, coastlines of the Federal Republic of Germany, Denmark, and the Netherlands would be affected. The F.R.G. territorial sea extension was designed to protect the coastlines, including tourist areas and fish breeding-grounds from the consequences of such an accident.

Footnotes

1. Convention on the Territorial Sea and the Contiguous Zone, *done* April 29, 1958, Geneva, 516 U.N.T.S. 205, 15 U.S.T. 1606.
2. 1972 International Convention for the Prevention of Collisions at Sea, *done* Oct. 20, 1972, *entered into force* July 15, 1987, 28 U.S.T. 3459, T.I.A.S. No. 8587, reprinted in 1 Singh, *International Maritime Conventions* 311 (1983).



MAP 2: The Extended Territorial Sea Claims of the Federal Republic of Germany

Validity of the Federal Republic of Germany's Roadstead Claim

Louis Sohn: I wanted to ask you again about the roadstead problem. I understand that under Article 9 of the 1958 Territorial Sea Convention and Article 12 of the 1982 Convention a roadstead can serve as a base-point for drawing territorial sea baselines even if it is wholly or partly outside the territorial sea. The F.R.G. approach does not, however, conform to those criteria.

Renate Platzoeder: That is one opinion. Historically, the Netherlands, for instance, raised this problem, and it was not settled. And in the Third United Nations Conference on the Law of the Sea, this problem was sidestepped in the English language Drafting Committee, because nobody seemed prepared to resolve it. Article 12 is phrased similarly to Article 9 in the 1958 Convention regarding the incorporation of the roadstead in the territorial sea. The lines may not comport with Article 12 and Article 9, but the Federal Republic of Germany has not signed either the 1958 or the 1982 treaty.

Sohn: But no one, Germany included, officially disagreed on this point in 1958.

Platzoeder: Although the Federal Republic of Germany participated as a full member in the 1958 negotiations, its primary interest was to solidify its position as the sole successor to the German Reich, and it did not really negotiate problems of the law of the sea. The Federal Republic of Germany has not signed the 1982 Law of the Sea Convention, perhaps 60 percent because of several letters sent by the Reagan Administration to Bonn. Because the F.R.G. is not a party to either convention, it now has more legal room to maneuver. I think one can argue that the extended German territorial sea is compatible with international law, although perhaps not with the history of these articles. The Federal Republic of Germany is free to identify its view of customary international law. Countries that object can protest or take the situation to court. The Federal Republic of Germany has, for very good reasons, not accepted compulsory dispute settlement before the International Court of Justice. I think the Federal Republic of Germany has the right to extend its territorial sea to control and monitor international traffic in this area for the safety of traffic and for pollution reasons.

Sohn: I think we should clarify this subject as much as we can. I have no special brief on the subject, but am interested in the proper interpretation of the Convention. I recall, from the North Sea Continental Shelf case[1] that Germany was very active on problems involving ocean boundaries. If roadsteads were important for Germany in 1958, they should have given notice to others at that time. To say suddenly

25 years later that Article 9 of the 1958 Territorial Sea Convention is unacceptable, without evidence of previous concern is difficult to accept. I think it is generally accepted that those provisions on the roadsteads and the other provisions on delimitation of the territorial sea and baselines are part of international law and the International Court of Justice has, to some extent, said so.[2]

Platzoeder: Professor Sohn, there are two questions involved. The first question is whether the articles on roadsteads are customary international law, and the second, if you agree that such a rule is customary international law, whether there is only one possible interpretation and application of this law. Article 9 of the 1958 Convention and Article 12 of the 1982 Convention read as follows: "Roadsteads which are normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea." The word "included" can be interpreted two ways.

Sohn: I agree it is ambiguous.

Platzoeder: There is some ambiguity. And the other question, with regard to the extension of the territorial sea of the Federal Republic of Germany, is whether this claim was politically wise, because the Federal Republic of Germany depends to a great extent on the freedom of movement of shipping and also on the movement of her military vessels and of course the military vessels and aircraft of the other NATO countries. For many, many years, the Federal Republic of Germany considered whether to extend its territorial sea. The other options did not satisfy our experts who have to deal with this problem in day-to-day operations, and that is why our government, after one year of negotiations with the United States, rejected the views of the U.S. government and decided nevertheless, to extend its territorial sea.

Thomas Clingan: Where is the real problem? Is it the intersection of these two traffic patterns?

Platzoeder: Yes, the real problem is the intersecting of traffic. In order to monitor the traffic flows, the authorities need to control incoming and outgoing ships using this deep sea roadstead.

Creeping Uniqueness

Lewis Alexander: This is another case of creeping uniqueness, just like the Canadian claim. (See pages 6-8 above).

Platzoeder: Yes. (Laughter)

Camillus Narokobi: I want to comment briefly on this concept of "creeping uniqueness." It is good to see the developed countries accusing each other of creeping uniqueness. Formerly it was the developed countries versus the developing countries, for example, when the Latin American countries proclaimed 200-mile patrimonial seas. Today many unique geographical situations, as Professor Alexander knows, are recognized, for example, the baselines of Norway and the archipelagic states. Why, therefore, should we accuse Canada and West Germany for

creeping uniqueness, when other unique claims were explicitly accepted in the Third UN Law of the Sea Conference.

Alexander: Is this really a roadstead; do they load and unload out here, and how long do they anchor waiting to get into port?

Platzoeder: It is a roadstead for anchoring, similar to a tanker parking lot. (Laughter)

Alexander: Is a traffic stop or a parking lot the use the 1958 negotiators had in mind when they said a roadstead can be used as a territorial sea? Ships can anchor many miles off ports.

Platzoeder: Well, Article 9 of the 1958 Territorial Sea Convention reads, "Roadsteads which are...used for anchoring of ships."

Narokobi: Although the F.R.G. did not sign the 1958 Convention, we, as members of the international community, do not expect the F.R.G.'s territorial seas to exceed 12 miles. Regarding the roadsteads, I think what Professor Sohn said is quite correct. It does not matter under the 1982 Convention where the roadstead is located, but for the purpose of drawing the territorial limits, a nation cannot use the roadstead as a basepoint to extend its territorial waters. If the roadstead is situated beyond 12 miles it is regarded as part of the coastal state's territorial seas jurisdiction, but it cannot be linked to other basepoints to expand jurisdiction.

Peter Bernhardt: If I remember correctly, in 1958 the Netherlands attempted to gain acceptance of what the F.R.G. did -- the joining of straight baselines from the territorial sea to a roadstead beyond the territorial sea. It was voted down in the 1958 conference.

Shigeru Oda: Mr. Bernhardt explained the drafting process of Article 9 of the 1958 Territorial Sea Convention. Throughout the Sea-Bed Committee and UNCLOS III, there was practically no discussion or comments made on this particular article, and the text of Article 9 of the 1958 Convention was retained in the 1982 Convention as Article 12. Although Germany has neither ratified the 1958 Convention nor signed the 1982 Convention, it is very difficult to deny that this article has become customary law.

However, it must be pointed out that Article 9 was drafted at a time when the territorial sea limit was only three and not 12 miles. Certain problems concerning roadsteads may now be resolved by reference to Articles 56 and 60 of the 1982 Convention regarding artificial installations in the exclusive economic zone, where states are permitted to exert jurisdiction over roadsteads as part of their rights to the exclusive economic zone.

Platzoeder: The Federal Republic of Germany has not declared an exclusive economic zone and is not considering one. We have only a fisheries zone. The only country that objected to this extension of the German territorial sea was the United States. We found out through many years of consultations that no other countries had any difficulties with it. And that was why the government of the Federal Republic of Germany, which tries to avoid doing anything that displeases Washington, no matter what administration is there, decided to make this extension.

Bernhardt: I have two questions for Renate Platzoeder. First, what is the source of the coastal state's authority to establish a roadstead? I am not questioning "ability" because every nation has that. Second, if the German Democratic Republic extended its median line in the Kadet Channel to the outer limit of Denmark's territorial sea, must international shipping follow the narrow high seas route, both for surface and subsurface navigation?

Platzoeder: To my knowledge, the Federal Republic of Germany has had no occasion to consider the conditions a coastal state must satisfy before establishing roadsteads because the roadsteads have been there for such a long time -- they were there before the 1930s.

With respect to Kadet Channel, although the traffic separation scheme is almost the median line between Denmark and the G.D.R., the Kadet Channel is two or three feet deeper on one side than on the other side of the line. A traffic separation scheme would not hamper surface vessels. But what about submarines? Throughout my many years in the law of the sea, the navy has told me one thing one day and another thing the next, and I have concluded that this is their way of handling difficult matters, by never really telling you the truth. Based on the length of the German submarines, and how much water they need to pass through submerged, a lawyer can predict that they could go out through this part of the channel. But if they did so, they would be operating very close to a territorial sea limit of the G.D.R. The submarines can also go around the Danish islands and down the Sound, but on this route they cannot pass submerged, not only because of Swedish and Danish laws but also because the water is too shallow. The detour of two to three days may be burdensome. In my opinion, the sophisticated German navy could manage submerged passge through these straits.

Joseph Morgan: Are the roadsteads in any way regulated? Do the nautical charts prescribe anchorages that must be assigned? If so, isn't it desirable for the roadstead to be part of somebody's territorial sea?

Platzoeder: Yes. A great deal of legislation is in force. Ships must observe specific lighting ranges, must maintain constant radio communications, and must use the roadstead if so ordered. These regulations are not the object of dispute between Bonn and Washington.

Bernhard Abrahamsson: I think it is important to note that this is a frequently used roadstead primarily to pick up pilots for various inland ports.

Edgar Gold: Yes, these roadsteads are a well-established part of the port, primarily as a discharge port for liquid and dry bulk cargoes. I have been anchored in such areas half a dozen times, once for a period of 31 days. In general, you are considered to have entered the port once anchored at the roadstead.

I think that we should take note of the point put forward by Judge Oda that the exclusive economic zone articles do give certain rights to the coastal state concerning ship operations. The United States has taken advantage of these rights in adopting its Deep Water Ports Act.

It is regrettable that the Federal Republic of Germany bluntly declared an extension of its territorial sea to 16 miles when a number of nations are nervous about "creeping uniqueness," but Germany could

probably have accomplished its goals through a more subtle claim. We must remember that the law of the sea, like all other law, is not carved in stone, but designed basically to provide a service to international maritime commerce. In this instance the coastal state has obligations to protect the commerce coming into port, and that is the main purpose of this particular extension.

Footnotes

1. *See, e.g.*, North Sea Continental Shelf Cases, 1969 I.C.J. 3, 26, 161, n. 1.
2. As the court has pointed out, when a convention does not allow reservations to its provisions, it is clear that they are regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law. *Id.*, at 38-39. Unlike the Continental Shelf Convention, the Convention on the Territorial Sea and the Contiguous Zone did not provide for reservations; therefore, the roadsteads provision has become a part of customary international law.

CONFLICTS BETWEEN FOREIGN SHIPS' INNOCENT PASSAGE AND NATIONAL SECURITY OF THE COASTAL STATES

Jin Zu Guang
Shanghai Maritime Institute
People's Republic of China

Different state interests, different views on the need for change and different formulae for effecting such change may be observed in relation to the rights of ships to innocent passage in territorial seas, straits used for international navigation, and archipelagic waters. As is known to all, maritime states and coastal states disagree on the rights of innocent passage in the territorial sea. In this paper, the author intends to contribute personal views to seek ways to narrow this gap.

The Development of the Innocent Passage Regime and the Problems of Implementation of the New Law

The notion of the territorial sea and the concomitant right of innocent passage was established in the nineteenth century. Its birth was not without incident but the law and practice of states has crystallized over the years until the outlines of these doctrines are fairly clear. The present rules of international law on passage through coastal waters are to be found in international customary law and in the Geneva Convention on the Territorial Sea and Contiguous Zone (1958).[1] They provide for a regime of innocent passage through the territorial sea including those parts of the territorial sea that form parts of straits used for international navigation. Innocent passage through such straits is specially protected in that the coastal state may not suspend such passage even where suspension is regarded as essential for the protection of its security.

Article 14(1) of the 1958 Territorial Sea Convention provides that ships of all states shall enjoy the right of innocent passage through the territorial sea. The term "passage" was defined and three tests of innocence were established. First, under Article 14(4), passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state. The convention gives no further guidance as to what acts or circumstances might be "prejudicial." The second test, in Article 14(5), relates to the passage of foreign fishing vessels which "shall not be considered innocent if they do not observe such laws and regulations as the coastal state may make and publish in order to prevent these vessels from fishing in the territorial sea."

Finally, Article 14(6) requires that submarines must navigate on the surface and show their flag.

The provisions in the 1982 Convention on the Law of the Sea are quite different. Article 19(1) provides that passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state. Unlike the 1958 Convention, however, it goes on in Article 19(2) to enumerate activities that are considered "prejudicial to the peace, good order or security of the coastal state."

Nearly all these enumerated acts are clearly of such a nature as to render a passage noninnocent. The value of the enumeration, however, lies not so much in what it includes as in what it excludes. Its existence makes "innocence" dependent on conduct during passage and prevents the coastal state from determining the noninnocence of a passage by reference to the character of the vessel, quite independent of its conduct during passage. For example, a coastal state might argue, under the 1958 convention, that the passage of a big oil tanker, a nuclear-powered vessel, or a vessel carrying dangerous chemicals is *ipso facto* noninnocent.

As to the laws and regulations relating to innocent passage, Article 17 of the 1958 convention provides simply that "foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation." But the 1982 Convention is much more specific, providing in Article 21(1) a list of situations in which the coastal state may regulate innocent passage through the territorial sea.

Since the Convention came into the world in 1982, many states, both maritime nations and coastal states, have enacted domestic laws governing the innocent passage of foreign ships. To take China for example, in line with the open-door policy of the Chinese government, several important laws regarding maritime traffic and marine environmental protection laws have already been enacted. Some additional laws relating to maritime law, marine insurance law, customs law and the territorial sea and contiguous zone are now in the course of enactment. One of the major problems is how to keep pace with the relevant international laws and regulations.

As we all know, each country has its own situation and problems and any law belongs to the category of superstructure which must reflect the foundation of economic production. When coastal states make laws they must take account of their own situation and problems, and some provisions in the new laws will, therefore, to some degree, differ from the international laws and regulations. For example, in the Marine Environmental Protectional Law of the People's Republic of China (March 1983), it is provided in Article 45 that "oils" means all kinds of oil and their refined products, which is quite different from the definition in the 1973 Convention for the Prevention of Pollution from Ships (MARPOL)[2] and the International Convention on Civil Liability for Oil Pollution Damage (CLC).[3] Article 27 of China's laws provides that any oil tanker of more than 150 tons gross tonnage or any other vessel of more than 400 tons gross tonnage shall be fitted with appropriate anti-pollution equipment and facilities. Here the meaning of "appropriate anti-pollution equipment and facilities" is much wider than that of the MARPOL Convention.

Article 11 of the Marine Traffic Safety Law of the People's Republic of China (January 1984) provides that no foreign military vessels

may enter the territorial seas of the People's Republic of China without being authorized by the government thereof. Article 39 of the same law provides that the dispatch of vessels or aircraft by foreign countries for entry into or flight over the territorial waters of the People's Republic of China for search and rescue of vessels or persons in distress must be approved by the competent authorities. If we compare these two provisions with the provisions of the 1982 Convention and other international laws, there is no doubt that some differences exist. Thus, I think that the basic problem to solve is the establishment of satisfactory laws that balance the interests of the coastal states and the general interests of international maritime navigation.

The coastal states' regulations must not apply to or affect the design, construction, manning, or equipment of foreign ships or matters regulated by generally accepted international rules unless specifically authorized by such rules. Foreign ships exercising the right of innocent passage are required to comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea. Noncompliance, though it will render the offender subject to prosecution, will not render the passage noninnocent and thus subject to whatever steps are necessary to prevent its passage unless its conduct amounts to one of the acts specified as noninnocent in Article 19 of the 1982 Convention. For example, it is quite possible that the conduct of a foreign fishing vessel might not only render it liable to prosecution under laws and regulations made under Article 21(1)(d) or (e) but might also make the passage noninnocent under Article 19(2)(*i*).

Article 22(1) provides that "the coastal State may, where necessary, having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships." This provision is backed up by the obligation placed upon foreign ships in Article 21(4) to comply with all generally accepted international regulations relating to the prevention of collision at sea. The reference to the prevention of collisions at sea will of course be read as a reference to the new Convention on the International Regulations for Preventing Collisions at Sea (1972),[4] which contains rules complementary to those of Article 21(4) of the 1982 Convention. Rule 10 of the 1972 Collision Convention contains a list of rules to be observed by ships navigating in or through traffic separation schemes adopted by the organization. Hence, states parties will be legally bound to adopt legislation making it mandatory for ships under their flag to comply with the rules enumerated in Rule 10 when navigating in or through traffic separation schemes adopted by the IMO.

To sum up, innocent passage is a sensible form of accommodation between the necessities of sea communication and the interests of the coastal states. In the face of tendencies by some states to claim a broader territorial sea, any proposals to restrict the right will no doubt be met with considerable opposition. Although the 1982 Convention has developed the regime of innocent passage, the exact meaning of innocent passage still remains difficult, not only in precisely stating the conditions of innocence, but also with regard to whether a presumption exists in favor either of foreign ships or of the coastal state in case of doubt. The governing principle allowing the coastal states to establish laws is to ensure national security while safeguarding international navigation.

Differing Views on the Right of Innocent Passage for Warships

As we all know, one of the principles of international law allows any coastal state to have rights and duties inherent in sovereignty; each state may make laws or regulations to limit and control foreign warships' innocent passage so that they can protect their national security to a great extent. At present, some states allow foreign warships innocent passage with certain conditions and others do not allow any foreign warships innocent passage. The former argue that warships belong to the category of "ships," and, like merchant vessels, any warship should enjoy the right of innocent passage without any previous notification and previous authorization. But the latter insist that innocent passage is applied only to merchant ships because allowing a warship innocent passage will cause damage to coastal states' interests and danger to the sea area.

This perspective in fact is not new. It was supported by the famous English scholars, Hall and Oppenheim, and also supported by a U.S. scholar, Jessup. Furthermore, Article 9 of the 1894 Regulations of the Territorial Sea Regime also stresses that "warship" is not included in the meaning of "ships." In 1930, in the conference for compiling international law, Mr. Miller, an American representative said that right of innocent passage could not apply to any warships and that such passage was a matter of international concession. The coastal states were entitled to require any foreign warships to obtain prior authorization. The notes to Article 22 of the "1929 Harvard Law School Draft on Territorial Waters" also provided that the right of innocent passage could not apply to any warships or any other vessels similar to warships.[5] However, under the 1958 Territorial Sea Convention, innocent passage of warships is governed by the "rules applicable to all ships" (Articles 14-17), and Article 23 provides that if any warship does not comply with the regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal state may require the warship to leave the territorial sea.

It should be noted that under this article, when a warship enjoys the right of innocent passage in the territorial sea no prior notification or authorization is needed. As far as I know, many states such as Indonesia and Turkey provide in their laws that any alien warships must give previous authorization when making passage in the territorial sea. Some North European states such as Denmark, Norway, and Sweden provide in their marine laws that warships should obtain previous notification when making innocent passage.

Because the People's Republic of China is not a party to the 1958 Territorial Sea Convention,[6] this international law will not bind it. In the Declaration of Territorial Seas of the People's Republic of China of 1958, it is stated that no military vessels of foreign nationality may enter the territorial seas of the People's Republic of China without being authorized by the government thereof. This view is again confirmed in the 1984 Chinese Maritime Traffic Safety Law of the People's Republic of China.

As is known to all, during the course of UNCLOS III, the Chinese delegation insisted that the coastal state has the right to request that any foreign warship give previous notification of passage, but the final text retained the regime of the 1958 Territorial Sea Convention, and Article 17 of the 1982 Convention provides that "subject to this convention, ships of all states, whether coastal or landlocked, enjoy

the right of innocent passage through the territorial sea." There is no doubt that the meaning of "ships" here covers warships. It is obvious that this law is in favor of military states. It must be met with strong opposition by coastal states because the enforcement of this provision will bring about sharp confrontations between military states and coastal states. Many coastal states will fear that, firstly, the military states have their powerful naval fleets and can carry on military activities with much freedom by using this law; and, secondly, the passage of warships through the coastal state's territorial sea are inherently a threat to their national security. Some coastal states like China and Greece have a very long coastline. It is very difficult to protect their national security effectively if foreign warships are allowed innocent passage without having obtained the government's permission. This concern will be particularly strong during wartime or when political disputes appear between the two sides. Thirdly, the free system of innocent passage for warships is bound to increase the expansion of the military fleets of some maritime or military states, the consequence of which will be prejudicial to the peaceful order of the world.

To cope with the quick development of international law with respect to warships' innocent passage, an urgent task before the coastal states is how to make a new policy to overcome the problems that have possibly appeared before or after the 1982 Convention. There exist three possibilities for solving the problems:

(1) To maintain existing policy; China, for example, has reiterated in recent laws its policy that no military vessels of foreign nationality may enter China's territorial seas without being authorized to do so by the government.
(2) To change the current policy entirely and to allow foreign warships to enjoy the right of innocent passage as much as merchant vessels do.
(3) To allow warships to exercise innocent passage in certain circumstances, by making reference to other regulations of the 1982 Convention and the national security of the coastal state.

A coastal state that does not intend to ratify the new Convention soon will take the first choice. The possibility of taking the second choice is very small because the majority of people and states in the world consider this approach to be bad. The third choice is perhaps the most likely possibility for coastal states like China. This alternative will be preferable even when the coastal states ratify the new Convention.

It goes without saying that fulfilling the third alternative will encounter many difficulties. Basically the following may be involved:

(1) Prior notification should be given when foreign warships enter the territorial sea of the coastal state. The notification should include time, place, nationality, displacement, and number of warships. Prior notification should be given at least one or two weeks in advance. Such a prior notification requirement should not be regarded as a prohibition of the innocent passage of warships. On the contrary, there is not any contradiction between such a requirement and customary international law.
(2) The coastal state should establish laws or regulations for the foreign warships, consistent with the international law of the

sea. Much attention should be paid to the 12 items of Article 19(2) of the new Convention.

(3) To protect national security, special regulations should be set for innocent passage by foreign warships. When making the laws or regulations, the coastal states should consider the following ideas:

(i) Many restraints should be given to the special warships, e.g., submarines should be required to navigate on the surface and show their flags, foreign nuclear-powered ships or ships carrying nuclear weapons should be required to notify or receive authorization by competent authorities in the coastal state in conformity with regulations in force.

(ii) Different rules should govern foreign warships during peacetime and wartime. According to international customary law, some areas during wartime can be prohibited areas for any foreign warships.

(iii) Coastal states may wish to establish some prohibited areas to take account of the economic realities, scientific and technological developments, and geographical characteristics of the country.

(iv) Coastal states may wish to limit the number of warships passing during a certain period or in a certain area, *e.g.*, not over three warships of one foreign state would be allowed in a certain period.

(4) The coastal state should make supplementary laws and regulations in accordance with the 1982 Convention and impose sanctions on any nonobservance or violation of its laws or regulations. If a foreign warship does not comply with the laws and regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance, the coastal state may require it to leave the territorial sea immediately. The flag state shall bear international responsibility for any loss or damage to the coastal state resulting from the noncompliance by a warship or other government ship operated for noncommercial purposes with the laws and regulations of the coastal state concerning passage through the territorial sea or with the provisions of the Convention or other rules of international law.

I must once again mention that the views and suggestions I have offered cannot be regarded as those of the Chinese government. As a scholar of marine law and policy, what I can do is to contribute my personal ideas for the establishment of a satisfactory regime reflecting the common interests of maritime nations and the coastal states.

Footnotes

1. Convention on the Territorial Sea and Contiguous Zone, *done* at Geneva, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.
2. Convention for the Prevention of Pollution from Ships, *done* at London, Nov. 2, 1973, 12 I.L.M. 1319 (1973).

3. International Convention on Civil Liability for Oil Pollution Damage, *done* at Brussels, Nov. 29, 1969, 9 I.L.M. 45 (1970).
4. Convention on the International Regulations for Preventing Collision at Sea, *done* at London, Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. No. 8587.
5. E.T. Feng & Z.Y. Zhou, *Knowledge of the Law of the Seas* (Chinese language ed.) Shanghai 1985; see *Harvard Law School Draft on Territorial Waters*, 23 Am. J. Int'l L. (Supp. 1929).
6. See note 1 *supra*.

DISCUSSION

Distinguishing Innocent Passage from Transit Passage and Archipelagic Sea Lanes Passage

Shigeru Oda: I found Mr. Jin's argument on the innocent passage of warships to be quite interesting. If, under the new regime, transit passage in straits and archipelagic sea lanes passage is recognized for warships, is there any reason for the innocent passage of warships in territorial seas to be included in this regime? The most important thing for warships is merely the passage through straits or archipelagic waters, otherwise very few war vessels may approach within 12 miles of the coastal state. So there would not be many practical problems of innocent passage of warships in the territorial seas.[1]

Joseph Morgan: The innocent passage regulations in Article 19 of the 1982 Convention provide 12 very specific prohibitions, and about half of them are specifically devoted to defining what warships can do. Although warships are never mentioned, such actions as launching and landing aircraft, taking on board any military device, firing guns, and intelligence collection seem clearly relevant to controlling the activities of warships on innocent passage. My personal opinion is that we do not need any more regulations, that they are quite specific, whereas with transit passage and perhaps archipelagic sea lane passage, the wording is vague, and the absence of specific admonitions suggests that more study is required.

Criteria for Chinese Designation of "Prohibited Areas"

Norton Ginsburg: Would you clarify the meaning of that phrase "prohibited areas," because the People's Republic of China has imposed them in the past without giving an explanation as to the justification for them.

Jin Zu Guang: Each country has its own situation. Maybe they considered that for some strategic purpose or some geographical purpose, they will designate some particular place or area as a prohibited area, in order to protect the interest of the country. According to international law, I do not think there are any exact criteria to limit the concept of prohibited areas.

Ginsburg: If there are no criteria, then any criteria can be used, and this creates potentially a very difficult, if not dangerous, situation with regard to world peace, stability, and interrelations among countries, all of which are objectives to which the People's Republic, for example, adheres quite closely.

Self Defense Against Acts of Piracy

Harvey Dalton: There is nothing in international law that prohibits or precludes a merchant vessel or warship, from defending itself against an act of piracy. So if the right of transit passage is, in essence, a reflection of state practice over many, many years, must that merchant vessel transiting a territorial strait, albeit an international strait, go through an area of known danger without charged firehoses or other mechanisms to repel a piratical attack? To me, that is concomitant with the transit passage, so I think you probably answered your question of whether a merchant vessel could do so. The question is whether a warship might accompany a threatened merchant vessel through a strait and therefore qualify for transit passage. That remains to be seen, but I do think that the security of a vessel in transit passage includes the right to repel a piratical attack.

Footnotes

1. See the discussion of the March 1986 U.S. maneuver in the Black Sea at pages 4-5 *supra*.

THE EFFECTS OF NATIONAL CLAIMS

Horace B. Robertson
Duke University Law School
Durham, North Carolina

The common theme of this Workshop has been the preservation of the sea lanes of communications from a variety of threats. The 1982 Convention created regimes designed to balance and protect the interests of coastal states, the interests of states who use the seas for navigation, and the interests of states, such as the United States, with both coastal and maritime interests to protect. Nevertheless, the abuse of the terms of the Convention or abuse of the customary international law it represents threatens the freedom of navigation no matter what state takes advantage of the regime.

Extension of the Territorial Sea

An extension of the territorial sea beyond 12 miles does not today constitute a threat. In most cases the outer limit of the territorial sea is more affected by the establishment of the baseline than by the breadth of the territorial sea.

The breadth of the territorial sea was a concern during practically all my years in the Navy. But now, with the 1982 Convention, the territorial sea may be obsolete. The results sought by extending the territorial sea can be accomplished as effectively, and with less disruption of international navigation, by other means. The Federal Republic of Germany and the German Democratic Republic could have used procedures of the International Maritime Organization (IMO) instead of extending, in one case, a peninsula of territorial sea into the high seas, and in the other, drawing the outer limit of the territorial sea in a rather unique way. In most cases, coastal states' interests are economic, and they can meet these needs by establishment of an exclusive economic zone.

Unique Claims

Lew Alexander's elegant term "creeping uniqueness" (page 107) characterizes both the U.S. marine sanctuary program (pages 283-98 below) and the Canadian Arctic baseline claim (pages 6-8). A claim of uniqueness undermines the carefully balanced system employed in both the 1982 Convention and in customary law.

Renate Platzoeder mentioned that we had used the term "claim" in a pejorative sense to describe the German regime of the territorial sea. The term "claim" in international law is not a bad word. In classic

McDougalian analysis of how international law is formed, a state's assertion of a right is a "claim." Only if that claim is accepted by other states does it become a part of international law.[1] States that "abuse" rights under the guise of pollution control, those that make unique claims for the territorial sea, those that claim particular rights for marine sanctuaries, are actually making claims. Only acceptance from other states transforms those claims into a part of our international legal order.

Finally, I hope that states confine their claims to those consistent with the 1982 Convention, which was the result of ten years of negotiating efforts, and which was itself brought about, as Professor Anand said (pages 127-30 below), by a proliferation of unique claims. Several states, including the United States and the Soviet Union, suggested something was needed to stabilize and bring order to the situation. Unique claims erode that order and may prevent the Convention from obtaining the acceptance we all hope it will receive.

Footnote

1. *See, e.g.*, McDougal and Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 Yale L.J. 648, 655-56 (1955).

Abuse of Rights

Louis Sohn: I would like to note that in the negotiations of the Law of the Sea Convention the particular issue that Professor Robertson has mentioned was addressed in Article 300: "States parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction, and freedoms recognized in this Convention in a manner which would not constitute an abuse of right." This abuse of rights provision is a notion accepted in many legal systems and has a relatively clear meaning that can be used in this kind of unique situation. It would prevent, for instance, a nation from establishing a sanctuary when no real environmental interests are involved, but other interests are at stake.

As Tom Clingan said, an abuse of rights provision is more valuable if combined with dispute settlement because both parties will assert they are acting lawfully and a third party is needed to resolve the dispute.

Thomas Clingan: I agree that Article 300 is a powerful article that will help the Convention to function properly in the future. It is coupled with an adequate dispute settlement procedure.

CHAPTER 4

INTERNATIONAL STRAITS AND TRANSIT PASSAGE

Introduction

In *Transit Passage and Overflight in International Straits*, R. P. Anand traces the development of the idea of transit passage through straits as a concept separate and distinct from innocent passage in territorial waters. After defining international straits and describing their importance to navigation, Professor Anand's paper discusses nineteenth and early twentieth century concepts of freedom of passage through straits, as well as the gradual extension of coastal nations' territorial sea claims. He then discusses the nature of innocent passage through the territorial sea, in particular the historical distinction between the passage of warships and the passage of merchant vessels, and authorization requirements for the innocent passage of warships. This section discusses the 1958 Convention's silence on the subject of warship passage and explains the 1982 Convention's treatment of the subject.

Professor Anand explains how the 1949 ICJ *Corfu Channel* case clarified the straits regime, how the 1958 Convention took a "step backward" to fuse straits and territorial seas regimes, and how the extension of the territorial sea limit to 12 miles influenced the straits regime. Next, the paper discusses the 1967 agreement between the United States and the Soviet Union to keep straits open, and opposition to that plan by nations bordering straits.

Unresolved issues over passage through international straits as defined in the 1982 Convention are analyzed in detail. Professor Anand considers whether transit passage includes submerged passage, and discusses overflight rights, archipelagic passage, and the "package deal" that emerged in negotiations. Finally, the partial U.S. acceptance of the 1982 Convention is discussed along with the reasons why the United States should accept the Convention as a whole.

In *The Passage of Warships Through Straits*, Judge Shigeru Oda of the International Court of Justice (ICJ) asserts that the transit passage regime serves military, not commercial, purposes and interests. Judge Oda describes negotiations at the United Nations Law of the Sea Conferences that led to a right of uninterrupted warship passage through straits. Speaking from the viewpoint of a 1958 delegate to the first UNCLOS meeting, Judge Oda provides insights into the development of the U.S. Navy's policy on transit passage and archipelagic sea lanes passage, and its relationship to the issue of the breadth of the territorial sea.

Judge Oda's presentation is followed by Professor Louis Sohn's commentary on developing law as expressed in the Restatement of Foreign Relations Law of the United States. Professor Sohn also discusses the binding force of customary international law on nonsignatory states -- whether nonsignatories have a right to reject provisions with which they do not agree.

Next the participants discuss three characteristics of transit passage rights: prior notification, undetected passage, and the extended limit of the territorial sea. What is the definition of a "warship"? Which countries supported requirements for prior authorization or notification by warships passing through straits? Does the Convention leave room for the argument that archipelagic states may require prior authorization even though the regime of transit passage through straits does not provide for states bordering straits to do so? Participants discussed whether the Convention's support in Article 39 of the right of submarines to transit through straits in their "normal mode" (i.e., underwater) can be viewed as customary law. Does the extension of the territorial sea boundary from three to twelve miles significantly reduce the coastal state's stake in requiring prior notification or in forbidding undetected passage? This section closes with a dialogue between Admiral Bruce Harlow and Professor William Burke on the question whether transit passage is customary law and with comments on maritime crime and piracy committed against vessels exercising transit passage.

Komar Kantaatmadja's paper, *Various Problems and Arrangements in the Malacca Straits (An Indonesian Perspective)*, first describes the archipelagic character of the state of Indonesia, a nation whose territory is 75 percent ocean. The geographical configurations of the strategically important Malacca and Singapore Straits present navigational challenges to the large vessels that transit these straits between the Indian Ocean and the South China Sea. Professor Kantaatmadja's paper describes the regulatory response to accidents and pollution that heavy use of the straits has caused. Regional arrangements among the three countries in the area of the straits -- Indonesia, Singapore, and Malaysia -- generated traffic separation schemes and other safety regulations. These measures, along with pollution control regulations, are explained in detail.

The Korea Strait by Choon-Ho Park provides historical background on the use of the Korea Strait in international trade and discusses conflicts between Korea and Japan and the Soviet Union. The paper examines the dependence of the countries of Northeast Asia -- Japan, South Korea, and Taiwan in particular -- on maritime transport and describes the region's vulnerability to military power and naval blockades because the strait is on the route to the Soviet naval base at Vladivostock.

Sea lane security is of vital importance to Japan, a country with virtually total dependence on foreign oil imports. Dr. Park's paper uses the 6,100 mile "Japanese oil road" stretching from the Persian Gulf to Kyushu to illustrate the maritime security policy developed by the Japanese Defense Agency in response to perceived threats to the security of this trade route. In commentaries following Professor Park's paper, the legitimacy of Korea's baseline claims are discussed in light of the 1982 Convention and the guidelines suggested in Peter Bernhardt's paper in Chapter 3.

TRANSIT PASSAGE AND OVERFLIGHT IN INTERNATIONAL STRAITS

R. P. Anand
School of International Studies
Jawaharlal Nehru University
New Delhi, India

International Straits: Geographical Definition and Importance

A necessary concomitant of the freedom of the seas is passage or navigation through straits, or those natural narrow passages that join two parts of the high seas. Geographically defined as "a narrow passage of water connecting two larger bodies of water,"[1] the term "strait" is used for waterways ranging in breadth from 800 yards to over 150 miles.[2] A relatively narrow waterway lying between areas of land, a strait may be a channel between continents, a continent and an island, or two islands, and may connect two oceans, two adjoining parts of the same ocean, two by-oceans, or an ocean and a by-ocean. The concept covers islands of an archipelago and is sometimes known as a "sound."[3] Unless these more than two-hundred waterways[4] -- some more important than others -- are kept open and free, they can act as bottlenecks for navigation and communication between states. Some oceans and even some states are accessible only through these passages: the Mediterranean and Aegean Seas open to the oceans of the world through the Strait of Gibraltar, for instance, and the Black Sea is connected with the Mediterranean and other waters through the narrow straits of the Bosporus and Dardanelles. The Baltic Sea flows to the outer ocean through the Danish Straits, and the Straits of Malacca join the Pacific and the Indian Oceans. These straits and many others are essential corridors of international maritime traffic, vital for the freedom of the seas.[5]

Freedom of Passage Through Straits

Mare clausum was abandoned as a policy by the European countries during the nineteenth century, and freedom of the seas came to be universally accepted. In the wake of the Industrial Revolution in Europe, the importance of keeping the oceans open as international highways in the interest of international trade and commerce came to be recognized.[6] In the age of new expansionism and colonization of Asia and Africa, freedom of the seas became a necessity.[7] It came to be universally accepted among the maritime states of Europe and America that the sea -- the great highway for commerce and communications between civilized

nations and the remotest regions of the earth -- should remain unrestricted during times of peace for the complete enjoyment of every nation. Although a small part of the adjacent sea was deemed essential for the security of the coastal state and was accepted as being under its dominion, even this part, it was felt, should be subject to the right of innocent passage by foreign ships, without, of course, compromising the security interests of the coastal state. The right of innocent passage was, therefore,

> the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters. While recognizing the necessity of granting to a littoral state a zone of waters along the coast, the family of nations was unwilling to prejudice the newly gained freedom of the seas.[8]

But even more important, straits that were natural gateways to the ocean could not be permitted to be closed to ships in peace or war, even if the strait states had to sacrifice part of their territorial sovereignty and independence for this purpose. Under the patronage and active participation of the big maritime powers -- especially Great Britain which as the biggest naval power had become policeman of the vast oceans -- even those straits lying within the territorial waters of coastal states were to be kept open, by agreement or otherwise. A number of agreements were concluded to declare freedom of passage through straits in the late nineteenth and early twentieth centuries which are valid even today. Thus the Turkish Straits are regulated by the Montreux Convention of 1934; the Straits of Magellan by the Treaty between Argentina and Chile of 1881 opening the straits to vessels of all nations; the Straits of Gibraltar by the Anglo-French Declaration of 1904 to which Spain adhered by the Franco-Spanish Treaty of 1912; the Danish Straits by Notes exchanged between Denmark and Sweden accompanying the Danish-Swedish Declaration of 1932.[9] An instance of this process of opening an international waterway to free use by all nations was the recognition by Japan, after receiving notes from the French, German, and Russian Ministers, of the Straits of Formosa as a "great sea highway of nations," beyond the exclusive control or appropriation of that country."[10] Not content with natural channels, the maritime powers constructed the artificial straits or waterways of Suez and Panama to serve the same purposes in terms of economic geography and navigation, namely, piercing an isthmus to afford easy access between two portions of the high seas.

Despite the importance of straits for navigation and communication between states in the heyday of the freedom of the seas doctrine, however, there was always some hesitation on the part of numerous strait states to accept the unquestioned right of all ships to pass through their waters irrespective of their security and other interests. Most of the strait states claimed territorial sea jurisdiction in straits unless the straits were much wider than double the territorial sea claimed by them. The big maritime states disagreed, contending that if a strait was wider than double the limits of the so-called traditional territorial sea of three miles claimed by them, i.e., broader than six miles, there was supposed to be a high seas corridor in the strait, open to free navigation by the ships of all nations. This, in practice, was never accepted. Indeed, coastal states generally claimed jurisdiction over the entire strait beyond even the limits it normally claimed for its territorial sea. Thus by a Protocol of March 10, 1873, the United States and Great Britain fixed the northwest water boundary between the United

States and Canada as a line running midway in the Strait of Juan de Fuca which ranges between 10 and 15 miles in width.[11] In his exhaustive study on straits in 1947, Bruel said that the situation in which a strip of high sea runs through an entire strait "rather belongs to the literature than to reality."[12] Especially during war, the strait states' concern was to protect their territories or maintain their neutrality, and they could not permit unrestricted navigation through straits and subject themselves to the crossfire of belligerents just because nature had put them on the crossroads of the world's oceans.[13]

The tension between the demands of the international community -- especially the maritime powers -- to keep the straits open and free for navigation, on one hand, and demands of the coastal states to protect their security, economic, and other interests on the other, continued and became even more pronounced after the Second World War. Despite the desires and pressure of he maritime powers to keep the straits free for navigation (and although several conventions or agreements had been concluded about navigation in some important straits) international law was still ambiguous about (1) the definition of a legal strait;[14] (2) mere "use" or "indispensability" of a strait for communications; and (3) whether innocent passage through a strait was an exceptional right or an application of the rule relating to the territorial sea.[15] Further, although it was generally conceded that warships had a right of passage through straits, in time of war or in peace, this issue was tied to the question of innocent passage of warships through the territorial sea. The maritime nations contended that warships had a right of passage through straits superior to their right of innocent passage through the territorial sea. These ambiguities persisted until the *Corfu Channel* case and although it was generally felt that the coastal state could not legally forbid passage through its international straits, the doctrinal basis of such a right remained a matter of controversy.[16] It was always considered to be merely a specific instance of innocent passage through the territorial sea. This is how it was treated at the Hague Codification Conference in 1930.[17] It is important to note that the concept of "innocent passage" through territorial waters was ambiguous, and the limits of these waters remained a subject of intense dispute among states.

Territorial Waters

Since the acceptance of the utility of the freedom of the seas in the nineteenth century, the maritime powers, interested in keeping the vast expanses of the oceans open, wanted the territorial sea to be as narrow as possible. Although the sovereign rights or jurisdiction of a state over part of the sea was generally recognized by the usage of nations and opinion of publicists, there was no agreement as to the extent of the "territorial waters," or "maritime or marginal sea," or "maritime belt," as it came to be variously called. Different limits were suggested at various times. Some early Italian jurists suggested 100 miles, or a distance from shore as could be covered in two days' navigation.[18] In several treaties and ordinances in the sixteenth and seventeenth centuries, the range was determined by the visual horizon.[19]

Because "protection" was the objective of the coastal state's claim to a belt of the sea, its extent was supposed to be measured by the power of the littoral sovereign. This vague principle was defined and translated into a maxim by a Dutch scholar, Bynkershoek, a judge of the Supreme Court of Appeals of the Netherlands. In his book on the *Dominion of the Sea* published in 1703, he declared that the territorial

dominion of a state extends as far as projectiles could be fired from cannon on the shore: "The dominion of the land ends where the power of arms terminates."[20] This distance was generally viewed as one marine league or three nautical miles at that time. Thus was born the so-called "cannon shot" rule. Although there is a difference of opinion among scholars about the exact range of cannon in the eighteenth century,[21] the three-mile rule came to be accepted and adopted by the big maritime powers, especially Great Britain, because it was an attractive compromise between the security, fishery and other economic interests of the coastal states and the needs of the European countries to keep the oceans open and free.[22]

The three-mile rule was not, however, a universally accepted limit of the territorial waters, and writers and diplomats differed on the limits of jurisdiction that a state might exercise in neighboring seas for the protection of its security and other interests. The Scandinavian countries claimed one marine league in matters relating to customs control, sanitation regulations and fisheries, but their league extended to about four miles;[23] Spain and Portugal claimed six miles; Italy, between three and ten miles; and Russia, 100 Italian miles. This disagreement continued throughout the nineteenth and into the twentieth century with countries adopting various limits as suited their interests or whims. Thus, the three-mile rule was accepted by Great Britain and adopted in several agreements and treaties that Great Britain concluded with several other European countries -- Belgium, France, Germany, Poland and Holland; the United States also adopted this rule, especially after 1876. Russia, on the other hand, declared in 1912 a 12-mile territorial sea; Italy, 10 miles; Spain and Portugal continued to claim six miles; and Scandinavian countries, four miles. In 1911, Fulton said: "There are very few writers ... who are of the opinion that the three-mile rule has become established in international jurisprudence as the legal limit, notwithstanding that it is commonly adopted."[24]

The British position was "commonly adopted" by members of the British Commonwealth of Nations and some smaller states "due in great measure to the prepondering influence of Great Britain and America in marine affairs, the lesser states following their example, willingly or with reluctance."[25] As late as 1919, another English writer of authority, W.E. Hall, said:

> It may be doubted, in view of the very diverse opinions which have been held until lately as to the extent of which marginal seas may be appropriated, of the lateness of the time at which more extensive claims have been fully abandoned, and of the absence of cases in which the breadth of the territorial waters has come into international question, whether the three-mile rule has ever been unequivocally settled.[26]

It is not surprising that at the Hague Codification Conference in 1930, despite strong support for the three-mile rule by the big maritime powers -- Great Britain, the United States, France, Germany and Japan -- it could not be accepted as a general rule of international law. Twenty countries were in favor of a three-mile territorial sea; but eight of them would accept this limit only on the condition that a contiguous zone of some kind should be recognized, which was not acceptable to Great Britain. Twelve states demanded six miles, the Scandinavian states four miles, and some were in favor of not fixing a uniform distance for all purposes and all countries.[27] Summarizing the position

after the Conference, Professor Manley Hudson said: "The history of the last century has failed to invest the 'three-mile limit' with any particular sanctity, and recent conquest of distance makes it seem in many respects archaic."[28]

This disagreement increased after the Second World War with the developments in science and technology and revelations of a new undersea world full of natural resources beyond the wildest dreams. It is only natural that most states sought to extend coastal jurisdiction for the exclusive exploitation of these resources.

An attitude of uncertainty predominated during the discussions on the width of the territorial sea in the International Law Commission during 1950 to 1956. In its 1956 report to the UN General Assembly, the Commission was not able to reach any agreement on the territorial sea. It noted in its commentary that it was an "incontrovertible fact" that there was no uniformity as regards the territorial sea, that "the extension by a state of its territorial sea to a breadth between three and twelve miles was not characterized by the Commission as a breach of international law," but that "international law did not justify an extension of territorial sea beyond twelve miles."[29] No agreement could be reached on the breadth of territorial waters at the first two UN Conferences on the Law of the Sea in 1958 and 1960. The Convention on the Territorial Sea and Contiguous Zone, adopted in 1958, prescribed only that:

> The contiguous zone may not extend beyond twelve miles from the baselines from which the breadth of the territorial sea is measured.

Because the contiguous zone is by definition contiguous to the territorial sea, it has been argued that, *a fortiori*, the breadth of the territorial sea could not extend beyond twelve miles under the 1958 Convention. But this could not be accepted as a general rule without a clear agreement and did not deter states from continuing to claim wider and wider limits. Although some of the delegations at the 1958 Conference assumed and pronounced the three-mile rule "dead and buried,"[30] the United States asserted

> that the three-mile rule is and will continue to be established international law to which we adhere. It is the only breadth of the territorial sea on which there has ever been anything like common agreement.[31]

The United Kingdom, France, Japan, and Germany endorsed the U.S. view.[32]

The U.S. position became further eroded after 1960 when coastal states continued to claim broader territorial seas. The number of states claiming a 12-mile territorial sea increased from 13 in 1960 to 54 in 1974 on the eve of the first substantive session of the Third UN Conference on the Law of the Sea at Caracas. Another 17 states claimed territorial waters ranging from 15 to 200 miles. It is important to note, however, that 25 states, including most of the Western maritime powers, continued to cling to the largely discredited three-mile formula.[33]

Despite the hesitation of the Western maritime powers to adopt both the 12-mile territorial sea and the 200-mile exclusive economic zone, these concepts were generally acceptable to most delegations at Caracas and were endorsed subsequently at almost every formal session of UNCLOS

III. Besides a large number of proposals supporting these limits, including some by Australia, Canada, the United States, the Soviet Union, and other Communist states, it is important to note that not a single country opposed these extensions.[34] In fact, as the U.S. delegation to the Caracas Conference pointed out in its report, "agreement on 12-mile territorial sea is so widespread that there were virtually no references to any other limit in the public debate."[35] With such widespread support, an agreement on the limits of the territorial sea was reached for the first time in history and is contained in Article 3 of the 1982 UN Convention on the Law of the Sea which provides:

> Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Innocent Passage Through Territorial Sea

Just as the nations disagreed throughout this century on the territorial sea, they also disagreed about the right of foreign ships to navigate through these waters. Although everyone agreed and accepted the concept of the freedom of innocent passage through the territorial sea, the meaning of "innocent passage" was not clear and there was a continuing controversy about the passage of warships. Because the chief, or perhaps the sole, reason for the acceptance of a right of innocent passage was "because of a recognition of the freedom of the seas for the commerce of all states,"[36] this right came to be confined to merchant vessels or other governmental vessels, and did not extend to warships. As the Harvard Law School Draft on Territorial Waters declared in its commentary on the eve of the 1930 Hague Codification Conference:

> There is ... no reason for innocent passage of vessels of war. Furthermore, the passage of vessels of war near the shores of foreign states and the presence without prior notice of vessels of war in marginal seas might give rise to misunderstanding even when they are in transit. Such considerations seem to be the basis for the common practice of states in requesting permission for the entrance of their vessels of war into the ports of other states.[37]

Jessup confirmed this state of the law:

> As to warships, the sound rule seems to be that they should not enjoy an absolute legal right to pass through a state's territorial waters. As Mr. Root has said: "Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and repass because they do not threaten."[38]

The right of innocent passage, even for merchant ships, did not exist in internal or inland waters, nor when the vessel of another state was "approaching the port of a state through its marginal seas or when she is entering or leaving a port of that state."[39] These rules, forming part of customary law, came to be codified for the first time in 1958 in the Convention on the Territorial Sea and Contiguous Zone.

Guaranteeing ships of all states the right of innocent passage through the territorial sea (Article 14(1)), the 1958 Convention defined "passage" to mean "navigation through the territorial sea for the purpose of traversing the sea without entering internal waters, or of proceeding to internal waters, or making for the high seas from internal

water" (Article 14(2)). Article 14(3) explained that "passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress."

Defining the innocence of passage, Article 14(4) declared a passage to be "*innocent so long as it is not prejudicial to the peace, good order or security of the coastal state.* Such passage shall take place in conformity with these articles and with other rules of international law." Because no specific criteria existed or could be established as to when a passage was prejudicial to the peace, good order and security of the coastal state, wide latitude was given to a coastal state to declare a passage noninnocent. If the coastal state did decide that a particular passage by a foreign vessel was not innocent, under Article 16(1), it might "take the necessary steps in its territorial sea to prevent such passage." It might also under Article 16(3), "without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published."

While exercising their right of innocent passage, submarines were "required to navigate on the surface and to show their flag" (Article 14(6)). If they acted otherwise, their passage would be noninnocent.[40]

Innocent Passage of Warships

Since the doctrine of innocent passage came to be established in the middle of the nineteenth century, the question of the right of passage of warships has remained controversial and coastal states have been reluctant to permit passage without previous authorization or at least notification. State practice was conflicting.[41] The U.S. Agent in the *North Atlantic Coast Fisheries Arbitration*, Mr. Elihu Root, argued that warships did not have such a right "without consent ... because they threaten. Merchant ships may pass because they do not threaten."[42] This statement has often been cited by governments and jurists to deny the existence of a right of passage for warships.[43] In response to the questionnaire addressed to governments by the Preparatory Committee of the Hague Codification Conference in 1930 on the right of innocent passage for warships, sixteen governments replied affirmatively, including the Soviet Union, and five governments replied negatively, including the United States, or were of the opinion that previous authorization was required before the right of passage could be exercised. At the Conference in 1930, not all delegations discussed the passage of warships, but the United States bluntly denied that there was a right of warship passage, because innocent passage existed primarily for commerce, and, so far as warships were concerned, it was wholly a question of usage and comity.[44] The United States was not an exception in this regard. The general discussion at the Conference

> revealed almost no support for the equivalent rights of warships and merchantships to traverse the territorial sea, but rather a tendency to favor the view that in times of a threat to national security passage of warships could be prohibited, and even the view that in normal times previous authorization, or at least previous notification, was required.[45]

The International Law Commission, in its 1956 draft presented to the 1958 UN Conference on the Law of the Sea, suggested that:

> The coastal state may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the provisions of Articles 17 and 18.

In its commentary, the Commission said:

> While it is true that a large number of states do not require previous authorization or notification; the Commission can only welcome this attitude which displays a laudable respect for the principle of communications; *but this does not mean that a State would not be entitled to require such notification or authorization if it deemed it necessary to take this precautionary measure.* Since it admits that the passage of warships through the territorial sea of another State can be considered by that State as a threat to its security, and is aware that a number of states do require previous notification or authorization, the Commission is not in a position to dispute the right of states to take such a measure.[46]

If, however, a coastal state had not enacted and published such a restriction, the Commission added, the foreign warships could pass without previous notification or authorization provided they did not enter a port.[47]

The International Law Commission's text, as it was presented to the conference favored the policies of the Soviet bloc. The United States, however, which until the Second World War had consistently opposed the passage of warships through territorial sea without authorization, had changed its stance. Having emerged as the greatest maritime power, it was now interested in the widest freedom of navigation even for its warships. The United States and its allies in NATO were strongly opposed to any limitation on the freedom of the seas, whether in the form of an extension of the territorial sea or a limitation on the passage of warships. Such a limitation, they thought, favored the Soviet Union which possessed the largest fleet of submarines that could operate undetected for long periods in neutral states' territorial waters without surfacing. Extension of territorial waters coupled with restrictions on free passage of warships, they felt, would have the effect of exposing the mobility of NATO warships and aircraft to crippling jurisdictional restrictions.[48]

But in spite of strong opposition by the United States and other NATO powers, the ILC's proposed text of draft Article 24 was adopted in the First Committee on April 10, 1958.[49] When the matter came before the Plenary Meeting on April 27, 1958, parliamentary tactics were employed by the NATO countries to reverse the situation. Italy sought a separate vote on the words "authorization or" in ILC draft Article 24 and the motion was carried, by a vote of 45 to 27 with 6 abstentions, to delete these words.[50] The effect now was to subject innocent passage of warships to procedures of notification only. Denmark, arguing that there was now no question of the need to seek permission of the coastal state, suggested that the article be redrafted. Defeated on the substance of the article, the Soviet Union organized sufficient support to ensure that the truncated article did not obtain the requisite two-thirds majority.[51] It was, therefore, not included.

The bizarre result of this diplomatic struggle at Geneva was that the 1958 Convention contains no provision on the subject of passage of warships through the territorial sea, but includes Article 23, as suggested by the International Law Commission, which states that if a warship does not comply with the regulations of the coastal state, the latter may require it to leave the territorial sea. This provision survived because the Commission had fortuitously made it a separate article rather than a part of the composite article on straits.[52]

The absence of an article on innocent passage of warships is sometimes interpreted by scholars and diplomats to mean that no restrictions are permissible on the passage of warships. This is said to be supported by Article 14 in which "all ships," including warships it is asserted, are given the right of innocent passage. Furthermore, Article 23 is said to permit the coastal state to regulate the use of the territorial sea by foreign warships, but not to require previous permission for their transit.[53]

Some countries and publicists argue, on the other hand, that the expression "ships" in Article 14 means merchant ships because the inclusion of warships, in the light of long-standing customary law, would have required an express provision; that Article 23 authorized the coastal state to insist on prior permission as part of its regulatory competence; and that this interpretation is supported by customary law which authorized the coastal state to exclude foreign warships from the territorial sea at will.[54] It is important to note that when the Soviet bloc countries, ratified the Geneva Convention, they made declarations that they considered that the coastal state has a right to establish procedures for the authorization of the passage of foreign warships through its territorial waters.[55]

With this historical record, it is difficult to conclude that warships have an untrammeled right of innocent passage through territorial waters. Because the 1958 Convention is silent on the subject, it must be interpreted in light of customary law. The consequence and result of the rejection of the controversial article relating to warships by the Geneva Conference was to shelve the issue and relegate the question of innocent passage to customary law[56] which did permit coastal states to require notification and authorization before such passage was permitted. Professor Sorensen also points out that "the proceedings of the conference leave no room for doubt" that the majority of delegations did not want warships to have the same rights as other ships.[57] In fact, it may be noted, that a majority of states do require authorization and others require at least prior notification of transit of warships.[58]

UNCLOS III and the Passage of Warships

During the Third UN Conference on the Law of the Sea (UNCLOS III), the Soviet Union and its allies quietly dropped their strong objections to innocent passage of warships through territorial waters. The new identity of interests among the major naval powers led to substantially identical proposals by NATO and Warsaw Pact countries to include warships in the rules relating to innocent passage.[59] Thus, the Informal Single Negotiating Text of 1975 contained no distinctions between warships and merchant ships (Article 29(2)). The opposition to the right of innocent passage of warships shifted during the Conference from the Soviet bloc to a few Third World countries,[60] which were both afraid of the super powers and wanted to protect their coastal areas from being used for military maneuvers by foreign ships.

It is significant that the Revision of the Single Negotiating Text between the 1975 and 1976 sessions of the Conference omitted the reference to warships and thus restored the situation that existed under the 1958 Geneva Convention. The requirement that warships comply with the law and regulations of the coastal state, provided in the 1958 Convention, was included without any change or discussion except for a reference to leaving the territorial sea "immediately."[61] The result is that the legal situation concerning the innocent passage of warships through the territorial sea remains practically the same in the 1982 Convention as it was under the Geneva Convention in 1958.

Although the 1982 Convention defines innocent passage in the same terms as the 1958 Convention as passage that "is not prejudicial to the peace, good order or security of the coastal state" (Article 19(1)), unlike the 1958 Convention it contains a catalogue of actions, applicable to all ships, that render the passage noninnocent. Proposed originally by both NATO and Warsaw Pact blocs to minimize fears concerning the innocent passage of warships, the catalogue was included in the Convention even after reference to "warships" had been removed. They are now applicable to "all ships" exercising the right of innocent passage as provided in Part II, Section 3 of the Convention. The catalogue of actions contained in Article 19 refers to such actions as "any threat or use of force against the sovereignty, territorial integrity or political independence of a coastal state," "any exercise or practice with weapons of any kind," the collection of information prejudicial to the defense or security of the coastal state, acts of propaganda affecting the security of the coastal state, etc. (Article 19(2)). The adoption of this catalogue to some extent presumes the right of innocent passage for warships, because the activities generally concern the mode of passage of warships.[62]

Like the 1958 Geneva Convention, the 1982 Convention requires submarines and other underwater vehicles "to navigate on the surface and show their flag" while exercising their right of innocent passage (Article 20).

The Corfu Channel Case and the Straits Regime

As noted earlier, in spite of the importance of straits for international navigation and although several treaties had been concluded for navigation of some important straits, there was no clear legal concept of an "international strait," much less a straits regime,[63] until the *Corfu Channel* case (Merits) was decided in 1949.

In this case, two British warships were fired upon by Albanian coastal batteries while the ships were within the Albanian part of the strait of Corfu, which lies between the island of Corfu, a part of Greece, and the coasts of Albania and Greece. Part of the strait is within the territorial water of Albania and part within that of Greece. The 1946 incident touched off a controversy between the United Kingdom and Albania regarding the claim of innocent passage for the former and the claim to require notification and authorization for passage by foreign warships and merchant vessels by the latter. Because the dispute could not be settled, the United Kingdom decided to test the Albanian attitude by sending warships through the strait. During the attempted passage through the Albanian part of the strait, two British destroyers struck mines and forty-four officers and men lost their lives, forty-two officers and men were injured, and serious damage was caused to the two ships. In November 1946, the United Kingdom announced its intention to minesweep the Albanian part of the strait to collect evidence of mine

laying and proceeded to do so without the consent of Albania. On the recommendations of the UN Security Council, the dispute was submitted to the International Court of Justice. Rejecting Albania's contention that the passage by British warships through the strait was a violation of Albanian sovereignty for which the United Kingdom was responsible, the Court said:

> It is in the opinion of the Court, generally recognized and in accordance with international custom, that states in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal state to prohibit such passage through straits in time of peace.[64]

The Court noted that the two riparian states, Greece and Albania, did not maintain normal relations, that Greece considered itself technically at war with Albania, and that Albania considered it necessary to take certain measures of vigilance in the region. "In view of these exceptional circumstances," said the Court, Albania "would have been justified in issuing regulations in respect of the passage of warships through the strait, *but not in prohibiting such passage or in subjecting it* to the requirement of special authorization."[65]

Whether the coastal state can require notification before the passage of a warship is not clear from the judgment. It is clear, however, that the Court rejected the Albanian arguments (a) that the Corfu Channel was the type of strait that would require prior authorization, (b) that it was not an important strait, (c) that it was not a necessary route between open sea areas, and (d) that it was used mainly for local traffic between Corfu and Sarvanda. The Court's opinion said:

> It may be asked whether the test is to be found in the volume of traffic passing through the strait or in its greater or lesser importance for international navigation. But in the opinion of the Court, the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic seas. It has nevertheless been a useful route for international maritime traffic.[66]

It is clear from the decision that the coastal authority over passage of warships and other ships is limited to the exclusion of non-innocent passage. The Court interpreted the term "innocent passage" broadly in this case. Even an otherwise provocative passage of a British force consisting of two cruisers and two destroyers, close to the coast of Albania, was held to be innocent because its purpose was to assert a right against previous and anticipated forceful attempts to deny it. It must be stressed, however, that even under such a restrictive interpretation of the coastal state's right to refuse passage, it still has wide discretion and, of course, the authority at least in the first instance, to decide whether a passage is or is not innocent.

Straits in the 1958 Geneva Convention

In its 1956 draft submitted to the Geneva Conference, the International Law Commission recommended that:

> There must be no suspension of the innocent passage of foreign ships through straits *normally* used for international navigation between two parts of the high seas ...

In its commentary, the Commission said that "it would be in conformity with the Court's decision to insert the word "normally" before the word "used" in this article, "which was suggested" by the *Corfu Channel* decision.[67] In the final provision relating to straits, however, the word "normally" was deleted from the Commission's draft on an amendment proposed by the United States. It was said that the *Corfu Channel* decision had not so qualified the word "used".[68] The objective of the proponents of the amendment was to assure passage through straits which were actually used and to avoid friction over the concept of normal use.[69] Article 16(4), as finally adopted, stated:

> There shall be no suspension of innocent passage through straits which are used for international navigation between one part of the high seas and another part of the high seas *or the territorial sea of a foreign state*.

The last eight *italicized* words, called the Aqaba Clause, were added over the strong objections of Indonesia, Saudi Arabia, and other Arab countries because of the Arab-Israeli dispute over access to Israel's territorial waters in the Gulf of Aqaba through the straits of Tiran. It is thus apparent that the 1958 Geneva Convention not only reaffirmed the broadly conceived conception of straits in the *Corfu Channel* case through which warships and merchant vessels have a right of innocent passage and which cannot be arbitrarily denied by the coastal state, but extended it further and made it more liberal.

But it is important to note that the 1958 Convention, like past practice, dealt with the question of straits in the context of innocent passage in the territorial sea,[70] provided for in section III ("Right of Innocent Passage"), Sub-section A ("Rules Applicable to All Ships"). Thus although Article 16, paragraph 4 provides for innocent passage through straits, paragraph 3 permits a state "to suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security." A shadow is further cast over the right of free passage through straits by Article 23, the only "Rule applicable to warships:"

> If any warship does not comply with the regulations of the coastal state concerning passage through the territorial sea and disregards any request which is made to it, the coastal state may require the warship to leave the territorial sea.

In other words, whether intentionally or otherwise, the 1958 Convention supported the contentions of the dissenting judges in the *Corfu Channel* case. Judge Krylov, the Russian judge, was emphatic that it made no difference that territorial waters constituted an international strait because:

> Contrary to the opinion of the majority of judges, I consider that there is no such thing as a *common* regulation of the legal regime of straits. Every strait is regulated individually.[71]

Judge Azevedo also asserted that there was no special regime for straits and that they are governed by the rules governing the territorial sea:

> Some writers consider that the wide differences between one strait and another prevent the adoption of any general rule. The situation of the chief straits is already governed by special conventions, and new measures will have to be framed to deal with cases that may be found to be of importance in the future. According to this theory, often referred to at the Hague, all other straits will be subject to the normal rules applicable to the territorial sea.[72]

The assimilation of the regime of straits with that of the territorial sea in the 1958 Convention was a step backward for all those supporting a special regime for straits. As Professor Baxter said, it would eliminate any --

> separate body of doctrine relating to straits, for the law respecting passage through territorial waters within a strait would differ in no respect from the principles having application to passage through the territorial sea of a state which does not form part of a strait. The absence of any distinction between the law of straits and the law of the territorial sea would entail as one of its consequences the ability of the coastal state to suspend the right of innocent passage of merchant vessels in a strait, as in other territorial waters, for the protection of its security. (As provided in Article 16(4)). The passage of warships through a strait might likewise be made subject to the regulations of the coastal state. (Article 23). To recognize such powers in the riparian state would impose needless and undesirable limitations on any "right" of free passage.[73]

Extension of the Territorial Sea and Straits Passage

After the failure of the 1958 and 1960 Conferences to reach agreement on the limits of the territorial sea, the frequent extension of coastal state maritime zone jurisdiction to 12 miles threatened to enclose within double the territorial sea limits another 116 straits. The three-mile rule would have left a strip of high seas between them. Freedom of navigation through major straits, such as the Dover Strait, the Strait of Gibraltar, the Bering Straits, Bab-el-Mandeb, and the Strait of Hormuz, became more precarious, because they came under the coastal states' problematic territorial sea jurisdiction and discretion. The territorial seas regime requires submarines to surface and show their flag, and there is no right of innocent passage for aircraft through the airspace above the territorial sea. This regime thus leaves the coastal state with wide discretion to declare any particular passage as noninnocent, the passage of nuclear-powered ships, for instance, or big oil tankers.

It is also important to recall the changed political environment after the two UN Conferences on the Law of the Sea. Before the Second World War, most of the strategic and vital straits, especially in Asia and the Middle East, were under the control of the maritime powers

interested in keeping them open (and claiming a narrow territorial sea of three miles). With the collapse of colonialism, new states emerged which were concerned more with their own security and economic interests and were not enamored with the "freedom of the seas" doctrine which had long been used and abused to their disadvantage. Indeed, feeling that unlimited freedom of the seas was against their interests, they wanted to curb it.[74] Some of these newly independent states were strait states now able and willing to control these important waterways to protect their vital interests. As the trend to extend territorial waters gathered momentum after 1960, most of these straits became part of the territorial seas subject to numerous controls and limitations imposed by the coastal states. In fact, some of these states went further and sought to make certain important straits internal waters subject to their absolute sovereignty. Thus, Indonesia and the Philippines, two newly independent archipelagic states, sought to employ the method of strait baselines joining the outermost points of the outermost islands of the archipelagoes for delimitation of their extended territorial waters,[75] thereby enclosing some of the most important straits, e.g., Lombok, Macassar, and Malacca.

US-USSR Agreement on Keeping Straits Open

This trend was totally unacceptable to the maritime powers. The Soviet Union, which until the 1958 Geneva Convention was opposed to a special regime for straits, quietly changed its position and became interested in keeping the straits as free as possible. Concerned about the increasing prospects of their closure, both the Soviet Union and the United States agreed in 1967:

(1) to fix the maximum breadth of the territorial sea at 12 nautical miles; and
(2) to preserve explicitly in international straits traditional freedoms of navigation as had existed in the pre-12-mile territorial sea regime.

They also contemplated calling an international conference on the law of the sea limited to these issues and began to elicit the consent of various countries through diplomatic means.[76] At the same time, Ambassador Arvid Pardo of Malta focused international attention on the potential value of the deep seabed minerals and suggested that they be declared "the common heritage of mankind," and that an international regime be established for their exploration and exploitation. As a result, a consensus developed for a law of the sea conference, but it was to be comprehensive in nature, and not confined to the navigational issues as contemplated by the United States and the Soviet Union. Nevertheless, for both the superpowers, navigational freedom through territorial seas and straits was the paramount issue to be addressed and resolved at the conference.[77]

As the Sea-Bed Committee (established by the General Assembly to prepare for the Third UN Conference on the Law of the Sea) started functioning, the maritime powers made clear their intention to keep the straits open. In his 1970 ocean policy statement, President Nixon emphasized the need for a treaty establishing a 12-mile limit for territorial seas and "free transit through international straits."[78] The maritime powers realized, however, that in spite of their strong intention to retain a three-mile limit, they could not force others to roll back their territorial seas. To ameliorate the situation, the United States

introduced a set of Draft Articles on the Breadth of the Territorial Seas, Straits and Fisheries in Subcommittee II of the Sea-Bed Committee on August 3, 1971. After recognizing the right of the coastal states to extend their territorial sea to 12 miles, Article 2 provided:

> In straits used for international navigation ... all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight as they have on the high seas. Coastal states may designate corridors suitable for transit by all ships and aircraft through and over such straits ...

The United States representative said in Subcommittee II of the Sea-Bed Committee that "in addition to the importance of sea navigation for their international trade, many states depended upon air and sea mobility in order to exercise their inherent right of individual and collective self-defense."[79] He pointed out that "the security of the United States and its allies depended to a very large extent on the freedom of navigation on and the overflight of the high seas. More extensive territorial seas, without the right to free transit of straits, would threaten that security."[80] In the U.S. view, the right of free transit through straits was "an indispensable adjunct to the freedom of navigation and that of overflight on the high seas themselves." Moreover, the regime of innocent passage provided for in the 1958 Convention on the Territorial Sea was "inadequate when applied to international straits" because it was a subjective standard subject to abuse. Some states, he said, had in fact claimed that certain types of passage -- by nuclear-powered ships and super tankers -- should be considered as noninnocent *per se*.[81]

The United States reiterated that it would not accept any extension of the territorial sea from three miles to twelve miles unless the right of *free passage* through international straits was accepted. It demanded freedom of unobstructed passage for warships, including nuclear submarines, on the surface or submerged, without notification and irrespective of mission. Further, it wanted freedom of civilian and military flights through the superjacent airspace. These rights were claimed not only in those straits that were wider than six miles and were supposed to have, at least theoretically, a corridor of high seas in their midst, but in *all straits irrespective of their breadth or importance*.

The United States was willing to accept and "observe reasonable traffic safety and marine pollution regulations," that is to say, regulations that were "consistent with the basic right of transit." The safety standards to be applied in straits, however, should be established by international agreement and should not be unilaterally imposed by the coastal state.[82]

As to the free transit of aircraft, the United States stated that civil aircraft already enjoyed transit rights over the territory of other states, under the Convention on International Civil Aviation and the International Air Service Transit Agreement. But such rights were not available to state aircraft. The United States demanded a right of free transit for all aircraft over straits, but also stated that such aircraft need not be routed over the strait itself but, at the coastal state's discretion, could be directed through "suitable corridors over land areas."

The United States was supported on this issue not only by the Western maritime powers, like the United Kingdom, France, West Germany, and others,[83] but also by the Soviet Union and Communist bloc countries

which also insisted that the limited right of "innocent passage" was not sufficient and "had never been and could never be applied to such straits as those of Gibraltar, Dover, Malacca, Singapore and Bab-el-Mandeb, where freedom of navigation had always been enjoyed."[84] In accordance with these views on July 25, 1972, the Soviet Union proposed "Draft Articles on Straits used for International Navigation."[85]

Although "the coastal state should be given appropriate guarantees of its security and protection against pollution of the waters of its adjacent straits," the Soviet Union, like the United States, was convinced that "the concept of innocent passage could not be accepted as applying to the principal straits used for international navigation because it was too widely interpreted as a concept giving, so to speak, the last word to the coastal state or states concerned." Refusal to recognize the principle of free passage would mean, according to the Soviet Union, "establishing the domination of only 12 to 15 states adjacent to straits over the passage of vessels of some 130 states of the world."[86] The reversal of the Soviet Policy from its stand in 1958 was, of course, the result of the emergence of the Soviet military capability -- naval, fishing, and merchant marine -- during the subsequent two decades.[87]

Opposition by Strait States

Skeptical of the true intentions of the maritime powers and fearful for their own security and sovereignty, the small coastal and strait states strongly objected to the right of "free passage" (instead of "innocent passage") through international straits. By "championing a superficial freedom of navigation," their representatives decried, the big powers were actually seeking authority to "interfere in the domestic affairs of states situated thousands of miles away from their shores."[88] The major powers, they argued, "should admit that the time in which they used to behave as owners and masters of the seas is passed. And they should agree and cooperate honestly for the establishment of a new order that will be adequate to present realities."[89] Any attempt to set up separate regimes for the territorial sea and for straits, they felt, "would clearly violate the fundamental principle of the sovereignty of the coastal state over its territorial sea." Strait states, they pleaded, could not "be expected to sacrifice any part of their national sovereignty for the exclusive benefit of the military and strategic interests of a few other states."[90]

The maritime powers had reservations about the concept of "innocent passage" and feared that the coastal state might use subjective criteria for determining whether a passage was or was not innocent. The developing nations recognized that the maritime nations had these concerns, but pointed out that passing ships might also use subjective criteria in deciding that their passage was not prejudicial to the coastal state. "Why should coastal states allow passing ships to determine what would endanger their interests and security?" they asked.

The principle of "free transit," they contended, might lead to a variety of unfortunate results. For instance, coastal state patrols might misinterpret the presence of military vessels and become involved in a confrontation. Foreign warships might meet other unfriendly warships with results detrimental to the coastal state. Moreover, a foreign military presence could cause domestic consternation and political upheaval, or create misunderstandings between the coastal state and its neighbors. If warships and submarines are engaged in harmless innocent passage there should be no reason for them not to let the coastal state

know of their presence.[91] If free transit were permitted, it was contended, military vessels and aircraft passing through international straits would enjoy freedom from law or regulation, a status never enjoyed by any navigator.[92]

The 1982 Convention

Despite the misgivings and apprehensions of the smaller coastal and strait states, which they repeated at the Caracas conference in 1974,[93] the maritime powers were not prepared to give up their demands. Both the superpowers and their allies left no one in doubt that "unless unimpeded passage on, over and under straits used for international navigation was conceded to all commercial vessels and warships, including submarines, there was simply no possibility of coming to an agreement on the subject of national jurisdiction and other issues."[94] They indicated that they were prepared to make concessions on other issues, e.g., the exploitation of deep seabed resources,[95] and accept wide coastal jurisdiction, even the claims of archipelagic states,[96] provided their naval mobility was not affected.

Over the objections of the strait states, an agreement seemed to be emerging at Caracas for the acceptance of unimpeded transit passage through straits. A large number of countries from the "Group of 77" supported this position. The Single Negotiating Text of 1975 reflected this agreement and provided for a non-suspendable "transit passage" through straits which, after several revisions, came to be included in the 1982 Convention. As finally adopted, the Convention provides for a guaranteed non-suspendable transit passage through straits and archipelagic waters, subject only to the power of the coastal state to make certain rules related to navigational safety, pollution, and fishing. For the first time, the Convention provides separate regimes for "innocent passage" through the territorial sea, laid down in Part II, Section 3 (Articles 17 to 32), and "Transit Passage" through International Straits, laid down in Part III, Section 2 (Articles 37 to 44), and Section 3 (Article 45), the latter applicable only to special straits. The right of transit passage applies to "straits which are used for international navigation between one part of the high sea or an exclusive economic zone and another part of the high seas or an exclusive economic zone." (Article 37). But transit passage does not apply to:

(1) Straits formed by an island of a state bordering the strait and its mainland if there exists seaward of the island a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. (Article 38(1)).
(2) Straits used for international navigation between one area of the high seas or an EEZ and the territorial sea of a foreign state. (Article 45(1)(b)).

For these two categories the right of "innocent passage" is deemed sufficient which, however, cannot be suspended (Article 45(2)).

Transit passage is defined as:

> the exercise in accordance with this part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an EEZ and another part of the high seas or an EEZ. However, the requirement of continuous and expeditious transit does

not preclude passage through the strait for the purpose of entering leaving or returning from a state bordering the strait subject to the conditions of entry to that state (Article 38(2)).

Article 39 lays down the duties of ships and aircraft while exercising the right of transit passage, such as (1) to proceed without delay through or over the strait; (2) refrain from use of force against the sovereignty, integrity, or independence of the bordering states, or in any manner in violation of the principles of international law; (3) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress. The ships and aircraft are also expected to comply with the generally accepted international regulations, procedures, and practices for preventing collisions and avoiding pollution; and aircraft must comply with the rules of the air established by ICAO or otherwise (Article 39(2)-(3)).

The coastal states have been authorized under Article 41 to designate sealanes and prescribe traffic separation schemes for navigation after receiving the approval of the IMO. They may also adopt rules and regulations regarding navigation, pollution, fishing, and loading and unloading in transit.

Does Transit Passage Include Submerged Passage?

Serious criticism has been made of these provisions and some have questioned whether "transit passage" as defined in Article 38 includes a right of submerged transit for submarines.[97] It is suggested that because the term "freedom of navigation" in Article 38 is accompanied by so many qualifications and restrictions,[98] and because there is no express mention of submerged passage, that this "freedom" was not intended to include submerged passage. Even if the negotiators sought to include such a right, it is argued, it is substantially qualified and hedged by numerous restrictions so that the text does not clearly and unequivocally "guarantee" a right of submerged passage. Professor Knight feels, for example, that the phrase "solely for the purpose of continuous and expeditious transit" qualifies the exercise of "freedom of navigation" so that it cannot be given its traditional meaning when bound by such a limitation.[99]

Secondly, it has been argued that the reference to "normal modes of continuous and expeditious transit" in Article 39(1)(c) does not refer to and does not authorize submerged transit and ought to be understood to mean surface transit.[100] According to Professor Reisman, the term "normal" might or might not mean submerged transit, because the significance of "normal" depends upon a great many variables in a given instance.[101]

Thirdly, Professor Knight suggests that Article 20 requiring surface-transit by submarines in the territorial sea, is not necessarily inapplicable to the territorial sea in straits. He derives this conclusion from an examination of Article 34, which provides that the regime of transit passage in certain straits "shall not in other respects affect the legal status of the waters forming such straits." Because submerged passage is not expressly permitted through straits, Knight argues that Article 34 therefore means that those straits remain as territorial sea to which Article 20 is applicable, or Article 45 which provides for innocent passage only in straits to which transit passage is inapplicable.[102] But in light of Article 45, as Professor Burke points out,

virtually the only important differences between innocent and transit passage are the rights of submerged passage and overflight; if these rights are not appurtenant to transit passage, Article 33 (now 34) approaches meaninglessness."[103]

The convoluted reasonings of Professors Knight and Reisman "rest almost completely on textual exegesis and manipulation of words without regard for, and with virtually no reference to, the negotiating context."[104] Considering the history of the drafting of these provisions and the emphasis that the United States, the Soviet Union and other maritime powers put on unimpeded passage through straits, including submerged passage for submarines and right of overflight for the aircraft, there can be no doubt that transit passage through straits clearly covers those rights. As John Norton Moore said: "To argue that Article 34(1) prohibits submerged transit in the face of the overwhelming textual evidence to the contrary is logic chopping at its worst."[105] He adds: "And in the real world of ocean politics, it is nonsense to believe that either the United States or the Soviet Union would accept a law of the sea treaty that did not fully protect freedom of navigation through straits."[106]

Overflight Rights

Although customary law never permitted a right of overflight over the territorial sea, the Convention text states explicitly that transit passage includes overflight rights (Articles 38(1), and 39). Article 39 specifies the duties of aircraft in transit, and Article 44 says that the strait state is prohibited from hindering the transit passage of an aircraft.

Archipelagic Passage

Part IV of the Convention establishes a right of "archipelagic sea lanes passage" through the archipelagic waters and adjacent territorial sea seaward of archipelagic baselines. This right, spelled out in Articles 52 to 54, is in all major respects the same as the right of transit passage through straits as defined in Articles 37 to 45. In fact, Article 54 expressly incorporates by reference Articles 39, 40, 42, and 44 of the straits chapter. It is well known that the concept of mid-ocean archipelagoes was accepted only subject to "archipelagic sea lanes passage," including rights of overflight and submerged transit.[107]

"Package Deal"

The above analysis shows that although the importance of straits as necessary doorways to make freedom of the seas effective had always been recognized, a separate straits regime has come to be accepted for the first time in history in the 1982 Convention on the Law of the Sea. As Professor Reisman points out, "'transit passage' is a neologism; it lies somewhere between 'freedom of navigation' on one hand, and 'innocent passage' on the other. It is a compromise, a concession or a second-best solution."[108] The 1982 Convention is a classic example of the progressive development of international law, which cannot be divorced from the codification of existing international law. It not only accepted the area of the seabed beyond the limits of national jurisdiction as the "common heritage of mankind," but provided complex machinery for its exploration and exploitation. The Convention also codified the historical maritime practices of states. It formally adop-

ted a 12-mile territorial sea, a 200-mile EEZ, a novel archipelagic regime, unimpeded archipelagic passage through archipelagic waters, and numerous other rules which the coastal states had already begun to adopt during the ten years of negotiations for the Convention.

The Convention was negotiated and accepted as a "package deal." The issues were interconnected. Several delegations made it clear that their willingness to accept one or more of the claims and proposals depended upon the acceptance of other claims and proposals.[109] The emphasis on the integrity of the "package deal" dominated the debates at various sessions. As Professor Oxman said:

> The "balance" of the Convention is so delicate, and the web of implicit bargains and complex relationships so opaque, that any attempt to take serious action on the premise that no article has been agreed to would surely prove as destructive as it is naive.[110]

Undoubtedly much usage attains legal *imprimatur* in treaties and becomes accepted as binding custom. It is equally true, as the International Court of Justice also confirmed in the *North Sea Continental Shelf* cases,[111] that "generalized provisions in bilateral and multilateral treaties generate customary rules of law binding upon all states."[112] But not all rules in a treaty, nor all treaties, may give rise to a rule of customary law binding even on nonparties. Only those treaties that have "generalizable rules can have that effect,"[113] provided there is a "a very widespread and representative participation in the convention."[114] It may be difficult to infer such an effect for several naval provisions adopted by the 1982 Convention that were accepted only as a compromise or as *quid pro quo* for some other provisions. Indeed, although the Convention is binding as a "package" these novel provisions, including transit passage through straits, at variance with customary law or based on uncertain practice and adopted for the first time, cannot be said to give rise to binding custom in a short time without sufficient practice.[115] Nor can nonparties take benefit of certain provisions without accepting the burden of others.

The United States Accepts Some Parts of the Convention

In March 1983, the United States claimed sovereign jurisdiction over a 200-mile EEZ as provided in the 1982 Convention, and thereby sought to take advantage of parts of this treaty. In an accompanying statement President Reagan stated:

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

He made it clear that:

> The United States will exercise and assert its navigation and overflight rights and freedoms on a world-wide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in uni-

> lateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high sea uses.[116]

Also, in this statement, President Reagan rejected the Convention's deep seabed mining provisions "as contrary to the interests and principle of industrialized nations."[117]

In a "Fact Sheet on U.S. Ocean Policy" issued on the same day by the White House, it was claimed that "the concept of the EEZ is already recognized in international law ... Over 50 countries have proclaimed some form of EEZ; some of these are consistent with international law and others are not."[118]

Although 78 countries claimed a territorial sea of 12 miles (and another 26 claimed even wider limits),[119] the White House said that:

> The President has not changed the breadth of the United States territorial sea. It remains at 3 nautical miles. The U.S. will respect only those territorial sea claims of others in excess of 3 nautical miles, to a maximum of 12 nautical miles, which accord to the U.S. its full rights under international law in the territorial sea. Unimpeded commercial and military navigation and overflight are critical to the national interest of the United States. The United States will continue to act to ensure the retention of the necessary rights and freedoms.[120]

The United States policy could be described in a single phrase: "Heads I win, tails you lose." As David Larson said:

> Clearly, the President's strategy was to pick and choose the benefits of the UN Convention for navigation and overflight so as to avoid the costs of deep seabed mining. That is, Reagan was explicitly trying to undo the package deal of transit passage in exchange for revenue-sharing in deep-seabed mining, which is at the heart of the trade offs and compromises of the single, comprehensive treaty."[121]

This is precisely what the other countries were not prepared to accept. During the March 1983 session of the Preparatory Commission, the Group of 77 declared, "its firm opposition to any action by states which have not signed the Convention to apply selectively, whether unilaterally or jointly, the provisions of the UN Convention on the Law of the Sea while continuing to reject the provisions relating to the international seabed area."[122]

On April 23, 1983, the Soviet Union said that:

> The United States ... ignores the fact that the Convention is integral and indivisible. It is a thoroughly balanced package of accords on all closely interlinked problems related to the regime of marine expanses, the use of the ocean's living and mineral resources. Any attempt arbitrarily to pick out some of its provisions, while discarding others, are incompatible with the law and order established by the Conventions on the seas and directed against the legitimate interests of the other state.[123]

Still insisting on the largely rejected 3-mile limit for the territorial sea along with some of its allies and some small countries unable

to extend it farther for geographical reasons,[124] the United States realized that it cannot force other states to limit their territorial waters jurisdiction. Any challenge to their sovereignty in these extended waters by a preponderant majority of states would be strongly resisted. Thus, in 1979 there were news reports that the United States had instructed its forces to exercise the freedom of the high seas up to the 3-mile limit off the coasts of other nations. Various ministries requested immediate clarification, some issuing statements that such a policy was illegal and would violate their sovereignty.[125] The group of coastal states at UNCLOS III also declared:

> The Group of Coastal States noted with surprise and concern recent media reports that the Government of the United States had "ordered its Navy and Air Force to undertake a policy of deliberately sending ships and planes into or over the disputed waters of nations that claim a territorial limit of more than three miles." In the view of the Group of Coastal States such a policy ... is highly regrettable and unacceptable being contrary to customary international law, whereby a great majority of states exercise full sovereignty in their territorial seas up to a limit of 12 nautical miles, subject to the right of innocent passage. That policy is also inconsistent with the prevailing understanding at the UNCLOS which has recognized the validity of such a practice .... The Group of Coastal States considers the statement that the regime of the high seas commences beyond three miles as clearly an anachronism.[126]

Statements criticizing the U.S. position were made by Angola, Argentina, Brazil, China, Colombia, Costa Rica, Ecuador, El Salvador, Peru, the Philippines, and Vietnam. The Soviet Union said that the Group of Coastal States was "justified in its anxiety to which the Soviet delegation was sympathetic."[127] In this environment, Professor Oxman was correct when he said that "it should be a warning to those who, in preference to a treaty, would rely on the major powers to make and enforce the law."[128]

The United States insists that it will not accept the 12-mile territorial sea adopted in the 1982 Convention unless its freedom of transit passage recognized in the Convention is also accepted. Most states, however, accepted the 12-mile territorial sea in practice before the provision relating to transit passage was ever discussed or formally proposed by the United Kingdom in 1974. As Professor Burke noted:

> The legal contention, mainly advanced by the U.S., is weak and self-serving. By the late 1960's and early 1970's, if not even earlier, it was plain that a 12-mile territorial sea was the single most popular limit among states and that there was absolutely no prospect of confining this region to a three-mile width. Indeed by the time the legal argument for free transit was being emphasized, most straits were already fully incorporated within the claimed territorial sea of adjoining states (Malacca, Gibraltar, Bab-el-Mandeb, Hormuz, etc.) and it was clearly evident to most observers that international law permitted a territorial sea out to twelve miles. The reality was that straits states had claimed a 12-mile territorial sea which incorporated these areas within national maritime territory and it was no longer tenable to negotiate as if this fact did not exist or as if less than 12 miles would be

> required by international law in the future, if the conference failed to produce a treaty.[129]

He pertinently remarked that the continued U.S. insistence on a 3-mile limit might "be laid solely to considerations of superior strength and not to expectations about conduct in conformity with law."[130]

The transit passage regime for straits came to be accepted in UNCLOS III, through hard bargaining and as a concession to the maritime powers for their agreement to accept wider coastal state jurisdiction in the EEZ and continental shelf, and an international machinery for the exploration and exploitation of deep seabed resources. Because the United States seeks to reject its part of the "package," the other states -- straits states -- are not bound to accept their part of the bargain. Thus, at the concluding session of UNCLOS III Arias Schreiber of Peru, spokesman of the Group of 77, ruled out third state rights under the Convention.[131] Iran specifically denied the right of non-parties to transit passage in its declaration to the Convention.[132] Spain, Morocco, and Oman also are reported to have declared that they recognize "innocent passage" rather than "transit passage" through Gibraltar and Hormuz. Indonesia and Democratic Yemen spoke against third state rights at the final session of UNCLOS III. Committed to keeping these straits open, the United States may be prepared to use force. This would certainly raise the stakes and cost of passage against the determined opposition of so many smaller states.

The United States could protect the mobility of its military and commercial fleets and aircraft through a series of bilateral and multilateral agreements with straits states. But the political, economic, and military costs of negotiating a number of such satisfactory agreements would far outweigh the costs and concessions involved in signing the 1982 Convention.

With the development of nuclear missiles capable of hitting virtually any target from practically any point in the sea, the need for unobstructed transit passage is questionable. Thus, according to Richard Darman:

> With the increased range and sophistication of U.S. missiles and missile launching submarines, it is arguable that transit through straits is not necessary to assure strategic deterrence.[133]

Pirtle also contends that the Trident system, with its increased range and accuracy, will minimize the importance of straits passage for submarines.[134]

Professor Burke has argued that:

> there appears to be a very insubstantial basis for concluding that the security position of the powers employing nuclear or other submarines would be materially prejudiced by requiring these craft to travel on the surface through straits or parts of the territorial sea. There may be, on the other hand, understandable apprehensions on the part of coastal communities about the use of national territory, without notice or knowledge, by foreign military craft of great strategic and tactical significance.[135]

He pointed out that the development of underwater surveillance systems makes undetected passage through straits improbable.[136]

In view of these developments it is obvious that the security interests of the United States, particularly interests associated with military functions, "have been predominant in the development of U.S. policy toward a comprehensive treaty on the law of the sea."[137] Trading an ideologically offensive seabed mining regime with a highly undesirable limit on production for the protection of freedoms of navigation seems, according to Darman, disproportionate. Trading these objectionable elements for "questionable interests in treaty protection of distant water military mobility seems to tie to the past at the expense of the future. And trading them to protect interests that might just as well be protected without a comprehensive treaty seems no trade at all."[138]

These views are rejected by other scholars who argue that they underestimate the value of transit passage to protect U.S. strategic interests. As Moore said:

> The importance of straits transit goes far beyond the military needs of any particular country at any point in time. The real issue is whether we will have a lasting oceans regime that protects the navigational heritage of all nations while meeting the legitimate concerns of coastal states. In what may be its principal achievement, UNCLOS has developed such a regime for straits."[139]

The United States Should Accept the Convention

It is unfortunate that the United States continues to reject the 1982 Convention which establishes this "successful regime" for straits, and settled numerous other issues of the law of the sea that had remained uncertain and controversial. All this for the sake of seabed mining provisions which may not be applicable for several decades.[140] The United States may be able to take advantage of a few provisions of the Convention that have already become customary law. But it cannot assume that other states will accept its view of the development of customary law, especially in regard to freedom of navigation through territorial sea and straits. The point is not whether the other states are right or wrong. As Ratiner points out, "what is dangerous for the United States is the existence of the argument and the potential uncertainty of its military rights in narrow seas during times of crisis."[141] The United States may indeed be correct in its interpretation of the rights of transit passage. Its stand may eventually be vindicated by an international judicial body. But the United States cannot risk its strategic interests on a view of the law that is disputed by a large number of states. As former U.S. Ambassador to the Law of the Sea Conference, Elliot Richardson, said:

> Analysis of the law of the sea, particularly by lawyers, tends to focus on legal substance while ignoring the importance of international consensus in maintaining the international environment needed to support optimum flexibility in global deployments. It is not enough merely to insist that freedom of navigation and overflight beyond a narrow territorial sea and unimpeded transit through, under, and over straits are essential. Nor is it enough to be prepared to assert our rights in the face of challenge. Our strategic objectives cannot be achieved unless the legitimacy of these principles is sufficiently accepted by the world at large so

that their observance can be carried out on a routine operational basis.[142]

It seems that a golden opportunity to make the controversial law of the sea into a widely accepted and recognized constitution of the ocean is being lost because of unfounded fears of the United States. These carefully drawn rules have been formulated after long and tedious negotiations with the United States playing a pivotal role in the whole process. It is high time that the leader of the free world and champion of the rule of law, both in national and international society, accepts this Convention and helps in making the law of the sea clear, precise, and effective.

Footnotes

1. *See* D. Stamp (ed.), *A Glossary of Geographic Terms* 436 (1968).
2. At its narrowest point the Dardanelles Strait is only 800 yards wide. On the other hand, the Hudson Straits are about 155 miles wide. *See* K.L. Koh, *Straits in International Navigation Contemporary Issues* 11 (1982). Some scholars refer to the difficulty of separating "in principle" gulfs from straits. Thus Hall refers to the Strait of Juan de Fuca (ranging from 10 to 15 miles in width) which he says possesses some of the characteristics of a gulf. W.E. Hall, *A Treatise on International Law* 195 (8th ed. 1924), *noted in* Koh, *id.* The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, *done* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, guaranteed in Article 16(4) passage through the Strait of Tiran connecting the Gulf of Aqaba and the Red Sea. See Koh, *id.*
3. *Id.* at 12.
4. Koh gives a list of 220 such straits from a list by W. Smith, *Strategic Quality of International Straits* (1973) (unpublished M.A. dissertation available at the University of Rhode Island), *noted in* Koh, *supra* note 2, at 24-26.
5. *See* R.H. Kennedy, *A brief geographical and hydrographical study of straits which constitute routes for international traffic*, Preparatory Document No. 6, 1958 UN Conference on the Law of the Sea (hereafter UNCLOS), UN Doc. A/CONF. 13/6 (23 Oct. 1957).
6. For historical details of the European abandonment of *mare clausum* and acceptance of the freedom of the seas in response to the needs of the industrial revolution, *see* R.P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* 129-37 (1983).
7. It took Europe nearly two centuries to appreciate the reasonableness of Grotius' thesis of *mare liberum* because of the pressure from the commercial and later industrial revolutions. *See* Anand, *id.* at 137 *et seq.*
8. P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 120 (1927).

9. *See* Shaw, *Juridical Status of the Malacca Straits in International Law*, 14 Japanese Annual J. Int'l L. 34, 35-36 (1976).
10. *Quoted in* R.R. Baxter *The Law of International Waterways* 8 (1964).
11. *Id.* at 5.
12. Bruel, *International Straits* 41 (1947).
13. Chile declared the Strait of Magellan as part of its territorial sea for the purpose of defending its neutrality. See Baxter, *supra* note 10, at 6.
14. At the Hague Conference in 1930, the German delegate pointed out that, while there was a geographical notion of a strait, "no general definition of the term exists in international law". *Quoted in* Koh, *supra* note 2, at 13.
15. *Id.*
16. *See* 1 D.P. O'Connell, *The International Law of the Sea* 301-05 (I.A. Shearer ed. 1982).
17. *Id.* at 303-06; *but see* Gidel, *cited in id.* at 305-06.
18. *See* T. Fulton, *The Sovereignty of the Sea* (1911 & reprint 1976) 539-31; C. Colombos, *The International Law of the Sea* 92 (6th ed. 1967).
19. Fulton, *supra* note 18, at 544-46.
20. *See id.* at 538-49.
21. Some scholars question the connection between "cannon shot" and the "three mile" limit of the territorial sea, since cannons fired much less powerfully in the 18th century. *See* Walker, *Territorial Waters: The Cannon Shot Rule*, 22 Brit. Y.B. Int'l L. 212, 231-31 (1945); *see also* Anand, *supra* note 6, at 138-39.
22. *See* Jessup, *supra* note 8, at 7.
23. Walker, *supra* note 21, at 228.
24. Fulton, *supra* note 18, at 688.
25. *Id.* at 681.
26. W.E. Hall, *A Treatise on International Law* 157 (7th ed. 1919).
27. *See* Colombos, *supra* note 18, at 124-05.
28. Hudson, *The First Conference on the Codification of International Law*, 24 Am. J. Int'l L. 447, 457 (1930).
29. 2 Y.B. Int'l L. Comm'n 265 art. 3.2 (1956).
30. *See* Garcia Amador, UNCLOS 2 Off. Rec. (53d mtg.), 2 UN Doc. A/CONF. 13/38 165 (1958); Ba Han, *id.* at 166. *See also* Anand, *supra* note 6, at 180.
31. Arthur Dean (U.S.), *id.* at 69; quoted in Anand, *id.*
32. *Id.* 38-39; *see also* Anand, *id.*
33. *See* Anand, *Freedom of Navigation Through Territorial Waters and Straits*, 14 Indian J. Int'l L. 169, 171 (1974); *see also* Anand, *supra* note 6, at 198.
34. *See* Stevenson & Oxman, *The Third UN Conference on the Law of the Sea: The 1974 Caracas Session*, 69 Am. J. Int'l L. 1 (1975).
35. *See U.S. Delegation Report on UNCLOS III* (Caracas) at 29.
36. Jessup, *supra* note 8, at 120.
37. *See Harvard Law School Draft on Territorial Waters*, 23 Am. J. Int'l L. (Supp. at 245)(1929); *see also* Colombos, *supra* note 18, at 261.
38. Jessup, *supra* note 8, at 120; *see also* Hall *quoted in* Jessup, *id.*
39. *See Harvard Draft*, *supra* note 37, at 295.
40. *See* Anand, *supra* note 33, at 173-75 (further discussion of innocent passage under the 1958 Convention).
41. *See* O'Connell, *supra* note 16, at 274-81.
42. *See supra* note 38.
43. O'Connell, *supra* note 16, at 277.

44. *Quoted in id.* at 282.
45. *Id.* at 283.
46. Report of the Int'l L. Comm'n, *supra* note 29, at 277 (emphasis added).
47. *Id.*
48. *See* Dean, *Geneva Conference on the Law of the Sea: What Was Accomplished?*, 52 Am. J. Int'l L. 607, 610-12 (1958); *see also* O'Connell, *supra* note 16, at 288-89.
49. *See* UNCLOS 3 Off. Rec. (1st Committee), UN Doc. A/CONF. 13/C.1/L.37/Con.2 212 (1958); *see also, id.* at 131, para. 25.
50. UNCLOS Off. Rec. (plen. mtgs) (1958) at 67, para. 28.
51. *Id.* at 68, para. 46.
52. *See* O'Connell, *supra* note 16, at 289.
53. This is the position taken not only by NATO Powers, Australia and New Zealand, but it is supported by several writers like Verzil, Kelsen, Jessup, Pharandand and Fitzmaurice. *Id.* at 290 n. 204.
54. Besides the Soviet Union and its allies, this interpretation was supported by the Philippines, Indonesia and Malaysia. Several scholars, Brownlie, Groethem, Slomina, Colombos and Tunkin, also agree with this interpretation. See O'Connell, *supra* note 16, at 291.
55. *Quoted in id.* at 291.
56. *Id.*
57. *See* Max Sorenson, *The Law of the Sea* 235 (International Conciliation No. 520, 1958).
58. *See* O'Connell, *supra* note 16, at 290, n. 205; I. Brownlie, *Principles of Public International Law* 189 (3d ed. 1979).
59. *See* U.K., Bulgaria, G.D.R., Poland, USSR, Malaysia, Morocco, Oman Yemen and Fiji, UNCLOS III, 3 Off. Rec. 183, 192, 196, 203.
60. For example: Bangladesh, Somalia, Sri Lanka, Maladives, Sudan, Yugoslavia, and Yemen passed laws requiring prior authorization before transit of warships. See O'Connell, *supra* note 16, at 293.
61. Article 30, United Nations Convention on the Law of the Sea, *done* Dec. 10, 1982, 21 I.L.M. 1261 (1982); UN Pub. E. 83.V.5 (1983).
62. *See also* O'Connell, *supra* note 16, at 292.
63. *See* Bruel, *International Straits* 46 (1947). *See also* Koh, *supra* note 2, at 12-13; O'Connell, *supra* note 16, at 305.
64. Corfu Channel (Gr. Brit. v. Alb.), 1949 I.C.J. at 28.
65. *Id.* at 29 (emphasis added).
66. *Id.* at 28.
67. 2 *Y.B. Int'l L. Comm'n* 273 (1956).
68. UNCLOS 3 Off. Rec. UN Doc. A/CONF. 13/c 1/L.39 220 (1958).
69. *Id.* at 95, para. 66.
70. *See* O'Connell, *supra* note 10, at 316.
71. 1949 I.C.J. at 74.
72. *Id.* at 104.
73. Baxter, *supra* note 10, at 166-67.
74. *See* Anand, *Tyranny of the Freedom of the Seas Doctrine*, 12:3 International Studies 416, 427 (July-Sept. 1973).
75. *See* Anand, *Mid-Ocean Archipelagoes in International Law: Theory and Practice*, 19 Indian J. Int'l L. 228, 238-42 (1979).
76. *See* Harlow, *UNCLOS III and Conflict Management in Straits*, 15 Ocean Dev. & Int'l L.J. 197, 199 (1985).
77. *Id.* at 199-200.
78. Sub-Committee II of the Committee on the Peaceful Uses of the Sea-Bed (hereafter Sea-Bed Committee), 26 UN GAOR Suppl. (No. 21A/

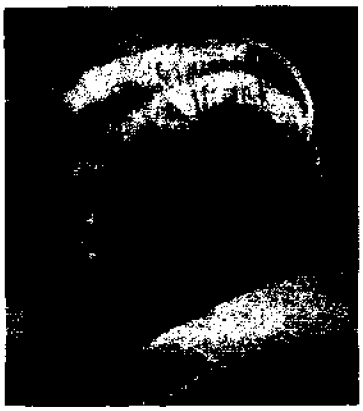
8421) at 241, UN Doc. A/A.C. 138/S.C. II/L.48.
79. Stevenson (U.S.), UN Doc. A/A.C. 138/S.C. II/SR8 45-47 (Aug. 3, 1971).
80. Stevenson, UN Doc. A/A.C. 138/S.C. II/SR. 37 65 (July 28, 1972).
81. *Id.* at 63.
82. Stevenson, *supra* note 80, at 25.
83. *See* Anand, *supra* note 33, at 182-83.
84. *See* Kolesnik (USSR), UN Doc. A/A.C. 138/S.C. II/SR.69 2-4 (July 24, 1973); *see also* Sapozhnikov (Ukranian SSR), UN Doc. A/A.C. 138/S.C. II/SR. 71 23 (Aug. 8, 1973).
85. UN Doc. A/A.C. 138/S.C. II/L.7 (July 25, 1972).
86. *See* Kolesnik, *supra* note 84.
87. *See* M. Janis, *Sea Power and the Law of the Sea* 31 (1976).
88. *See* Egyptian delegates, *Report of the 9th Session for the Asian-African Legal Consultative Committee at Lagos* 320 (1972).
89. A. Schreiber (Peru), Sea-Bed Committee, UN Doc. A/A.C. 138/SR.60 188 (April 4, 1973).
90. R. Morales (Spain), *id.*
91. *See* Djalal (Indonesia), *id.* at 191.
92. Warioba (Tanzania), Sea-Bed Committee, UN Doc. A/A.C. 138/S.C. II/SR.58 137-38 (April 2, 1973).
93. *See* UNCLOS III, Off. Rec. UN Doc. A/CONF. 62/C.2/L.16 192 (July 22, 1974) (introduced by Malaysia, Morocco, Oman, Yemen).
94. *See* Stevenson & Oxman, *supra* note 34, at 5.
95. The Nixon administration was prepared for this trade-off. See L. Ratiner, *quoted in* Anand, *UNCLOS and the U.S.*, 24 Indian J. Int'l L. 153, 162 (1984).
96. Most of the objections to the wide archipelagic claims of countries like Indonesia and the Philippines were raised because of the threat to international navigation; *see* Anand, *supra* note 75, at 250.
97. Such criticisms were made and doubts raised by Prof. H. Gary Knight and Prof. Michael Reisman in memoranda submitted to Senator Barry Goldwater as Chairman of a Senate Committee on the Law of the Sea negotiation in 1976. *See* Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty*, 52 Wash. L. Rev. 193 (1977); *see also* Reisman, *The Regime of Straits and National Security: An Appraisal of International Law Making*, 74 Am J. Int'l L. 48 (1980).
98. These conditions are said to be provided in Articles 38 to 40 which set forth the duties of passing ships and regulatory competence of the strait state.
99. Knight, *quoted in* Burke, *supra* note 97, at 207.
100. *Id.* at 212.
101. Reisman, *quoted in* Burke, *id.*
102. Knight, *quoted in* Burke, *id.* at 214.
103. Burke, *id.* at 215.
104. *Id.* at 202; see also John Norton Moore, *The Regime of Straits and the Third UNCLOS*, 74 Am. J. Int'l L. 77, 89 (1980).
105. Moore, *id.* at 93.
106. *Id.* at 121.
107. *Id.* at 111.
108. *See* Reisman, *supra* note 97, at 68.
109. *See* Stevenson & Oxman, *supra*, note 34, at 765.
110. Oxman, *The Third UNCLOS: The Eighth Session 1979*, 74 Am. J. Int'l L. 47 (1980).
111. 1969 I.C.J. at 38.

112. A. D'Amato, *The Concept of Custom in International Law* 104 (1971); see Anand, *UNCLOS and the U.S.*, *supra* note 95, at 188 (1984) (detailed discussion of treaty-custom dichotomy).
113. A. D'Amato, *supra* note 112.
114. 1969 I.C.J. at 43-45.
115. Prof. Reisman observes: "By its nature, submerged passage is not the sort of practice that generates customary rights. The notoriety and opportunity for parties thereafter subordinated -- requisite components of formation of prescriptive rights can hardly be fulfilled when the strait state does not or cannot know of the passage or lacks the means of stopping it. And even if such practices were deemed to have generated customary rights in one strait, they could not *ipso facto* be applied to all straits, nor would they be probative of features of surface or aerial passage." Reisman, *supra* note 97, at 57. *See also* the discussions on 156, 161-62, and 310-11 in this volume.
116. *See* Larson, *Security Issues and the Law of the Sea: A General Framework*, 15 Ocean Dev. & Int'l L. J. 99, 136-37 (Appendix B) (1985).
117. *Id.* at 136.
118. Appendix C, *id.* at 139.
119. *See Summary of Territorial Sea and Fishing Claims*, U.S. Dept. of State (1984) in Larson, *id.* at 140.
120. Larson, *supra* note 116, at 140.
121. *Id.* at 111-12.
122. 18 *Soundings* 4 (1983); see also Schreiber (Peru), Seabed Committee (185th mtg.), UN Doc. S.E.A./M.B./2 5 (Dec. 6, 1982); Castaneda (Mexico), *id.*; Ballati (Trinidad & Tobago), *id.* at 6; Nandan (Fiji) UN Doc. 3 (Dec. 7, 1982).
123. *Soundings*, *id.* at 3.
124. See a list of 26 such states including Bahrain, Belize, Brunei, Chile, Dominica, Qatar, Saint Vincent and the Grenadina, Singapore, Solomon Islands, Tuarolu and UAE. Larson, *supra* note 116, at 141.
125. *See* UN Doc. A/CONF. 62/85 (Aug. 22, 1979) (declaration by Foreign Ministers of Colombia, Ecuador, Chile, and Peru), *quoted in* Oxman, *supra* note 110, at 9.
126. *See* Oxman, *id.* at 10.
127. *Id.* at 11.
128. *Id.*
129. Burke, *Contemporary Law of the Sea: Transportation, Communication and Flight* in Occasional Paper of the Law of the Sea Institute 14, (1975). *But see* Moore, *supra* note 104, at 115-16 (UNCLOS creating custom for transit passage).
130. Burke, *id.* n. 87.
131. UN Doc. A/CONF. 62/PV 185 (1983).
132. *Id.* at 191.
133. Darman, *The Law of the Sea: Rethinking U.S. Interests*, 56 Foreign Affairs 373, 376 (1978).
134. Pirtle, *Transit Rights and U.S. Security Interests in International Straits: The Straits Debate Revisited*, 5 Ocean Dev. & Int'l L. J. 477, 492 (1978).
135. Burke, *supra* note 129, at 12.
136. *Id.* at n. 78; *contra* Reisman, *supra* note 97, at 53 n. 51.
137. Darman, *supra* note 133, at 375.
138. *Id.* at 388.
139. Moore, *supra* note 104, at 84-85.

140. No commercial mining is expected before 1995 or even much later. *See* Anand, *supra* note 95, at 174.
141. Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, 60 Foreign Affairs 1019 (1982).
142. E. Richardson, *National Security and the Law of the Sea* (1974), quoted in Moore, *supra* note 104, at 82.

THE PASSAGE OF WARSHIPS THROUGH STRAITS AND ARCHIPELAGIC WATERS

Judge Shigeru Oda
International Court of Justice
The Hague, Netherlands



I would like to make a few comments on the passage of warships. In fact, I accepted your invitation to this meeting because of my particular interest in this subject.

As a member of the International Advisory Panel, I have had occasion to study, during its preparation, the new Restatement of the Foreign Relations Law of the United States, for which Louis Sohn is an Associate Reporter.

Section 153 of the revised Restatement covers the passage through territorial seas, straits, and archipelagic waters. When I first read the new draft a few years ago, my immediate reaction was that the Restatement should indicate more clearly that the new regime on the passage through straits and archipelagic waters was introduced not only for the navigation of commercial vessels but, in particular, to maintain uninterrupted navigation of warships -- including submarines -- and the free navigation of military aircraft. Although I have not been able to find much time over the past ten years since I came to The Hague to study the law of the sea, and thus may be blamed for my ignorance, I believe that the passage of warships through straits and archipelagic waters is of fundamental importance in relation to the law of the sea which should certainly not be overlooked. However, the current draft of the Restatement does not seem to cover this point. Bearing that in mind, I recently appealed to Louis Sohn to make this point much clearer.

As foreign commercial vessels enjoy the right of innocent passage while passing through territorial seas, straits, or archipelagic waters, there was no reason for the Law of the Sea Convention to mention the right of transit passage unless to secure the passage of military vessels and aircraft through straits and archipelagic waters. The new regime concerning straits used for international navigation was apparently offered as a compromise in exchange for the recognition of the 12-mile territorial sea in the late 1960s and early 1970s, as Professor Anand has so rightly pointed out (see pages 137-44). At UNCLOS I and II the United States and the Soviet Union considered the seas as a forum for the free maneuver of their naval fleets and military aircraft, while marine resources were the main concern shared by the developing

countries and Japan. The two conferences in 1958 and 1960 failed in reaching an agreement upon a territorial seas' limit, mainly because the United States was not prepared to accept the 12 miles as the territorial sea limit. Such an expansion of the territorial sea limit to 12 miles would have reduced the area of high seas available for U.S. naval maneuvers. The United States Navy, in particular, would have lost its forum for free maneuvers in the Straits of Gibraltar and in other straits. Expansion of the territorial sea beyond six miles would have seriously hampered the mobility of the U.S. naval fleets. Thus, from the U.S. point of view, the concept of a territorial sea limit greater than six miles from the coast was unacceptable.

Towards the end of the 1960s when the concept of a wider territorial sea limit was about to be recognized by many developing nations as a *fait accompli*, the United States felt compelled to secure the free maneuverability of its fleet and its military aircraft through strategically important straits. The United States was ready to sacrifice the interests of its own fisheries for its military interests. The turning point came in February 1970 with the advent of President Nixon's White Paper on Ocean Policy. Jack Stevenson, the Legal Adviser of the State Department, made a speech in Philadelphia the same evening. The United States declared that it would accept the 12-mile territorial sea limit on certain conditions, among others that the free and uninterrupted passage of warships and military aircraft and submarines through straits used for international navigation be guaranteed. This was a basic point of the new regime of transit passage through straits.

The idea of the archipelagic sea lane passage developed in a similar fashion. The Philippines initiated the archipelagic concept in 1956, two years before UNCLOS I, by proclaiming itself to be a political, economic and geographical entity. (See pages 199-200 below). In January 1971, a meeting of the Asian-African Legal Consultative Committee was held in Colombo in which I myself participated as the Japanese delegate, and in which Bernard Oxman sat as an observer from the United States. The delegates from Indonesia and the Philippines jointly submitted a paper on the new archipelagic concept. At that time, they claimed that archipelagic waters should be internal waters but not territorial seas. A few years later, during discussions at the Sea-Bed Committee and the UNCLOS III, the original definition of archipelagic waters being internal waters changed, and they became more like territorial seas, throughout which the innocent passage of vessels could be guaranteed.

Even this development was unacceptable to the U.S. Navy, because under the innocent passage concept its submarines would not be able to carry out underwater operations. The U.S. Navy would only accept the archipelagic concept on the condition that the undetected and uninterrupted passage of submarines would be guaranteed throughout archipelagic waters. Thus the concept of the archipelagic sea lanes passage was first introduced to permit naval vessels including submarines and military aircraft to enjoy a free and uninterrupted passage through archipelagic waters. This type of passage was introduced in parallel to transit passage in straits; without recognizing this similarity to transit passage in straits, the new regime of archipelagic sea lanes passage cannot be properly understood. Therefore, I do not find it easy to be in entire agreement with my friend from Yale, Michael Reisman, in his debates with John Norton Moore in the American Journal of International Law.[1] I also wonder why the Restatement of the Americal Law Institute does not address this important issue.

Footnote

1. *See* Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 Am. J. Int'l L. 48 (1980), and J. N. Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 Am. J. Int'l L. 77 (1980).

DISCUSSION

Louis Sohn: The Restatement has had a checkered history. References to the subject Judge Oda refers to have been inserted and excised several times. New suggestions from the State and Justice Departments were received and the interplay at this point is unclear, but I assure him that the rapporteurs (in particular myself) have taken his comments into account. I have inserted those ideas several times, but they have also been excised several times.

The Philippines have stated, in a statement made when they signed the Convention at Montego Bay on December 10, 1982, that the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, thus removing straits connecting these waters with the exclusive economic zone or the high seas from the right of transit passage by foreign vessels. The Philippine statement is quite inconsistent with the Convention, and was protested by the Soviet Union and several other countries of Eastern Europe. As far as I know, the United States has not yet protested, but is probably thinking about doing so. Washington is now concerned with other places like Libya, and some people think that Washington cannot deal with two subjects at the same time. Nevertheless, I think it quite clear that the United States has a tremendous interest in this particular statement, and should be able to say something about it.

Of course, the United States is in a rather difficult position because it itself asserts the right to say that some parts of the Convention are not yet customary international law and are therefore not binding on it. The Philippines can, on the same principle, say that this particular part of the Convention is not yet customary international law either because this is something completely new that was concocted at UNCLOS III. Although I have read some very interesting arguments by Admiral Harlow in the American Journal of International Law on this subject,[1] and I think he is correct, nevertheless this issue of the right of a particular state to reject a particular provision of the Convention is going to haunt us throughout the years.

The *Norwegian Fisheries Case* held that if a new custom of international law is created, it can become binding on all nations except those that from the beginning clearly reject it.[2] The Philippines could say "we claimed from the beginning the archipelagic waters are internal waters rather than territorial sea."

How does that affect the rights of other states? The United States and the Philippines have a special relationship, and in their statement, the Philippines said that they will continue to observe their special agreements with other countries. But the Soviet Union will certainly find it difficult to reach agreement with the Philippines. Because the Philippines accuses the Soviet Union of supporting a communist rebellion in the southern and central parts of the Philippines, it is a matter of national security for the Philippines to exclude Soviet ships. We have, therefore, two distinct issues of security: the ability of the major powers to go anywhere, and the interest of the small powers to

prevent these major powers, at least some of them, from coming near their coasts.

Passage in Sea Lanes of Communication

John Craven: I want to remind everyone that in January 1984 we had an excellent workshop, in which many of you participated, the proceedings of which have appeared in the book J. Van Dyke (ed.), *Consensus and Confrontation: the United States and the Law of the Sea Convention* (1985). There is an intersection between some of the issues that we are talking about now and the topics that we discussed at that workshop and I would encourage you not to redebate that workshop.

I would also like to remind you that our intention here is not to look just at straits but to look at the overall total passage which is involved in the sea lanes of communication. Most ships leave port with the intention of returning to port. What this workshop would like to look at is the totality of the law which relates to port-to-port successful voyage completion. We have received a very good general picture from our three speakers on the changing nature of commercial and military port-to-port use of the sea, and a very fine retrospective with respect to the straits, the chokepoints, and the territorial sea.

Prior Authorization or Notification by Warships

Camillus Narokobi: I agree with John Craven's caveat that the question of "pick-and-choose" and the U.S. position on the law of the sea was discussed to a great length two years ago in this very building. So I will not go into that in detail. But I would like to comment on Professor Anand's analysis (pages 131-34) covering the question of prior authorization or notification by warships. This question remained unresolved as late as 1980-81, and the negotiators at the Law of the Sea Conference continued to discuss this question in the corridors at great length. At least 30 countries including Papua New Guinea and Indonesia insisted that language be inserted into Article 21 requiring prior authorization or notification before warships were permitted to navigate through territorial waters. More than 40 countries, presently require such authorization and/or notification. All the Scandanavian countries have legislation to that effect, as does the Soviet Union. Because of opposition from the United States, Australia, New Zealand, and others, this change was not made and Article 21 remained intact. With regard to the point raised by the distinguished Judge Oda on the movement of vessels through the archipelagic waters, I would say that although a right of transit passage exists through archipelagic waters, vessels have no right, according to the Law of the Sea Convention in our view, and in the views of the archipelagic states, to have freedom to prowl through any part of the archipelagic waters.

Nugroho Wisnumurti: A point I would like to make concerns the words "normal mode" in relation to submerged passage through straits. I personally think it is historically correct to recognize there was a package negotiation and a package solution at UNCLOS III. I do not think that the United States would have agreed with the consensus in 1977 without the understanding that "normal mode" means submerged vessels passage. But now it is more important to consider seriously possible interpretations of individual countries, especially those strait countries which have very strong views and which might adopt their own

interpretations along the lines of the ideas of Professor Knight about imposing limitations or restrictions in addition to the regime established under the Law of the Sea Convention.[3]

Craven: I appreciate those remarks, and I think those remarks are relevant to interaction between navigation and nuclear-free zones.

Definition of "Warship"

Bernhard Abrahamsson: First, what is the definition of a warship? For example: prepositioned Military Sealift Command (MSC) ships; are they warships or not? What about fast supply ships that may carry war material, but are under civilian charter to the Military Sealift Command and are operated by unionized civilian crews. Are they warships or not? We need a clear-cut definition. Second, I do not see the value of a general regulation for international straits because most straits can be avoided. We should discuss those straits that cannot be avoided, like the Strait of Gibraltar. I think there must be a distinction between necessary transit and merely transit.

Norton Ginsburg: The U.S. position of a territorial sea is greatly affected by the conflict between the states and the federal government regarding the ownership of offshore mineral resources. Control of petroleum resources is particularly important in the thinking that lies behind the current U.S. position.

There are only a handful of really crucial straits in the world. The right to normal modes of continuous and expeditious transit in the 1982 Convention is severely curtailed by the rights and responsibilities of the adjacent coastal states to regulate that transit. These coastal nations have not only security interests but also environmental considerations, and safety concerns that are relevant to both transit and archipelagic sea law passage. Restrictions of this kind must be based on international norms, presumably those of IMO. How should we assess the practical significance of the reference to "normal modes" of transit, even on the assumption that they permit transit submerged of submarines as the normal mode. Are there certain places where it is significant? Are there other places where it is not significant? It is very hard for me to think of a submarine transiting the Strait of Malacca submerged, without reference to some regulation. It is impossible.

R.P. Anand: It has been claimed that the provisions in the 1982 Convention relating to transit passage, are almost the same as international practice as it has existed over the past 45 years. This assertion is erroneous. Until the Second World War even the United States was against any innocent passage of warships without authorization. After the Second World War, the 1956 Report of the International Law Commission clearly said that there was no right of innocent passage for warships unless they received authorization and gave notification. Before the 1958 Convention, because of certain reasons in the first committee, the authorization required in the report was deleted. This led some of the other countries, especially the Soviet Union, to see that this truncated article, which now required only notification, was not accepted at all. So the result was that this article was altogether deleted.

The bizarre result of this diplomatic struggle in the 1958 Geneva Conference is that there is no provision in the 1958 Convention on the subject of passage of warships through the territorial sea, but there is Article 23 in the Territorial Sea Convention which suggests that if a warship does not comply with the regulations of the coastal states the latter may require it to leave the territorial sea. Most countries have argued the absence of an article on notification and authorization does not mean that they do not have the right to claim authorization and/or notification, and in fact the practice of more than 41 countries shows clearly that authorization or notification is required. The requirement of authorization also means a nation can refuse to permit any warships through the territorial sea. When the Third UN Conference on the Law of the Sea started, the Soviet Union and the United States together made it clear that they would not accept any treaty unless free passage through the territorial sea was accepted.

This free passage later came to be translated into what is called "transit passage," and transit passage came to be accepted, under pressure from these maritime powers, after they gave up as a *quid pro quo* several other rules relating to the extension of the territorial sea to twelve miles, the establishment of the exclusive economic zone, the continental shelf extending to the continental margin, and most importantly, the exploitation machinery for the deep seabed resources.

There is no doubt about the fact that transit passage started only after 1970 or so. If that is the case, when 41 countries were claiming the right to have authorization and even to refuse to permit ships to pass, how could this be a practice which had been done for more than 45 years?

Transit passage also means that ships, especially submarines, have the right to pass undetected, and also airplanes have the right to fly over these straits. These rights were never part of innocent passage.

Another difference is that the earlier innocent passage right was only in straits that were wider than six miles. How the transit passage applies not merely to those straits that are wider than six miles, but to all straits irrespective of their size or importance.

Shigeru Oda: My answer to Professor Anand is that the question of the prior authorization or notification of the passage of warships applied only when the territorial sea was limited to three miles, so that certainly in the past this question was valid because the territorial sea used to be three miles. Since 1970, however, the situation has changed.

Customary Practice in Straits Passage: Prior Notification and Submerged Passage

Bruce Harlow: It certainly is true that 41 nations or more have claimed the right to demand prior authorization or notification of warships as a concomitant part of the right of innocent passage, which I suppose is to say there is no right of innocent passage of warships in territorial seas. But Judge Oda has made one extremely important point, and that is that during the 1940s and 1950s, and early 1960s, it was the firm position backed by practice of the United States that there was a three-mile territorial sea. The view of the United States was that key international straits had a high seas corridor. Notwithstanding the fact that there were 41 countries requiring authorization or notification,

the firm practice of the United States was *not* to give authorization or notification prior to warship passage through international straits.

An old army friend of mine once told me -- and I have used this expression once before -- "when the map varies from the terrain, you have to go with the terrain." And the truth of the matter is that the practice has been to *not* provide authorization or notification for navigation through straits.

One final point. It is sometimes asked, if we are talking about submerged navigation, how can that practice possibly be reflective of the process of claim and counter-claim that would create customary international law? It is true that information relative to such practice may not be in the public domain, but certainly knowledgeable individuals responsible for maritime affairs of coastal states have been and are aware of the general navigational practices of maritime nations. I asked one senior official years ago as to whether or not he was aware of a certain navigational practice off his country and he conceded that unless one were to believe in the process of levitation, he had to accept that submarines passed in a submerged mode in straits adjacent to his country and had been doing so for a matter of decades. So it is a matter that does fall within the process of claim and counterclaim. As such it forms the basis for the authoritative process of claim and counter-claim and concomitant acquiesence, which is the basis for customary international law.

Do Ships Exercise Transit Passage or Innocent Passage in Straits Less than 24 Miles Wide?

Choon-Ho Park: How does a ship actually exercise transit passage? Does the captain have to declare that it is going to be an innocent passage or a transit passage? When does the transit passage begin?

Harlow: You have raised a fundamental and important point. As Dr. Alexander points out, if you accept coastal states' claims to a twelve-mile territorial sea, virtually all the key straits to the world are overlapped by territorial sea claims. Thus, we are talking about a modified territorial sea regime. These form important rivers of navigation that ships really cannot avoid.

In Professor Anand's excellent paper, he is basically making the point that transit passage is a new, unique, and strange principle that is not reflective of customary law, and that a nonparty or nonsignatory to the Convention cannot assert any rights thereunder. And, related to your point, because it is a new concept we have to determine what practices might be applicable to the exercise of that right.

As I have mentioned, it has been the United States' position that transit passage is reflective of customary law. One might ask "how can that possibly be the case if we are talking about a new and unique formulation that was recognized for the first time in the language in the 1982 Convention?" My response is that "transit passage" is not new, but

is an articulation of a long-standing practice that has been going on for decades.

You could talk to commanding officers of naval vessels not only in the United States Navy, but in virtually all the maritime navies of the world, and ask them how they navigate through straits or, in other words, exercise what we now call "transit passage." We did not call it that before, but nonetheless the activities took place. It is significant that the United States did not contemplate any new or different navigational activity pursuant to the 1982 Convention, but simply intended to continue business as usual under a new articulation.

The proliferation of territorial sea claims to 12 miles prompted the practice of the maritime nations to change early in 1960. By 1966, the United States and most other maritime nations were giving de facto recognition to a claimed 12-mile territorial sea, and were not exercising high seas rights in the three to 12-mile zone. This practice was in stark contrast to the way navies were acting with regard to international straits. They were acquiescing to claims to 12 miles in territorial seas generally, but not in international straits. The formulation contained in the 1982 Convention is remarkable in the sense that it virtually, without exception, codifies what has been a wide-spread practice for the last 25 years. In that sense, one can maintain that the "transit passage" rights, reflective of navigational practices through straits, articulate customary rights recognized under customary international law. At the first meeting of the Law of the Sea Institute in 1966 a paper was presented discussing the recognition of a 12-mile territorial sea and the special rights of navigation through international straits,[4] so the U.S. position that has emerged in the post-1982 period is not a new proposition or a new expression of concern.

William Burke: I want to take advantage of the references to the persistent objector to answer Bruce Harlow by saying that I objected previously to the characterization that transit passage is protected by customary international law. When the deputy negotiator for the United States appeared before the House Foreign Affairs Committee in 1982 and was asked about the Administrations' position that navigation rights were adequately protected under customary international law and specifically about the transit passage problem, he did not believe that was the case, and that the congressman should take a look at some classified documents that might persuade him otherwise (see pages 389-90 note 2 below). I have no way of knowing what was in the classified document, but apparently it contained information adverse to the U.S. position, so maybe someone could enlighten us on what these documents contain.

Piracy

Harlow: The problem of maritime crime, particularly as it may impact on ships exercising the right of transit passage in international straits has been raised. Could an act of piracy be committed in such an area, or within the exclusive economic zone? By definition, "piracy" is an act that occurs on the high seas. Having said that, it makes some sense that this definition be taken in the contextual sense and perhaps be viewed in practice as extending to the exclusive economic zone and, under special circumstances, to passage through international straits. I say this because such acts can impact on the exercise of the international right of transit passage.

Thomas Clingan: Article 58 specifically incorporates the piracy article (Article 100) by cross-reference so that the fact that it is in the high seas section of the treaty should not cause any particular difficulty.

Burke: How can a ship claim the right of transit passage while doing something to another ship? I do not understand how transit passage is involved at all. It certainly would not be simply passing through; it would have to do something, because by definition piracy involves acts not on board a single vessel but directed at another vessel.

Harlow: If a ship is subjected to an act of piracy or, in broader terms, an "international crime of violence," whatever that might be, when exercising the right of transit passage, that ship's right could be limited or restricted to the point where this vital navigational right is taken away from the ship. My point is that a flag state should be able to ensure that its ships can enjoy transit passage under those circumstances.

Footnotes

1. Harlow, *Letter to the Editor-in-Chief*, 79 Am. J. Int'l L. 1037-40 (1985).
2. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131, 139 (because Norway had consistently objected to the 10-mile limit on straight lines closing bays to foreign fishing included in the 1882 North Seas Fisheries Convention, the United Kingdom could not involve that limit against Norway).
3. See references in footnote 97 on page 152 in Professor Anand's paper and the discussion on pages 142-43.
4. *See* Harlow, *Freedom of Navigation* in L. Alexander (ed.), *The Law of the Sea: Offshore Boundaries and Zones*, 1 L. Sea Inst. Proc. 188 (1967).

VARIOUS PROBLEMS AND ARRANGEMENTS IN THE MALACCA STRAITS (AN INDONESIAN PERSPECTIVE)

Komar Kantaatmadja
Director, Indonesian Center for the Law of the Sea
Bandung, Indonesia

Indonesia as an Archipelagic State:

Geographically the Indonesian archipelago is comprised of six main islands with dense population and about 13,660 smaller islands, of which 931 are inhabited. The principal islands are Sumatra (164,000 square miles), Java and Madura (51,000 square miles), Kalimantan (208,000 square miles, and about 28 percent of which belongs to Malaysia), Sulawesi (73,000 square miles), and adjoining smaller islands called Nusa Tenggara Islands, the Maluku Islands, and Irian Jaya (159,375 square miles).

Of this configuration, 75 percent of Indonesian territory is comprised of sea water. From the perspective of our national interest, therefore, even before the birth of the Third UN Law of the Sea Conference, Indonesia's position as an archipelagic state has been firm. Our legislation dates back to December 13, 1957, when Prime Minister Djuanda announced a declaration on the new boundaries of Indonesia utilizing straight baselines connecting the outermost points of the outermost islands of the Indonesian archipelago as a basis for measuring the 12-mile territorial sea. This declaration revoked existing noncomplying regulations such as the Territorial Sea Ordinance (1939). This declaration is the modern manifestation of the traditional view of Indonesian society reflecting the essential unity between life on land and life at sea which is known as our archipelagic outlook (cara pandang Nusantara). The Djuanda Declaration also states that innocent passage is enjoyed by ships travelling in the internal waters enclosed by the baselines provided that the security of the nation is not threatened.

Despite many protests, especially from maritime countries, the declaration was implemented more specifically by Indonesian law in February 1960. As we are aware, these concepts have been accepted in the 1982 Law of the Sea Convention.

Specific Character of the Malacca Strait:

Indonesia views the Malacca Strait as a bridge of strategic importance between the Indian Ocean and the Pacific on one side and between the Asian and Australian continents on the other. Geographically, the

Malacca and Singapore Straits stretch between the Indonesian island of Sumatra and Malaysia to the east and between the Indonesian island of Riauw and Singapore to the South; it also connects the Indian Ocean to the South China Sea. The Malacca Strait has always been a subject of great concern to the three coastal states, Malaysia, Indonesia and Singapore, because of its strategic role as a gateway between the Indian Ocean and the South China Sea. This 500-mile long passage is the most efficient sea route from Europe and the Middle East to Japan, China and South East Asian countries. The excellent ports and trade centers of Batam make it likely that the present 5,000 vessels per month that pass through the Strait will increase in the future.

The oddly funnel-shaped waterway, with a width that varies from its narrowest passage (3.2 miles) near Singapore island to its widest (300 miles) near the northwestern entrance between Sabang and the Kra Isthmus, is also quite shallow. A hydrographic survey conducted in 1970 noted that in the 330 square kilometers of the Phillips Channel 37 survey points were found to be less than 23 meters deep. The strait is up to 24 fathoms deep west of the Aruah Island, but only between 3 and 7 fathoms deep south of these islands. Within about 13 miles of the Aruah island and the southern end of North Sands, there is a one fathom bank. Southward there is a dangerous three-and-three-quarter fathom patch. The width of the navigable channel is only four miles.

The critical points are the One Fathom Bank near the western entrance to the strait, the Phillips Channel near the Strait of Malacca, and the Horsburg Lighthouse on the exit route from the Strait of Singapore to the South China Sea. These difficult geographical configurations are of serious importance to the safety of navigation in the Malacca Straits, especially in view of possible "crash stops" and "squats" for large ocean going tankers. A "squat" possibility occurs when the depth is less than 1.5 times the draught of the vessel traveling at a fair speed. According to the Indonesian Navy, a tanker requires a distance 15 times its length to come to a stop in a crash. In a "crash stop" a tanker of 300M length will stop in a distance of approximately 4.5 kilometers. Even if the wheel is turned left and right and the propeller is stopped and reversed, the tanker requires three miles to stop. An illustration of the importance of the vessel's draught is the accident we call the "*Torrey Canyon* of the East" -- the 1975 *Showa Maru* tanker incident. The vessel grounded on a shoal of 20-22 meters deep. A few moments before the tanker went aground the front draft of the vessel was 19.98 meters and the rear draft was 20.00 meters. It is therefore understandable that various accidents occurred in the Malacca Strait prior to the imposition of the tanker separation scheme. In 1975, for instance, fifteen major accidents and nine minor accidents occurred, any one of which could have caused long term ecological damage. These numbers illustrate that the volume of traffic - 5,000 vessels per month - is too great for the small channel.

Most sea currents in Indonesia are ruled by the monsoon. The monsoon changes the direction of the currents twice a year and practically reverses certain currents when their influence is strongest. During the southwest monsoon, currents are dominant in the middle part of the South China Sea and the Java Sea; during the westward inflow to the Java Sea the current from the Banda Sea and Sulawesi Sea through the Makassar Strait, the Java Sea, partly through the Strait of Karimata, and partly through the Strait of Malacca. During the northeast monsoon the direction reverses for the main current from the Karimata Strait into Java Sea and Banda Sea. However, the direction of the current in the Strait

of Malacca remains northwest toward the Indian Ocean.

These changing currents present navigational challenges to mariners, and accidents caused by navigational errors can seriously damage the environment and resources of the area.

A recent survey held by a French-Indonesian Research Corporation in Oceanography, as assessed by LEMIGAS and CNEXCO (1982), denotes relatively low tar pollution figures in the area of the Malacca Straits, although some form of accumulation could be observed in the Pulau Seribu area (Java Sea, coast of Jakarta). The LEMIGAS and CNEXCO study analyzed tarballs collected along the coast of Indonesia to determine possible origin and sources of oil in the residues. The tar beach contamination at the Pulau Seribu area was about 811.0 g/m. In the Macassar Strait this level was about 57 g/m. In the Malacca Strait the pollution levels ranged from 11.3 g/m to 29.8 g/m. At Kukop and Krakal beaches in south central Java, the levels were less than 1 g/m. The high level of accumulation of tars at Pulau Seribu consisted of tanker sludges, fuel oil residues, and weathered tar in addition to weathered crude oil. In most other regions where the study collected samples the predominant form of oil in the tar residues was weathered crude oil, although tanker sludge residues were reported at Kepulauan Riau, Labon Kecil, and Besar, and fuel oil residues were found at Kepulauan Riau and Kapul Besar. This tar pollution data arouses suspicion as to the possible accumulation of the tar that has been carried from the area surrounding the Malacca Strait to the Pulau Seribu area. It appears that currents and strong waves carry the pollution to the Java Sea, where it tends to accumulate. Concern about this problem may justify greater Indonesian regulation of navigation through the straits.

Malacca and Singapore Straits and Regional Arrangements:

When it dealt with straits used for international navigation in 1956, the International Law Commission referred only to straits connecting two parts of the high seas. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone broadened the concept, however, by defining a strait as an area "between one part of the high seas and another part of the high seas or the territorial seas of a foreign state." (Article 16(4)). The 1982 Law of the Sea Convention considered international straits as "straits used for international navigation," but provided no geographical definition. It is therefore contemplated that no straits belong to the international community: every such strait must be considered to be under the control of the states bordering the strait although there will be due recognition of foreign ships.

Improvements in the conditions of passage through the Malacca Strait has been the concern of states bordering straits as well as user states. In 1969, Japanese private firms supported the founding of the Malacca Strait Council, an organization designed to maintain close cooperation among the three states bordering the strait, Indonesia, Malaysia, and Singapore. In 1971, these governments held consultations with a view to adopting a common position on matters relating to the Straits of Malacca and Singapore. They issued a joint statement on November 16, 1974, in which:

(i) the three governments agreed that the safety of navigation in the Straits of Malacca and Singapore is the responsibility of the coastal states concerned;
(ii) the three governments agreed on the need for tripartite cooperation through establishment of an administrative body

(composed only of the three coastal states) on the safety of navigation in the two straits;

(iii) the three governments also agreed that the problem of the safety of navigation and the question of internationalization of the Straits are two separate issues;

(iv) the governments of the Republic of Indonesia and of Malaysia agreed that the Straits of Malacca and Singapore are not international straits, while fully recognizing the principle of innocent passage. The Government of Singapore took note of the position of the governments of the Republic of Indonesia and of Malaysia on this point; and

(v) on the basis of this understanding the three governments approved the continuation of the hydrographic survey.

The ability of coastal strait states to regulate certain activities in the straits was recognized in the early drafts of what became Article 42 of the 1982 Law of the Sea Convention. This article states that besides laws and regulations on the passage of ships strait states may also make laws and regulations relating to:

(a) the safety of navigation, and regulation of maritime traffic;
(b) the prevention and control of pollution, by giving effect to applicable international regulations;
(c) the prevention of fishing; and
(d) the loading or unloading of any commodity, currency or person in contravention of customs, fiscal, immigration or sanitary regulations.

In accordance with such guidelines, Indonesia, Malaysia, and Singapore formulated the Straits Traffic Separation Scheme (TSS) as an addition to the 70 TSS's already in existence throughout the world. After various meetings, the delegations issued a Joint Statement on February 18, 1975, pointing out, *inter alia*:

(1) In order to protect the coastal states from damages resulting from oil pollution, all three delegations agreed on the need to maximize the safety of navigation in the Straits of Malacca and Singapore.
(2) A traffic separation scheme (TSS) should be established and immediate steps should be taken in this direction.
(3) Because of the shallowness and narrowness of the straits, the density of traffic, the limited maneuverability of the VLCCs and other factors, the VLCCs passing through the straits should be limited, on conditions that would be discussed further by experts.
(4) A group of experts should be appointed to study the extent of the limitations and other related measures to enhance the safety of navigations.
(5) Advanced navigation aids and the possibility of improving navigation in the straits should be further studied.
(6) A group of experts should be appointed from the three countries to work out measures to achieve close consultation, coordination and cooperation on an antipollution policy and measures.
(7) There should be consultation and cooperation with regard to the compensation for damage caused by oil pollution and steps should be taken to assure proper restitution. (The total damages caused by the 1975 *Showa Maru* accident have not yet been determined,

because the long-term ecological consequences are as yet unknown. Three years after the accident an ecological survey revealed remnants of pollution on the seabed and in various islands in the strait. Compensation awards in U.S. dollars were: $400-500,000 to Singapore, $600,000 to Malaysia, and $1,300,000 to Indonesia.)

(8) A body to be named "Council for the Safety of Navigation and the Control of Marine Pollution in the Straits of Malacca and Singapore" should be established at the ministerial level. There should be a committee consisting of senior officials to assist the ministers in the discharge of their function.

(9) The Council of Ministers will meet once a year and the Senior Officials Committee will meet twice a year or more often if necessary. The Council should establish the necessary experts groups to implement the various measures that have been agreed upon by the three governments.

Following this Joint Statement, a meeting of senior officials was held that lead to the Tri-Partite Agreement of February 24, 1977, which stated that:

(1) Vessels shall maintain a single under keel clearance (UKC) of at least 3.5 meters at all times during the entire passage through the Straits of Malacca and Singapore. They shall also take all necessary safety precautions especially when navigating through the critical areas. (The figure of 3.5 meters was a compromise between 2.5 meters proposed by Singapore and 4.4 meters proposed by Malaysia and Indonesia. At the time Singapore was interested in maximizing navigation through the Strait. Another reason why 3.5 meters is critical is that in the Malacca Strait, 4.5 meters is the difference between the average depth of the channel, 23 meters, and the average critical draft of vessels, 18.5 meters.)

(2) The delineation of the traffic separation scheme in three specified critical areas of the Straits of Malacca and Singapore, namely in the One Fathom Bank area, the Main Straits and Phillips Channel, and off Horsburg Lighthouse, shall be defined.

(3) Deep draft vessels, namely vessels having drafts of 15 meters and above, are required to pass through the designated Deep Water Route in the Straits of Singapore up to Buffalo Rock and are recommended to navigate in the specified route from Buffalo Rock up to Baru Berhenti Area. Other vessels are recommended not to enter the Deep Water Route except in an emergency.

(4) Navigational aids and facilities shall be improved for the effective and efficient implementation of the traffic separation scheme.

(5) The existing voluntary reporting procedure and mechanism for large vessels shall be maintained.

(6) The principle of voluntary pilotage through critical areas in the Straits of Singapore shall be applied.

(7) VLCCs and deep draft vessels are advised to navigate at a speed of not more than 12 knots during their passage through critical areas, and no overtaking shall be allowed in the Deep Water Route.

(8) Charts and current data shall be improved.

(9) Rule 10 of the International Regulation for Preventing Collision at Sea, 1972, shall be applied as far as practicable within the traffic separation scheme.

(10) The implementation of the traffic separation scheme should not pose a financial burden on the coastal states and the necessary funds shall be obtained from the users.
(11) A joint policy to deal with marine pollution shall be formulated.
(12) All tankers and large vessels navigating through the Straits of Malacca and Singapore shall be adequately covered by insurance and compensation schemes.

The traffic separation scheme and underkeel clearance arrangements are imposed on ships in the Malacca Strait pursuant to the IMCO Resolution A-378(X) 1977 and in accord with Article 43 of the Law of the Sea Convention (1982) reiterating that:

> "User States and States bordering a strait should by agreement cooperate:
>
> (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
> (b) for the prevention, reduction and control of pollution from ships."

Article 22 also permits coastal states to require ships exercising the right of innocent passage through its territorial sea to use traffic separation schemes when appropriate.

The 14th Tripartite Technical Expert Group Meeting on the safety of navigation in the Straits of Malacca was held by senior officials from the three strait states in Bali on April 9-10, 1984. The substantive matters discussed and decided were:

a. Harmonization of the aids to navigation in the Straits of Malacca and Singapore;
b. Priority I: Aids to navigation marking the shoal off Takong. It appears that this Resilient Light Beacon (RLB) located at 01 degrees 05' 48" N 103 degrees 43' 48" E at the 20.5 meter shoal has been knocked down by passing ships various times. The Expert group then recommends the Beacon be moved to a location approximately 800 meters westward (position 01 degrees 15' 54" N, 103 degrees 43' 20" E);
c. Implementation of Priority II: Aids to Navigation;
d. Resurvey of the One Fathom Bank.

Conclusion:

1. The Malacca Strait is a unique coastal and marine environment. The planning and management of such environment shall, therefore, be at its best if approached from the national interests of the states bordering the strait.
2. As a sign of responsibility and cooperation the users (private companies and governments) should cooperate in providing the necessary assistance (technical and/or financial). We now have a group of oil companies and a group of ship owners assisting the financiers of the Malacca Strait, but the November 1985 knockdown of the Resilient Light Buoy was done by a Greek tanker.
3. The substantive problems are interrelated, and therefore solutions should be pursued from an integrated approach.

4. To enhance research and development in fields related to the needs and priorities of development, as decided by the states bordering the strait and by all state users and the international community, a permanent study center for the Malacca Strait could be established to increase the number of experts in the field.

References

1. Phiphat Tangsubkul, *ASEAN and the Law of the Sea* (ISEAS, 1982).
2. Munodjat Danusaputro - *Elements of an Environmental Policy and Navigational Scheme for Southeast Asia, with Special Reference to the Straits of Malacca*, in *Regionalization of the Law of the Sea*, 11 L. Sea Inst. Proc. 171 (Honolulu, 1977).
3. Valencia & Jaafar, *Environment Management of the Malacca/Singapore Straits: Legal and Institutional Issues*, 25 Natural Resources J. 195 (1985).
4. LEMIGAS and CNEXCO, *Occurrence of Tar Pollution along shore in Indonesia* (Jakarta 1982).
5. *Report of the 14th Tripartite Technical Expert Group Meeting on the Safety of Navigation in the Straits of Malacca and Singapore* (Denpasar, Bali Apr. 1984).
6. Durijat Rasjad, Traffic Separation Scheme di Selat Malaka-Singapura Fakultas Hukum (Universitas Indonesia, Jakarta 1983).
7. Convention on the Territorial Sea and Contiguous Zone, done at Geneva, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

DISCUSSION

Indonesia's Interest In the Malacca Strait

Komar Kantaatmadja: Indonesia's, Malaysia's, and Singapore's respective interests in the Malacca Strait reflect their national interests. For example, Singapore's interest is in having as many ships as possible passing through the channel and stopping in Singapore. So there is a differing attitude toward the position of the channel.

The Indonesian position in 1986 is reflected in the formal ratification of the Law of the Sea Convention by the Indonesian government in December 1985. Research and development will be in areas given priority by the states bordering the straits; what we have in mind is safety and efficiency of navigation and environmental protection. We do not stress at all the strategic interest which is more important for big powers.

On the relation between the Malacca tripartite government council and IMO, Article 41 of the Law of the Sea Convention specifies that states bordering straits may, or coastal states may, make rules on the safety of navigation and the regulation of marine safety. The starting point for discussion of the underkeel clearance between the three governments is Resolution A378X, Rule 10, of 1977 of IMO. In my paper, priority 1(B) on aids to navigation refers to marking the shoal off Takong. The expert group recommended moving this resilient light beacon 800 meters westward, and this resolution was then passed on to IMO for approval. After that the maritime world will be notified.

Edgar Gold: As somebody who has gone through Malacca very often I am very glad that this beacon has been shifted.

There is ample evidence that in times in actual or perceived threat international law is suspended. Whether you call it a right, as Captain Dalton did, or self defense, or anything else, law, as we regard it, basically ceases. At best, the new law of the sea rules might influence the threatened state in some of the action such state takes. But the real danger is that this approach greatly depends on unilateral self assessment of a situation that may have multilateral effects. In this particular case, I would refer to the commercial economic realities of shipping. Even under those circumstances, shipping seems to be able to survive and deal with this quite adequately, as they do with most problems which are imposed on them. In times of armed conflict, shippers cover additional risks and liabilities with their everready, friendly neighborhood underwriters. All this for a price, of course, which is passed on to the price of the goods.

THE KOREA STRAIT

Choon-Ho Park
Korea University College of Law
Seoul, Korea

Geographical Circumstances

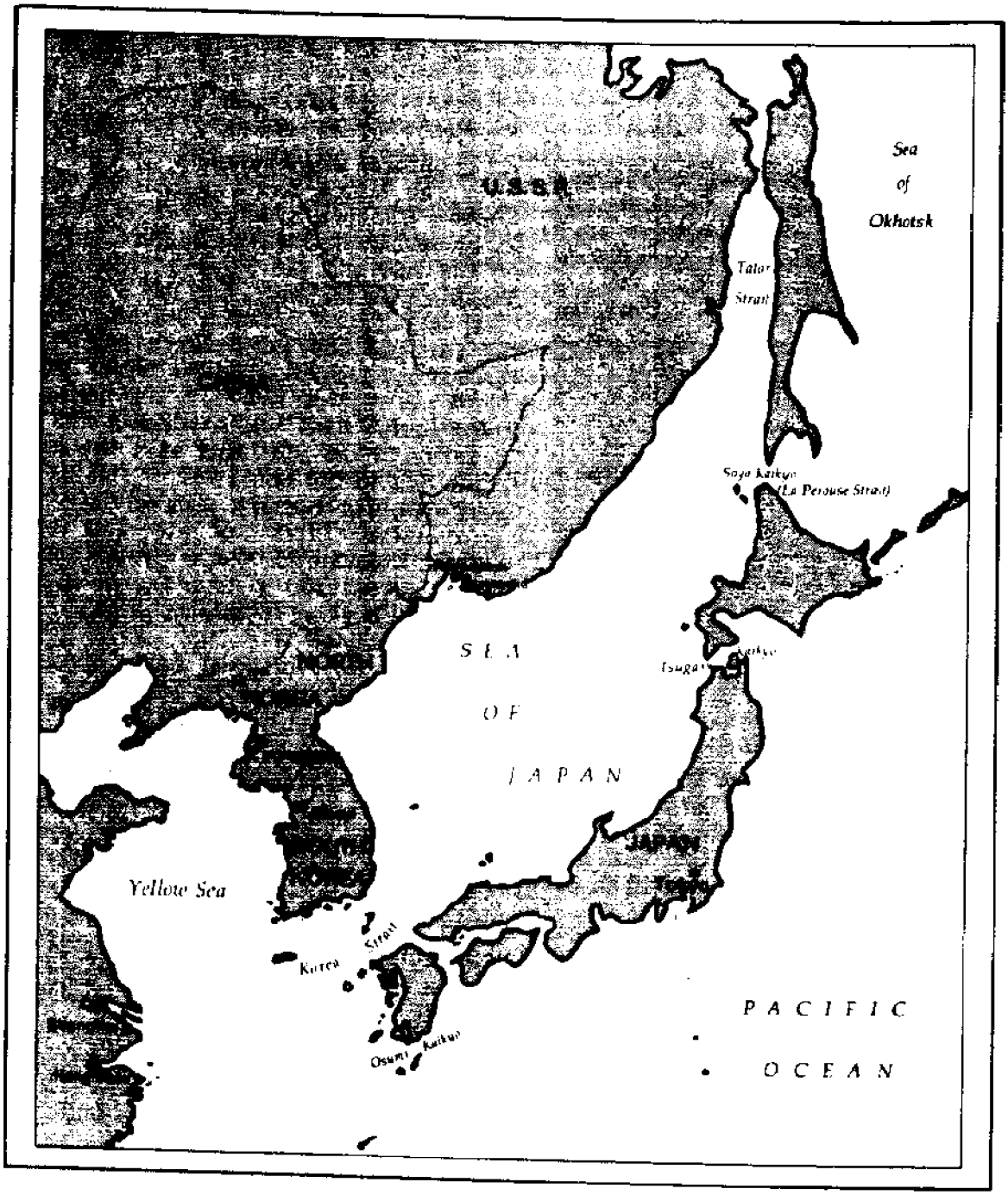
The Korea Strait consists of the Eastern Channel, situated between the Japanese mainland of Honshu and Kyushu on the east and the Japanese islands of Tsushima on the west, and the Western Channel, situated between Tsushima on the east and the southeastern coast of the Korean peninsula on the west. The two waterways of less than 100 nautical miles (n.m.) total width connect the Sea of Japan to the northeast with the East China Sea to the southwest. At their narrowest, the Eastern channel is approximately 22.75 n.m. wide and the Western Channel 25.00 n.m. Water depths do not exceed 200 meters, except in a narrow strip along Tsushima in the Western Channel.

As Japan's shortest surface approach to the Northeast Asian continent, the Korea Strait also represents the largest and most important of the four gateways to the Sea of Japan, the other three being the Tsugaru Strait situated between the Japanese islands of Honshu and Hokkaido, the Soya Strait (La Perouse) between Hokkaido and Soviet Sakhalin, and the Tatar Strait between Sakhalin and the Siberian continent (see Maps 3 and 4). It is from these particular geographical circumstances that the Korea Strait derives its economic and strategic importance, as is discussed in detail later.[1]

Place-Name Variations

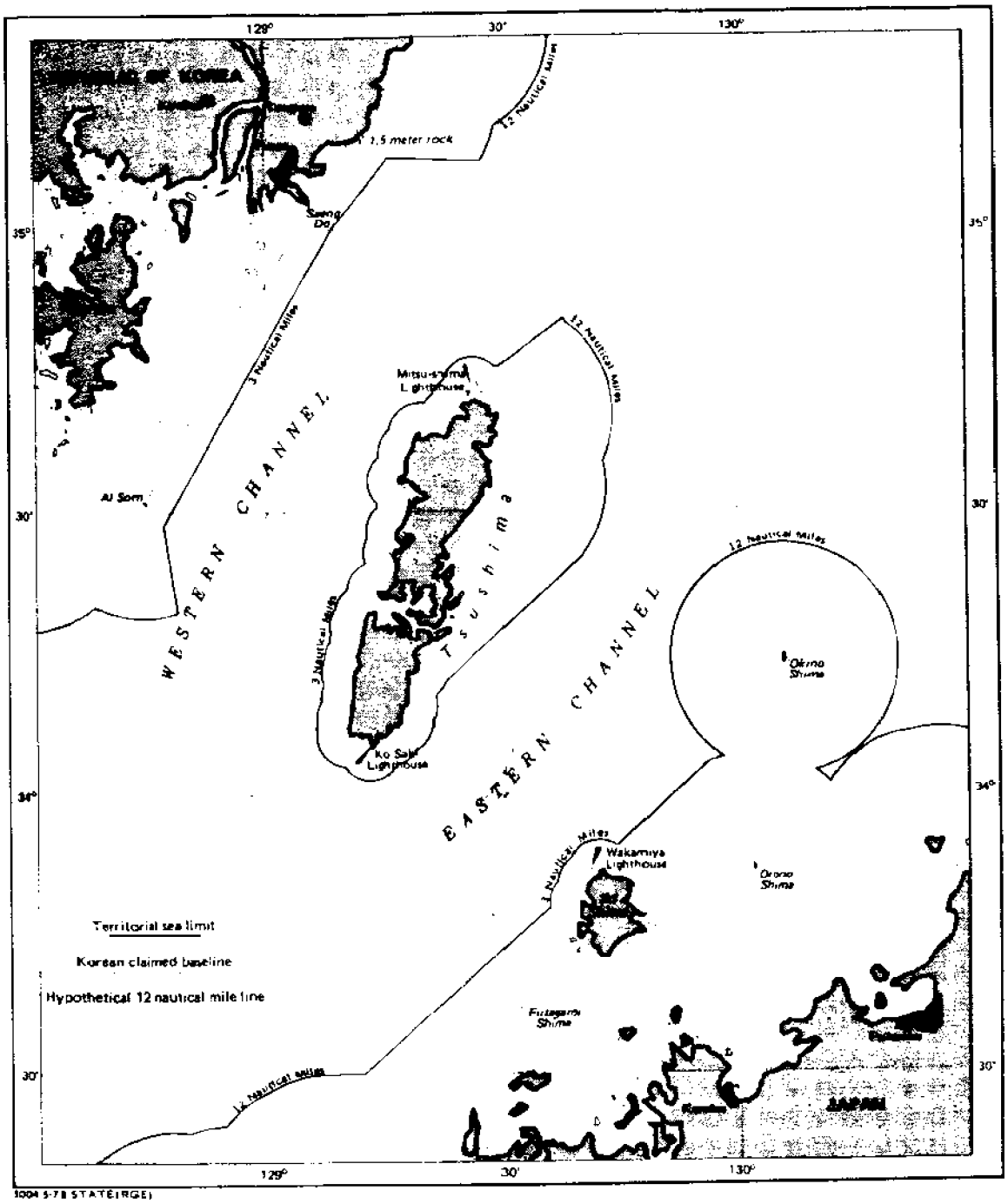
In the geographic literature, so many different names are used to denote the Korea Strait that outside observers are frequently confused. There are perhaps fifteen different names given to this Strait in Japanese, North Korean, South Korean, Chinese, Russian and Western languages. This is the case with few other straits used for international navigation. It is further confusing that, even in government publications of the coastal states, some of the names are transcribed in different ways. The multiplicity of names may be seen from the following examples:

In Japan, "Tsushima Kaikyo" (strait) is the most commonly used name for the Korea Strait, but the Hydrographic Department prefers to spell it "Tushima Kaikyo".[2] In South Korea, "Daehan Haehyeob" (strait)



Kathryn Gibbs

MAP 3: The Four Straits Around the Sea of Japan



MAP 4: Territorial Sea Claims in the Korea Strait

is the standard version, but the Hydrographic Office calls it "Hangug Haeheob".[3] In North Korea, "Chosun Haehyop" is the only name used.[4]

In some transcriptions, the similarity of sound helps to lessen the danger of confusion arising from the difference in spelling. In the case of the names in different languages, however, each of the above versions has its own historic or political reasons for use to the exclusion of the other ones. In a region noted for the complexity of territorial disputes and where feelings run high over such issues, each country's preference to use a particular version of the name cannot be safely ignored. In the choice of terminology, North and South Korea both avoid the use of a name the other side prefers, the identity of their language notwithstanding. For a similar reason, China follows the North Korean usage as a rule.[5]

In some extra-regional sources, both "Korea Strait" and "Tsushima Strait" are used interchangeably,[6] but there are uncommon usages that add to the confusion such as "Korea Kaikyo",[7] an English-Japanese combination, or "Chosen Strait",[8] a Japanese-English combination. It is also a potentially confusing novelty to call the Eastern Channel of the Korea Strait the Korea Strait and the Western Channel the Western Korea Strait,[9] or to call the Eastern Channel the Korea Strait and the Western Channel the Tsushima Strait.[10] In the interest of preciseness, therefore, it is advisable to check unclear names against cartographic illustrations, unless otherwise clarified.

Historic Environment

Historically, the Korea Strait has been no exception to the rule that geographical proximity between nations breeds more enmity than amity. Unlike the Straits of Malacca or Gibraltar, for example, the Korea Strait has been important not so much as a link between major trade centers of the world but as a lane of strategic communications between the region and the world. As such, it has often been a scene of clash rather than a channel of friendship between the coastal states themselves or between the coastal states and its extra-regional users. Some of the notable past happenings in the Korea Strait are cited here to place this highly controversial waterway in its historical perspective.

1. Long before the density of sea traffic in the Korea Strait had reached the current level, relations between Japan and Korea were often strained by their proximity. Japanese fishermen-pirates haunted the southern coast of Korea to prey on the defenseless fishing villages. To cope with the growing difficulty, in 1426 Korea had to designate three of its southern ports for settlement by Japanese fishermen and in 1442 even concluded a crude form of fisheries agreement with Japan. Nevertheless, Japanese piracy continued to increase culminating in the so-called "Japanese fishermen's uprising" in 1510, leading to a complete severance of relations between the two countries.[11]

In feudal Korea, fishermen held the lowest social status, and rulers were not seriously concerned with providing adequate protection from foreign pirates. Even fishing itself was discouraged under the Buddhist tenet whereby the killing of any form of life, including fish, could constitute blasphemy.[12] For these reasons, some southern coastal areas of Korea were at times open to foray by Japanese fishermen. As a matter of fact, these Japanese fishermen were so familiar with Korean coastal waters that they were highly efficient as pilots at the time of the Japanese invasion of Korea beginning in 1592.[13]

Fishery relations between Japan and Korea underwent a period of quiescence over 200 years, when the Tokugawa shogunate of Japan enforced a closed-door policy (*sakokurei* beginning in 1639, but the problems emerged again in the middle of the 19th century and remained a major source of conflict up until the Japanese annexation of Korea in 1910. Within years of the liberation of Korea from Japan in 1945, however, the fishing rights controversy surfaced to cause an extremely acrimonious "fish war" for 14 years (1952-1965), in which 327 Japanese fishing vessels with 3,929 fishermen were seized by Korea.[14] Hostilities finally ended in 1965 in the form of a negotiated settlement, which is still in force.[15]

2. In relation to Imperial Russia, Japan has an extraordinarily good reason to recall with contentment what took place in the Korea Strait in 1905. In the first battle between the two iron fleets in history, the Baltic Fleet of Russia commanded by Admiral Zinovi Rozhdestvenski was completely devastated by the Combined Fleet of Japan commanded by Admiral Heihachiro Togo on May 27 and 28, 1905. In the ten encounters beginning on May 27 in the Western Channel, out of 38 Russian warships 19 were sunk, five captured, four surrendered, and the remaining ones severely damaged, with some 6,000 Russian sailors, including the commander himself, taken prisoner, while Japan lost only three torpedo boats.[16] The Russian defeat in the sea battle ended the Russo-Japanese War of 1904-1905 in favor of Japan, a war that began over hegemony in the Korean peninsula.

3. In the height of the Pacific War of 1941-1945, the Soviet Union was still neutral toward Japan by virtue of the Japan-USSR Neutrality Pact of April 1941. This pact was unilaterally abrogated by the Soviet Union in April 1945 -- four months prior to a Soviet declaration of War against Japan in August 1945. In connection with the status of their relations, the following Soviet allegations against Japan may be noted with interest:

> --- In serious violation of the general principles of international law, Japan established a series of forbidden zones and naval defense zones in the *Korea* Strait in late 1941 and seriously impeded the passage of Soviet ships. Japanese authorities illegally detained Soviet ships and subjected them to careful inspection.
>
> --- Certain channels were established for the passage of Soviet ships. These channels seriously hampered navigation and failed to provide the safety of navigation in time of war. As a result, in passing through these channels several Soviet ships were sunk by "unidentified" submarines. For example, the steamer "Angarostroy" was sunk on 1 February 1942, and on 17 February 1943 the Soviet merchant ships "Il'men'" and "Kola" were sunk in the very same area. Obviously, under these conditions it was impossible to use the strait and Soviet ships were forced to seek other outlets to the ocean.[17]

It is true that, simultaneous with its declaration of war against Great Britain and United States on December 7, 1941, Japan proclaimed 12 naval defense zones in its important coastal areas and straits, including the Tsugaru and Soya Straits, in addition to other security zones in force.[18] From the circumstances of the time, when Japan could have hardly afforded the loss of Soviet neutrality in the War, however, it is not easily conceivable that the "unidentified" submarines that

sank the above three Soviet ships in the Korea Strait in 1941 were likely to have been Japanese.[19]

On account of such unfortunate experiences of the past, the Soviet Union has been increasingly anxious to ensure the safety of passage through the Korea Strait. For example, at the San Francisco Conference on peace with Japan, the Soviet Union made use of the occasion to propose that:

> The Korea Strait, and all other straits leading into the Sea of Japan, be de-militarized and opened to the passage of the merchant ships of all nations, but only to the passage of warships of the coastal states.[20]

At San Francisco, this proposal was not adopted; on the contrary, Soviet concern over problems of passage through the Korea Strait has been greatly enhanced by the post-War developments, especially by what took place during the cold-war.[21]

It should also be noted in passing that Soviet claims with respect to the Korea Strait are based on its so-called "closed sea" doctrine whereby "the closed seas are opened to the innocent merchant shipping of all nations of the world," but "complete freedom of navigation of warships and overflights of military aircraft of noncoastal States does not extend to such seas".[22] Soviet jurists have persistently sought to "establish a special regime for the closed seas," thereby subjecting the Baltic, Black, Caspian, and Okhostk Seas and the Sea of Japan to it, but "the imperialist States have done everything in their power to prevent it."[23] Because of the geographical disadvantage of having to use numerous narrow passage, particularly in the Mediterranean Sea, to reach warm-water ports and the major oceans of the world, however, the USSR, a global maritime power, appears to have become less assertive of its traditional doctrine.[24]

Use for Shipping and Maritime Trade

As one of the world's major trading nations, Japan is heavily dependent on foreign trade for the viability of its economy and, as an island nation, the viability of its foreign trade has to rely predominantly on shipping. This particular situation also applies to South Korea which, due to ideologically divided leadership on the Korean peninsula, carries on no foreign trade with or through North Korea.

Such heavy dependence on foreign trade by Japan and South Korea is made necessary by the severe shortage of natural resources in both countries. In fact, Japan is unique among the developed countries of the world in this regard, as is South Korea among the developing countries. Japan depends on foreign sources for 99.7 percent of its crude oil, 99.6 percent of its iron ore, 86.3 percent of its wheat, and 94.7 percent of its coal, to name only a few major items.[25] To meet the colossal demand for raw materials, in 1985, Japan imported a total of approximately 600 million tons of primary products, literally from all over the world, the major terms being 240 million tons of crude oil and refined products, 124 million tons of iron ore, 92 million tons of coal, 23 million tons of timber, and 25 million tons of food.[26]

Most of the huge quantities of raw materials imported by Japan are reduced to manufactured or semi-finished goods for export. In 1982, Japan shipped out over 83 million tons of commodities.[27] The total of imports and exports accounted for nearly 19 percent of the world's total volume of trade in the same year.[28] In addition to these imports and

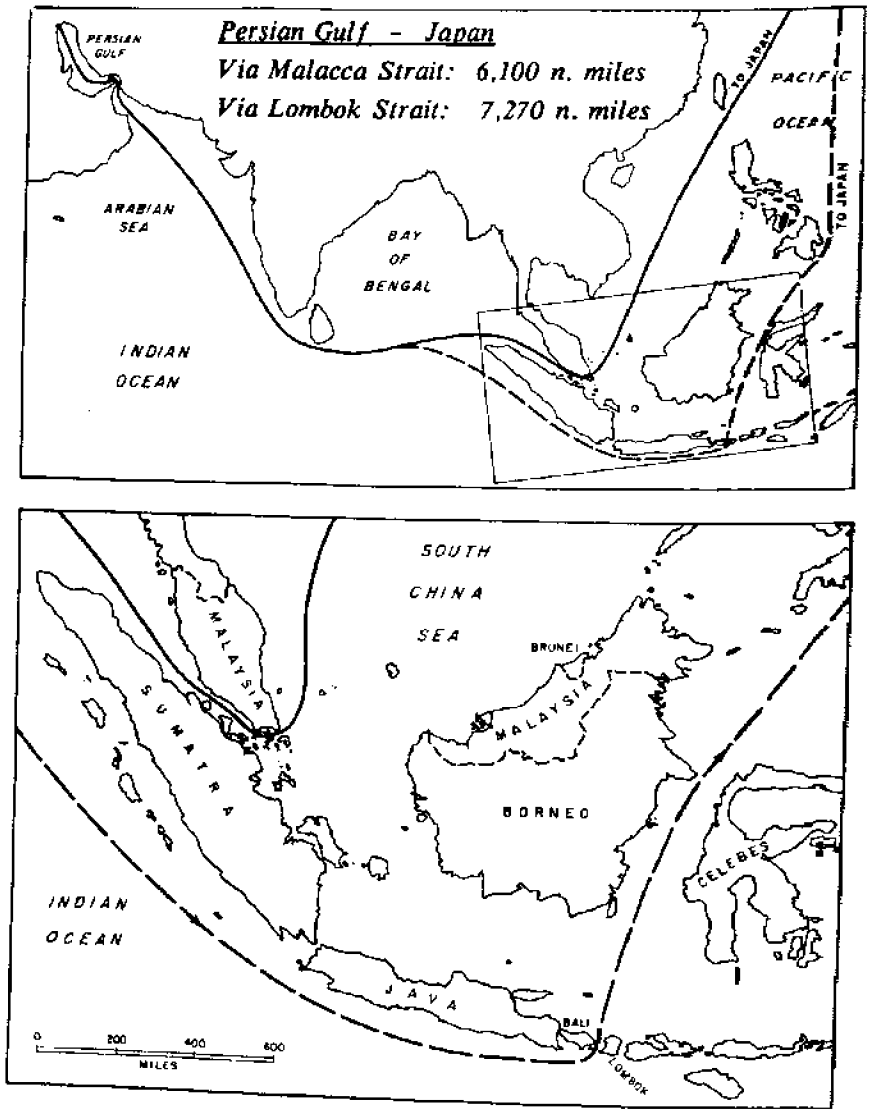
exports, a third category of maritime cargo is handled by the Japanese coastal shipping industry, which accounted for another 450 million tons in 1984.[29]

The volume and importance of shipping and maritime trade for the Japanese economy - and its impact on the world economy - may be seen from the fact that over 1,133 million tons of maritime cargo was carried into, out of and around the Japanese archipelago every year. In the long run, this grand total is not likely to decrease significantly, unless the economy of the world undergoes a basic change in structure due to, for example, the New International Economic Order. In the past sectoral decreases in demand for what Japan imports and exports did not greatly alter the overall volume of its foreign trade. For instance, in an effort to shift the primary source of energy from oil (65.8 percent in 1980) to coal, Japan imported 24 million tons (9.3 percent) less crude oil and refined products in 1980 than in 1979 (the year of the second oil crisis), but total imports decreased by only 13 million tons (2.1 percent), due to increases in coal imports and other items.[30]

South Korea is strikingly similar to Japan in some aspects, its pattern of demand for imported minerals and other major raw materials being basically parallel to that of Japan. In 1984, total maritime imports exceeded 95 million tons, and exports of commodities were over 30 million tons.[31] The geographical and industrial circumstances of South Korea are quite dissimilar to those of Japan, so that, in overall maritime transport, coastal shipping does not figure nearly as prominently as in Japan.

In the case of three nearby states: China, North Korea and Taiwan the situation varies from one to another. For obvious reasons, the economy of Taiwan[32] is heavily dependent on foreign trade and this, in turn, on shipping, as is the case with Japan and South Korea. North Korea borders on China and marginally on the Soviet Union as well, a factor that helps to lessen its dependence on seaborne trade for its economic viability. In the absence of published figures easily available to outside observers, it is not possible to describe the pattern of North Korean shipping and maritime trade in numerical terms.[33] Nevertheless, it may be assumed that, in its overall foreign trade volume, the share of maritime transport is not significant, because China and the Soviet Union are North Korea's two principal trade partners.

In its pattern of foreign trade, China is different from the other countries in the region. First, in terms of endowment in natural resources, China is in an extremely enviable position relative to its Northeast Asian neighbors, including Japan. Second, as a basically self-contained continental economy, grounded in a traditional doctrine of self-sufficiency, China does not have to depend as heavily on foreign trade as do Japan, South Korea and Taiwan. Because of the rapid growth of its foreign trade since the latter part of the 1970's, however, China's maritime trade and coastal and canal shipping are becoming proportionately more important, its major trading partners being Japan, Hong Kong, Singapore, the United States, Canada, West Germany, France, Italy, and Australia (in order of value traded). In 1970, China's 20 ports (15 state-controlled and 5 province-controlled) open to international trade handled a total of 285 million tons of cargo. Its merchant fleet grew rapidly from 20 ships in 1960 to 214 in 1975 and to 431 in 1980.[34] It may also be noted that China can develop an alternative route for its trade with Eastern Europe and the Middle East, namely, via the trans-Siberian land-bridge.[35]



MAP 5: Navigation Routes via Malacca and Lombok Straits

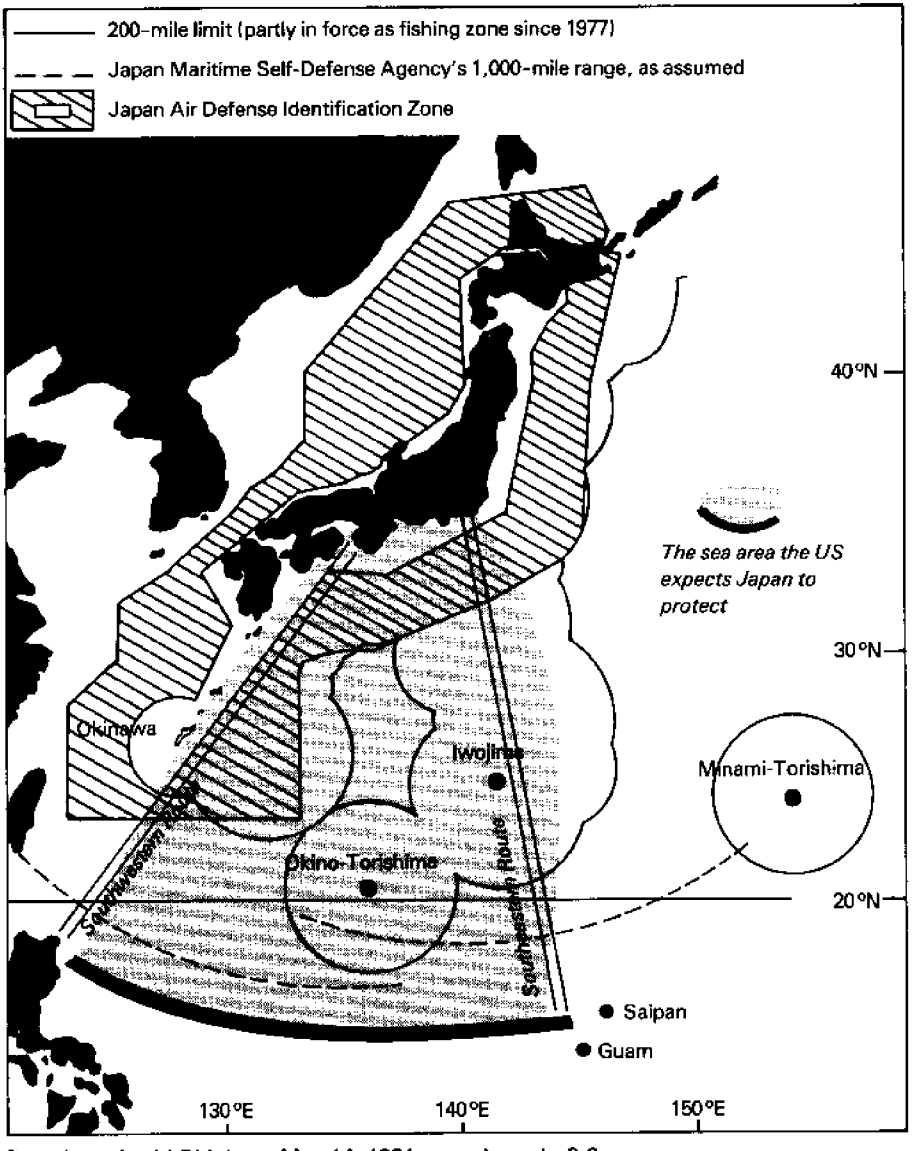
The countries of Northeast Asia - Japan, South Korea and Taiwan in particular - have no choice but to depend predominantly on maritime transport. Their dependence can be shown in relation to the density of commercial traffic in the Korea Strait. In this regard, the use of the Strait by China, North Korea and Taiwan is not substantial in fact, each of these non-strait states can safely rely on alternative routes which are equally, if not more, convenient. Nor is the Strait essential as a foreign trade link for Japan and South Korea, because these two coastal states can also count on other routes should the Strait be unavailable for passage.

In recent years, the coastal states as well as the other users of the Korea Strait have nevertheless been increasingly obsessed with the potentiality that, in case of a local or global emergency, the Strait might be blockaded for purposes not directly related to their shipping or maritime trade. It is plainly clear that such drastic measures might be intended to frustrate or even immobilize the Soviet Pacific Fleet based in Vladivostok. Since the blockade or the threat of blockade would not be conceivable under normal circumstances, they are concerned not so much with the blockade itself or its immediate impact on their foreign trade, but with the tension that would build up to cause it and a worse situation that could result from it.

Specifically, relations between the United States and the Soviet Union or between Japan and the Soviet Union would have to deteriorate to the point of conflict before the blockade of the Strait would actually take place. In the rivalry between the two super-powers over maritime supremacy, Japan might then find its vitally important sea-lanes vulnerable to interdiction by "unidentified" or piratic elements, in spite of its alignment with the United States or perhaps even in consequence of such alignment. South Korea would be in a situation similar to Japan. While the other countries in the region would not be free from such concern, partly due to their smaller volume of maritime trade than Japan's and partly due to their different political alignment with either super-power, they would find themselves involved to a lesser extent. The blockade of the Korea Strait could thus take place from both regional and extra-regional causes, because the problems of the Strait and the sea-lanes linking Northeast Asia with the rest of the world are closely related.

Problems of Sea-Lane Defense in Japan

The global network of sea-lanes on which Japan relies for its maritime trade are used by its large merchant fleet, which includes oil tankers. Safety of navigation presupposes uninterrupted passage through foreign territorial waters and straits, foremost among them the Malacca Straits. On the physical side, two geographical factors as they relate to maritime transport bear heavily on Japan as on few other major economies of the world. One is the extremely long distance its shipping has to traverse and the other is the uncomfortably narrow or troubled waterways the ships have to navigate. For instance, one of Japan's most important sea-lanes is the so-called "Japanese oil road", a stretch of 6,100 miles from the Persian Gulf to domestic crude-oil terminal stations, including one at Kiire situated at the soutern end of Kyushu. A detour via Lombok Straits rather than the more direct route through the Straits of Malacca and Singapore, makes the route longer by more than 1,000 miles (see Map 5).[36] However, this compares with Japan's non-oil maritime trade routes of 11,300 miles to Rotterdam via the Suez Canal or 15,000 miles via the Cape of Good Hope.[37]



Based on: Asahi Shinbun, May 14, 1981, morning ed., 2:2.

MAP 6: Air and Maritime Zones Around Japan (June 1981)

From the beginning, problems of sea-lane security have been a matter of concern to the Japanese shipping industry and, to a lesser extent, to the Japanese Maritime Self-Defense Force as well. But it was not until the late 1960s and the early 1970s that Japan began to foresee causes for concern regarding the security of its maritime transport. Among the series of notable happenings by which Japan was alerted were the Torrey Canyon accident of 1967, the six-day war of 1967 in the Middle East resulting in the closure of the Suez Canal, Malaysia's extension of its territorial waters from three miles to 12 miles in 1969, and the 1971 declaration by Indonesia, Malaysia, and Singapore intended to "de-internationalize" the Malacca Straits.[38]

By 1971, problems of sea-lane security in Japan had begun to assume a new phase, when the Japanese Defense Agency itself informally voiced the need to examine them in terms of what has since become the basis of Japanese maritime security policy, namely, the protection of the south-eastern and southwestern sea-lanes up to 1,000 miles from Japan proper (see Map 6).[39] Sea-lane defense has thus become one of the most serious of national concerns in Japan, especially since 1975 when, in the wake of United States withdrawal from Vietnam, the Soviet Union began to enjoy easier access to the East Asian seas as well as to Vietnam. Such Japanese concern has been further substantiated by a number of maritime incidents that have taken place in recent years due partially to increasing density of super-power naval traffic in the waters of the region. The sea of Japan is like a swimming pool for Russian submarines, and this is the source of many problems. A few incidents may be noted with interest.

First, early in October 1976, a 5,000-ton Soviet C-class cruise missile attack nuclear submarine was caught in the net of a 349-ton Japanese trawler (Taito-Maru No. 55) in the Okhostk Sea. The hauler found itself suddenly pulled backward so it hauled its net up slowly. A big black bump appeared. The captain thought he had caught a big whale, but the top opened and two neatly dressed Russian naval officers came out and signaled to him to untie the rope around the submarine. Interestingly, the event was reported nowhere in the Japanese press except in the Japanese language version of Playboy magazine. Japan was at first amused by this extraordinary accident, but was alarmed by the report of the presence in Far Eastern waters of a submarine type which, according to *Jane's Fighting Ships 1975-1976*, had previously not operated east of the Mediterranean Sea.[40]

Second, in August 1980, a fire broke out on a 4,600-ton Echo-class Soviet nuclear submarine approximately 100 miles east of Okinawa, killing at least nine crewmen and seriously injuring another three. Two days later, it was towed to Vladivostok by a Soviet tug through the 20-mile wide channel between Yoron and Okino Erabu islands north of Okinawa. At first, Japan strongly protested the unauthorized use of its territorial waters by the Soviet nuclear submarine, but the Japanese government subsequently conceded that the passage was new innocent.[41] Third, in April 1981, a 6,880-ton U.S. nuclear submarine, the George Washington, collided with a 2,300-ton Japanese merchant marine vessel, the Nissho-maru, 27 miles west of Kogoshima, Japan. As a result of this collision, the Japanese vessel sank almost immediately, with two of its crewmen reported missing.[42]

Finally, it is necessary to look at the legal aspects of the problems in the Korea Strait. The new law of the sea as embodied in the 1982 Law of the Sea Convention authorizes coastal states to extend their territorial seas to 12 nautical miles (nm). It also provides that a

coastal state can regulate passage of foreign vessels through its territorial sea.

If both Japan and South Korea enforce their 12-mile limits in the Korea Strait, approximately 18.5 nm of the Western Channel will fall completely under their jurisdictions (see Map 4). South Korea applies the three-mile limit in the Western Channel, however, as does Japan on both Channels "for the time being." This leaves a "high seas" corridor 11.8 nm wide in the Eastern Channel and another 15.2 nm wide in the Western Channel open for foreign vessels to pass through. Elsewhere around their respective coasts, both states apply the 12-mile limit, Japan since 1977 and South Korea since 1979.[43]

If foreign vessels choose to pass through the territorial seas of China, North Korea, or South Korea, some legal problems can arise, because these states demand permits or advance notice from noncommercial and military vessels on passage, a practice which the 1982 Convention does not recognize. All that is required of them is to comply with what the Convention provides in the name of "innocent passage" (or "transit passage" in the case of international straits). It now remains to be seen how these three coastal states are going to adjust their related domestic laws on or following ratification of the Convention they signed.

In this regard, the position of the Soviet Union, which is one of the major users of the Korea Strait, may be noted with interest. The Law on the State Boundary of the USSR of November 24, 1982, which came into force on March 1, 1983, superseding all related previous laws, does not specifically require foreign vessels to obtain a permit or give advance notice on passage through Soviet territorial seas.[44]

Notes

1. For the geographical circumstances of the Korea Strait in general, see Office of the Geographer, U.S. Dept. of State, *New Territorial Sea Limits in the Korea Straits*, Report No. 998, (1978); Maritime Safety Agency, Japan, *Chart Showing the Territorial Sea (Designated Area)*, Tusima Kaikyo, Chart No. 9092, (1977) [hereinafter cited as Japanese Maritime Safety Chart No. 9092]; and Hydrographic Office, Korea, *Fishing Zones*, Chart No. F-101 [hereinafter cited as Hydrographic Office Chart F-101]. Taking the two channels into account, the Korea Strait is sometimes given in plural form as the Korea Straits. In this study, however, the singular form is used. Incidentally, names of places and countries used in this study denote geographical reference only and, in succession, appear in alphabetical order.
2. See *e.g.*, Law No. 30 on the Territorial Sea, Supplementary Provisions, para. 2, Korea (May 2, 1977); and its Enforcement Order 17 Art. 4, Annexed Schedule Korea (June 17, 1977); For the English translation, see *United Nations Legislative Series* ST/LEG/SER.B/19, 57, at 60-61 (1980); [1981 Binder 1] N. Am. & Asia-Pacific & the Dev. of the L. of the Sea (Nordquist and Park) *Japan* at 5 and 9 (Feb. 1981). For an example of "Tsuima Kaikyo", see the Japanese Maritime Safety Chart No. 9092, *supra* note 1.
3. For an example of "Daehan Haehyeob", see *e.g.*, Presidential Decree No. 9162 of Sept. 20, 1978, Enforcement Decree of the Terri-

torial Sea Law, Art. 3, and Supplementary Provisions, Schedule 2; for the Korean and English texts, see Ministry of Foreign Affairs, Korea, *Territorial Sea Law and Its Enforcement Decrees of the Republic of Korea* 9 and 15 (no date). The English translation uses Korea Strait; *Id.* at 27 and 35. For an example of "Hangug Haehyeob", see Hydrographic Office Chart F-101 *supra* note 1.

4. For "Korea", North Korea uses "Chosun" without exception, as distinct from South Korea's "Daehan" or "Hangug".
5. In Chinese, it is "Chaoxian Haixia", which is the Chinese pronunciation of North Korean "Chosun Haehyop" or Japanese "Chosen Kaikyo", these three being merely the local variations in pronunciation of the same four Chinese characters.
6. For examples of both "Tsushima Strait" and "Korea Strait" in maps published by the U.S. government agencies, see *e.g.*, Office of the Geographer, U.S. Dept. of State, *Limits in the Seas*, No. 43, Straight Baselines: People's Republic of China, July 1, 1972 (retyped, July 31, 1978); Office of the Geographer, U.S. Dept. of State, *Continental Shelf Boundary and Joint Development Zone: Japan-Republic of Korea*, No. 75 (Sept. 2, 1977)

   For an example of "Korea Strait" "(Koreyskiy proliv)" in a Soviet map in a volume on the Pacific Ocean, by Sergi G. Gorshkov, Commander-in-Chief, USSR Navy. See. S. Gorshkov, 1 *World Ocean Atlas* at 18 and 281 (1976).
7. For an example of "Korea Kaikyo", see Hammond *Scan-Globe A/S* (1976).
8. For an example of "Chosen Strait", see U.S. Dept. of State, *Sovereignty of the Sea*, Geographic Bulletin No. 3 at 25 (rev. ed. Oct. 1969).
9. Central Intelligence Agency, Map No. 517133 4-74.
10. P. Barabolya, A. Bakhov, L. Ivanashchenk, D. Kolesnik, V. Logunov, S. Molodtsov & Y. Nasinovskiy, Ministry of Defense, USSR *Voenno-Morskoy Mezhdunarodno-Pravovoy Spravochnik* (Manual of International Maritime Law) 144 (1966); (the English translation, U.S. Dept. of the Navy. (Jan. 1968).
11. Office of Fisheries, Republic of Korea, *Hankook Susansa* (History of Fisheries in Korea) 185-87 (1968).
12. *Id.* at 22-23.
13. *Id.* at 187.
14. Park, *Fishing Under Troubled Waters: the Northeast Asia Fisheries Controversy*, 2 Ocean Dev. & Int'l L. 103 (1974).
15. *Id.* at 102-110.
16. For details with a cartographic illustration of the Sea of Japan battle, see Kaigun Yushukai, *Kinsei Teikoku Kaigunshiyo* (Summary of Recent Imperial Naval History) 662-63, (H. Hirose, ed. 1938). One of the four Russian cruisers, the Admiral Nakhimov, which was the Fleet treasurer, was sunk very close to the west coast of Tsushima. When, in 1980, it was reported that part of the treasures in her would be salvaged by a Japanese entrepreneur (Ryoichi Sasakawa), the Soviet Union voiced its intention to claim title to the cargo, whereupon Sasakawa offered to trade it with the four Northern Islands in dispute between Japan and the Soviet Union (see Asahi Shinbun, Oct. 10, 1980, at 1 & 3 (morning ed.)).
17. Barabolya, *supra* note 10, at 145.
18. Ministry of the Navy, Japan, *Bogyo Kaimenrei (Ordinance on Defense Zones)*, Imperial Ordinance No. 11, Jan. 23, 1904; Ministry of the Navy, Japan, *Bogyo Kaimen (Defense Sea Zones)*, Decree No. 38, Dec. 8, 1941; Office of the Secretary to the Minister of the Navy,

Japan, 3 *Kaigun Shoreisoku* (Naval Decrees and Regulations). For the English translation of part of the Japanese Imperial Ordinance No. 11 of Jan. 23, 1904, on the Defense Sea Areas (the Japanese text in *Id.* at 189), see U.S.

Naval War College, *International Law Situations* 122-23 (1912); U.S. Naval War College, *International Law Documents* 64-65 (1943), and Taussig, *Territorial Control and Jurisdiction over Sea Areas*, 7 U.S. Naval Inst. Proc. 816 (July, 1945). For a cartographic illustration of the defense zones covering the Korea Strait area, see Chinkai Keibifu (Chinhae, South Korea, Area Security Command), Nihon Kaigun (Japanese Navy), *Tsushima Kaikyofukin Shosen oyobi Shokuzu (Patrol Lines and Zones in the Tsushima Strait and Adjacent Areas)*, *Senji Nitshi* (War-time Daily Journal), Annex, Tokyo, (Feb. 1943) [hereinafter cited as War-time Daily Journal].

19. In the Japanese navy's War-time Daily Journal *supra*) note 18, covering the period of the sinking incidences, numerous entries are found referring to visitations aboard, and advance notices of passage by Soviet vessels in transit, but the three vessels in question are not named in the navy journal or in the Japanese dailies of the time.
20. Barabolya, *supra* note 10, at 145. Dulles, *Record of Proceedings. Conference for the Conclusion of Treaty of Peace with Japan*, Department of State Bulletin No. 4392, 122 (1951).
21. Barabolya, *supra* note 10, at 145-147.
22. *Id.* at 111.
23. *Id.*
24. Butler, *The Soviet Union and the Law of the Sea* 116 (1971). For the Soviet doctrine on the "closed seas" in general, see Butler, *The Law of Soviet Territorial Waters* 19-26 (1967); and Barabolya, *supra* note 10, at 111-114.
25. *Sujide miru Nihonno Kaiun Zosen 1986 (Japan's Shipping and Shipbuilding in Numerical Terms in 1986)* 60 (1986).
26. *Id.* at 59.
27. *Id.* at 23.
28. *Id.* at 49.
29. *Id.* at 96.
30. Ministry of Transportation, Japan, *Nihon Kaiunno Genkyo* (Current Status of Shipping in Japan) 9 (1981).
31. Korea Trade Organization, *Muyuk Nyungam* (Trade Yearbook) 37, (Seoul, 1985). Also see Kim, *Ocean Transportation and Sea-Lanes of Communication of Korea: An Overview*, in C. Park & J. Park (eds.), *The Law of the Sea: Problems from the East Asian Perspective* 52 (1987); Lee & Kim, *Jubyunhaesang Jungsewa Hankukeui Haesangkyotongro Huakbochaek* (Maritime Circumstances and the Security of Sea Lanes in Korea), 17 *Haeyang Junryak* (Maritime Strategy) 39-118 (Korean Naval War College, Aug. 1982).
32. For Taiwan's economic statistics, see the annual Statistical Data Book, published by the Council for Economic Planning & Development.
33. For an up-to-date analysis of North Korean foreign trade in general, see *Economic and Trade Relations between China and North Korea*, Special Report, 36 China Newsletter 25-29 (Tokyo, Jan.-Feb., 1982).
34. For an up-to-date analysis of Chinese foreign trade, see *Trends in China's Foreign Trade*, Special Report, 37 China Newsletter 22-24 (Tokyo, Mar.-Apr., 1982); and for details on China's shipping and port facilities in general, see Delfs, *U.S.-PRC Shipping*, 8 China Bus. Rev. 10 (Washington, D.C., Sept.- Oct., 1981); Pisani, *China's*

Port and Maritime Program, 8 China Bus. Rev. 22; *Renmin Jiaotong Chubanshe* (People's Communications Publishing House), *Zhong Kuo Haihang Gaikuang* (Sea Ports of China) (Beijing, 1974). For subsequent developments in China's shipping, see Park, *Junggong eui Haiun Hangman Hyunhang (Current Status of Shipping in China)*, in Haiun Hangman (Shipping and Ports), Summer 1986, at 48.

35. This has been steadily on the increase since 1972. Although the lower fares are an attraction, Japan is concerned about the fact that the safety of this route is contingent on its political relations with the Soviet Union. See *Nihon Kaiunno Genkyo*, *supra* note 30, at 32-33.
36. Malacca Straits Council, *Aid Report 1970* (in Japanese), 38-40 (Tokyo, 1970). Chen, *Malacca Kaikyo-to Nihon: Toraburuwa Kanarasu Kakudaisuru (Malacca Straits and Japan: the Trouble will Necessarily Aggravate)*, (Sekai Shuho), (Weekly World), Mar. 28, 1972, at 16-26. For a 10-installment report in Japanese on a 66-day round trip between Japan and the Persian Gulf aboard the London, a supertanker, see Momo, *The Oil Road (in Japanese)*, Asahi Shinbun, July 1-11, 1980.
37. Farnsworth, *Not Only Egypt Will Welcome an Open Suez*, Two cartographic illustrations provided. N.Y. Times, Jan. 27, 1974, sec. 4 at 2, col 1.
38. For the English text of the three party declaration, see H. Ahmad (ed.), *Malyasia and the Law of the Sea* 319 (1983).
39. Takaoka, *Silein Boeironno Kikensei* (The Danger of Sea-lane Defense Argument), *Sekai* (The World), 210 (Jun. 1982). The author of the article in this monthly gives a series of his negative views on the feasibility of sea-lane defense by Japan. *Id.* at 205-209. The Japan Times, *The Defense of Japan* 79 (1985). This book is the English translation of Japan's defense yearbook. For a comprehensive observation, see *Kaiekino Anpo* (Security of Maritime Areas), Asahi Shinbun, Jun. 17-21, 1981, at 3 (morning ed.). This is a 5-installment series written by Japanese correspondents based in Cairo, New Delhi and Singapore, and their colleagues at home.
40. For details, see Iwajima, *Soren Kaigun* (The Soviet Navy), *Puleiboi* (Playboy), 126-128 and 215-219 (Tokyo ed. Feb. 1977). Asahi Shinbun, Oct. 31, 1976, at 19 (morning ed.).
41. For details, see Grammig, *The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea*, 22 *Harvard Int'l L.J.* 331 (Spring 1981); and *Asahi Shinbun*, Aug. 26, 1980, at 1 (morning ed.).
42. For details on this accident, see Asahi Shinbun, April 11, 1981, at 1 (morning ed.), and May 6, 1981, at 1 (evening ed.). For the loss of cargo aboard the Japanese vessel, China sued the U.S. government; the amount of damage awarded by a Federal Court in New York was US$3,800,000. Yomiuri Shinbun, July 7, 1983, at 5 (morning ed.).
43. For details on South Korean territorial sea law, see *Territorial Sea Law and Its Enforcement Decrees of the Republic of Korea*, *supra* note 3; on Japanese territorial sea law, see Yanai & Asonuma, *Japan and the Emerging Order of the Sea -- Two Maritime Laws of Japan*, 21 Japanese Annual of International Law 48 (1977). On the Japanese and Korean laws, see Smith, *New Territorial Sea Limits in the Korea Straits*, Report No. 998, Office of the Geographer, U.S. Dept. of State, June 15, 1978.

44. For details on the Soviet state boundary law, see W. Butler (ed.), VI-2 *Collected Legislation of the Union of Soviet Socialist Republics and the Constituent Union Republics*, Release No. 83-1 (1983).

South Korea's Baseline Claims

Jon Van Dyke: Are the claimed baselines of South Korea as shown in Map 7 consistent with the guidelines presented by Peter Bernhardt (pages 85-99 above)?

Lewis Alexander: The only baseline that I would question is the one on the southwest between Hong-do and Hoeng-do, a distance of nearly 54 miles; the line could have touched one of the islets or rocks in between, closer to the coast. The other baseline with what might be termed excessive length is more to the south between Cholmyong and Sohuksan-do, 60 miles in length, but here there are no coastal islets or rocks closer to the coast to use as way-points.

Van Dyke: You think this one is okay?

Alexander: Yes. I do not see what else you could do. You are following the general direction of the coast. You are picking up those islands that are a part of the coast. It looks like a fringe of islands.

Van Dyke: These would not be fringing islands, though, according to Peter Bernhardt's notion (see pages 92-95).

Alexander: They are rocks, aren't they?

Van Dyke: They do not mask the coast to the extent that he said would be necessary.

Alexander: They mask the coast.

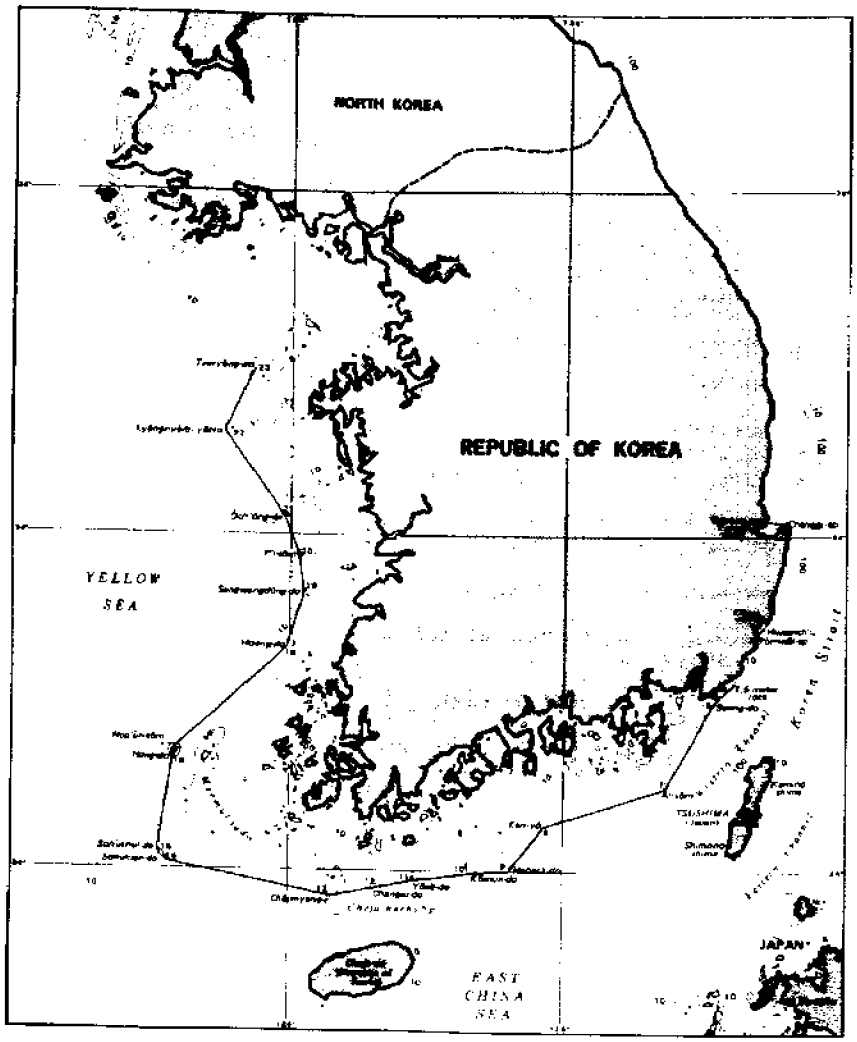
Van Dyke: Is there a 70 percent mask?

Alexander: The coast is right behind them. They do not have have to be really big. You do not have to have a large amount of territory. Look at the Norwegian skjaergaard. They are just rocks along the coast.

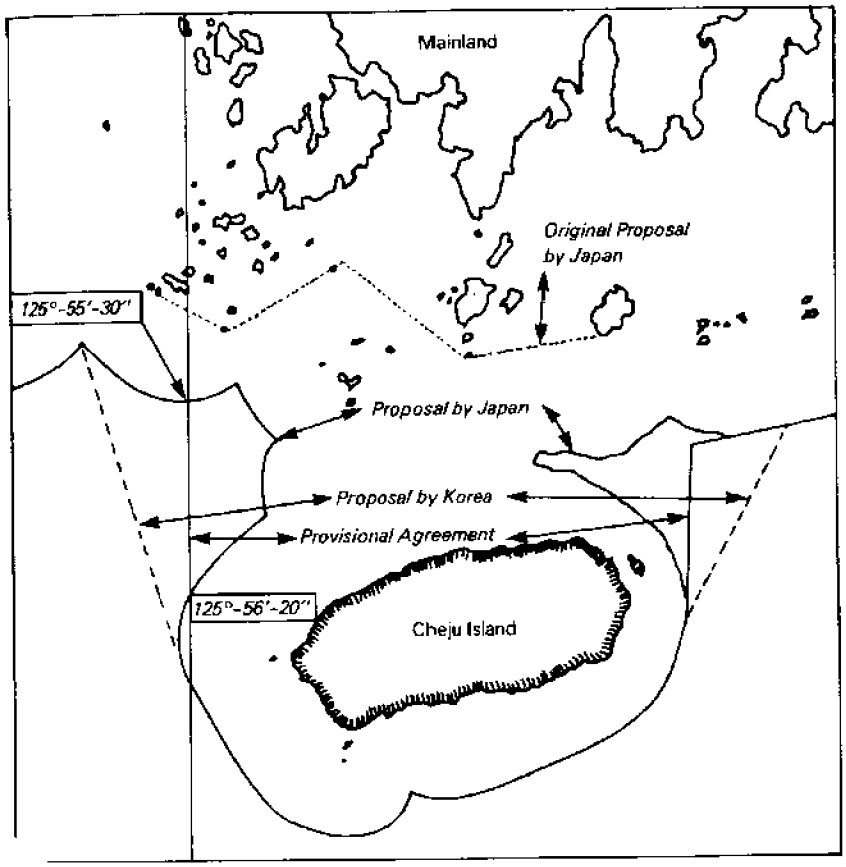
Van Dyke: What does it mean to mask the coast?

Alexander: That means that all the way along the coast you keep seeing islands. But they do not have to completely cover the coast so that you cannot get from the coast out to the sea.

I am surprised they did not go down and pick up Cheju. In fact, on other maps I have seen (Map 7) the baselines go all the way down and pick up Cheju Island and then go back, which would make Cheju Strait between the island and the mainland an internal strait. But this version does not do that.



MAP 7: Straight Baseline Claims of the Republic of Korea



MAP 8: The Demarcation Around Cheju Island
(based on the initialled Korea-Japan Agreement).

Choon-Ho Park: On the map you are referring to (Map 8) Lew, you are right, the Cheju Island area is all within Korean territorial waters. In fact, that map is somewhat misleading in the sense that there are 3,500 plus islands not shown on the map. But if you were to draw a 12 mile limit from both the mainland and from Cheju Island, then the Cheju Island area would come under the South Korea territorial sea.

But the real problem began in 1965 when Japan and Korea negotiated a fisheries agreement. When the Koreans said their position was unnegotiable, Japan strongly opposed the baselines enclosing Cheju Island. So the treaty says that, as a provisional measure, the area would be included temporarily under Korean fishery zones. But Japan did not say it would recognize the Korean straight baselines. This a very touchy point still now.

Alexander: Is Cheju still left out in your latest maps?

Park: Yes, this map (Map 7) is the latest, in fact. Now Japan has not questioned any of the segments there. The real problem there is not the straight baselines but the passage, because of what the Convention says: if there happens to be an equally convenient route seaward of the island (See Article 36). Foreign navigators would think that passage should be between the mainland and Cheju Island, but the Korean government thinks that, in spite of some additional distance, still the route seaward off Cheju Island would be equally convenient. That is why in the 1977 Territorial Sea Law of Korea there is no reference as to whether Cheju Strait is international or not, whereas the western channel of the Korea Strait was specifically designated as international.

Alexander: Further northwest of Cheju Island, at Maemul-sudo, you close that off. But the right of innocent passage should still exist through there, shouldn't it because it was a high seas area earlier (see Article 8(2))?

Park: If you question it in Korea, you probably won't be invited to a party.

Sang-Myon Rhee: Another interesting factor in this map is that at the Bay of Kanghwa near the south entrance of Seoul, there is no straight baseline. So the measure of the territorial sea would be the great problem. The red line goes up and then suddenly stops. And then where are the limits of the territorial sea? Of course, if you go a little bit northward, there is a special maritime zone for internal purposes.

Continental and Mid-Ocean Archipelagic Claims

Rhee: And another point I want to make is that in the Law of the Sea Convention there is too much respect for the ocean archipelagic regime but there is not so much respect for the coastal archipelagic regime.

Van Dyke: I was thinking along these same lines when Peter Bernhardt was making his presentation, that the very rigid guidelines he was suggesting did seem so dramatically different from the guidelines governing archipelagic states, which the United States had accepted. He went out of his way to emphasize that the current U.S. position is to

differentiate sharply between archipelagic states which have archipelagic waters and the claims of every other nations, which are going to be scrutinized carefully.

Rhee: This existence of two different regimes creates inconsistencies. For example, between Malaysia and Indonesia, there is a special provision in the Law of the Sea Convention respecting Malaysian interests. (See Article 47(6)). Under the principle of mutual reciprocity, they mutually agreed to have a longer straight baseline on the side of Malaysia. On the other hand, Japan is an archipelagic state, but Japan does not claim any archipelagic water. If Japan were to claim archipelagic regime, then they could draw a longer baseline from Tsushima to Kyushu and all surrounding Japanese small islets in the western part of the Pacific Ocean.

Alexander: Japan cannot be an archipelagic state. They do not have a one-to-one ratio of water to land.

Rhee: That depends on how one draws the lines.

CHAPTER 5

ARCHIPELAGOES AND ARCHIPELAGIC SEA LANES PASSAGE

Introduction

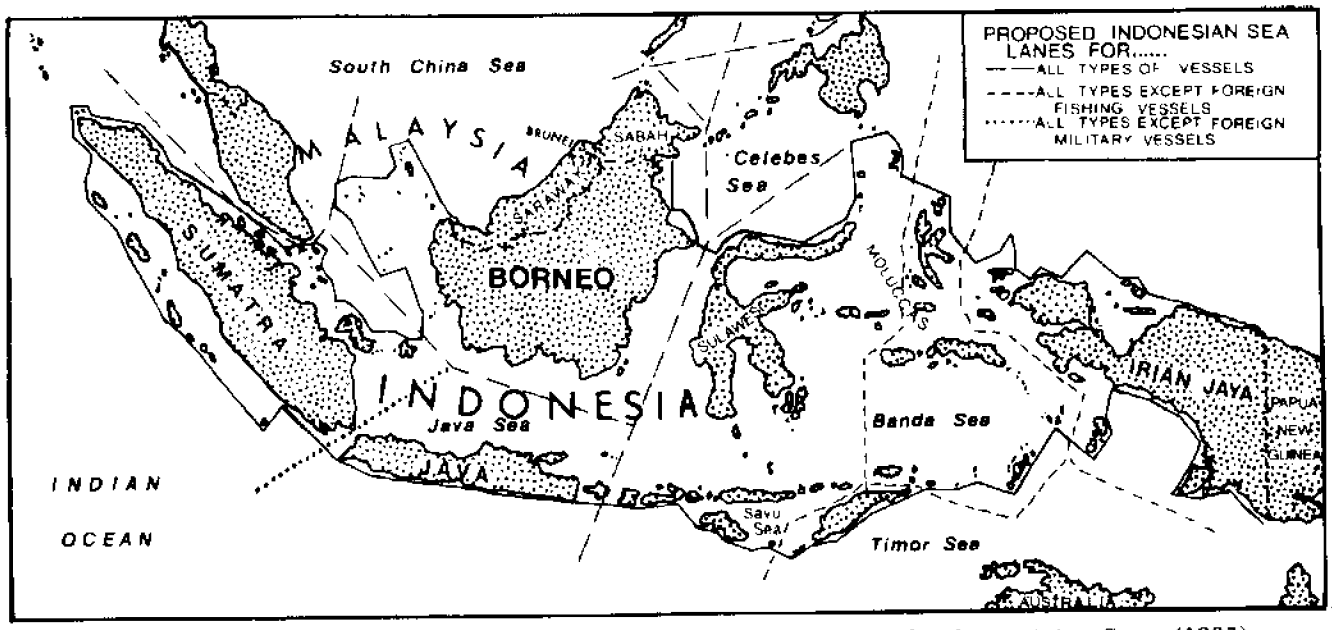
An archipelagic nation is one whose national territory includes not only islands but also the marine waters between the islands. The 1982 Law of the Sea Convention specifies that archipelagic nations must consist solely of islands or parts of islands and that the ratio of water to land included within archipelagic baselines must be between 9:1 and 1:1. This archipelagic regime is now codified in Part IV of the Convention. In return for giving the maritime nations a right of passage through defined sea lanes, archipelagic states achieved recognition of their sovereignty over a broad and carefully defined area. This recognition is more than mere lip-service to local control, because the regime enables the archipelagic state to enforce environmental and economic proscriptions, enhance security, control and preserve resources, prescribe sea lanes and traffic separation schemes, and promote political unity. The 1982 Convention assigns to the archipelagic nations the responsibility for designating sea lanes in coordination with the "competent international organization," which is assumed to be the International Maritime Organization (IMO). Designation of archipelagic sea lanes is a potentially potent device for regulating navigation.

The first paper in this chapter, *Archipelagic Waters and Archipelagic Sea Lanes* by Nugroho Wisnumurti of Indonesia, provides a thorough analysis of the evolution of the archipelagic concept with all its ramifications both for sovereignty over resources and international navigation. He discusses subtle yet important differences in the Convention between the real meaning of innocent passage, transit passage, and archipelagic sea lanes passage.

Mr. Wisnumurti considers the archipelagic regime a compromise acceptable only as part of a carefully balanced "package deal." Archipelagic sea lanes passage is limited to "continuous, expeditious" passage. He notes that the absence of the word "freedom" in Article 53(3) as compared to Article 38(2) further removes archipelagic passage from that of high seas passage, and he warns of vulnerability regarding the designation of sea lanes and a tug-of-war between a broad versus narrow interpretation of Article 53(4).

Comments following Mr. Wisnumurti's paper concern the nature of archipelagic sea lanes passage and the status of archipelagic waters. Is the archipelagic regime customary international law or new law? Are nonsignatories bound? What actions can archipelagic states take against vessels that do not comply with littoral state regulations?

Indonesia has long advocated the archipelagic principle and has played an important role in its legal development. In his paper, *Some Aspects That Should Be Considered in Designating Indonesia's Sea Lane*, Indonesia's Atje Misbach Muhjiddin briefly traces the archipelagic concept as it evolved in post-World-War-II Indonesia and the various inter-



Source: J.R. Morgan and M.J. Valencia (eds.) *Atlas for Marine Policy in Southeast Asian Seas* (1983)

MAP 9: Proposed Indonesia Archepelagic Sea Lanes

national conventions dealing with the law of the sea. He then discusses the concerns that will affect their placement.

Although Indonesia's sea lanes have not yet been formally proclaimed, in informal discussions the following lanes have been suggested:

I. Sea lanes connecting the South China Sea with the Indian Ocean:

1. The South China Sea route with the entry point at the sea around Matak Island - Singapore Strait - Malacca Strait - the Indian Ocean;
2. The South China Sea route with the entry point at the sea around Matak Island - Karimata Strait - Sunda Strait - the Indian Ocean.
3. The South China Sea route with the entry point at the sea around Matak Island - Karimata Strait - Java Sea - Bali Sea - Lombok Strait - the Indian Ocean.

Sea lane I.2 would be designated only for merchant ships other than super tankers and nuclear-powered ships, and the sea lane I.3 would be for all types of ships except super tankers and nuclear ships.

II. Sea lanes connecting the Pacific Ocean with the Indian Ocean:

1. The Pacific Ocean with the entry point around Miangas Island - Sulawesi Sea - Makassar Strait - Flores Sea - Lombok Strait - the Indian Ocean;
2. The Pacific Ocean with the entry point around the Miangas Island - Maluku Sea - Grey Hound Strait - Banda Sea - Flores Sea - Omb Strait - Sawu Sea - the Indian Ocean (exit point around Sawu Island);
3. The Pacific Ocean, entry point Miangas Island - Halmahera Sea - Maluku Sea - Grey Hound Strait - Banda Sea - Indian Ocean (exit point around Yoko Island to the east of Timor Island);
4. The Pacific Ocean, with the entry point around Sayang Island - Halmahera Sea - Searam Sea - Arafuru then divide into two directions (1) to the east to Torres Strait; and (2) to the west to the Indian Ocean.

The sea lanes II.2, 3 and 4 would be designated for all types of ships except fishing vessels.

These sea lanes are illustrated in J.R. Morgan and M.J. Valencia (eds.), *Atlas for Marine Policy in Southeast Asian Seas* (1983) in a map attached hereto as Map 9.

Camillus Narokobi's paper *The Regime of Archipelagoes in International Law* traces the development of the concept through various legal pronouncements of scholars and jurists. He distinguishes among three types of archipelagoes: mid-ocean, coastal, and geographically insular. Mid-ocean archipelagoes are typified by nations such as Indonesia, the Philippines, and Fiji, while coastal archipelagoes are those that consist of fringing islands adjacent to continental nations. To Mr. Narokobi, a citizen of Papua New Guinea, the third type, geographically insular archipelagoes, is the most important. In his words, this group consists of "a part of one or a number of large islands that constitute the mainland plus associated smaller fringing islands that are 'tied' to the mainland through the use of straight baselines." This paper examines some special navigational problems relating to Papua New Guinea as a consequence of that nation's geography, and Mr. Narokobi explains how

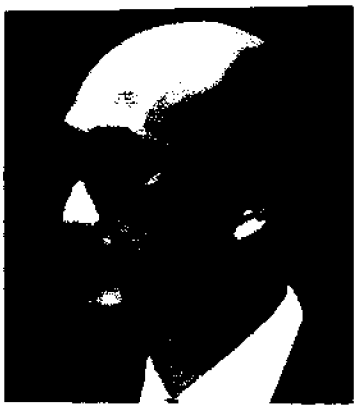
Papua New Guinea may be exempt from archipelagic sea lanes passage altogether.

A number of references to the "competent international organization" appear in the Convention. The International Maritime Organization (IMO) is assumed to fill this role with reference to navigation, ocean pollution, and related matters. The IMO is important to the international maritime community and to coastal states concerned with the security and environment of their waters. The paper by Thomas S. Busha, then the general counselor to the IMO, entitled *The Response of the International Maritime Organization to References in the 1982 Convention to the "Competent International Organization,"* provides valuable insights into IMO views of archipelagic sea lanes concepts in addition to many other maritime issues. Mr. Busha's paper discusses in detail the IMO's role in adopting archipelagic sea lanes when such sea lanes appear to meet the needs of both the archipelagic state and flag states.

Much uncertainty remains on the balance of power articulated in the Convention between maritime powers and archipelagic states. What Mr. Wisnumurti finds an "acceptable compromise," Mr. Narokobi sees largely as an "unacceptable give-away." The discussion following the papers focuses on the process through which treaties are implemented and guidelines become law. Specifically, the respective roles and power of the IMO and of the coastal states in designating sea lanes are discussed. Thomas Clingan describes the IMO decision-making process as "consultative" but says the IMO has virtual veto power; Edgar Gold characterizes the IMO's role as that of a "clearinghouse" with coastal states retaining ultimate control over decision making; Nugroho Wisnumurti asserts that the archipelagic states in fact seem to be subject to a double veto. In addition to designation of sea lanes in particular strait and archipelagoes, air routes over archipelagic sea lanes and restrictions on warships in archipelagic sea lanes are discussed.

ARCHIPELAGIC WATERS AND ARCHIPELAGIC SEA LANES

Nugroho Wisnumurti[1]
Director of Legal and Treaty Affairs
Indonesian Department of Foreign Affairs



The significance and impact of the 1982 Convention on the Law of the Sea (the Convention) to the international community are indeed beyond doubt. The result of fifteen years of strenuous negotiations, the Convention figures prominently as a monumental achievement of the world community in establishing new world order of the oceans. As Tommy Koh, the President of the Third UN Conference on the Law of the Sea put it, "it represents the most ambitious effort at the codification and progressive development of international law undertaken by the international community since the creation of the United Nations."[2]

Although some previously existing rules are preserved or further refined by the Convention, a significant number of new legal regimes governing the uses of the sea are created. One of the most innovative is the regime of the archipelagic state. The inclusion of an archipelagic state regime in the Convention signifies a recognition by the international community of the basic need to preserve the unity of states comprising archipelagoes.

The concept of archipelagic waters is the cardinal element of the archipelagic state regime because it ensures the unity of the archipelagic state. This paper examines the evolution of the regime of archipelagic waters, the legal status of archipelagic waters, the regime of archipelagic sea lanes passage, and issues pertaining to the implementation of the regime.

The Evolution of the Regime of Archipelagic Waters

Early Academic Opinions and the Work of International Bodies

The regime of archipelagic waters, which constitutes a legal regime *sui generis*, was developed to suit the particular geographical characteristics of a state composed of archipelagoes or groups of archipelagoes and to preserve the unity of the archipelagic state. The concept of unity can be traced back as early as 1889 when the question of the delimitation of the territorial sea of archipelagoes was raised in the Hamburg session of the Institut de Droit International by the Norwegian jurist Aubert,[3] who suggested that an archipelago should be treated as one unit.[4]

Concrete proposals on the delimitation of the territorial sea of archipelagoes based on unity concepts were later submitted to and discussed by various international bodies and international law publicists, but for many years no agreement was reached. The International Law Association, for instance, proposed at its 1924 meeting in Stockholm the following language:

> Where there are archipelagoes the islands thereof shall be considered as a whole, and the extent of the territorial waters ... shall be measured from the islands situated most distant from the center of the archipelago.[5]

In its final resolution of 1928, the Institut de Droit International proposed the following:

> Where archipelagoes are concerned, the extent of the marginal sea shall be measured from the outermost islands or islets provided that the archipelago is composed of islands and islets not farther apart from each other than twice the breadth of the marginal sea and also provided that the island or islets nearest to the coast or the mainland are not situated farther out than twice the breadth of the marginal sea.[6]

A provision on the territorial sea of archipelagoes was included in a draft convention prepared for the 1930 Codification Conference at the Hague:

> In the case of archipelagoes, the constituent islands are considered as forming a whole and the width of the territorial sea shall be measured from the islands most distant from the center of the archipelago.[7]

The Preparatory Committee later drafted the following:

> In the case of a group of islands which belong to a single State and at the circumference of the group are not separated from one another by more than twice the breadth of territorial waters, the belt of territorial waters shall be measured from the outermost islands of the group. Waters included within the group shall also be territorial waters.[8]

The judgment of the International Court of Justice in the Anglo-Norwegian Fisheries Case of 1951,[9] opinions of international law publicists, and the work of the International Law Commission have all contributed to the evolution of the archipelagic state regime.

National Claims

In 1955, the evolution of the regime entered a new stage. The Philippines and Indonesia made national claims. The Philippine government sent a note verbale to the Secretary General of the United Nations on March 7, 1955, and another note verbale with virtually the same content on January 20, 1956 to the International Law Commission, stating that all waters between and connecting different islands belonging to the Philippine Archipelago, "irrespective of their width and dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland water, subject to the exclusive sover-

eignty of the Philippines." All other water areas within the lines described in the Treaty of Paris of December 10, 1898 and other related agreements are considered the territorial waters of the Philippines. Innocent passage of foreign ships through these waters was assured in these notes verbales.[10] In the Congressional Act of 1961 which confirmed the position of the Philippine government, the waters enclosed by treaty limits referred to in the note verbale as territorial waters are regarded as part of the territory of the Philippine islands, but the waters within the baselines drawn from the appropriate points of the outermost islands are designated as "inland waters" or "internal waters".[11] With the promulgation of this Act, therefore, the right of innocent passage of foreign ship was put in doubt.[12]

After independence on August 17, 1945, Indonesia continued to promote the unity concept. Until 1957, Indonesia's maritime jurisdiction was governed by the 1939 Territorial Sea and Maritime Areas Ordinance (inherited from the Dutch colonial government) which stipulated that the width of the territorial sea of the Indonesian islands was three nautical miles measured either from straight baselines connecting the outer edge of a group of two or more islands or from the low water mark of the islands.[13] It was apparent then that the law did not sufficiently safeguard Indonesia's territorial integrity. "Pockets" of high seas in the middle of the Indonesian archipelagoes had been used -- or rather misused -- by hostile foreign forces to destroy the country and the nation. The heart of Indonesia was exposed to foreign intervention, subversion, and aggression.

The grave situation endangering the very existence and survival of Indonesia in 1957 compelled the Indonesian Government to make a historic decision. On 13 December of that year, the Indonesian Government issued the Djuanda Declaration, which in effect proclaimed Indonesia an archipelagic state. It states in part that "all waters around, between and connecting the islands of the republic of Indonesia, regardless of their width, are the natural appurtenances of the land territory of Indonesia, and therefore, form part of the internal or national waters under the absolute sovereignty of the Republic of Indonesia." The principles underlying this concept are the unity of the land and the waters of Indonesia, and the political unity of the country.

Indonesia's special responsibilities to the international community regarding international maritime traffic were addressed in the Declaration of 1957, reflecting its awareness of the importance of the seas as a means of communication. The Declaration states, *inter alia*, that the innocent passage of foreign vessels through the internal waters enclosed by the new method of drawing straight baselines (now called archipelagic waters) is guaranteed so long as it is not contrary to the sovereignty of and does not disturb the security of the Republic of Indonesia.[14]

The Djuanda Declaration of 1957 which revoked certain provisions of the 1939 Territorial Sea and Maritime Areas Ordinance was followed by the promulgation of Law No. 4 of the Year 1960 on the Indonesian Internal Waters. The law confirms and elaborates the archipelagic state concept as contained in the Djuanda Declaration, stipulates that Indonesian Waters consist of the Indonesian Territorial Sea and Indonesian Waters,[15] and gives a legal and territorial framework to the national philosophical outlook of Indonesia based on the concept of the unity of the land, the waters, and the people.

The implementing regulation[16] defines the term "foreign vessels" and lays down specific rules concerning the innocent passage of foreign

fishing vessels, scientific research vessels, and warships as well as foreign noncommercial government ships.[17]

These national claims signify new elements in the evolution of the concept of archipelagoes. Firstly, geographic unity is no longer the only basis of the concept. Political and economic unity as well as national security manifested themselves as the more prominent basis. Secondly, it is the status of the waters enclosed by the archipelagic baselines which constitute the most essential element of the concept rather than the method of drawing straight archipelagic baselines, in as much as it gives meaning to the concept of unity. In their national claims, Indonesia and the Philippines considered internal waters as the only status that could correspond to the concept of unity in its totality. Thirdly, it became clearer that international recognition of the concept of the archipelagic state depended on a regime of passage through the enclosed waters.

First and Second United Nations Conferences on the Law of the Sea

It was at the First UN Conference on the Law of the Sea held in Geneva in 1958 that the concept of the archipelagic state was advocated by governments in an international forum. The Philippines submitted the following proposals to the Conference:

> The method of straight baselines shall also be applied to archipelagoes, lying off the coast, whose component parts are sufficiently close to one another to form a compact whole and have been historically considered collectively as a single unit. The baselines shall be drawn along the coast of the outermost islands, following the general configuration of the archipelago. The waters within such baselines shall be considered as internal waters. Alternative: When islands lying off the coast are sufficiently close to one another so as to form a compact whole and have been historically considered collectively as a single unit, they may be taken in their totality and the method of straight baselines provided in Article 5 may be applied to determine their territorial sea. The baselines shall be drawn along the coast of the outermost islands, following the general configuration of the group. The waters inside such baselines shall be considered internal waters.[18]

The proposal was strongly opposed by major maritime countries who were seriously concerned with the effect of the concept on the freedom of navigation. In the face of such strong opposition and the lack of sufficient support (the composition of the participants of the Conference was not advantageous to newly independent states like Indonesia and the Philippines), the Philippine delegation withdrew its proposal.

Third United Nations Conference on the Law of the Sea

The effort to promote international acceptance of the archipelagic state concept was renewed during preparatory work for the Third UN Conference on the Law of the Sea and during the Conference itself. Indonesia, the Philippines, Fiji, and Mauritius submitted draft principles on archipelagic states to the 1973 spring session of the United Nations Sea-bed Committee, the committee entrusted with the preparation of the Third United Nations Conference on the Law of the Sea. The principles spelled out in the Four Power draft are as follows:[19]

1. Any archipelagic State, whose component islands and other natural features form an intrinsic geographical, economic and political entity, and historically have or may have been regarded as such, may draw straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago from which the extent of the territorial sea of the archipelagic state is or may be determined.
2. The waters within the baselines, regardless of their depth or distance from the coast, the sea-bed and the subsoil thereof, and the superjacent airspace, as well as all their resources, belong to and are subject to the sovereignty of the archipelagic State.
3. Innocent passage of foreign vessels through the waters of the archipelagic State shall be allowed in accordance with its national legislation, having regard to the existing rules of international law. Such passage shall be through sealanes as may be designated for the purpose by the archipelagic State.[20]

The archipelagic state concept was further elaborated upon in draft articles submitted by the four archipelagic states to the 1973 summer session of the UN Sea-Bed Committee,[21] and to the second session of the Third UN Conference on the Law of the Sea held in 1974 in Caracas, Venezuela.[22] The Caracas Draft defines more clearly an archipelagic state, spelling out rules concerning the drawing of baselines from which the extent of the territorial sea, the economic zone, and other special jurisdiction areas are to be measured. It also enumerates the nature and characteristics of the waters inside such baselines designated as archipelagic water, prescribes rules for innocent passage, and defines the rights and obligations of foreign vessels exercising passage through the archipelagic waters and the designated sealanes.[23]

The draft articles received general support from developing countries attending the Caracas session. The opponents of the draft articles were the major maritime countries who feared that the freedom of navigation through the archipelagic waters would be hampered or impeded.

In order to reach a mutually acceptable solution to the conflicting positions, intensive negotiations between the most directly interested countries held, namely the four archipelagic states and the major maritime powers, represented primarily by the United States and the Soviet Union.

Several years of intensive direct negotiations finally produced concrete results. A consensus was reached in 1976 between the archipelagic states except the Philippines (but including new members such as Papua New Guinea and the Bahamas) and the major maritime powers on the legal regime of the archipelagic state, which now appears in Part IV of the 1982 UN Convention on the Law of the Sea.

Legal Status of Archipelagic Waters

Preparatory Work Towards an Agreed Legal Status

As mentioned earlier, the most essential element of the archipelagic state is the regime of archipelagic waters. From the early stage of the evolution of the concept of archipelago, the status of the waters enclosed by the archipelagic baselines has always been the determining factor in reaching agreement on the concept of archipelago, aside from the regime of passage. Even among the archipelagic states, this question was not easily resolved.

In the meetings of the archipelagic states consisting of Fiji, Indonesia, Mauritius, and the Philippines held in New York on March 13, 1972 and in Manila on May 25 and 26 of that year, it was evident that each had different positions with regard to the legal status of the waters enclosed by the archipelagic baselines. The Philippines insisted on designating the waters as internal waters which would ensure the sovereignty of the archipelagic state and would be consistent with its laws. This position was basically shared by Indonesia. Fiji on the other hand preferred to designate the waters as a territorial sea. Mauritius's position was closer to that of Fiji. Closely linked to their respective positions on the status of the enclosed waters was the question of the regime of passage to be applied in those waters.

The differing positions resulted from their different perceptions concerning the concept of the archipelagic state. The concept of unity for the Philippines and Indonesia is construed in its broadest sense, i.e., unity in a geographic, political, economic, and cultural sense; furthermore, the concept is security oriented. For Fiji, geographic and economic unity are the essential elements of the concept.

Realizing this difficulty, Indonesia suggested that the draft principles should only describe the nature of the waters reflecting the sovereignty of the archipelagic state. This suggestion was agreed to and the draft principles submitted to the UN Sea-Bed Committee in 1973 did not designate any name for the enclosed waters.[24]

This approach was justified because the proposed status of the enclosed waters -- as the draft principles revealed -- was a legal status *sui generis*. It is not internal waters because it allows the innocent passage of foreign vessels; it is not a territorial sea because the waters lie on the inner side of the territorial sea baselines and the regime of internal waters (with innocent passage) applies in those waters; neither is it high seas because there is no freedom of navigation.[25]

Finally, at the 1973 summer session of the UN Sea-Bed Committee the term "archipelagic waters" was used in the first comprehensive draft articles on the archipelagic state submitted by the four archipelagic states.[26]

Legal Status of Archipelagic Waters Under the Convention

Article 19(1) of the Convention stipulates that the sovereignty of an archipelagic state "extends to the waters enclosed by the archipelagic baselines" joining the outermost points of the outermost islands and drying reefs of the archipelagic state; these are the waters described as archipelagic waters. Paragraph 2 of the same Article provides that this sovereignty "extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein."

It is stated in Article 49(3), however, that this sovereignty is exercised subject to the provisions of Part IV. It is obvious that this paragraph refers to those provisions that have the effect of limiting the sovereignty of the archipelagic state, *e.g.*, provisions on the right of innocent passage (Article 52), on the right of archipelagic sea lanes passage (Article 53),on existing rights and all other legitimate interests of "an immediately adjacent neighbouring state" (Article 47(6)), existing agreements with other states, on traditional fishing rights and other legitimate activities of the "immediately adjacent neighbouring States" and on existing submarine cables (Article 51), and

on the prohibition against suspending archipelagic sea lanes passage (Article 44 by virtue of Article 54).

The right of archipelagic sea lanes passage through the archipelagic sea lanes and air routes above them affects the sovereignty of an archipelagic state more than the rights of neighboring states in the archipelagic waters. It is all the more so if one considers the potential threat to the security of the archipelagic state inherent in the exercise of the right of archipelagic sea lanes passage. This weakness is in a way balanced off by the fact that the sovereignty of the archipelagic state over the archipelagic waters, seabed and subsoil thereof, and the resources contained therein, and over the airspace above them, as provided in Article 49(1) and (2), remains to be the basic element of the archipelagic state regime. The recognition of the sovereignty of the archipelagic state in the 1982 Convention is a testimony of international recognition of the legitimate interests of the archipelagic state to safeguard and protect the political, economic, social, and cultural unity of the nation as well as the territorial integrity and security of the archipelagic state.

Archipelagic Sea Lanes Passage

Legal Nature of the Archipelagic Sea Lanes Passage

Closely linked to the question of the legal status of archipelagic waters is the regime of passage through these waters. Two regimes apply, namely the regime of innocent passage through the archipelagic waters and the regime of archipelagic sea lanes passage through the designated sea lanes and air routes above them. This paper will deal only with the regime of archipelagic sea lanes passage.

Article 53(2) of the Convention stipulates that in the archipelagic waters, all ships and aircraft enjoy the right of archipelagic sea lanes passage in the designated sea lanes and air routes thereabove. Article 53(3) defines the archipelagic sea lanes passage as:

> the exercise in accordance with the Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Under Article 44 (applicable *mutatis mutandis* by virtue of Article 54), an archipelagic state may not hamper or suspend archipelagic sea lanes passage.

The regime of archipelagic sea lanes passage is a compromise between the regime of innocent passage advocated by the archipelagic states on the one hand, and the regime of freedom of navigation advocated by the maritime powers on the other hand.

The definition of archipelagic sea lanes passage that emerged is similar to that of transit passage through straits used for international navigation. The two regimes share the same important principle, *i.e.*, nonsuspension of passage. One should not, however, overlook a subtle yet important difference. Article 53(3) defines archipelagic sea lanes passage as "the exercise ... of the rights of navigation and overflight ...," while Article 38(2) defines transit passage through straits used for international navigation as "the exercise ... of the freedom of navigation and overflight ..." The absence of the word "freedom" in the definition of archipelagic sea lanes passage has the legal

effect of clearly distinguishing archipelagic sea lanes passage from the freedom of the high seas, while the term "freedom of navigation and overflight" embodied in the definition of transit passage renders the regime of transit passage closer to the freedom of the high seas.[27] The regime of archipelagic sea lanes passage is further distinguished from the regime of transit passage through straits used for international navigation by the specific provisions governing archipelagic sea lanes.

Significance of the Archipelagic Sea Lanes Passage Regime

This regime of passage seems to be inconsistent with the earlier position the archipelagic states promoted focusing on the right of innocent passage. As a compromise, the regime of archipelagic sea lanes passage was basically acceptable, as an element of a "package deal" concerning the regime of archipelagic states, for the following reasons:

1. The definition of archipelagic sea lanes passage in Article 53(3) contains specific restrictions applicable to ships and aircraft exercising the right of archipelagic sea lanes passage. As mentioned previously, the passage is defined as "the right of navigation and overflight," instead of "freedom of navigation and overflight" applicable on the high seas and straits used for international navigation (Article 38(2)). Article 53(3) also provides that the archipelagic sea lanes passage is "solely for the purpose of continuous, expeditious ... transit," which constitutes another specific restriction to be observed by ships and aircraft.
2. Article 39 (applicable *mutatis mutandis* by virtue of Article 54) imposes duties on ships and aircraft during the archipelagic sea lanes passage to protect archipelagic states against any action that might endanger their security. Paragraph 1 provides that ships and aircraft while exercising the right of archipelagic sea lanes passage shall:

   (a) proceed without delay through or over the archipelagic sea lanes;
   (b) refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of the archipelagic state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
   (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure* or by distress;
   (d) comply with other relevant provisions of Part III (Straits Used for International Navigation).

Any violation of the provisions spelled out above would certainly render the passage a nonarchipelagic-sea-lanes-passage. In such a case, the archipelagic state has the right to take appropriate measures to protect its security interests.[28]

3. Article 42 (applicable *mutatis mutandis* by virtue of Article 54) recognizes the right of an archipelagic state to prescribe laws and regulations on specified matters relating to archipelagic sea lanes passage.
4. The regime of archipelagic sea lanes passage according to Article 49(4) will not in other respects affect the status of the archipe-

lagic waters, including the sea lanes, or the exercise by the archipelagic state of its sovereignty over such waters and the air space above them, the seabed and subsoil, and the resources contained therein. This provision is necessary in order to prevent any dilution of the sovereignty of the archipelagic state which might be inferred from the regime of archipelagic sea lanes passage.

5. The regime of innocent passage through archipelagic waters provided in Article 52 also takes into account the security interest of the archipelagic state. Paragraph 2 stipulates that the archipelagic state may suspend temporarily in specific areas of its archipelagic waters, the innocent passage of foreign ships, if such suspension is essential for the protection of its security.
6. Acceptance of the regime of archipelagic sea lanes passage would ensure acceptance by the major maritime powers of the basic principles of the archipelagic state concept advocated by Indonesia and the other archipelagic states.

With all the essential safeguards incorporated in the Convention, the security interest of the archipelagic state would not -- in the view of the writer -- be compromised by the acceptance of the regime of archipelagic sea lanes passage. In practice, this will of course depend on many factors such as the universality of the Convention, the practical implementation of the archipelagic state regime, particularly the designation of the archipelagic sea lanes and air routes, and above all the enforcement capability of the archipelagic state, supported by modern surveillance equipment and techniques.

Some Aspects of the Implementation of the Regime of Archipelagic Waters

The designation of the archipelagic sea lanes has particular features. According to Article 53, an archipelagic state may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and adjacent territorial sea. Before designating sea lanes, however, the archipelagic state is required by paragraph 9 to submit to the competent international organization proposals on the sea lanes to be designated "with a view to their adoption." This paragraph also provides that the organization may adopt only sea lanes as may be agreed with the archipelagic state. The essence of these provisions is that the archipelagic state could designate sea lanes only if they have been mutually agreed upon by the archipelagic state and the international organization concerned. If there is no agreement and consequently no sea lanes are designated, then paragraph 12 will apply, and the right of archipelagic sea lanes passage may be exercised through routes normally used for international navigation.

The designation of sea lanes will therefore require a political will on the part of both the archipelagic state and the competent international organization (particularly its members who are most directly concerned -- the maritime powers) to negotiate and reach agreement on the sea lanes. Such a negotiation will most probably be focused on the interpretation and implementation of Article 53(4), which provides that the designated sea lanes "shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic water ..." One could expect that the major maritime countries who are members of the competent international organization and party to the 1982 Convention will give the widest possible interpreta-

tion to that provision and the archipelagic state will do the exact opposite. What is imperative, in the opinion of the writer, is that the legitimate security interest of the archipelagic state must be taken into full account. To be more precise, the security of the archipelagic state will certainly be more vulnerable if there are more sea lanes designated in the archipelagic waters than are really essential for maintaining international communications, and such sea lanes should traverse the archipelagic waters through the shortest possible routes. The archipelagic state concept will be rendered meaningless if we allow the designation of sea lanes which criss-cross all parts of the archipelagic waters.

The problem of nonparties might also affect the implementation of the Convention relating to the designation of the archipelagic sea lanes. A few states which decided to stay outside the Convention, hopefully temporarily, because of their objection to Part XI on seabed mining happen to be major maritime powers which have special interests in the designation of the archipelagic sea lanes. The question arises whether or not nonparties can invoke rights relating to the designation of sealanes under the Convention.

Regarding nonparties, it is an established principle of international law that a treaty does not create either obligations or rights for a third state without its consent.[29] On the other hand, a nonparty cannot choose to give its consent only to a certain part of a treaty, while rejecting the other parts. Such a selective adherence to a treaty will undermine the validity of the treaty which constitutes an integrated whole.

The "integrated-wholeness" of the 1982 Convention on the Law of the Sea hardly needs to be emphasized. As has been pointed out, the mandate of the Conference on the Law of the Sea, the use of consensus in negotiations, the prohibition on reservations to the Convention and the intent of state-parties "lend strong support to the argument that the new legal rights created by the Treaty cannot be claimed individually by nonparties as customary."[30]

Conclusion

The regime of archipelagic waters which on the one hand recognizes the sovereignty of an archipelagic state over these waters, and on the other hand recognizes the right of archipelagic sea lanes passage of all vessels and aircraft, reflects an acceptable balance between the interests of the archipelagic states and those of the international community. It remains to be seen whether or not the balance achieved in the Convention will in reality also generate a true balance of interests. The world is awaiting the entry into force of the Convention and its implementation.

It should be recognized that the implementation of the Convention -- *in casu* the provisions on archipelagic waters and archipelagic sea lanes -- requires diligent ground work as well as imaginative thinking in order to resolve specific problems of implementation, including the problem of nonparties.

Footnotes

1. The views expressed in this paper are those of the writer and do not necessarily reflect the views of the Indonesian government.

2. T. Koh, *Negotiating a New World Order of the Sea*, 24 Va. J. Int'l L. 761, 783 (1984).
3. 11 Annuaire de l'Institut de Droit International 136, 139 *et. seq* (1891).
4. *Id.* at 37.
5. International Law Association, *Report of the 33rd Conference* 266 *seq.* (Stockholm 1924).
6. 34 Annuaire de l'Institut de Droit International 673 (1928).
7. League of Nations Doc. C.196 M.70 1927 V art. 5 at 72, (1927).
8. League of Nations Doc. C.74 M.39 1929 V.2 at 48 (1929) (Sub-Comm to the Comm. of Experts, Bases of Discussion No. 13).
9. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116.
10. *See* O'Connell, *Mid-Ocean Archipelagoes in International Law*, 45 Brit. Y.B. Int'l L. 27 (1971).
11. *Id.* at 28-29.
12. *Id.* at 32. See also Rajan, *Towards Codification of Archipelagoes International Law*, 13 Indian J. Int'l L. at 471, 472 (July-September 1973).
13. *See also* the paper by Atje Misbach Muhjiddin at 213 *infra*.
14. For an account of the circumstances and considerations that led to the Djuanda Declaration of 1957, *see* Kusumaatmadja, *The Legal Regime of Archipelagoes: Problems and Issues*, in L. Alexander (ed.), *The Law of the Sea: Needs and Interests of Developing Countries*, 6 L. Sea Inst. Proc. 166 (1973), republished in Jakart as *Bunga Rampai Hukum Laut* 84-88 (1978). *See also* Kusumaatmadja, *Hukum Laut Internasional* 186-92 (Badan Pembinaan Hukum Nasional Departemen Kehakiman, 1978).
15. Article 1(1)(2) of the Law No. 4 (1960). *See also* the paper by A Misbach Muhjiddin at 213 *infra*.
16. Government Regulation No. 8 of the Year 1962 on Innocent Passage o Foreign Vessels Through Indonesian Waters.
17. Article 7(1) provides that prior notification is required for inno cent passage of foreign warships and noncommercial government ship through the territorial sea and internal waters of Indonesia unless innocent passage is conducted through the designated sea lanes.
18. UNCLOS I, 3 *Off. Rec.* 239 (A/CONF.13/39) (1958).
19. *See also* the discussion by Camillus Narokobi at 223-26 *infra*.
20. 28 UN GAOR, 3 Supp. (No. 21) at 1 (March 14, 1973).
21. 28 UN GAOR, 3 Supp. (No. 21) at 102-05 (Aug. 6, 1973).
22. UNCLOS III, 3 *Off. Rec.* 226-27 (Aug. 9, 1974).
23. For a detailed account of the evolution of the archipelagic state concept in UNCLOS III, see H. Djalal, *Perjuangan Indonesia di Badang Hukum Laut esp.* at 67-95 (Badan Pembinaan Hukum Nasional Departemen Kehakiman, 1979).
24. *See* note 20 *supra*.
25. *See* discussion *infra* at 260-61.
26. *See* note 21 *supra*. The term "archipelagic waters" was first used b M. Kusumaatmadja (albeit in a broader sense) in his paper, *supra* note 14, at 26-29.
27. *See* Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 Va. J. Int'l L. 809, 858-61 (1984). *See also* Slot, *The International Legal Regime for Naviga tion*, 15 Ocean Dev. & Int'l L. 93-96 (1985).
28. For an analysis on Article 39 in respect of overflight of foreign aircraft over archipelagic sea lanes and straits used for interna-tional navigation, see Hailbronner, *Freedom of the Air and the*

Convention on the Law of the Sea, 77 Am. J. Int'l L. 490, 494-503 (1983).

29. Vienna Convention on the Law of Treaties, Article 34, *opened for signature* May 23, 1969, UN Doc. A/CONF.39/27.
30. Note, *United States Activity Outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage*, 84 Colum. L. Rev. 1032, 1057 (1984).

DISCUSSION

Is the Archipelagic Concept New Law or Customary Law?

Bruce Harlow: Is it the position of the government of Indonesia that the 1982 Convention is generally reflective of customary international law of archipelagoes, or do you feel that the 1982 Convention is a new and unique series of provisions that will only come into being in the law when the Treaty comes into force?

Nugroho Wisnumurti: Indonesia has always considered this archipelagic concept as a new concept of law because certain countries had many times strongly opposed the concept. Because of such opposition, one cannot say that our claim fulfilled the criterion for becoming customary international law. Like the straits regime, with respect to what Professor Anand has said (pages 125-54 above), I think the regime of transit passage through straits used for international navigation is not really a regime which we can say is part of customary international law or has been derived from customary international law because it totally departed from the then-existing law.

Lewis Alexander: How many hundreds of miles can a vessel wander its way through the territorial sea unannounced on its way to the strait?

Harlow: As far as necessary.

Consequences of Noncompliance with Archipelagic State Regulations

Thomas Clingan: In Nugroho Wisnumurti's paper, he refers to Article 39 of the 1982 Convention, which is incorporated by reference into the archipelagic chapter. He lists the provisions of Article 39, and then says, "any violation of the provisions spelled out above would certainly render the passage a nonarchipelagic sea lane passage; in such a case, the archipelagic state has the right to take appropriate measures to protect its vital security interests." I am not persuaded that this statement is true. The appropriate analogy is not to innocent passage for a number of reasons. The analogy is to the straits, as Nugroho recognized by the cross-reference to Article 39. Article 39 says clearly that the ships in transit passage have a duty to comply with laws, but it does not say what the consequences are of not complying with that duty. Article 233 in part takes care of that with respect to pollution violations; it says that for pollution violations in straits the littoral state can take the appropriate action, presumably including excluding the offending vessel. Interestingly enough, Article 233 makes no reference to archipelagic waters whatsoever, only to straits.

Louis Sohn: The Philippines claim that archipelagic waters are internal waters is wrong because, within the chapter on archipelagic states there is Article 30, which provides specifically for delimitation

of internal waters within the archipelagic waters, namely, waters of various bays, etc. Therefore, it certainly is recognized that archipelagic waters are something different from internal waters. This is something special, a different kind of regime, *sui generis*.

The Persistent Objector and Nonparty Status

Horace Robertson: If the archipelagic principles are new principles created by the 1982 Convention, then the conclusion from that is that only states that are parties to the Convention can exercise the right of archipelagic sea lane passage and so forth, on the basis that a treaty does not create either obligations or rights for nonparties.

A second principle of international law is the principle of the persistent objector. If this is accepted, then because archipelagic principles are new, those nations that objected to the declarations of the Philippines and Indonesia prior to the 1982 Convention consider those waters outside of the territorial sea as high seas. Therefore these nations would be entitled to exercise freedom of navigation through those areas that remain in their view high seas.

Wisnumurti: It is correct to say that the archipelagic state is a new concept. But now, because this concept has been accepted by a consensus at UNCLOS III, the situation will be different. For those who continue to oppose the concept and stay outside the treaty, then of course the rule of law says in Article 34 of the Vienna Convention, that a treaty will not impose any obligation or rights on outside parties without their consent. So they are not bound by this concept. At the same time, they cannot invoke rights on the basis of the Convention if they oppose other parts of it.

In response to Tom Clingan's comment, it is a valid argument to say that when transitting vessels do not comply with certain provisions concerning passage, then their action does not qualify as archipelagic sea lanes passage as defined in the Convention. For that reason, the archipelagic state has a right to take some measures, legal or diplomatic, to redress the situation.

SOME ASPECTS THAT SHOULD BE CONSIDERED IN DESIGNATING INDONESIA'S SEA LANES

Atje Misbach Muhjiddin
Padjadjaran University
Bandung, Indonesia

Introduction

This paper examines the Indonesian archipelagic waters and explains how the 1982 Law of the Sea Convention applies to Indonesia.

The passage of foreign ships through archipelagic waters is the central question in contention between the maritime states and the archipelagic states. The right of archipelagic sea lanes passage is the accommodation made by the archipelagic states in exchange for the international community's recognition of the sovereignty of the archipelagic states over their archipelagic waters, including the air above and the seabed and subsoil and resources therein.

This paper explores the geographical and historical background of the Indonesian archipelagic claim, national and international interests in relation to the Indonesian archipelagic waters, and some aspects of the national interests that should be considered in designating Indonesian archipelagic sea lanes.

Geographical and Historical Background

Indonesia is an archipelagic state, consisting of more than 13,000 islands, large and small. It lies at the crossroad between two continents, Asia and Australia, and two oceans, the Indian and the Pacific Oceans. Since time immemorial the Indonesian archipelago has become a focal point of multi-purpose international navigation. Moreover, because of its natural resources, the Indonesian archipelago has attracted certain countries in the past not only as a passage way, but also as an object for conquest and control. In 1945, Indonesia declared its independence, and began developing its own approach toward international and ocean law.

The Indonesian archipelago consists of many varied geographical features. Among the many islands, the largest are Kalimantan, Sumatra, Irian Jaya, Sulawesi, and Java. The most important of the smaller islands are Halmahera, Seram, Sumbawa, Timor, Flores, Sumba, Bali, and Lombok. Because of its many islands, Indonesia has many straits. In addition to the Malacca Strait, which it shares with its northern neighbors, Indonesia has the Lombok Strait, the Makassar Strait, the Ombai

Strait, the Sunda Strait, the Karimata Strait, and the Gaspar Strait, with widths varying from 1.75 to 52 miles. The seas also vary greatly, from shallow waters in some parts that cover the continental shelves to the great depths that lie south of the Maluku Islands.

Every Southeast Asian country (except Thailand) was under the absolute control of the Western powers before World War II, and local practices concerning the use of the sea had been changed to conform to those of the Western powers. Thus, before 1957 the Indonesian maritime system was governed by Dutch legislation, namely, the "Territoriale Zee and Maritime Kringen Ordonantie of 1939, No. 442." This ordinance established a three-mile territorial sea around each Indonesian island, thereby dividing Indonesia into many parts because the "high seas" regime governed much of the waters in the archipelago. This division caused the Indonesian archipelago to be vulnerable to external attack. In World War II, in fact, the Japanese navy easily defeated the Dutch navy in the Java sea, then occupied Indonesia and replaced the Dutch Government until Indonesia achieved independence on August 17, 1945.

Because of these geographical realities and its commitment to the aspirations embodied in the preamble of its Constitution, Indonesia acted to ensure and safeguard its national and political unity, territorial integrity, and national security by declaring itself on December 13, 1957 to be an archipelagic state. This declaration stated, among other things, that all waters around and between the islands of the Republic of Indonesia are natural appurtenances of the land territory of the Republic of Indonesia and therefore form part of its internal or national waters under its absolute sovereignty. This concept emphasizes the unity of the land and water territories of Indonesia.

In this declaration, the government of Indonesia also recognized the needs of the international community, particularly the maintenance of international maritime traffic and the importance of the seas as a means of communication and therefore stated that innocent passage of foreign vessels in the internal waters enclosed by the new method of drawing straight baselines (now called archipelagic waters) is guaranteed as long as it is not contrary to the sovereignty of, and does not disturb the security of, the Republic of Indonesia. These guarantees for the innocent passage of foreign vessels through these waters have been further regulated in Law No. 4 of 1960, concerning Indonesian Waters, and Government Regulation No. 8, 1962, concerning innocent passage for foreign vessels in the Indonesian waters.

Law No. 4 of 1960 has these basic considerations: (a) a 12-mile territorial sea is claimed, with straight baselines drawn to define this area; (b) the state holds sovereignty over the waters situated within those straight baselines, including the seabed and its subsoil with all their resources as well as the air space above it; and (c) innocent passage of foreign vessels through the archipelagic waters is guaranteed as long as it is not harmful to the interests of and does not disturb the security and good order of the state. Law No. 4 of 1960 (Article 3) and Government Regulation No. 8 of 1962 define the system of innocent passage with language similar to that in the 1958 Geneva Territorial Sea Convention. Certain regulations are applicable only to certain kinds of ships, such as foreign fishing vessels, scientific research vessels, and warships and other noncommercial government ships.

A further step taken by the Indonesian Government to gain international recognition for its archipelagic state concept was the presentation of the concept to the Geneva Conferences on the Law of the Sea of 1958 and 1960, and to other regional and international academic meet-

ings, and to the Third UN Conference on the Law of the Sea. This Conference accepted the archipelagic state principle and embodied it in Part IV of the 1982 Law of the Sea Convention. Prior to this acceptance, Indonesia had concluded not less than twelve bilateral agreements with its neighboring states on their continental shelf and territorial sea boundaries. The most recent one is the treaty between Indonesia and Malaysia relating to the legal regime of the Indonesian archipelagic state and the rights of Malaysia in Indonesia's territorial sea and archipelagic waters and airspace above the territorial sea lying between east and west Malaysia. This Treaty, signed in Jakarta on February 25, 1982, has been enacted by Indonesia in Act No. 1, 1983. All agreements concluded with the neighboring states are based on the archipelagic state principle as provided in Law No. 4, 1960, taking into account the relevant rules of international law.

Indonesia, as one of the 119 countries that signed the 1982 Law of the Sea Convention, is aware of the significance of the new convention and is ready for the implementation of the various legal concepts and regimes provided in it, particularly the implementation of Part IV of the Convention regarding the archipelagic states. Indonesia will have to establish and adjust the outer points of the outer islands as required by the Convention in order to be able to draw the baselines which will enclose its archipelagic waters. Indonesia will also have to establish archipelagic sea lanes in its archipelagic waters through which international navigation can be carried out, taking into account the relevant provisions of Part IV.

National and International Interests

As mentioned earlier, the primary interest of the Republic of Indonesia is the achievement of national unity, territorial integrity, and political and economic stability, which is the prerequisite to the national goal articulated in the preamble of its Constitution, namely, to build a just and prosperous society. For that purpose, Indonesia must develop its potential marine resources. The Government of the Republic of Indonesia must maintain its sovereignty over national waters to manage the living and nonliving resources, to use them as a medium of communication for inter-island trade, to achieve the status of a single political unit with a single system of law, to create a unified national defense and security system, and to maintain laws and regulations relating to the sea. In other words, the national interests of the people of Indonesia in its national waters are prosperity and national security.

The National Development Plan activities, with regard to the utilization of the seas, include: (a) the exploitation of marine living resources, including fish production, fish processing, and fish marketing, with the objective to raise national income as well as the income of the fishers and the fish farmers; (b) the exploration and exploitation of nonliving resources such as offshore oil-drilling and mineral mining; (c) sea communication including sea transportation for maintaining and promoting inter-island trade as well as international shipping; (d) marine environmental conservation and the prevention of pollution; (e) marine scientific research; (f) promotion of tourism and; (g) activities in the field of national defense and security including enforcement and maintenance of the peace and good order in Indonesian national waters.

In implementing the 1982 Law of the Sea Convention, Indonesia faces many problems related to the establishment and adjustment of its national

laws and regulations with regard to new legal concepts in the Convention, taking into account the legitimate rights and interests of foreign countries on one hand and the safeguarding of Indonesia's national interests on the other. One of the important problems is the implementation of Article 53 of the Convention concerning the right of the archipelagic sea lanes passage.

Article 53 gives to foreign countries the right of continuous, expeditious and unobstructed navigation and overflight through and over archipelagic waters between one part of the high seas or exclusive economic zone and another part, either for commercial or noncommercial purposes. For commercial shipping the primary interests of the maritime nations would be for safety and expeditious transport. For noncommercial navigation, particularly military, the primary interests would be the maintenance of the mobility of naval forces, the safe deployment of fleets, the secrecy of submarine missions and avoidance of notification or identification.

In the 1982 Law of the Sea Convention, there are three types of passage of foreign ships through national waters: (a) the regime of innocent passage in the territorial sea (Articles 17-32), in straits used for international navigation (Article 45) and in archipelagic waters (Article 52); (b) the regime of transit passage in straits used for international navigation (Articles 37-44); and (c) the regime of archipelagic sea lanes passage in archipelagic waters (Article 53).

Historically, these regimes are different from one another. The concept of innocent passage was an early compromise resulting from the controversies between two doctrines of the law of the sea, *mare liberum* and *mare clausum*; the rights of transit passage and archipelagic sea lanes passage are international legal concepts that emerged from recent developments in the law of the sea. The right of transit passage appears to have resulted from the extension of the breadth of the territorial sea from 3 miles up to 12 miles, which caused some important international straits less than 24 miles wide to come under the sovereignty of the riparian states. By the right of transit passage, all ships and aircraft have the right to enjoy the freedom of continuous and expeditious transit and overflight in the straits used for international navigation, subject to certain provisions of the related articles of the Convention (Articles 38-42). The states bordering straits have the right to adopt laws and regulations relating to transit passage in respect to safety of navigation, pollution control, fishing vessels, and other matters such as loading and unloading any commodity or currency.

In the regime of the archipelagic sea lanes passage, subject to Articles 39, 40, 42, 44 and 54, the right of the archipelagic state is limited to designating the sea lanes or substituting such sea lanes and prescribing traffic separation schemes in the archipelagic waters that are suitable for continuous, expeditious passage of foreign ships and aircraft through and over its archipelagic waters and the adjacent territorial sea (Article 53 (1), (6)-(7)). Because the rights of the archipelagic states are limited only to the designation of such sea lanes, the archipelagic state must be careful in designating such sea lanes, taking into account national interest as well as the interests of international navigation in order to be able to maintain a harmonious situation between the users and owner of the national waters.

How should a nation designate suitable archipelagic sea lanes that safeguard the continuous, expeditious, and unobstructed navigation of foreign ships and also protect the fundamental national interests, namely, national prosperity and national security? It seems to me the

concepts of prosperity and security are important not only to Indonesia, but also to all countries in the world. These concepts should, therefore, be regarded as universal and fundamental interests. On the other hand, the essence of the international interests are also the national prosperity and security of certain countries in the global perspective.

It must be remembered that ships and aircraft are different in modern times. Not only are their size and capabilities different, but also the degrees of their potential danger to coastal environments, particularly the oil super tankers and the advanced nuclear powered submarines carrying nuclear missiles. For example, by 1950 tankers of more than 45,000 tons were common; by the 1960s very large crude carriers of more than 200,000 tons began to carry huge shipments of oil; and by the 1970s several tankers in service carried more than 400,000 tons. By 1979 about sixty percent of all the world tanker tonnage was in vessels of more than 200,000 deadweight tons, and five monstrous tankers were in service, over 1,333 feet long, each of them capable of carrying more than one-half million tons of oil in a single voyage.

Some Indonesian National Interests that Should Be Considered in Designating Sea Lanes

Although there are several kinds of foreign passage through Indonesian archipelagic waters, this paper will emphasize only the archipelagic sea lanes passage, with special regard to the problem of designating the sea lanes. As an archipelagic state, Indonesia has the right to designate sea lanes that are suitable for continuous, expeditious, and unobstructed navigation of foreign ships through its archipelagic waters, taking into account its national interests as well as the interests of foreign ships.

Indonesia must, for instance, take into account the safety of navigation of foreign ships, and must specify which areas of its archipelagic waters are not suitable for certain types of ships because of their geographical features. Such features include the shallowness of the sea, the width of certain straits, and the existence of submerged rocks. In relation to this situation, the archipelagic state should prescribe traffic separation schemes for the safe passage of ships as provided in Article 53(6), (7) and (11) of the Convention. The failure to consider physical and geographical features in designating sea lanes would invite accidents that could endanger the safety of ships as well as the environment of the coastal state. It cannot be imagined how hazardous an accident would be, if caused by a nuclear powered ship collision.

In realizing its national economic development program, Indonesia must mobilize all of its national resources for the purpose of productive investment, to increase the productive power of the economy, and to increase the food production and economic infrastructure of the country. This development, as mentioned earlier, relates also to the human activities in utilizing the sea which is under its sovereignty and is its sovereign right. This will include the exploration and exploitation of living and nonliving natural resources of the sea, sea communication, and marine preservation.

The objectives of Indonesia's national development program in the field of fisheries are among others: (a) to raise the income of the fishers and fish farmers by creating more productive employment in the fisheries field; (b) to increase production and productivity of the fishers and fish farmers; (c) to increase the dietary intake of fish, especially among village people, with the object of nutritional improvement; (d) to increase fisheries exports; and (e) to exercise control

over fisheries areas. In 1982, fisheries production reached 2.02 million tons, comprising 1.49 million tons from marine fisheries and 0.53 million tons from inland fisheries. This production will increase to 2.9 million tons in 1988, consisting of 2.2 million tons from marine fisheries and 0.7 tons from inland fisheries.

To prevent illegal fishing by foreign fishing vessels while they exercise their right of innocent passage through Indonesian territorial seas and internal waters, the government issued Government Regulation No. 8 of 1962 (See Article 5(2)) and Defense Ministry Decree No. KEP/17/IV/1975. Foreign fishing vessels sailing through the sea lanes along the Sulawesi Sea to the Lombok Strait must meet the following requirements: (a) fishing gear must be stored in designated places; (b) fishing gear may not be ready for operation; and (c) no fishing activities may be conducted while exercising the right of innocent passage. These regulations show that their fisheries are very important to the people of Indonesia. It is also necessary to mention here that Indonesia has experienced many violations of its fisheries regulations by foreign fishing vessels using greatly advanced technology, resulting in the decrease of local, traditional fish production. Foreigners fish not only the distant fishing areas, but also at times in areas close to the coasts. For these reasons, in designating the archipelagic sea lanes, the Indonesian Government must consider its national interests in the field of fisheries as one that should be protected by defining areas which are not suitable for foreign fishing vessels.

Another important sector of economic activities which is closely related to the problems of designating archipelagic sea lanes is national sea transportation. Taking into consideration the physical composition and geographical location of the Republic of Indonesia, sea transportation has an important role and has become the backbone in development of the state. The system applied to sea transportation consists of: (a) ocean-going shipping, including liner service and special transportation to and from foreign countries which serve five main directions -- Europe, both coasts of North America, Japan, Australia, and the Middle East; (b) inter-island (domestic) shipping, comprising regular and irregular liner services which serve domestic and regional transportation needs; (c) local shipping serving routes of 500 miles or less; (d) traditional shipping using sailing vessels; and (e) pioneer shipping serving the isolated regions.

The inter-island shipping connects the capital ports of the regions. The regional and local shipping further connects these capital ports with the small ports. There are not less than 84 primary ports served by the inter-island shipping. By the 1970s there were more than 46 companies for inter-island shipping operating bulk carriers and oil tankers.

This system of national sea transportation functions, combined with the other sea-use activities such as the exploration and exploitation of living and nonliving resources, marine scientific research, and other activities in the non-economic sectors, will naturally increase the intensity of the sea traffic in Indonesian waters. The most used areas are the Java Sea and its surroundings, including the Sunda Strait. This traffic occurs not only because of Jakarta, the capital city and the center of national economic activities, but also because of the density of population on Java Island. The center of national defense is also located on this island.

The designation of archipelagic waters also requires designating the air routes above the archipelagic sea lanes. The concentration of air traffic also has to be taken into consideration, with the heaviest

concentration of the air traffic also being above Java Island, especially around Jakarta, where the main Indonesian international airport is.

Furthermore, the government of the Republic of Indonesia is also concerned about marine environmental problems affected by human activities in the sea, such as transportation of oil, seabed mining, and overfishing, especially in the Java seas, the Malacca Strait, the Makassar Strait, and the Bali Strait. These activities may also affect the marine environment by causing pollution which may seriously affect biological and geochemical processes in the ocean. Marine pollution in Indonesia is mainly caused by oil -- oil spills, oil slicks from offshore operations, and spillage during normal loading operations at oil terminals and oil ships. In addition, the Indonesian archipelago suffers from heavy international marine traffic, particularly the oil tankers taking Middle East crude en route to Japan. About two-thirds of the major oil spills were caused by tanker accidents. Because of the increasing oil activities in the Indonesian waters, Indonesia may easily rank highest on the list of potential victims of marine pollution.

Conclusion

Indonesia considers the new Law of the Sea Convention, signed in 1982, to be not only the greatest achievement of the international community since the signing of the Charter of the United Nations in 1945, but also the culmination of its efforts during 25 years to have the principle of archipelagic states formally accepted as part of the law of the sea by the international community.

The acceptance of the archipelagic state principle in the 1982 Law of the Sea Convention has given birth to a new regime of foreign passage through national waters, that is, the right of archipelagic sea lanes passage. This new regime of passage gives more freedom of navigation than that in the regime of innocent passage through the archipelagic waters, using the sea lanes that would be designated by the archipelagic state in conformity with rules as provided in the Convention.

Once the sea lanes have been designated, everyone must follow them, and therefore in designating the sea lanes it is necessary to consider both the national and international interests that are relevant to the implementation of Part IV of the new Law of the Sea Convention. For the purpose of harmonizing the archipelagic state interests and international community interests it is necessary for both the archipelagic state and the users of the archipelagic waters to create a mutual understanding based on the principle of international cooperation as embodied in the Charter of the United Nations.

BIBLIOGRAPHY

Central Bureau of Statistics, *Inter-Island Cargo Traffic by Shipping Sector* (1978).

Dansaputra, S., *Environmental Legislation and Administration in Indonesia* (1978).

Maijari, *The Development of Merchant Ships in Indonesia*, in *Proceedings of a Conference on Pacific Shipping* (1977).

Janis, Mark W., *Sea Power and the Law of the Sea* (1976).

Kusumoprojo, Wahyono S., *Beberapa Pikiran Tentang Kekuatandan Per Tahahan diLaut* (Surya Indah, Jakarta, 1979).

Kusumaatmadja, Mochtar, *Legal Regime of Archipelagoes, Problems and Issues*, in *The Law of the Sea: Needs and Interests in L. Alexander (ed.). Developing Countries*, 6 L. Sea Inst. Proc. 166 (1973).
Laursen, F., *Toward a New International Order* (1982).
Lemhanas, *Wawasan Nusantara II* (1981).
Mangone, G., *Law for World Oceans* (1981).
Morgan, J. and Valencia, M., *Atlas for Marine Policy in Southeast Asian Seas* (1983).
Sani, *The United Nations Convention on the Law of the Sea*, in E. Hay and A.W. Koers (eds.), *The International Law of the Sea -- Proceedings of a Seminar* (1984).
Tangsubkul, Phiphat, *ASEAN and the Law of the Sea* (Institute of Southeast Asian Studies, 1982).
The Law of the Sea. Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index (UN Sales No. E.83.V.5, 1983).

THE REGIME OF ARCHIPELAGOES IN INTERNATIONAL LAW

Camillus S.N. Narokobi
International Law Branch
Department of Justice
Papua New Guinea

Introduction

The status of mid-ocean archipelagoes was one of the many challenging issues left unsettled by the four 1958 Geneva Conventions.[1] Although the concept of archipelagoes has long been understood, and even though coastal archipelagoes were already accepted by customary international law, it was not until the Third United Nations Conference on the Law of the Sea (UNCLOS III) that a real attempt was made to codify and formulate the principles relating to the subject.

Origins of the Concept

Although the concept of archipelagoes took considerable time to be codified, its meaning has long been understood. The Enclopedia Britannica defines archipelago as "any island-studded sea." Webster's Third New International Dictionary notes that the term "archipelago" is derived from the Greek archipelago in the Aegean Sea, and applies to the sea "or other expanses of water having many scattered islands." It also says that an archipelago is "a group or a cluster of islands," a description similar to "any island-studded sea."

As the definition of an archipelago evolved in modern times it incorporated the following features: the islands must be naturally formed, not artificial or man made; there should be some intrinsic relationship between the islands and the waters based on geographic,[2] economic, and political factors; and if the relationship is lacking a case for an archipelago can be made on the basis that a group of islands or part of the islands "historically have been regarded as such."

The negotiations at UNCLOS III attempted for the first time to define an archipelago and the new concept of the archipelagic state in legal terms. These definitions are now embodied in Article 46 of the 1982 Convention on the Law of the Sea.[3]

Developments Prior to UNCLOS III

International law recognizes three types of archipelagoes: mid-ocean, coastal, and what is commonly known as the geographically insular archipelago.[4]

The mid-ocean archipelagoes consist of islands surrounded by sea, "situated out in the oceans in such a manner in relation to the coasts of a mainland (continent) as to merit consideration as an independent whole rather than as forming part of the coastline of a mainland."[5] Nations in this group include the Philippines, Indonesia, Mauritius, Fiji, the Bahamas, and the Solomon Islands.[6]

Coastal archipelagoes are those "situated so close to a mainland and as such are reasonably considered as a part of a mainland coast for the purposes of measuring the territorial sea."[7] This group is typified by the Norwegian fringing islands.

The third archipelagic system consists of geographically insular archipelagoes. This group usually consists of a part of one or a number of large islands that constitute the mainland plus associated smaller fringing islands that are "tied" to the mainland through the use of straight baselines. Examples are the islands of the United Kingdom, Iceland, Denmark (Sjoelland), Greenland, Cuba, the Dominican Republic, Haiti, and Papua New Guinea.

Prior to the 1958 Law of the Sea Conference, international law publicists generally considered only mid-ocean archipelagoes. The question of archipelagic claims was rarely addressed, except for some literature from the Philippines.[8]

Jens Evensen of Norway opened this question anew in a preparatory document for the 1958 LOS Conference,[9] which focused primarily on coastal archipelagoes, rather than mid-ocean archipelagoes.[10] He proposed the following:

(1) Delimitation of the territorial sea by an archipelagic state may be based on its practical needs and interests. Such delimitation has international law aspects.
(2) The close dependence of the territorial area on the land domain of the archipelagoes will be of paramount importance.
(3) The drawing of baselines may not appreciably differ from the general direction of the coast.
(4) Closure of vast areas of oceans by unreasonably long baselines could not be allowed.
(5) Waters enclosed by the baselines are not necessarily internal waters. Their nature will depend upon geographic, historic, and economic factors and their proximity to the land mass.
(6) The right of innocent passage through "straits" is not be be impaired.[11]

The Anglo-Norwegian Fisheries case also distinguished mid-ocean from coastal archipelagoes.[12]

Academic opinion contributed further to the formulation of archipelagic principles. Gihl argued that no distinction should be made between coastal islands and archipelagoes; that all are equally susceptible to a baseline system.[13] O'Connell also argued that if coastal islands are used to draw baselines for territorial seas, then the same principle should apply to mid-ocean archipelagoes.[14]

Waldock, writing in 1951, pointed to a tendency in 1930 to favor special rules for all types of archipelagoes. However, conflict over the width limitation between islands and the "internal water" treatment of enclosed waters precluded agreement.[15] Sorensen questioned why mid-ocean archipelagoes should be treated differently from coastal groups.[16] Verzijl, on the other hand, argued that the difference existed because of the provisions of the 1958 Geneva Convention on the Territorial Sea

and Contiguous Zone.[17] Article 10(2) provides that baselines are limited to a distance not greater than double the territorial sea distance. Sorensen contested the Verzijl interpretation of Article X(2).[18] McDougal and Burke questioned the archipelagic concept, but recognized that it was gaining in popularity.[19]

Columbos, Schwarzenberger, and Dahm commented that when a group of islands on geographic or historic grounds constitute an archipelago, it is treated as a group.[20] Brownlie saw the claims of the Philippines and Indonesia as a "further application to special facts" of the Anglo-Norwegian Fisheries case.[21]

State practice was similarly far from uniform. For instance, the Galapagos archipelago was treated by Ecuador as a unit with the territorial waters extending outward from baselines drawn connecting outer islands of the archipelago, the longest baseline being 147 miles.[22] Ecuador apparently treated the water within as internal waters.[23]

Indonesia and the Philippines made similar claims.[24] Both nations drew baselines encircling all islands forming their respective archipelagoes and treated the water within as internal waters. The claims of Ecuador, Indonesia, and the Philippines were, however, protested by other states, particularly Japan and Australia.[25]

International organizations also played a key role in the formulation of archipelagic principles. In 1928, the Institute de Droit International considered the question and concluded that the territorial sea should be measured from the outermost islands when they are not farther apart than twice the breadth of the territorial sea.[26] The American Institute of International Law and the International Law Association in the 1920s, and the Hague Convention in 1930, proposed treating the islands as a unit and measuring the territorial sea from the islands farthest from the center of the archipelago.[27] Subcommittee II of the Hague Conference concluded specifically that a group of islands could have a territorial sea measured from straight baselines if the distance between islands does not exceed ten nautical miles.[28] After the Hague Conference, government attitudes varied. Some refused to recognize archipelagoes as single entities; others acknowledged the concept but wanted limitations imposed.[29]

The International Law Commission (ILC) worked on the archipelagic issue, but by 1958 had no specific solutions. The special rapporteur's negotiations led, however, to a consensus concerning certain principles: (1) archipelagoes were defined as three or more islands enclosing a portion of the sea; (2) the straight-line joining each one should not exceed five miles in length except one such line could extend to ten miles; (3) the territorial sea was to be measured from these baselines outwards; and (4) the waters enclosed were to be considered internal waters.[30]

Conflicting Interests at UNCLOS III

The first formal codification of archipelagic principles can now be found in Part IV of the 1982 Law of the Sea Convention. It is instructive to review the negotiation process that led to these articles, particularly the conflict between Fiji, Indonesia, the Philippines, and the United Kingdom. Maritime nations like the United Kingdom, although a coastal archipelago itself, were not convinced that special treatment should be granted to mid-ocean archipelagic states such as the Philippines and Indonesia. The maritime nations argued that recognition of archipelagic status was detrimental to their interests in the freedom of navigation, the preservation of fishing rights, military maneuverabil-

ity, rights of communication, the laying of submarine cables, and the maintenance of international air routes.[31]

The Philippines and Indonesia argued strenuously, however, that their geographic configurations demanded an archipelagic status. The Philippines described its goals in the note verbale of March 7, 1955 t the Secretary-General of the United Nations, which emphasized its national security concerns:

> ... for the purposes of protection of its fishing rights, conservation of its fishing reserves, enforcement of its revenue and anti-smuggling laws, defense and security, and protection of such other interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendl foreign vessels of the right of innocent passage over those waters.[32]

Similarly, Indonesia in 1957 issued a communique stating that ".. the peaceful passage of foreign vessels through these waters is guaranteed as long ... as it is not contrary or harmful to the sovereignty of the Republic of Indonesia."[33]

The 1973 statement of principles of Fiji, Indonesia, the Philippines, and Mauritius contained the following features:[34]

1. The identification of an archipelago should be based collectively on intrinsic geographical, economic, political, and historic factors.
2. The straight baseline method as applied between islands of coastal archipelagoes and indented coastlines can be used to draw baselines for the territorial sea.
3. The territorial sea should extend outwards from the straight baselines.
4. There should be no limitations on the drawing of baselines as long as they are aligned with the general direction of the coast and reasonable in the circumstances.
5. The sovereignty of archipelagic states extends over waters within the baselines (regardless of their depth and distance from each island), the seabed, subsoil, air space, and resources.
6. Innocent passage would be allowed through the enclosed waters.
7. Exercise of innocent passage would be in accordance with national legislation which must conform with international law.
8. When the archipelagic state exercises its right to designate sea lanes the passage shall be through those sea lanes.

Text of the Four Nations Draft Articles

The draft articles proposed by the four nations designed to give effect to this statement of principles were as follows:[35]

Article I

1. These articles apply only to archipelagic States.
2. An archipelagic State is a state constituted wholly or mainly by one or more archipelagoes.
3. For the purpose of these articles an archipelago is a group of islands and other natural features which are so closely interrelated that the component islands and other natural features

form an intrinsic geographical, economic and political entity or which historically have been regarded as such.

Article II

1. An archipelagic State may employ the method of straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago in drawing the baselines from which the extent of the territorial sea is to be measured.
2. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.
3. Baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.
4. The system of straight baselines shall not be applied by an archipelagic State in such a manner as to cut off the territorial sea of another State.
5. The archipelagic State shall clearly indicate its straight baselines on charts to which due publicity shall be given.

Article III

1. The waters enclosed by the baselines, which waters are referred to in these articles as archipelagic waters, regardless of their depth or distance from the coast, belong to and are subject to the sovereignty of the archipelagic State to which they appertain.
2. The sovereignty and rights of the archipelagic State extend to the air space over its archipelagic waters as well as to the water column, the seabed and subsoil thereof, and to all of the resources contained therein.

Article IV

Subject to the provisions of Article V, innocent passage of foreign ships shall exist through archipelagic waters.

Article V

1. An archipelagic State may designate sealanes suitable for the safe and expeditious passage of ships through its archipelagic waters and may restrict the innocent passage by foreign ships through those waters to those sealanes.
2. An archipelagic State may, from time to time, after giving due publicity thereto, substitute other sealanes for any sea lanes previously designated by it under the provisions of this article.
3. An archipelagic State which designates sealanes under the provisions of this article may also prescribe traffic separation schemes for the passage of foreign ships through those sealanes.

4. In the prescription of traffic separation schemes under the provisions of this article, an archipelagic State shall, *inter alia*, take into consideration:

   a. The recommendation or technical advice of competent international organizations;
   b. any channels customarily used for international navigations;
   c. the special characteristics of particular channels; and
   d. the special characteristics of particular ships or their cargoes.

5. An archipelagic State may make laws and regulations, not inconsistent with the provisions of these articles and having regard to other applicable rules of international law, relating to passage through sealanes and traffic separation schemes as designated by the archipelagic State under the provisions of this article, which laws and regulations may be in respect of, *inter alia*, the following:

   a. the safety of navigation and the regulation of marine traffic, including ships with special characteristics;
   b. the utilization of, and the prevention of destruction or damage to, facilities and systems of aids to navigation;
   c. the prevention of destruction or damage to facilities or installations for the exploration and exploitation of the marine resources, including the resources of the water column, the seabed and the subsoil.
   d. the prevention of destruction or damage to submarine or aerial cables and pipelines;
   e. the preservation of the environment of the archipelagic State and the prevention of pollution thereto;
   f. research of marine environment;
   g. the prevention of infringement of the customs, fiscal, immigration, quarantine or sanitary regulations of the archipelagic State;
   h. the preservation of the peace, good order and security of the archipelagic State.

6. The archipelagic State shall give due publicity to all laws and regulations made under the provisions of paragraph 5 of this article.
7. Foreign ships exercising innocent passage through those sea lanes shall comply with all laws and regulations made under the provisions of this article.
8. If any warship does not comply with the laws and regulations of the archipelagic State concerning passage through any sea lane designated by the archipelagic State under the provisions of this article and disregards any request for compliance which is made to it, the archipelagic State may suspend the passage of such warship and require it to leave the archipelagic waters by such route as may be designated by the archipelagic state. In addition to such suspension of passage the archipelagic state may prohibit the passage of that warship through the archipelagic waters for such period as may be determined by the archipelagic State.
9. Subject to the provisions of paragraph 8 of this article, an archipelagic State may not suspend the innocent passage of

foreign ships through sealanes designated by it under the provisions of this article, except when essential for the protection of its security, after giving due publicity thereto, and substituting other sealanes for those through which innocent passage has been suspended.

10. An archipelagic State shall clearly demarcate all sealanes designated by it under the provisions of this article and indicate them on charts to which due publicity shall be given.

The Response of the Maritime Nations

The United Kingdom, speaking as a maritime nation, responded with the following proposal:[36]

Rights and Obligations of Archipelagic States

1. On ratifying or acceding to this Convention, a State may declare itself to be an archipelagic State where:

   a. the land territory of the State is entirely composed of 3 or more islands; and
   b. it is possible to draw a perimeter, made up of a series of lines or straight baselines, around the outermost points of the outermost islands in such a way that:

      i. no territory belonging to another State lies within the perimeter,
      ii. no baseline is longer than 48 nautical miles, and
      iii. the ratio of the area of the sea to the area of land territory inside the perimeter does not exceed five to one:

   Provided that any straight baseline between two points on the same island shall be drawn in conformity with Articles ... of the Convention (on straight baselines).

2. A declaration under paragraph 1 above shall be accompanied by a chart showing the perimeter and a statement certifying the length of each baseline and the ratio of land to sea within the perimeter.
3. Where it is possible to include within a perimeter drawn in conformity with paragraph 1 above only some of the islands belonging to a State, a declaration may be made in respect of those islands. The provisions of this Convention shall apply to the remaining islands in the same way as they apply to the islands of a State which is not an archipelagic State and references in this article to an archipelagic State shall be construed accordingly.
4. The territorial sea, [Economic Zone] and any continental shelf of an archipelagic State shall extend from the outside of the perimeter in conformity with Article ... of this Convention.
5. The sovereignty of an archipelagic State extends to the waters inside the perimeter, described as archipelagic waters: this sovereignty is exercised subject to the provisions of these Articles and to other rules of international law.
6. An archipelagic State may draw baselines in conformity with Articles ... (bays) and ... (river mouths) of this Convention for the purpose of delimiting internal waters.

7. Where parts of archipelagic waters have before the date of ratification of this Convention been used as routes for international navigation between one part of the high seas and another part of the high seas or the territorial sea of another State, the provisions of Articles ... of this Convention apply to those routes (as well as to those parts of the territorial sea of the archipelagic State adjacent thereto) as if they were straits. A declaration made under paragraph 1 of this Article shall be accompanied by a list of such waters which indicates all the routes used for international navigation, as well as any traffic separation schemes in force in such waters in conformity with Articles ... of this Convention. Such routes may be modified or new routes created only in conformity with Articles ... of this Convention.
8. Within archipelagic waters, other than those referred to in paragraph 7 above, the provisions of Articles ... (innocent passage) apply.
9. In this Article, references to an island include part of an island and reference to the territory of a State includes its territorial sea.
10. The provisions of this Article are without prejudice to any rules of this Convention and international law applying to islands forming an archipelago which is not an archipelagic State.
11. The depositary shall notify all States entitled to become a party to this Convention of any declaration made in conformity with this Article, including copies of the chart and statement supplied pursuant to paragraph 2 above.
12. Any dispute about the interpretation or application of this Article which cannot be settled by negotiations may be submitted by either party to the dispute to the procedures for the compulsory settlement of disputes contained in Articles ... of this Convention.

Differences Between Maritime Nations' and Archipelagic Nations' Proposals

Delimitation

The question of delimitation of an archipelago impeded earlier codification of the archipelagic regime. Draft article 2(1) of the four archipelagic nations called for straight baselines to connect the "outermost points" upon delimitation without restriction. The breadth of the territorial sea, the contiguous zone, and the exclusive economic zone began at the baselines. The United Kingdom's 48-mile baseline and 5 to 1 ratio limitations were unacceptable to the archipelagic states.[37]

Although Australia supported the U.K. proposal, it agreed to make allowance for "... one or two longer closing lines ... provided that such lines were not ... unreasonable."[38] The Soviet Union stated that the "isolated islands or islets hundreds of miles from the principal territory of a state," should not be included in any delimitation. The Soviet Union argued that it was possible to consider limits other than those proposed by the United Kingdom.[39]

The United Kingdom countered that the distance of 48 nautical miles[40] was linked to Article 4 of the 1958 Geneva Convention on the Territorial Sea. The ratio of 5 to 1 was introduced because no natural relationship existed between islands and the waters of mid-ocean archipelagoes such as exists between a coastal archipelago and its mainland.[41]

The limitations upon distance and the sea-land ratio were specifically unacceptable to Fiji and Mauritius. Fiji argued that such limitations would exclude some portions of an archipelago from boundaries already permitted by international law.[42] Mauritius stated that the introduction of "such extraneous criteria as size, length of coastline reached by 1974 as to the utility of straight lines as baselines for delimiting the archipelago, but differences remained on the length of such baselines and the water to land ratio.[44]

Differences also existed over the definition of an "archipelagic state." The four nation draft articles defined it as constituted "wholly or mainly of one or more archipelagoes." The Bahamian proposal of August 20, 1974 stated that even a part of an island could qualify.[45] This addition became very useful for nations like Papua New Guinea.

Status of Archipelagic Waters

The four nation draft articles renamed the enclosed waters as "archipelagic waters," subject to the sovereignty of the archipelagic state regardless of depth and distance between islands. In explaining the term "archipelagic waters" the Indonesian delegate said:

> ... the sponsors had introduced a new concept, according to which the waters inside the baselines would be known as "archipelagic waters" or "waters of the archipelagic state," having an attribute of internal waters namely sovereignty over the waters and the resources -- and an attribute of territorial seas -- the recognition of innocent passage through sealanes. Unlike the concept of "inland waters," the concept of archipelagic waters admitted the existence of innocent passage only through sealanes and not through the whole body of archipelagic waters.[46]

There appeared to be more than one position on the precise meaning of archipelagic waters, even among the four nations. Certainly the positions of the Philippines and Mauritius differed from the position of Indonesia.

The Philippines argued that waters historically part of an archipelago should be considered as internal waters.[47] This position was not insisted upon by the Philippines in its separate proposal dated August 6, 1973[48] in its statement before Committee II of UNCLOS III on August 12, 1974, in Caracas.[49] Mauritius also had treated waters inside the base lines as internal waters[50] but did not press this point rigorously in the subsequent debates. The Ecuadoran proposal of August 12, 1974 implied that the waters of mid-ocean archipelagoes should be internal waters as was the case for waters of coastal archipelagoes. The Bahamian delegate referred to waters "historically regarded as parts of the territory of the Bahamas ..."[51] Most nations that are not large maritime states and have archipelagoes appeared to treat the archipelagic waters as internal, e.g., Denmark, Sweden, Yugoslavia, and Saudi Arabia, and it is curious that they did not co-sponsor the four nation draft articles.[52] It is equally interesting that the coastal archipelagic states did not co-sponsor the U.K. proposal on archipelagoes. The U.K. proposal provided that the waters within the archipelagic baselines were subject first to the sovereignty of the archipelagic state and second to other rules of international law.[53] Thus the proposals of the four nations and the United Kingdom were not in fact too far apart in how these waters should be treated, and a compromise approach was possible.

Effect on Navigation

The rights of navigation through archipelagic waters presented the most formidable issue in the negotiations. The draft articles of the four nations had to grapple with many entrenched rights, especially the freedom of navigation, when trying to make a case for the special status of the mid-ocean archipelagoes. Their Article IV provided that innocent passage shall exist in the archipelagic waters subject to the requirements of Article V, which gave the archipelagic states the discretion to designate sealanes and the right to suspend and prohibit the innocent passage of warships through the sealanes. Non-warship innocent passage could be suspended only for security purposes and only if alternate sealanes were available.

Because they did not recognize the archipelagic state's right to define and regulate traffic movement in the archipelagic waters, the United Kingdom and other maritime states took exception to Articles IV and V. The U.K. delegate explained:

> paragraph 7 of [our] article was designed to ensure that these parts of archipelagic waters which were now used as routes for international navigation would continue to be available to the entire international community.[54]

Indonesia and Fiji argued that the risk of pollution required them to control passage in their waters. They further argued that it was wrong to label the suspension of innocent passage "arbitrary" because any legislation would consider technical advice from international organizations.

Some maritime states supported the draft articles of the four nations. Spain contended that the peculiarities of archipelagoes "made them highly vulnerable to damage from pollution,"[55] thus necessitating sealanes and traffic separation schemes. The Australian position objected only to the notification requirement, at least for surface vessels,[56] implying that the archipelagic states should only require prior notification for submarines. Despite these differences, all nations involved in these negotiations recognized the importance of the freedom of navigation.

Nature of the Resources Within

The four nations' draft articles dealt with resources, in Article III, which referred specifically to the sovereignty of the archipelagic states over the resources. The United Kingdom wanted sovereignty limited to internal waters. However, in referring to the outward extension of the territorial sea and the continental shelf, the United Kingdom acquiesced to archipelagic state control of resources in these areas. This is supported by her subsequent draft article 1(a) of July 3, 1974 entitled, "Draft Articles on the Territorial Sea and Straits."[57]

A separate proposal emerged which deserves mention here, the draft article submitted by Thailand, dated August 15, 1974.[58] In part it provided that in the archipelagic waters, previously considered high seas, the archipelagic state "shall give special consideration to the interests and needs of its neighboring states, with regard to the exploitation of living resources in these areas." The proposal appeared to be contrary to draft articles of the four nations, and did not gain much initial support.

Additional proposals supported the specifics of the four nations' draft articles on the resource question. Draft Article 7(2), co-spon-

sored by Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand, and Norway,[59] duplicated the language in the four nation draft article III(2) pertaining to the archipelagic state's sovereignty over resources. India separately submitted a draft article with similar language.[60] No similar support materialized for the position of the United Kingdom.

Sovereignty Over the Airspace

During negotiations the language on both sides regarding airspace appeared identical except for an attempt by the archipelagic states to make explicit an archipelagic state's absolute sovereignty over airspace.

Articles 49 and 53(1) appear to be a compromise reached between the archipelagic and maritime states. Like the question of sealane passage, the archipelagic states must designate lanes through the airspace over their archipelagic waters and the territorial seas, a task not required prior to the 1982 Convention on the Law of the Sea. If the archipelagic states fail to do this, then air routes would continue to be routes normally used for international flights.

Papua New Guinea: An Exception To the Transit Passage Regime?

Although Papua New Guinea's straits are not yet heavily used for international navigation, this situation will probably change.[61] The increasing growth of seaborne traffic compels the establishment of regulatory measures. Papua New Guinea qualifies as both a strait and archipelagic state. Questions of both innocent passage and free transit are relevant because all of Papua New Guinea's straits such as the St. George's Channel, Vitiaz Strait, Dampier Strait, Bougainville Strait, the Great East Channel, and Torres Strait come under the rubric of both the 12 mile territorial sea and archipelagic waters.

Because it is unclear to which straits the regime of transit passage applies to, Papua New Guinea can contend that its straits are excluded from the transit passage regime for two reasons. First, the traffic volume is minimal and second, alternate routes over the adjacent high seas are available. Thus, transit passage would be prohibited in Papua New Guinea's straits and foreign vessels passing through them would be required to navigate under the doctrine of innocent passage. Alternatively, ships could use the high seas beyond the Bismarck archipelago. If, however, the transit passage concept were extended to all straits, Papua New Guinea's view of innocent passage would still be protected by the archipelagic regime.

Innocent passage through archipelagic waters is recognized with the right of the coastal states to designate sealanes. Thus Article 52 provides:

1. Subject to Article 53 (right to designate sea lanes) and without prejudice to Article 50 (delimitation of internal waters), ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with section 3 of part II (right of innocent passage through territorial waters).
2. The archipelagic State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

On the question of overflight the best solution is bilateral agreements with the nations concerned. Such agreements must reflect international law, but most importantly, they must meet the specific needs and interests of the parties concerned.

Commentary

The definition of an archipelago in Article 46 of the Convention is almost identical to the definition proposed by the draft articles of the four nations. The inequity of enclosing large areas of water by including outlying islands is tempered by the language of Article 46(a): "archipelagic State means a state constituted wholly by one or more archipelagoes and may include other islands." Outlying islands will be included as part of the territory of the archipelagic state but may be excluded when drawing straight baselines. The definition recognizes the Bahamian proposal that allows parts of islands to form archipelagoes.

The question of baselines is settled by a compromise. Although the four nations did not succeed in doing away with the water to land ratio prerequisite, they did obtain a larger ratio than proposed by the United Kingdom. Additionally the archipelagic states may draw three percent of the total number of baselines in any given system to a maximum of 125 nautical miles.

The four nations also succeeded in gaining acceptance by the international community of historical factors as an alternate qualification criterion. The number of islands needed to constitute an archipelagic state is also a direct result of the four nation draft articles. The U.K. three island minimum failed in favor of one or more islands.

The status of "archipelagic waters," a term coined in the Law of the Sea Convention, is unique. Conceptually, archipelagic waters have characteristics of territorial waters, the exclusive economic zone, high seas, and straits, but they are not internal water (See Article 50).

The question of international navigation through archipelagic waters was critical in the negotiations and is now governed by at least two principles. First, all states enjoy the right of innocent passage in the same manner as in the territorial seas (Article 52(1)). The passage must be continuous, expeditious and not prejudicial to the peace, good order, and security of the archipelagic state. Second, passage through certain parts of archipelagic waters, namely, sealanes or internationally recognized routes, would be exercised in the same manner as navigation through international straits (Article 53). Thus the principles of innocent passage and transit passage both govern navigation in archipelagic waters.[62]

Under the new regime, if the passage is innocent, it cannot be suspended. If it becomes noninnocent because of changing circumstances in either the coastal state or aboard the transitting ship passage can be suspended after notice is given, but the suspension must be nondiscriminatory, temporary, and limited to specific areas. Arguably, passage is suspendable if it does not meet the requirements of transit passage under Article 53(3). The new principle of sea lane passage is subject only to Article 53 and applies only when sea lanes are designated by the archipelagic state. It is unlike transit passage; nonsea-lane areas are governed by the regime of navigation in the territorial seas (Article 52) and international straits (Article 54). Because archipelagic states are not obliged to designate sea lanes, there could be situations where archipelagic waters may not have sea lane passages laid out and enforced (Article 53(1)).

Many questions remain unanswered. First, Article 52 provides that, absent designated sea lanes, all ships enjoy the right of innocent passage throughout archipelagic waters, even if islands are more than twelve miles apart. Some nations, notably Indonesia, did not envision that innocent passage would apply to all archipelagic waters.

Second, although designating sea lanes is not mandatory, the archipelagic states would find it desirable to designate sealanes because failing to do so would by default entitle anyone to passage through routes normally used for international navigation.[64] Article 53(12) implies that all archipelagic states have normal routes for international navigation in their archipelagic waters, but this may not be true in all cases. The regime of archipelagic sea lanes passage allows submarines to navigate submerged, even in nonstrait passage. This is a right that did not previously exist. It is extraordinary that for the first time submarines will be allowed to navigate below the surface through sea lanes that begin and end in the territorial sea of archipelagic states. The right of submarines to pass submerged through archipelagic waters is the biggest "give away" by the archipelagic states in the negotiations.

When the negotiations began, the archipelagic nations had policies that completely excluded foreign vessels from their internal waters. Now, such navigation is not only allowed, but is given new freedoms. The maritime states secured for themselves more than they asked for, and the archipelagic states have lost the right to restrict the movement of warships and submarines in both archipelagic and territorial waters.

The archipelagic states have almost absolute control over the resources in the archipelagic waters, but Article 51 states that the archipelagic states shall respect existing agreements with other states and traditional fishing rights of immediately adjacent states. This provision partially allays concerns of Thailand, Pakistan, and Japan.

Conclusion

The subject of archipelagoes was dealt with comprehensively in the early stages of UNCLOS III, and, by 1975 when the first text of the Conference was produced, most work on it was concluded. Because of this early conclusion and acceptance of the principles by the opposing sides, it became virtually impossible to reopen debate on trivial points.[65] The concept now forms an integrated part of the 1982 Convention on the Law of the Sea.

Mid-ocean archipelagoes obtained recognition under the 1982 Law of the Sea Convention. It will be interesting to see how states react to the archipelagic provisions. Although the archipelagic concept devolved from the positions of Fiji, Indonesia, Mauritius, the Philippines, and the United Kingdom, concerns of other states were incorporated. The definition of an archipelago is limited. For instance, Cuba, an early proponent of the archipelagic regime, does not technically qualify.[66] The initially strong and unwavering archipelagic state positions eroded under pressure from the maritime powers. Some call this a compromise, but is it really?

Under the pretext of traditional fishing rights and the exercise of the rights of navigation, activities can take place that can affect the security and economic interests of the archipelagic states. The limitations imposed on the archipelagic states in the exercise of their sovereign rights may be the most significant source of any future conflict. The Convention protects the security and economic interests of

the maritime powers. The same cannot be said for the interests of the archipelagic states.

Footnotes

1. Sorensen, 6 *Nederlands Tijdschrift voor International Recht* 315 (1959).
2. Originally the geographic factor was the main if not the only relevant characteristic of an archipelago. Now a number of factors enjoy relatively equal status.
3. UN DOC. A/CONF.62/L.78 (1982).
4. C.F. Amerashinge, *The Problem of Archipelagoes in the International Law of the Sea*, 23 Int'l & Comp. L.Q. 5390 (1974). (This Amerashinge is not the first President of UNCLOS III).
5. *Id.* at 5390.
6. *Id.* at 540.
7. *Id.*
8. M.D. Santiago, *The Archipelagic Concept in the International Law of the Sea, Problems and Prospects*, 49 Philippines L.J. 323 (1974).
9. UN Conference on the Law of the Sea, 1 *Official Records*, Preparatory Documents 289 (1958).
10. D.P. O'Connell, *Mid-Ocean Archipelagoes in International Law*, 45 Brit. Y.B. Int'l L. 58 (1971). [hereinafter *Mid-Ocean Archipelagoes*].
11. *See* Amerashinge, *supra* note 4, at 5423.
12. 1951 I.C.J. 116. The holdings of this case can be summarized as follows:

    (1) A state must be allowed to make its own delimitations to give effect to long evidenced usage and economic interests peculiar to a region where the sea and land exist in a close relationship.
    (2) Straight baselines are acceptable for deeply indented coastlines and coastal archipelagoes so long as the general direction of the coastline is followed.
    (3) Straight baselines are subject to the test of reasonableness.
    (4) Waters enclosed by straight baselines are internal waters in the case of deeply indented coasts and coastal archipelagoes.
    (5) When straight baselines enclose a strait, the coastal state must allow innocent passage through it.

13. 44 Brit. Y.B. Int'l L. 59 (1971).
14. O'Connell, *Mid-Ocean Archipelagoes*, *supra* note 10, at 59.
15. Waldock, 28 *Brit. Y.B. Int'l L.* 144 (1951).
16. O'Connell, *Mid-Ocean Archipelagoes*, *supra* note 10, at 59.
17. Verzijl, 3 *International Law in Historical Perspective* 71 (1970).
18. *Id.*
19. M. McDougal and W. Burke, *The Public Order of the Oceans* 411 (1962
20. *See* note 10 *supra*. O'Connell, *The International Law of the Sea* 255 n. 73 (1982) [hereinafter *Law of the Sea*].
21. Brownlie, *Principles of Public International Law* 203 (3d ed. 1979).
22. UN DOC. ST/LEG/S3R. B/6, at 487 (1951). Lines of 48, 62, 32, 124, 147, 76, and 4.7 miles resulted.

23. Ecuador insisted at UNCLOS that the archipelagic waters be treated as internal waters.
24. Although similar, the claims of the Philippines were more rigorous. The Indonesian claim of December 14, 1957 was based on immemorial usage while the Philippines' claim of January 20, 1956 was based on historical grounds.
25. *See* note 10 *supra*. O'Connell, *Law of the Sea, supra* note 20, at 248 n. 46. It has been claimed that Australia at one time had been seeking permission prior to their warships entering the archipelagic waters of the Philippines.
26. 34 Annuaire de l'Institut de droit International 756 (1928).
27. 20 Am.J. Int'l L. 319 (Supp. 1926); *Report on Questions Which Appear Ripe for International Regulation*, L.O.N. DOC. C.196, M.70, 1927.V (1927). *Cf.* O'Connell *Law of the Sea, supra* note 20, at 238, text with n. 6.
28. L.A. Teclaff, *Shrinking the High Seas by Technical Methods from the 1930 Hague Conference and the 1958 Geneva Conference*, U. Det. J. Urb L., November 1962, at 39. Cf. O'Connell, *Law of the Sea, supra* note 20, at 239, text with n. 8.
29. For example, a limit to the distance between islands, a limit on baseline length, and a minimum water-land ratio of 1:1. *Cf.* O'Connell, *Law of the Sea, supra* note 20, at 238, text with n. 7.
30. 1954 Y.B. Int'l L. Comm'n 5 (Art. 12 on the Regime of the Territorial Sea in the Third Report and in the First Report discussed in 1955). *Cf.* O'Connell, *Law of the Sea, supra* note 20, at 244-45 text with nn. 22-24.
31. Amerashinge, *supra* note 4, at 540 *et. seq.*
32. UN DOC. A/2934, at 52-3 (1955).
33. D. Bowett, *The Legal Regime of Islands in International Law* 98 (1979).
34. *See* Amerashinge, *supra* note 4, at 5489.
35. *Id.* at 549
    1. Throughout the negotiations, principles, proposals, and draft articles differed significantly. The 1973 four nations' proposal went further than the statement of three principles in that:
        (1) The historical element became an alternative way to qualify an archipelago;
        (2) The proposals disavowed low tide elevation as end-points for the drawing of baselines;
        (3) Roping off the territorial sea of another state when drawing baselines is specifically limited;
        (4) Baselines must be publicized.

    Id. at 5512, DOC. A/CONF.62/C.2/L.49 (1974) (draft articles of August 9); UN DOC. A/AC.138/SC.II/L.58 (statements of principles).
36. UN DOC. A/AC.138/SC.II/L.44.
37. Cuba submitted a proposal allowing the use of straight baselines that followed the configuration of the main island or islands and excluded isolated islets or reefs. Furthermore, baselines shall not enclose waters traditionally used by other states for customary or international purposes; UN DOC. A/CONF.62/L.73. The Bahamas wanted baselines measured from the outermost points at low tide; UN DOC. A/CONF.62/L.70 (1974). Ecuador, Panama, and Peru acquiesced to using straight baselines for the delimitation of archipelagoes UN DOC. A/AC.138/SC. II/L.27 (1973). Ecuador further proposed that the

method applied to drawing archipelagic baselines shall also apply to archipelagoes that form a part of a state; UN DOC.A/CONF.62/L.51 (1974). *But see* H.P. Rajan, 14 Indian J. Int'l. L. 236 (1974) (Australia, Japan, and the Soviet Union found the U.K. proposal constructive).

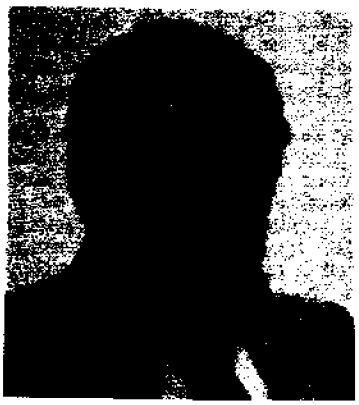
38. UN DOC. A/AC.138/SC.11/SR.75 (Aug. 20, 1973).
39. UN DOC. A/AC.138/SC.11/SR.74 (Aug. 14, 1973).
40. A nautical mile was defined as the equivalent of one minute of latitude at a particular latitude, varying about 19 meters between the equator and the poles; International Hydrographic Conference at Monaco, April 1929.
41. UN DOC. A/AC.138/SC.11/SR.73, at 20-21 (1974).
42. UN DOC. A/AC.138/SC.11/SR.53 (1974).
43. UN DOC. A/AC.138/SC.11/SR.73, at 4 (1974).
44. For a study of different methods of delimitation *see* 24 Am. J. Int'l L. 543, 5467 (1930).
45. UN DOC. A/CONF.62/L.70 (1974) (Art. 1(2)).
46. UN DOC. A/AC.138/SC.11/SR.73, at 13 (1974) (Indonesian statement).
47. G.R. Coquia, 7 Far E. L. Rev. 422 (1959-60).
48. UN DOC. A/AC.130/SC.11/6.46 (1973).
49. UNCLOS III (2d Sess.), 2 *Off. Records* 260 (1974).
50. G. Martson, *International Law and Mid-Ocean Archipelagoes*, 4 Annals of Int'l Stud. 186 (footnote) (1973).
51. UNCLOS III, Official Records, vol. 11 (Second sess., Caracas).
52. Cuba also treated its waters as internal. Cuba's position was similar to that of the Bahamas; *see* UN DOC. A/CONF.62/C.2/L 173 (1924)(Cuban amendment to Bahamian proposal). The Cuban amendment left intact the notion that the archipelagic waters, belong to and are subject to the sovereignty of the archipelagic state to which they appertain. *See also* Evensen, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagoes, Preparatory Document No. 15* A/CONF.13/18 (November 29, 1957).
53. Proposal 5 of the British proposal, see text accompanying note 36 *supra*.
54. UN DOC. A/AC.138/SC.11/SR.73, at 21 (1974).
55. UN DOC. A/AC.138/SC.11/SR.73, at 18-19 (1974).
56. UN DOC. A/AC.137/SC.11/SR.75, at 7 (1974).
57. UN DOC. A/CONF. 62/C.2/L.3 (1974).
58. UN DOC. A/CONF. 62/L.63 (1974).
59. UN DOC. A/CONF. 62/L.4 (1974).
60. *Id.* at art. 1(2) (1974).
61. UN DOC. A/CONF. 62/C.2/L.3 (1974).
62. Although suspension of innocent passage in the archipelagic waters is governed by the regime of innocent passage in the territorial seas, the two are not the same because of some differences between Articles 52(2) and 25(2) relating to exercise of weapons.
63. *See* text accompanying note 61, *supra*.
64. W.T. Burke, *Contemporary Law of the Sea: Transportation, Communication, and Flight*, Occasional Paper Series, Law of the Sea Institute Occasional Paper No. 28, November 1975 at p. 7; indeed while it is true that archipelagic states may not act to designate sea lanes, they would in fact be compelled to do so for fear of maritime states using the absence of sea lanes as an excuse to trawl the archipelagic waters.
65. In the 10th Session in New York I tried to introduce some minor language changes in Committee II to certain provisions dealing with

the conditions relating to the suspension of innocent passage but was told that the four archipelagic states had struck an agreement with maritime nations to not touch anything, despite support I had from the Cape Verde delegation and others. O'Connell, *Mid-Ocean Archipelagoes*, *supra* note 10;

66. *Cf.* O'Connell, *Law of the Sea*, *supra* note 20 at 256-57; *Mid-Ocean Archipelagoes*, supra note 10.

THE RESPONSE OF THE INTERNATIONAL MARITIME ORGANIZATION TO REFERENCES IN THE 1982 CONVENTION TO THE "COMPETENT INTERNATIONAL ORGANIZATION"

Thomas S. Busha
International Maritime Organization
London, United Kingdom



I am, on the one hand, enjoined to avoid remarks implying that the International Maritime Organization (IMO) has taken any institutional position whatsoever on matters arising directly from the 1982 Law of the Sea Convention, and, on the other hand, I must acknowledge with much satisfaction the reference in the Convention that "gives appropriate and generally satisfactory recognition to the competence of the International Maritime Organization in the areas of interest to the Organization," including navigation.

Because the IMO governing bodies have not yet formally responded to the implications of the Convention for the Organization, IMO involvement will focus on the Convention itself rather than on the Organization's opinion of the Convention. This paper therefore does not reflect any settled view of IMO or of its members. C.P. Srivastava, Secretary General of the International Maritime Organization, at the 1985 Law of the Sea Institute Annual Meeting at Cardiff, Wales, stated that

> ... the Convention gives legal and political confirmation to the regulatory regimes developed by IMO, and it implicitly recognizes IMO as the legitimate international forum in which states are expected to develop new international standards and regulations or revise existing rules on these subjects. The Convention also adopts and emphasizes the basic approach adopted in IMO's treaties and instruments, *i.e.*, the principle that the primary responsibility for the enforcement of internationally adopted standards and regulations lies with states -- with flag states, coastal states or port states depending on the nature of the regulations or standards concerned.[1]

He went on to say:

> As far as IMO is concerned, the 1982 Convention establishes general principles relating to navigation, the promotion of safety at sea, the prevention and control of vessel-source pollution, the

regulation of pollution by dumping and international cooperation and technical assistance.[2]

I intend to give less emphasis to the environmental concerns of IMO in this paper, in view of the workshop's emphasis on matters of navigation. Participants concerned with the environmental aspects of shipping should refer to Professor Clingan's paper[3] and Professor Sohn's paper on the *Implication of the Law of the Sea Convention Regarding the Protection and Preservation of the Marine Environment* presented at the 18th Annual Conference of the Law of the Sea Institute in September 1984.[4]

Preliminary steps of IMO in response to the references in the 1982 Convention to the "competent international organization," can be described in general terms. At its thirteenth regular session in 1983, the IMO Assembly requested that a careful and detailed examination of the provisions of the 1982 Law of the Sea Convention should be undertaken to assess the implications of the Convention for the IMO, its Convention, and work. In particular, the Assembly wanted to determine the "scope and areas of appropriate IMO assistance to Member States and other agencies in respect of the provisions of the Law of the Sea Convention dealing with matters within the competence of IMO." The examination would also enable IMO "to develop suitable and necessary collaboration with the Secretary General of the United Nations on the provision of information, advice and assistance to developing countries on the Law of the Sea matters within the competence of (the) IMO."

The Secretary-General of IMO was requested and authorized to provide advice and assistance that might be required by the Preparatory Commission for the International Sea-Bed Authority on matters within the Organization's competence. By agreement between the Secretary-General of IMO and the Special Representative of the Secretary General of the United Nations for the Law of the Sea, a study is now being prepared by IMO in consultation with the relevant officials of the Office of the Special Representative.

General Remarks

Although only once specifically referred to by name in an annex to the 1982 Convention, IMO is implicitly recognized in many provisions as the "competent international organization." The Convention requires states, in exercising powers or rights in many important areas, to conform to or take account of the relevant international regulations and standards adopted "through the competent international organization or by general diplomatic conference." The words "or by general diplomatic conference" are the means by which the organization has adopted its major treaty instruments. These treaty instruments have always been prepared by conferences open to the entire United Nations system, not merely to the members of the organization, and are open to ratification and accession by all states. The Law of the Sea Convention recognizes the competence and role of IMO in provisions dealing with the rights and obligations of states (flag states, coastal states, or port states) in the regulation of navigation; and the prevention, reduction and control of marine pollution from vessels and by dumping and other maritime activities.

IMO has a global mandate from the United Nations, *inter alia*, to adopt the highest practicable standards for efficiency of navigation, maritime safety, and the prevention and control of vessel-source pollution. It must be assumed, therefore, that some of the rules and standards adopted by IMO for improving maritime safety, efficiency of navi-

gation, and the prevention and control of marine pollution are accepted or expected to be included in the international standards and guidelines by which states are required or empowered to take measures to regulate navigation and related activities in the marine environment, regarding vessels operating under their authority or in areas within their jurisdiction or subject to their regulation. In these areas, many of the international regulations and standards developed by IMO are recognized as enforceable by or applicable to parties to the 1982 Convention on the Law of the Sea.

The phraseology used in the 1982 Convention to enjoin or empower states varies. A state must "take account of," "conform to," "give effect to," or "implement" certain standards developed by or through IMO which are themselves variously referred to as "applicable international rules and standards," "internationally agreed standards and recommended practices and procedures," "generally accepted international rules and standards," "generally accepted international regulations," "applicable international standards," "applicable international instruments," or "generally accepted international regulations, procedures, and practices."

Although the Convention omits formal definitions and guidelines for these "applicable international rules and standards," it has been generally agreed in the Conference discussions and in commentaries on the Convention, that some of the agreements, regulations, and standards adopted by IMO constitute the "generally accepted" standards referred to in the 1982 Convention. Accordingly, to the extent that any such regulation or standard qualifies or is deemed to be "generally accepted" or "applicable" in any context, the regulation or standard will constitute a yardstick by which a state will determine its requirements or responsibilities in the implementation of the 1982 Convention. Such a yardstick will help define the context of national laws and regulations adopted for particular situations.

Because the 1982 Convention does not indicate which international standards of IMO are "generally accepted or applicable," states involved in the implementation of the Convention (and other states and entities affected by national measures of implementation) will expect guidance as to which IMO regulations and standards are relevant to the respective articles of the 1982 Convention. Moreover, the standards, procedures, recommended practices, and other international rules and regulations adopted by IMO and embodied in codes, guidelines, manuals, and recommendations relating to all aspects of maritime safety and efficiency of navigation, as well as the prevention and control of marine pollution also need clarification.

Formally speaking, the only authoritative interpretations of the 1982 Convention provisions can be those undertaken by states parties. Many states, particularly those in the course of ocean development, will need advice and guidance to ascertain their rights and obligations under the 1982 Convention regarding IMO regulations and standards.

Clearly, it is necessary to identify provisions of the Convention that deal with matters that are also the subject of conventions or other instruments adopted in IMO. This identification may help the organizations and governments to discover any incompatibilities, conflicts, and inconsistencies. This study will aid in determining:

(i) whether any IMO treaty or other instrument requires formal amendment or revision to bring it in line with the 1982 Convention;
(ii) whether IMO is required to adopt new tasks or modify its current work programs to discharge responsibilities assigned by the 1982

Convention, or to perform functions that IMO considers itself bound to as a result of particular provisions;

(iii) whether IMO must establish new working procedures because of any particular provision.

An example of *inconsistencies* between IMO standards and those of the 1982 Convention is Article 237(2), which concerns the preservation of the marine environment. It states that specific obligations assumed by states under "special conventions" should be carried out in a manner consistent with the 1982 Convention. Presumably "special conventions" would include some of those adopted by IMO. IMO practice calls for relevant intergovernmental bodies to decide such issues and to determine the need and timing for revision of any IMO regime or regulations.

The IMO study will draw attention to the provisions of the 1982 Convention that affect particular areas of IMO work. Many of the articles of the 1982 Convention relate directly or indirectly to IMO's field of activity, particularly provisions that deal with the territorial sea and innocent passage, the exclusive economic zone, archipelagic waters, straits used for international navigation, the protection and preservation of the marine environment, the high seas, and international cooperation and the settlement of disputes.

Many articles of the 1982 Convention not immediately relevant to IMO standards may have either significant or marginal implications for the work of the Organization. Attention should focus, however, on provisions directly relevant to IMO, namely provisions concerning the following main areas:

(a) The rights and obligations of coastal and port states and the regulation of shipping activities in:
  (i) the territorial sea;
  (ii) the exclusive economic zone;
  (iii) straits used for international navigation; and
  (iv) archipelagic waters.[5]
(b) The rights and obligations of flag states;
(c) The functions and responsibilities of IMO in relation to:
  (i) matters already dealt with by the Organization in accordance with its constitutional mandate;
  (ii) matters relating to new IMO functions or responsibilities that are expected of the Organization under some provisions of the 1982 Convention.

In addition to the detailed analysis of major provisions, an annex to the study will list, in tabular form, the provisions of the 1982 Convention that may directly or indirectly affect IMO and its work. An appendix to the annex will list the IMO treaties that deal with matters covered by the respective articles of the Convention. The appendix also will list the major "nontreaty" international instruments adopted by IMO. The role, if any, of these nontreaty instruments in the implementation of the Law of the Sea Convention is unclear. But because some deal with matters of considerable substantive and technical importance, they will be brought to the attention of governments and interested parties. Many of these nontreaty instruments supplement and apply within the context of particular treaty instruments, making them of considerable interest to those involved in implementing the treaty instruments to which these nontreaty acts are related.

Major Provisions of the 1982 Convention with Clear or Probable Implications for IMO

The Territorial Sea

A number of IMO Conventions and other instruments were adopted before the 1982 Convention and before the establishment of any international consensus on the limit of 12 nautical miles for the breadth of the territorial sea. It may therefore be necessary to examine some IMO treaties to ascertain whether provisions remain appropriate and adequate for the purpose of the treaty concerned or whether they need to be changed.

Under Article 21 of the 1982 Convention, the laws and regulations of the coastal state that apply to ships conducting innocent passage through the territorial sea and dealing, *inter alia*, with the safety of navigation and the regulation of maritime traffic, must conform with the provisions of the Convention and "other rules of international law." Moreover, such laws and regulations shall not apply to the design, construction, and manning or equipment of foreign ships unless effecting generally accepted international rules and standards, as specified in Annex VIII on Special Arbitration, where IMO is specifically mentioned in Article 2(2).

Under Article 21(4), foreign ships conducting innocent passage through the territorial sea "shall comply with all such laws and regulations (of the coastal state) and all generally accepted international regulations relating to the prevention of collisions at sea." Article 22(3)(a) of the Convention requires a coastal state, in designating sea lanes and prescribing traffic separation schemes for ships conducting innocent passage through the territorial sea, to "take into account the recommendations of the competent international organization" (IMO).

Thus, regarding the regulation of shipping in the territorial sea and the promotion of safe navigation, the coastal state's rights and obligations under the Convention are significantly affected by:

(a) IMO's international rules and standards on the design, construction, manning, and equipment of vessels not flying the flag of the coastal state concerned;
(b) the provisions of the International Convention for the Prevention of Collisions at Sea[6] and, through Regulation 10 of that Convention, the traffic separation schemes adopted by IMO;
(c) IMO principles and procedures regarding the prescription of traffic separation schemes and sea lanes; and
(d) other international regulations and standards of IMO regarding the territorial sea that may be deemed to form part of the "international law" applicable to that area.

The application of Article 25(2), which is similar to Article 16(2) of the 1958 Convention on the Territorial Sea,[7] is also important for the port state implementation of IMO Conventions. Article 25(2) provides:

> In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such call is subject.

Articles 19 and 21 of the 1982 Convention concerning innocent passage foresee that acts of willful and serious pollution contrary to the Convention are to be considered prejudicial to innocent passage, and that coastal states may legislate in conformity with international law to preserve the coastal environment. Thus, under Article 21(1)(f), the coastal state has the right to adopt rules and regulations applicable to vessels exercising the right of innocent passage through its territorial sea. Such laws and regulations must, however, be in conformity with the rules of international law and in particular shall not apply to the design, construction, manning, or equipment of foreign ships unless the laws and regulations of the coastal state are "giving effect to generally accepted international rules and standards" (Article 21(2)).

Article 220(2) must also be mentioned as conferring important enforcement rights to coastal states with regard to ships navigating in the territorial sea and with respect to the violation of pollution control standards. The coastal state is empowered, under Article 21(4), in the exercise of its sovereignty within its territorial sea, to adopt laws and regulations for the prevention, reduction, and control of marine pollution from foreign vessels. Such laws and regulations must, however, not hamper the innocent passage of foreign vessels. Other provisions of the Convention regarding the rights and obligations of coastal states in the prevention and control of marine pollution, and having significance for the International Maritime Organization, are: Article 211(3); Article 218(1) and (3); Article 219; Article 220(1); Article 223, and Article 226.

Provisions in the 1982 Convention concerning the prevention of pollution of the marine environment by dumping in the territorial sea directly relate to the only comprehensive global treaty for the prevention of such pollution, namely, the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter at Sea, known as the London Dumping Convention.[8] The contracting parties designated IMO as the competent organization responsible for the secretariat duties of this Convention. Article 210(6) of the 1982 Convention stipulates that national laws, regulations, and measures "shall be no less effective ... than the global rules and standards." The global rules and standards are currently contained in the London Dumping Convention and the regulations developed within the framework of that convention in IMO.

Article 216(1) obliges the coastal state to enforce the laws and regulations adopted in accordance with the 1982 Convention and "applicable international rules and standards established through competent international organizations or diplomatic conferences for the prevention, reduction and control of pollution of the marine environment by dumping..." Enforcement is required of the coastal state with regard to dumping, *inter alia*, within its territorial sea.

Articles 223-33 relate to safeguards in connection with proceedings to enforce laws and regulations; to the prevention, reduction, and control of marine pollution; and also to laws and regulations dealing with pollution by dumping.

The Exclusive Economic Zone

Under Article 56(1)(b)(i) of the 1982 Convention the coastal state has jurisdiction with regard, *inter alia*, to the "establishment and use of artificial islands, installations and structures." The coastal state has exclusive jurisdiction over such artificial islands, installations,

and structures, with regard in particular to safety laws and regulations (Article 60(2)). However, the coastal state is obliged under Article 60:

(a) to give due notice of the construction of such artificial islands, installations or structures and to maintain permanent means for giving warning of their presence (paragraph 3);
(b) to remove any installation or structures that are abandoned or disused "to ensure safety of navigation taking into account any generally accepted international standards established in this regard by" IMO, as the competent international organization (paragraph 3);
(c) not to extend the breadth of safety zones around such artificial islands, installations, or structures beyond 500 meters, "except as authorized by generally accepted international standards or as recommended by" IMO, as the competent international organization (paragraph 5);
(d) not to establish artificial islands, installations or structures, or safety zones around them, which might interfere with the use of recognized sea lanes essential to international navigation, and to ensure that all ships comply with accepted standards of navigation, in their vicinity (paragraphs 6 and 7);
(e) to give due publicity in respect of any artificial islands, installations, or structures that are not entirely removed and the extent of any safety zones established around artificial islands, installations, or structures (paragraphs 3 and 5).

Note that the obligations also apply to the coastal state in relation to such islands, installations, and structures on the continental shelf of that state (Article 80).

Reference was made earlier in this paper to the regulation of shipping for the prevention, reduction, and control of the marine environment, including pollution by dumping. The 1982 Convention foresees the exercise of jurisdiction in this regard by coastal states and the adoption of laws and regulations conforming and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference. The exercise of jurisdiction is "for the purpose of enforcement." Articles 210, 211, 216, 220, and 223-233 may also be examined in this respect.

Straits Used for International Navigation

Under Article 41 of the Convention, states bordering a strait used for international navigation are empowered to designate sea lanes and prescribe traffic separation schemes for navigation where necessary to promote the safe passage of ships. This power extends also to the substitution of sea lanes and traffic separation schemes. This power may be exercised subject to certain conditions, in particular:

(a) States bordering straits used for international navigation are not permitted to exercise their powers under Articles 41 and 42 in such a way as to have the practical effect of denying, hampering or impairing the right of transit passage (Article 42(2)). In the case of such straits that are excluded from the application of the regime of transit passage under Article 38, or lie between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state, the bordering state is under an obligation to apply the regime of innocent passage applicable to the territo-

rial sea (Article 45). No state bordering a strait used for international navigation may suspend transit passage or innocent passage as the case may be through the strait (Articles 44 and 45(2)).

(b) The sea lanes or traffic separation schemes designated or prescribed by the bordering states must conform to generally accepted international regulations (Article 41(3)). In this connection, note that IMO is the institution with the mandate to develop international regulations with regard to routing systems for ships.

(c) Before designating sea lanes or prescribing traffic separation schemes (or substituting existing sea lanes or traffic separation schemes), the states must refer proposals to IMO as the competent international organization with a view to their adoption. Although the power of formal "adoption" of the sea lanes or traffic separation schemes is given by the Convention to IMO, traffic separation schemes are adopted in consultation with the states bordering the strait concerned. The states concerned can designate, prescribe, or substitute the sea lanes or traffic separation schemes only after formal adoption by IMO (Article 41(4)).

(d) Where sea lanes or traffic separation schemes through the waters of two or more states bordering a strait used for international navigation are proposed, the states concerned are required to "cooperate in formulating proposals in consultation with" IMO (Article 41(5)).

(e) A state designating sea lanes or prescribing traffic separation schemes in a strait used for international navigation is required to indicate clearly the sea lanes and traffic separation schemes in question on charts to which "due publicity" must be given. The publicity could presumably originate with IMO (Article 41(6)).

(f) Article 42(1) of the Convention empowers states bordering straits used for international navigation to adopt laws and regulations relating to transit passage for the safety of navigation and the regulation of maritime traffic, as provided in Article 41.

(g) Ships in transit passage must respect established sea lanes and traffic separation schemes and laws and regulations adopted in accordance with Articles 41 and 42. They also must comply with generally accepted international regulations, procedures, and practices for safety at sea including the 1972 Convention on the International Regulations for Preventing Collisions at Sea.[9] Accordingly, the bordering state can take measures necessary to ensure the compliance with such laws by the ships in transit passage.

(h) In the case of straits that are excluded from the application of the transit passage regime (Article 38), or lie between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state, the bordering state is under an obligation to apply the regime of innocent passage applicable to its territorial sea (Article 45). No state bordering a strait used for international navigation may suspend transit passage, or innocent passage as the case may be, through the strait (Articles 44 and 45(2)).

(i) Article 42 empowers a state bordering a strait used for international navigation to adopt laws and regulations relating to transit passage through the strait in respect of the prevention, reduction, and control of pollution. The conditions for the enforcement of these powers are the same as those applicable to the laws and regulations for the safety of navigation, set forth above. Note the inconsistency between the language in Article 39(2)(b) and

Article 42 (1)(b) of the 1982 Convention in their use of "generally accepted" and "applicable" to describe international regulations in provisions dealing with essentially the same subject. Attention was drawn to this inconsistency during the Conference but the language was not redrafted.

(j) Under Article 233 of the Convention, a state bordering a strait used for international navigation has the same powers of enforcement regarding violations of laws and regulations adopted under Article 42, where the violation causes or threatens major damage to the marine environment of the strait. In such a case, the bordering state concerned can take appropriate enforcement measures, subject to the safeguards stipulated in Articles 223 to 232.

(k) Article 216 empowers and requires states to enforce laws and regulations adopted in accordance with the Convention and applicable international rules and standards established through IMO or a general diplomatic conference for the prevention, reduction, and control of pollution in the marine environment by dumping. Where a strait used for international navigation is otherwise within the jurisdiction of a bordering state for the purpose of pollution prevention, the right and obligation of such a state under Article 216 will also extend to the prevention of pollution by dumping in the strait concerned.

Archipelagic Waters

Pursuant to Article 52 of the Convention, the right of an archipelagic state to regulate shipping in its archipelagic waters is subject to the right of "innocent passage" applicable to the territorial sea, subject to Article 53 and without prejudice to Article 50. Article 53 of the Convention gives an archipelagic state the right to designate sea lanes suitable for the continuous and expeditious passage of foreign ships through the archipelagic water and the adjacent territorial sea (53(1)), and traffic separation schemes for the safe passage of ships through narrow channels in the sea lanes designated by that state (53(6)). Article 50 concerns the delimitation of internal waters.

Article 53 articulates the conditions and procedures for the designation of such sea lanes and traffic separation schemes in archipelagic waters. These include:

(a) The sea lanes and traffic separation schemes must conform to "generally accepted international regulations" (paragraph 8).

(b) Proposals for new or revised sea lanes and traffic separation schemes must be referred by the state concerned to IMO, which is empowered to adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic state. The archipelagic state may designate, prescribe, or substitute sea lanes or traffic separation schemes after adoption by IMO (paragraph 9).

(c) The archipelagic state is required to indicate clearly the axes of the sea lanes and the traffic separation schemes designated or prescribed by it on charts, and due publicity should be given to such charts (paragraph 10).

(d) Sea lanes and traffic separation schemes that meet the conditions of Article 53 must be respected by ships in "archipelagic sealane passage" (Articles 53(11) and 54). Article 54 provides that the provisions of Article 39 apply to ships in archipelagic sealane passage. This means that such ships are required to comply with

generally accepted international regulations, procedures, and practices for safety at sea, including the 1972 Convention on the International Regulations for Preventing Collisions at Sea, adopted at IMO.[10]

Article 54 provides that "Articles 39, 40, 42 and 44 apply *mutatis mutandis* to archipelagic sea lanes," making the regime of transit passag through straits applicable to archipelagic lanes passage. Thus, the regime for the safety of navigation is matched with regulations for the prevention of vessel-source pollution in archipelagic waters; and the provisions relating to the prevention of pollution by dumping, as applied in the territorial sea and exclusive economic zone, apply also to archipelagic waters.

Article 221 reaffirms the right of a coastal state to enforce measures beyond the territorial sea to protect its coastline or related interests from the results of a maritime casualty or related acts that may reasonably be expected to result in major harm. The Article asserts that this right of the coastal state is based on both "customary" and "conventional" international law. The law is given treaty form in the 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Damage,[11] and in the 1973 Protocol[12] which extends the 1969 Convention to Pollution Damage from Substance Other than Oil. These two treaties, adopted under the auspices of IMO, constitute the current "conventional" law on the right of coastal state intervention. Their application, interpretation, and implementation may therefore be significantly affected by the general rule enunciated in Article 221.

A reference should also be made to Article 211(7) of the 1982 Convention which envisages the establishment (through IMO or a general diplomatic conference) of international rules and standards relating to the prompt notification to states whose coastline or related interests may be affected by incidents, including maritime casualties, that involve discharge or the probability of pollutant discharge. The only existing international rules and standards in this respect are those contained in the 1973 International Convention for the Prevention of Marine Pollution from Ships, as modified by the Protocol of 1978 (MARPOL 73/78)[13] and, in particular, Article 8 and Protocol I to that Convention. Also relevant are the Guidelines on Reporting and Notification developed by IMO to supplement provisions of the Convention and its Protocol I.[14] The provisions of the IMO Treaties and Guidelines constitute an important part of the yardstick by which coastal state action may be evaluated. The provisions of the 1982 Convention may be relevant to the interpretation and application of the scope of the IMO rules.

Rights and Obligations of Flag States

Safety of Navigation

Article 94 of the Convention requires a flag state to exercise jurisdiction and control over every ship flying its flag, together with the master, officers, and crew of such a ship, in respect of, *inter alia*, administrative and technical matters concerning the ship (94(2)(b)), and of necessary measures to ensure the safety of the ship at sea (94(3)). The measures listed in Article 94(3) relate to several crucial areas of seaworthiness and safe navigation.

In taking the safety measures called for in Article 94, the flag state must conform with "generally accepted international regulations,

procedures, and practices," and must take any steps necessary to secure their observance (94(5)). Note that the IMO treaty practice of excluding small ships from registration is recognized in Article 94(2)(a).

Under Article 94(7), the flag state must inquire 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 of nationals of another state, or serious damage to the ships or installations of another state, or serious damage to the ships or installations of another state is also required to cooperate in any inquiry held by the state whose nationals, ships, installations, or marine environment have suffered serious damage as a result of the casualty or incident.

Under Article 98, the flag state is under an obligation to require the master of a ship flying its flag, as far as possible without endangering the ship, crew, or passengers, to render assistance to any person found at sea and in danger of being lost, and to proceed with all possible speed to the rescue of persons in distress, if informed of their need for assistance, provided that such action may reasonably be expected of the master. The state must also require the master, in case of a collision involving his ship, to render assistance to the other ship, its crew, and passengers (Article 98(1)(c)).

Many provisions of the Convention impose on the flag state, expressly or by implication, the obligation to ensure the compliance by ships flying its flag of requirements imposed for the purpose of promoting maritime safety. These requirements are found in Articles 21, 23, 39, 41, 42, 45, 53, 54, 60, 80, and 147. These Articles deal with innocent passage in the territorial sea, transit passage through straits used for international navigation, and archipelagic sealane passage in archipelagic waters, as well as in the vicinity of artificial islands, installations, structures, and the safety zones properly established around them.

These provisions do not impose an express obligation on the flag state, regarding the duties specified for the ship. Nevertheless, if any of the requirements may be considered as part of the "generally accepted international regulations, procedures and practices" concerning "the safety of life at sea, and the prevention of collisions," it may be assumed that the flag state is obliged under Article 94(5), to take any necessary steps to ensure their observance. Article 94 also obligates the flag state to take measures regarding ships flying the flag to ensure that the master, officers, and to the extent appropriate, crew are fully conversant with and required to observe the applicable international regulations concerning the prevention, reduction, and control of marine pollution (Article 94(4)(c)). The flag state is also obliged in respect of the prevention and control of marine pollution from vessels flying its flag to comply with "generally accepted international rules and standards" established through IMO or a diplomatic conference.

These provisions, and those of Articles 216, 219, and 220, affect enforcement of the laws and regulations of the coastal state that implement the applicable international rules and standards.

A number of provisions of the Convention stipulate for the flag state a right with regard to other states in respect of measures taken by such states against the ships of the flag state. The flag state of a ship affected by the laws, dangers, or special requirements in the coastal state's waters, appears to be entitled to demand of the coastal state that it comply with the requirements of the Convention and that it publicize the coastal state's domestic law in this regard. Where a coastal state takes action or measures that contravene its obligations

or violate the rights of a foreign ship, the state of the flag or registry of that foreign ship can invoke procedures for the settlement of disputes, as provided in the Convention. Certain specific rights of the flag state are also stipulated in Articles 218, 223, 226, 228, and 231.

Implications of the 1982 Convention for IMO Treaties

The 1982 Convention does not claim, and is clearly not intended, to replace or abrogate other regimes of international law, customary or arising from treaties, that currently apply in respect of particular areas of maritime activity. This conclusion appears to be supported by the affirmation, in the ninth paragraph of the Preamble to the Convention, that "matters not regulated in this Convention continue to be governed by the rules and principles of general international law," when read in conjunction with the provision in Article 311(2), which states that the 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."

Although the Convention establishes precise rules, regulations, and procedures in some cases, many provisions are general in content and are expected or will need to be supplemented or further amplified by special or more specific agreements or other appropriate international rules or regulations. Indeed, some articles of the Convention, such as those relating to the safety of navigation, presuppose the existence of generally accepted international regulations, procedures and practices for safety at sea which states must implement. The provisions of the Convention for the protection and preservation of the marine environment expressly enjoin states to establish the "international rules and standards" to be applied for the purposes set out in the 1982 Convention.

Accordingly, it is generally recognized that the adoption of the Convention will not necessarily affect the continuing viability and applicability of the international regulatory regimes developed by IMO in treaties and nontreaty instruments. Nor does the Convention question the mandate and suitability of IMO continuing to develop international regimes, or reviewing and revising existing rules and regulations where necessary. The Convention amply confirms the international application of the IMO regimes in the fields of its competence. Many of the standards and regulations in these IMO regimes are declared by the Convention to constitute part of the rules and regulations which states must undertake to implement the provisions of the Convention. Again, the Convention recognizes IMO as an appropriate organization or *the* competent organization through which the international regulations and rules needed for the implementation of the Convention's provisions are to be established. A number of articles of the 1982 Convention assign or propose to IMO functions that are necessary or desirable for the effective implementation of particular provisions.

Although Article 311 of the Convention safeguards the legal validity of treaties adopted or administered by IMO, the continuing validity of the treaties is reserved only to the extent that they are compatible with the Convention and do not affect rights or obligations under the Convention. Article 237(2), which provides that specific obligations under environmental conventions should be carried out in a manner consistent with the general principles and objectives of the 1982 Convention, was mentioned earlier in this paper and is relevant also to the immediately preceding remarks.

The implications of the 1982 Convention for IMO require assessment of three principal questions:

(a) whether or to what extent the provisions of the 1982 Convention make it necessary or desirable for IMO to revise or amend any treaty or other instrument adopted under its auspices;
(b) whether the provisions of the Convention make it necessary or useful for IMO to develop new international regulations on any matters within its components; and
(c) whether IMO must develop or establish new procedures or revised machinery to undertake responsibilities assigned to it by the Convention or assumed by the Organization as a result of the Convention's provisions.

With regard to the first of these, it is essential that IMO treaties dealing with matters covered by the Law of the Sea Convention be examined to identify any inconsistencies or gaps and ambiguities resulting from comparison of the relevant provisions. In conformity with the spirit of Article 311, the appropriate bodies of IMO would determine the action necessary and feasible -- whether in the form of amendments or revision or treaty provision -- to remove any conflict, inconsistency, ambiguity, or lacuna.

In particular, IMO treaty instruments should be considered in respect of Article 3 (Breadth of the Territorial Sea) and Articles 56 and 60 (The Exclusive Economic Zone). Many of the international regulations, rules, and standards of IMO were considered and adopted either before the endorsement of the concept of the exclusive economic zone, or at a time when the nature and extent of that regime was unclear.

With the establishment of the exclusive economic zone and the clarification of its status and nature, as opposed to the territorial sea and the high seas, it may be necessary and appropriate for IMO to consider the extent to which the provisions in the various IMO regimes, intended for application in the territorial sea, the high seas, or "areas within the jurisdiction of States," may not be adequate for the purposes of the exclusive economic zone.

The most significant aspects of the jurisdiction of the coastal state in the exclusive economic zone, for the purposes of IMO treaties, relate to:

(a) the protection and preservation of the marine environment, and
(b) the establishment and use of artificial islands, installations, and structures.

Regarding (a), recall that the 1973 IMO Conference, at which the MARPOL treaty system originated and which took account of the discussions then under way in UNCLOS III on the nature and extent of the EEZ, decided to include in Article 9(3) of the MARPOL Convention[15] the following:

> The term "jurisdiction" in the present Convention shall be construed in the light of international law in force at the time of application or interpretation of the present Convention.

Article 4(2) of the same Convention states:

> Any violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited

and sanctions shall be established therefor under the law of that Party.

These provisions raised the question whether the term "within the jurisdiction" sufficiently extends to states under MARPOL enforcement powers regarding incidents and violations within the exclusive economic zone. The very simple provision of MARPOL 73/78 may, in fact, create major problems for interpreting and applying that Convention in a manner consistent with the 1982 Convention, even considering MARPOL Article 9(3) which provides that "jurisdiction" shall be construed in the light of existing international law.

Similarly, Article VII(5) of the 1972 London Dumping Convention[16] provides:

> Nothing in this Convention shall affect the right of each Party to adopt other measures, in accordance with the principles of international law, to prevent dumping at sea.

Article XIII of the same Convention also provides that it shall not "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."

In view of the relevant articles of the 1982 Convention (56, 210, and 216), it would appear that a state party to the MARPOL system or the London Dumping Convention may apply the provisions of the respective Convention in respect to its exclusive economic zone to the extent that it has jurisdiction in that zone by virtue of the relevant provisions of the 1982 Convention. The question, however, deserves more detailed consideration by the bodies responsible for the respective treaties, with particular reference to Article XIII of the London Dumping Convention.

Other IMO Conventions presently provide that their application or implementation shall be on the high seas. In the case of the 1972 Convention on the International Regulations for Preventing Collisions at Sea,[17] the provision that "these Rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by sea-going vessels" (Rule 1(a)) would appear to permit the extension of the application of the Convention to the exclusive economic zone. This would, however, be for the parties to decide.

Article I(1) of the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties[18] states that:

> Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

Article I(1) of the 1973 Protocol[19] to the 1969 Convention contains the same wording.

In discussions about the adequacy of this provision in the context of the 1982 Convention, it has been suggested that the intention of the 1969 Convention was to assert and regulate the right of the coastal state to take measures in the area beyond its territorial sea, and that

this area in 1969 was generally agreed to constitute the high seas. Under the 1982 Convention, however, an area beyond the territorial sea of a state, up to the limits specified in the Convention, may be designated as the exclusive economic zone. Upon designation, that area will not be a part of the high seas, although other states may still exercise in the zone certain of the freedoms available on the high seas.

The reference to "fishing" as one of the "related interests" appears to be by way of example, but it has been suggested that the 1969 Convention and its 1973 Protocol may need revision to make it clear that the powers of the coastal state extend to measures taken in the exclusive economic zone, and also that the objectives of such measures include the protection of fishing interests of the coastal state taking the measures. Note also that Article 221 of the Convention recognizes the right of intervention to protect against "actual or threatened damage," whereas the 1969 Convention refers to measures to prevent "grave and imminent danger."

Amendments were adopted in 1984 regarding the 1969 International Convention on Civil Liability for Oil Pollution Damage[20] and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.[21] The original provisions on the scope of territorial application of the Conventions limited application "exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State," including preventive measures taken to prevent or minimize the damage (see, e.g., Article II of the Civil Liability Convention).

In 1984, the diplomatic Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea, agreed to amend provisions of the above-mentioned treaties to extend their application to cover incidents or damage occurring in the exclusive economic zone or similar zones established in accordance with international law. In the revised text of the Protocols relating to both Conventions, an additional provision stated that the treaty would apply if a contracting state had not established an exclusive economic zone:

> ... in an area beyond and adjacent to the territorial sea of that State in accordance with international law and extending not more than 200 nautical miles from the base lines from which the breadth of its territorial sea is measured.

Both 1984 treaties included within the scope of application preventive measures, wherever taken to prevent or minimize pollution damage. These amended provisions do not specifically refer to UNCLOS III, but discussions at the 1984 Conference leave no doubt that the principal reason for the adopted amendments was to enable the scope of application to cover damage in the exclusive economic zone of coastal states.

In connection with the powers of enforcement available to states, particularly regarding actions to prevent and control vessel pollution, provisions of the 1982 Convention may have implications for the interpretation and application of IMO regulatory regimes. Specifically, consideration may need to be given to whether, and if so to what extent, the rights of the coastal state under the 1982 Convention differ from those under the MARPOL 73/78 system, and whether revisions to that system would be necessary or desirable. These questions relate also to the matter referred to above, namely, "applicable" international rules and

standards in this context. The most significant point to be noted is that Article 4 of MARPOL 73/78[22] empowers and requires a state party to enforce provisions against its flag vessels and any other vessels that violate the treaty within the jurisdiction of that party. Article 5(4) further requires parties to apply the requirements necessary to ensure that the ships of nonparty states be given "no more favorable treatment" than the ships of party states. Article 220 of the 1982 Convention supports this scheme by empowering and requiring the coastal state to enforce its laws and regulations adopted in accordance with "applicable international rules and standards" and to institute proceedings regarding violations of laws and regulations in the territorial sea or exclusive economic zone of that coastal state (220(1)).

Beyond the exclusive economic zone and territorial sea, a state can investigate and institute proceedings against violations by a ship of international rules and standards established thorugh IMO or a general diplomatic conference (Article 218(1)). This power is exercised only against a ship voluntarily within the port of the enforcing state, and subject to the rights of the flag state or, if the violation occurred within the territorial sea or the exclusive economic zone of another state, the right of that other state. Consideration must be given, in particular, to the effect, if any, of the 1982 Convention on the scope of application of the "no more favorable treatment" provision mentioned above (Article 5(4) of MARPOL 73/78).[23] Similar provisions appear in other IMO treaties.

Implication of the 1982 Convention Regarding Functions and Responsibilities in Areas Already Dealt with by IMO or Expected to be Entrusted to It by the Convention

The new law of the sea has significant implications for IMO in the following areas of past and on-going activity:

(a) *The construction, operation and use of artificial islands, installations and structures by coastal states in their EEZ, and the removal of such installations and structures when they are abandoned or disused*

Aspects of Article 60 are significant to IMO regarding coastal state jurisdiction in the exclusive economic zone. The coastal state obtains the exclusive right to authorize, construct, and regulate islands, installations, and structures within the exclusive economic zone. The state must also remove abandoned or disused installations and structures to facilitate safe navigation, taking account of generally accepted international standards established by IMO. The removal requirement particularly affects the off-shore industry, but note that Article 60(3) imposes no specific and absolute obligation on the coastal state requiring only that abandoned or disused structures "shall be removed to ensure safety of navigation." IMO may be called upon to adopt or identify the standards that will govern removal, and make recommendations for determining the breadth of safety zones around installations or structures where the coastal state considers it necessary to exceed the distance specified (500 meters). Guidelines with regard to publicizing and issuing warnings about the presence of the islands, installations, structures, and their safety zones, appear to fall within the ambit of IMO, together with the necessary international standards regarding navigation in their vicinity.

(b) *The designation and prescription of sea lanes and traffic separation schemes*

The 1982 Convention recognizes sea lanes and traffic separation schemes as important means for regulating maritime traffic to ensure safety and prevent pollution. The Convention therefore confers on coastal states the power to designate sea lanes or prescribe traffic separation schemes in the territorial sea (Article 22), straits used for international navigation (Article 41), and in archipelagic waters (Article53). The power of the coastal state, however, is subject to restrictions that depend on decisions of IMO. Thus, for the territorial sea, recommendations of IMO must be taken into account (Article 22(3)(a)); for straits used for international navigation, the sea lanes designated and the traffic separation schemes prescribed must conform to generally accepted international regulations, adopted by IMO in agreement with the coastal state (Article 41(3) and (4)); and in archipelagic waters, the archipelagic state may designate sea lanes and traffic separation schemes that "conform to generally accepted international regulations" and are adopted by IMO with the agreement of the archipelagic state concerned (Article 53(1),(6), and (9)). These are important provisions for IMO which may find it necessary to examine its work and procedures to determine what new regulations or arrangements are needed to discharge the functions expected of the Organization. In particular, decisions or determinations will need to be considered in respect of:

(i) The recommendations that coastal states will consider in desig nating sea lanes or prescribing traffic separation schemes in their territorial seas;
(ii) The generally accepted international regulations to which sea lanes and traffic separation schemes within straits used for international navigation, and in archipelagic waters, must conform;
(iii) The procedure by which coastal states may refer to IMO proposals for sea lanes or traffic separation schemes in international straits or archipelagic waters, including procedures and arrangements to facilitate cooperation in formulating proposals in respect of the sea lanes or separation schemes in the waters of two or more states;
(iv) The extent to which the existing IMO procedure and regulations concerning ships' routing are appropriate and adequate with regard to the concept of "sea-lanes" as used in the 1982 Convention. In this connection, it should be noted that some doubts were expressed by the representatives of IMO, and by a number of delegations and observers to UNCLOS III about the appropriateness of the expression "sea lanes" in the context of the routing of ships for the purposes of navigational safety.

(c) *Establishment by coastal states of special requirements for pollution prevention as a condition for the entry of foreign vessels into their port, internal waters, or off-shore installations.*

Under Article 211(3) of the Convention, a coastal state may establish particular requirements for the prevention, reduction, and control of pollution of the marine environment as a condition of entry of foreign vessels into its ports, internal waters, or for a call at its off-shore terminals. A coastal state exercising this right is required

to publicize and communicate the special requirements to IMO. Cooperative arrangements and harmonized policy between states are also foreseen in the Convention. IMO may therefore find it necessary and useful to develop procedures for receiving and disseminating the information to states, other entities, and persons in need of the information.

(d) *Requirements regarding nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances.*

Article 23 requires foreign ships answering the above description that conduct innocent passage through the territorial sea (Articles 45 and 52), or transiting through straits used for international navigation where the regime of innocent passage applies, or in archipelagic waters, "to carry documents and observe special precautionary measures established for such ships by international agreements." It will be for consideration by IMO to what extent there are appropriate and adequate requirements in respect of such documentary and other precautionary measures and, if not, what role IMO can or should play in developing the necessary international agreements.

(e) *Procedures and requirements for bonding or other appropriate financial security in respect of vessels detained by a coastal or port state*

Article 220(7) provides that a coastal state that detains a vessel for violation of international regulations, or international laws enforcing those regulations, must allow the vessel to proceed if it has complied with the bonding or other appropriate financial requirements. The coastal state is bound by the procedures establishing the requirements in question. Article 220 also states that the appropriate procedures may be established through the competent international organization (IMO), or as otherwise agreed. IMO may therefore wish to consider whether the establishment of such procedures on bonding or financial security would be necessary or useful and, if so, what mechanism would be most suitable for establishing such procedures.

In this connection, note that Article 292 provides for a procedure under which an application may be made by or on behalf of the flag state of a vessel if it is alleged that the vessel is being detained in contravention of the requirement for prompt release, following the posting of a reasonable bond or other financial security. International procedures may affect the implementation of the dispute settlement arrangements in Part XV of the Convention.

(f) *Establishment by coastal states of special and additional mandatory measures for the prevention of pollution from vessels in respect of clearly defined areas of their exclusive economic zones.*

Under Article 211(6), a coastal state may, under the conditions stipulated, adopt special laws and regulations for the prevention, reduction, and control of marine pollution in its exclusive economic zone. Laws and regulations can, however, only be adopted by the coastal state after a determination by the competent international organization (IMO) that the conditions in the area concerned correspond to the requirements set out in the Convention. Furthermore, the laws and regulations adopted by the coastal state in this regard may only implement the international

rules and standards or navigational practices that are made applicable, through IMO, to special areas. A similar procedure applies if the state wishes to adopt "additional laws and regulations" on discharges and navigational practices; but the laws cannot require foreign vessels to observe design, construction, manning, or equipment standards other than generally accepted international rules and standards.

IMO may need to consider and possibly adopt procedures for consulting with coastal states in this context and reaching the necessary agreement with the coastal states concerning their proposals. It may also be necessary for IMO to establish the "international rules and standards for navigational practices" that may apply to the relevant areas of the exclusive economic zone.

The Role of IMO Under the 1982 Convention with Regard to Procedural Aspects of Enforcement and Matters of Notification and Publicity

Article 223 concerns the institution of proceedings against a foreign vessel thought to be in violation of laws and regulations on marine pollution. The Article requires the state that institutes such proceedings to facilitate the hearing of witnesses, the admission of evidence submitted *inter alia* by IMO, and the attendance of "official representatives" of IMO (who shall have rights and duties provided for under national or international law). IMO may have the duty to consider the arrangements under which the Organization might have to intervene in the proceedings and the procedure for designating "official representatives."

Articles 1 and 2 of Annex VIII of the Convention (on Special Arbitration) state that disputes concerning the interpretation or application of the articles relating to "navigation, including pollution from vessels and by dumping" may be submitted to a special arbitral procedure. The procedure involves consideration of disputes by a special arbitral tribunal selected from a "list of experts ... drawn up and maintained subsidiary body concerned to which [IMO] has delegated this function." IMO will need to consider how to establish and maintain a list of experts, and which subsidiary body of IMO would perform the IMO functions. IMO will also wish to establish procedures for liaison between the Organization and the parties to the 1982 Convention that can nominate or withdraw experts. Liaison with the Secretary General of the United Nations regarding the constitution of the special arbitration tribunal must also be pursued.

In enforcement, particularly against foreign vessels, states acquire responsibilities under Articles 225 and 226. The first is substantive, in requiring that powers of enforcement shall not endanger the safety of navigation or otherwise create hazards for a vessel, or bring it to an unsafe port of anchorage, or expose the marine environment to any unreasonable risk.

Article 226 entails procedural responsibility. States shall not delay a foreign vessel longer than is essential for the investigations provided for in the Convention. The Article establishes conditions and limits of physical inspection of any vessel, including its absolute or conditional release. States undertake to cooperate in developing procedures to avoid unnecessary physical inspection of vessels at sea. This paragraph relates to Regulation 6 of Chapter I of MARPOL 73/78[24] which imposes conditions on arrangments for unscheduled inspections carried out on ships for the enforcement of the MARPOL regulations. IMO must examine the MARPOL provisions and decide whether they provide an appro-

priate or suitable basis for the elaboration of further international procedures.

A number of the provisions of the 1982 Convention regarding notification, including warning signals, and other measures of publicity, presume some IMO involvement. Article 261, for example, provides that the deployment and use of any type of scientific research installations or equipment "shall not constitute an obstacle to established international shipping routes." Article 262 states that such installations or equipment shall bear identification markings and "shall have adequate internationally agreed warning signals to ensure safety at sea and the safety of air navigation, taking into account rules and standards established by competent international organizations."

IMO may need to develop rules and standards in consultation with the other organizations concerned, including the International Civil Aviation Organization (ICAO), the International Telecommunication Union (ITU), the International Maritime Satellite Organization (INMARSAT), and, with regard to Article 261, the Intergovernmental Oceanographic Commission (IOC) of UNESCO.

With regard to numerous articles requiring states and other entities to publicize legislative or other measures taken to prevent infringement of the laws and regulations involved and to avoid dangerous situations and incidents, it is essential that the publicity reach those likely to be affected. In some cases, the states or entitities required to make the information available must also notify IMO. Even where no reference is made to another body or bodies, some IMO involvement may prove helpful or necessary. The articles that require or envisage publicity in matters of interest to IMO include Articles 21, 22, 24, 41, 52, 60, 211, and 217. Because IMO had direct contact with the authorities of states concerned with the safety of navigation and the prevention of vessel-source pollution, the purpose of the required "publicity" may be served by some IMO involvement. IMO may, therefore, wish to consider procedures and arrangements to assist the states concerned.

Such involvement may extend to situations in which IMO is not the organization specified in the 1982 Convention as the recipient of the information; note several articles of the Convention stipulate that information should be deposited with the Secretary General of the United Nations, the designated depositary of the 1982 Convention. Although the Secretary General will likely make the information available to the states concerned, even those states may still need IMO involvement to further disseminate the information. Article 16(2), for example, requires states to give due publicity to charts showing baselines for measuring the breadth of the territorial sea, or lists of geographical coordinates.

Article 147 also requires notice for the erection, emplacement, and removal of installations in the "Area," i.e., the "sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" (Article 1(1)(1)). Undoubtedly the information required to be publicized is relevant to flag states, shipowners, operators, and other persons involved in shipping. They will need this information to discharge responsibilities in the Area and to take safety measures to prevent accidents that could result in pollution. It may, therefore, be maintained that IMO has a legitimate interest in the effective dissemination of information to all states, entities, and individuals concerned. An arrangement to channel information to the relevant authorities, institutions, or persons directly affected could be worked out in consultation with the Secretary General of the United Nations.

Other Provisions of the 1982 Convention that May Involve the Initiation of New IMO Programs, Procedures, or the Modification of Existing IMO Activities

A fundamental aim of IMO and its Technical Co-opeation Program is to provide training in maritime matters to the nationals of developing countries. Articles 202 and 268 of the 1982 Convention stipulate as an objective of international cooperation "the development of human resources through training and education of nationals of developing States and countries..." (Article 268(9)). The Organization may turn to the relevant articles of the 1982 Convention to promote the transfer of technology and provide assistance to developing countries in the maritime field.

Articles 192 and 201 envisage the promotion of global and regional cooperation for the protection and preservation of the marine environment. IMO already cooperates with the UN Environmental Program (UNEP) and other organizaitons in the establishment of regional arrangements to combat marine pollution. IMO also participates in the work of the government experts operating under the auspices of GESAMP, which is related to Articles 204 and 206 of the 1982 Convention dealing with "Monitoring and Environmental Assessment."

Articles 275-77 on the development of national and regional maritime scientific and technological centers, parallel the aims and purposes of IMO in this field. The experience and facilities of the World Maritime University are directly relevant to the objectives of these articles.

Article 278 calls upon organizations to take all appropriate measures to ensure, either directly or in cooperation, the effective discharge of their functions and responsibilities. This will probably lead, in particular, to new measures for coordinated liaison with the Secretary General of the United Nations, the International Sea-Bed Authority and the International Tribunal for the Law of the Sea when they are established. In additon, liaison with the established bodies of the United Nations system may be enhanced. At its thirteenth regular session, the Assembly of IMO envisaged possible "assistance by IMO to member states and other agencies in respect of the provisions of the Convention on the Law of the Sea dealing with matters within the competence of IMO"; "suitable and necessary collaboration with the Secretary General of the United Nations on the provision of information, advice, and assistance to developing countries on the law of the sea matters within the competence of IMO, as well as the provision of advice and assistance which might be required by the Preparatory Commission for the International Sea-Bed Authority on matters falling within the competence of IMO."

Conclusions

Many areas of competence are ascribed to IMO by the 1982 Convention. IMO member states will be compelled to consider when and how to respond to this extensive acknowledgement of IMO's competence. Such a task will engage the energies and foresight of IMO as a specialized agency for many years to come, assuming the entry into force of the 1982 Convention. How much these added responsibilities and expectations will affect the present machinery of consensus in the Organization will remain to be seen.

IMO has 127 member states. It is the smallest agency of the United Nations system in terms of budget and available Secretariat resources, but its membership is global and extends comprehensively to all states

interested in maritime matters involving vessels. Its cornerstone and leitmotiv is the creation of uniform standards. This involves a highly developed, technical, consensual process, and a high degree of restraint on premature or excessive exercises of regulatory power through international legislation.

The 1982 Convention calls upon IMO to proceed beyond the benign anarchy of the unfettered and libertarian world of shipping so cherished in the past by mariners, shipowners, and the major maritime states. We are hopeful that the effective machinery of IMO and its member states will meet the many requirements of regulated ocean uses laid down in the Convention. With the appropriate resources, and with the necessary collaboration of all states in the UN system, IMO should be able to continue to ensure the development of sound ocean management free from the costly and impractical extension of differing measures of municipal jurisdiction by states. With goodwill and optimism we may still see large spheres of ocean activity regulated carefully in a specialized multinational forum of the United Nations family.

Footnotes

1. C.P. Srivastava, *IMO and the Law of the Sea* in E.D. Brown and R. Churchill (eds.), *The UN Convention on the Law of the Sea: Impact and Implementation*, 19 L. Sea Inst. Proc. 419 (1987).
2. *Id.* at 420-21.
3. *See* 273-79 *infra.*
4. Sohn, *Implication of the Law of the Sea Convention Regarding the Protection and Preservation of the Marine Environment* in R. Krueger and S. Riesenfeld, *The Developing Order of the Oceans*, 18 L. Sea Inst. Proc. 103 (1985).
5. Port states deserve separate consideration because the 1982 Convention attributes new and more precise rules to port state jurisdiction and enforcement than those that existed before.
6. Convention on the International Regulations for Preventing Collisions at Sea, *done* at London, Oct. 20, 1972, *entered into force* July 15, 1977, 28 U.S.T. 3459, T.I.A.S. No. 8587, *reprinted in* 1 Singh, *International Maritime Law Conventions* 3 (1983).
7. Convention on the Territorial Sea and Contiguous Zone, *done* at Geneva, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.
8. Convention on the Prevention of Marine Pollution By Dumping of Wastes and Other Matters (London Dumping Convention), *done* at London, Mexico City, Moscow, and Washington, Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165, IMO Doc. LDC/9/INF.2 (May 28, 1985) (comprehensive account of history and provisions), 3 Singh, *supra* note 6, at 2522. The parties to this Convention are bound by regulations promulgated by the International Atomic Energy Agency, which require an environmental assessment.
9. *See* note 6, *supra.*
10. *Id.*
11. International Convention on the High Seas in Cases of Oil Pollution Casualties, *done* at Brussels, Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. No. 8068, *entered into force* for the United States May 6,

1975, *reprinted in* 9 I.L.M. 25 (1970) and 4 Singh, *supra* note 6, at 3166.

12. 1973 Protocol (other substances).
13. Convention for the Prevention of Pollution from Ships *done* at London Nov. 2, 1973, T.I.A.S. No. 10561, 12 I.L.M. 1319 (1973), has been implemented and modified through the 1978 Protocol (MARPOL 73/78), 17 I.L.M. 546 (1978), 3 Singh, *supra* note 6, at 2272, 2414.

    MARPOL *entered into force* Oct. 2, 1983, U.S. Dep't of State, *Treaties in Force* (1983). As of 1985 MARPOL covered more than 80 percent of the world's merchant tonnage and was in force with 38 states parties. Amendments adopted in 1984 entered into force on Jan. 7, 1986. UN Doc. A/40/923, Nov. 27, 1985.

    The 1973 Marine Pollution Convention also includes two Protocols -- one containing provisions concerning reports on incidents involving harmful substances and prevention of polluting by (1) oil, (2) noxious liquid substances in bulk, (3) harmful substances carried by sea in packaged forms or in freight containers, portable tanks, or road and rail tank wagons, (4) sewage from ships, and (5) garbage from ships.
14. *See* 3 Singh, *supra* note 6, at 2287 *et. seq.*
15. *See* note 13, *supra.*
16. *See* London Dumping Convention, *supra* note 8.
17. *See* 1 Singh, *supra* note 6, at 14.
18. *See* 2 Cay, Churchill, and Nordquist, *New Directions in the Law the Sea* 592 (1973).
19. *See* note 12, *supra.* Although the 1969 Conference limited the scope of both Conventions to oil, the need for recognition of other pollutants was considered important. The IMO responded by developing the Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil adopted by an international conference convened in London in October - November 1973. This Protocol extends the application of the provisions of the 1969 Convention to substances other than oil. *Done* in London, Nov. 2, 1973. *See* 3 Singh, *supra* note 6, at 2482, 2483.
20. International Convention on Civil Liability for Oil Pollution Damage, *done* at Brussels Dec. 8, 1971, *reprinted in* 9 I.L.M. 45 (1970) and 3 Singh, *supra* note 6, at 2468.
21. International Convention on Establishment of an International Fund for Compensation for Oil Pollution Damage, *done* at Brussels Dec. 8, 1971, *reprinted in* 11 I.L.M. 284 (1972). *See* 2 Cay, Churchill, and Nordquist, *supra* note 18, at 611.
22. *See* note 13, *supra.*
23. *Id.*
24. *See* 3 Singh, *supra* note 6, at 2294.

DISCUSSION

Shigeru Oda: The archipelagic concept is a very specific one that applies only to a handful of nations such as the Philippines and Indonesia. The legal status of archipelagic waters is dissimilar to internal waters but similar to territorial seas, where the right of innocent passage is fully recognized. Even so, some big naval powers could not accept this concept, and thus the concept of archipelagic sea lane passage was introduced to secure a much freer navigation of warships and military aircraft than the innocent passage. Are the Philippines and Indonesia the only two archipelagic countries which are important to the naval maneuvers of the big powers?

Lewis Alexander: The Bahamas will qualify under the 1982 Convention as an archipelagic state, but they have not yet formally declared that status.

Oda: The archipelagic sea lanes may be designated by the archipelatic state, but with the approval of a competent international organization such as the IMO. However, any disagreement between the IMO and the archipelagic states, can be referred to Article 53(12) of the 1982 Convention. If an archipelagic sea lane is not designated by the archipelagic state, then vessels (including naval vessels) can exercise the right of passage through the routes normally used for international navigation.

Camillus Narokobi: Papua New Guinea's biggest contribution to the archipelagic concept was that islands or parts of islands could form an archipelago (see Article 46(b)). We sought this language because part of our main island of New Guinea is under the jurisdiction of Indonesia. The concept of the archipelagic regime was agreed to at a very early stage in the negotiations and subsequent efforts were designed to ensure that no changes were made in the early drafts. Our delegation became a member of the group led by the Philippines and Indonesia when we became an independent nation, and now Mauritius, the Bahamas, and the Solomon Islands also qualify by the criteria listed in the Convention. The ratio of the land mass to the water body in our case is close to a 1:1 ratio, so we would fit into the criteria that has been set out in Article 47(1).

Can Archipelagic Waters Be Internal Waters or Territorial Waters?

The archipelagic waters cannot be treated as part of the internal waters of the archipelagic state, nor as part of the territorial waters. They have a special regime created by the Law of the Sea Convention and therefore have a different status, although some of the characteristics and forms are very similar to those of both the internal waters and the territorial seas. In 1976, Papua New Guinea declared an archipelagic regime, but we have not yet designated the archipelagic sea lanes.

Under Article 53(12), if a state has not designated those sea lanes, normal international traffic channels would continue to be used. In this case, our most used traffic channel would be the Bougainville Strait. Much of the traffic between Australia and Japan going through our waters passes through Bougainville Strait. Traffic separation schemes are a very important part of an archipelagic regime. In fact, under Article 53(6) traffic separations schemes could be established through the archipelagic waters. Indeed, it is quite possible that separation schemes could be created to separate different categories of traffic such as warships or oil carriers. The substitution of channels for sea lane passage is a right given to the archipelagic states.

Although transit passage, which applies in the archipelagic waters, is not to be suspended, application of innocent passage through the archipelagic waters can be suspended. If there are straits through the archipelagic waters, I would imagine under the Convention the right of transit passage would exist and cannot be suspended, unless passage through certain straits are later deemed not as important as others. Apart from the value of the 200-mile exclusive economic zone, the acceptance by the international community of archipelagic regime in the 1982 Law of the Sea Convention is a great gain for us.

Archipelagic State Control Over Designation of Sea Lanes

Jon Van Dyke: Camillus, you represent a country that has archipelagic waters and I noticed in your paper on archipelagic waters that you raised the possibility that certain of your lanes might not be ones appropriate for international passage and that you would like to keep open the possibility of having some of them more tightly controlled by your nation than others (see page 230 above).

Narokobi: Professor Burke has discouraged me from pursing this argument when I was studying at the University of Washington Law School, but in our discussions here I think you can see the logic of that position when you are discussing establishment of archipelagic sea lane passage. In theory you can have only two archipelagic sea lane passages, one the entry passage and the other the exit passage. And when you have more than one international strait within the archipelagic waters, as in the case of Papua New Guinea, then why would a vessel be allowed to navigate far beyond that entry channel or exit channel to pass through an international strait far away from the channel? Because the waters are within the archipelagic waters, and because there are only two channels of entry and exit, and because those straits are not normal routes for international navigation and commerce, it is logical to argue that they should not be open for navigation as a strait just because it is an international strait. So I think it is quite appropriate to pursue this approach.

Another related comment is that because the Convention allows for the establishment of alternate routes of navigation through exclusive economic zones or high seas adjacent to the strait, then it is arguable that straits within archipelagic waters could be closed off because alternative outside routes can be established by archipelagic states in order for normal navigation to take place. On this very point I think we are giving IMO quite a lot of responsibility. As you know, Article 53(9) refers to the "competent international organization" without specifically mentioning IMO. If a state is not a party to IMO, would

it submit its charts and its proposals to IMO? This is a possible problem that may emerge.

An additional problem which I think is quite relevant is: if IMO refuses to adopt a coastal state's or archipelagic state's proposals, would the coastal states then go higher to submit the matter as a dispute under the dispute settlement mechanism in the Law of the Sea Convention? And would the results therein be binding on nonparties to the Law of the Sea Convention such as United States?

Thomas Busha: Regarding proposals submitted by nonmembers of IMO, while I agree perfectly with what Tom Clingan, Edgar Gold, and Nugroho Wisnumurti have said on this matter, this would be entirely a consultative matter, if past practices are to be our guide. We are dealing with a provision, Article 53(9), which has never been and will not be implemented by IMO until such time as the Convention comes into force.

We might have the prospective application of Article 53(9) with or without the formal involvement of IMO, depending on whether a government such as Indonesia came to the organization for assistance. We might secondly have the present application of the 1973 COLREG Convention,[1] on which IMO has focused its attention, that is to say, on traffic separation schemes and routing systems. That, I might say, could be regarded by the purists as involving only the parties to the COLREGS, but of course, the COLREG parties called upon the IMO to fulfill the consultative process. A third possibility would be a request to IMO to take a position outside any treaty regime on this matter concerning sea lanes.

In my view, anybody's interpretation of Article 53(9) is as good as anybody else's until it has been applied. IMO has not yet dealt with sea lanes. Indeed some of my colleagues have even gone so far as to suggest that the term "sea lanes" is at variance both with IMO and with mariners' terminology. Our function has been the consultative one, followed by the specific notification to seafarers, the general guidelines on these matters, and then the description of the routing procedures that would be adopted. We have involved ourselves in the question of the Malacca Straits, but when it comes to the practical application, the thought that the process would be any different from the traffic separation schemes seems to me to be unrealistic.

It seems to me that this would not be a matter of veto, either on one side or the other. But I put my emphasis on the words from Article 53(9): "the organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic state." This language makes it quite plain that these decisions would be a matter that would be worked out in the time-honored procedures of IMO and not by some exercise of fiat by the organization or indeed something that was similarly exercised by the states that wished to assert a particular sea lane. IMO would ultimately give its views, the views being those of navigational experts concerned primarily with safety of navigation. That would be how I would foresee it. I hope that this approach would be confirmed by Professor Gold.

Costs to the Littoral State Associated with Regulatory Measures

Edgar Gold: I was very interested in the illustration of the responsibilities of coastal states vis-a-vis international shipping in Dr. Kantaatmadja's paper. Coastal states have often been painted as being avaricious ocean-grabbers, but many coastal states have now seen

that the advantages of their new extensions also have a cost factor attached. For example, Indonesia has relatively little economic advantage from having the misfortune of being geographically situated next to one of the most important international straits in the world. Yet Indonesia, at the same time, has real responsibilities. The Malacca Straits Council and the IMO relationship involves costs for the Indonesian government and for other coastal states. Lighting, navigational aids, hydrography, and the environmental impact assessment which Indonesia has been involved in since the *Showa Maru* case, are very real cost factors. For some states, particularly the least developed of the developing countries, these factors will have real economic impacts which the Law of the Sea Convention is not even designed to take account of.

There is already evidence in other oceans of hydrographic information, navigational aids, radio aids etc. being neglected because the traditional states are not doing as much as they used to, and these responsibilities are falling increasingly on the shoulders of coastal states.

Tentative Designation of Indonesia's Sea Lanes

Van Dyke: The archipelagic sea lanes proposals that have been tentatively put forward in informal discussions in Indonesia (see Map 9 on page 195 above) list some lanes that would exclude certain types of vessels. Certain lanes would exclude fishing vessels and other lanes would exclude military vessels. What might IMO's response be when the consultation process begins between IMO and Indonesia on those sea lanes?

Komar Kantaatmadja: We are speculating on what will happen in the future. It is not clear that this map represents the proposed designated sea lanes by Indonesia.

Nugroho Wisnumurti: Firstly, I just want to confirm what has been said by Dr. Komar about the status of the sea lanes described in Map 9: They are not really an official position. Nongovernmental agencies and interagencies have done several studies which have done several studies which have considered all the possibilities for designation of sea lanes in Indonesia.

Joseph Morgan: The map of the sea lanes which we have been talking about appeared in J. Morgan and M. Valencia (eds.), *Atlas for Marine Policy in Southeast Asian Seas* (1983). The information for the map came from Indonesian officials, speaking in unofficial capacities, at a conference in Jakarta in 1981. We received the information from Indonesians, and we reviewed with Indonesia and the Philippines the contents of that atlas before we published it. These sea lanes may not be absolutely what Indonesia will propose, but as of the publication date of the *Atlas* that was the understanding, and some of the Indonesians at this meeting were confirmed that this approach may still be the government's intention.

If you examine those proposed sea lanes the probable cause of complaint might be from, say, the United States Navy, because its military vessels would be excluded from passing through the Sunda Strait, which is reserved for all ships with the exception of military vessels. The other straits, particularly in the eastern archipelago, Lombok and Ombai Wetar, are more important sea lanes because they are deep enough for all

types of vessels, and they do not exclude military transits. It is hard to say whether the United States would object to the Indonesian designation from a practical standpoint. From a theoretical, conceptual standpoint I do not really know how the Law of the Sea Convention would be interpreted. When IMO approves sea lanes, do they have to be for anybody and everybody or can they have this unique concept that Indonesia has come up with? Some for fishing vessels, some for merchant vessels, some for everybody?

Hypothetical Dispute Between Archipelagic State and IMO

Oda: Suppose a state asks the archipelagic state for two or three archipelagic sea lanes but the latter is not ready to designate more than one sea lane. The former state can then appeal to the IMO, which may hold that there must be three sea lanes instead of one. In this particular case, should Article 53(12) apply or not?

Kantaatmadja: I think, Judge Oda, the country proposes the archipelagic sea lanes to IMO, and if this proposal is not accepted by IMO, then the existing sea lanes used by general navigation will prevail until we propose another plan.

Busha: When it comes to an institutionalized means of approval, as far as I know, general provisions on ships' routing and guidelines for vessel traffic services do not require approval by the IMO in the sense of giving any overall treaty imprimatur to the decisions. It is primarily a matter of consultation, as Judge Oda stated in his opening words. Even in the area of traffic separation systems and schemes, governments develop their own approach and then come to IMO. The navigation subcommittee then considers the plans and can approve them, but the government may change plans, as they frequently do.

At some point the government of the Sultanate of Oman considered that the large tankers were coming close to its shore in the Strait of Hormuz and asked that the traffic separation scheme for the ships' routing be moved. That was done by simply making the request. IMO does not exercise any firmness in granting its approval in this matter. It is primarily for the state to propose a workable plan, and in terms of traffic separation schemes, they became obligatory under Regulation 10 of the Collision Regulations of the 1973 Convention.[2]

Wisnumurti: It is impossible for us to exhaust this discussion because it is important for everybody here to understand what the Convention means. Let us start off with the *de facto* situation. In the *de facto* situation there is no sea lane designated so ships navigate through the lanes customarily used for international navigation.

In December 1985 Indonesia ratified the Convention. This action means we are bound by the obligations under the Convention, including the designation of sea lanes. Now the question is: Is it in the interest of the archipelagic state to designate sea lanes. Does Indonesia, with its vast area of archipelagic waters, want to confine this free, liberal regime to the sea lanes? Under Article 53(g), Indonesia has the right of and veto so does IMO. It is a mutual veto. So we have to reach a mutual agreement concerning the number of sea lanes and the area where sea lanes will be established. That decision involves the interested parties, especially the maritime powers. So, we must negotiate with interested maritime powers to reach some understanding or agreement

about the number of sea lanes and the area where sea lanes will be established.

Now comes the question of nonparties. Let us assume the United States is one of the most interested parties in this respect, but it has decided to stay outside the treaty. So let us say Indonesia negotiates with those maritime powers which are parties -- for instance, the Soviet Union. Can the Soviet Union represent the interests of the United States? The United States delegation in the IMO subcommission or in the plenary will object to any sea lanes designated without regard to U.S. interests. IMO will exercise its veto and the *de facto* situation will remain. Without designated sea lanes, ships will continue to go through the sea routes customarily used for international navigation. That is why it is important that we find ways and means to overcome this difficult practical situation without jeopardizing our positions.

The treaty is one integrated whole. This is the position of the Group of 77.[3]

Consensus on the Role of the I.M.O. in Designating Archipelagic Sea Lanes

Van Dyke: We have talked extensively about the archipelagic sea lanes. I hesitate to use the word "consensus," but some feeling has been voiced that the archipelagic state ultimately will have the first and final word on where those sea lanes are to be drawn, and that the role of IMO is going to be quite limited under Article 53. This is what Mr. Busha suggested (see pages 262 and 264). Certain of the proposed Indonesian sea lanes will be limited to certain types of vessels; fishing vessels are not permitted in certain sea lanes, military vessels are not permitted in other lanes. What will be the position of the United States with regard to the proper role of IMO in responding to these Indonesian initiatives?

Scott Hajost: This is something that Peter Bernhardt and I have been discussing, because I believe the decision-making process has not been given serious consideration. Although I do not know the negotiating history of Article 53, in my mind a good reading and a good interpretation would be that the IMO indeed has the final say, and that if the IMO does not give the final say, then normal historical usage would control. I suggested to Peter that we go back to Washington and look at this subject some more. What will be the role of the IMO? What committee in the IMO will look at it? IMO usually uses a consensus decisionmaking process. Does it have to go to the Assembly? I think we will have to consider this in more detail.

Van Dyke: Tom, do you have any thoughts about what the negotiating history would tell us about the intent of Article 53(9)?

Thomas Clingan: I think the intent is that IMO should play a very significant role in determining the proper location of archipelagic sea lanes. With regard to straits, for example, Article 41(4) starts off with the word "before." It says,

> Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall 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, after which the States may designate, prescribe or substitute them.

Whether you call it a veto or not, the procedure is a consultative procedure. But it is clear that before the archipelagic state can designate those sea lanes, it must go through this IMO procedure. The implication is that there must be a satisfactory resolution between IMO and the participating states. Only after that process is completed can these sea lanes be established. So you can call it a veto or not. "Veto" is a very strong word. But it is a process that must be completed and it requires the assent of all the parties: of IMO, of the archipelagic states, and, presumably of those other affected states that would be involved in the negotiating process as well.

Van Dyke: Edgar, in your presentation you referred to Article 41 and the role of IMO with regard to the sea lanes and traffic separation schemes in straits and you suggested, if I heard you right, that IMO's role was limited merely to looking at them and nodding. Is your perception that IMO's role is the same with regard to the archipelagic sea lanes as it is with regard to the straits?

Gold: I do not want to quibble with Tom Clingan, but I think there is a difference. I think that the language, at least from my reading of it and from what I remember from the negotiations, means that IMO is to be used as a clearing house for the proposals put forward by states for any sea lanes which have to comply with the standard IMO has established. For example, if there were three traditional sea routes in a particular area and the state came forward and said, "We want a sea lane in just one of these locations," I think that the navigation section of IMO would say, "But there are traditionally three sea routes; why do you insist on only one?" There would then be some negotiating. If the state, whether it is a strait, archipelagic, or coastal state would then insist on only one sea lane, the only thing left for IMO to do is to use other diplomatic processes to dissuade that particular state. That has always been my understanding of the process.

Does the I.M.O. Have Veto Power?

Wisnumurti: I would like to interject at this point a remark on this very important aspect of the archipelagic sea lanes regime. I believe as Dr. Busha and Professor Gold have indicated, that the role of IMO remains consultative. But there is an interpretation that IMO does not have the power of a veto. If this interpretation is correct, then, of course, well and good for us. I think that is what we wanted to have all along, that we have the right to establish the sea lanes unilaterally.

But what I am afraid of is that a double veto is hidden in Article 53(4). Both the archipelagic state and IMO have veto rights. Article 53(9) starts by saying, "In designating or substituting sea lanes or prescribing or substituting traffic separation schemes, an archipelagic State shall refer proposals to the competent international organization with a view to their adoption." This is the veto right of IMO. But at the same time, the archipelagic state has also its own veto. That is the second sentence. "The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic

State...." So this is the veto right of the archipelagic state. So we have a mutual veto right, and when one of them exercises its veto right, it means Article 53(12) will apply. Of course we do not like it, but we have to live with it.

Limiting Sea Lanes According to Vessel Type

Van Dyke: The other part of Article 53, that is relevant to this discussion is Paragraph 2, which says that all ships and aircraft enjoy the right of archipelagic sea lane passage. The question that the proposed Indonesian lanes has raised is whether that can somehow be interpreted so that certain lanes are not open for certain types of ships.

Clingan: Now, with regard to the question about whether there could be archipelagic sea lanes limited to certain types of vessels, that question is related to this process. Article 53(2) says nations enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes. If you want to have one that is just a sea lane and not an air route and all parties agree to that, then I see no problem. But that would be part of the consultative process in working out just what kinds of sea lanes are appropriate, to whom they apply, and what activities they permit. The Convention, of course, legally requires that there be air passage as well as sea passage but if the parties that are affected by this were to agree otherwise, then I see no problem.

Van Dyke: Is the United States going to agree to a sea lane that military vessels cannot pass through?

Clingan: I have no idea. I have nothing to do with the United States. [Laughter].

Bernhard Abrahamsson: I confess to total confusion as to what IMO is supposed to do. Unless their function has changed drastically very recently, they never were a policy-formulating body. They were supposed to be a technical advisor and implementing body. And under those circumstances I do not understand what it means that IMO "adopts" the proposal for a sea lane. I would submit that if Indonesia wants to have a sea lane, it would submit it to IMO for the technical and feasibility assessment. And if IMO agrees that this is technical and it is feasible, they adopt it. It has nothing to do with permitting anything. It has only to do with the safety of life at sea. That is, if the sea lane promotes those objectives, we adopt it and that is it. But the way the discussion is going here, it seems to indicate that Indonesia would submit the proposal to IMO and IMO would sit there and contemplate and maybe permit it or not permit it. I do not understand that at all.

Van Dyke: Tom Clingan stated that there could be different sea lanes for different purposes if all parties agreed. Were you referring to parties of IMO or parties to the Law of the Sea Convention when you said that?

Clingan: Neither, really. In any given scenario, one can identify parties most directly affected by the decision to be taken. This is precisely what we did in the negotiation of these articles themselves. Consultations were taken among those states that were most directly

impacted upon by the construction of these articles and agreement was reached among those parties.

Van Dyke: We are talking about a consensus process?

Clingan: Yes.

Norton Ginsburg: I am still puzzled as is Bernard Abrahamsson about IMO and its relation to some of these questions. Let me pose a question Let us propose a situation with regard to archipelagic passage and the delineation of sea lanes where there are, within an archipelagic state, say, three traditionally employed passages. The archipelagic state discusses the matter with IMO, says, "We recommend identifying only one of those lanes as an archipelagic passage." The IMO experts are bound to say, "How come? Is it a matter of safety?"

Suppose the archipelagic state answers that it is not quite a matter of safety. It is rather that the nation only has the capacity to monitor the area covered by one sealane. IMO is not in a position, it seems to me, to dispute that assertion. What happens then? A sovereign state would under the Convention have the right to restrict itself to one such passage. Then the interested parties, that is, the maritime powers that use these passages would, in their self-interest, mobilize themselves through diplomatic channels to bring pressure on the archipelagic state to reconsider the matter and perhaps to explore possibilities for dealing with the concerns of the archipelagic state.[4]

Air Routes and Warships in Archipelagic Sea Lanes

Oda: I want to ask a few technical questions. Mr. Busha has explained that a process of consultation between the archipelagic state or strait coastal state and the IMO is necessary prior to the designation of sea lanes. In the case of archipelagic states, in addition to the sea lanes there are air routes to be designated. Unlike sea lanes, the designation of air routes, according to the 1982 Convention, can be made simply by the archipelagic states, without consulting any international organization. This can be carried out by the archipelagic states themselves. For what purpose is the air route designated? For commercial or civil nongovernmental aircraft, the ICAO Convention[5] covers air traffic, and so any designation of an air route would only be for military aircraft. I wonder whether U.S. or Soviet military aircraft will really comply with this designation of air routes.

My next question is as follows. There are divergent views on whether submarines passing through sea lanes can be submerged or not. That is a controversial question, but the majority believe that submerged navigation is allowed. In this case, what purpose does the designation of sea lanes serve, because submerged submarines can pass through anywhere in archipelagic waters without being detected? In international straits or archipelagic waters, the military aspect is of fundamental importance.

Kantaatmadja: Air routes based on ICAO are bilateral and are respected by civil aviation both before and after the archipelagic state ratifies the Convention. Air routes in relation to the archipelagic sea lanes are considered to be concomitant with archipelagic sea lanes. So, above the archipelagic sea lanes are the air routes for military purposes.

Wisnumurti: With regard to air routes, if I may add to the comme of Dr. Komar these routes are a secondary element. I think Tom Clingan can explain why nations insist on having air routes above the sea lane although it is in practical terms rather difficult to understand. Must these air routes be above the sea routes to provide possibilities for maneuvering while the naval forces of a particular fleet are passing through the sea lanes? This requirement appears to be dictated by the naval maneuver instead of the need of air navigation. So there is no need to consult with the ICAO for that matter.

Clingan: With regard to the air lanes over the sea lanes in the archipelagic chapter, Nugroho is entirely correct. During the UNCLOS I negotiations, we were at least as much or more concerned about the military aspects as any other. Under the standard operating procedures in naval fleets, not just ours, air cover is a very important part of the passage of a military force through any area of the water and that was the concern about the air lanes. Judge Oda is correct in pointing out that Article 53(9) talks about IMO approving the sea lanes but not approving the air lanes. That was done deliberately because the air routes are not within IMO's jurisdiction. The way air lanes are covered is in Article 53(1), where it says that an archipelagic state may desi nate the sea lanes and air routes above them. So once sea lanes are approved, the air lanes are tied in to those sea lanes through Article 53(1).

Peter Bernhardt: The confusion arises in Article 53 because Paragraph (1) describes the coastal state's right to designate sea routes and air lanes, but Paragraphs (2) and (3) talk of ships and aircraft enjoying the right of archipelagic sea lanes passage which in Paragraph (3) it is defined as including both. Unfortunately, Article 53(9) talks about designating sea lanes and sending them to IMO. But automatically therein, under the definition of sea lanes passage, leaving aside ICAO air routes, air routes are always included part and parcel in the sea routes. I was glad to hear what Professor Kantaatmadja and Mr. Wisnumu stated.

Oda: I have one final point to raise. Air routes that have normall been used for international navigation may be different from the sea lanes used for maritime navigation. They are not always identical.

Busha: Article 53(9) does not clearly offer IMO any opportunity tc exercise any veto. It is stated that the archipelagic state shall refer proposals to the competent international organization, IMO, with a view to their adoption. The only requirement or condition in what follows is "[t]he organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic State." In other words, the procedure is very much the same for the traffic separation schemes and the sea lanes. The IMO has not concerned itself with the concept of sea lanes particularly. This may be an example of the first part of Professor Sohn's tripartite system of treaty-making;[6] treaties that have not yet entered into force are perceived as authoritative guides. We are discussing the application of a treaty that is not yet in force. It will concentrate the minds of the delegates to IMO wonderfully to have the treaty enter into force and to have the concerns of Indonesia brought to it. To my knowledge they have not yet been seriously considered at IMO.

Footnotes

1. See S. Mankabady, *Collision at Sea: A Guide to the Legal Consequences* (1978).
2. *Id.*
3. See, e.g., Djalal, *The Effects of the Law of the Sea Convention o the Norms that Now Govern Ocean Activities*, in J. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* 50-56 (1985).
4. *See also* discussion at 392-93 *infra.*
5. Convention on International Civil Aviation, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295, *done* at Chicago, Dec. 7, 1944.
6. *See* Professor Sohn's discussion on 301-02 *infra.*

CHAPTER 6

ENVIRONMENTAL ISSUES

Introduction

"States have an obligation to protect and preserve the marine environment." These simple words introduce the Law of the Sea Convention's innovative Part XII on marine environmental protection, a far-reaching codification of customary international law covering pollution from many sources -- land based pollution, ocean dumping, pollution from sea-bed activities, and atmospheric pollution. This chapter includes papers on vessel-source pollution and port state jurisdiction and on the U.S. Marine Sanctuaries Program, as well as comments by participants on implementation of the Convention's provisions on the marine environment. Issues related both to the military and the environment, such as nuclear free zones, are considered in a separate chapter on military issues, Chapter 7.

Thomas Clingan Jr. sets the background for discussion of pollution issues in his paper on *Vessel Source Pollution, Problems of Hazardous Cargo, and Port State Jurisdiction*. Professor Clingan notes that although land-based pollution is the more prevalent source of marine contaminants, serious problems are caused by discharges from ships, in particular petroleum discharges. The Convention gives coastal states new powers to enforce pollution control regulations against vessels polluting their waters, a power once belonging to the flag state of the vessel. This paper discusses the need for uniformity in regulatory schemes and the potential for abuse in the form of artibrary or intrusive coastal state action. Professor Clingan explains that port state jurisdiction is not a new concept, but it is innovative to permit coastal states to institute investigations against vessels voluntarily within their port for violations of pollution control regulations occurring beyond the 200-mile limit of the EEZ. Finally the paper examines coastal state authority over vessels carrying hazardous cargo, including nuclear materials and other toxic or potentially harmful substances. The discussion following the paper touches on standards set by MARPOL, the competence of coastal states to prescribe standards in safety zones, and how archipelagic and straits pollution control regimes differ. In this discussion, it is pointed out that the shipping industry benefits by what some call "threats" to navigation.

Scott Hajost introduces the topic of the U.S. Marine Sanctuaries program with a general overview of international agreements -- in addition to the 1982 Convention -- that regulate the marine environment. He refers to international treaties regulating whaling, concerning prevention of pollution, and protecting the environment in Antarctica and the Torres Strait as "international imperatives" related to marine sanctuaries. Mr. Hajost describes the UN Environmental Program's Regional Seas Program as offering the "greatest promise" for international cooperation in protecting the marine environment, and explains

U.S. participation in the negotiations for the Regional Seas Program in the Caribbean and in the South Pacific.

The paper traces the history of the marine sanctuaries program since 1972 and examines the 1984 amendments extending marine sanctuaries' jurisdiction to the limit of the continental shelf. The paper provides two examples of the "interplay between the marine sanctuaries program and the freedom of navigation." In the Flower Garden Banks in the Gulf of Mexico, damage to coral reefs caused by ships waiting to enter U.S. ports raised the question of U.S. jurisdiction to prohibit foreign vessels from anchoring in that area. After the foreign vessel *Wellwood* entered the Key Largo National Marine Sanctuary in Florida, destroying much of the reef, questions were raised over the validity of applying penalties against foreign vessels under international law. After the paper, Mr. Hajost responded to participants' questions on a wide range of subjects related to alternative jurisdictional bases for pollution control and enforcement of environmental regulations.

The balancing of interests between coastal states and maritime states frequently emerges as a topic of concern when marine regulatory matters are discussed -- and a particular worry of maritime states is constraints on freedom of navigation these regulatory measures might impose. Rear Admiral Bruce Harlow expressed a general philosophy on the balancing of interests envisioned by negotiators at the Convention as well as the realistic concerns foreseen in the implementation phase. Drafting language in a treaty is only a small step down the road toward successful implementation of a regime, Admiral Harlow notes, adding that most of the work lies ahead of us. This comment is followed by a discussion among Admiral Harlow, Thomas Busha, and Louis Sohn on the process through which international law is formed after multilateral treaties are signed.

VESSEL-SOURCE POLLUTION, PROBLEMS OF HAZARDOUS CARGO, AND PORT STATE JURISDICTION

Thomas A. Clingan, Jr.
University of Miami School of Law
Miami, Florida

Environmental concerns were clearly in the minds of the negotiators at the Third United Nations Law of the Sea Conference. This fact explains the extensive provisions on the protection and preservation of the marine environment found in Part XII of the resulting Convention. Environmental concerns are also reflected in those portions of the treaty dealing with the conservation of natural resources, particularly within the exclusive economic zone (EEZ).[1]

I wish to focus on those provisions of Part XII, and related articles, that raise questions concerning the potential for coastal state interference with navigation through the application of rules regarding marine pollution and their enforcement. The balance between these provisions, along with their safeguards and dispute settlement procedures, with those relating to the conduct of navigation is well known. Without adequate protection for the marine environment, many coastal states would not have been able to accept the provisions on navigation, and without adequate safeguards and dispute settlement, many maritime states would not have been able to accept the pollution provisions. Although these two sets of provisions were negotiated in different committees, they were carefully coordinated.

Of the various sections in the part on pollution, my focus is on vessel-source pollution, the port state concept, and hazardous cargoes.[2] I must, of necessity, make reference to the dispute settlement provisions, since they were an essential part of the negotiated package. The key article in this scheme is Article 297.

Vessel-Source Pollution

Of the various sources of marine pollution, vessel-source contamination poses the least threat in terms of the quantity of pollutants finding their way into the oceans. Land-based pollution has been estimated to contribute 75 percent or more of the pollutants in the oceans.[3] Nonetheless, contributions from ships, particularly petroleum discharges, are significant, and moreover, highly visible. In 1975, it was estimated that some 1,000,000 tons of oil were dumped into the oceans each year in standard operations, while about 200,000 tons more were the result of marine casualties.[4] Although these figures have undoubtedly increased

since then, the total discharge represents only a small percentage of the total cargo carried each year, and yet this problem is significant enough to warrant international controls. It is, of course, these controls that pose a potential threat to the free conduct of international trade.

The Law of the Sea Convention addresses the problem of vessel-source pollution on two levels. On the first level, it recognizes that the two elements working toward a solution of the problem are standard setting and enforcement. On the second level, the treaty recognizes that different forms of standard setting and enforcement are required in different zones of the oceans, themselves established or recognized by the treaty. From the standpoint of potential interference with navigation, perhaps the most significant provisions are those dealing with pollution in the exclusive economic zone, and those dealing with contamination in restricted navigation areas such as international straits and archipelagic sea lanes.

With regard to the exclusive economic zone, it was recognized that since these zones incorporate about a third of the total ocean space, uniformity in setting of standards would be essential. Disparate coastal schemes for prevention of pollution from ships would be destructive to international trade. Thus the concern was not as much with the stringency of the rules which all considered beneficial, but with their uniform content and application.

Article 211 of the treaty deals with vessel source pollution. In addition to confirming the traditional rule relating to flag state regulation of vessels, and establishing the right of coastal states to adopt rules for the territorial sea (preserving the right of innocent passage), this article provides for coastal states' control over pollution in the EEZ by permitting them to adopt rules "conforming to and giving effect to generally accepted international rules and standards adopted through the competent international organization ..."[5] In addition to this general authority, coastal states have been provided with special powers in certain areas. First, the coastal state may develop special rules for identified areas that may be ecologically sensitive. Before doing so, however, it must submit supporting data to the International Maritime Organization (IMO) for its determination that the area is appropriate for such treatment (Article 211(6)(a)). The second special provision is found in the "safeguards" section of the chapter, and it deals with the right of coastal states to enact special provisions for ice-covered areas, having due regard for navigation in those areas (Article 234).

Although Article 211 seeks to accommodate the problem of uniformity of regulation by linking coastal state regulations to international standards, shipping could still be interrupted through an overly stringent system of enforcement. Enforcement of pollution laws traditionally has been accomplished by the application of regulations by a flag state to its own vessels. This concept is retained in Article 217.[6] In addition, the treaty introduces a new enforcement concept, known as port state enforcement, about which more will be said later.

The potentially most threatening kind of enforcement from a shipping perspective, however, is coastal state enforcement. Article 220 provides the coastal state with important new powers which are a necessary part of the EEZ package. At the same time, it contains explicit restrictions on the exercise of those powers. The article recognizes three different levels of coastal state action in situations where pollution occurs. The first level is collection of information, the second is investigation, and the third level is the institution of

appropriate proceedings. The conditions precedent to the exercise of coastal state rights become more stringent on each level. Before the coastal state may require the offending vessel to give information relevant to a possible violation, it must have "clear grounds for believing that" the vessel has "committed a violation of applicable international rules and standards" (Article 220(3)). Before undertaking physical inspection of a vessel in the EEZ, the coastal state must have clear grounds for believing it has committed a violation "resulting in a substantial discharge causing or threatening significant pollution of the marine environment (Article 220(5)). Furthermore, it may board the vessel only if the vessel has refused to give information under level one, or if the information that was given is manifestly at variance with the evident factual situation. Proceedings may be instituted against a vessel navigating in the EEZ only where there is "clear objective evidence" that the vessel has committed a violation "resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State" or to its resources (Article 220(6)).

This ascending order of difficulty in meeting preconditions provides some protection for vessels from arbitrary coastal state action, but does not preclude that state from taking protective action in appropriate cases. Other protections for vessels are found in Section 7 of the chapter dealing with safeguards. These include the right of the flag state to pre-empt coastal state punitive proceedings (Article 228), restrictions on the manner of investigating ships at sea (Article 226), prohibitions against other than monetary penalties (Article 230), and others.

Problem Areas: International Standards and International Straits

These permissions raise some problems that require further comments. First, there is bound to be confusion regarding standard setting. The treaty, in various provisions, uses on the one hand the term "generally accepted" international standards, and on the other the term "applicable" international standards. It is not clear what the distinction is. Furthermore, it is certainly not clear what makes an international standard "generally acceptable." Certainly there is an implication that these standards should arise from international agreement. But how widespread should that agreement be and must a state be a party to those agreements before being bound? Presumably, these questions will require further considerations in an appropriate forum, probably the IMO.

There are other definitional problems as well. The preconditions for coastal state enforcement actions under Article 220 are full of qualifiers, such as "clear grounds," "clear objective evidence," "substantial discharge," "significant pollution," and "major damage." Although lawyers are accustomed to dealing with such words, they defy precise definition. They require subjective judgment. It is like the classic definition of pornography -- "I can't define it but I know it when I see it." In the first instance, the coastal state will have to make these decisions subject, in appropriate cases, to review by dispute settlement procedures.

What about international straits? Because the interaction between vessels and the littoral states is more intense in these waters, the potential for destructive pollution from vessels is much higher, calling for effective controls. The balance attained by the straits articles was laboriously worked out. Articles 41 and 42 of the treaty are important parts of this compromise. Article 41 deals with the establishment of sea lanes and traffic separation schemes under the guidance of the IMO, and

Article 42 specifies laws and regulations of states bordering straits with regard to transit passage.

One or two points are particularly important. First, littoral states may establish sea lanes and traffic separation schemes, but before they may do so, they must submit them to the IMO for adoption. The IMO adopts these schemes only after discussion and agreement with the concerned states. States may then adopt laws and regulations regarding safety of navigation and the prevention and control of pollution by giving effect to international regulations regarding discharge of oil, oily waste and other noxious substances. The provision for adopting rules regarding the safety of navigation was understood by the negotiators to include rules regarding underkeel clearance. Article 42 provides that ships in transit passage "shall comply" with such rules. But it does not say what the coastal state may do if a ship does not cooperate. This initial oversight in the straits chapter was corrected in Article 233. This article provides that in the case of a violation of regulations referred to in Article 42, the state bordering the strait may take "appropriate enforcement measures." This was understood, for example, to include the right of the strait state to prohibit passage of a vessel that was in violation of an agreed-upon underkeel clearance. Similar provisions for the establishment of sea lanes and traffic separation schemes (Article 53) and for the control of pollution (Article 54) are provided for archipelagic waters, although, significantly, there is no provision in Article 233 similar to that for straits.

Impact on Nonsignatories: Loss of Dispute Settlement Procedures

What is the significance of the fact that several major maritime states, in particular the United States, have not signed the Law of the Sea Convention, and will not become parties to it? For the most part, this fact does not create serious difficulties with regard to the substantive pollution provisions of the treaty. It would not be seriously argued today that the exclusive economic zone concept is not globally accepted, or that the United States did not have a right to establish one of its own. Nor would it be argued that any state could voluntarily accept the duties with regard to pollution as they are set forth in the treaty. And it could be expected that coastal states parties to the treaty, should it enter into force, would undertake their treaty obligations with respect to vessels in a nondiscriminatory way, although this is not explicitly assured.

With respect to straits and archipelagoes, the picture is not as clear. Some states may argue, and indeed have done so, that these parts of the treaty are new and do not represent customary international law. Should that become accepted doctrine, then the United States, as a nonsignatory, might not be accorded the protections of transit passage or archipelagic sea lanes passage. Putting the legal argument aside, I do not perceive this as a serious threat. It is almost inconceivable to me that the states concerned would fail to see the disadvantages to them of treating U.S. vessels in a discriminatory way. Uniformity of usage of these waters is to their advantage as well as to the advantage of vessels transiting them.

But there is one area where the United States is at a serious disadvantage as a nonparty to the treaty. The pollution provisions of the treaty, standing alone, could not have been acceptable to all participants absent an effective dispute settlement procedure by which arbitrary actions of states in violation of the treaty could be challenged. The treaty deals effectively with this problem. Article 297 calls for compul-

sory dispute settlement for two major kinds of issues: when it is alleged that a coastal state has acted in contravention of the Convention with regard to the rights and freedoms of navigation, or in contravention of pollution rules adopted in accordance with the Convention. These provisions are the only true check against arbitrary actions of coastal states that might have the effect of seriously impeding international transportation by sea.

Because this provision is institutional in nature, it cannot be a part of customary international law, and a nonsignatory state could not demand access to international tribunals established for such disputes. Thus the United States is effectively denied recourse against coastal states should they decide to discriminate against its flag ships in the establishment of rules or enforcement of its pollution laws, or to act arbitrarily with respect to them. Although the treaty provisions with respect to seabed mining are clearly not satisfactory to the United States, the loss of dispute settlement, particularly with regard to navigation and pollution, is one of the costs paid, and it is a high one. Professor Bernard Oxman of the University of Miami Law School, among others, is actively pursuing ways to adjust to this unfavorable situation, by proposing ways to encourage alternate, reciprocal dispute settlement procedures with important coastal states. This process must continue and be given prompt attention by appropriate levels of the executive and legislative branches.

Port State Enforcement of Pollution Laws

The idea of state jurisdiction, which involves gaining control over pollution by the exercise of port state powers, is not a new one. Traditionally coastal states have denied access to their ports to vessels that violate their laws. This is an effective device. Thus, a coastal state may use this device to gain leverage in seeking new international agreements with respect to vessel safety, or to encourage recalcitrant states to monitor their own laws effectively. Refusal of the United States to grant access to passenger vessels failing to follow minimal fire safety procedures was a major element in leading to new international agreement on more stringent measures.

But the Law of the Sea Convention does introduce one significant *new* port state jurisdictional concept with regard to the enforcement of pollution laws. Article 218 of the treaty permits a port state to institute investigations and proceedings against a vessel voluntarily[7] within its port for offenses arising out of discharges beyond 200 nautical miles from its shores, provided that no such actions be taken with respect to offenses committed in the internal waters, territorial sea, or exclusive economic zone of another state unless that state so requests. This is an important addition to the overall enforcement package.

It is not clear to me, however, that a nonsignatory coastal state would have the right to take these unusual enforcement steps. But if not, it does not seem to me to be a serious loss. The more important rights are those that the coastal states might exercise in respect of violations in their own waters, including those related to the exclusive economic zone.

Hazardous Cargo

I would like finally to address the question of hazardous cargo in the context of the Law of the Sea Convention. Words used in the treaty that are related to this context are "hazards," "harmful," and "noxious." The provisions concerning nuclear vessels are also relevant. With respect

to the territorial sea, and the exercise of innocent passage, Article 22(2) permits coastal states to require tankers, nuclear-powered ships, and ships carrying nuclear or other inherently dangerous or noxious substances or materials to confine their passage to designated sea lanes. Furthermore, Article 23 requires such ships, when exercising innocent passage, to carry documents and observe special measures established by international agreement. These limitations are precautionary and necessary, but do not hamper innocent passage, provided that the limitations of the Convention are followed by the coastal state. With regard to international straits, as we have already seen, strait states may enact laws under Article 42(1)(b) regarding the prevention of pollution from oil, oily wastes, and other noxious substances in straits. Again, however, such laws give effect to applicable international regulations. As to mining, Article 145 places the burden on the International Sea-Bed Authority to enact measures to deal with destructive environmental elements connected with all phases of mining activities. Article 246 addresses the harmful substances problem related to marine scientific research. Consent to conduct research may be denied by the coastal state for activities having such destructive or harmful results. Finally, the general provisions found in the pollution chapter, particularly Articles 194 and 195, call for measures to prevent the release of toxic or harmful substances, and to prevent the transfer of hazards from one area to another. All of these provisions give coastal states ample authority to monitor and regulate the discharge of harmful substances, but none of them, unless abused in contravention of the treaty, poses any significant impediment to the navigation of vessels.

Summary and Conclusion

I have attempted to highlight the balance in the treaty provisions between the interests of coastal states in preserving and protecting the marine environment from vessel-source pollution, on the one hand, and the need for a continued unhampered flow of international trade on the other. The balance is a good one. But before closing, I wish to reemphasize the most serious threat to navigation in the application of these provisions to vessels of non-treaty parties, and that is the lack of effective dispute settlement. The dispute settlement provisions were understood by the negotiators to be critical. In fact, they were the key to a successful balance. If this workshop can do nothing else, its efforts should include a fruitful discussion of this problem and alternatives to its solution.

Footnotes

1. See particularly the provisions of Part V of the treaty dealing with the EEZ and the provisions of Part VI concerning the resources of the continental shelf. Both of these parts have an impact on the conduct of navigation because both present the potential for conflicting uses.
2. The treaty also deals, although less extensively, with pollution from land-based sources (Articles 207 and 213), pollution from seabed activities (Articles 208 and 214), pollution from activities in the Area (Articles 209 and 215), pollution by dumping (Articles 210 and 216), and pollution from the atmosphere (Articles 212 and 222).

3. Johnston, *The Environmental Law of the Sea* (197 IUCN Environmental Policy and Law Paper No. 18), Land-based sources contribute such ocean pollutants as chlorinated hydrocarbons, municipal wastes, solid materials, heavy metals, petroleum, heat, radioactivity and carbon dioxide. *Id.* at 195.
4. Office of Technology Assessment, *Oil Transportation by Tankers: An Analysis of Marine Policy and Safety Measures* 26 (1975).
5. References to the "competent international organization" in the pollution chapter were intended to mean the International Maritime Organization (IMO).
6. Previously, flag State rules were weak or nonexistent, or they were not enforced. Article 217 attempts to address these problems by requiring flag states to adopt and enforce effectively applicable international standards. It also provides for certification and inspection, and requires flag states to prohibit their vessels from sailing if they are not in compliance.
7. Presumably, a vessel entering in *force majeure* would be excluded.

International Standards and Dispute Settlement Procedures

Scott Hajost: To what extent does MARPOL 73/78 (see pages 246 and 283), particularly the mandatory annexes, represent generally accepted international rules and standards? And to what extent can MARPOL compulsory settlement mechanisms address the lack of dispute settlement in the Law of the Sea Convention context created by the U.S. decision not to ratify?

Thomas Clingan: MARPOL is exactly what we had in mind for "generally accepted" international standards. The issue is how far have we gone and what remains to be done? For example, with traffic separation schemes and sea lanes, some standards are still being established by IMO, and they are only voluntary. If mandatory, they would bind only the parties to IMO. By channeling approval through IMO, the standards bind every party to the Law of the Sea Convention (see Article 2(3)). The problem is, we never defined "generally accepted".

Peter Bernhardt: What is the competence of the coastal state to prescribe standards within safety zones around installations and structures in the EEZ, and does that competence extend to a complete prohibition on navigation; because there is a talk of expanding these safety zones. Article 60(6) states that "in the vicinity of" the safety zones, the transiting vessel shall comply with generally accepted international standards. Whose standards apply inside the safety zone under the Convention?

Clingan: A prohibition by the coastal state of entry into those zones would be unacceptable. That certainly was not intended. The safety zone was intended to be exactly what it was: to protect the installation itself and only reasonable rules and regulations designed to serve that purpose are allowable. The 1982 Convention has added one thing over the 1958 Treaty on the Continental Shelf with regard to the safety zone. Article 5(3) of the 1958 Treaty simply provides for a 500-meter zone, and Article 60(5) of the 1982 Convention allows additional precautions subject to IMO approval. The argument that gave rise to that clause was that for the big new supertankers 500 meters is inadequate to protect an offshore installation. Any regulation would be subject to the rule of reasonableness, but a state could, for example, require a vessel to start slowing down 25 miles out.

Jon Van Dyke: I am confused about the comment you made earlier (page 210) with regard to Nugroho's paper about the authority of the archipelagic state to act if a transitting ship violates the norms established by the archipelagic state in light of what you just said about the absence of a comparable provision to Article 233 being inadvertent (page 276).

Clingan: I think it was inadvertent. The straits chapter came after the archipelagic chapter and late in the negotiations. The question of pollution control in the staits came up. Article 39 imposes a duty to comply with coastal state regulations but omits any specific remedy, the implication being that liability or damages would be the only relief. If a vessel charges through a strait trailing oil all the way, damages are not an effective remedy. Because we were so far along in the straits negotiations no one wanted to risk reopening the argument. In response to a very reasonable request by the strait states, we added the second sentence of Article 233, thus allowing the straits state to take appropriate action in response to violations of Articles 41(a) and (b). But Article 233 makes no reference to the archipelagic chapter. One could argue that because Article 41 is cross-referenced into the archipelagic chapter by Article 54, it draws with it this provision of Article 233. When we did this, we were trying to finish the straits chapter and, frankly nobody even though about the archipelago because that was essentially put aside and we are focussing on straits. The failure to mention archipelagoes in Article 233 was an oversight. Article 233 gave coastal states a special privilege regarding transit passage, which should also apply, I think, to archipelagic sea lane passage, with regard to pollution control and traffic safety.

My friend Nugroho and I have always disagreed on the ability of the archipelagic state to suspend archipelagic sea lanes passage. (See page 210). If it was intended to give that power to the archipelagic state, it should have been stated clearly, just as Article 19 clearly does for the territorial sea. Article 19 lists activities that nullify innocent passage. There is no equivalent provision in the straits or the archipelagic chapter. We disagree but we come to meetings together nonetheless to present our views. This is our annual argument.

Edgar Gold: Tom Clingan, your terminology is very similar to that used by the International Chamber of Shipping, which always talks as if there were grave potential dangers to shipping. If an archipelagic state can take action only in accordance with a widely accepted set of rules, how can you say those rules interfere with legitimate behavior? The rules exist because the shipping industry asked for them, in part to improve the behavior of the shipping industry itself. You have referred to coastal state interference "and their threat." Those accusations present a specific point of view which you may well want to put forward here, but I think that it retards the balance of what is otherwise a very excellent presentation.

Clingan: Thank you, Edgar. I do not disagree with you on that. I was referring to a potential threat. If the process of evolving the rules were to get out of hand, there would be a potential threat. The rules themselves could eliminate the threat if they contain an adequate dispute settlement procedure.

Van Dyke: Tom, do you still feel that a nonsignatory coastal state may not invoke Article 218, the port state jurisdiction provision? (See page 277). I remember Professor Burke arguing two years ago that port state jurisdiction had always been with us and is part of customary international law.[1]

Clingan: I look at port state jurisdiction in two ways: the traditional port state doctrine allows a port state to refuse access to

ports to vessels that do not comply with certain reasonable provisions, like fire safety, passenger safety, and things of that kind. And then there is the port state provision in the treaty, which is something new. It is the right of the port state to prosecute or proceed against a vessel that violates the Convention's pollution regulations under the treaty beyond the exclusive economic zone (but not in somebody else's jurisdiction). I question whether the United States, for example, as a nonsignatory could exercise the latter type. Maybe Bill will comment.

William Burke: I was talking about the exercise of port state jurisdiction based on control of the vessel, which at least in private international law has been given very wide scope, even in agreements. For example, the Convention on Arrest of Vessels[2] is much broader than anything in the Law of the Sea Convention, and deals with remedies for wrongs rather than proceedings for the enforcement of an international agreement. Under normal private international law principles, control of an asset and particularly over a ship has conferred very wide authority with respect to taking action through the judicial process. And this effectively limits the authority of the flag state.

Footnotes

1. See discussion in J. Van Dyke (ed.), *Consensus and Confrontation: the United States and the Law of the Sea Convention* 501 (1985).
2. 439 U.N.T.S. 193; 53 Am. J. Int'l L. 539 (1959).

THE UNITED STATES MARINE SANCTUARIES PROGRAM AND FREEDOM OF NAVIGATION

Scott A. Hajost
Attorney-Adviser for Oceans,
International Environmental and Scientific Affairs
Office of the Legal Adviser
U.S. Department of State
Washington, D.C.

The topic of my paper is the United States Marine Sanctuaries Program as it bears upon freedom of navigation. My purpose is to describe the program, place it in its international setting, examine some case studies and briefly summarize the implications they present for international navigation. (The views expressed are those of the author and do not necessarily represent the views of the U.S. government.)

Before turning to a description of the Marine Sanctuaries Program, I would like to say a few words about international initiatives that relate to the concept of marine sanctuaries. Article 194(5) of the 1982 UN Convention on the Law of the Sea[1] reflects the obligation of states to take measures to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other forms of marine life. The 1946 International Convention for the Regulation of Whaling, as amended, provides in Article VI for designation of sanctuary areas, one of which has been established in the Indian Ocean.[2] Principles 2 and 4 of the "Stockholm Declaration," made at the 1972 UN Convention on the Human Environment, states that especially representative samples of natural ecosystems and wildlife habitat must be safeguarded and the Report and recommendations of the conference, at which protection of the marine environment was an important issue, make numerous references to protected areas.[3] The 1973 Convention for the Prevention of Pollution from Ships, as modified by the 1978 Protocol (MARPOL 73/78), provides in Article 10 of Annex I for "special areas" of sea where for recognized technical reasons relating, *inter alia*, to their oceanographical and ecological conditions, special mandatory methods for prevention of pollution by oil is required.[4] The 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals (to which the United States is not a party) calls for conservation of habitats of migratory species, including marine species.[5]

I might also mention the Antarctic Treaty, which applies to the area south of 60 degrees South Latitude.[6] Under the Treaty, a legally binding recommendation has been adopted on "Agreed Measures for the Con-

servation of Antarctic Fauna and Flora."[7] The measures apply to the Antarctic Treaty area, subject to the same high seas safeguards as contained in Article VI of the Treaty; that is, as provided in Article I(2), nothing in the Agreed Measures shall affect the exercise of the rights of any state under international law with regard to the high seas within the treaty area. The Agreed Measures treat the entire Antarctic Treaty area as a "special conservation area," and Article VIII thereof provides for the establishment of specially protected areas to preserve unique natural ecological systems. Although in theory these protected areas would include marine areas, in practice they have been terrestrially oriented. Another Antarctic Treaty recommendation established a system for protecting sites of special scientific interest, including areas of nonbiological interest.[8] Designated sites are covered by management plans designed to preserve their scientific qualities. Some sites incorporate marine elements, and proposals have been made to designate sites that are exclusively marine. However, these proposals have not been acted upon because of the concerns of at least one Antarctic Treaty party regarding potential impacts on navigational freedoms. Although of doubtful necessity because of the absence of shipping by nonparties in the Antarctic Treaty area, specially protected marine areas or sites of special scientific interest could be designated as the situation warrants. The Antarctic Treaty parties could seek cooperative action by the International Maritime Organization (IMO). Finally, another component of the Antarctic Treaty system, the 1980 Convention for the Conservation of Antarctic Marine Living Resources, which regulates harvesting, also provides for the designation of special areas for protection and scientific study.[9]

I might also note one bilateral arrangement: the 1978 Treaty between Australia and Papua New Guinea concerning Sovereignty, Maritime Boundaries and Related Matters in the Torres Strait.[10] Article 10 of the treaty establishes a protected zone in Torres Strait comprising the land, sea, airspace, seabed, and subsoil. One of the purposes of the zone is to protect and preserve the marine environment and indigenous fauna and flora. Article 7 of the treaty sets out detailed navigational rights in the zone (largely addressed to the contracting parties) and makes clear that provisions relating to the zone are not in derogation of rights of navigation and overflight under general principles of international law.

What may offer the greatest promise for international cooperation in protecting special areas of the marine environment are the regional marine environment protection agreements developed under the UN Environment Program's Regional Seas Program. The first of these was the 1976 Convention for the Protection of the Mediterranean Sea Against Pollution.[11] Although the convention itself does not contain a provision on specially protected areas, its parties adopted in 1982 an associated Protocol Concerning Mediterranean Specially Protected Areas.[12] For purposes of designating specially protected areas, the protocol applies seaward into the Mediterranean only to the limits of the territorial seas of the parties (Article 2). Article 7 of the protocol sets out measures to be taken, in conformity with the rules of international law, and includes "regulation of the passage of ships and any stopping or anchoring." It will be interesting to see how this protocol is implemented in practice.

The United States has participated in two Regional Seas Program negotiations, for the wider Caribbean and for the South Pacific. Both apply to marine areas in and beyond the territorial sea. Article 10 of the 1983 Convention for the Protection and Development of the Marine

Environment of the Wider Caribbean Region, which includes the Gulf of Mexico, the Caribbean Sea, and portions of the adjacent Atlantic Ocean, (and which the United States has ratified) calls for the establishment of protected areas to preserve rare and fragile ecosystems and threatened species.[13] The same article provides that the establishment of such areas is not to affect the rights of other parties, thereby protecting navigational freedoms. One of the resolutions agreed to by the diplomatic conference that adopted the Convention called for early work after the Convention's entry into force on a protocol on specially protected areas.[14] The Draft Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, on which expert level negotiations were concluded in November 1985, has a substantially similar provision (Article 14) to that of the Caribbean Convention.[15] Finally, I might mention that discovery of the *Titanic* last year has led to U.S. efforts seeking international commemoration of the vessel as a maritime memorial.

The U.S. Marine Sanctuaries Program

The United States Marine Sanctuaries Program was initiated by enactment of the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA).[16] The MPRSA's primary purpose was to establish the United States ocean dumping program, administered by the Environmental Protection Agency (EPA) under Title I of the Act, while Title III of the Act established the marine sanctuary provisions, to be administered by the Department of Commerce.[17] The MPRSA's marine sanctuaries provisions are related to its ocean dumping provisions insofar as both were included in the October 1970 Council on Environmental Quality (CEQ) Report entitled "Ocean Dumping - A National Policy" (which provided the inspiration for the Act) and were included in the same statute.

Both the legislative history of the MPRSA and the CEQ Report reveal that the control of ocean dumping was paramount to the concern for marine sanctuaries. The Senate rejected the marine sanctuaries title recommended by the House largely because it believed that effective U.S. control over foreign as well as domestic uses could not be maintained in marine sanctuaries beyond the territorial sea without international agreement. In particular, the Senate noted that:

> Clearly the United States can unilaterally set aside marine sanctuaries in areas under its exclusive jurisdiction. That is, to the outer limits of the territorial sea. In order to be effective beyond the territorial sea, it is necessary to enter into international agreements in order to set aside sanctuaries not only from domestic uses, but also from foreign uses. The range of domestic authority beyond the outer limits of the territorial sea is narrow. The customs, fiscal, immigration, or sanitary purposes for which a coastal State may exercise control in a nine-mile contiguous zone seaward of the territorial sea under the terms of the Convention on the Territorial Sea and the Contiguous Zone do not justify setting aside areas as marine sanctuaries. The sovereign rights that a coastal State exercises over the resources of the continental shelf do not extend to the superjacent waters, which are high seas. An effective marine sanctuary must include control over the seabed as well as the water column above. And if the purpose of proponents of marine sanctuaries is to control or prohibit the exploitation of resources of the seabed and subsoil, such authority already exists under the Outer Continental Shelf Lands Act.

> Marine sanctuaries require the forbearance of all people, United States citizens and foreign citizens, from acts that would destroy or harm the natural values within the sanctuary. United States jurisdiction does not extend to foreign people or ships in high seas areas; domestic legislation authorizing designation of marine sanctuaries in such areas would be ineffective unless international agreements were executed to establish sanctuaries and to regulate the conduct of signatories in them.
>
> An additional consideration is essential to any such decisions. It is in the best interests of all maritime nations, the United States included, to assert narrow geographical claims to sovereignty or sovereign rights in the world's oceans. Important commercial, scientific, and naval concerns are at stake whenever a coastal State asserts exclusive jurisdiction over areas that were previously high seas and open to all nations to use with reasonable regard to the interests of all other States in their exercise of the freedom of the high seas. To authorize designation of marine sanctuaries in high seas areas by the United States is inconsistent with the traditional stance of this country in such matters, as well as being inconsistent with the position taken by the Department of State in preparation for the Conference on the Law of the Sea under United Nations auspices, scheduled for 1973.[18]

The Executive Branch of the U.S. also opposed the marine sanctuaries provisions on a number of grounds, including law of the sea concerns similar to those of the Senate.

Title III was included in the final version of the MPRSA only after modifying the statutory language to make clear that the regulations and enforcement activities under the title would apply to non-United States citizens "...only to the extent that such persons were subject to U.S. jurisdiction, either by virtue of accepted principles of international law, or as a result of specific intergovernmental agreements.[19] Thus, from the moment of the MPRSA's enactment, one can perceive the concern for ensuring consistency between the U.S. Marine Sanctuaries Program and navigational interests.

The marine sanctuary provisions of Title III of the MPRSA were modified by the "Marine Sanctuaries Amendments of 1984," which clarified procedures for implementation of the Program as well as its jurisdictional scope in light of existing international law of the sea.[20] The amendments expressed the opinion of Congress that, *inter alia*, certain areas of the marine environment possess conservation, recreational, ecological, historical, research, educational, or esthetic qualities that give them special national significance and that a federal program that identifies special areas of the marine environment will contribute positively to marine resources conservation and management.[21] The purposes of Title III of the MPRSA, as expressed in the 1984 Amendments, are to identify marine sanctuaries, to provide authority for comprehensive and coordinated conservation and management of marine sanctuaries to complement existing regulatory authorities, to support and coordinate scientific research on resources in such sanctuaries, to enhance public awareness and wise use of the marine environment, and to facilitate, consistent with the primary objective of resource protection, uses of the resources in marine sanctuaries not otherwise prohibited by other authorities.[22] The MPRSA charges the Secretary of Commerce with the responsibility for designating discrete areas of the marine environment as marine sanctuaries and the program, as delegated, is administered by

the Office of Ocean and Coastal Resource Management (OCRM) of the National Oceanic and Atmospheric Administration (NOAA).[23]

The 1984 amendments to the MPRSA defined the marine environment to include "...those areas of coastal and ocean waters...and submerged lands over which the United States exercises jurisdiction consistent with international law.[24] Thus, the marine sanctuaries provisions of the MPRSA apply seaward of the U.S. coast to include the U.S. territorial sea, EEZ, and outer continental shelf where it extends beyond the EEZ. The marine sanctuaries provisions of the MPRSA apply to the fifty states, the District of Columbia, Puerto Rico, the Northern Marianas, American Samoa, the Virgin Islands, Guam, and other commonwealths, territories or possessions of the United States.[25]

In designating a marine sanctuary, the MPRSA requires a finding, *inter alia*, that the area is of special national significance because of its resource or human-use values; that existing authorities are inadequate to ensure coordinated and comprehensive conservation and management; and that it is of a size and nature to allow such conservation and management.[26] Factors to be considered in determining whether the area meets the above standards are the area's natural resources; ecological, historical and cultural qualities; the present and potential uses of the area which depend on maintaining its resources and which may adversely affect it; adequacy of existing federal and state regulatory authorities (e.g., the Fishery Conservation and Management Act (FCMA), 16 U.S.C. secs. 1801 *et seq.* and the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. sec. 1331 *et seq.*); manageability of the area in terms of size, accessibility, and suitability for monitoring and enforcement; public benefits to be drawn from sanctuary status; and socio-economic effects of the designation.[27] In making these findings and determinations the MPRSA requires that the Secretary of Commerce consult, among others, the Department of State, to ensure that international law and foreign policy considerations are taken into account.[28]

The MPRSA's procedural requirements for designation of a marine sanctuary include a notice in the Federal Register of the proposal, along with proposed regulations, and a summary of a draft management plan; preparation of an environmental impact statement that includes a resource assessment, maps depicting the boundaries of the proposed sanctuary, and the existing and potential uses and resources of the area; the possibility for the appropriate regional Fishery Management Council to develop recommended fishery regulations under the Fishery Conservation and Management Act; public hearings; and reporting to the House Merchant Marine and Fisheries Committee and the Senate Commerce, Science and Transportation Committee.[29]

In designating a marine sanctuary, the Secretary of Commerce must publish a notice in the Federal Register with final regulations (and submit such notice to Congress), which includes the geographic area; the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational or esthetic value; and the types of activities subject to regulation.[30] The designation and regulations become final 45 days after continuous session of Congress, beginning on the date of the the notification, unless the Congress, through a joint resolution, disapproves the designation in part or in whole.[31]

Title III of the MPRSA provides that "any person subject to the jurisdiction of the United States" who violates any regulation shall be liable for civil penalties and that a vessel used in the violation of a regulation shall be liable *in rem* in any district court having jurisdic-

tion.[32] Of particular relevance to international navigation is that portion of Title III concerning how and to whom regulations issued thereunder shall apply. It provides that these regulations "...shall be applied in accordance with generally recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the United States is a party" and that:

> No regulation shall apply to a person who is not a citizen, national, or resident alien of the United States, unless in accordance with -
>
> (1) generally recognized principles of international law,
> (2) an agreement between the United States and the foreign state of which the person is a citizen; or
> (3) an agreement between the United States and the flag state of a foreign vessel, if the person is a crew member of the vessel.[33]

In recognition of the above, the Secretary of State is encouraged to negotiate with other countries arrangements for the protection of any national marine sanctuary.[34] Thus far, negotiations have not occurred in designating existing marine sanctuaries.

The most recent NOAA regulations implementing the Marine Sanctuary Program were published in May 1983 prior to the 1984 Amendments to Title III of the MPRSA.[35] They establish a Site Evaluation List (SEL) which comprises the most highly qualified marine sites identified by regional resources eveluation teams.[36] The SEL serves as NOAA's working list for future marine sanctuaries, and only sites chosen may be considered for subsequent review as active candidates. After a preliminary evaluation and consultation with concerned agencies and others, NOAA selects a site as an active candidate and publishes it in the Federal Register.[37] After a selection of an active candidate, NOAA prepares a draft designation document, including the terms of designation, and a draft managment plan that includes goals and objectives, management responsibilities, resource studies, interpretive and education programs, public and private uses consistent with designation, and an appropriate regulation.[38] The environmental impact statement required by the MPRSA is prepared on the designation document managment plan and regulations. After final consultation with the State Department and other appropriate federal agencies, the proposed designation becomes effective as provided for in the 1984 Amendments to the MPRSA.[39]

The regulations specify that the designation of a marine sanctuary and the management plan implementing it, including applicable regulations, are binding on any person "subject to the jurisdiction of the United States"; that designation does not constititute any claim to territorial jurisdiction by the United States; and that management plans apply to foreign citizens "only to the extent consistent with recognized principles of international law or otherwise authorized by international agreement."[40]

It is interesting to compare the present language of Title III requiring consistency of regulations with international law and calling for international negotiations to that of the original language. When enacted, Title III encouraged the Secretary of State to negotiate international agreements when a marine sanctuary included ocean waters "outside the territorial jurisdiction of the United States."[41] In addition, the nonapplication of regulations to foreign nationals or vessels unless consistent with international law or absent agreement was applicable to

ocean waters "outside the territorial jurisdiction" of the United States.[42] The 1984 Amendments, as I have noted, removed the territorial presumption in view of extended maritime jurisdictions.

Since the MPRSA's enactment, much has changed in the international law of the sea and U.S. positions thereon. In 1972, the United States neither claimed nor recognized 200-nautical-mile fisheries jurisdiction nor exclusive economic zones. Instead, jurisdiction beyond the territorial sea was limited to that of the contiguous zone and the continental shelf where there was fairly limited authority to regulate the activities of foreign nationals and vessels. In 1977, the United States established a 200-nautical-mile Fishery Conservation Zone which provided additional authority to protect living resources. Most recently, on March 10, 1983, President Reagan proclaimed a United States Exclusive Economic Zone.[43] Except for the NOAA decision to designate Fagatele Bay in American Samoa in April 1985, all marine sanctuaries were designated prior to the establishment of the United States EEZ.

The President's EEZ Proclamation and accompanying statement and oceans policy fact sheet all confirm the United States' right under international law to take measures to protect and preserve the marine environment in the EEZ. The Presidential statement also reinforced the United States' commitment to preserving high seas freedoms of navigation and overflight and that the United States would continue to work through the IMO to develop uniform international measures for protection of the marine environment which impose no unreasonable burden on commercial shipping. The EEZ Proclamation and policy statement have direct import for the Marine Sanctuaries Program.[44]

Since the designation in 1975 of the first marine sanctuary, the Monitor, off North Carolina and beyond the territorial sea, the State Department has worked with NOAA to ensure consistency of the Marine Sanctuaries Program with United States' positions on law of the sea.[45] Because the Monitor lay beyond the territorial sea and was not a resource of the continental shelf, it was designated with the understanding that the regulations protecting it did not apply to foreign vessels and nationals and that prohibited activities only apply to persons subject to the jurisdiction of the United States.[46]

Regulations for other existing marine sanctuaries generally specify that prohibitions and controls thereunder must be applied consistently with international law and would only be applied to foreign nationals and vessels in accordance with international law.[47] Because the implementing regulations for the marine sanctuaries contained many restrictions on vessel operations that raise questions as to their consistency with international law with respect to foreign vessels beyond the territorial sea, such language was essential to preserve U.S. law of the sea positions. No attempt was made to spell out where and which regulations could apply to foreign vessels, and thus application to such vessels was left open for consideration in specific cases in light of existing international law. Although there is greater certainty with respect to coastal state rights under international law to protect and preserve the marine environment, as reflected in the 1982 Law of the Sea Convention, and even though greater authority accrues to the United States because of the establishment of its EEZ, the need to ensure the Marine Sanctuary Program's consistency with U.S. law of the sea interests remains. Because of the still developing application of the international law of the sea, it is important for the United States to set a good example in implementing the Program.

The 1982 Convention has a number of provisions relevant to marine sanctuaries and navigation. Article 21 specifies that the coastal state may adopt laws and regulations consistent with international law relating to innocent passage in respect of, *inter alia*, the safety of navigation and regulations of maritime traffic, conservation of living resources of the sea, preservation of the environment, and the prevention or reduction and control of pollution. Under Article 22, the coastal state, where necessary, may require foreign ships exercising the right of innocent passage through its territorial sea to use sea lanes and traffic separation schemes it may designate having regard to the safety of navigation and taking into account recommendations of the IMO.[48] Subject to the rights of transit passage through straits used for international navigation and innocent passage (Articles 17, 37, and 38), the United States has authority to regulate foreign vessel activities in a marine sanctuary in the territorial sea.

In the EEZ, as reflected in Article 56, the coastal state has sovereign rights for exploring, exploiting, conserving, and managing the living and nonliving resources of the seabed, subsoil, and superjacent waters, as well as jurisdiction for protection and preservation of the marine environment. As stated in Article 58, the high seas freedoms of navigation and overflight referred to in Article 87 apply within the EEZ, as long as their exercise by other states is compatible with other provisions of the Convention. Article 59 is also relevant as a sort of residual clause declaring the relative equities which are to be weighed when a question arises as to respective rights of coastal and flag states in the EEZ. Article 73 reflects the right of a coastal state, in exercising its sovereign rights, to conserve and manage living resources in its EEZ and to ensure compliance with laws and regulations therefore through law enforcement action at sea and judicial proceedings. Article 77 reflects the sovereign rights of the coastal state over the continental shelf for purposes of exploring and exploiting its natural resources, and Article 78 confirms that the exercise of these rights may not infringe or unjustifiably interfere with navigation.

Part XII of the Convention sets forth the rights and obligations of states with respect to protection and preservation of the marine environment. In looking at this part, which addresses pollution, it is important to bear in mind the definition of pollution as embodied in Article 1(1)(4):

> 'Pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

Article 211 addresses pollution from vessels. In the territorial sea the coastal state can adopt its own regulations for pollution from vessels, provided that they do not hamper innocent passage and, in the case of international straits, transit passage. (See Articles 211(4) and 42). In the EEZ, the coastal state may only adopt laws and regulations "conforming to and giving effect to generally accepted international rules and standards" established through the IMO or a general diplomatic conference (Article 211(5)). If a coastal state believes that more

stringent measures with respect to foreign vessel pollution in the EEZ, such as in a marine sanctuary, are necessary, Article 211(6) provides:

(a) Where the international rules and standards referred to in paragraph 1 are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal States, after appropriate consultations through the competent international organization with any other states concerned, may, for that area, direct a communication to that organization, submitting scientific and technical evidence in support and information on necessary reception facilities. Within 12 months after receiving such a communication, the organization shall determine whether the conditions in that area correspond to the requirements set out above. If the organization so determines, the coastal States may, for that area, adopt laws and regulations for the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organization, for special areas. These laws and regulations shall not become applicable to foreign vessels until 15 months after the submission of the communication to the organization.
(b) The coastal States shall publish the limits of any such particular, clearly defined area.
(c) If the coastal states intend to adopt additional laws and regulations for the same area for the prevention, reduction and control of pollution from vessels, they shall, when submitting the aforesaid communication, at the same time notify the organization thereof. Such additional laws and regulations may relate to discharges or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards; they shall become applicable to foreign vessels 15 months after the submission of the communication to the organization, provided that the organization agrees within 12 months after the submission of the communication.[49]

Thus, the United States would not seem to have the unilateral right to regulate foreign vessel discharges in marine sanctuaries in the EEZ beyond the territorial sea more stringently than generally accepted international rules, such as contained in MARPOL 73/78.[50] Sanctuary-implementing regulations would have to be construed accordingly and where more stringent than MARPOL 73/78, they could not be applied to foreign vessels unless the United States sought either the approval of IMO or entered into bilateral or multilateral agreements. In commenting on proposed final regulations for the proposed La Parquera National Marine Sanctuary near Puerto Rico, the State Department suggested that in addition to the international law consistency provision normally included in marine sanctuary regulations, the proposed prohibition on discharge of polluting substances be revised to make clear and distin-

guish U.S. pollution jurisdiction over foreign vessels in the territorial sea and beyond. The suggestion incorporated:

(1) a prohibition on the discharge of oil or hazardous substances as provided in Section 311 of the Clean Water Act (33 U.S.C. sec. 1321 (B)(3)) which allows discharges consistent with MARPOL 73/78, applying to all vessels in the sanctuary; and
(2) a prohibition on littering limited to the territorial sea for foreign vessels but applying to U.S. vessels anywhere in the sanctuary.[51] It is notable that in this case, all proposed regulations were reviewed for consistency with international law and specified revisions were suggested rather than simply relying on the international law savings clause.[52]

Articles 210 and 216 of the 1982 Convention should also be mentioned because they articulate the coastal state jurisdiction to regulate dumping in its EEZ or onto its continental shelf. Thus, even though the United States has not yet amended Title I of the MPRSA to regulate foreign dumping beyond its 12 nautical mile contiguous zone (a bill, H.R. 1957, is pending in Congress), it does have jurisdiction under international law to prohibit and enforce regulations pertaining to dumping by foreign vessels in marine sanctuaries in the United States EEZ.

Reference should also be made with respect to enforcement of measures to protect the marine environment because the distinction between the power to regulate and the power to enforce is fundamental to the Convention's pollution regime. International law recognizes the right of a coastal state to condition access of foreign vessels to its ports as an attribute of its sovereignty. It can condition port access for any reason, including violation in the EEZ of marine sanctuary regulations consistent with with international law. Article 211(3) reflects the right of a coastal state to condition access to its ports by foreign vessels in order to prevent, reduce, and control pollution.

Part VI of the Convention, specifically Article 220 on enforcement by coastal states, bears on enforcement of the Marine Sanctuaries Program. Article 220(1) recognizes the right of a coastal state to institute proceedings, while a vessel is voluntarily in its port, for violation in its territorial sea of its laws and regulations consistent with the Convention or applicable international rules and standards for prevention of pollution when the violation occurred in the EEZ. Article 220 also allows for enforcement action to be taken in the territorial sea or EEZ under specific conditions against a violating vessel. (Title III of the MPRSA does not provide the Secretary of Commerce with any specific at-sea seizure authority.) Thus, there is no doubt that the United States may enforce violations in the EEZ by a foreign vessel of marine sanctuary regulations pertaining to pollution that are consistent with international law while it is voluntarily in a U.S. port.

Two case examples will illuminate the interplay between the Marine Sanctuaries Program and the freedom of navigation. The Flower Garden Banks lie over 100 nautical miles off the coasts of Louisiana and Texas in the Gulf of Mexico. Comprised of two coral formations, East and West Flower Garden Banks, they represent the northernmost shallow water tropical coral reef community in the Gulf of Mexico and support a rich and unique biological community. The Banks are surrounded by waters approximately 325 to 390 feet deep, and the reefs rise to a maximum height of about 50 feet below the sea surface. They lie near major shipping lanes in the Gulf, and anchoring by ships waiting to enter U.S. ports has been

reported to be causing significant damage to the coral communities. In the late 1970s, NOAA considered the Flower Garden Banks for designation as a marine sanctuary, and the area was treated as an active candidate. Further action on the site was suspended in 1980, and in 1982 it was withdrawn from active consideration.

On August 2, 1984, NOAA again named the Flower Garden Banks (a 44 square mile area) as an active candidate to become a marine sanctuary.[53] (There was also Congressional interest in legislation protecting the reefs as reflected in correspondence with the Department of State.[54]) The Federal Register notice naming the Banks noted that one of the reasons for the earlier withdrawal was a belief that a Coral Fishery Management Plan for the Gulf would have regulated anchoring (the one unresolved issue in the prior designation process), but that the final regulations implementing the Plan did not.[55] As also indicated in the notice, Minerals Management Service stipulations establishing a no-anchoring zone are not applicable to vessels not engaged in actual oil and gas activity at the Banks. Preparation of a draft environmental impact statement is undergoing final NOAA review.

The principal reason for proposing designation of the Banks as a marine sanctuary is to prohibit anchoring, which would include anchoring by any foreign vessels, not just those waiting to enter the United States. Without regulation of such vessels, designation of the Banks as a sanctuary would not be fully effective in protecting them. In discussing sanctuary management, the notice refers to cooperation with the Department of State and concludes that there should be no adverse impact by an anchoring prohibition, other than "inconvenienced vessels."[56] The views of the Department of State on whether the United States could regulate anchoring by foreign vessels in the Banks consistent with international law was critical to NOAA's decision to proceed. Both the notice of active candidate status and the May 4, 1984 notice of Preliminary Consultation quote a portion of a Department of State communication to NOAA to the effect "that the United States does have jurisdiction to prohibit anchoring in the area, except for anchoring required by *force majeure*."[57] The Department of State communication noted that the proposed limitation on anchoring and therefore navigation is justified because of the "demonstrable damage" it can do to fragile coral formations and because of the "relatively limited area" in which it would be prohibited.[58]

Anchoring is a normal incident to navigation and is a protected aspect of the exercise of freedom of navigation unless a coastal state has specific rights to the contrary. There is nothing in the 1982 Convention that specifically addresses coastal state authority to regulate anchoring beyond the territorial sea and thus one must look to the Convention in its entirety to find a basis. It seems questionable that anchoring could be considered pollution as defined in Article 1(1)(4), or as potentially dangerous. Thus, Article 211 on "pollution" from vessels does not appear to provide the legal authority. There are three theories that could be used individually or in conjunction to justify U.S. jurisdiction to regulate anchoring of foreign vessels in a Flower Garden Banks Sanctuary. One of course is port state authority. The United States could argue that a requirement not to anchor on the Banks is a reasonable condition for foreign vessels to enter its ports.[59]

Another approach would be premised on resource jurisdiction and the coastal state's right to regulate activities that affect its resources in the EEZ and as part of its measures to protect and preserve the marine environment, coral being a living continental shelf resource

managed under the FCMA. In addition, as articulated in Article 58(3), in exercising freedoms of navigation in the EEZ, the flag state must have due regard for the rights of the coastal state, i.e., the right to protect its unique living resources. Thus a prohibition on anchoring in a limited area of the U.S. EEZ to protect particularly vulnerable coral can be seen as a reasonable limit on navigation. Along these lines, reference has already been made to Article 59 under which a prohibition of anchoring could also be argued to be a reasonable balancing of the equities of the coastal and flag state interests.

The United States has not articulated the international law justification for the proposed marine sanctuary regulation. It is clear that theories in justification may be advanced, but it is also clear that the protection of navigational interests under any of the theories is dependent upon the good will of the final decision-maker. Thus, a precedent has been established which may be awkward if followed in another factual situation by a coastal state not so concerned with global navigational freedoms as the United States.

Finally, I would like to mention one example of actual application of marine sanctuary regulations to a foreign vessel beyond the territorial sea. On August 4, 1984, the West German managed, Cypriot registered and British captained 400-foot freighter *M/V Wellwood* mistakenly navigated into the Key Largo National Marine Sanctuary off Florida and grounded on Molasses Reef, outside the U.S. territorial sea.[60] It was not until August 16 that the vessel was freed from the reef. Large areas of the reef were totally destroyed and other portions were seriously damaged. The vessel was apparently seriously off course at the time of the incident, suggesting the possibility of faulty and perhaps even criminally negligent navigation. The incident attracted significant public attention and outcry, and set off intense Executive Branch discussions on the appropriate course of action. At issue was whether to proceed against the vessel for violation of the Key Largo Marine Sanctuary regulation prohibiting destruction of or damage to coral in the sanctuary and requiring all watercraft to be operated so as to avoid striking or causing damage to natural features in the sanctuary.[61] Another issue was how to obtain jurisdiction over the *Wellwood*, which was beyond the territorial sea, if the United States chose to proceed against it under the MPRSA and the Key Largo Marine Sanctuary Regulations. Fortunately, the enforcement question was avoided when the *Wellwood* voluntarily entered the U.S. territorial sea.

The key question was whether the sanctuary prohibitions and penalties could be applied to the *Wellwood* consistent with the MPRSA and the sanctuary regulations requirements that they be applied consistently with international law; i.e., could the United States, consistent with international law, take enforcement action, including the imposition of penalties, not mere recovery of damages, against the *Wellwood* for damage to United States natural resources beyond the territorial sea due to faulty navigation.[62] The Executive Branch answer to the question was yes, the *Wellwood* could be penalized consistent with international law for running aground in the sanctuary. On August 10, 1984 an *in rem* action incorporating the MPRSA Sanctuary regulations penalities was filed in Federal District Court and the vessel was arrested when it later voluntarily entered the U.S. territorial sea.[63] The government has thus far been successful in opposing defense motions to dismiss. The Complaint seeks over $20,000,000 in damages and penalties, of which the MPRSA penalties are a minor portion; unless the case is settled it may reach trial in 1987 after completion of final damage assessments.[64]

On January 18, 1985, NOAA published a Federal Register notice prohibiting anchoring over the grounding site of the *Wellwood*.[65]

The 1982 Convention does not specifically address negligent navigation. Thus, as with anchoring, authority must be found in the Convention as a whole to impose penalties. The analysis and theories involved are much the same as with anchoring. In this case action against the *Wellwood* was premised on U.S. resource jurisdiction in its EEZ. In balancing the interests of the United States in protecting its continental shelf coral resources beyond the territorial sea and international navigation, it was determined that applying the penalties against the *Wellwood* was in accord with international law and gave due regard for freedom of navigation. In essence, to protect its marine resources in the EEZ, a state can penalize bad navigation. The implications of the case for United States interests that navigation be as free as possible are readily apparent. Although navigational error in this case was extreme (but apparently not willful) and the damage was great, once this type of jurisdiction has been asserted it may be difficult to contain.

On one hand, the U.S. interests are as a flag state; on the other hand, with is long coastlines, the United States is a coastal state. It has a deep commitment to and national security interest in preserving worldwide freedom of navigation. At the same time it has a very strong interest in preserving and conserving its marine resources. The difficulty is in balancing the two. Where concrete environmental interests are affected, as seen in the Flower Garden Banks Marine Sanctuary proposal and in the *Wellwood* case, concern for less tangible law of the sea interests may be diminished.

To avoid problems in the future, I would suggest two courses of action. The first is to draft sanctuary regulations in a sufficiently explicit manner that the application of prohibitions and controls to foreign vessels is clear, rather than simply relying on the international law savings clause. The other is to make use of international agreements and the IMO. I have already referred to Article 211(6). The IMO is the appropriate body, not only with respect to special pollution measures, but also for vessel traffic routing and control schemes as well, which a coastal state does not have a unilateral right to regulate in its EEZ.[66] By taking these actions, U.S. marine protection and resource conservation and preservation interests, as reflected in the MPRSA, may be addressed squarely, before marine sanctuary regulations have to be tested in practice against our navigational interests.

Footnotes

1. UN Doc. A/CONF. 62/122 (1982).
2. International Convention for the Regulation of Whaling, *done* Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, Protocol to the Convention, *done* Nov. 19, 1956, 10 U.S.T. 952, T.I.A.S. 4228.
3. UN Doc. A/CONF. 48/14, Rev. 1 (1973).
4. Convention for the Prevention of Pollution From Ships, *done* Nov. 2, 1973, 12 I.L.M. 1319 (1973), Protocol to the Convention, with Annexes, *done* Feb. 17, 1978.
5. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 15 (1980).

6. Antarctic Treaty, *done* Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780.
7. Recommendation III-8, T.I.A.S. No. 10485 (1980).
8. Recommendation VIII-3, T.I.A.S. No. 10486 (1980).
9. Convention for the Conservation of Antarctic Marine Living Resources, art. IX.2(g), T.I.A.S. No. 10240 (1980).
10. Treaty on Sovereignty and Maritime Boundaries in the Area Between the Countries, Dec. 18, 1978, Australia-Papua New Guinea, 18 I.L.M. 291 (1979).
11. Convention for the Protection of the Mediterranean Sea Against Pollution (Feb. 16, 1976), 15 I.L.M. 290 (1976).
12. Protocol concerning Mediterranean Specially Protected Areas (1982), UNEP Publication G.E. 84--01299 (June 1984).
13. Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Mar. 24, 1983), S. Treaty Doc. No. 98-13, 98th Cong. 2d Sess. (1984), 22 I.L.M. 227 (1983).
14. An initial draft produced by elements of the U.S. environmental community presents some interesting issues with respect to navigation, including provisions calling for denial of use of a party's EEZ by nonparties under certain conditions and for agreement among parties for seizing nonparty vessels.
15. Draft Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, South Pacific Regional Environment Program (SPREP) Expert Meeting A/Draft Report/Convention (Nov. 1985).
16. 16 U.S.C. Secs. 1431-34, (1976 & Supp. II 1984), 33 U.S.C. secs. 1401 4 (1976 & Supp. II 1984).
17. 33 U.S.C. secs. 1401 4 (1976 & Supp. II 1984), 16 U.S.C. 1431-34 (1976 & Supp. II 1984). Title II of the MPRSA, 33 U.S.C. secs. 1442 4, which have been amended, originally established a comprehensive research program to be carried out by the Secretary of Commerce.
18. S. Rep. No. 451, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4234, 4241 2.
19. H. Conf. Rep. No. 1546, 92d Cong. 2d Sess. *reprinted in* U.S. Code Cong. & Admin. News 4264, 4280.
20. Pub. L. No. 98 98, 98 Stat. 2296.
21. 16 U.S.C. sec. 1431(a) (1976 & Supp. II 1984).
22. 16 U.S.C. sec. 1431(b) (1976 & Supp. II 1984).
23. 16 U.S.C. sec. 1433(a) (1976 & Supp. II 1984). Prior to the 1984 amendments, designation required approval of the President. Pub. L. No. 92 32 (1972).
24. 16 U.S.C. sec. 1432(3) (1976 & Supp. I I 1984). The definition also includes the Great Lakes and their connecting waters. Title III originally provided for preservation of marine sanctuaries in ocean waters as far seaward as the limits of the U.S. continental shelf. Pub. L. No. 92 32, 86 Stat. 1052 (1972).
25. 16 U.S.C. sec. 1432(5) (1976 & Supp. II 1984).
26. 16 U.S.C. sec. 1433(a)(2) (1976 & Supp. II 1984).
27. 16 U.S.C. sec. 1433(b)(1) (1976 & Supp. II 1984).
28. 16 U.S.C. sec. 1433(b)(2) (1976 & Supp. II 1984).
29. 16 U.S.C. sec. 1434(a) (1976 & Supp. II 1984).
30. 16 U.S.C. sec. 1434(a)(4), (b)(1) (1976 & Supp. II 1984).
31. 16 U.S.C. sec. 1434(b) (1976 & Supp. II 1984). The governor of a state may also disapprove any or all of that portion of a proposed marine sanctuary in state waters. As originally enacted, Title III of the MPRSA contained no legislative disapproval mechanism. The

1980 amendments, Pub. L. No. 96-332, 94 Stat. 1057 (1980) added one providing for a two house concurrent resolution which, apparently in response to the Supreme Court decision in I.N.S. v. Chadha, 462 U.S. 919 (1983), ruling one- and two-house legislative vetoes unconstitutional, was changed to require a joint resolution by the 1984 amendments.

32. 16 U.S.C. sec. 1437(b), (c) (1976 & Supp. II 1984). The Secretary of Commerce is responsible for enforcement. 16 U.S.C. sec. 1437(a) (1976 & Supp. II 1984).
33. 16 U.S.C. sec. 1435(a) (1976 & Supp. II 1984).
34. 16 U.S.C. sec. 1435(b) (1976 & Supp. II 1984).
35. 15 C.F.R. secs. 922.1 - .40 (1985).
36. 15 C.F.R. sec. 922.20 (1985). The final Site Evaluation List was published. 48 Fed. Reg. 35,568 (1983).
37. 15 C.F.R. sec. 922.30 (1985).
38. 15 C.F.R. sec. 922.31 (1985).
39. After a designation becomes effective and where essential to prevent immediate serious and irreversible damage to the resources of a sanctuary, activities other than those listed in the designation may be regulated, consistent with the MPRSA, on an emergency basis not to exceed 120 days pending amendment. 15 C.F.R. sec. 922.31(h) (1985).
40. 15 C.F.R. sec. 922.10 (1985). I would note that both this and the statutory language are in essence savings clauses designed to ensure that implementation of the Marine Sanctuary Program comports with United States law of the sea and freedom of navigation interests. The language must, however, be interpreted and applied in individual cases and regulations governing specific sanctuaries.
41. Pub. L. No. 95 32, 86 Stat. 1052 (1972).
42. *Id.*
43. 48 Fed. Reg. 10,605 (1983), 19 Weekly Comp. Pres. Doc. 383-85 (Mar. 14, 1983).
44. The United States has also stated that it regards Part XII of the UN Convention on the Law of the Sea as satisfactory and that outside of Part XI, the Convention generally reflects customary international law. The question for the future is how the United States will integrate its additional coastal state jurisdiction for protection of the marine environment with its navigational interests. This question is not entirely new.
45. 15 C.F.R. sec. 924 (1985).
46. 15 C.F.R. sec. 924.3 (1985).
47. *See e.g.* Key Largo Marine Sanctuary Regulations, 15 C.F.R. sec. 929.7(a), (d) (1985).
48. Under the Port and Tanker Safety Act of 1978, the Secretary of Transportation is responsible for regulating vessel traffic (including routing systems) in the territorial sea, but the act applies only to foreign vessels destined for a U.S. port and not to those engaged in innocent or transit passage, unless pursuant to *international treaty, convention or agreement to which the United States is party.* [emphasis added], 33 U.S.C. sec. 1223 (1976 & Supp. II 1984). In designating traffic separation schemes, the Secretary must consider the establishment or operation of marine sanctuaries.
49. Proposals were made in the course of the negotiation of this paragraph that the coastal state merely notify the organization.
50. MARPOL 73/78, *supra* note 4.

51. Letter from Geoffrey Grieveldinger, Attorney-Adviser, Department of State to Jack Archer, Attorney, Ocean Services, NOAA (Nov. 13, 1984).
52. Along these lines, the State Department also suggested that controls on vessel speed only be applied to foreign vessels while in the territorial sea in the sanctuary. *Id.* I understand that the La Parquera site is no longer being considered for designation in response to Puerto Rican views.
53. 49 Fed. Reg. 30,988 (1984).
54. Letter from Congressman Soloman P. Ortiz to Peter Bernhardt, Office of Ocean Law and Policy (Feb. 7, 1984). Letter from William Stele and Dan Ashe, House Committee on Merchant Marine and Fisheries to Scott Hajost and Geoffrey Grieveldinger, Office of the Legal Adviser, Department of State (Feb. 15, 1984).
55. 50 C.F.R. sec. 638.22 (1984).
56. 49 Fed. Reg. 30,991 (1984).
57. 49 Fed. Reg. 30,990 (1984), 49 Fed. Reg. 19,096 (1984), quoting from letter from Edward E. Wolfe, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs to Dr. Nancy Foster, Chief, Sanctuary Programs Division, NOAA (Apr. 19, 1984).
58. *Id.*
59. I would note, however, that the Department of State Communication to NOAA quoted in part in the Flower Garden Banks Federal Register notices specificallly suggested not to rely solely on port state authority as an enforcement device. *Id.* This seems prudent in attempting to avoid a precedent which others might unilaterally use to load numerous and burdensome restrictions onto the port state access concept.
60. 15 C.F.R. sec. 929 (1985). The Key Largo Marine Sanctuary was designated in 1975 to provide protection to a 100 square mile coral reef area south of Miami, Florida.
61. 15 C.F.R. sec. 929.7(a)(1), (6)(I) (1985).
62. 15 C.F.R. sec. 929.7 (1985). The United States and Cyprus are not party to any agreement specifically authorizing application of such penalties for the violation in question outside the U.S. territorial sea.
63. United States v. M/V Wellwood, No. 84-1888 (S.D. Fla. Aug. 10, 1984).
64. *Id.*
65. 50 Fed. Reg. 2,703 (1985).
66. The International Maritime Organization had adopted more than one resolution dealing with vessel routing which provide for areas to be avoided on, *inter alia*, environmental grounds.

DISCUSSION

Choice of Jurisdictional Basis for Environmental Protection

Edgar Gold: I was happy to hear now that the United States is still a coastal state and has coastal state interests, and does take an *a la carte* approach to the Law of the Sea Convention like other states.

Mr. Hajost, if you have a straightforward grounding of a foreign vessel accompanied by pollution, doesn't Article 220 apply? It is a difficult article but nevertheless is, I think, applicable and would allow the coastal state to take action against the foreign vessel. I am confused that you exerted offshore jurisdiction over the foreign vessel for damage that occurred in the exclusive economic zone. I think jurisdiction could easily be asserted under the Civil Liability Convention[1] or the Fund Convention[2] if the United States were a party to them and I believe the United States is very close to becoming a party.

Scott Hajost: The United States did sign protocols to the Civil Liability and the Fund Conventions but is not yet a party to them. We intend to proceed towards ratification. But in this case we considered it a question of physical or resource damage to the coral reef as compared to pollution damage, and that is the distinction.

Thomas Clingan: Scott, why did you rely on Articles 56 and 59, which were designed for the water column and not the continental shelf, as sources of jurisdiction in this case? Are you avoiding the continental shelf because *United States v. Alexander*,[3] held that regulations to protect coral reefs must relate to the exploration and exploitation of the shelf? Is the government interpretation of resource jurisdiction broader than was possible under the 1958 Convention?

Hajost: There is no intention to avoid the continental shelf provision. I simply articulated a couple of different theories. In the papers that have been filed with the court in opposition to the motions, we refer more than once to the 1958 conventions and to continental shelf jurisdiction. And *United States v. Alexander* may present a problem, but putting the economic zone and the continental shelf provisions together made it easier for the government to make its argument in this case.

William Burke: My general comment is that the conclusions of the paper seem to me to be very reasonable ones. The alternatives that you mention as a jurisdictional basis sort of remind one of killing flies with a shotgun. There could be a lot likely to get damaged in the process.

But I am curious. You mentioned Article 194(5) as applicable to marine sanctuaries but apparently do not believe it is applicable specifically to the Flower Gardens Bank assertion by the United States. I do not understand why if it is applicable to marine sanctuaries generally it is not also applicable to this marine sanctuary.

Hajost: We found it difficult to conclude that anchoring constituted the form of pollution anticipated in the Article 194(5) definition of pollution.

Burke: But an anchor at the bottom works its harm by energy, which is specifically included in the definition of pollution (Article 1(1)(4)).

Hajost: I recognize that such an argument could be made, but we have chosen not to make that particular argument.

Burke: Then why do you insist on using the shotgun? You run all kinds of risks with your arguments, particularly the port state jurisdiction argument which does not even meet the problem that you are talking about because you are dealing with vessels anchoring that may not enter the port. In addition, your interpretation could be used to justify all sorts of assertions of jurisdiction.

Hajost: Your comments are valid. Nonetheless, for better or worse, aware of these implications and taking into account the particular facts in this case, the United States decided that the impact could be limited and that these arguments were appropriate in this particular case.

Is Arbitration a Viable Alternative to Litigation?

Jon Van Dyke: In the *Wellwood* case (pages 294-95), the defense lawyers suggested that international arbitration might be more appropriate than litigation in the U.S. District Court to resolve the matter. What would be the U.S. position on that?

Hajost: I do not believe arbitration has been suggested, and I am not in a position to give you a good answer about arbitration. As a gut reaction, I would probably say we would not be too keenly disposed to it.

Jin Zu Guang: As far as environmental protection is concerned, there are many similarities between the United States and China because both are flag states and also coastal states. In recent years we too have come across serious marine pollution incidents, by foreign ships. Has the United States felt that it must depart from the principles of international law as found in the Law of the Sea Convention and the MARPOL regulations in order to protect its environment?

Hajost: In no way will the United States depart from international law, and my office and Peter Bernhardt's office are in the State Department to insure that such departures do not occur. There is always some danger that if regulations are drafted in the midst of a crisis, they may construe international law improperly. We are generally trying to limit the application of U.S. regulations that apply to foreign vessels to the territorial sea jurisdiction of the United States.

The Role of International Organizations in the Implementation Phase of the Convention

Bruce Harlow: The challenge presented by growing competition among users of the oceans remains difficult and vexing. Certainly it is

reflected in the extraordinary length of the 1982 Convention, which is probably 100 times longer than any previous convention involving maritime affairs. The successful negotiation of language is only a small step toward successful implementation of a regime. Most of the work lies ahead of us and the nations of the world.

Many complex implementation issues are yet to be resolved. There are many divergent views. Regardless of one's legal approach -- whether the Convention reflects customary law, whether it reflects emerging principles of customary law; whether it is in the nature of a contract that creates rights and duties applicable only to parties -- there is a movement toward implementation of the balances envisioned in the navigational provisions of this document. Perhaps this is because there is no viable alternative to gradual implementation of these balances.

The 1982 Convention provides a distinct and important role for international organizations such as the IMO, especially in environmental and pollution matters, traffic separation schemes, and navigational matters. The role of such organizations is to lend consistency and perhaps objectivity to the natural bias we all carry into the implementation phase. It is my hope that the IMO will play an important leading role during this challenging period.

Tripartite Legislative Process: Treaty, Supplementary Regulations, Voluntary Guidelines

Louis Sohn: The new legislative process is really a tripartite process. One part is treaty-making. Even an unratified treaty can provide guidelines for future action. Second, we have regulations supplementing a treaty. We now have more than 20 treaties which provide that after the basic treaty is signed, parties agree that a particular organization, such as IMO, ICAO, or WHO, can supplement the treaty by additional regulations. The regulations take effect on a certain date if approved by that date by a specified number of states and bind all states parties to the basic convention, except a state that has expressly said it does not want to be bound. So there is a rule of tacit acceptance softened by the right to exempt yourself. Because most governments do not pay enough attention to the subject, these regulations come into effect on a specified date. Usually by that time, out of 120 or 140 states, maybe five have objected to a particular article or portion of the regulations while accepting the rest.

A third part of the tripartite process involves guides and codes which are not binding in principle but very often are binding in fact. For instance, a code enacted on the transportation of dangerous goods becomes binding when Lloyd's or another big insurance group says it will not insure a ship that does not follow the guidelines.

Article 21(2) says that the laws of the coastal nation shall not apply to design, construction, manning, or equipment of foreign ships. But people forget there is a second clause saying that the coastal nation may have laws in these areas that give effect to generally accepted international rules or standards. And there are more of such rules and standards all the time and some are from organizations other than IMO. One of these sets of standards came about in 1976 because the International Labor Organization (ILO) said the seamen belonging to unions get into trouble if their ships are not safe. ILO then enacted a very elaborate convention on minimum standards in merchant ships involving construction, manning, qualifications of the captain, pilot, etc., under the guise of protecting the health and life of seamen. It is unclear

how IMO felt about this initiative and whether there was a cooperative effort in enacting this convention.

Thomas Busha: There were some problems at first between IMO and ILO in the 1976 minimum standards development. Oddly enough, these problems had to do with treaty law. The ILO wanted to include in their convention provisions that would impose the entire list of IMO treaties on the parties to the new ILO treaty, a matter to which we objected on the grounds that if they wanted to become parties to an IMO convention they would come to us and deposit instruments of acession. Otherwise the negotiation was done entirely with the greatest harmony between ILO and IMO.

How States Are Bound by IMO Treaties

The question of IMO's role in facilitating understanding between parties and nonparties opens a number of interesting features of treaty law, and of the institutional activity of the United Nations. It also goes to the matter of what are generally accepted standards in the world of the states where the treaty is a very important means of reaching consensus as well as binding one state to another. A very large debate may still take place as to whether the treaties of IMO will gain greater stature in the relations between parties to the 1982 Convention when it enters into force. Will, for instance, an IMO treaty like the International Convention for Safety of Life at Sea (SOLAS)[4] become binding upon states by virtue of their being parties to the 1982 Convention?

When an IMO convention is adopted and acquires the status of treaty law between X number of states, it enters into force, and is certainly at that point law between those states. The question of whether it is "generally accepted" must, however, remain open. But when the same treaty has been adopted by X plus Y states, it may become "generally accepted" or applicable in the terms of the Law of the Sea Convention. Its authority and applicability is greater because it has acquired those extra states as parties, not only the X and Y states but also the Z states, which are parties to the 1982 Convention but not at that juncture parties to the IMO convention. When you reach this point, ships of X, Y, and Z states will all be subject to the IMO convention by virtue either of being parties to that treaty or by being parties to the 1982 Convention.

Is it Necessary to Incorporate Law into the Treaty Form?

We are rapidly reaching the stage that the legislative process within international diplomatic conferences is more germane than the question of being party or not party to the resulting treaty. That may seem like a rather strange assertion, but the question was whether there might be a bridge between states that are parties and those that are not. Very definitely there are bridges in IMO, because there are some states that are not even members of IMO that may become parties to the conventions that IMO has promulgated. Until the 1982 Convention enters into force a great many of the standards and applicable law of the states in the maritime field will be developed out of the IMO forum. IMO has already produced most of the law relating to shipping, and that process may go on irrespective of the entry into force of the 1982 Convention. The institutional activity is what is of interest. IMO is more

and more frequently taking the view that it is not necessary to incorporate the law of the sea into treaty form.

One of the most interesting features of our own history is that the collision regulations, which for decades have been the absolute basis for shipping activity on the seas were not a treaty and created no relationship or obligation *inter se* between states. These regulations were annexed to the final act of previous conferences on the law of the sea. There was no need to regard them as raising rights and duties between states.

Similarly, we in IMO now often look for a means by which a set of guidelines, or something of that nature, may answer problems that would be lost in a morass of conflict and long-winded discussion if taken to a diplomatic conference. Perhaps the question of piracy may be approached with greater likelihood of successful solution by means that do not involve the creation of a treaty or treaties.

Harlow: An expectation of universal application arose in the world community as a result of the UNCLOS III discussions. A similar expectation was engendered in 1958, although certainly not all the nations of the world ratified the 1958 Conventions. And yet they established guidelines for a unified world system of expectations in the maritime environment. Many parties or signatories to the 1982 Convention take the position that universal ratification is critical to its becoming a "law-making" treaty. Certainly many people involved in UNCLOS III expected a "legislative" result that would result in a singular system of guidelines for the oceans. I do not think anyone expected there would be universal ratification. Notwithstanding, they did expect rules that would, as a practical matter, be universally applicable to the maritime community.

Busha: It should also be noted that UNCLOS III was also in part a codification conference. Not all by any means of the 1982 Convention is novel; so much was picked up from the 1958 Convention and from the customary law of the sea that the 1982 Convention might well be seen as being 88% established law anyway.

Harlow: Very true.

The IMO Bridges the Gap Between Commercial and Noncommercial Shipping Interests

Edgar Gold: IMO's role as a bridge between signatory and nonsignatory states is perhaps not as important as IMO's bridge between shipping and nonshipping, particularly shipping and coastal states. The motto of the organization of "Safer Ships and Cleaner Seas" should perhaps have been "Safer Ships and Cleaner Coasts" because, to some extent, clean coastlines are of greater concern.

Footnotes

1. International Convention on Civil Liability For Oil Pollution Damage, *done* at Brussels, Nov. 29, 1969, 9 I.L.M. 45 (1970).

2. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, *done* at Brussels, Dec. 8, 1971, 11 I.L.M. 284 (1972).
3. 602 F. 2d 1228 (5th Cir. 1979).
4. International Convention for the Safety of Life at Sea, *done* at London, June 17, 1960, 16 U.S.T. 185, T.I.A.S. No. 5780, 536 U.N.T.S. 27.

CHAPTER 7

NATIONAL SECURITY INTERESTS

Introduction

This chapter explores the effect of the Law of the Sea Convention upon flag and coastal state security concerns. Although the Convention largely preserves the status quo regarding freedom of navigation, maritime nations find themselves increasingly confronted with coastal states less willing to view foreign passage or presence as benign, either strategically or environmentally.

Louis Sohn's paper entitled *International Navigation: Interests Related to National Security* provides an overview of the areas of agreement and disagreement between coastal nations interested in safeguarding national territory and naval powers interested in mobility and accessibility. These controversies include access to ports, jurisdiction of the port state, prior notification, navigation within the territorial sea and the contiguous zone, regional and special security zones, and nuclear-free zones. The 1982 Convention clarifies rules of conduct in these areas only up to a point.

Professor Sohn suggests that special security zones are illegal but will nevertheless continue to be utilized. A nuclear-free zone is a "legal" security zone implemented by separate regional treaties. A separate section at the end of this chapter considers these treaties because they represent a hybrid between military and environmental security zones.

Security concerns differ in the North and in the South Pacific. The North Pacific is affected both by the proximity of the perceived military threat and a preoccupation with commercial and economic interests. The South Pacific, appears free from imminent military threat and recognizes mutual regional interests as witnessed by the South Pacific Nuclear Free Zone Treaty.

Choon-Ho Park addresses the prevalence and illegality of the North Pacific security zones. He highlights the economic nature and purpose of the zones and indicates that they are too important to be left to international law alone. Present fishery zones could become military security zones, raising the question whether rules can exist that govern both peacetime and wartime contingencies. And if the Law of the Sea Convention only implicitly recognizes the suspension of the rule of law during conflict, are gray areas left to unilateral interpretation? Are the North Pacific security zones disguised military zones, therefore unjustifiable without an ongoing conflict as in the Persian Gulf?

Professor Sang-Myon Rhee's paper, *Accommodating Conflicting Claims in the Northwest Pacific*, describes some important claims and the potential effects of the conflicts on international navigation, particularly possible interference with commercial and military SLOCs. He argues that it is to the advantage of all parties to the conflicts to settle claims amicably. Professor Rhee then provides specific suggestions for cooperative accommodation.

Morris Sinor points to an underlying, inherent lack of conflict -- a disguised identity of interests between flag and coastal states. He argues that no inherent conflicts exist between resource and security interests. Captain Sinor concludes that the objectives of crisis control -- containment, conflict resolution, and deterrence -- are best achieved by a positive, preventive military presence. Because this presence requires maintaining freedom of navigation, restrictions on transit engender instability and undermine deterrence. One model of the successful balance that can be achieved exists in the Gulf of Mexico. Harvey Dalton expands upon Captain Sinor's theme by highlighting exceptions to the Convention such as "creeping" jurisdiction and altered rules during armed conflict.

Camillus Narokobi argues that without the 1982 Convention for guidance, conflicts in archipelagic sealanes, party/nonparty issues, and issues of self-defense are subject to the dictates of the maritime powers. He compares warship and merchant vessel immunity and notes that Article 36 permits the "rerouting" of traffic in archipelagic sealanes. Mr. Narokobi also sketches the developing nations' view of U.S. policy and questions whether the United States is invoking rights without assuming attendant responsibilities. Many developing nations do not think much of customary international law, in part because they played no part in its development.

Jack Grunawalt characterizes the 1982 Convention as a blueprint that represents only the "starting point" for analysis because it is not yet in effect. In support he points to the International Maritime Organization as an entity outside the Convention employed to resolve ambiguity and conflict.

Bruce Harlow reiterates President Reagan's refusal to accept the seabed mining provisions of the Law of the Sea Convention. Admiral Harlow speaks of national interests in self-preservation and defense that exist apart from and independent of the Convention. Admiral Harlow further argues that results achieved from trade-offs in negotiation are applicable to the implementation phase of the Convention and that the United States did not forfeit its navigational rights by not signing the Convention. He also asks us to consider the practical aspect of neglecting the day-to-day reality of navigation issues.

Michele Wallace explores the views of the delegates to the UNCLOS III negotiating conference regarding the rights of warships in the EEZ. Does the ambiguous phrase "peaceful purposes" in Article 88 support those who claim that the negotiating style produced a flaccid provision? Or does the strength of that phrase lie in its broad grant of power to unilateral interpretation? The answer affects one's view of the numerous unilateral declarations made in reference to Article 88.

This chapter considers the pattern of both North and South Pacific and maritime versus coastal state issues and competing concerns within the context of the Law of the Sea Convention. One question is how much of what the maritime nations thought they had secured, regarding the freedom of navigation and passage, has eroded? Will inroads continue to be made both symbolically and in practical terms? Will the maritime nations be able to focus less on "uncertainty," resisting what some consider as inevitable, and work within the evolving patterns, as Dr. Craven suggests? In short, are there rocks and shoals ahead?

INTERNATIONAL NAVIGATION: INTERESTS RELATED TO NATIONAL SECURITY

Louis B. Sohn
University of Georgia Law School
Athens, Georgia

This paper is based on the assumption that the rules relating to navigation and closely related subjects embodied in the United Nations Convention on the Law of the Sea "generally confirm existing maritime law and practice and fairly balance the interests of all nations."[1] As the International Court of Justice pointed out, it could not ignore any provision of the Convention, "if it came to the conclusion that the content of such provision is binding upon members of the international community because it embodies or crystallizes a preexisting or emergent rule of customary law."[2]

The long negotiations leading to the achievement of a consensus on the navigational provisions and related issues established a balance between the interests of the coastal states and those of the traditional and new users of the oceans. That balance is reflected in particular in provisions relating to the sea lanes of communications (SLOCs). All international maritime traffic has at its beginning and terminal points the ports open to international navigation. Such traffic has to pass through the territorial seas and the exclusive economic zones of coastal states, through international straits and archipelagic sea lanes, and the vast areas of the high seas. In each of these spaces, the interests of the coastal states and those of the ocean-going ships differ to some extent, and their differences cannot always be avoided. International customary law has developed rules to mitigate and resolve such conflicts. The rule of thumb is that the closer a ship comes to land, the stronger is the control of the coastal state. Other principles or rules are contained in Article 59 of the United Nations Law of the Sea Convention and other relevant documents.[3]

Security Interests

It is necessary to consider two kinds of security interests: those of the coastal state, and those of the flag state. The coastal state is interested primarily in ensuring that foreign warships, and military airplanes (and perhaps missiles) do not threaten its national security. The origin of the territorial sea breadth of three miles can be traced to a large extent to the undesirability of foreign powers fighting their naval wars too close to a neutral state's shores. Gunfire interfered with

local shipping and sometimes even landed on the shore, wounding innocent third-party civilians and violating the national sovereignty of a neutral coastal state.[4] Spain went one step further and argued for a six-mile limit, so that belligerents' gunshots would not interfere with the coastal state's shipping (cabotage) in the three-mile zone.[5] With the extension of the range of coastal guns, by the end of the nineteenth century, proposals were made to extend this safety zone further, but because of opposition by the naval powers this idea was squelched,[6] with only Russia and a few other states insisting on a 12-mile zone.[7] By this time, of course, other interests of the coastal state came to the fore, especially the need to protect coastal fisheries from overexploitation by foreign vessels.[8] At present, the coastal state is interested in particular in avoiding any potentially threatening passage of foreign warships through its coastal waters, and its special concern is in not having too many foreign warships appear suddenly in these waters. Because of this concern, some states require advance notification and insist on the right to deny admission if a particular passage should appear inappropriate,[9] either because of the number of vessels involved or because the coastal state does not want warships of two powers unfriendly to each other to meet in its waters (e.g., Tunisia might be worried about several United States warships wanting to pass through its waters at the same time that several Libyan warships wish to pass in the opposite direction).

On the other hand, the major powers are interested primarily in mobility and accessibility, in being able to move their warships as expeditiously and as safely as possible to the point where they are needed. Any restrictions by the coastal state, such as regulations requiring either notification or special permission, are undesirable and sometimes may result in having to abort a mission or risk a confrontation. A state wants its navy to be able "to position itself at sea near foreign countries without entering the territory of friend or foe," and to move "forces and supplies past the coasts of other countries irrespective of their view of the mission."[10]

No wonder, therefore, that it might be difficult to frame the rules of international law on this subject in a way that would satisfy both sides. For countries like the United States there is the additional problem that it is not only an important naval power, but also a coastal state with important coastal interests. Some of the precedents the United States establishes through activities designed to protect its coastal interests may interfere with its naval interests, as they may prevent the United States from objecting to acts of other coastal states that are similar to prior United States acts.

This paper explores a few situations in which the rules regulating the relationships between the security interests of the naval powers and those of the coastal states have been clarified, in which the existing rules are causing difficulties, or in which there is disagreement whether the rules codified in the United Nations Law of the Sea Convention of 1982 are satisfactory.

Access to Ports

Foreign flag vessels may enter a port generally open to international commerce, but a government may restrict access for national security reasons. For instance, United States legislation allows the President to issue regulations governing the anchorage and movement of foreign flag vessels whenever he finds that "the security of the United States is endangered by reason of actual or threatened war, or invasion

or insurrection or subversive activity."[11] In 1950, President Truman issued an executive order in which he stated that "the security of the United States is endangered by reason of subversive activity," and prescribed various regulations under the above-mentioned statutory authorization.[12] Relying on this executive order, the Secretary of the Treasury issued additonal regulations, including those relating to the so-called Special Interest Vessel (SIV) Program. These regulations were classified in the interest of national security, and no list of ports to which they applied was published, nor any criteria for denying a vessel access to a port.

In 1980, the M/V Tropwave owned by a Swiss corporation, chartered to a Canadian corporation, subchartered to a Belgian corporation, and flying the flag of Singapore, tried to enter the port of Norfolk. It was denied access by the Coast Guard on the ground that its multi-national crew included a Polish master and Polish officers. The vessel was then diverted to Baltimore, where it discharged its Polish officers, and under different officers was permitted to return to Norfolk to load coal for transport to Spain. After loading, the vessel returned to Baltimore and reboarded its original officers. When the charterer and subcharterer sued the United States for damages caused by the Baltimore detours, the United States claimed that the action of the Coast Guard was "discretionary" and therefore immune from suit under the Suits in Admiralty Act,[13] but the court held that the Coast Guard's decision did not involve a choice between competing policy considerations but only the implementation of policy choices already made. The court concluded therefore that it was entitled to decide whether the Coast Guard officers acted arbitrarily and in violation of regulations in diverting this vessel, in view of the fact that other ships belonging to the same owners were allowed to call at Norfolk despite the presence on board of "communist bloc" officers. On the other hand, the court held that the decision to keep secret the details, and even the existence, of the SIV program was immunized by the discretionary function exception.[14]

The authority thus exercised by the United States to restrict access to ports for security reasons is different from that exercised under Article 25(3) of the Law of the Sea Convention, which allows a state to "suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security." Such suspension may not, however, discriminate "in form or in fact among foreign ships," and it can take effect only "after having been duly published." United States port restrictions discussed above were clearly discriminatory and were not published. Although this provision of the Convention might have been applied by analogy to ports also, it can be argued that it is not applicable to them because the right of innocent passage does not extend to ports or other internal waters.[15]

The recent Soviet Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters, Internal Waters and Ports of the USSR require foreign warships to obtain prior permission from the USSR Council of Ministers to "enter internal waters and ports of the USSR."[16] Article 12 (Rules and Traffic Separation Systems) provides that innocent passage of foreign warships through the territorial sea "for the purpose of traversing the territorial waters of the USSR without entering internal waters" is permitted only along specific "routes ordinarily used for international navigation." Article 12(1) identifies permissible routes for innocent passage through the Baltic Sea, the Sea of Okhotsk, and the Sea of Japan. These provisions appear to be inconsistent with the inter-

pretation of innocent passage that other nations share, which would allow unrestricted passage through the territorial sea, as long as the vessel is "innocent." Innocent passage of foreign warships "for the purpose of entering the internal waters or ports of the USSR or of putting out therefrom" is permitted only in the designated "sea lanes and traffic separation" systems or "along a route agreed in advance." The law authorizes the establishment within the territorial and internal waters of the USSR of areas "in which by decision of the competent Soviet agencies the navigation and sojourn of foreign warships is not permitted" and requires that the establishment of such areas be announced in the Notices to Mariners.[17] The law does not seem to distinguish between temporary and permanent restrictions.

Jurisdiction of the Port State

A ship in port (or other internal waters) is clearly subject to the concurrent jurisdiction of both the coastal state and the state of the ship's flag. The flag state continues to control the internal affairs of the ship involving its crew and passengers, while the coastal state is concerned only with crimes committed on board the ship when "they are of a serious character or involve the tranquility of the port" or affect persons other than the crew or passengers.[18] Foreign warships and other government ships operated for noncommercial purpose are entitled to soverign immunity when in port.[19]

Ships Navigating Through the Territorial Sea

Similarly, merchant and government ships operated for commercial purposes that are passing through the territorial sea are subject to the criminal jurisdiction of the coastal states only if a crime disturbs "the peace of the country or the good order of the territorial sea," or "if the consequences of the crime extend to the coastal State."[20] The jurisdiction of the coastal state is broader, however, if the ship is passing through the territorial sea after leaving a port or other internal waters of the coastal state;[21] in such a case the civil jurisdiction of the coastal state may also be extended to the vessel.[22]

Foreign warships and other governmental ships operated for noncommercial purposes are protected by sovereign immunity from interference by the coastal state. If a warship does not comply with the laws and regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance therewith, the coastal state may require it to leave the territorial sea immediately.[23] In addition, if a foreign warship or a noncommercial governmental ship causes any loss or damage by such noncompliance with coastal laws and regulations, its flag state bears international responsibility for compensating the coastal state for such loss or damage.[24]

Special difficulties have arisen in connection with submarines, which are required to navigate on the surface and to show the flag when in the territorial sea.[25] In particular, problems have been caused by Soviet submarines discovered lurking in waters of Sweden and Norway. In the most serious Swedish incident, a submerged Soviet submarine ran aground in a restricted area near a Swedish naval base. Only after the Soviet Union allowed Swedish officers to question the captain of the submarine and examine the navigation logs and an allegedly faulty compass, did a Swedish Navy tug tow the submarine to the 12-mile limit where it was relinquished to a waiting Soviet flotilla.[26] In an earlier incident, in Norway's Sogne Fjord near Bergen, the Norwegian Navy tried to persuade the suspected Soviet submarine to surface by dropping hand

grenades and, later, depth charges, but eventually permitted the submarine to leave the fjord, in order to avoid jeopardizing a forthcoming European security conference.[27] Soviet surface ships, ostensibly civilian, have also trespassed into restricted Norwegian waters, usually claiming shelter from bad weather. They retreated to the high seas when Norwegian gunboats approached.[28]

One of the major controversies at both the First and the Third United Nations Law of the Sea Conferences related to the right of coastal states to require prior notice of or authorization for the passage of foreign warships through the territorial sea.[29] The text adopted by the Third Conference contains no reference to prior notice or notification, and identifies specifically which activities by warships are not innocent; it allows coastal states to issue various regulations relating to innocent passage, provided they do not hamper such passage or impose requirements that would in fact deny or impair it.[30] The President of the Conference, in order to avoid a vote on the issue of prior notice or authorization, notified the Conference of the understanding of a group of states that the coastal states retain the right "to adopt measures to safeguard their security interests in accordance with articles 19 and 25 of the convention."[31]

At the time of signature of the Law of the Sea Convention, several states made declarations stating that the Convention recognizes the right of the coastal states to adopt measures to safeguard their security, including the right to adopt laws and regulations relating to innocent passage of foreign warships through their territorial sea. Some of these declarations refer to the statement by the Conference President, supposedly under the assumption that it authorizes such measures.[32] When ratifying the Convention, Egypt declared that warships "shall be assured innocent passage through the territorial sea of Egypt, subject to prior notification."[33]

The coastal state may also require certain foreign ships exercising the right of innocent passage through its territorial sea to use designated sea lanes and traffic separation schemes; when designating such lanes the coastal state is obliged to take into account the recommendations of the competent international organization (i.e., the International Maritime Organization). In particular, the coastal state may impose such sea lanes on tankers, nuclear-powered ships, and ships carrying nuclear or other inherently dangerous or noxious substances or materials.[34] Ships belonging to these categories (except tankers) are also obliged to carry documents and observe special precautionary measures established for such ships by international agreements. If a coastal state should require only ships carrying nuclear materials to use the designated sea lanes, a warship carrying nuclear weapons (which of course contain nuclear materials) would disclose this fact by using such a lane, or would violate the law by not using it. It is also quite likely that in order to identify in advance ships subject to these restrictions, the coastal state may require special notification or authorization to enter from ships in the designated categories.[35]

The authority of the coastal state with respect to the protection and preservation of the marine environment has been strengthened by the Law of the Sea Convention, but these provisions of the Convention do not apply to any warship, auxiliary craft, or other vessel or aircraft owned or operated by a state and used on government noncommercial service. States are required by Article 236, however, to ensure that such vessels and aircraft flying their flags will "act in a manner consistent, so far

as is reasonable and practicable," with the Convention's antipollution provisions.[36]

Contiguous Zone

In a zone contiguous to its territorial sea, extending up to 24 miles from the baseline from which the breadth of the territorial sea is measured, the coastal state may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.[37]

The idea of extending the coastal state's authority in the contiguous zone to issues of national security was rejected in 1956 by the International Law Commission, which considered that "the extreme vagueness of the term 'security' would open the way for abuses and that granting of such rights was not necessary," especially as the right to take measures of self-defense against an imminent and direct threat to the security of the coastal state was governed by general principles of international law and the Charter of the United Nations.[38] A Polish proposal at the First United Nations Law of the Sea Conference to include a reference to "violations of its security" in the list of prohibited activities in the contiguous zone did not obtain the necessary two-thirds vote.[39] Although the subject was mentioned from time to time in the Third Conference, no proposals for inclusion of "security" were actually made.[40]

Regional and Special Security Zones

Various states have attempted to establish special security zones over the years. After the outbreak of the Second World War, the Declaration of Panama, adopted at a meeting of the Foreign Ministers of the 21 American states, established as "a measure of continental self-protection," a zone of security extending in some places 300 miles from the shores of the continent. The belligerents were asked to refrain from committing hostile acts in that zone, but they refused to accept such an obligation in view of the unilateral character of the inter-American action. The American states did not try to enforce their declaration and limited themselves to protests against violations of the zone.[41] The Inter-American Treaty of Reciprocal Assistance drew similar lines around the Western Hemisphere, extending to both the North and South Poles and passing through the Atlantic and Pacific Oceans some 300 miles from shore. It provided that any armed attack within the region shall be considered an attack on all American states and will result in measures of collective self-defense.[42]

In the United States, legislation authorized the Secretary of the Army to establish danger zones and regulations therefor, and many such zones were created "in the interest of national defense" in both internal waters and the territorial sea, with some such areas also extending into the contiguous zone. These areas are being used by the various armed services for firing, bombing, strafing, gunnery and other military practice. The regulations for these areas are enacted by the Corps of Engineers, Department of the Army, and vary in scope from temporary to permanent duration and from complete prohibition against entry to all vessels at any time, except with specific military consent, to restrictions on navigation only at certain times or within certain sea lanes. Other regulations establish "restricted areas" in territorial waters, limiting uses of the waters in varying degrees to all vessels; they protect naval anchorages, are designed to keep unauthorized personnel away from certain governmental installations, or safeguard underwater

installations and oceanographic survey equipment. The President has also been authorized to establish "defensive sea areas," and more than 50 such areas have been established, discontinued, and re-established from time to time. In the 1940s, for instance, the President established 17 "Maritime Control Areas," some of which included areas of the high seas outside the United States territorial sea.[43] It is not clear how many areas within these various categories still exist and what restrictions now apply, because some restrictions are classified.

In 1962, the United States established a "strict quarantine on all offensive military equipment under shipment to Cuba," under which all ships carrying to Cuba "cargoes of offensive weapons" were to be turned back.[44] The Council of the Organization of American States, acting as Provisional Organ of Consultation under the Inter-American Treaty of Reciprocal Assistance,[45] recommended that the member states take all measures, including the use of armed force "to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military materials and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent."[46] On the basis of this authorization, President John F. Kennedy issued a proclamation authorizing: the interception of any vessel proceeding toward Cuba, for the purpose of identifying it and its cargo; visit and search of any such vessel; directing it, if carrying prohibited material, to proceed to another destination; and taking it into custody if it fails or refuses to obey such direction.[47] The Soviet Union objected to this "naval blockade," and accused the United States of engaging in "piracy,"[48] but nevertheless Soviet vessels did not challenge the legality of the U.S. proclamation. Other vessels, after search which revealed no prohibited weapons, were allowed to proceed to Cuba. After an exchange of messages between the United States and Soviet governments, the Soviet Union agreed to remove the missiles and bombers from Cuba, and the United States terminated the interdiction of deliveries to Cuba.[49]

Various security zones extending beyond the territorial sea have also been established by other countries. For instance, China established a Military Warning Zone in the 1950s, extending at some points more than 50 miles offshore, and such zones were established by Vietnam in 1977 (24 miles), North Korea also in 1977 (50 miles), and South Korea in the 1970s (150 miles in the Sea of Japan and 100 miles in the Yellow Sea).[50] In 1952, the United Nations Command in Korea established a 100-mile zone to safeguard the Korean coastline, prohibiting fishing by Japanese fishermen but putting only militarily necessary restrictions on neutral vessels in transit through that zone.[51]

In 1973 Libya claimed the waters of the Gulf of Sidra (or Sirte) out to 100 miles as a maritime security zone or "restricted area," and later changed its claim to that of historic waters. Neither claim was recognized by the United States.[52] In 1985, the United States protested new Libyan regulations that restricted innocent passage through the Libyan territorial sea of noncommercial vessels, allowed daytime passage only and prohibited such passage permanently through three special zones.[53]

In 1983, Nicaragua declared a 25-mile naval and air security zone, requiring foreign warships and military planes to ask permission to enter it 15 days in advance, and requiring civilian craft to seek such permission a week in advance.[54] (When Nicaraguan harbors were mined in 1985, resulting in damage to several foreign merchant ships, and Nicaragua

accused the United States of this action, several governments protested directly to the United States Government.)[55]

The war between Iran and Iraq, which started in 1980, has escalated over the years and has spread to foreign shipping in the Persian Gulf, as each side has tried to disrupt its opponent's trade and destabilize its economy. Since April 1984, many tankers have been attacked, damaged, or sunk, affecting not only the two belligerents but also other oil-producing Gulf states, as well as the oil-consuming states.[56] In 1984, the Arab states on the Western shore of the Gulf established the Persian Gulf Protected Shipping zone; and the Gulf Cooperation Council, of which these states are members, agreed to arrange for protective patrols by vessels and planes of Saudi Arabia and other member states.[57] In June 1984, the Security Council of the United Nations adopted a resolution condemning the attacks on merchant shipping, demanded that they be ended and that, in particular, there be no interference with shipping to and from the countries not parties to the conflict. It also reaffirmed the right of free navigation in international waters.[58]

In January 1984, the United States asked that the International Civil Aviation Organization (ICAO) distribute a Notice to Airmen (NOTAM) for the Persian Gulf and the related sea areas, informing pilots that aircraft flying at less than 2,000 feet and not cleared for approach to or departure from a regional airport must "avoid approaching closer than five nautical miles to U.S. naval forces operating in the area" and, when approaching that distance, should "maintain radio contact with U.S. naval forces on specified frequencies." Should an aircraft whose intentions were unclear to U.S. naval forces enter the forbidden area, it "might be held at risk by their defensive measures." This notice was justified by "hazardous operations [that] are being conducted on an unscheduled basis." It was made clear that there is no intention to "affect the freedom of navigation of any individual or state." A United States naval forces were operating in the Persian Gulf and its vicinity and were "taking additional defensive precautions against terrorist threats," and warned ships in the area to identify themselves before approaching the U.S. naval forces closer than five nautical miles. If they come closer without making prior contact and identifying themselves, or if their intentions are unclear, they "may be held at risk by U.S. defense measures." It was further explained that the United States will act only in self-defense, and that the measures taken were to be implemented "in a manner that does not impede the freedom of navigation of any vessel or state." When Iran asserted that these activities did not comport with international law, the United States rejected this protest claiming that the "proedures adopted by the United States are well established and fully recognized in international practice on and over international waters and straits.[59]

When Argentina occupied the Falklands (Malvinas) on April 2, 1982, the Security Council immediately called for the withdrawal of Argentine forces from the islands and for a cessation of hostilities.[60] To stop the flow of Argentine reinforcements to the islands, the United Kingdom established a maritime exclusion zone around the islands within a 200-mile radius, threatening to sink any Argentine ship entering the zone, and sent a fleet to the South Atlantic to recover the islands "in the exercise of the inherent right of self-defense." At the end of April, the United Kingdom proclaimed a total exclusion zone, banning the ships of all nations from the 200-mile zone around the islands. The Soviet Union protested the scope of the zone, considering it a violation of the 1958 Convention on the High Seas. Argentina responded with the creation

of its own 200-mile zone, extending from Argentina and all the contested islands in the South Atlantic, in which all British ships and aircraft, whether military or civil, including even fishing vessels, were to be considered as "hostile and treated accordingly." The United Kingdom responded on May 7, 1982, by announcing that it would treat as hostile any Argentine warship or plane found more than 12 miles from the mainland. Several Argentine and British vessels were sunk, and the hostilities ended with the British reoccupation of the islands and the surrender of Argentine forces.[61]

Nuclear-Free Zones

Nuclear-free zones and nuclear-weapons-free zones are common today and more are likely to come into existence.[62] The Antarctic Treaty,[63] and the Seabed Arms Control Treaty,[64] and the Latin American Nuclear-Free Zone Treaty[65] (Tlatelolco Treaty) all prohibit the introduction of nuclear weapons into the protected zones.[66] Of concern to the United States is whether these prohibitions have any effect on the free navigation of nuclear-powered ships or ships carrying nuclear weapons in the protected zones.[67] When the United States ratified the Additional Protocols I and II to the Tlatelolco Treaty,[68] the ratifications were accompanied by several understandings, including the following: that the provisions of the treaty do not affect the exclusive right of any state to grant or deny transit and transport privileges to its own or any other vessels or aircraft irrespective of cargo or armaments; and that those provisions of the treaty applicable to parties to the protocol do not affect the rights under international law of a state adhering to the protocol regarding the exercise of freedom of the sea, or regarding passage through or over waters subject to the sovereignty of a state.[69]

The Seabed Arms Control Treaty forbids the emplacement of nuclear weapons beyond 12 nautical miles from the coastal state. It seems implicit that nuclear weapons can be placed by the coastal state, or with its permission, within the 12 nautical miles limit.[70] This treaty does not affect freedom of navigation.[71]

Nuclear-free zones might affect port calls of nuclear-powered ships, but even without a nuclear-free zone there might be difficulties with port calls of such ships.[72] The United States provided for the port calls of the U.S. Savannah through bilateral Nuclear Ship Agreements.[73] These agreements do not apply to nuclear powered warships.[74] The regulations adopted under the International Convention for the Safety of Life at Sea and those adopted by the International Atomic Energy Agency also exclude nuclear-powered warships from their coverage.[75] The United States allows foreign nuclear-powered warships into U.S. ports without special agreement, because it recognizes the sovereign nature of warships.[76]

The vast area of the South Pacific is especially important to the U.S. Navy,[77] particularly in light of recent developments. On August 7, 1985, the 40th anniversary of the atomic bombing of Hiroshima, eight Pacific nations approved a treaty declaring the South Pacific to be a nuclear-free zone. The treaty prohibits acquiring, manufacturing, or receiving any nuclear explosive device in the zone.[78] The treaty was conceived in 1984 at the South Pacific Forum; other countries are expected to add their approval soon.[79]

The treaty is not solely concerned with nuclear weapons, but also attempts to control other types of nuclear activity.[80] Its coverage is more extensive than that of the Tlatelolco Treaty, as it seems to forbid the disposal of nuclear waste at sea and on land.[81]

The South Pacific was nuclear-free to a large extent even before the Treaty. There is no direct nuclear presence there, and the states concerned want it to remain that way. As David Lange, the Prime Minister of New Zealand, has said: "Once in place, the [South Pacific Nuclear Free Zone] will help keep the South Pacific free, as it is now, of strategic confrontation."[82] This region is important to the nuclear weapons programs of both the United States and France. The French test their weapons at Mururoa Atoll,[83] and, although the United States has ceased testing nuclear weapons in the Pacific, it retains leases for various purposes on some Pacific islands and maintains defense communications posts in Australia.[84]

The continuing French nuclear-weapon tests have been a primary reason why South Pacific states have promoted the concept of a nuclear free zone.[85] The treaty bans tests by the parties to the treaty only, but it is hoped that united opposition to all nuclear tests will influence the French government. The treaty does not affect the transit of nuclear-powered or nuclear-armed ships; it states that: "Nothing in this treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to freedom of the seas."[86] Admiral Crowe, while serving as Commander-in-Chief of U.S. Pacific forces, stated in late 1984 that the United States would give support to the treaty only if certain conditions were met. In particular, he emphasized that the principles of freedom of navigation of the high seas and the right of innocent passage through territorial seas cannot be contravened.[87] The United States is likely to accept the protocols to this treaty,[88] which are similar to those accompanying the Latin American Nuclear-Free Zone Treaty.[89]

Each country under the Treaty can choose for itself whether to admit nuclear-powered warships into port. Vanuatu and New Zealand have both declared that they have closed their ports to nuclear-powered ships.[90] In February 1985, New Zealand denied entry to the U.S. destroyer *Buchanan*.[91] This action has caused a rift in United States relations with New Zealand and affects the ANZUS treaty.[92] New Zealand has decided not to allow port calls by U.S. warships unless assurance is given that the ships are not nuclear-powered nor carrying nuclear weapons. The U.S. Navy has a policy of never giving such assurance, and so the two countries have reached an impasse.[93]

Conclusions

The issues discussed in this paper are only a selection from a longer list. Questions of national security permeate the 1982 Law of the Sea Convention, and many conflicts are likely to arise concerning its interpretation and the underlying question whether it accurately reflects the present customary law of the sea. It is rather discouraging that the United States has no access at this time to the elaborate dispute settlement provisions of the Convention.

Footnotes

1. United States Ocean Policy, Statement by the President of the United States, 19 Weekly Comp. Pres. Doc. 383-85 (March 14, 1983); 22 I.L.M. 464 (1983).

Similarly, France declared on signing the convention that its provisions relating to the status of the different maritime spaces and to the legal regime of the uses and protection of the marine environment confirm and consolidate the general rules of the law of the sea and thus entitle the French Republic not to recognize as enforceable against it any foreign laws or regulations that are not in conformity with those general rules. 5 UN Law of the Sea Bull. 11 (July 1985).

2. Case Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 38. *See also* Sohn, *The Law of the Sea: Customary International Law Developments*, 34 Am. Univ. L. Rev. 271-80 (1985). *But see* Caminos and Molitor, *Progressive Development of International Law and the Package Deal*, 79 Am. J. Int'l L. 871, 887-90 (1985) (only some provisions of the Convention have achieved customary law status); and the reply by Harlow, *id.*, at 1037 0.

   According to a declaration made by Iran on signing the Convention:

> Notwithstanding the intended character of the Convention being one of general application and of law making nature, certain of its provisions are merely product of *quid-pro-quo* which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character. Therefore, it seems natural and in harmony with article 34 of the Vienna Convention on the Law of Treaties, that only States parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein.

   According to this declaration, these considerations apply in particular to: the right to transit passage through straits used for international navigation; the notion of the Exclusive Economic Zone; and all matters regarding the International Seabed Area and the concept of Common Heritage of Mankind. (5 UN Law of the Sea Bull. 13, 14 (July 1985).

3. Article 59 provides that conflicts between the interests of the coastal state and any other state should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole. Although this provision is applicable primarily to conflicts relating to the exclusive economic zone, it reflects a general principle. For text of the United Nations Convention on the Law of the Sea, *signed* at Montego Bay, Jamaica, on December 10, 1982, see UN Sales No. E.83.V.5 (hereafter cited as the Law of the Sea Convention).
4. As the U.S. Secretary of State Thomas Jefferson stated in 1793, the United States was entitled to as broad a margin of protected navigation as any nation whatever. 6 The Writings of Thomas Jefferson 440 42 (1895 ed.). *See also* 1 J. Moore, *Digest of International Law* 702-06 (1906); Walker, *Territorial Waters: The Cannon Shot Rule*, 22 Brit. Y.B. Int'l L. 210 (1945).
5. *See* 1 Moore, *supra* note 4, at 706-14.
6. *See* 3 G. Gidel, *e droit internaitonal de la mer* 153-92 (1934).
7. *See, e.g.*, with respect to Russia, C. Meyer, *The Extent of Jurisdiction in Coastal Waters* 239 (1937).

8. For a survey of the practice of various states with respect to fisheries in coastal waters, *see* S. Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942).
9. *See* the discussion in the International Law Commission [1955], 1 Y.B. Int'l L. Comm'n 142 1, UN Sales No. 60.V.3, vol. I. *See also* the Commission's report [1956], 2 Y.B. Int'l L. Comm'n 253, 276-77, UN Sales No. 1956.V.3, vol. II.
10. Richardson, *Power, Mobility and the Law of the Sea*, 58 Foreign Aff. 902, 908 (1979-80). *See also* statements by Hedley Bull and Admiral Gorshkov (USSR) *cited in id.* at 907, 910-11.
11. 50 U.S.C. 191 (1976 & Supp. III 1984).
12. Exec. Order No. 10,173, 3 C.F.R. sec. 356 (1949-53 Comp.).
13. 46 U.S.C. secs. 741-752 (1976 & Supp. III 1984).
14. Canadian Transport Co. v. United States, 663 F.2d 1081, 1084, 1087-88, 1091 (D.C. Cir. 1980).
15. *Cf.* Law of the Sea Convention, *supra* note 3, art. 8(2). Concerning the difference between internal waters, including ports, and the territorial sea, *see, e.g.*, Bishop and Sahovic, *The Authority of the State: Its Range With Respect to Persons and Places*, in *Manual of Public International Law* 311, 335 (M. Sorensen, ed., 1968); I. Brownlie, *Principles of Public International Law* 123 (3d ed., 1979).
16. Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) of the USSR and the Internal Waters and Ports of the USSR, confirmed by Decree of the USSR Council of Ministers, No. 384 (Apr. 28, 1983), art. 15, *reprinted in* W. Butler (ed.), *The USSR, Eastern Europe and the Development of the Law of the Sea*, Booklet C.2 at 8 (May 1986), 24 I.L.M. 1715, 1718 (1985).
17. *Id.*, art. 6, Butler at 4, 24 I.L.M. at 1716.
18. *See, e.g.*, the Consular Convention between the United States and the United Kingdom *done* in Washington, June 6, 1951, art. 22(2), 3 U.S.T. 3426, T.I.A.S. No. 2494, 165 U.N.T.S. 121. *See also* the Wildenhus' Case, 120 U.S. 1 (1887).
19. *See* Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812); 2 G. Hackworth, *Digest of International Law* 408 (1941); statement by Vice Admiral Colclough, U.S. Delegate to the 1958 Conference on the Law of the Sea, *reprinted in* 6 M. Whitemen, *Digest of International Law* 553 4 (1968). *See also* Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, *signed* at Brussels, April 10, 1926, art. 3; for text of this convention, *see* 176 L.N.T.S. 199 and 3 M. Hudson, *International Legislation* 1837 (1931) (the United States is not a party to this convention).
20. Law of the Sea Convention, *supra* note 3, art. 27(1).
21. *Id.*, art. 27(2).
22. *Id.*, art. 28(3).
23. *Id.*, art. 30.
24. *Id.*, art. 31.
25. *Id.*, art. 20.
26. *See* Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, 21 San Diego L. Rev. 625, 626-28. *See also* Times (London), Nov. 3, 1981, at 2, col. 4; *id.*, Nov. 4, 1981 at 1, col. 6; *id.*, Nov. 7, 1981, at 4, col. 4; Newsweek, Nov. 16, 1981, at 48. With respect to more than forty other incidents in Swedish territorial sea, *see* Froman, *supra.*, at 627 n. 11, and at 680-83.

27. *See* N. Y. Times, Nov. 26, 1972 at 3, col. I; *id.*, Nov. 28, at 12 col. 2. The Norwegian navy was later authorized to bring alien submarines to the surface by using all necesary force regardless of potential danger to the submarine and its crew. *See* the Norwegian guidelines cited in Froman, *supra* note 26, at 685. Froman reports several other incidents in Norwegian waters. *Id.* at 684-88.
28. *See* Time Magazine, Aug. 7, 1978.
29. *See* Froman, *supra* note 26, at 634-36, 637 4 (listing in note 66 some 30 states supporting in 1980 an amendment permitting a prior notice or authorization requirement); *see also* notes 65 and 118.
30. Law of the Sea Convention, *supra* note 3, arts. 19, 21 and 24.
31. UN Doc. A/CONF.62/SR.176, para. 1 (1982); 16 UNCLOS III, Off. Rec. 132 (UN Sales No. E.84.V.2).
32. *See* the statements of: Cape Verde (referring to Articles 19 and 25 of the Convention, and the declaration by the President of the Conference, and dealing also with innocent passage through archipelagic waters); Finland and Sweden (continuation of the present regime for the passage of foreign warships and other state-owned vessels used for noncommercial purposes which requires notification and in some cases permission); Iran (relying on customary international law and Articles 19, 21 and 25, and mentioning expressly the requirement of prior authorization); Oman (referring to Articles 19, 25, 34, 38 and 45, and mentioning protection of its interest in peace and security, but omitting any reference to warships); Romania (similar to Cape Verde's declaration, but omitting reference to archipelagic waters); Sao Tome and Principe (referring to archipelagic waters); and Sudan (relying on President's statement). For the texts of these statements, *see* United Nations, *The Law of the Sea: Status of the United Nations Convention on the Law of the Sea* 12-26 (UN Sales N E.85.V.5; 1985) (hereinafter cited as *Status of the Convention*).
33. *Id.*, at 34, 35.
34. Law of the Sea Convention, *supra* note 3, art. 22.
35. When ratifying the Law of the Sea Convention, Egypt declared that, pending the conclusion of international agreements establishing, in accordance with article 23, precautionary measures for nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances, Egypt will require such ships to obtain authorization before entering the territorial sea of Egypt. For text of the declaration, *see Status of the Convention*, *supra* note 32, a 34, 35. Similarly, Yemen declared, when signing the Convention, tha prior agreement must be obtained by any nuclear-powered craft, as well as warships and airplanes in general, before passing through its territorial waters, in accordance with the established norm of general international law relating to national sovereignty. *Id.* at 29.
36. For a comment on this provision, *see* Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 Va. J. Int'l L. 809, 820-21 (1984).
37. Law of the Sea Convention, *supra* note 3, art. 33.
38. [1956] Y.B. Int'l L. Comm'n 294. Already in 1930, the United Kingdo delegation to the 1930 Hague Conference for the Codification of International Law considered the need for a formula recognizing the legitimate right of a State to repel attack or defend itself against imminent danger threatening outside territorial waters. *See* Lowe, *The Development of the Concept of the Contiguous Zone*, 52 Brit. Y.B. Int'l L. 109, 132 (1981).

39. 2 [First] UN Conf. on Law of the Sea, Off. Rec. 40 (UN Sales No. 58. V.4, vol. II). Sir Gerald Fitzmaurice has expressed an opinion that the Conference rejected security zones on the theory that it would always be open to the coastal state to take such measures as might be necessary to protect its security. Fitzmaurice, *The Territorial Sea and Contiguous Zone and Related Topics*, 8 Int'l & Comp. L.Q. 73, 113 (1959). *See also* Fell, *Maritime Contiguous Zones*, 62 Mich. L. Rev. 848, 854 6 (1964); Leiner, *Maritime Security Zones: Prohibited Yet Perpetuated*, 24 Va. J. Int'l L. 967, 980-83 (1984).
40. With respect to the protection of national security in the territorial sea, *see* Oxman, *supra* note 36, at 854 5.
41. 7 G. Hackworth, *Digest of International Law* 702-09 (1943).
42. *Signed* at Rio de Janeiro, September 2, 1947; *published in* 62 Stat. 1681; T.I.A.S. No. 1838; 4 Bevans 559; 21 U.N.T.S. 77 (hereinafter cited as the Rio Treaty).
43. With respect to danger zones, *see* 33 C.F.R. sec. 204 (1985), and concerning other restricted areas, *see id.* sec. 207 (in the 1985 edition these two sections extend over 150 pages); for a list of naval defensive sea areas, *see* 32 C.F.R. sec. 761.3(a) (1985), *See also* 4 M. Whiteman, *Digest of International Law* 388-90, 496-97 (1965); MacChesney, *Situations, Documents and Commentary on Recent Developments in the International Law of the Sea* 603-07 (Naval War College, International Law Situation and Documents, Vol. 51 (1957)). For a discussion of the constitutionality of defensive sea areas, *see* Feliciano v. United States, 297 F.Supp. 1356 (D.Puerto Rico, 1969), *aff'd*, 422 F.2d 943 (1st Cir., 1970), *cert. denied*, 400 U.S. 823 (1970).
44. Address by President Kennedy, October 22, 1962, 47 Dep't of State Bull. 715 (1962).
45. Rio Treaty, *supra* note 42.
46. 47 Dep't of State Bull. 722 (1962).
47. 27 Fed. Reg. 10,401 (1962); 47 Dep't of State Bull. 717 (1962).
48. Statement by Soviet Government, October 23, 1962, UN Doc. S/5186 (1962); 17 SCOR, Supp. Oct.-Dec. 1962, at 149 4.
49. 47 Dep't of State Bull. 740 6, 762, 874-75, 918 (1962). For a description of the quarantine, *see* Christol, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962*, 57 Am. J. Int'l L. 525 (1963). For a discussion of the legality of the quarantine, *see* Meeker, *Defensive Quarantine and the Law*, *id.* at 515; Q. Wright, *The Cuban Quarantine*, *id.* at 546; and comments by Fenwick, MacChesney, and McDougal, *id.* at 588, 592, 597. *See also* the comments by Barnet, Q. Wright, Chayes, Acheson, and others, in 57 Proc. Am. Soc. Int'l L. 1-18 (1963).
50. For information on these three zones, *see* Park, *The 50-Mile Military Boundary Zone of North Korea*, 72 Am. J. Int'l L. 866-75 (1978). *See also National Advisory Committee on Oceans and Atmosphere. The Exclusive Economic Zone of the United States: Some Immediate Policy Issues* 32 (a special report to the President and to Congress, 1984) (according to the Committee, such areas are inconsistent with the LOS Convention).
51. *See* Park, *supra* note 50, at 872.
52. 1973 *Digest of U.S. Practice in International Law* 302-03 (1974), *id.* at 293-94. With respect to a 1981 incident, *see* N.Y. Times, Aug. 20, 1981, at A1, col. 4. *See also* Leiner, *Maritime Security Zones*, 24 Va. J. Int'l L. 967, 986-88 (1984).
53. 6 UN Law of the Sea Bull. 40 (Oct. 1985).

54. Wash. Post, Oct. 24, 1983, at 1, col. 4. For prior clearance requirements, *see* Nicaraguan 1981 Circular, cited in U.S. Dept. of State, National Claims to Maritime Jurisdiction 128 (Limits in the Seas Series, No. 36, 5th rev., 1985).
55. International Court of Justice, Memorial of the Government of Nicaragua, April 30, 1985, para. 481.
56. According to a report of the UN Secretary-General in the last seven months of 1984 there were 42 attacks on merchant shipping in the Gulf region. UN Doc. S/16877/Add.1 (1985), *summarized in* 22:1 UN Chronicle 14 (1985).
57. *See* N.Y. Times, May 29, 1984, at A1, col. 6.
58. Security Council Resolution 552 (1984), June 1, 1984. For a summary of the debate preceding the adoption of this resolution, *see* 21:5 UN Chronicle 5-10 (1984).
59. For a summary of these notices and the United States-Iran correspondence, *see* Leich, *Contemporary Practice of the United States Relating to International Law*, 78 Am. J. Int'l. L. 884-85 (1984).
60. 19:5 UN Chronicle 5 (1982).
61. 19:6 *Id.* 34-37; 19:7 *id.* 18-23. *See also* Leiner, *supra* note 52, at 989-91; Craig, *Fighting by the Rules*, 37:3 Naval War College Rev. 23-27; N.Y. Times, April 8, 1982, at A1, col. 4; *id.*, May 3, 1982, at A1, col. 4; *id.*, May 8, 1982, at A1, col. 4.
62. *See* Comprehensive Study of the Question of Nuclear-Weapons-Free Zones in All Its Aspects, Special Report of the Conference of the Committee on Disarmament, UN Doc. A/10027/Add.1 (1976); 1976 World Armaments and Disarmament: SIPRI Y.B. 297-306; 1982 *id.* 75-93 (Nordic zone). *See also* Buzan, *Naval Power, the Law of the Sea, and the Indian Ocean as a Zone of Peace*, 3 Marine Policy 194 (1981); Fry *Toward a South Pacific Nuclear-Free Zone*, 41:6 Bull. Atomic Scientists at 16-20 (1985); Grimsson, *Nordic Nuclear-Free Options*, *id.*, at 25-28; Andricos, *A Balkan Nuclear-Weapons-Free Zone*, *id.*, at 29-31; McFadden, *Nuclear Weapons Free Zones: Toward an International Framework*, 16 Cal. W. Int'l. L. J. 214 (1986).
63. The Antarctic Treaty, *signed* at Washington, Dec. 1, 1961, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.
64. Treaty on the Prohibition of the Emplacement of Nuclear Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, *done* at Washington, London and Moscow, Feb. 11, 1972, 23 U.S.T. 701, T.I.A.S. No. 7337.
65. Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), *signed* at Mexico City, Feb. 14, 1967, 22 U.S.T. 762, T.I.A.S. No. 7137, 634 U.N.T.S. 281. The United States is not a party to this treaty but has ratified both Protocols I and II, and the text of the treaty was published in the United States as an annex to Protocol II. Protocol I came into force for the United States on Nov. 23, 1981, T.I.A.S. No. 10147, 634 U.N.T.S. 362. Protocol II came into force for the United States on May 12, 1971, 22 U.S.T. 754, T.I.A.S. No. 7127, 634 U.N.T.S. 364. For an analysis of this treaty, *see* 1969/70 SIPRI Y.B.: World Armaments and Disarmament 218-36.
66. *See, e.g.*, Seabed Treaty, *supra* note 64, art. 1(1).
67. Eight-four percent of the major navy ships are equipped for carrying atomic weapons. Morrison, *Japanese Principles, U.S. Policies* 41:6 Bull. Atomic Scientists at 22 (1985).
68. Treaty of Tlatelolco, *supra* note 65.
69. *Id.*

70. Larson, *Security Issues and the Law of the Sea: A General Framework*, 15 Ocean Dev. & Int'l L. 99, 121 (1985).
71. Seabed Arms Control Treaty, *supra* note 64, Preamble: The States Parties to this Treaty, . . . Convinced that this Treaty will further the purposes and principles of the Charter of the United Nations, in a manner consistent with the principles of international law and without infringing the freedoms of the high seas... 23 U.S.T. 703.
72. *See* Thornton, *The Nuclear Ship in the International Community*, 1960 JAG Journal 9 (concerning nuclear merchant ships but covering the issues of liability that arise when dealing with nuclear ships); Nakamura, *The Passage Through the Territorial Sea of Foreign Warships Carrying Nuclear Weapons*, 25 Jap. Ann. Int'l L. 1 (1982).
73. *See* 1979 *Digest of U.S. Practice in International Law* 108384. *See also* agreements between the United States and Belgium (14 U.S.T. 1612, T.I.A.S. No. 5466, 493 U.N.T.S. 83), Denmark (15 U.S.T. 1403, T.I.A.S. No. 5612, 529 U.N.T.S. 277), West Germany (13 U.S.T. 2567, T.I.A.S. No. 5223, 460 U.N.T.S. 169), and Greece (13 U.S.T. 1379, T.I.A.S. No. 5099, 459 U.N.T.S. 3). Similar agreements have also been concluded with Ireland, Italy, Netherlands, Norway, Portugal, Sweden, United Kingdom, and Yugoslavia. All of them related to the U.S. Savannah.
74. 1979 *Digest of U.S. Practice in International Law* 1803.
75. *Id.* at 1083-84. For the text of the International Convention for the Safety of Life at Sea (the so-called SOLAS Convention), *done* at London, Nov. 1, 1974, *see* T.I.A.S. No. 9700.
76. 1979 *Digest of U.S. Practice in International Law* 1084.
77. Wilsher, *The Pacific Basin*, Sunday Times (London) Magazine, Oct. 20, 1985, at 27 8.
78. South Pacific Nuclear Free Zone Treaty, *signed* at Rarotonga, Cook Islands, on Aug. 6, 1985. For the text of the treaty, *see* 6 UN Law of the Sea Bull. 24-39 (1985); 24 I.L.M. 1442 (1985) (hereinafter cited as South Pacific Treaty). Concerning the signature of the treaty, *see* N.Y. Times, Aug. 8, 1985, at A1, col. 1.
79. Wilsher, *supra* note 77, at 45.
80. For instance, the treaty deals also with restrictions on peaceful nuclear activities. South Pacific Treaty, *supra* note 78, art. 4.
81. According to the preamble, the parties are determined to keep the region free of environmental pollution by radioactive wastes and other radioactive matter, but Article 7 speaks only of dumping radioactive waste and other radioactive matter "at sea." *Id.*
82. Fry, *supra* note 62, at 17.
83. Wilsher, *supra* note 77, at 45.
84. Fry, *supra* note 62, at 17.
85. *Id.*
86. South Pacific Treaty, *supra* note 78, art. 2(2).
87. Fry, *supra* note 62, at 19. Other criteria listed by Admiral Crowe were:
    - that the initiative should come from the region concerned,
    - that all states should participate,
    - that there should be adequate verification,
    - that existing security arrangements should not be disturbed, and
    - that the proposal should prohibit the development or possession of any nuclear explosive device by parties to the treaty.
88. *Id.*

89. Treaty of Tlatelolco, *supra* note 65.
90. Fry, *supra* note 62, at 18.
91. *Id.* at 16.
92. New Statesman, Feb. 8, 1985, at 2-3. For the text of the ANZUS treaty, the Security Treaty between Australia, New Zealand and the United States, *signed* at San Francisco, Sept. 1, 1951, *see* 3 U.S.T 3420, T.I.A.S. No. 2493, 131 U.N.T.S. 83.
93. N.Y. Times, Aug. 8, 1985, at A7, col. 1.

DISCUSSION

Security Zones

Choon-Ho Park: The problem of security zones in international law has always been quite controversial. The 1956 International Law Commission report[1] indicates that security zones will be open to abuse. The potential for abuse was one reason the Commission objected to such zones. China originally set up three security zones shortly after the Korean War broke out in 1950. The zone around Shanghai lapsed because in 1958 China established a 12-mile territorial sea. Two zones still exist.[2] Japanese fishing vessels have been the major victims, not beneficiaries, of those zones. Occasionally Japanese fishing vessels are sent in to test China's enforcement of the zones.

Enforcement typically depended on the political relations between the two countries. When they were friendly, China would turn the other way; otherwise China would be very vigilant against Japanese fishing vessels. From Korea's standpoint, the reasons for establishing the zones no longer exist, but China might argue that the zones are still in force because there is only an "armistice" in Korea.

In 1977, North Korea set up what is called the 50-mile military boundary zone, and, interestingly enough, the first paragraph of the declaration says it is to safeguard the economic zone. In fact, the zone was set up so suddenly that there was confusion in Korea because the Korean sound for boundary could be interpreted in two ways, either as "boundary" or "warning". Our newspapers said it was a military "warning" zone, while foreign newspapers relied on the English language announcement from Pyongyang which said it was a "boundary" zone, as North Korea intended. We have some documentation which says North Korea declared its 12-mile zone in 1955. By the time of the *Pueblo* incident[3] people were not talking about this zone at all.

Another problem arose in September 1975 when the *Shosei Marus*, a Japanese fishing vessel was shot at near the estuary of the Yalu River.[4] North Korea insisted the ship was within the territorial waters or 12 miles from the North Korea coast. Japan insisted that the vessels was outside the 12 mile limit. It turned out that the low-tide baseline as seen by the North Koreans and by the Japanese differed by at least seven or eight miles.

North Korea would be hard-pressed to justify the security zone or military boundary zone from the standpoint of international law. South Korea has some special zones or security intended zones but basically they are intended as something internal between the two Koreas, and are not intended to interfere with foreign shipping. Japanese fishing vessels have occasionally been advised to leave during certain fishing seasons. Even their seasonal or temporary nature does not justify these actions in terms of the Law of the Sea Convention. So here we have a problem. Both Koreas are signatories to the 1982 Convention. In the ratification process, it remains to be seen how they will resolve inconsistencies between the Convention and the established security zones.

Both of them also require advance authorization or advance notice for passage of foreign vessels through their territorial waters. The countries that claim security zones often think problems involving their security to be too important to be left in the hands of international law alone. The question of where the law ends and politics begins arises here, although legally I would say the security zones are not really tenable under international law.

Footnotes

1. International Law Commission Report (1956), General Assembly Official Records, Eleventh Sess., Supp. 9, pp. 39-40, UN Doc. A/3159 (1956).
2. For details, see Choon-Ho Park, *Fishing Under Troubled Waters: The Northeast Asia Fisheries Controversy*, 2 Ocean Development and International Law 114 (1974), *reprinted in* Choon-Ho Park, *East Asia and the Law of the Sea* 53 (Seoul, 1983).
3. U.S. Dept. of State, Press Releases 280 and 281 (December 22, 1969); and 60 Dept. of State Bulletin, nos. 1 and 2 (1969).
4. For details, see The People's Korea (a North Korean weekly in English), September 17, 1975.

ACCOMMODATING CONFLICTING CLAIMS IN THE NORTHWEST PACIFIC

Sang-Myon Rhee
College of Law
Seoul National University
Seoul, Korea

Introduction

The Northwest Pacific is an area where the Soviet Pacific Fleet and the U.S. Seventh Fleet confront each other. The Northeast Asian seas have long provided battlegrounds as well as trading routes for the competing neighbors. Disputes exist not only over islands and maritime boundaries, but over different uses of the seas as well. Ideological confrontation and national sentiment undermine efforts to accommodate conflicting claims. The purpose of this paper is to analyze the problems arising out of conflicting claims and to examine the possible accommodation of such claims.

Conflicting Claims in the Northwest Pacific

The traditional southward policy of Russia resulted in the acquisition of the Maritime Provinces from China in 1860 in return for Russia's exerting political influence on the United Kingdom and France which then occupied Beijing. Russia soon constructed a naval base at what is now called Vladivostok. Russian ambition collided with Japanese imperialism in 1904. In May 1905, the Russian fleet, after a long, tedious journey from the Baltic Sea via the Cape of Good Hope, was completely destroyed in the Tsushima Strait by the Japanese navy. Thus, Russia was defeated by Japan, which was supported by the United Kingdom under the 1902 Anglo-Japanese Alliance.

The Japanese attacks on Pearl Harbor and Southeast Asia in 1941 were also intended to preempt the sea lanes in the Northwest Pacific. The Russian ambition of southward movement was also evident during the 1950 Korean War. After the truce in 1953, there was a continuous buildup of Soviet Far Eastern Forces, particularly since the mid-1960's. Today, the Soviet Union deploys a quarter to a third of its forces in the Far Eastern front. For example, a quarter to a third of its entire ICBM and SLBM strategic missiles, along with nuclear-powered submarines such as the Delta III-class SSBN carrying SLBMs, the Kiev-class aircraft carrier and the Kara-class missile cruisers, are deployed in this region. Notably, Soviet fighter aircraft, such as TU-22M Backfires, are quite active in the Sea of Japan and Korean waters.[1] They have at times violated Japanese and Korean air space.

If a war broke out in the Persian Gulf, it would be possible for the Soviet Union to initiate an armed conflict in East Asia. The U.S. Seventh Fleet's move to meet any war in the Persian Gulf would leave a relative power vacuum in the Northwest Pacific. That is why the United States negotiated a cooperative role with Japan to protect the sea lanes in the so-called 1,000-mile defense zone.[2] The Japanese role includes surveillance of the maritime area, protection of the sea lanes, and defense of certain straits. The Soviet fleet in Vladivostok cannot gain access to the Pacific without passing through significant choke points in the Soya, Tsugaru, Korea and Tsushima Straits.[3]

This increased role of Japan may, however, alarm the People's Republic of China (PRC) and the Republic of Korea (ROK), both of which were invaded by Japan in the earlier part of the twentieth century. Anti-Japanese feeling still exists in Korea and in China. There are no diplomatic relations between the PRC and the ROK. Any attempt at rapprochement between the two could be frustrated by the intervention of North Korea.

The countries bordering the semi-enclosed seas dispute certain islets. Japan claims four northern islands off the coast of Hokkaido occupied by the Soviet Union. Since 1978 the Soviet Union has redeployed ground troops in disputed Kunashiri, Etorofu and Shikotan. Japan also disputes possession of the islets of Tokdo/Takeshima which are currently administered by the ROK. Japan, the PRC and Taiwan claim ownership of the islets by Dyaoyu-tai/Senkakuretto in the East China Sea because they generate a huge maritime area which may have oil potential. The PRC and Taiwan also dispute the jurisdiction of maritime spaces with Japan and the ROK. Japan and the ROK were able to agree in 1974 on a small segment median line in the sea between the southern coasts of Korea and Kyushu in Japan, and on the Continental Shelf Joint Development Zone in the northeastern part of the East China Sea. The PRC and Taiwan have been challenging the legitimacy of this zone ever since.

In this controversial area, the old regime of the law of the sea still persists. In the 1965 Japan/ROK Fisheries Agreement, the breadth of the exclusive fisheries zone was only 12 miles. A major part of the joint fisheries protection zone established in the 1975 Fisheries Agreement in the Yellow Sea is located on the Korean side of the mediar line between China and Korea. The PRC and Taiwan have not yet proclaimed a 200-mile Exclusive Economic Zone (EEZ). Japan has not yet enforced its 200-mile Exclusive Fishing Zone vis-a-vis China and Korea.

The priority for these countries is national security. The PRC maintains three military zones in Bohai Bay, the seas off the coast of Shanghai, and in the Strait of Taiwan. North Korea reportedly challenges a certain maritime area surrounding five islands, arguing that jurisdiction of the maritime area was not clearly provided for in the 1953 Armistice Agreement. The ROK has two Special Maritime Zones vis-a-vis North Korea.[4] North Korea also established military zones, covering virtually all of its potential EEZ.

No innocent passage is allowed for foreign military vessels in the territorial waters of the PRC and North Korea. The ROK requires foreign warships or government-owned non-commercial vessels to provide three days prior notification in advance of passage. No such requirements are present in the provisions of the territorial sea laws of Japan and Taiwan.

The Soviet Union and Japan, along with the United States and other maritime powers, supported transit passage at UNCLOS III. Occasionally, Russian nuclear submarines out of Vladivostok navigate secretly to

Chinnampo near Pyongyang, via the Korea Strait and the Cheju Strait, without prior notification. The ROK has never recognized the Cheju Strait as an international strait, and instead considers it to be a part of the territorial sea. If the ROK takes any military action against Russian submarines in the Cheju Strait, hostilities could escalate and other nearby nations might become involved.

Reasons for Accommodating Conflicting Claims

The long oil route from the Persian Gulf to Northeast Asia passes through the Malacca-Singapore straits and the South China Sea. Oil tankers pass by at 10-minute intervals. Because Japan and the ROK are without necessary raw materials, they are very dependent upon foreign trade and unimpeded passage. This significant lifeline for Japan and the ROK could be vulnerable to interception by the haunting Russian naval vessels. No one country alone can effectively frustrate such an attack by the Russians.

If the U.S. Seventh Fleet reponds to a war in the Persian Gulf, Northeast Asian waters will be left unguarded and will be in danger. From the U.S. point of view, joint or cooperative action by Japanese, ROK, and perhaps PRC forces would be most desirable. This may not be possible, however, because of suspicion by China and Korea of Japanese intentions. Prime Minister Nakasone once declared his firm determination to defend the Tsushima Straits. Japan may not be able to defend Tsushima effectively without exchanging information with the ROK. Such an exchange of information would mean military cooperation between the two countries in technical violation of Article 9 of the Japanese constitution, which does not allow any military alliance or cooperation.

Furthermore, the ROK may not share the Japanese view of any "threat from the north," because it has also a direct threat from North Korea. Due to the strong nationalism in Korea, any possible military cooperation may have certain limits.

The Straits of Malacca and Singapore are situated well beyond the Japanese 1,000-mile defense zone. Japan has not yet stated any possible necessity of military cooperation, perhaps due to conflicting views of neighbors who share similar interests in the area concerned. The sea lanes in the Straits of Malacca and in the South China Sea may not be effectively defended without joint or cooperative efforts by the directly interested countries against Soviet forces in Cam Ranh Bay, Vietnam. It was reported on January 9, 1986, that the U.S. Seventh Fleet and the Chinese East Sea Fleet would jointly conduct a so-called "passing exercise" in sight of Cam Ranh Bay.[5]

The United States has strong military ties with both Japan and the ROK. There is, however, no cooperative military arrangement between the latter two. Any Japanese attempt at military cooperation with its neighbors will arouse suspicion and mistrust. Even though the United States has very good relations with both the PRC and the ROK, any possible military cooperation between the PRC and the ROK is presently impossible. The Korean War has not been technically terminated, hence, there are no diplomatic relations between the two. North Korea is another strong constraining factor. Thus, despite the interest in common defense against a possible military attack from the Soviet Union, military cooperation between Japan, the PRC, and the ROK is severely constrained by multiple factors.

Efforts for Accommodation and the Constraints

In 1921, the Soviet Union adopted a 12-mile territorial sea. North Korea and the PRC adopted the 12-mile regime, in 1955 and 1958, respectively. Japan and the ROK had traditional three-mile limits, like the United States, until they adopted the 12-mile regime in the late 1970s, in accordance with the UNCLOS III consensus. The East Asian countries also adopted various rules concerning passage through the territorial seas and straits. As stated earlier, North Korea and the PRC do not allow any innocent passage by foreign military vessels without prior permission, whereas the ROK allows passage only with prior notification of three days.

In the 1960 National Frontier Law, the Soviet Union adopted the rule of prior permission for any passage of a foreign military vessel through the territorial sea. The 1982 National Frontier Law, effective March 1, 1983, discarded the clause requiring prior permission. The Soviet Union probably changed its policy to avoid any inconsistency with its support of the new rule of transit passage at UNCLOS III. Actually, the traditional Soviet policy of prior permission would not benefit the Soviet Union if it could be applied by all states in accordance with the rule of reciprocity, because of the rapid increase of Soviet vessels.

State claims usually represent maximum national interests. Therefore, conflicting claims would be better accommodated through bilateral negotiations. Through give-and-take negotiation, states can modify, for the benefit of all, their previous positions based on individual maximum interests. Notably, Northeast Asian states have achieved good accommodation in fisheries through bilateral arrangements. Japan and the ROK have been under a Fisheries Agreement since 1965. It was largely based on the 1958 Geneva Convention on the Law of the Sea. Japan and the PRC also agreed to a fisheries arrangement between fishing organizations of both countries. Even without diplomatic relations, the North Korean Fishermen's Association has fisheries arrangements with the Japanese Fishermen's Association.

However, bilateral accommodation is more difficult when states deal with territorial or maritime boundary disputes. Japan and the ROK were not able to agree on the dispute over the islet of Tokdo/Takeshima. China and Japan were also unable to agree on the matter of Diaoyutai/Senkaku-retto, except by shelving the matter indefinitely. The controversial issue of delimitation in the Joint Development Zone was postponed for 50 years in the 1974 Agreement on the Continental Shelf Joint Development between Japan and the ROK. The PRC and Taiwan have raised objections to this Joint Development Zone between Japan and the ROK because it excludes China. The PRC and the ROK have not conducted any negotiations over the issue of delimitation of maritime boundaries. Any negotiation attempt would be disrupted by a North Korean complaint to the PRC.

The North Koreans have different arguments. They assert that arrangements done between Japan and the ROK are null and void. Despite some progress in the North-South dialogue, the two rival polities are not in a position to agree on any arrangement of maritime affairs. There are also no diplomatic relations between the ROK and the Soviet Union. The Russians flatly refused any possibility of talks for compensation after the shooting down of the Korean Airlines Flight 007 in 1983.

Suggestions for a Cooperative Accommodation

It would be desirable to have a regional meeting on maritime salvage, maritime pollution and preservation of fisheries resources. Al-

though this might seem a distant hope because of existing political controversies, a suggesion by a third-party or by an international organization might provide the necessary impetus.

In this highly sensitive area, national policies are rigid. States will not easily compromise their interests because of national sentiment, ideological differences, or enmities against former or present enemies. Any ambitious attempt at a one-hundred-percent solution could easily be frustrated by latent contingencies and constraints. A flexible step-by-step approach is desirable. States in the region have to a degree already attempted flexible, functional approaches.

One approach is to shelve the dispute indefinitely or for a certain period. For example, prior to the negotiation over rapprochement between Japan and the ROK, the then strong man in Korea, Kim Jong-pil, and Ohira in Japan agreed to shelve the dispute over the islet of Tokdo/Takeshima indefinitely, thus removing one of the most salient constraints affecting the two parties. Similarly, Deng Xiao-ping decided to leave the dispute over the islets of Diaoyu-tai/Senkaku-retto to future generations when he needed Japanese help in modernizing the Chinese economy. As stated earlier, Japan and the ROK decided to shelve the issue of delimitation of the Joint Development Zone for a period of 50 years, when both parties discovered that the overlapping area produced by the equidistance line of Japan and the principle of natural prolongation by the ROK could not be readily resolved. Because the main interest in the area was commercially exploitable hydrocarbon deposits, both parties in the 1974 Agreement decided to divide the interest instead of the maritime space.

Conflicting claims, as noted earlier, can be accommodated through bilateral negotiation. Compromise frequently produces an acceptable solution. A series of such bilateral solutions can pave the way toward trilateral or multilateral solutions. For example, separate Japanese agreements on fisheries with China, the ROK, North Korea, and the Soviet Union could produce understanding and even agreed standards among these states. Ideally, a binding multilateral arrangement would be arranged. Hopes at arriving at such an agreement would be but a fantasy at this time. An international agreement like the Helsinki Accords in Europe would be highly desirable in East Asia.

As for the issue of defending the strategic sea lanes, any formal arrangement like NATO would be impossible at this time. Possible military cooperation between East Asian countries sharing similar interests in national security would be desirable, though extremely difficult to achieve. Fortunately, the United States has a good relationship with the PRC, Japan, the ROK, and Taiwan and is in a good position to accommodate conflicting interests between these countries.

Indeed, the United States has contributed much to the 1965 rapprochement between Japan and the ROK. Some contingent problems, like the incident of the hijacking of a Chinese Civil Airline plane between the PRC and the ROK were successfully dealt with through direct consultation by both parties, using the good offices extended by Japan and the United States. The fundamental approach of the United States is to build a strong relationship with each country in East Asia which shares similar security interests. A strong ROK is desirable for international peace in the area, just as a strong and modernized China is desirable to the United States for global peace. The next step the United States should take is to encourage friendship between East Asian countries sharing similar security interests.

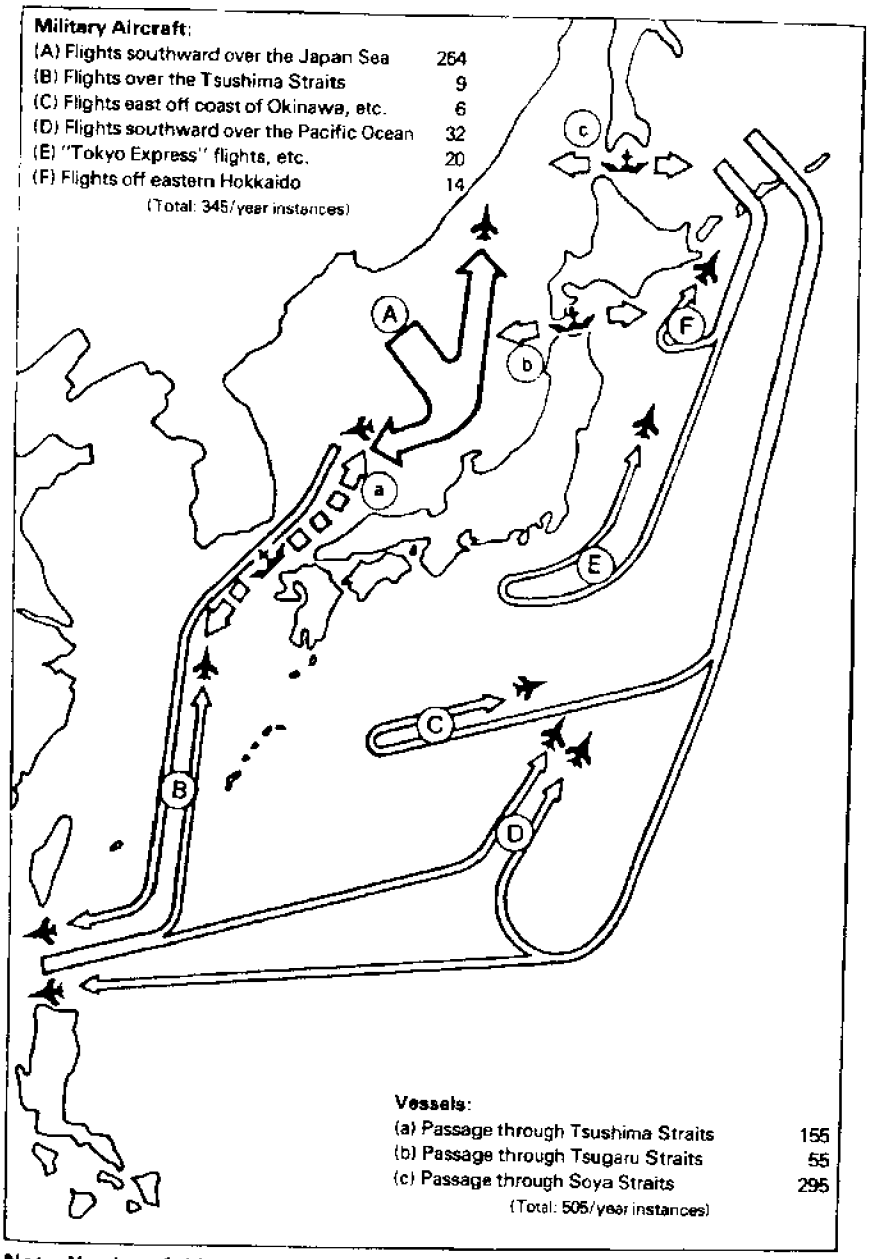
This cooperative spirit could pave the way toward a cooperative accommodation of conflicting claims in Northeast Asia. Because the United States has business interests in both the PRC and the ROC related to hydrocarbon development, it is in a good position to advise both on a rational approach, based on rules and principles of international law, to resolve the maritime boundary disputes. Voluntary or mediated cooperation can lead to arrangements for international peace and security in the area.

Conclusion

To tackle the numerous constraints to true regional cooperation, decision-makers should use flexible and creative methods to resolve differences in a step-by-step, practical way. Although a remote possibility, a cooperative accommodation could be initiated by a member state in the area. It is desirable for the United States to take the initiative to increase its friendly ties with those Northeast Asian countries sharing similar interests, thereby boosting the cooperative spirit needed to achieve accommodation of conflicting claims. Any possible accommodation should be based on reasonable standards, criteria, usages, rules and principles of international law.

Footnotes

1. The Japan Times, *Defense of Japan* 24-30 (1985).
2. Asahi Shinbun, May 9, 1981 and Sept. 1, 1982.
3. Japanese call the Korean Strait the "Western Channel of the Strait of Tsushima," and the strait between Tsushima and the Japanese main islands the "Eastern Channel of the Strait of Tsushima."
4. The purpose of the establishment of these two zones by the ROK is probably to protect the fishers who frequent the area.
5. The Chung'ang Ilbo, Jan. 9, 1986, at 1 and 4.



Note: Number of ships and instances indicates average figures over the past five years.

Source: *The Japan Times*, *Defense of Japan*, 33 (1985)

MAP 10: Outline of Soviet Naval Activities and Military Aircraft Movements Around Japan

NATIONAL SECURITY AND RESOURCE MANAGEMENT AND DEVELOPMENT

Morris Sinor
Fleet Judge Advocate
CINCPAC Fleet
Honolulu, Hawaii

The title of this presentation was advertised as "Accommodation of National Security Concerns to Conflicting Claims Relating to Resource Management and Development." However, I am going to give a different approach to the subject because I start from the position that there is no inherent conflict between national security and resource management and development, if we restrict our views simply to these subjects. Obviously, there is a perception of conflict, as noted by Professor Sohn and others in their papers. I would suggest that these perceptions are based more on coastal state security concerns, which are in turn expressed in terms of pollution control, in resource development regulations, or in some other form of regulation along these lines. I would even go further than that and would state that national security concerns and economic well-being, which necessarily includes resource management and development, go hand in hand and are intimately intertwined. I do not see how you can start with one without addressing the other.

This workshop has focused on the sea lanes of communication, the SLOCs. The papers introducing this subject reported that an infinite number of sea lanes are available in the world, but only a finite or a limited number of trade routes are used. Professor Abrahamsson pointed out that the inter-modality of land and sea transportation is changing those routes and changing the centers of commerce, and that those routes are fluid (pages 39-52 above). In other words, they move. The trade route of today is not necessarily the trade route of tomorrow. Professor Abrahamsson was followed by Professor Morgan, who talked about the "strategic sea lanes" (pages 54-68). He correctly pointed out that some lanes are obviously of more strategic value than others. I would suggest that Dr. Abrahamsson's principle also applies to strategic sea lanes, in that the value of a strategic sea lane will vary depending upon the situation we are dealing with, where the potential for conflict is, and other factors that are not directly related to trade but nonetheless are connected with trade.

Trade remains the critical vulnerable element of a nation's economic health and, as such, it is a vulnerable element of a nation's physical

security as well. Its vulnerability stems from the fact that sea lanes of communication are capable of being interrupted by military intervention and also by coastal state regulation. We have focused upon intervention by military forces, but we have neglected to consider intervention by coastal state regulation. The impact is the same in both cases; it affects our ability to utilize those sea lanes of communication.

Nowhere in the world are the sea lanes of communication more important than in the Pacific. If we look at the Pacific nations, Japan is now the second largest free-world economy. But if we look at trade patterns, Japan conducts very little trade with its immediate coastal neighbor, the Soviet Union. The major portion of Japanese trade is across wide reaches of the Pacific Ocean, with the United States, with Europe, and throughout the other regions of the world. At the same time, Japan depends to a great extent on the importation of raw materials from such distant places as the Persian Gulf. Another excellent example is the Republic of Korea, where per capita income was $62 in 1961. Korea's per capita income had risen twenty-seven fold to some $1700 by 1982, and, although I do not have current figures, I believe it is much higher today. That economic development, and its accompanying political stability, are intimately tied to the sea lanes of communication.

We have mentioned the Port of Singapore, which is now second in gross tonnage only to Rotterdam. Hong Kong, another small state is a major world financial market, falling just behind London in its importance to the world economy. The common denominator in each of these situations is political stability coupled with aggressive trade policies that rely upon the sea lanes of communication. Without those sea lanes, economic development could not have occurred. It is the interdependence of these various economies throughout the world that leads to regional stability and world peace. For these reasons, I think it is impossible to separate national security considerations from resource development and protection of the sea lanes of communication.

If we look at the United States itself, we are also dependent upon the sea lanes of communication. The majority of U.S. trade is carried by vessels with foreign flags. Professor Burke pointed out the problem of flags of convenience, and I recognize that a number of those foreign flag vessels are owned by U.S. interests. But the fact remains they are still foreign flags that are bringing commerce to and from the United States. If we look at the U.S. military strategy in terms of U.S. economic interests and in terms of the sea lanes of communication, we find that obviously our first goal is to deter war and, if that deterrence fails, to carry the fight to the enemy's territory as far forward as possible, to contain the conflict, to prevent escalation to nuclear war, and to resolve the conflict as early as possible on favorable terms. A look at the national security policies of most other nations of the world would show them to be generally similar.

The U.S. maritime strategy, which is designed to implement this deterrence through a positive preventive presence that will contribute to crisis control and thereby deter war. The point is, that strategy is dependent upon naval mobility and flexibility which Professor Sohn has described as the ability to go where necessary without impediment. The U.S. position, at least in my view, is that we recognize the high seas freedoms of all nations, with the only limitation being that each nation must have due regard for the high seas freedoms of others, as reflected in both the 1958 and the 1982 law of the sea conventions. This recognition, and the necessity to preserve the sea lanes of communication, should provide a stable environment on the high seas that is free from

crime (such as piracy) and free from intervention. The U.S. maritime strategy is also based on our treaty relationships and our alliances with friends and allies. It is a global coalition that is designed to provide peace and stability.

I recognize that if there were a Soviet representative here today he might take a slightly different position, but I think if he were to express his views, we would find that they were reasonably similar. The interests of coastal states in resource management and development are not necessarily inconsistent with this maritime strategy. Obviously, a country does not want a naval war going on in its exclusive economic zone nor pollution of its waters as a result of warfare in another region, but the means of preventing this from occurring do not lie in imposing restrictions upon the transits of military ships through international straits, territorial seas, archipelagoes, or exclusive economic zones. I believe that those types of restrictions can cause an opposite result by limiting the ability of maritime nations to establish the degree of presence necessary to deter war.

Once armed conflict breaks out, its impact will extend beyond the region where it occurs and it will have an effect upon the neighbors and nations far away. The point was made earlier, by Professor Morgan, that the Iran-Iraq War, which has been going on for a number of years now, has not stopped commerce in the Persian Gulf (page 55 above). That is true, it has not; there is still commerce, and oil is still leaving the Gulf region. The point also has to be made, however, that the consumers of the oil products of the Persian Gulf region have been looking to other sources of supply, with more stable sea lanes of communication, in order to satisfy their needs. The result is that the share of the world oil market of the Persian Gulf nations has declined. There are other factors that contributed to the decline, but the point is that the war has affected the political and economic relationships, not only of Iran and Iraq, but of their neighbors and of countries far away, such as Japan and the United States, which depend upon Persian Gulf imports.

Several speakers have taken the position that the interests of maritime nations have predominated in the past and that those interests are somehow in conflict with the needs of newly developed nations, the nations that have become independent since the end of World War II. I am not sure that I agree with that concept. If you take the position, which I do, that physical security and economic and social well-being go hand in hand, then all countries have an interest in preserving the sea lanes of communication, making sure that they are stable and that trade flourishes. The alternative, it seems to me, is economic stagnation, and very few countries have economic stagnation high on their list of priorities. There are many forums today available to deal with the conflict between coastal state interest in the protection and development of resources and the national security concerns of the major maritime nations.

When I looked at a world chart trying to identify the single spot where I thought that these concerns are focused most clearly, I looked first at the United States. It is obvious that the United States is a major coastal state. We are a major maritime nation, in that our trade is dependent upon the sea lanes of communication; our ports are utilized by fleets of merchant ships flying foreign flags; we have considerable offshore resources; and, we have considerable development of those offshore resources. All of those interests come together off our southern coast in the Gulf of Mexico. I think the development in the Gulf of Mexico has been more intense there than in any other region of the world.

There are currently more than 8,000 off-shore structures in the Gulf itself with some structures located more than 200 nautical miles off the coast of the United States. There is a major fishery in the Gulf of Mexico. Major commercial routes enter the Gulf, feeding into ports such as New Orleans and Houston as well as the ports on the eastern seaboard of Mexico. The Gulf of Mexico is the one place where there has been an attempt to accommodate all of these concerns.

If we look at the chart of the offshore structures in the Gulf of Mexico, we would see that the traffic lanes leading to major commercial ports have been preserved. The reasons are obvious. The United States and Mexico want the trade and commerce to continue and cannot afford the cost of a collision with an offshore oil well. The costs of pollution are too severe, so we protect those sea lanes and keep them free of obstructions. If we look at the fisheries side of the equation, the United States has very strict requirements on the use of offshore drilling rigs, and in the manner and the procedure for penetrating the sea floor. Again, the purpose is to protect the environment and the fisheries resources. Simultaneously, other maritime nations of the world, including the Soviet Union, periodically send their naval vessels into the Gulf of Mexico. The ships enter and leave without incident and without confrontation. The traffic routes were submitted to IMO years ago, and were approved by that organization. They are published on maritime charts and other countries that use these waters are aware of what routes have been designated and how they are to be utilized. I would suggest that these same procedures can be used to resolve the conflict between coastal states' resource management and development concerns and the national security interests of the major maritime nations.

We have established rules of navigation and overflight which are generally accepted by the maritime nations of the world. It is within the context of these rules that we should resolve conflicts between maritime states and coastal states. I do not think it is material that we base our position on customary international law while others look within the 1982 Law of the Sea Convention itself. The point is that we need to look at the underlying interests of the coastal states and of the major maritime nations in trying to resolve these conflicts. There is a tendency on the part of lawyers, geographers, political scientists and others to look at something like the 1982 Convention and try to find the answers in the words, without looking at the reason for the words or the underlying principles. By going back to those underlying principles, we will find that there are no inherent conflicts between national security concerns and resource management and development that cannot be resolved within the international organizations that presently exist.

DISCUSSION

Jon Van Dyke: Professor Morgan states in his paper on page 66 above that if there are situations in which coastal states make claims that are contrary to international law,

> "the maritime power has the choice of making the transit despite the objections or respecting the interpretations of the law by the presumably weaker coastal country. I suspect that most big powers would choose the former option, since to recognize interpretations of the Convention that interfere with the rights of innocent and transit passage sets a precedent, which could be troublesome in the future. There is a risk involved in making the passage without permission, however, since by so doing a degree of goodwill is lost, which could create future problems."

My question is this: to what extent is Professor Morgan's prediction that the big powers would choose the former option in fact true? Are there occasions that we could mention here this afternoon where the big maritime power is in fact respecting the ambiguous interpretation or the illegal interpretations of the rights of coastal states despite the perhaps unfortunate precedent that might be raised? Captain Sinor, could I ask you, to start with, whether there are such situations?

Morris Sinor: Of course, there are situations where the former is chosen, when we do transit as a matter of right and accept whatever consequences flow therefrom, but I think there are also situations in which the issue is mutually ignored. In other words, the restriction is not asserted by the coastal state and it is not objected to by the maritime state. That is particularly true in a number of countries that have indicated that they intend to impose restrictions but have yet to promulgate those restrictions. We are aware of those proposed restrictions and we continue to operate in the area. In a number of circumstances, we have just said that each side's position is preserved, and then we carry on from there.

Van Dyke: Professor Park showed us a map of the east coast of North Korea which shows the straight baseline claim of North Korea. Do we respect that claim of North Korea?

Sinor: Are you talking about the straight baselines or the security zone that is drawn, the military exclusion zone?

Van Dyke: The straight baseline claim.

Sinor: I think it would be accurate to say that we do not recognize that claim.

Van Dyke: Do we challenge it by sending our boats through that area?

Sinor: As was mentioned earlier (page 66), there is a program in which the United States does assert its maritime rights against excessive maritime claims. Those assertions, however, are frequently classified. In other words, they are not published, they are not promulgated, but the program does exist and a substantial number of claims have been challenged. It is only recently that the existence of the program was declassified. The purpose of that program is to preserve the right of transit, which should benefit everyone. The program does not provide for notification to the coastal state that we are exercising that right. We just exercise the right at a given time and circumstance. I do not like to talk about specific claims but the claims that have been challenged vary from states whose interests are not the same as ours, such as the Soviet Union, to states whose interests are virtually identical to ours.

Van Dyke: What about the claim of many states that warships must obtain prior authorization before going through the territorial sea?

Sinor: The United States does not provide notification prior to going through the territorial sea in innocent passage. In some situations, of course, the coastal state is aware of our presence. We provide information on ship movements in a number of different forums, but I think you will find that the U.S. policy is that we will not request permission or provide advance notification.

Van Dyke: Do we exercise these freedom of navigation exercises more vigorously with regard to nations that are our adversaries?

Sinor: No, the program is nonpolitical in nature. I saw a recent breakdown on the numbers and types and they were fairly equally balanced between what you might call friends and allies, nonaligned, and states whose interests are not the same as ours. There is about an equal mix.

Van Dyke: What about China?

Sinor: Again it is difficult to talk about specific states. I assume you are referring to the People's Republic of China. I am not sure that I have even seen their straight baselines officially promulgated. When they are promulgated, the procedure that is will be followed will be to forward the documents to the State Department for review. The State Department's Geographer makes an initial determination whether we would recognize the claim. If we would not recognize the claim, then we notify the coastal state that we believe their claims to be excessive. But if you start looking at what is going on in the world today, there are many, many claims that are in some state of review within the U.S. government. Some of the straight baselines recently claimed by the Soviet Union, for instance, appear to conform to what we would recognize as customary international law, and would appear to conform to the 1982 Convention, but a substantial number do not, and there are modifications in some of their historic claims. Once those claims are reviewed, and we determine whether or not they are excessive, our position is made known to the government involved.

Van Dyke: So, to summarize, we would protest to the government involved and then, in the usual case, would assert our position by sending warships through the disputed area.

Sinor: I think the U.S. view would be that the sending of warships is not a requirement. In other words, we do not go out and line up all those claims we believe to be excessive and then say, now we are going to challenge them one by one by one. I do not think that is the way the program works. If there is a reason for us to be there, then the challenge takes place.

Contested Claims - Black Sea

Joseph Morgan: What provoked me to make that statement was that when I was still on active duty at CINCPAC, in 1971, in the India-Pakistan War, we decided to send a carrier battle group from the Pacific Fleet into the Indian Ocean. This was not usual in those days, since we did not have that many interests in the Indian Ocean. We sent the group via the Malacca Strait without prior notification, and almost immediately, within a day or so, we received a complaint from Indonesia saying, "Why didn't you notify us?"

CINCPAC then asked the State Department for some sort of suggested reply. The State Department said, "It has never been our policy to make these notifications, since we do not believe that prior permission is required to go through territorial seas on innocent passage." And I am also aware that units of the U.S. Mediterranean Fleet regularly go into the Black Sea to test Soviet claims that the Black Sea is virtually a Soviet lake and to support our claim that it is high seas. That is the origin of my statement in the paper. I defer to Captain Sinor, of course, who knows what the current situation is.

Sinor: I think I can respond by saying that U.S. Navy vessels do go into the Black Sea. We do operate in the Black Sea as we do in most of the major oceans of the world. There are ongoing discussions with various states concerning whether or not we believe their claims to be excessive. There have been occasions in which we received notice from those coastal states that they do not agree with our right to go in a particular place or to be there in the capacity that we are in. In other words, they diplomatically protest our presence and we usually respond to those protests, so that it preserves a diplomatic record of the claim and counterclaim.

Camillus Narokobi: One of the speakers mentioned earlier the Treaty of Lausanne which relates to the right of passage through straits.[1] I would like to draw your attention also to another related convention. A convention was concluded in 1936 at Montreux regarding the regime of straits.[2] The convention was signed by The United Kingdom, Australia, Bulgaria, France, Greece, Rumania, Turkey, The Soviet Union, Yugoslavia, and Japan. Article 13 of the convention provides that warships must give notification prior to their entry into the straits.

Van Dyke: This is the Treaty of Montreux which governs the Dardanelles. Does the United States give that notification?

Sinor: Yes, we provide that notification.

Van Dyke: But the United States interprets that requirement as being limited to that strait?

Sinor: As being limited to that one strait by virtue of that treaty.

Chinese Warship in Korean Territorial Sea

Choon-Ho Park: We have a textbook case involving entry of foreign warships into South Korean territorial waters. In May 1985 a Chinese torpedo vessel had a kind of mutiny aboard. And then it had engine trouble so that it drifted into Korean territorial waters. Then, several Chinese warships entered into the Korean territorial waters in search of the torpedo vessel. The Korean Navy asked them to leave and the Chinese warships left.

But now, I have a question. The 1982 Convention is silent on what would happen if the foreign warships entering foreign territorial waters di not leave. No penalty is found in the Convention. Could Captain Sinor or Bruce Harlow be able to give me an answer as to what would happen if a foreign warship simply stayed on as some Russian warships do off our coast occasionally just immediately ouside the three-mile limit? They simply do not leave. So our navy finds a tiger or a lion licking its lips just ouside our backyard, and we are somewhat scared occasionally. This has happened more than once. But what would happen if the warship did not leave and what is the reason for the silence in the Convention with regard to penalties? Is this too sensitive? Would it come under the law of armed conflict?

Sinor: You do not have to go back to the law of armed conflict. There are published regulations. The Soviets have published regulations on what actions they will take if a foreign warship refuses to comply with their instructions to leave the territorial sea. If you have a warship that is not in innocent passage and is perceived by the coastal nation as a threat to its national security, then the coastal nation is entitled under the United Nations Charter and the principles of self defense to take action to cause that warship to leave. Most coastal states would have procedures that they would go through that would lead to that result. If it is a threat and the threat is imminent, and force is the only thing that is available to remove that threat, then I would assume force would be used to remove the threat from the territorial sea.

Park: When this incident took place in May 1985, perhaps the Chinese captains studied our territorial sea law very carefully. The 1982 Convention says a coastal state can request the foreign warship to leave immediately (Article 30). But in the South Korean territorial sea law, that adverb "immediately" is not there. I do not know whether the typist nodded; somehow it is not there. You can ask the vessel to leave but not to leave immediately. Then they could respond, "Well, we are leaving, but not until next Christmas."

John Craven: The 1982 Convention is very specific with respect to those circumstances in which a warship is in the territorial sea and not behaving properly. Article 30 says "the coastal State may require it to leave the territorial sea immediately." Those are very strong words. The terms "may require it to leave" appear only once or twice in the Convention. I regard them as the strongest terms in the Convention because I

presume "require it to leave" implies the use of whatever force is necessary in order to have that accomplished.

Footnotes

1. 2 Hudson 1028 (1923).
2. Convention Concerning the Regime of the Straits with Annexes and Protocol, signed at Montreux July 20, 1936, 173 L.N.T.S. 2, 3, 7 Hudson International Legislation 386 (1936).

MILITARY ACTIVITIES IN THE EXCLUSIVE ECONOMIC ZONE

Camillus S.N. Narokobi
International Law Division
Justice Department
Papua New Guinea

Military Warships in the EEZ

The status of the exclusive economic zone is similar to that of the high seas for purposes of navigation. The coastal state does, however, have control over the first 24 miles of that zone, which constitute its territorial sea and its contiguous zone. Beyond the 200-mile zone in some parts of the world are extended continental shelves which can give the coastal state additional jurisdiction over the exploration and exploitation of natural resources. So even though the 200-mile exclusive economic zone may be a part of the high seas, and in fact is the high seas, the rights given to coastal states for purposes of territorial waters, the contiguous zone, and the continental shelf very much limit the freedom of navigation.

Coastal State Jurisdiction Over Warships in the Territorial Sea

The 1812 *McFadden* case[1] held that warships are part of the flag state's territory and cannot be seized or interfered with by another state. The coastal state waives jurisdiction by admitting a warship into its territorial sea.

The *Cunard SS. Co. v. Mellon* case of 1923[2] held, however, that merchant vessels voluntarily entering territorial limits may be subject to the coastal state's jurisdiction. Apparently, only warships and not merchant vessels are entitled to immunity in the territorial sea.

The question of whether warships should be required to seek authorization or at least provide notification prior to entering the territorial sea of another nation was discussed and debated right to the last minute of the 1974-82 UNCLOS III negotiations. Approximately 30 countries, including China, wanted specific mention of a prior authorization or notification requirement. The specific requirement differed from state to state as has been pointed out by Professor Sohn,[3] but approximately 80 countries supported the concept in one form or another, in addition to the 30 countries that were specifically co-sponsors of language that would have given the coastal states the right to require authorization or notification before foreign warships could navigate through the territorial waters.

An additional point I wish to make relates to the navigation by warships through the exclusive economic zone, through the territorial waters, and into the archipelagic waters. The provisions in the Convention relating to straits allows for states bordering the straits in appropriate circumstances to prescribe alternative traffic channels so that the ships need not navigate through straits (Article 36, 41(1)). Also, under Article 36 alternative routes other than straits can be used for navigation when there is a similar passage through the high seas or exclusive economic zone. Utilizing that provision it is arguable that an archipelagic state with straits could designate alternative routes through their exclusive economic zone, in effect rerouting traffic outside the archipelagic waters rather than through the straits that exist in the archipelagic waters.

Hot Pursuit

I would like also to mention the implication of Article 111 in relation to the right of hot pursuit. Military vessels conducting hot pursuit in the EEZ under Article 111, apparently can pursue into the offender's territorial waters or those of a third state. I would be interested in the views of others as to whether a military vessel is allowed to pursue and offender through the exclusive economic zone of a third state?

The Law of the Sea Convention is designed to balance competing and different interests. The classic book by McDougal and Burke articulated this goal in 1962 when it said that "The historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests, inclusive and exclusive, of all peoples in the use and enjoyment of the oceans."[3] That balance is now found in the 1982 Convention, and it must be maintained at all costs in order for the world to remain in harmony.

Footnotes

1. The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812).
2. 262 U.S. 100 (1923). The coastal state "may ... forego the exertion of its jurisdiction or to exert the same only in a limited way, but this is a matter resting solely in its discretion." *Id.* at 124.
3. M. McDougal and W. Burke, *The Public Order of the Oceans* 1 (1962).

DISCUSSION

James Anthony: As a Pacific Islander, I am interested in the 32 million square miles added to our territory jurisdiction. I have heard constant references at this meeting to interests, obligations, and responsibilities. And I keep asking myself, "whose interests, whose obligations, and whose responsibilities?" We in the Pacific Islands, two-and-a-half million people occupying half a million square miles, have yet to recognize what has happened since UNCLOS III. The United States and the Soviet Union must recognize the distance between our interests and their interests. Because the law is unclear we need to create a space to confront problems as they arise. The corpus of law that has developed over the centuries is not clear on many of these issues. In the future, suitable mechanisms must be established to address future developments in the Pacific region, which is becoming a lot more important than the Atlantic.

THE RIGHT OF WARSHIPS TO OPERATE IN THE EXCLUSIVE ECONOMIC ZONE AS PERCEIVED BY DELEGATES TO THE THIRD UNITED NATIONS LAW OF THE SEA CONVENTION

Michele Wallace
University of Hawaii Law School
Class of 1987
Honolulu, Hawaii

For the maritime powers, protectin the freedom to conduct military activities was a central motivating force in organizing and participating in the Third United Nations Law of the Sea Conference.[1] Many coastal states, on the other hand, were anxious to ensure that all activities within the newly proposed exclusive economic zone be carried out exclusively for peaceful purposes. The resolution of this conflict in the text of the Convention[2] is to a large extent ambiguous. For example, although the "peaceful purposes" language is included in Article 88 of the Convention, it is not clearly stated what activities this would prevent. Article 58 is an even more striking example of ambiguity. In the first paragraph, the freedoms of navigation and overflight are reasserted. Then, the second paragraph says that Article 88 and its "peaceful purposes" language applies to the exclusive economic zone. Other articles, such as Article 23 placing restrictions upon nuclear ships in the exclusive economic zone belie the assertion of complete freedom of navigation in the zone.[3]

Many would argue that although the Convention itself does not clearly state whether a nation may conduct military activities in the exclusive economic zones of another nation, it was the general understanding of the negotiators that such activities would be permitted.[4] This general understanding was not universal, however, as evidenced by Brazil's formal declaration upon signing the Convention.[5] Some states have indicated that they feel they made significant strategic sacrifices in acceding to this general understanding.[6] Because of the U.S. position rejecting Part XI of the Convention, some other nations may wish to reevaluate their position on the warship question. A review of the negotiating history on this issue can provide insights into how this general understanding was reached, and thus, some indication of its strengths and weaknesses.

Many statements were made at the formal sessions of the Conference requesting clarification of the extent of permissible military activities in the exclusive economic zone. In a consensus process, however, positions may be as forcefully communicated by silence as by verbal

statements. This observation may be particularly true when the position favored by the silent is the position that is expressed in the existing text. It may not therefore be surprising that almost all of the formal statements concerning military activities in the EEZ oppose such activities.[7]

Peaceful Purposes in the Exclusive Economic Zone

The first issue raised by the delegations was whether the EEZ was to be reserved for peaceful purposes, and, if so, what those purposes excluded. Concern over this issue was expressed in the plenary meetings of the Conference as early as July 1974. Many states used the term "peaceful purposes," such as in the statement by Abdel Hamid, delegate from Egypt that

> ... coastal States should manage the zone without undue interference in other legitimate uses of the sea and they should ensure that all activities within the exclusive economic zone be carried out exclusively for peaceful purposes."[8]

Similar statements in the first few plenary meetings of the Conference were made by the delegate from Bulgaria, who stated that the coastal state "should ensure that any exploration and exploitation activities carried on within its exclusive economic zone had exclusively peaceful purposes;"[9] the delegate from the Congo,[10] and the delegate from Bangladesh.[11] Other delegations also made statements similar in sentiment.[12] In response to these expressed concerns, a draft article was proposed by the Soviet bloc: "the coastal State and all other States shall ensure that all activities for the preservation, exploration and exploitation of the living and mineral resources in the exclusive economic zone are carried out solely for peaceful purposes."[13] This draft proposal was not accepted by the Conference, although the "peaceful purposes" language of Article 88 was applied to the EEZ.[14]

Few delegations detailed the activities they would consider as not having peaceful purposes. Naval exercises and espionage were the activities most frequently mentioned by those states that did enumerate non-peaceful purposes. Peru was one of the most vocal of these delegations, as seen by the following statement:

> [The current proposal for Article 5 did not mention] the duty of ships in transit through the exclusive economic zone to behave in a peaceful manner and to abstain from exercises or practice with weapons or explosives, the embarkation or disembarkation of persons or materials without the consent of the coastal State or any act of propaganda, espionage or interference with communications...[15]

Brazil was equally vocal in its view of these activities.

> Although coastal States and third States...seemed to be placed on an equal footing, doubts might arise over what rights derived to third States from the broad concepts of freedom of navigation and other legitimate uses of the sea. For example, would ships of third States, in the economic zone, have the right to engage in naval exercises, launch missiles or aircraft, load or unload cargo, embark or disembark persons, establish floating casinos or television stations? Those actions were not, in his opinion, permissible,

> and he raised the question of who should decide that they did not fall under the broad category of legitimate uses of the sea.[16]

Concern over naval exercises and espionage was also expressed by the delegate from Albania. He stated that

> [t]he convention should contain precise regulations prohibiting the massing of foreign fleets and maneuvers by warships in their zones ... It was clear what ... freedom [of scientific research] entailed - freedom for the USSR to send warships and reconaissance vessels in order to obtain military information and establish military and economic control over the States.[17]

The delegate from the Khmer Republic raised a different kind of concern over the conduct of naval exercises, stating that those might disturb the living resources of the zone should be prohibited.[18] Concern over the conduct of naval exercises was later expressed by the delegate from the Democratic People's Republic of Korea, in response to a specific proposal by the Peruvian delegation to prohibit naval exercises in the EEZ.[19] Although drafted by the Peruvian delegation, this informal proposal was presented by Costa Rica, Ecuador, El Salvador, Pakistan, Peru, the Philippines, Portugal, Senegal, Somalia, and Uruguay.[20]

Espionage in the EEZ was raised by the delegate from China, who said "freedom of scientific research in the past has meant espionage," and who hoped that what would be considered as research in the zone could be cleared up.[21] Espionage was also mentioned as a concern by the delegate from Somalia, who hoped that the maritime powers would not persist in endangering the security of coastal states through sea based espionage.[22]

The U.S. Delegate, T. Vincent Learson, obliquely referring to the conduct of naval exercises, was alone in formally stating in the plenary meetings that military activities with peaceful purposes were not, and should not be precluded:

> The term "peaceful purposes" did not, of course, preclude military activities generally. The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with principles of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement. The Conference as not charged with such a purpose and was not prepared for such negotiation. Any attempt to turn the Conference's attention to such a complex task could quickly bring to an end current efforts to negotiate a law of the sea convention.[23]

This statement makes it abundantly clear just how impossible compromise on the enumeration of nonpeaceful purposes was. Accordingly, the Convention text does not attempt such a task.

From this negotiating history, it could be argued that espionage was accepted as a nonpeaceful purpose, because no statements were made directly dissenting from this viewpoint. It might also be argued, however, that espionage was included in the concept "military activities," and was part of the general understanding that such activities would be permitted.[24] The failure to enumerate peaceful and nonpeaceful purposes

leaves this understanding more vulnerable to contemporary and subsequent varying interpretations.

The Passage of Warships Through the Territorial Sea

The next thorny issue about military activities concerned the passage of warships through the territorial sea, particularly through straits. Not surprisingly, most of the nations that had opposed permitting military activities such as naval maneuvers or espionage in the EEZ also opposed passage of warships through the territorial sea without prior notification of the coastal State. This issue, however, excited much more comment. Peru was once again one of the most vocal delegations, stating that the Soviet delegation should undertake "to pledge that its warships would not arbitrarily pass through the straits in other countries' territorial seas without authorization from coastal States."[25]

The delegate from Iran also opposed high seas passage through the territorial sea for warships:

> [T]he passage of foreign ships, particularly warships, through territorial waters, including those of straits, should be subject to the principle of innocent passage and conducive to the development of international commerce and communications.[26]

The delegate from the Democratic People's Republic of Korea was even stronger in his statement. He stated that the articles of the negotiating text concerning passage through the territorial sea should "take into account the view expressed by a number of countries that foreign warships should only pass through the territorial sea of a coastal State with the prior permission of, or with prior notification to, that State...."[27] Similar concerns were expressed during the 1980 meetings by the delegate from Romania, who reported that a proposal with the effect of requiring prior notification by warships of passage through territorial waters had received widespread support in the Second Committee.[28] The delegate from Pakistan went so far as to call this proposal essential.[29] In all, 30 nations joined the sponsors of this proposal, with the delegations from Argentina, Bahrain, Gabon, Honduras, Kampuchea, Oman, and Syria also making statements from the floor concerning this issue.[30] In addition to requiring authorization for warships, requiring authorization for the "passage of nuclear ships or vessels carrying dangerous goods" was also supported by the Egyptian delegation.[31]

Despite the objections of these countries, the negotiating text and eventually the final version of the Convention did not include any provisions requiring prior authorization for the passage of any vessels, including warships. Instead, Articles 17-19 of the resulting text allows innocent passage through the territorial sea generally, and Article 38 allows the more liberal right of transit passage through international straits. These provisions were viewed by many as a fragile compromise, with some commentators remarking that reopening this question would have been tantamount to an agreement to continue negotiations for many years to come.[32]

The delegation from Brazil "did not consider it essential to have [such] a provision ... since it believed that States were already entitled under international law to adopt legislation regulating the passage of warships through their territorial sea, and the convention would not deprive them of that right."[33] Although this view was not

widely expressed, it may be indicative of the future. Some nations, especially those that feel they made great sacrifices to reach this compromise, may enact legislation seen by maritime powers as contrary to the language and spirit of the Convention.

Conclusion

The results of the Third UN Law of the Sea Conference can be evaluated in several ways. According to the language of the text and many experts such as Ambassador Koh,[34] the Convention assures navigational freedoms for military as well as for nonmilitary vessels. In addition, some results were unstated, but generally understood.[35] With universal ratification of the Convention apparently unlikely, the enduring qualities of these difficult compromises, often made to promote universal acceptance of the Convention, is unclear. The history of the negotiations is important in providing insight into the relative strengths and weaknesses of the Convention's result. The issues of military activities in the EEZ and prior notification of warships in the territorial sea were especially divisive ones, as seen in the negotiating history. Because of this friction in negotiation, these issues are likely to be continuing sources of conflict.[36]

Footnotes

1. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 Va. J. Int'l L. 809, 810 (1984).
2. United Nation Convention on the Law of the sea, opened for signature Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), reprinted in 21 I.L.M. 1261 (1982). Article 88 states that the high seas "shall be reserved for peaceful purposes."
3. Article 23 states that

   > Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.

4. Most notably Ambassador Tommy T.B. Koh of Singapore, in J. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* 303-04 (1985).
5. Declaration made upon signature of the Convention at Montego Bay, Jamaica, on December 10, 1982. Paragraph four of the Brazilian declaration reads as follows:

   > The Brazilian Government understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone military exercises or maneuvers, in particular those that imply the use of weapons or explosives, without the consent of the coastal State.

6. *See, e.g.*, statement by Camillus Narokobi of Papua New Guinea, in J. Van Dyke (ed.), *supra* note 4, at 302.

7. The one exception is the statement by U.S. Delegate Learson, see *infra* note 23 and accompanying text.
8. Third United Nations Conference on the Law of the Sea 1 Official Records (OR) (2d Sess. Caracas) (23rd mtg.) 75 (1974).
9. *Id.*, statement by Mr. Yankov, (36th mtg.) at 150.
10. *Id.*, statement by Mr. Bayonne, 2 OR (2d Sess. Caracas) (22nd mtg.) at 177.
11. *Id.*, statement by Mr. Chowdhury, (23rd mtg.) at 182.
12. *Id.*, statement by Mr. Theodoropoulos of Greece, 1 OR (2d Sess. Caracas) (32nd mtg.) at 129; statement of Mr. Robleh of Somalia, 1 OR (2d Sess. Caracas) (42nd mtg.) at 186; statement of Mr. Schreiber of Peru, 2 OR (3d Sess. Geneva) (24th mtg.) at 187 (1975); statement of Mr. Rangel of Brazil, 2 OR (3d Sess. Geneva) (26th mtg.) at 202 (1975); statement of Mr. Plaka of Albania, 2 OR (3d Sess. Geneva) (26th mtg.) at 210 (1975); statement of Mr. Soth of the Khmer Republic, 2 OR (3d. Sess. Geneva) (27th mtg.) at 212 (1975).
13. Proposed Draft of Article 9 by Bulgaria, Byelorrussian Soviet Socialist Republic, German Democratic Republic, Poland, Ukrainian Soviet Socialist Republic, and the Union of Soviet Socialist Republics, Doc. A/Conf. 62/C.2/L.38, reprinted at 3 OR C.2 (3d Sess. Geneva) 215 (1975).
14. See *supra* notes 2-3 and accompanying text.
15. Third United Nations Conference on the Law of the Sea, 2 OR (3d Sess. Geneva) (45th mtg.) 300 (1975).
16. *Id.*, 2 OR (3d Sess. Geneva) (26th mtg.) 202 (1975).
17. *Id.*, 2 OR (3d Sess. Geneva) (26th mtg.) 207, 210 (1975).
18. *Id.*, 2 OR (3d Sess. Geneva) (27th mtg.) 212 (1975).
19. *Id.*, 9 OR (7th Sess. New York) (105th mtg.) 78 (1978).
20. UN Doc. A/Conf. 62/Informal Meeting 19.
21. Third United Nations Conference on the Law of the Sea, 2 OR (3d Sess. Geneva) (30th mtg.) 228 (1975).
22. *Id.*, 1 OR (2d Sess. Caracas) (42nd mtg.) 186 (1974).
23. *Id.*, 5 OR (4th Sess. New York) (67th mtg.) 62 (1976).
24. See *supra* note 4 and accompanying text.
25. Third United Nations Conference on the Law of the Sea 5 OR (4th Sess. New York) (67th mtg.) 63 (1976).
26. *Id.*, 5 OR (4th Sess. New York) (68th mtg.) 66 (1976).
27. *Id.*, 9 OR (7th Sess. New York) (105th mtg.) 78 (1978).
28. *Id.*, 8 OR (6th Sess. New York) (125th mtg.) 8 (1977).
29. *Id.*, 14 OR (9th Sess. Geneva) (125th mtg.) 17 (1980).
30. A list of the thirty countries can be found at *id.*, 16 OR (11th Sess. New York) 114 (1982). These statements can be found at the following pages: *Id.*, 16 OR (11th Sess. New York) (161st mtg.) 31 (1982) (Argentina); 14 OR (9th Sess. Geneva) (138th mtg.) 62 (1980) (Bahrain); 16 OR (11th Sess. New York) (170th mtg.) 105 (1982) (Gabon); 14 OR (9th Sess. Geneva) (139th mtg.) 152 (1980) (Honduras); 16 OR (11th Sess. New York) (170th mtg.) 107 (1982) (Kampuchea); 16 OR (11th Sess. New York) (170th mtg.) 106 (1982) (Oman); 14 OR (9th Sess. Geneva) (139th mtg.) 72 (1980) (Syria).
31. 14 OR (9th Sess. Geneva) (135th mtg.) 28 (1980).
32. These states include Mongolia, 14 OR (9th Sess. Geneva) (139th mtg.) 29 (1980); Ukraine, Laos, Hungary, Italy, 15 OR (10th Sess. New York) (148th mtg.) 23 (1981); Australia, 16 OR (11th Sess. New York) (161st mtg.) 36 (1982); Bulgaria, Portugal, Madagascar, 16 OR (11th Sess. New York) (170th mtg.) 111-13 (1982); Canada, 16 OR (11th Sess. New York) (172nd mtg.) 115 (1982); New Zealand,

16 OR (11th Sess. New York) (172nd mtg.) 119 (1982); and the Federal Republic of Germany, 16 OR (11th Sess. New York) (173rd mtg.) 122 (1982).

33. Third United Nations Conference on the Law of the Sea 16 OR (11th Sess. New York) (170th mtg.) 103 (1982).
34. See *supra* note 4 and accompanying text.
35. *Id.*
36. One recent example of this conflict is the U.S. use of military force in Libya. Address of President Reagan (April 14, 1982), 22 Weekly Comp. Pres. Doc. 491 (April 21, 1986) (addressing the nation following the attack), reprinted in N.Y. Times, Apr. 15, 1986, at A10, col. 1. *See also* Bialos & Juster, *The Libyan Sanctions: A Rational Response to State-Sponsored Terrorism?*, 26 Va. J. Int'l L. 799 (1986).

Treaty of Tlatelolco

The Latin-American Treaty of Tlatelolco was signed February 14, 1967 in Mexico City and was the first nuclear-free zone enacted in a populated region. The concept and form of the Tlatelolco Treaty strongly influenced the subsequent drafting of the South Pacific Nuclear Free Zone Treaty (SPNFZ). Although an important first step, the Treaty of Tlatelolco's prohibition against nuclear weapons in the protected zone is compromised in three areas:

(1) Article 18 permits the explosion of a nuclear device for peaceful purposes, although such explosions are subject to both IAEA safeguards and the treaty's definition of a nuclear weapon. No attempt was made to define "peaceful." Peaceful nuclear devices can, of course, be converted into weapons.
(2) A second problem is that Article 18 can be interpreted in alternative ways:
   (a) that the treaty sanctions peaceful nuclear explosions, or
   (b) that the treaty prohibits the manufacture of a nuclear explosive device for peaceful purposes unless or until nuclear devices are developed that cannot be used as weapons.
(3) And third, because several countries of the region have not yet acceded to the treaty's provisions, the extent of their obligations remains unclear. Cuba and Guyana are not parties. Argentina, Brazil and Chile have signed but have not ratified the treaty.

Other aspects of the treaty should be noted. Instruments of propulsion are specifically allowed (Article 5), as are peaceful uses of nuclear energy (Article 17). The status of the "high seas" areas included in the zone of application, which remain unclaimed and under no state's jurisdiciton, is also not clarified in the treaty.

The United States is not a party to the treaty but has ratified both Protocol I and II and published the text of the treaty as an annex to Protocol II. France and the United States declared their "understanding" in Protocol II that the transport and transit of nuclear weapons are permitted. This statement was issued primarily to ensure freedom of navigation in the area.

Certain assurances of nonuse have been diluted by conditions attached in the form of reservations concerning, for example, changed circumstances clauses. The United States, the United Kingdom, and the Soviet Union have reserved the right to reconsider their obligations in the event of an armed attack in the region. Whether or not such hedged guarantees conform to the spirit of Protocol II is open to question. The treaty itself does not allow reservations.

South Pacific Nuclear Free Zone Treaty (SPNFZ)

On August 7, 1985, the Pacific island nations signed a treaty in Rarotonga, Cook Islands, declaring the South Pacific to be a nuclear-

free zone. Their treaty was modeled on the Treaty of Tlatelolco but went further, for example, in banning "peaceful" nuclear explosions and permitting the unilateral closing of ports to nuclear-powered or nuclear-armed vessels. The treaty zone includes areas from the western shores of the Australian continent to the western coast of the Latin American continent. It stretches north to the equator and south to Antarctica, abutting the Tlatelolco and Antarctic treaties zones. The South Pacific Treaty has three protocols. The first invites France, the United States, and the United Kingdom to apply key provisions of the Treaty to their South Pacific territories; the other two invite the five nuclear-weapon states to abstain from the use or threatened use of nuclear weapons against parties to the treaty, which includes testing nuclear explosive devices within the zone.

Prohibitions

The South Pacific Nuclear Free Zone Treaty prohibits nuclear testing, the land-based deployment of nuclear weapons, bases for nuclear-armed ships and aircraft, the storage of nuclear weapons, and the dumping and storage of nuclear waste at sea. Furthermore, no party may manufacture, acquire, possess, control, or even receive assistance related to nuclear weapons or waste. The giving of permission to another party to act within any of the categories referred to above would be considered a violation of the treaty. "Stationing" is explicitly defined to cover emplantation, emplacement, transport on land or internal water, stockpiling, storage, installation, and deployment. Article 7 imposes an obligation to refrain from dumping at sea or authorizing other nations to dump within a ratifying party's jurisdiction. The preamble speaks of keeping the "*region* free of environmental pollution by radioactive wastes and other radioactive matter" (emphasis added), and thus covers at least through rhetoric both land and sea areas. Verification combines IAEA safeguards with possible "challenge" on-site inspections.

Transit

This treaty does not, however, affect the transit or staging of nuclear craft. Under Article 5(b), a nation can restrict the port calls of nuclear vessels but other nations can permit such visits without violating the treaty. Vanautu and New Zealand, for example, have declared their ports off limits to nuclear craft, but Australia and most other South Pacific nations still permit such visits. It is unclear whether such unilateral port restrictions will affect freedom of navigation for the maritime powers. Nuclear-powered vessels do not logistically require port access but the political repercussions may, nonetheless, affect transit indirectly. The United States has claimed, for instance, that New Zealand's restrictive port policy caused the break-up of the ANZUS Treaty. This treaty also does not prohibit (conventional) missile testing, surveillance and communication facilities, the provision of uranium (subject to IAEA safeguards), and the peaceful use of nuclear energy (hospitals).

Antarctic Treaty Regime

The Antarctic Treaty was signed December 1, 1961, in Washington, and had been ratified by 32 nations by 1986. Article I dedicates Antarctica to peaceful purposes only. It outlaws measures of a military nature, such as the establishment of military bases and fortifications, maneuvers, and the testing of weapons. Military equipment or personnel may be used for scientific research or any other peaceful purpose.

The provisions of the Antarctic Treaty are quite rigorous, especially its verification and nonmilitary use articles. The ban placed upon "any nuclear explosions" prohibits military and nonmilitary explosions, both atmospheric and below the surface. Article V bans all nuclear explosions in Antarctica from being used as a nuclear proving ground or as a dumping ground for radioactive wastes. It also prevents the possibility that harmful fallout will be spread to neighboring regions. This article does not, however, prevent the use of nuclear energy in atomic power plants nor the use of radioactive material in the region. This understanding was made explicit by the United States, Australia, and France. The United States in fact operated a nuclear plant at McMurdo from 1962–72. Norwegian legislation has, on the other hand, outlawed the use or possession of a nuclear reactor, nuclear fuel, or radioactive products at its facilities. This Norwegian prohibition is in addition to the restrictions on nuclear explosions and the disposal of radioactive waste which apply to all nations.

The Antarctic parties have agreed to exchange information on the application of nuclear equipment and technologies in the treaty area. The treaty in particular requires prior notification of the use of radio isotopes, and waste containing radio isotopes must be removed from the treaty area. The possibility of nontreaty states disposing of nuclear waste in Antarctica was not discussed until the eighth consultative meeting.

Because Article VI preserves high seas rights, radioactive waste could be dumped at sea without violating the treaty. The right to inspect ships and aircraft, limited to the points of discharge (Article VII), reinforces the interpretation of this article as a loophole. The right of inspection does not apply to vessels at sea. Article VII also contains provisions designed to ensure that the peaceful intent of the treaty is carried out. Advance notice must be furnished of almost any activity. Parties must report on military personnel and equipment intended to be sent to Antarctica. The treaty allows complete freedom of access and aerial observation at any time for inspection purposes, and in fact many inspections have taken place.

Under Article VIII(1) any member of the United Nations may accede to the treaty. Article X pledges the parties not only to refrain from giving assistance to persons or countries that might engage in nonpeaceful activities or atomic tests, but to take active steps to discourage any such activitiy. This treaty is subject to review after thirty years (1991) (Article XII(2)).

Seabed Treaty

The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor was signed on February 11, 1971, by the Soviet Union, the United Kingdom, and the United States. By 1986, 83 countries had deposited instruments of ratification, including Byelorussia and the Ukraine, with Mexico, Vietnam, Italy, India, and Canada making declarations.

Parties undertook not to place on the seabed "any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations, or any other facilities specifically designed for storing, testing, or using such weapons." The Treaty is not applicable to the territorial sea (Article II). Article III authorizes observation that does not interfere with the activity being observed, followed by inspection if needed. As Louis Sohn points out this treaty does not affect freedom of navigation (see page 315 above).

Discussion

During the discussion that follows, Iosefa Maiava of Western Samoa, complains that the South Pacific Nuclear Free Zone Treaty (SPNFZ) is little more than a paper tiger: it prohibits only four activities and leaves another twelve unaffected, thus granting those twelve legitimacy by default. These concessions made to gain credibility and adherence by the nuclear powers went too far, in his judgment. Although nuclear testing is banned, the infrastructure essential to testing remains; although permanent stationing is banned, the lack of a time element in the "stationing" criteria opens a loophole that eliminates the provision as a preventive measure.

A striking contrast in tone follows from another South Pacific islander. Gracie Fong from Fiji also describes the South Pacific Nuclear Free Zone Treaty, discussing specific articles in some detail. It seems that support or criticism for the South Pacific Nuclear Free Zone Treaty corresponds to how one evaluates the "symbolic" value attached to the treaty and whether that "symbolism" will be sufficient to achieve its objective.

John Craven takes a step back in predicting that nuclear-free zones are only the first step in the probable elimination of absolute immunity for warships and poses a hypothetical concerning verification and the Treaty of Tlatelolco to Professor Sohn. Nugroho Wisnumurti addresses the implications of New Zealand's ban on nuclear craft and the repercussions of that action. In Bruce Harlow's words, this is where the "rubber meets the road." For him the treaty now is more a symbolic statement or expression of aspiration. He predicts that New Zealand will suffer from its action and afforts will increase to discourage further nuclear-free zones.

Jim Anthony, speaking on the environmental treaty adopted under the auspices of the South Pacific Regional Environment Programme (SPREP), agrees with Mr. Maiava regarding the symbolic meaning and importance of an absence of prohibiting nuclear testing language. Gracie Fong, involved with both the SPREP and the SPNFZ treaties, takes strong exception to both Iosefa Maiava's and Dr. Anthony's views, as does Scott Hajost. She sees, for example, "definitional" problems where others find bad-faith purpose and motive. Scott Hajost also refers to the complexity of the testing issues at SPREP and cautions against broad, simplistic inferences being drawn from positions taken on issues like testing. In the case of SPREP and the Nuclear Free Zone Treaty, the symbiotic whole may be more than the sum of the parts.

TREATY FOR THE PROHIBITION OF NUCLEAR WEAPONS IN LATIN AMERICA (THE TREATY OF TLATELOLCO)

****

Article 1
Obligations

1. The Contracting Parties hereby undertake to use exclusively for peaceful purposes the nuclear material and facilities which are under their jurisdiction, and to prohibit and prevent in their respective territories:

(a) The testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons, by the Parties themselves, directly or indirectly, on behalf of anyone else or in any other way, and

(b) The receipt, storage, installation, deployment and any form of possession of any nuclear weapons, directly or indirectly, by the Parties themselves, by anyone on their behalf or in any other way.

2. The Contracting Parties also undertake to refrain from engaging in, encouraging or authorizing, directly or indirectly, or in any way participating in the testing, use, manufacture, production, possession or control of any nuclear weapon.

* * * *

Article 3

Definition of territory

For the purposes of this Treaty, the term "territory" shall include the territorial sea, air space and any other space over which the State exercises sovereignty in accordance with its own legislation.

* * * *

Article 5

Definition of nuclear weapons

For the purposes of this Treaty, a nuclear weapon is any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes. An instrument that may be used for the transport or propulsion of the device is not included in this definition if it is separable from the device and not an indivisible part thereof.

* * * *

Article 16

Special inspections

1. The International Atomic Energy Agency and the Council established by this Treaty have the power of carrying out special inspections in the following cases:

(a) In the case of the International Atomic Energy Agency, in accordance with the agreements referred to in article 13 of this Treaty;

(b) In the case of the Council:

(i) When so requested, the reasons for the request being stated, by any Party which suspects that some activity prohibited by this Treaty has been carried out or is about to be carried out, either in the territory of any other Party or in any other place on such latter Party's behalf, the Council shall immediately arrange for such an inspection in accordance with article 10, paragraph 5;

(ii) When requested by any Party which has been suspected of or charged with having violated this Treaty, the Council shall immediately arrange for the special inspection requested in accordance with article 10, paragraph 5.

The above requests will be made to the Countil through the General Secretary.

2. The costs and expenses of any special inspection carried out under paragraph 1, sub-paragraph (b), sections (i) and (ii) of this article shall be borne by the requesting Party or parties, except where the Council concludes on the basis of the report on the special inspection that, in view of the circumstances existing in the case, such costs and expenses should be borne by the agency.
4. The Contracting Parties undertake to grant the inspectors carrying out such special inspections full and free access to all places and all information which may be necessary for the performance of their duties and which are directly and intimately connected with the suspicion of violation in this Treaty. If so requested by the authorities of the Contracting Party in whose territory the inspection is carried out, the inspectors designated by the General Conference shall be accompanied by representatives of said authority, provided that this does not in any way delay or hinder the work of the inspectors.

* * * *

Article 17
Use of nuclear energy for peaceful purposes

Nothing in the provisions of this Treaty shall prejudice the rights of the Contracting Parties, in conformity with this Treaty, to use nuclear energy for peaceful purposes, in particular for their economic development and social progress.

Article 18
Explosions for peaceful purposes

1. The Contracting Parties may carry out explosions of nuclear devices for peaceful purposes - including explosions which involve devices similar to those used in nuclear weapons - or collaborate with third parties for the same purpose, provided that they do so in accordance with the provisions of this article and other articles of the Treaty, particularly articles 1 and 5.

* * * *
* * * *

SOUTH PACIFIC NUCLEAR FREE ZONE TREATY

* * * *

Article 1
Usage of Terms

For the purposes of this Treaty and its Protocols:

(a) "South Pacific Nuclear Free Zone" means the areas described in Annex 1 as illustrated by the map attached to that Annex;
(b) "territory" means internal waters, territorial sea and archipelagic waters, the seabed and subsoil beneath, the land territory and the airspace above them;

(c) "nuclear explosive device" means any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the purpose for which it could be used. The term includes such a weapon or device in unassembled and partly assembled forms, but does not include the means of transport or delivery of such a weapon or device if separable from and not an indivisible part of it;

(d) "stationing" means emplantation, emplacement, transportation on land or inland waters, stockpiling, storage, installation and deployment.

Article 2
Application of the Treaty

1. Except where otherwise specified, this Treaty and its Protocols shall apply to territory within the South Pacific Nuclear Free Zone.
2. Nothing in this Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to freedom of the seas.

Article 3
Renunciation of Nuclear Explosive Devices

Each party undertakes:

(a) not to manufacture or otherwise acquire, possess or have control over any nuclear explosive device by any means anywhere inside or outside the South Pacific Nuclear Free Zone;

(b) not to seek or receive any assistance in the manufacture or acquisition of any nuclear explosive device;

(c) not to take any action to assist or encourage the manufacture or acquisition of any nuclear explosive device by any State.

Article 4
Peaceful Nuclear Activities

Each Party undertakes:

(a) not to provide source or special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material for peaceful purposes to:
   i) any non-nuclear-weapon State unless subject to the safeguards required by Article III.1 of the NPT [Nuclear Non-Proliferation Treaty], or
   ii) any nuclear-weapon State unless subject to applicable safeguards agreements with the International Atomic Energy Agency (IAEA).

   Any such provision shall be in accordance with strict non-proliferation measures to provide assurance of exclusively peaceful non-explosive use;

(b) to support the continued effectiveness of the international non-proliferation system based on the NPT and the IAEA safeguards system.

Article 5
Prevention of Stationing of Nuclear Explosive Devices

1. Each Party undertakes to prevent in its territory the stationing of any nuclear explosive device.
2. Each Party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lane passage or transit passage of straits.

Article 6
Prevention of Testing of Nuclear Explosive Devices

Each Party undertakes:

(a) to prevent in its territory the testing of any nuclear explosive device;
(b) not to take any action to assist or encourage the testing of any nuclear explosive device by any State.

Article 7
Prevention of Dumping

1. Each Party undertakes:

(a) not to dump radioactive wastes and other radioactive matter at sea anywhere within the South Pacific Nuclear Free Zone;
(b) to prevent the dumping of radioactive wastes and other radioactive matter by anyone in its territorial sea;
(c) not to take any action to assist or encourage the dumping by anyone of radioactive wastes and other radioactive matter at sea anywhere within the South Pacific Nuclear Free Zone;
(d) to support the conclusion as soon as possible of the proposed Convention relating to the protection of the natural resources and environment of the South Pacific region and its Protocol for the prevention of pollution of the South Pacific region by dumping, with the aim of precluding dumping at sea of radioactive wastes and other radioactive matter by anyone anywhere in the region.

* * * *
* * * *

TREATY ON THE PROHIBITION OF THE EMPLACEMENT OF NUCLEAR WEAPONS AND OTHER WEAPONS OF MASS DESTRUCTION ON THE SEA-BED AND THE OCEAN FLOOR AND THE SUBSOIL THEREOF

* * * *

Article I

1. The States Parties to this Treaty undertake not to emplant or emplace on the sea-bed and the ocean floor and in the subsoil thereof beyond the outer limit of a sea-bed zone, as defined in

Article II, any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.

2. The undertakings of paragraph 1 of this Article shall also apply to the sea-bed zone referred to in the same paragraph, except that within such sea-bed zone, they shall not apply either to the coastal State or to the sea-bed beneath its territorial waters.
3. The States Parties to this Treaty undertake not to assist, encourage or induce any State to carry out activities referred to in paragraph 1 of this Article and not to participate in any other way in such actions.

Article II

For the purpose of this Treaty, the outer limit of the sea-bed zone referred to in Article I shall be coterminous with the twelve-mile outer limit of the zone referred to in Part II of the Convention on the Territorial Sea and the Contiguous Zone, signed at Geneva on 29 April 1958, and shall be measured in accordance with the provisions of Part I, Section II, of this Convention and in accordance with international law.

Article III

1. In order to promote the objectives of an ensure compliance with the provisions of this Treaty, each State Party to the Treaty shall have the right to verify through observation the activities of other States Parties to the Treaty on the sea-bed and the ocean floor and in the subsoil thereof beyond the zone referred to in Article I, provided that observation does not interfere with such activities.
2. If after such observation reasonable doubts remain concerning the fulfilment of the obligations assumed under the Treaty, the State Party having such doubts and the State Party that is responsible for the activities giving rise to the doubts shall consult with a view to removing the doubts. If the doubts persist, the State party having such doubts shall notify the other States parties, and the Parties concerned shall co-operate on such further procedures for verification as may be agreed, including appropriate inspection of objects, structures, installations or other facilities that reasonably may be expected to be of a kind described in Article I. The Parties in the region of the activities, including any coastal State, and any other Party so requesting, shall be entitled to participate in such consultation and co-operation. After completion of the further procedures for verification, an appropriate report shall be circulated to other Parties by the Party that initiated such procedures.

   If the State responsible for the activities giving rise to the reasonable doubts is not identifiable by observation of the object, structure, installation or other facility, the State Party having such doubts shall notify and make appropriate inquiries of States Parties in the region of the activities and of any other State Party. If it is ascertained through these inquiries that a particular State Party is responsible for the activities, that State Party shall consult and co-operate with other Parties as provided in paragraph 2 of this Article. If the identity of the State responsible

for the activities cannot be ascertained through these inquiries, then further verification procedures, including inspection, may be undertaken by the inquiring State Party, which shall invite the participation of the parties in the region of the activities, including any coastal State, and of any other Party desiring to co-operate.

4. If consultation and co-operation pursuant to paragraphs 2 and 3 of this Article have not removed the doubts concerning the activities and there remains a serious question concerning fulfilment of the obligations assumed under this Treaty, a State Party may, in accordance with the provisions of the Charter of the United Nations refer the matter to the Security Council, which may take action in accordance with the Charter.
5. Verification pursuant to this Article may be undertaken by any State Party using its own means, or with the full or partial assistance of any other State Party, or through appropriate international procedures within the framework of the United Nations and in accordance with its Charter.
6. Verification activities pursuant to this Treaty shall not interfere with activities of other States Parties and shall be conducted with due regard for rights recognized under international law, including the freedoms of the high seas and the rights of coastal States with respect to the exploration and exploitation of their continental shelves.

* * * *
* * * *

THE ANTARCTIC TREATY

* * * *

Article I

1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any means of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.
2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.

* * * *

Article V

1. Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.
2. In the event of the conclusion of international agreements concerning the use of nuclear energy, including nuclear explosions and the disposal of radioactive waste material, to which all of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX are parties, the rules established under such agreements shall apply in Antarctica.

Article VI

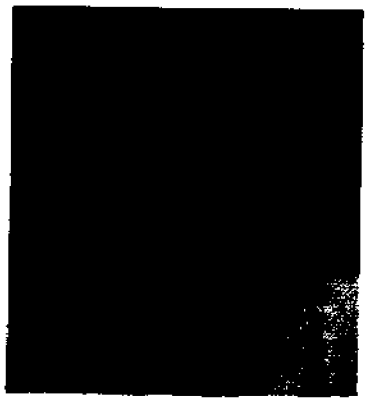
The provisions of the present Treaty shall apply to the area south of 60 degrees South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.

Article VII

1. In order to promote the objectives and ensure the observance of the provisions of the present Treaty, each Contracting Party whose representatives are entitled to participate in the meetings referred to in Article IX of the Treaty shall have the right to designate observers to carry out any inspection provided for by the present Article. Observers shall be nationals of the Contracting Parties which designate them. The names of observers shall be communicated to every other Contracting Party having the right to designate observers, and like notice shall be given of the termination of their appointment.
2. Each observer designated in accordance with the provisions of paragraph 1 of this Article shall have complete freedom of access at any time to any or all areas of Antarctica.
3. All areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, shall be open at all time to inspection by any observers designated in accordance with paragraph 1 of this Article.
4. Aerial observation may be carried out at any time over any or all areas of Antarctica by any of the Contracting Parties having the right to designate observers.
5. Each Contracting Party shall, at the time when the present Treaty enters into force for it, inform the other Contracting Parties, and thereafter shall give them notice in advance, of
   (a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory;
   (b) all stations in Antarctica occupied by its nationals; and
   (c) any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article I of the present Treaty.

THE SOUTH PACIFIC NUCLEAR FREE ZONE TREATY

Iosefa Maiava
Ph.D. Candidate
University of Hawaii
Honolulu, Hawaii



On August 6, 1985, eight countries of the South Pacific Forum signed the Treaty of Rarotonga in the Cook Islands.[1] The Treaty seeks to balance the conflicting interests of the maritime powers and the coastal states of the Pacific Islands. The South Pacific Nuclear Free Zone Treaty guarantees most of the maritime power interests, i.e., unimpeded use of the Pacific Ocean for military and nonmilitary purposes. The Pacific island nations, on the other hand, wanted to ensure that maritime activities within their region did not threaten their national security interests and other interests as well. The need for a nuclear-free zone in the area is clear to us. The Pacific islanders are second only to the Japanese regarding exposure to nuclear activities. The treaty protects certain of the Pacific island interests, for example, Article 3 prohibits the acquisition of nuclear weapons, Article 5(1) prohibits the permanent stationing by external powers of nuclear explosives, Article 6 prohibits nuclear testing (although it still is being conducted by the French government), and Article 7 prohibits the dumping of nuclear wastes. Perhaps other prohibitions could be teased from the text but I will leave that to the lawyers. As a political scientist I cannot see any other prohibitions beyond the four I listed.

The Treaty Allows More Than It Bans

By not explicitly banning other activities, the Treaty legitimizes or allows them to occur. Twelve important nuclear related activities remain unaffected. For example, the treaty does not ban nuclear weapons transit on ships and submarines within territorial waters. Nothing is said about nuclear-weapon related command, control, communication, intelligence, and navigation, all important aspects of the nuclear arms race. The treaty does not ban missile testing or monitoring; nor does it ban military exercises involving nuclear armed vessels and aircraft. It does not ban the transit or port calls of nuclear-powered vessels. It does not ban commercial nuclear-power reactors; it does not ban nuclear waste disposal on land; it does not ban military alliances using nuclear weapons; and it does not ban logistical support and resupply for nuclear weapon carriers. The treaty allows more than it bans.

Circumventing the Treaty

Some people have said that this treaty is a useful, realistic balance between the interests of the maritime powers and those of the coastal states. Others say that is is a "paper tiger," a useless treaty because it really does not ban anything. And such people will point, for example, to the fact that even when we consider the four important activities that are prohibited by the treaty, we can see that nations involved can circumvent the prohibitions. For example, an indefinite port stay by a ship avoids the ban on permanent stationing of nuclear explosives because the treaty fails to define what constitutes "permanent stationing." Is an American nuclear ship stationed in Australia for eight months of the year in violation?

Some Pacific island governments wanted more specificity, but Australia and I think New Zealand did not, apparently in anticipation of this loophole. Because the ban on the acquisition of nuclear weapons can affect only Australia and New Zealand, it is meaningless for the Pacific Island nations.

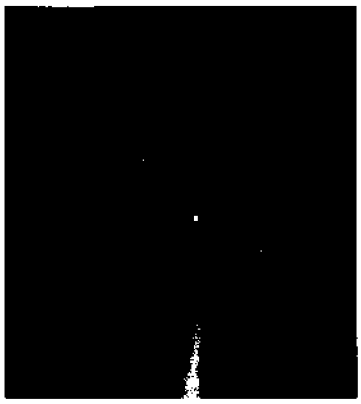
On a positive note the treaty conforms with what is currently called international law or customary law. For what it is worth, the treaty seems to conform with that.

Footnote

1. South Pacific Nuclear Free Zone Treaty, *done* at Rarotonga, Cook Islands, Aug. 6, 1985, 24 I.L.M. 1440 (1985).

COMMENTS ON THE SOUTH PACIFIC NUCLEAR FREE ZONE TREATY

Gracie Fong
Crown Law Office
Fiji



The idea of a nuclear-free zone fo the South Pacific is not new. It was raised in the 1970s, in 1983 at the meeting of the South Pacific Forum, and again in 1984 at the Forum meeting held in Tuvalu. At that meeting, the heads of government agreed to establish a Working Group of Officials to draft a treaty for the heads of government to consider at its next meeting in Rarotonga. Beginning in November, 1984 the Working Group met five times, a separate session of the drafting committee had produced the first draft. Within seven months the draft was ready for the Rarotonga meeting. There, the heads of government adopted the draft treaty and eight countries signed.[1] The three draft protocols were not adopted but the Working Group was directed to undertake consultations with the five nuclear weapon states. A ninth country, Papua New Guinea, has subsequently signed, and Fiji, and the Cook Islands have ratified.

In addition to Article 2(2), which preserves freedom of the high seas, Article 5(2) preserves the power to make unilateral decisions regarding port and airfield visits. This matter was specifically preserved by the heads of government. Article 5(2) also preserves the sovereign right of each party to control the transit of its air space and navigation in its territorial sea and in archipelagic waters. In Article 6, the parties agreed to prevent testing in their territory, as defined by the treaty, and agreed not to assist or encourage testing by any state. This latter prohibition extends throughout the world, not only to the defined zone. Article 7 deals with dumping at sea. There is no provision in the treaty concerning disposal or storage on land. Article 7 refers specifically to the SPREP Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.[2]

Footnotes

1. South Pacific Nuclear Free Zone Treaty, adopted by the South Pacific Forum at Rarotonga on August 6, 1985 and signed on the same day by

New Zealand, Australia, Cook Islands, Fiji, Kirubati, Niue, Tuvalu, and Western Samoa.

2. Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, *done* at Noumea, New Caledonia on November 24, 1986, *reprinted in* 26 I.L.M. 38 (1987).

DISCUSSION

Arms Control and Arms Limitations

John Craven: In no way can warships, both on the high seas and in the territorial zone, continue to enjoy the immunity they have received in the past. All nations have a vested interest in arms control and arms limitation. The possessors of arms have a vested interest in demonstrating to the world their compliance with arms control and arms limitation. Nuclear powers operating on the high seas must therefore invent a technique to persuade other parties and the rest of the world of their compliance with the limits on the number of nuclear weapons that can be transported on the sea.

To maintain security, with respect to the nuclear arms race, it is not necessary to occupy all the ocean. Vast areas of the high seas are in fact nuclear-free. The *de facto* zones are increasingly declared to be *de jure* nuclear free through the establishment of nuclear-free zones and the need to verify these zones requires new legal mechanisms. This modification of the immunities given to warships must protect the warships and protect the security interest of the deploying nations. Clearly, arms control agreements will require mechanisms to allow either inspections or demonstrations on the high seas. The limitations on ships in port and in the territorial sea within these nuclear-free zone treaties represent the leading edge of that process.

Professor Sohn pointed out in his presentation (page 310) that Sweden claimed the right to inspect a grounded Soviet warship that had entered its territorial waters. In case law, Sweden lacks the right of inspection. But note the careful language in the Treaty of Tlatelolco. If a violation is suspected within territory to which the treaty applies, such territory being carefully defined to include the territorial sea, then that state is obligated to make the site of the suspected violation available to a formally constituted inspection team.[1] The protocol the nuclear powers have signed states that signatories will abide by the treaty, not only within the zone, but within the territory.[2]

My hypothetical to Professor Sohn states that a protocol nation's warship is visiting a port of a contracting party and is suspected of a violation by military officers of another protocol nation who also happen to be in the port on their warship. Can the contracting party (the port state), under the terms of the treaty and the protocol, detain the ship suspected of a violation and permit an inspecting party to investigate the alleged violation?

Louis Sohn: I do not think it is possible for State A to say that the warship of State B should be inspected by a third party or even by an international authority. Of course, the warship state could grant permission. Interestingly, Article 16 of the Tlatelolco Treaty provides two options: a state may lodge a complaint against a third party, or the suspect state may request an inspection to demonstrate innocence.[3] The

same kind of provisions exist and work in human rights treaties.[4] In the Swedish situation, Russia did not permit inspection of the entire submarine, only of the official quarters of the captain and the navigation room. One obstacle in the law of the sea negotiations relating to inspection or dispute settlement in general, was the possible disclosure of military secrets. Although a vessel may not carry nuclear weapons, a state will refuse an inspection that might uncover other classified machinery. This refusal of permission to inspect will be viewed as an admission of guilt. Because of this dilemma the navy prefers not to permit inspection at all. The solution adopted in the Treaty of Tlatelolco might work; simply permit the state to invite you -- say "we would be very pleased if you invite us." Then the burden shifts to the other side. But certainly you cannot allow host State A to authorize an international inspection of State B's vessel simply because State B's vessel happens to be in State A's port or territorial water.

Bruce Harlow: I want to comment on the idea of the "package deal" -- that the United States agreed to a package and now is splitting it apart, taking the best out of it and abandoning the rest. I personally participated in "package" negotiations over the years. This was a dynamic present in most discussions during the negotiation phase. Countries, like individuals, often negotiate issues as trade-offs -- *e.g.*, if you support me on this article I will support you on another. Such an approach is appropriate during the negotiating phase.

But in my personal judgment if you extend that logic to the implementation phase it would be terribly unfortunate and counterproductive from all nations' perspective. We are faced with the ongoing question of how to navigate warships and commercial ships. This is something that has to be dealt with on a daily basis. Decisions cannot be delayed for any period of time. How do we conduct ourselves, what rights do we assert, and on what basis do we assert them? And I would hope no one would take the position that the United States relinquished its navigational rights because we decided not to sign the treaty. The real issue is "how" are those navigational rights to be undertaken, not whether the United States will excercise navigational rights. I continue to believe it is in everyone's interest to develop a unitary rather than a dualistic system to avoid chaos and confusion. It would ultimately be complicated and confusing to have the United States asserting rights under one set of rules and customary practices, while other nations are working toward implementing the balances envisioned in the 1982 Convention. I do not minimize the importance of the future of seabed mining. We will have ample opportunity to deal with that problem later, and should look at the navigational challenges as a separate, more immediate issue.

Developing Nations' View of U.S. Policy:

Camillus Narokobi: Admiral Harlow's comments have forced me to repeat again what a number of us, including Hasjim Djalal, made very clear in the meeting two years ago[5] -- that we do not understand how if the United States is not a party to the Law of the Sea Convention it can invoke the rights under the Convention without accepting the responsibilities. The Vienna Law of Treaties[6] does not allow it. If you are saying that customary rules of international law give you the right, many developing countries respond that there are no such customary principles of international law.

Harlow: Our colleague from the southwest Pacific, Camillus Narokobi, reminds us that under the 1969 Vienna Convention on Treaties a nation cannot enjoy treaty rights if it is not a party to the treaty. I agree with that conclusion, but it brings us back to the fundamental question -- what is the nature of United States' activities on the high seas? Is it currently acting, when its ships proceed through international straits, pursuant to the Convention or is it acting, as it has for many years, pursuant to pre-existing rights? I would be the last to suggest that the United States as a nonparty could assert "transit passage" *per se*, because that particular formulation is a unique and new word of art. But it does not follow from that admission that the United States must cease and desist from exercising navigational rights it has traditionally enjoyed for many years.

As I read the President's March 10, 1983 Ocean Policy Statement,[7] he is not in any way asserting rights under the Convention. The United States has expressed a willingness to use the balances contained in the Convention as a blueprint for bilateral discussion and implementation. It was simply an offer. Any nation can refuse that offer.

This situation leaves us with several options. One, as was suggested by our Canadian colleague Edgar Gold, we could think in terms of negotiating a new convention for commercial shipping and perhaps a separate convention for military strategic interests (see pages 394-400 below). I cringe at that thought. Indeed, I personally think that if principles in the 1982 Convention fail to gain a consensus of support, there would be little political support for another round of negotiations, even though that would create employment for another generation of lawyers and diplomats.

I would simply close in expressing the thought that although the United States is in no position to assert rights under the Convention, there is a lot to be said for informally discussing the possibility of bringing the maritime world together using the 1982 Convention as a blueprint for a unitary and peace-promoting system.

Scott Hajost: I am one of the lawyers that Admiral Harlow has referred to that are "carrying on." Life goes on with respect to ocean law, and, as Admiral Harlow says, we have been utilizing the 1982 Convention as a blueprint, whether it be to look at questions of marine scientific research and its implementation, what coastal states are doing, or whether it be the marine environment section. There is a lot being done now and most of it conforms to the principles of the 1982 Convention.

Nugroho Wisnumurti: I would like to mention the relation between the passage regime and the freedom of navigation and the establishment of nuclear-free zones. The refusal by New Zealand to grant port access to American nuclear ships has triggered an attempt by the United States to discourage the establishment of nuclear-weapon-free zones which are now widely considered to be essential in the effort to promote general and complete disarmament. The recent South Pacific Nuclear Free Zone Treaty is an important phenomenon which has to be taken into account. Although the transit of nuclear ships remain unaffected, the treaty delegates the question of port access to individual state discretion.

James Anthony: Law of the sea issues intertwine with issues of war and peace, and with big and small power naval strategy. "Navigation" includes both commercial navigation and nuclear-powered, and nuclear-

weapons-carrying ships. Regional navigation issues are also tied to the exploitation of pelagic and living resources and to seabed mineral exploitation, which constitutes a minerals denial policy by the United States. And also perhaps on the part of the Soviet Union, if the Soviet Union is able to get its clutches on some of the islands in the Pacific. My position as a Pacific Islander is as follows: foreign policy is not about getting into bed with anyone, either the Soviets or the Americans. But I feel we must live and talk with the great powers, enjoy friendly relations, and at the same time pursue our interests. Those interests remain unarticulated. I do not speak *for* the Pacific here, but I am speaking about the Pacific as a Pacific Islander. The Pacific islands are information-scarce societies. We constantly face the inability to deal realistically with the outside world and with processes of globalization because we lack information. At the negotiations under the auspices of the South Pacific Regional Environmental Programme (SPREP) in Noumea, New Caledonia, which produced the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region,[8] the American delegation could contact Washington at the press of a button, whereas we lacked access to needed information.

Three major issues divided the experts during these negotiations. One was the question of the delineation of the convention zone; the second was the question of prohibition language with respect to dumping, and the third was the biggest stumbling block, the prohibition language regarding nuclear testing. If the treaty is completed without any significant prohibition language on testing, it would amount to an abandonment of principles enunciated time and again over the last 20 years, particularly by my country, Fiji. This would amount to a major political victory for France, lending an imprimatur, a legitimacy to French testing in the Pacific. The United States must choose between French nuclear and colonial policies in the Pacific and the interests of the Pacific Islanders.

With regard to the South Pacific Nuclear Free Zone Treaty, one problem was that no effective public input was allowed. At these negotiations, Australia, to us an Australian term, "carried the can" for the United States.

Gracie Fong: I was with Dr. Anthony at the third SPREP experts meeting in 1984. There are a few things I wish to comment on because there may be otherwise a misunderstanding.

It is news to me that the Australians or any other Pacific delegations are applying pressure for the deletion of the testing provision in the SPREP Convention. At the fourth experts meeting (November 1985), we considered the testing issue informally. No formal progress was made except that delegations decided to take the matter home and look for compromise along the lines of the options we had discussed informally. Any decision to delete the version totally prohibiting testing does not signal an abandonment of our opposition to testing. As a party to the South Pacific Nuclear Free Zone Treaty, Fiji is bound by the testing prohibition and will pursue opposition to the French testing no matter how long it takes.

I would also like to respond to the several matters raised by Iosefa (pages 363-64) regarding the South Pacific Nuclear Free Zone Treaty which I was able to catch. The questions of the definition of nuclear devices and of stationing under the treaty, and the failure to include missiles, i.e., the transport systems for nuclear warheads, were raised during the negotiations. The treaty is a consensus document and its records are still confidential so I do not consider it proper to canvass the various

opinions here, but I can say that we were confronted with a definitional problem. We were told that it is all very well to talk about transport systems but the same transport systems that are capable of carrying nuclear warheads can also carry conventional weapons. How can one distinguish between a truck carrying a nuclear warhead and one carrying a conventional one? That was the sort of problem we were facing.

On the question of public representation at the working group's meetings, the shortage of time precluded oral presentations and led to the decision to ask for comments in writing. The written representations from the public were certainly circulated and discussed.

Whether the South Pacific Nuclear Free Zone Treaty is a paper tiger and toothless, I am not fully qualified to answer. This again is a question of opinion. From the outset we had to acknowledge that the effectiveness of the treaty would depend on its being acceptable to the nuclear weapon states. In an ideal world, many of us would try to ban everyone, not just ourselves, from doing a whole lot of things. But given the constraints within which we had to work, we had to limit our goals. Nonetheless, limited though our treaty may be, it still goes much, much farther than its Latin American counterpart. (See pages 355-57).

Hajost: I want to add a word or two with respect to Dr. Anthony's comments on the South Pacific Regional Environment Program Convention negotiations, and I want to stress that I am speaking very much in my personal capacity. I have been involved in the SPREP negotiations from the beginning as the U.S. representative. It was a difficult, yet rewarding and unforgettable experience. Nuclear testing was perhaps the most difficult issue in the negotiations. This transcends many different concerns. It involves global relationships and it does present some very difficult decisions not only for the United States but for all the rest of the participants involved in the negotiations. One area where I might differ with Dr. Anthony is that if the convention does not totally prohibit testing, the South Pacific nations should not view that as the abandonment of their position. The South Pacific position is well known and understood and receives its expression clearly in the South Pacific Nuclear Free Zone Treaty, which will stand on its own regardless of the final language in the SPREP treaty.

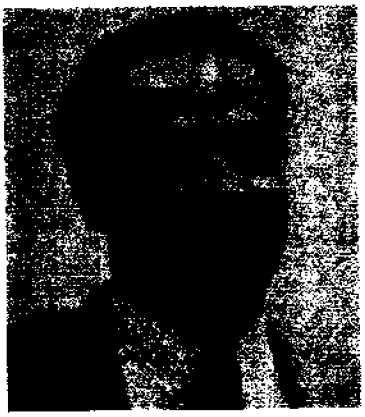
Footnotes

1. The Treaty for the Prohibition of Nuclear Weapons in Latin America, Mexico City (Tlatelolco), *done* Feb. 14, 1967, 22 U.S.T. 762, T.A.I.S. No. 7137, 634 U.N.T.S. 381.
2. Additional Protocol II to the Tlatelolco Treaty, 22 U.S.T. 754, T.A.I.S. 7137, 634 U.N.T.S. 364.
3. *See* note 1 *supra.*
4. *See*, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 48, 213 U.N.T.S. 222, 45 Am. J. Int'l L. Supp. 24 (1951).
5. Djalal, *The Effects of the Law of the Sea Convention on the Norms that Now Govern Ocean Activities*, in J. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* 50-57 (1985).
6. Vienna Convention on the Law of Treaties, *done* May 23, 1969, UN Doc. A/CONF. 39/27, at 289 (1969), *reprinted in* 8 I.L.M. 679 (1969).

7. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).
8. 26 I.L.M. 38 (1987). This treaty is frequently referred to as the "SPREP Treaty" because it was negotiated under the auspices of the South Pacific Regional Environmental Programme (SPREP).

COMMENTS ON NATIONAL SECURITY CONCERNS

Harvey Dalton
Judge Advocate General's Office
United States Navy
Hawaii



Creeping Jurisdiction

Creeping jurisdiction and creeping uniqueness are no longer limited to developing countries. Now the most developed countries are participating in this type of action. Examples include the recently promulgated Italian system of straight baselines, the Soviet system of straight baselines,[1] and the Canadian system of straight baselines in the Arctic.[2] One might argue that the Federal Republic of Germany's territorial sea box (see Map 2 on page 105), seems conservative by comparison. The United States has also been characterized at this meeting as acting in a manner not justified by the law (see page 368).

The Malacca Straits

The paper on the Malacca Straits noted that in 1971 Indonesia and Malaysia felt that Malacca was not an international strait (see page 168 above). Is that still the current position of the government of Indonesia?

Data Sharing

Does the recommendation to enhance research and development regarding the needs and priorities of strait states include data-sharing? Would data be shared with other states? Would data be shared with potential enemies? Would data be shared during armed conflict? Would it make any difference if Indonesia was not neutral? What information would be shared under those circumstances and would it make any difference?

My point is this: the Convention and the customary international principles articulated in the Convention, cannot be implemented in total isolation from the broad web of international law.

The Convention During Armed Conflict

At present we are in what could be characterized as a peacetime environment, although there are ongoing armed conflicts in the Persian Gulf and in Southwest Asia. Military lawyers must address law of the sea issues not simply within the context of the Convention, but also within the context of military operations and national security, including our

commitments to our allies and our friends. For example, Iran conducts visits and searches and confiscates contraband from so-called neutral vessels on the high seas. United States officials indicated that a recent search of a U.S. flag vessel on the high seas was legal. During the recent Falklands conflict, a "hot" war limited geographically, the concept of a military exclusion zone, and then of a total exclusion zone, was imposed on vast areas of the high seas.

Protection of Warships on the Persian Gulf

The United States defends its warships in and around the Persian Gulf by issuing notice to mariners and airmen to identify themselves upon approach and within a certain distance.[3] We ask aircraft and vessels not to come within five nautical miles without identifying themselves. This five mile requirement is not an exclusion or a free-fire zone. Military lawyers carefully balance the interests of high seas navigational and overflight freedoms with the need to protect warships from territorial attack.

The Right of Self Defense Under the UN Charter

The framework that underlies the Convention and military operations is the United Nations Charter. And the UN Charter is reflected in the Convention regarding archipelagic sea lanes and straits transit. For example, Article 39(1)(b) states that in transit, ships shall refrain from the threat or use of force against the coastal state or in any other way in violation of the principles of the UN Charter.

A fundamental principle of the UN Charter is the right of self defense which is a customary right of international law articulated in Article 51 of the UN Charter. Article 51 pervades the entire spectrum of armed conflict -- from a very low intensity guerrilla or terrorist-type action to world war. States have the right to protect themselves, their vessels, and their citizens.

The use of force and the use of force in self defense introduces a spectrum of legal principles, such as rules of belligerency and rules of neutrality. These rules are designed to limit the conflict to the belligerents themselves, to constrain escalation, and to limit the involvement of neutral states. These rules must be reconciled with principles of customary international law contained or articulated in the Law of the Sea Convention that might be applicable during armed conflict and that may require some adjustments by both the belligerents and by neutral states.

Operation Zones and Exclusion Zones

In the Persian Gulf war, both Iran and Iraq have declared operation or exclusive zones in areas of the Persian Gulf. The zones extend into high seas areas. One could argue from the provisions the 1982 Convention or the 1958 High Seas convention that these actions are illegal. The 1958 Convention, however, clearly articulated that it applied in peacetime and not during armed conflict.[4] The same notion might apply to the 1982 Convention where the application during times of armed conflict is not clearly articulated. Given also the principle of self defense, where states in armed conflict delineate and create zones, one cannot say, merely looking at the 1982 Convention, that this is an illegal assertion of control and authority over the high seas in violation of international law. You have to look at Article 51. You have to look at the Charter. You have to see what is reasonable in order to defend youself, or in order to carry on an armed conflict.

In the Falklands conflict, a temporary military exclusion zone became a total exclusion zone. Narrowly read, the conventions state that interference with high seas transit and overflight violates international law. To me, that is a narrow way of looking at international law. I think you have to look at the right of self defense and the rights that belligerents have to conduct their operations on the high seas. Their obligation to constrain the conflict and avoid drawing in neutrals are also important.

Safety Systems During Armed Conflict

We have to look at this dynamic between armed conflict and peacetime in terms of the traffic separation schemes approved by IMO, and the systems of navigational aids that might be imposed in the Straits of Malacca, even without armed conflict. What are you going to do when you are faced with an adversary that is going to send a task force through the straits of Malacca to invade Indonesia? Are you going to leave your navigational lights on? Absolutely. Navigational aids must be maintained regardless of the threat to neutrals, even if they help a belligerent, and draw neutrals into the conflict.

All the rights and principles contained in the Convention should be examined within the larger context of international law, including the rules of armed conflict because aside from the unlikely formal declaration of war, rules of neutrality and rules of belligerency will automatically come into play. They are being applied in the Persian Gulf right now. The visit-and-search of the U.S. flag vessel is a classic case of a belligerent right on the high seas. It is significant that there has been little, if any, interference with transit passage through the Straits of Hormuz by the belligerent. This could be because the Law of the Sea Convention, or customary international law of transit passage, has constrained the actions of belligerents in the Strait of Hormuz. State interests must be weighed against the rights and responsibilities of belligerents and neutrals and what is articulated in the Convention.

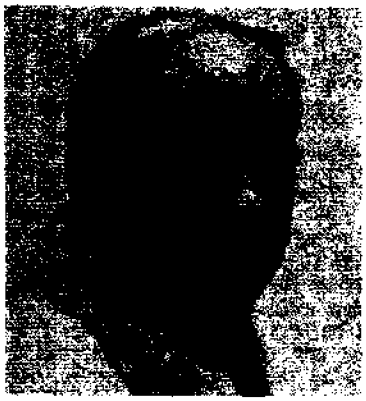
In summary, the law is a seamless web. Regulatory actions in straits and archipelagic sea lanes will be helpful in peacetime; but when a developed or developing nation, a big or small power must invoke the right of self defense, we cannot arbitrarily apply the Convention; the situation should be examined within the broader context of international law.

Footnotes

1. Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters of the USSR and the Internal Waters and Ports of the USSR, 24 I.L.M. 1715 (1985).
2. Canada: Statement Concerning Arctic Sovereighty (Sept. 10, 1985), 24 I.L.M. 1723 (1985).
3. *See* 78 Am. J. Int'l L. 884-85 (1984) and page 314 *supra*.
4. Convention on the High Seas, *done* at Geneva, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

COMMENTS

Richard Grunawalt
Naval War College
Newport, Rhode Island



The Convention in Peacetime and During Armed Conflict

I find it extraordinarily difficult for military lawyers to balance rules on the law of the sea and the rules of armed conflict. Captain Sinor, Captain Dalton, and I have all, at one time or another, been involved in the drafting of specific rules of engagement. This is where "the rubber hits the road" with respect to how our naval officers shall conduct themselves at sea under circumstances in which the use of force is either ongoing or imminent. This is a speculative, difficult task given that we are essentially at peace and that we operate within the context and the constraints of the 1982 Convention. Yet we have a responsiblity to recognize that belligerent rights are in effect in certain parts of the world, such as in the Persian Gulf. Issues bear more sharply and focus more acutely for the lawyer whose task it is to formulate practical rules of engagement for operating forces.

The Convention as a Blueprint

In discussing possible solutions to conflicts, I note that our blueprint or starting point is the 1982 Convention, even though it is not in effect. For example, the United States employs internal mechanisms to resolve problems regarding marine sanctuaries (see pages 285–95 above). The starting point and boundaries of the resolution of that problem are within the 1982 Convention.

Role of the IMO

Regarding the Straits of Malacca, Professor Kantaatmadja, to what extent has IMO played a part in past traffic separation schemes between the tripartite nations, and to what extent do you visualize in future years that IMO will have a role to play? As to seeking international agreement(s) to traffic separation schemes or other regulatory devices of coastal nations, IMO is a logical bridge between nations that become parties to the Convention and those that do not.

DISCUSSION

Bruce Harlow: Captain Dalton has reminded us (pages 373–75) that the UNCLOS III negotiations were undertaken with the understanding that the principles developed were to be applicable in peacetime. It may not be appropriate to implement and enforce them in times of military conflict. One has to be cognizant of the broader scheme in which these rules must operate. In a situation involving the exercise of rights of self defense and national preservation, the United Nations Charter, the 1907 Hague Convention, other applicable treaties, and many other rules of customary international law come into play.

It is not only possible but perhaps likely that we will be faced with the challenge of effectively implementing the Law of the Sea Convention and the laws of armed conflict side by side. There may well be the continuation of normal peacetime commerce in areas of regional conflict, as we find in the Persian Gulf today.

Self Defense

Louis Sohn: Mr. Dalton raised an important issue about Article 51 of the UN Charter. I would simply emphasize that Article 51 is only the tip of the iceberg. It simply says that in case of armed attack you are entitled to self defense. It does not say what you can do if there is no armed attack. It says if there is no armed attack you are not supposed to use force. But how many other things can you do if there is no armed attack? The classic case which we are now facing in many places is intervention. If a state invervenes by assisting a revolutionary group in a particular country where there is a civil war, is another state permitted to take some counter-measures? The second state is not intervening if it is doing the same as the first state is doing, as long as its action is proportional and the matter does not escalate. Isn't this permitted by international law? Various counter-measures are permitted if there is a violation of international law by State A.[1]

In the Iran-Iraq conflict, the interesting problem is that both states are in gross violation of the United Nations Charter. The Security Council has already adopted several resolutions saying that they are violating the Charter. Twice the Security Council has even said the fighting must stop on a certain date. Nothing happened. In other places when the Security Council has taken such action, usually the fighting has actually stopped. In this particular case it did not stop and what is worrisome is that the Security Council has not taken any action.

Nobody can ever make me understand that the might of the rest of the world, five billion people, cannot deal with those two small countries. If the big powers are willing to participate, or if they were simply willing to stay away from the conflict, the rest of the world could solve it. But nothing has happened, and as a result there are complications like the ones recently discussed, namely that this conflict starts spilling over, starts changing other rules of international law.

When the Charter was adopted in 1945, the French were the first to say there is no longer any neutrality under the Charter. I remember their delegate saying that in San Francisco very clearly.[2] Neutrality was said to be abolished because nobody could be neutral against a violator of the Charter. Somehow we have abandoned that view now 40 years later.

Military Conflict in Archipelagic Sea Lanes

Nugroho Wisnumurti: An important subject ignored at this meeting is the security aspect of international navigation with particular reference to the coastal state interests regarding the need to accommodate conflicting interests. For many years the security interests of the maritime powers prevailed over the interests of the coastal states which were never given due attention. International reality dictated the recognition and development of coastal rights and responsibilities, and our discussion of war or conflict in straits and archipelagic sea lanes and indicates the need for mechanisms or arrangements to ensure the integrity of international law.

Both Professor Sohn (page 377) and Captain Dalton (page 375) have commented on the need to look at the Law of the Sea Convention in a bigger perspective, that is within the whole range of international law, and I entirely agree with that approach. If under this concept, there is a war or a conflict situation, I can agree there is a breakdown in international law. What is relevant now is the question of the involvement of a nonbelligerent. This question will arise not only in the Persian Gulf but also in the archipelagic sea lanes.

Suppose U.S. vessels exercising the right of archipelagic sea lanes passage are subjected to unlawful acts, but those acting unlawfully are not belligerent to Indonesia, and the United States is not a belligerent in relation to Indonesia. Then what would happen? Of course, Article 51 of the UN Charter would apply, and the United States could exercise its right of self defense. But the concept of self defense is restricted by certain principes and criteria, as Professor Sohn has mentioned (page 377), and what is considered to be the most important criterion is the rule of proportionality. So it is not an open-ended legal principle. If the actions involved nonbelligerents, then all the parties concerned must seek cooperation with the nonbelligerent in whose territory the incident happened. For instance, if Indonesia, a nonbelligerent, and the United States and a third country, both belligerent, take belligerent actions in the sea lanes, then the United States does not have the right to exercise self defense under Article 51 without due regard to other criteria on the self defense rule, as well as the need and the position of Indonesia within the context of the Law of the Sea Convention.

R.P. Anand: I agree with what Professor Gold (pages 395-96 below) and Captain Dalton (pages 373-375) have said that there is no doubt that the law of the sea, which has been codified for times of peace, is bound to be modified during armed conflicts. These rules have been modified during previous wars, particularly in the light of the more fundamental rules such as the right of self defense. There may be a new problem now because in the past only the major maritime military powers changed the law, but now smaller countries are modifying the rules and these initiatives may create more problems.

In the 19th century, the smaller European countries were asking for freedom of the seas against the tyranny of the United Kingdom. It was then thought that the United Kingdom was not restricting the freedom of

the seas, especially during armed conflict. The United Kingdom and other like powers in the First and Second World War, set up long distance blockades and neutral trade was significantly disrupted. These smaller countries were thus denouncing the tyranny of these big powers and were asking for the freedom of the seas. Now I hope there will be more of a balance with smaller countries having a say in changing the rules. Change is bound to occur.

Admiral Harlow and the others have been talking about the 1982 Convention as the accepted law even though the United States has not accepted it. It is very interesting that although the U.S. government has refused to accept the treaty, it is being accepted by U.S. lawyers. Even the U.S. government has accepted several parts of it, and has declared a large part of it to be part of customary international law. Uncle Sam has been very cautious about formally accepting the Convention, apparently because of skepticism about the intentions of these smaller countries that are now taking initiatives in developing new norms of international law and feeling that Samson may lose his locks in some unguarded hour. I feel, however, that the other countries ought to have a little more patience with the United States which has *de facto* if not *de jure* accepted the Convention and is increasingly treating it as the governing law.

Harlow: Certainly the President's 1983 Oceans Policy statement can be read as accepting the Convention with the exception of course of the seabed mining provisions. These provisions are properly characterized as reflecting a new and different aspect of law of the sea, and can be distinguished from many of the issues that we have been talking about here. In a practical sense in accepting the large body of the treaty, one could say that the United States has gone beyond signing, gone beyond ratification, and in effect is holding its hand out suggesting meaningful implementation. Admittedly, there is still the problem of what to do about seabed mining. In my judgment agreement on this issue is a long way off. To tie this with the rest of the treaty would perhaps render an already difficult situation impossible. So, there is a lot to be said for looking at these questions as separate issues and to proceed to deal with them separately.

John Craven: The Iranians have done everyone a great favor by highlighting a void that exists in international law which would be hard to fill because of the political reluctance of nation states to admit it. A more precise definition of this void follows. For conflict resolution purposes, or to demonstrate arms control, maritime states would welcome, on an occasional basis an inspection at sea. In this particular Iranian case,[3] although the United States may not have welcomed the inspections, we were pleased because we did not have war contraband on that ship. It is impossible for a powerful nation to invite inspection, because if the inspection is invited, the inspector would not agree, or would believe that the inspection was staged. So as nations in the future propose more and more arms control agreements, such as those limiting the number of nuclear weapons deployed at sea, these nations will want to have some way, on an international legal basis, for those who suspect their intentions to be able to inspect them in a credible way. This observation comes from my own experience working many years with the Navy's Polaris program. The reason that both sides not only tolerate but even encourage various kinds of spying is because it is only through spying that the opposition can learn your true intent in a credible way.

Admiral Levering Smith, who was the technical director of the Polaris program, would very frequently say that nothing in the Polaris program ought to be classified, because if indeed it was intended to be a deterrent, it would not be a deterrent if there were any element of the program which was unknown to the deterree. So one of the things to look at in the law of the future is to recognize that the world is eventually going to be not an arms-free world, but an arms-controlled world, and that in an arms-controlled world it will be very difficult to get mechanisms which will be credible to the people who need assurance that arms control has taken place. This is an issue which in the past has been avoidable only because the power of weapons was not that great. We are fudging the issue if we say as Edgar Gold has (pages 395-96 below) that the law is suspended in times of war. We really would like to have a law which will be operative not only in time of war but in times of conflict resolution. This problem of conflict resolution will be the major problem facing the world on the high seas for the next decade or so.

Edgar Gold: As I have argued in my paper (pages 394-400 below), mixing strategic navigation and international commerical navigation leads to significant misunderstandings: military navigation has little feel for the infrastructure on which commercial navigation is based; and international shipping considers the military a nuisance that clutters tricky parts of the oceans, shoots rockets and lays mines, and disobeys even the most basic international rules of navigation. The twain meet only in times of national emergency or war (or for reasons of self-defense, as Bruce Harlow would say), and when shipping is subordinated to naval control. Thankfully, these are exceptional circumstances. Shipping today needs very little protection as even war risks are covered by insurance underwriters. Shipping continues into the Gulf, but war-risk premiums are costly.

I disagree with Admiral Harlow's argument that one purpose of navies is the protection of flag merchant shipping. In international shipping, it is difficult to assess whose interest is actually protected. The link between flag and maritime property has become very tenuous today. For example, many merchant ships today are registered in an open registry. The term "flags of convenience" is no longer accepted; we now refer to "open registry" or "flag of necessity" in the oil industry. A ship is officially under the ownership of a filing cabinet company in Panama, it is financed by a Middle Eastern bank in Italy, it is beneficially owned by a group of mysterious shareholders in eight or nine nations, and staffed by a crew of 60 nationalities. These circumstances are quite different from the old days to which Admiral Harlow refers.

I concede that shipping interests supported the strategic transit freedom initiatives of the major maritime states. The International Chamber of Shipping was a strong supporter; however, that is to be expected. Shipping is a conservative industry, reluctant to accept change of dubious commercial benefit which might remove certain real or perceived freedoms.

Port state jurisdiction, where one nation is asked to take action on behalf of another nation, involves cost factors. Some of the European countries have come to terms with these costs through the Paris Memorandum.[4] But in most other regions the cost implications have not yet been thought through.

The presentations at this workshop and the discussion between John Craven and Louis Sohn (pages 367-68, 377, and 379-80) clearly indicate that strategic navigation may also need a new regime. As Captain Sinor

pointed out, the Law of the Sea Convention has presented strategic maritime navigation with problems of interpreting and balancing coastal states' rights vis-a-vis strategic rights. The traditional historic immunity of warships is in the process of being challenged if it still exists at all. Coastal nations have assumed certain rights of inspection and soon such inspection may become an accepted part of nonproliferation and other arms limitation treaties. Accordingly, some type of regime is needed, a regime designed to protect the rights of strategic navigation and balance those overlapping rights. Strategic and commercial navigation serve different purposes. Because they generally serve different masters, it clouds the issue if we mix them too much. And I think we have done that a bit too much at this meeting.

Malvan Lam (Assistant Director, Law of the Sea Institute): I feel that the conference suffers from a serious imbalance, caused by a lack of geographical representation. We did invite representatives from Vanuatu, New Zealand, the Soviet Union, and Peru, and because of circumstances essentially beyond our control they could not come. Their absence has been felt by myself and some other people here. To give one example, Choon-Ho Park referred to the seas around Japan as a swimming pool for Soviet submarines and warships (page 183 above). No doubt others view the Pacific waters as a swimming pool for U.S. submarines and warships.

The other cause of the imbalance as I see it results from the fact that most of the people giving papers here have functioned, most eminently, for many years now at the UNCLOS negotiations as representatives of their various governments. That and the fact that they are primarily lawyers makes it probably very difficult for them to shed their partisanship.

The role of international law, since UNCLOS, involves ensuring predictability in the international order but also contributing to the maintenance of peace and redressing of inequities that existed in the international order prior to these negotiations. Although related, these functions are conceptually distinguishable. This workshop focused more on the predictability aspect for the rights of the maritime powers. They are very concerned about where the current law leaves them in terms of international navigation, primarily military navigation, and that certainly is a legitimate concern. But I wish that since we have such eminent lawyers collected here they could have risen beyond their national perspectives and addressed those other issues that the UNCLOS III negotiations were trying to advance, namely the goals of peace and equity.

I noted with concern Mr. Harlow's comment that the United States is ready, if informally, to proceed with the implementation of all aspects of the Law of the Sea Convention except the deep seabed mining (pages 368, 369, and 379). He urged that we close ranks on navigation issues because the deep seabed mining controversy is unresolvable at the present time and, for economic reasons, deep seabed mining is in any event said by some to be not commercially viable now. But if this matter is then not a real problem at present, the argument also cuts the other way for U.S. signature and I do not see why the United States did not simply sign the Convention.

Secondly, I was also concerned about Mr. Harlow's suggestions that many of these issues could be resolved through recourse to customary law, or bilateral or regional arrangements instead of the Convention. This approach would reduce the equalizing effect of the Convention, namely, that everybody enjoys the same rights within it. States outside the treaty must, as Dr. Anand said, negotiate and in fact pay a pretty high

price for gains derived from negotiations (page 147 above). But whatever the price, they may obtain gains that others do not and thus the equalization effect is removed.

Having said all that, I would still say to the future readers of our proceedings that these are extremely useful papers that we have heard, and they will be useful insofar as they reveal the thinking that motivated the individuals who have been able to attend.

Footnotes

1. *See* Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984).
2. *See* 6 Documents of the United Nations Conference on International Organizations 312, 400-01 (San Francisco, 1945); 7 *id.* 309 (1945).
3. In January 1986 an Iranian naval ship forced the U.S. merchant ship, *President Taylor* to stop in international waters near the Persian Gulf. Armed Iranian sailors boarded the U.S. freighter and forced the ship to submit to an hour-long search for military cargo headed for Iraq. When no war material was found, the vessel was allowed to proceed to Fujaira, United Arab Emirates.
4. Memorandum of Understanding on Port State Control, Paris, Jan. 26, 1982, 21 I.L.M. 1 (1982).

CHAPTER 8

CONCLUSIONS

Introduction

In this final chapter, two papers serve to summarize in various ways the numerous and complex problems of international navigation under the new law of the sea. In addition, the editors have added their own summary and concluding remarks.

Professor William Burke's remarks, *Threats to the Public Order of the Ocean*, reflect not only his concerns, but what he perceives to be the important issues brought to the conference by other participants -- creeping uniqueness and the status of the United States as a nonsignatory, for example. Professor Burke discusses U.S. congressional action in whaling and fishing regulations and U.S. military action to prevent access to the ports of Nicaragua. He points out inconsistencies in the Convention. Limitations on a coastal state's regulatory power depend, for instance, on whether the activity is characterized as environmental protection or as resource management. Finally, he discusses the problem of substandard vessels' flying "flags of convenience," some advantages of port state jurisdiction, and the role of the "persistent objector" state in the development of international law.

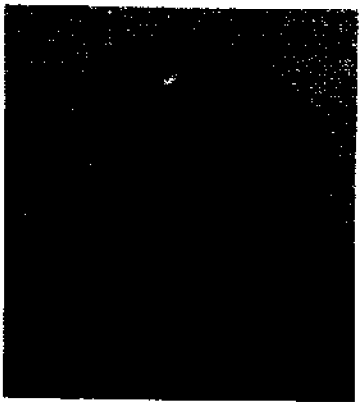
Following Professor Burke's presentation, Nugroho Wisnumurti, Thomas Clingan, and Bruce Harlow comment extensively on the role of the archipelagic state in the process of designating archipelagic sea lanes and balancing interests of the maritime states. Scott Hajost adds that the State Department consciously pursues a persistent objector policy.

Edgar Gold optimistically points out that coastal states have not thus far imposed excessive controls on commercial navigation, and the few new regulations have served to enhance safety of navigation and environmental protection. His paper serves as a useful summary of the conference proceedings, because it discusses all aspects of the problem of international navigation in today's legal and political environment. Two direct quotes from the paper serve to emphasize the most important points:

> "...[T]here is a clear distinction between 'purely strategic' and normal commercial navigation. It is my opinion that failure to make this distinction retarded progress at UNCLOS III and still leads to misunderstanding today" (page 396), and
>
> "What I am advocating here is the need for an all-embracing, widely accepted international convention on maritime transit and transportation which will provide a needed regime for international merchant shipping, providing legislative terms of reference for all aspects of maritime transport ranging from access and transit to navigational safety and environmental protection" (pages 398-99).

THREATS TO THE PUBLIC ORDER OF THE OCEANS

William T. Burke
University of Washington School of Law
Seattle, Washington



Creeping Uniqueness

It seems pretty clear that the most striking single recurring theme of this meeting was the proclivity of states to conclude that they have an interest that requires protection which they then set to accomplish even though the claim to do is not recognized or established by the overall legal regime that is assumed to be prevailing at the time. This is the traditional phenomenon of creeping jurisdiction, now renamed "creeping uniqueness."

Someone in this Workshop remarked that it seemed unlikely that participants in the Third UN Law of the Sea Conference (UNCLOS III) expected that the Law of the Sea Convention would ever enjoy universal acceptance. I cannot vouch for the bona fides of the U.S. government officials involved in the law of the sea negotiations, but my impression was that they seriously believed early in the game that the law of the sea agreement was going to achieve virtually universal explicit acceptance. And the reason for this belief and this fond hope was that the purpose of these ten years of negotiations was to put a stop to creeping jurisdiction and creeping uniqueness. The whole idea of the negotiations was to bring a halt to the development of international law of the sea by custom. That is, insofar as you adopted a treaty on a particular subject matter, that was supposed to be it. The new law of the sea treaty was intended to be all-inclusive. And, therefore, creeping uniqueness was not supposed to intrude any further. I am going to say something about the realism of that kind of approach later.

But now we are looking at a very different kind of situation than the one contemplated by U.S. officials in the UNCLOS III negotiations. From one point of view we are looking at the world turned upside down. The one state (the United States) that most strongly advocated a law of the sea treaty to stop the development of customary law and to fix boundaries, concepts, propositions, doctrines -- in order to protect its own major interests and perhaps incidentally the interests of other states -- now has rejected the whole treaty because a small part of it (not dealing with any of its significant interests) is inconsistent with ideological conceptions that are not shared by most of the rest of the world. What this approach requires, then, is a rescue operation to protect U.S. interests in navigation, and I look on this meeting as a part

of that rescue operation, or at least I think it has been perceived that way.

This effort reminds me of the little Dutch boy at the dike, sticking his finger in to keep the ocean out, but unfortunately the holes keep appearing in different places as uniqueness is discerned around the world, in various places and issues. For this analogy to be accurate, we would also have to introduce some companions who were thought to be associates of this little Dutch boy but who turned out instead to want to put additional holes in the dike. What is now happening is, for example, that the United States is putting pressure on the Federal Republic of Germany to reject the Law of the Sea Convention, but then it must put more pressure on the Federal Republic of Germany because of its actions which continue the new process of creeping uniqueness. In fact, the United States itself probably bears the honor of being the first one to make claims based on creeping uniqueness.[1]

It is not surprising that these things are happening; the premise that the Law of the Sea Convention was going to end the development of law by customary means was an illusion in the first place. What is going on now, in my opinion, is simply an acceleration of a process that was going to occur anyway, because the law of the sea, like every other area of the law, deals with uses and processes that are constantly changing and developing. We cannot anticipate all potential problems. It was unrealistic to think that this treaty would stop nations from making unilateral claims. The treaty could, I think, have added some stability in boundary delimitation and in understanding about what authority would be exercised where, at least for some period of time, but certainly not forever. Even if the treaty had been accepted by the United States and by the Federal Republic of Germany, for example, it is difficult to assume that the Federal Republic of Germany's interests that led it to the partial 16-mile territorial sea would have disappeared. The treaty itself could not have entirely ended creeping uniqueness, but its rejection by the United States has, I think, given that process a bit of impetus.

This difficulty of terminating customary law development is also now aggravated because the United States is forced by circumstances to attempt to protect its interests by relying on the customary law that it had previously wanted to displace. This strategy, in my view, encourages other participants to make new or different unilateral claims to protect their perceived interests. They see the United States doing it, and so they see no reason or principle for them to refrain from doing the same thing. And, this tendency is reinforced when the claims by the United States about customary law, particularly customary law dealing with navigation, are widely perceived as inconsistent with its own emphatically proclaimed early views that this same customary law did not serve its interests. The negotiations were designed to put into the Convention a treaty formulation that would be an improvement on customary law. It is spelled out in so many words in all of the negotiating statements that were made by the United States from 1971 on.[2] Not only do Americans end up being skeptical or even cynical about the positions which the United States is forced to take because of the rejection of the treaty by the Reagan Administration, but a lot of other people end up the same way. So, the U.S. rejection of the treaty obviously stands as an obstacle to the development of customary law that reflects the treaty.

This phenomenon is illustrated by the question of which sea lanes may be proposed by Indonesia. If I understood what was said earlier (see pages 264-65 above), these sea lanes will be proposed, and will be

discussed in IMO with other states interested in passage, but not with the United States, because it is not party to the Law of the Sea Convention. This position surprised me, but if my understanding of the statement by Mr. Nugroho Wisnumurti (page 264-65) is correct, Indonesia does not want to develop a customary regime that is the same as the treaty regime. As I understand it, the United States wishes to recognize archipelagic waters and the balance of rights and interests in the Law of the Sea Convention as a matter of customary law. But Indonesia apparently will not deal with the United States even in IMO and is prepared for rejection of their proposed sea lanes, which would throw it back to the customary routes. Because the customary routes were presumably not the ones they wanted in the first place, Indonesia would apparently rather have unsatisfactory sea lanes than be permitted to establish new ones, more satisfactory, but through a procedure that would rely in part at least on customary law. I do not know how that approach serves general interests in establishing a new international order for the ocean on either side.

I understand the uncomfortable position of lawyers representing U.S. interests who now must have recourse to legal arguments others consider doubtful or questionable, in order to secure the interests that they are supposed to protect. And I do not see any way out of that dilemma. I hope I understand and appreciate the position of the states that have accepted the treaty but who feel victimized by the sudden U.S. change in position and now find themselves asked to accord to the United States the benefit of treaty rights only in the form of customary law even though the United States rejects a part of the treaty. And I do not know, I have to confess, how they should resolve that situation either. It is one thing to say we will deal with each problem on its merits as it comes up, but unfortunately that approach ignores the political realities of coalition building, which reduces the freedom of maneuver of states and may tax international lawyers beyond their capacity to play with words.

U.S. Maritime Policy

Now some more specific observations on the earlier presentations. My first comment is inspired by the comment made about the lack of balance of this gathering (see pages 381-82). There is an unfortunate tendency by the United States now to use its political, economic, and military power to escape from or actively to avoid its international commitments or to deter behavior by others who consider themselves fully supported by international law. We have observed this behavior on a number of occasions. Unfortunately it is almost getting to be a habit, and not just by the executive branch, because the executive branch in the United States has been perhaps more consistent with international law on this subject than the legislative branch. Some examples are currently in the newspapers -- the recent incident dealing with the Pelly Amendment,[3] which will penalize both Japan and the USSR for taking whales in a manner that is not supported by the regulations of the International Whaling Commission.[4] What has happened is that under the International Whaling Commission treaty, regulations are promulgated. These regulations under the treaty do not take effect with respect to states who object. Nonetheless we have a law which says that if a state effectively interferes with the implementation of a conservation agreement they can lose a substantial part of their fishing quota in U.S. waters. That law has been interpreted to require the reduction of those quotas even though, under the international agree-

ment to which the United States is a party, it has agreed that the regulations are not applicable to the state concerned. That particular controversy is now on appeal to the U.S. Supreme Court and one would begin to hope that some legal rationality would begin to enter in.[5] That is an example of Congress using economic power to attempt to sanction behavior to which the United States has previously agreed.

Tuna Legislation

Another example is the U.S. legislation on tuna, which effectively imposes an economic sanction on states that behave in accordance with international law as they see it and as almost all of the rest of the world sees it, with the exception of the United States.[6] As I say, I would hope that kind of use of economic power would begin to diminish and that agreements that have been made and negotiated would find more ready acceptance in the United States after we have already agreed to them. In this instance, this is a matter of Congressional action, not action by the executive branch. Of course, U.S. general policy toward the Law of the Sea Convention is in some ways an indication of the same kind of tendency by the United States but in a somewhat different form.

Nicaragua

The most extreme form that this has taken has been the attempt by the United States to prevent access by other countries to the ports of a state with which the United States has intense disagreement by the use of minimal but at least noticeable violence. And I am referring, of course, to the mining of harbors in Nicaragua, which is not exactly an attempt to insist on a position under the Law of the Sea Convention, but is a part of what I view as an unfortunate tendency that characterizes the conduct of American diplomacy in too many instances.

Balancing Interests in the EEZ

On the question of balancing coastal state interests and navigation interests in the exclusive economic zone, there has been a tendency to look at the freedom of navigation in the exclusive economic zone as more absolute than is actually possible in conducting everyday activities in the ocean. Coastal state actions to protect resources will require somewhat more of an impact on navigation rights than many people are going to be comfortable with. That impact ought to be minimized; we do not want to encourage undue interference with navigation rights. Excessive interference would imperil everybody's interests. On the other hand, there also must be somewhat more deference to the ability or the capacity of coastal states to exercise some jurisdiction affecting navigation in the zone.

The conflict between coastal states' rights and the rights of maritime interests can be illustrated by numerous examples, some of which have been discussed here. The marine sanctuary issue,[7] for instance, involves how one characterizes what it is one is doing -- protecting resources or protecting the environment. They fall under different parts of the Convention and there are different limitations on what the coastal state can do depending on how it characterizes its activity. My argument has been that it falls under a different part of the Convention and therefore the United States might have to observe limitations if it were to abide by the Convention or the standards that are in the Convention.[8]

The same questions arise in connection with enforcement by coastal states of fisheries laws that may impinge on transit of unlicensed fish-

ing vessels in the exclusive fishing or the exclusive economic zones. This is an area of considerable interest in many parts of the world such as the Central, Western, or Southern Pacific where there are enormous water areas, very small land areas, and considerable difficulty with enforcement of coastal states' rights. One of the ways to try to meet their enforcement needs is to engage in creative interpretation that would allow the coastal state to take measures that might not be acceptable in other contexts but would be aimed in that context at improving their enforcement capacity because the enforcement capacity and the lack of it is absolutely critical to being able to take advantage of their living resources in those very large areas. Without enforcement it will be very difficult to realize benefits.

Flags of Convenience

Flags of convenience is a subject we really have not talked very much about but obviously the responsibility of states for the activities of their vessels or for their adherence to international standards and requirements is affected by the ease with which vessels may be registered in states that have no other connection with those vessels. Both the 1958 and the 1982 law of the sea treaties have provisions aimed at this problem. The "genuine link" required in the 1958 and 1982 agreements arose because of rather narrow interests of ship owners who were worried about some shipowners not being subject to taxation, labor standards or manning requirements on board vessels that could easily escape particular international requirements or be registered in states where they were not enforced. This has also come up in another forum. The United Nations Conference on Trade and Development (UNCTAD) has had an ongoing negotiation for the last two years dealing with conditions of registry. This group has concluded a third draft of a treaty attempting to spell out additional requirements for the registry of vessels.[9] Unfortunately, they have not really been able to introduce much additional restraint in this area. The "genuine link" part of the 1958 Convention on the High Seas[10] is perhaps one of the best examples of an international treaty provision which is nothing more than words. Since the 1958 agreement came into effect, the number of vessels registered under flags of convenience has increased enormously. A very substantial portion of seagoing vessels are now registered in flags of convenience states, many more than there were in 1958, and one does not really see anything in the 1982 agreement that would restrict that continued development. Through UNCTAD there has been another effort made to introduce standards with respect to nationality of ownership and nationality of manning requirements, and for effective jurisdiction by the flag state. Thus far, though, they have not really been able to get over the hump. All of the provisions of the draft agreement have bracketed words and without fail one bracketed phrase is "Each state shall" and then the next bracketed phrase is "Each state should" so you can see where the hangup is in this new international agreement. It may or may not end up doing anything to improve the situation.

Port State Jurisdiction

Port state jurisdiction was discussed by Tom Clingan (page 277 above), and I would like to add one point. One of the functions that port state jurisdiction would serve in improving or in protecting navigation rights is that, because it is possible for a coastal state to request a port state to entertain proceedings with respect to a pollution-causing incident in an area within the coastal state's juris-

diction, it diminishes the need for that state to take any action immediately, assuming that it can do so under the Convention with respect to apprehension or detention of a vessel. What it can do is request the port state to take proceedings and then if it wishes, under the Convention it can ask for these proceedings to be transferred back. In the meantime, the vessel of course has gone on about its way because the requirments are for posting security and the vessels are not held up. But it does provide a means for obtaining a remedy without interfering or adding unnecessarily to the cost of vessel movement around the world.

The Consistent Objector Principle

There have been references to the "consistent objector" or "persistent objector" principle in international law (see pages 163, 211, and 393). The United States has not taken advantage of this principle to any noticeable degree. As I understood the formulation of it, a state must concede that a principle is now a part of customary international law but nonetheless assert that it is not bound by this principle because it has consistently objected to it. A nation cannot object to a principle as binding unless it recognizes its existence. The United States has not taken advantage of this approach with respect to any of these problems, including, for example, the tuna problem or the width of the territorial sea question, if they wanted to continue objecting and maintain that they were only bound by a three mile territorial sea. Instead, the United States has taken quite a different position, insisting that it is right about what customary law is.

This "consistent objector" principle is fairly well recognized as a principle of law, even though it has rarely if ever actually been employed in judicial decisions. Those instances in which reference to it has been made in judicial decisions have not been necessary for the specific decision. But it is there and would be available to be used, and the United States has not attempted to use it. Maybe the United States does not feel there is any necessity for it but it is a way within the system to maintain at least some element of its position without too many circumlocutions.[11]

Footnotes

1. *See* W.T. Burke, *Changes Made in the Rules of Navigation and Maritime Trade by the 1982 Convention on the Law of the Sea* in *The Developing Order of the Oceans* (R. Krueger & S. Riesenfeld eds.), 18 L. Sea Inst. Proc. 662 (1986).
2. See explanations to Congress of the United States position by John Norton Moore, head of the Interagency Task Force on the Law of the Sea, in 1974 Digest of United States Practice in International Law 347 (Rovine ed. 1975) and 1975 *id.* 431 (McDowell ed., 1986).

   The view of the United States, prior to its post-UNCLOS III insistance that customary law protected transit passage in straits, is dramatically suggested by the following 1982 dialogue between Representative (now Senator) John Breaux of Louisiana and Leigh Ratiner, who was then a member of the U.S. delegation to the Third UN Conference on the Law of the Sea:

MR. BREAUX. Is it not customary now in the interpretation of the United States that we have the right to passage through straits?

MR. RATINER. No; we have no such position on customary law. We have a position that we have a right to pass on the high seas freely, and we recognize only a 3-mile limit; that is widely understood to be anomalous, anachronistic, and not sustainable in international law.

MR. BREAUX. But we continue to do it.

MR. RATINER. Mr. Chairman, there is classified information which should be put at your disposal by the U.S. Government which would indicate the contrary.

MR. BREAUX. We do not pass through straits outside of 3 miles?

MR. RATINER. There are arrangements, Mr. Chairman, which involve obfuscation of these issues, which are quite important to your consideration of this matter, and you should find out about them.

MR. BREAUX. But we do it?

MR. RATINER. Mr. Chairman, I really would not wish to say more on that subject. I think it is a subject you should inquire about of the Defense Department and the State Department.

MR. BREAUX. Thank you.

Status of the Law of the Sea Treaty Negotiations, Oct. 22, 1981; Feb. 23, July 20, 27, 1982: Hearings Before the House Subcomm. on Oceanography and the Comm. on Merchant Marine and Fisheries, 97th Cong., Ser. No. 97-29 at 236 (statement of Leigh S. Ratiner, Dept. Chairman of the U.S. Delegation to the 11th Session to the Third UN Conference on the Law of the Sea).

3. Pelly Amendment, 85 Stat. 786, as amended, 22 U.S.C. sec. 1978 (1971). Congress passed this amendment to the Fishermen's Protective Act of 1967 (22 U.S.C. sec. 1977 et. seq.) to protect North American Atlantic salmon from depletion by Danish fishermen in violation of the ban imposed by the International Convention for the Northwest Atlantic Fisheries. The Amendment also protected whales. *See* 117 Cong. Rec. 34752 (1971) (remarks of Rep. Pelly); H.R. Rep. No. 92-468 at 6 (1971).

4. Concern over excessive whaling prompted 15 nations to form the International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849 (*entered into force* Nov. 10, 1948). To achieve its purposes the ICRW included a Schedule which, inter alia, regulates harvesting practices and sets harvest limits for various whale species.

Art. I, 62 Stat. 1717, 1723-27. The ICRW also established the International Whaling Comm'n (IWC) which implements portions of the Convention and is authorized to amend the Schedule and set new harvest quotas. *See* Art. III, 62 Stat. 1718-19; Art. V, 62 Stat. 1718-19. *See generally*, Smith, *The International Whaling Comm'n: An Analysis of the Past and Reflections on the Future*, 16 Nat. Resources Law 543 (1984). The IWC has no power to impose sanctions for quota violations. *See* Art. IX, 62 Stat. 1720. Quotas are binding on IWC members if accepted by a three-fourths majority vote. Art. II, 62 Stat 1717. Any member country that files a timely objection to an IWC amendment of the Schedule is exempt from any obligation to

comply with the limit. Art. V, 62 Stat. 1718-19. The Pelly Amendmen was, in part, a reaction to the IWC's inability to enforce its quotas.

5. Japan Whaling Ass'n v. Amer. Cetacean Soc., 478 U.S., 92 L. Ed. 2d 166 (1986) (certification that Japan is "diminishing the effectiveness" of international fishery conservation program is not required by Pelly Amendment to 1967 Fisherman's Protective Act nor by Packwood Amendment to Fishery Conservation and Management Act, 16 U.S.C. secs. 1801-82 (1976)) for Japan's refusal to abide by IWC quotas. The Secretary may reasonably interpret the Amendment to permit other actions designed to improve international conservation efforts as, in this instance, by an executive agreement with Japan requiring adherence to specific short term level of limited whaling and to an agreement to discontinue all commercial whaling by 1988).
6. *See* J. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* 312 398 (1985) (Chapter 6, Fishing Issues), *especially* W.T. Burke, *The Law of the Sea Convention and Fishing Practices of Nonsignatories, With Special Reference to the United States* 314-37; J. Van Dyke & C. Nicol, *U.S. Tuna Policy: A Reluctant Acceptance of the International Norm* in *Tuna Issues and Perspectives in the Pacific Islands Region* (D. Doulman ed., 1987); W.T. Burke, *Highly Migratory Species in the New Law of the Sea*, 14 Ocean Dev. & Int'l L. 273-314 (1984) and W.T. Burke, *The Law of the Sea Convention on Conditions of Access to Fisheries Subject to National Jurisdiction*, 63 Ore. L. Rev. 73-119 (1984).
7. *See* W.T. Burke, *supra* note 1, at 666 and S. Hajost at 283-98 in this volume.
8. *See* Burke, *id.* at 668.
9. Composite Text as at the close of the Second part of the Session on Feb. 15, 1985, in United Nations Conference on Conditions for Registration of Ships on the Second Part of its Session, UNCTAD Doc. No. TD/RS/CONF/15/Add.1, Feb. 28, 1985. The Convention has now been adopted. United Nations Convention on the Conditions for Registration of Ships, Feb. 7, 1986, 8 Law of the Sea Bull. 87 (1986). Although the final version appears to adopt mandatory language, it is not considered to establish effective conditions that would by themselves remove open registry as a widespread practice. See Sutmey, *The United Nations Convention on Conditions for Registration of Ships*, 1987 Lloyds Mar. & Comp. L.Q. 97.
10. Convention on the High Seas, *done* at Geneva, April 29, 1958, art. 5, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.
11. The first of the recent spate of American articles on this principle is Stein, *The Approach of the Different Drummer: the Principle of the Persistent Objector in International Law*, 26 Harvard Int'l L. J 457 (1985). See also Colson, *How Persistent Must the Persistent Objector Be?*, 61 Wash. L. Rev. 957 (1986); Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 1985 Brit. Y.B. Int'l L. 1 (1986).

The Process of Designating Archipelagic Sea Lanes (see also pages 261-70 above)

Nugroho Wisnumurti: May I take this opportunity to clarify one point raised by Professor Burke. Professor Burke thought I said that Indonesia is prepared to exclude the United States from the consultations within the IMO in the establishment of sea lanes because the United States is not a signatory to the 1982 Convention. That is an incorrect interpretation of what I said. I indicated that I have not taken any position on this point. What I did was present to this gathering various scenarios that we can envisage and study and consider. The first scenario is that we, Indonesia, an archipelagic state, before establishing sea lanes, would consult with various interested parties except the United States. Then the proposal would be without the interests of the United States taken into account. We would then bring the proposal to IMO, and IMO might adopt the proposal, but there is also a possibility that the United States as a member of the IMO would rally support in opposing the proposal and thus that our proposal might be rejected by IMO. This is the first scenario. They refuse to adopt our proposal, so they exercise their right of veto.

In the second scenario I mentioned we would include the United States in the consultations prior to bringing it to the IMO. Under this scenario, because everybody has agreed to the proposal, IMO can easily adopt it.

The third scenario is the possibility that we would not include the United States in the consultations but the U.S. interests would be represented by certain maritime states that are parties to the Convention. So the U.S. interests would be represented by other states. And then we could reach agreement among ourselves without the United States, but with the U.S. interests taken into full account. When we bring this proposal to IMO, because the United States has been indirectly consulted and has agreed to the proposal, then the IMO will easily adopt the proposal and we will have the sea lanes.

I deliberately have not taken a position at this point on these three scenarios because, as you know, Indonesia has to take all factors into account: bilateral relations with the maritime countries not party to the Convention, the global interests of Indonesia, the solidarity with the developing countries, the Group of 77, and above all, the unified character of the Convention itself.

Thomas Clingan: Nugroho is precisely right. None of us ever anticipated that archipelagic states would come up with a sea lanes package, take it to IMO, and fight it out there. We imagined that there would be a consultative process along the lines of one of the scenarios that he suggests. The idea of representation of the maritime interests is consistent with the negotiating process at UNCLOS III. Small groups of states met together and discussed these issues, but it was clear that

certain states were also consulting with a broader group of states to guarantee that when the decision point was reached there would not be any objections. It was all carefully negotiated and we were satisfied that when it went to the committee it would be an acceptable package. The same kind of process is anticipated for taking these things to IMO.

The normal pattern would be that once it got to IMO it would be a mechanical process because the work had already been done and any objections had been already ironed out at that point. So, as a practical matter, we are not talking about vetos. Nugroho is right; it is balanced. Both the maritime states through IMO, and the archipelagic states, as prescribed in the Convention, must agree before these can go into force.

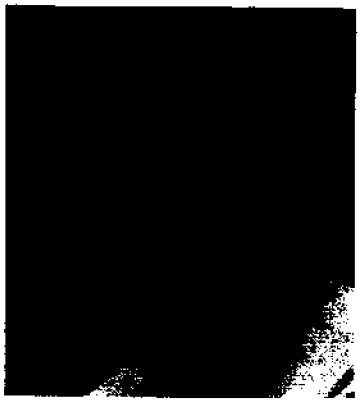
Bruce Harlow: I would comment on the suggestion of our colleague from Indonesia, Nugroho, who described as the third possible scenario that other countries could represent the United States in the archipelagic lane situation (page 392). It would be my personal judgment that it would be extraordinarily difficult or impossible for the United States to have another country negotiate or represent its interests. These decisions would be viewed as involving fundamental security interests in the United States, and as requiring direct participants by the United States.

The United States as a Persistent Objector

Scott Hajost: We have an attorney in my office who spends a fair amount of time looking at claims to excessive maritime jurisdiction. A mix of activities takes place with respect to such claims, including informal inquiries, formal notes, and exchange of papers to set the record straight, or indeed actual operational measures. Professor Burke indicated that the United States was not doing much in the way of being a persistent objector (page 389), and I think we really are. We exercise our navigational freedoms and respond directly to the claims by other states with respect to maritime jurisdiction.

THE FUTURE OF MARITIME TRANSIT

Edgar Gold
International Institute for Transportation and Ocean Policy Studies
Halifax, Nova Scotia, Canada



Introduction

The problem faced by oceanic shipping has been considered by the Law of the Sea Institute (LSI) on a number of previous occasions. At LSI 10 in Rhode Island (1976), a panel voiced concerns about changes in the freedom of international navigation in the law of the sea negotiations. I was a commentator who did not fully agree in remarks entitled: "Navigation: The 'Not-so-sacred' Freedom of the Sea".[1] Consequently, I was invited to present a major paper at LSI 12 in the Hague (1978), setting out my views in more detail.[2] At LSI 13 in Mexico City (1979), Douglas Johnston and I developed these ideas further in a paper entitled: "Ship-Generated Marine Pollution: The Creator of Regulated Navigation".[3] Finally, at LSI 19 in Cardiff, Wales (1985), navigational issues were, once again, a full agenda item.[4] It seems thus quite fitting that navigation should merit its own LSI workshop.

We are presently in a very interesting state in the law of the sea process. Although the Convention is not in force, much of its contents are widely accepted. This "a la carte" approach to the Convention is particularly evident in matters relating to international navigation. There is general satisfaction with the Convention's articles related to navigation in the territorial sea, the EEZ, archipelagic waters, and straits and the control of ship-generated marine pollution. However, interpretation of the meaning of the new articles in cases of dispute lies ahead. The Convention provides a "directive umbrella" beneath which further interpretation will be required. This will cause difficulty and confusion during the interim period as the world hovers between the old 1958 Geneva rules and the new 1982 Convention. What is the status of unilaterally promulgated provisions taken from the new Convention without acceptance of the full Convention? This is clearly a problem beyond this paper and one which has[5] and will continue to occupy the Law of the Sea Institute. In the case of maritime transit this problem is, however, causing different difficulties.

At LSI 12 (1978), shipping was seen as one of UNCLOS III's "neglected areas." Attention focused upon the transit of vessels more than on the reasons for such transit. During the many UNCLOS III sessions, ship-

ping played a minor role; it was seen as a "polluting industry" defensively fighting for an outdated status quo. Even the major maritime states, in weighing their various maritime interests, placed their quickly fading shipping industries in importance below resource and strategic interests.

What had actually occurred was a discernible realignment of international maritime interests which provides the background for viewing modern international navigation. The right of vessel transit must now be balanced against international, economic, and ecological considerations. No longer will navigation be the prime ocean use before which all other marine interests must yield.

The preservation of the marine environment has become a prime and common interest shared by all nations, leading directly to a new era of regulated navigation. As a result, the 1982 Convention explicitly establishes the legal right of coastal states to take initiatives that protect the marine environment. Many states have already initiated new measures to prevent or reduce ship-source marine pollution. As a result, shipping is becoming much more regulated.

Is this new regulatory regime necessarily bad? Does it unduly interfere with international sea-borne commerce? Does it make maritime transport too costly? Are far-reaching principles of international law being breached?

Unfortunately maritime transit was discussed almost exclusively in strategic terms at UNCLOS III. (The word "strategic" is here interpreted in its narrower "military-political" meaning.) Not surprisingly, shipping interests supported the "strategic transit freedom" initiatives of the major maritime powers. Shipping, a conservative industry, resisted changes of dubious commercial benefit that might have removed certain "freedoms," real or perceived. In any case, it is no secret that the shipping industry, hardly ever a cohesive, homogeneous world body, was woefully prepared for the demands of UNCLOS III. Consequently shipping became a "fair weather" supporter of delegations that had a different maritime transit agenda. This greatly clouded the issue.

"Strategic" Maritime Interests and Commercial Navigation

There are very clear differences between "clear" strategic maritime interests and traditional commercial navigation. The former always seeks the protection of legal principles but is rarely averse to breaking them. The latter only needs the protection of such principles when they are breached by the former!

Shipping, as a form of international trade and commerce, has developed from pre-history and is accepted as something truly to the common good. It is a service required by all states, whether a state owns ships or not. Thus, in the three millenia of written history, relatively little interference has occurred in time of peace. Even in times of war and armed conflict neutral shipping has proceeded with minimal interference.[6]

Interdiction of merchant shipping occurred only when war, armed conflict, or other political expendiencies prevailed. Then even the best of international legal principles were either suspended or disregarded. Lauterpacht advocated "international law in times of war" but was dismally disregarded by most belligerents in most wars.[7] Rules protecting maritime transit are nonexistent in a Cuban missile crisis, during a Rhodesia/South Africa blockade, in the case of the "Mayaguez"-type incident (see page 404 n. 6), and possibly soon off the coasts of Central America or North Africa. The arrest of certain vessels by Latin-

American countries, within 200-mile territorial sea claims, risked international displeasure to make a political point. Ecuador, for instance, arrested the Onassis whaling fleet a number of years ago, but they made this gesture in a discriminatory way, ignoring all other ships conducting innocent passage through the territorial sea.

The point here is that there is a clear distinction between "purely strategic" and normal commercial navigation. It is my opinion that failure to make this distinction retarded progress at UNCLOS III and still leads to misunderstanding today.

The present forum is no exception. The strategic maritime transit interests of many states are often deliberately disguised by interpreting coastal state rights as aimed at interfering with legitimate international commercial shipping. In fact, there is little or no evidence of such interference. Yet outbursts relating to the underlying threats of "creeping jurisdiction," the ending of the so-called "traditional freedom of navigation" etc., all seem to find a receptive audience that is either uninformed or very well aware of an entirely different agenda. In any case, this approach serves no real purpose. Strategic maritime transit rights and the transit needs of legitimate international commercial navigation are entirely distinct matters.

The 1982 Law of the Sea Convention

The 1982 Convention introduced new controls over navigation. Although some view any control as objectionable, this is a minority view that can today be disregarded. Because the safety record of international merchant shipping is far from good, it was clear that more controls were needed. This problem has led to the motivating principle of "safer ships and cleaner seas" of the International Maritime Organization (IMO), which is considered by the new Convention to be the "competent international organization" in the field of shipping. The IMO Secretary-General outlined this competence in his luncheon address at LSI 19 in 1985.[8]

The Convention provides direct and implied "terms of reference" for navigational measures. Article 192 in a very simple, single sentence places a heavy new responsibility on all states, namely that they "have the obligation to protect and preserve the marine environment." This language gives states very broad terms of reference to protect the seas. Article 194(3)(b) is more specific in stating that measures to protect the marine environment shall be designed to minimize:

> pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels.

This definition could, for example, easily include a number of vessel traffic control requirements involving training and equipment. On the other hand, the very difficult Article 211, dealing with pollution from vessels, somewhat narrows the powers of states to implement such measures.

Innocent Passage

In the Convention's section on innocent passage in the territorial sea, such passage is now clearly defined. Under Article 21 the coastal state may make laws and regulations relating to innocent passage con-

cerning the "safety of navigation and the regulation of maritime traffic" (21(1)(a)), as well as relating to protection of the marine environment. Article 22 sets out new rules relating to sea lanes and traffic separation schemes, and coastal states are given the right to require vessels to comply with such rules after due consultation with the IMO. It follows that noncompliance with regulations under Articles 21 and 22 could be interpreted to be noninnocent passage, resulting in criminal proceedings under Article 27. This article gives coastal states criminal jurisdiction over foreign vessels for crimes that "disturb ... the good order of the territorial sea (27(1)(b))."

Although Article 26 specifically prohibits charging vessels for territorial sea passage, charges are, nevertheless, permitted for specific services. It would seem that traffic separation schemes, vessel traffic control zones, and navigational aids may be chargeable on a "user-pay" principle.

Sea Lanes and Traffic Separation Schemes

Under Article 41, states can establish sea lanes and traffic schemes in international straits after consultation with the IMO as well as other states bordering such straits. Article 43 empowers strait states to make laws and regulations relating to the safety of navigation and the regulation of maritime traffic, similarly to coastal states in the territorial sea. Furthermore, such states are required to cooperate by agreement "in the establishment and maintenance in a strait of the necessary navigational and safety aids or other improvements in aid of international navigation" (43(a)).

In the Convention's Part IV, dealing with archipelagoes, similar guidelines for archipelagic states are established. Article 53 empowers such states to designate sea lanes for passage through such areas as well as traffic separation schemes for the safe passage of ships through the narrow parts of such sea lanes.

Coastal state competence to regulate international navigation in the EEZ is more limited. However, a recent view by a member of the UN Law of the Sea Secretariat suggests that any state navigating in the EEZ or the coastal state may propose schemes for ships' routing or use allocation respectively.[9] Under Article 56, coastal states have jurisdiction with regard to the establishment and use of artificial islands, installations, and structures and, as always, with regard to the protection of the marine environment. Even in the Area, the International Sea-Bed Authority may establish similar safety zones around exploratory/exploiting installations in accordance with the Convention.

Coastal States' Regulatory Responsibilities

The new Convention thus provides a fairly comprehensive regulatory "umbrella" for complex new rules relating to the safety of navigation in the territorial sea, international straits, archipelagic waters and, to a more limited extent, in the international seabed, the EEZ, and ice-covered areas of the EEZ. Furthermore, the Convention's strict legal requirements to protect the marine environment can be seen to imply that in areas where navigational controls and services could aid the safety of navigation, the lack of such systems may well be a breach of the Convention. This implication may well prevent a number of states, particularly in the developing world, from accepting the Convention at an early date. The frequently voiced threat of a "crazy patch-work quilt" of multiple coastal regulation of maritime traffic, hardly ever with much foundation in the past, has clearly receded further. There is

certainly no rush of eager coastal states all clamoring to establish oceanic tollgates manned by uncorruptible, bureaucratic maritime policemen bent on stopping passing vessels for any imaginary offense. In actual fact, there is a discernible reluctance by coastal states to assume the heavy new responsibilities contemplated by the Convention. This reluctance is apparent both in the North and in developing countries. Again, economic considerations have overridden poorly disguised political ambitions. Navigational controls involve a cost that many states are, for now, reluctant to assume.

This reluctance, rather than the much-feared overzealousness, may cause real problems for the future of navigational transit. The marine environment needs protection and shipping accepts, even welcomes, specific aspects of coastal control. Some traffic control can actually expedite traffic; prescribed sea lanes can shorten passages; safer ships are easier and cheaper insurance risks; better hydrography and navigational aids assist navigation.

In summary, coastal states have the right to guard against ship-generated marine pollution, but their responsibilities relate to pollution prevention, port state jurisdiction, pollutant reception facilities, navigational aids and hydrography, vessel traffic systems, and the expansion of training demanded by all of these. Maritime states have the right to pursue legitimate commercial navigation in their own interest and for the common good of international trade and commerce. Because the shipping industry is presently depressed and always cost-conscious, unnecessary deviations, delays and other navigational interference are unacceptable. On the other hand, maritime states have the responsibility to ensure that their ships are safe, comply with accepted international standards, and are adequately covered by liability insurance.

A New Maritime Transit Regime?

The 1982 Convention is unable to balance these interests any better, and is probably not designed to do so. It provides directions, guidelines, and principles but few details. It is here that a new regime may have to be created. Shipping faces increased regulation on safety, transit and access, environmental standards, manning and training, commercial and technical developments, liability coverage, and many other operational aspects at the national, regional, and international level with jurisdiction emanating from flag, port, and coastal states, as well as international organizations. But maritime transport is probably less prepared for these challenges than ever. The depressed shipping industry presently offers little encouragement to private shipowners for innovative ideas. Also, state shipping enterprises in the centrally planned states of the Eastern bloc and in the "South" are too busy making inroads into the traditional shipping markets to bother much about the need for a new transit regime. Major maritime states consider their shipping industries worthy of only limited support, being more concerned with other ocean uses and resources. An exception may be the United States, which has since the 1930s reluctantly supported an inefficient shipping industry to retain some control over shipping in times of national emergency.[10] This blending of the commercial with the strategic influenced the U.S. position.

What I am advocating here is the need for an all-embracing, widely accepted international convention on maritime transit and transportation which will provide a needed regime for international merchant shipping, providing legislative terms of reference for all aspects of maritime transport ranging from access and transit to navigational safety and

environmental protection. It goes without saying that such a convention should have at its integral heart provisions giving the IMO the necessary powers to carry out its present and future mandate as the "competent international organization" under the new law of the sea.

Aviation provides a good analogy. For over 40 years aviation -- maritime transport's younger brother -- has enjoyed the security of the type of convention advocated here. The Chicago Convention on International Civil Aviation, 1944, in a relatively simple and broadly worded instrument provides aviation with an internationally accepted "umbrella" relating to general principles of aviation; overflight, transit, and access; nationality and registration; facilitation of navigation; aids to aviation; safety matters; and international standards. In addition, the basic terms of reference for the IMO's air counterpart, the International Civil Aviation Organization (ICAO), are clearly laid out. Amendment procedures are simple and other aviation agreements and conventions are subordinated to the main Chicago Convention. Military/ strategic aviation is largely excepted.

The negotiation of a general maritime transport and transit convention in the late 1980s will be as easy or as simple as concluding an aviation convention over four decades ago. Although the ICAO has not been a panacea for aviation in every respect, its positions have gained international acceptance because of the overriding concern for safety in the air. In the past there has been less general concern for safety in the shipping industry which, rightly or wrongly, placed commercial questions first. During the UNCLOS III period, where the protection of the marine environment occupied a large part of negotiations, and partly because of IMO's "cleaner seas and safer ships" principle, this attitude has changed rapidly. There is growing belief today that maritime safety and environmental protection are inseparable from the prime commercial purpose of shipping. Yet rules, standards, and customary norms affecting *all* aspects of international shipping are today scattered in numerous international and regional conventions and other instruments. They receive diverse interpretation at the national, regional, and international level. They create double standards and inequities to the detriment of international shipping as a whole. They create lacunae in important areas of maritime safety. And, last but not least, they create political uncertainties that allow states to misuse the common good of international maritime trade and commerce for their quite different and, in my opinion, totally unrelated strategic agenda. All of this should provide sufficient incentive for an early general diplomatic conference to provide ocean shipping with its own regime.

Footnotes

1. In E. Miles and J. Gamble (eds.), *Law of the Sea: Conference Outcomes and Problems of Implementation*, 10 L. Sea Inst. Proc. 120 (1977).
2. In J. Gamble (ed.), *Law of the Sea: Neglected Issues*, 12 L. Sea Inst. Proc. 248 (1979).
3. In T. Clingan (ed.), *Law of the Sea: State Practice in Special Zones of Jurisdiction*, 13 L. Sea Inst. Proc. 156 (1982).
4. E. Brown and R. Churchill (eds.), *UN Convention on the Law of the Sea: Impact and Implementation*, 19 L. Sea Inst. Proc. 9-126 (1988).
5. See J. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* (1985).

6. There was rarely need to interfere with shipping on the seas when the commercial infrastructure which supported shipping allowed all the rivalry, competition, regulations, subsidization, and other economic pressures conceivable. But at sea "freedom prevailed," the very basis of free enterprise adhered to by all maritime states regardless of central planning or lack thereof.
7. 2 L. Oppenheim, *International Law* (H. Lauterpacht ed., 7th ed. 1952).
8. In E. Brown and R. Churchill, *supra* note 4, at 419.
9. G. Plant, *Traffic Separation Schemes in the EEZ*, 9 Marine Policy 332 (1985).

DISCUSSION

Louis Sohn: Mr. Gold mentioned (page 380) the Paris Memorandum of Understanding on port state control in which, very interestingly, 14 European states got together to control ships that are coming to their ports for the purpose of finding out whether they violate international conventions.[1] We now have the first report on the working of that memorandum, which says that they inspected 8800 vessels out of which only 271 were found defective.[2] They inspected 50 percent of the vessels of the 14 countries within the region, but also the ships of 94 other countries. And some of those 94 countries have been objecting that discriminatory standards are being applied to them, especially the developing countries.

The shipping committee of UNCTAD tried to investigate what was happening and they came to the conclusion that the fears of the developing countries are unjustified, that the inspectors are using, objective standards and the deficiencies they discovered, in fact justified detaining certain vessels. Only three precent of the inspected vessels were actually detained, until the deficiencies were corrected. The UNCTAD investigation proved that those deficiencies were really serious and needed correction for the benefit, in fact, of the ship owners and of the crew. This process shows that this arrangement can be a good system and that a port inspection system can save us from quite a number of problems.

Lewis Alexander: After listening to these excellent papers, I finally end up at the end of the three days saying, "Where are we and what do we have, from a global viewpoint?" It seems to me we have entered into a period of posturing. These discussions have illustrated that we are in a period that I might call "the UNCLOS hangover," in which we have not quite figured out where to go.

On the one hand, we have the maritime powers, particularly the United States, insisting on their rights, insisting that we have a very structured regime pursuant to the nonseabed provisions of the Law of the Sea Convention and that this regime must prevail. On the other hand, there are some coastal states which are asserting all sorts of rights in the statements they make at the time of signing and ratification, in their national legislation, and in the statements of government officials. These statements in a sense constitute more creeping jurisdiction. We have to ask ourselves whether these claims and assertions really constitute serious threats.

I think of the West German action (pages 103-110 above): does this cause the whole global communication system to end because they went four more miles out than they legally have? What major trend does this indicate?

I would suggest, barring a disaster, things in the global regime may stay pretty much the way they are now. I can see us meeting ten years form now, and arguing the same questions over again, bringing in more of the same inconsistencies. Then I ask myself: are there serious

trends now eroding the present global regime? Are the national jurisdictional claims against the global regime really going to take off or not?

What kinds of disasters, barring global war or a large limited war might occur? One that John Craven suggested at lunch would be a nuclear accident of a warship in somebody's port. This might start a whole series of unfortunate events. A liquid natural gas carrier might blow up in a populated area. Such disasters could throw off some of the restraints of the current regime.

But if we have a relatively stable regime, then how are we going to take care of the new needs and the new interests and perceptions on the part of coastal states? In other words, how can we adjust to the shocks that are going to come along? We should try to maintain the balanced regime as it is set up in the Convention, while adjusting to the shocks, with the realization that each of these inconsistencies that come up do not necessarily upset the whole apple cart. Matters might stabilize for a while now, because we are still in the hangover period.

I said earlier in my remarks that 25 countries claim greater than a 12-mile territorial sea. But I should point out, as Bruce Harlow reminded me, that none of those have occurred since 1982. They were all early claims, so we have had stability during the past several years. One thing that will cause trouble, as Edgar Gold mentioned (page 397-98), are the vessels that are perceived as potential polluters. They may in the long run cause more trouble then warships.

Finally, although I hate to think about it, at least for the United States and maybe for other countries, too, I could see navigation becoming more politicized, just as fisheries become politicized. We ended up in the United States with a "Fish and Chips" policy, and could end up with a "Ship and Chips" policy someday, too? I certainly hope not, but this is one of the possibilities of adjustment.

Sohn: Lew Alexander has asked what do we do next? I think what is happening is quite clear and that Ambassador Pardo was to some extent right: that we should not have been concentrating on the International Sea-Bed Authority but should instead have been concentrating on an International Sea Authority. We need an organization that would be able to enact regulations, like the International Civil Aviation Organization (ICAO) is doing all the time very quietly, subject to the procedure that permits a nation to opt out rather than requiring an affirmative act to opt in, which is working very well. Similar procedures have been developed by IMO and are embodied by now in several maritime conventions.[4] I think what we need, whether IMO likes it or not, is to impose additional regulatory responsibilities on IMO, just as we have done to the International Atomic Energy Agency where they had an original function of one sort and then we imposed upon them a second function for the purpose of the Nuclear Nonproliferation Treaty.[5] When we discover areas in which we need additional regulatory powers, instead of going to all the trouble of creating a new international authority, we should add additional powers to increase the regulatory responsibilities of existing organizations, like IMO. The contracting parties would have to agree, but as we have seen with regard to the Paris agreement (page 401), only 14 countries agreed but 108 countries were inspected. Maybe we should begin this approach on a regional basis and then extend it globally.

Bruce Harlow: Every workshop has its lightning rod and I suppose I perform that service for this workshop. Frankly, I was prepared to

receive bolts of lightning from many quarters but I was totally unprepared when our Canadian colleague made the point that the navies were not needed to protect commercial shipping because of the safe environment they find themselves in. I suppose I am result oriented but I would suggest that one might argue that the reason they are relatively safe is the existence of the navies. I personally believe, although I could not prove it, that the U.S. action in the *Mayaguez*[6] case bears some relationship to the relatively safe environment that ships have enjoyed, although I fear that the future may not be quite as comfortable as the past.

I did want to comment on Bill Burke's sobering assessment (pages 384-86). I agree that customary law is not static and is subjected to the phenomenon that participants here have characterized as claims of "creeping uniqueness." I would suggest that if the United States had signed the 1982 Convention and indeed if all countries had signed the Convention, we would be in much the same position we find ourselves in today. We would not be calling it "creeping uniqueness;" we would be calling it "imaginative interpretation." But it would nonetheless be a similar phenomenon.

Scott Hajost: I would like to make one comment on Professor Gold's suggestion about a new convention. About 1984, the parties to the London Dumping Convention, for which the IMO provides the secretariat, received a report of a group called the Task Team 2000. The reason I raise this point is that, although the London Dumping Convention is addressed towards ocean dumping, it also states the general obligation to protect the marine environment from all sources and records the obligation of states to work in all areas related to marine pollution. The conclusion in this Task Team 2000 report was that the London Dumping Convention should retain its focus on ocean dumping. But at the same time it indicated that incremental approach to improving the environmental protection regime should continue. I think it is unrealistic to think of negotiation of an overall maritime convention. We have not been able even to bring the optional annexes to MARPOL[7] into force. We must continue to make the effort, however, when opportunities present themselves.

Jon Van Dyke: I regret that it is now time to bring this meeting to a close. I hesitate even to try to summarize what has been three days of very fascinating discussion.

One idea that seems clearly agreed upon by this group is that maritime shipping is a good thing and that the commercial aspects of it, at least, are likely to continue because of the economic forces that drive them forward. The participants have disagreed on military transport, and I suspect that is where our problems will be in the next decade. We will see claims and counterclaims and much controversy to be resolved, by lawyers (we hope) rather than by military might. It is highly probable that many of us will have the occasion to work together again on these issues.

Footnotes

1. Memorandum of Understanding on Port State Control, Paris, Jan. 26, 1982, 21 I.L.M. 1 (1982)

2. UNCTAD Secretariat, International Maritime Legislation: Treatment of Merchant Vessels in Ports at Regional Level, UN Doc. TD/B/C.4/275 (1984). See also [1985] IMO News, No. 1, at 16.
3. UNCTAD Doc., *supra* note 2, at 11.
4. For a history of this IMO development, see Adede, *Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience*, 17 U.N.T.S. 161.
5. Treaty on the Nonproliferation of Nuclear Weapons, *done* at Washington, July 1, 1968, Art. 3, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.
6. On May 12, 1975 a Cambodian naval vessel opened fire on the *S.S. Mayaguez*, an unarmed American containership with 40 U.S. crew members aboard, in international waters off the Gulf of Thailand, and forced the ship into the port of Kompong Som (Sihanoukville). After diplomatic efforts to obtain the vessel's release failed, the U.S. representative to the United Nations informed the Secretary General of U.S. intentions to take measures in self-defense under article 51 of the UN Charter. The United States took military action. On May 14, U.S. aircarft destroyed three Cambodian patrol boats, but the Cambodians did not release the *Mayaguez*. On May 15, President Ford ordered U.S. Forces to board the *Mayaguez* and land on the island of Koh Tang. This action sucessfully rescued the crew and obtained the release of the ship intact. A number of U.S. military personnel were killed in an accident related to this rescue. *See* McDowell, *Contemporary Practices of the United States Relating to International Law* 69 Am. J. Int'l L. 861, 875-79 (1975).
7. See discussion on, and references to the MARPOL agreements on 246, 259 n. 13, 283, and 295 n. 4 *supra*.

THE EDITORS' CONCLUSIONS

1. **Although most of the provisions of the 1982 Law of the Sea Convention do not distinguish between commercial and military navigation, many nations do treat these types of ships differently and different rules may apply to each.**

Historically, nations have developed one set of rules to govern warships and another set to regulate commercial vessels. Those nations with large navies have sought to diminish these distinctions in recent years, and the text of the 1982 Law of the Sea Convention does eliminate most of the traditional distinctions. In the 1982 Convention's provisions on innocent passage through the territorial sea (Articles 17-32), for instance, warships[1] have certain rules that apply only to them (Articles 29-32), but are generally governed by the same rules that govern commercial vessels.[2] Activities by a foreign ship considered prejudicial to the peace, good order and security of the coastal state are listed in Article 19(2).

Many coastal nations nonetheless continue to regulate warships differently from commercial vessels with respect to prior notification requirements for innocent passage through the territorial sea, safety requirements for nuclear vessels, and military maneuvers in the exclusive economic zone. Some states believe that warships intrinsically threaten coastal state security interests, and thus that the passage of foreign warships is *per se* noninnocent.[3] Although most of the enumerated activities are military in nature,[4] Article 19 does not distinguish according to vessel type. In their domestic legislation on innocent passage, however, many coastal nations either require foreign warships to obtain prior authorization or restrict the innocent passage of foreign warships to designated sea lanes. These regulations do not apply to foreign commercial vessels.

China and Papua New Guinea are, for instance, among the many coastal nations that have argued that military vessels should obtain prior authorization or provide notification before entering the territorial sea of another coastal nation. Professor Sohn's paper provides several additional examples of nations that distinguish between military and commercial vessels. In 1985, Libya enacted regulations restricting innocent passage by noncommercial vessels to daytime hours and banning these vessels completely from specified zones (page 313). Nicaragua requires foreign warships to give 15 days advance notice to enter the country's 25-mile security zone, but requires only one week for commercial vessels (page 313).

For safety purposes, coastal states may regulate the passage of foreign ships through their territorial seas by designating sea lanes and traffic separation schemes (Article 22(1)). The Convention grants coastal states discretion to designate sea lanes for "tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials" (Article 22(2)). More stringent documentation and safety requirements apply to "foreign nuclear-powered

ships and ships carrying nuclear or other inherently dangerous or noxious substances" than to tankers (Article 23). Because nuclear powered vessels and vessels carrying nuclear weapons pose special threats to coastal state security, the regulation of the International Maritime Organization (IMO) permits coastal states to pass legislation to monitor the activities of vessels transporting dangerous substances and to require them to move only in designated sea lanes.

Another subject on which coastal states distinguish military from commercial vessels is the extent to which foreign nations may conduct military maneuvers in another nation's exclusive economic zone (EEZ). This issue is particularly significant in such politically sensitive regions as the Black Sea, the Sea of Okhotsk and the Persian Gulf, which are entirely within exclusive economic zones. Maritime nations tend to argue that the freedom of navigation granted under Article 58(1)[5] permits them to conduct military activities that do not interfere with the purpose for which EEZs were established, the exploitation of resources. Coastal nations emphasize that under Article 58(3)[6] these freedoms must be exercised with due regard to the interests of coastal states and regulations enacted to protect these interests. Some nations have enacted domestic legislation requiring prior notification or consent before foreign warships may enter the EEZ and requiring submarines to surface in these areas.[7] Other nations have interpreted provisions that give coastal states exclusive rights to install devices for the exploration and exploitation of natural resources on their continental shelves to mean that emplacement by foreign nations of military devices is forbidden without coastal state consent.[8]

A failure to distinguish between merchant shipping and military shipping may have hampered progress during negotiations at the Third United Nations Conference on the Law of the Sea (UNCLOS III). In ordinary peacetime conditions merchant shipping of all nations travels unimpeded on its legitimate journeys. Strong navies may be essential to ensure that this free travel continues, although Professor Gold suggested that such protection may no longer be necessary (see pages 395-96). Even those who advocate a clear distinction between commercial shipping and naval operations in peacetime generally agree that this separation of functions breaks down under wartime conditions.

2. **The concept of "transit passage" through international straits, which was developed in the 1982 Convention, has an uncertain status under customary international law.**

Articles 37 to 44 establish the regime of transit passage through international straits which guarantees a nonsuspendable right of commercial and military vessels to pass unimpeded through all straits that are used for international navigation. This regime includes overflight and submerged passage rights. Without the transit passage regime, 153 straits would have been blocked from free international navigation by the extension of territorial sea claims to 12 miles. To assert the right to transit international straits, the United States, as a nonsignatory of the 1982 Convention, has found it essential to argue that this right was part of pre-existing customary international law, not "new" law the Convention created. Admiral Harlow supports this position at pages 161-62. Professor William Burke, on the other hand, disagrees and states that the transit passage regime is not part of customary law (page 385).

Judge Shigeru Oda reasons that because innocent passage already protected commercial passage through straits, the transit passage provisions were designed to protect only military vessels (pages 155-57). Professor Anand quotes Professor William Burke (pages 142-43) to point out that submerged passage and overflight are the only important differences between innocent and transit passage.

Some scholars disagree with Admiral Harlow's views. Professor Anand asserts that transit passage is new law, not customary law. He emphasizes that the *Corfu Channel* case interprets *innocent* passage, not *transit* passage, and that the 1958 Convention applied the term "innocent" to passage through straits as well as through the territorial sea. He points out that in the 1970s President Nixon referred to "free" passage through straits, and that the concept of "transit" passage emerged at Caracas in 1974. He also argues that before the 1970s a number of states bordering straits required prior authorization (pages 126, 130, 138, and 161). Admiral Harlow counters that with the three-mile territorial sea, "key international straits had a high seas corridor" and the "firm practice of the United States was not to give authorization or notification prior to warship passage through international straits" (pages 161-62). In April 1986, U.S. F-111s flew over the Strait of Gibraltar on their Libyan bombing mission. If the right of overflight is not customary international law, why did signatories to the Convention not protest that the United States had asserted a right to which, as a nonsignatory, it was not entitled? Admiral Harlow argues that submerged passage in international straits also is a long-established state practice because "unless one were to believe in a process of levitation" one must concede that submarines have passed through straits in their normal submerged mode for decades.

The subtle meanings of these provisions are of great interest to nations bordering straits. Participants from two such nations present their views: Komar Kantaatmadja discusses the Malacca Straits, and Choon-Ho Park discusses the Korea Strait.[9] Lewis Alexander's paper on delimitation also explores ambiguities of straits passage, especially whether the phrase "useful" or "used" for international navigation is a better criterion for qualifying straits for the transit passage regime. Clarifying the legal arguments on both sides of these issues should engage the attention of international lawyers for many years to come.

3. Nations still disagree about the meaning of "innocent passage" through the territorial sea, and whether this concept allows military vessels to transit freely in areas adjacent to the coasts of other nations.

Professor Anand analyzes historical distinctions between warships and merchant ships, quoting Elihu Root's maxim that warships threaten, but "merchant ships may pass because they do not threaten" (page 130). Jin Zu Guang of the Shanghai Maritime Institute warns that coastal states should oppose Article 17 of the 1982 Convention, which includes warships in the meaning of "ships," because "the enforcement of this provision will bring about sharp confrontations between military states and coastal states" (page 115).

Mr. Jin points out that domestic laws of Indonesia and Turkey require warships to obtain prior authorization before exercising innocent passage, and that laws of Norway and Sweden require prior notification. Under the 1984 Chinese Maritime Safety Law of the People's Republic of China, foreign warships must obtain prior authorization. Mr. Jin

proposes limiting the numbers of foreign warships allowed in a nation's territorial waters at one time. Professor Sohn states that Tunisia might want to restrict the numbers of Libyan and U.S. warships in its offshore waters (page 308). Will maritime nations accept this kind of limitation? Will the law on innocent passage of warships evolve to favor maritime states' rights or to increase coastal states' rights to limit this passage?

A striking disparity between U.S. and Soviet concepts of innocent passage exists in the Soviet view that coastal states may restrict vessels exercising innocent passage to designated sea lanes. Professor Sohn's paper, *International Navigation: Interests Related to National Security* describes this Soviet legislation and proposed traffic separation schemes. In a 1986 test of the right of innocent passage, U.S. warships armed with intelligence equipment passed within six miles of the Soviet Black Sea shoreline (see introduction at pages 4-5). In May 1987, the Soviet Union protested U.S. warship entry into Soviet territorial waters in the Northwest Pacific near the Sea of Okhotsk. In both incidents, the Soviets warned of "serious consequences" if the United States continued to refuse to comply with Soviet domestic maritime legislation.[10]

How does the nonsignatory status of the United States influence its assertion of rights to exercise innocent passage? Will this concept be colored by international acceptance of lane designation in straits and in archipelagic waters? The haunting warnings by Chinese and Soviet officials suggest that misunderstandings over the meaning of innocent passage could lead to significant confrontations. These provisions demand the thoughtful attention of both international ocean lawyers and policy makers at national and international levels.

4. Although the 1982 Convention appears designed to protect the free movement of military vessels in the EEZs of other nations, some nations still disagree about whether such activity is protected under international law.

In the exclusive economic zone, coastal states have sovereign rights for exploring and exploiting, conserving and managing natural resources of the subsoil, the sea-bed, and its superjacent waters (Article 56(1)(a)). The coastal state has jurisdiction for installations and structures (Article 56(1)(b)(i)), marine scientific research (Article 56(1)(b)(ii)), and environmental protection (Article 56(1)(b)(iii)) in the EEZ. In the exclusive economic zone of another nation, other states enjoy freedoms of navigation and overflight (Article 58(1)). The Convention requires coastal states to have "due regard to the rights and duties of other states" (Article 56(2)) and requires other states to have a "due regard to the rights and duties of the coastal State" (Article 58(3)). Provisions relating to high seas freedoms in Articles 88 to 115 are incorporated by reference into the rules on the exclusive economic zone (Article 58(2)).

Some feel that the intent of these provisions, which did not clearly state the transit rights of military vessels in another nation's EEZ, was to give military vessels the same rights as commercial vessels.[11] In interpreting the rights of states to carry out military maneuvers in the EEZ of a third state, two crucial articles are Article 88[12] and Article 301[13] which provide that the seas are reserved for peaceful purposes. The Brazilians used these articles to support a different interpretation of the Convention, arguing that national sover-

eignty over the resources of the exclusive economic zone precludes third states from carrying out military maneuvers without consent in another nation's EEZ, particularly when these activities involve the use of weapons or explosives.[14]

At this meeting, Camillus Narokobi and others stated their belief that the question of military activity in the EEZ is unsettled, particularly in light of the U.S. decision not to sign the treaty. During the negotiations at the Convention, a number of nations asserted that naval exercises and espionage activity are inconsistent with "peaceful purposes" (see pages 345-51). Does international law support Brazil's view that aircraft launching should be impermissible in another nation's EEZ? Can Libya forbid U.S. military vessels from conducting missile firing exercises in its EEZ? Or, as the maritime nations believe, does the negotiating history of the Convention imply that military activities are generally understood to be permitted in the EEZ?

Another open question regarding military vessels in other nations' EEZs is whether a military vessel exercising hot pursuit can cross a third nation's EEZ to pursue into the offender's territorial sea. The definition and extent of military activities that can take place in another nation's EEZ are topics that remain to be debated.

5. **It is unclear what process should be used to designate the archipelagic sea lanes, and what role the IMO should play.**

Article 53 provides that archipelagic states may designate sea lanes and air routes over them. The archipelagic state, however, must first submit its plans to the International Maritime Organization. The IMO cannot adopt the sea lanes without the assent of the archipelagic state.

How can the archipelagic state be certain its national interests in prosperity and security will be duly considered in the process of designating archipelagic sea lanes? How will the decision-making process within the archipelagic state balance competing interests in the domestic economy, such as environmental protection, fishing and national sea transport? (See pages 216-18).

How will the IMO carry out its duties to assure the sea lanes "conform to generally accepted international regulations?" Thomas Busha states the IMO may find it necessary to examine its work and procedures to determine what new regulations or arrangements are needed to discharge the functions expected of the organization (see pages 237-59). Will the IMO be overly subject to the political influence of its maritime state members?

When Judge Oda asked how a dispute between the IMO and the archipelagic state over designating sea lanes would be resolved, Komar Kantaatmadja responded that existing sea lanes would prevail (page 264). Thomas Busha said that governments often alter routes the IMO navigation subcommittee approves. Nugroho Wisnumurti stressed the influence of maritime powers in decision-making, and asked how the interests of nonsignatories would be represented.

Is the IMO's role consultative? Does the IMO have veto power? Does the archipelagic state have veto power? The authority and procedures through which these issues will be resolved require further attention.

6. **Nations are likely to continue to make claims for additional maritime jurisdiction based on the "unique" configurations of their coasts ("creeping uniqueness"). Nations disagree on when it is**

appropriate to draw straight baselines and what limits exist on such claims.

"Creeping uniqueness" characterizes extended jurisdictional claims such as Canada's 1985 assertion that, for reasons of environmental protection, the Northwest Passage waters are internal waters of Canada. Is this claim legal? Geographer Lewis Alexander calls this claim a "bizarre turn" in straight baseline practice (page 75) and warns that "if Canada can make a claim based on its unique case, then the door is open to all other countries as well" (page 83). He characterized the practice of nations to make such claims as "creeping uniqueness" (page 107).

Can the Federal Republic of Germany include within its territorial sea an area designated by closing lines marked around a roadstead wholly outside the territorial sea (see pages 103-10)? The United States argues that such a claim is illegal. The F.R.G. extended its territorial sea boundary to protect economic interests in fishing and tourism from potential pollution damage at an intersection of heavy tanker traffic. Professor Sohn asserts the 1958 Convention would not support the F.R.G.'s claim. Renate Platzoeder responds that the claim is consistent with the ambiguous meaning of the phrase "included in the territorial sea" in the 1958 Territorial Sea Convention's provision on roadsteads.

Do these claims of extended jurisdiction by drawing closing lines or straight baselines represent "creeping uniqueness"? This volume contains a paper by U.S. State Department official Peter Bernhardt proposing strict criteria by which straight baseline claims could be evaluated (pages 85-99). Will this mathematical system provide a useful model for developing consistent standards and objective criteria?

7. **National claims designed to protect the marine environment will continue to place constraints on navigational freedoms.**

Worldwide agreements reflecting environmental concern arose only recently and most efforts at protecting the environment have at some point conflicted with firmly entrenched traditional freedoms. On land, indifference to the environment associated with perceived freedom to do what one wished with private property has given way to obligations not to injure the rights and interests of others. In international law, an arbitral decision involving emissions from a smelter in Trail, Canada that caused injury in the U.S. state of Washington established transboundary obligations so that one nation may not permit the use of territory that would cause harm to another.[15] On the ocean, traditional freedoms of navigation have been tempered by positive obligations not to injure the marine environment. The *Torrey Canyon* oil spill provided the impetus for pollution control regulations on the ocean.[16]

The 1982 Convention was designed to balance coastal state interests in resource development against maritime state interests in freedom of navigation. To protect its resources in part of the EEZ, a coastal nation must protect coastal and offshore regions from environmental damage (see Professor Clingan's paper at pages 273-79). Before the Convention, enforcement authority over a vessel that polluted territorial waters belonged to the flag state. The Convention gave coastal states new powers to enforce regulations against these ships. Expanded port state jurisdiction permits coastal states to investigate violations of pollution control regulations that occur outside their EEZs once the vessel appears voluntarily in their ports.

Establishing marine sanctuaries places another constraint on navigational freedom. National legislation, like the U.S. Marine Sanctuaries Program, raises question international lawyers will have to grapple with: Does a coastal state have jurisdiction to prohibit foreign ships from anchoring in an area where they would damage coral reefs or other forms of marine life? Is it consistent with international law to apply penalties to foreign vessels that do cause such damage? (See pages 283-98).

Are these developments likely to foster disputes between coastal interests and the exercise of navigational freedoms? Does the nonsignatory status of the United States limit U.S. ability to resolve these issues satisfactorily by peaceful means without the Convention's dispute resolution procedures?

8. The dispute resolution procedures in the 1982 Convention which were designed to reduce conflicts caused by these competing claims may not be widely used if the Convention is not universally ratified.

If chemical discharges from one nation's industries harm the fish in the exclusive economic zone of another nation, what mechanism will resolve disputes over responsibility for the damage? If tars from several nations' tankers make another nation's beaches unsuitable for tourism how will damages be assessed? It is uncertain how disputes will be resolved without pre-established mechanisms. How are differences in interpretation of the provisions of the Convention to be reconciled? How will archipelagic states and states bordering straits enforce environmental and resource management regulations without the Convention's disupte resolution procedures? Domestic remedies, litigation, and customary international law may not provide satisfactory alternatives.

The elaborate dispute resolution provisions of the 1982 Convention are among the most innovative international law mechanisms ever devised. Part XV of the Convention, Settlement of Disputes, offers states a choice among four main systems for the resolution of disputes -- the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea, arbitral tribunals, and special technical arbitral tribunals. Annex V describes the voluntary, nonbinding conciliation proceedings. Annex VI, the Statute of the International Tribunal of the Law of the Sea, describes the organization, competence and procedures of the Tribunal and its specialized Seabed Disputes Chamber. Annex VII describes the special arbitral tribunals and Annex VIII involves experts from the Food and Agricultural Organization, the United Nations Environmental Program, the Inter-Governmental Oceanographic Commission, and the International Maritime Organization in the resolution of disputes in their areas of technical expertise. All parties are presumed to accept arbitration if they cannot agree on one of the other peaceful means of dispute resolution. The obligation to exchange views expeditiously at least maintains communication as a basic step in solving the problem.

The United States played a significant role in developing this part of the treaty. Has the U.S. decision not to sign the Convention foreclosed the United States from benefiting directly from this regime? Will other nations forego these procedures as well? Without these safety valves are ocean disputes more likely to escalate into major confrontations involving the use of force?

9. **A new international treaty may be needed to protect maritime transport.**

One of the major themes of this workshop was that although commercial and military navigation share many common interests, in some situations their interests to not overlap and may even be antagonistic. Professor Gold remarks (at pages 395-96) that the military views commercial ships as a nuisance on the sea lanes, impeding the smooth operation of military navigation and vice versa. Professor Morgan stressed the historic role of navies in keeping sea lanes open for international commerce in commodities vital to nations' survival and prosperity (pages 54-68). Admiral Harlow suggests it may be inappropriate for commercial shipping interests to underestimate the benefits flowing to commercial shipping from the Navy's protective role (pages 402-03). Professor Gold rejected this view, saying that commerical shipping no longer requires military protection (pages 380 and 396). The 1987 confrontations in the Persian Gulf may serve to clarify this dispute.

As the negotiating history of the 1982 Convention suggests, freedom of navigation has implicitly been understood to mean freedom of military navigation. Did the Convention's emphasis on military navigation overlook important issues facing commercial shipping? The call to negotiate a new treaty designed primarily to meet the needs of commercial maritime interests and to clarify the rights and duties of states in regulating the passage of these vessels was clearly expressed by Edgar Gold (pages 394-400). Should a structure be developed for commercial navigation similar to the international commercial aviation industry's International Commercial Aviation Organization? Would the maritime interests be better served by a single convention to clarify ambiguities about maritime obligations under diverse international envirommental, safety, and economic agreements as well as under the 1982 Convention? Would coastal nations also benefit from a more predictable and uniform regime?

Concluding Remarks

Are there rocks and shoals ahead for international navigation? The papers, discussions and comments presented in this volume have shed light on the problems and possible solutions, but many questions remain unanswered.

Mariners, both commercial and naval have always had to contend with obstacles to unimpeded navigation. These have heretofore been primarily associated with shallow water, strong currents, the danger of collisions in crowded fairways and poor visibility in fogs or storms. To those must now be added what some may view as political hazards to navigation. How parties interested in international navigation will manage to solve the additional problems will have to be discussed at future conferences and workshops. The input of all countries is essential because all countries realize that trade and shipping are essential for the welfare of the people of the world.

Footnotes

1. Section 3 (Innocent Passage in the Territorial Sea) of Part II (Territorial Sea and Contiguous Zone) of the Convention is divided into three subsections. Subsection A (Rules Applicable to All

Ships, Arts. 17-26), subsection B (Rules Applicable to Merchant Ships and Government Ships Operated for Commercial Purposes, Arts. 27-28), and subsection C (Rules Applicable to Warships and Other Government Ships Operated for Non-Commercial Purposes, Arts. 29-32).

2. A "warship" is defined as "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State ... manned by a crew such which is under armed forces discipline" (Art. 29).
3. The threat or use of force is among the listed activities considered prejudicial to the peace, good order, or security of a foreign state (Art. 19(2)(a)).
4. In addition to exercises or practice with weapons (Art. 19(2)(c)) and launching or landing aircraft or military devices (Art. 19(2)(e)-(f)), the list includes "any fishing activity" (Art. 19(2)(c)(i)).
5. Article 58(1) provides:

> In the exclusive economic zone, all States ... enjoy ... the freedoms referred to in Article 87 of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the other provisions of this Convention.

6. Article 58(3) provides:

> In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

7. Boczek, *Peacetime Military Activities in the Exclusive Economic Zone of Third Countries* (paper prepared for the 28th Annual Convention of the International Studies Association, Washington D.C., April 1987).
8. *Id.* at 17-21.
9. *See also* A. Jaafer, *The Changing Legal Status of the Malacca and Singapore Straits*, in J. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* 285 (1985).
10. Schmemann, *Soviet Lodges a Protest*, N.Y. Times, Mar. 19, 1986, at A11, col. 4; Honolulu Star Bulletin, May 21, 1987, at , col. .
11. For a discussion of negotiations over the issue of whether or not a third state may conduct military activities in the EEZ, and excerpts from Brazil's 1982 declaration, see Koh, *Discussion* in J. Van Dyke (ed.), *supra* note 9, at 303-04.
12. Article 88 provides "the high seas shall be reserved for peaceful purposes."
13. Article 301 tracks the language of article 2(4) of the United Nations Charter and provides:

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner

inconsistent with the principles of international law embodied in the Charter of the United Nations.

14. Koh, *supra* note 11.
15. The Trail Smelter Case (United States V. Canada), 3 U.N.R.I.A.A. 1911 (1938), 1936 (1941).
16. *See* C. Gill, F. Booker, and T. Soper, *The Wreck of the Torrey Canyon* (1967).

INDEX

SPONSORS

The Law of the Sea Institute was founded in 1965 at the University of Rhode Island by two oceanographers and a geographer concerned with the increasing political impact of ocean activities. In 1966 they initiated a series of annual conferences and workshops to bring together statesmen, lawyers, scientists, businessmen, governmental officials, and students to discuss the national and international uses of the oceans, the problems arising from changing technologies, and the conflicts of interests in the control and exploitation of the sea. In 1977 the Institute moved to the University of Hawaii and further expanded the scope of its international program. Since the close of the UN Conference on the Law of the Sea in 1982, the Institute's conferences and workshops have provided a forum in which to discuss the implementation of the Law of the Sea Convention and the issues it engenders.

The Institute is governed by an 18-member Executive Board comprised of internationally recognized scholars and leaders in ocean law and policy. Support for the Institute's activities is provided by the Sea Grant Program of the National Oceanographic and Atmospheric Administration, the State of Hawaii, the University of Hawaii, and private corporations and individuals. The Institute's publications are produced with funds from the Andrew W. Mellon Foundation, and travel funds for third world scholars to attend Institute conferences and workshops is provided by the Ford Foundation.

The East-West Center is a public nonprofit educational institution established in Hawaii in 1960 by the United States Congress. The Center's mandate is "to promote better relations and understanding among the nations of Asia, the Pacific, and the United States through cooperative study, training, and research." Each year some 2,000 research fellows, graduate students, and professionals in business and government work with the Center's international staff to examine major issues related to population, development policy and resources, the environment, culture, and communication in Asia, the Pacific, and the United States. The Center's funding is provided by the U.S Congress, Asian and Pacific governments, and private agencies and corporations.

The Resource Systems Institute is one of four research institutes within the East-West Center. RSI's programs focus on issues of economic growth, international trade and cooperation, and energy and mineral resources policy in the Asia-Pacific region.

The University of Hawaii Sea Grant College Program is part of the National Sea Grant College Program, which was created by the Congress as the ocean parallel of the land grant college concept. Annually, about 60 projects receive Sea Grant funding in four areas of research in marine resources development, Pacific basin policy studies, marine technology, and marine environmental assessment, in addition to ongoing programs in education and extension service.

The William S. Richardson School of Law at the University of Hawaii at Manoa was founded in 1973. It has a student body of 250 and offers the full range of courses leading to the J.D. degree, with a particular emphasis in Pacific and Asian Legal Studies.

OTHER LAW OF THE SEA INSTITUTE PUBLICATIONS

Conference Proceedings

The International Implications of Extended Maritime Jurisdiction in the Pacific. Proceedings of the 21st Annual Conference, 1987, in Honolulu, Hawaii. Edited by John P. Craven and Jan Schneider (1988). Approx. $44.

The Law of the Sea: What Lies Ahead? Proceedings of the 20th Annual Conference, 1986, in Miami, Florida. Edited by Thomas A. Clingan, Jr. (1988) 578 pages. $43.

The UN Convention on the Law of the Sea: Impact and Implementation. Proceedings of the 19th Annual Conference, 1985, in Cardiff, Wales. Edited by E. D. Brown and R. R. Churchill (1987) 639 pages. $38.50.

The Developing Order of the Oceans. Proceedings of the 18th Annual Conference, 1984, in San Francisco, California. Edited by Robert B. Krueger and Stefan A. Riesenfeld (1985) 749 pages. $20.

The Law of the Sea and Ocean Industry: New Opportunities and Restraints. Proceedings of the 16th Annual Conference, 1982, in Halifax, Nova Scotia. Edited by Douglas Johnston and Norman Letalik (1984) 605 pages. $18.

The Law of the Sea and Ocean Development Issues in the Pacific Basin. Proceedings of the 15th Annual Conference, 1981, in Honolulu, Hawaii. Edited by Edward Miles and Scott Allen (1983) 638 pages. $18.

The Law of the Sea in the 1980s. Proceedings of the 14th Annual Conference, 1980, in Kiel, Federal Republic of Germany. Edited by Choon-ho Park (1983) 636 pages. $18.

Law of the Sea: State Practice in Zones of Special Jurisdiction. Proceedings of the 13th Annual Conference, 1979, in Mexico City, Mexico. Edited by Thomas A. Clingan (1982) 550 pages. $14.25.

The Law of the Sea: Neglected Issues. Proceedings of the 12th Annual Conference, 1978, in The Hague, Netherlands. Edited by John King Gamble, Jr. (1979) 545 pages. $8.75.

Workshop Proceedings

The Law of the Sea: Problems from the East Asian Perspective. Proceedings of Two Workshops, 1981 and 1984, in Seoul, Korea. Edited by Choon-ho Park and Jae Kyu Park (1987) 601 pages. $42.

Consensus and Confrontation: The United States and the Law of the Sea Convention. From a workshop, 1984, in Honolulu, Hawaii. Edited by Jon Van Dyke (1985) 576 pages. $29.50

Arctic Ocean Issues in the 1980's. From a workshop, 1981, on Mackinac Island, Michigan. Edited by Douglas M. Johnston. 60 pages. $5.

Alternatives in Deep-Sea Mining. From a workshop, 1978, in Ka'u, Hawaii. Edited by Scott Allen and John P. Craven (1979). 110 pages. $4.

Occasional Papers

The Soviet Union in Arctic Waters. By Willy Ostreng. 77 pages. $10.

Perspectives on U.S. Policy Toward the Law of the Sea: Prelude to the Final Session of the Third U.N. Conference on the Law of the Sea. Edited by David D. Caron and Charles L.O. Buderi (1985). $5.

Distant Water Fisheries and the 200-Mile Economic Zone. By Vladimir Kaczynski (1983) 50 pages. $4.25.

The Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea. Edited by Myron H. Nordquist and Choon-ho Park (1983) 689 pages. $16.

The Transfer of Marine Technology to Developing Nations in International Law. By Boleslaw A. Boczek (1982) 79 pages. $3.75.

These books may be ordered from:

The Law of the Sea Institute
Wm. S. Richardson School of Law
University of Hawaii
2515 Dole Street, Room 208
Honolulu, Hawaii 96822
Telephone: **(808) 948-6750**
Telex: 7431895 SEALAW

LAW OF THE SEA INSTITUTE PUBLICATIONS

Conference Proceedings

THE INTERNATIONAL IMPLICATIONS OF EXTENDED MARITIME JURISDICTION IN THE PACIFIC, Proceedings of the 21st Annual Conference, 1987, in Honolulu, Hawaii. Edited by John P. Craven and Jan Schneider (1988). Approx. $44.

THE LAW OF THE SEA: WHAT LIES AHEAD? Proceedings of the 20th Annual Conference, 1986, in Miami, Florida. Edited by Thomas A. Clingan, Jr. (1988). 578 pages. $43.

THE UN CONVENTION ON THE LAW OF THE SEA: IMPACT AND IMPLEMENTATION, Proceedings of the 19th Annual Conference, 1985, in Cardiff, Wales. Edited by E. D. Brown and R. R. Churchill (1987). 639 pages. $38.50.

THE DEVELOPING ORDER OF THE OCEANS, Proceedings of the 18th Annual Conference, 1984, in San Francisco, California. Edited by Robert B. Krueger and Stefan A. Riesenfeld (1985). 749 pages. $20.

THE LAW OF THE SEA AND OCEAN INDUSTRY: NEW OPPORTUNITIES AND RESTRAINTS, Proceedings of the 16th Annual Conference, 1982, in Halifax, Nova Scotia. Edited by Douglas Johnston and Norman Letalik (1984). 605 pages. $36.

THE LAW OF THE SEA AND OCEAN DEVELOPMENT ISSUES IN THE PACIFIC BASIN, Proceedings of the 15th Annual Conference, 1981, in Honolulu, Hawaii. Edited by Edward Miles and Scott Allen (1983). 638 pages. $18.

Workshop Proceedings

THE LAW OF THE SEA: PROBLEMS FROM THE EAST ASIAN PERSPECTIVE, Proceedings of Two Workshops, 1981 and 1984, in Seoul, Korea. Edited by Choon-ho Park and Jae Kyu Park (1987). 601 pages. $42.

CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION. From a workshop, 1984, in Honolulu, Hawaii. Edited by Jon Van Dyke (1985). 576 pages. $29.50.

ARCTIC OCEAN ISSUES IN THE 1980'S. From a workshop, 1981, on Mackinac Island, Michigan. Edited by Douglas M. Johnston. 60 pages. $5.

Occasional Papers

THE SOVIET UNION IN ARCTIC WATERS. By Willy Ostreng. 77 pages. $10.

PERSPECTIVES ON U.S. POLICY TOWARD THE LAW OF THE SEA: PRELUDE TO THE FINAL SESSION OF THE THIRD U.N. CONFERENCE ON THE LAW OF THE SEA. Edited by David D. Caron and Charles L. O. Buderi (1985). $5.

DISTANT WATER FISHERIES AND THE 200-MILE ECONOMIC ZONE. By Vladimir Kaczynski (1983). 50 pages. $4.25.

THE REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA. Edited by Myron H. Nordquist and Choon-ho Park (1983). 689 pages. $16.

These books can be ordered from:
The Law of the Sea Institute, 2515 Dole St., Honolulu, Hawaii 96822.