

The Law of the Sea:
Problems from the
East Asian Perspective

Edited by
Choon-ho Park
Jae Kyu Park

The Law of the Sea: Problems from the East Asian Perspective

Proceedings
of Two Workshops of
The Law of the Sea Institute
held in Seoul, Korea

Law of the Sea:
Major Problems from the East Asian
Perspective held on June 30–July 3, 1981
with the Institute of Social Sciences,
Seoul National University
and the Korea Ocean Research and
Development Institute

East Asia and the Law of the Sea—
UNCLOS III Review
held on July 3–6, 1984
with the Institute for Far Eastern Studies,
Kyungnam University
and the Environment and Policy Institute,
East-West Center

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PREFACE

The Law of the Sea Institute cosponsored two workshops in Seoul, Korea: the first one on June 30 - July 1, 1981, with the Korea Ocean Research and Development Institute and the Institute of Social Sciences of Seoul National University on *Law of the Sea: Major Problems from the East Asian Perspective* and the second on July 3 - 6, 1984, with the Institute for Far Eastern Studies of Kyungnam University and the Environment and Policy Institute of the East-West Center, Hawaii on *East Asia and the Law of the Sea*.

As may be seen from the range and depth of what was discussed on both occasions, the participants represented a cross-section of expertise in this field. Fortunately, no basic changes have taken place in the positions of the coastal states and in the contentions of the disputes between the parties. Therefore, the present volume is by no means a piece of history but an inventory of what has been going on in Northeast and Southeast Asia with respect to the use of the sea and its resources. To date, no other monograph offers so much so comprehensively.

However, nothing would excuse me for the long delay in the publication of the proceedings. I have no acceptable reasons to offer, nor do I regard myself too young to procrastinate or too old not to.

For what the present volume is, I am deeply indebted to Dr. John P. Craven, Director, Dr. Scott Allen, Associate Director, and their staff of the Law of the Sea Institute. I am particularly grateful to Ms. Carol Stimson, Administrator/Editor of the Institute, without whose efforts the present volume would have left a lot to be desired or taken longer to be finished. I would also like to thank Ms. Lydia Mesrobian, Ms. Alyson Nakamura, Ms. Elizabeth Ng, Ms. Linda Nihei, Ms. Eunice Yang, Ms. Pearl Yao, and Ms. Ida Yoshinaga for transcribing, typing, and proofing the manuscript. For any errors or misrepresentations, I hold myself solely responsible and punishable.

FOREWORD

As it relates to the progressive development of the international law of the sea, the United Nations Convention on the Law of the Sea, which was adopted at Montego Bay, Jamaica, on December 10, 1982, marks the opening of a new era in the efforts of the international community to bring up to date international legal measures on the uses of the sea and its resources. The United Nations has indeed every reason to pride itself on its achievements culminating in the adoption of the Convention.

The Convention is yet to come into force -- "12 months after the date of deposit of the sixtieth ratification or accession." But the fact that many of the provisions in the Convention have already been put into practice by a large majority of coastal states, including major maritime states, is a sure indication that the purpose for which the Convention was adopted after 15 years of negotiations (1967-1982) has been substantively met. To this extent, it would be safe to count on the role of the Convention as the first comprehensive ocean constitution in history.

It was against this background that the Institute for Far Eastern Studies of Kyungnam University and the Law of the Sea Institute, University of Hawaii, gladly agreed to sponsor jointly the International Conference on East Asia and the Law of the Sea, Seoul, July 3-6, 1984.

As the present volume shows, at the conference, which was the first to be held since Montego Bay, the purpose was to take an inventory of problems and issues before the coastal states in this region. It is hoped that the findings at this first get-together of eminent scholars and specialists would be followed up into further discussions in the future, with a view to looking into what could be done to resolve the numerous potential and real disagreements between and among unilateral, opposite and adjacent claimants and disputants "over the sea."

In closing, we wish to extend our sincere gratitude to all staff members at IFES and LSI, without whose devoted efforts it would not have been possible to hold the meaningful event. We also wish to thank all the participants, most of whom came long distances, for their efforts to make the conference what it was to the great satisfaction of the sponsors.

Jae Kyu Park
Director, IFES

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The Asia Foundation

The Environment and Policy Institute, East-West Center

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Korea Ocean Research and Development Institute (KORDI)

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Korean Ministry of Foreign Affairs

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PART I: 1981 WORKSHOP

OPENING CEREMONIES

OPENING CEREMONIES

Hong Koo Lee: Welcome to the campus of Seoul National University. I am Hong Koo Lee, Director of the Institute of Social Sciences here. There are three co-sponsors for the workshop. Dr. Craven, Director of the Law of the Sea Institute, University of Hawaii, will now make a brief opening statement.

John Craven: Dr. Lee, Dr. Park, and distinguished participants: with a great deal of pride as a co-sponsor of this most significant workshop, I welcome you. The Law of the Sea Institute has attempted to be a unique international institution, and since its inception at Rhode Island its primary objective has been to provide annually a forum in which true scholars and practitioners could meet to discuss the ongoing and future problems of the law of the sea in an objective and scholarly manner. When the Institute was in Rhode Island, it was possible to draw together this community of scholars because of the proximity to New York and the United Nations, and therefore it was appropriate to hold the annual conferences there. But the nature of the development of the law of the sea and other events dictated that the locale of the Institute should change. Partially the change has come from the fact that the law of the sea, though still developing through the deliberations of the United Nations, is also developing very rapidly as a result of changes in states' practices and in regional arrangements. It is developing as a rich and complex law of the sea in support of and complementary to the UNCLOS, and one can no longer rely on the UN meeting place to bring together the appropriate scholars in the appropriate area.

Thus when the Institute was moved to Hawaii, our conferences and workshops began to take place at various cities around the world. We have had conferences and workshops in Honolulu, The Hague, Mexico City, Kiel, and in remote places like Ka'u; and each time the place chosen was significant in terms of the development of the law of the sea. With this philosophy in mind, the Executive Board and I have consciously attempted to structure these meetings so that they take place at the appropriate time, with the appropriate subject matter, and with the appropriate distinguished scholars. We concluded that a workshop in Korea focusing on the problems of the developing law of the sea in East Asia was an absolute requirement, because the legal problems of the law of the sea in this interesting, rich, and semi-enclosed sea and strait area are so different from the problems of the rest of the world that they can only be addressed in this very special context.

We were receptive to the early recommendation that we hold a workshop here in Korea a year and a half ago, and when it became necessary to reschedule it, we determined to do so as soon as it was convenient, proper, and appropriate. It is a source of great satisfaction to me that we now have collected so many scholars from so many different countries in this important area. As I look around the room I see colleagues from all those countries which ought to be represented here. That means that we will have a frank, full, objective, and scholarly workshop that will provide significant insight on the developing law of the sea in this area that is fraught with complexity. The results of this workshop will be of immense use to scholars, or more importantly, to practitioners who are seeking, through the United Nations or through regional arrangements or through their own state's practice, to develop

a regime which is peaceful, productive, and equitable for all the peoples of this region. Thank you.

Hong Koo Lee: I now introduce Dr. K. Y. Lee, Vice President of Seoul National University. President Kwon E. Hyock is out of town today and regrets very much that he could not be here to greet you personally. Dr. Lee.

K. Y. Lee: Mr. Chairman, ladies and gentlemen, I welcome you all to the first international workshop on the law of the sea to take place on the campus of this university. We have hosted many important conferences and workshops in the past, but few have dealt with a topic quite so cogent and timely as this one.

Geographically speaking, Korea is a small peninsula with oceans on three sides. Though we have few natural resources, with a population density almost the highest in the world, this country has made enormous strides in economic development during the past two decades. As you know, the development of our land resources is rapidly reaching its limits. Exploration of outer space is still far beyond the practical capabilities of this energetic yet small nation. The sea naturally offers the most enticing prospect for further outlet to the Korean people. Indeed, the further prosperity of our nation might depend on the successful development and management of the various possibilities that the sea offers. To my great dismay our university, the foremost educational institution of higher learning in Korea, has not allocated sufficient attention to the study of issues of the international exploration and division of oceanic resources.

It is my great hope that this international workshop on the law of the sea will serve as a herald of a new era for the study of the sea at this university and in this country. In placing high expectations on the outcome of the workshop, I sincerely hope to be of service in making your stay here on the campus fruitful and pleasant. Thank you.

Hong Koo Lee: The Korea Ocean Research and Development Institute is one of the three co-sponsors, but actually KORDI did most of the preparation for this conference and deserves the greatest part of the credit. I would like to introduce its director, Dr. Byung Don Lee.

Byung Don Lee: Distinguished guests, ladies and gentlemen: It is my great privilege and honor to make some remarks at this workshop on the law of the sea from the East Asian perspective here in Korea. On behalf of the Korea Ocean Research and Development Institute, I would like to extend to every one of you a very warm welcome.

Since 1973, all the nations of the world have made a concerted effort to reshape the entire regime of the oceans through the Third United Nations Conference on the Law of the Sea. The basic issues of the Law of the Sea Conference, as you know, are the preservation and orderly development of ocean resources for all of us. This conference is nearing the conclusion of a new international convention on the sea. Needless to say, the oceans offer a new promise for all nations, particularly for the countries in this part of the world. The Pacific Ocean is the greatest reservoir of living and non-living resources on this planet. Economic, strategic, and other interests are interwoven among the Asian nations.

Unlike the other side of the Pacific, therefore, this area has complex problems which reflect the relation of each coastal state to

its surrounding seas. Considering these circumstances, the topics and discussions of this workshop are highly significant and relevant for the development of an effective ocean regime.

We know that ocean development will contribute to a better life for mankind, but there are many problems to be settled. We recognize that immediate interests inevitably are in conflict, and these conflicts are hard to resolve. We must have more cooperation among nations if we are to bring co-prosperity in the long run. I note joint development of the continental shelf between our country and Japan as a good example of settlement of boundary delimitation among neighbors.

Finally, I sincerely hope that this gathering will give us an opportunity to openly discuss the problems of the law of the sea and light a route to understanding and cooperation among coastal nations.

May I conclude my talk with special words of thanks to Dr. John Craven and Dr. Choon-ho Park, Law of the Sea Institute, University of Hawaii, for their congenial endeavor in promoting this special workshop to be held here in Seoul, and to the Asia Foundation for its support. We welcome you again, particularly those of you from abroad. Good luck and thank you.

Hong Koo Lee: Dr. Choon-ho Park, our co-chairman, will introduce our speaker this morning. Let me say a few words about my personal relation to Dr. Choon-ho Park. Although Dr. Park is a graduate of Seoul National, we never met on the campus during our student days. Back in January 1973, I was invited to spend a year as a fellow at the Woodrow Wilson International Center, Smithsonian Institution, and it was there that I met Choon-ho, who had arrived earlier to participate in the second Ocean Studies Program there. Arvid Pardo was directing that program. Up to that time I didn't know anything about oceans, certainly nothing about law of the sea. So it was during my stay there, through my acquaintances and talks with Arvid and Choon-ho, that I developed some understanding about the problems of oceans. It is actually through that personal relationship that our Institute has become co-sponsor for this conference. Here is Dr. Choon-ho Park.

Choon-ho Park: Thank you very much. I regret to say that Dr. Pardo is unable to attend through circumstances beyond his control. I am happy to say that Dr. John P. Craven, Director of the Law of the Sea Institute, University of Hawaii, will speak on "Arvid Pardo and The Law of the Sea." Some people say that Ambassador Pardo started "the growth industry of the century," and has also helped to produce many sea lawyers. To me the law of the sea is for the big fish to eat the medium fish, for the medium fish to eat the small fish, and for the small fish to wish for good luck. But in the context of what the United Nations has been doing since 1967, a new law of the sea is for the small fish to bite at any fish bigger than himself, and for the medium fish to wish it were or smaller or larger than itself, and for the big fish to wish for equal opportunity. Now it is my pleasure to present to you Dr. Craven.

ARVID PARDO AND THE LAW OF THE SEA

John P. Craven
Director
Law of the Sea Institute
University of Hawaii

I was both honored and terrified when Dr. Park asked if I would be the substitute for Arvid Pardo. In thinking about this talk, I realized that there can be no substitute for Arvid as an individual. But I welcome this rare opportunity to give a retrospective appraisal of the views of Arvid Pardo and to interpret these views to this particular part of the world. Dr. Pardo has the problem of most people who have generated a single history-making document. The world has interpreted and re-interpreted this resolution so that it has taken on a meaning that is very different from the one intended by Arvid Pardo. Indeed, we all know that the misinterpretations and distortions that have produced the present UNCLOS text have been a source of deep disappointment to Dr. Pardo. So if we are to understand what Pardo really had in mind, we should look at the other papers he has written. More importantly we should have the opportunity -- as I have -- to be with him in numerous sessions where he has discussed his entire philosophy, his entire perspective, on the developing law of the sea. We must look at his origins and the experiences that have shaped his thinking. His southern European and Scandinavian heritage gave him an understanding of semi-enclosed and enclosed seas of the Mediterranean and the Baltic, which have geophysical configurations that are similar to those of the China Seas. But, in particular, his experience in the Mediterranean, his wartime and post-wartime experiences as a British civil servant, and his career as a dual citizen and then a citizen of Malta, that most significant island, have given him an understanding of history and of the development of the law of the sea that is very Western and very complex but provides the basis for a sound understanding of the realities of these types of waters.

Let's look at Malta. Malta starts history as an ideal Phoenician colony. The grand harbor has what is called a Punic facies -- a face that is Phoenician -- that characterized all of the Phoenician colonies around the Mediterranean: the deep harbor, the steep side walls, and the geophysical separation from the rest of the community. The Phoenicians, if you will, found natural Hong Kongs, mini-Hong Kongs, all over the Mediterranean Sea. From the time the Phoenicians first appeared some time around 1200 B.C. until the time of the first episodic event that led to the destruction of this sea-based trading community, there were 500 years of a regime for the use of the resources of the sea that in retrospect seems ideal.

What was the nature of that regime? First, the Phoenicians were not a sovereignty. There was no locus of their sovereignty. Pardo would point out that they had no bureaucracy. The International Sea-bed Authority bureaucracy is built into the UNCLOS draft document in a way in which no treaty has ever before -- and I hope since -- built bureaucracy into an organization. Phoenicians had no bureaucracy, but they had a legal code. That legal code was detailed, it was well known, and produced results very similar to those of admiralty codes existent throughout the world today. The Phoenicians traded with everybody. There was no such thing as friend or foe; there were only traders that

they were willing to trade with. The standard technique of the Phoenicians would be to come with their ships, deposit a cargo on the shore, set out to sea again, and wait. The local people would come down to the shore, look at the cargo, place a quantity of gold next to the cargo, or some other trade, and then back off. The Phoenicians would then come in and see whether an adequate amount of gold or other payment had been left, in which case the trade would be effectuated. If not, they would back off again. These motions would go on several times until the transactions were closed or until the Phoenicians decided that they would never trade there again. And so with this mini-Hong Kong approach was a very effective regime.

I would suppose that Arvid Pardo, when thinking about a common-heritage regime, thinks not of sovereignty but of laws for use on the high seas to guarantee that the traders and miners and fishermen on the high seas engage equitably with all of the other people who are on the sea or who have access to the sea, not just coastal zone states but all those that have ports. Minneapolis, Minnesota is a seaport, and there are many other inland seaports: Basel in Switzerland is a major deep ocean seaport. He would envision some kind of activity that would allow all of mankind to have access to the sea and to share in this commerce and trade. But that Phoenician model and subsequent events conditioned Arvid Pardo to avoid certain things.

The first breakdown of the Phoenician model came when the Persians decided that they were going to become a great coastal state. They started out along the road to conquer the Greeks. They chose a typical land-sea operation, and in the sea operation they enlisted the aid of the Phoenicians. The Persians did not impose their sovereignty on the Phoenicians; the Phoenicians were enlisted because they thought it was probably a good idea to help this particular coastal state establish its jurisdiction over the Aegean Sea. The Phoenician attitude was extremely well demonstrated in the battle of Salamis in which the Phoenician ships were fighting on the side of the Persians against the Greeks. When the Phoenicians saw that the battle was going the wrong way, they lowered the Persian flag and raised the Greek flag, turned around, and helped resolve the battle in the Greeks' favor. In that battle the Phoenicians attempted to demonstrate to the Greeks as well as to the Persians that a regime on the high seas, whether it be commercial or military, must show no favorites; it must be neutral even in the face of extreme hostility.

A few hundred years later the Greeks came back the other way and didn't play the game. They decided they were going to extend coastal state jurisdiction from Greece all the way around to Alexandria. So the Phoenicians were moved from the eastern Mediterranean into the western Mediterranean where they attempted to continue their way of life until the Romans got the idea the Greeks had, and soon a rim warfare, if you will, took place which resulted in the complete destruction of Carthage. Malta became an orphan in the middle of the Mediterranean, waiting to be adopted again when there would be a re-competition for the commerce and trade and utilization of the Mediterranean.

This period under Roman control demonstrates to Pardo or anyone who studies history that nominal absolute sovereignty over enclosed seas will be ineffective; unless you yourself are involved in the commerce and trade and have the military capability to extend your effective jurisdiction over the area, independent traders over whom you have no control will soon be out on the high seas again.

Roman control of the seas was challenged in the period before 1000 AD by Moslem sea power. The Moslems dominated the sea commerce and trade, particularly here in the Pacific, and attempted to dominate it in the Mediterranean. A struggle for free commerce and trade on the high seas ensued between the Romans and the Islamic world. Under these two banners developed two competing commerce and trade activities, and in this competition Malta became a significant strategic island.

The Knights of St. John, who had been involved in the Crusades to the Holy Land, had retreated first to the island of Rhodes, which seemed to be an appropriate spot from which to protect Christendom. They were driven from the island of Rhodes to the island of Malta. Here they played a key role in the Grand Siege of Malta, an event that took place in the 15th century. It was a significant battle, stemming the tide of Moslem influence into the northern part of the Mediterranean. The successful resistance to the Grand Siege of Malta by the Knights of St. John guaranteed that the southern Mediterranean world could not reestablish a foothold in Spain and Italy. Shortly thereafter the Battle of Lepanto set limits to the Moslem foothold at the other gate of the Mediterranean.

In the next period, the technology of commerce and trade expanded the world's ocean beyond the Mediterranean. The world's ocean became the Atlantic and trade routes led to the Pacific and to the New World. In that wonderful, yeasty period around 1600 the great battles of the books were fought and the doctrine of freedom of the seas was developed. Britain first used the advantages of an island community to dominate the trading routes of Europe and eventually the trading routes of the world. In its time this island state had the kind of economic dominance that we now associate with an island nation here in the Pacific.

It was significant to Pardo that Britain conceived that its duty and responsibility were to maintain the peace and security of the world, not just for its own trading position but for other traders. The British thought that the world, as long as it was not belligerent, was a world of free ships and free goods. Ships of nations that did not carry out the British concept of a peaceful world were subject to arrest and impoundment until they again joined the set of behaving nations. Privateering and anti-privateering developed in this period, and Britain was preeminent in maintaining both a privateering and an anti-privateering capability. It was therefore preeminent in establishing commerce and trade -- preeminent, but not alone.

It was this model of some strong entity motivated to maintain equitable and free commerce and trade that Pardo had in mind as he thought about the future and the common heritage of mankind. In his lectures he has stated over and over again that, were it not for this dominant British attitude towards commerce and trade on the high seas, the world's oceans would have been much more chaotic during this period. Many of our doctrines of freedom of the sea, of free use of the sea, of the sea's availability to all, would have had a much harder struggle for existence. Be that as it may, this was a shaping influence.

A second shaping influence was Pardo's disappointment, expressed in the talk he gave several months ago, with the United States' failure to assume leadership. As he reviewed the maritime history of the United States, he saw that it has had the technology, the access to the sea, and the economic strength to take leadership in the use, the commerce, and the regime of the sea.

But he perceived a failure of the institution builders of the United States to create academic institutions -- Law of the Sea Institutes, if you like -- to develop a cadre of officials within the State Department and the Foreign Service who understand the ocean, its resources, its commerce, and its trade. Because of their absence the United States' attitude has been vacillating. Though we were re-stirred to action in the War of 1812, we very quickly dropped out by refusing to sign the Treaty of Paris in 1863 that henceforth declared that free ships mean free goods. There is that concern in Dr. Pardo's study of America.

We come to Pardo's own personal experiences in Malta. He came to Malta right after Malta had once again played a key role in answering the question: shall there be a *mare nostrum*? Can the Mediterranean be under a single jurisdiction? Can its sea surface and its resources be totally appropriated? Malta was under a second great siege, an interception of military goods that were being moved from England to North Africa. This island was an isolated spot in the Mediterranean, within air striking range of Italy. The island was at one point reduced to almost complete immobility because it had no food, no oil, no supplies of any kind. Then the British sent a convoy of some fifteen military ships and a large number of commercial ships. The convoy was successful because one ship, the *Ohio*, survived. Though it sank in the harbor, its oil, gas, and supplies could be removed. One incoming ship provided the reserves that kept Malta viable as a base for that critical period of the conflict.

Pardo arrived in Malta at a time, as history has demonstrated again and again, that a small island state, if it has the protection of a military and economic entity, can play a vital and dominant role in both the military and economic activities of a great ocean sea. It is in that philosophy that he became ambassador to the Soviet Union, ambassador to the United States, and ambassador to the United Nations. In that character and philosophy he perceived the need for an international regime that would guarantee to Malta that it need not in the future look, as it had been forced to look in the past, for a sovereign willing to adopt it as an orphan, or as a child worker, in order to survive as a people and as an island and to have access to the resources of the sea -- the only thing to which they can have access. It is in that spirit that he came forward with a statement on the new resources.

Pardo was very much aware, as few ocean lawyers are, of the developing ocean technology. I would suppose that, before he stated his resolution, the question that most intrigued Arvid Pardo was, "What is the technology really going to be?" He was one of the first people to realize that the technology of the deep ocean is going to be simple and straightforward, that access to the seabed is not going to be limited to 200 meters, and that the depth that admits exploitation is the very bottom of the sea. He saw that this technology was coming at a great pace.

Soon there would be the ability to develop ocean resources such as no one had even dreamed of and which are still not dreamed of. Today, for example, we are just starting to realize that ocean thermal energy -- which doesn't appear in the UNCLOS deliberations -- may be one of the world's major sources of energy. We are just starting to get the notion that geothermal vents may be the source of important, rich minerals of the ocean. We do not yet know what the significant resources of the ocean are going to be, and we will not know until technology is

developed. Pardo was correct in predicting that technology will move at a much faster pace, certainly faster than the deliberations of lawyers at UNCLOS III. With this prediction in mind, he felt it very important to establish a regime that would advance the exploitation of the ocean, that would employ standard mechanisms of commerce and trade, but that would guarantee equitable distribution to all of mankind.

It was in that spirit that he set forth. He encountered his first disappointment as the territorial sea became the economic zone and the economic zone became the 200-mile zone, whose resources were swallowed up by coastal state jurisdiction. The hole in the doughnut that remained had at best manganese nodules, at worst, traditional high-seas freedoms of transportation. He was greatly disappointed, and yet as a realist he accepted the ocean with the attitude of land-based peoples as the Pope, the Romans, and Alexander had done. The attitude of land-based peoples, when there is impending change in the technology and in the law of the sea, is to presume that jurisdiction can be unilaterally extended out from the coastal state to some semi-infinite distance at sea.

What would Pardo say today? He would say that we have a second chance, in the following sense: the treaty is going to approach its conclusion a little more asymptotically than we had expected. The United States will make a full, complete, and thorough review of the treaty. We do not yet know what that review will indicate, but we do know that the United States will cross the spectrum, all the way from ratification of the treaty as it stands -- highly unlikely -- to the notion of non-participation in the treaty as it stands. Tommy Koh has recently made a fine assessment of the situation and has indicated what alternatives are available. I would commend these for your attention.

There is a probability that we will move further into a regime in which regional states' practice and customary international law will develop with respect to these zones of extended jurisdiction. Pardo would probably suggest that the longer we can delay formalization and allow the interplay of regional adjustments and arrangements in the economic zones, the sooner we can develop regimes within those regions that move in the direction of equity and the management of equity.

This suggestion therefore poses an important challenge to this conference. We have the opportunity, in looking at the many problems which beset this region, to set forth alternatives and principles for ameliorative and effective allocation and utilization of the resources of the area. This is not a unique region; it is a region very much like the region of the Mediterranean and the Baltic in which these problems have been waged for many years.

Let me close with a cultural note. The oceans will not be utilized effectively if we ignore the cultures of the people who are on their shores. Cultures are best preserved in music, poetry, and art. What we know about the early Mediterranean we know mostly from the *Odyssey*, a poem in dactylic hexameter. I had thought about doing this speech in dactylic hexameter, but I concluded that the time allotted for it is only an hour, total, and that dactylic hexameter is not the poetry of this part of the world. So I have been looking at the poetry of this part of the world in preparation for this talk -- Choon is always upset to find me reading not technical papers but poetry -- and I have discovered that the cultural spirit of Korea is preserved in a poem that I am going to mispronounce called the *sijo*. There are three lines in the *sijo*. The first line is three syllables, four syllables, four syllables, four; the second line is three syllables, four syllables,

four syllables, four; and the last line has dramatic impact by being three syllables, five syllables, four syllables, three. As I understand it, the first two lines are a statement and the last line presents the surprising paradox. So I'd like to summarize the import of the talk this morning in my own English version of creation of *sijo*, and I hope that I do not offend my Korean colleagues.

Where are they, those rocks, islands, those ocean seas semi-
enclosed,
Narrow straits, peninsulas, and even archipelagoes,
Where else but the Mediterran? Or it might be China Seas.

DISCUSSION

Choon-ho Park: Thank you very much, Dr. Craven, for your excellent coverage of the history. Before opening the floor for general questions and answers, I'd like to put a question to Dr. Craven. Two years ago, the Law of the Sea Institute was holding its annual conference in The Hague, Netherlands. At the lounge in the John F. Kennedy airport, there were about fifteen people waiting for the flight to Europe. At one point I said to him, pointing at that galaxy of law-of-the-sea specialists, that if somehow, unfortunately, the plane were to go down, the law of the sea in North America would be put about fifty years behind. John said, "No, it's going to be fifty years ahead, because these are the trouble makers!"

In a similar context, my question is this: Many things have taken place since 1967 when Pardo made his speech. Suppose Pardo hadn't spoken. Would someone else have said something quite similar anyway, or would the law of the sea have remained where it was, at least for a while?

John Craven: Prior to the Pardo speech, a number of significant conferences took place pointing to the fact that the law of the sea was a major issue to be addressed by the world. But the Pardo speech very clearly enunciated, so that the whole world could see, the kind of regime that every coastal state would want to make sure did not exist. The rate at which the opposition to the common heritage of man developed was probably significantly speeded up. If he had not given that speech, perhaps we could have had some creeping common heritage. Indeed that is what I have been advocating this morning and I think Pardo would advocate: that it's now time for creeping common heritage to creep into the economic zone.

Dan Cheever: I have a question for both of you. Was there a step in Ambassador Pardo's career that was omitted before he was ambassador to the Soviet Union simultaneously with being ambassador to the United States simultaneously with being his country's delegate to the United Nations? Did he not serve briefly as a member of an international secretariat?

John Craven: I do not know. Perhaps someone here knows. He did? He did, yes. Mr. Pardo was for a number of years a member of the UN secretariat.

It's my personal view that conceptually the current proposed regime is an experiment in the development of a Third World economic order. Many of the strong protagonists for the seabed authority and the regime have this in mind, and to the extent that one presumes that a Third World regime is automatically common heritage, then they're very similar. But if one takes the long view of history, the basis of the choice of the Third World is the economic inequities that have existed and the fact that this is primarily the world of the poor. But those of us who have been watching the trend of economics recognize that some of us industrial giants, the world's rich, may become the world's poor, and the world's poor may become the rich. We need a regime such that when that transition takes place, the common heritage of mankind includes the new poor and does not continue to reward the newly rich. My concern is that the current organization of the distribution of the

rewards is equitable in the short term but may result in a new set of long-term inequities.

Myron Nordquist: Dr. Craven, would you comment on some of the technological advances that may challenge even the existing regime?

John Craven: Again this is a personal, parochial view, but I now believe that ocean thermal energy will appear in many manifestations as forms of ammonia production, forms of synthetic fuel production, that these forms will be low-cost and economic, and that therefore we are dealing with a major source of energy on the high seas. I also think that deep ocean technology is going to become very inexpensive. Deep ocean technology is expensive at the present time because land-oriented engineers design things as though they were on the land and are surprised to discover that they fail in the sea. Once when I was working with the Navy, we had an emergency situation. We needed a pump to operate at 20,000 feet in connection with one of our searches, and we found that no aerospace manufacturer could produce a pump to our specifications at anything less than astronomical cost in time. Someone said, "Why don't you go down to Sears Roebuck, buy a garden pump, and modify it?" We got a Sears Roebuck pump, modified it for \$25 and discovered that it worked perfectly at 20,000 feet. One reason it worked was that it was so poorly built it didn't know that it was in a regime in which it was not supposed to operate. Deep ocean technology is going to become relatively inexpensive technology, and that means utilization of the seabed for all sorts of things: controlled waste disposal, searching for geothermal vents that are cold but mineral rich, etc. This technology will open up, not as fast as I had hoped or expected, but fast enough.

Horace Robertson: In answer to your projection of what would have happened if Dr. Pardo had not spoken and if we had allowed this situation to simmer a while and then had reached an interplay, it seems to me that the processes you have pointed out are just the opposite of the ones he has used. I have the impression that you're suggesting there will be as the result of the common heritage further territoriality, further coastal state claims.

John Craven: If we examine what practice is now developing, we discover that the coastal states have an economic zone that is resource-rich and are rapidly realizing that they do not have the technological capability to exploit these resources, nor do they have the need for the resources within their zones. Therefore joint ventures are almost a necessity. We're starting to see parties who need that resource move very rapidly to sit down and negotiate for an appropriate share. If they negotiate on an equitable basis, an equitable regime will result. It is becoming increasingly clear that coastal states will not extend their 200-mile zones to develop resources solely for their own use. Those resources, as they are developed in the coastal states' zones, are going to be allocated to the rest of the world. The real question is: is that allocation equitable? Are the priorities right? And how open is the access to negotiation for those resources? And that can be unilaterally set. There's nothing to stop a coastal state from setting up its own common heritage allocation scheme for the resources in its 200-mile zones. The U.S. thinks it's done that. It really hasn't, but it thinks it has, and it feels very noble about it. So if we had noble

coastal state regimes around the world, the common heritage of mankind would be realized.

Roy Lee: The EEZ was a disappointment not just to Professor Pardo, but to anyone who was internationally minded. Yet, be that as it may, I think one should look at the extended resource jurisdiction of coastal states in terms of the share that will benefit those other countries. The economic zone of the world as a whole covers about one third of the ocean area; it covers all the proven reserves of gas and hydrocarbons, 90 percent of the fish catches, and all of the mineral resources practically exploitable in the next few decades. It is up to the coastal state to make decisions on using its resources for its own benefit.

Secondly, we must not forget that the coastal states took over a great deal of the ocean, altering the proportion of land to ocean claimed by each nation, and this is a very significant development. Take Korea, for example. In extending out over an economic zone, they are gaining something like three times their land area, including some mineral resources. How to use this mineral resource in the national context and how to integrate land and ocean together to assure a coherent whole are important challenges to each coastal state. One must not just condemn the extension of regional jurisdiction but one must look at it in a positive way. The coastal state must determine a reasonable and rational development and use of the resources.

John Craven: That was an excellent comment. I did not intend to imply that either Pardo or myself would do otherwise. I did suggest that at the present time the 200-mile economic zone is being promulgated as both customary and unilateral law. That kind of arrangement may be more flexible and may permit a more intelligent and organic development of these areas than the best attempt of legal minds to structure in words a regime that probably is more effectively constructed by deeds. Certainly it would be constructive and useful for the coastal states to spend a period of time assessing what is in the economic zone and what is on the shelves.

The full burden of my talk this morning is the suggestion that we should not be unhappy with the long, drawn-out negotiation process; we should be unhappy with it only if it is not accompanied by an exploration and negotiation and study process. If you will remember, the United States proposed deferring consideration of the regime until we had completed ten years of ocean exploration. The United States may not have been completely eleemosynary, but it was not an unwise proposal. The world still needs another decade or more to find out what technology is required to develop the resources before it sets in concrete a regime that will become very difficult to modify.

Byung Don Lee: I am sorry that Arvid Pardo couldn't be here. He told me that the last time he visited Korea was in 1937 as a very young man just out of the University of Rome. He was traveling around the world and visited us. I really wanted to have him here. However, John Craven gave us a very good start, and I think it promises to be a most productive conference.

THE FUTURE OF DISTANT-WATER FISHING

THE FUTURE OF DISTANT-WATER FISHING

Choon-ho Park: The first session on the future of distant-water fishing is one in which many East Asian countries -- Japan, South Korea, and Taiwan in particular -- are keenly interested. Our principal speaker this afternoon is Professor Edward Miles of the Institute for Marine Studies, University of Washington, Seattle. Our panelists are Dr. Hyung Tack Huh of Korea Ocean Research and Development Institute (KORDI), Professor Hideo Takabayashi of Kyushu University, Japan, who has been a frequent participant at the Law of the Sea Conference, Professor Choung Il Chee of Seoul National University, who has a rare combination of practical and theoretical experience in the distant-water fishing industry, and Kwan Yul Lee of the Korea Deep Sea Fisheries Association. We have a good combination of academics and industry representatives. I now present Professor Edward Miles to you.

THE FUTURE OF DISTANT-WATER FISHING

Edward L. Miles
Director
Institute for Marine Studies
University of Washington

I will give you my view of the future of distant-water fishing, and you will realize that, since I come from the other side of the Pacific, my view of the future of distant-water fishing is considerably different from that of my colleagues on this panel. They will no doubt point out at great length where they differ from me and what my errors are. But let me try to look at the situation globally, and in doing so I must use only the FAO Yearbook of World Fisheries statistics, not because they are particularly valid, but because there is no other source that will allow me to compare trends in different regions of the world.

Let us look first of all at the impact of extended coastal state jurisdiction on transient total world catch. In the northwest Atlantic, the tradition of distant-water fishing is a very old one. Portuguese fishermen are always quick to point out that they have been fishing in the northwest Atlantic for more than 300 years, but I would argue that the modern phenomenon of distant-water fishing is very recent, and it exists only since the late 1950s. It was developed principally by Japan, followed closely thereafter by the USSR.

The total world marine catch of fish and shellfish hasn't changed much in many years; let me take only the years of 1970, 1975, 1976, and 1978 to demonstrate what I mean. 1970 and 1975, of course, precede the most recent spate of unilateral extensions by coastal states, precipitated by the actions of the United States and Canada in 1976. 1976 and 1978 give you what has happened since the major extensions in national jurisdiction:

Total World Catch Fish and Shellfish	Total World Marine Catch
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1970 - 67,312,000 mt.	1970 - 61,982,400 mt.
1975 - 67,632,400 mt.	1975 - 61,222,400 mt.
1976 - 71,188,900 mt.	1976 - 64,807,100 mt.
1978 - 71,263,500 mt.	1978 - 64,986,000 mt.

My conclusion is that extended coastal state jurisdiction, so far, has had no discernible impact on the level of the total world marine catch, but its major impacts have been on what is caught, where it is caught, and on the price of catching it. But even on the question of price, I will argue that extended jurisdiction as a source of price increases is insignificant as compared to other engines of inflation,

especially fuel, labor, food, maintenance, insurance, etc., and that fuel costs are the primary source of increases in operating costs for distant-water fleets.

Now let's look at who catches how much and where. The rank by country for the total world marine catch is shown below.

Who Catches How Much and Where?

Rank	Country	Total World Catch	Country	Total Marine Catch
1	Japan	10,752,163	Japan	10,524,045
2	USSR	8,929,754	USSR	8,197,339
3	China	4,660,000	USA	3,431,303
4	USA	3,511,719	China	3,400,000
5	Peru	3,364,843	Peru	3,355,038
6	Norway	2,647,074	Norway	2,647,074
7	India	2,367,852	ROK	2,317,882
8	ROK	2,350,778	Thailand	2,114,000
9	Thailand	2,264,000	Denmark	1,729,442
10	Denmark	1,745,474	India	1,472,469

In terms of the investment in fishing fleets, if we look at the rank order first in number of vessels and then in tonnage, we will see the following:

Rank Order (Number of Vessels)	Rank Order (Tonnage)
1. USSR	1. USSR
2. Japan	2. Japan
3. USA	3. Spain
4. Spain	4. USA
5. Norway	5. Poland
6. France	6. UK
7. France	7. ROK
8. ROK	8. France

Source: Lloyd's Register and Shipping Statistical Tables, 1976

The USSR is number one followed by Japan. The USSR had in 1976 more than 3800 vessels larger than 100 tons, Japan had a little more than 3,000. Far below comes the United States, number three with a little over 1800; then Spain, number 4; and dropping far below them Norway, the United Kingdom, France, and the Republic of Korea. The situation changes somewhat if you look at tonnage. The USSR in terms of tonnage is several times larger than Japan, and most other nations drop

off very quickly after the USSR, Japan, U.S., Spain, Norway, UK, France and ROK.

These distant-water fishing nations still account for a significant portion of the total world catch. But what have been the trends as a result of extended jurisdiction? I won't bore you with details, but I did a detailed analysis of the regional breakdown in the latest available yearbook of world fisheries statistics, 1978, and the trends seem to me to be as follows: distant-water fishing declined precipitously in the northwest Atlantic after 1975 -- that is, after extended jurisdiction. It is fairly clear and dramatic. There has been a gradual decline in catch in the east-central Atlantic and in the northeast Pacific. The areas where there have been increases in the distant-water catch have been the southeast Atlantic, the southwest Atlantic, the western and eastern Indian Ocean, the west central Pacific, and the Antarctic. The Antarctic, of course, is the area of greatest potential production, but primarily of one species, krill. Now in the early period: that is, the late 1950s to the end of the 1960s -- distant-water fleets tended to operate in the same fashion. They first targeted high-value species. These are, if you use the normal biological terms of calculation, based on the maximum sustainable yield (MSY); these operations led to depletion of stocks in particular areas of the world. Then the fleets shifted targets to low-value species. Since extended jurisdiction, distant-water fleets have been forced to engage in joint ventures with coastal states for the exploitation of high-value species, and they continue to search for and exploit low-value species and unexploited stocks. On the basis of these trends, then, I conclude that while total world catch has not changed much, the effects of extended jurisdiction have been major on catch composition, location of catch, and the fishing patterns of distant-water fleets inside and outside of extended zones of jurisdiction.

What has been the impact of extended jurisdiction on opportunities to fish for the distant-water fishing nations? Let's begin with the new ocean regime as defined in the Draft Convention. If you look at the economic zone, certain things are very clear. The coastal state has sovereignty over living resources within 200 miles. It has sovereignty over living resources of the continental margin out to a maximum of 350 miles with limited revenue-sharing provisions for production beyond 200 miles. Though I say these provisions are limited, I am aware that the people in Chevron Oil Company think they're outrageous. But that's a difference in point of view, I suppose. The coastal state has exclusive jurisdiction over economic activities in the water column to 200 miles, over artificial islands and installations, and over marine scientific research, and shared jurisdiction with respect to pollution-control standards affecting shipping within 200 miles.

So the EEZ is a multi-purpose zone, and the coastal state has gained exclusive control over not only a considerable amount of space but over a much wider range of activities than ever before. Coastal states quite clearly haven't waited for entry into force of the treaty before extending jurisdiction over resources. There is considerable variety globally in the national legislation of eighty-four states as of April 1981, that is, claiming extended jurisdiction over fisheries to 200 miles. But it seems to me, on looking at that legislation, that there is no essential difference between the Draft Convention on the one hand and the national legislations on the other, on three fundamental points. The first is that it is the coastal state that exclusively sets the allowable catch. The second is that the coastal state

unilaterally determines its own capacity to harvest the allowable catch and whether or not there are any surpluses to be shared. The third is that these decisions are non-reviewable by any third party. The first point of difference between my colleagues on the panel and myself would be that I do not look upon the "obligations" to share surplus in the text as terribly significant. I think both my Japanese and Korean colleagues do. I merely note that.

Some problems remain with respect to the status of highly migratory species, but only the United States, I would note, is adamant on the question. While the government of Japan has certainly not yielded its principle on the issue, it has been more flexible in adapting to the realities of situations around the world than has been the United States.

Distant-water fishing nations have adapted to extended jurisdiction in four major ways. In the first place, they have entered into a large number of bilateral agreements with coastal states which regulate the terms and conditions of access. In the second place, they have expanded very significantly their involvement in joint-venture operations, primarily with Third World countries. Japan is quite clearly the leader in this respect. They have changed their fishing patterns, targeting species in different locations both within and outside of 200-mile zones. And third, they have begun to seek the developed technology for deep ocean fisheries, primarily mesopelagic species.

It is important to realize that extended jurisdiction has not really led to any greater control of fishing effort globally. Some local dislocations have occurred, but globally effort has not decreased significantly but simply shifted.

It seems to me, then, that extended jurisdiction has had two principal effects as far as distant-water fishing nations are concerned. In the first place, it has provided coastal states, both in the developed world and in the developing world, with the opportunity to manage fisheries more rationally than they have in the past. Whether coastal states will actually take that opportunity remains to be seen.

Secondly, extended jurisdiction has provided developing coastal states with the opportunity to derive income and other national benefits from the leasing of rights to the resource. This has been done in a variety of ways, either lump-sum fees based on a percentage value of the catch (royalties), or per vessel charges, or joint ventures, or the requirements for landing fish in coastal states' ports, or training of nationals or some combination of these. These are the two principal effects.

I think distant-water fishing nations have adapted rather well to the change in the ocean regime. If the new ocean regime were the only constraint distant-water fishing nations had to face in the future, I would say the future is rosy. But the future is not rosy in my opinion. My own view is that the long-term outlook -- the next twenty years -- is not good. This is not primarily the result of extended jurisdiction, which seems to have led only to marginal increases in the cost of fishing operations relative to the value of the fishery. These increases, I note, are simply passed along to the consumer. One needs only to follow price trends in the major countries, and it's quite clear what the pattern is. Extended jurisdiction does increase, perhaps significantly, the administrative cost to both the coastal states and the distant-water fishing states. To the coastal states the costs are negotiations and surveillance enforcement. To the distant-water fishing states, they're primarily negotiations. The case of Japan is the one

I'm most familiar with, and I must say I have a considerable amount of sympathy with friends in the Japan Fisheries Agency, because their lives are taken up by almost constant negotiation. That is not a particularly enjoyable way to spend one's life -- at least in my opinion.

The major constraints for distant-water fishing nations in the future are past and future increases in the cost of fuel. These increases in fuel cost currently approach 30% of total operating costs for large distant-water fishing nations like Japan. I would suggest there's no end in sight. Fuel costs also trigger inflationary spirals which result in increases in the cost of labor, goods, insurance, ship construction, and repair. This is the major problem facing distant-water fleets in the long term, not extended jurisdiction. Vivid examples of the point I'm making can be seen if you look at the global long-line fisheries of Japan, the Republic of Korea, and Taiwan.

On top of that, the effect of fuel price increases has been dramatic on longlining in the Indian Ocean. In 1970, Japanese longline effort was heavily dispersed in all three major oceans. By 1978 most Japanese longliners had relocated to the Pacific, and the fleet therefore has pulled back. Very little of the Japanese longline fishing fleet is left in the Atlantic and Indian Oceans. I think this is a clear example of the fuel cost problem, which I suggest is the major problem for distant-water fleets in the long run.

We know, of course, that the global picture tends to hide very significant regional variations. Let us look at a number of specific regional situations. Between 1970 and 1977 the north Pacific as a whole accounted for between 22% and 28% of total world harvest -- that is, from 15.6 to 20.5 million metric tons. The largest share of this was produced in this part of the world, the northwest Pacific. Japan in that same period took from about 13% to 16% of total world catch out of the northwest Pacific alone. The USSR took from 8% to 14%. If we look at the north Pacific catch, Japan took from 45% to 47% of its total world catch out of the north Pacific and the USSR from 14% to 17%. The Republic of Korea took from 5% to 10%. In 1975, the north Pacific accounted for 91% of the Japanese catch, 33% of the Soviet catch, and 90% of the Republic of Korea catch.

What have been the impacts of extended jurisdiction in the North Pacific? Remember that the U.S. and Canada extended jurisdiction in 1976. They were followed very quickly by the USSR and the Democratic People's Republic of Korea and very reluctantly by Japan in its protected zone fisheries vis-a-vis the USSR. China did not extend, the Republic of Korea did not extend, but in 1978 the Republic of Korea extended its territorial sea to twelve miles.

This was a catastrophic year for both Japan and the ROK, not because of what had happened in the northeast Pacific, but because of what had happened in the northwest Pacific as the Soviet Union extended its jurisdiction. For the Japanese fleet the permitted catch in the Soviet zone for 1977 was 46% less than it was in 1975. The burden of this loss fell on the offshore fleet, and they had to absorb it in one year. Their catch in the U.S. zone was down 15%. In 1976 the Japanese fleet had more than 3000 vessels fishing in the north Pacific. In 1977 they had to withdraw more than 1054 vessels, all but 27 of which were withdrawn from the Soviet zone. The Japanese offshore fleet, mainly the Hokutensen Trawler Group, had to seek other opportunities to fish in the northeast Pacific, the Antarctic, and elsewhere. After the initial drastic cut, the situation stabilized at rough parity between Japanese allocations in the Soviet zone and Soviet allocations in the Japanese

zone. But this division is based on different species. The Japanese seek basically groundfish in the Soviet zone while the Soviets seek coastal pelagics in the Japanese zone. The latter are subject to violent fluctuations in distribution and abundance over time.

So I wish to ask my Japanese colleagues what will happen if coastal pelagics in the Japanese zone decline precipitously; what are the likely impacts on the Japanese quotas in the Soviet zone? The Republic of Korea fleet was shut out of the Soviet zone in March of 1977 after, as they claim, having taken 330,000 metric tons of pollock off Kamchatka and about 100,000 to 150,000 metric tons of pollock in the U.S. zone in 1976. Pollock is very important to them, both for domestic consumption and for the export market, mainly to the United States. This shortage of raw material in 1977 led to major increases in the domestic price for pollock and unemployment in the fleet and the domestic processing industry. At that time the 15-member North Pacific Fisheries Development Association of Korea had about fifty-seven vessels in pollock fisheries. By 1978 only twelve of these vessels were employed, operating in the eastern Bering Sea in the U.S. zone.

The Republic of Korea strategy, at least as I see it, is to seek to increase its allocations in the U.S. zone at the expense of both the USSR and Japan. How has it fared? The Japanese maintained between 1976 and 1981 the largest share of U.S. allocations in the northeast Pacific. These ranged from 1.1 to 1.4 million metric tons: that is, 60-69% of the U.S. allocations. The USSR's share consistently declined from 31% in 1976 down to .05% in 1981. The drastic cuts of 1980 and 1981 are to be explained by the U. S. response to Soviet intervention in Afghanistan. (The U.S. - USSR joint venture was not affected by the collapse of the Soviet quota, however.) The Republic of Korea increased its catch from 6% to 12% of the U.S. allocation and made major gains in 1980 as a result of the Soviet shutout. By 1980 the Republic of Korea had up to 245,000 million metric tons in direct allocations, plus the allocations to its ROK - U.S. joint ventures, plus, albeit declining, the allocations to its primarily Korean-Mexican joint venture.

Poland in the same period is an interesting case. The Poles found themselves in great difficulty as a result of extended jurisdiction, and they asked the Soviet Union in brotherly fraternity to let them into the Soviet zone in the Pacific. The Soviets said no. So the Poles came to the United States, and they seem to have done rather well, again at the expense of the Soviets: the Poles increased their allocations from 2% to 11%. So the major gainers as a result of the Soviet shutout in the U.S. zone have been Japan, The Republic of Korea, and Poland.

It is extremely difficult to get any data on the fishing production of the North Koreans, but I have heard recently that they have been the major beneficiaries of the shutout of the Republic of Korea in the Soviet Zone and that North Korean production of pollock is up to about 200,000 metric tons. I have no way of knowing whether there is any validity to this rumor, and I would be very interested in hearing the views of my Korean colleagues on the subject.

So what are the major problems, at least as I see them, of future fishing in the North Pacific? In the North Pacific it seems to me the Japan - USSR relationship, while currently stable, is based on a fundamentally unstable biological situation. And one does not know what is likely to happen in the long term. In terms of Japan - Republic of Korea there remain problems over Takashima Island. Japan - China and Japan - North Korea seem to be stable. In the northwest and northeast

Pacific, the following issues are the major ones, at least as seen by those in the northeast Pacific versus those in the northwest:

a. The rate of foreign phaseout in the northeast Pacific fisheries. Foreign phaseout, though a concept dearly held by Alaskans, is based in my opinion on rather questionable economic reasoning. But whether it is true or not, the Alaskans would like to phase out the foreigners as quickly as possible and will continue to put pressure on the United States government to do so.

b. The whole question of import restrictions and access to markets. This is a very difficult question indeed and likely to remain so in the future.

c. The incidental catches of prohibited species in the northeast Pacific fisheries.

d. The level and type of regulations imposed on the foreign fleet by the coastal states.

I would like to say a word or two about problems facing Soviet and Polish fleets. As Kaczynski has shown in a series of papers, Soviet-bloc countries are driven into large-scale investments in fishing fleets as a result of the failure of domestic agricultural production to supply enough protein for domestic consumption. Soviet-bloc countries base the expansion of fleets on the abundance, not the value, of resources. Their main targets now seem to be large concentrations of commercial species which are under-utilized by coastal states. The high level of technological flexibility and adaptability in the Soviet fleet is based on highly developed ship-building economies in the USSR, Poland, and the GDR. The bulk of the fish caught by distant-water vessels built in socialist countries is purchased with soft currencies. Exports therefore generate hard currencies which can be used to pay license fees, finance emergency fish imports, and other things. The USSR is not much affected by fuel price increases yet, but all the others are. This is a particularly difficult problem for the Polish fleet and leads to increasing operating costs and declining productivity. Both the USSR and Poland have increased their involvement in joint ventures. All socialist-bloc fishing fleets seem to be highly dependent on Soviet research and development for location and exploitation of unutilized, underutilized, and unconventional resources.

We shift now very briefly to the South Pacific, where the focus is primarily on tuna. Total production of tuna is not an especially large part of total world catch, but value is very high. The global canning market is dominated by the United States, then Japan and western Europe. The global fresh market is dominated almost wholly by Japan. The west central and southwest Pacific have been the traditional Japanese fishing grounds, primarily for longline and pole-and-line vessels but with growing involvement of the purse seine fleet. Japan is followed by the Republic of Korea's longlining farther south, with what appears to be a recent but significant increase in Republic of Korea's purse seining. There is a small but rapidly growing United States effort in purse seining in the western Pacific as well. The targets are skipjack, yellowfin, bigeye, bluefin, and albacore, with some incidental catch of blue marlin. Skipjack offer the largest possibility for growth in the region, and the purse seine is the gear with the greatest promise for increasing production in the short run. I think the pole-and-line fleet will hold its own vis-a-vis the purse seiners, and the longliners will hold their own, too.

Most distant-water fishing in the region is now regulated by access agreements with coastal states. Most charge license fees. There

are some joint ventures, but not a large number, and some conflict over the scope of the joint-venture policy of the coastal states, particularly between Japan and Indonesia over the Banda Sea operations.

In the eastern tropical Pacific, the problem is primarily between United States and the Central and South Americans, and while there are no solutions at the moment to the renegotiation of the IATTC arrangement, I would foresee eventual settlement of this conflict but no opportunity for major expansion in distant-water effort.

I am going to skip a detailed evaluation of the North Atlantic where the possibilities for distant-water fleets are very small. The east central and southeast Atlantic are significant; the Indian Ocean, potentially significant. New resources are primarily the Southern Ocean krill, the Patagonian shelf resources, and open ocean mesopelagics.

In conclusion, bilateral access agreements already regulate all aspects of fishing operations; the jurisdictional question is no longer at issue except for tuna, and even that primarily in the eastern tropical Pacific. There are very few areas of potential expansion open to distant-water fleets. I would expect that, given the rapidly escalating fuel costs, both distant-water fleets and coastal states will rely primarily on joint ventures in the long term. The rapid growth of joint ventures with Third World countries has already been documented by others. The major foreign participants are Japan and the USSR; Japan is by far the larger. In the future, I would expect declines in both catch and effort of traditional distant-water fleets that are not involved in joint ventures.

I think the distant-water fishing nations ought to look at this period as one of transition. That is, it presents them with the opportunity to provide for orderly disinvestment, rationalization of fleet structure, and development of more fuel-efficient, highly specialized fleets. I would expect major technical advances in fishing fleets and gear in the near future. I foresee continuing and increasing conflict over issues related to international trade in fishery products, in particular in import prohibitions and demands by coastal states for access to markets.

DISCUSSION

Choon-ho Park: Thank you very much for your very enlightening presentation. Many people tend to think that the 200-mile limit is really the culprit. Quite a few years ago South Korean fishermen accidentally caught some crabs which they were not supposed to catch; they were required to throw them back into the water. But under such circumstances, according to Dr. Craven, the primary concern of fishermen is where the fish are and where the Coast Guard is not, not what the law of the sea says. So they didn't throw the crabs back into the water. The very efficient United States Coast Guard spotted something unusual. They boarded the vessel, inspected but found no crabs in the storage spaces. They were about to leave the vessel when one of the Coast Guards -- who might have won a medal for this -- wanted to see one of the cabins. But the Korean fisherman had dumped the crabs under their beds. By the time the door was opened, the ten crabs were appreciating the furniture and inspecting the pinups. The fine -- a record amount -- was approximately \$600,000. So for each crab it was about \$60,000. The Guinness Book of Records somehow missed it.

We now ask Professor Takabayashi to comment on Professor Miles' paper.

Hideo Takabayashi: I should like to confine my comments to two aspects of the problem: the terms and conditions of access to the 200-mile zone and possible response to the no-treaty situation.

The year 1977 was a turning point in world marine fisheries market. Many coastal states had extended exclusive fishery jurisdiction out to 200 miles from their coasts. The trend is still going on. At present eighty-eight states have established 200-mile zones of some kind. During the four-year period from 1977 to 1980, our experiences in fishery management within the 200-mile zone reveal certain features of state practice.

One of these features is the terms and conditions of foreign fishing access to the 200-mile zone of the coastal state. On this subject, the Draft Convention on the Law of the Sea stipulates that

[w]here the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations ... give other States access to the surplus of the allowable catch Nationals of other States fishing in the exclusive economic zone shall comply with the ... terms and conditions established in the regulations of the coastal State.

I would like to analyze the past four years' state practice concerning this problem. I think the terms and conditions, other than those enumerated in the Draft Convention and agreed upon between parties or requested by coastal states, may be divided into the following types:

1. Coastal State prohibitions on the operation of fishing vessels of foreign nationality.
2. Foreign fishing is allowed on the condition that fishing vessels of the coastal state will in return have access to the zone of the foreign state, that is, reciprocal access system.

3. Foreign fishing is permitted upon the payment of fees, and also on the condition that the foreign state will provide economic or technical assistance, such as deposit of certain goods, financial cooperation, or investment in port facilities.

4. The conditions of revenue sharing; that is, foreign fishing companies are requested to turn over a certain portion of their profits in the zone to an entity of the coastal state.

5. The fishing permit is issued on the condition that the fishing nation promises to purchase a certain quantity of non-fishery products of the coastal state.

More recently, so-called "fish and chip" diplomacy is being advocated, that is, allocation of the foreign catch is linked with exportation to that fishing state of fish caught by the coastal state.

One may conclude that state practice has not been consistent regarding the principle anticipated in the Draft Convention that fishing states are to have access to the surplus of the allowable catch of other coastal states under reasonable terms and conditions.

I do not hesitate to recognize that fishery resources within the 200-mile zone are the natural resources of the coastal state. But renewable resources like fish are quite different from non-renewable resources like crude oil, the exploitation of which permanently reduces the total amount of resources of the state concerned. This is why the creation of an OPEC-type production cartel has not been challenged. However, optimum utilization of fish does not endanger maintenance of the living resources of the coastal state.

Our generation now faces the very grave concern of how to feed an ever-increasing world population. Needless to say, fish is one of the most important sources of protein for human nutrition. I emphasize the important role of fisheries in solving the world food problem. I also think that the future of distant-water fishing depends on this access to surplus resource.

The Draft Convention on the Law of the Sea recognizes this overriding necessity of humanity and stipulates that "(t)he coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone..." No doubt the coastal state has discretionary powers for determining the allowable catch, the state's harvesting capacity, the allocation of surpluses to other states, and the terms and conditions of regulations. At the same time, the determination of allowable catch in the 200-mile zone should be based on the maximum sustainable yield as qualified by relevant economic and social factors, and the level of optimum yield should not be decided solely on the basis of economic considerations of a particular state without regard to the biological consequences.

If the optimum yield were to be determined by egocentric economic considerations, there would be many unfavorable results. For instance, a coastal state aiming at an immediate increase in financial returns might set the level of allowable catch very high, irrespective of the biological situation, and destroy the living resources by overfishing. Or a coastal state might set the level of allowable catch extremely low and seek excess profits from the storage of a certain kind of fish. These policies are clearly hostile to the overriding responsibility of humanity to feed an ever-increasing world population.

The Law of the Sea Conference is approaching a very critical stage. My comments just delivered are based on an assumption that the new Law of the Sea Convention will be adopted in the near future. But

if UNCLOS III fails to produce a new convention, we will no doubt face a very difficult situation. In one view, even if UNCLOS III should be unable to adopt the Convention, several of the text's articles on the fishery problem fairly represent a wide range of consensus among participants, therefore they will serve as guiding principles for future conduct. But the most serious defect of a no-treaty situation is, I think, the lack of the dispute-settlement procedures stipulated in that text.

To overcome this situation, I would like to propose the conclusion of a regional convention which will comprise the fishery provisions and the dispute-settlement clauses of the text and Annexes, as a substitute for the global Convention. I still believe that the fishery provisions of the Draft Convention represent a fair balance of complicated interests regarding this problem.

Choon-ho Park: Thank you very much, Dr. Takabayashi. The world of fishing is complicated indeed. This may discourage fishermen from going to sea, and we may have to stop eating fish. Dietary habits change over time, too. Three years ago the *Nihon Keizai Shinbun* ran a 41-installment series describing the Japanese fishing industry -- all aspects of it from historical to practical. I recall reading one very interesting story. Up until the immediate postwar years, tuna was in fact not so popular in Japan, but the pressure for food promoted tuna fishing. One of the reasons tuna wasn't popular -- whereas skipjack definitely was -- was that a traditional name for tuna was *shibi* which also means the day of death, whereas skipjack, *katsuo* means something very different -- the warrior or victor. If we go on with this complicated distant-water fishing business, we might want to see dietary habits change. Now let us turn to the practical side of fishing and Professor Chee.

Choung Il Chee: Thank you, Mr. Chairman. First, the present Draft Convention on the Law of the Sea devotes a considerable portion to the rights of coastal states at the expense of the rights of non-coastal states. The result that has emerged at the Law of the Sea Conference is that non-coastal states or distant-water fishing states have virtually no rights, except to share in the surplus resources. Even here, the surplus is to be determined unilaterally by the coastal state, and the coastal state's right to determine the surplus resources is not subject to dispute settlement, adjudication, arbitration, and so forth, meaning that the right is almost exclusive. The rights of coastal states are so extensive that any international obligation on the part of a coastal state may not be meaningful.

Let me reflect on the development of the law of the sea as it concerns the rights of non-coastal states on the high seas. I may be a lone voice shouting in the dark, but nevertheless it is important to remind ourselves of what has occurred in terms of the evolution of the law concerning fisheries and the rights of coastal states.

This development began with the Truman Proclamation. The Truman Proclamation was never intended as a unilateral right to claim the living resources of the sea outside the territorial sea, but rather it lays down the principle that the United States will negotiate with those parties interested. It was never intended to become a unilateral right.

Then we come to the second stage, the first Geneva Convention in 1958. If you read that Convention very carefully, you will note that the coastal states may exercise a unilateral right to conserve

resources. It says nothing about the right to exploit. The exploitation right of the coastal state was recognized by a special resolution referring to Iceland. Even in 1958 the coastal state wasn't allowed to unilaterally exploit, to the exclusion of other states, the living resources in the part of the high seas area.

The third stage was the 1974 *Icelandic Fisheries Jurisdiction* case. The court declared that the Icelandic fishery limit of fifty miles was contrary to the customary law of the sea, a principle enshrined in article 2 of the High Seas convention, which later became part of customary law. There, the court declared it a preferential right. The preferential right was never intended to be applied to the exclusion of the concurrent rights of the other states.

We all know the Caracas session began in 1974, and later in 1975 the single negotiating text emerged. In the deliberations of the Law of the Sea Conference, you find no reference to this 1979 fisheries jurisdiction case. Now this is very interesting. Here non-coastal state's rights have been sacrificed by the coastal states.

The rationale for the coastal state's right to claim the living resources near the territorial seas was that of a special dependence. But that special dependence did not necessarily give the coastal state the right to exclude non-coastal states from areas where they used to fish together. I may be presenting to you a very futile argument, an argument that has already been settled, but we should be reminded that this long-standing situation was instantly changed, so that we have here instant custom.

What can be done? Can non-coastal states restore their rights at this stage? I doubt, as Dr. Miles pointed out, that this is possible. It looks like a *fait accompli*. In fact, treaty pacts reveal that there is no real practice of allocation of the surplus, and no consideration has been given to the allocation of a surplus. Under the treaty, at least the non-coastal state is given a right to the surplus to be determined by the coastal states.

Unilateral determination of harvesting capacity is really begging the issue. The harvesting capacity can be improved. The states that cannot exploit the surplus should give it to other states. But this condition is meaningless because the coastal states can always form a joint venture with the technologically advanced and financially capable states to harvest the living resources. So in practice, they can throw out anybody for the simple reason that they can harvest the entire living resources with ease.

This exploitability test was a disastrous doctrine produced by the first Geneva Convention. The coastal states will exploit so far as they can, then, with a joint venture, by hiring the cooperation of other states, they can easily exploit further.

What can be done to rectify this situation? The Law of the Sea Convention has not done anything to really help non-coastal states except offer these meaningless, non-compulsory conciliation proceedings. The conciliation procedure is really meaningless. It has not been effective. I see a grim future for distant-water fishing industry.

The second comment is that extended jurisdiction has not really had any visible impact upon the harvesting of fisheries resources on a global basis. Of course, statistics support Dr. Miles' conclusion, but in the case of trawl fisheries, there has been considerable decline in the industry. Korea, for instance, which used to be a force in terms of production, is facing great difficulties in its distant-water fishing industry, I understand. So is Japan. I had a conversation or two long

ago with an official of one of the five leading fisheries corporations in Japan; he told me that his company was under bank management and that the bank simply told him to cut down on the fishing operations, except those that are absolutely profitable. Of course, business is always like that.

I have no contention with Dr. Miles' reason for the decline of the fishing industry: the fuel cost, which consumes, as far as trawl fisheries is concerned, 60% of the operation. Also there are the difficulty in recruiting crews, the high wages, and the marketing. You catch the fish, then you have to sell it to make a profit, but the price may go up and down and then the profitability of the fishing industry is affected. It is a very difficult business. I can't produce statistics at this point to support my conclusion, but I have a feeling that the trawl fisheries are declining generally and so are the catches.

The third point is this idea of income for the coastal states. Fishermen are not rich people; when one speaks of equitable distribution of resources or sharing these resources, I should like to raise the issue of equitable income for the poor fishermen of the world. What one must realize is that the fishermen of the rich nations are not all rich. They are just as poor as the fishermen of the poor countries. For this reason, the fishermen of the non-coastal states such as Korea -- and Korea is not by any means a rich nation -- should be given consideration for their plight.

Joint ventures are very difficult. It generally takes three years to put a joint venture into effect, and it requires training of fishermen and setting up onshore processing facilities. I would like to emphasize that those requirements can be met by fishing industries that are state-run enterprises and where losses can be made up by tax money. But in other countries, the fishing industry is run, managed, and owned by the private sector, and very frequently their finances are in a shaky position. They are not in a position to easily meet the demands of coastal states, especially when the demands include an exorbitant royalty fee and the onshore processing facilities.

Let me give you one example of what's happening in Mauritania, which is a very rich trawl-fishing grounds. The standard royalty amount of \$800 per ton allows a boat to break even or make a slight profit. But if you go beyond the \$800 royalty per ton, then you are in trouble. How have the Japanese resolved this problem? With state subsidies. I understand that \$800 comes from the state, and \$800 from the private sector. The Korean fishing industry cannot afford that so they've been thrown out, except for one company which operates about seven fishing boats. How are they going to come out? Hard to say.

There is one other aspect of difficulty in terms of the joint venture, the mixed crew operation. Language barriers, habits, etc., prevent efficient fishing. Unless the coastal states reduce their demands for onshore processing facilities, the royalty, etc., I don't see a bright picture for the distant-water fishing industry. On the other hand, the distant-water fishing industry should have reasonable expectations of its profits. There should be restraint on both sides to make distant-water fishing possible.

Choon-ho Park: Thank you very much, Professor Chee. Now let us turn to Mr. Kwang Yul Lee of Korea Deep Sea Fisheries Association.

Kwang Yul Lee: Let me speak to you about the past, present, and future of Korea's deep sea fishing industry. This industry began in 1957 with

longline fishing as a main axis. Then during three Five-Year Economic Development Plans, Korean private enterprise, with strong government support, extended Korea's fishing industry into the Indian Ocean. After entering into the North Pacific trawl fishery in 1967, the Korean industry grew with remarkable speed and achieved the rank of third in the world's deep sea fisheries after the USSR and Japan. At the end of 1980, the Korean distant-water fishing fleet had a total of 750 vessels operating at twenty-four overseas fishing bases with a yearly catch of 457,000 metric tons and exports valued at \$352 million.

Since 1977, however, Korean deep sea fisheries have faced the huge problems raised by the increasing number of declarations of 200-mile economic fishing zones following a statement by the United Nations Conference on the Law of the Sea, along with problems caused by strict enforcement of fishing regulations by coastal states including the United States, Canada, and the USSR.

Under these adverse conditions, Korea's deep sea fishery catches have declined from the 1976 figures and further fishery development has been seriously impeded. Moreover, the commercial profit in deep sea fishery management has been greatly reduced because of conditions caused by the worldwide increases in oil prices and exacerbated by the third Middle-East war in 1973 and the ensuing Iranian situation in 1979. As a result, new investment in fisheries has had to be curtailed, and the vessel power of the deep sea fishing fleet has also been gradually reduced. The outlook is not at all good for Korea's deep sea fisheries in the 1980s.

We must resolve to break this deadlock by using our combined power, patience, and wisdom based on our staying power and on the experience we have accumulated in our fishing industry, all of which contributed to our becoming one of the top-ranking deep sea fishing countries in the world within the short period of two decades. Korean industry will gladly participate in the exploration and exploitation of the open seas, the Antarctic Ocean, and other allowable coastal areas; and the fishing technology and equipment of the Korean fleet will be improved to cope with international competition.

To maintain our industry, it is essential that we strengthen the mutually beneficial cooperation which exists between the archipelagic states and Korea and between the friendly coastal states and Korea. We would also hope that when the Draft Convention on the Law of the Sea enters into force, Article 62, "Utilization of living resources in the 200-mile economic zone of the coastal states," will be faithfully observed for the mutual benefit of the coastal states and the advanced fishing countries which are, in terms of economics, the developing countries.

Hyung Tack Huh: I think Professor Miles' presentation was a very comprehensive analysis of the present problems and future prospects for deep sea fishing industries. Therefore I am afraid my comments will be nothing but redundant. I will make my comments short, and hopefully optimistic. Needless to say we are now under the new regime of the sea. The new 200-mile economic zone is having a profound effect on many aspects of world fisheries. As we are well aware, the total catch of world fisheries has increased very rapidly since World War II, approximately 6% a year, which is a much more rapid rate than the growth of human population or agricultural production up to the mid-1970s. In the last years, however, we have seen a levelling off of total harvest of

the sea, although Dr. Miles pointed out that extended jurisdiction has had no discernible impact on the world catch.

I think there has been a very serious impact on the world fisheries. If you look at the total catch, it is quite clear that the annual rate of increase has sharply declined since the beginning of the 1970s. No one really knows whether this trend will continue or can be reversed by improving the technology. There are pros and cons on the fisheries potential of the seas. Some scientists say that it may be difficult even to maintain the current yield, while others predict world harvests several times more than they are now. It is my personal conviction that no matter what is happening in the world ocean today, the rate of production in the seas far exceeds the current yield.

The most recent estimates of fisheries potential or productivity range from 150 to 450 million metric tons, which is about two to six times greater than the present yield. It is also true that certain species in certain areas have been under heavy exploitation and some have nearly disappeared. Yet there are many more unconventional species which are not fully exploited or are not exploited at all. Therefore the major program emphasis now is not to meddle with depleting resources but to improve management of the resources.

We all agree with the spirit and the principle behind the new law of the sea. However, the concept of the 200-mile economic zone reflected very differently upon fisheries of the coastal nations primarily because of conflicting interests, aims, and aspirations. There are gainers and losers as well as the unaffected among coastal nations. I think Korea is definitely one of the losers. If we look at the statistics, Korea's annual catch by distant-water fisheries has been declining very significantly since 1976. In 1976 we caught about 734,000 metric tons of distant-water fisheries, compared to 486,000 metric tons in 1979.

I believe that the present slack in the fishing industry is rather due to limited access to distant-water fishing because of extended jurisdiction rather than overfishing or depletion of stocks. Merely enforcing stringent regulations upon the distant-water fishing fleet cannot be a cure or remedy for the coastal nations to preserve the harvesting population which can produce the maximum sustainable yields. To insure proper conservation and management, coastal states should first assess the fishery resources and determine the allowable catch for the foreign fishing fleet. This requires ethical scientific studies for which the developing coastal nations will need technical and financial assistance from developed fishing nations. I also believe that the programs and any negative impact associated with the new ocean regime could be overcome by tightening the cooperative bond between the developed and developing fishing nations and wise management of fishing resources.

Choon-ho Park: The floor is open to questions and answers.

Choung Il Chee: The establishment of the 200-mile EEZ has brought about effective conservation, yes, by those states who can afford to manage it but neglect by those states who cannot afford to manage it. Conservation, yes, but optimum utilization, no. Coastal resources have not been optimally exploited. In the developed coastal states like the United States, the cost of fuel and the people's lack of desire to go out and fish, surplus resources have up to now been allocated to other countries. The developing coastal states, on the other hand, by demand-

ing unreasonable economic returns and royalties, make it very difficult for a distant-water fishing nation to go inside the 200-mile zone to fish the resource.

John P. Craven: At Dr. Park's urging, I would like to ask a ray-of-hope question. The magnificent thing about law and lawyers is that regardless of what the words of a text or treaty or law say, by the time they show up in court, they can make white read black and black read white. We saw this in the case of the North Sea Continental Shelf case that Professor Oda argued so persuasively before the World Court and got a solution that no one thought was possible. We see that there are words in the text that call for equitable distribution of resources and equity. Dr. Miles dismissed those words with one or two waves of his hand during his presentation. Yet the concepts in general international law of equity and equitable principles I don't believe have been fully developed. I'd like to ask the speaker and panelists: Do you think there is a ray of hope for starting to develop legal doctrines for equity and equitable principles that would move through the World Court or tribunal processes to make a wedge by which one could come into economic zones in which he is otherwise denied by the specific words of the treaty?

Edward Miles: My answer to that is no. I think that it's quite clear in the text. In the debate that developed in the Second Committee over a long period of time, obligations for sharing and for full utilization were imposed upon the coastal state; but the coastal state has been given sovereignty over living and non-living resources in the zone. The coastal states group and others sought to protect that sovereignty and prevent its erosion in the dispute settlement procedure in other parts of the text. Optimum utilization and sharing drop out of the national legislation, so, in terms of the state practice that one observes, there's not even a shred of a mention. I don't see what recourse even our very astute and imaginative lawyer could have for claiming that the coastal state didn't have the right to make those kinds of decisions, and that those decisions were in fact reviewable by third parties. I don't think there's a shred of hope for that.

Dan Cheever: I confess that this is also a desperate effort to make the members of the panel at least smile. My perspective is quite different geographically from yours; I'm northwest Atlantic. Is it possible from the perspective of total world catch, total production of protein, that matters might have been worse had there not been an extension of this exclusive sovereignty over the utilization of coastal living resources? My guess, based on the northwest Atlantic, is that things might have been a good deal worse.

Edward Miles: It's too early to tell, and the northwest Atlantic is a very special case. The northwest Atlantic accounts for a very small proportion of the total world catch: about four million tons. The two most productive areas of the world ocean are the northwest Pacific and the northeast Atlantic, if you count the traditional commercially valuable species. Whether coastal states in general, globally, will do better in the future than we have done in the past in managing fisheries is an open question. What we have seen achieved is a redistribution of authority and income. We do not know whether the actual performance will be better.

Dr. Huh raised a very important point about the total productivity of the sea and whether the sharp declines that we've seen in the annual rates of increase in total world catch since 1970 are to be attributed to extensions in jurisdiction. I myself doubt that.

I think that globally we work with a very restricted range of commercially valuable species and that on those species we are approaching the upper limits of production, traditionally estimated at around 100 million metric tons. The closer you get to that limit, of course, each additional unit becomes prohibitively high. Is there some potential for the development of unconventional species? That's the really critical question as far as the world food problem is concerned. The economics at the moment are very unfavorable. There is no incentive for putting the investment into large-scale production of unconventional species because you're going to go bankrupt over a fairly short period of time.

Parenthetically, let me treat here the interesting question raised by Professor Chee, whether there's a decline in trawl fisheries or not. It is worth considering that the problems being faced by the trawl fleets right now -- and these are the ones that will have to bear most of the burden of the unconventional species production -- are not in extended jurisdiction but in the design of the power plants that drive those vessels. Factory ships were certainly built for another era -- some of them are steam operated -- and even though they use a fairly low grade of bunker fuel, they still inhale the stuff. I don't think those vessels are going to be employed for too much longer because they are simply much too expensive to operate. I think the question of unconventional species production is linked not only to the economics but to the redesign of the fishing fleet as we know it and to the development of fairly highly specialized sub-units within that fleet. I really think distant-water fishing is doomed over the long run, and I hope to make that point quite clear to those people involved in it because they have to readjust. In my view they've got about twenty years.

Unidentified Speaker: Krill?

Edward Miles: Krill? No, that's a separate problem. Catching krill is easy if you can stand the difficult hydro-meteorological conditions of the Southern Ocean. It's primarily a processing, marketing, and cultural problem. Initially, it's a biochemical problem. If the Soviets have correctly estimated krill production, we're going to produce a hundred million metric tons of krill. What are you going to do with the stuff? Have you ever tasted that? It doesn't seem too appetizing to me.

Myron Nordquist: Bearing in mind that the United States has probably the most well developed fisheries management and conservation scheme, I'd like to ask Professor Miles two questions, but I'd like to make a couple of points before that. First, under the Magnuson Act, the United States has set up eight fishery management councils that by and large consist of fishermen from the region. The practice to date has been for the councils, through a variety of means, to substantially understate the surplus that would be available for foreign fishermen. Their attitude seems to be that they would almost prefer that the stocks be unharvested than to allow foreign fishermen to catch them. We could go into that in great detail if anyone challenges the premise.

Second, in the Breaux bill last year, there was a five-year phase-

out period for foreign fishing that almost made it in. There was a lot of sentiment for it.

My third point is that next year we can expect substantially increased tonnage fees for foreign fishing within the United States zone. There is even talk by the Reagan administration of making the foreigners pay for Coast Guard enforcement. My suspicion is that if you ever weigh the Coast Guard budget against the value of the stocks that are taken, there will probably be no fishing.

The fourth point is that the American Fisheries Promotion Act that came into effect in January this year provides for on-board observers. These are also to be paid for by the foreigners. Just in the last couple of weeks there was a bill passed unanimously in the Senate that would prohibit processing within the internal waters of the United States off Alaska. I don't know the status of that bill in the House, but it seems to me that all the evidence points in one direction. I hope I haven't loaded the question, which is: Is the United States' regulatory scheme compatible with the LOS Convention articles? Second, if it's your view, using the United States example, that foreign processing and harvesting vessels will be squeezed out, how long do you think it will be until that happens?

Edward Miles: Let me preface my frank response by saying that it is my private opinion, that it in absolutely no way represents the opinion of the North Pacific Fishery Management Council in which I participate.

The Magnuson Act in my view is incompatible with the Draft Convention in only two respects. One is tuna, and the other is in the criminal enforcement provisions vis-a-vis foreign fishermen which go against what was agreed in the Conference and which are in fact discriminatory. The United States position on tuna, I might add, is seen correctly to be self-serving because by fiat the United States excludes billfish from being counted as highly migratory. And that just simply can't be taken seriously.

The more serious questions are (1) whether the United States' regulatory system is adequate, desirable, and (2) the rate of foreign phaseout. I must say I've become fairly disillusioned with the nature of the management system, because I think it is impossible to get coherent fishery policy out of it. The fragmentation is much too great. Each and every issue involves not only a state/federal jurisdictional problem but now a three-way split between the state, the regional council, and the feds. The federal government, in my view, has not been willing or able to take the lead in establishing coherent national fishery policy. In fact the feds have argued that this just can't be done. They have adopted a set of guidelines and regulations on what ought to constitute fisheries plans that seem to me especially rigid and unproductive. A fishery is an annual event, at least in the Bering Sea and the Gulf of Alaska, and we have been operating on the basis of amended FMPs. We are on Day 900 and something of the Bering Sea Fishery Management Plan, and there's no end to that in sight. I'm not at all convinced that we have a system that other people ought to emulate. In addition, Alaskans, I had to learn the hard way, define foreigners as Japanese, Koreans, Poles, Russians, and people from Washington, Oregon, and California.

On the foreign phaseout issue, there is really theology. Looking at the economics, if you were to take 20,000 metric tons of processed Pacific cod and deliver it without charge to dealers in Seattle, they couldn't sell the stuff and wouldn't take it. In my view, the biggest

hindrances to the development of United States groundfish fisheries are not the foreigners but the United States Jones and Nicholson Acts. The Jones and Nicholson Acts impose on joint venture operations really significant constraints. Both the foreign and the United States partners operate on a very narrow range of fairly uneconomic alternatives. There are real problems in each case. I have some doubts how long these things are going to be able to last. Unless the United States is willing to eliminate or significantly amend those two acts, I don't see that the economics will allow rapid foreign phaseout. I think that that provision in the Breaux bill that caused so much shouting and yelling was a pipe-dream and maybe that's what quite a number of people wanted. They wanted the foreigners out and they didn't care if the resource was adequately utilized. I care that the resource be adequately utilized, and I don't see the point of wasting it to pander to xenophobia. I would hope that the federal government would have the guts not to do that, but I have my doubts.

Edgar Gold: Choon, I think that your admonition to try to be positive is a very good one, and I think one of the positive aspects of Ed Miles' excellent paper is that, in keeping with his reputation for writing gloomy prognoses, he hasn't let us down. But I want to take issue with this whole gloomy panel of yours, which reminds me of a group of oil-consuming states crying crocodile tears a week after the formation of OPEC. How can we go back to the good things, the good old days? Ed has made very clear to us that the economic zone and the sovereignty of coastal states over living resources is here to stay, so how are we going to deal with it? We can't go back and look at the past.

For example, this morning there was an interesting piece of news that one of the large OPEC members in North Africa, governed by an army colonel who is not known for his mental stability, has just reduced the oil price by one dollar. And the world, since the formation of OPEC in 1973, has absorbed incredible increases in oil prices. I think that if we have been able to do this with resources such as energy, we surely ought to be able to do it with fisheries resources, too.

That is why I am surprised that the panel -- an American, three Koreans, and a Japanese -- all members of states that have traditionally believed in free-market forces, is so gloomy about the free-market forces of fisheries resources. Particularly Professor Chee will know, I'm sure, that once the grass is no longer free, these charges will have to be passed along. Prices will have to be absorbed. Fish will cost more, just as fuel costs more. If the economies can no longer absorb these increases for a variety of reasons, then the state will have to step in, as it has, we are told, in Japan. Other states will have to do the same. But the product will in the future be much more expensive because of licensing and other fees. I don't really see this gloom and doom -- that states are not going to be able to absorb it. I'm quite sure they will be.

PROBLEMS OF STRAIT PASSAGE

PROBLEMS OF STRAIT PASSAGE

Pyong-choon Hahm: Dr. Park complained that his session was a gloomy one. I don't know what this session is going to be, but it certainly has strategic importance. We have two papers on the problems of strait passage, one by Mr. Myron Nordquist of Nossaman, Krueger, and Marsh and one by Professor Horace Robertson of Duke University. We will then move on to Professor Dalchoong Kim's paper on ocean transportation and sea lanes. Dr. Edgar Gold and Dr. Takane Sugihara will then comment on the papers.

THE INNOCENT PASSAGE REGIME

Myron H. Nordquist
Nossaman, Krueger and Marsh
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Introduction

The activities of high seas users, by and large, are converged into the territorial sea of coastal states, funneled by the dictates of geography. Broadly speaking, users consist of vessels and aircraft, both military and commercial. The activities of commercial aircraft are governed by the International Civil Aviation Convention and are considered outside the scope of this paper. The existing regime applicable to other vessels and aircraft in the territorial sea is contained in the Convention on the Territorial Sea and the Contiguous Zone. A new regime dealing with transit passage in straits used for international navigation which are overlapped by territorial waters is proposed in the Draft Convention on the Law of the Sea.

Ocean commerce and trade are heavily dependent upon predictable availability to vessels of the world's sea routes. Likewise, stability and order are promoted by coastal states' non-interference with foreign military vessels and aircraft merely transiting territorial waters. At the same time, coastal states have deeply held security concerns that must be protected. Refinements on the rights and duties of user and coastal states are provided in the 1958 Conventions.

Existing Innocent Passage Regime

A critical maritime jurisdictional line is between the territorial sea and the high seas. Landward of the territorial sea, the coastal state is sovereign; seaward of it, freedom of navigation and overflight exist. A problem of straits passage arises when territorial waters cover narrow water areas essential to international traffic.

Articles 14-17 of the Convention on the Territorial Seas and the Contiguous Zone prescribe the rules applicable to all ships enjoying the right of innocent passage. Article 14(4) provides the general rule that passage is innocent which is "not prejudicial to the peace, good order or security of the coastal State."

Several categories of activities are non-innocent; these include, *inter alia*:

- a. Foreign fishing vessels which do not observe coastal state laws and regulations prohibiting fishing;
- b. Foreign ships not observing coastal state import and export or customs controls;
- c. Submarines navigating submerged; and
- d. Aircraft overflying without coastal state permission.

The general standard of non-prejudice is subjective, having been formulated at the 1958 Conference with limited debate or clarification. As discussed subsequently, the stated reason for an elaboration of the innocent passage doctrine at the Third Conference was to detail a more precise definition of the concept.

Article 15 of the 1958 Convention precludes the coastal state from "hampering" innocent passage through the territorial sea. Article 16 authorizes the coastal state to take necessary measures to prevent passage which is not innocent. The coastal state may even temporarily

suspend innocent passage in specified regions when essential for the protection of its security. However, no suspension may be imposed in straits used for international navigation.

Articles 18, 19, and 20 of the Territorial Sea and the Contiguous Zone lay out the rules applicable to merchant ships. Limitations are imposed on charges that may be levied on foreign vessels in innocent passage as well as for the exercise of the coastal state's criminal jurisdiction. Somewhat greater latitude is granted for the imposition of civil proceedings.

Articles 21 and 22 apply special rules for government ships operated for commercial purposes. Such vessels are predominantly from socialist nations that have recently accepted commercial treatment. Hence, the distinction in practice is now almost academic. However, immunity for warships remains intact. That is, if a warship does not comply with the regulations of the coastal state, all the coastal state may do is require the warship to leave its territorial sea.

ICNT Innocent Passage Regime

The Third U.N. Conference on the Law of the Sea allocated consideration of the doctrine of innocent passage to the Second Committee, the predecessor of which had been Committee II during the preparatory meetings from 1971-1973.

A flavor for the status of the negotiations in 1973, just prior to the formal commencement of the Third Conference, may be gleaned from the paragraph in the Committee II report that summarized the debate on the innocent passage regime:

With respect to the regime of passage through the territorial sea, reference was made to the right of innocent passage and to the need to elaborate that concept further. In that connection, it was stated that coastal States had the right to establish regulations relating to navigation and, in particular, to the establishment of sea lanes and compulsory traffic separation schemes. Reference was also made to the right of States to establish rules applicable to the passage of certain types of ships, including ships with special characteristics, as well as regulations for the protection of the marine environment and for marine pollution. In that connection, the view was expressed that such coastal regulatory powers were not compatible with the principle of innocent passage. It was stated that the regulations established by the coastal State should take into account both the interests of coastal States in their own security and the interests of the international community in trade and communication. It was also stated that there was no need to revise the concept of innocent passage as it applied in territorial sea areas other than straits used for international navigation. Reference was made to the establishment of an appropriate and binding machinery for the settlement of disputes.

The first substantive session of the Conference was held in Caracas, Venezuela, in 1974. The Second Committee work product of that session was a main trends paper intended to embody the principal proposals on each agenda item. The Second Committee held two formal meetings and fourteen informal meetings during the 1975 session of the Conference. The work of the Committee began with a second reading of the document on main trends with a view toward reducing the excessive number of

variants. The real negotiations, however, were taking place in a series of small consultative groups focused on particular issues. The groups dealt with the following subjects: baselines, historic bays and historic waters, contiguous zone, innocent passage, high seas, question of transit (landlocked states), continental shelf, exclusive economic zone, straits, enclosed and semi-enclosed seas, islands, and delimitation.

The work of the informal consultative group in 1975 most pertinent to a discussion of innocent passage was indicated as follows:

12. The informal consultative group on innocent passage held six meetings. On the basis of the discussions in the group, the Bureau presented a consolidated text on provisions 24 to 46 of the document.

In addition, many other official and unofficial negotiations were carried out, including consultations on the definition of the territorial sea. Unfortunately, no official records exist of any of these informal consultations.

We do know that Articles 17-32 of the Draft Convention were almost entirely derived from C.2/Blue Paper No. 14, "Consolidated text on innocent passage" (hereinafter BP No. 14). The so-called "Blue Paper" was issued at the second substantive session of the Third Conference in Geneva on 7 May 1975, as an informal conference paper. BP No. 14 was prepared under the supervision of Vice-Chairman of Committee II, Mr. Frank Njenga of Kenya, and was based on the discussions in the six meetings of an informal consultative group on innocent passage. To a large degree, BP No. 14 consolidated provisions 24-47 of the Main Trends documents (A/Conf.62/WP.1, 5 October 1974).

Article 19 of the Draft Convention restates the general rule for innocent passage as defined in Article 14(4) of the 1958 Convention. However, the proposed new Convention then details a dozen activities that are not innocent, concluding with a non-exclusive residual clause prohibiting "any other activity not having a direct bearing on passage."

Article 21(1), by contrast, provides an exhaustive list of eight subjects that the coastal state may regulate. One area the coastal state may not unilaterally regulate is the "design, construction, manning or equipment of foreign ships."

Article 22 of the Draft Convention expressly allows the coastal state to require foreign ships engaged in innocent passage through the territorial sea to use sea lanes or traffic separation schemes. Arguably, Article 22 is an unnecessary elaboration of existing coastal state powers. Article 23, however, singles out nuclear vessels by requiring special precautionary measures. Significantly, Article 23 implicitly recognizes the right of innocent passage for nuclear vessels.

Article 24 precludes the coastal state from hampering innocent passage, while Article 25 authorizes the coastal state to prevent non-innocent passage. Suspension of innocent passage for essential security reasons is also authorized, but an exception for straits is not included since Part III of the Draft convention deals with the subject of straits in detail.

The remaining articles in the Draft Convention are modeled on comparable provisions in the 1958 Convention which were reviewed above.

Straits of Malacca and Singapore

The foregoing rules are better understood when their application is considered in a specific case. Indeed, the inadequacies of the doctrine of innocent passage become evident in the case of the Straits of Malacca and Singapore.

From either a commercial or military standpoint, these straits are of strategic importance. Essentially the Straits of Malacca and Singapore connect the Indian Ocean with the South China Sea. The coastal states bordering the Straits are Indonesia, Malaysia, Singapore, and Thailand. Combined, the Straits are about 560 n.m. long and are 2-1/2 n.m. at the narrowest point near Singapore. The limiting depth is approximately 13 fathoms in the navigable channel. If a 6-foot bottom clearance is allowed, transit is limited to ships with a draft less than 72 feet or about 200,000 deadweight tons.

Marine navigation aids are generally poor, traffic is dense, fishing vessels are numerous, and obstructions are often uncharted.

From an economic point of view, the Straits are indispensable since alternative routes are much longer. For Japan, 90% of its oil must come through the Straits. Some 2,000 large vessels transit the Straits annually. By estimates, a tanker enters the Straits every 2-1/2 hours.

From a military perspective, the Straits are indispensable links between the Near East and Far East as well as with the southern Pacific region. Although portions of the Straits are too shallow for submerged transit by submarines, the Straits are key passage routes for rapid deployment of operational vessels such as aircraft carriers.

The commercial airspace over the Straits is governed by the International Air Services Transit Agreement of 1944 and the International Civil Aviation Convention, except that Indonesia is not party to the former agreement.

The political circumstances surrounding the Straits are complicated. On 16 November 1971, Indonesia, Malaysia, and Singapore declared tripartite responsibility for the Straits. The three states declared the Straits were not international and expressed opposition to any attempt to internationalize the waterway. In 1972, Indonesia unilaterally announced that supertankers in excess of 200,000 deadweight tons were prohibited from transiting Malacca. This was partially an effort to divert traffic through Sunda and Lombok which are located within the Indonesian archipelago. The tripartite powers have steadfastly refused efforts by the Intergovernmental Maritime Consultative Organization to delimit traffic separation schemes. Indonesia and Malaysia have mentioned the possibility of charging vessels transiting the Straits a tonnage fee to establish and maintain improved navigational aids in the Straits.

At the Third Conference, Indonesia and Malaysia consistently took strong positions favoring straits state control of international navigation and overflight. Singapore, being totally dependent for its survival on international maritime commerce and yet being a bordering coastal state, often took a more moderate position.

In the end, the legitimate needs of a foreign user in straits must be balanced against the interests of coastal states. In the general territorial sea area, the tilt should be toward the coastal state. However, in straits used for international navigation, the balance should be toward the foreign users.

THE STRAITS PASSAGE REGIME

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At the outset, I would like to make one key point which I think has been neglected in much of the discussion of law-of-the-sea issues. That is, despite all the emphasis that has been given to fishing, to exploitation of the petroleum resources of the continental shelves, and to the hoped-for development of the resources of the deep sea-bed, the principal economic activity in the ocean is -- and will remain for the foreseeable future -- navigation. It is my view then that we should critically examine any proposed new legal regime of the oceans in the light of its adverse impact on the freedom of navigation and the benefits that that freedom confers on the international community.

With that statement as the fundamental premise from which I proceed, let me first recapitulate briefly what Myron Nordquist has just said about the current regime for straits, which are the choke points and possible bottlenecks of international navigation unless freedom of navigation through them is preserved.

Under current international law, for straits wider than twice the breadth of the territorial sea, a high-seas passage through the strait exists. Thus, there is freedom of navigation through such straits, including the right of submerged passage for submarines and the right of overflight for aircraft (Art. 2, High Seas Convention). For parts of these straits that are included within the territorial sea of a bordering state, the right of innocent passage would exist. For straits narrower than twice the breadth of the territorial sea, the regime would be one of nonsuspendable innocent passage (Art. 16(4), TS/CZ Convention).

For straits narrower than twenty-four miles then (assuming adoption of a twelve-mile territorial sea, either under the Draft Convention or by operation of customary international law) and assuming no changes in the current international-law regime of straits, the regime of nonsuspendable innocent passage would apply. There are over 100 straits world-wide used for significant international navigation that would become "territorial" under a twelve-mile territorial sea that would be "high seas" straits under a three-mile territorial sea. These include such waterways as the Strait of Gibraltar, the Strait of Dover, the entrance to the Persian (Arabian) Gulf, and in this area of the world, the Malacca Straits, a number of Indonesian Straits, and the Western Channel of the Korean (Tsushima) Strait.

For such straits, the regime of innocent passage creates certain problems for user states.

a. What passage is "innocent" under the 1958 Convention on the Territorial Sea and Contiguous Zone (TS/CZ Convention) is not dependent solely on acts while in passage but arguably may depend on the *purpose* of the passage. Article 14(4) provides that, "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."

b. Arguably then the determination of "innocence" could depend on flag, cargo, or destination. This lends itself to a subjective standard by the coastal state rather than a determination based on objective criteria.

c. Submarines must navigate on the surface (Art. 14(6)). This can pose a danger both to them and to other ships, as modern submarines have little reserve buoyancy, and they present a low profile, making it hard for other ships to see them either by day or by night.

d. Aircraft are not entitled to exercise the right of innocent passage through the territorial sea.

The result then is that if the territorial sea is expanded beyond its traditional three-mile limit to twelve miles, a substantial number of straits will be closed to aircraft and subjected to the regime of innocent passage for ships.

This possible outcome of a Third United Nations Conference on the Law of the Sea was deemed unacceptable by the United States and a number of other maritime states. For them, free or unimpeded passage through straits was a fundamental condition of their acceptance of any new law of the sea treaty which adopted a broadened breadth of the territorial sea.

On the other hand, states bordering straits serving as major highways for international commerce were concerned that unlimited and uncontrolled passage by ships and aircraft through "their" straits would endanger their security, their marine environments, and their exclusive rights to exploit their marine resources.

What was needed in any new regime then was a balance between the legitimate needs of coastal states and user states. It is the contention of this paper that Part III of the Draft Convention of UNCLOS III (Articles 34-45) (A/CONF.62/L.78) provides that balance. It does so by creating an entirely new regime -- "transit passage" -- for straits which fit the text's definition of straits used for international navigation and which are not excluded from that regime by specific exceptions in the text. To support my contention that this text provides a balanced regime, I will examine Part II under several headings.

Applicability

The regime of transit passage is applicable to any strait joining an area of the high seas or an exclusive economic zone (EEZ) to another area of the high seas or EEZ and used for international navigation. Two types of straits are excepted:

a. "Secondary" straits between the mainland and islands of the same state if a high seas or EEZ route "of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island." (Art. 38(1)).

b. Straits through which runs a ribbon of high seas or EEZ waters if a high seas or EEZ route "of similar convenience with respect to navigational and hydrographic characteristics" exists (Art. 36).

(As I shall point out later, these exceptional cases are not necessarily governed by the same regime.)

Nature of the Right of Transit Passage

To determine the nature of the right of transit passage, one needs to examine the articles from two viewpoints -- that of the user state (that is, the flag state of the transiting ship or aircraft) and that of the states bordering the strait.

From the viewpoint of the user, Part III provides for both rights and obligations of the user states and ships and aircraft exercising rights of transit passage.

The rights granted to the user state and its ships and aircraft are described by the inclusive term "freedom of navigation and over-

flight." The use of this term is significant in that it is taken from Article 87 of the High Seas part of the Convention and carries with it the full connotations of "freedom" as used in that part. It is thus clearly distinguished from the right of innocent passage as used in Part II. Any incidents of the latter regime (i.e., innocent passage), such as the requirement that submarines operate on the surface or its inapplicability to overflight of aircraft are clearly not a part of the regime of transit passage. It obviously includes warships as well as merchant ships.

In addition to the meaning derived from the term "freedom of navigation and overflight," the right of transit passage is reinforced by explicit safeguards in the text. Transit passage may not be impeded (Article 38(1)); it may not be denied, hampered, or impaired (Article 42(2)); and it may not be suspended (Article 44). It includes the right to carry out activities consistent with the normal mode of continuous and expeditious passage (Article 39(1)(C)).

On the other hand, transit passage through the territorial sea of a state bordering a strait is not fully equivalent to the freedom of navigation and overflight of the high seas. During such passage, transiting ships and aircraft have certain obligations and duties. They are obligated to make their passage continuous and expeditious (Article 38(2)), proceed without delay (Article 39(1)(a)), and to refrain from any activities inconsistent with continuous and expeditious passage in the normal mode, including any activities that might threaten the sovereignty, territorial integrity, or political independence of states bordering straits (Article 39(1)(b) and (c)). They may not conduct research and survey activities without the consent of the coastal state (Article 40). Transiting ships must comply with regulations lawfully promulgated by states bordering straits with respect to sea lanes, traffic separation schemes, pollution control, prohibition of fishing, and certain customs, fiscal, immigration, and sanitary matters (Articles 39(1)(d), 41(7), and 42(4)). Aircraft must observe ICAO rules of the air and operate with due regard to safety of navigation (Article 39(3)).

It is significant, however, that the transit-passage part of the Draft Convention contains no provision, such as that in Article 25(1) pertaining to innocent passage, which would permit a coastal state to deny or prevent the exercise of transit passage merely because a transiting ship or aircraft violated a regulation of the coastal state. Of course, the transiting ship or aircraft may incur liability for damages, but it does not forfeit its right to transit passage. If a ship entitled to sovereign immunity is involved, the flag state of such ship shall bear international responsibility for the delict (Article 42(5)).

Turning now to the rights and duties of states bordering straits, in order to promote safety of navigation in straits, states bordering straits may adopt sea lanes and traffic separation schemes after consulting with and obtaining agreement to such schemes from the competent international body (IMCO) (Articles 41 and 42(1)(a)). To protect other legitimate interests, they may adopt regulations concerning safety of navigation and regulation of marine traffic (Article 42(1)(a)), the prevention, reduction, and control of pollution (Article 42(1)(b)), the prevention of fishing by fishing vessels (Article 42(1)(c)), and the taking on board or putting overboard of any commodity, currency, or person in contravention of customs, fiscal, immigration, or sanitary regulations (Article 42(1)(d)).

States bordering straits, on the other hand, are under certain correlative duties. They may not impede (Article 38(1)), deny, hamper, or impair (Article 42(2)), or hamper or suspend (Article 44) the transit passage of ships or aircraft. They may not -- and this is a key provision -- make laws or regulations that discriminate in form or in fact among foreign ships or have the practical effect of denying, hampering, or impairing the right of transit passage (Article 42(2)). Finally, they must publish sea-lane and traffic-separation schemes (Article 41(6)), give due publicity to laws and regulations they promulgate (Article 42(3)), and give appropriate publicity to hazards to navigation or overflight (Article 44).

Exceptions

As earlier noted, there are two exceptions to the applicability of the regime of transit passage to international straits. The first of these is a strait between the mainland of a state and an island forming a part of the territory of the same state if there is a high seas or EEZ route seaward of the island that is "of similar convenience with respect to navigational and hydrographical characteristics" (Article 38 (1)). The regime of nonsuspendable innocent passage applies to the strait landward of the island (Article 45(1)(a)). This is the same regime of nonsuspendable innocent passage that would apply to international straits leading from the high seas or an EEZ to the territorial sea of a foreign state (Article 45(1)(b)).

The second exception is contained in Article 36, which excepts from the applicability of Part III of the Convention straits through which there exists "a high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographic characteristics." Presumably, the right of transit passage through such straits was not believed necessary since if the high seas or EEZ route was truly "of similar convenience," then there was no necessity for the transiting ship or aircraft to use the territorial sea of the bounding states. Of course, the right of innocent passage would apply to the territorial portions of such straits, but it would not be "nonsuspendable," since Article 45 would not apply. This seems a strange anomaly, since the island-mainland straits excepted from the transit-passage regime are subjected to the regime of nonsuspendable innocent passage. Nevertheless, although one could argue from the history of this provision that the failure to make Article 45 applicable to it was the result of a drafting inadvertence (since the U.K. proposal from which it was derived did not create the same anomaly), the interpretation I have suggested appears to be the correct one.

Examples in East and Southeast Asia

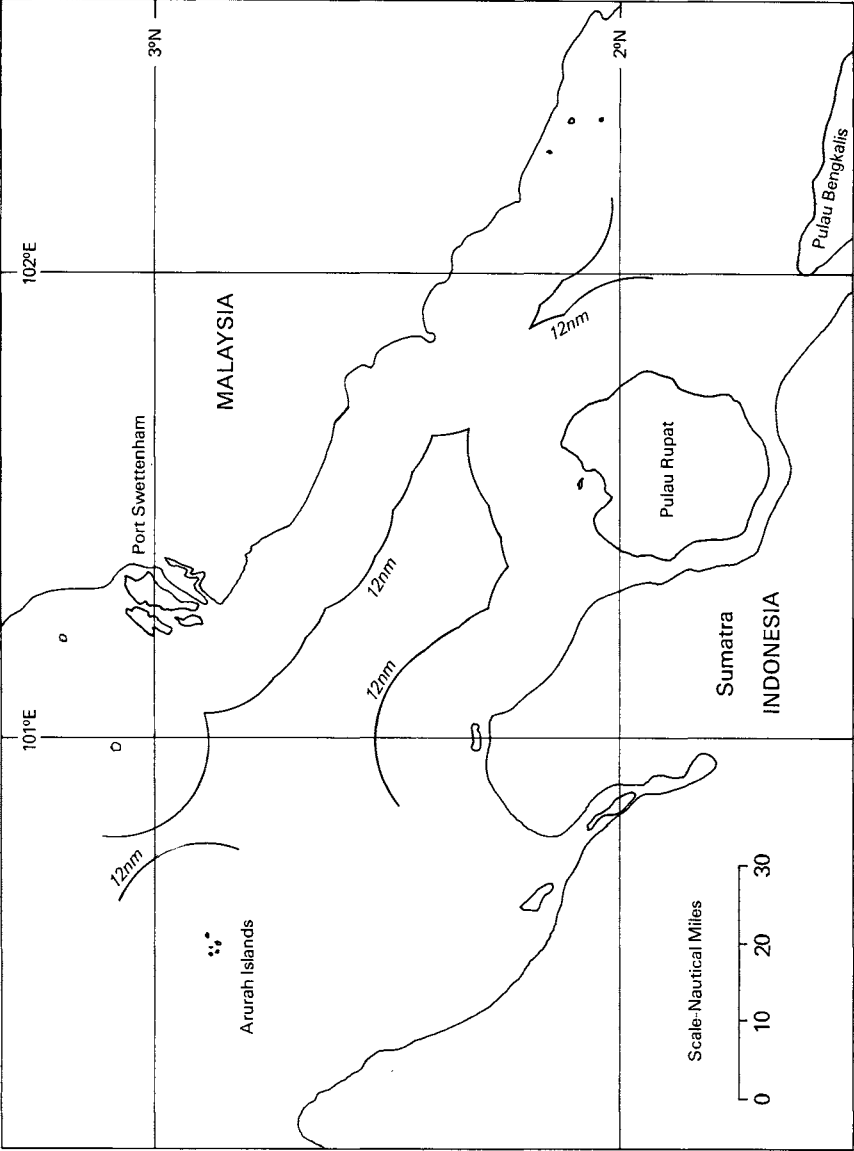
Following up on the example used by Myron Nordquist in his discussion, let us take a look at the Malacca Strait.

As Myron Nordquist pointed out, the Malacca Strait is the main navigational route between the Indian Ocean and the Pacific. Most tankers carrying oil from the Mideast to Korea and Japan pass through this strait.

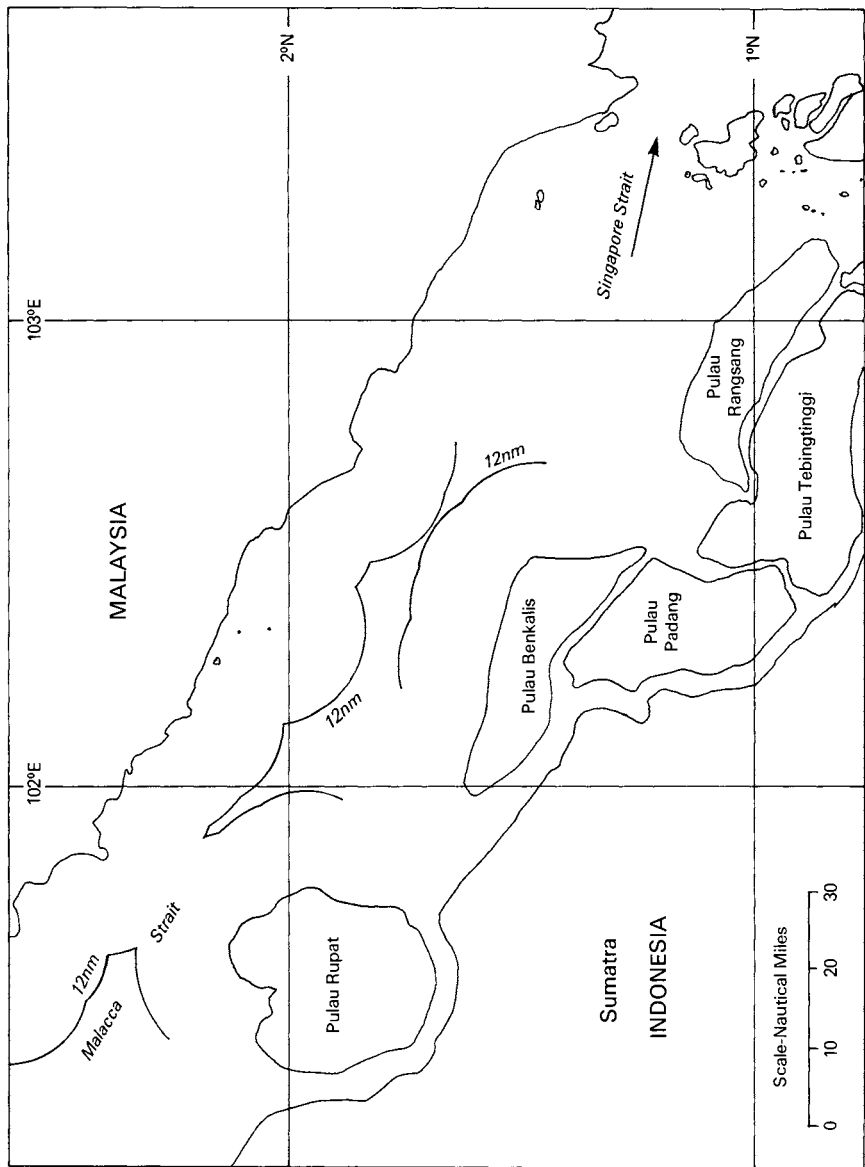
Now take a look at the rough hand-drawn charts of the straits that I have distributed. For each of the bordering straits I have drawn a territorial sea of twelve nautical miles using the arcs-of-circles method and using the coastlines as the baseline (Maps 1 and 2). I do not mean to suggest by this method that I either accept or reject the validity of the straight baseline claims of either state. The charts

are for illustration only and demonstrate that the territorial seas of the opposite states meet or overlap in at least two places even using this conservative method of delimiting territorial seas. Thus, without the regime of transit passage established in the Draft Convention, the regime of nonsuspendable innocent passage would be applicable with the consequences we have discussed earlier. On the other hand, if the Draft Convention should be adopted, the regime of transit passage would apply.

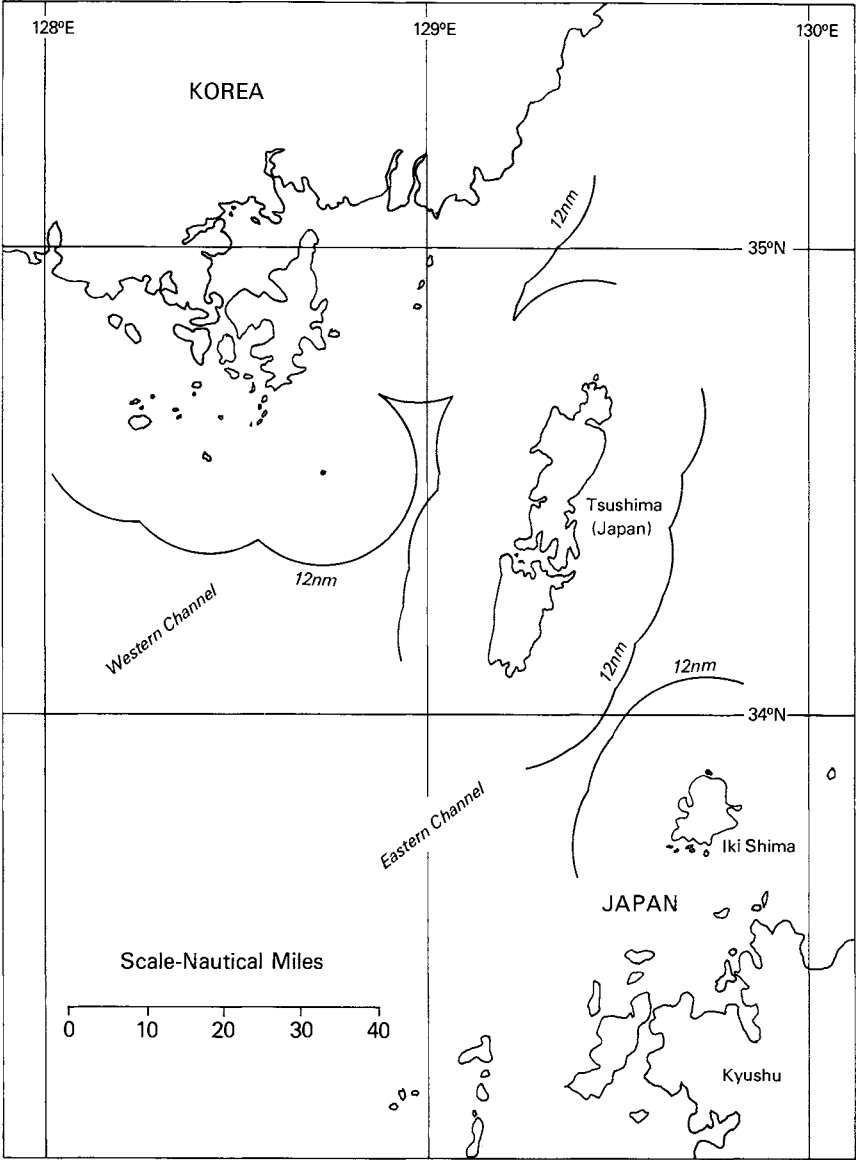
Turning now to a strait closer to our present location, take a look at the second chart I have distributed (Map 3). This is the Chosen Strait (or the Tsushima or Korea Strait). It connects the East China Sea with the Sea of Japan. The Western Channel lies between the Korean mainland and offshore islands on the west and the Japanese Tsushima archipelago on the east. This channel is less than twenty-four miles wide, and the territorial seas of Japan and Korea would meet if each claimed twelve miles. The Eastern Channel, however, bounded by Japanese islands on both sides is more than twenty-four miles wide, leaving a narrow ribbon of high seas or economic zone (depending on the claims of the state involved) running through the channel. Ships transiting this channel could remain outside the territorial sea of Japan even if that state claimed twelve miles. The regime of transit passage would thus apply to the Western Channel but would embrace the Eastern Channel only if the high seas or EEZ route were not "of similar convenience with respect to navigational and hydrographical characteristics" as the territorial sea route.



Map I



Map 2



Map 3

OCEAN TRANSPORTATION AND SEA LANES OF COMMUNICATION OF KOREA: AN OVERVIEW

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Korea has special reasons to be concerned about maritime transportation in the emerging international maritime environment in the Pacific and Indian Oceans and the opportunities and threats it poses for its national economy and security. There are two directly related reasons for this concern. First, Korea depends heavily upon use of the seas for trade and commerce. This dependency is growing daily. Second, Korea depends critically upon maritime transportation for moving military supplies to support war efforts in time of war.

Viewed on a global scale, the basic method for moving vast quantities of raw materials and manufactured goods is by waterborne means. Waterborne transport is by and large the most efficient and economical means of moving materials. Other transport systems -- rail, truck, aircraft, and pipeline, for example -- support, augment, and complement shipment by sea. As a result, the worldwide transport system is one based primarily on shipboard carriage.

Ocean transportation plays an important role in the development of a nation's economy. For a country like Korea which has limited land and raw materials, and has to depend on an export-oriented trade policy, the vital importance of shipping has never been doubted. As a result of a series of economic development plans during the past two decades, the Korean economy has achieved remarkable growth. The growth in the trade sector has been especially impressive. Commodity exports increased from \$55 million in 1962 to \$17 billion in 1980, an annual increase of about 40%. Imports also expanded markedly during this same period, rising from \$390 million to \$22 billion. The Korean Government plans to export \$55 billion worth of commodities by 1985. Such a growth, both in exports and imports, has brought about a new challenge: the development of a shipping industry.

Korea is completely surrounded by sea except at its northern border which is blocked by the armistice line. As a result, South Korea is practically an insular country. It is therefore impossible for Korea to enjoy world trade without an effective merchant marine fleet and safe sea lanes of communication.

In view of these facts, Korean economic survival and national security are critically dependent on world trade and sea lanes of communication. The maintenance of its sea lanes of communication in peacetime and protection of them under conditions of war or other emergency are vital to the survival of Korea.

Tonnage

The total tonnage as of March 1981 of the Korean merchant fleet amounted to 5,175 thousand gross tons (GT), which shows a startling increase over tonnage in 1961 that was only 113 thousand GT. This latest tonnage figure represents a remarkable percentage growth of 4,500% in just twenty years. Table 1 tracks the yearly expansion of tonnage in the oceangoing fleet over the last five years according to vessel type. It shows almost a twofold fleet expansion since 1976. Table 2 depicts the Korean oceangoing merchant fleet expansion plan as projected by the government: 6 million GT by the end of 1981,

Table 1

KOREAN OCEANGOING MERCHANT FLEET

Year	Status	Total		Freighter		Container		Lumber C.		Bulk C.		Chemical T.		Oil T.		Others	
		No.	G/T	No.	G/T	No.	G/T	No.	G/T	No.	G/T	No.	G/T	No.	G/T	No.	G/T
1976	National Flag	261	1636	144	351	26	86	24	96	36	365	8	12	23	725		
	Bareboat charter	160	1071	51	186	1	2	48	188	31	396	10	10	19	290		
	Total	421	2707	195	537	27	88	72	284	67	761	18	22	42	1015		
1977	National Flag	321	2292	146	357	39	153	37	145	54	566	16	21	26	1010	3	40
	Bareboat charter	129	1085	38	201	2	5	41	166	27	387	9	10	12	315		
	Total	450	3377	184	558	41	158	78	311	81	953	25	31	38	1325	3	40
1978	National Flag	396	3140	174	534	41	186	38	164	88	1101	20	85	32	1030	3	40
	Bareboat charter	107	1023	29	199	2	23	38	156	19	229	10	12	9	404		
	Total	503	4163	203	733	43	209	76	320	107	1330	30	97	41	1434	3	40
1979	National Flag	417	3609	172	580	47	317	44	184	97	1243	21	67	33	1164	3	53
	Bareboat charter	100	1016	30	217	2	23	29	115	19	254	11	14	9	393		
	Total	517	4625	202	797	49	340	73	299	116	1497	32	81	42	1557	3	53
1980	National Flag	448	4039	190	780	48	348	46	199	108	1432	22	27	31	1204	3	49
	Bareboat charter	88	1136	34	284	2	20	21	90	15	242	7	11	9	489		
	Total	536	5175	224	1064	50	368	67	289	123	1674	29	38	40	1693	3	49

As of March 31, 1981

Tonnage in Thousands

Source: Korea Maritime and Port Administration

Table 2 KOREAN OCEANGOING MERCHANT FLEET EXPANSION PLAN

	1980(A)	1981	1986	1991(B)	B/A
Total G/T	5175	6025	11569	20645	4.0
No. of Full Containers	14	18	28	32	2.3

Tonnage in thousands

Source: Korea Maritime and Port Administration

12 million GT by 1986, and 21 million GT by 1991. That means a more than threefold increase of tonnage during this decade of the 1980s.

1980 figures indicate that there are 44 countries which had more than 1 million GT of oceangoing vessels in 1980. According to Lloyd's *Register of Shipping Statistical Tables 1980*, the Korean fleet stands nineteenth in terms of tonnage, and comprises 1% of the world's gross tonnage in oceangoing vessels. As listed by *Bremen Shipping Statistics*, Korea stands twentieth and shares 1% of world gross tonnage. Excluding flag of convenience nations such as Liberia, Panama, and Singapore, Korea stands sixteenth in the world, and fourth in Asia after Japan, the People's Republic of China, and India. Including the tonnage of hire purchase bareboat charter, which is 100% under national control, the Korean fleet comprises 1.2% of the total world tonnage.

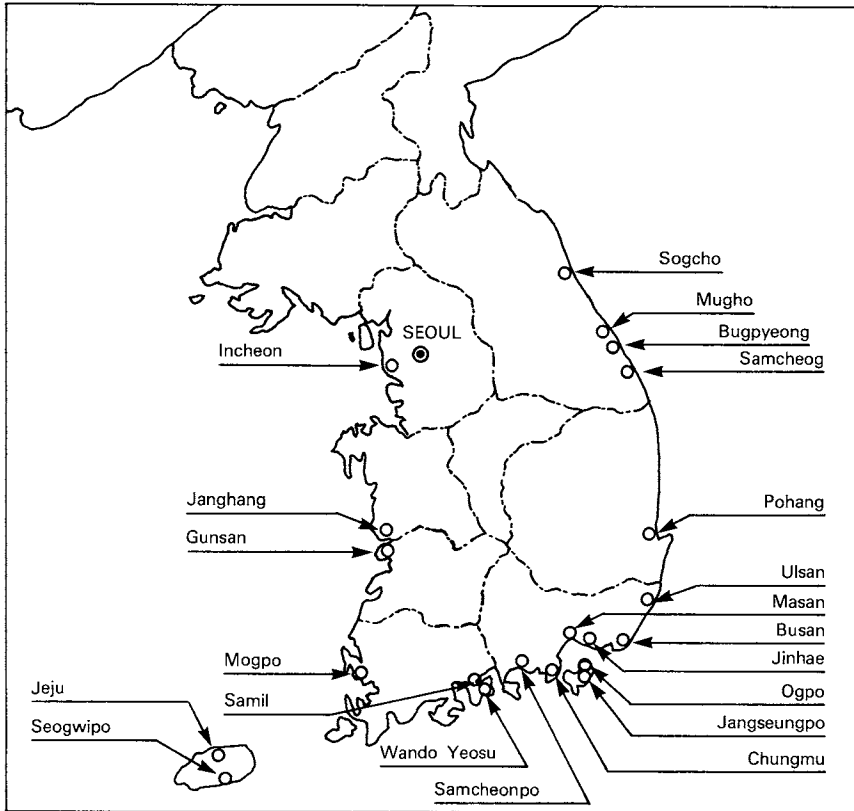
Ports

The Korean peninsula, with its three sides surrounded by water, has a total of 12,788 km of coastline dotted with about 1,800 ports of various size. Table 3 shows major ports of Korea with port facilities and capacity. Of these, twenty-two ports including Pusan and Incheon are open to international traffic and have been constructed and are being operated directly by the Korea Maritime and Port Administration. Those ports open to international traffic are designated as First Class Ports. A second group of twenty-two ports has been designated as Second Class Ports. These Second Class Ports were originally constructed by the Korea Maritime and Port Administration, but the management and operation of the ports have been entrusted to local provincial governors.

The total dry cargo handling capacity of Korean ports in 1980 was 82 million tons, twice as much as the 1977 figure of 41 million tons. By 1991 the cargo handling capacity should be 224 million tons, which would provide sufficient support for the \$100 billion export goal projected for the early 1990s.

The port of Pusan is well qualified as a first-rate international commercial port in terms of both its size and the variety of cargo being handled there. The port was opened to international trade in 1876 and since then has served as the main gateway to Korea. At the present time, one fourth of all marine transport cargo is handled at this port. Moreover, the port of Pusan handles 60% of total export cargo and 90% of all containerized cargo in Korea.

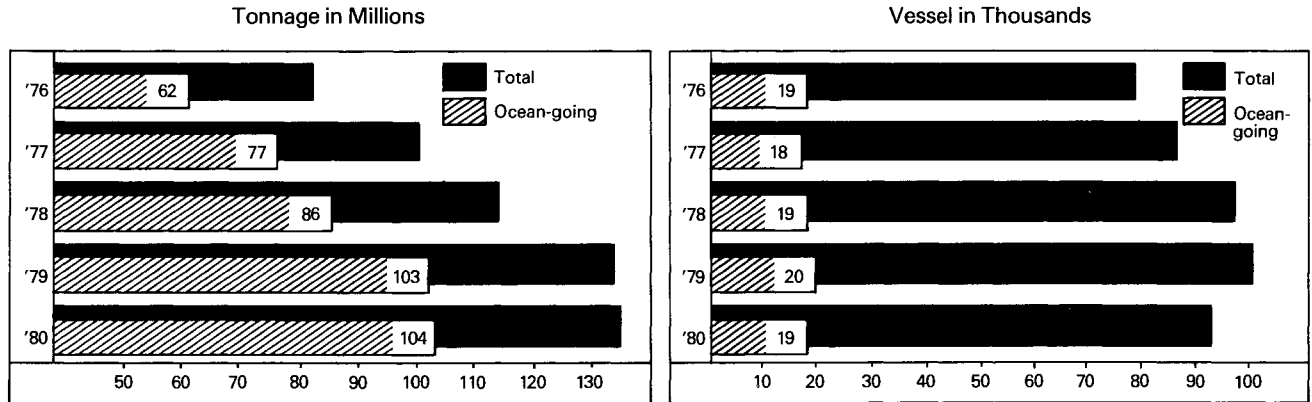
Table 3: Major Ports of Korea with Facilities and Capacity.



Facility Port	Berthing		Anchorage (ship/DWT)	Wharfage (m)	Ware- house (m ²)	Open Storage (m ²)	Cargo Handling	
	Quay (m)	Simultaneously (ship/DWT)					Annual Capacity (1,000M/T)	'80 (1,000M/T)
Busan	8,012	52/455,000	48/567,500	6,380	43,305	413,196	14,000	25,590
Incheon	5,420	29/453,000	59/960,000	1,010	54,880	313,220	9,323	21,347
Gunsan	525	5/24,000	5/40,000	606	11,391	198,771	1,540	1,493
Mogpo	320	4/15,000	9/135,000	879		19,642	1,000	966
Yeosu	1,805	18/113,000	13/51,900	1,961	5,284	94,688	5,722	13,829
Masan	1,575	14/103,500	8/57,000	1,236	6,882	82,000	2,333	2,618
Ulsan	1,041	15/143,000	14/50,600	580		64,600	2,657	17,989
Pohang	2,390	18/393,000	9/300,000	1,266		237,660	22,160	18,725
Bupyeong	1,680	8/160,000	10/200,000	201			8,914	3,280
Jeju	797	6/18,000	63/3,000	361	733	24,530	843	1,116
Others	1,599	22/48,000	7/16,000	12,038	6,870	133,718	13,769	5,933
Total	25,164	191/1,925,500	247/2,381,000	26,518	129,345	1,582,025	82,261	112,886

Source: Korea Maritime and Port Administration.

Table 4: Vessel Entrance and Clearances.



Source: Korea Maritime and Port Administration.

Table 4 represents vessel entrance and clearance. In recent years, ocean-going ships that have called at Korean ports are, on a gradual basis, larger than those of the mid-1970s. The fact that 19,000 vessels or 62 million GT entered and left Korean ports in 1976 in contrast to 19,000 vessels or 104 million GT in 1980 clearly evidences that the number of vessels have increased by 0% while the tonnage has escalated by 59.6%.

Cargo

The cargo volume carried by both Korean and foreign ships has increased steadily year by year. Table 5 shows total cargo volume in and out of Korea carried by waterborne transport and airborne transport and the respective percentages carried by each. Merchandise and raw materials imported and exported from Korea move primarily by waterborne transportation. Airborne cargo continues to represent only a minor fraction -- 0.2% -- of total import-export tonnage. In 1981 the total volume of Korea's waterborne export and import cargo was estimated to be 110.9 million tons, an increase of 18% over 1980.

Table 5 COMMERCIAL CARGO TOTALS

	1976		1977		1978		1979		1980
	Cargo	%	Cargo	%	Cargo	%	Cargo	%	Cargo %
Waterborne	55757	99.8	68312	99.8	77882	99.8	90820	99.8	94035
Airborne	105	0.2	124	0.2	142	0.2	167	0.2	
Total	55862	100	68436	100	78024	100	90987	100	

Tonnage in thousands

Source: Korea Maritime and Port Administration

Table 6 shows incoming cargo volume according to point of origin. Of a total of 71 million tons, 27 million tons (37.7%) of cargo originated from Southeast Asia, and 22 million tons (30.9%) of cargo originated mostly from the Middle East and other regions. Table 7 shows outgoing cargo volume according to destination. 36.8%, 28.4%, and 21.7% of the total cargo volume in 1980 went to Japan, Southeast Asia, and the Middle East, respectively.

Table 8 shows Korean national flag vessels' share of ocean carriage. It reveals that the level of the home-vessel share of shipment in 1980 for incoming cargo (50.3%) was slightly higher than that for outgoing cargo (46.3%). The shipment ratio average for Korean national flag vessels reached 49.3% in 1980 and was expected to peak at 50.0% in 1981 where it is expected to level off. In the case of tankers, however, 60% of the total crude oil was carried by Korean national flag

tankers in 1980, or 15.9 million tons out of a total of 26.5 million tons.

Table 6 INCOMING CARGO TOTALS

Year		Total	Japan	S' east Asia	North America	Europe	Middle East & Others
1976	Cargo	41446	6386	11269	5897	10597	7297
	%	100	15.4	27.2	14.2	25.6	17.6
1977	Cargo	51498	8196	15019	8114	243	19926
	%	100	15.9	29.2	15.8	0.5	38.1
1978	Cargo	61843	10378	18559	9803	326	22777
	%	100	16.8	30.0	15.9	0.5	36.8
1979	Cargo	72992	9744	21801	14538	531	26378
	%	100	13.3	29.7	19.9	0.7	36.4
1980	Cargo	71353	7646	26931	14165	564	22047
	%	100	10.7	37.7	19.9	0.8	30.9

Tonnage in thousands

Source: Korea Maritime and Port Administration

Shipping Companies

The Korean shipping industry is a private industry. As of December 1980, sixty-six shipping companies were engaged in international trade.

Freight

Merchant ships are important earners of dollars in the international transportation market. In addition to earning foreign exchange, they contribute to the balance-of-payments situation by keeping foreign exchange at home. Freight revenue was recorded at \$306 million in 1975. Total freight revenue in 1980 was \$1,895 million, which was more than 4% of the GNP and over 10% of the total amount of exports in that year. Waterborne freight transport was projected to earn \$2,140 million in 1981; it is hoped that figure will reach \$5 billion in 1986 and \$10 billion in 1991.

Table 7

OUTGOING CARGO TOTALS

		Total	Japan	South- east Asia	North America	Europe	Middle East & Others
1976	Cargo	14311	6601	3630	1580	823	1677
	%	100	46.1	25.4	11.0	5.8	11.7
1977	Cargo	16814	7121	3674	1458	437	4124
	%	100	42.4	21.9	8.7	2.6	24.5
1978	Cargo	16309	6497	3985	1540	477	3810
	%	100	39.8	24.4	9.4	2.9	23.4
1979	Cargo	17828	7623	5007	1597	630	2971
	%	100	42.8	28.0	9.0	3.5	16.7
1980	Cargo	22682	8330	6438	1662	1324	4928
	%	100	36.8	28.4	7.3	5.8	21.7

Tonnage In Thousands

Source: Korea Maritime and Port Administration

Manpower

Table 9 shows officer and crew totals for the Korean shipping industry. As of February 1981, more than 21 thousand Korean officers and crew members were assigned to 1,016 foreign vessels of 33 countries. These officers and seamen on board foreign vessels brought home earnings over \$166 million in 1980.

Liner Service

Table 10 shows liner trade routes of the Korean shipping industry. The Korean fleet now provides service over 6 liner trade routes. They are (1) the Japan route, (2) the Southeast Asia route, (3) the United States route, (4) the Europe route, (5) the Middle East route, and (6) the Australian route.

As of the end of February 1981, 129 vessels, or 920,559 GT, were operational for liner services. Among them 67% of the vessels and 62% of the tonnage were general cargo ships, while only 14 vessels and 29% of the tonnage were container ships.

Table 8

KOREAN NATIONAL FLAG VESSEL'S SHARE OF CARGO TONNAGE

		1976	1977	1978	1979	1980
Total	Total Cargo Tonnage Carried on Korean Flag Ships	50939	68312	77882	90820	94035
	Share (%)	19731 38.7	29009 42.4	35472 45.5	43050 47.4	46390 49.3
Export	Total Cargo Tonnage Carried on Korean Flag Ships	10858	16814	16039	17828	22682
	Share (%)	4401 40.5	4410 26.2	5942 37.0	8137 45.6	10507 46.3
Import	Total Cargo Tonnage Carried on Korean Flag Ships	40081	51498	61684	72992	71353
	Share (%)	15330 38.2	24599 47.8	29530 47.9	34913 47.8	35883 50.3

M/T in Thousands

Source: Korea Maritime and Port Administration

Table 9

OFFICERS AND CREW PERSONNEL

	Officer	Crew	Total
Total	23050	58099	81149
National Flag Ships	7180	11748	18928
Foreign Ships	6812	14739	21551
Fishing Vessels	9058	31612	40670

As of February 28, 1981

Source: Korea Maritime and Port Administration

At present, the container liner services are not fully developed, because of the lack of experience and capital required for maintaining container services. The Korean shipping industry planned to put four more container ships into service in 1981. It is planned also that more than 28 full container ships will be operational on major liner routes by 1986. Tables 11 and 12 show five liner routes for container services. One more container liner service route to the Middle East was added in July 1981.

Tables 13 and 14 show Korea's sea lanes of communication for importing vital materials, such as crude petroleum, iron ore, potash, and coal. Tables 15 and 16 show the record of crude oil imports and import trade routes.

Korea began to import crude oil through major oil suppliers for the first time in 1964. The total volume imported that year was about 6 million barrels. In 1980 Korea imported about 180 million barrels, an increase of 3,000% since 1964 and which represents annual increases of 25%. The value of imported crude oil comprised only 3% of the total value of all imported products in 1964, but in 1980 it comprised about 27%. Major crude oil suppliers are Saudi Arabia, Kuwait, and Iran. These three countries supply 96.3% of the total volume of oil imports. Korea began to diversify crude oil purchases in 1979 by importing 10 thousand barrels per day from Indonesia. Since 1981 Korea has imported 5 thousand barrels per day each from Ecuador and Venezuela. Malaysia has been supplying 5 thousand barrels per day since May 1981.

There is every indication that Korea will increase its involvement in commercial maritime activities in the future. Korea, therefore, depends on its sea lanes of communication for economic survival and national security. Should Korea become isolated from its trading partners and allies, and its stockpile of raw materials become depleted, the consequences could indeed be severe.

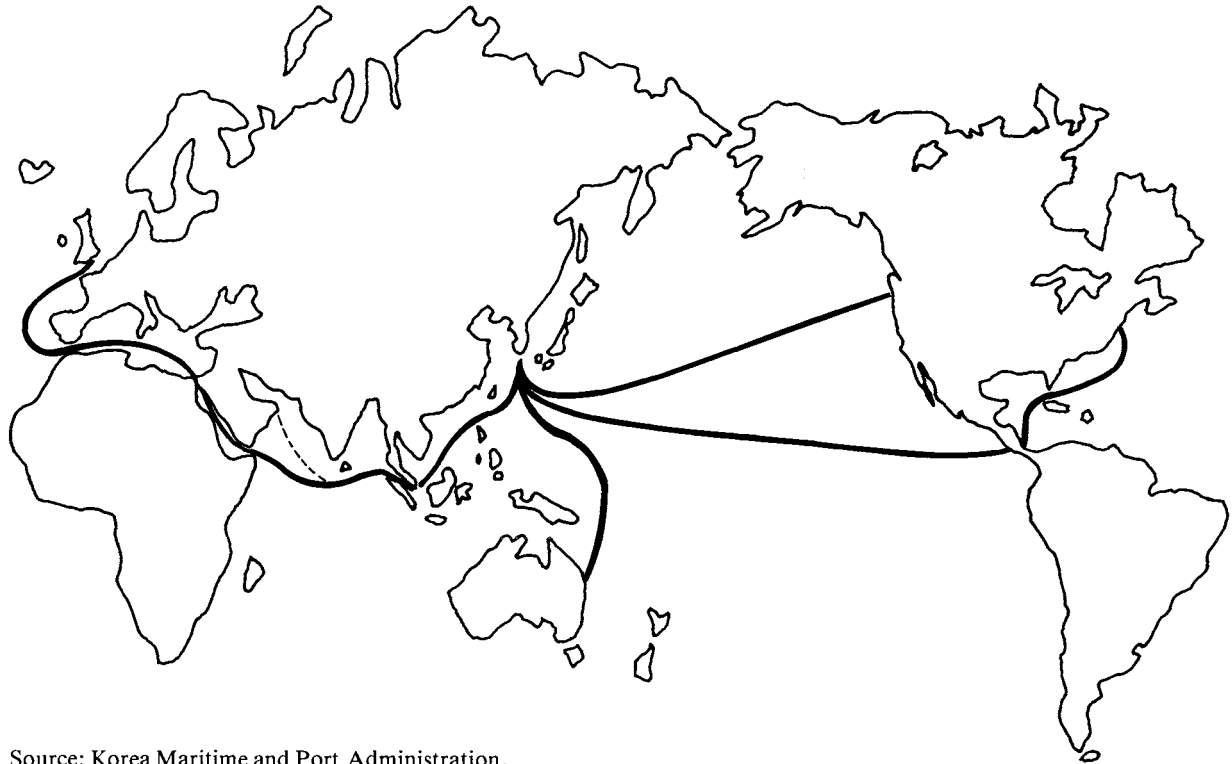
To preserve Korea's distinctive cultural heritage as an independent nation in time of peace or war, it is evident that two critical priorities must be met. First, Korea must be assured supplies of raw materials, manufactured goods, and military equipment adequate to its economic needs and national defense requirements. Inasmuch as the trading partners and military allies who furnish such vital supplies are globally dispersed, supplies must come to Korea by way of the sea. The sea is without rival as a medium allowing for the efficacious

movement of large quantities of cargo. Consequently, there arises in satisfaction of this primary need for supplies from abroad, the second important priority that sea lanes must at all times be kept open and safe for commerce, especially in time of war. Keeping open Korea's sea lanes is of vital interest to Korea as a developing nation.

Source: Korea Maritime and Port Administration

_____ Operating
 - - - - - Planned

Table 11: Container Liner Routes as of 31 March 1981.



Source: Korea Maritime and Port Administration.

Table 12

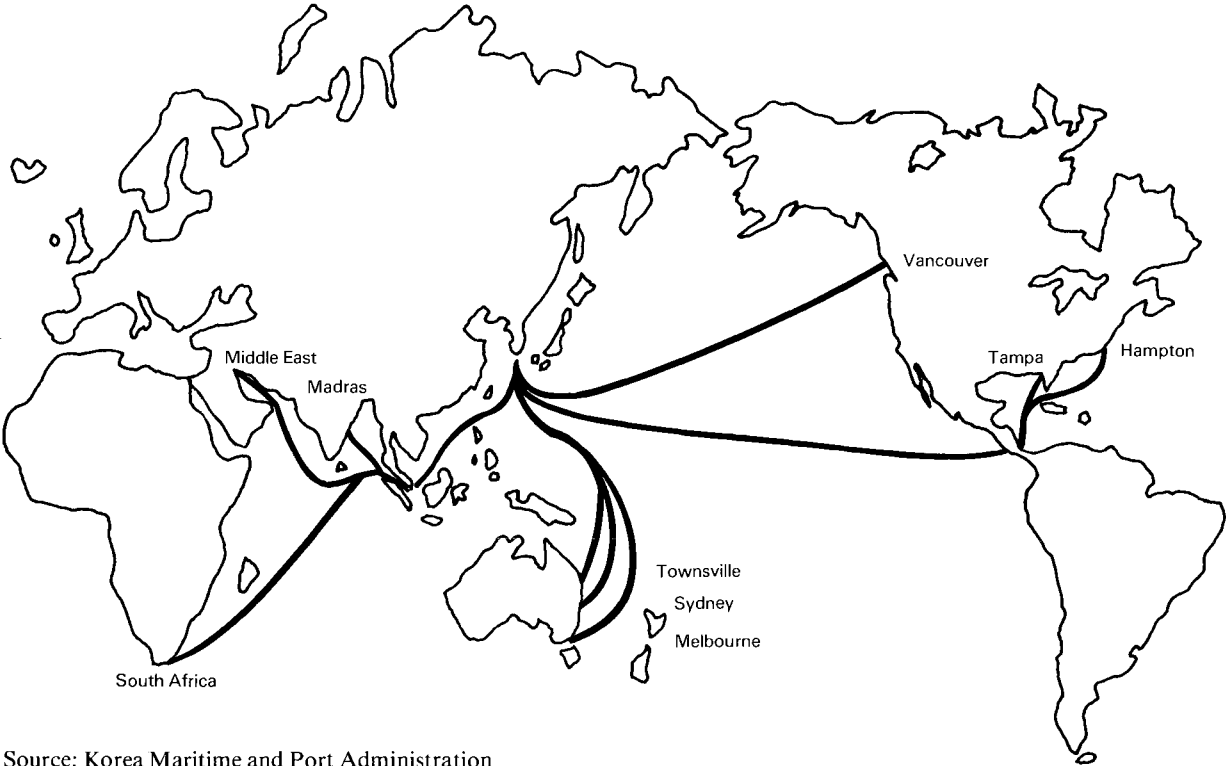
CONTAINER LINER SERVICES

Route	Origin	Destination	Distance	Calling Ports	Days	Freight	No. Ships	G/T
N. America (East)	Busan	New York	10600	Kaohsiung, Hong Kong, Kobe, Los Angeles, Oakland, Long Beach	32	75/MT	3	75442
N. America (West)	Busan	Seattle	9900	Los Angeles, Oakland	14	75/MT	5	86950
Europe	Busan	Southampton	10600	Le Havre, Rotterdam, Hamburg, Felixstowe, Antwerp	34	100/MT	3	82340
Australia	Busan	Brisbane	5200	Yokohama, Osaka, Nagoya, Sydney, Melbourne	15	95/MT	1	13294
Southeast Asia	Busan	Singapore	2500	Hong Kong, Manila, Kelang, Bangkok, Pinang	15	35/MT	2	8456

As of March 31, 1981

Source: Korea Maritime and Port Administration

Table 13: Routes for Importing Essential Materials



Source: Korea Maritime and Port Administration

Table 14

ROUTES FOR IMPORTING ESSENTIAL MATERIALS (B)

Route	Origin	Destination	Distance	Days	Freight (U.S.\$)	No. of Ships	G/T (1000s)	Essential Materials
Middle East	Middle East	Ulsan	6200	20	10.00/MT	15	1300	Crude Oil
Australia	Australia	Pohang	4700	15	11.70/MT			
India	India		4300	14	7.20/MT	11	486	Iron Ore
U.S. (East)	U.S. (East)	Ulsan	9400	32	37.65/MT	15	263	Potash
Canada (West)	Canada (West)		4600	17	32.50/MT			
U.S. (East)	U.S. (East)	Ulsan	9600	32	37.00/LT	10	61	Coal
South Africa	South Africa		8200	27	29.00/LT			
Asia	Asia		2400	13	17.00/LT			

As of March 31, 1981

Source: Korea Maritime and Port Administration

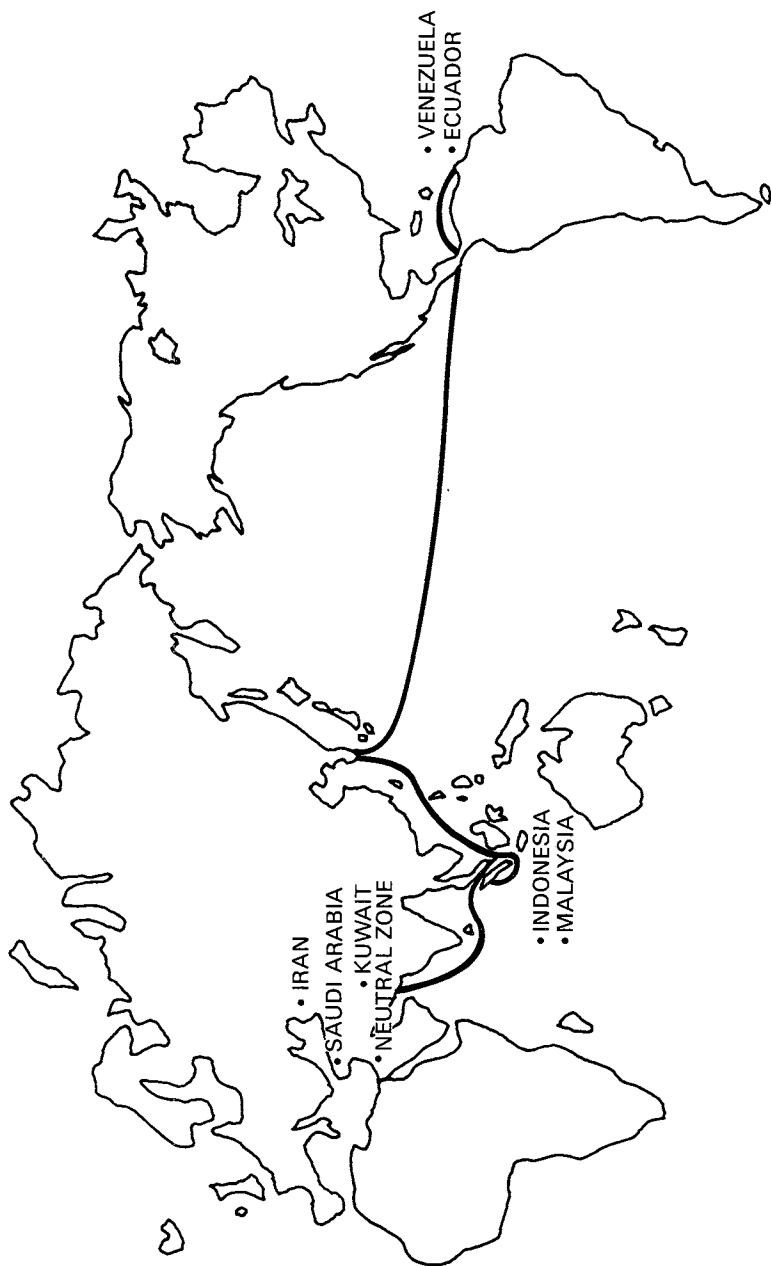
Table 15

IMPORTS OF CRUDE OIL

Year	KUWAIT		SAUDI ARABIA		IRAN		NEUTRAL ZONE		OTHERS		TOTAL	
	Volume 1000 b	%	Volume 1000 b	%	Volume 1000 b	%	Volume 1000 b	%	Volume 1000 b	%	Volume 1000 b	US\$ 1000
1964	5835	100									5835	12507
1965	7137	63.9			4033	36.1					11170	23677
1966	8513	59.9			5689	40.1					14202	29803
1967	11023	59.7			7435	40.3					18458	37909
1968	17997	49.4			18412	50.6					36409	70683
1969	24464	43.8	12545	22.4	18880	33.8					55889	97681
1970	24998	36.2	21955	31.7	22197	32.1					69150	118916
1971	43984	51.6	30549	35.8	10892	12.7					85425	178761
1972	46628	50.4	36867	39.8	2824	3.1	6262	6.7			92581	221077
1973	19401	18.8	63411	61.4	4554	4.4	15844	6.4			103210	305158
1974	18886	16.8	73713	65.4	3305	2.9	16799	4.9			112703	1107822
1975	53637	45.5	51861	44.0	882	0.8	10194	8.7	1221	1.0	117795	1328152
1976	52407	39.6	52640	39.7	14234	16.8	10901	8.2	2225	1.7	132407	1492011
1977	49657	32.1	83396	54.0	16766	10.8	912	0.6	3818	2.5	154459	1890104
1978	50789	30.5	95841	57.5	12912	7.8	3854	2.3	3136	1.9	166532	2174000
1979	59887	32.3	98865	53.3	19806	10.7	847	0.4	6105	3.3	185513	3330000

Source: Dong Sung Cho, International Resources: With a Focus on Oil Problems, Seoul; Pakyoung-sa, 1981, p.203

Table 16: Crude Oil Import Routes.



DISCUSSION

Edgar Gold: First, I would like to quote from Myron Nordquist's abstract, printed in the program for this workshop:

A stable passage regime through and over straits used for international navigation is essential for world trade and order. Foreign shipping traverses an identifiable number of geographic constrictions, and such strategic entrances dominate access to enclosed seas.

I am very grateful to Professors Robertson and Kim for bringing up the importance of maritime transport. As a former mariner, I have worried for a number of years that maritime transport appears to be the most neglected subject in the Law of the Sea Conference. However, in the history of the law of the sea, both recent and long term, there is very little evidence of coastal states interfering in legitimate navigation purely for political reasons during peacetime. Of course, the interdiction of enemy trade is something very different in times of armed conflict. However, Professor Kim's statistics give evidence for this region that the international trading pattern is so interlinked today that even states of very different ideological/political persuasions must co-operate either openly or by clandestine means. Military and security considerations relating to straits and territorial sea passage have completely dominated this aspect of the law of the sea at the Third U.N. Conference on the Law of the Sea as they did in 1930 at The Hague and in 1958 in Geneva. Accordingly, the maritime transit states have demanded and, to a great extent, achieved general-passage freedoms far in excess of those really needed by commercial shipping. In other words, these states have used the need for "commercial freedom" to achieve strategic goals. That may be perfectly legitimate, but we should be fully aware of it. As a result, some articles in the Draft Convention, which make distinctions between commercial and military vessels, are only included in the Convention to provide "humorous" interludes. For example, Article 20 requiring submarines on the surface to show their flags! We have yet to see nuclear submarines of the superpowers do this. However, as in many other parts of the Convention, these articles are compromises, as it was probably not feasible to have separate regimes in the territorial seas and the straits regime for commercial and military vessels.

It should, however, be remembered that coastal states have always liked international navigation to use their territorial seas and their nearby straits. History has shown that all of the world's great trading cities owe their foundation to the fact that they were geographically blessed by being located near important international straits and ocean passages. In this region, Hong Kong, Singapore, Kobe, Osaka, Pusan, and Inchon all draw their lifeblood from the sea and its proximate maritime traffic. In other regions, too, the growth of great ports and industrial concentrations have been determined by proximity to the ocean highroads, some of which go back to prehistory. As a result, it can hardly be in the interest of any coastal state to take actions which would cut off its own commercial lifeblood. Even the coastal transit passage of cargo is in the interests of international commercial intercourse. Stopping such a passage would be a foolhardy action, because commercial retribution would be relatively swift. However, these

commercial realities were rarely discussed at UNCLOS III, which didn't really understand shipping. From the very beginning of the Conference -- even in the Sea-bed Committee days -- international shipping was isolated from Conference considerations, and there was, instead, a concentration more on the actual medium of vessel passage than on the ancient, but still sound, commercial principles of maritime transport which are: to carry cargoes from point A to point B as expeditiously and directly as possible.

Now a comment on environmental protection as it affects the subject under discussion. All pollution, including vessel-generated pollution, is the unpleasant by-product of industrialization and international commercial communication. The large-volume carriage of crude oil and petroleum products has increased the potential for large-scale marine pollution. Even this could have been tolerated by the coastal and archipelagic states. However, world shipping, as it has increased to the almost 500-million-ton fleet of today, of which well over half are tank ships, had to cope with three additional pressures. The first pressure relates to the very heavy concentration of shipping in strategic straits and territorial seas. Secondly, arising out of this, there is an increasing accident rate interspersed with spectacular tanker disasters and resultant major pollution. Finally, there appears to be insufficient action by the major maritime states, either within or outside IMCO, to come to grips with these realities and tighten international ship safety standards considerably and, therefore, decrease accidents. Not surprisingly, coastal, archipelagic, and strait states have pressed for greater controls in the territorial sea as well as in straits at IMCO and, of course, at UNCLOS III. This was an entirely expected reaction. International measures were simply impotent to deal with a real problem, and the coastal states, some already damaged or fearing further damage, stepped in. It has to be remembered that such a step is a costly one, and one not taken easily or without good reason. The patrimonial sovereignty of the Chile/Ecuador/Peru era is long past. States make few decisions today which do not at least attempt to be cost-effective.

The subsequent conflict between coastal, archipelagic and strait states, and maritime states -- the latter fearing that the former would shut the gate -- has given us the rather strange regime we have had described to us before. It is not a fully satisfactory regime as it does not fully meet the interests of either side. However, there is no question that coastal states will take further action under Articles 22 and 41 relating to separation zones, traffic control, etc., to control marine traffic in the territorial sea and straits and archipelagic waters, and they will do this at considerable cost in order to protect their coasts. The often forgotten aspect of coastal state control of nearby straits may, in the long run, be the preservation of the flow of commerce rather than its impediment. For example, a major tanker casualty at the western end of the Strait of Singapore could effectively block the whole passage for a considerable period. There is no question that coastal states can and will act until the maritime states significantly reduce the potential of ship-generated pollution by at least, as a first step, acceding to IMCO's call for "safe ships and clean seas." Until they do, the regime which we have discussed will remain a precarious one, and the sea lane passage for states which really draw their whole lifeblood from international commerce will be jeopardized.

Despite the arguments over the straits regime and free passage, which have been battled over for a long time, nothing has ever really interfered with commerce. I take Professor Robertson's point that there certainly are danger points. I would be the last person to disagree, having spent a large part of my seagoing life in the Middle East working for one of the belligerent nations. But what we will probably have to do is examine the future use of sea lanes. I think there is now increasing indication by some of the commercial and shipping nations that what we need to achieve is another convention. We have to move now towards an international maritime transit convention, but this time we have to keep the foreign ministries, the lawyers, the oceanographers, and the hangers-on out of it and go back to the people who run international maritime transport.

Even during the recent Iran-Iraq conflagration, the tap wasn't completely shut off. They were very careful. They both have the military capability to completely destroy each other's oil, but they didn't. The oil kept flowing, because the cash register has to keep clinking to the extent that some of those countries now are in virtual control of 50 percent of the world's currency reserves. These are the commercial realities, whether we are in a free economy or a planned economy, and they are not affected by the Law of the Sea Convention. Many other aspects of maritime commerce are also not affected. For example, 130 years ago, there was a small international conference related to lighthouses and navigation marks, which required shipowners when they came into port to pay "lighthouse dues" for their ships in order that coastal states would keep lighthouses and navigation marks going. This is a good analogy for questions of liability which small coastal states will have to examine. There may have to be some type of provision in a maritime transit convention to pay for potential liability to coastal states so that the passage is kept open rather than placing a tollgate there. If there is some sort of standard payment, if an accident occurs, the affected coastal state has a fund to go to.

The Law of the Sea Convention is, therefore, from the commercial maritime transport viewpoint, not going to make very much difference. Shipping is going to continue except during times of armed conflict when it will be very quickly suspended. Shipping is the world's jugular vein. During such time, it will be very much up to states to take what will then not be a commercial decision but a military decision of whether the lifeblood is to flow or not.

Takane Sugihara: I would like to comment on just two points. The first relates to the new regime of strait passage which is introduced in the Informal Draft Convention on the Law of the Sea. It seems a common understanding that the new strait passage regime is in essence a form of freedom of navigation. In my judgment, it is much closer to the freedom of navigation available on high seas than to the concept of innocent passage in the territorial sea. Under the new regime, a coastal state has no right to determine that passage is not innocent and then to prevent that passage. The coastal state has limited regulatory competence over vessels in transit through straits. The only such regulatory competence is contained in Article 42 and is intended to implement internationally established sea lanes and traffic separation schemes and internationally established discharge standards for vessel-source pollution.

There is no question in my mind that passage of ships through straits used for international navigation is of vital importance to all

states. Passage through such straits requires far greater protection than through the territorial sea in general. Therefore, it is inadmissible that a state bordering a strait should assume the discretionary power to permit or refuse access to the strait for subjective reasons, which might be arbitrary or political.

At the same time, it is essential also that the legitimate interests of the strait states be protected. Every state bordering a strait within its territorial sea has a legitimate right not only to protect its marine environment from pollution but also to safeguard vital interests connected with its security. In the past, passage of merchant vessels was considered to be in the general interest of the international community as a whole, but passage of warships was not, because the warship represented the national interest of each state. William E. Hall, a famous English lawyer of the nineteenth century, said this:

The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States. But no general interests are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other States with its ships of war. Such a privilege is to the advantage only of the individual States, and it may often be injurious to third States; and it may sometimes be dangerous to the proprietor of the waters used.

But as far as strait passage is concerned, this sort of view was expressly dismissed by the *Corfu Channel* judgment of the International Court of Justice. Today, a number of international lawyers even assert that freedom of strait passage for all ships and aircraft, including those of military purposes, is a prerequisite to a stable world order and therefore is in the common interest of the world community.

I want to stress that it is extremely important to ensure an equitable balance between the security interests of the strait states and the right of passage of ships indispensable to the world economy and communication. Otherwise, no strait regime could be a lasting one. Therefore, so far as the international legal regime is concerned, the issue is not any particular strait, any limited number of states, any one commercial or strategic need, but rather protection of the common interest of all states. Accordingly, the real issue is, in my view, whether we will work out successfully the following two points: (1) will we have a lasting strait regime that protects the navigational interest of all states while meeting the legitimate concerns of coastal states; and (2) will we put the regime into good and sound practice where both of the interests are in fact duly respected?

Now I would like to move to the second point. It relates to the possible breakdown of the current negotiations in the Law of the Sea Conference. Of course, such a situation is not advisable, but no one can totally deny its possibility. Then, in the event of no treaty, what kind of legal regime should become applicable in straits used for international navigation? In my view, the current regime of innocent passage, set out in the 1958 Geneva Convention on the Territorial Sea, remains still valid in areas within straits covered by the territorial sea. In other words, it is not the proposed transit-passage regime but the existing innocent-passage regime that would apply in straits forming part of the territorial sea, if no convention is adopted. It is a fundamental principle of law that until a new rule of law is formally established, the existing rule of law remains to be applied. In the

Icelandic Fisheries Jurisdiction case, Judge Andre Gros of the International Court of Justice said this:

The calling of a third codifying conference in July 1974 amply demonstrates that certain procedures and agreements are necessary to replace codifying texts. Until different texts have been regularly adopted, the law of the sea is recorded in the texts in force.

It is true that the current regime of the Geneva Convention has a number of ambiguities and uncertainties, but from the legal point of view it is doubtful whether this fact provides any justification for unilateral abrogation by individual states of the existing regime. This is not to say, however, that there is no likelihood of the evolving of a new customary international law of strait passage. At present, I do not want to prejudge the substance of an evolving customary law, but it would suffice to say for the present that the transit passage systems in the Draft Convention on the Law of the Sea will, more or less, have a considerable potential power and influence for the formation of the new customary international law of strait passage.

Dan Cheever: If I were a Korean shipowner, or if I were a Japanese energy importer, I'm not sure I would be reassured that my vessels will move sufficiently freely through these vast archipelagic regions. Do transit rights apply?

Horace Robertson: You who are familiar with the Draft Convention know that Part IV which immediately follows the transit passage part deals with archipelagic states. And as you pointed out, Professor Cheever, archipelagic states, if they meet the criteria laid down in the article for creation of archipelagic waters, are able in essence to create vast areas of the ocean that don't fit within any of the traditional regimes we have talked about. The old regimes were internal waters, territorial waters, contiguous zone, and high seas. This new regime is inside the territorial waters and has many of the characteristics of the territorial waters regime yet is also very similar to the transit passage regime. The archipelagic state would be entitled to designate archipelagic sea lanes through the archipelago, and if it did not do so, then the user state would be entitled to transit all of the normal passages that are used for international navigation with their nonsuspendable rights. I think this regime shocked Arvid Pardo when he saw these big areas of the world being taken away from the high seas, but in my view when delegates saw that states such as Indonesia and the Philippines would be able to accomplish much of the same thing by an exclusive economic zone, it wasn't a very big step to go to the archipelagic waters concept, provided that there could be this assurance of navigational rights.

Myron Nordquist: A page of history is worth a great deal of reasoning and discussion. The archipelagic articles evolved independently of the straits articles. It would have been very easy simply to say that the transit passage regime in straits is applicable in the archipelago, but a different set of parties was negotiating it, and they tried to rationalize it as much as they could. There is probably another practical reason as well. A military flotilla, for example, would be in a different kind of deployment going through an archipelago a thousand

miles long than it would if it were going, say, through a restricted strait area. We ought to refer to Admiral Robertson when we talk about the practical side of things. I agree with his comments that it is a similar problem, and it was given a similar solution.

Frances Lai: Since I come from Singapore, I feel that perhaps I should react to this comment, as you are talking about the Malacca Straits and the Strait of Singapore. I do agree with Dr. Gold that concern about passage through the straits is mainly derived from security reasons. I am glad to see that Dr. Sugihara's view also balances security and economic needs for the straits. In Singapore, of course, we are traders and we survive on free navigation, but we also see the need for keeping the straits free of pollution and obstruction. That's why we participated in this three-country declaration. Of course, there are also political reasons behind it, too, but I think we have come to realize that reasonable regulation of the straits is important.

At the beginning, before we disagreed over the Malacca Straits, we worried that overemphasis of jurisdiction would lead to obstruction of navigation and maybe diversion of traffic. If we had realized that this concern for free passage through straits is mainly from security reasons, which are not negative, we would have a more balanced view.

Horace Robertson: Thank you, Miss Lai. I would like to make a couple of comments if I may. Because of time limits I omitted from the first part of my statement an introduction which indicated that the intent of the transit passage regime was to create a regime that would balance the legitimate and strong concerns of the coastal states to protect themselves from the threats to their security, from pollution of the area, and so forth, against the need for the passage of user states. While one may argue whether the product that has come out in the Draft Convention is balanced or overbalanced one way or the other, there certainly has been an attempt to reach that solution by consensus. I would certainly not say that defense considerations are not a key part of the regime; nevertheless I would hate to see us conclude, as Mr. Gold and Miss Lai both suggested, that the states that border straits would refuse the right of passage.

They have an economic interest in having ships transit the straits and use the ports along the straits for buying oil, reprovisioning, and so forth. Dr. Gold suggested that they would not cut off their commercial lifeblood because of considerations other than economic. I'm not sure that they would not do that. We've heard the statement that the Mid-East countries would not cut off their oil in any sort of regional or international dispute, but I think we've seen, just within the past few months, an example that shows this is not necessarily true. Iran and Iraq in their current war went immediately for each other's oil-producing capacity. That would be contrary to the economic logic and the long-term interests of both of them. We've seen examples of that in revolutionary movements in other areas that might lead us to believe that it could occur in this area as well.

Edward Miles: Mr. Chairman, I think you've had a remarkably optimistic panel, compared to Choon-ho Park's prediction. All of your panelists assumed the issue was settled, and they set out to explain to us exactly what was meant by the wording in the text. But it's possible that things aren't settled, of course, and that the United States may upset the apple cart. We may have no treaty or a treaty on available

terms without the United States. I wonder what the panel would think of that sort of situation, and in particular how our colleagues from Japan and Korea would view that eventuality. The world has been remarkably free from unilateral action on this particular issue, unlike the case of fisheries. I wonder if that will remain so.

Phiphat Tangsubkul: I would like to come back to the question of the archipelagic concept. I am involved in research work relating to this emerging concept of mid-ocean archipelagos. I am not very clear about the legal status of the archipelagic sea lanes, specifically under the Draft Convention. I am talking about that area within 25 nautical miles. What exactly is the legal status of this water? Is the water within this 25 miles under the sovereignty of the archipelagic state? Or is it under the international community control as though *de novo*? Can the flag state enjoy such a right only immediately when the vessel is crossing this archipelagic sea lane?

Myron Nordquist: The regime for the archipelagos is an exception or special regime carved out to satisfy predominantly political concerns of a very limited number of nations. The way the floor and the ceiling on land-to-water ratios is set up, there are by the facts of geography only seven to ten nations that could ever qualify.

The first point is that the archipelagic concept is a new concept in international law. The problem that was on everyone's mind is that while the Conference could understand why a nation such as Indonesia with many scattered islands wanted to have a sense of political unity, it had to accommodate the equal rights or concerns of nations that needed to go through those waters. The political compromise that was worked out was to allow for the drawing, again within very defined limits of archipelagic baselines. Within those baselines, it is intended that the archipelagic state has sovereignty but that in those very broad sea lanes there is, in essence, freedom of navigation to get through. You could say, as a gross generalization, that outside the sea lanes the archipelagic state is sovereign, and that within the sea lanes it is sovereign over third-state navigators and fliers. As long as they stay within the rights that are given to them, they have at least equal standing.

Choung-II Chee: I want to comment on the predicament that Korea faces on this issue of the strait and the innocent-passage regime. As you know, the Korea Strait is not only a strait but is a territorial strait. If I understand correctly, the regime of innocent passage applies.

Here, we are faced with Russian warships passing through the Korea Strait. The predicament is this. Russia is neither hostile nor exactly in a state of peace with Korea; the Republic of Korea has the armistice agreement which means that the state of war has not ended. So we have a situation here of no war, no peace. Law has to take into account this kind of situation.

Since Russia is an ally of North Korea, with whom the Republic of Korea has not exactly ended the state of war, what shall we do? Do Russian warships pass through the Korea Strait? Should we sit still and then say hello or require notification? This sort of thing should have been debated. All who are familiar with the diplomatic history concerning straits know that they have always been geopolitically important and militarily significant. I am here referring to the Strait of Gibraltar, the Dardanelles and Bosphorus, the Strait of Magellan. Big

powers always exerted their influence on the weak powers to let big-power navies pass through.

For commercial passage, I don't see any problems. But when a warship passes through a strait under conditions of neither war nor peace, you have a problem. What can you do? UNCLOS III or the creative ingenuity of the lawyer should take into account this sort of ambivalent security situation that the Republic of Korea is confronted with.

Keu-Cab Cho: In the formulation of principles to govern this strait problem, there are three choices. One is free passage; the second is transit passage; the third is innocent passage. We already discussed innocent passage in the territorial sea. Free passage is for the high seas, but the strait we are discussing is an international strait; it is different from the other straits. If we think of past tradition, free passage must be applied for straits of this character. The marine powers favored free passage, but the coastal states and the developing nations opposed it, as we already know from the Law of the Sea Conference. I think the practical solution to this problem is the second principle of transit passage, which is acceptable to both sides, taking into account the conflicting interests of maritime powers and coastal states.

PROBLEMS OF MARITIME DELIMITATION

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Choung Il Chee: We now investigate boundary problems in the Pacific and East Asia. Dr. Choon-ho Park will present and comment on a series of slides showing boundary problems in this area and in other parts of the world as a background to our discussion. Then we will hear comments from our other panelists, Mr. Akio Suda of the Japanese Foreign Ministry, the Legal Affairs section of the Treaty Bureau, Dr. Douglas Johnston of the Dalhousie Ocean Studies Programme and the Faculty of Law, and Dr. Paul Yuan of the Louisiana State University Law Center.

(Choon-ho Park presents slides and brief commentary. See his slide presentations in second part of this book.)

DISCUSSION

Choung Il Chee: I would like to make several comments on Dr. Park's presentation before I turn to the panel discussion. As you all know, continental shelf delimitation is one of the few remaining unresolved issues at UNCLOS III, and the Convention text has produced a very complex formula. It leaves the delimitation problem to the Commission on Continental Shelf Delimitation, an action which reflects the difficulty that UNCLOS III has encountered in connection with this problem. The issue seems to be resource-sharing or resource distribution rather than delimitation of the line or the seabed itself, as Judge Jessup pointed out in his dissenting opinion on the *North Sea Continental Shelf* cases. We should have devoted more to the issue of resource sharing rather than to delimitation *per se*.

Another point I'd like to make is the case of the Philippines, which referred to treaty rights in making claim to that sea area. You all recall the *Island of Palma* arbitration, in which Huber pointed out that what you have can be ceded, but what you don't have cannot be ceded. He was referring to the inchoate title to the island of Palma. At the time, this concept of jurisdiction beyond the territorial seas did not exist.

I now turn to Mr. Suda of the Legal Section of the Treaty Bureau of the Japanese Foreign Office.

Akio Suda: One of the main issues of the Law of the Sea Conference is the principle of delimitation of the economic zone and the continental shelf. The arguments have long been going back and forth between so-called "median and equidistance principle" and "equitable principle." The arguments do not seem to me, however, to be carried on in a very practical or fruitful manner.

On the one hand, since the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases of 1969, no student of international law denies the principle that equitable considerations should be taken into account when delimitation is to be agreed upon between states. The denial of equitable considerations seems to be almost the denial of rational efforts in seeking peaceful relations between states.

However, the equitable principle cannot stand by itself as a practical guideline for delimitation unless the international community

accumulates practices. The equitable principle may be good philosophy but cannot by itself be a useful method to solve real delimitation questions between states. It is very important, therefore, to look into real practices of states' agreements on delimitation.

Of the forty-nine agreements we have studied on the delimitation of the continental shelf, twenty-nine are expressly based on the median or equidistance line; nine are presumably based on median or equidistance line; and only eleven do not use the median or equidistance line. I am quite sure that the median or equidistance line is even more dominant in the case of the fishery zone or the economic zone. This fact indicates that even if you adopt the equitable principle as a philosophy of delimitation, you have to, in most cases, resort to the practical method of the median or equidistance line with some variations.

Having said this, whether we take the "median or equidistance principle" or the "equitable principle" doesn't matter much. The median or equidistance principle is fine, because we know that equitable considerations will also be made if there are any special circumstances. Or the equitable principle is also all right, because we know that the median or equidistance line is the most important part of equitable considerations. But one thing I would like to emphasize is that if international law is expected to develop and maintain justice in international relations, the guideline for delimitation between states should be a practical rather than a philosophical one so that the delimitation is actually guided by international law and not determined solely by a power game between the states.

We now come to the hypothetical question of delimitation in the China Sea, particularly the East China Sea. I would like to comment briefly on (1) the relation between delimitations of exclusive economic zone (EEZ) and continental shelf; (2) the prolongation of continental shelf in the area; and (3) the merits of islands for delimitation.

First, as many people point out, one of the big problems of the Draft Convention on the Law of the Sea is the lack of real rules linking the EEZ regime with the continental shelf regime. That is, the coastal state has sovereign right over non-living natural resources of the seabed and subsoil under both the EEZ regime and the continental shelf regime. Consequently, if the boundary of the EEZ is not identical with that of the continental shelf, conflict of jurisdiction over the natural resources in a certain area occurs. The Draft Convention doesn't contain a real solution to this problem. Logically, states could agree to adopt one boundary for the EEZ and another for the continental shelf. At the same time, practically speaking, it is desirable, if circumstances allow, that states agree to the same boundary for both the EEZ and the continental shelf in order to avoid the difficult problem of dual jurisdiction over natural resources.

The East China Sea has important fishery and mineral resources for coastal states. Therefore, whenever we talk about the future delimitation of the China Sea, we must always ask ourselves what is the best way to nullify or minimize the conflict that could occur if different boundaries were to be used for the EEZ and the continental shelf.

Second, although I am not an expert in any marine science, I would like to say one thing about a natural feature of the continental shelf of the East China Sea because I think it is very important when we talk about the possible delimitation of the continental shelf in that area. I would like to point out that the natural prolongation of the continental shelf there extends down to the Ryukyu Trench without any inter-

ruption. West of the Okinawa Islands is the Okinawa Trough, whose depth exceeds 2,000 meters in some parts. But, according to many geologists, the trough consists of the continental crust overlain with some thick sediment. This geological feature certainly means that the trough is not anything foreign to the continental shelf of the East China Sea but rather a part of its natural prolongation. Therefore, any argument to the effect that the continental shelf of this area should be delimited by the Okinawa Trough does not have good geological reasoning.

Third and finally, another important question we have to tackle when we consider the possible maritime delimitation of the China Sea is how much we should count the merits of islands located in this area in comparison with the continent and some main islands. For the convenience of argument here, I exclude rocks which are not habitable. Somebody may say that an island should be given only small merit because it is an island or is small. This kind of simple argument seems to come from the wrong perception of the legal regime of the EEZ and continental shelf. These maritime regimes which have been developed in recent decades are aimed at keeping a balance between the expansion of man's activities toward the sea and the orderly control of such expansion. If it is so, the maritime delimitation under these regimes should not be dominated by the mere geographical characteristics or the size of the land area. Instead, much emphasis should be put on the traditional and potential maritime activities of the people living there. It should be noted in this context that people living on small islands have, in many cases, keener interests in maritime activities than other people do. Therefore, in a delimitation case which involves habitable islands, equitability, in a real sense, can be achieved only by giving due regard to the potential as well as to the traditional maritime activities of insular people. From this point of view, the merits of habitable islands in the East China Sea should be given full account for maritime delimitation.

Douglas Johnston: At the very beginning I have to ask whether to accentuate the positive or the negative on the subject of boundary delimitation. On the one hand, one could accentuate the positive and talk about the seventy-five existing boundary agreements that have now been negotiated, almost all of them within the last ten years. That's a fairly impressive number to constitute a foundation of state practice. On the negative side there are something like 150 unresolved maritime boundary issues in other parts of the world. That's a very large number, and one might well ask what the prospects are of dealing effectively with these 150 unresolved boundary issues in the next twenty years. How much does it matter whether these 150 unresolved boundary issues are resolved in the next few years? What's at stake? My inclination is to talk initially about the negative, as it's interesting, but in the hope of turning it around a little bit with a reasonably optimistic conclusion, in accordance with my sunny disposition and outlook on life.

First of all, let's bear in mind that boundary treaties are extremely difficult to negotiate. They are full of these technical complexities that we've been reminded of by Dr. Park and by Mr. Suda. But there are three basic reasons why boundary treaties are very difficult to negotiate compared with other types of national agreements. First, the interests represented by a boundary negotiator are perceived by his fellow countrymen to be proprietary or quasi-proprietary in character. The boundary negotiator knows that he is perceived by his fellow countrymen as being in danger of giving away something they

think belongs to them. He is in danger -- they think -- of giving away something in the name of compromise diplomacy, betraying his country's interests. More so than in the case of trade negotiations, for example. The tendency is then for the boundary negotiator to negotiate under political and psychological constraints to force him to take rather a hard line in negotiations, and this does not make things any easier.

Second, boundary treaties are difficult to negotiate because once they are negotiated they tend to be terminal, final, absolute. I suppose it's possible to conceive of a boundary treaty that would be subject to review after a number of years, but in real life, this is difficult to impossible to accomplish. A boundary once agreed upon tends to be there permanently. So the boundary negotiator more than any other type of negotiator has to consider the longest range of consequences imaginable. At least, he ought to.

Third, and this is perhaps not quite so obvious, a boundary treaty more than most other types of treaties is visibly capable of being violated. A violation of a boundary treaty, therefore, can be discerned empirically and can be objectively determined. Now this is more true of a land boundary than an ocean boundary, I admit, but in light of the rapid advances in the technology of detection and surveillance, it will not be long before many coastal states can observe very clearly indeed whether a boundary -- ocean boundary -- has been violated or not. Certainly if they have a mind to, the technology will exist. Either of the parties to a boundary treaty may then use a boundary treaty as ammunition against the other. It is a very handy weapon, potentially, to use against the other partner if the political relationship between the two should deteriorate.

If one stopped there, it would be difficult to be optimistic about the easy and rapid resolution of these 150 unresolved boundary issues around the world. But how optimistic or pessimistic we ought to be depends on what we are assuming about the priority that should be given to boundary delimitation. I think, at the risk of oversimplifying things a good deal, that there are only two schools of thought you can belong to about this. Essentially there are only two ways you can think about boundary delimitation, whether on land or in the ocean.

Either you belong to the school of common sense, or you belong to the school of functional logic, but you can't belong to both at the same time. Membership in one rules out membership in the other. Some of us prefer to be skeptical about both common sense and managerial logic and may not regard ourselves as candidates for either, but that leaves you without any rational approach to boundary delimitation. There is always an argument that we should be rational, I suppose, about boundary delimitation, but if we wish to be rational, we have to belong to one of these two schools.

The school of common sense is straightforward. It says boundaries are fences. It will repeat the old truism that good boundaries make good neighbors. It assumes therefore that the first thing two neighbors would want to do would be to agree on the fence between their properties. Everything else is secondary. That's common sense, isn't it? It assumes that anything else is less important than building a fence.

The school of managerial logic starts from a totally different premise that a boundary -- at least a boundary in the ocean -- should be seen in the most sophisticated way, unfortunately a more complicated way. A boundary in the ocean should serve a number of functions. To make it serve a number of functions, one must first think of the kind

of relationship he wants to have with his neighbor. Once you've thought that out clearly by reference to the resources in the environment of the offshore which you share with your neighbor, what kind of arrangements you wish to make with your neighbor for the sharing of these resources in the environment, then but only then do you begin to think about the boundary or the several boundaries, perhaps, that you ought to have between you and your neighbor. Now this is not a conception of a boundary as a fence. It is a very different approach altogether, and would take you along different lines than in the case of common sense.

We should remember that really there are three kinds of boundaries in the sea, and UNCLOS III has not served us very well in drawing a distinction between these three. First there are sovereignty boundaries, territorial-sea boundaries. Of the three types, the sovereignty zone boundary is the easiest to deal with since it's spatially only a twelve-mile distance. In some ways, of course, it might seem the most emotional since sovereignty is at stake, as it were.

The second category is what I would call uni-functional boundaries designed to encompass unifunctional zones in the sea. The continental shelf boundary, properly speaking, is unifunctional; a fishing-zone boundary is uni-functional; a pollution-control zone boundary is uni-functional; and so on. Now if we're moving from a sovereignty-zone boundary, to one of these uni-functional kinds, arguably we are getting away from the school of common sense and getting closer to the school of managerial logic. Moreover, if we're looking at a uni-functional zone, the functional logic may not be very complicated, since there is only one function for that particular type of boundary. So one is not necessarily becoming immersed in impossible complexities in espousing the school of managerial logic if one is trying to draw a boundary around a uni-functional zone. It may be difficult but not horrendously difficult to draw the line with proper consideration for what is actually at stake -- production of mineral resources on the shelf or the design of fishing rights and fishery management systems or the control of certain types of pollution hazards. No one of these sectors is hopelessly complicated and therefore under *a priori* the functional approach to a uni-functional boundary might not be too complicated.

The third type of boundary in the sea is the most complicated of the three. An economic-zone boundary by definition is multi-functional in character, in purpose. Here we are in danger of becoming hopelessly immersed in complexities if we belong to the school of managerial logic and have to weigh in the balance the many different functional considerations that are appropriate in a multi-functional economic zone. So perhaps only purists or those who belong to the school of managerial logic might feel compelled to support the economic zone boundary in such a complicated manner. In the remainder of my comment, I will confine myself to this third and most difficult category of economic zone boundaries.

Let's put aside territorial-sea boundary-making on the one hand and continental shelf and fishing zone and other uni-functional boundaries on the other and look only at this most difficult of all challenges in the late twentieth century, the drawing of economic-zone boundaries. That's the boundary, of course, which starts at the surface, goes right down through the water column to the seabed and the subsoil thereunder. Assume for a moment that an economic zone boundary line would have to be a single boundary line if it's to be consistent with the logic of UNCLOS III as to the nature of an economic zone. If

this is the most difficult kind of boundary of all to draw in the ocean, we have to assume that many neighboring states will fail to resolve this kind of issue in the next twenty years. Too contentious, especially if they adopt what I call "functional logic," managerial logic, especially if they avoid the simplicities of common sense. But you might say there is a case for common sense and simplicity even in -- or perhaps especially in -- the case of an economic-zone boundary. "Look", you might argue, "after all, the economic zone itself is outrageously arbitrary by any kind of managerial logic, so why be a purist when it comes to drawing the boundary lying between two neighboring economic zones? You accept the same degree of arbitrariness that is inherent in the economic zone itself and accept it cheerfully when it comes to boundary making."

But one nation's arbitrariness may not be the same as the other nation's arbitrariness, and it doesn't solve the problem to use common sense. So I would assume, then, that regardless of which school prevails in the drawing of economic-zone boundaries around the world, many of these issues will remain unresolved for a long period of time.

The final question -- and I'd like to reflect upon it -- is how serious this would be. I would think that we should try to perceive a range of possibilities open to diplomats called upon to negotiate economic-zone boundaries. We should try to perceive is a continuum of diplomatic objectives that range from the two extremes. One extreme is nothing, total non-agreement between two neighboring states on their economic-zone boundary, anarchy if you like. The other is the successful negotiation of an economic-zone boundary.

Is it all or nothing? My suggestion is no, that there are many intermediate possibilities that serve some, at least, of the purposes that a boundary ought to serve, and that something is better than nothing. It's not all or nothing. So what are these intermediate diplomatic objectives in the most difficult economic-zone boundary-making situations? Let me suggest eight. Let us go quickly through the continuum, beginning with the most modest -- so modest in fact that it is just scarcely worthwhile, but still arguably better than nothing.

The number one position would be an agreement to disagree. It could be argued that an agreement to disagree on where your economic-zone boundary is, is better than nothing. An agreement to disagree would presumably be formulated in a joint communique, informal document, but be highly public and therefore would serve the purposes of publicity. It would at least -- probably not more than this -- but it would at least acknowledge the existence of the dispute and by implication concede publicly that each is entitled to a degree of sensitivity in the area -- better than nothing.

Second, moving up the continuum, still a modest intermediate objective would be an agreement on the definition of the area that is in dispute. Nothing more than that. Just an agreement by the two parties who are unable to resolve the boundary dispute but can at least agree on the exact longitude and latitude, as it were, of the area that is in contention. Now this is one step, perhaps *only* one step, better than the first agreement to disagree. This second type of agreement either implicitly or even explicitly would put the world, not just each other, on notice that there is an area that is extremely sensitive, that is precisely delineated, and this represents, if you like it best, an area for future negotiations when conditions become more favorable. It could be construed as an exactly defined area where there is a

promise not to be unduly provocative on the part of either of the two neighboring states.

Third, moving further up the continuum, another intermediate diplomatic objective would be an agreement on some limited degree of cooperation or consultation in the defined area of dispute. For example, it may be simply an agreement that each has an obligation to notify the other when some initiative is being considered by one of the states in the defined area in dispute. Or it might be something simple like an exchange of scientific research data taken from the area in dispute. It might even be some kind of agreement on a joint scientific venture, a joint expedition by the two neighboring states in the area in dispute, proceeding on the common perception that there is a mutual benefit in carrying out more scientific research in that area and that it should not be deterred or postponed unduly simply because they are unable to agree on a boundary running through that area in dispute.

Fourth, moving further up the continuum would be an agreement of rather more ambitious kind on certain questions of access for specific purposes in the defined area in dispute. There are many such examples now, several at least, in the world. The one I am most familiar with is the recent effort by the United States and Canada in the Gulf of Maine to set out fishing rights of access in the disputed area and in adjacent waters pending an agreement or an adjudication on the placement of the boundary line. This was negotiated after much effort. Unfortunately it has to be related to East Asia that that agreement on fishing access has not been ratified by the parties and has failed to be implemented. But if it had been ratified, it would have been a good example of this fourth kind of agreement halfway up my continuum.

Fifth, a little more ambitious would be an agreement on joint activities looking to joint prospecting for the mineral resources in the area in dispute.

Sixth, a little more ambitious still would be an agreement on a joint venture for production purposes in the area in dispute.

Now I've dealt with six out of eight of the intermediate objectives. If I can pause just for a second, we are now at the point where we've begun to suspect, I think, that drawing a boundary is not necessarily the first thing to do. We've now reached the point in the continuum where we might recognize that it is in the national interest of the two neighboring states to have a joint development program with respect to the resources in the area in dispute, and that proceeding on that joint-development basis is actually more important than having a boundary in the area in dispute. So the question of priorities should now be salient in our minds, I would have thought, once we've reached Stage 6 in the continuum. But I've got two more that I think would make this point more forcibly.

Seventh on the continuum would be an agreement on a full-scale joint management system for the area in dispute and possibly for adjacent waters on both sides that are not in dispute. An agreement of this kind would have provisions on how to assign responsibilities to each of the two parties, but it might not go to the end of the line in being spatially explicit about the extent of some of these management functions that have been assigned to agencies belonging to the two parties.

The eighth and last intermediate diplomatic objective would be an agreement on a full-scale joint-management system for the area in dispute and adjacent waters including, however, provisions for the assignment of responsibilities between the agencies of the two neighboring states with designated administrative boundary lines set up

within the overall area of the agreement. This is my last example, but of course it is extremely ambitious. It is perhaps so desirable in some parts of the world that it is far more important to have agreement on number eight than to simply have an agreement on the boundary.

Still, from a purely boundary-delimitation point of view, this would be intermediate, because the administrative boundary lines drawn within the co-management region would be administrative, temporary, not final, not legally binding in some formal sense, and to that extent at least would have a subordinate and even subsidiary character. To that extent only, perhaps, would this aspect number eight agreement be an interim and intermediate objective from the point of view of boundary delimitation.

Choon-ho Park: The two commentators have mentioned some excellent things indeed. Mr. Suda mentioned the possibility of dual boundaries in the same zone in the East China Sea. Coincidentally, Professor Bowett, in his book on the regime of islands, mentioned the desirability of having a dual boundary in the same zone. Practically, it is not convenient, but in the context of the Draft Convention, this is really conceivable. I agree with him and appreciate the point he made. I also appreciate Professor Johnston's itemization of the different possibilities. These two comments have been enlightening indeed.

My next point is not a comment as such. I recall that the late Robert Hodgson, the former Geographer of the U.S. State Department, at the Thirteenth Annual Conference of the Law of the Sea Institute in Mexico, made a very interesting observation with respect to the nature of equidistance principle and equitable principle. As Mr. Suda mentioned, this is one of the few outstanding issues at the U.N. Conference. Hodgson mentioned, and I agree with him wholeheartedly, that equidistance is a process of achieving an equitable purpose. We have observed the futile efforts being made in the Conference to integrate into one identity concepts that are not necessarily compatible.

John Craven: I would like to add a point to the excellent set of suggestions made by Professor Johnston. Too often we who are involved with the legal aspects of the law of the sea fail to recognize a fundamental physical aspect of the ocean. The ocean is very unlike the land in that things characteristically move on the ocean. We had no problem finding the conference room this morning because this hotel, not being a ship, stayed in position. Had this hotel been the same size and been a ship that was anchored out in the water, we would have expected to see that it had moved. We discover that a basic characteristic of things in the ocean is that they migrate.

We face the reality that unlike the land, most meaningful functions have moving boundaries. Therefore we would be wise to find intermediate diplomatic approaches that would result in the management and utilization of these resources while leaving the boundaries somewhat undefined. In that regard Douglas Johnston has made one of the most significant statements in this area that has been made in quite some time.

Myron Nordquist: Professor Park referred to Dr. Hodgson, who had a maxim that if you want to find out where the oil is, simply look to where all the conflicting claims exist, and there's the oil.

Yozo Yokota: I would like to draw your attention to another area that will be important in the future, the maritime boundary between the economic zone or continental shelf and the seabed area. As you know, the current Convention on the Law of the Sea contemplates the establishment of the International Sea-bed Authority to control, administer, and regulate the activities in the deep seabed area. The interesting question is how to draw the line between the area to be controlled by the Authority and the area to be controlled by the coastal state. According to the current wording of the Convention, particularly Article 76, I recall, the coastal states have the final power to draw the outer limit of the continental shelf unilaterally if there is no other coastal state claiming a continental shelf for that area. I feel that there ought to be some way to regulate such unilateral establishment of the boundary. I am aware that there are certain rules and standards to be established by the Convention which would be applied to the establishment of the outer edge of the continental shelf, but as you all know, these standards and criteria are quite vague, and it may extend beyond what common sense tells us. I would like to get some comments or opinions from the speakers or from any person.

Paul C. Yuan: The following are my personal views and represent by no means the views of the People's Republic of China.

Delimitation of Shelf Boundaries: The Chinese working paper declares:

States adjacent or opposite to each other, the continental shelves of which connect together, shall jointly determine the delimitation of the limits of jurisdiction of the continental shelves through consultations on an equal footing.¹

It goes on to say:

States adjacent or opposite to each other, the continental shelves of which connect together, shall, on the basis of safeguarding and respecting the sovereignty of each other, conduct necessary consultations to work out reasonable solutions for the exploitation, regulation and other matters relating to the natural resources in their contiguous parts of the continental shelves.²

This is similar to the Geneva Convention which likewise calls on states to settle their boundary problems by negotiation but in addition provides that the rule of equidistance will prevail failing agreement or in the case of special circumstances.³ Considering the general attitude taken by the Chinese government on the question of the continental shelf, it can be safely inferred that the natural prolongation principle of the *North Sea Continental Shelf* cases will be China's primary consideration in whatever agreement might be reached concerning a limit to the continental shelf. The Chinese favor the natural prolongation theory propounded by the International Court of Justice in the *North Sea* cases so much that Chinese legal scholars are suggesting inclusion of the following clause in the Convention on the Continental Shelf with respect to the shelf delimitation:

The delimitation of the continental shelf between states with opposite or adjacent coasts should be effected through agreement under

the guiding principle of natural prolongation and in accordance with equitable principles, taking into account all relevant circumstances.⁴

They go on to suggest including a compromise clause in addition to the above:

A joint management or development regime might be established in the disputed area of the continental shelf between the parties concerned as a *modus vivendi* pending agreement on delimitation, or as a substitute for the delimitation of the said area.⁵

It is quite evident that the Chinese are attempting to make the natural prolongation theory, which essentially rests upon a geomorphological and geological basis, a rule of international law binding upon all states.

China has sea boundary problems with her coastal neighbors. The delimitation of the shelf between China and Korea is less complicated than that between China and Japan because China and Korea share the same geographical shelf in the Yellow Sea, and the islands of both states are situated quite close to their mainlands. The issue of delimitation between China and Japan is much more complex because it involves the question of baselines and of the status to be given to offshore islands, especially Tiao-yu-tai Islands (Senkaku Gunto). And there is also the problem of the Okinawa Trough. The complicated geography of the area makes it extremely difficult to find a method of delimitation which would be acceptable to all parties concerned. In the South China Sea the question is further complicated by a territorial dispute with Vietnam over the Paracel Islands and with Vietnam and the Philippines over the Spratly Islands. I am not going to elaborate on the boundary problems China has with her neighboring countries, as this would go beyond the scope of the present meeting. Suffice it to say that China would, for the present, limit its exploitation activities to the shallow regions in the offshore areas of its immediate vicinity. In certain disputed areas, a joint development plan might be conceived. The reasons are quite simple. China would not run into trouble with her neighboring countries or engage in long drawn out disputes over territorial sovereignty at the expense of delaying oil development and production off her shores unless she were compelled to. After all, many international and domestic factors are pressuring China to take a more realistic and moderate policy on many vital questions relating to her economy and international relations. In the case of the disputed islands of Tiao-yu-tai, Japan is considering joint oil development with China in the area outside the territorial waters of the Tiao-yu-tai Islands,⁶ thus putting aside the snarled issue of the ownership of the islands for the foreseeable future.

NOTES

1. Working paper submitted to the Second Subcommittee of the United Nations Seabed Committee in 1973. U.N. Doc. A/AC.138/SC II/L.34(1973).

2. Id.

3. 1958 Convention on the Continental Shelf, Art. 6 (1) and (2).

4. Shao Jin, "Decisions of the International Court of Justice on the North Sea Continental Shelf Cases and the Principle of Continental Shelf Delimitation," *Beijindaxue Xuebao (Peking University Journal)* 2(1980):36. The English translation is my own.

5. Id.

6. *Can-Kao Xiao-Xi (Reference News)*, 14 July 1979. *Reference News* is a tabloid publications published in Peking for internal circulation in China and covering reports published in the foreign press around the world.

Choung Il Chee: You and Dr. Johnston have raised the issue of a joint arrangement. There should be an allowance for a preliminary-to-a-preliminary agreement that would show the willingness of parties concerned to negotiate initial stages. I think that consideration is crucial as far as conflict avoidance is concerned. With that remark I would like to close the session.

POLLUTION CONTROL IN THE
SEMI-ENCLOSED SEAS OF EAST ASIA

POLLUTION CONTROL IN THE SEMI-ENCLOSED SEAS OF EAST ASIA

Tai-Joon Kwon: We have for this session two professors from Canada to present their papers on pollution control in the semi-enclosed seas of East Asia. Professor Edgar Gold is the executive director and principal investigator of the Dalhousie Ocean Studies Programme, Halifax, Canada. Professor Douglas Johnston also works within that program and is a member of the Faculty of Law at that university. The other four gentlemen on our panel are Professor Julian Gresser of University of Hawaii Law School, Professor Myong-Joon Roe from Hankuk University of Foreign Studies, Dr. Charn-Kiu Kim from Kyung Hee University, and Dr. Kwang Woo Lee from Korea Ocean Research and Development Institute.

POLLUTION CONTROL IN THE SEMI-ENCLOSED SEAS OF EAST ASIA

Professors Edgar Gold and Douglas Johnston
Dalhousie Ocean Studies Programme
Dalhousie University

Douglas Johnston: Professor Gold and I will attempt a joint venture by alternating back and forth in our joint presentation.

My theme is this: In identifying the factors that advance the cause of marine pollution control, it is useful to refer to coalitions on one hand and forums on the other. The hypothesis is that marine-pollution control is developed through successful efforts to establish coalitions in the appropriate forums at appropriate times.

Marine-pollution control has had a peculiar history over the last ten years. It belongs to two rather different fields: international environmental law and the law of the sea. These are not the same circuits. Diplomats in these two fields sometimes overlap, but generally speaking they are different. Leader states come from different geographical areas. Some of the peculiarity in marine-pollution control comes from the fact that we are at the point of convergence between these two different fields of diplomatic activity. Each of the two has had its own distinctive evolution, and a blending of the two has not been easy.

International environmental law is a relatively recent development in international law and diplomacy and the direction it is likely to take is still fairly tentative.

International environmental law originated in the late nineteenth century in a few bilateral and multilateral treaty arrangements designed to meet limited conservation objectives in three distinct areas.

The first was the effort to establish treaty arrangements for the protection of birds and endangered mammals in East Africa.

The second, beginning in the twentieth century, was fishery conservation.

The third was the arrangements by the agricultural section of public health in the twentieth century to control pests and prevent plant disease.

In addition, general maxims of international law of rather undefinable scope and of uncertain applicability to environmental protection were evolving, principles like *sic utere* and neighborliness, and so forth, the sorts of things that are very difficult to pin down, subject only to very slow and secular processes.

Today, of course, international environmental law is growing very rapidly. It is evidenced by a rapidly increasing volume of treaty arrangements, most of them regional rather than global in dimension. Also, a significant volume of what we might call soft-law pronouncements has been growing. These soft-law pronouncements -- not appearing in the form of formal, legally binding treaties but in other kinds of documents, declarations, resolutions, charters, and so on -- have divided international lawyers as to the precise juridical significance to be attached to them. The most famous example of a soft-law announcement on international environmental law was the famous Stockholm Declaration on the Human Environment which was enunciated and accepted by the United Nations General Assembly nine years ago.

In summary, international environmental law is in an early stage, one might even say a theoretical stage, of legal development, a stage

where we see efforts to establish novel, even creative hypotheses, but a stage in which it is still too early to see any concerted global effort to institutionalize it in a permanent and specific form. We are in a somewhat amorphous area with international law.

Marine-pollution control also belongs to the law of the sea, which has a very different history, a very long and ancient history. The principles of the law of the sea until modern times were customary in character, but now, as we all know, the law the sea is undergoing an unprecedented transformation under the treaty-making process at the global level, subject to an unprecedented assortment of stresses and strains in the gladiatorial arena of conference diplomacy.

Where are we going with marine-pollution control, given that it belongs to both of these different fields?

We have to consider the factors that are operating to create coalitions. We can identify four kinds of human influences that have been at work in the development of marine-pollution control. Two of these four influences are idealistic in character, and the other two are very definitely pragmatic. To anticipate the probable successful coalitions in the next ten or twenty years, we would have to take into account to what extent these two idealistic and two pragmatic influences can be merged.

First has been the influence of the naturalist, as he was called in the nineteenth century, or the ecologist, as he'd more likely be called today. The old-fashioned naturalist was extraordinarily successful in influencing elites and social leaderships, establishments, outside the political system; that his influence was exerted outside the political system may account for his success. He maintained very low visibility, he attracted very little criticism from organized political pressure groups and political parties. This is still how he tends to operate and still accounts for his surprising success. The classic exponent of political influence for this idealistic naturalist-ecologist purpose was Julian Huxley, the famous biologist, who after the conclusion of the Second World War became the first director-general of UNESCO and, not least, the founder of the International Union for the Conservation of Nature and Natural Resources (IUCN), which is, of course, the worldwide system of scientific influence in the field of conservation. People like Huxley literally knew every prominent biologist in the world personally. By picking up a telephone he could speak to any biologist on the globe and, for that matter, most of the other outstanding scientists in the world. Through scientific elitism it was possible to exert surprising influence in conservation areas that by any normal political test would have a very low priority in the scale of things, if it had to be fashioned through political systems. So the old-fashioned naturalist went around political systems and accomplished a great deal.

The modern ecologist is a different animal from the old-fashioned naturalist. He thinks in a different way about the problems, but the problems are the same that the old-fashioned naturalist was interested in. His methods tend to be rather different, however, from those of the naturalist. He is more direct in his approach. He normally works within and not outside political systems and, generally speaking, he is more confrontational in approach. The ecologist has simply become another type of pressure group to be weighed on the scales by the professional politician against all the other pressure groups that address themselves to the political system. Despite the differences of method, both the naturalist and the ecologist share strong faith in the value of

nature. Their concern is with the preservation of nature and natural resources, with the maintenance of ecological unity and balance, preservation of diversity of species, and the special protection of rare, endangered species. They are altruistic, which makes them unusual political agents, even touched with an ability that normal political analysis cannot come to terms with very easily. That's number one type of idealist.

Number two is the internationalist. The internationalist comes in many shapes and sizes. In the first half of the twentieth century the internationalist was likely to be a globalist with a political ideal for the entire world community that required the use of global agencies and global forums. In all his different forms, the internationalist has a deep-rooted suspicion, even abhorrence, of excessive nationalism. He may not say so openly, but he has a distaste for sovereignty, or at least for an excessive dependency on sovereignty, which he is likely to see as a display of selfishness under an emotive guise that is likely to appeal to the general electorate. He is a committed person, by and large, not like the first type of idealist, and has a missionary approach to such matters as marine-pollution control. His concern is with human behavior and essentially he is interested in reducing the risks of conflict in the world and promoting the cause of cooperation. I would say that today most internationalists, idealists, are more likely to put their stock in regionalism rather than globalism. The call for regional cooperation is partly idealistic in character, though there is also a pragmatic side to it as well. So that's the second type of idealist that we need in order to advance most forms of marine-pollution control.

Third is a type of pragmatist that I would call a resource conservationist. A resource conservationist is concerned with adjusting arrangements to reduce the depletion of natural resources. His concern with depletion of natural resources begins not with the need for defending nature as in the case of the naturalist-ecologist, nor with the need to reduce conflict and promote cooperation like the internationalist, but rather with the need to use intelligence in the use and management of a scarce but renewable commodity. The precise intellectual approach he takes depends to some extent on the discipline in which he is trained. That's worth emphasizing because he tends to be a man of discipline. He tends to be scientific in the way he looks at the world. He's likely to be a biologist, or an economist; more recently he might be a sociologist. Whatever he is, however he is trained, his disposition, his motivation is much the same as his fellow conservationist. His concern is with promoting efficiency, an order of economic rationality. That's the third kind of person we need in order to advance marine-pollution control.

The fourth type of person is what I would call a safety technologist. His concern is with the reduction of hazard in international affairs. He responds very quickly to the need to make adjustments, usually institutional, sometimes technological, to exploit popular fear. It is easy to see historically that this popular fear began after 1945 in reaction to the nuclear hazard and grew in the late 1950s after Rachel Carson wrote about the misuse of chemicals. That triggering of a second round of fears and alarms, very slow admittedly in the case of chemical hazards, made it socially and politically possible for technologists to go to work within bureaucratic systems. Then oil spills attracted a lot of public attention and fears, perhaps unrealistically heightened fears but fears nonetheless, that facilitated efforts by the

safety technologist to plant the seeds of ideas in bureaucratic circles that would result eventually in international measures. This person whom I call a safety technologist may not actually be trained as an engineer or indeed as a technologist in the narrow sense, but he has learned to think like an engineer, since his focus is on prevention and control.

All four of these types of people would agree, albeit for different reasons, on the need for regulating the uses of the ocean. All have to contend with emotional and ideological resistance as well as pragmatic obstacles like cost, in their efforts to increase regulation over the use of the ocean. Sometimes they may even have to contend with cultural indifference; the buccaneering tradition of Europeans, of course, had a great deal to do with the dominance of the freedom of the high seas for hundreds of years.

Last, we come to alternative forums. It is enough to mention the three most important forums for marine-pollution control purposes. First, the 1972 Stockholm Conference on the Human Environment was a worldwide forum open to the widest possible variety of influences, particularly both kinds of idealists that I mentioned. Both the naturalist-ecologist idealist and the internationalist-idealist were influential behind the scenes in preparing the way for the Stockholm Conference on the Human Environment. The framework for global action devised at the Stockholm Conference is nothing if not the product of the best kind of idealism. To a much lesser extent did the two kinds of pragmatists that I mentioned play a major role at the Stockholm Conference. This is worth thinking about in looking at the future of marine-pollution control after UNCLOS III because, as you know, next year, 1982, marks the tenth anniversary of the Stockholm Conference, and the United Nations Environment Program in Nairobi has planned a ten-year review of it.

One of the items likely to be put on the agenda for that ten-year review is marine-pollution control, though I am not sure how much emphasis UNEP will give to it.

Land-based sources of marine pollution will probably get the most attention. This means that the ten-year review will take place in a forum somewhat similar to the original Stockholm Conference and therefore be opened up again to the influences of the naturalist-ecologist and the internationalist. But in Stockholm nine years ago globalist idealism tended to be prevalent, whereas one suspects that in 1982 these same idealists will be talking about regional cooperation and will give much attention to UNEP's regional-seas program.

The second forum, which Edgar Gold is much better qualified to discuss than I, is IMCO. IMCO is a different kind of forum from Stockholm. It is concerned with operational matters and lends itself to the skills of the pragmatists, the safety technologists in particular in the area of ship-generated pollution, but only ship-generated. The site of marine pollution can be dealt with directly within the IMCO forum.

Third and last is UNCLOS III, the most difficult of all to characterize because it has covered so many different things. It is rather difficult to say what coalitions have been salient in developing the marine-pollution control provisions being negotiated in UNCLOS III. I am inclined to say that the pragmatists have been more prominent than the idealists within the forum of UNCLOS III. The prevailing view seems to have been that to advance marine-pollution control in UNCLOS III, you were trying to get away from the visionary and the idealistic perceptions of the Stockholm Conference and get down to more specific

details. The idealists have tended to move to the side, and the pragmatists have come up with some useful and interesting provisions that fully involve manipulation of existing institutional arrangements. The UNCLOS III approach is eclectic and, as you know, it had to distinguish priorities in marine-pollution control. The highest priority was given, properly, to ship-generated pollution, not because it is the most serious source of marine pollution but because it was most likely to be dealt with in a forum like UNCLOS III at that time.

How would we evaluate the present state of affairs in marine-pollution control? It depends on which of the four kinds of people you identify with. If you identify with the first type of idealist, the naturalist-ecologist, UNCLOS III is an unmitigated disaster. It shows almost no ecological knowledge and awareness. It could not have been ecologically rational; it was too big and had to be broken down for organizational reasons, given the logistics of the operation. It is not surprising that it happened that way, nor is it surprising that most naturalists and ecologists are extremely unhappy with the treatment of marine-pollution control in the Draft Convention on the Law of the Sea.

The second type of idealist, the internationalist, is equivocal about the state of marine-pollution control in UNCLOS III. He is distressed to see 200-mile economic zones, and he doesn't know how much trust to vest in the responsibility of the coastal state to adopt rational measures within 200-mile zones for the preservation of the marine environment. He doesn't know how much hope to invest in the relationship between the coastal state on one hand and IMCO, for example, on the other, under certain provisions of the Draft Convention. He is not sure what to think. But on the whole he is not happy with UNCLOS III from a marine-pollution control point of view.

The last two will be a little more positive in their accounts, but one of them, the resource conservationist, is also equivocal, like the internationalist, because he tends to look at the impact of marine pollution on the productivity of resources, and he is not at all sure whether UNCLOS III has significantly improved the capability of coastal states to reduce marine pollution as a threat to resources, nor is he sure he likes the UNCLOS III language that has to do with fishery conservation.

Only the last of the four, the safety technologist, would probably say that UNCLOS III has done well in marine-pollution control. His type of person was influential in the Third Committee and did most of the work on institutional adjustments. It is a mixed verdict, but not perhaps optimistic.

I will now turn the podium over to Professor Gold.

Edgar Gold: My task now is simply to zero in on our region of interest and to describe semi-enclosed seas as related to marine pollution, with special emphasis on the uses of the seas which, after all, result in the pressures which cause pollution. Then Douglas Johnston will continue on national and regional responses of pollution control. He will speak about the diplomatic and legislative responses and then allow me the last word on what we have termed administrative responses. We have chosen to concentrate on four semi-enclosed seas of the region. These are the East China/Yellow Seas, the Sea of Japan, the South China Sea, and the Sea of Okhotsk.

In terms of marine pollution the following general facts have to be borne in mind. First, the littoral and adjoining areas have the heaviest population concentration in the world. Second, these areas

have one of the heaviest concentrations of industry in the coastal zone in the world, particularly in Japan, Korea, and the People's Republic of China. Third, here is a heavy concentration of shipping routes of the world, second only to the eastern North Atlantic/Northern Europe area. Fourth, as Dr. Park has shown us, there is considerable potential for oil and gas in the offshore.

If we consider that some 90% of all marine pollution is derived from land and the other 10% from ships, it should be quite clear that we have in this region a considerable base for marine pollution. Large coastal areas, particularly off Japan, are already heavily polluted. It can be foreseen that further serious problems will continue unless fairly concerted action is taken.

In this respect marine pollution endangers three crucial ocean uses in the region. First of all, as Professor Miles already has indicated, there is one of the most concentrated and important fisheries in the world -- for many of the coastal communities in the region often the only protein supply. In the four seas at present conservative estimates speak of seven to eight million tons of fish. Others estimate ten million tons, so it's between seven and eight million tons per annum with the potential of between fourteen and twenty million tons per annum -- it's a very large fishery.

Second, considering the close proximity to the sea of a large percentage of the region's population, serious pollution off the coastal zones' seaward areas would cause considerable difficulties to the heavy sea use, in its widest meaning, of the population.

Third, the poor safety record of shipping in the region, which at the moment has the second-highest accident rate in the world, may inevitably lead to major large-tanker catastrophes which may suspend vessel traffic for short periods during wreck removal and cleanup operations. This would be a very serious problem, particularly if you consider the Japan and Korea lifeline.

I intend now to have a closer look at the four semi-enclosed seas to further illustrate the general points I have just made.

First of all, the East China/Yellow Seas encompass 362,000 square miles and have two important gulf subsidiaries: the Gulf of Pohai, which is also claimed by the People's Republic of China as historical waters, and the Gulf of Korea. There are four straits of crucial interest, the Van Dieman and Kolnut Straits, leading to Japan, the West Korea Tsushima Strait, and the Formosa Strait. The sea is 75% enclosed, and all 100% of its water area will fall within 200-mile economic zones. The littoral states are the People's Republic of China, Taiwan, Japan, the Republic of Korea, and North Korea. Fishing at present produces between two and two and a half million tons with a potential somewhat in excess of that. The main ports and coastal industrial cities are Nagasaki, Shanghai, Kitakyushu, Tsingtao, Inchon, Hangchow, and Sasebo -- a formidable array of industrial centers. In offshore activity certainly there have been serious oil surveys since the 1960s as Professor Park has already pointed out to us. The Japan National Oil Company is actively engaged in oil exploration. There is also activity by British Petroleum, ELF Aquitaine, etc. This is an extremely promising area for offshore oil development.

Second, the Sea of Japan covers 294,000 square miles, and its subsidiary water areas include Peter the Great Bay, claimed by the USSR with historic title. This sea is 94% enclosed, and again 100% of its waters will fall in exclusive economic zones. Its three important straits are Tsugaro Kaikyo, La Perouse Strait, and the West Korea

Tsushima Strait. Littoral states are Japan, Republic of Korea, North Korea, and the Soviet Union. Fishing produces between one and a half and two million tons per annum, with a potential somewhat in excess. Major ports and industrial centers are Pusan, Wonsan, Vladivostok, Nakhodka, Shimonoseki, Maizuru, and Niigata -- oil refineries, heavy steel, major industrial development. The offshore potentials are promising but not developed at this particular stage.

Next, the largest of the semi-enclosed seas, the South China Sea, has close to 700,000 square miles with subsidiary waters: The Gulf of Siam and the Gulf of Tonkin. It is 90% enclosed, and once again 100% of its waters will become exclusive economic zones. There are eight important straits including the Straits of Malacca and Singapore and the Strait of Hainan which is claimed by the People's Republic of China. Many littoral states: Malaysia, Thailand, Cambodia, Vietnam, People's Republic of China, Taiwan, Philippines, Indonesia, Singapore, Hong Kong, Brunei, Macao; and, in close proximity, the landlocked state, Laos. Fishing at present produces about two and a half million tons per annum. Again, major ports and industrial centers include Bangkok, Singapore, Hong Kong, Manila, Saigon -- the most important cities in that general area, huge population concentrations, large industrial bases. The Spratly and Paracel Islands pose a special sovereignty problem. There is vigorous commercial oil production off Malaysia and Borneo and various oil surveys off the People's Republic of China coast, and once again, positive potential.

Finally, and to a lesser extent, an area of interest is the Sea of Okhotsk. Of its area of 445,000 square miles, 92% is enclosed, 97% is economic zone waters, so 3% of the Sea of Okhotsk will remain high seas. Two important straits were already shown to us: the Kunashiri and the La Perouse Straits. Fishing: not too much, between one and two million tons, unknown potential. One very large Soviet industrial port, Magadan.

In conclusion, the region comprising these four semi-enclosed seas faces the potential of large-scale deterioration unless great care is taken. Alleviation of this threat is a regional as well as a national concern. It has to be remembered that due to the special tidal and current activity within semi-enclosed seas, the self-cleansing action of the waters may not be as pronounced as it is in open seas. On the other hand, it may be better. Oceanographic research in the region is so far quite inadequate. However, the commonality of the problem of marine pollution, the byproduct of industrial civilization, is perhaps -- if I put it in positive terms -- one of the few uniting factors in a politically diverse region. The technical and scientific aspects of pollution control are too complex for political polemics. Furthermore, regardless of the political persuasion of the state, pollution will be perceived negatively. The political system will have to react. If national efforts cannot control, regional efforts will have to. Thus it can be said that something as negative as pollution may have some positive aspects if it opens regional avenues of cooperation which have hitherto been closed. But this really leads to the types of diplomatic and legislative responses which Douglas Johnston will now refer to.

Douglas Johnston: I would like to suggest a number of diplomatic and legislative initiatives that one might now wish for in any region of the world, but especially in a region such as Southeast Asia featured by a number of semi-enclosed seas. I will pick out only three of each, since time is short.

First of all, not very ambitious but important would be diplomatic regional initiatives to promote bilateral joint contingency plans for dealing with marine pollution emergencies in the region. These indeed are called for in Article 199 of the Draft Convention on the Law of the Sea. Some initiatives of this kind have already been taken around the world, but a great deal more should be undertaken. There is no particular reason why they shouldn't be because, as Professor Gold said, they need not be bogged down indefinitely by political differences between neighboring states. That would be my first call: bilateral joint contingency planning.

My second suggestion is to respond to the call in Article 207 (4) of the Draft Convention for regional studies as a first step toward effective regional response to the problems of land-based pollution. Particularly in semi-enclosed seas this would be beneficial.

My third and last diplomatic suggestion would be the establishment of some kind of regional or sub-regional research center, as called for in Article 276 of the Draft Convention. UNCLOS III's approach to this proposal put special weight on the need for the transfer and development of technology for the benefit of developing states, but one could expand the scope of such a regional center or sub-regional center to include scientific research for other purposes as well as transfer of technology. I would think that East Asia is well equipped to set up one or probably a number of sub-regional centers. In fact, it might be best to think of four different sub-regional centers -- one for each of the four semi-enclosed seas, so that each can deal more specifically with the local conditions and local problems and capabilities in each sub-area.

Those are just three possible regional diplomatic initiatives that we might think about in the aftermath of UNCLOS III. Finally, I could suggest three types of legislative initiatives to consider.

Most coastal states do not yet have a national ocean management plan or program. Perhaps it is possible to exaggerate the virtues of having a systematic plan. Perhaps in most cases it is difficult for a coastal state to think about marine pollution control unless it can do so within the context of a national ocean management plan where priorities, agencies, and capabilities are identified. Most coastal states in East Asia would benefit greatly in the 1980s by going to work on a comprehensive, systematic, national ocean management plan.

The second suggestion is development of a coastal zone management plan. This would take cognizance of all the land-based activities on the shoreline and the impact of these activities on the coastal waters and vice versa. Which of these two is more important? It may be too difficult to do both management plans at the same time. It would depend very much on the geographical configuration of a given state. Some countries in East Asia ought to begin with coastal zone management plans, but it might be wiser for those with oceanic reach to have a national ocean management plan first. Either way, this exercise would present an opportunity to think through carefully the possible ways to deal more effectively with marine pollution control in general, and land-based marine-pollution control in particular.

Third and last, we are likely to see a growing number of coastal states responding to the call of Article 211(6) in the Draft Convention on the Law of the Sea, and making the effort to establish specially protected areas within their economic zones that might gain the approval of IMCO. I know that the language in 211(6) is a little ambiguous. The precise relationship between the coastal state wishing

to establish special areas and IMCO is a difficult question to resolve globally. We will watch with enormous interest in the 1980s to see what kind of relationship does in fact evolve.

Edgar Gold: On the administrative side, apart from national and regional approaches to deal with effluent controls to prevent land-source marine pollution, which as Douglas Johnston has indicated will be the main task of the region states, UNEP's regional seas program will as always concentrate on protection of the marine environment by preventing ship-generated marine pollution. In order to do this properly -- and it's not being done properly at the moment -- there are three main areas of concentration.

First of all, the route of international conventions. There are under IMCO several marine pollution conventions which require implementation via ratification in the region. IMCO is now a full-fledged specialized agency of the United Nations with a politicized membership of 120 states. Its task will be more difficult in the future. Its work in the past has been good. Only the 1954 oil pollution convention, though not its 1969 and 1972 protocols, has been accepted by some of the states in the region. The very important 1973 MARPOL Convention has not yet been accepted at all. The 1973 convention is the first one which also deals with substances other than oil. A very small tanker loaded with liquified chlorine gas is probably environmentally much more hazardous than 250,000 tons of crude oil when dumped into the marine environment, yet at the moment the safeguards which we do have in the region relate only to oil. The so-called IMCO private law conventions relating to the crucial aspect of civil liability and compensation for ship-source pollution have also not been accepted by most states in the region. This is the cash register which pays for damage, and I really see no reason why states should not avail themselves to access to that cash register. There are absolutely no reasons not to.

Second, the question of ship safety. There must be national recognition and enforcement in the region of at least the minimum ship safety standards laid down by IMCO, also required by the Draft Convention. There are far too many elderly, sub-standard vessels in the region. The unacceptable side of the very worst flag-of-convenience shipping is today based in Singapore and Hong Kong. In addition, there must also be a tightening of professional standards of those who sail ships in the region. These vary from the very worst to the very best in the world. As 90% of all marine accidents are caused by human error, this must not be overlooked.

Third, traffic control. Considering the intensity of marine traffic, the crisscrossing of such traffic, and the concentration of shipping in the many narrow straits, the region is ideally suited to experiment with marine traffic control systems. They already have a proven record of reducing marine accidents in the English Channel by 45% since 1978. As I have already said, the region has the second highest marine accident rate in the world. A similar reduction is surely indicated here.

It is easy to establish shipping traffic zones in congested areas, particularly if the distances are not too great, as in many straits in this region. States would have a choice to establish first, simple traffic separation zones as required under the 1972 Marine Collision Regulations; second, traffic advisory zones requiring reporting to an advisory center; third, traffic control zones dealing with a specific congested area such as contemplated for the Singapore-Malacca area,

which is about to go into effect shortly; and fourth, full control zones similar to air traffic control, as is already in use in approaches to some of the Japanese ports. This procedure can also be used for coastal security, fishery control, and surveillance. Although initially coastal states will have to pay to set up the system, it is certain that a user-pay system will evolve once users realize the benefits of such systems.

In conclusion, then, the four semi-enclosed seas in the region face a continuing marine-pollution threat both from their littoral areas and from the heavy uses of the water itself. Pollution prevention will by necessity require national as well as regional responses combined with those international efforts which IMCO and UNEP are increasingly urging. The preservation of the marine environment is obviously worth every effort which can be brought to bear.

DISCUSSION

Julian Gresser: I am very pessimistic that any serious national or regional effort will be made to control marine pollution in the semi-enclosed seas. The balance in favor of development is far greater than that in favor of protection, and the competition between the other uses, exclusive of resource protection or food, seems to predominate. Moreover, there is very little constituency within the respective governments, including the United States. Even among the constituencies outside of government, which in countries in the region have been very active, there is very little developed interest in marine protection. Finally, even at a conceptual level, if one were to think of these enclosed seas as lakes, it is difficult to discern exactly what balance of competing uses should be struck. This problem is compounded when we think of it in an international context.

With that caveat, my second point is that there are certain trends, mainly at the national levels of each of the countries involved. There is a significant expression of interest manifested in domestic legislation for environmental protection. Of course, the United States and Japan have been active over many years in environmental protection, but Korea in 1977 and a few years before enacted new legislation, set up a new office of environmental protection. There is increasing interest in this country. Last summer I was impressed with the new developments in environmental law in China, particularly the emphasis on resource recovery and its application throughout environmental policy.

The third point is that I would agree with both Professors Gold and Johnston that at the international level, it's clear that nobody has formulated a contingency plan. That seems a very sensible, obvious first step because we already have a high accident rate here. It's only a matter of time before we have a major crisis like the *Torrey Canyon*. The lessons in all other parts of the world suggest that it is better to anticipate the crisis rather than accuse each other when a crisis is at the doorstep.

A major oil spill has particularly acute and sad distributive consequences. The fishermen in many parts of the world, exclusive of Japan, are the poorer elements of society and will be most directly and grievously affected; and there is no mechanism for compensation for any of these losses developed by any of the national countries involved.

At the national level there are building blocks within the respective national laws which one could use. Each of these countries, including China, the Republic of Korea, United States, and Japan, has a framework for environmental impact assessment. That in various ways has been applied to technology assessment. But technology is moving so swiftly that the legal and regulatory institutions can't keep up.

Finally, the idea of compensation is well established, and that can be used to develop basic regional principles.

The final point is that, in terms of domestic institutions as well as existing bilateral international institutions, there is some cause for cautious hope. First, it's important to point out that many countries do not require new legislation in order to implement environmental protection. In Japan, environmental protection went on for about ten years before there was a formal basic law and even after its enactment, continued. Similarly with Korea and with China, environ-

mental protection proceeded before the recent enactment in China of the new environmental protection law.

Second, there is an existing bureaucracy at the national as well as at the international level, including UNEP. Also the World Bank, the UNDP and other international organizations have some fairly well developed environmental programs which they incorporate into lending and other activities.

The third point is that the 200-mile economic zone may turn out to be beneficial to environmental protection. These countries obviously have jurisdiction and could implement effective environmental regulations.

Finally we have existing precedents, both in terms of Article 21 of the Stockholm Conference and the body of experience developing from the Baltic Convention. On a regional basis countries have proceeded in other parts of the world in a fairly sensible way to protect the environment.

The final point I make is that although this is still inchoate, effective control of marine pollution will never proceed until the idea of environmental protection is wed much more carefully to the industrial policies of the respective countries of the region. Japan and China recognize this principle clearly. United States is quite far behind in recognizing that environmental protection indeed will serve industrial policy. Any student of the present administration's policies in the United States can well recognize that these are seen as necessary adversaries, whereas other parts of the world have, in my opinion, correctly seen that environmental protection actually can serve industrial development purposes.

Charn-Kiu Kim: To cope with marine pollution, one should keep in mind some oceanographic features of the sea. According to oceanographers, marine pollution, particularly land-generated pollution, cannot be easily dispersed, because of two factors. One is the so-called thermocline, the other is the current. At some depth of the sea, the temperature changes and falls rapidly. This zone of sharp temperature change, or thermocline, prevents pollutants in the upper layer of the water from mixing with those in deeper layers of water.

The current also acts as a barrier to the horizontal dispersal of pollutants in the sea. The surface current prevents any mass transfer across their flow paths. The Gulf Stream, for example, in flowing along the western edge of the Atlantic Ocean, tends to act as a barrier between the shelf waters west of the Gulf Stream and the Sargasso Sea.

Keeping those two factors, oceanic vertical and horizontal stratification, in mind, let us see the problem that exists in the semi-enclosed Yellow Sea.

Many rivers empty into the Yellow Sea. This may be a good thing because of the land-based pollution there. According to some estimates, Pohai Bay and the coastal areas of the Yellow Sea are the most industrially developed places in China. There are large industrial cities such as Tienchin and Qing-tao with hundreds of huge factories and three oilfields adjacent to those areas.

Next, exploration of the continental shelf is very actively undertaken among coastal states of the Yellow Sea, and even though there is no indication of oil production from the seabed of the Yellow Sea, we cannot exclude its possibility in the future. In the course of exploration and exploitation of hydrocarbons, there may be a high possibility of blowing oil out into the sea by accident. We have seen

examples in the North Sea and in the Santa Barbara Channel. Actually on 25 November 1979 the oil rig *Pohai No. 2* capsized off the coast of China in Pohai Bay when the platform was being towed during a gale from one drilling site to another point 117 nautical miles away. It was reported by the *Beijing Review*. Further, tankers cross the Yellow Sea from Pohai Bay to Japanese ports. We cannot exclude the possibility that some of them may pass through the Straits of Korea in order to save time and costs of transportation. If those tankers run aground on their way and create oil spills, the shores of coastal states would suffer disastrously. We have also seen many examples of this throughout the world; the contaminants can never easily be dispersed and diluted due to the oceanic vertical and horizontal stratification. So some cooperational scheme among its coastal states to preserve the marine environment in the Yellow Sea is required. Otherwise the coastal states will collapse together.

Myong-Joon Roe: As a student of international law, I am much enlightened by the paper presented by Professor Johnston and Professor Gold. Frankly speaking, I am not an expert on marine pollution, and I am not in a good position to make extensive comments on their paper. But I will express my feelings about the problem of marine pollution in general.

The traditional concepts of international customary law are not quite responsive to the needs of controlling marine pollution. Progress will undoubtedly be made through multilateral treaties, but the prospects are rather slim that multilateral and universal international organizations will promulgate detailed obligations and standards and enforce them effectively. I have a firm belief that the problem of controlling marine pollution can effectively be solved by mutual agreements between interested states in the same region. Regional organizations composed of states that have similar political, economic, and social standards would better be able to solve the common problem of controlling marine pollution than multilateral organizations such as IMCO and UNEP. In western Europe we have a number of success stories: NATO and OECD, for example, have done a great job in controlling marine pollution. I think there is no reason why this cannot be achieved elsewhere. As far as northeast Asia is concerned, I think the situation is quite different. In northeast Asia, Japan is the only highly industrialized country. She has accumulated tremendous wealth and can afford to promulgate various stringent measures to protect the marine environment and enforce these measures effectively. South Korea, however, is quite different. She is still developing economically and not in a position to spend huge amounts of money on pollution-control programs. It was only in 1977 that the Korean government enacted the marine pollution prevention act and the environmental protection act that led to the establishment of the environmental protection office last year. It is too early to assess the effectiveness of our program in combating pollution problems.

Let us now turn to North Korea, which is very hostile to us, and PRC, which is not friendly with us. I think these two nations are not likely to enter into cooperative arrangements with us. I see no possibility of creating regional institutions for controlling marine pollution in northeast Asia in the foreseeable future. I think in this respect I do not agree with Professor Johnston. I think his view is too idealistic. Sovereign nations are resistant to change through rational

and cooperative measures. Only self-restraint and mutual respect of sovereign nations can sustain the habitability of this planet.

Kwang Woo Lee: Drs. Johnston and Gold gave an excellent and extensive view on the issues and problems and approaches to the protection of the marine environment in this East Asian Sea. According to Dr. Johnston's categorizations, I must fall somewhere between naturalist-ecologist and internationalist. To me, UNCLOS III is definitely too vague. With this in mind, as an idealist I would like to make some comments. The realization of the importance of coastal waters in preserving marine resources is, I think, best illustrated by a 1978 published report of UNESCO which states that coastal waters consist of 10% of the total ocean area but provide 99% of the total fish production, including that from upwelling areas. Coastal waters and enclosed and semi-enclosed ones like the Yellow Sea, Sea of Japan, and East China Sea are known to be among the best spawning and breeding grounds, as we know, and I can say the importance of protecting these coastal waters' quality cannot be overemphasized in view of protection of the world marine biological resources.

I would like to see the establishment of international guidelines incorporated in the new UNCLOS III for stricter national regulations, especially for persistent and toxic pollutants such as heavy metals, chlorinated hydrocarbons, and radionuclides which are known to be bioaccumulated through food chains. Of course there is, as Dr. Gold explained, IMCO's 1973 convention for the prevention of pollution from ships, so-called the 1973 MARPOL. However, it deals mainly with pollution of oil and waste from vessels, and I think the new guidelines should include regulations for effluent standards and discharge from ocean outfalls and other land-based sources. International guidelines will not only encourage and facilitate but also force each state to establish appropriate national regulations for protection of the marine environment. Korea is revising its 1977 marine pollution control law so as to be in harmony with the newer IMCO 1973 MARPOL.

Second, I would like to see the Convention on the Law of the Sea include some provision for establishing a marine pollution fund, possibly to be called "marine environment protection fund" or "superfund" if you want a shorter name more easily brought to the attention of the media. The "superfund" can be shared equally and equitably, not unlike the environment fund which is shared mainly by developed countries. This new fund should be equally shared by developed and developing countries by charging some very little percentage of freight charge or fish catch or something of that sort. The fund can best be used for marine protection and pollution research and monitoring on a regional or global scale as well as for marine pollution control, technology transfer, and assistance from developed to developing countries.

Third, I would like to mention the need and significance of international cooperation, especially regional cooperation. In this east Asian region the Sea of Japan, the Yellow Sea, and the East China Sea handle most of the waste from one-third of the world population. Protection of water quality in a semi-enclosed area cannot be accomplished without regional international cooperation. I would like to see the Convention emphasize regional cooperation.

I might add that this kind of international cooperation can be the beginning and the shortest road to world peace among nations regardless of their differences in political system, race, religion, or ideology

-- these things will no longer be an issue. The only issue will be protection of the common heritage of mankind.

Bob Linotinan: There was no mention of the London Dumping Convention. I would appreciate any comment on its importance in the area of marine pollution and environmental protection.

Y. Miwa, *Japan Industrial Journal*: My high regards to Professor Gresser for his remarks on the role of the Japanese government efforts to set up preventive measures to protect coastal waters from pollution, but you forget the role of Japanese newspapers, which always made efforts to protect coastal waters from pollution. If you, on another occasion, mention the role of the Japanese people in protecting their coastal waters from pollution, please mention the role of newspapers.

Choon-ho Park: In the course of writing an article on the joint development agreement between Japan and Korea I had occasion to look into the marine pollution preventive laws of the two countries. To me they looked pretty much alike, but if someone on the panel or on the floor could identify the major differences, I am keenly interested.

Roy Lee: I appreciate the approach outlined by Professors Johnston and Gold, using ideas developed in Europe for this part of the world. Being an international civil servant, I'll be the last one to oppose ideas developed through the UN systems. One does have to take into account the regional characteristics and the political ingredients underlying any international system or regional approach. To that extent I appreciate very much what Professor Roe and Professor Kim mentioned. But, on the other hand, it seems to me that they are a little bit too pessimistic. If we take Professor Lee's approach, we should have a more optimistic view of the future. Taking a regional approach brings neighboring states together to evaluate the political situation. A functional approach can bring political harmonization. That should be a goal.

But I think the emphasis should be on strengthening national legislation. This is proven in the several approaches that U.N. has taken in other regional sea areas. In the Mediterranean, for example. The range of national legislation there is very wide, so they started with a regional approach. After they had drawn the regional convention, they realized that the real problem lies in how to strengthen national legislation in certain countries and to harmonize it with that of neighboring countries.

Douglas Johnston: I am often accused of being an optimist, mostly by people who accuse me of saying things I didn't say. I haven't said anything today or ever about the probability of regional cooperation in East Asia. I was talking about the desirability, not the political probability, but having made that minor point by way of prelude, I would be inclined to say that my philosophy -- if it's an optimistic one -- comes from this belief that if you don't try things, they most assuredly will not happen. Second, a study of eight or ten major areas of intergovernmental behavior in the last ten or twenty years would reveal that most of the genuine new ideas first surfaced at the international level, not the national level. Difficult and complex ideas come up to the international level for first consideration. If they're found acceptable at an international level, which is sometimes global,

sometimes regional, then but only then do they go back down to the national level, sometimes for reconsideration, sometimes for modification, sometimes for implementation. We may just have different views of the world.

This is my *Weltanschauung* of the 1960s and 1970s. This is what's interesting about the world community in the late twentieth century. The old ideas that you must first somehow thrash everything out at the national level are wrong. If there are political constraints and difficulties in the national system, the argument goes, no decisions will be possible and therefore, the fallacy continues, if it's not possible to produce action on the national level, then nothing can be done at the regional level; as if you've got to get all the national problems out of the way first. Reality isn't like that now in the late twentieth century. Government agencies are so intertwined in the world today that those with difficult ideas or major ideas are usually forced to bring them up in international forums of one kind or another.

I admit that in politically difficult regions, ideas will have to surface at a global forum rather than a regional forum, if there are no regional forums there for the discussion of the kind I've suggested. Of course, I'm talking about surfacing.

You might say, well, but all ideas come from national delegations and therefore by definition they have a national origin. But this is engaging in semantics. The ideas I'm talking about get generated deliberately and by design for the international level. That's the way I perceive the world. It gives me a nice roseate view of the future of international cooperation. The only matter in doubt normally is which of the various international forums is the most appropriate for the development of these ideas and then later for bringing them down again to the national level for reconsideration or implementation. That's my credo. If I sound optimistic at times about international cooperation, it's for that reason.

Edgar Gold: I must echo in self defense that any suggestions made about regional approaches were expressed in terms of desirability rather than probability, although I'm prepared to stick my neck out. I'm also an optimist and admit to it. The probability factor is sometimes much better than many people believe. Who would have believed ten years ago that the Israelis and the Egyptians would be on friendly terms? It would have been called blatant optimism at a forum such as this. I think there is hope. If there is not hope, then we have very little left.

On the point of the anti-dumping convention, I agree with the questioner that that is a very important convention. In my presentation I didn't go through every applicable convention. There are several others I did not mention by name. To the best of my knowledge, Japan has acceded to the anti-dumping convention. It is very important, although there are holes in that convention that you can drive a truck through; particularly in regard to the dumping of nuclear wastes from military vessels, which is excluded specifically.

I have not spoken at all about nuclear hazards at nuclear power stations. In the foreseeable future, commercial nuclear-powered vessels will present the region with further dangers.

We also know the very heavy military use of the region has caused additional hydrographic hazards. Ships now not only need to avoid rocks and shoals but they also may find other man-made shoals when they surface underneath them. The potential collision between a nuclear-

powered vessel -- either military or nonmilitary -- and a very large tanker is a pessimistic note to conclude on, but perhaps this is some time away.

Roy Lee: In a positive note, I would like to say something about this WESTPAC program that has been going on in this region since 1965. The encouraging thing was that in the last few years the People's Republic of China has actively participated in various aspects of the WESTPAC program. The only exception is, of course, North Korea, but in due time I am sure they will participate in the program, too.

Tai-Joon Kwon: As a student of environmental studies myself, I would like to leave a few thoughts of my own on the discussions of this particular session. I have rarely looked upon the environment beyond this national boundary until today. I have learned a great deal about the international aspects of environmental problems. For their contributions, I thank the two speakers and the members of the panel.

On the question of whether national or international or pessimistic or optimistic over the future in the international aspects of marine pollution, environment is one area for which there have been more international conferences than any other areas of human concern recently. I agree with Professor Johnston that ideas can be and may be very fruitfully exchanged on international levels and international channels. But I find that very few institutionalized efforts have been made as compared to the number of international conferences and the international channels of exchange of ideas. I hope that this kind of conference in the future will promote institutionalized efforts, be it national or international, for the protection of the marine environment.

PROBLEMS OF ANTARCTIC RESOURCES

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Byung Don Lee: Preceding panels have discussed the problems and perspectives of distant-water fisheries, strait passage, maritime boundary delimitation, and marine pollution. Now we come to Antarctica. Surely Antarctica is almost everyone's concern these days because it is known to be a great untapped reservoir of food, oil, and mineral resources. Therefore it is my privilege to preside at this panel on the problems of Antarctic resources. It is particularly meaningful for me to chair this panel because I was a member of a research team on the Antarctic organized by Texas A&M University back in 1962 and 1963. I would like to introduce Professor Dan Cheever of the Graduate School of Public and International Affairs at the University of Pittsburgh; Dr. Edward Miles of the Institute for Marine Studies at the University of Washington; Professor Yozo Yokota from the International Christian University in Tokyo; Mr. Naohiro Kumagai, Ministry of Foreign Affairs, Japan; and Mr. Woo-Il Choo, head of the Fisheries Economics Department, Korea Rural Economics Institute, Seoul. Now Professor Cheever will discuss the complex legal issues associated with the current Antarctic regime. It is my understanding that these issues are excluded among the items of agenda at the U. N. Law of the Sea Conference. Professor Cheever.

PROBLEMS OF ANTARCTIC RESOURCES

Daniel Cheever
Graduate School of Public and International Affairs
University of Pittsburgh

It would be ill-advised for me to say that I can give you an East Asian perspective to the problem of Antarctic resources. But I know this capable panel will be able to make a start in that direction.

I ought to say at the outset that the problem of course is weather. The climate, the severity of the operating conditions in the world's sub-continent, may be the controlling variable in the immediate future with respect to problems of Antarctic resources.

The question for this afternoon is: Can the emerging treaty regimes of this great subcontinent remain insulated from the rest of the global ocean regime? Some people in some foreign offices look with misgiving on raising such a question.

The regimes that govern the exploitation of resources south of latitude 60 degrees South are, at least legally speaking, quite separate from the regime that governs ocean resources and pollution control elsewhere. So far some statesmen of the world are saying that the political-legal regimes to maintain and preserve for the benefit of mankind the resources below the Antarctic convergence, which is close to but not entirely consistent with the 60th parallel of South latitude, are and can be kept separate. Of the two regimes, one is the political-legal system of the emerging Law of the Sea Convention. The other is the regulatory system envisaged by the Antarctic Treaty of 1959, which came into force in 1961, and the recent Convention for the Conservation of Antarctic Marine Living Resources, now up for approval and ratification by the signatory governments but not yet in force, and a third proposed treaty under discussion this past week in Buenos Aires at a meeting of the Antarctic consultative parties. These three treaties, one already in force, one up for ratification, and one in the planning stages, constitute the Antarctic regime envisaged as separate, planned as separate and distinct from the global ocean regime, the Draft Treaty of UNCLOS III.

My question is: Is this separation desirable, is it possible, and will it continue? I suggest that it is possible that the Antarctic non-territorial regime, because that is what it is, of 1958-1959, will melt before the century is out, perhaps within the decade. I advance this argument for discussion because the circumstances no longer obtain that made possible the separation of an Antarctic treaty regime from the regime of the Geneva Conventions. The circumstances that made it possible to freeze Antarctica, freeze territorial claims, freeze the question of exclusive jurisdiction, are fading and changing rapidly.

Increased demands for food alter the regime that has been proposed and is in force at the moment. One can argue that the present Antarctic regime cannot provide the necessary operating conditions when governments need to exploit these resources as the demand for food and fuel increases between now and the end of the century.

Industrialized countries, particularly when it comes to hydrocarbon exploitation, the search for oil, will need property rights and security of tenure that may not be sufficiently strong under the present regime. The question is whether, with present technology, banks and oil companies will explore or exploit the alleged potential,

although still unproved, of hydrocarbon resources on the continental shelf. We are dealing then with the dynamics of technological advance. This is the root of the matter as it has been the source, the input, the main dynamic of the Law of the Sea Conference itself. And, in a word, the regime that was sufficient for scientific cooperation in 1959, the regime that was formalized in the Antarctic Treaty with great success -- that work of art -- will prove insufficient when krill and oil become increasingly important.

One question is whether the climatic conditions are too harsh. That is a possibility, but from what I know and what I have learned from people like John Craven, my guess is that human beings can overcome the hazard of climate with science applied as technology when the need is great enough. I doubt if that harsh climate gives sufficient reason to say that the regulatory systems of the southern continent can be quite different from those which regulate the exploitation of resources in the rest of the global ocean.

The Antarctic regime is a weak regime. It comprises these three formally separate, but frequently cross-indexed, treaties. There are many references in the treaty on the conservation of resources to the first Antarctic Treaty, which is really a framework for cooperative scientific investigation.

Because the law of the sea provides for coastal state jurisdiction over the shelf and out to 200 miles from the territorial sea base lines, one is curious to know why a similar arrangement does not apply to Antarctica. The territorial question in Antarctica has never been resolved, as you know. The 1959 treaty was signed by a small, select group. There were twelve original signatories. Seven of them are claimants to territory in Antarctica. Three of the seven: Argentina, Chile, and the United Kingdom -- have overlapping claims. The other original signatories make no territorial claims nor do they recognize the claims of claimant states. The provisions of the treaty specify that these claims are not recognized and that activity in Antarctica does not in any way form the legal basis for a territorial claim. These provisions, by cross-referencing, are carried over into the present treaty now up for ratification.

Of the seven countries that have acceded since 1959 -- Rumania, the Federal Republic of Germany, Brazil, Poland, Czechoslovakia, Denmark, and the Netherlands -- only Poland has consultative status under the terms of the Antarctic Treaty. Japan was an original signatory, as were the United States and the Soviet Union. The socialist bloc is heavily represented in this emerging Antarctic regime.

Some of the bases for claims are very old indeed. The Latin American countries on record have gone back to the Papal Bull of 1494 and cling to this very tenaciously. Other bases are discovery, exploration, effective occupation, continuity, and even contiguity, although the distances seem very far from territorial land bases until you take into account the islands between the continents and the subcontinent itself. I am told that all kinds of events have taken place to demonstrate effective occupation as a basis for a claim: a marriage ceremony, scientific investigation, and an Argentinian baby's birth there. The last one may be apocryphal, but the fact that it is discussed suggests the importance some countries attribute to showing effective occupation.

One point is clear. Although there are claims, under the treaty no state by itself exists on the continent. This fact surely affects continental shelf and economic zone or other claims. No coastal state

clearly possesses territorial waters. No state can be certain of its economic jurisdiction on the basis of its land claims. This situation surely influences the economics and the risks and the investment matters when it becomes necessary to exploit these regions for energy and other minerals.

So much for the first element in this frozen regime south of the convergence, at approximately 60 degrees South latitude, where the warmer waters of the north meet the cold coastal waters of the Antarctic region. It is where upwelling occurs, and it is a crucial element in the ecosystem, in the life-support system of the living resources now being exploited by the Republic of Korea and by Japan as well as many other powers, particularly from Eastern Europe.

The conservation convention is a very similar club. It is restricted. I gather from accounts and interviews that the Republic of Korea has been considering accession to the Antarctic Treaty or the Convention on the Conservation of Living Marine Resources. This has not come to pass for reasons that I do not fully know and perhaps will be discussed. The conservation convention involves fifteen nations. Whereas the first treaty we discussed involves the continent that is 10% of the earth's land surface, the conservation treaty deals with a similar proportion of saltwater, about 8% of the world's ocean south of the convergence. This group includes the German Democratic Republic, the Federal Republic of Germany, and the Antarctic consultative parties. In addition, non-governmental organizations such as the International Union for the Conservation of Natural Resources and inter-governmental organizations like the Committee on Arctic Resources, governmental organizations such as the IOC, and others have been involved in the establishment of this conservation regime. The United Nations and some of its specialized agencies do not appear altogether welcome in this process, however, despite their participation in the conservation treaty in the last few years. Some activities that were proposed by FAO have not been implemented and have not been accepted. This continent and the ocean around it are managed by a small select group of countries. When the resource being exploited was scientific and the question was to gain knowledge about climate and resources, this regime proved thoroughly acceptable.

There is insufficient time to go into the convention for living resources. The first article simply defines that the obligations of the treaty apply to 60 degrees South latitude. The second article makes very clear that the purpose of the treaty is the conservation of Antarctic living resources. How that is done is spelled out in a number of detailed paragraphs. This second treaty is much more detailed than the first treaty and much more technical for obvious reasons. I might quote from Article 2, paragraph 3(a) elaborating on the objective of the treaty:

For the prevention of decrease in the size of any harvested populations to levels below those which insure its stable recruitment.

Stable recruitment. It doesn't say maximum yield or sustainable yield.

For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment.

I'm sure some of you scientists will wish to comment on that and explain it for the rest of us.

Other articles of the treaty indicate that the obligations with respect to territoriality in the Antarctic Treaty apply also to the signatories of this treaty. To fulfill the objectives, a Commission for the Conservation of Antarctic Living Resources is established. Each contracting party is a member. The purpose of the commission is simply to give effect to the objective of the organization, to facilitate the search, to implement a system of observation and inspection established under a later article of this treaty. That reminds us of what was so phenomenal under the Antarctic Treaty when inspection was permitted and seldom necessary, when scientific activity took place free of fears or apprehensions about national aggrandizement or territorial expansion. Something of that spirit carries over here. But remember, we are now talking about commercial resources, we are now talking about food. We are no longer talking about pure knowledge, if knowledge is ever pure, that is, free from commercial implications. The commission operates by consensus. That means each signatory has a veto. This suggests to me that the rules will not be very strict. I doubt they will be strict enough to meet the objectives of the treaty. There are other provisions that bear upon this -- technical commissions, scientific committees, and so on, as you would expect.

The third phase of the emerging Antarctic regime is the regulatory system to manage the harvesting or use of minerals, and by minerals we mean specifically hydrocarbons. There is evidence from scientific investigation that hydrocarbons are available under the shelf in commercial quantities. These are unproved, but two or three oil companies have expressed, at least unofficially, an interest in exploratory opportunities to see if the investigations that began with the International Geophysical Year of 1958 and the continued scientific cooperation that I've already alluded to under the treaty can be proved. So far there is no such activity taking place. I assume the reason for this is the uncertainty of who or what can assign or legitimize property rights.

The question is: Can limited property rights -- site rights -- be assigned under some instrumentality that is not territorial in nature? The trick then will be to grant mineral rights without recognizing territorial claims. This is very important for Argentina and for Chile. It is obvious from the behavior of these two countries that their territorial claims in Antarctica are very strong and very firmly held. I doubt that they are for bargaining purposes only. New Zealand had proposed that perhaps the consultative group -- but that's a pretty limited group -- under the treaty might be the international authority that could grant exclusive mining and drilling rights. The question then comes to my mind: Is that consultative group sufficiently representative of the world's political and economic interests to maintain itself?

I am sure about one conclusion: treaty or not there will be no recission, no receding, no pulling back of territorial claims. This is simply part of global law for the rest of this century and well into the next.

I question whether the commission proposed under the conservation regime is sufficient for the purpose. Even leaving aside the consensus principle which is required for the commission to act, commissions of this type, such as fishery commissions and the whaling commission, have had a poor record.

This leads to some of the possible options for the future. One possibility is that things may continue as they are; at least one member of the panel believes that that will be the case. That would imply that use regimes to regulate hydrocarbon exploitation or deep sea mining would be legitimated or sought on a non-territorial basis. How this is to be done is far from clear. It implies a moratorium to me. The moratorium could succeed only if there were lessened demand or insufficient demand or expense owing to the harshness of climate. Those conditions would have to obtain if the moratorium were to continue. In that case, perhaps ten years from now no one of the signatory powers will ask for a review conference; but under the terms of the treaty, they may in 1991.

Perhaps this is the U.S. position. The U.S. appears to say that the high seas extend to the coastline, there being no functioning state on the continent. The U.S. would argue, I presume, that there is open access to all who have the capability to exploit either the living or the continental shelf resources. I suppose this means that high seas principles obtain right up to baselines.

Another scenario, one consistent with what has happened in the global ocean as a whole, is that the national claims will be insisted upon and retained. It has been rumored in the fairly recent past that perhaps the United States will lay claim to Marie Byrd Land. In other words, the continent would be sliced up at the review conference. Then you would have the basis for an exclusive economic zone. The distinction between the two regimes would evaporate.

Another solution which has been associated with New Zealand is that the consultative parties might combine either to form a condominium of their own to exploit both living and mineral resources or that they would in effect be the authority to grant the property rights that will be necessary before firms or government corporations or governments are ready to take the risk. It is very hard for me to see how the offshore question can be disentangled in the future as resources are exploited more fully from territoriality on shore.

In conclusion, the first treaty was a political work of art and a great success. It did lead to and permit and encourage the advancement of knowledge. Perhaps there can be a second political-legal sleight of hand or work of art that will make possible the exploitation of a whole continent's resources, but its continental shelf resources will be exploited first. These are more accessible than the resources that are under a mile or more of ice over almost the entire continent. Above all, technological capability will be a very important variable in determining the kind of regime that will govern Antarctica in the future.

DISCUSSION

Yozo Yokota: I appreciate the exposition by Professor Cheever, which is so precise, broad, and covers all the possible areas of problems in connection with the question of the status of Antarctica and the law of the sea.

In Professor Cheever's first scenario, things go on as is unless the members of the Antarctic Treaty decide to change their present status. I assume we have to live with the present situation for the time being. But as Professor Cheever correctly pointed out, that present regime is insufficient for the future exploitation of mineral and oil resources, because it only contemplates preliminary scientific research and conservation of the natural environment, not the actual economic exploitation of resources in Antarctica.

The second scenario is a nationalist solution: to divide up the continent into the various sectors which are claimed by the claimant countries. In this case, of course, we have to resolve the questions of how to settle the overlapping claims and also how to settle the unclaimed areas. That approach will most likely be opposed by a majority of states, including the members of the Antarctic Treaty. Scenario two seems to be not only undesirable but probably impossible politically.

The third scenario is the same sort of regime controlled by the consultative group either through the commission or some sort of semi-permanent organization. Here there is a certain variety you can think of. For example, just establish a commission without any specific power to operate or regulate. Or establish a permanent international organization which has a kind of secretariat and has certain specific functions to meet with the problems posed daily. Then I would like to add two more scenarios which are actually hinted at by Professor Cheever but not mentioned in the conclusion. One is the international organization that is established by any country wishing to belong to it, and that organization would have the authority to administer, control, and regulate activities in the Antarctic.

The last scenario is to let the contemplated International Sea-bed Authority in the Law of the Sea Convention deal also with the natural resources of Antarctica, because some people claim that the status of natural resources in Antarctica is similar in nature to the status of resources in the deep seabed area. Because of the geographical, climatic, or physical conditions we have been so far unable to exploit those mineral resources on an economic basis. But gradually those resources have become the object of economic exploitation.

Another argument which supports the final scenario of letting the Sea-bed Authority deal with the mineral resources in Antarctica is the interpretation of the Draft Convention on the Law of the Sea. As you all know, in the definition part of the LOS Convention, Article 1, Paragraph 1 says "area" and that means deep seabed area. Area means the seabed, the ocean floor, and the subsoil thereof beyond the limits of national jurisdiction. Of course it is hard in some cases to interpret that the Antarctica area is a seabed or ocean floor or subsoil thereof. But still we can interpret this part to imply that it gives authority, the power to regulate and administer the natural resources beyond the limits of the respective national jurisdictions.

Now let me go into the next point, which is probably a preferable choice among the scenarios I presented but which actually comes from

Professor Cheever's presentation. To make this selection, it is important to have some sort of principles. One important principle is to take into account the existing or past claims and also the actual achievements that some countries have made so far. In other words, accept the current facts as they are. A second principle is to take into account some of the physical, geographical, and climatic conditions. A third principle is to take into account the interests of the world community as a whole so that the solution will not give rise to serious international disputes in the future.

Attached to those principles I have just stated are some corollaries. The first corollary is not to allow any part of the Antarctic to be appropriated into the territories of a few selected countries of the world, even though we respect some claims that have been made in the past.

The second corollary is to respect some of the achievements and some activities done already in the area and also to respect some countries which are keenly interested and economically as well as technically able to participate in the activities in the Antarctic area.

The third is to open the Antarctic to any state or any entity, including companies and corporations, on a non-discriminatory basis, to some economically profitable exploiting activities. In other words, even though Antarctica may be controlled by one organization, or by a limited number of countries, or by one country, the possibility for participating in activities should be broadly open to practically any entity or any state.

Taking into account those principles and corollaries, I think that, among the scenarios I have presented, some sort of permanent international organization that will administer and control and regulate the activities in the Antarctica is desirable. But it is desirable only on the condition that that organization will not be restricted to a selected number of countries, nor will it be controlled by countries that are not interested in, or not capable of, or at the present or in the future not involved with, the activities in the area. In other words, in the administration and operation of this permanent international organization, we have to take into account the importance of the relationship between actual activities and the voices of the people or countries that are involved in the actual activities. But at the same time we have to take into account the common interest of the world community; and I assume that this organization, which may be controlled by a limited number of countries, at the same time has to be under certain control of the broader, global organization, most preferably the United Nations.

My last comment relates to the last scenario: the possibility of giving the International Sea-bed Authority control of the Antarctic area. I do not think this is possible or desirable for the following reasons. Even though resources in the deep seabed area and in Antarctica may appear to be similar, because of the technical difficulty in reaching them and in exploiting them economically, the Antarctic is way beyond the normal understanding we have of the sea. Antarctica is certainly not a part of the sea, and we have not considered that area as the sea. It is quite unnatural at this point in history to extend the notion of the law of the sea into Antarctica as a whole. We can only go as far as Professor Cheever did in asking to what extent we should accept the notion of the territorial sea or continental shelf or exclusive economic zone for the Antarctic.

Certain countries have claimed territorial sovereignty over certain portions of the Antarctic continent, whereas no country has made such a claim in the deep seabed area. In Antarctica almost permanent activities are already going on, whereas in deep seabed areas activities are still very provisional and experimental activities. So I feel that to give the International Sea-bed Authority the power to regulate and control the resources in Antarctica is not possible or preferable.

Edward Miles: I want to make a couple of comments on the question of the conservation regime for living resources and the environmental protection problems that have been touched on by Dan Cheever.

As you know, the largest potential living resource is the krill. The Soviets suggest that the annual production may be as great as 100 million metric tons. In addition, we have seen, principally in the catches of the Soviet Union, certain other species including the so-called Antarctic ice fish. But there's a very curious thing about the Soviet catches: the significant annual yield fluctuations. We simply do not know enough about stock structure, distribution, and abundance to tell what is going on in any way. The Soviets have jumped, for instance, from a bit over 17,000 tons one year up to 112,000 tons the next year and then down again to 80,000 tons. There's no clear trend. For the Japanese, however, there's a fairly steady increase and it's principally krill. The point about the conservation regime and why I do not sneer at it even though it is not a particularly strong one, is that the time is now. We have these large distant-water fleets moving into the Antarctic, in part because they are being excluded elsewhere in the world. It would be extremely naive to think that one would get the Japanese or the Soviets or the Poles or the Germans to agree to stringent controls on their operations when they are being shut out elsewhere. That is simply not in the cards. We had just better forget about it. But what do we need to get out of the regime?

Principally we need information, because our ignorance is vast. I would suggest that the regime that is now on the table for ratification serves that job as best as one could expect. And it does provide the possibility that we will have the framework for a much better exchange of information in the future. Now it is true that the framework for regulation is loose if and when conditions require such management regulations, and that we ought not to hope for too much, given the prior experience of regional fisheries commissions. But that is life, and there is nothing we can do about that.

On the conservation standard, if one moves to an ecosystem approach to fisheries management -- and in my view this is the most exciting thing about fishery science currently -- then you have immediately to get away from the old notion of maximum sustainable yield (MSY). In the first place MSY is a function of a model and not of a population, and in the second place you cannot think in both ecosystem terms and MSY terms because it is absolutely impossible simultaneously to maximize the potential yield of all species in an ecosystem. Therefore you have to turn to some other standard. In the United States we have made two attempts at this. One, in my view, is scientifically complete nonsense, and this is the standard in the Marine Mammal Protection Act which goes under the name of optimum sustainable population. Nobody knows what that means and nobody is likely to know, because it means nothing. The other standard in the Fishery Conservation and Management Act is optimum yield. In my view, this has a lot more potential. It is true that optimum yield can mean

whatever you say it is, but there are ways of going about that that are a great deal more systematic and meaningful than in the case of optimum sustainable population. The choice in the conservation regime before us on stable recruitment is a pretty good one in my opinion, and the standard that's in the treaty is nothing to sneer at.

Now let's shift to the environmental protection issues which are, of course, related to hydrocarbon development. Just two weeks ago in Michigan there was another workshop jointly sponsored between Dalhousie and the Law of the Sea Institute on the Arctic. We did there a fairly sustained evaluation of Arctic policy problems, and I would suggest that when we're talking about minerals in the Antarctic, we have a lot more time than we had with fisheries, and we don't need to rush into anything. In addition, when we eventually come to work in the Antarctic, it will be after the significant experience of working in the Arctic, so the knowledge will be greater. It used to be feared that oil spills in the Arctic could change significantly the climate of the planet. It now appears from the research that has been done, principally by the Canadians, that the spills will be contained fairly quickly and in limited areas and that they are likely to sink. Oil, after all, is a natural substance and in every case of very large oil spills that we have seen so far, it doesn't appear that there are long-term adverse impacts on the natural environment. What you've got to worry about is the patchiness in the spill and the impact on certain of the living resources. Birds seem to be the most vulnerable. In environments like the Arctic and the Antarctic, fairly large populations congregate in particular areas and are therefore rather vulnerable. The Antarctic environment is so harsh that the economics of going after the resources there simply won't lead to rapid exploitation. On the other hand, we do exploit some minerals and this is leading to some concern about environmental pollution, mainly with respect to heavy metals. I don't think we are going to face this problem in the Antarctic very soon, so I don't think there is all that much to worry about. I know that on the conservation of living resources we have done about as well as we could be expected to do.

Dan Cheever asked whether circumstances no longer exist that made possible the insulation of the Antarctic regime from the global ocean regime in the first place; and secondly he asked whether the Antarctic regime itself may be inadequate when commercial concerns weigh more heavily than scientific and environmental concerns. My thinking about this is very briefly as follows: There were two preconditions for the Antarctic regime in 1959 and these converged. First, we had no major security interests but the primacy of interest in scientific research. Second, we needed to come up with some means of suspending national claims. Now what has changed? It seems to me that neither of those two conditions has changed, and what we have got are two new potential additions. The first is the commercial potential of the region as a result of advancing technology, and the second is the emerging new global regime for the international seabed area and the potential role of the International Sea-bed Authority. But if you look closely at these two new conditions, they affect primarily the second dimension, the suspension of national claims. Here I agree very much with Professor Yokota, who argues that the potential losses in the disintegration of the regime are greater than the potential gains. This argument leads strongly to the support of continued insulation from the global ocean regime.

The Latin American position here is a crucial ingredient in the possibilities of continuing this insulation. You will remember that under the initiative taken by Sri Lanka in the person of Chris Pinto at the non-aligned meeting in Colombo, I think it was in 1977, he did raise the issue of the applicability of the new ocean regime to Antarctica. This went over like a lead balloon. Nobody took it up, and nobody's likely to take it up, in my view. Participation in Antarctic activities is the key to having a voice and it is the key to having some access to decision making about the regulation of such activities, and that ought to remain the key. Again I agree with Professor Yokota on that point. Those who have no involvement have no effective control over what is done, nor do they have any means of channeling their demands.

Furthermore the salience of the issue is low, globally, and it's likely to remain so as a result of the seabed experience in UNCLOS III. Let us not forget that to most of the developing countries, the seabed experience is a disillusioning one. There is wide perception in the Group of 77 that there are likely to be few or no benefits available for general distribution and that if, in fact, monies are produced, they will be swallowed up by that enormous bureaucracy that will be created. It would seem to me that there is an easy out here: if it provided for revenue sharing, the restricted Antarctic regime might be allowed to continue without participation by those uninvolved and without having to face the question of handing over jurisdiction to the International Sea-bed Authority. I dispose of the first issue that way.

The second issue is the more troubling one: Is it possible to get both continued insulation and continued suspension of national claims in the face of the presumed hydrocarbon potential of the region? That, to me, depends solely on the sharing arrangements that can be arrived at among the signatories. I agree with Dan Cheever that it is absolutely necessary to split resource distribution from territorial claims and that if one does so, one can avoid disintegration of the regime. Avoiding requires also agreements on the sharing of risks, and by risks I mean both investment and environmental protection. Maintaining a separate regime will provide exclusivity of title. The only point on which I disagree with Professor Yokota is that I see no need to have any formal connection between this Antarctic regime and the UN.

Naohiro Kumagai: I have been listening to Professor Cheever's speech with much interest. Now I would like to make some observations in my personal capacity.

Antarctica is a long distance away from Japan, yet it has been close to the minds of the Japanese people for many years through our activities there. Apart from the prewar expedition by Japanese explorers, the Japanese government has sent national expedition teams to Antarctica every year since 1956; and there is, as you know, a Japanese Showa Station in Antarctica.

For more than two decades, the international forum created by the Antarctic Treaty, i.e., the Consultative Parties, has proved to be an efficient body in promoting international cooperation and the freedom of scientific research, ensuring the peaceful use of Antarctica and safeguarding its environment. The forum is indeed a splendid "political work of art." I feel strongly that this system based on the Antarctic Treaty should continue to exist for many years to come, and that it should become the basis of the future regime for the development of the resources in Antarctica.

With the emerging problem of resource exploitation, this body of Consultative Parties is now faced with a new challenge. As to the marine living resources, I am extremely happy to note that a treaty was adopted last year and that my country signed it. It is now anticipated that a preparatory meeting of the Marine Living Resource Conservation Commission will be held in August in Hobart. The problem of the marine living resources in Antarctica has thus been solved. Therefore I do not wish to touch upon this problem.

Regarding the mineral resources, discussions on the legal-political as well as the technical-ecological aspects of the problem are needed. It is, of course, a difficult and complicated task to reach a final agreement satisfactory to all of the countries concerned with regard to a regime on mineral exploration and exploitation, because it relates to the hard core question of jurisdiction. It is, however, becoming more desirable, in light of the special responsibility of the Consultative Parties, that they initiate a regime of some kind at the earliest possible date, so that they may show to the rest of the world their firm intention to maintain the present Antarctic Treaty regime and to protect the Antarctic environment. For that regime to be viable, it must provide fairness and benefit to all those concerned.

Now I wish to make some comments on Professor Cheever's speech. He seems to suggest that there are three ways for the United States to proceed with Antarctic mineral-resource development. First is by subscribing to the institutionalization of the common heritage of mankind in the International Sea-bed Authority; second, by staking its own territorial claim; and third, by a joint or otherwise cooperative venture with an existing claimant.

Professor Cheever's first suggestion invites comment. If the United States chooses this solution, it should be cautious. The world community has learned now, through the process of the Third United Nations Law of the Sea Conference, that the solution based on the principle of the common heritage of mankind is difficult to realize, if mankind insists on developing its common heritage with its own hands. We have seen this through the debate on deep seabed mining in the Law of the Sea Conference. There the world community insisted that the common heritage of mankind be developed with their own hands and did not entrust the development of deep seabed minerals to the potential seabed-mining countries. They insisted on creating their own "Enterprise." The Group of 77 countries, while accepting the "parallel system," have pushed the potential seabed-mining countries too much into a corner by imposing severe production limitation, unreasonable obligations of technology transfer, and burdensome financial obligations on the future miners. The G-77 were strongly supported by the land-based producing countries.

It is true that the idea of "parallel system" was proposed by the United States, and it has been incorporated in the Draft Convention on the Law of the Sea. But the United States and other potential mining countries now find it difficult to go along with the restrictions which have since been imposed. These restrictions included in the Draft Convention were the result of the force of a majority of the developing countries with the help of a beautiful and -- in my personal view -- misinterpreted concept of the "common heritage of mankind."

It is true that the common heritage of mankind concept was approved and obtained the blessing of the world community in 1970. But I wonder whether this means that the "common heritage" should be developed by "mankind's" own hands. I do not subscribe to this hasty

conclusion. It does not seem to be workable, as you see in the case of deep seabed mining. The Enterprise, which is an international bureaucratic organ to develop the "common heritage," is in my opinion not workable.

The best way to develop deep seabed minerals is for all mankind to entrust certain technologically and financially advanced countries with the task. The profit gained from such development should then be distributed to the rest of the world either through certain international funds or through the usual economic or technical aid programs, after deducting a due share for the mining countries. I believe that the idea of the Enterprise created within the framework of the parallel system was a mistake. I wish to warn the world community that it should never repeat this unfortunate experiment in the case of the Antarctic resources. The Antarctic mineral resources are not as yet termed "common heritage of mankind." But even if they were, their development should not be considered in the same way as in the case of the deep seabed minerals.

We need a comparative analysis between the Antarctic mineral resources regime and the regime of deep seabed mineral resources development. If we look closely at the problem, we find some analogous points between the two, the most striking point being that in both cases there are countries which have certain interests in the area concerned; they want their special interests to be protected or at least reflected in the regime to be created.

Mining companies in several countries have already invested a large amount of money in future development of deep seabed mining. Several countries have made territorial claims to areas of Antarctica. They want their claims, whether economic or sovereign, to be duly treated.

Future deep seabed miners request that their financial investments be protected by a "preliminary investment protection" system within the framework of the Law of the Sea Convention, or if there is no Convention, then by a mini-treaty called a "reciprocal states arrangement." Antarctica claimants request recognition of their legal competence to issue licenses and permits for exploration or exploitation.

In both cases there also exists a basic opposition to and criticism of their claims, i.e., the opposition and criticism from the Third World. In the case of deep seabed mining there is actual opposition from the Group of 77, supported strongly by the land-based producing countries, to the unilateral development of the deep seabed resources. The Group of 77 says that the mineral resources of the deep seabed are the common heritage of mankind and therefore it is against international law for any country to proceed with unilateral development. They insist that even preliminary investment should not be permissible in light of the principle of the common heritage of mankind. In Antarctica, the claims for territorial sovereignty are not recognized as such by the world community.

There is still another similarity between the two cases. Between the original claimants and the opposing Third World, there are a certain number of countries that would like to join the original claimants. They cannot gain the full status of the original claimants because they somehow regard themselves as late-comers. While not agreeing completely with the opposing argument of the Third World, they have the feeling that the original claimants are making their own ways too quickly. These intermediary countries are found, in the case of Antarctica, in the so-called non-claimant countries within the

Consultative Parties of the Antarctica Treaty, and in the case of deep seabed mining, among those countries like Japan, France, Italy, Belgium or the Soviet Union which do not fully accommodate the U.S.'s and Germany's hasty initiative in creating a mini-treaty regime among like-minded countries while not fully committed to the parallel system based on the common-heritage-of-mankind principle.

In both cases, Japan belongs to this intermediary status, whereas the United States is, in the case of deep seabed mining, the original claimant and, in the case of Antarctica, an intermediary country. Also in both cases, the original claimant countries wish to maintain or consolidate the legal competence of licensing and permitting exploration and exploitation. The United States, knowing that it is one of the few original claimant countries in deep seabed mining, is now trying to consolidate its claims by creating a Reciprocal States Agreement (mini-treaty). She is trying to stop or dissuade the latecomers like Japan and other countries. However, in Antarctica, the situation is somewhat different for the United States. The United States has already succeeded in creating a mini-treaty. The Antarctic Treaty in reality serves as a mini-treaty creating a barrier against possible latecomers. (We know, of course, that Poland and the Federal Republic of Germany have joined since.)

While there are similar points between the two cases, there is still a striking difference. In the case of deep seabed mining, there is not yet a mini-treaty, whereas in the case of Antarctica, there is already a mini-treaty in the form of the Antarctic Treaty. We have to take special note of this fact. We have to start from this fact when we consider the problem of the development of Antarctica's mineral resources.

I said earlier that we should not create a parallel system in Antarctica like that of the deep seabed regime. When we consider mineral resource development in Antarctica, we should start from the fact that we already have a mini-treaty.

In this connection I would like to remind you of a very good suggestion made by Professor Alexander at the seminar on Antarctica sponsored by the University of Miami. He suggested that the development of Antarctic mineral resources be based on a new concept called the "collective resource jurisdiction." And this "collective resource jurisdiction" is, as I understand, based on the present Antarctica Treaty, our mini-treaty.

The most realistic and effective method of developing the Antarctic mineral resources is for the world community to entrust the development to a limited number of capable countries. I believe that the countries of the Consultative Parties are the ones most capable for this purpose in light of their past experience in and knowledge of Antarctica. The regime to be created by the countries of the Consultative Parties for the development of Antarctica's mineral resources should serve the purpose. And in creating such a regime, the concept of the "collective resource jurisdiction" is the best concept to be considered. By relying on this concept, the United States may safely maintain the merit of the mini-treaty of Antarctica while also maintaining intact the status of the U.S. as a latecomer within the Antarctica Treaty.

I would now like to present my argument on the politico-legal aspect of the proposed mineral resource regime of Antarctica. We have to consider, first, its effect on the sovereignty claims of the so-called claimant countries. The claimant countries hold the opinion that

the territorial claims cover the right to give concessions to applicants for exploration and exploitation. And the Antarctic Treaty does not negate their territorial claims.

On the other hand, the so-called non-claimant countries of the Antarctic Treaty do not recognize the claimant countries' territorial claims over Antarctica. Furthermore, they argue that the Antarctic Treaty does not provide for such economic matters as resource exploitation in Antarctica. Therefore they argue that the resource problem should be regulated by a separate treaty rather than within the present mechanism of the Consultative Parties.

The Third World arguments for the new economic order aim at the redistribution of the world's resources. They claim that Antarctica should not be excluded from the new equitable economic order. As to the territorial claims by seven claimant countries, most of the world community would not give much consideration to their validity. Such claims are not likely to be recognized.

If we have to accommodate the concerns of these three groups of the world community in establishing a new regime over mineral resources in Antarctica, I find the solution suggested by Professor Alexander attractive. Alexander proposes a pooling of the claims of the Consultative Parties and suggests that they initiate a "Joint Antarctic Resource Sovereignty" in order to establish an exclusive but community-oriented jurisdiction over the Antarctic region. Under his plan, the new legal order applicable to resource activities in Antarctica would include all states qualifying for consultative status under a revised Antarctic Treaty. The revision or amendment would allow new states to accede to the Treaty and to qualify for consultative status without affecting any other provision.

Under this plan, those areas suitable for commercial activities would be leased to interested states, and revenues generated from the leasing of the areas would go exclusively to the original Consultative Parties on an equal basis. However, revenues from taxes levied on exploitation would go in part to the original Consultative Parties and in part to a trust fund created to aid less developed states and administered by the United Nations.

My answer to the question put by Professor Cheever, i.e., whether the Antarctic Treaty regime could be insulated, is a positive one. Its further internationalization may be necessary, but it is desirable to honor the experience and knowledge of the Consultative Parties.

Woo-II Choo: Before I comment on the Antarctic resources problem, I want to introduce a brief note for our foreign participants regarding the Korean effort to exploit Antarctic resources, particularly krill. Like other developing countries, Korea has been enthusiastic about exploiting Antarctic resources, but it was only recently that the Antarctic resources exploitation plan was actually implemented in Korea.

After the Korean War, the Korean fishing industry enjoyed ever-increasing catches attributable mainly to the expansion of deep sea fisheries into foreign fishing grounds. However, after the 1977 declaration of 200-mile economic zones by the U.S.A. and USSR, the Korean deep sea fisheries began to feel the results of the loss of their productive fishing grounds. This forced Korea to look to the Antarctic for possible exploitation of living resources. From December 1978 to March 1979 in a first-time cooperation with a private deep sea fishing company, the Korean Office of Fisheries conducted an experimental

expedition in the Antarctic which resulted in a catch of more than 500 metric tons of krill as well as scientific data in various fields. This winter the Korean Office of Fisheries plans to dispatch a fishing vessel mainly to catch krill. This kind of exploitation is very important in helping to solve Korea's food problems.

Now I want to turn to the legal position of the Antarctic continent and the near shore. Originally twelve countries participated in signing the Antarctic Treaty in 1959. Seven of them claimed territorial sovereignty in Antarctica, but the U.S. held a peculiar position. In 1924 the official U.S. position, announced by then Secretary of State Charles Evans Hughes, was that the discovery of lands unknown to civilization, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by an actual settlement of the discovered country.

In my view this might be a reasonable doctrine, particularly for the Antarctic regime problem. The resources of Antarctica are the common heritage of all mankind. As Mr. Kumagai pointed out, the concept of the common heritage of all mankind is controversial, and it is difficult to harmonize the various ideas. All the concepts are difficult to define at first, but the definition can be developed if we combine our efforts in the matter even though it is a time-consuming problem.

So, following the concept of common heritage of mankind, I insist that the Antarctic resources should continue to belong to all human beings, regardless of whatever existing treaties have defined about the legal positions thus far. I cannot give the ideal scenario on how to settle the various conflicts among the countries; but the principle, I believe, should be that the disputes which will arise in the future should be settled in meetings where all the countries in the world attend simultaneously, as in the pattern of the ongoing United Nations Conference on the Law of the Sea.

Daniel Cheever: I did not hear anyone mention the sensitivity of the food chain in the Antarctic and krill's rather unique place in it. The resources farther up the chain depend on krill, and this implies to me a rather close supervision of the harvesting operations -- more knowledge, in short. That's the big point I haven't heard, and I hope there will be some comment on this environmental impact.

Hung Tack Huh: I want to thank Dr. Cheever for his excellent deliberation. I am very happy with his perspective on the current Antarctic regime. I am also very pleased with Professor Yokota's view. I hope the current Antarctic regime is a very weak one, as Dr. Cheever mentioned, and will be open to access by all nations who have the ability to exploit. However, the political realities are not always as the majority wishes. In fact, the more persuasive realities are often against our will. In his opening remarks, Dr. Lee mentioned that the Antarctic regime is not included in the items of agenda on the UN Conference on the Law of the Sea. This is very strange to me. Why is the Antarctic regime excluded in the U.N. Law of the Sea Conference, and what is the relationship between this treaty and the Law of the Sea Convention? If some countries claim territoriality or declare exclusive economic zones, can these claims be overruled by the Law of the Sea Convention, and if so, how?

Daniel Cheever: My answer is very easy. I think many objectives that were sought in the Preparatory Commission for the law of the sea would have been jeopardized if the wish of a few governments to include the Antarctic regime in the general discussion had held sway.

Yozo Yokota: A very brief comment about the question you raised. It is interesting how the final clauses of the Law of the Sea Draft Convention would be put into actual work, particularly in relation to the European Community's insistence on the possible participation of international organizations. If that clause goes through, because European countries are insistent on it, there is a possibility that this future international organization for Antarctica may become a party to the Law of the Sea Convention. Then the interesting question is whether it can claim, as a party to the Convention, territorial sea, EEZ, and continental shelf.

John Craven: Whenever one is asked a question that one cannot answer, the thing to do is to answer a different question, the one that wasn't asked. I now want to respond to your question by talking to a different one which relates somewhat. The very fact that the Antarctic is treated differently comes from the technological difficulty if not the impossibility of utilizing Antarctica in the classical way as land. If Antarctica were not forbidding and inaccessible because of the weather and climate, it would certainly become part of the regime, and its sovereign status would have been established a long time ago. So the next question is: What is the trend of technology, and will technology move at a rapid enough pace to change this characteristic in the very near future? Because if the characteristic is changed so that Antarctica can be exploited reasonably, then there will be strong international pressures by people who desire to exploit it for changing the regime. I think that, fortunately, technology will not move that rapidly.

One element associated with the technology of the Antarctic is that the energy costs for going down and working there are high. Already we are discovering that in terms of the energy cost to harvest the krill, it is a very expensive journey even though the resource is plentiful and abundant. Before krill is developed as a resource, we must reduce these energy costs and solve the much more difficult problem of making krill taste good. Another element of technology is that there is a benign environment in the Antarctic, the water column beneath the free surface. At this point you are in an isothermal area in which the water is not very cold. It is not any colder than it is in the deep water in the tropical regime, and therefore submersible technology would permit undersea exploitation of the seabed. But submersible technology is still limited by the fact that only nuclear power can operate for long periods of time completely submerged because of the non-availability of atmospheric oxygen. Although trends in non-nuclear submarine technology are developing, they almost all require some access to the free surface. I do not think we will see a submersible technology developing in the very near future. I would therefore expect that here is one of the few instances in which technology will move at a pace nearly as slow as that of the international legal process.

Pyong-Choon Hahn: I once heard something about the need for fresh water and how ideal the iceberg is. Someone in the Middle East considered

towing this huge iceberg across the ocean to have it slowly melt down and use it as fresh water. I wonder if there has been any further development, because I think it will provide a lot of jobs for the lawyers, too. How will the iceberg affect the climates along the way, what will it do to the ecosystems along the way and at the destination?

Maybe Dr. Miles can give me the answer: What is the nutritional value of krill? Apparently the taste is not very good, but is it a very nutritional kind of food?

Edward Miles: On the first question. A couple of years ago during the Kiel conference of the Law of the Sea Institute, during the panel that we organized on polar regions, one of my students, in fact, had done a polar sea analysis related to the transportation of icebergs. The French were involved and one Saudi Arabian prince with more money than perhaps judgment -- the arrangement didn't work out. I don't really see very much possibility for that in the future.

Secondly, as to the nutritional value of krill, it follows the old adage one learns as a child that even though it tastes particularly nasty, it's pretty good for you.

Daniel Cheever: One point was raised for the lawyers to come in on. What is this ice? Is it territorial, is it oceanic? Antarctica almost doubles in size in the winter months if you think of the ice. There's a continuation of the ice mass over the land and that's the kind of area where the lawyers would have a field day.

Choung Il Chee: Now this territorial claim by states for the Antarctic area raises rather interesting jurisprudential questions. The only analogous claim I can think of from the standpoint of international law is the legal status of eastern Greenland. The whole doctrine of occupation is being eroded, enabling the state to claim the territorial sea or the territory as a whole, or sovereignty for that matter. What is happening to the doctrine of effective occupation, then?

Daniel Cheever: I hate to agree with the inference of the question. It doesn't seem to me that these are valid claims, although those are pretty permanent scientific stations. Obviously one can occupy if one spends enough money, but I would defer to real lawyers on that one if I may.

Unidentified Speaker: Actually the nutritional value of krill is very high, as proved by several laboratory experiments. One showed that cats fed on this krill grow much better than other cats on their normal feed. One conservative estimate is that the maximum sustainable yield of krill is about 200 million metric tons. Man requires about 36 grams of protein per day. On that basis, the 200 million metric tons may feed about 90% of the current world population if we used krill entirely for that purpose. There are some who argue about it, but I believe that krill is very important to feed the growing world population.

It has proven to be very good against high blood pressure and several other diseases. I think there are many good things about krill.

Roy Lee: I would like to venture a possible interpretation on Antarctica, but I must make it quite clear that it was never the intention of the Draft to include Antarctica within the present Law of the Sea Treaty. I think there are quite a few representatives here who

would support my statement. I think you could make an argument, and the argument would go as follows: Article 1 of the Draft Convention defines the international area as the area beyond national jurisdiction. Article 76 on the continental shelf talks about jurisdiction within national jurisdiction. So, according to the law of the sea, what you have is national jurisdiction and international area, but they are not clearly defined, so by using Article 1 and Article 76 and Article 134 on the definition of the area, it is possible to say those areas in the Antarctic which are not claimed and the areas of national jurisdiction like the Ross Sea could arguably come under the International Seabed Authority. But the Authority would have jurisdiction over the mineral resources, not the living resources in the water. I think this will keep Professor Yokota happy.

LAW OF THE SEA AND KOREA

LAW OF THE SEA AND KOREA

Hongkoo Lee: The session this morning will be centered around the question of the law of the sea and Korea. The main paper will be presented by Ambassador Pyong-choon Hahm, who needs little introduction. After graduating from Harvard Law School, he came back and taught for a number of years at Yonsei University in Seoul. Then he joined the government as special assistant to the President. Then he served as our ambassador in Washington. Currently he is our chief delegate to the United Nations Conference on the Law of the Sea. Therefore there is no one in Korea who is better qualified to give a Korean perspective on the law of the sea.

Our panel also includes Keu-Cab Cho from the Korean Branch of the International Law Association, Jack Davidson from the University of Hawaii Sea Grant Program, and Chi-Young Park of Hanyang University.

A KOREAN PERSPECTIVE ON THE LAW OF THE SEA A PRIVATE VIEW*

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Geopolitical and Resource Factors

As a peninsula, Korea is surrounded on three sides by the sea. It is also encircled by three major powers of the world: Japan, China, and the Soviet Union. With China and the Soviet Union, it shares land borders. The island chain of Japan surrounds it to the east and to the south. All three of these neighbors have always regarded the Korean peninsula as of vital strategic value to each of them. Consequently, they have strenuously endeavored to secure predominance on the peninsula to maximize their respective strategic influence throughout the region. At the minimum, they have felt constrained to strive to prevent the other two from gaining superiority in the peninsula. The critical strategic importance of the peninsula as perceived by the three big powers may be summarized as follows.

Japan has viewed the Korean peninsula in the hands of China or Russia as a dagger or a pistol pointed at the heart or the head of Japan. Both China or Russia have regarded the peninsula under the control of Japan as a bridge or a stepping-stone over which Japanese expansionism has exploded on the continent. China's (especially Manchuria's) security would be gravely jeopardized if Russia gained predominance in the peninsula. On the other hand, Russia's influence, if not its expansionism, would be seriously undermined if China acquired paramountcy in the peninsula. Given the great importance of the Korea Strait as the critical bottleneck through which its naval (and later, air) forces, based in Siberia, have had to pass in order to gain access to and from the East China Sea, China's hegemony over the Korean peninsula would be intolerable strategically to Russia.

Thus encumbered with the interplay of power dynamics among its neighbors, Korea has had to search for some means to break out of the big-power encirclement in order to establish friendly relations with distant countries and to restrain the destructive behavior (such as turning the peninsula into their battlefield) of the immediate neighbors. Korea's principal means for reaching outward has lain with the sea. Its political independence and territorial integrity have been closely bound up with its capacity to keep its sea lines of communication open.

Korea's past has inevitably affected its perception of contemporary events. Its calculation of security interests is largely conditioned by historical experience. The fact that Korea was a victim of a most brutal form of "gunboat imperialism" has built a certain predisposition into its perspective toward the appearance of foreign warships near its shores. One gunboat displaying its deadly firepower was enough to spell Korea's ultimate political demise a century ago. Passage of a foreign warship through its territorial sea or the straits on which it borders, consequently, poses a very serious security problem to Korea.

Moreover, as there is only an armistice, not a full peace settlement between the Republic of Korea and North Korea, the former is still

technically at war with the latter. As North Korea's military provocations continue and the Republic's fishing boats are unlawfully seized by it, the quasi-war condition adds a critical dimension to the security aspects of the law of the sea as a whole.

The Korean peninsula is poorly endowed with natural resources. Only a little over one-fifth of its land is arable, severely restricting its agricultural capacity. For the Republic of Korea, the land area is approximately 98,000 square kilometers, whereas the maritime area falling under its national jurisdiction on the basis of delimitation by the median-line-equidistance formula is about 317,000 square kilometers. Since only a little over 20% of the land area is arable, the maritime space, every part of which can be put to a productive use, is about sixteen times larger than the arable land area. With a fairly large population, effective management and conservation of living resources and efficient exploitation of non-living resources from its own offshore areas are of critical importance. An active participation in distant water fishing, a vigorous expansion of its shipping and shipbuilding industries, and a careful advance preparation for joint-venture arrangements with other newly industrializing Third World countries to exploit deep seabed mineral resources in the sites reserved for the Enterprise of the International Sea-bed Authority are some of the primary policy imperatives facing the country.

Boundary Delimitation

The Republic of Korea has adopted the median-line and equidistance formula as the principle governing the delimitation of the territorial sea with opposite or adjacent countries as provided for in Article 15 of the Draft Convention. Fortunately, it faces little problem with respect to the delimitation of the territorial sea. It is in regard to the exclusive economic zone and the continental shelf that the Republic of Korea faces areas of potential disputes with neighbors. Any problem with North Korea regarding delimitation of maritime boundaries is being held in abeyance until an overall solution to the problem of the inter-relations between the two parts of Korea is obtained.

As for the delimitation question with the People's Republic of China (PRC), the Republic of Korea (ROK) government has expressed its readiness to engage in mutual consultations and negotiations on several occasions in the past, beginning on 16 March 1973. The PRC has so far refused to respond positively to this proposal of the ROK. With regard to the question of delimitation of the continental shelf with Japan, a joint exploration and exploitation agreement has been worked out concerning the shelf area to the south of the Republic. Korea, together with Japan, is justly proud of this achievement which may serve as a model for international cooperation throughout the world.

But on the question of delimitation of the exclusive economic zone, the ROK has not yet taken authoritative steps to proclaim it, while Japan has exempted the application of its exclusive economic zone toward the ROK until the latter proclaims its own exclusive economic zone. The area of potential conflict in this respect is the Japanese challenge to Korean sovereignty over the island of Tokto in the Sea of Japan. In view of the past record of mutual consultation and amicable negotiation between the two neighbors, however, a mutually beneficial solution could be worked out in such a way as not to affect the legal status of existing territorial claims to the island.

It appears that the only possible compromise concerning the applicable formulas of boundary delimitation at the Third United Nations

Conference on the Law of the Sea (UNCLOS III) would be to enumerate both the "median or equidistance line" and the "equitable principles"¹ on an equal footing. The effort of either side to expunge even a reference to the opposing formula from the relevant articles of the Draft Convention seems to possess little prospect of success, only causing interminable delay to the adoption of the final Convention.

As for the "compulsory conciliation" procedure and the "provisional arrangements" provided for in the Draft Convention as a part of the delimitation regime, the ROK would have preferred a stronger obligation imposed upon all the states to consult and negotiate on the basis of sovereign equality and fairness even in the absence of recognition between the parties. The reason for this preference is self-evident; two of the ROK's big-power neighbors, the PRC and the USSR, have obstinately refused to respond to its call to consult and negotiate on the question of maritime boundary delimitation. A consequence of this big-power obstructionism has been to checkmate the ROK's exercise of its national jurisdiction in these maritime zones. Development and utilization of its resources in these zones have been severely hampered. Tension and hostility in the region have increased, jeopardizing peace in an area of the world which contains a quarter of humanity.

Straits

Korea borders on two straits: the Korea (the Western Channel) and the Cheju. The former is formed between the Korean peninsula and Tsushima Island of Japan. The latter is formed between the peninsula and Cheju Island, a province of the ROK. Both straits have a width of less than twenty-four miles. The ROK has recognized the Korea Strait to be an international strait while refusing similar status to the Cheju Strait on the ground that a high-seas route or a route through an exclusive economic zone of similar convenience is available to international shipping on the seaward side of the island. The Cheju Strait is, therefore, a territorial sea (an inland sea) and subject to the provisions of the Territorial Sea Law (31 December 1977) and its Enforcement Decrees of the ROK.

In the case of the Korea Strait, the ROK government has for the time being proclaimed ² three miles of the territorial sea. This measure, by creating a high seas route (the ROK having not yet proclaimed its exclusive economic zone) has rendered the transit passage regime as provided for in Part III of the Draft Convention inapplicable to the Korea Strait.³ However, in view of the quasi-war status in which the ROK is placed vis-a-vis North Korea, transit passage of a warship belonging to North Korea or either of its two military allies, the USSR and the PRC, poses a grave threat to the sovereignty and political independence of the ROK.

Inasmuch as both the USSR and the PRC refuse to recognize the sovereignty of the ROK, the combination of their military alliance with North Korea with which the ROK is technically at war and the ROK's expressly stated willingness to normalize relations with both of them renders the transit passage of their warships through the Korea Strait an intolerable threat to the sovereignty of the ROK under Article 39 of the Draft Convention.⁴ It is expected that the ROK will extend its territorial sea in the Korea Strait to the median or equidistance line with Japan in the near future. If such a measure were to be taken, the ROK might authoritatively construe Article 39 in such a manner as to

apply its provisions to the transit passage of warships belonging to the USSR and the PRC through the Korea Strait.

The Soviet naval and air power has been expanding at a rapid pace in the Far East. Few warships flying the PRC flag have passed through the Korea Strait. Consequently, whatever impact produced by the ROK government's application of Article 39 would mostly fall upon the warships and military aircraft of the Soviet Union. It should also be pointed out that it is not the strait state (in this case, the ROK) that refuses to recognize the sovereignty and political independence of the transit state (the USSR). All that the strait state demands is a bare minimum of international civility: a recognition of its sovereignty and political independence by the transit state. The pain of being victimized by a neighbor's devastating "gunboat diplomacy" is still vivid in the Korean memory. What the ROK desires as a strait state is not to impede peaceful transit through the strait but to promote peace and international amity and cooperation in the region by forestalling any threat to its sovereignty.

Territorial Sea

As has been mentioned in the foregoing, the territorial sea of the width of twelve miles from the baseline has been declared by the ROK. The United States as a global naval power and the most important ally of the ROK has expressed misgivings concerning the ROK decision to require prior notification in the case of innocent passage of foreign warships through its territorial sea. But here again its national history and contemporary regional power realities combine to compel the ROK to ask the United States to agree to disagree on this important issue.

Infiltration of North Korean armed guerrillas into the ROK across its long shoreline continues unabated. North Korean patrol boats frequently violate the ROK waters to seize unlawfully the latter's fishing boats. Under the tense quasi-war circumstances now prevailing on the Korean peninsula, passage of warships belonging to certain governments in the name of "innocent passage" under the current provisions of the Draft Convention would gravely jeopardize "the peace, good order and security" of the ROK. It is out of genuine solicitude for regional peace that the ROK has decided to require prior notification as an effective means to prevent dangerous miscalculation and escalation of tension and hostility.

Some delegations at UNCLOS III have argued for prior authorization for passage of a foreign warship through the territorial sea. The ROK has deemed such a position to be somewhat overly restrictive for the reason that the requirement of prior authorization might in practice become a source of tension and conflict rather than being an effective way to alleviate them. On the other hand, an intrusion of military force into the territory of another country is an extremely serious matter under any circumstances. Inasmuch as there have been two conflicting schools of theory in traditional international law on the passage of a foreign warship through the territorial sea, the requirement of prior notification appears to strike a reasonable and just balance and compromise between the interests of coastal states (especially small and poor former colonies) and the interests of large naval powers.

At the UNCLOS III sessions, the major naval powers of the world have taken the position that the innocent passage regime had been a part of the "package deal," no part of which is amenable to further

discussion for fear of undoing the whole package deal which is a fragile product of an arduous and long process of negotiation at the preceding sessions of the conference. The opposing argument has denied the existence of a package deal on this issue, pointing out that the issue on which a package deal had been worked out was on the regime of transit passage through international straits.

Another favorite argument of the naval powers has been that Articles 18 through 23 carefully circumscribe the right of innocent passage and therefore the rights of coastal states are fully protected without the additional safeguard of prior notification. But a warship which disdains even a minimum of international courtesy and concern for peace, that is, prior notification of its proposed passage through the territorial sea of another country, is not likely to respect whatever constraints the Convention provisions might impose upon it. One could scarcely imagine a simpler, easier, and more effective measure to demonstrate a warship's *bona fide* commitment to refrain from any course of action which may be prejudicial to the peace, good order or security of the coastal state than a prior notification of its intended passage through the latter's territorial sea.

A further argument against the requirement of prior notification might stress probable restraints upon the freedom of navigation by pointing out that, one, hostile tension would inevitably result from even an unintentional failure to give prior notification, and two, an emergency would make it practically impossible to give such an advance notice. But as a practical matter, an unintentional failure is a very remote possibility which could only demonstrate cavalier chauvinism and habitual contempt for the coastal state's sovereignty on the part of a warship. As for an intentional failure to give prior notice, there could not be a more cogent proof of the warship's prejudice against the peace, good order and security of the coastal state. Concerning an emergency, it is precisely in a crisis that prior notification performs an essential function of preventing dangerous miscalculation and defusing tension. Although the ROK requires three days (excluding official holidays) of interval between the notification and the passage,⁶ in a demonstrable emergency, surely, what is crucial is prior notification itself, not how far in advance it is communicated. Whatever is reasonable and feasible under particular circumstances should suffice.

In this connection, it is rather curious that a naval power such as the Soviet Union whose domestic legislation clearly requires "prior authorization" has supported staunchly the adamant refusal of the North Atlantic naval powers even to discuss the prior notification issue at the conference. It will be interesting to witness an abrupt change in the Soviet position on this issue some time in the future, just as it did an about-face, simultaneously with the United States, on the question of the 200-mile exclusive economic zone a few years ago.

Shipping and Shipbuilding

The international trade volume of 40 billion dollars and the import of approximately 72 million metric tons a year, and the export of about 23 million metric tons a year of manufactured goods indicate the vital importance of shipping as a lifeline for the country. The ROK is the nineteenth largest shipping nation in the world and the fourth largest in Asia. Its shipbuilding industry is expanding rapidly. As of 1978, the ROK ranked globally as the tenth largest in shipbuilding

capacity, the eighth in actual tonnage built, the ninth in order backlog, and the fifth in orders currently received.

The ROK's interest as a developing shipping nation is somewhat in conflict with its interest as a new and rapidly growing shipbuilding power. Inclusion of strict provisions designed to combat vessel-source pollution in the Convention would work severe hardship upon its still fledgling shipping industry which is still largely composed of aging vessels and equipment. If these old vessels are driven out of commission by the Convention, this would effectively destroy Korea's shipping industry in view of its shortage of capital.

A European delegation at the conference has taken an extreme position by arguing for the power of each state or group of states to promulgate regulations concerning the design, construction, manning, and equipment standards for the vessels entering its ports and to deny access to its ports of those vessels which fail to meet such standards. It is obvious that if such a drastic measure were adopted, it would place an intolerable strain and impediment upon international trade and commerce. Moreover, it would all but effectively suppress the development of shipping industries among Third World countries, promoting monopoly of world shipping by industrial powers.

On the other hand, if obsolescence of ships is enforced by the Convention, Korea's shipbuilding industry may derive some benefit from an increased demand for new ships. But the order books of Korean shipyards are already bulging with backlogs of orders, especially for new container-ships and offshore drilling rigs. Therefore, it is highly problematic that the adoption of overly strict pollution control measures in the Convention would redound to the benefit of Korea's shipbuilding industry.

The security of long sea lines of communication is a matter of utmost concern for the ROK, because its survival as a nation depends upon it. The ROK, however, has no illusions about its own naval capabilities, either at present or in the future, to safeguard its own long sea lanes by itself. Need for a multi-national cooperative arrangement with those countries which share common interests in maintaining the safety of sea lanes throughout the world is definitely indicated. It also fully realizes the fact that of all the interests related to the sea, navigation is still the most valuable and primary. The ROK is fully committed to the greatest possible degree of the freedom of commercial shipping throughout the globe.

Fishing and Conservation

An efficient management and rational conservation of living resources of the sea are matters of critical importance to a nation which is the ninth largest fishing nation of the world. During the first half of the 1970s, the annual rate of growth in fishing was posted at 6%. But the combination of the aftermath of the first oil crisis and the extension of the exclusive economic zone by the Soviet Union and the United States dealt a staggering blow to the distant-water fishing of the ROK. Although it is still the third largest distant-water fishing nation of the world, it has yet to recover from the blow. Having been excluded from the nearer fishing grounds off the Kamchatka peninsula, Korean fishing boats are being forced to travel longer distances to reach the American zone, causing them to expend more fuel. In the face of ever rising energy costs, the future hope for Korea's distant-water fishing lies in the technological innovation in the area of energy efficiency.

Another difficulty confronting Korea's distant-water fishing is the "creeping national jurisdiction" in the name of conservation of fishery resources. The ROK considers any further attempt to expand the coastal state's jurisdiction beyond 200 miles with regard, for example, to the so-called "straddling" stocks of fish as an unacceptable extension of the exclusive economic zone. The present formulation of Paragraph 2 of Article 63 embodies a reasonable balance between the interests of the coastal states and the fishing states and therefore should not be altered to expand the coastal states' jurisdiction any further.

The ROK has concluded a number of bilateral fishery agreements in order to obtain license to fish in the exclusive economic zone of other countries. In some instances, the licensing and other fees have turned out to be rather exorbitant. Joint ventures and technical assistance have also been tried with success. Fishery immigration has been agreed upon with a couple of countries in South America.

In regard to near-shore fishing, aquaculture is assuming increased importance as the primary and essential factor in the conservation and utilization of living resources in the nation's sea. The dietary favor of the Korean people for marine vegetation greatly enhances the economic potential of aquaculture. The success of cultivating prawns in neighboring Japan holds great significance for Korea. As the essential requirement for protein in the infant diet for normal brain growth is increasingly realized by the average Korean, the productive management and rational utilization of the living resources have become the policy imperative for the ROK.

Therefore the ROK is clearly in favor of marine scientific research, provided that the information gathered by the research is fully shared by all the nations of the world. Aquaculture, if it is to be successful, must base itself upon full and accurate research data. Consequently, the ROK attaches great importance to Part XIII (Marine Scientific Research) of the Draft Convention. In addition, the ROK wishes to see Part XIV (Development and Transfer of Marine Technology) implemented in such a way as to facilitate international exchange of aquaculture technology.

Dispute Settlement Machinery

Being a small country surrounded by powerful and sometimes hostile neighbors, the ROK would have preferred a more effective machinery for third-party settlement of international disputes than the one found in the current formulations of Part XV of the Draft Convention. The ROK is aware, however, of the ideological inflexibility among certain delegations concerning third-party settlement of international disputes on the ground that such a procedure is an unacceptable derogation of their national sovereignty.

It serves no useful purpose here to engage in polemics on the various theories and doctrines concerning the interrelations between national sovereignty and treaties as international legislation. Suffice it to say, the current formulations of Part XV may very well be the best possible compromise under the present configuration of international power dynamics.

The obligation of states parties to settle disputes by peaceful means (Article 279) and "to exchange views regarding settlement of the dispute through negotiations in good faith or other peaceful means" (Article 281) would have acquired more substance and efficacy if the articles had clearly provided that the states parties may not defeat

this obligation by using the lack of diplomatic relations or absence of recognition as an excuse. The ROK has been confronted time and again with the refusal of two of its big-power neighbors to negotiate (on the ground that they do not recognize its sovereignty), coupled with threats of dire consequences if every one of their most high-handed demands is not met. This type of big-power chauvinism is not only inimical to international peace but also renders the elaborate provisions of Part XV practically useless.

Regional and International Cooperation

The Draft Convention encourages international cooperation on a regional basis wherever possible throughout its entire length. The Republic of Korea has strongly supported this trend because its geography alone, without more, makes regional cooperation a policy imperative for the country. The area in which regional cooperation is both indispensable and urgent is protection of the marine environment. Measures designed to protect the marine environment can be effective only on a regional basis. Both the Yellow Sea and the Sea of Japan which enclose the Republic of Korea are themselves semi-enclosed seas.

Although the Sea of Japan is much more fully enclosed (95%) by land, such hydrographic features as the depth and the relatively rapid circulation of the sea water permit it to be somewhat less susceptible to irreparable or permanent pollution damage than the Yellow Sea which is 75% enclosed. The latter is a relatively shallow sea with a large amount of land effluent in the water which has given the Yellow Sea its descriptive name. Both of these seas are encircled by land masses which support the world's heaviest concentration of population and industry and the second-heaviest concentration of shipping. Offshore exploration and exploitation of oil and gas are rapidly increasing in this area. Given the magnitude of fishery catch in these seas and its essentiality as the source of protein for the enormous population, combined with the heavy use of the seas, a major tanker catastrophe, for instance, would spell an environmental disaster with long-lasting damage to the entire region. The overwhelming need for regional cooperation for the purpose of preventing, reducing, and controlling pollution of the marine environment is quite clear.

Unfortunately, two of the Republic of Korea's big-power neighbors have so far refused to open channels of communication to discuss possible areas of cooperation. Here again, the Republic of Korea would have preferred a more emphatic provision in the Draft Convention in favor of regional cooperation among states parties who do not have diplomatic relations. This is certainly a matter of sharing in a community of common fate by virtue of geography. The physical survival of literally hundreds of millions of human beings is involved. As the same seas lap the shores of several different coastal states, every aspect of the law of the sea (especially protection of the marine environment) demands regional cooperation.

Another field of international cooperation in which the Republic of Korea has serious interest is deep seabed mining. Under Part XI and Annex III (particularly Articles 8 and 9), developing states are to be given opportunities for "effective participation" in the mining activities in "reserved sites." As one of the newly industrializing countries, the Republic of Korea looks forward to organizing joint ventures with other developing countries to exploit such sites. In keeping with its industrial development, its demand for mineral resources is bound to increase rapidly. The Republic of Korea deems it

in its interest to see that the development of deep seabed resources take place in the nearest possible future.

Concluding Observations

In its magnitude of scope and diversity of interests involved, UNCLOS III has no historical parallel. Even the founding of the United Nations itself in 1945 is dwarfed by the number of delegations and the sheer complexity of the subject matter on which a global solution is being sought. As has often been pointed out, the establishment of the United Nations did not include detailed formulations of new international legal concepts and principles or reformulations of doctrines and definitions of traditional international law. Nor did it include vast spatial expansion of a variety of national jurisdictions: territorial, administrative, economic, and environmental. Many of the ideas, concepts, and principles now being embodied in the Draft Convention did not even exist in 1945.

The sea, the subject matter of the Conference, is infinitely complex. Much about it remains unknown or only imperfectly understood. The legal relations affecting the use of its surface, in rapid flux as they are, are dauntingly intricate. The effective conservation and rational management of living resources in the water itself require a creative mind to construct a legal regime which is to benefit all mankind. The surface of seabeds demands a separate legal regime quite distinct from that which regulates the exploration and exploitation of the subsoil resources.

Abjectly dependent though he is on his earthly environment, man is above all a polluter of his environment. Since almost all of the pollution he generates on land eventually washes into the sea, his marine environment is being assaulted from both land and sea. By dumping wastes from vessels and offshore installations and by exterminating various species of marine organisms, man is rapidly destroying his marine environment. The regime to protect and preserve this fragile environment requires both intelligence and good neighborliness. Nations and governments must cooperate with one another, irrespective of ideological or political differences. Otherwise, the alternative is too dreadful to contemplate.

If the Conference succeeds, it will be a monument to human intelligence and reason. If it fails, world peace will be that much less secure. The Republic of Korea has fully participated in the Conference. It remains committed to the speedy and successful conclusion of the Conference in the form of the Convention on the Law of the Sea.

NOTES

1. The relevant wording of Paragraph 1 of Articles 74 (the exclusive economic zone) and 83 (the continental shelf) is as follows:

The delimitation ... shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.

2. The three-mile exception to the general rule of twelve miles of the territorial sea is provided for in the two Presidential Decrees, Nos. 8994, 29 April 1978, and 9162, 20 September 1978.

3. Article 36 provides:

This Part does not apply to a strait used for international navigation if a high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists through the strait.

4. Article 39 provides:

1. Ships and aircraft, while exercising the right of transit passage, shall: ...

(b) Refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering straits, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; ...

5. For example, Paragraph 1 of Article 19 provides:

Passage is 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 this Convention and with other rules of international law.

6. Article 4 of the Presidential Decree No. 9162 (20 September 1978).

* The view expressed in this paper is exclusively the writer's own and in no way reflects that of the government of the Republic of Korea.

DISCUSSION

Keu-Cab Cho: Ambassador Hahm has given a comprehensive report. I would like to touch upon a different phase of the problems, a conceptual dimension rather than the practical details of the problems that Ambassador Hahm spoke of, for law of the sea problems will be solved only after clarifying the general community interest. To secure all interests one must have a clear and unambiguous understanding of three different processes: the process of interaction by which the oceans are enjoyed; the process of claims by which interests are searched; and the process of adjudication by which interests are honored and protected. In each of these processes, certain participants seek a great variety of objectives, starting a range of inter-connected strategies in different situations. They employ a variety of uses, claims, and decisions to achieve important outcomes and effects, both intended and unintended, which are affected by constantly changing conditions. This is the primary scheme of logic for a creative solution to the problems. So I would like to touch upon the concrete problems of boundaries and straits.

The trend of interaction of the world community in the law of the sea has changed from the principle of use of the high seas by the maritime powers to the principle of extension of sovereign jurisdiction of the territorial states as claimed mostly by the developing nations. The bases of the claims may be classified in two groups. One is the maximization of exclusive use of the sea by developing nations and the other is maximization of wider use of the sea by marine powers, which for the most part are developed nations. These problems are related to the north and south problems raised at the UN Conference on Trade and Development (UNCTAD).

In the solution to strait problems, there are three guiding principles: free passage, transit passage, and innocent passage. As the Ambassador mentioned already, Korea does not adhere only to one principle. In its concrete decisions it sometimes adopts free passage, sometimes innocent passage in the territorial sea, and sometimes transit passage. But, generally speaking, Korean standards follow the incomplete text of the Convention.

Lastly, I would like to touch upon regional cooperation. As all of us know, the Republic of Korea has no official permanent relations with the PRC or with the USSR. However, issues such as pollution control and deep sea mining and the exclusive economic zone are crucial problems to the neighboring states. So we study these problems at the non-political, academic level and propose creative solutions to the diplomatic circles.

Jack Davidson: In the late 1960s I first became acquainted with Korean people in the form of students at the East-West Center at the University of Hawaii. In 1970 I visited Korea and was impressed by the tremendous enterprise and the individual and national spirit. Subsequently my students finished their studies and returned to Korea to work. Now in 1981 I revisit Korea after eleven years and see tremendous change and growth as a result of this individual and national spirit for achievement. During the first three days here I managed to visit all of my old students and talk to them, learn about their jobs and functions, and I asked many questions about Korea's economic growth. What they told me was very helpful as I came into this

conference, because I am listening as an economist to lawyers and diplomats.

I was impressed with the role the ocean has begun to play in Korean national development. I had a visit with the Director-General of Fisheries and learned of the developments in aquaculture and the long-range fisheries achievement of the past twenty years. I learned about Korean shipping -- I knew a little about it but not a great deal -- and I've got a view of the problems.

I see twenty years of unparalleled progress and then three years of a shock occasioned by the energy crisis. Other shocks associated with pollution control have acted upon the ocean enterprises and, momentarily at least, slowed down some of the growth and achievement. So it is from this perspective that I speak.

In near-shore fisheries and aquaculture, Korea appears to face a great challenge here at home. The challenge is that nearshore fisheries are probably overfished and in need of management. The aquaculture potential has not been developed on the one hand, and on the other hand, both the fisheries and aquaculture need a lot of protection from the residual effluent of chemicals and pesticides and pollutants that will eventually accumulate in the ocean as a result of rapid industrialization.

There is what we economists call an externality here where the costs have been passed on to Nature for many years, and eventually someone will have to pay these costs. The sea is a tremendously resilient, but in the nearshore areas it must be protected. I was greatly encouraged to learn that KORDI has organized an ocean environmental section. I assume that many scientific and government people will be looking at this problem of pollution control.

So while there is the broad question of the pollution of the Yellow Sea, yes, there's also a question of nearshore protection. The long-range fisheries, of course, are presently reeling under the shock of fuel costs and extended jurisdiction. I've heard here at this conference a most reasonable attitude; the Korean people will extend their ingenuity into joint ventures and whatever is necessary to take advantage of the changing situation.

Whether or not the fisheries will retain or reacquire a growth phase is up to bankers. This is one of the problems of growth. As you become successful in economic growth, other enterprises become more profitable. Whether the bankers will be amenable to building new-generation fishing boats and financing marginal ventures with the other investment opportunities that come with internationalization of Korea's industry will be an interesting problem. It may be that fisheries will be reassessed. You may decide you do not want to remain third in long-range fisheries. You must work out the costs and benefits associated with joint ventures and with the long-range fuel problem and so forth. You also have a problem in that as economic progress continues, wages are higher and people are not as willing to go fishing, which is an undesirable operation in many ways. They will demand higher wages which will also have to come into balance here.

Shipping also hit the shock, I assume, in the late 1970s with accelerating obsolescence because of higher fuel costs. These higher energy costs have caused a period of severe overcapacity in world shipping. Many countries are going through major adjustments in this area. But Korean shipbuilding is very impressive.

I assume that Korea will remain very strong in long-range fisheries, but there will be a very close economic assessment. The govern-

ment could have a policy to subsidize fisheries in certain long-range strategic interests, but not if they are excessively uneconomical. There are too many other opportunities they could take advantage of.

I have the impression from listening to some of the speakers early in the conference that they believe that most problems would give way to economic pressures eventually, and that economics would out. I'm a student of history, and while admit I have not studied enough history of this area, I have studied the history of the Middle East, back many centuries up to the modern day. It is fairly evident that at least in some cases economics don't necessarily out. The sheer urge for power over fellow men often disrupts economics. Perhaps economics will out in the long run, but in the long run, as one prominent economist said, we're all dead. I think that we from the Western point of view who have lived all of our lives, and even several generations, in comparative peace and lack of close tension are in a very poor position to evaluate the real essence of the regional problems. While we could give advice, we should realize that our advice is apt to be naive here.

Chi-Young Park: I am grateful to Ambassador Hahm for his persuasive presentation, which helps us to gain insight into the complexity of the problems we are faced with at this time in relation to the law of the sea. I believe we have had enough discussions during the past two days about the complexity of the problems concerning the law of the sea in East Asia. Moreover, I feel that we believe that the issues are too difficult to find any kind of solutions for. We have been talking about many issues, such as boundary delimitation problems and international straits, but these are political issues as much as legal ones.

By profession, I am a political scientist, but I have taught and been a student of international law and international organization. I have been watching and reading all the materials concerning the UNCLOS III for the past seven or eight years. We are now attempting to resolve the political issues within the framework of international law of the sea. Whenever we have this kind of meeting, we are often tempted to say or feel that the erection of some suitable rules or principles might facilitate a solution to all kinds of problems facing all nations in the world. However, I'd like to point out that even a comprehensive convention may not provide us with solutions to the complex problems we have been talking about these past few days. Too many interests are involved, too many interests are at stake to give up whatever claims nations have made in past years, even under the new law of the sea principles. To me the Draft Convention which has been under consideration in the past years may be no more than old wine in new bottles. The same old problems still remain.

Conflict of interests among nations may take different shape under the new law of the sea principles. With the adoption of a new comprehensive law of the sea treaty there will be many disputes concerning interpretation and application of the agreement in addition to the substantive issues such as revolutionary concepts of the common heritage of mankind. One clear principle has emerged at UNCLOS III: states cannot take unilateral action in dealing with oceans. There must be some kind of common effort based on the sense of global community among nations.

In fact we must consider three aspects of the law of the sea: law, physics, and politics. We often tend to emphasize one aspect over the others. We must approach Korean problems in regard to the law of the sea with this point in mind. As Ambassador Hahm noted in his presenta-

tion, we have problems involving the PRC and the Soviet Union, not to mention North Korea. I will confine my comments to only one problem: the boundary delimitation with the PRC.

The Republic of Korea and the PRC support their positions with different arguments. We support the median line of a consensus or the equitable principle or the joint development plan. The PRC favors the natural prolongation theory. The Republic of Korea has been ready to negotiate, according to the reports and a couple of petitions, ever since 1974. In fact, as Mr. Yuan pointed out at yesterday's session, the People's Republic of China is also ready to negotiate. Of course, there is a gap between the positions taken by the two countries. But in approaching the problem of boundary delimitations, perhaps we should reflect here on the following considerations:

1. As Dr. Johnston pointed out earlier, a joint utilization proposal could be one way of solving the problems in a disputed area. In fact, the boundary itself may not be the most important part of the problem in connection with boundary delimitations. Particularly when you talk about revenue-sharing concepts, as Dr. Choon-ho Park mentioned yesterday, the intensity of the dispute depends on the size of the potential resources in the sea. If you have nothing in the sea, you may not have a really big issue beyond making clear that you have a proprietary right over a certain body of water. So we may try to negotiate with the PRC a proposal for joint management or joint development as in the case of the Korea-Japan joint effort.

2. If the obligatory application of the equidistance principle is modified, it could be a good basis for starting negotiations. In the present political circumstances, Korea and the PRC, and for that matter the Soviet Union, may find it difficult to get negotiations started for many different reasons. But with the passing of time, the two countries will find their interests more and more interlocking. Mutual interests will eventually bring the two countries to the conference table regardless of whether the PRC recognizes the Republic of Korea. So long as we deal with the problem of boundary delimitation with patience and practical consideration, I feel hopeful that we will find a compromise.

In concluding my comments I would like to answer the following couple of questions:

Can there be a negotiation with the PRC? I am very optimistic, especially after I heard what Mr. Yuan said yesterday. It will be a matter of time, I think, if practical considerations are given some weight.

We need some sort of effective dispute-settlement machinery. Ambassador Hahn mentioned that perhaps tougher compulsory dispute settlement machinery -- at least tougher wording -- might be desirable. I share Ambassador Hahn's view on this point, but we also have to remember that one of the problems with the International Court of Justice is that you cannot force a sovereign state to submit itself to the jurisdiction of the ICJ against the state's wishes. I don't see how we can force a sovereign state to compulsory measures under the law of the sea. Perhaps psychological pressures or public opinion may work. In fact all the nations that have participated in the Law of the Sea Conference in the past seven or eight years had to come to the conference table, had to come up with some sort of comprehensive convention because they need it, not because they are forced.

Perhaps voluntary informal third-party conciliation might be a more effective way to settle disputes. Perhaps in documents resulting

from conventions we could add tougher provisions to make sure that all nations have to settle disputes in a peaceful manner.

Hideo Takabayashi: Thank you, Ambassador Hahm, for your explanation of the Korean position. I should like to ask for your interpretation of the Draft Convention on several points. The first point concerns the Cheju Strait. As you said, in that strait the distance between island and mainland is short: twenty-four miles. That strait does not belong to the category defined in Article 36 of the Draft Convention, I think, because that strait is an international strait. I think the Cheju Strait belongs to the category of exception stipulated in the first paragraph of Article 38 because a route of similar convenience exists seaward of the island.

The second point. You say that the transit by a warship belonging to a state that refuses to recognize the sovereignty and the political independence of the Republic of Korea is a violation of the duties listed in Article 39 of the Draft Convention. But I think transit passage of a warship does not itself constitute the threat or use of force against the bordering state. If your interpretation is correct, a Korean government ship could not pass through the straits of the People's Republic of China or the Soviet Union.

Pyong-Choon Hahm: Let me just say that we do think that there is a sea route of similar convenience available to the seaward side of Cheju Island so that the ship need not go through the Cheju Strait to economize on fuel or things of that nature. That's the reason why we said that the Cheju Strait, as far as Republic of Korea is concerned, need not be designated as the international strait.

About the second point, there is an important difference. It's not the ordinary case where the strait state is trying to impede the transiting of other countries' ships. It is the transiting state that, while transiting, says to the strait state (which is the Republic of Korea) "We don't recognize your sovereign independence," and goes through the strait. That's the problem, particularly given the quasi-war situation. Also, the Soviet Union's military capability is by treaty so closely aligned with North Korea, with whom we are at war technically, that this is a very peculiar problem.

We are willing to have normal diplomatic relations with both PRC and the Soviet Union. We don't go through the PRC's strait or the Soviet Union's strait saying, "PRC, you are not the sovereign independent country", or, "USSR, you are not the sovereign independent country". That we are not saying. On the contrary, we go through that strait and say that we want to be friendly with them. That's what we are saying. But the Soviet ship is saying the exact opposite.

Choong-II Chee: I want to comment on three points that Ambassador Hahm raised. The first is this notification factor. Perhaps it's interesting to speculate on the legal distinction between the notification requirement and the authorization requirement, but in substance they are the same in the sense that Article 30 authorizes the coastal state to require the warship to leave the territorial sea if the transiting warship does not comply with the regulations of the coastal state. That's probably why the Soviet Union has objected to a notification regime at UNCLOS III. Article 20 requires a submarine to pass on the surface, with a flag. What's behind this requirement? The coastal state doesn't want to be surprised, that's all. I don't really see the diffi-

culty of the notification requirement on the simple grounds that the coastal state doesn't want to be surprised.

The second point is on fisheries. Ambassador Hahm said something about the disparity between Korea and Japan, and so forth, in terms of catches of fish. But it's not really the tonnage and weight of the fish that is important. The crucial question is the market value of the fish. I have been saying this for quite some time, in negotiating with Japan, that from the standpoint of equity, parity must be the market value of the fish, not so much the weight. Catching a hundred tons of salmon is one thing. Catching a hundred tons of pollock is something else. Certainly the Korean government should exploit this fact in future negotiations. I have said this many times, but nobody has listened.

The other point in connection with fisheries is the problem of enforcement. It's very elusive, that requirement of a certain tonnage allocation to certain states. If you don't have effective enforcement apparatus, there's no way of telling how many fish are being caught. Maybe under the Korea-Japan treaty, there are requirements that the Japan should be allowed to catch only 150 tons. But they may be catching more simply because of the inability of Korean law enforcement. EEZ law enforcement is very costly. This is realized even by the United States, which is a fairly rich nation and can afford very extensive law enforcement operations. Furthermore, the treaty is rather unconventional in the sense that it does not allow coastal states to enforce or to punish the offender. This is a rather unusual treaty, I would say obsolete treaty. I don't say that the treaty requires any revisions but this should be clearly recognized by the people concerned.

One final point I would like to make is the possibility of concluding trade relations among the unrecognized states. Now certainly pollution is one area in which China, North Korea, Korea, Japan -- these concerned states could conclude a regional convention. There's a precedent in which the unrecognized states concluded treaty relations that had nothing to do with recognition: the 1973 convention between the United States, South and North Vietnam, and the revolutionary government. The four parties concerned were all unrecognized. So a treaty is definitely possible once the states are willing to conclude such a convention.

John Craven: Dr. Hahm has made a splendid contribution to our understanding of international law and our understanding of the words that are in the proposed text, which many of us have felt were more or less window-dressing, but which in point of fact become very real and significant in an actual situation. Earlier in this conference, I suggested that words in the treaty having to do with equity and equitable principles are worn-out window-dressing, although they may have been placed in the treaty for that purpose -- that there will come a time when nations having difficult problems will have to resort to the use of those words in order to express their position.

We have a very interesting example here of a case in which a nation that is in a legal state of war with another state, although an armistice does exist, is now faced with a problem when a legal neutral is transiting its waters -- in this case, not carrying but towing contraband of war. The state, faced with the delicate problem of attempting to comply with the customary interpretation of the text, must now examine very closely the words that ships and aircraft, while exercising the right of transit passage, shall refrain from any threat

or use of force against the sovereignty. The term "use of force" is very clear, but the term "threat" has to be interpreted in the context of all the legal relationships between the parties.

The final comment I would make is that I would encourage, at workshops of this kind, that we do focus more on problems of the kind that Ambassador Hahm has raised, with the intent of providing, at least off the record, an interpretation of the meaning of the word "threat" as it appears in this document, and, I might also add, the meaning of the word "equity" or "equitable principles" so that in the absence of *travaux préparatoires* and the absence of interpretive statements on the record, the community does have some understanding of these words that we all regard as so much window-dressing.

Choon-ho Park: Regarding the territorial sea laws of Korea, Japan, China, and other countries, one striking difference between the territorial sea laws of Korea and Japan is that Japan simply defines in great detail the spatial extent only. The legal or jurisdictional aspect within a limit isn't really defined, because it's assumed that it will rely on general international law as such. Korea's is, in contrast, in great detail on respect to the jurisdictional side as well.

One comment with respect to the Cheju Strait. The requirement for advance notification or authorization is not to be applied in the case of straits used for international navigation. That's the language given in the enforcement provisions. The crucial question here is, then, is or is not Cheju Strait an international strait used for international navigation? This is going to be a point on which futile, circular arguments will go on for a long time to come.

Paul Yuan: First of all I greatly benefited from Ambassador Hahm's very informed speech as well as from comments by panelists. Since many speakers mentioned PRC and some mentioned my name, I feel compelled to speak a few words. First of all, I want to point out that what I said yesterday and what I am saying now is entirely my personal opinion. This point must be made very clear. The second point: I quite agree that there is no fundamental conflict of interests between our country and Korea. Of course, this is only one aspect of the problem. There are many strategic, political, and other factors that will have to be considered by the individual countries according to their circumstances. Such as, PRC has to consider her relationship with North Korea. The third point I would like to mention after having talked with many Korean scholars -- and some of them are also officials -- is that I find that there exists genuine interest on the part of Korea to develop relations with the PRC. Yesterday, one commentator struck a not very rosy note. But I find that the situation is changing. Today's *Korea Times* shows that the situation is developing quickly. Imagine that the new Chairman said that he will also draw experiences from South Korea. These are, I think, indications that things are changing.

Personally I am quite optimistic about the future prospects of our two countries, and I have heard many encouraging remarks from scholars here about future relationships with the PRC. I think I might help in this matter at least by relaying your messages to my own country. We are all scholars here, and scholars represent one section of Korean public opinion.

Pyong-Choon Hahm: A brief comment on what Professor Choung Il Chee was saying about prior notification in connection with what Dr. Chi-Young Park said about the Soviet Union's attitude. The Soviet Union by its own domestic law requires prior authorization for foreign military warships, but at UNCLOS it has been more or less taking sides with the United States in opposition to any kind of prior conditions to the passage of warships through the territorial waters of other countries. So there is a conflict. We have watched both the United States and the Soviet Union, who had been so virulently, violently opposed to the exclusive economic zone, change their positions overnight by 180 degrees. "You can never trust these big powers, you see?" is what they say at the international conference. "They are subject to change without notice." So, in a sense, we cannot rely on the position the Soviet Union takes. During the just past March-April session of UNCLOS, I saw the Soviet delegates persuading Cuba, Vietnam, the Group of 77, not to go along with this idea of prior notification or authorization because the Soviet Union policy is against it. But the Soviet Union might change its position. We never know.

I think in any event that prior notification is much more reasonable than prior authorization. Prior authorization is just an impossible idea. On the other hand, you cannot go into somebody else's territory with your military machine without some kind of courtesy notice. All of these requirements are based on the idea that the warship will show some kind of willingness to abide by the coastal state's regulations. There has to be a basic good will in this kind of approach.

Dr. Craven's point about how you interpret these words in a practical context is a very serious problem, I think. Equity, for example, is like the size of the foot in Great Britain: it depends on the size of the chancellor's foot. Of course, we all know that. All of these terminologies acquire some very important legal meanings. And we must clarify as best we can.

On Dr. Park's point about whether the Cheju Strait is an international strait, that is exactly what we are saying. We don't want to be trapped into admitting it's an international strait, because as soon as we do that, we're stuck with the regime under the Draft Convention.

And about Mr. Yuan's point, I am really encouraged to hear this. Like Dr. Davidson's point that economics isn't everything, perhaps the primary consideration for the PRC at the moment is its political or ideological relationship with North Korea which takes precedence over everything else. The common interest about pollution control, any other kind of regional cooperation, and benefits therefrom may be overshadowed by this political and diplomatic consideration of North Korea. But I'm happy that we could finish on an optimistic note.

SUMMARY AND CLOSING

SUMMARY AND CLOSING

Choon-ho Park: I always regard it as a virtue to be brief, and sometimes I quote the late Adlai Stevenson, who said, "My business is to speak. Your business is to listen, and I want to finish my business before you finish yours."

In the first session, Dr. Craven gave us a good coverage of the history of the law of the sea before and since 1967. From that point on, it is an ongoing process of codification. The conclusion of the Conference at the United Nations will be an opening for a great many other things at much shorter intervals than before. That is, we shall see some more Arvid Pardos, but not at intervals of so many years. I'm reminded of what Senator Tolentino of the Philippines said at one of the sessions in New York. Tolentino happens to be the only head of delegation who has headed his delegation through three conferences, 1958, 1960, and the current one. At one of the plenary sessions, he sat in the spectators' seats, he put his hand on my shoulder and said, "Choon, look at those people. Half of them were barely graduate students when I represented my country in Geneva, but now many of them have made quite a career out of this ongoing thing. Their ranks are going up, and their hair is retreating." That was his recollection.

In the panel on problems of strait passage, Myron Nordquist, Horace Robertson, and Dalchoong Kim presented excellent papers. The issue is really too sensitive and too deeply interlocked with other aspects of national and security interests to be left to what we call the law of the sea. Often we argue sensitive issues in the polite and inoffensive language of law and diplomacy so that law is only providing the means through which the arguments are made. None of the problems are solely legal in nature; law of the sea or no law of the sea, ships and submarines will come and go, and the battle of books, mouths, and nerves among the coastal states will continue.

The panel on problems of maritime boundary delimitation where I presented cartographic illustrations was also an interesting one. The categorization of different boundary issues by Professor Johnston was really very exciting. I was also impressed by Mr. Suda's points. Indeed, everything that needed to be said on this point has been said, but one thing that we didn't go into very deeply was the territorial issue, because it is too sensitive to be discussed here anyway, and it is slightly outside the context, so I want to make a few points on it very briefly.

Regarding the territorial issues of the ownership of mid-ocean islands, most of the flyspecks -- some observers call them flyspecks because they are hardly visible on ordinary maps -- are covered by bird droppings but hardly any vegetation. But disputants invariably call them "the sacred territory of the fatherland." This is the only region where we have fatherlands covered with bird droppings. In East Asia there are few instances where territories changed ownership peacefully. Usually it was done under duress, violence, or war. One notable exception was the swapping of Sakhalin and the Kurile Islands by Japan and Imperial Russia in the latter part of the nineteenth century. Because of this historic reason, national sentiments easily flare up over any piece of territory, regardless of its physical value. The island of Tokto or Takeshima is a striking example. I wonder whether claimants to ownership of these flyspeck islands would disclaim them if they oozed some noxious, poisonous, offensive substance destroying all marine life

and killing human beings flying or swimming by. Perhaps I am being too imaginary.

Unfortunately, in many quarters where there are possible oil or mineral deposits, the settlement of territorial disputes is now going to be a prerequisite to the delimitation of maritime boundaries, and the delimitation of maritime boundaries is in turn going to be a prerequisite to the development of natural resources. This I say with respect to areas toward the sea, because development activities are already underway in waters very close to coasts where the jurisdiction is not contested.

In the China Seas, and by this I mean the Yellow Sea, the East China Sea, and the South China Sea, whether you like it or not, active participation or cooperation of the two major coastal states, China and Vietnam, is going to be essential for the final settlement of the boundary issues. We know that China is a country with a very high boiling point, by which I mean the Chinese people can afford any degree of patience. I am reminded of an ancient saying that if you cannot kill a tiger, just wish him to be a vegetarian. But we must wait a long time for China to come forward to sit face-to-face with other negotiators. Mr. Yuan has kindly shed some light on the possibility of this, regardless of when this is going to take place in the future.

On the panel on pollution control, there is no question that Professor Johnston and Professor Gold are leading experts on this topic. They presented wonderful papers. The China Seas have been free of major incidents like tanker accidents. We haven't had anything like the *Torrey Canyon* disaster, not because of the efforts made by the coastal states, but because of sheer good luck. But this doesn't mean that the good luck will continue to be there. The density of traffic increases. Japan imports roughly 600 million tons of raw materials, including crude oil which is approximately one third of it, and exports about one-tenth, which is 60 million tons of manufactured or processed goods, mostly or almost entirely by sea. And South Korea does approximately one-tenth of that. China's foreign freight is also increasing, not only in value but in volume. We can imagine that the density of traffic is going to increase in the future. Ironically or cynically, it took an accident like the *Torrey Canyon* for IMCO and other international organizations to take action. I never would suggest that something like this should happen in the East Asian Seas so that the countries would come around, but I certainly would say that we've got to do something on a multilateral basis. We cannot count on good luck indefinitely.

Here I might remind you that with respect to the need for regional cooperation, in Stockholm in 1972, China suggested that countries in different regions should create compensation funds for restitution or compensation. I'm not sure whether that was just a friendly proposal to be on record, or whether that has been substantiated since.

On the Antarctic resources panel Professor Cheever presented a very nice paper indeed. This is another area on which UNCLOS III hasn't really touched upon at all. It was virtually silent on Antarctica. Perhaps sea lawyers are reserving this for another conference on Antarctica, AntarcticLOS I or UNCLOS IV. Sometimes, of course, it is better to keep lawyers busy that way instead of keeping them bored, when they will only create more complicated problems.

Few people doubt that the mineral and living resources including krill in the Antarctic are great indeed. There was some mention of the nutritional value of krill. But aside from its nutritional value, it

needs something else. People have got to like the fish for them to appreciate it. Again here I stretch my imagination a bit too far. Suppose a group of physicians or nutritionists come up to say, "Krill, although it may taste too greasy or not very tasty indeed, has a cancer-preventing element in it." Then I would say there would be a mad race of deep sea fishermen to the Antarctic.

In this morning's session Ambassador Hahm gave us an elucidating presentation on the position of South Korea. I have been dabbling in the law of the sea, so to say figuratively, for the past fifteen years but haven't found many countries whose law of the sea problems are as complicated as Korea's. The only problem South Korea doesn't have, to date, is the landlocked problem, unless someone is going to start a landlocked country nearby. East Asia has five landlocked countries and all of them border on China. But so far, China hasn't been really bothered by this problem. Four countries could reach the sea without disturbing China. If Mongolia really wanted to reach the sea by the shortest route, it would have to go through the capital city of Beijing and anchor its vessels at one of China's most important harbors, Tientsin. Given the relations between China, Mongolia, and the Soviet Union, I think if I were a Chinese security guard in Beijing, I wouldn't want to see Mongolian ox carts going through with a lot of Russian-made electronic devices inside.

But coming back to the Korean position, I simply cannot think of any other country with so many law-of-the-sea problems. And it happens to be a shelf-locked country, too. I would say that in the past we experienced so many problems and we have so many on hand, and possibly a lot more will arise. So I am being very selfish when I say that I really don't envy our people involved in law-of-the-sea problems. I really sympathize with them.

This has been a quick summary of what has happened. Now I'd like to open the floor for general comments.

John Craven: I don't propose to add to or modify that masterful summary in which wit and humor highlight the serious words that are said beneath. It is always a joy to hear Dr. Park, because after you have enjoyed all the humor, you recognize that you were fed a fine bit of substance. I do want to say that if I were to summarize this conference, I would regard it as one that not only raised the problems of this area. We knew before we came that this total set of semi-enclosed seas, islands, peninsulas, archipelagos, and all the configurations we can enumerate, would have all the problems one could imagine associated with the law of the sea. This conference would be successful if it had merely summarized them in a clear and coherent way. But to me the greatest contribution to this conference was the structuring in an orderly way of mechanisms by which these problems may be resolved. That was perhaps the most significant contribution in bringing all the people together here to exchange these views. There are indications from this meeting that these mechanisms, structured and laid out by the participants, will in fact be put to work when the conference is over and we leave our roles as scholars and revert to our roles as practitioners in our respective official capacities. These mechanisms are primarily joint ventures and agreements to work out for the utilization of the resources in disputed areas. Receptiveness to these ideas gives us every confidence that these ideas will show up in official forums.

Roy Lee: On behalf of the overseas participants, I would like to thank our hosts. I'd like to mention why this meeting is most rewarding to me. I have observed that Korea has assembled a first class team of experts in response to the overseas participants. What they have done is the following: They have clearly identified for us the national interests and those critical issues in the area of the law of the sea. And they have shown us that they know what measures they should take in order to protect their interests and to face these critical issues. At the same time, they also gave us a balanced and a rational regional perspective of the interests and the issues. Above all, they have demonstrated to us the frankness in the exchange of views among these experts. I think this conference sets an excellent example for UN seminars to follow.

The second reason I find it personally rewarding is Ambassador Hahn's talk this morning. I have known him for many years, but always in the conference context of formal speeches, formal meetings. This is the first time I have had the opportunity to listen to what he called a personal view of the the law of the sea issues facing Korea.

This morning Professor Park said that now that we have identified the issues, we feel that there is a need for a functional approach in dealing with the boundary issues of the neighboring states. We also recognize that the necessary political ingredients may not be present in the current circumstances. I would ask the board to consider some of the ideas that were conceived in this workshop and to sponsor another meeting in a third party's capacity to bring those states together.

PART II: 1984 WORKSHOP

OPENING CEREMONIES

OPENING CEREMONIES

Choon-ho Park: Good morning, ladies and gentlemen. I am Professor Park. In Korea we have over four million Parks, and I am just one of them. I am the general chairman of the conference, and my role is that of a postmaster-general because the conference staff is so excellent and well organized. Dr. Jae Kyu Park, Director of the Institute for Far Eastern Studies, Kyungnam University, will welcome you.

Jae Kyu Park: Mr. Chairman, distinguished participants from home and abroad, ladies and gentlemen, on behalf of the Institute for Far Eastern Studies, Kyungnam University, I am very pleased to welcome all of you to this conference. First, I wish to thank Professor Clingan and Professor Craven of the Law of the Sea Institute and Professor Van Dyke, who is representing the Environment and Policy Institute of the East-West Center of the University of Hawaii. I am deeply indebted to these gentlemen and the institutions they represent for co-sponsoring this conference with us. Without their cooperation, it wouldn't have been possible for us to get together here today. I also wish to thank all participants for their preparation. Many of you have come a long way to discuss the problems of the sea in this part of the world.

This is the first regional conference of specialists on the law of the sea not only from within the region but also from the other side of the Pacific since the U.N. Convention on the Law of the Sea was signed at Montego Bay, Jamaica, in December, 1982. Once the Convention comes into force, the international law of the sea will not be the same as before. Already, many of the provisions embodied in the Convention are being enforced by many coastal states and maritime powers. The 200-mile exclusive economic zone is one such example. East Asia has numerous national and international problems relating to the use of the sea and its resources. The uncomfortable political relations among some of the coastal states also add to the complex nature of the issues we will discuss. In few other regions do the political and economic interests of the four major powers -- namely, the United States, Japan, the People's Republic of China, and the Soviet Union -- converge in the seas of this region. Also, countries in few other regions are so heavily dependent on the sea for their economic viability. For all of these reasons and many others, I must say we could have hardly picked a more relevant topic to discuss in the four days ahead. I look forward to the interesting and informative discussions we will have. I wish to close by wishing you all a pleasant stay in Seoul with old and new friends. Thank you.

Choon-ho Park: Thank you very much, Dr. Park. Now, Dr. John P. Craven, the Director of the Law of the Sea Institute, University of Hawaii, is not only going to welcome you but will speak on some very current topics, such as what's happening in the Persian Gulf or the Arabian Gulf. He's also going to speak in more than one language. It is my pleasure to present Dr. Craven.

John P. Craven: Thank you very much. We at the Law of the Sea Institute are indebted to the many Professor Parks for their role in bringing about this important conference. We particularly want to thank the Institute for Far Eastern Studies of Kyungnam University for initiating this important international conference, indeed the first of its kind,

representing as it does, or as it will, a statement of the law of the sea in East Asia. It is unique even though it is, for many of us, the second workshop or conference which we have had the good fortune to experience here in Seoul under the Law of the Sea Institute sponsorship.

Between that workshop, which occurred three years ago to this very day, and the present conference, there has been a firming up of the law of the sea and the mechanisms for its implementation. Two major factors contributing to this firming-up have been (1) the concluding of the UNCLOS III negotiations, and (2) the independent declaration on the law of the sea by the United States. Now the Reagan Declaration, while it was bold and independent in the tone and the style of its rhetoric, was in fact a major affirmation of nearly all of the massive text of the Treaty. It declares most of these principles to be the common law of the sea in the face of incontrovertible evidence that one or more of these new regimes fails to satisfy the generally accepted conditions for becoming international common law. The Reagan Declaration therefore substitutes negotiated Treaty text as the best evidence of customary international law. But the Reagan Declaration is more than an affirmation of the Treaty and more than an independent statement. It is in fact a declaration of self-imposed restraint more than it is a declaration of challenge to the Treaty or the treaty process.

The Reagan Proclamation acknowledges for the rest of the world a twelve-mile territorial sea but boldly and independently states that we, the United States, will refrain from jurisdictional extension of sovereignty from three to twelve miles no matter how intense the domestic and international pressure to provide that jurisdictional benefit to its own people or to extend the protection and regulation of the territorial sea to international navigation for others.

The Reagan Proclamation acknowledges the right of coastal states to impose a consent regime on scientific research but boldly and independently states that we will extend freedom of scientific research to others in our economic zone, no matter how intensive the domestic and international pressure, to insure that such valuable scientific data is made available to the world science community.

The Reagan Proclamation acknowledges the right of other nations to adopt a transit passage regime but boldly and independently asserts that it will claim that regime under the name "traditional passage" and will require its own flag to pass through transit straits under a title cloud of its own making. The Reagan Proclamation acknowledges the right of nations to regulate fisheries in the economic zone but boldly and independently declares tuna and only tuna as an exempt pelagic species even though it imposes on its industry a delicate and disadvantageous negotiation process and a less easily controlled and managed international harvest of this valuable species in its own 200-mile exclusive economic zone.

Of greatest significance, and of greatest significance to this workshop, however, the Reagan Proclamation invites, if only by implication, each coastal state to declare and assert its own independent perception of the law of the sea, and it also suggests by implication that coastal state restraint in implementing its rights under the law of the sea may prove to be of international benefit. The acid test of this implied suggestion is now in process as freedom of navigation is challenged as it has not been challenged since the eighteenth century. The question is now once again raised: Do free ships make free goods? The empirical evidence says no, as ships of the non-involved are struck by

mines in international waters off the coast of Central America or by missiles in the Persian Gulf. The legal evidence is also negative as we contemplate the increase in the many new ways in which a ship on the heretofore high seas can be stopped, inspected, detained, arrested, or required to change its course and speed. All too often, East Asian nations, zone-locked, bounded by straits and semi-enclosed seas, are frustrated in their attempts to make their way to the safety and freedom of the high seas and to conduct their business in great waters without the hazards of entering "zones of special jurisdiction." All too often, the lamentable news is of a Korean fishing vessel seized under pretext of law or a Korean freighter sunk by missiles in the Persian Gulf or the anguish of a Korean airliner whose wreckage is strewn in waters that are clearly international. If this erosion and reversal of the traditional freedom of the seas and freedom of navigation for ships of the neutral flag cannot be reversed by international treaty duly concluded among the nations of the world, then at the very least it can be identified for what it is through independent restatements of the law of the sea. And it is in this independent restatement that we see the tremendous value of this conference.

Now, you must tolerate the tradition that says that the Director of the Law of the Sea Institute must close his initial remarks with poetry that at least resembles the poetry of the nation in which the conference takes place. And so I have attempted to summarize the words that I have just said in a poetic form which I believe is called the Korean *sijo*. The *sijo* has a form of three syllables, four syllables, four syllables, four; three, four, four, four; three, five, four, three. But basically it consists of one line of statement, a second line of restatement, and a third line of paradox. So may I now invite your indulgence as I summarize these opening remarks:

The high seas, Where are they now? Beyond the coast, the littoral.
Past the straits, territories, and the wide shelves continental.
Outside the archipelagos, the Area -- no man's sea.

THE REPUBLIC OF KOREA AND THE LAW OF THE SEA

THE REPUBLIC OF KOREA AND THE LAW OF THE SEA

Myron Nordquist: Our first speaker, Choung Il Chee, will tell us about the position of our host, the Republic of Korea. Dr. Chee obtained his Master's and Ph.D. degrees in New York and taught in the United States for over ten years. He has taught here in Korea since 1974 and has been advisor to several government agencies concerned with law of the sea matters. Most recently he was an advisor to the Republic of Korea's delegation to the special meeting dealing with the delicate issue of Flight 007. He also serves as the Vice President of the Korean Association of International Law. It is with considerable pleasure that I introduce Dr. Chee.

THE REPUBLIC OF KOREA AND THE LAW OF THE SEA

Choung Il Chee
The Korean Association of International Law
Korea

Territorial Sea

Article 1 of the Territorial Sea Law of the Republic of Korea (ROK), which was promulgated on 31 December 1977 and which entered into force on 30 April 1978, defines the outward limit of the territorial sea:

The territorial sea of the Republic of Korea shall be the area of the waters up to the outer limit of twelve nautical miles measured from the baseline. However, the breadth of the territorial sea in the specified area may be determined differently within the limit of twelve nautical miles in accordance with the Presidential Decree.

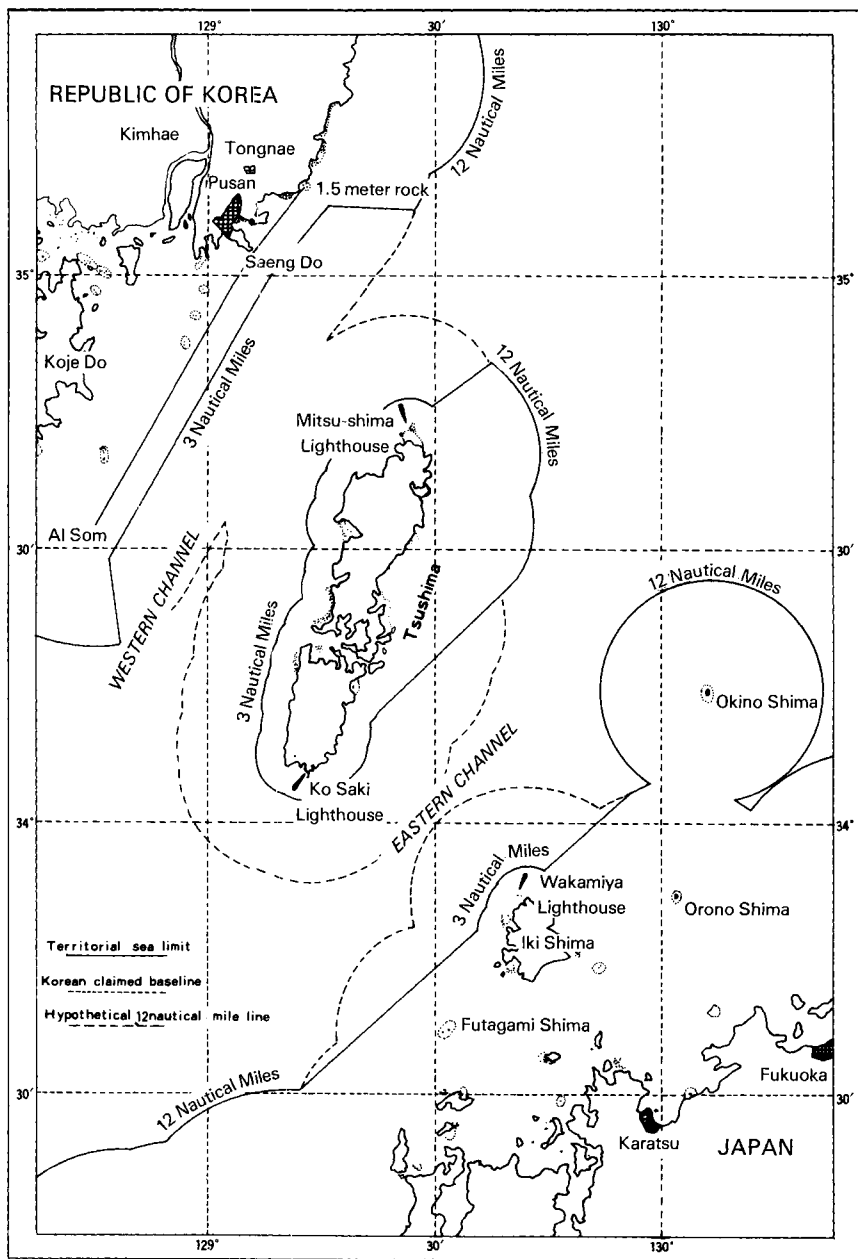
The Presidential Decree No. 8994 of 29 April 1978 specifically defined the breadth of the territorial sea in the Korea Strait as three nautical miles.¹ The intent of limiting the territorial sea to three nautical miles in the Korea Strait is to leave a high seas corridor through it. Japan has adopted a similar three-mile limit in the same area with perhaps the same intention. It appears that both ROK and Japan want to avoid enforcement of their Territorial Sea Laws in the Korea Strait, which is an outlet to the Pacific Ocean for the Soviet Union from Vladivostok, the Soviet naval port in the Far East (see Map 1).

The straight baselines that the Republic of Korea has employed link basepoints of islands lying on the outer fringe of the ROK's coast. The lengths of these straight baselines range from 3.14 to 60.3 miles (see Map 2). The ROK's practice of limiting the territorial sea and its use of straight baselines in general should be characterized as modest and in line with both customary rules of international law and provisions of the Montego Bay Convention relating to the breadth of the territorial sea and the use of the straight baseline.

For instance, Paragraph 2, Article 5 of the Territorial Sea Law, which defines activities not deemed to be innocent, is almost identical to Article 19, Paragraph 2 of the Montego Bay Convention. One exception to this is Subparagraph 5 in the ROK's Territorial Sea Law which allows submerged navigation of the submarine with consent of the authorities but otherwise concurs with Article 20 of the Montego Bay Convention, which requires the submarine to navigate on the surface when exercising the right of innocent passage.

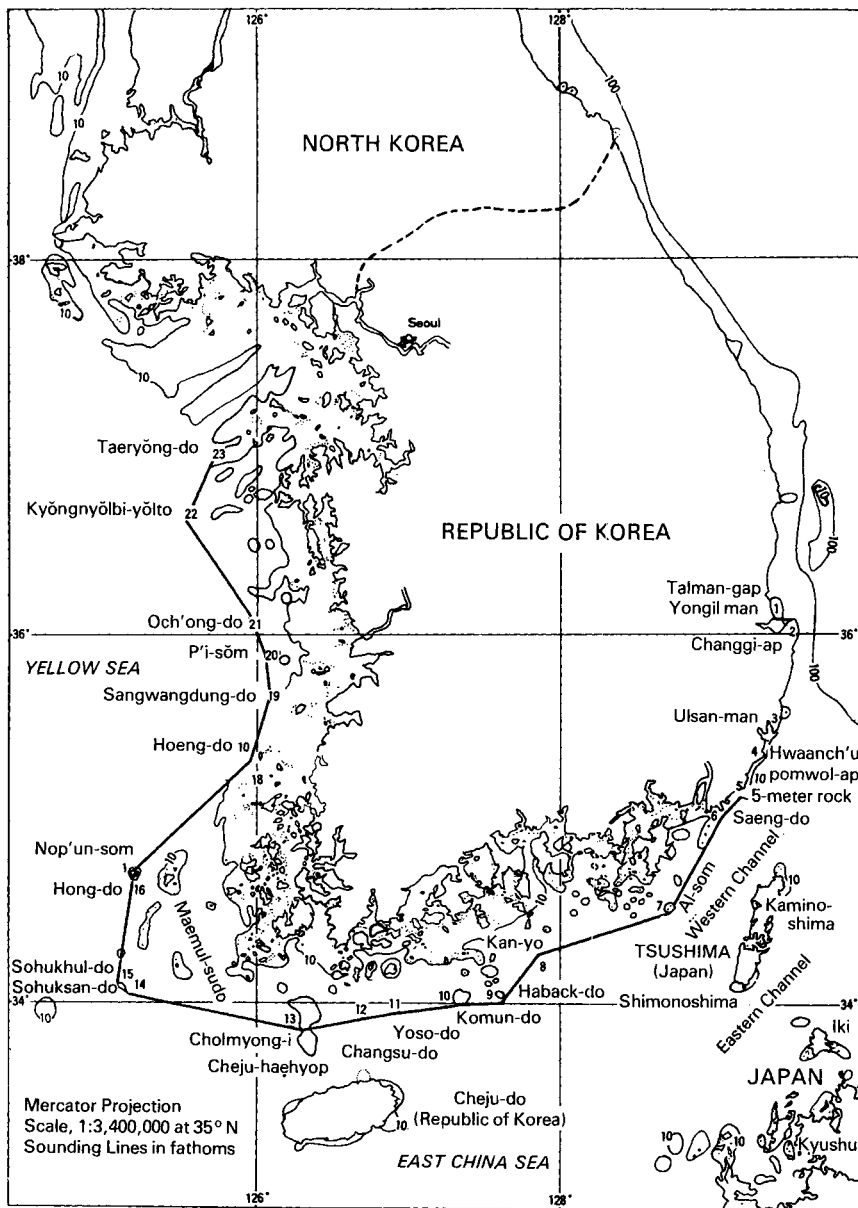
The debatable part of ROK's practice in the territorial sea is perhaps the requirement for foreign warships or other government ships to give prior notice to the ROK's authority before passing through the ROK's territorial sea. Article 4 of the Enforcement Decree of the Territorial Sea Law of 20 September 1978 provides:

If a foreign warship or other government ship operated for non-commercial purposes intends to navigate through the territorial sea, it shall notify the following particulars to the Minister of Foreign Affairs not later than three (3) days (excluding official



Map 1

Source: U.S. Government



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Map 2

holidays) prior to its passage in accordance with the latter part of paragraph 1 of Article 5 of the law, except in cases where the area of the waters through which the aforementioned ship navigates form a strait used for international navigation in which no high seas route exists.

- (1) Name, type and official number of the ship
- (2) Purpose of the passage
- (3) Passage route and schedule²

The foregoing provision exempts the foreign warship or government ship from the requirement of giving prior notice when it navigates through a strait used for international navigation where no alternate high-seas route exists. But there is no such strait along the ROK's coast. The only other strait of international significance is the Cheju Strait off the ROK's southern coast. If the ROK's current straight baselines are linked with the twelve-mile limit of the territorial sea of Cheju Island, the Cheju Strait would be closed and becomes a territorial strait. But an alternate sea route lies south of Cheju Island. Consequently, the ROK could apply both the innocent passage rule for the foreign warship or government ship and prior notice requirement as conditions for innocent passage in the Cheju Strait.

Two observations could be made about the prior notice requirement of the ROK's Enforcement Decree of the Territorial Sea Law. First of all, the regime of prior notice should be distinguished from the prior authorization regime under which the coastal state would require prior authorization as a condition for the innocent passage of the foreign warship or government ship. Unlike the regime of previous authorization, the prior notice regime does not deny the right of innocent passage to the foreign warship or government ship but simply requires the foreign warship or government ship to give notice prior to exercising the right of innocent passage.

The distinction between the requirement of prior notice and previous authorization is critical; while the regime of previous authorization subjects the foreign warship to the authorization of the coastal state, the regime of prior notification does not. This distinction is aptly noted by Hydeman and Berman who said that "a requirement of prior authorization would be difficult to support, but prior notification would be a different matter."³

Second, the prior notice requirement under the ROK's Enforcement Decree of the Territorial Sea Law is justified on the grounds of the ROK's security, as the 1953 Armistice Agreement that the United Nations forces concluded with both North Korea and the People's Republic of China (PRC) does not formally terminate the state of war in the Korean peninsula. Thus the ROK is still technically at war with both North Korea and the PRC. North Korean provocations and the ambivalent policy of the PRC and the Soviet Union toward the ROK create concerns for the ROK. Consequently the ROK cannot afford to simply sit still when the warships or government ships of both the PRC and the Soviet Union pass through the Cheju Strait with unknown intentions.

UNCLOS III did not adopt the regimes of prior notification and previous authorization as conditions for the innocent passage of foreign warships and government ships, largely due to the opposition of the NATO and Warsaw bloc states, although a considerable number of states supported them. As a result, the issue of prior notice or previous authorization as a condition for exercising innocent passage is left very much as it was under the 1958 Geneva Convention. That is,

the Montego Bay Convention makes no explicit reference to these two regimes, except to recognize the rights of protection of the coastal state under Article 25 of the Convention.

As the Montego Bay Convention does not authorize the coastal state to require prior notice or previous authorization for the foreign warship transiting its territorial sea, the legal validity of these requirements may have to depend on customary international law through state practice. While both the NATO and Warsaw blocs and other states deny that these requirements have a basis in international law, there has been considerable evidence to show that the regimes of prior notice and prior authorization have been emerging as rules of maritime international law. For instance, of the previous authorization regime, Professor Brownlie states that:

It is clear that a significant number, and perhaps a majority, of states require prior authorization for the passage of warships, and as a consequence, dogmatic assertions of a right of passage have an aspect of advocacy.⁴

Again, it is worth recalling that the 1956 International Law Commission's Draft Articles on the Law of the Sea, which were considered by the 1958 Geneva Conference on the Law of the Sea, explicitly recognized the right of the coastal state to require previous notice or authorization. Article 24 of the Draft Articles provided:

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 observance of the provisions of articles 17 and 18.⁵

The Commentary to Paragraph 2, Article 24, of the Draft Articles is more illuminating on the right of the coastal state to require prior notification or previous authorization by a foreign warship passing through the territorial sea of another state. The Commentary observed:

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 freedom 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 the position to dispute the right of States to take such a measure.⁶

Though Draft Article 24 was not adopted by the 1958 Geneva Convention for lack of a majority, the Commentary could be regarded as reflecting the validity of state practice in international law; and the fact that the practice of a large number of states is not to require previous authorization or notification "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."

The ROK's practice of requiring prior notification should be evaluated in light of the foregoing observations and comments.

Continental Shelf

The ROK's claim to the continental shelf goes back to the Presidential Proclamation of Sovereignty over Adjacent Seas of 18 January 1952. The area of the continental shelf claimed under the 1952 Presidential Proclamation was delimited by the MacArthur Line which was designed so that the Supreme Command of Allied Powers (SCAP) could prevent Japanese from fishing in the water area near the Korean peninsula. The water areas covered by the ROK's Presidential Proclamation of 1952 ranged from 20 to 200 miles from the Korean coast (see Map 3).

Subparagraph 1, Paragraph (b), (i) of the Presidential Proclamation provides that:

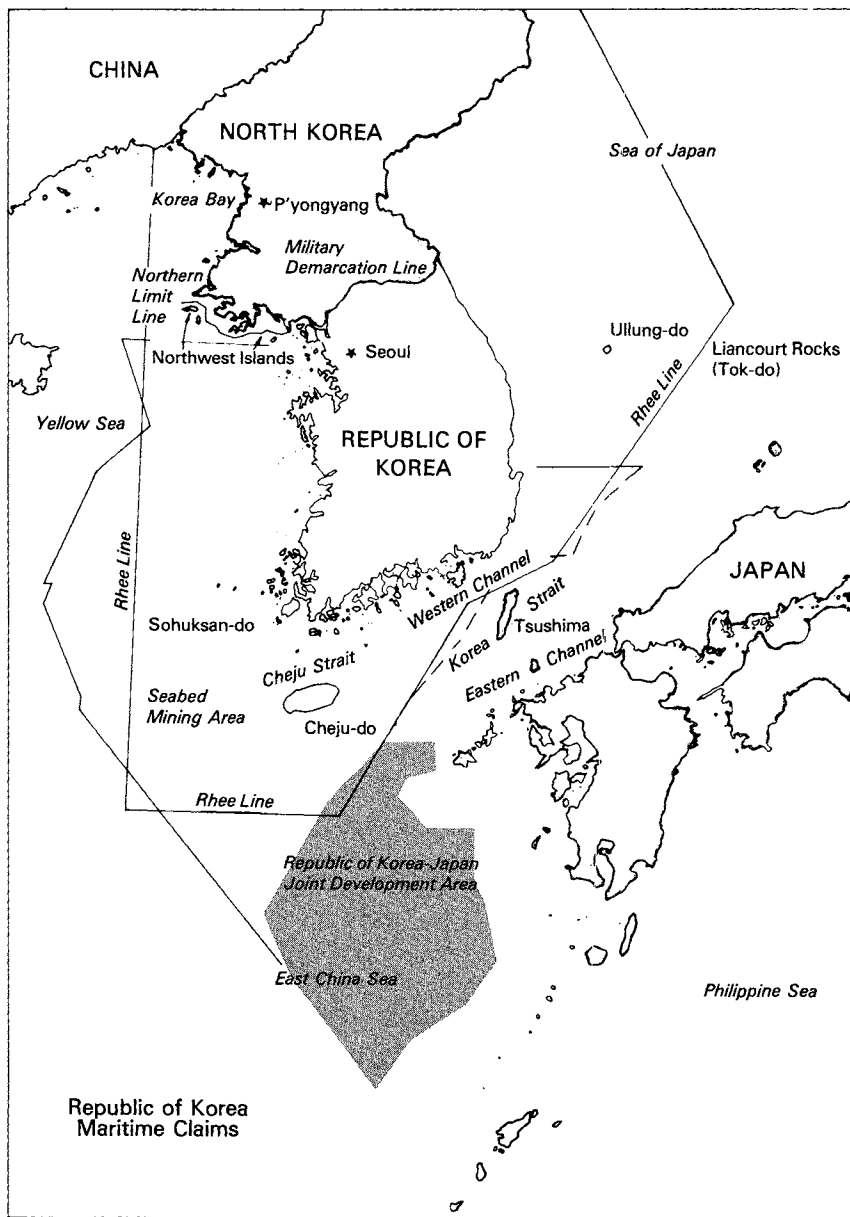
Supported by well-established international precedents and urged by the impelling need of safeguarding, once and for all, the interests of national welfare and defence, the President of the Republic of Korea hereby proclaims:

The Government of the Republic of Korea holds and exercises the national sovereignty over the shelf adjacent to the peninsular and insular coasts of the national territory, no matter how deep it may be, protecting, preserving and utilizing, therefore, to the best advantage of national interests, all the natural resources, mineral and marine, that exist over the said shelf, on it and beneath it, known or which may be discovered in the future

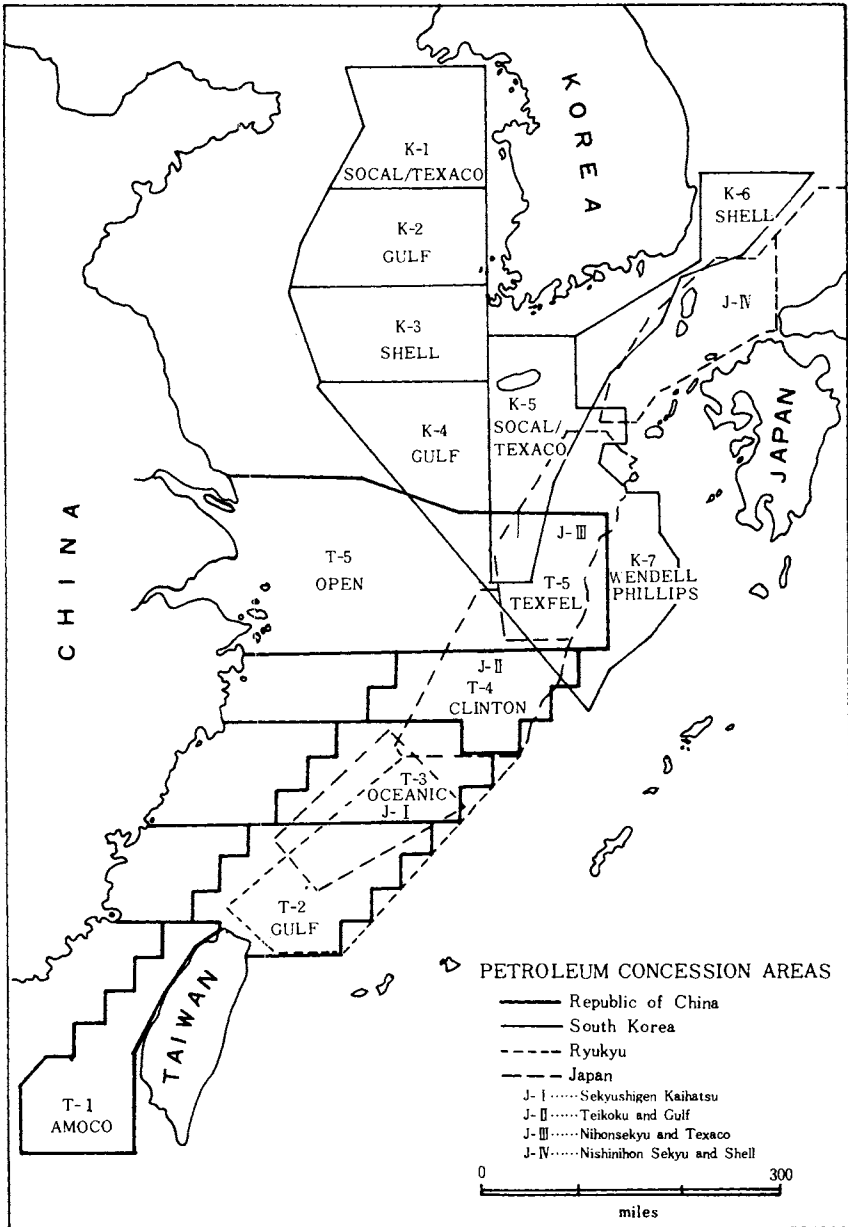
Subparagraph 4 adds:

This declaration of sovereignty over the adjacent seas does not interfere with the rights of free navigation on the high seas.

The claim of the ROK to the continental shelf was inspired by the Truman Declaration of 1945 on the Continental Shelf and the claims made by Latin American states prior to 1952.⁷ The ROK's proclamation of 1952 in substance "closely resembled the Peruvian Decree of August 1, 1974."⁸ The ROK's claim of 1952 was not implemented by legislation for the exploration and exploitation of the continental shelf as the technology for those activities was still in the infant stage at that time. It was not until 1970 that the ROK adopted implementing legislation to put her claim over the continental shelf into effect in accordance with the 1952 Presidential Proclamation. The Submarine Mineral Resources Development Law was enacted on 1 January 1970. Under this law the ROK designated seven different subzones and gave concessions to several U.S. companies for exploration (see Map 4). Subzone 7 immediately became a focal point of controversy with Japan, which also laid a claim to that area. After protracted negotiation, ROK and Japan concluded two agreements, one defining the continental shelf boundary and the other designating the disputed area of the continental shelf (ROK's sub-zone 7) as a joint development zone for fifty years (see Map 5). The agreement on the joint development zone represents "an interesting compromise solution for an interim regime which might be utilized in other cases of delimitation dispute."⁹



Map 3



Map 4

Source: Choon-ho Park, *Harvard International Law Journal*, 1973, 212-260 (219).

The ROK has not adopted the exclusive economic zone or the exclusive fishing zone, though it is fully entitled to adopt such zones under customary rule of international law.

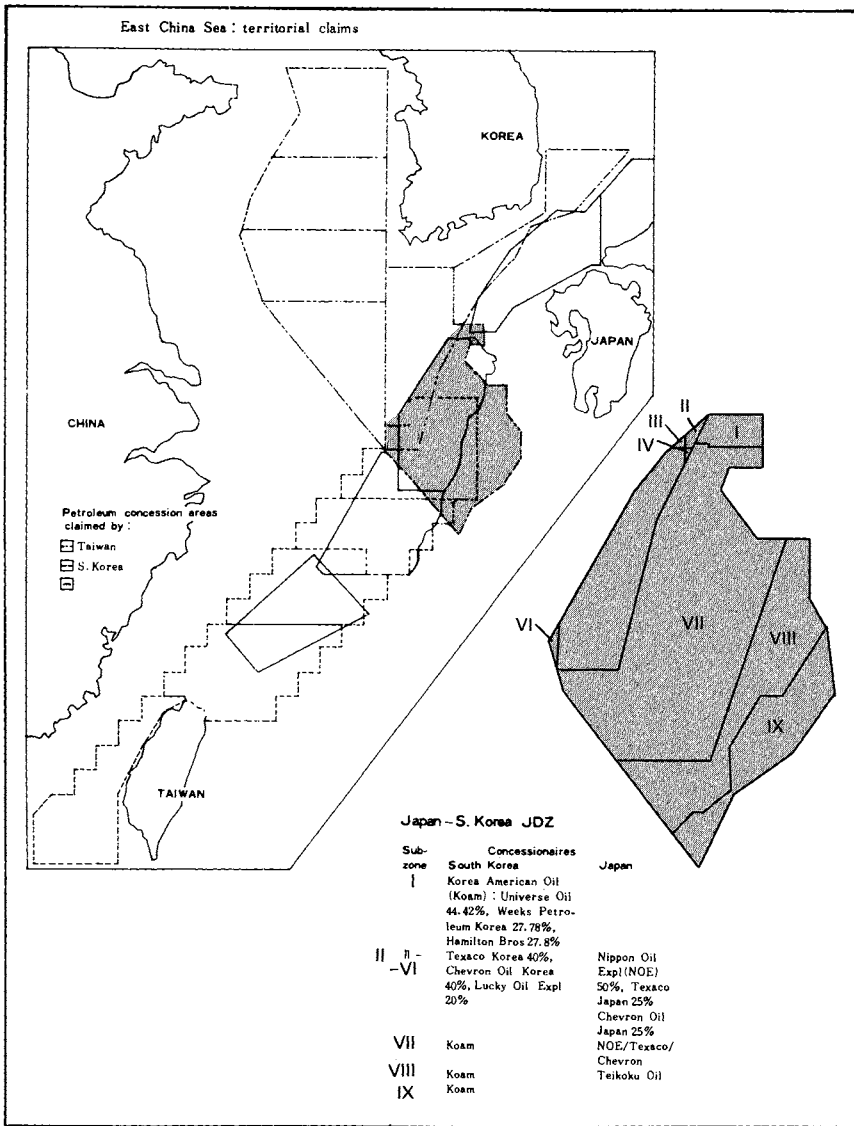
Delimitation of the ROK's Maritime Zones

On the issue of the delimitation of the territorial sea, the ROK adheres to the equidistance-median rule. Article 4 of the 1977 Territorial Sea Law, Law No. 3037, provides that:

The boundary between the territorial sea of the Republic of Korea and that of an adjacent or opposite state, unless otherwise agreed between the states concerned, shall be the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two states is measured.

This practice of the ROK conforms to Article 15 of the Montego Bay Convention.

The ROK's Submarine Resources Development Law makes no reference to the delimitation of the continental shelf. However, the manner in which the ROK has drawn its outward boundary of the continental shelf in the Yellow Sea and part of the East China Sea leads one to infer that the ROK adheres to the median line in those continental shelf areas. At the same time, the outward boundary of the ROK's continental shelf in the northeastern part of the East China Sea extends beyond 200 nautical miles from its baseline of the territorial sea and therefore demonstrates that the ROK also relies on the doctrine of natural prolongation. Thus the ROK's claim to the outer limit of the continental shelf around its coast is based on a combination of the two criteria, median line and natural prolongation. Such a claim of combined criteria for the entitlement to the continental shelf is not at variance with existing rules of maritime international law, for these rules do not specify how the delimitation should be effected as long as it is done in an equitable manner to produce an equitable solution. Indeed, the use of combined criteria for the delimitation of the continental shelf is evidenced by the decision of the Court of Arbitration in the 1977 *U.K.-France Channel Arbitration* case where the Court applied an "enclave" solution in the Channel Island area and a "half effect" solution in the Atlantic region. The Court's approach is consistent with the dictum of the International Court of Justice in the *North Sea Continental Shelf* case that "it is necessary to seek not one method of delimitation but one goal." (Para. 92). In the 1982 *Continental Shelf* case (Tunisia vs. Libya), the International Court of Justice again referred to combined methods in the delimitation of the continental shelf between those two countries. Thus the Court produced two different lines, one for the adjacent coasts and the other for the opposite coasts, relying on different methods of delimitation. Noting state practice in this regard, the Court stated that "the method adopted has been given in response to the varying geographical and other circumstances of the particular case" (Para. 129). The Court then gave only half effect to the Kerkennah Islands. It is thus clear from the jurisprudence of the International Court of Justice and the Court of Arbitration in the *U.K.-France Channel Arbitration* case that the use of different criteria based on different geographical or other relevant factors is in conformity with prevailing rules of maritime international law.



Map 5

Source: Park, *Petroleum News*, August, 1982.

Use of the median line solution by the ROK in the Yellow Sea and part of the East China Sea is entirely in line with the customary rule of maritime international law as exemplified by the rulings of both the International Court of Justice in the 1969 *North Sea Continental Shelf* case and the Court of Arbitration in the 1977 *U.K.-France Channel Arbitration* case. As the Yellow Sea and part of the East China Sea have a common continental shelf where the depth of the water does not exceed 200 meters, the applicable rule for delimitation of such a shelf between states with opposite coasts is the median line. This has been unequivocally stated in the Judgment of the International Court of Justice in the *North Sea Continental Shelf* case, where the Court held that:

The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of median line (Para. 57).¹⁰

In the *U.K.-France Channel Arbitration* case, the Court of Arbitration reiterated the ICJ's view:

In the Channel, as is recognized by the United Kingdom itself in company with the French Republic and by the Court, the geographical and legal frame of reference is that of a delimitation between opposite States; and the method of delimitation indicated by Article 6 of the Convention and by customary law alike is the median line (Para. 109).¹¹

The PRC's claim to the continental shelf in the Yellow Sea and the East China Sea is based on the natural prolongation theory, the proportionality of the lengths of the coastling,¹² and the overlay of sediments in the seabed of the Yellow Sea.¹³ It would be useful to examine the merits of these claims, which may be advanced by the PRC, to put the problem of the delimitation of the continental shelf between the ROK and the PRC in a proper legal perspective.

The PRC's claim to its continental shelf entitlement based on natural prolongation cannot extend beyond the median line vis-a-vis the ROK, as is understood from the dicta of the International Court of Justice in the 1969 *North Sea Continental Shelf* case and the Court of Arbitration in the 1977 *U.K.-France Channel Arbitration* case, as mentioned above. The International Court of Justice in the case of *Tunisia vs. Libya* in 1982 ruled that in the area of the single continental shelf, "no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such." (Para.133(2))¹⁴

It is also doubtful that the PRC can successfully invoke the argument of proportionality of the relative lengths of the coastline to claim a larger area of the continental shelf, for the lengths of the coastlines of the ROK and the PRC in the Yellow Sea region are roughly equal.

The PRC may also raise the proportionality issue in its claim that its continental shelf extends beyond the median line drawn by the ROK in the East China Sea up to Subzone 7 of the ROK's continental shelf. However, as the area of Subzone 7 is not disproportionately large relative to the length of the coastline vis-a-vis the PRC's, the PRC may not be able to invoke this argument as grounds for adjusting the

median line currently drawn by the ROK. Proportionality of the relative lengths of the coastlines is merely a factor to be taken into account in producing an equitable delimitation of the continental shelf, not "a general principle providing an independent source of right to areas of continental shelf."¹⁵ In light of the ruling by the Court of Arbitration to this effect in the 1977 *U.K.-France Channel Arbitration* case, it is unfortunate that the International Court of Justice in the 1982 *Continental Shelf* case (Tunisia vs. Libya) resorted to proportionality of relative lengths of coastlines -- Libya 40, Tunisia 60 -- to calculate the delimitation of the continental shelf between these two countries. This approach of the Court, according to the *ad hoc* Judge Evensen, went farther than the use of the proportionality test in the Judgment of 1969 *North Sea Continental Shelf* case and the decision of the Court of Arbitration in the 1977 *U.K.-France Channel Arbitration*. Criticizing the majority opinion on the use of the proportionality test, Judge Evensen held in his dissenting opinion that:

I further respectfully submit that the Court in the present case seems to have gone much farther in almost elevating the proportionality test -- applied as a mathematical formula -- to the status of international law in its search for legal arguments compared to the more modest use of the proportionality test made by the Court in its Judgment of 1969 in the *North Sea Continental Shelf* case and by the Court of Arbitration in its Decision of 1977 in the *Delimitation of the Continental Shelf* case. In my opinion, the 1969 Judgment and the 1977 Decision struck the proper balance between proportionality and the applicable principles of international law.¹⁶

The dissenting Judge Gros went further than Judge Evensen in his criticism of the Court's use of the proportionality test. Judge Gros held that:

The present Judgment drastically alters the restricted role which properly belongs to the proportionality factor, and the justice of the calculation it employs is not borne out by any of the precautions taken in a delimitation which took account of the proportionality of the areas concerned.¹⁷

These criticisms by both Judge Evensen and Judge Gros of the proportionality test perhaps represent a more judicious view of its proper role than the Judgment of the majority. It is submitted in this context that the statement of the Court of Arbitration in the 1977 *U.K.-France Channel Arbitration* case with regard to the role of the proportionality factor still stands as the appropriate test in the delimitation of the continental shelf. The statement of the Court was that:

the element of "proportionality" in the delimitation of the continental shelf does not relate to the total partition of the area of shelf among the coastal States concerned, its role being rather that of a criterion to assess the distorting effects of particular geographical features and the extent of the resulting inequity.¹⁸

To invoke the proportionality test in the delimitation of the continental shelf vis-a-vis the ROK, the PRC must show that the current median line drawn by the ROK for its outer limit of the continental

shelf represents the "distorting effects of particular geographical features and the extent of the resulting inequity." Thus the burden of proof of such effects would rest on the PRC.

The PRC's continental shelf claim that is derived from the overlay of sediments in the Yellow Sea and part of the East China Sea appears to be based on Article 76,4 (a) (i) of the Montego Bay Convention:¹⁹

a line delineated in accordance with paragraph 7 by reference to the outermost fixed point at each of which the thickness of sedimentary rocks is at least 1 percent of the shortest distance from such point to the foot of the continental slope

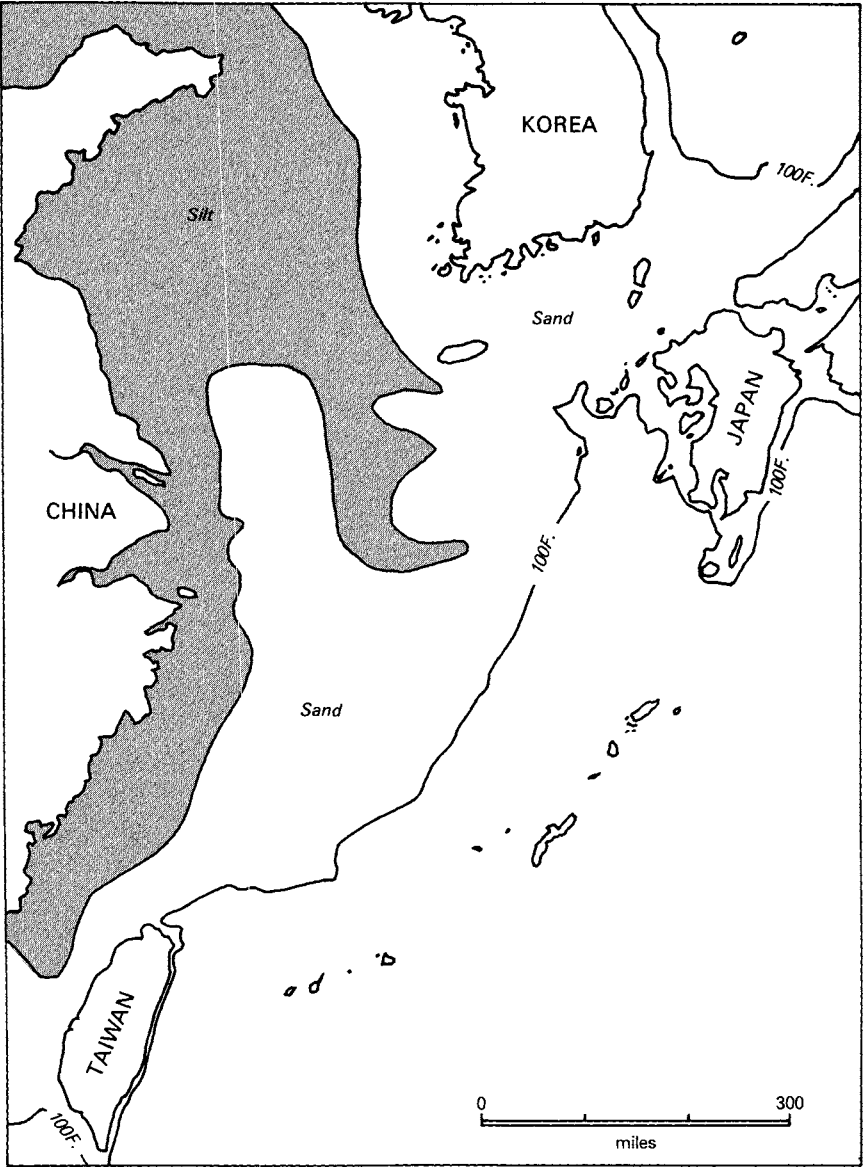
This provision, which can be traced back to the Irish proposal during UNCLOS III, refers to the formula for determining the outer limits of the continental rise and thus presupposes the existence of the continental shelf, the continental slope, and the continental rise. But in the Yellow Sea and part of the East China Sea, there is no such geological formation to justify the application of this article. It is a single and continuous continental shelf without slope or rise. Therefore, the PRC cannot base its claim to the continental shelf entitlement on Article 76, 4 (a) (i) of the Montego Bay Convention.

Sediments in the seabed of the Yellow Sea and part of the East China Sea are composed of silt from mainland China carried out to sea by the Yellow River (see Map 6), but the PRC may not rely on this geological link to justify its continental shelf entitlement. In the 1982 *Continental Shelf* case (Tunisia vs. Libya), the International Court of Justice rejected the claims of both Tunisia and Libya for their continental shelf entitlement based on geological considerations, stating that:

The function of the Court is to make use of geology so far as required for the application of international law. It is of the view that what must be taken into account in the delimitation of shelf areas are the physical circumstances as they are today; that just as it is the geographical configuration of the present-day coasts, so also it is the present-day seabed, which must be considered. It is the outcome, not the evolution in the long-distant past, which is of importance.²⁰

The Court's view is clear enough to preclude any possible claim of the PRC to continental shelf entitlement based on the flow of sediments from the Yellow River of mainland China into the seabed of the Yellow Sea and the East China Sea.

One final point to consider is the PRC's use of Barren Islet by the PRC as a basepoint in the delimitation of the continental shelf between the PRC and the ROK. Located approximately fifty nautical miles off the coast of mainland China and separated by about twenty miles from the islet of North Saddle in the north and from Lukonshan Liehtao in the south, Barren Islet lies at the geographical coordinates of 31 degrees North latitude and 123 degrees East longitude. It creates a promontory that allows the PRC to push its median line boundary well within the median line boundary drawn by the ROK, causing such an obvious inequity in the delimitation that the PRC should forego the use of it as a basepoint.



Map 6

The PRC's use of Barren Islet is also contrary to Article 7(3) of the Montego Bay Convention which requires that "the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast...." The PRC should draw straight baselines between the North Saddle and Lukonshan Liehtao to conform with this article, which should be regarded as a customary rule of international law as reflected in the decision of the International Court of Justice and Article 4(2) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. This observation is based on the assumption that the PRC would use Barren Islet as a basepoint of its continental shelf, following the hypothetical straight baselines which were drawn by the Office of the Geographer, the U.S. Department of State, in its *Limits in the Seas Series*, No. 43.

The ROK's problem of the delimitation of the continental shelf vis-a-vis Japan has been caused by Japan's claim over subzone 7 of the ROK's continental shelf in the East China Sea. The ROK's claim to subzone 7 is based on the natural prolongation theory, while Japan has advanced its claim to the same zone based on the median line rule, with the use of baselines encompassing the Danjo Gunto and Torishima, rocky islets situated approximately 100 nautical miles from Japan's mainland. After four years of protracted negotiations, both countries concluded two agreements in 1974, one to define the continental shelf boundary and the other to establish a joint development in the disputed area, ROK's subzone 7.

The legal aspects of both countries' arguments in support of their claims to the disputed area of the continental shelf have been discussed elsewhere.²¹ In the present study I would like to make some observations on the two 1974 agreements, which are in force as both countries have ratified them.²² The agreement on the continental shelf boundary is noteworthy in several respects. First of all, the agreement has drawn the boundary line from the geographical coordinates of 36 degrees 10.0' North 131 degrees 15.9' East to 32 degrees 57.0' North 127 degrees 41.1' East. The demarcation of the continental shelf boundary in this manner reflects the desire of both Japan and the ROK to avoid a controversy over the ownership of the Dokto and to shelve a dispute over their respective claims to subzone 7. Secondly, the boundary line of the agreement has been drawn by means of "a selective equidistance line," as "the majority of the turning points are very close to being equidistant from one point on each country's base-line."²³ Thirdly, the agreement contains no provision dealing with its termination. A logical inference is that the agreement is not subject to unilateral denunciation or withdrawal by either party as are peace treaties or other treaties fixing territorial boundaries. The obligations of both Japan and the ROK not to exercise their rights to unilateral denunciation or withdrawal from this 1974 agreement without mutual consent derive from Article 56(1) of the 1969 Vienna Convention on the Law of Treaties to which both countries are parties:

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of treaty.

Of course, if both Japan and the ROK consent to terminate the agreement in the future, it is possible that the termination would conform to the rule of general international law.

The 1974 ROK-Japan agreement on the establishment of the joint development zone of the continental shelf has been called "the first of its kind to be negotiated."²⁴ The agreement contains several innovative features related to sharing of the continental shelf resources by states in an era when the rule of maritime international law with regard to overlapping claims is still in a formative stage.

First of all, the agreement is an excellent example of international cooperation, echoing the view of Judge Jessup of the International Court of Justice as expressed in his separate opinion in the 1969 *North Sea Continental Shelf* case. Urging states to cooperate in exploration and exploitation of the continental shelf resources in "the still unlimited but potentially overlapping areas of the continental shelf which have been in dispute,"²⁵ Judge Jessup stated that:

Clearly, the principle of cooperation applies to the stage of exploration as well as to that of exploitation, and there is nothing to prevent the Parties in their negotiations, pending final delimitation, from agreeing upon, for example, joint licensing of a consortium which, under appropriate safeguards concerning future exploitation, might undertake the requisite wildcat operations.²⁶

Secondly, the ROK-Japan agreement on the development of a joint exploitation zone represents an interim or provisional regime as contemplated under Article 83(3) of the Montego Bay Convention, pending the final delimitation of the continental shelf.²⁷ As a regime of provisional arrangement, the agreement has set aside the question of sovereign rights over all or any portion of the joint development zone without prejudice to the positions of both Japan and the ROK with respect to the delimitation of the continental shelf.²⁸ Under Article 9 of the Agreement on the joint development zone, both Japan and the ROK are to share equally the natural resources from the joint development zone and also to bear equally the expenses of exploration and exploitation of the natural resources in the zone.²⁹

Thirdly, the ROK-Japan agreement on the joint development zone is to remain in force for fifty years under Article 31(1) of the agreement and may be terminated by either party after giving three years' notice at the end of the initial fifty-year period or at any time thereafter (Article 31(3)). Thus both parties have bound themselves to keep the agreement for at least fifty years. Neither party may unilaterally denounce or withdraw from the agreement without the consent of the other by virtue of the doctrine of *Pacta sunt servanda*, which has been enshrined under Article 26 of the 1969 Vienna Convention on the Law of Treaties³⁰ to which, again, both the ROK and Japan are parties. By insuring its own fifty-year duration, the ROK-Japan agreement has provided legal stability for conflict avoidance and peace between the two countries based on an equitable compromise on resource-sharing.

ROK's Control of Fisheries

The ROK has adopted neither the Exclusive Economic Zone nor the Exclusive Fishing Zone at the moment, although the current rule of maritime international law entitles it to claim such zones. Though protection of coastal fisheries is important to the ROK, its interest

in distant water fishing is no less important. Thus the ROK has taken an ambivalent attitude toward the doctrine and practice of state extension of maritime jurisdiction in recent years. This position is the reverse of its past position; the ROK pioneered the extension of fishery conservation jurisdiction beyond the traditional three-mile limit of the territorial sea under the 1952 Presidential Proclamation of Maritime Sovereignty.³¹ The development of its distant-water fishing capability has, however, made the ROK reluctant to support other States' claims to 200-mile EEZs or EFZs. Thus the ROK has not been particularly happy with some fisheries provisions of the Montego Bay Convention which may not adequately account for the interests of the distant water fishing states.

As the ROK has signed the Montego Bay Convention, the 200-mile limits of the exclusive economic zone or the exclusive fishing zone have now become crystallized as regimes under customary international law, and the ROK is bound to support coastal states' claims to such zones. Since the ROK is also entitled to claim these zones itself, she may assess the need for the protection of its fishing interests in the light of such entitlement. However, whether the ROK will actually make such claims remains to be seen.

As it is, the ROK controls its coastal fisheries without unilaterally extending its fishery conservation jurisdiction beyond the twelve-mile limit of the territorial sea, which happens to coincide with the limit of the twelve-mile exclusive fishing zone recognized under Article 1 of the 1964 ROK-Japan Fishery Agreement which regulates the coastal fisheries of the ROK vis-a-vis Japan. This agreement, which is still in force, deserves our attention for several reasons. First of all, it was concluded in 1965 and as such is an anachronistic legal instrument operating contrary to current trends of maritime international law. Instead of recognizing sovereign rights of the coastal state over fisheries up to the 200-mile limit, it created a zone, beyond the 12-mile limit of the exclusive fishing zone of the ROK, where both the ROK and Japan would jointly regulate fisheries under the concept of flag-state jurisdiction. This zone of joint regulation thus becomes an area of the high seas.³² In the zone of joint regulation, the ROK or Japan would exercise its jurisdiction to control and regulate its own fishing vessels to the exclusion of the other party. Such an exercise of jurisdiction can only be found in the high seas under the doctrine of flag state jurisdiction. Secondly, the 1965 Agreement makes no provision for mandatory review of the annual or other periodic allocation of fish catch quota based on maximum sustainable yields. The Agreement merely allocates a quota of 150,000 tons of fish to each party, allowing a 10% upward adjustment without specifying how such quota may be adjusted. Thirdly, the Agreement refers to the ROK's straight baselines, which are not to be redrawn without the consent of Japan.³³ If the straight baselines referred to are meant to be the straight baselines from which is measured the breadth of the territorial sea, such a provision amounts to a novel practice: drawing straight baselines for the territorial sea is necessarily a unilateral act by the coastal state, although the validity of that unilateral act would depend on international law. For the above reasons one must conclude that in the 1965 ROK-Japan Fishery Agreement the ROK conceded unilateral control of its fisheries in return for the economic package presented by Japan.

ROK's fisheries policy near its coastal waters is not confined to relations with Japan; it faces the PRC in the Yellow Sea and the East

China Sea. As the ROK does not have any fishery agreement with the PRC and neither country claims a unilateral fishery jurisdiction zone, each country is technically free to fish in any areas of the Yellow Sea and the East China Sea beyond the limits of their territorial seas. Nevertheless, the ROK has refrained from fishing in areas in the Yellow Sea and the East China Sea which have been designated by both the PRC and Japan as the Convention area. This act of restraint by the ROK is strictly voluntary; it is under no obligation under international law to observe an agreement to which it is not a party.

One source of controversy between the ROK and the PRC off and on has been the PRC's designation of the fishery protection zone, which is known as Protection Zone 1, in the middle of the Yellow Sea. This zone, which Japan may oppose by virtue of its agreement with the PRC to designate it as a Convention area, is without any basis in international law. Thus, when the ROK's fishing vessels have entered the PRC's Protection Zone 1 and the PRC has protested, the ROK has denied the PRC's claim to such zone for lack of any basis in international law. But to avoid any controversy with the PRC, the ROK has voluntarily restricted its fishing vessels from entering the PRC's Protection Zone 1. Thus a curious situation exists in the Yellow Sea and the East China Sea where the ROK, though not a party to the 1975 PRC and Japan Fishery Agreement, observes its terms. From the legal perspective, this is not a satisfactory situation. A desirable course of action for both the PRC and the ROK would be to conclude a fishery agreement, to put fishery regulation in a proper legal instrument whereby both sides would observe standards of conduct as a matter of legal rights and obligations.

Fishery cooperation between the ROK and the PRC will take on a new dimension as both countries become signatories to the 1982 Montego Bay Convention on the Law of the Sea, which imposes obligations on the states bordering semi-enclosed seas under Article 123 of the Convention to cooperate on management, conservation, exploration and exploitation of the living resources of the sea, protection and preservation of the marine environment, and maritime scientific research in the semi-enclosed seas. As both PRC and the ROK are bordering on semi-enclosed seas, the Yellow Sea and the East China Sea, Article 123 of the Convention should have bearing on their fishery relations.³⁴ But both PRC and the ROK are mere signatory states to the Convention and, as such, the provisions of the Convention are not directly binding on them. However, any unilateral action leading to violence or intimidation by either party should certainly be regarded as contrary to its obligation not to frustrate the objectives and purposes of the Montego Bay Convention.

Deep Seabed Mining and the ROK

As a resource-scarce state, the ROK is interested in access to the mineral resources of the deep seabed beyond national jurisdiction as has been contemplated under the Montego Bay Convention on the Law of the Sea. In particular, the ROK appears to have been interested in becoming a pioneer investor as prescribed under Resolution II of the Montego Bay Convention.³⁵ The Korea Ocean Research and Development Institute, an affiliate of the Ministry of Science and Technology of the Republic of Korea, took an initiative in 1982 to study the feasibility of ROK's participation in the exploration for seabed minerals. But so far there has been no official announcement as to what concrete policy the ROK would follow toward deep seabed mining.

Conclusion

In general, the ROK's claim to maritime zones, its practices in the territorial sea and the continental shelf, and its delimitation of the continental shelf are in line with customary rules of maritime international law and the provisions of the Montego Bay Convention with the exception of the 1965 ROK-Japan Fishery Agreement. So far there has been no evidence to indicate that the ROK would reverse its current course of policy relating to maritime claims and jurisdiction. As a signatory state to the 1982 Montego Convention on the Law of Sea along with its neighbors, the PRC and Japan, the ROK is expected to pursue its maritime policy within the framework of the Convention and in accordance with relevant rules of maritime international law.

NOTES

1. Annex to the Presidential Decree No. 8994, Regulation Concerning the Date of Entry into Force of the Territorial Sea Law and Other Related Matter, promulgated on 29 April 1978.
2. Presidential Decree No. 9162, Enforcement Decree of the Territorial Sea Law, promulgated on 20 September 1978.
3. O'Connell, D.P., *International Law of the Sea*, ed. I. A. Shearer, 2 vols. (Oxford: Clarendon Press, 1982-1984) vol. 1, footnote 205, p.290.
4. Ian Brownlie, *Principles of Public International Law*, 3rd edition (Oxford: Clarendon Press, 1979), p. 206. In the footnote 205, Chapter 7 of D. P. O'Connell's book, *International Law of the Sea* 1:290, there is an extensive discussion and references to the opinions of writers and state practices on the regime of prior notification or previous authorization.
5. *1956 Yearbook of International Law Commission* (New York: United Nations) 2:276.
6. *Ibid.*, p. 277.
7. The ROK's claim to the continental shelf was said to have been supported by the practices of Latin American states for their claims to the continental shelf and maritime zones for conservation of the living and non-living resources. Choul Kuen Chee, *The Peace Lines* (Seoul: Bum-munsa, 1979), pp. 129-152.
8. Choon-ho Park, *East Asia and the Law of the Sea* (Seoul: Seoul National University Press, 1983), p. 63.
9. C. R. Symmons, *The Maritime Zones of Islands in International Law* (The Hague: Martinus Nijhoff, 1979), p. 188.
10. *I.C.J. Reports*, 1969. Paragraph 109.
11. *U.K.-France Continental Shelf* case (first decision), reproduced in *International Law Report* 54 (1979), p. 70 (paragraph 109).
12. Paul C. Yuan, "The New Convention on the Law of the Sea from the Chinese Perspective," *Consensus and Confrontation: The United States and the Law of the Sea Convention* ed. Jon Van Dyke (Honolulu: The Law of the Sea Institute, 1985) p. 203. r
13. Richard T. S. Hsu, "Rational Approach to Maritime Delimitation," *Ocean Development and International Law Journal* 13, no. 1 (1983):110.
14. *I.C.J. Reports*, 1982, p. 92.
15. *U.K.-France Channel Arbitration* case, p. 68 (paragraph 1010).
16. *I.C.J. Reports*, 1982, p. 314 (Diss. Op. para. 23).
17. *I.C.J. Reports*, 1982, p. 152 (Diss. Op. para. 17).

18. *U.K.-France Channel Arbitration case*, p. 124.
19. Hsu, "Rational Approach," p. 110.
20. *I.C.J. Reports*, 1982, p. 54 (paragraph 61).
21. Park, *East Asia and the Law of the Sea*, pp. 22-31.
22. The ROK ratified the two agreements in 1974 and Japan ratified them in 1978.
23. Office of the Geographer, Bureau of Intelligence and Research. *Limits in the Sea Series*, No. 75 (Washington, D.C.: U.S. Department of State, 1977), p. 6.
24. *Ibid.*, p. 7.
25. Separate Opinion by Judge Jessup in the 1969 *North Sea Continental Shelf* case, reproduced in *International Law Reports*, 41 (1970):103 (paragraph 82).
26. *Ibid.*, pp. 103-104 (paragraph 83).
27. Paragraph 3, Article 83 of the Montego Bay Convention provides:

Pending agreement as provided for in Paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of a final agreement. Such arrangements shall be without prejudice to the final delimitation.

28. Article 28 of the 1974 ROK-Japan Agreement on the Joint Development Zone provides:

Nothing in this Agreement shall be regarded as determining the question of sovereign rights over all or any portion of the Joint Development Zone or as prejudicing the positions of the respective Parties with respect to the delimitation of the continental shelf.

29. Article 9 of the Agreement provides:

1. Concessionaries of both Parties shall be respectively entitled on an equal share of natural resources extracted in the Joint Development Zone.
2. Expenses reasonably attributable to exploration and exploitation of such natural resources shall be shared equal proportions between concessionaries of both Parties.

30. Article 26 of the Vienna Convention on the Law of Treaties provides: *Pacta sunt servanda*. Every treaty in force is binding upon parties to it and must be performed by them in good faith.

31. See *supra* note 7.

32. Article 2, 1965 ROK-Japan Fishery Agreement.

33. Article 1, 1965 ROK-Japan Fishery Agreement.

34. Article 123 of the Montego Bay Convention provides:

States bordering enclosed or semi-enclosed seas should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavor, directly or through an appropriate regional organization:

- (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;

- (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to co-ordinate their scientific research policies and undertake where appropriate joint programs of scientific research in the area;
- (d) to invite, as appropriate, other interested States of international organizations to co-operate with them in furtherance of the provisions of this article.

35. Draft Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules, Annex IV. U.D. Doc.-A/CONF.62/L.132/Add.1.

DISCUSSION

Myron Nordquist: Thank you very much, Dr. Chee. You referred in your paper to the MacArthur Line. Could you just explain what that is? Your paper implied that it is a predecessor to the Rhee Line.

Choung Il Chee: Yes. This was a line drawn by SCAP, the Supreme Command of Allied Powers, in Japan, when Japan was under the Allied occupation, to prevent Japanese fishermen from coming to the coastal waters of the Republic of Korea. The MacArthur Line was later superseded by the Rhee line and concurrently there was a line called the Clark Line during the Korean War, which was roughly drawn along the same line as the MacArthur Line.

Myron Nordquist: Thank you. Dr. Chen?

Rong-Jye Chen: I have one question. Many states, including the Republic of China, require prior notice or even prior permission for innocent passage by warships through territorial seas. It seems to me that you consider that the innocent passage of warships through territorial seas is an international custom. To what extent is the international custom of innocent passage by warships through territorial seas evidenced by state practice?

Choung Il Chee: I was thinking that the absence of a provision prohibiting innocent passage for warships under the Geneva Convention reflects customary international law. In Volume II of D.P. O'Connell's 1984 book, he gives three different interpretations of innocent passage. So I have assumed that the Geneva Convention's omission of the prohibition of innocent passage for warships and also the similar approach taken by the Montego Bay Convention both reflect the customary rule of international law.

Rong-Jye Chen: It seems to me that your assumption is based on the Geneva Convention on the Territorial Sea's codification of the international custom. Is that your understanding?

Choung Il Chee: Yes. Also the practice subsequent to the Geneva Convention and the attitude, the approach, taken by the Montego Bay Convention.

Rong-Jye Chen: To my knowledge, many countries, including the so-called Communist hard-line and the Third World countries, will require all warships going through territorial waters to obtain so-called prior notice or prior permission.

Choung Il Chee: Previous authorization is another matter, but I don't see any incompatibility between prior notice and innocent passage, especially when the conditions of security warrant such a requirement, as is the case with the Republic of Korea. Ambassador Clingan?

Thomas A. Clingan: I simply want to point out, as you all know, that the position of the United States is not precisely in line with the position that you have just put forward. Throughout the course of the negotiations several formulas were advanced with regard to the

passage of warships through the territorial sea. One proposal was in the form of a formal amendment, prior authorization or notification, which was subsequently withdrawn by reason of the widespread objection of the maritime powers. In its place, a statement was made by President Koh of the Conference, which I will refer to later. In the course of negotiations, the question was: could the United States and other maritime powers accept the deletion of "authorization" and accept simply a reference to "prior notification"? That principle was firmly rejected not only by the United States but by all of the maritime powers. I don't mean to start a debate at this point but simply to point out that there is a difference of opinion on this issue.

Choung Il Chee: From the jurisprudential point of view, previous authorization and prior notification are relatively new regimes. Whether this practice of requiring prior notice and previous authorization is permissible or not is more a matter of the customary rules of international law than of codification. Codification could reflect the customary rule of international law or, when urgency requires, could come about without sufficient prior practice or time. The outer space treaty, for instance, is not preceded by much custom or state practice, yet it reflects and represents international law. In the case of previous authorization and prior notification, however, since they were not adopted by the Montego Bay Convention, all we have to follow are the customary rules of international law as revealed through state practice. If state practice is widespread enough to attain a majority without opposition, it may form a customary rule of international law. But since, at this point, some states object to the prior notice and previous authorization requirement, we have room for debates on this matter. But that's how I made the assumption.

Myron Nordquist: Dr. Park?

Choon-ho Park: Yes, on this point of distinction between prior authorization and notice, by my rough count there are over thirty countries, most of them developing countries, requiring advance notice or prior notification. One of the extreme examples is Somalia, which has a 200-mile territorial sea, and foreign ships passing through should give notice. But I think if we go a step further, the distinction would depend on the punitive measures written into domestic laws as to what happens if you don't give prior notice. For instance, if you don't give prior notice, we'll sink your vessel, or we'll simply not like you and we'll recall your ambassador. In plain crude terms, then: if you don't kiss my wife, I don't like you; or, if you kiss my wife, I'll kill you. The distinction can be worked on this, but if you check the national laws of different countries, generally the punitive measures are not stipulated in very strict, clear terms; some of them simply demonstrate their displeasure of any foreign ships passing through in violation of their domestic laws. But the general trend seems to be that, be it notice or authorization, it seems somewhat against the spirit of the Convention as it is written now.

Myron H. Nordquist: Thank you, Dr. Park. I think, if there's any confusion about this, that at least my recollection of the Soviet position was very clear. They wanted notice or authorization in their waters but they didn't want to give it in anyone else's. So at least they had a clear position on the subject. Dr. Smith?

Robert W. Smith: With respect to Korea's straight baselines on its western coast, on Map No. 2 Point No. 23 ends on an offshore island. Where do internal waters and territorial sea meet here? Has the Republic of Korea faced any problems with the distinction of the waters in this area or in general with the depiction of straight baselines in this area? Why isn't the circle completed at this point of the straight baseline system?

Choung Il Chee: This is the area covered by the 1953 Armistice, and there was extensive discussion during the course of the armistice negotiations as to what type of waters this area should be. North Korea claimed twelve miles. Drawing clear-cut straight baselines in this area was pointedly avoided, and under the 1953 Armistice agreement this area has not been clearly defined, although the Republic of Korea claims this area. Korea claims that the median line is the solution as far as the delimitation of the territorial seas is concerned. But with North Korea, the question of unification is also involved, the constitutional issue -- whether the Republic of Korea should claim the entire peninsula area or, as a matter of practicality, only this area. There have been delicate questions on those interwoven issues, so that's how I interpret it.

Robert W. Smith: I appreciate the problems you face in maritime jurisdiction and I just assume that Korea has not been faced with any day-to-day logistical problems. The territorial sea could wrap around that straight baseline system, which essentially is left dangling out there, but I've gotten the impression from the few people I've talked to that there is no pressing need to close that off, considering the other problems you face. The other question I'd like to raise concerns the joint development zone with Japan. I find it an intriguing solution to what I assume was a rather ticklish matter in the early 1970s, to attempt to delimit a boundary out there. I suspect that in the coming years other countries may find that an appropriate alternative to a boundary is a joint zone. I know that ratification problems slowed its progress, but how is the joint arrangement working out there?

Choung Il Chee: We'll know as soon as they find oil in that area. So far neither side has sufficient practice to show whether it's going to work out or not.

Myron Nordquist: The positive way to say it is that there have been no disputes about the development --

Choung Il Chee: -- precisely because of the fact that no oil has been discovered.

Myron Nordquist: Noegroho?

Noegroho Wisnoemoerti: I would like to eventually raise some questions concerning the innocent passage regime in which, of course, Indonesia is very much interested. As you know, the law that is now in force requires prior notification. But, for the moment, I would very much like to have you elaborate a bit further, Dr. Chee, not only on the prospect of success but on the main features of this joint development zone. As Mr. Smith has put it, this might be the future solution for unresolved boundary delimitation problems. But some other factors have

to be taken into account. For instance, the different levels of development of those countries involved and the difference in legal systems, and so on.

Myron Nordquist: Choon-ho, do you have a comment or two on this?

Choon-ho Park: Yes, on this joint development scheme between Japan and the Republic of Korea, Dr. Smith asked how it is working. Procedurally, repeat, procedurally, it is working marvelously. In finding oil, it has been very efficiently hitting on dry holes. But we haven't given up; it will go on. There are four major instances of joint development schemes in the world now: in the North Sea, in the Persian Gulf, the Japan-South Korea instance, and between Thailand and Malaysia. Each has its own features. One striking difference between the other three and the one in the Persian Gulf is that the Arabs are very practical in the sense that they argue over religious or other political issues so fiercely, but when it comes to developing oil jointly, they agree marvelously. Their point is, "Let's get oil first and argue later." In contrast, in the East China Sea, they knew, or at least knew slightly, about where oil was likely to be even before they thought about agreement on boundary issues. In the North Sea, they agreed on the boundary problems before they had any reasonably good idea as to where oil was likely to be. But in the East China Sea they knew, or at least were told, where oil was likely to be, and then had to worry about the boundary delimitation. So each claimant began to stretch international law of the sea like a piece of Malaysian rubber, raw rubber, stretching it to reach or cover where oil was likely to be.

The British Institute of International and Comparative Law, in coordination with the Institute for Minerals and Petroleum Law Studies at Dundee University, is conducting an extensive study of East Asian joint development schemes, those in force as against those that would be coming in the areas where boundary delimitation is going to be very difficult. But the Thai-Malaysian instance is much simpler compared to the Japan-Republic of Korea example because the area to cover in the Gulf of Thailand is only a small patch compared to what we have in the East China Sea. But on the main features that Mr. Noegroho asked about, the basic idea is to freeze boundary problems for future negotiations and to go ahead with resource development, oil development. This appears to be a good idea on the face of it, but the delimitation problem can come up again as a disagreement on the ratio of sharing the actual proceeds. In the Japan-Republic of Korea case, one article specifically stipulates that the agreement doesn't have anything to do with surface boundary problems. But this article is just procedural. Oh, it's marvelous, but it's not very practical. Once you've emptied the disputed area of oil, would you still argue over how to share what's left? So I don't think that article, which is procedurally very important and a good one, has much of anything to the point.

Choung Il Chee: To my answer to Mr. Smith's question: I'm sorry, I stand corrected. When you referred to Point No. 23, I was thinking of the area for the wrap on the Armistice line. Let me clarify this point. From this area is drawn the Northern Limitation Line, which is observed by both sides, and the drawing of the straight baseline for the wrap may affect the North Limitation Line. That's probably one of the reasons why the wrap hasn't been drawn from there.

Now the second point. The crucial part of the joint development zone is the equal sharing of resources and expenses. They have attempted to explore this area but so far no oil has been discovered, so they haven't really been able to practice equal sharing in accordance with their agreement. Setting aside the delimitation problem between Korea and Japan is, as I have explained in my paper, in accordance with the Montego Bay Convention. A provisional or interim regime is in force until the delimitation issue is settled. Furthermore, in the *North Sea Continental Shelf* case, the Court explicitly referred to the possibility of a joint exploitation zone, especially when there is a unity of deposit. And it has become part of international law, but as far as how this has been explored and what has been discovered, how many areas they have attempted to explore, probably Dr. Park knows more than I do.

Unidentified Speaker: In the North Sea, the Court actually proposed the joint development program as a possible solution, but I think it's a matter of unitization rather than a joint development zone; you just draw a small unit and divide the interest of that area between the parties. But what we are talking about now in other parts of the world -- for example, in the East China Sea and Thailand and Malaysia -- is actually a zone of joint development. I also doubt that this joint development scheme is actually a solution to the delimitation problem because condominium does not last forever; it lasts as long as it serves its purpose. So in the future there must be a delimitation of some kind, I think.

Choung Il Chee: I don't have the text of the judgment of the *North Sea Continental Shelf* case with me but, if I recall, the Court referred to the unity of deposit. In an area where you have a unity of deposit of natural resources, it may be possible to solve this problem of utilization of the natural resources through a joint development zone. That's one way to solve the problem of overlapping areas of the continental shelf. On this question of whether the joint development zone is a solution to the delimitation problem, it's not the area of the continental shelf that the countries are interested in, it's the resources therein. As long as they are agreed on the equal -- which may be regarded as equitable -- sharing of the resources, they've found the solution to that problem. The delimitation of the continental shelf becomes a moot question if you solve the question of the sharing of the resources. That's the way I look at the issue.

Unidentified Speaker: Of course you can divide or share the interests -- for example, natural resources -- of the area concerned. But there are other interests: space, fisheries, jurisdiction. I think you should delimit the area concerned anyway, in the future.

Choung Il Chee: You are assuming that the zone includes the water column above the continental shelf; I'm referring strictly to the continental shelf. I'm saying that sharing of the resources is a really critical part of the delimitation question.

Unidentified Speaker: As far as the continental shelf is concerned, resources of course are very important. But if you survey state practice throughout the world, most states would like to have single

maritime boundaries. In only a few areas do they have two boundaries -- one for the water column, the other for the continental shelf.

Myron Nordquist: Professor Chiu?

Hungdah Chiu: As they are drawn on this map, some of the straight baselines on the western coast of Korea do not seem to follow the general direction of the coast. In delimiting the continental shelf between the Republic of Korea and China, China would hardly agree to Korea's extension of the baseline very far to the sea. So, I think you probably need some other information in your paper to justify such a baseline.

Choung Il Chee: Which particular area are you referring to?

Hungdah Chiu: I meant Points 10 to 16, and then to 15 and then to 13. There are big islands here but you disregard them and go to the small islands. Can you justify this practice under the Convention on economic interest? Even if that's the case, you still need some evidence to support the deviation from the general direction of the coast.

Choung Il Chee: Well, that's a very difficult question you are asking me. I feel that the way this area is drawn meets the test for following the general direction of the coast. You can see that the outer fringes of the island are used as basepoints, which are permitted by the Montego Bay Convention. Are the distances too great between the coastal area and the outer fringes of the island? Now, that's another matter, probably ten miles, five miles, according to the dictum of the 1951 *Anglo-Norway Fisheries* case.

Choon-ho Park: It will be difficult to discuss the matter in question here on the basis of the map we have before us. At the latest count by the Minister of Home Affairs last December, the Korean peninsula has about 3,500 islands; in fact, that's about 150 islands less than it used to be because of reclamation projects. It doesn't matter, it's irrelevant here. But along the Chinese coast, there are also approximately the same number of islands. The map given here doesn't illustrate the exact geographical circumstances with regard to how many islands are where and so forth.

Myron H. Nordquist: Lee Kimball?

Lee Kimball: Dr. Chee, I just wanted to go back to the joint development zone and how it works. I have a question about the sharing of expenses, which, as you quote the law here, are reasonably attributable to exploration and exploitation. Are those just administrative expenses or other expenses? Are exploration costs shared jointly?

Choung Il Chee: I assume all sorts of expenses in connection with the exploration of the continental shelf are being shared. How it works out in reality I have no way of knowing.

Choon-ho Park: The joint development zone is divided into nine sub-zones, and by agreement the two parties are given alternating rights. For instance, in Zone A, if you are given the mining rights, your

counterpart is given the exploration rights. So there isn't really any need to actually reckon the expenses.

Choung Il Chee: Another point I raised in my paper is the PRC's use of a straight baseline in the East China Sea area around the "Barren Islet," fifty miles off the coast. This line forms two sides of a triangle and creates a promontory that will affect the median line drawn by the Republic of Korea. As far as I'm concerned, it's actually drawn by the United States Office of the Geographer. Assuming that the PRC is going to follow that straight baseline as drawn by the U.S. Geographer's Office, I think that is not equitable and requires adjustment precisely because it does not meet the test for following the general direction of the coast. The Montego Bay Convention refers to the "appreciable extent." What is appreciable extent? How far? Twenty miles, thirty miles, forty miles? It hasn't been resolved yet, but as far as I'm concerned the line does create a promontory and it does affect the median line so that the PRC may not be able to invoke the straight baseline as is drawn by the U.S. Office of the Geographer.

Myron H. Nordquist: It's appropriate that our next questioner is Bob Smith.

Robert W. Smith: I guess I'll have to preface a question with a comment. First of all, our depiction of the Chinese straight baseline is hypothetical. One of our problems in following state practice around the world is that oftentimes a country will declare a zone or straight baselines without giving geographic coordinates or producing a map, so we are forced to assume things. For the record, our depiction of the Chinese baseline is just our possible interpretation of what straight baselines could be, not that they will come out looking that way. The question I asked a few minutes ago was a simple question, but, as I listen to the conversation, it's become more complicated in my mind.

I would like to shift the focus to the Sea of Japan for a moment and ask you a hypothetical question. Should an area be delimited prior to gaining knowledge of its resources? Should an area be delimited by one maritime boundary, or in some instances should there be multiple boundaries, one for the sea floor, one for the water column, and for other purposes? Applying this question to the Sea of Japan and the sovereignty dispute between Korea and Japan over a couple of little rocks out there, do you see how that whole issue could be resolved under existing maritime zones?

Choung Il Chee: On your first remark that the U.S. is drawing a hypothetical line along the Chinese coast, I will say that that U.S. hypothetical line is contrary to the general-direction-of-coastline test.

On your second point, in my opinion -- I don't reflect the view of the government -- I don't think that the island located somewhere on the midpoint of the maritime zone of the two states situated opposite to each other should be regarded as a significant factor in drawing the baseline. Applying the test used by Donald E. Karl in his 1977 article in the *American Journal of International Law*, such an island could be disregarded in drawing the delimitation line as it is located in the median area of the maritime zone. The validity of the remark that the islet could be disregarded in drawing the median line is also supported by the judgment in the *North Sea Continental Shelf* case, where the Court held that the presence of islets, rocks, and minor coastal pro-

jections could be ignored to eliminate the disproportionately distorting effect in drawing "an equal division of the particular area involved." (Paragraph 57 of the judgement.) Therefore, I was surprised to see, on the potential maritime zone map prepared by, again, the U.S. Office of the Geographer, that two different lines have been drawn, depending upon who owns that particular islet. To me it doesn't really matter who owns it; I don't think that the islet constitutes any significance as a base point, precisely because of its location in the median area of the maritime zone between Korea and Japan. It can generate a twelve-mile territorial sea, but other than that, not much. As for ownership, my feeling is that maybe neither side wants to provoke any issue; what they're interested in is fish, not the islet. Both the Republic of Korea and Japan claim it, so there the dispute lies. But I say again that you have to look at this one particular conflict in the general context of overall relations between the two countries. Probably both sides are really doing that, taking their current positions in light of overall relations.

Robert W. Smith: It seems to me that island is important precisely because it can be used as a base point for the creation of an equidistant line and that, if you took that value away from that point, you could delimit a boundary or a regime that would be satisfactory to both sides. But, unfortunately, in international law and the geographic application law, it's very easy to draw an equidistant line; it's just the geometrical thing to do. To come up with other lines takes some imagination. So it's quite easy for the people in the back room to draw "a hypothetical equidistant line" just to see what land areas in a given region will do to a line. Here in the Sea of Japan, that little rock affects significantly the area to be delimited under equidistance.

Choung Il Chee: Precisely because of its location in the median area of the maritime zone between Korea and Japan, the islet of Dokto should not be used as a basepoint although I do not disagree with the proposition that islands or islets could be used as basepoints.

Robert W. Smith: Well --

Choung Il Chee: In the test of equitable delimitation, that is. One of the drawbacks of the Montego Bay Convention is that it makes no reference to what islet should be used as a base point. No reference, nothing, as far as my interpretation of the Convention is concerned. Island, rocky island, continental shelf limitation, the EEZ -- these are referred to in Article 121, Paragraph 3. But on whether a particular islet in a certain geographical area should be used as a base point or not, the Convention is silent. Such a basepoint should not be used if it affects the equitable solution in the delimitation of the continental shelf. It is for this reason that the PRC cannot use Barren Islet as a basepoint.

Jon Van Dyke: Two quick questions. Dr. Chee, you mention the ambivalent attitude of the Republic of Korea towards the fishing provisions in the Convention. I wonder if you could indicate to us what the current thinking of the Republic of Korea is on ratifying the Convention and on Article 64, particularly as to whether it requires that an organization be created to handle the question of highly migratory species in the South Pacific and the Western Pacific area.

Choung Il Chee: Well, as far as fishing is concerned, the Republic of Korea is not particularly happy to see that other countries are drawing 200-mile zones. For instance, when the 200-mile limits are drawn, the Republic of Korea loses about 360,000 ton of fish catch from the Soviet zone and about 100,000 tons from the U.S. zone in the North Pacific. This is a blow for the distant-water fishing industry in the Republic of Korea. But since it has signed the Convention, the Republic of Korea would observe its obligations as a signatory state under the Convention. On whether or not the ROK will ratify this Convention, I can only give you an ambivalent answer.

As to whether the Republic of Korea should accept the arrangement detailed in Article 64 on migratory species, I would say yes. For instance, the Republic of Korea has concluded a fishery agreement wherein it has recognized New Zealand's 200-mile EEZ claim, with specific reference to the highly migratory species. If the fishing industry dictates that the ROK should accept any suitable arrangement, probably the ROK will go along with it, including Article 64.

Myron H. Nordquist: Mario?

Mario C. Manansala: I have in mind two points. Firstly, a very slight correction on the statement made by my colleague, Dr. Clingan. The amendment favored by a group of countries requiring prior notification was not withdrawn; it was simply not pressed to a vote, based on the statement that the President of the Conference made, and Dr. Clingan is correct in that point.

Second is a question to Dr. Chee. Does the ROK have domestic legislation requiring prior notification or authorization?

Choung Il Chee: Yes. There is a specific provision requiring prior notice.

Myron H. Nordquist: Dr. Chen?

Rong-Jye Chen: According to Dr. Chee's paper, the Republic of Korea relied on the so-called median line as the guideline for the delimitation of the continental shelf. And even the Convention on the Law of the Sea takes the position of so-called equitable solutions. It seems to me that a median line is sometimes equitable but sometimes is not. My question is: in addition to the so-called proportionality of the lengths of the coastlines or the island as referred to earlier in your discussion, what other factors should be taken into consideration in application of the median line principle in order to achieve an equitable solution?

Choung Il Chee: Are you asking the question whether it's not necessarily an equitable solution or is necessarily an equitable solution?

Rong-Jye Chen: Sometimes it is. A median line sometimes is an equitable solution but sometimes is not.

Choung Il Chee: Okay, that's what the Court said in North Sea judgement, depending on the features of the coastlines. As far as I can see, the Court said that when you have opposite coasts and a common continental shelf, the median line is an equitable line of delimitation. Now, one thing that bothers me: in Article 76, Paragraph 4, Subparagraph (a) (i) you will read that the thickness of 1% refers to

the outermost limit of the continental rise as the extent of the continental rise. In the Yellow Sea area, however, you only have a shelf, not a slope, not a rise. So, this argument, which was advanced by Mr. Richard Hsu in *Ocean Development and International Law*, to me is not applicable. But I do agree with you that a median line sometimes does not produce equitable solutions nor constitute the equitable delimitation for the shelf.

Myron H. Nordquist: Mr. Noegroho.

Noegroho Wisnoemoerti: I think Bob Smith's statement on the unitary system of delimitation is interesting. We consider that it is not necessary that one single line be drawn for delimiting different maritime boundaries, for one simple reason: history should be taken into account. For instance, Indonesia has concluded agreements with its neighbors since 1969, and during that time the principles of international law concerning delimitation were not yet fully developed. So, in interpreting the principle of median line, as provided for in the 1958 Geneva Convention, we have nothing really to take as a guide in drawing the line. We have therefore used outlying islands as base points although they lie very far from the coast. I think that, in the subsequent development of international law, the judgement in the 1977 *U.K.-France Arbitration* case that Mr. Chee has referred to is really a milestone in this respect and the position of islands is prominent in the delimitation. In that situation where the median line principle would lead to the non-equitable solution, then we take into account other factors relevant to the delimitation. An island is a prominent factor in this aspect, even when it lies far beyond the coast of the state that owns it. I think that this is the trend in the development of international law which might be taken into account in existing or future negotiations with neighboring countries. I just want to make this point because it is quite relevant in our present-day implementation of the Convention.

Choung Il Chee: Yes, I agree with you. But it depends on where the island or islet lies. In the *U.K.-France Arbitration* case, the Scilly and the Ouessant islands have a considerable population, 2500. There were two methods of solution, the "enclave" solution on the island of Jersey, and the half-effect solution. But the island there was a full-fledged island. Now, on the other hand, if the islet lies in between two countries, far off from their coastlines, let's say sixty miles, seventy miles, without really connecting any other base points, I don't know. But, in substance, I agree that the island is important in delimitation.

Chao Hick Tin: Having listened to Dr. Chee this morning and read his article very quickly, I understand that the ROK has some reservations on the exclusive economic zone concept in the Convention. It also has some problems on delimitation with its neighbors and on the question of the territorial sea. The ROK passed a law in 1977 which requires all foreign warships to give notification before passing through the territorial sea, but in the text of the Convention as adopted, there is no requirement for prior notification. I wonder whether that Korean law might not have to be altered. Dr. Chee says that the ROK's 1977 law is in line with this particular part of the Convention dealing with innocent passage through straits. Dr. Chee, could you elaborate a little

bit on this particular point, quite apart from the background controversy regarding how this article in the Convention has been drafted and why certain proposals for amendment were not pushed. The Korean law as it now stands is consistent with the law of the sea text on innocent passage?

My second question is a general one which was touched on by Professor Van Dyke when he asked about the attitude of the Korean government regarding ratification. You answered that it depends on the Korean government. I'd like to ask you point-blank: if your government should come to you as an academic international lawyer and ask you if the Republic of Korea should ratify the treaty, what would your views be?

Choung Il Chee: Perhaps I didn't make it clear in my paper that prior notification is, to a certain extent, the exception to the prevailing rule of international law. Therefore what I did was to try to go back to customary international law to seek a justification for the ROK's prior notice requirement under its law of the territorial sea. It's true that the Montego Bay Convention makes no reference to either the prior notice or the previous authorization requirement. But outside the Convention, there is no lack of authority in support of either prior notice or previous authorization. In this context I referred to Professor Brownlie's remark. Of course, he was discussing previous authorization, not prior notice; but the assumption could be made that if previous authorization is acceptable, prior notice will be more so. That's the assumption that I haven't really developed. Is that in conformity with prevailing international law? I have already referred to the 1956 International Law Commission's draft articles on prior notice and previous authorization, including the commentary. I stand by what was recommended and written in those draft articles.

To answer your second question, whether Korea is going to ratify the Montego Bay Convention or not, I suppose that the Republic of Korea may undertake to examine all the relevant provisions to find out whether it warrants ratification. Of course, one assumes that they examined the Convention before they signed it. Whether they want to ratify or not is hard to say. What would I recommend? I would recommend that they should examine all the relevant provisions and, if necessary, make some declaration which is permitted under the Convention. The Convention itself is very interesting, as you all know. It prohibits reservations; at the same time, it allows a declaration. What is a declaration, what is its legal nature, under international law? Is it a reservation or does it mean anything, nothing? Then why the declaration? But at any rate my recommendation would be to examine the Convention more carefully in the context of the ROK's national interest and of the rules of international law. In other words, examine with care before ratification and, if necessary, make some declaration.

Myron H. Nordquist: Mr. Saito?

Masaki Saito: I put this question to Mr. Chee or any participant: what would be the trend among state practices in delimiting the continental shelf or the exclusive economic zone between countries which are situated less than 400 miles apart, since, as you know, in the international agreement which stipulates the delimitation of the continental shelf there is some disclaimer that this agreement does not affect the future legal status of the water column or any other status. What would

be the future relationship of these two regimes or what would be the logical conclusion from the Convention?

Choung Il Chee: The Convention doesn't offer any solution to the problem of the overlapping area of the continental shelf and the EEZ. You all know how vague are the provisions in Articles 74 and 83 concerning the delimitation of both the continental shelf and the EEZ. There are basically three components in those provisions. First, they impose a mandatory obligation to reach an agreement. Second, the agreement must be reached "on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice." Third, the delimitation must "achieve an equitable solution." To effect an equitable solution that is required under the Convention -- as the Court said in the *North Sea Continental Shelf judgment* -- a party can resort to all kinds of methods to find an equitable solution.

As long as you satisfy those three requirements under the articles dealing with the delimitation of the continental shelf and the EEZ, I think that you are in line with the Convention and the rules pronounced by the International Court of Justice in the 1969 *North Sea Continental Shelf* case and 1982 *Libya vs. Tunisia* case, and the ruling by the Court of Arbitration in the 1977 *U.K. v. France Channel Arbitration* case. It should be remembered that in all these three cases, the international tribunals stressed that the equitable solution should have priority.

The much-awaited decision of the International Court of Justice between Canada and the United States in the *Gulf of Maine* case may help us in the delimitation of a uniform zone for both the EEZ and the continental shelf. In the decision of the 1982 *Libya-Tunisia* case, it has been said that the International Court of Justice ruled that natural prolongation is irrelevant in the delimitation of the continental shelf, but the Court never really dwelled upon this issue of the entitlement of the coastal states to the continental shelf, based on natural prolongation. It should be pointed out in this connection that the Montego Bay Convention and the judgment of the International Court of Justice in the *North Sea Continental Shelf* case refer to the entitlement of the coastal states to their continental shelves based on natural prolongation. What really concerns me is that in all three continental shelf cases dealt with by international tribunals, namely the 1969 *North Sea Continental Shelf* case, the 1977 *U.K.-France Channel Arbitration* case, and the 1982 *Libya-Tunisia* case, the tribunals never talked about equitable apportionment, although the results may be the same. I guess you'll have to use a pragmatic solution to satisfy all parties concerned.

Myron H. Nordquist: Would others care to respond?

Noegroho Wisnoemoerti: In the future, I can see possible situations in which maritime boundaries will be defined in terms of more than one line for the reasons I have referred to earlier. In the legal situation at this stage, that is, the 1982 Convention, I think we should apply the same principles and criteria for both the continental shelf and the exclusive economic zone. But we should also accommodate historical situations such as the Indonesian one mentioned earlier. That is, agreements concluded in 1969, before state practice on delimitation was fully developed, might require a different line. Using an island, irrespective of its distance from the coast, as a basepoint might result in an delimitation that is considered inequitable in the new

legal situation. So, for instance, with Australia, we defined the line of the continental shelf using then-existing principles of international law for guidance, which, with other factors, resulted in a line which is very close to the Indonesian coast. But, with the same country, Australia, we have agreed on a provisional line for fishing which is quite different because we use current criteria concerning islands. As a result, we have two different lines. One is a provisional line, but it delimits the area on which each party would exercise its respective jurisdiction. So I can see that, at least because of this historical aspect, we might find ourselves in a situation in which we use more than one line to delimit maritime boundaries, one for the continental shelf and another one for the economic zone or fishery zone.

Myron H. Nordquist: Professor Rhee?

Sang-Myon Rhee: This morning we talked about the possibility of two lines: one for the water column, the other one for the continental shelf. But, as I said before, most states would like to have one single maritime boundary. Paragraph 1 of Article 74 and Paragraph 1 of Article 83 are exactly the same although the factors that we should take into account in delimiting the water column and the continental shelf might be or even should be different. Of great importance would be the geological factor. According to the judgement of the *Libya-Tunisia* case, principles should be equitable but the factors that should be taken into account in the delimitation would be length of coastline, proportionality, and a natural prolongation. Other prevailing factors would include geological aspects, the median line factor, or factors in the water column -- that kind of thing. I think for administrative convenience the single maritime boundary is ideal, and for the principles and details of delimiting the single maritime boundary, we have to wait for the results of the *Gulf of Maine* case.

Myron H. Nordquist: Choon-ho?

Choon-ho Park: Mr. Saito's point about the possibility of separate boundaries for the seabed and the surface is very important. The International Law Association has been discussing this point already for a couple of years and the forthcoming session in Paris in late August has as many as two long sessions planned to discuss it. This issue was also raised for discussion at the last meeting in Montego. One of the reasons why we haven't got many scholarly studies on this point, in spite of the fact that it is really crucial, is that there hasn't been enough time for the international legal community to come up with any serious analysis yet. The Convention was signed less than two years ago. Conceptually two separate boundaries are possible, the surface boundary and the seabed boundary. In one of my earlier articles, in fact, I mentioned that conceptually this was possible, and some people smiled at me. Some instances are already coming up. In an analysis done by a mainland Chinese scholar, the PRC's position definitely maintains the dual possibility: one, the surface, the other one, the bottom. In the case of the East China Sea, therefore, there are to be two tri-junctions: one floating up, another one somewhere on the bottom, not coinciding at all. The Australia-Papua New Guinea agreement is another example where the fishing boundary is different from the seabed boundary. Another one I was told about but haven't been able to confirm

yet is somewhere on the west of the Malaysian peninsula, the tri-junction between Malaysia, Thailand, and possibly Indonesia. Noegroho, you can come up with more specifics on this.

Choung Il Chee: With reference to Mr. Saito's question, it is true, once the Convention is ratified, that its obligations will come into force without affecting the rights and obligations of other agreements. But right now, Japan and Korea are just signatory states to the Convention; they are only bound to it to the extent of their status as signatory states under general international law.

The other point I'd like to make is about the natural prolongation rule. It's unfortunate that in the 1982 *Libya-Tunisia* judgement the Court held that the principle of natural prolongation does not "necessarily provide criteria applicable to the delimitation of the areas appertaining to adjacent states." (Paragraph 48 of the Judgment). Namely, the Court ruled that the principle of natural prolongation is not a factor to play a role in the delimitation of the continental shelf with a neighboring state (Paragraph 43 of the Judgment). This ruling of the Court has seriously undermined the natural prolongation rule for the determination of the limit of the continental shelf between neighboring states. If the natural prolongation rule cannot play any role in the delimitation of the continental shelf, what would be a rule in the event of overlapping of the two continental shelves, one of which is based on natural prolongation while the other is simply based on the distance of the sea bed floor? Should the natural prolongation rule be disregarded, under such circumstances, with the result of cutting off the continental shelf for the coastal state whose claim is based on the natural prolongation rule? Would such a result amount to an equitable solution for the coastal state whose continental shelf, at least a part, is being cut off? It must be pointed out that the International Court of Justice has stressed an equitable solution, not the means, for the delimitation of the continental shelf.

In the final analysis, I would like to point out the fact that it is the equitable solution, instead of the means to achieve it, that was emphasized by the Court in the 1982 *Libya-Tunisia* judgment, as the Court stated that "it is, however, the result which is predominant; principles are subordinate to the goal." (Paragraph 70 of the Judgment). I have lots of reservations about the 1982 judgment. But I rest my comment on that remark.

Myron H. Nordquist: I think it's easy to understand why, in the last fifteen years, the majority of the cases before the International Court of Justice have been concerned with maritime delimitation.

NORTH KOREA AND THE LAW OF THE SEA

NORTH KOREA AND THE LAW OF THE SEA

Myron Nordquist: Our next address is by Professor Jung-Gun Kim from Yonsei University, one of the oldest universities here in the city. Professor Kim did his undergraduate and Master's work in the United States and earned his Ph.D. at the University of Maryland. He spent sixteen years in the United States teaching, and he has published many articles and written with others a number of books. Professor Kim?

REFLECTIONS ON THE ATTITUDE OF NORTH KOREA
TOWARD THE LAW OF THE SEA TREATY
(UNCLOS III)

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Introduction

North Korea has participated, even actively in some sessions, in the making of the treaty resulting in UNCLOS III, and it was one of the signatory states when the treaty was signed in Montego Bay, Jamaica, 10 December 1982.¹ However, it has not, as of this writing, ratified the treaty.

While North Korea is, like South Korea, not a member of the United Nations, it is a member of no less than seven specialized agencies of the United Nations, and two other related international organs.²

Though it may be small, it is not small in condemning the "imperialist and colonial nations" of the world; and while it may plead for a "new economic order," it is prepared to defend those of its interests that are based nevertheless on the "old order."

Even to a casual observer, the treaty resulting from UNCLOS III has certain general features which are hard to miss:

First, the treaty has significantly expanded coastal states' jurisdiction over their territorial waters and contiguous zones, while it has succeeded in defining the outer limits of the contiguous zone as twenty-four nautical miles from the baseline.

Second, the treaty is an attempt to reduce the inequity in technology and wealth between states so as to indirectly stabilize and reduce the disequilibrium between the "have" and "have not" nations.

Third, the treaty has strengthened the dispute settlement procedures in ocean-related issues.

Fourth, the treaty has attempted to reduce or eliminate the military use of the ocean and to discourage the use and exploitation of ocean resources for any other than peaceful purposes and those that are consistent with the notion of the "common heritage of mankind."

These are some examples of the strength and plausibility of the treaty resulting from UNCLOS III. The writer can recall few, if any, international conferences which were attended by delegates of as many nations as attended UNCLOS III, nor can he recall a meeting aimed to codify international law which lasted as long and involved as many divergent interests and representatives.

Certainly, North Korean participation in UNCLOS III signifies not only its determination to plead its case in an international forum but also to legitimize what it believes to be "just" and "right" in ocean-related issues. In this regard, North Korean delegates' statements require careful scrutiny to "understand" their perception and vision of the world.

Whatever may be said of the government in North Korea, its positions as revealed in various statements made during UNCLOS III sessions indicate:

(a) its sense of "self-persecution," that is, its belief that in the past it has been victimized unjustly by the hostile powers of the outside world (most important and recently, by the Western world headed by the United States);

outside world (most important and recently, by the Western world headed by the United States);

(b) its belief that the only course for its survival and prosperity lies in resolutely waging a struggle against those antagonistic postures and powers which are antithetical, cunning, hostile, and basically belligerent;

(c) its determination to align, support, and harmonize its actions with those of the Third World, especially in ocean-related issues;

(d) finally, its determination to pursue a course of action at the Conference which would encourage tacit recognition of its legitimacy and independence, while at the same time indicate, when possible, its verbal subscription to the ideal of stability and peace in the world and region.

In general, the North Korean position on many technical points discussed during the Conference reveals either its lack of understanding of the technical issues or its determination to dwell only in generalities despite its in-depth technical knowledge. In any event, contradictions in statements made by the North Korean delegates are many and important (see, for example, its statement relating to the continental shelf, as will be discussed in this paper.) Perhaps, dwelling in generalities (often contradicting itself) may be a purposeful posture.

Initially, it may be worth recalling certain facts about North Korea. North Korea's coastline is 2,495 kilometers long (as compared with the ROK's 2,413 kilometers), its total area is 121,730 square kilometers (as compared with 98,400 square kilometers of the ROK), and expanding its jurisdiction from the baseline to the limits of a hypothetical 200-mile economic zone would add an estimated 378,000 square kilometers in area (as compared with 1,016,000 square kilometers for the ROK). (For an additional factual comparison of the two Koreas, see attached appendix).

Yet, and despite, its relatively long coastline and two important ocean boundaries in the east and west, North Korea seems to be a relative latecomer to the scene of ocean-related global movements.

From its founding until the 1960s, the North Korean government presumably felt no urgent need to pursue the legal issue of an ocean regime and related issues. Partly colored by ideological (and political) considerations and partly prompted by pragmatic considerations of economics, the North Korean regime has taken a position which generally agrees with those of various Latin American countries and, more recently, with the positions taken by developing "Third World" nations.

As far as one can ascertain, the early North Korean position on the issue of territorial waters and related issues may be seen in the negotiation of the Armistice Agreement (1953) which terminated the Korean conflict. During the course of the negotiation, the North Korean Government demanded a twelve-nautical-mile limit to its territorial waters as a counter to the position of the United Nations Command (UNC) which then advocated a limit of two nautical miles. Because of this difference, the Agreement omits the specific delimitation of the breadth of territorial waters and instead employs the vague terminology of "territorial water." In practice, the U.S. Department of State interprets the term to denote a breadth of twelve nautical miles.³

On 11 September 1958, North Korea again gave to the outside world a clue to its position when it supported the People's Republic of China's proclamation of its territorial waters.⁴ However, it was not until the *Pueblo* incident of 1968 that the North Korean claim of

twelve-mile territorial waters came to a direct and public test. It is recalled that the incident occurred at 11.3 miles from the North Korean coast.⁵

Despite the events described above, North Korea did not begin to specify its position on the issue of territorial waters⁶ until the early 1970s, more specifically around the time of the Caracas session of the Law of the Sea Conference.

Of special importance in this regard are the following events:

- (1) Statement by the representative of North Korea during the 22nd meeting of the second session, 23 June 1974, of UNCLOS III;
- (2) *Shosei Maru* Incident (2 September 1975);
- (3) Report of the delegation of the Japan-North Korea Friendship Society subsequent to their visit to North Korea (24 June - 4 July 1976).

(1) Guk Jun Kim, speaking on behalf of the North Korean Government, stated in Caracas, among other things, the following:

The peoples of the newly independent countries in Asia, Africa and Latin America were waging a dynamic struggle to exercise complete sovereignty in all spheres of State and social life and in the international arena The peoples of the developing countries were waging a vigorous struggle to safeguard their territorial seas and natural resources as part of their fight against aggression and imperialist and colonial intervention the peoples of the third world were independently fixing the limits of their territorial sea and the zone under their jurisdiction in conformity with the actual conditions of their countries, thus frustrating imperialist efforts to limit the territorial waters to only three miles. Each country should independently fix its territorial sea and limits under national jurisdiction.⁷

Viewed from the above perspective, the North Korean outlook on territorial waters is more in the context and spirit of "struggle" between the developed colonial and imperial powers versus the developing nations. And, more importantly, the question revolves around the matter not of the negotiated international standard, but of the "right" of coastal states, a right which is beyond reproach by any other power.

(2) The *Shosei Maru* incident involved the seizure of a Japanese commercial vessel off the coast of North Korea which, at the time of the incident, was allegedly within the North Korean territorial water. Irrespective of the disputed facts regarding the exact location of the vessel at the time of seizure, North Korea stated that the vessel was, at the time of seizure, at 29 degrees and 37.5 minutes North latitude and 124 degrees 10.4 minutes East longitude, which unmistakably places the vessel's location within the twelve miles of North Korean territorial waters.⁸

(3) According to the report of the Japan-North Korea Friendship Society upon completion of their visit to North Korea, they were told by the Chang-Joon Joo, Assistant Chief of the (North) Korea External Cultural Liaison Committee, that "North Korea regards its territorial water to be 12 nautical miles" and this is "in accordance with global trend".⁹

The North Korean claim of twelve-nautical-mile territorial waters does not deviate from the current norms of the UNCLOS III treaty.

Significant, however, is their method of delineating the baseline, their exceptional claim of a military boundary or security zone, which

is also measured from the same baseline, and their complete exclusiveness of jurisdiction within the territorial waters and the security zone.¹⁰ Specifics about the baseline were announced at a press conference on 10 September 1977, following the visit by the "Japanese-Korean Friendship Promotion Parliamentary Union" (of Japan). Mr. Hayashi Kiro, a member of the the ruling Liberal Democratic Party in the Japanese Parliament as well as a member of the visiting delegation, stated that, in the East Sea or Sea of Japan:

Baseline shall be "Man Koo Bong Shoaee Sun" [or the line enclosing the bays]; a straight line connecting the end of the Demilitarized Zone [DMZ] in the East Sea, a point north of Kan Sung in Kang Won Province of [South] Korea with that of the Korea-Soviet Union border in the town named Na Joo Ri in the Ham Kyung Buk Do [province] in North Korea.

[Based on the above baseline,] military boundary [or security] zone would include a rectangular area connecting the base-points of the above with the following:

Basepoint A :	38 degrees	36 minutes	48 seconds	Lat N
	129 degrees	30 minutes	30 seconds	Long E
Basepoint B :	41 degrees	46 minutes	13 seconds	Lat N
	131 degrees	31 minutes	15 seconds	Long E

[As for the exclusive economic zone,] the area would include the two base-points in the baseline with the following:

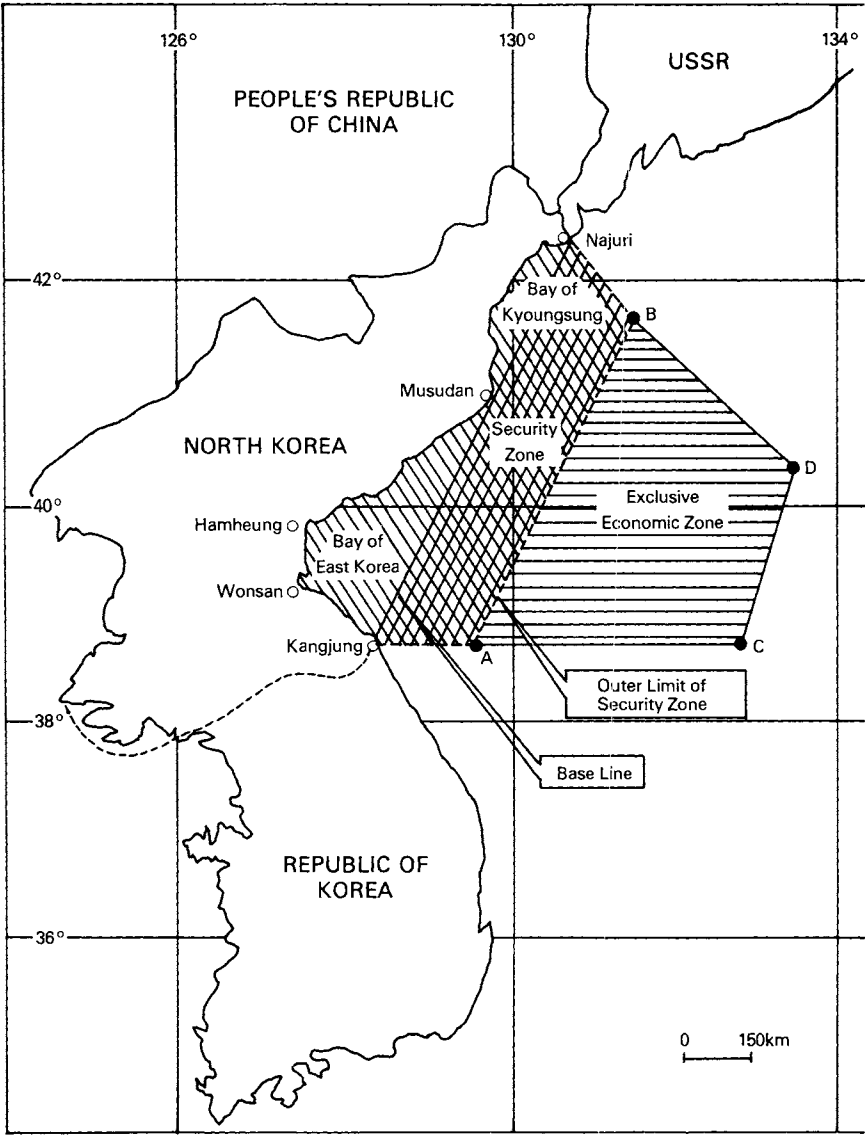
Basepoint C :	38 degrees	36 minutes	46 seconds	Lat N
	132 degrees	36 minutes	52 seconds	Long E
Basepoint D :	40 degrees	6 minutes	27 seconds	Lat N
	133 degrees	36 minutes	38 seconds	Long E. ¹¹

It was recalled that, according to the UNCLOS III treaty, the following factors come into play when the coastal state uses straight baselines to delineate its territorial waters¹²:

- (1) the coastline is deeply indented or fringed by islands;
- (2) the drawing of such baselines must not depart from the general direction of the coast (except when justified historically);
- (3) the system of straight baselines may not be applied so as to cut off another state from the high seas or its territorial sea;
- (4) the line must be marked on large-scale charts officially recognized by the coastal state.

The North Sea Fisheries case¹³ further provided a guide for defining "exceptional circumstances" by reason of a historical claim. It is important to recall several important elements outlined in the case:

- (1) "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in municipal law."
- (2) "The drawing of baselines must not depart to any appreciable extent from the general direction of the coast."
- (3) There must be "the more or less close relationship existing between certain sea areas and the land formations which divide or surround them."



Map 1

(4) "The real question in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal water."

(5) Otherwise "certain economic interests peculiar to the region, the reality and importance of which are clearly evidenced by a long usage."

(6) The rules governing delineation of straight baselines must be adapted to the differences in the necessary local conditions.

(7) There must be general tolerance of foreign states, including prolonged absence of protest or opposition, and this tolerance must be "an unchallenged fact."

From the foregoing, two important considerations emerge in drawing straight baselines, even where the basic geographical requirements are met:

(1) In view of the imprecise nature of required criteria (e.g., "deeply indented," "not depart to any appreciable extent", "more or less close relationship," "sufficiently closely linked," or "a long usage"), the legitimacy of drawing the straight baseline must be conditioned by a final judicial determination¹⁴.

(2) As the opinion of the Court indicated in the *Fisheries* case, "the delimitation of the sea areas has always an international aspect; it cannot depend merely upon the will of the coastal State as expressed in its municipal law."

In testing the North Korean claim of straight baselines against the criteria discussed above, it is improbable that the claim can withstand the legal requirements and conditions.

It can hardly be stated that the coastline along the East Sea (or the Sea of Japan) is so "deeply indented" to justify employment of straight baselines as the method of delineating its territorial waters, nor can it be doubted that the straight baseline so delineated appreciably departs from the general direction and configuration of the coastline. Indeed, as the Court (ICJ) in the *Fisheries* case indicated, "the delimitation of the sea areas has always an international aspect; it cannot depend merely upon the will of the coastal state as expressed in its municipal law."

It may be of passing interest to note that the North Korean description of the water landward of the (straight) baseline is described by the Chinese character denoting a "bay," which leads one to believe that North Korea presumably regards the enclosed waters as internal waters for the reason of its being a "bay." Suffice it to say that the criteria for delineating a bay are clear¹⁵ and the North Korean claim cannot meet the test.

Security Zone

The North Korean pronouncement of 21 June 1977 on the exclusive economic zone (EEZ), which was to take effect from 1 August of the same year, provided:

Demanded by the situation prevailing in our country, the Supreme Command of the Korean People's Army establishes the military boundary to reliably safeguard the economic sea zone of the Democratic People's Republic of Korea and firmly defends militarily the national interests and sovereignty of the country. The military boundary is up to 50 miles from the starting line of the territorial waters in the East Sea and to the boundary line of the economic sea zone in the West Sea. In the military boundary [on

the sea, in the sea and in the sky] acts of foreigners, foreign military vessels and foreign military planes are prohibited and civilian ships and civilian planes [excluding fishing boats] are allowed to navigate or fly only with appropriate prior agreement or approval. In the military boundary [on the sea, in the sea and in the sky] civilian vessels and civilian planes shall not conduct acts for military purposes or acts infringing upon the economic interests.¹⁶

The specific geographical dimensions of the "military boundary" (discussed in this paper as "security zone") are described above. A few points of significance should be observed from the very outset:

- (1) The zone is confined to the East Sea (or the Sea of Japan); no similar claim is made in the Yellow Sea.
- (2) The purpose of establishing the zone was to "reliably safeguard the economic sea zone" (EEZ) and to "firmly defend militarily the national interests and sovereignty of the country."
- (3) Without specific authorization, no right of navigation or over-flight will be permitted for any vessels and planes, except fishing boats.
- (4) No right of innocent passage is recognized.

In essence, waters within the security zone are "territorialized" for all practical intent and purpose.

As Professor Larkin observes, "security zones may be temporary or continuing; prohibitive or inhibitive or regulatory; blanket or selective [as to type of ship and states affected]." In the case of the North Korean security zone, it is obviously "comprehensive, continuing, [and] prohibitive."¹⁷

Recognizing that there are precedents¹⁸ for unilateral extension of jurisdiction by coastal states beyond the limits of their territorial waters, the degree of exclusiveness with which North Korea claims its jurisdiction over the zone appears unprecedented.

The North Korean perspective on the world that is reflected in the proclamation on the security zone may also be seen in the statement made by the North Korean delegate at the UNCLOS III meeting:

Today, aggression and interference by outside forces were the main obstacles to the realization by the peoples of Asia, Africa and Latin America of their national independence, the safeguarding of their political sovereignty and to the building of independent, prosperous and new societies. Korean people, too, had one half of their country occupied by foreign imperialist forces of aggression and their national dignity and sovereignty were ruthlessly denied. ... The occupation of South Korea by the United States Army and the acts of interference which grossly violated the exercise of sovereignty should cease, yet aggression was continuing and the acts of plunder by the militarist forces of Japan in the southern half of Korea and its adjacent sea and continental shelf had become increasingly violent. Korea's south sea had thus become one of the areas where the imperialist and colonialist Powers were competing for a "marine monopoly."¹⁹

Based on their general perception of the immediate surroundings as stated above, the North Korean security zone is put in place to meet the external threat (real or imaginary) and to ensure the "national interests and sovereignty of the country" by, initially, protecting

militarily the "economic interests" of the nation. For this reason the security zone is legitimate and requires no further test for its validity in international law. So it appears from their perspective.

In 1955 the PRC declared two security zones (in addition to a fisheries conservation zone) which extend far beyond the outer limits of its territorial sea.²⁰ In their jurisdictional exclusiveness these zones are quite similar to the North Korean security zone.

However, there is a basic and fundamental difference between the claims of North Korea and the PRC in the guise of security, claims which attempt to territorialize the body of water beyond the territorial sea and subject it to the full and complete sovereignty of the coastal state, and those claims which assert greater jurisdiction than the breadth of territorial waters but are conditioned by specific pre-designated occasions or purposes, as in the case of the U.S.'s Air Defense Identification Zone (ADIZ), etc. Indeed, there is a basic difference in jurisdictional exclusiveness of the Korean claim, the degree of which is unmatched save in the Chinese case.²¹

Furthermore, ambiguities in the pronouncements -- such as "civilian ships and civilian planes," "acts infringing upon the economic interests," "national interests and sovereignty of the country" and the like -- are susceptible not only to exaggeration but to unilateral interpretation by the North Korean Government.

In addition, denial of the right of innocent passage in the waters not only of the territorial sea but also of the security zone knows no historical precedent nor recognition in the UNCLOS III Treaty.²²

As for the right of overflight, it is true that state aircraft are not permitted to fly over or land in the territory of another state without authorization or special agreement.²³ Statements made by delegates to the Geneva Convention on the Law of the Sea indicate a widespread conviction that aircraft enjoy no right of innocent passage other than by special international agreement. During the course of negotiation in UNCLOS III, the right of denying innocent passage to aircraft was reasserted.²⁴

However, this is not to deny the overflight rights over the air-space beyond the territorial sea, including the EEZ and the continental shelf, and, in the present case, that portion of the security zone beyond the territorial sea of North Korea.

Related to the security zone and the twelve-mile territorial sea is the status of five islands which are located well within the twelve-mile territorial waters of North Korea in the Yellow Sea north of the DMZ line. These islands had been continuously under the jurisdiction of the Republic of Korea but became a focal point of tension due to a sudden North Korean pronouncement.

At the 346th meeting of the Military Armistice Commission on 1 December 1973, the North Korean delegate, Poong Sub Kim, asserted for the first time that the waters contiguous to the five islands are North Korean territorial waters and as such any vessel in transit through them is subject to prior notification and permit by the appropriate North Korean authority.²⁵

Two crucial points must be observed:

(1) The Armistice Agreement effectively delineated the land boundary separating the two contending forces through the DMZ (Demilitarized Zone). However, no such boundary was delineated for the contiguous waters and no mention was made of a demarcation line in the surrounding ocean.

(2) Article 2 (12) and (13) speak of "coastal islands" with the proviso that (as of June 24, 1950, when the agreement was signed) the respective areas of jurisdiction would be based on the following formula:

- (a) all islands north of the provincial boundary line of Hwang Hae and Kyung Gi provinces would be placed under North Korea;
- (b) all islands south of the same provincial boundary line would be placed under United Nations Command (UNC). However, the five islands²⁶ which are located to the north of this provincial line will be placed under UNC command due to the fact that UNC had the effective control over the islands at the time of cease-fire (see Map 2).

In practice the ROK and the UNC have voluntarily maintained the so-called "Northern [Patrol] Limit Line" (NLL) -- a median line separating the five islands from the shores of North Korea -- as a self-regulatory measure which North Korea had been observing (or at least acquiescing to) until the 346th meeting of the Armistice Commission on 1 December 1973.

The North Korean claim is seemingly based on two legal grounds:

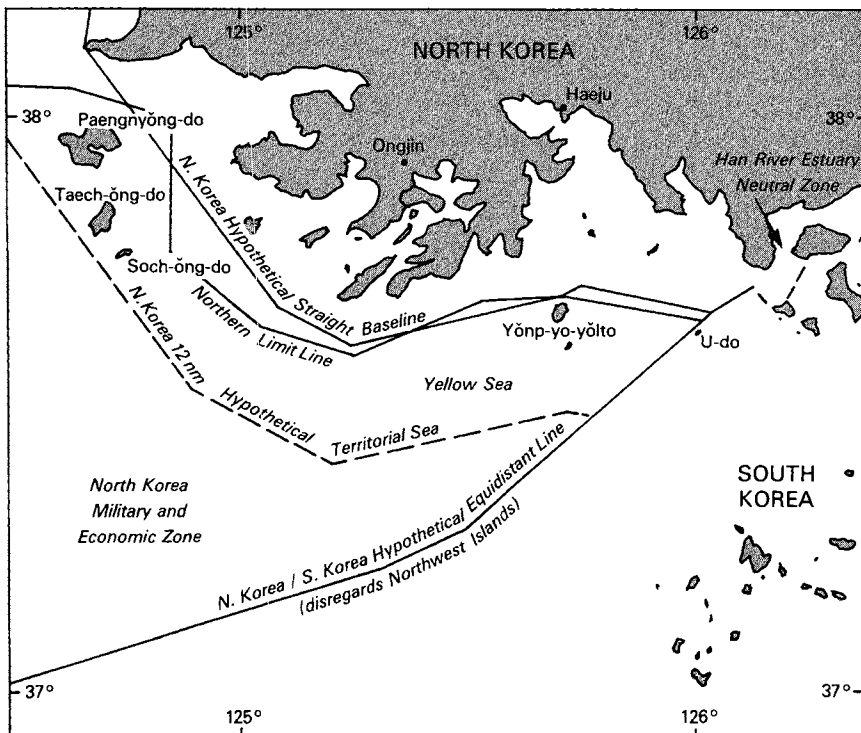
- (1) Inasmuch as the party to the Agreement -- i.e., the United Nations Command -- has been dissolved, the Agreement is null and void.
- (2) The NLL notwithstanding, waters surrounding the islands are North Korean territorial waters by virtue of being within twelve miles of its coast. Implicitly, therefore, the question is not over the control of the islands but over the jurisdictional rights to the surrounding waters.

Undoubtedly, the first question involves the question of succession in international agreements, and the second involves the complex issue of treaty interpretation, among other things.

The problem of succession in the Agreement differs from traditional state succession in that, for all practical purposes, the ROK succeeded not a state but an international entity. The legal capacity of the UNC to conclude an agreement is supported by the International Court of Justice in the *Reparation of Injuries* case advisory opinion. The UNC, though technically still a viable entity, is nevertheless a U.S./Korean force, and the destiny of the Korean polity is dictated not by the UNC but by the ROK Government. The UNC is succeeded by the ROK for all practical intents and purposes.

As a general guide, The Vienna Convention on the Succession of States in Respect of Treaties (1978), which was the culmination of work done by the International Law Commission, may be consulted. In this context, it may be worth recalling that the International Law Commission Report (1974) contained the following passages:

- (1) Both in the writings of jurists and in State practice frequent reference is made to certain categories of treaties, variously described as of a "territorial," "dispositive," "real" or "localized" character, as binding upon the territory affected notwithstanding any succession of States. The question of what will for convenience be called in this commentary "territorial treaties" is at once important, complex and controversial. In order to underline its importance the Commission need only mention that it touches such major matters as international boundaries, rights of transit on international waterways or over another State, the use of international rivers, demilitarization or neutralization of particular localities, etc.



From 503737 4-78

Map 2

(17) The weight of the evidence of State practice and of legal opinion in favour of the view that in principle a boundary settlement is unaffected by the occurrence of a succession of State is strong and powerfully reinforced by the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which establishes a boundary.²⁷

Certainly, the Armistice Agreement may be included in the category of "territorial treaties" relating to "international" boundaries and rights of transit on "international waterways. And, as such, it hardly seems possible to argue that the Agreement is invalid because the ROK assumed the role (rights and duties relative to the Agreement) previously played by the UNC.

As for the question of treaty interpretation, it may be worth remembering that Article 31, Paragraph 1, of The Vienna Convention on the Law of Treaties (1969) provides a main principle to be applied in treaty interpretation. It states: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Furthermore, a unilateral interpretation of an international agreement by a party is concededly invalid. Article 31, Paragraph 3 further provides that interpretation should be carried out on the basis of "intrinsic materials" including texts and related instruments, particularly taking into account the object and purpose of the treaty and subsequent practice.

It seems undeniable that the Agreement was signed to terminate the hostility and to provide respective areas of jurisdiction separated by a buffer (DMZ) for the two competing sides until the conflict could be terminated through a mutually agreeable arrangement. The object and purpose of the Agreement was to terminate the conflict, not to introduce a source of further conflict.

Given the intent and spirit of the Agreement, the only possible interpretation of the status of contiguous waters of the five islands is that:

- (a) the absence of specific demarcation stipulations on the surrounding waters of the islands is an oversight, unfortunate though it may be, and the only reasonable delineation criterion would be the median line principle;
- (b) the ROK government's self-imposed use of the "NLL" line as a line of demarcation, a practice which has gone unchallenged since the conclusion of the Agreement over thirty years ago, must be taken as supreme evidence;
- (c) North Korean unilateral assertions are indeed "assertions."

Irrespective of the illegal aspects of the newly established security zone of North Korea, the likelihood that the North Korean regime will abolish the zone seems to be very slight. Some observers believe that an external challenge to the North Korean security zone is improbable because:

- (1) "Only the Soviet Union would normally run naval vessels southward along the Korean coast; and Pyongyang appears unlikely to wish a confrontation with Moscow on this point";
- (2) "the spectacle of a trespassing superpower destroying North Korean naval craft suggests that there are no political gains to be won by such a test";

- (3) "[the] Japanese ... hope to avoid trouble is further guarantee to North Korea that the United States would not force an encounter";
(4) "the controlling geopolitics are more nearly those which dictate U.S. caution following seizure of the *Pueblo*".²⁸

Exclusive Economic Zone

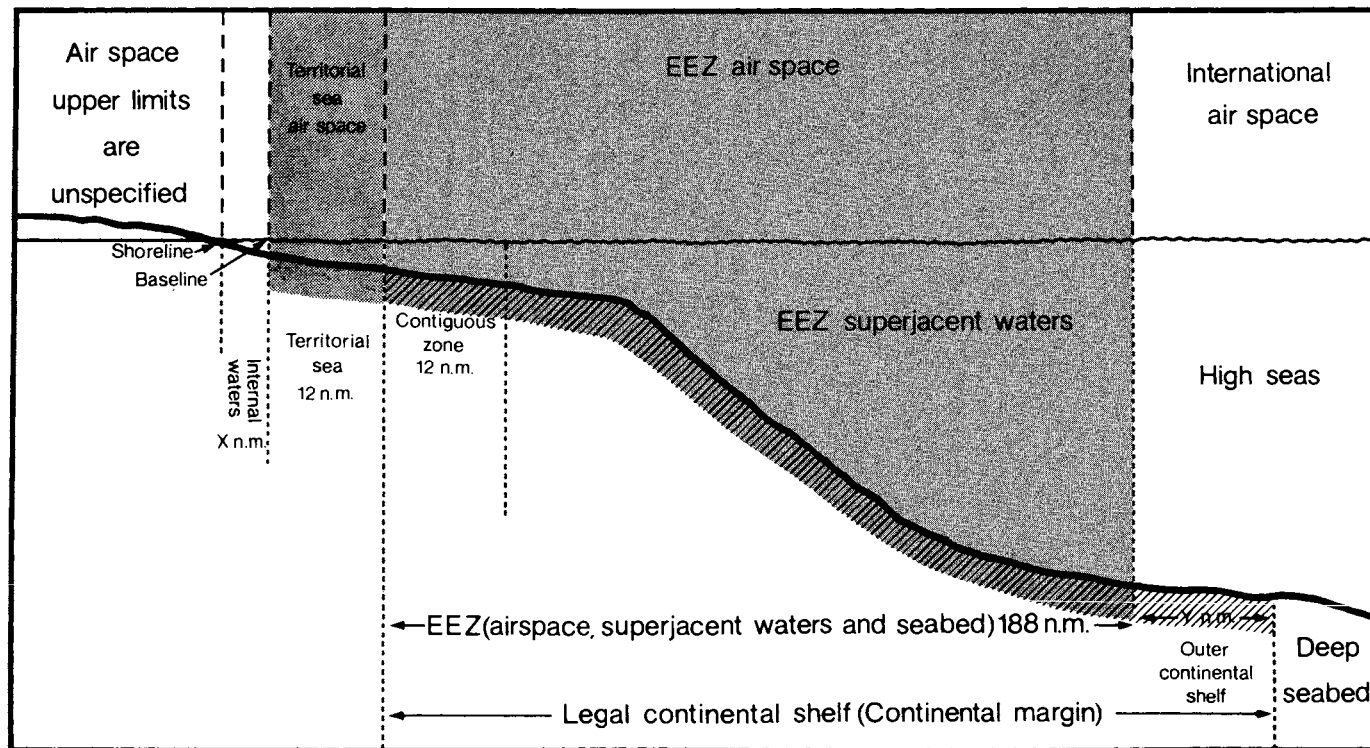
During the twenty-seventh meeting of the Second Committee, UNCLOS III (August 1974), the representative of North Korea declared his delegation's full support of the concept of establishing the economic zone or patrimonial sea to a limit of 200 nautical miles and indicated further his delegation's perception of "important and essential elements." They are as follows:

1. [T]he coastal State should have within its economic zone or patrimonial sea sovereign rights over living and non-living resources, including preservation and protection of those resources, up to a limit of 200 nautical miles, and jurisdiction over scientific research and control of marine pollution;
2. [T]he land-locked countries should have reasonable rights and interests and should be given the possibility of participating in exploitation of the living resources in the economic zone or patrimonial sea of neighboring coastal State, such rights and interests to be provided for under bilateral or regional agreements;
3. [T]he coastal State should allow freedom of navigation and overflight and laying of cables and pipelines, without prejudice to its sovereign rights and exclusive jurisdiction over the zone, and subject to its consent to delineation of the course for the laying of such cables and pipelines;
4. [T]he boundary of the economic zone or patrimonial sea between adjacent or opposite States should be determined by consultation in accordance with the principle of an equidistant line or a median line.²⁹

The North Korean proclamation of the EEZ -- at least to the outside world -- was broadcast on the Central Newscast on 1 July 1977³⁰ and contained the following essential points:

- (1) The Central Committee of North Korea adopted a decree on 21 June 1977 establishing the EEZ;
- (2) The EEZ extends to 200 nautical miles from the "base of territorial water" (which came to be known as the straight baseline discussed above);
- (3) Where such delineation is impossible -- such as in the Yellow Sea -- the median line principle will be followed;
- (4) North Korea exercises sovereign rights within this area over all resources, living and non-living, in the sea-bed and subsoil;
- (5) Without prior permission of the appropriate authority of North Korea, no foreigner, foreign vessels, or aircraft may engage in fishing, construction of installation, exploration and exploitation, and like which is detrimental to the economic development of the country;
- (6) All activities which cause harm to the people and resources (e.g., ocean or air pollution) are prohibited;
- (7) The decree comes into force on 1 August 1977.

To supplement the EEZ proclamation, North Korea adopted the so-called "Regulation Regarding Economic Activities of Foreigner, Foreign



Map 3

Source: *Ocean Yearbook* 3:324

Vessel and Foreign Aircraft Within the EEZ," on 12 August 1978 (which came into force on 1 January 1980). Some of its essential elements are:

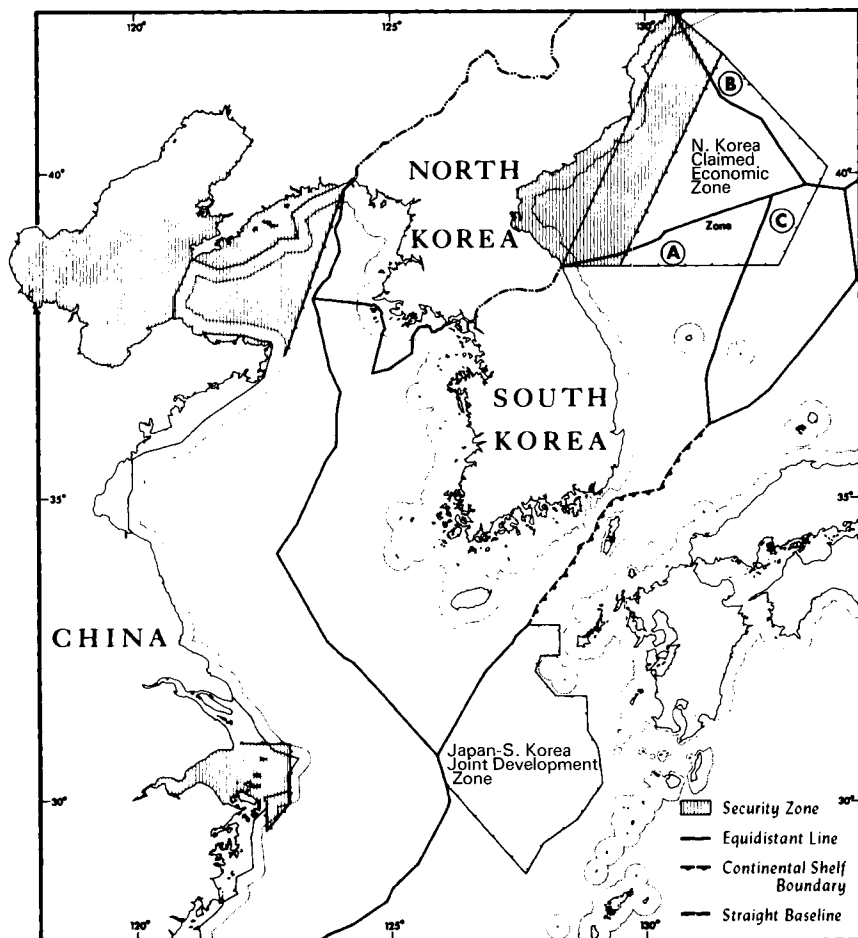
- (1) North Korea exercises sovereign right over all living and non-living resources in the water, seabed, subsoil, within the EEZ (Art.2).
- (2) The Regulation applies to all foreigner, foreign vessel, foreign aircraft which are engaged in economic activity and scientific investigation within the zone (Art. 3).
- (3) Activities not covered by the Regulation which are undertaken by foreigner, foreign vessel or aircraft will be resolved through treaties, which may be concluded, or agreement (Art. 4).
- (4) No foreigner, foreign vessel may undertake fishing activities within the zone without the prior authorization by its Resources Supervisory Organ (Art. 5).
- (5) No foreigner or foreign vessel may engage in fishing in its security zone or other areas which may be designated as prohibited areas (Art. 20).
- (6) All foreigner, foreign fishing vessel must unconditionally abide by the order of the appropriate North Korean authority.
- (7) In case of violation, in certain cases, seizure of the vessel and its crew, or, in the case of serious breach, violators will be subject to criminal prosecution. (Art. 23)³¹

The basic tenets of the North Korean proclamation on the EEZ, as seen through the descriptions made so far, seem to revolve around several main themes:

- (1) North Korea exercises sovereign rights over its EEZ;
- (2) no activity which hampers either their economic activity or causes harm to "life and resources" will be tolerated;
- (3) in the absence of a pertinent agreement, no foreigner, foreign vessel, or foreign aircraft is immune from the North Korean exercise of jurisdiction.

It may be relevant to recall the legal standards governing the EEZ as a result of the UNCLOS III Treaty to provide a basis for comparison. UNCLOS III standards include:

- (1) The right of the coastal state over its EEZ is limited to "exploring and exploiting, conserving and managing natural resources" and "other activities ... such as the production of energy from the water, currents and winds" (Art. 56 (1) (a))
- (2) "In exercising its rights and forming its duties ... the coastal state shall have due regard to the rights and duties of other states" Art. 56 (2))
- (3) In the EEZ, "all states ... enjoy ... the freedom of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful use of the sea" (Art. 58 (1))
- (4) ICNT, Art. 62 (3) provides that if the coastal state does not have the capacity to harvest the entire allowable catch, it shall give access to other states ... and land-locked (Art. 69. ICNT) states with "special geographical character" (Art. 70, ICNT) and developed land-locked states (Art. 69(4), 70(5), ICNT) have the right of access to another state's EEZ;
- (5) Penalties of violating the laws and regulations of the coastal state (Art. 73, ICNT) include:
 - (a) prompt release upon posting reasonable bond or other security,
 - (b) prompt notification to flag state in case of arrest or detention of foreign vessel.



Map 4

Source: *Ocean Yearbook* 2:291.

Areas depicting overlapping claims (real or potential) are marked by the author.

The map appearing above is adapted from the map issued by the Office of the Geographer, U.S. Department of State, December 1977. The Office made an important disclaimer that "Other than the Japan-Republic of Korea agreement, this map is intended only to depict hypothetical maritime zones as calculated by the Office of the Geographer, U.S. Department of State. These lines do not necessarily reflect United States Government position nor necessarily those of the states involved. The map should serve only as a general reference document.

Note the overlapping of North Korea's claimed EEZ with the line of demarcation drawn based on the equidistant principle signified by the author with letters A,B,C.

It is apparent from the foregoing that the North Korean version of the EEZ differs considerably from the general norms and the spirit of the UNCLOS III treaty, especially in its jurisdictional exclusiveness and its creation of an interdependent security zone to protect and safeguard the EEZ. Implicit in the assertion is the will and the determination to establish and enforce municipal law on the EEZ, whatever may be the prevalent legal norms or state practice. This attitude is illustrated by the statement made by the North Korean delegate in the sixty-fourth Plenary Meeting of the Conference (in the Fourth Session of UNCLOS III) on 9 April 1976:

Disputes arising in the areas within national jurisdiction must be resolved in accordance with national laws and regulations, and the question of whether a dispute should be subject to the jurisdiction of an international judicial organ should be decided on a voluntary basis and by agreement between the parties. The Conference should therefore not formulate any provisions that might impose unconditional acceptance by the parties of the jurisdiction of such an organ. The procedures adopted for the settlement of disputes should reflect the just demand of the great majority of states that the old international economic order which had served the interests of the imperialist and colonialist maritime Powers should give way to a new international economic order appropriate to the contemporary world.³²

Implied in the statement is that:

- (1) the "old international economic order" is no longer an applicable standard of conduct in international economic relations and there is a need for "a new international economic order [which is] appropriate for the contemporary world," hence the sanctity or validity of the traditional international legal norms which regulated the "old" economic order are implicitly rejected;
- (2) since the proclamation on the EEZ owes its origin to the municipal law of North Korea, any dispute which may arise under, or related thereto, the law must be exclusively "resolved in accordance with national law" of North Korea;
- (3) conflicts about jurisdictional claims "should be decided on a voluntary basis and by agreement between the parties," hence the notion expounded by the ICJ in the *Fisheries* case that "the delimitation of the sea areas had always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law" and, in particular, the explicit provision of Article 36(6) of the ICJ Statute³³ is rejected.

It is significant that while North Korea has vehemently asserted its EEZ, backed by the security zone, in the East Sea (or Sea of Japan), it has made no similar assertion or specificity in the Yellow Sea, perhaps because of the political reality that the PRC is its counterpart.

The Yellow Sea is less than 400 miles wide, hence it is inevitable that North Korea's claim to a 200-mile EEZ there would overlap a corresponding claim by the PRC.³⁴ Possibly prompted by this and related considerations, the North Korean delegate stated in the UNCLOS III meeting:

the boundary of the economic zone or patrimonial sea between adjacent or opposite States should be determined by consultation

in accordance with the principle of an equidistant line or a median line.³⁵

While it advances "consultation" -- a negotiated delineation of a demarcation line -- as a guide, North Korea insists that any "consultation" should be based on the principle of an "equidistant line or a median line."

This demand for the use of a median line principle holds a potential for conflict with the PRC, which not only made an equally wide claim to a 200-mile EEZ but also a consistent claim to resources in the continental shelf of the Yellow Sea which, it insists, should be delineated in accordance with the "natural prolongation of landmass" doctrine.³⁶

If their political alignment of the immediate past continues³⁷, the two states may keep any conflict on the EEZ (and the continental shelf) submerged in favor of other more urgent and practical political objectives. However, should the traditional alignment change, it is possible that a conflict may arise.

Continental Shelf

(I)n the case of small countries, the rights of the coastal State over the continental shelf had always been subject to the whim and cunning of imperialists and colonialists, whose ... aggressive policy against the weak nations had now been extended to the seabed under such pretexts as joint investigation, joint development and technical co-operation. The imperialists and colonialists had turned other countries' continental shelves into so-called joint development zones in return for a few dollars and were trying to gather the seabed's resources with their superior technical equipment. With the intensification of aggression and plunder, the victim countries had become increasingly conscious of their rights as masters and owners of their resources, as was apparent from their legitimate struggles to protect those resources. It was only right therefore that those countries should exploit their continental shelves for their own prosperity and economic development.³⁸

With this global economic perspective North Korea, in principle, clearly sides with the "have-not" nations and its political coloration is assimilated into the Third World and socialist countries. But stating those generalities in principle and applying them in the specific context of North Korean national interests may involve contradictions.

On the same occasion in the UNCLOS III conference, the delegate from North Korea offered several specific points on the continental shelf issue. They are:

First, it was reasonable for the coastal state to define the limits of the continental shelf, according to its specific geographical conditions, as the natural prolongation of the land territory beyond its territorial sea or economic zone.

Second, the coastal State had sovereign rights over the natural resources of the continental shelf, such resources including the mineral and other non-living resources of the sea-bed and subsoil

and the living vegetable organisms and animals belonging to sedimentary species.

Third, all States should enjoy freedom of normal navigation and overflight in the superjacent waters of the continental shelf beyond the territorial sea, but without prejudice to the coastal State's economic activities in exploiting the continental shelf.

Fourth, the laying of submarine cables and pipelines by one State on the continental shelf of another State should be subject to the consent of the latter.

Fifth, the boundary between States adjacent or opposite to each other should be determined by consultation, according to the principles of an equidistant or median line.

Sixth, exploitation of the sea-bed and ocean floor beyond the limits of national jurisdiction should be strictly suspended until the new international regime of the continental shelf had been established.³⁹

These statements of the North Korean delegate should be read in the context of practical reality. Any major conflict over the continental shelf of North Korea would more than likely be waged with the PRC, whose Yellow Sea coast is less than 400 miles distant. Furthermore, the PRC has consistently asserted, since the decision on the *North Sea Continental Shelf* case in 1969, that the proper basis for delineating the continental shelf in cases where it is bordered by opposite or adjacent states (as it is in the Yellow Sea) should be the principle of "natural prolongation of land."⁴⁰ Given Chinese insistence on this position, North Korea would be at a disadvantage or, at the very minimum, in conflict with it.

The North Korean position, therefore, reflects several self-negating or contradictory principles, though, at an immediate glance, none may be readily noticeable. First, to state that "it was reasonable for the coastal state to define ... the continental shelf ... according to natural prolongation of land territory beyond its territorial sea or economic zone" is to woo the PRC with the "natural prolongation" theory but, at the same time, reject the applicability of that same theory by conditioning it with the statement "beyond its ... economic zone." "Considering that the Yellow Sea is less than 400 miles wide and that the "natural prolongation" principle, if applied in the Yellow Sea, would place, according to the Chinese claim, a major portion of the sea under Chinese jurisdiction, the phrase "beyond its ... economic zone" would have the effect of qualifying or negating the "natural prolongation land territory" principle. (See also North Korea's fifth point in the same statement.)

Second, while "freedom of normal navigation and overflight in the superjacent waters of the continental shelf beyond the territorial sea" is conceded in general, it is in fact countered by the condition that the enjoyment of such freedom must not "prejudice ... the coastal State's economic activities" especially since North Korea seemingly reserves the right to determine what is or is not "prejudicial" to its economic activities. (See discussion above on North Korea's position in claiming complete jurisdiction over all matters arising under "national law," and, for other matters, based on agreement between parties.)

Third, whereas UNCLOS III Treaty Article 79 recognizes the right of other states to lay and maintain cables and pipelines in the continental shelf of coastal states subject to "reasonable measure" of the coastal state (in fact, Article 79(2) is emphatic in stating that "the coastal state may not impede the laying or maintenance of such cables or pipelines"), the North Korean version subjects unconditionally such activities to the consent of the coastal state by the proviso "subject to the consent of the [coastal state]." While Article 79(3) provides that "[t]he delineation of the course for the laying of such pipelines ... is subject to the consent of the coastal state," there is a significant difference in the spirit and subject matter of what is subject to coastal state consent in the treaty article and its North Korean version.

Fourth, (as if to challenge Chinese intelligence to note the contradiction between the "First" and "Fifth" points in its statement) North Korea re-emphasized the principle that where the continental shelf is bordered by two or more states, the delimitation of the boundary line should be based on "an equidistant or median line."

Fifth, as a counter to the claims of the Western and developed countries, North Korea pleaded for a moratorium, in its "Sixth" point, on exploitation of resources "beyond the limits of national jurisdiction ... until the new international regime of the continental shelf had been established." In view of the intense opposition to the treaty of certain countries, most importantly the United States, and notwithstanding the complex legal question involving the validity of the treaty for a non-signatory state, "the new international regime on the continental shelf" may or may not be established. If the "regime" established were not to the liking of North Korea, it might hide behind the plea that the regime lacks legal validity because the principal powers had not agreed to it and because it would not apply to non-signatory states. If the regime is not established, North Korea can of course claim the illegality of exploitation of resources "beyond the limits of national jurisdiction." In either event, the statement is a safe position from the North Korean perspective.

Perhaps, politically, the North Korean position is a reflection of several irreconcilable considerations, each of which, nevertheless, is important in itself. Some of these include:

- (1) to maintain good and amicable relations with the PRC,
- (2) to place itself as an active member of the Third World -- the "world of the future,"
- (3) to claim, as is the trend, as many marine resources in the contiguous seas as possible,
- (4) to woo the Soviet Union, when needed, by denying that no concession has been made to the PRC Government.

Whatever may be at work, North Korea, so far, has been less vehement on the issue of the continental shelf than it has been on the EEZ issue, especially in the East Sea. North Korea, as of this writing, has not enacted or proclaimed an official decree on the continental shelf.

North Korea's failure to enact laws relating to the continental shelf, however, is not, perhaps, because it is indeterminate or fails to comprehend the ramifications of the issue. As seen in the statements made by its delegate to UNCLOS III, the North Korean position on the continental shelf is clear and consistent, though stated in vague and elastic terms. If examined closely and carefully, its position on the continental shelf is basically the same as its position on the EEZ in its practical effect. Some tend to believe that this position stems not

from their confusion but from several substantive considerations, such as:

- (1) taking a less-than-clear and indefinite position will enable it to criticize and oppose, for instance, the ROK's agreement with Japan for joint exploitation;
- (2) postponing enactment of laws relating to the continental shelf legitimatizes and supports its claim that issues such as the territorial water and the continental shelf should be settled, like other issues, only after the unification of the country;
- (3) the realization that to clearly and publicly indicate its outer limits of jurisdiction is to implicitly concede to its people that it is subscribing to the "two Korea" policy; and
- (4) their public claim to the EEZ (and its delimitation based on the median-line principle) in fact includes a greater area than the claim based on the continental shelf if delimitation is based on the "natural prolongation of land territory" principle.

Concluding Remarks

From the foregoing, several general observations may be made regarding North Korea's attitude toward the norms recently adopted in UNCLOS III.

While, as has been observed, the delineation of the maritime boundary is not, and cannot be, under the exclusive and unilateral control or jurisdiction of the coastal state devoid of the concerns and the control of international law, North Korea has insisted historically that it should determine independently the breadth of its territorial waters, taking into account its "historic, geographical, economical, security and navigational considerations." Implicitly, therefore, North Korea reserves this right to delineate the breadth of its territorial waters, whatever may be the basis of its delineation, and the "sovereign right" it intends to exercise, despite its signature on the treaty.

Related to the above point is the question of innocent passage. So long as North Korea judges any passage to be less than innocent based on its "historical, geographical, economical, security and navigational considerations," no passage shall be allowed, presumably. This position would conflict not only with traditional international law principles (e.g., the *Corfu Channel* case norm which, among other things, seems to define innocence not by the motive or objective of the passage but on the act of passage alone) but also with the UNCLOS III Treaty standards which define the meaning of innocence in greater detail than do past norms but cannot be construed to grant the judgment of innocence to the municipal law of a coastal state.

Furthermore, as has been observed in this paper, the straight baseline from which its territorial waters are measured seems undoubtedly beyond the blessing of international law -- traditional or otherwise. This is so particularly in the East Sea where its position has been made clear.

Additionally, the North Korean perspective on territorial waters is more in the context and spirit of "struggle" between the developed colonial or imperial powers *versus* the developing nations. To them the question revolves around not negotiated international standards but the rights of coastal states which are beyond the concerns of other powers.

As for the security zone, which extends fifty nautical miles from the above stated (straight) baseline, it hardly bears repeating that it is drawn illegally and its claimed jurisdictional exclusiveness and its

legitimization of unilateral action are beyond the norms of international law. Similarly, any attempt to ignore the "NLL" line -- the line of mutual demarcation observed since the Truce Agreement was signed in 1953 -- is nothing more than an effort to destabilize the otherwise normally observed practice, and the question of legitimacy of the ROK government to succeed UNC in the Agreement is at once answered by The Vienna Convention on the Succession of States in Respect of Treaties, 1978, as cited in the text.

As with its baseline, North Korea's EEZ, specifically in the East Sea, seems beyond the blessing of international law. Additionally, as Map 4 indicates, the North Korean EEZ as presently claimed comes into conflict with those drawn on the basis of the equidistance principle by the neighboring states, most specifically the ROK and USSR.

The establishment of the "security zone" as part of an interdependent EEZ system tends to divide the zone into two distinctly different areas in terms of jurisdictional exclusiveness and purpose. In addition, North Korea emphatically demands that any dispute which may arise in relation to its EEZ must be resolved in accordance with its municipal law, since the proclamation on its EEZ owes its origin to municipal law.

It should also be observed that while the North Korean claim, and delineation, of the EEZ in the East Sea may be precise, the same cannot be said in the Yellow Sea. In fact, as far as the writer knows, North Korea has not publicly stated with precision its claim to an EEZ in the Yellow Sea other than to state the general principle which should guide the drawing of such a delimitation line. Indeed, possibly fearing the PRC's reaction, the North Korean delegate at UNCLOS III merely observed that such a delimitation line should be determined "by consultation" based on "the principle of an equidistant line."

Recalling that the PRC has insisted upon the principle of "natural prolongation of landmass" as the basis for delimiting the continental shelf between opposite states, this issue has a potential for future conflict between the two states because North Korea insists upon "consultation in accordance with ... equidistant line" as a basis of delimitation. North Korean motives are probably similar to those relating to the continental shelf.

Finally, as has been observed earlier, the North Korean position, or its lack, on some of the major ocean-related legal problems may come not from its lack of determination or its failure to comprehend the ramifications of the issues but from its calculated, sometimes conflicting, substantive considerations of "national interest."

NOTES

1. The treaty was signed by 117 nations. Twenty-two nations, including the United States, went to Jamaica but did not sign, and twenty-four others were invited but did not attend; hence, a total of forty-six nations did not sign the treaty. The actual number of signatures in the convention book was 119 because it included a United Nations body representing South West Africa, and the Cook Islands, whose largely self-governing people are citizens of New Zealand. The number also includes separate signatures for two Soviet republics, Byelorussia and the Ukraine S.S.R.

Those nations that did not sign include Belgium, Italy, Luxembourg, Spain, Japan, the Republic of Korea, Benin, Ecuador, Equatorial Guinea, the Holy See, Israel, Jordan, Libya, Oman, Peru, Samoa, Swit-

zerland, Turkey, Venezuela and Zaire as well as the United States, Britain and West Germany. The Republic of Korea eventually signed the treaty, however.

The treaty takes effect one year after sixty ratifications have been deposited. As of 15 June 1984, ten states plus the U.N. body representing Namibia have signed the treaty.

The U.S. opposition is based, among other things, on the belief that the treaty does not give the U.S. "adequate, long-term and assured access to the strategic minerals of the seabed, principally manganese, cobalt, copper and nickel."

As for the shortcomings of the treaty proper, some writers point out the following:

- (a) Confusion of boundary needs for mineral resources with those for fishing;
- (b) Failure to use the base of the slope as the exclusive guide to mineral resources jurisdiction;
- (c) Inadequate definition of "foot of the continental slope";
- (d) Failure to recognize a proper status for enclosed or semi-enclosed seas;
- (e) Perversion of the term "continental shelf";
- (f) Neglect of the base of the insular slope in assignment of jurisdictional areas to islands;
- (g) Undue influence of tiny shelf-slope islands on the oceanward extent of coastal state jurisdiction;
- (h) Failure to define criteria for "habitability" of islands;
- (i) Lack of due regard for scientific and technical advice.

For this and related discussions, see *The New York Times*, 11 December 1982, p. 1, and Hollis D. Hedberg, "A Critique of Boundary Provisions in the Law of the Sea Treaty," *Ocean Development and International Law Journal* 12:337-44. Information to date on the number of states that have ratified the treaty was secured from the Office of International Law of the Ministry of Foreign Affairs, ROK, on 15 June 1984. Some 134 states have signed the Treaty as of 15 June.

2. Giuseppe Schiavone, *International Organizations; A Dictionary and Directory*, (Chicago: St. James Press, 1983), p. 302.

3. See George L. Aldrich, "Question of International Law Raised by Seizure of the USS *Pueblo*", *Proceedings of the American Society of International Law*, (1969), p. 3n. See also related discussion in: "Contemporary Practice of the United States Relating to International Law," in *American Journal of International Law*, 62 (1968):756.

4. The PRC's proclamation was dated 6 September 1958, and the official North Korean support was contained in *No Dong Shin Moon* (official North Korean Workers' Party newspaper), dated 11 September 1958.

5. North Korean charges and the related story are contained in *No Dong Shin Moon* dated 23 January 1968.

6. According to North Korean sources, territorial water is defined, *inter alia*, as an area which belongs to a coastal state and within which the coastal state may exercise sovereign rights. See *No Dong Shin Moon* 16 March 1974, 6 May 1973, 26 September 1973, and May 1974 issue of *Chun Lee Ma*, 14 September 1979 edition of *No Dong Chung Nyun*. The North Korean version of *Political Dictionary* (*Jung Chi Sa Jun*) provides that "territorial water is a coastal water of a given breadth contiguous to its territory and excludes water areas of bays and ports."

As for the breadth of the territorial waters, the North Korean position is, essentially, that the coastal state may determine independently the breadth of its territorial waters taking into account its

historical, geographical, economical, security and navigational considerations. See the May 1974 issue of *Chun Lee Ma*. Further, the delimitation of the breadth of territorial water is a question of the coastal state's sovereignty, and coastal states have the independent right to determine their territorial waters taking into account their historical, geographical, military and economic circumstances. Claims and assertions basically along this line are found in: *No Dong Shin Moon*, 6 May, 25 September, 9 October 1973, and 23 June 1976, 20 February 1979, and 10 March 1980. See also the 14 September 1979 edition of *No Dong Chung Nyun*.

7. Third United Nations Conference on the Law of the Sea, *Official Records* 1 (1975):67.

8. The incident took place on 2 September 1975. The Japanese claimed that the vessel, at the time of the incident, was at a location 39 degrees 10 minutes North latitude and 123 degrees 55 minutes East longitude, which would place her outside the claimed twelve-mile North Korean territorial waters. On 11 September 1975, *Central News* of North Korea carried the story of the interview in which the captain conceded the location, as described above. The incident terminated with an official apology by the North Korean government and payment of condolence money (about \$20,000 each to the families of the two deceased crewmen in the incident). For further details, see Charn-Kiu Kim, "Ba Da -- Book Han E No Ri Nun 'Sa Gak'" (The Ocean of North Korea), *Jung Kyung Yun Koo*, (June 1978), p. 248.

9. While Mr. Joo's comment may not, under ordinary circumstances, be taken as the official position of North Korea, many believe that, considering political realities in North Korea, his statement cannot be made without the official blessing of the government. It is in the same statement that Mr. Joo made comments regarding the North Korean establishment of a fifty-mile military boundary (or security) zone, but this subject will be dealt with separately. See Kim, pp. 250-1.

10. The security zone itself is dealt with in a subsequent section.

11. Considering that the baseline is the straight line connecting the northeasternmost point of the DMZ (Demilitarized Zone) and the point (near the town of Na Joo Ri) on the Korea-Soviet border, the delineation would in effect internalize the waters landward of this line. At some points these waters measure well over 100 miles in width. The drawing of the straight baseline described here is confirmed in an article by Kenjo Kawakami published in the Soviet *Navigation Journal* in its August 1977 issue.

12. UNCLOS III Treaty, Article 7.

13. This widely-known case involved the Norwegian Government decree of 1935 (similar to its 1812 decree) which declared the headland-to-headland method of drawing baselines along the *skjaergaard*, prompted by increasingly intense fishing exploitation by British vessels along the Norwegian coast. The British Government instituted proceedings in the International Court of Justice, claiming that the Norwegian decree violated international law which requires the baseline to be the actual low-water mark. The Court was asked to decide whether or not the Norwegian method of delineating its baseline (i.e., straight baseline connecting *skjaergaard* as base-point) was legal. The Court held that Norway had applied the system consistently since 1869, at least, and that the British Government had refrained from reservation to that decree until at least 1935, hence strengthening the practice of Norway. In the opinion of the Court, the Norwegian method of delimitation was

dictated by geographical realities and was not in violation of international law. See (1951) ICJ 116.

For discussion on various aspects of the *Fisheries* case, see Marjorie M. Whiteman, *Digest of International Law* 4:137-94.

14. Lauterpacht suggested that "the legitimacy of the application of the standards formulated by the Court must be made dependent upon the willingness of the state which claims to delimit its waters by the method of straight lines, to submit any disputed delimitation to judicial determination by reference to the tests as laid down by the Court ..." Lassa F. L. Oppenheim, *International Law*, 8th ed., ed. H. Lauterpacht, 2 vols., (New York: David McKay Company, 1948-52) 1:489-90 n.5.

ICNT follows the 1958 Convention in essential points. See, in particular, Article 5 (normal baseline) and Article 7 (straight baselines). Article 6 relates to islands situated on atolls or having fringed reefs, in which cases the baseline is the seaward low water line of the reef.

15. The basic guideline is found in ICNT Article 10. In general, there are two basic tests for determining the lawfulness of a delineation of a bay: (1) geographic test (based on a maximum closing line and a minimum area of enclosed waters -- i.e., the total area of the enclosed body of water must be at least as great as that of the semi-circle whose diameter is the line drawn across the mouth of the bay) and (2) an "historic" test. Conceding that the "historic" test is less objective and hence subject to abuse, a claim based on historical reason must be founded upon the "peaceful and continuous display of state authority," which is against the principle that the high seas cannot be appropriated. Thus a "claim of 'historic waters' must rest, if it is to succeed, more on evidence of recognition (or at least acquiescence) by other states than on evidence of continued display and exercise of authority by the coastal state." For further discussion, see Louis Henkin et al., *International Law: Cases and Materials*, American Casebook Series, (St. Paul, Minn.: West Publishing Co., 1980), pp. 325-27. Protests and opposition by the neighboring states will be discussed in subsequent pages.

16. For the text of the announcement and related discussion, see Choon-ho Park, "The 50-mile Military Boundary Zone of North Korea," *American Journal of International Law* 72: 866-75.

17. Bruce D. Larkin, "East Asian Ocean Security Zone," *Ocean Yearbook*, ed. Elisabeth Mann Borgese and Norton Ginsberg, (Chicago: University of Chicago Press, 1980) 2:284.

Examples of Professor Larkin's classification are as follows:

Examples of Taut and Partial Zones

	Partial and Qualified Zonal Characteristics						
	Tempo- rary	Regu- latory	Special Use	Contin- uing	Inhib- itive	Prohib- itive	Compre- hensive
U.S. air defense identification zone (ADIZ)		x	x	x			
U.S. nuclear test	x		x		x		
USSR rocket test	x		x		x		
UK nuclear test (Australian site)	x		x			x	
French nuclear test (Pacific site)	x		x		x		
Chinese military security zone				x		x	x
North Korean military zone				x		x	x

Source: Larkin, "East Asian Ocean Security Zone," p. 284

18. A general survey relating to the security zone reveals that the concept has its origin in the right of existence and of self-defense. As early as 1804, in the judgement of *Church v. Hubbard* (6 U.S.(2 Cranch) 187, 2 L. Ed. 249), decided by the U.S. Supreme Court, the coastal state's extension of its jurisdiction beyond the limits of its territorial waters was legitimized on the basis of what is sometimes called the "rule of reason" or the "theory of interest." These provide that a coastal state may extend its jurisdiction beyond the territorial water limits if it is established that there is a "legitimate interest" and such extension is indeed "reasonable."

In 1906, in the *Caroline* case (J. B. Moore, *Digest of International Law*, 8 vols. (Washington: Government Printing Office, 1906) 2:412) international law seemingly permitted a coastal state to exercise jurisdiction beyond its own territory in a case where there is "an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment of deliberation."

Under the Charter of the United Nations, relative to Article 51 (the right of self-defense), conditioned by the general principle of Article 2(4), the right of self-defense is permissible "if an armed attack occurs" (including seemingly an imminent attack, and this right of self-defense is independent of the establishment of any special zone of security or prior condition).

It is recalled that since the establishment of the United Nations, especially in the Law of the Sea Conferences of 1958 and 1960, those states which favored the extension of territorial water to twelve miles justified their position based on "security" (e.g., the USSR) and on "defense" (e.g., Jordan, although it asserted three miles then, Yemen, Poland, Czechoslovakia, the Philippines, and Byelorussia. The Republic of Korea was also in favor of it for the same reason. However, because the term "security" was vague and hence susceptible to abuse, the International Law Commission did not include a security zone in its draft.

As UNCLOS III approached, there were therefore conflicting interests between the naval and maritime powers and the coastal states. Of course, the interests of coastal states were based on their desire to free themselves from intimidation by traditional gun-boat diplomacy and, toward the end, by the desire to to equip themselves with the power to safeguard their own "defense." For these and related discussions, see Henkin, *International Law*, pp. 359-60.

For an additional discussion of precedents -- i.e., Air Defense Identification Zones (U.S.), U.S. Nuclear Test Zones, USSR Rocket Test Sites, and British Nuclear Tests in Australia -- see Larkin, "East Asian Ocean Security Zone," pp. 294-99.

19. Third United Nations Conference on the Law of the Sea, *Official Records* 1:67.

20. In addition to the military zone, the People's Republic of China has also declared as its "internal water" those bodies of water in (a) the Bohai Gulf, (b) the Qiongzhou Straits, and (c) the waters landward of the baseline. As in the North Korean instance, the PRC's declaration on the territorial sea (1958) reveals the prohibitive and comprehensive unilateral assertion of its rights over the entire area of territorial water, including, at least in spirit, denial of the right of "innocent passage" without specific authorization. It is interesting to note that when the PRC declared the Bohai Gulf as its internal water, it stated that it could justify the assertion based on either one or all of the following three definitions of the Bohai Gulf

(1) as a bay, (2) as waters within the "straight baseline," (3) as historic waters.

The two security zones are: (1) the Military Alert Zone, as it is called, which lies west of a line from the Yalu River to a point off the Shandong Peninsula, and (2) the Military Exclusion Zone which surrounds the port of Shanghai and a number of islands to the east of Hangzhou Bay. For discussion of this and related points, see Larkin, "East Asian Ocean Security Zone," pp. 286-89.

21. A few instances of coastal states' unilateral extensions of their jurisdictions beyond their territorial waters may provide a comparison in terms of exclusiveness with that of the North Korean claim to a security zone.

During the early part of the eighteenth century, the British government launched the so-called *Hovering Act* (repealed in 1876) by which British authority exercised jurisdiction up to 100 leagues from the shore specifically for the purpose of preventing the smuggling of goods ashore and applied this against vessels suspected of hovering along the shore.

In 1922, the U.S. launched the so-called "Customs Zone", usually twelve miles from the shore, for the purpose of enforcing customs. While five zones were established under the Act, only one seizure was made under the law. Even in that case, the seizure was for conspiracy, not for customs violations. The *Tariff Act* of the same year was launched for the purpose of preventing widespread smuggling of liquor from British and other nations' vessels. Yet the U.S. policy was to release vessels so seized beyond its limit if they were not bound for the United States, except in cases where the vessel had already been "in contact" with the shore.

During World War I, a number of South American countries proposed a declaration aimed at preventing hostile acts by belligerents within a "reasonable" distance from the shore.

After World War II, the foreign ministers of American republics issued the "Declaration of Panama" which provided, among other things, that "those waters adjacent to the American continent ... (be) free from the commission of any hostile act by any non-American belligerent ... "

During the Algerian war, the French Government exercised jurisdiction on the high seas over vessels suspected of carrying arms for Algerian rebels. When, in January 1958, the Yugoslavian vessel *Slovenija* was examined by French forces some forty-five miles from the coast of Casablanca, the resulting Yugoslavian protest was met by the French response that the incident concerned an act of smuggling and that the French were aware that arms were involved and of their destination, hence the right of self-defense justified French action. Incidents related to French exercise of jurisdiction in the waters beyond their territorial waters involving, for instance, the German freighters *Bilbao* and the *Paul Rickmers* and the British vessel *Wet Breeze* are found in Whiteman, *Digest of International Law* 4:513-14. For other discussion on unilateral extension, see Henkin, *International Law*, pp. 355-7. For a discussion on the Declaration of Panama, see Charles Fenwick, "The Declaration of Panama," *American Journal of International Law*, 34:116.

22. "As a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established international law," Philip C. Jessup, *The Law of Territorial Water and Maritime Jurisdiction* (New York: G. A. Jennings, 1927), p. 120.

Even debates over the right of innocent passage within territorial waters generally revolve around the determination of "innocence" and related conditions.

For example, the 1958 *Convention on Territorial Water and the Contiguous Zone* provides, in Article 14(4), that the passage is "innocent so long as it is not prejudicial to the peace, good order or security of the coastal state."

UNCLOS III, Treaty Article 19(2) provides that:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:

- (a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) Any exercise or practice with weapons of any kind;
- (c) Any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) Any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) The launching, landing or taking on board of any aircraft;
- (f) The launching, landing or taking on board of any military device;
- (g) The embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal State;
- (h) Any act of wilful and serious pollution, contrary to this Convention;
- (i) Any fishing activities;
- (j) The carrying out of research or survey activities;
- (k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) Any other activity not having a direct bearing on passage.

Despite the fact, therefore, that the coastal state may enact laws to regulate activities in their territorial waters, the right of innocent passage is not at issue. Indeed, the sovereignty of coastal states is qualified by the right of innocent passage.

The right of innocent passage for warships is less than clear. Article 23 of the 1958 Convention provides that if any warship fails to comply with regulations of the coastal state and disregards any request for compliance, the coastal state may require the warship to leave the territorial sea. The UNCLOS III Treaty, Article 30, added the word "immediately" to the text. Many Afro-Asian and Soviet-bloc countries added reservations to the 1958 convention providing that the coastal state has the right to require warships to seek previous authorization prior to passing through territorial waters. The UNCLOS III Treaty placed warships and other government ships operated for non-commercial purposes in the same subsection of a section entitled "Innocent Passage in the Territorial Sea," and the right to innocent passage is set forth in a subsection applicable to all ships. As for submarines, UNCLOS III Treaty Article 20 (like Article 12(b) of the 1958 Convention) provided that submarines and other underwater vehicles are required to navigate on the surface and show their flag. For discussions on these and related points, see Solomon Slonim, "The Right of Innocent Passage and

- the 1958 Geneva Conference on the Law of the Sea," *Columbia Journal of Transnational Law* 5 (1966):96; Henkin, *International Law*, pp. 328-34.
23. ICAO (treaty), Article 3.
24. 65 *State Department Bulletin*, 261 (1971).
25. The Armistice Agreement (27 July 1953) was annexed with 22 maps, and Map 3 indicates the location of the five islands. Article 2 (13)(b) and (15-16) provide, among other things, that the five islands are under the United Nations Command's control. Additionally, parties to the Agreement are prohibited from blockading the islands from either side of waters contiguous to, and from the air space over, the areas under the control of the other. For a related discussion, see Park, "The 50-Mile Military Boundary Zone," p. 868. See also Charn-Kiu Kim, "Seo Hae O Do Ui Jun Ryak Juk Bub Juk Ji Wi" (Strategic and Legal Status of Five Islands in the West Sea), *Jung Kyung Yun Koo*, 18 (March 1980):135 1.
26. The five islands are named as follows: (1) U do, (2) Yonpyo-Yolto, (3) Sochong-do, (4) Taechong-do, and (5) Paengnyong-do. The five islands are only five miles square and reportedly inhabited by 1300 people.
27. *International Law Commission Reports* 1, part 2 (1974):157, 196, 201, and 206.
28. Larkin, "East Asian Ocean Security Zone," p. 294.
29. In the same meeting, the North Korean delegate charged that "[s]ome imperialist Powers ... were opposing [the establishment of an economic zone]." He continued: "One, for example, was opposed to the establishment of exclusive rights over fishery resources in a zone extending beyond the limits of the territorial sea, while another proposed that foreign fishermen should have non-discriminatory rights to fish in a coastal State's economic zone when the latter was not using its resources in the zone to the full. Those Powers were attempting to harvest the living resources in the economic zone of other States beyond the limits of the territorial sea and were a threat to developing coastal States." For a complete text, see Third United Nations Conference on the Law of the Sea, *Official Records* 2:215.
30. Charn-Kiu Kim, "Buk Han Ui Kyung Je Soo Yuk E Dae Han Ko Chal" [Study on the EEZ of North Korea], *Buk Han Haeng Jung Non Chong*, Publication of Korea University, Office of Legal and Administrative Research, 5 (May 1982):91-109.
31. *Ibid.*
32. Third United Nations Conference on the Law of the Sea, *Official Records*, 5 (1976):47.
33. Article 36(6) of the Statute provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."
34. The PRC has been a supporter of Latin American claims to a 200-mile zone of maritime jurisdiction since November 1970. During the summer session of the Sea-Bed Committee in 1973, China made known its adherence to the concept of a 200-mile EEZ measured from the baseline of the territorial sea and to the principle that all natural resources within the Zone are owned by the coastal state. For this and related discussion, see Choon-ho Park, "The Sino-Japanese-Korean Sea Resources Controversy and the Hypothesis of a 200-mile Economic Zone," *Harvard International Law Journal* 16:27-46.
35. Third United Nations Conference on the Law of the Sea, *Official Records* 2 (1975):215. Note: Despite the statement of the North Korean delegate as quoted which favors the equidistant line principle, the

same principle is rejected in the delimitation of the EEZ on the East Sea side.

36. Although the terminology may be different, in actual practice, the difference in EEZ and continental shelf claims is of little practical importance. Indeed,

EEZ regimes are intimately related to continental shelf and extended fisheries regimes. The emerging pattern of state practice is to establish a fishing zone as a prelude to enactment of EEZ legislation. Furthermore, when fishing zone and continental shelf claims exist simultaneously, the resulting regime is virtually identical to an EEZ. In establishing an EEZ, the practice of almost all states is to define the seabed of the EEZ as legal continental shelf. Existing continental shelf legislation thereby applies to the seabed and subsoil of the EEZ. In practice, the name given to any assertion of jurisdiction makes little difference.

For this related discussion, see Robert B. Krueger and Myron H. Nordquist, "Evolution of the 200 Mile Exclusive Economic Zone: State Practice in the Pacific Basin," *Virginia Journal of International Law* 92, no. 2 (1979): 321-99. The quotation above comes from p. 355.

37. North Korea has been particularly anxious to maintain the friendship of the PRC throughout the recent period. In the seventy-fourth plenary meeting of the Conference, Fifth Session, UNCLOS III, the North Korean delegate In Gyu Li extended his country's condolences at the passing away of Mao Tsetung with the following words: "A most intimate friend of the Korean people, Comrade Mao Tsetung had regarded the revolutionary struggle of the Korean people as the struggle of his own people. His immortal deeds would be engraved in the hearts of the Korean people forever." Third United Nations Conference on the Law of the Sea, *Official Records*, vol. 6 (1977), p. 13.

38. Part of a speech given by the North Korean delegate at the twentieth meeting of Second Committee Second Session, UNCLOS III. For further details see Third United Nations Conference on the Law of the Sea, *Official Records* 2 (1975):162.

39. Ibid.

40. For an argument that the PRC assertion of "natural prolongation of land territory" is the correct method of delineating the Yellow Sea, see Richard T.S. Hsu, "Letters and Comments; A Rational Approach to Maritime Boundary Delimitation," *Ocean Development and International Law Journal* 13, no. 1:103-13. The author observes, for instance, that "This sea (the Yellow Sea) takes its name (Hwang Hai) from the deposits of the Yellow River (Hwang Ho) which traverses China. Masses of clayey soil derived from the northwest regions of China are carried southward by the current. According to an estimate, the Yellow River washes down into this sea 15,000 million million cubic yards of sediment every year.... The influence of the two Chinese rivers -- meaning Yellow River and Yangtze River -- extends far beyond the shoreline on the west so that a smooth, gentle slope (1:26,000) from the west (Chinese side) meets the deep and less regular slope (1:6000) from the east (Korean side) in an axial valley two-thirds across on the eastern side of the Yellow Sea"

The Yellow Sea has an average depth of 55 meters and nowhere does the depth exceed 125 meters.

Country Summary

		NK	ROK
	Area (sq km)	121,730 (124%)	98,400
POP.	In 1977		
	(In thousands)	16,651 (46%)	35,953
	Annual Growth 1970-1977(%)	2.6	2.0

	In 1977		
	(millions \$)	11,380 (32%)	35,150
GNP	Per Capita		
	1977 \$	680 (69%)	980
	Annual Growth 1970-1977(%)	5.3	7.6

Source: OY, 2:586 (Table 11)

Marine Jurisdiction Claims

	NK	ROK
Coastline		
Coastline/Area Ratio	2,495 km (103%)	2,413
Ports (No.)		
Major	6	10
Minor	26	18
Hypothetical Area to 200 nm. (thousand square km)	37.8	101.6

Source: OY, 2:692 (Table 21)

Fish Catch (Million Metric Tons)

	1970	1971	1972	1973	1974	1975	1976
NK *	800	--	--	--	--	--	--
ROK-	842.1	1071.5	1339.8	1682.2	2022.1	2124.6	2390

(* based on FAO estimate)

Source: OY, Vol. 1, Appendix D, p. 809

Merchant Fleets

	NK	ROK
1971	50,556 (5.4%)	940,009
1972	50,556 (4.8%)	1,057,408
1973	60,347 (5.4%)	1,103,925
1974	60,347 (4.9%)	1,224,679
1975 (1/2)	81,782 (5.0%)	1,623,532
1976	89,482 (5.0%)	1,796,106
1977	89,482 (3.6%)	2,494,724

Source: OY., Vol. 1, Appendix F, p. 829

Nominal Marine Catch (1,000 metric tons)

	NK*	ROK
1970	1,000.0 (119%)	843.1
1973	1,300.0 (77%)	1,682.2
1974	1,400.0 (69%)	2,022.3
1975	1,500.0 (71%)	2,124.9
1976	1,600.0 (67%)	2,390.3
1977	1,600.0 (67%)	2,393.1

(* FAO estimate)

Source: OY., 2, Appendix D:595

Merchant Fleets (grt as of July 1, 1979)

	NK	ROK
1975	81,782 (5.0%)	1,623,532
1976	89,482 (5.0%)	1,796,106
1977	89,482 (3.6%)	2,494,724
1978	90,078 (3.0%)	2,975,389
1979	162,261 (4.1%)	3,952,946
Change		
78/79 (%)	80.1	32.9

Source: OY, 2:620 (Table 3F)

Value of 1973 Fish Catch: NK

Value/Metric Ton (US \$): 235
Total value (\$ million): 188
Value/per capita (US \$): 13
Catch as % GNP: 4.0

Source: OY, 2:600 (based on Table 7D)

Fishing Fleets

		NK	ROK
Trawlers and Fishing	grt	2,867 (1%)	295,100
Vessels (excluding	No.	2 (0.25%)	786
vessels of < 100 grt)	Over 500 grt (%)	90.7	37.1
Factory Ships and	grt	36,190 (55.3%)	65,486
Carriers	No.	6 (25%)	24

Source: OY, 3:537 (Table 6C)

Nominal Marine Catch (1000 metric tons)

	NK	ROK
1970	447.0 (61.6%)	725.5
1976	1,064.0 (50.6%)	2,102.9
1977	1,130.0 (54.9%)	2,059.6
1978	1,200.0 (58.3%)	2,059.1
1979	1,264.0 (60.0%)	2,121.3
Change		
78/79(%)	5.3	3.0

Source: OY, 3:532 (Table 4C)

DISCUSSION

Myron H. Nordquist: Thank you very much, Professor Kim. Questions?
Jon?

Jon M. Van Dyke: Could you say a few words about the straight baseline claim and the security zone and the prospects that those claims will ultimately stand or fall?

Jung Gun Kim: The countries most concerned about the security zone would be South Korea, the Soviet Union, and Japan. South Korea has been protesting and, as far as I know, the Soviet Union has been less than vocal in opposing or confronting this issue. My understanding is that Japan is not, at this juncture, in the mood to carry this point to the extreme to the detriment of their current attempts to establish a reasonably normal relationship.

Jon M. Van Dyke: Can one then say that there has been some acquiescence to these claims?

Jung Gun Kim: South Korea and the United States are quite concerned about the establishment of a security zone as absolute and exclusive as the North Korean regime has been claiming. Dr. Smith, would you have anything to add or comment on this point?

Robert W. Smith: The only comment I have as a result of the last exchange was -- and I'm definitely not a lawyer, so perhaps I could throw this out as a question: what does it really take to acquiesce? To my knowledge, the claim of North Korea has found its way to the public through the back door. The Japanese association found out some information; the North Koreans have not really published their claim as most countries normally do. Is the international community on notice right now for acquiescence to this claim or do these claims have to be made more formal?

Jung Gun Kim: I'll have to ask Mr. Nordquist to correct me on this, but my understanding is that this particular proclamation was made in conjunction with their unilateral claim to an exclusive economic zone and that it came in through the back door via a visit by a team of Japanese. So if your question is: how official or legitimate a standard is this straight baseline, not being the officially proclaimed municipal law of North Korea -- I can't tell you. I do know that a lot of what we learn about the North Korean regime comes, unfortunately, from such channels. There are newspapers, magazines. Mr. Nordquist, would you have anything to add to that?

Myron H. Nordquist: It just seems like the Soviet Union is the one that knew about it and goes through the area, so I'd say that it's no surprise to them, but to the rest of us, it's news. I certainly don't think that that claim has any kind of accepted state practice, and I would think they'd be very hard-pressed before any objective tribunal to say that there's been international acquiescence to it. Maybe some other lawyers would like to comment. Dr. Chee?

Choung Il Chee: I'd like to make several observations on Dr. Kim's presentation. About acquiescence, I don't know whether the North Korean legislation meets the notoriety requirement. There has to be notoriety before acquiescence.

The security zone has been part of a contiguous zone in the past, demonstrated by scant state practice. As a part of general international law it has never acquired status as an independent regime. We spoke of a contiguous zone prior to the Second World War, but you'll find a reference to a security zone conspicuously omitted, as it was omitted in the 1956 draft articles that Dr. Kim referred, to because it may be subject to abuse. It seems to me that the North Korean claim to a security zone is clearly illegal from the standpoint of international law.

The second point I'd like to make is about a case decided by the U.S. Supreme Court in 1804 in which it acknowledged exercise of jurisdiction by the Portuguese in an area outside the three-mile limit, about four or five miles offshore. I wonder whether this is really a case of a unilateral extension or of the exercise of jurisdiction in the high seas, the right to visit and search and so forth.

The third observation I'd like to make is about the statement that one party to the 1953 Armistice Agreement has ceased to exist. You all know that the armies signing the Armistice Agreement on the front line are one thing and the state that later on signed the treaty of peace is something else. Those are separate procedures. Of course this treaty, this legal instrument signed by the army, is binding on the state because, as Professor Baxter has pointed out in his 1952 article on the unification command, the armistice represents a political-military instrument. As such, as far as I'm concerned, the agreement is still in force, the party is still the same party. How you are going to prove that the ROK is a party to the Armistice Agreement is a separate issue.

I'm not sure whether the *Reparations* case is really a correct analogy to draw about the capacity of an international organization to bring a claim. The Vienna Convention on the Succession of Treaties refers to a state, not to the relationship between the belligerent parties, an army on the one hand and the state on the other. So I have some reservations on this question.

Myron H. Nordquist: Chao?

Chao Hick Tin: Just a point of clarification. Is Map 1 drawn to scale? As I measure it, the economic zone is, at its widest point, about 300 nautical miles from the security zone. It's not drawn to scale.

Jung Gun Kim: No, it's not in scale. It is hand-drawn.

Chao Hick Tin: I see.

Jung Gun Kim: What I was trying to show in the map were two main points. First, relying upon the straight baseline as it is drawn will internalize that body of water, which at some point exceeds 100 miles. Second, I was trying to show the security zone in terms of a simple geographical dimension. The map is not scaled.

Chao Hick Tin: My second question refers to your statement that the security zone is not approved under the new Convention. Do you as a close observer of North Korea think, now that it has signed the treaty, that North Korea might review its position on a security zone in the light of the provisions contained in the new Convention and perhaps revise its laws before ratifying the treaty?

Jung Gun Kim: Let me simply begin by stating that this is a wild guess. No, an educated guess. Based upon what I have read, my impression is that, although North Korea did sign the treaty, it is highly unlikely that it will indeed ratify the treaty. I say that with two conditions. One, its stand deviates from the treaty not only in connection with the security zone but also it has been less than clear on the exact delimitation of an exclusive economic zone in the Yellow Sea. Nor has it been very concrete in its proclamation regarding the continental shelf. North Korea claims only that, regarding the continental shelf in the Yellow Sea, it will subscribe to the equidistance principle. This claim directly confronts the People's Republic of China, which claims that the proper delineation of the line requires the use of the principle of the natural prolongation of land territory. As I've tried to indicate in the paper, there may be a potential for disagreement or conflict between the two governments -- the People's Republic of China and North Korea -- precisely on this point. Given a reasonably cordial political climate, perhaps this confrontation can be postponed, but not indefinitely.

For these and other reasons, it would seem that North Korea is not in any hurry to render its final approval in the form of ratification to the treaty.

Myron H. Nordquist: Professor Rhee?

Sang-Myon Rhee: The possible delimitation problem in the Yellow Sea between North Korea and China is certainly interesting, but I think a more controversial problem exists in the East Sea. Any entity in international law can claim as much as it wants, but it certainly should have some reasons or principles on which to base claims. I do not understand on what principle the North Koreans could draw this strange kind of line as shown on Map 1. At the Law of the Sea Conference, they supported the equidistance or median line principle, but they certainly didn't use that kind of method in the East Sea. What do you think are their reasons? Certainly you are not in a position to support their claim, but could you elaborate?

Jung Gun Kim: Well, Dr. Rhee, I don't know if I can do that with any kind of authority, but I do know that this was admittedly a unilateral claim on their part, and legitimacy is determined by them. This map should be read in conjunction with Map 4, which gives a broader picture. Along the line that Professor Rhee observes, I have marked A, B, C as potential areas of conflict, markings of my own and not originally from the Office of the Geographer, as I said at the very bottom of the footnotes. And, if I read this map correctly, delineations were made on the basis of the equidistance principle. What I'm trying to indicate here is that, if we rely upon the equidistance principle, North Korea's claimed EEZ on the East Sea does pose the problems, conflicts, duplications, I've cited here. But Map 1 is strictly hand-drawn; it's not at all in scale.

Sang-Myon Rhee: One thing that bothers me on Map 4 is the town located in the southwestern part of North Korea. If you strictly apply the equidistance line, this town falls within North Korea. But in practice, since the Armistice Agreement, North Koreans have never attempted to exercise any jurisdiction upon this town.

Jung Gun Kim: Other than the outlines of the Republic of Japan and the Republic of Korea, as calculated by the U.S. Department of State's Office of the Geographer, these lines do not necessarily reflect the U.S. government's position on the boundaries involved. I know of no maps that we can regard as authoritative sources other than the ones that were issued by them one-sidedly. So this map would be a point of reference from which to examine in greater detail the legitimacy of the claim, but it is certainly not to be taken as a final authoritative delimitation. Dr. Smith, do you have anything to add on that?

Robert W. Smith: Yes, I would just like to comment that Map 4, with the exception of the labels A, B, C, and a line which is extending from the North Korea-China land boundary, has been reconstructed from a map that we put out in our Office a number of years ago, and the equidistant lines on it are indeed just hypothetical lines that we calculated using any and all pieces of territory that we found in the area. We made no judgments as to whether islands were inhabitable or whether they should or should not be given effect; we just drew the lines on the geometric criterion.

Personally, I'm a bit surprised that North Korea would support the equidistant method in the Conference. I think North Korea, like many other countries, finds itself looking towards one method off one of its coasts only to see it backfire off another of its coasts. I suspect that North Korea sees its trapezoid figure in the Sea of Japan as a rather nice calculation because, as you see the equidistant lines, they find themselves in a West-Germany sort of geographical position cut off from the north and the south, so perhaps they are seeing further down the line than we give them credit for. If they claim something beyond the equidistance line, then they're starting with a bargaining chip. If they found themselves before some sort of third-party arbitration, they would have a leg up in an argument. And who's to say that any government has logical arguments when it comes to boundary delimitation? That line looks as sane and rational as a lot of lines I've seen around the world.

Jung Gun Kim: If I may add to that point, Dr. Smith, the reason that the North Korean regime favors the equidistance principle, especially in the Yellow Sea, is that it will give them a greater share of ocean than will the natural prolongation theory, as is being claimed by the People's Republic of China.

Robert W. Smith: That might have been true when they proclaimed it, but having seen many of the arguments before the International Court and even arguments we and Canada have just made, I think they could have made a number of arguments even in the LOC vis-a-vis China at this point.

Myron H. Nordquist: Choon?

Choon-ho Park: Somehow, I'm in possession of a little piece of paper, the English version of what the Soviet Defense Ministry's Intelligence Bureau put out in the late 1960s. The English version was done by some government source in the United States in 1970. It says that the North Korean twelve-mile zone was declared by the State Council in March, 1955 and refers, as does Map 1 here, to the baseline on the east coast starting from a point at the eastern end of the line of division. If you follow the baseline on this original map, the first point of land you meet is at Songjin, a city renamed by the North Koreans as Kimch'aek after the commanding general of the People's Army during the Korean War. But on Map 1 the first point of land you hit is Musudan, which is further east than Kimch'aek. So we can see that the North Korean territorial-sea claims have undergone several changes. I'm not going to discuss the legality of their closure of the large bay, but it wouldn't fit any elastic definition of a bay -- this is no bay indeed.

At the UN Conference on the Law of the Sea, in 1974 at Caracas, at the first substantive session -- serially the second one -- North Korea in its keynote speech mentioned that the median line should be used to demarcate the boundaries between countries adjacent or opposite. But, over the years, if you look at their pronouncements very carefully, they have gradually changed to some neutralized position. By "neutralized," I mean that they have simply said later that the lines should be drawn by consultation. So the median line intervention gradually fades, not into obscurity -- it's still there -- but politically they probably have to please both the Soviet Union and China so they don't want to appear to be taking any position. This is something quite important in considering the North Korean position on territorial sea claims.

Jon Van Dyke was asking about the protest by countries in that region to the North Korean military zone. The Soviet Union simply reported the fact that North Korea declared a military zone; China has been quite silent; it hasn't commented either for or against it. Of course, the Republic of Korea was furious about this, and Japan's main preoccupation was whether Japanese fishing vessels would be allowed into the zone or not. The United States was opposed, but the statement made in the name of the United Nations Command in Seoul was that the North Korean proclamation does not change the UNC's duties and obligations under the terms of the Armistice Agreement, or something like that. With the exception of the Republic of Korea, the protest wasn't really very serious or to the point. Statements made at that time -- within days of the North Korean proclamation -- were evasive because people simply didn't have time to digest exactly what the North Korean military zone claim was. Some of our major dailies in Seoul called it the "military warning zone" and other papers called it the "military boundary zone" because, coincidentally, in Korean the words "warning" and "boundary" sound exactly alike. Ironically, foreign newspapers writing about the North Korean English language broadcast came up with the exact term: "boundary zone." So I think we have to look at this proclamation in the context in which it was made and in the context of statements by people who were anxious to protest it. They didn't bother to look at exactly what it is but protested before they were able to do with any precise legal analysis.

Jon M. Van Dyke: I take it that South Korean ferries are going to those five islands in the Yellow Sea on a regular basis and that the

North Koreans are not enforcing their 1973 decree requiring authorization for that sort of travel.

Jung Gun Kim: Yes, that is correct.

Jon M. Van Dyke: So in that case, at least, we have non-acquiescence and non-enforcement by the North Koreans.

Jung Gun Kim: That is quite true.

Jon M. Van Dyke: Whereas on the east side, no vessels have gone up there and tested the North Korean resolve?

Jung Gun Kim: Not that I know of.

Myron H. Nordquist: Dr. Chen?

Rong-Jye Chen: Since Professor Kim referred to the "territorialized" end of the so-called full and complete sovereignty of the coastal states, my question is: in its claim to a security zone is North Korea just enjoying full and complete sovereignty or is it exercising exclusive jurisdiction for all purposes? In my personal opinion, sovereignty is more than jurisdiction.

Jung Gun Kim: When I used that term, "territorialized," I was trying to imply that that body of water on the landward side of the straight baseline, having become internal water, would have -- generally speaking -- the legal status of a territory, not even admitting the right of innocent passage and other privileges that are normally accorded to third states.

Myron H. Nordquist: Do we have any other questions for Professor Kim?

Unidentified Speaker: I think that the *North Sea Fisheries* case might serve as an example of general acquiescence; the Norwegians used straight baselines and eventually went to the courts in 1951.

Is the security zone temporary? Is it just a wartime measure rather than permanent? In either case, it would be a sort of blockade. But because you can't enforce it effectively, ships can pass through it easily, and there will be some question of prescriptive rights.

Jung Gun Kim: The North Korean proclamation nowhere indicated the time limit, but it is perfectly clear about the purpose for which this particular security zone has been established: to protect the resources in the EEZ. In that context, if I read it correctly, as long as the EEZ lasts, the security zone would last.

Unidentified Speaker: And then we come to the question of enforcement. If you can't enforce it effectively, how can you establish these prescriptive rights?

Jung Gun Kim: I know of no military confrontation over this specific security zone as established in the proclamation. I think it would be premature at this point to test whether or not it is being enforced. I can assure you, I would certainly not be the one to test it.

Unidentified Speaker: Thank you.

Myron H. Nordquist: I thank you very much, Professor Kim. It is very difficult to get this kind of information and I, for one, found it very enlightening to hear from you.

PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF THE SEA

Myron Nordquist: The next presentation is by Choon-ho Park, who is responsible in large measure for the planning and pulling together of this entire conference. I think he needs an introduction because many of his accomplishments are not always known; people know him in different ways. In the United States, Choon-ho established a reputation many years ago at the Harvard Law School as a leading authority on East Asia, particularly on continental shelf delimitation. He then spent five years at the East-West Center, where his contributions went far beyond anyone's expectations to get an understanding and a dialogue going and to know the players that really counted on this rather specialized subject area. Choon-ho is also a linguist. I'm not even sure that I know all of the languages in which he's proficient, but they certainly include Chinese, Japanese, Korean, English, and Scottish, as he mentioned earlier, having attended Edinburgh.

In any event, Choon-ho, it's with respect not only for your scholarship but also for your very decent humanness that I ask you to make the next presentation.

Choon-ho Park: Thank you, Myron, for your very generous introduction. In the surroundings here, I'm sure it would take either a very foolish person or a very foolhardy person to talk about the People's Republic of China's (PRC) law of the sea position because, geographically, the PRC borders on all the seas which border on most of those countries within the region; thus I would be stepping on many sensitive toes. But I'm just a plastic Chinese and I'm not going to speak for or against the position of the PRC or any country; I'm just trying to present the positions of the countries involved as they are.

The general background on PRC's maritime jurisdiction is like this. The PRC signed the Convention in December, 1982, at Montego Bay, Jamaica. Those of you who were there will remember that the Chinese head of delegation suddenly produced from one of his inner pockets a brush pen and portable ink, and signed in Chinese. It was quite a scene to watch. The PRC has been very active in support of the Third World position. But they did not in fact try to define what exactly the Third World position was, if something like that actually existed. It's something very euphemistic, but if you go one thickness deeper, then the Third World is a concoction of hundreds of conflicting interests indeed.

The two problems on which the Chinese have been most active, among others, were the 200-mile EEZ regime and the natural prolongation of land territory criterion. Let me give you a few points of interest.

My first point is on the EEZ, which China supported actively, partly for political reasons. In fact, if you look at the number of countries that have diplomatic relations with the PRC, more than one third of them set up relations with the PRC since it came into the United Nations in the fall of 1971 and began to talk about the new economic order and the EEZ problems, suggesting that the EEZ would possibly be the panacea to Third World countries' economic woes. Then, later on, its position on the EEZ and on other matters gradually toned down.

But what actually happened was that when the EEZ had been firmly established and was certain to become a new regime in the law of the sea, China returned home to find that in its own coastal waters it did not have a single spot to apply that limit in full because there were

countries opposite and adjacent to its own coast within 400 miles. Therefore, so far China hasn't really done anything, virtually nothing, by way of negotiating EEZ boundary problems with the countries in its neighborhood. But there are political reasons, too, for its not doing so.

This is an additional problem they have in East Asia. I often say that among the three East Asian countries there is one thing too many: among the three East Asian countries there are five governments. In other words, it takes five parties to argue over what would, under normal circumstances, require only three to argue. One Japanese observer said, "So, because of the political relations among them, the East Asian countries don't get together. And if they get together, they don't talk. If they talk, they don't negotiate. If they negotiate, they don't agree. And if they agree, they don't act on it."

China has problems with its opposite and adjacent states, namely North Korea, South Korea, Japan, Vietnam, the Philippines, Malaysia, Indonesia, and Brunei, depending on the strength of its claims in the South China Sea. One of the main reasons why the PRC has been so reluctant to negotiate boundary problems or other ocean-related problems is that the problems are too complicated indeed. And the geographical or physical situations are too complicated as well. To make matters worse, China also has territorial issues with Japan, Vietnam, the Philippines, and Malaysia. So the PRC has been simply not in a mood to negotiate, but just reap the noncooperator's benefits by doing nothing. It tends to feel that it's more advantageous doing so, because if under one particular situation it wants to settle one of the issues by any particular criterion, then the same criterion can work against its own interests in another situation. Thus, it is locked in so many conflicting situations.

Now, let me go into some specific issues. First, the territorial sea claims. The 1958 proclamation has some conflicting provisions, and these are things we have been discussing all day today. Paragraph 3 of the territorial sea proclamation provides that foreign military vessels may not enter the PRC's territorial sea without permission. And this is in conflict with Article 17 of the 1982 UN Convention on the Law of the Sea regarding innocent passage. But, in all fairness, I must point out the fact that China is not alone on this point. We have seen earlier in the day that the two Koreas have similar provisions in their respective territorial sea laws.

The Soviet Union, it is interesting to note, had similar prior authorization requirements in its USSR state border law of 1960, but in late November, 1982, which was less than two weeks before the UNCLOS III signing session in Jamaica began, the Soviet Council of Ministers changed the USSR state border law; now there's no requirement for foreign non-military vessels to obtain advance notice. They very silently but very skilfully removed this. And that law came into force on 1 March 1983. So it remains to be seen how the PRC is going to bring its domestic law on this point in keeping with the Convention if it wants to ratify it. Having said so much in support of the Convention, the PRC would need a very strong reason not to ratify it now.

Now, my second point is about military zones or maritime security zones. On the outbreak of war in Korea in 1950, the PRC proclaimed three maritime security zones. The first one is the Military Warning Zone enclosing a huge area from the Yalu River estuary to the eastern end of the Shandong Peninsula. It's been there for such a long time, and occasionally Japanese fishing vessels meant to confirm whether the

zone was still enforced. Earlier, Professor Kim said he has no way to test the North Korean security zone. But I would rather have said he could test it by going into it; he would have difficulty coming home! For the same reason, a foreign vessel can test the Chinese military warning zone, but would have difficulty coming back.

The second zone the PRC declared, almost simultaneously, was the Military Navigation Zone off Shanghai, a small squarish enclosure which, in fact, was superseded in 1958 when the PRC extended its territorial sea up to twelve miles. If you look at Professor Kim's paper, you'll see why the Military Navigation Zone was superseded. Off Shanghai, there is a little square with a hypothetical baseline; the outer limit of that zone coincides with what's supposed to be a twelve-mile territorial sea limit. There was, in fact, no need for that navigation zone to be there any more.

The third zone -- it was not actually a zone -- was the Military Operation Zone north of Taiwan. Originally it was at the 29th northern latitude. Then, in 1957, they pulled the line southward by two degrees, so that it's now the 27th northern latitude.

Then, when Japan was negotiating a formal fisheries agreement with the PRC, which was signed and came into force in 1975, China came up with the same claims, but with only two military zones. The second zone I've mentioned wasn't brought up at all. But Japan didn't recognize the other two zones, either. But in the interest of fisheries cooperation between the two countries, Japan, without abandoning its own rights, just agreed to keep its fishermen out of the two zones. Thus, in strict legal terms, Japan didn't recognize the Chinese military zones.

In the morning session there were questions about security zones, beginning with the MacArthur Line, which was proclaimed around Japan soon after World War II. At first, it wasn't called the MacArthur Line, but the proclamation said that all shipping craft of Japan should be at a standstill. But the post-war shortage of food in Japan was so acute that gradually the occupation authorities had to expand the Line to enable Japanese fishermen to go beyond. And the MacArthur Line was the reason why South Korea declared the Peace Line or the Rhee Line, named after the president who made the proclamation. When Japan's sovereignty was to be restored on the coming into force in April 1952 of the San Francisco Peace Treaty with Japan, the MacArthur Line would have no reason for existence. The South Korean government was afraid that Japanese fishermen would then return to the Yellow Sea and other China Sea fishing grounds. The Peace Line was proclaimed to keep them off. In fact, the formal name of that proclamation was "Proclamation of Sovereignty over the Adjacent Seas." The Peace Line was named by the president, who said, "This is intended to maintain peace with Japan." In Japan, however, it's called the Rhee Line.

Then there appeared several other lines named after individuals. The Mao Ze-dong Line was off the eastern coast of mainland China, the official name being the East China Motor Trawl Prohibition Line. In 1956, there was a line called the Bulganin Line, named after the Soviet premier at the time, off the Maritime Provinces of the Soviet Union. But that one, proclaimed against Japanese fishermen, didn't in fact come into force, because an agreement had been made before it was enforced. We also had a line called the Clark Line, named after the Commanding General of the United Nations Forces in Korea, who proclaimed a security zone around the Korea peninsula during the Korean War. But this one was lifted shortly after the Armistice Agreement came into force in July 1953. So we have several lines named after indi-

viduals. If you were a prime minister or a head of state, you might have been tempted to draw a line and name it after yourself. It was quite a fashion and some people, just out of the urge to be in fashion, drew lines and named them after themselves.

My third point deals with the PRC's continental shelf claims. When the natural prolongation of land territory criterion came up from the Hague Court in February 1969, that was also the time when the continental shelf disputes were fermenting in the Yellow Sea and the East China Sea. So the PRC picked it up and threw it against Japan, saying that the natural prolongation should be the criterion to be applied against the Korean peninsula, Japan, and other countries in the region. China thinks this is a kind of a sacrosanct, inviolable criterion. In fact, China's reliance on it hasn't changed. On the contrary, it has been said that China really worships that principle. And this has to do with what we have been discussing earlier in the day, namely, the relationship between the PRC's continental shelf claims and the EEZ claims.

In one of the recent articles in the *Chinese Yearbook of International Law* - 1983 there's an in-depth analysis of this. Simply put, it goes like this: the continental shelf regime and the EEZ regime are two separate things, not to be confused. But the author, Lien Qun-cheng, forgot to say that, within enclosed seas or semi-enclosed seas where the coastal states are within 400 miles of one another, it is indeed possible, and quite probable too, for the two boundaries -- the surface boundary and the seabed boundary -- to not coincide. The author has really perspired to articulate the Chinese position for the simple reason that it is very advantageous to China's interests, and disadvantageous to the other countries.

But Vietnam took China by surprise when it, shortly before their clash in late 1979, approached China, suggesting to negotiate over the boundaries in the Gulf of Tonkin. A hypothetical dialogue would have been like this. China: What would be your criterion for delimitation? Vietnam: We have been fighting imperialists for the past thirty years and haven't done any study on the law of the sea, but we have seen you, Big Brother, throwing that natural prolongation criterion against North Korea, against South Korea, against Japan, and against everybody. So why don't we simply go by that criterion?

But if you look at the topography of the Gulf of Tonkin, especially the southwestern part of Hainan Island, the natural prolongation criterion is more advantageous to Vietnam than to China. In the Gulf of Tonkin, the dotted vertical line (Map M at page 278) shows the line, drawn in 1887 between France and the then Ching Dynasty, which Vietnam now insists should be the boundary. But of course the Republic of China and the PRC would simply laugh at this line. The median line there, kind of an arrow, is supposedly the Chinese claims based on the median line. This is far beyond the vertical line of 1887. Here, therefore, it means that the natural prolongation criterion is really against the PRC's own interest.

We have another situation that we have discussed earlier. In the northern part of the Yellow Sea, North Korea would apply the median line to draw the boundary with the PRC. But I am sure the PRC would hang on to the natural prolongation criterion.

Now, my fourth point is about joint development. Japan and the Republic of Korea signed the joint development scheme in January, 1974, but it came into force in June, 1978 -- and there are interesting reasons why it took as long as four years and six months for the

agreement to come into force. There's no point in going into that because there's a long story behind it. China, right from the beginning, has been protesting, but the joint development zone is in fact so far away from the Chinese coast that there are a number of other reasons, including political ones, why the Chinese always say it should also be entitled to the resources in the East China Sea. But the language used in the Chinese protests is so blunt and so ambiguous, it's like throwing one net in a large pond to catch all the fish.

Politically, the PRC will continue to oppose it. On the other hand, in late 1980 and early 1981, I understand Japan and the PRC had two informal meetings to feel out each other's intention on the advisability or possibility of entering into some joint development scheme. I've no way of checking whether that was true, but a U.S. congressional hearings record of 28 February of this year, a copy of which Professor Chiu kindly lent to me, has the reference and the witness is someone quite well known to all of us, namely Selig Harrison.

My fifth point relates to the territorial disputes between and among the East Asian coastal states. China is involved in a series of territorial disputes over ownership of offshore islands. One of them is over who owns the eight uninhabited islands situated northeast of Taiwan and west of Okinawa, called *Senkaku* in Japan and *Diaoyutai* in China. Each claims that the islands have always been its own.

The second dispute is over the four archipelagos in the South China Sea. The first one is the Pratas Islands (*Dongxia* in Chinese) situated southwest of Taiwan. The ownership has never been contested -- it's just Chinese. The second one is the Paracels (*Xixia* in Chinese) which caused a two-day *blitzkrieg* between the now-defunct South Vietnam and the PRC in January 1974. The islands have been under Chinese control ever since. Vietnam complains that China is encroaching on its territory and also has been saying that temporary relinquishment of physical control doesn't in any way affect its territorial ownership of the islands.

The third one, the biggest of the controversy, is over the Spratlies (*Nanxia* in Chinese), which are claimed in whole by the Republic of China, the People's Republic of China, Vietnam, the Philippines, and, in part, by Malaysia. We have Mr. Mario Manansala from the Philippines and also Mr. Hamzah from Malaysia but nobody from Vietnam. I shall style myself as a plastic Vietnamese again later in the week, but in the surroundings here I've got to be very careful in mentioning the controversy, although I'm not taking any position.

One peculiar point with respect to the territorial disputes in the South China Seas is about the Macclesfield Bank (*Zhongxia* in Chinese) right at the center of the South China Sea. There are about thirty coral islands, all submerged. But the 1958 proclamation by the PRC refers specifically to them, saying that all the submerged coral islands have straight baselines and twelve-mile territorial seas. So it will be very interesting to see how the Republic of China or the People's Republic is going to justify ownership of what lies under water. And later we can turn to the galaxy of scholars from the Republic of China to enlighten us on that point.

But one very interesting point is that one geography book published by a Chinese in Hong Kong said, "being coral islands, they grow by at least four inches (about ten centimeters) a year and the tallest one is about ten meters from the surface at low tide." From my calculations, then, it would take 100 years for the island to emerge, but that

very book says, "therefore in a few years' time it will emerge on the surface." Here we have a different time frame.

Incidentally, we can turn to a very interesting case in the Republic of Korea. Somewhere in the East China Sea between Cheju Island of Korea and the Chinese coast, and on the Korean side of the median line or what would be the median line, is a submerged rock called the Socotra Rock. Recently some Koreans went there to feel out the natural prolongation. I don't think it's going to be reinforced in the very near future. But given the fact that the PRC and the ROC as well are claiming the submerged Macclesfield Bank in the South China Sea, Socotra Rock is going to give Korea very interesting things to look at.

Now let me stop here and turn to my slides.

Map A: The shaded part simply shows waters less than 200 meters deep. The dark line east of Japan is the hypothetical 200-mile zone around the Japanese archipelago and neighboring countries.

Map B: Now this is what the PRC is claiming, namely, the military warning zone in the northern part of the Yellow Sea. The shaded area along the Chinese coast is the fishing zone as agreed between Japan and the PRC in 1975. The square is a special protection zone. But the crosshatched band around the mainland coast is a hypothetical twelve-mile territorial sea limit from hypothetical baselines. North of Taiwan we see the military operation zone, which is the 27 degrees North latitude. A hypothetical median-line between the China mainland and the Korean peninsula is also shown there.

Sang-Myon Rhee: Professor Park, may I ask a question? I'm interested in the square zone in the middle of the Yellow Sea. Most of that square is on the Korean side of the median line?

Choon-ho Park: Yes.

Sang-Myon Rhee: Is it permissible?

Choon-ho Park: Well, the fisheries agreement between Japan and the PRC was signed in 1975 and is now in force. I think there is something the Republic of Korea can make out of it against China and Japan. But that square also encroaches into South Korea's so-called Peace Line, which is still in existence. The fact that Japan negotiated this zone though it is not a coastal state of the Yellow Sea really upset both Koreans. But nobody really has come up with any serious comprehensive objective analysis of the situation yet. So I don't know whether it's permissible or not permissible. It's simply there and in force. The square is in fact a fisheries protection zone seasonally, not on a permanent basis.

Sang-Myon Rhee: According to information provided by the *Petroleum News*, reprinted in your paper, the special fisheries protection zone -- is it also located in a similar area?

Choon-ho Park: Yes.

Map C: The two zones were set up in 1981, showing that the Chinese fishing rights claims are expanding eastward. It won't be long before we see some Chinese fishing vessels off Inchon, Korea.

Map D: This one is also what we were discussing earlier. On the west coast there, you see the North Korean hypothetical claims between North Korea and the PRC. From all indications, the two coastal states do not seem to have agreed on the boundary. The Chinese wouldn't be very happy to draw the lines by the North Korean terms of a median line. North Korea wouldn't accept the natural prolongation rule there. Oil exploration is going on on both sides of what would be the median line.

Sang-Myon Rhee: Professor Park, I think the so-called median line located in the Yellow Sea is quite different from the one reprinted in earlier pages of Professor Kim's paper.

Choon-ho Park: That one originally published in *Ocean Yearbook* was based on the other one, so the variations could be simply some cartographic errors.

Sang-Myon Rhee: You see, here, the problem is very significant because the so-called five islands problem is quite ignored in this map.

Choon-ho Park: Yes.

Map E: The five islands under the United Nations Command control, hence under the Republic of Korea administration, are well within twelve miles of the North Korean coast. So the lines would be different depending on whether you give full effect to those five islands or half effect or no effect.

Map F: This is what has been going on. They just dissected the offshore waters into seventeen separate blocks, of which only four are uncontested.

Map G: These are the five offshore zones, staked out by the Republic of China, based on constitutional grounds, so that the five blocks stretch out from the mainland coast. The zones show actual oil exploration contracts between the Republic of China government and foreign oil companies.

Map H a and b: These are the PRC oil exploration contract zones between the PRC government and foreign oil interests as of December, 1983.

Map I-a: In this one the diamond shows the joint development zone between Japan and South Korea.

Map I-b: The three little squares show the spots where the PRC is reported to have drilled, and supposedly found a very good promise of oil on the western end of the joint development zone.

Sang-Myon Rhee: Are you sure that those three spots, drilled by China, are located on the Chinese side of the median line?

Choon-ho Park: Three are there. A fourth one, not shown on this map, is said to be somewhat inward.

Unidentified Speaker: Inward means on the Korean side of the line?

Choon-ho Park: Yes. This morning Professor Chee mentioned *Tong Tao*, Barren Island, off Shanghai. Using that uninhabited offshore island as

the base point would affect one of the four points with very good promise of gas or oil. In fact, that is a pain in the neck to some Korean oil interests, because of the possible controversy it might give rise to.

Map J: Now we are getting into the South China Sea, a continuation of Map A that we saw earlier. The shaded areas depict the 200-meter depth area. We don't see any 200-nautical-mile lines in the South China Sea, which means the countries are situated within 400 miles of one another, or at least the distance from one land or island to another doesn't reach 400 nautical miles.

Map K-a: Now the very controversial Spratly Islands. Those islands have names in Chinese, English, Tagalog, and Vietnamese. Perhaps our friend Mario Manansala can recite all the eighty or so coral islands in Tagalog. Malaysia is claiming part of them also, as does Vietnam in whole.

Map K-b: This is slightly out of date, but the squares, circles, and triangles show islands occupied by different claimants. The enclosure was done by the Philippines in 1978, and the Philippine government gave a new name in Tagalog: Kalayaan, which I understand means "Freedom Land." Is that right, Mario?

Mario Manansala: That's correct.

Choon-ho Park: Freedom Land, where there is a lot of tension, in fact. And the lower half like a camel's hump is the Malaysian claims made in 1978 in the Spratlies.

Unidentified Speaker: Dr. Park, what would be the potential claim by Brunei?

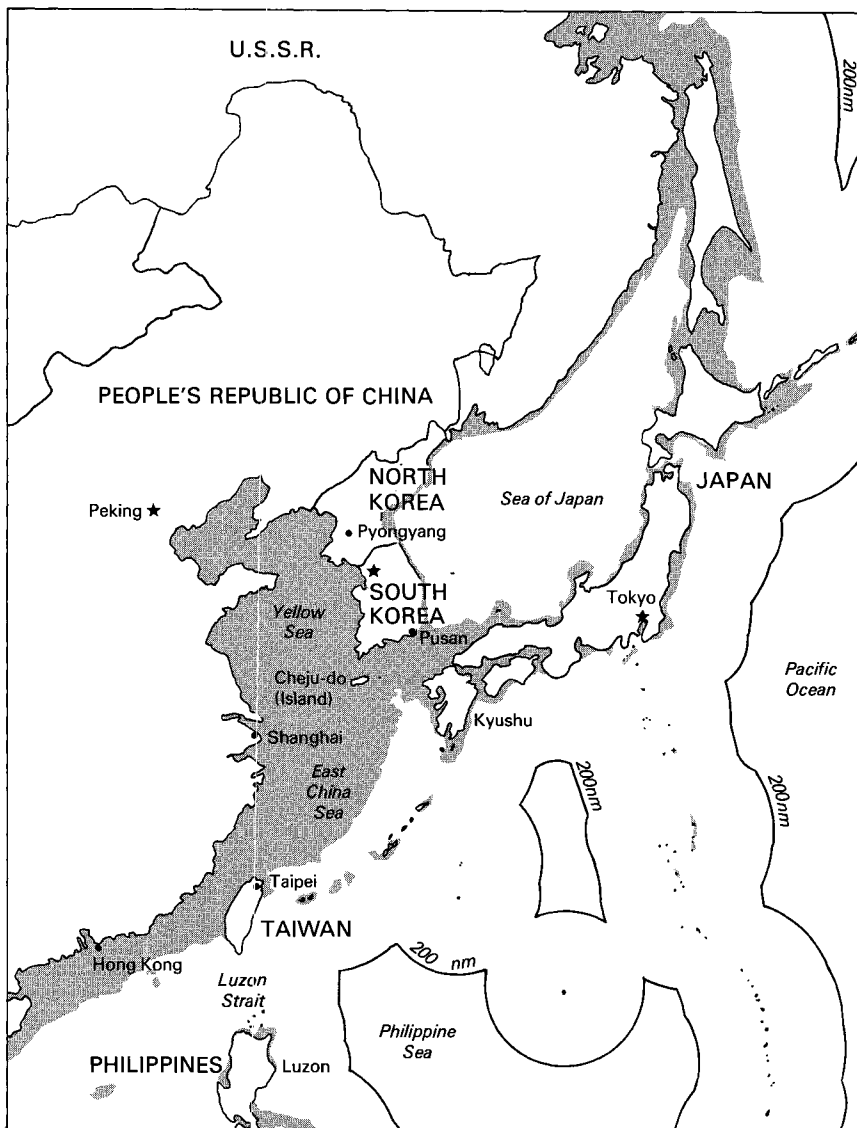
Choon-ho Park:

Map L: These are Brunei's potential claims. Later in the week, Mr. Hamzah can enlighten us or bring us up to date on Brunei and Malaysian positions in this part of the South China Sea. Finally, these maps show what's happening in the South China Sea.

Map M: In the Gulf of Tonkin, you see the 1887 line. Its lower end wasn't specified, and Professor Hungdah Chiu has analyzed this very intensively. He even has pointed out some errors in the translation of that treaty. The languages used were Chinese and French, but the subsequent translation into English was more precise, according to him. Later, Hungdah, would you enlighten us on that very interesting point: some errors in the translation of an important treaty text?

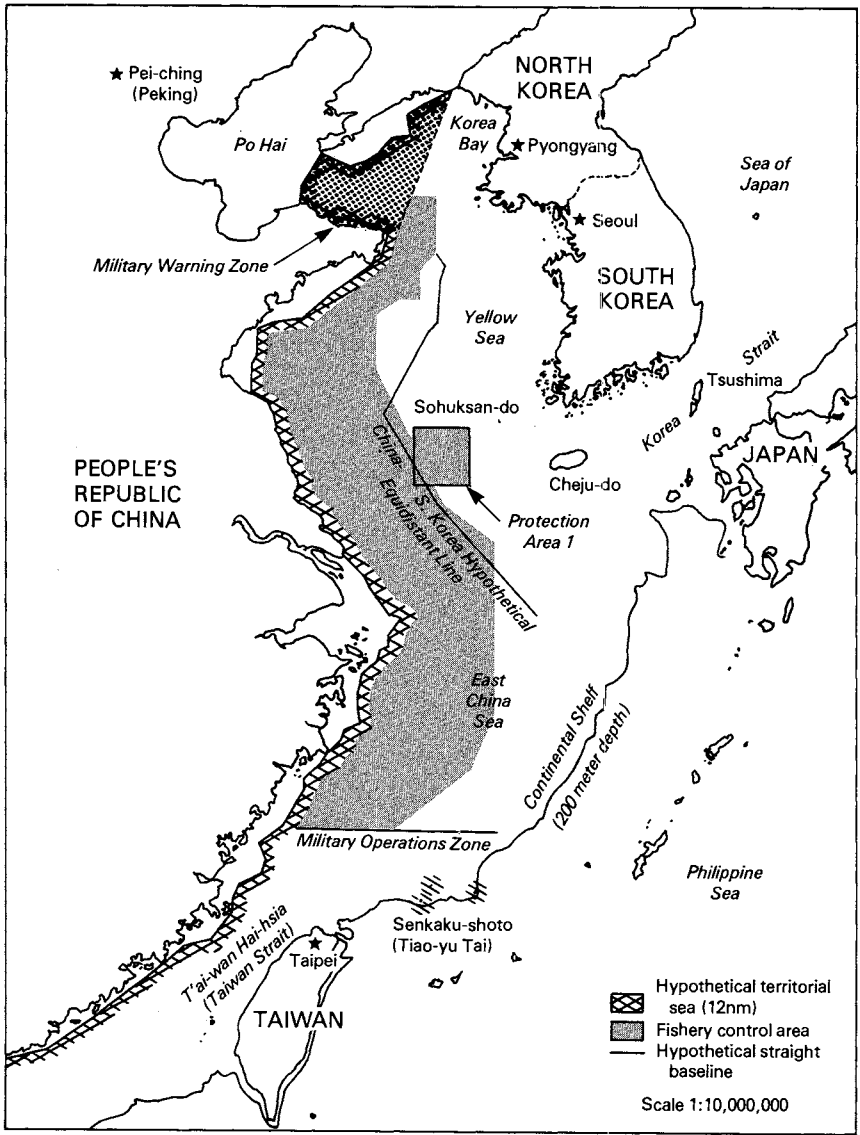
Map N: Southwest of Vietnam you see a triangle. That is the joint development area between Thailand and Malaysia.

Map O: Claims staked out by the former South Vietnam and now the unified Vietnam claims are shown here. They conflict with Indonesia's claims there north of Natuna Islands. I understand there have been more than six negotiations, six sessions alternately in Djakarta and Hanoi between Indonesia and Vietnam, although they have virtually come to agreement but haven't actually signed one.



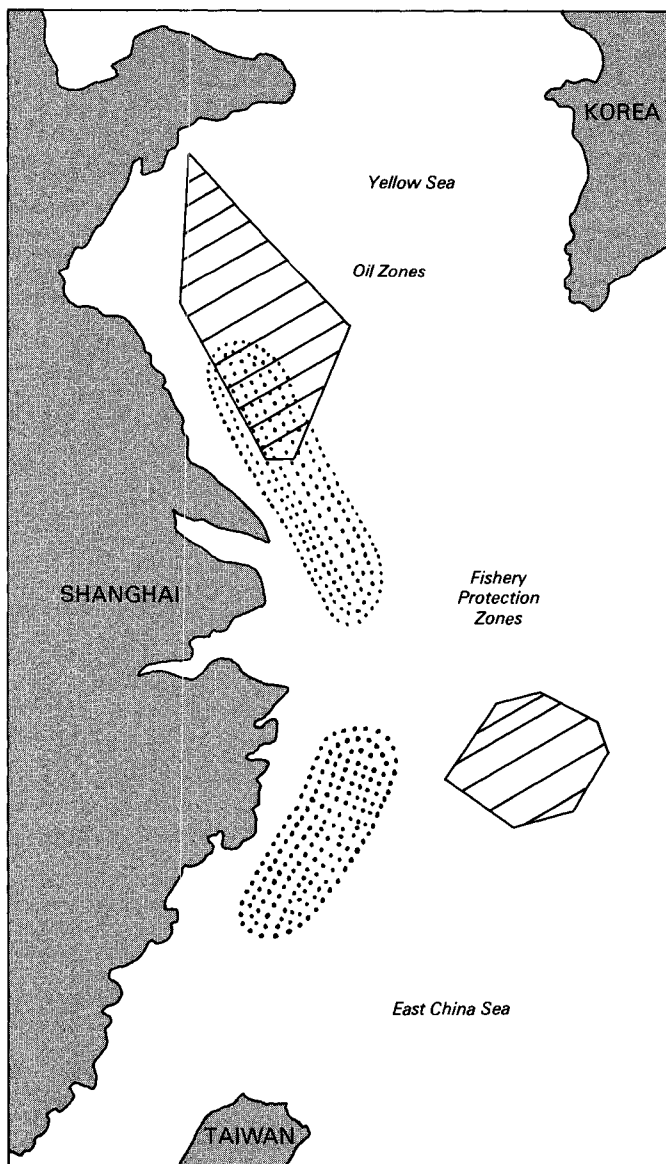
From 517133 3-74

Map A: 200-meter depths.



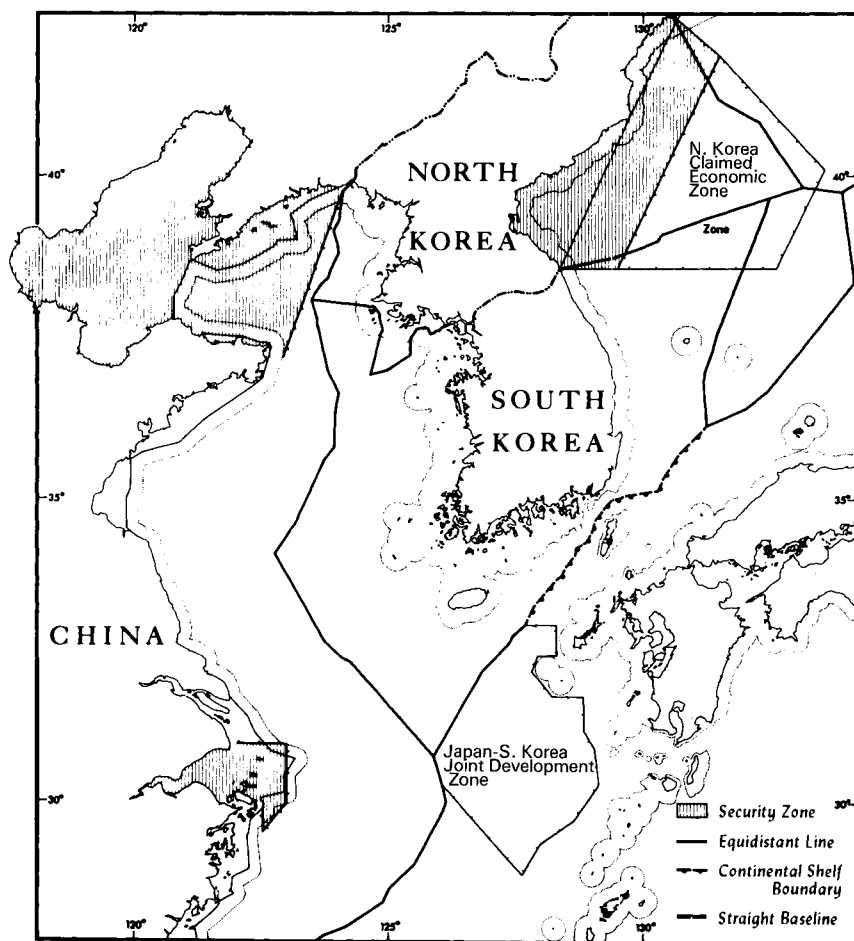
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Map B: People's Republic of China Maritime Claims.



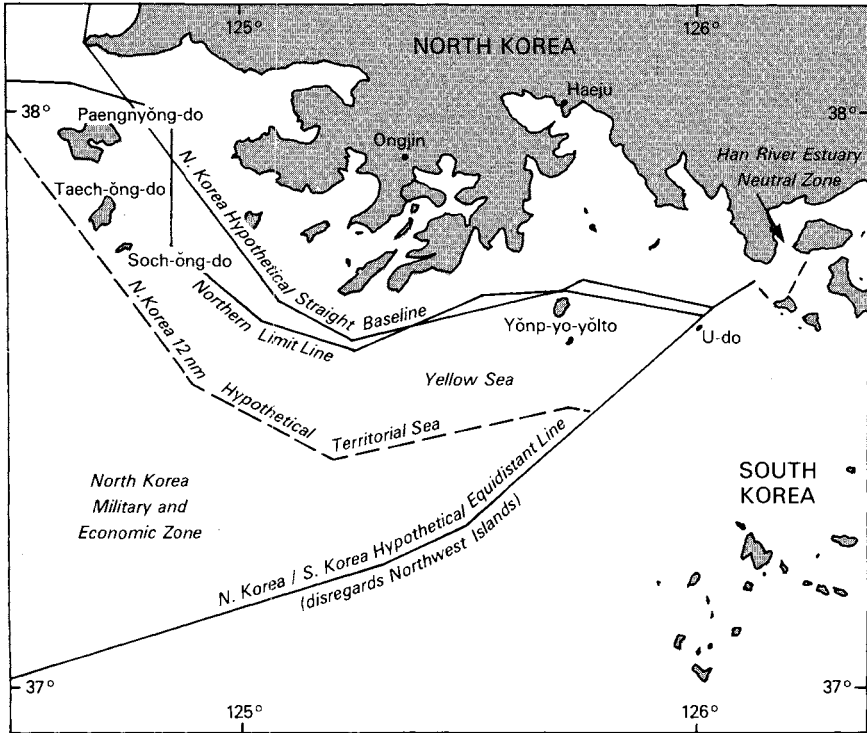
Map C: China: special fishing zones.

Source: *Petroleum News*, May 1984, p. 24.



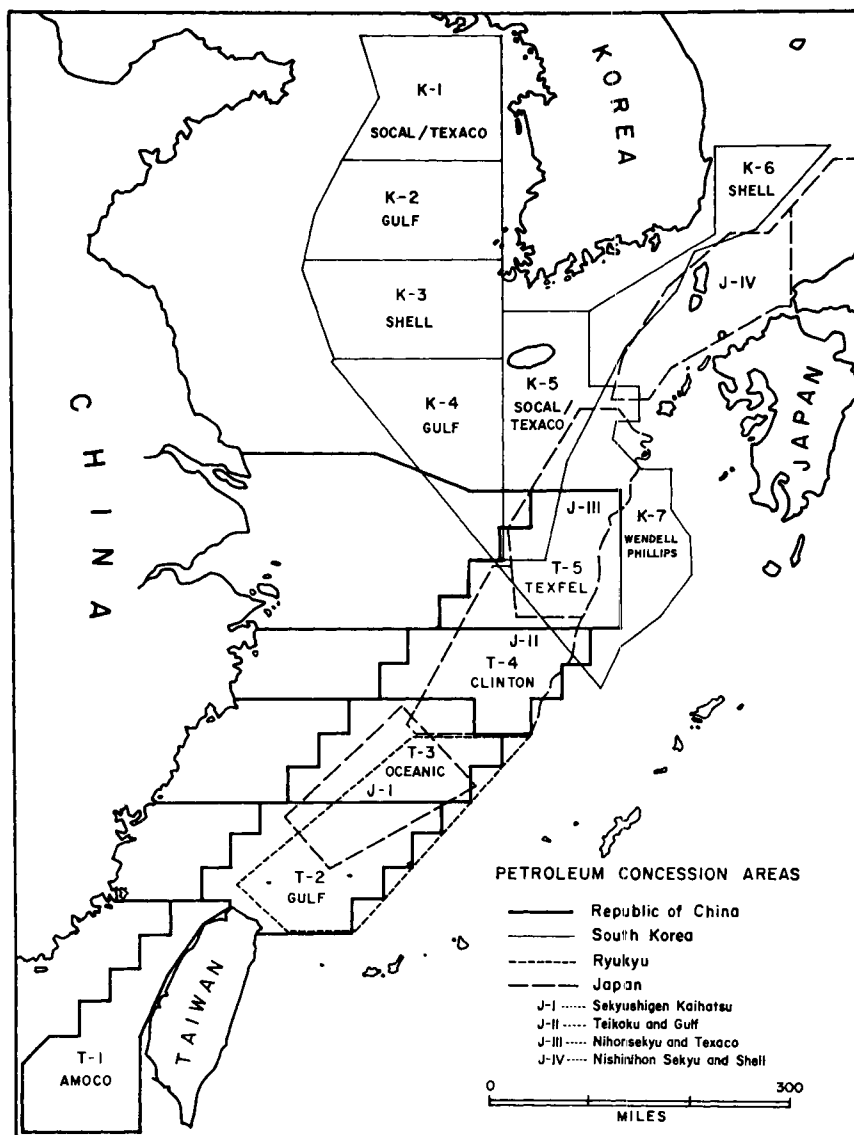
Map D

Source: *Ocean Yearbook* 2:291.



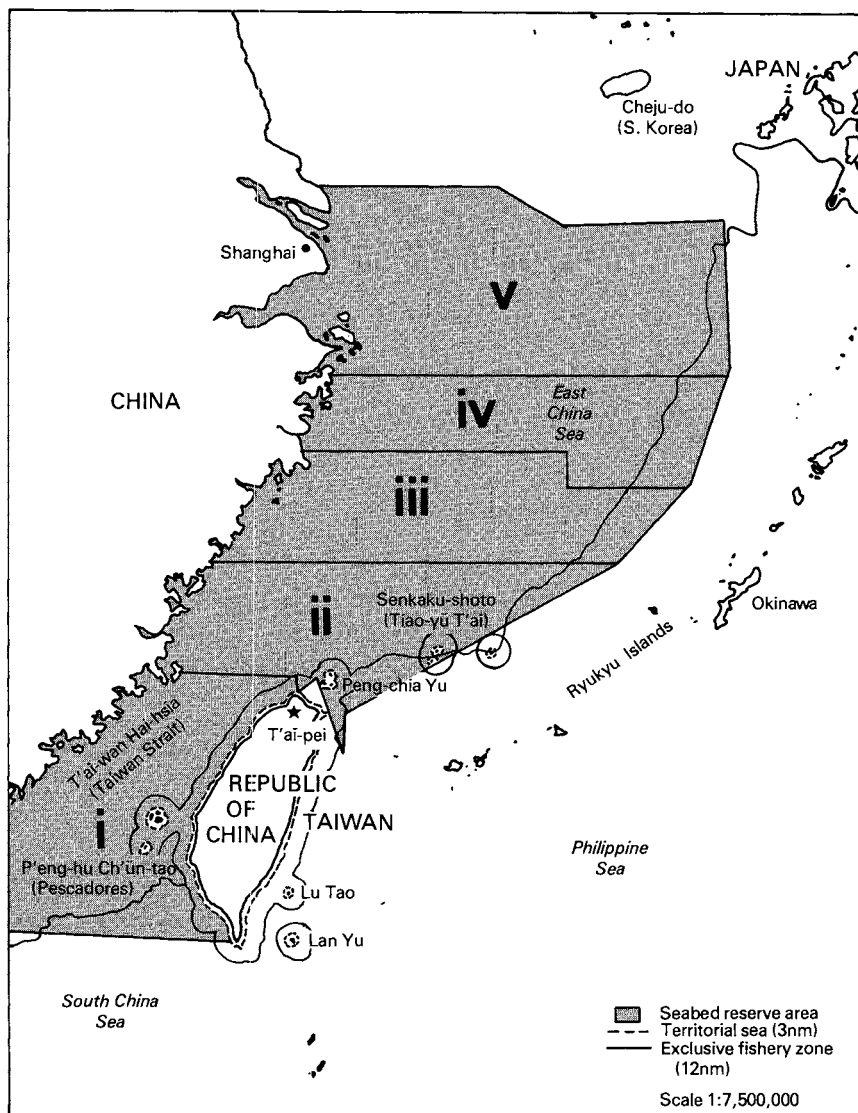
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Map E: Northwest Islands Area.

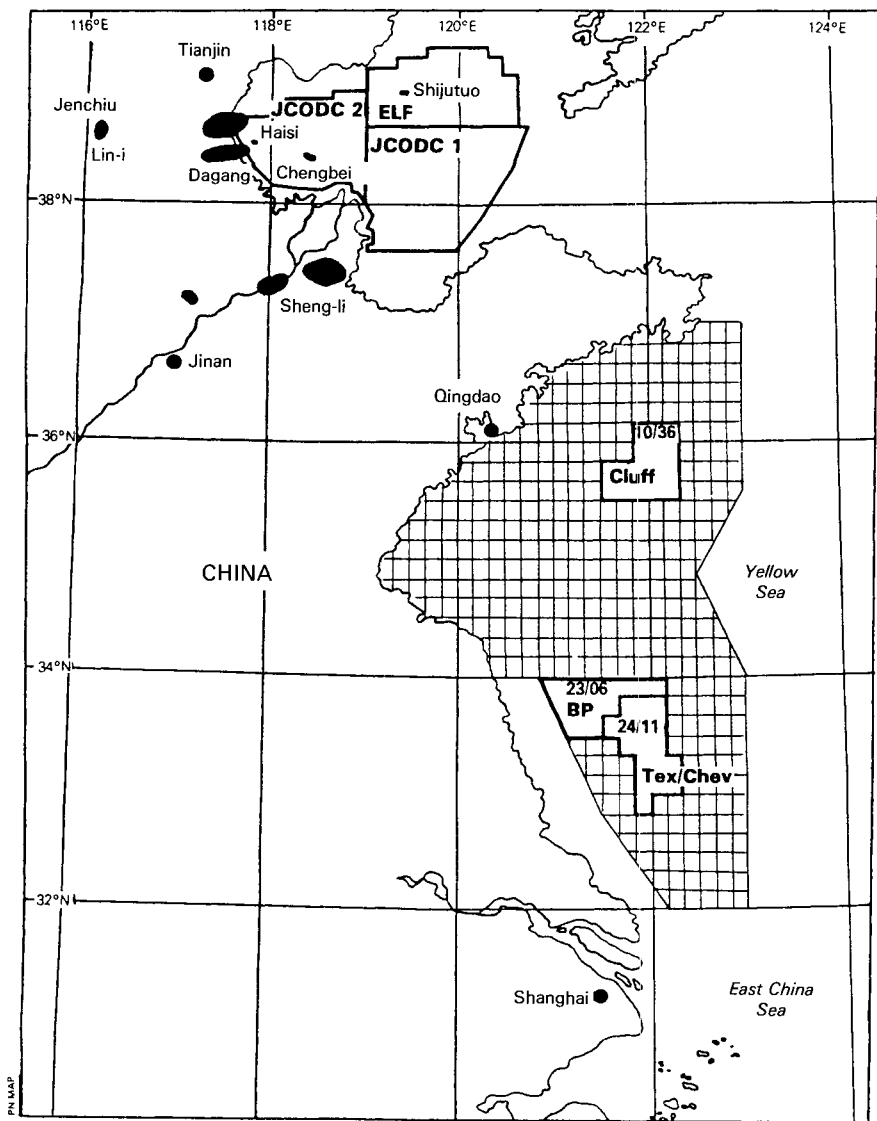


Map F

Source: Choon-ho Park, *Harvard International Law Journal*, 14 (1973):219.

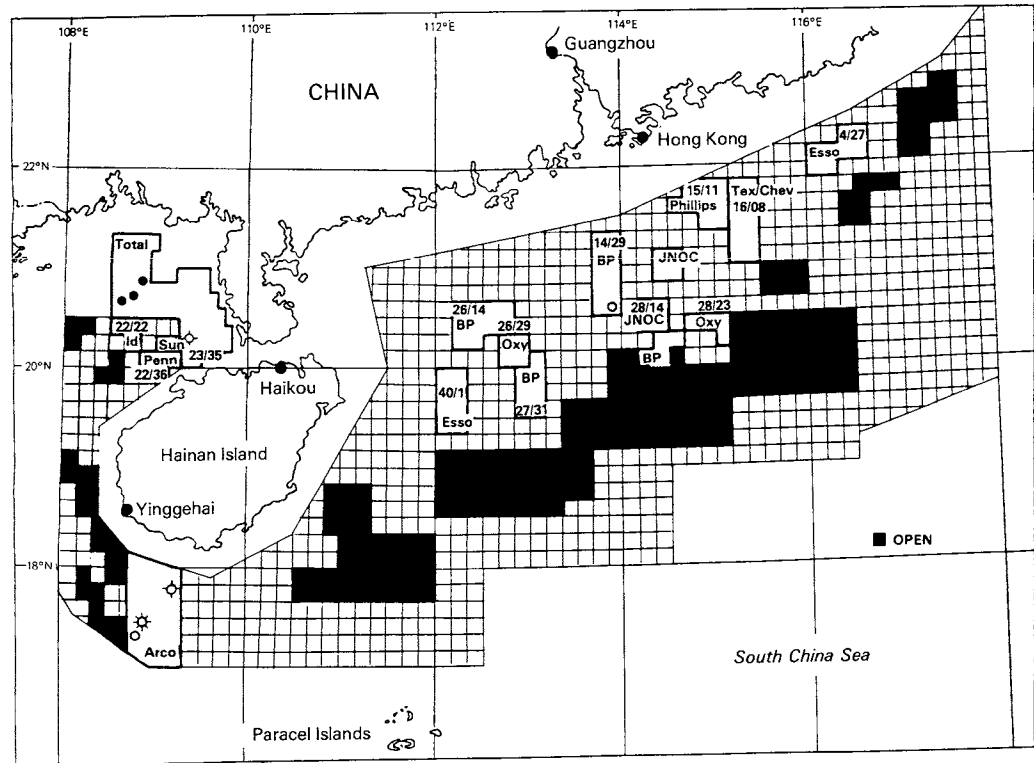


Map G



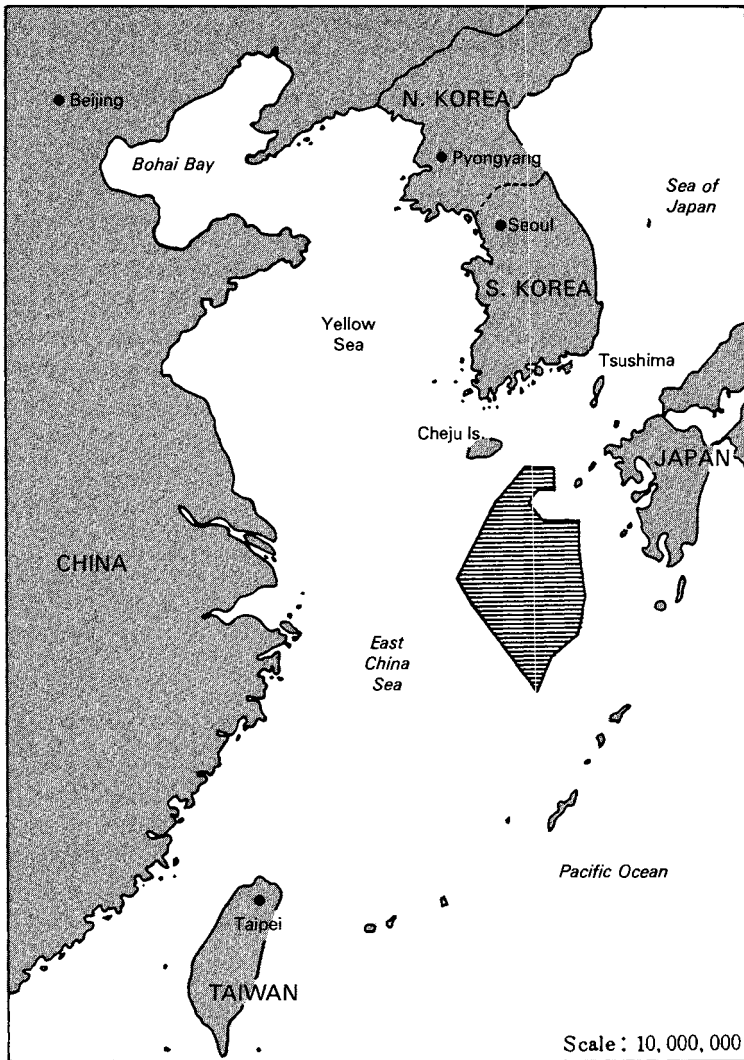
Map H-a: South Yellow Sea and the Bohai Gulf.

Source: *Petroleum News*, January 1984, p. 18.



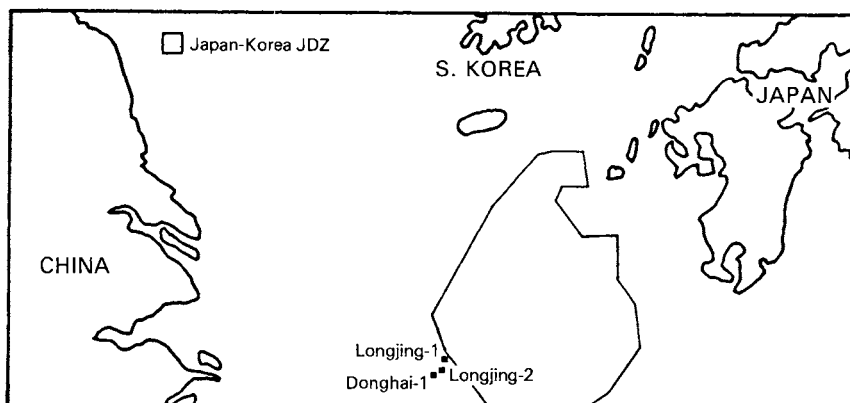
Map H-b: South China Sea: contract areas.

Source: *Petroleum News*, January 1984, p. 15



Map I-a: Japan-South Korea Joint Development Zone.

Source: Choon-ho Park, *East Asia and the Law of the Sea*,
3rd printing (1985), p. 129



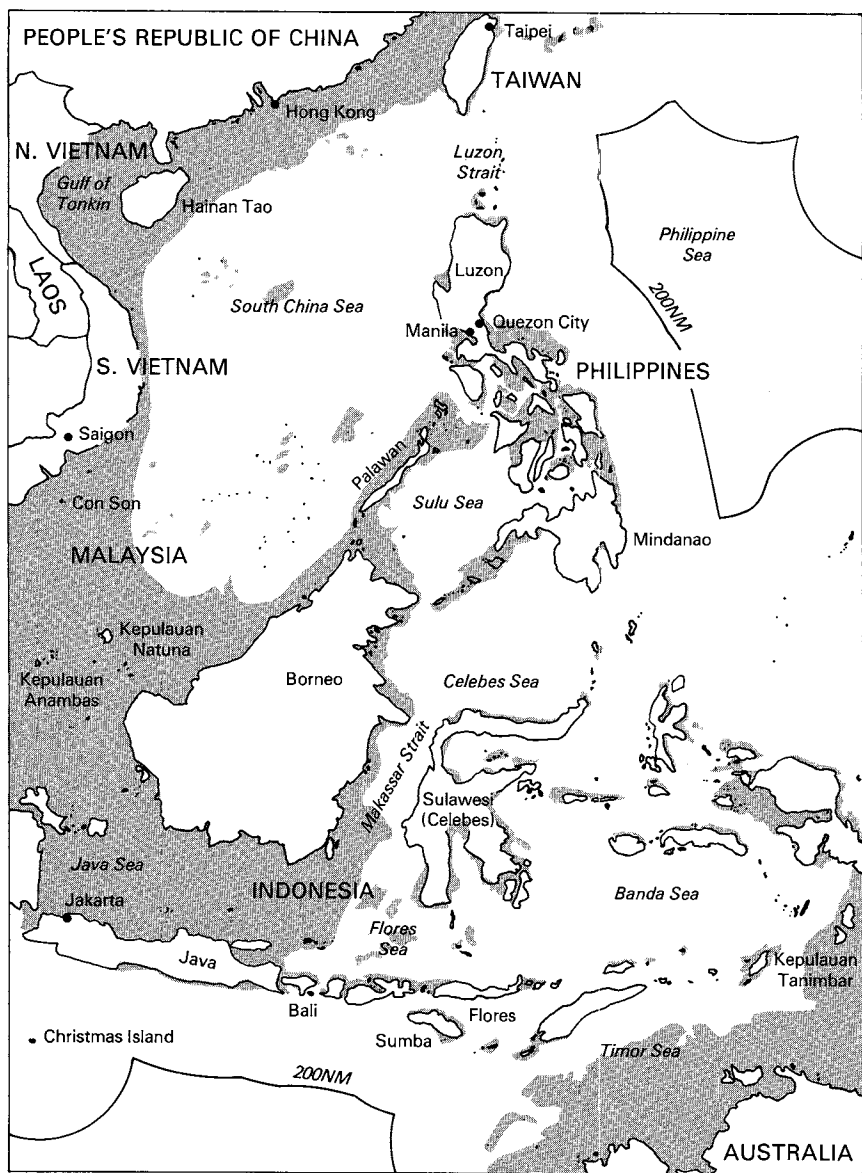
Map I-b: East China Sea: development zones.

Source: *Petroleum News*, August 1982, p. 7

East China Sea: wells drilled by China's ministries of geology and petroleum

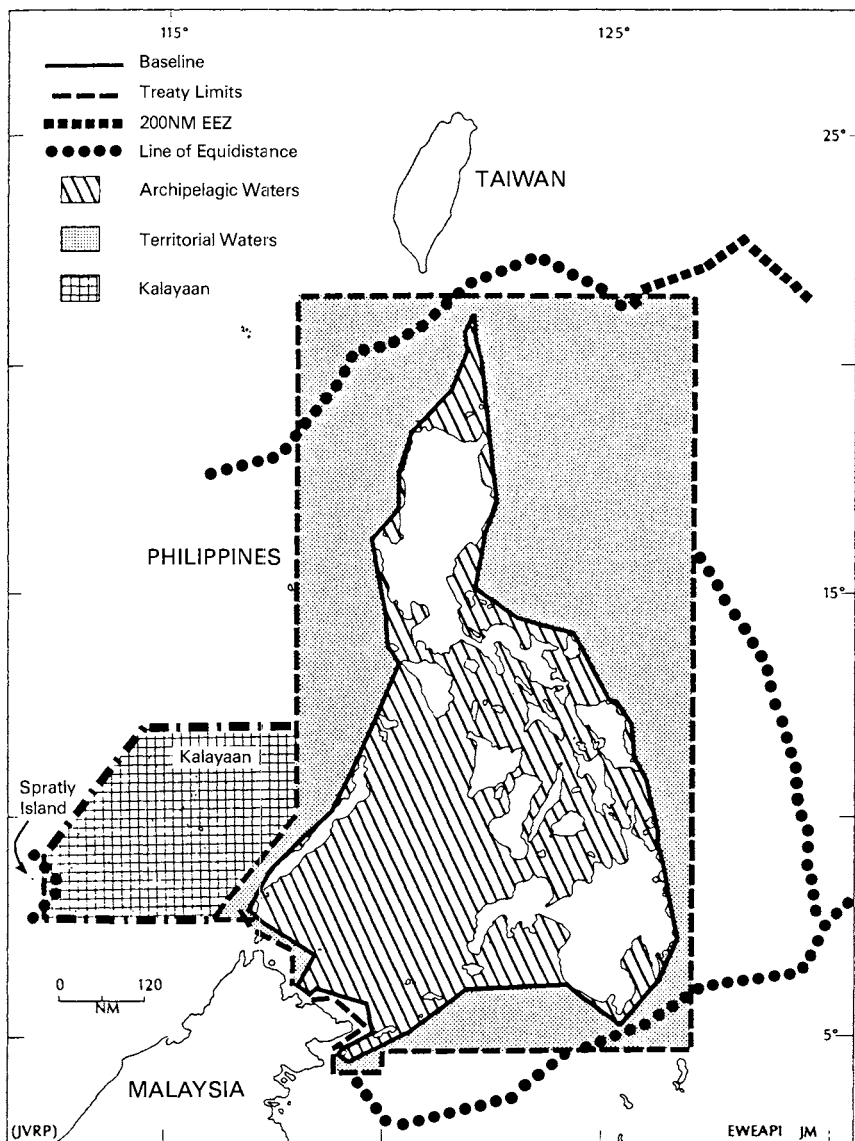
Well name	Coordinates	Rig	Spudded/ completed	WD/DD (m)	Remarks
Longjing-1	30 10'N 126 05'E	Kantan II	Late '80 Early '81	50 3470	Discovery, drilled by MOG
Longjing-2	30 01'N 126 02'E	Kantan II	Mar 15 '82 Jul 24 '82	81.5 4228	Gas discovery, drilled by MOG
Donghai-1	29 52'N 125 56'E	Bohai IV	Feb 24 '82 Jun 22 '82	77.7 4200	Hydrocarbon shows, drilled by MOP

Source: *Petroleum News*, August 1982, p. 7



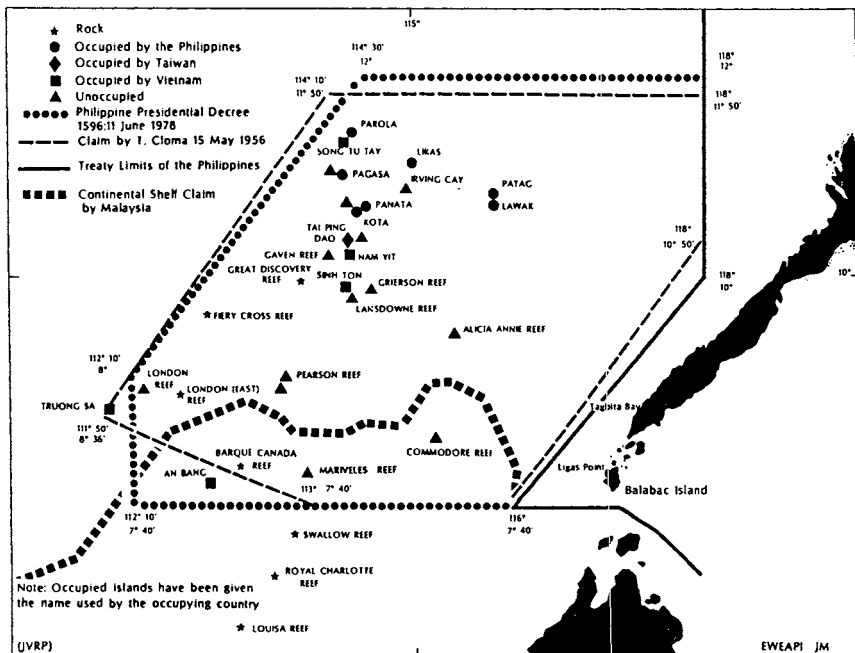
From 517134 3-74

Map J: 200-meter depths in the South China Sea.



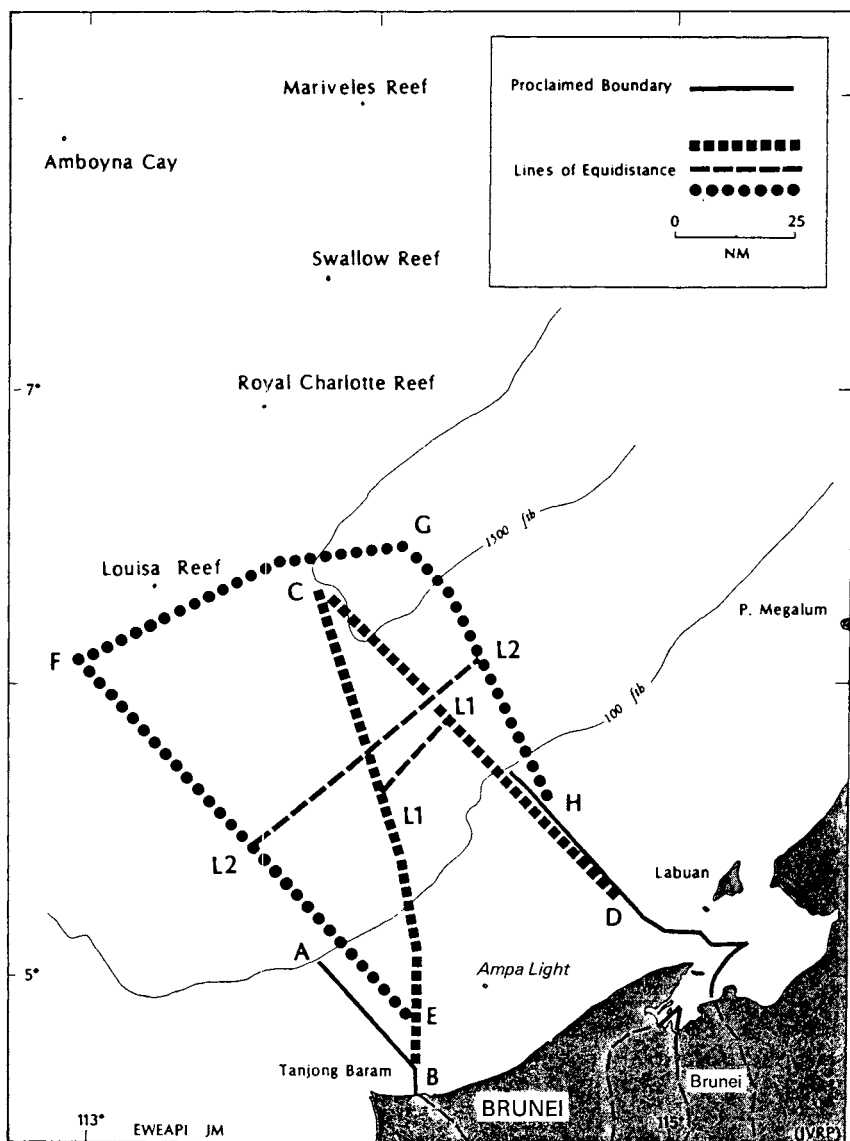
Map K-a: Maritime zones claimed by the Philippines.

Source: J. R. V. Prescott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map*, East-West Center EAPI Research Report No. 2, 1981, p. 15



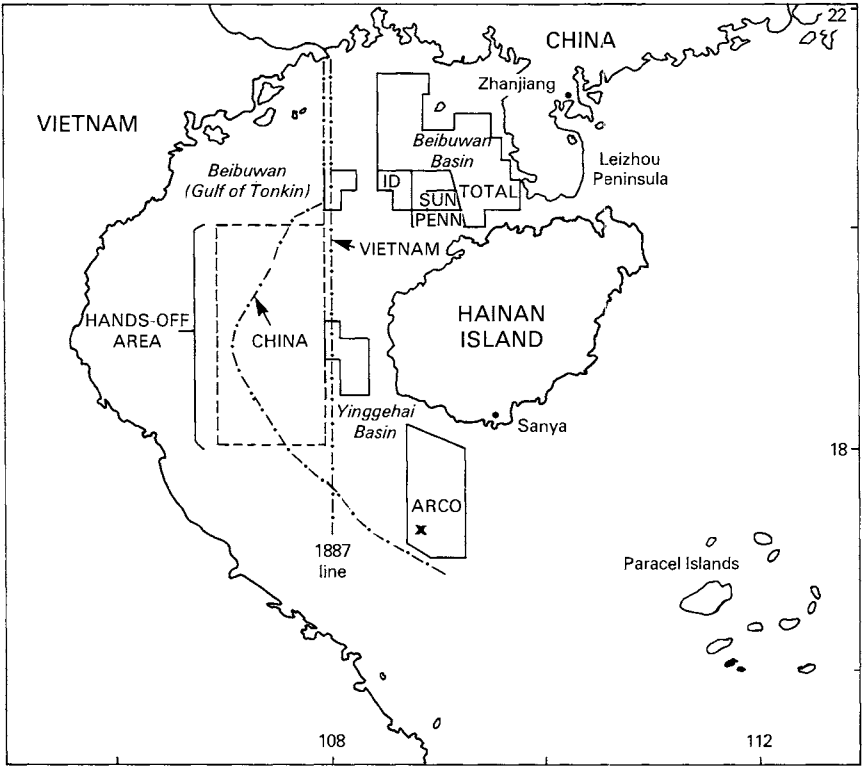
Map K-b: The Spratly Islands.

Source: J. R. V. Prescott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map*, East-West Center EAPI Research Report No. 2, 1981, p. 30



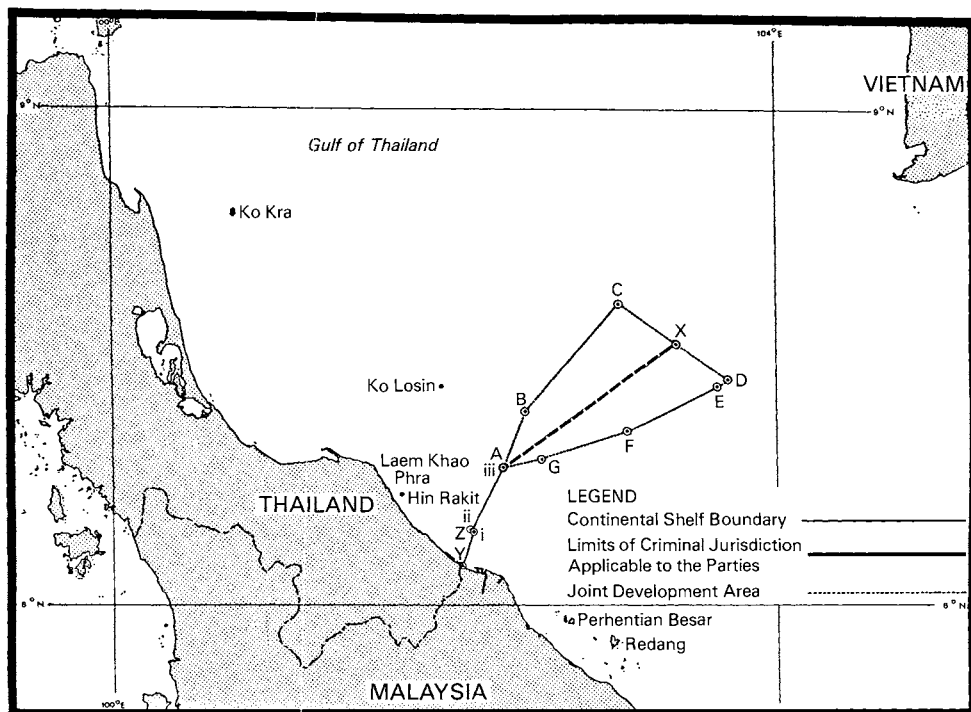
Map L: Brunei's potential maritime boundaries.

Source: J. R. V. Prescott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map*, East-West Center EAPI Research Report No. 2, 1981, p. 42



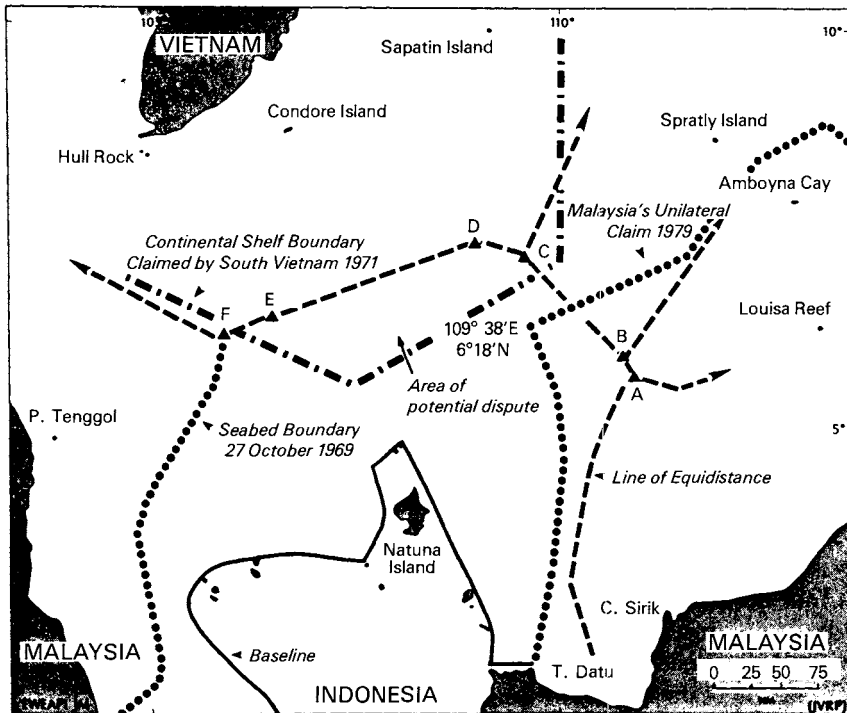
Map M: China-Vietnam: claimed borders.

Source: *Petroleum News*, February 1984, p. 12



Map N: Malaysia-Thailand continental shelf boundary (Gulf of Thailand).

Source: International Court of Justice, *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada-United States of America)*, Annexes to the Reply Submitted by Canada, Volume I, State Practice, December 12, 1983, p. 608



Map O: Maritime boundaries in the vicinity of the Natuna Islands.

Source: J. R. V. Prescott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map*, East-West Center Research Report No. 2, 1981, p. 40

CHINA AND MARITIME JURISDICTION: SOME BOUNDARY ISSUES

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This paper was first published in the *German Yearbook of International Law*, Volume 22, 1979, and it was reproduced with a postscript in the author's monograph entitled *East Asia and the Law of the Sea* (Seoul: Seoul National University Press, 1983, 445 pages).

Updates with cartographic illustrations are attached at the end of this paper.

Some important legislative developments relating to the PRC's maritime jurisdiction are:

1. Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, 30 January 1982.

2. Law on Marine Environmental Protection, 1 March 1983 (subsequently supplemented with two new laws: Regulations for the Administration of Environmental Protection in Offshore Oil Development, and Regulations for the Control and Prevention of Pollution from Ships in Coastal Waters, adopted by the PRC State Council in January 1984, promulgated in March 1984).

3. Two Special Fishery Protection Zones in the East China and Yellow Seas, in 1981.

Introduction

On the limits of its maritime jurisdiction, the People's Republic of China has been basically unspecific to date. The law of the sea itself, as it relates to the delimitation of maritime boundaries between adjacent and opposite states, is not yet specific enough to be readily applicable in geographically complicated circumstances such as in the China seas¹. Thus far, China has been under no great economic pressure to move to the sea to develop resources more readily available onshore. Furthermore, the political relations between China and some of its neighbors have not been conducive to negotiation of sea boundaries. From its own standpoint, therefore, it has been practically unnecessary for China to pronounce its maritime jurisdiction in specific terms.

In other coastal states of the China seas, however, the demand for sea resources -- oil in particular -- has been much more pressing than in China, hence, their persistent efforts to negotiate bilateral or multilateral boundaries with China. In the case of Northeast Asia, for instance, the sea-bed oil controversy took place in 1970 among the five claimants, including North Korea and Taiwan; but the issue still remains unresolved between China and the other parties involved, the decade-long "war of nerves and battle of mouths" notwithstanding. In the relatively small enclosed or semi-enclosed seas of East Asia, therefore, it will become increasingly difficult for China or any other coastal state to continue to ignore the interests of its maritime neighbors. For these reasons, China will eventually have to delimit by agreement its sea boundaries with Japan, North and South Korea, Malaysia, the Philippines and Vietnam. On the strength of its claims in the South China Sea with respect to the ownership of the Spratly

Islands, China might even find it necessary to do the same with Britain (or Brunei, due to become independent of Britain in 1983) and Indonesia as well.

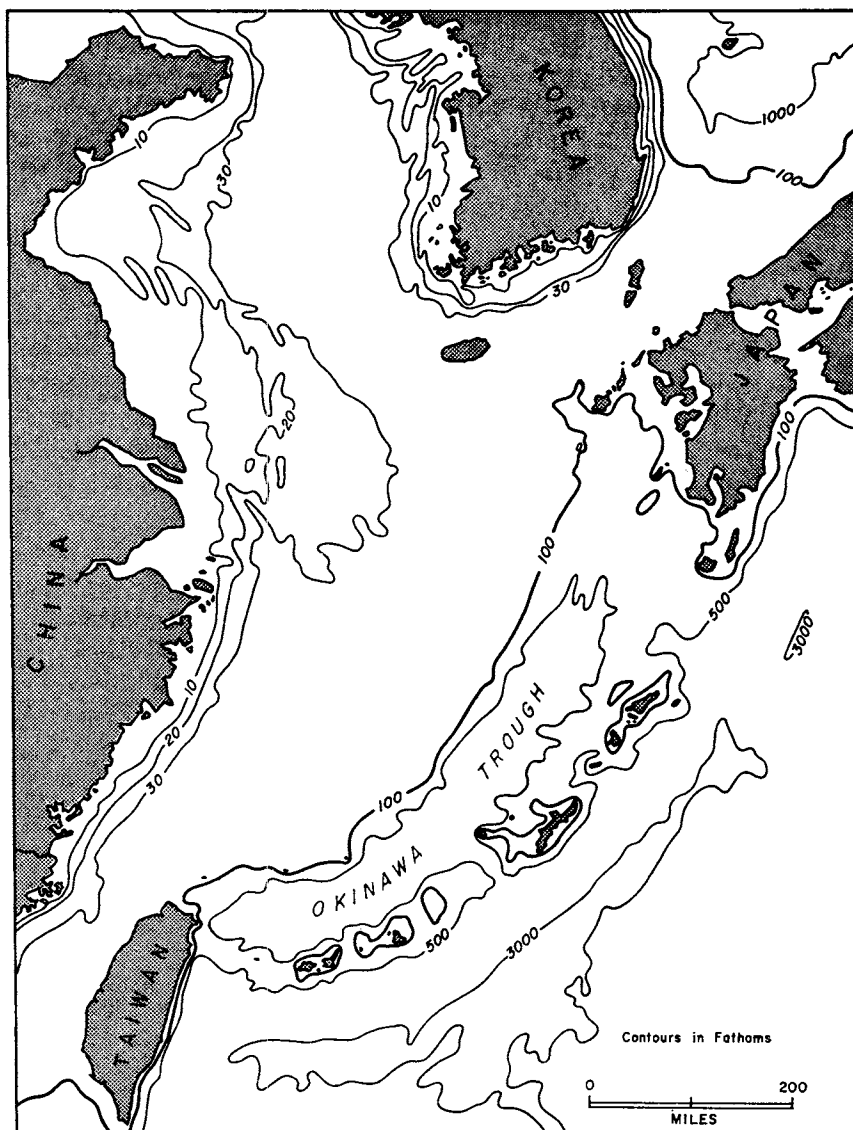
With the above assumption in mind, the present study attempts to analyze hypothetically the problems of maritime jurisdiction in the China seas with particular reference to the continental shelf and 200-mile zone boundaries between China and its adjacent and opposite states. Since the baseline for the measurement of the limit of a coastal state's territorial sea is also used for the measurement of its other maritime jurisdictions, it is necessary to take a brief look at Chinese practices relating to its territorial sea and contiguous zone. This, in turn, makes it necessary to identify some relevant geographical facts of the China seas. Thus, as general background, this introduction summarizes China's geographical circumstances, territorial sea and maritime military jurisdictions, and the territorial disputes in the East and South China Seas.

The Geographical Circumstances

Unlike other continental countries, China, with a coastline of approximately 6,000 nautical miles on the mainland alone, does not border on an ocean except marginally on the Pacific side of Taiwan; it borders on a number of relatively small seas that are also enclosed or semi-enclosed by other states whose maritime interests are as serious as China's own. Its geographical circumstances are further complicated by the fact that its coastline is not only deeply indented, but also fringed with some 3,500 islands, including Taiwan and those under ownership dispute, the length of their coastlines totalling another 5,000 miles².

The area of the three China seas should also be noted with interest. The Yellow Sea, the East China Sea and the South China Sea are approximately 400,000 square kilometers (sq. kms.), 700,000 sq. kms. and 3,400,000 sq. kms. respectively in size, each of them comparing with the North Sea's 500,000 sq. kms. Nevertheless they are all studded with so many offshore and mid-ocean islands that nowhere in the three seas does the distance from one headland or island to another approach 400 miles. In view of the stated or anticipated claims of the coastal states to the regime of a 200-mile zone, this is an important factor, even if many of the islands, especially those in the South China Sea, may not be large enough or otherwise be likely to meet the legal definition of an island.

In depth, each of the China seas varies from one another. The depth of the Yellow Sea is approximately 55 meters on the average and nowhere exceed 125 meters. The East China Sea is also shallow, its seabed sloping gently from the Chinese coast and, to a lesser extent, from the Korean coast, until it drops abruptly into the Okinawa Trough whose depth reaches nearly 2,300 meters at its deepest (see Map A). In the South China Sea, the 200-meter contour line runs relatively close to the Chinese, Vietnamese, Malaysian and Philippine coasts, with the central parts of the Sea dropping to an abyssal depth. However, the depth of the China seas is not likely to be an important factor in the delimitation of the continental shelf and 200-mile zones should the relevant provisions of the revised Informal Composite Negotiating Text (ICNT) of the current Third United Nations Law of the Sea Conference (UNCLOS III) be adopted as the new criteria.



Map A: The contours in fathom in the Yellow and East China Seas (based on *ECAFE Technical Bulletin*, Vol. 2, 1969).

Source: Choon-ho Park, *Continental Shelf Issues in the Yellow Sea and the East China Sea*, Occasional Paper No. 15, Law of the Sea Institute, University of Rhode Island, 1972.

The Territorial Sea Limit

China declared a 12-mile limit of its territorial sea on September 4, 1958³. The timing of this declaration had to do with Taiwan's plan in the late summer of that year to defend Quemoy and Matsu, the mainland's two offshore islands under its control, with United States support⁴.

For the purpose of this Study, it is important to note that China adopted the straight baseline method for the delimitation of its territorial sea. According to Paragraph 2 of the Declaration:

China's territorial sea along the mainland and its coastal islands takes as its baseline the line composed of the straight lines connecting basepoints on the mainland coast and *on the outermost of the coastal islands ... The water areas inside the baseline, including Pohai Bay and the Chiungchow Straits, are Chinese inland waters.* (emphasis added)

The mouth of Pohai Bay is approximately 45 miles wide, but, under the 12-mile limit, the presence of islands situated at the entrance would determine it as internal waters. The Chiungchow Straits, which separate the Liuchow Peninsula and the Gulf of Tonkin by a distance of less than 20 miles at its widest⁵, would also satisfy the definition of internal waters.

China's adoption of straight baselines, however, does not appear to have been substantiated through geographical coordination of points or clear indication on charts; at least no apparent publicity thereto has been made externally. The Chinese position in this connection was expounded in one of the two Working Papers which the Chinese delegation presented to the Geneva session of the United Nations Sea-Bed Committee in July 1973⁶. Paragraph 2 of its Territorial Sea section reads:

A coastal State is entitled to reasonably define the breadth and limits of its territorial sea according to its geographical features and its needs of economic development and national security and *having due regard to the legitimate interests of its neighboring countries and the convenience of international navigation, and shall give publicity thereto.* (emphasis added)

This provision would obligate the coastal state to give publicity to the defined breadth and limits of its territorial sea, but not necessarily to the charts showing its straight baselines or, alternatively, to the geographical coordinates of the basepoints, as provided in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 4 (6), or in the ICNT, Article 16 (2), for example. Compared to what is commonly observed by most other coastal states concerning publicity of their straight baselines, the Chinese practice cannot be said to be sufficiently specific in terms of "due regard to the legitimate interests of its neighboring countries and the convenience of international navigation."

With respect to the delimitation of its straight baselines, China could not have been unspecific without reason. First, among the adjacent and opposite states of the China seas, the North and South Korean coastline is more irregularly and deeply indented than the Chinese coastline, so that any method of delimitation adopted by China can possibly result in greater advantage to Korea than to China itself, if

reciprocally applied along the Korean coast. Second, by the same token, another more important reason is conceivable, this one relating to the legal status of offshore and mid-ocean islands situated in the China seas. If, as provided in the 1958 territorial sea declaration of China, all the outlying islands of China -- regardless of their size or merit -- are connected to compose its straight baselines⁷, Korea and the other coastal states with obscure islands farther offshore would be likely to do the same on their sides. Ultimately, the Chinese portion of the continental shelf and the 200-mile zone can be adversely affected by such possibilities. In other words, whatever China may have to gain from having longer segments of straight baselines can be easily outweighed by what it may have to lose in the delimitation of its continental shelf and 200-mile zone with its maritime neighbors. In such circumstances, from China's point of view specificity would not appear to serve its interests as well as ambiguity.

In the case of the East and South China Seas, the territorial status of some islands has also been a source of serious disputes over sea boundaries. The complexity as well as the particular nature of the territorial issues makes it necessary to deal with them separately⁸, though the island disputes have more immediate impact on the delimitation of the claimants' territorial sea limits.

The Military Jurisdictions

In April 1955, a non-governmental fisheries agreement was signed in Peking between the private fisheries associations of China and Japan⁹; in the absence of diplomatic relations between the two countries, a formal agreement was not possible. In the course of the three-month-long negotiations, the Japanese negotiators were astonished to be notified by their Chinese counterparts that in the interest of defense security and military needs, the Chinese government had designated three offshore areas of China as military zones, namely:

The Military Warning Zone, situated in the northwestern part of the Yellow Sea, into which Japanese fishing vessels would not be admitted except by permission of the Chinese government;

The Military Navigation Zone, situated in the Hangchow Bay south-east of Shanghai, into which Japanese fishing vessels would not be admitted at all; and

The Military Operations Zone, situated south of the 29th northern latitude and north of Taiwan, which Japanese fishing vessels would enter only at their own risk.

The Military Warning Zone, enclosed by a straight line roughly connecting the estuary of the Yalu River and the eastern end of the Shandong Peninsula, reaches far beyond China's 12-mile territorial sea limit proclaimed in 1958. The Military Navigation Zone is a relatively small area covering most of the Chousan islands but only marginally reaching out beyond 12 miles from what would be the nearest basepoint of China. The Military Operations Zone is indeterminate in terms of its spatial extent, because the above-mentioned Chinese notification given to the Japanese negotiators in 1955 did not indicate the eastern limit; by a State Council decree of July 26, 1957, the northern limit of the Zone has been moved southward to the current 27th northern latitude¹⁰.

Although, due to apparent absence of publicity thereto, the exact sources and dates of these military measures are not ascertainable, they are known to have been proclaimed sometime in 1950 when, with the outbreak of war in Korea, tension began to mount fearfully in the Yellow and East China Seas. In their private capacity, therefore, the

Japanese negotiators found it difficult to refute the legality of zones formed by China supposedly for the security of its national defense. Consequently, in the interest of Japanese fishing in the offshore waters of China, Japan had to agree to observe China's military restrictions, on the understanding that they would be applied indiscriminately to all foreign fishing vessels¹¹.

The Sino-Japanese non-governmental agreement was renewed in 1963¹² and 1965¹³ and, with their relations normalized in 1972, a formal fisheries agreement was finally signed in August 1975¹⁴, which still remains in effect to date. At each renewal of the non-governmental arrangements in 1963 and 1965, the military measures were carried over virtually without change. Upon signing the formal agreement of 1975, however, it was made clear by Japan that, while Japan could not admit the Chinese position with respect to the military zones, "in consideration of the necessity for preserving fishery resources in [the zones]," Japanese fishing vessels would refrain from entering them for purposes of conducting fishing operations. The formal agreement of 1975 is silent on the previous Military Navigation Zone, making it unclear whether it has been abolished, simply left to lapse, or whether it still remains in force.

The maritime security measures of a coastal state taken as a military expedient would not be expected to outlast the causal situation from which they originated. However, with Korea ideologically divided and still under the 1953 armistice, of which China itself is a signatory, and with Taiwan under its own leadership, China probably regards the chronic tension in the Yellow and East China Seas as a *raison d'être* for its military zones. In the South China Sea, Vietnam added a 12-mile contiguous zone beyond its 12-mile territorial sea in May 1977¹⁵, one of its purposes being "to see to its security and other interests." Furthermore, due to the deterioration of relations between China and Vietnam in recent years, tension is building up again in this part of the China seas.

In the Yellow and East China Seas, regulation of foreign fishing has often been a source of serious political issues between and among the coastal states, especially in time of local tension; Japanese fishermen's experience with the now defunct Clark Line (1952-1953)¹⁶, a sea defense zone proclaimed around the Korean peninsula during the war (1950-1953), is a classical example. Sea-bed activities to seek or develop mineral resources would not escape the watchful eyes of the adjacent and opposite coastal states with the degree of security-sensitivity commonly seen in this region. In such circumstances, it would appear impractical for a coastal state to consider its maritime economic jurisdiction and its security jurisdiction as entirely separate issues. In fact "to reliably safeguard its economic sea zone," North Korea put into force a 50-mile military boundary zone¹⁷, in August 1977, whose outer limit in the Yellow Sea coincides with that of its economic zone. Consequently, in the northern part of the Yellow Sea China's Military Warning Zone and North Korea's Military Boundary Zone have left only a narrow strip of "non-military" waters.

The Territorial Disputes over Offshore Islands

In the East China Sea, the ownership of eight uninhabited islands situated northeast of Taiwan and west of Okinawa (called the *Senkaku* in Japanese and the *Tiaoyutai* in Chinese) is seriously contested by China, Japan and Taiwan. Territorial disputes easily fire the national sentiments of the parties involved, but there is another particularly

important reason why the Senkaku-Tiaoyutai case remains one of the most sensitive political issues primarily between China and Japan since 1969. Neither party will easily compromise its claims due to the oil supposedly underlying the sea-bed areas of the islands. Currently, the islands are not in full control of either claimant.

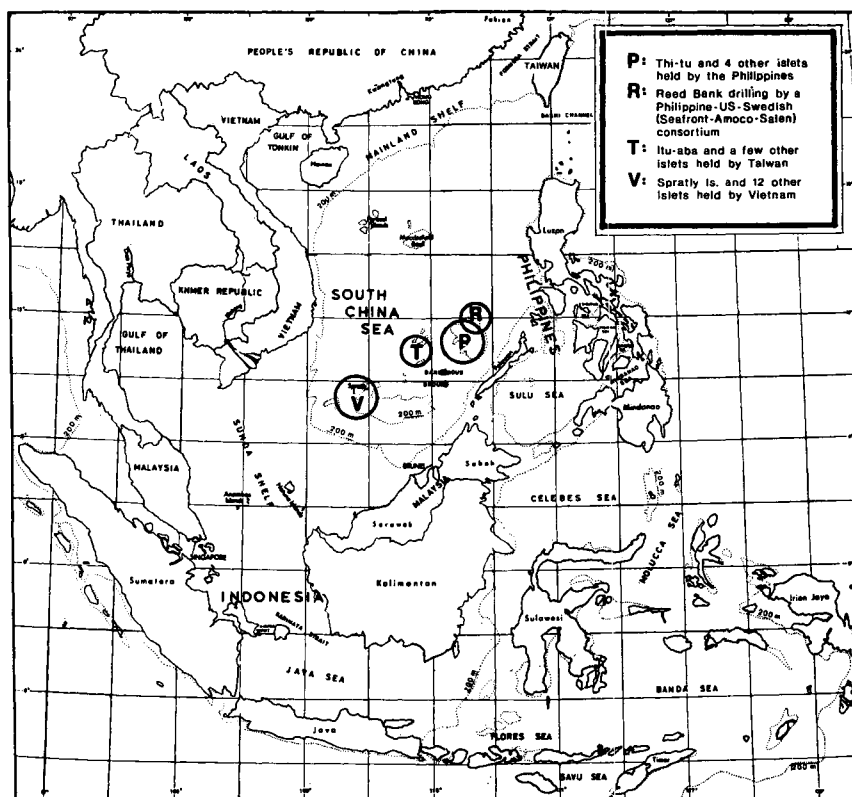
In the South China Sea, an island group called the Paracel Islands situated southeast of China's Hainan Island and east of Vietnam (called the *Xisha* in Chinese and the *Hoang Sa* in Vietnamese) is claimed by China, Taiwan and Vietnam¹⁸. Since January 1974, when China and the now defunct South Vietnam held a two-day *blitzkrieg*, the islands have been under Chinese control. Subsequently, in April 1975, the socialist regime of Vietnam inherited the burden of contesting the Chinese claims, in observance of what the former Saigon government defined as "the Vietnamese tradition [whereby] the temporary loss of physical control over a territory does not mean the relinquishing of a legitimate right"¹⁹.

Also in the South China Sea, there is another territorial dispute, which is far more complicated than the Paracel Islands case. The Spratly Islands (called the *Nansha* in Chinese and the *Truong Sa* in Vietnamese) cover the southern expanse of the South China Sea, and are claimed by China, the Philippines, Taiwan and Vietnam²⁰. In fact, with the exception of China each claimant is in control of some islands in the group consisting of over 70 islands altogether (see Map B). Furthermore, the Philippines is reported to have been successful in its efforts to locate oil in the Reed Bank area, albeit in modest quantity as yet.

As most of them are uninhabited banks, rocks, shoals and coral outcroppings²¹, the tiny islands in dispute are virtually negligible in physical value. In enclosed or semi-enclosed seas, however, even an obscure island large enough or otherwise qualified for a base point could substantially affect boundary delimitation between or among the coastal states in favor of its owner(s). For this reason, none of the parties to the above three disputes would confine its interests to the physical value of the islands claimed, but would count on the economic value of what it might be entitled to by virtue of the ownership of the "fly-specks."

The seriousness of the Chinese claims to the islands in the South China Sea may be seen, for example, from the fact that the 1958 declaration of its territorial sea limit provided (in Paragraph 4) for the adoption of straight baselines to be drawn around the four archipelagoes, including the Paracel and Spratly Islands. In passing, it may also be noted with interest that one of the four mid-ocean archipelagoes that China claims is only comprised of a group of 29 underwater elevations called the Macclesfield Bank (the *Zhongsha* in Chinese) situated in the middle of the South China Sea. According to some Chinese sources, however, "the submerged atolls will eventually surface, coral reefs growing at a pace of some 10 centimeters a year"²².

These territorial disputes are basically legal issues and are, in fact, argued in the polite and inoffensive language of law and diplomacy. Each disputant bases its contention on history, geography, international law and even geology, but nevertheless the disputes are political problems that would have to be settled accordingly. China and Japan have already experienced the difficulty of resolving political questions of this nature over the Senkaku-Tiaoyutai dispute²³, and China and the other parties to the South China Sea disputes are likely



Map B: The Spratly Islands under divided control (base map from John Marr, *Fishery and Resource Management in Southeast Asia*, Resources for the Future, Inc., Washington, D.C., 1976, 6-7)

Source: Choon-ho Park. "The South China Sea Disputes: Who Owns the Islands and the Natural Resources?", *Ocean Development and International Law Journal*, 1978, 27-59 (29).

to face a similar difficulty. In enclosed or semi-enclosed waters troubled with ownership of offshore islands, therefore, delimitation of boundaries as well as development of resources could be delayed indefinitely, pending settlement of the territorial issues, as has happened in the East China Sea over the Senkaku-Tiaoyutai dispute.

Maritime Boundary Issues Between China and Its Adjacent and Opposite Coastal States

Against the foregoing background, the current and potential maritime boundary problems between China and the other coastal states in its neighborhood may now be analyzed with particular reference to the delimitation of their continental shelf and 200-mile zone boundaries.

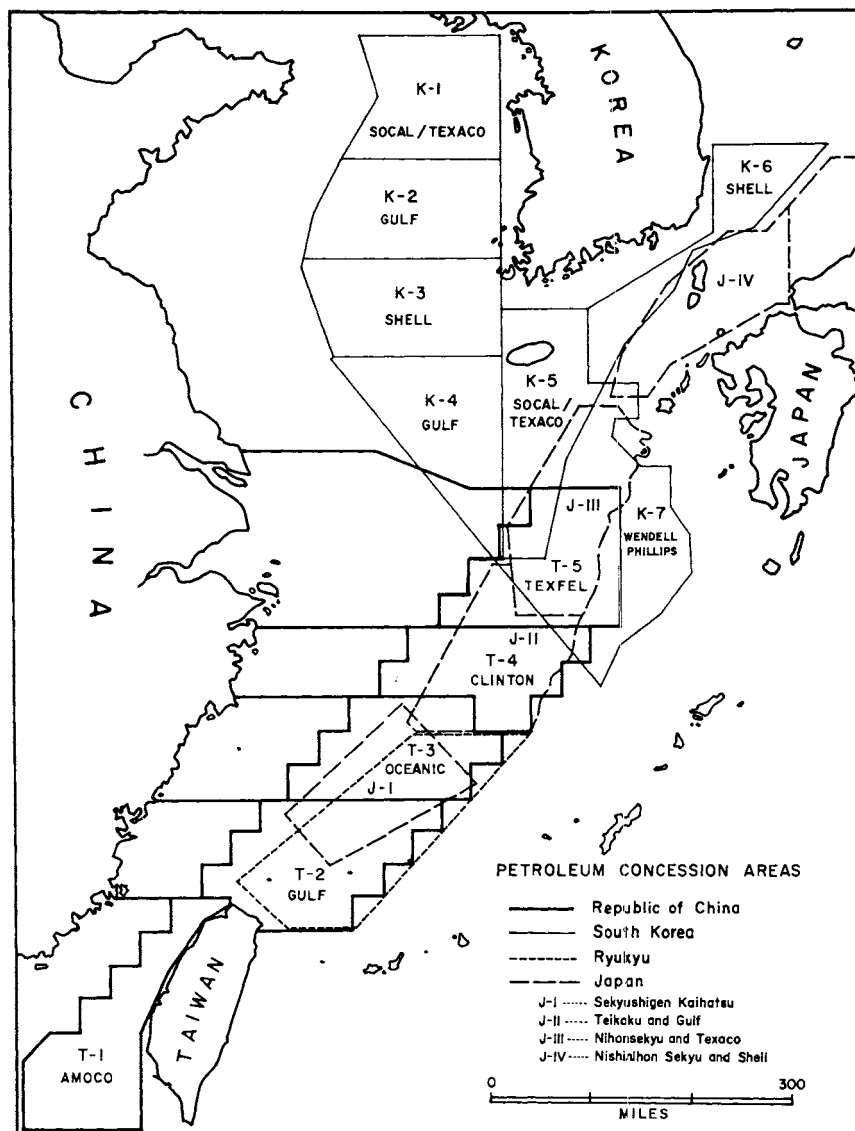
*Boundary Issues between China and Japan, China and South Korea, and Japan and South Korea*²⁴

In early 1969, based on a geophysical survey of the Yellow and East China Seas²⁵, the United Nations Economic Commission for Asia and the Far East (ECAFE)²⁶ hinted at a potentially high promise of oil in some offshore areas between China, Japan and Korea. Excited by the sensational report of oil, Japan, South Korea and Taiwan -- three of the coastal states heavily or totally dependent on imported oil -- tried, in a flurry of competition, to grab as much of the sea-bed area as possible. By September 1970, each had staked out unilateral claims to most parts of what it regarded as its own share of the continental shelf, including one area claimed by the then Ryukyu government under United States administration. As many as 17 sea-bed oil zones had been established, with 13 of them overlapping partly or substantially with one another (see Map C).

The three coastal states also hastened to enter into concessions or other forms of contact with Western oil interests for the purpose of exploring their seabed zones²⁷. In doing so, Japan, having no seabed mining law, had to apply *mutatis mutandis* its general mining law of 1950²⁸. South Korea hastily enacted a submarine resources development law in January 1970²⁹, as did Taiwan in August 1970³⁰. At the same time, the Taiwan government also initiated domestic procedures to ratify the 1958 Geneva Convention on the Continental Shelf; by depositing the instrument of ratification with the United Nations in October 1970³¹, Taiwan became the forty-third party to the Convention.

In laying unilateral claims to the continental shelf, each coastal state applied a different principle of international law. Japan adopted the median-line principle as defined in Article 6(1) of the Geneva Convention. Taiwan adhered to the natural prolongation of land territory principle as suggested by the International Court of Justice (ICJ) in its 1969 judgment of the *North Sea Continental Shelf Cases*³². South Korea relied on a hybrid of the Japanese and the Taiwanese approach, by applying the median-line principle toward China in the Yellow Sea and the natural prolongation of land territory principle toward Japan in the East China Sea. When none of them showed the slightest inclination to compromise its claims, it was rightly feared that, in the face of debilitating oil shortage, their efforts to confirm the presence of oil in their own backyard would have to be suspended, pending agreement on their continental shelf boundaries.

In search of a breakthrough in what appeared to be an endless legal scramble, a three-party (Japan, South Korea and Taiwan) development scheme was conceived in July 1970, whereby oil would be jointly developed and shared among them, leaving the continental shelf boundary



Map C: Unilateral claims and concessions in the Yellow Sea and East China Sea (based on US State Dept. Office of the geographer map no. 261 7-71).

Source: Choon-ho Park, *Harvard International Law Journal*, 14 (1973):219.

issues for future negotiation³³. However, by late 1970, when Japan, South Korea and Taiwan had agreed to proceed with the scheme, Peking came forward with a strong protest³⁴, which had a chilling effect not only on the three partners themselves but also on the foreign licensees involved. Practical as it appeared to be under the circumstances, the first attempt at joint development was thus stalled even before the practicality of the idea was put to test. Subsequently, a second attempt was made by Japan and South Korea alone in 1974, as is noted later in this section.

In the meantime, the law of the sea itself was undergoing some basic changes, especially with respect to the continental shelf. As a result of the 1969 ICJ judgment in the *North Sea Continental Shelf Cases*, the applicability of the median-line principle was substantially undermined by the emergence of the natural prolongation of land territory principle. Because of the depth and seabed topography in the East China Sea, therefore, the above judgment could hardly have been more timely to China (and, to a lesser extent, to South Korea), and more untimely to Japan. In its above-quoted Working Paper³⁵, presented to the UN Sea-Bed Committee in July 1973, China even "localized" the term "natural prolongation of land territory" to read the "natural prolongation of *continental* territory." (emphasis added) Furthermore, the legal definition of the continental shelf itself is now being changed at UNCLOS III. In the successive versions of the negotiating texts³⁶, a 200-mile limit has emerged in place of the 200-meter depth criterion and the exploitability test. As a specific case, under this new definition the Okinawa Trough could cease to be a limiting factor on Japan in the delimitation of the East China Sea continental shelf.

The regime of a 200-mile economic zone also represents another important development that has emerged in the law of the sea since the seabed controversy took place in the Yellow and East China Seas. Within 200 miles from the baseline, the depth of the sea would be irrelevant to delimitation of economic jurisdiction, the latter being a new form of maritime sovereignty which a coastal state would be entitled to claim even more comprehensively than its continental shelf jurisdiction. First presented by Kenya³⁷ to the UN Sea-Bed Committee in August 1972 following a consensus at regional levels³⁸, the proposed regime has since become the new maritime order of the day -- and so rapidly that, as of January 1979, as many as 76 independent coastal states out of 131 were known to have adopted a 200-mile limit for fishing or other economic purposes³⁹.

As a new criterion to define the continental shelf and as the extent of an exclusive economic zone, the 200-mile limit now threatens, in turn, to undermine the natural prolongation of land territory principle as applicable between China, Japan and South Korea. Consequently, this chain of events attending the law of the sea would enhance the likelihood of the median-line principle regaining its applicability between these three coastal states.

The emergence of the 200-mile limit as applicable in the East China Sea would, therefore, appear to be definitely advantageous to Japan rather than to China and South Korea. In extra-regional terms, however, it would not necessarily be so, because of Japan's global interest in the use of the sea and its resources. Also it should be pointed out that adjacent and opposite coastal states would determine their maritime boundaries not by mechanical application of legal principles but by negotiated agreement based on legal principles as guidelines or points of departure.

At the present time, it would be difficult for the coastal states of the Yellow and East China Seas even to get together for sea boundary negotiations, largely because of political relations between China and the divided Korea. Japan and South Korea have in fact voiced their willingness to seek negotiated agreement with China, their overtures only to be met with silence. Hereupon, a second attempt at joint development of the continental shelf was made, this time between Japan and South Korea alone, when they signed an agreement in January 1974⁴⁰. Subject to abrogation at or after the expiry of its 50-year mandatory period (Article 31:2-3), the agreement froze the surface boundary issue (Article 28) and stipulated the conditions under which the two parties would develop mineral resources believed to underlie the disputed waters. As expected, Peking registered its displeasure, warning Japan and South Korea against "[i]nfringing on China's sovereignty." when "it [s]tood to reason that the question of how to divide the continental shelf in the East China Sea should be decided by China and the other countries through consultations"⁴¹.

South Korea ratified the agreement in December 1974, but it was not until June 1978 that Japan finally did so after four and a half years of procedural manipulation⁴². The reluctance of the Japanese parliament to approve a pact the government had signed with South Korea may be ascribed to both China's protest and, more importantly, to the fact that virtually the entire sea area to be jointly developed is situated on the Japanese side of what would quite likely be the median-line between China and Japan as well as between Japan and South Korea⁴³. Rightly or wrongly, opponents of the pact in Japan might have counted on the potentiality that under the emerging 200-mile limit, the agreement area would eventually fall under Japanese jurisdiction, hence why foreclose such a potentiality by hastily effecting an agreement that might possibly remain in force for a minimum of 50 years? The supporters of the pact, on the other hand, might have been somewhat uncertain about the prospect of the 200-mile limit; hence, the urge to secure what might otherwise fall under South Korean jurisdiction on the strength of the natural prolongation of land territory principle.

Over eleven years have passed since the possible presence of oil in the Yellow and East China Seas was hinted at in the 1969 ECAFE report. Nevertheless, the coastal states have yet to confirm a sniff of oil in their troubled waters. If oil is found in quantities, the joint development scheme will prove to be more than an alternative in default. In case of no oil, however, the scheme will, for Japan and South Korea, turn out to be much ado about nothing. In either case, the fact will remain as a reminder that Japan has agreed to develop what lies on its own side of the median-line jointly with a competing claimant, a fact that may imply its compromise of the median-line principle. Consequently, if Japan seeks to apply this principle towards China in an adjacent part of the same waters, China may refuse to accept it on the grounds of Japan's inconsistency, among other reasons. Although, as stipulated in its Article 28, the joint development pact does not concern itself with the surface boundary, this point cannot be entirely moot, for the reasons that a coastal state's sovereign rights over its continental shelf are exercised for the exploitation of the resources in it and that its sovereignty over a depleted part of the continental shelf would be basically meaningless or even unnecessary. Furthermore, in the case of China and Japan, the settlement of the Senkaku-Tiaoyutai dispute could be prerequisite to the delimitation of

their sea boundary or even to the development of resources to be found in that part of the East China Sea.

Boundary Issues between China and North Korea

On July 1, 1977, North Korea announced its decision to put into force an exclusive economic zone to a limit of 200 miles from August 1, 1977⁴⁴. Among China's maritime neighbors, North Korea thus became the second to claim a 200-mile economic zone, the first being Vietnam whose zone was declared on May 12, 1977⁴⁵. For the purpose of this Study, it is important to note that, in the Yellow Sea, which is not wide enough for China and North Korea to apply their 200-mile limits toward each other, North Korea defined the outer limit of its economic zone by adopting "the half-line of the sea."

North Korea has been as unspecific as China with respect to the baseline from which its territorial sea is to be measured, so that it is not possible for outside observers to determine exactly how far the median-line as referred to in its declarations would extend toward China from "the starting line of [its] territorial waters." For practical purposes, North Korea would also need to draw two lateral sea boundaries with South Korea on the east and west coasts, but, for political reasons, no reference appears to have been made thereto. Neither is it clear how the lateral sea boundary with the Soviet Union would be drawn in the Sea of Japan. On the other hand, North Korea did enhance the exclusivity of its economic zone by simultaneously declaring a 50-mile military boundary whose outer limit, in the Yellow Sea, coincides with that of its economic zone, as is noted earlier⁴⁶.

The relatively small northern part of the Yellow Sea is the only area where China and North Korea need to draw a sea boundary -- a lateral one -- but no agreement seems to have been reached to date, or at least no external publicity thereto seems to have been given. Whatever the position, in delimitation of sea boundaries with adjacent or opposite states China would have insisted on the natural prolongation of land territory principle and North Korea on the median-line principle, as may be seen from their official statements. In the area of the sea between China and North Korea, not only are the geographical circumstances relatively more simple than in other parts of the Yellow Sea or in the East and South China Seas, but also no offshore territory is reported to be under dispute between them. If the two political allies were nevertheless to disagree on the delimitation of their sea boundary or were to decide to give no publicity to the agreement reached, some circumstantial reasons would be conceivable for their contention or silence. China would not easily accept the median-line principle or, if it did decide to under particular circumstances, it would feel no practical need to give publicity thereto, because its position could be potentially weakened with Japan, South Korea, and possibly other coastal states with which it has sea boundary problems. By the same token, North Korea would be careful not to imply compromise of its stated adherence to the median-line principle, unless its position toward South Korea and the Soviet Union would remain thereby unaffected.

Boundary Issues between China and Vietnam

On May 12, 1977, the government of Socialist Republic of Vietnam made a 7-point proclamation relating to the maritime jurisdiction of the unified Vietnam⁴⁷. The 12-mile limit of territorial sea, which was originally declared by North Vietnam in September 1964⁴⁸, was

reaffirmed, and a 12-mile contiguous zone was established "to see to its security and [other] interests." An exclusive 200-mile economic zone was established, with the sovereign rights of Vietnam specified broadly along the lines of the 1976 Revised Single Negotiating Text of UNCLOS III. The continental shelf of Vietnam was defined in a similar way, i.e., with reference "to the natural prolongation of the Vietnamese land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles ... where the edge does not extend up to that distance." The proclamation also specifically provides that "[the] islands and archipelagoes, forming an integral part of the Vietnamese territory and beyond the Vietnamese territorial sea ... have their own territorial sea, contiguous zones, exclusive economic zones and continental shelves." As a whole, the proclamation is generally comprehensive, but even more unspecific than China's or North Korea's with respect to the delimitation of baselines.

By comparing the maritime jurisdictions of China and Vietnam, it is now possible to identify the points of conflict that would arise in the delimitation of their sea boundary in the Gulf of Tonkin and the South China Sea. First, for the delimitation of the continental shelf, both of them would seek to apply the natural prolongation of land territory principle. In the Gulf of Tonkin, this principle would be more advantageous to Vietnam than to China because of the seabed topography. In fact, as was reported in September 1978, China was concerned that its Hainan Island would hardly be left with a 12-mile limit of territorial sea under measures Vietnam would press on China for the delimitation of the sea boundary in the Gulf⁴⁹. The very formula believed to be advantageous to China in one situation -- in the Yellow and East China Seas -- would thus threaten to undermine its position in another -- the Gulf of Tonkin. In its unilateral claims in the Gulf of Tonkin, however, Vietnam does not appear to have been consistent. When, in April 1973, North Vietnam reportedly reached an agreement with *Ente Nazionale Idrocarburi* (ENI), the Italian state oil company, for drilling in the Gulf, the outer limit of the area specified in the agreement was approximately the median-line toward China⁵⁰. Vietnam's subsequent emphasis on the natural prolongation of land territory principle may have originated from its belief that this principle would be advantageous for itself in relation to China in the Gulf of Tonkin and in relation to Indonesia in the Sunda Shelf. In this regard, a reference in China's 8-point peace proposal to Vietnam following the Sino-Vietnamese conflict of February 1979 should be noted with interest⁵¹:

4. Each side shall respect the other side's sovereignty over its twelve-nautical mile territorial sea, and the two sides shall demarcate their respective economic zones and continental shelves in the Beibu Gulf and other sea area in a fair and reasonable way in accordance with the relevant principles of present-day international law of the sea.

Second, China has neither declared an exclusive 200-mile economic zone, nor formally defined its continental shelf, whereas Vietnam has done both and has, with its proclamation of May 1977, further provided the legal status of what it regards as its own islands and archipelagoes, a provision that may have been prompted by the fact that Vietnam has serious territorial disputes with China, the Philippines and Taiwan in the South China Sea and with Kampuchea in the Gulf of Thailand⁵². For these reasons, negotiations for sea boundary delimitation in the

Gulf of Tonkin and the South China Sea would not be possible, unless the maritime claims of China as well as the other coastal states involved were specified, the disputes over the ownership of the islands were settled, and the legal status of the islands were agreed on among the coastal states.

Observations

The decade-long seabed controversy in Northeast Asia betokens the difficulty of delimiting the continental shelf and the exclusive economic zone between adjacent and opposite states. This also can be seen from the deadlock in Negotiating Group 7 of UNCLOS III⁵³, to which this topic was assigned as one of the outstanding hard-core issues, as well as from the indeterminate language in Articles 74 and 83 of the Revised ICNT. By the end of its Resumed Eight Session, UNCLOS III will have been in session for a total of 63 weeks since 1973, but the relevant provisions -- Articles 74(1) and 83(1) -- simply read:

The delimitation ... between adjacent or opposite States shall be effected by agreement in accordance with *equitable principles*, employing, where appropriate, *the median or equidistance line*, and taking account of all the relevant circumstances. (emphasis added)

At UNCLOS III, Negotiating Group 7 was baffled by the futile exchanges between the advocates of "equitable principles" and the "median-liners." Since UNCLOS III can only provide general criteria at best on issues as complicated as the present ones, China and its maritime neighbors of the enclosed and semi-enclosed seas may eventually find themselves in an endless scramble to solve such questions as, for example, what these "equitable principles" and "relevant circumstances" actually are, and in what situations it is "appropriate" to take "all the relevant circumstances" into account. From the definitions of the continental shelf and the exclusive economic zone as given in the Revised ICNT, it would also be technically possible to conceive of a situation in which the sea-bed (continental shelf) boundary between two adjacent or opposite states might not necessarily coincide with that of their surface (economic zone) boundary, if, in the sea area in question, either side should decide to opt for the mineral resources at the expense of the non-sedentary living resources.

Apart from such legal technicalities, boundary delimitation in the China seas can be further complicated and delayed by the difficulty of settling the politically sensitive territorial issues. For example, when, in the summer of 1979, Japan sought to confirm Chinese intent to develop oil jointly within the disputed Senkaku-Tiaoyutai area, China was reported to have responded affirmatively, on the condition that the joint attempt would in no way affect its stand on the territorial issue. Hereupon, the Japanese government decided to suspend further action, in order not to fall into what China was careful to avoid⁵⁴. Thus, in a region where the nations have yet to engender the tradition of resolving their disputes by means of adjudication, arbitration or other forms of third-party involvement, territorial issues are likely to remain a negative factor in sea boundary delimitation.

Among China's maritime neighbors, only North Korea and Vietnam have each declared an exclusive 200-mile economic zone, and, in the case of Japan, its provisional 200-mile fishing zone does not apply in waters beyond its territorial sea and certain specified areas on the west, thereby to avoid conflict with China, North and South Korea.

Both in Northeast and Southeast Asia, the other coastal states seem to find it impractical for any one of them alone to extend its maritime jurisdiction into areas that would demand multilateral arrangements. Partly because of this interlocking situation, China itself appears to have been reluctant to declare a 200-mile zone, and, if it does, the declaration would have to be as unspecific as its territorial sea declaration of 1958, for example. In view of the fact that China, ever since 1971 when it replaced Taiwan in the United Nations, has been most active in its support of the 200-mile regime, it is ironic to realize that, in the enclosed and semi-enclosed seas it borders on, there is not a single spot where a 200-mile limit can be applied without overlapping with those of the other coastal states. A measurement shows that even on the Pacific side of Taiwan, the Chinese or Taiwanese sector would hardly reach 115 miles before it was wedged in by the Japanese and the Philippine sectors⁵⁵.

Such interlocking situations need not always be a negative factor; they could, after all, urge the coastal states to seek multilateral delimitation in the interest of expediting resources development. Since, at the present time, the political relations between China and some of the coastal states in the region are unfavorable to the negotiation of multilateral sea boundaries, it would still be premature to expect the boundary and territorial issues to be resolved in the near future. With the demand for food and energy resources becoming more and more pressing in all the coastal states including China itself⁵⁶, however, it would be difficult for any one of them to turn a deaf ear to the plight of its maritime neighbors indefinitely. In spite of the afore-mentioned negative factors, then, there are also some positive ones that will move the coastal states to face the issue in a spirit of cooperation or compromise. First, in an enclosed or semi-enclosed sea, the conservation of living resources cannot be successful without multilateral arrangements among the coastal states. Second, the exploitation of unitized oil and gas deposits would require cooperation between or among the claimants in the interest of economic recovery; otherwise, there might be little, if anything, left to reap in the way of the non-cooperator's benefit. Third, in few other enclosed or semi-enclosed seas are multilateral measures for marine pollution control so deficient, if not entirely absent, as in the China seas; whereas the hazards arising from intensified use of the sea and its resources are thought to be on the increase. It is to be hoped that, for these reasons, the nations so intransigent over land issues may be brought together by the sea.

NOTES

1. "The China seas" as used in this study refers to the Yellow Sea, the East China Sea, the South China Sea, the Gulf of Tonkin, and the Sunda Shelf, collectively or selectively, as the case may be.

2. For the geographical circumstances of China, see *I. Hu*, *Zuguode Haiyang* (The fatherland's ocean), 1956, 3; *S. J. Yeh and H. T. Liu*, *Zhongguo Ziran Dili Zonglun* (The natural geography of China), 1959, 37; and *Huang Jiu-shun*, *Zhongguo Dili Gailun* (Introduction to the geography of China), 1978, 78-87. A "mile" in this study refers to a nautical mile.

3. For the Chinese text, see *People's Daily*, Sept. 5, 1958; for the English text, see *Peking Review*, Sept. 9, 1958, 21; and for a brief comment on the Declaration, see *Liu Tse-yung*, *A Major Step to Protect China's Sovereign Rights*, *Peking Review*, Sept. 9, 1958, 11-13; for an analysis of China's territorial sea problems, see *Fu Zhu*, *Guanyu Wo-guode Linghai Wenti* (Concerning the question of our country's territorial sea), 1959; the English translation in *Jerome A. Cohen and Hungdah Chiu*, *People's China and International Law*, Vol. I, 1974, 470-487.
4. *Cohen and Chiu* (n.3), 469.
5. *Tao Cheng*, *Communist China and the Law of the Sea*, *American Journal of International Law* (AJIL) 1969, 47-73 (61). For further details and a map, see *Limits in the Seas*, No. 43, *People's Republic of China*, Office of the Geographer, US Dept. of State, 1972, 3.
6. United Nations, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond National Jurisdiction, Vol. III, General Assembly Official Records: Twenty-Eighth Session, Supplement No. 21 (A/9021), 1973, 71-74 (72).
7. For China's hypothetical straight baselines, see the map in *Limits in the Seas* (n.5), No. 43.
8. See section 4, *Territorial Disputes over Offshore Islands*.
9. For the Chinese text, see *Zhonghua Renmin Gongheguo Tiaoyueji*: TYJ (The People's Republic of China treaty series), Vol. 4, 1958, 265-278; for the English translation (the principal text only), see *B. McChesney*, *International Law, Situation and Documents*, Vol. LI, 1956, 368-370; for the German translation with a brief remark, see *Vertrage der Volksrepublik China mit anderen Staaten* (VdVRC), *Schriften des Instituts für Asienkunde in Hamburg*, IXX-1, 1962, 150-160, and for the Japanese text, see *Nitchu Kankei Shiryoshu* (Documents on Japan-China relations), *Nitchu Kokkyo Kaifuku Sokushin Giin Renmei* (The parliamentarians' association for the restoration of Sino-Japanese relations), 1945-1970, 1971, 325-334.
10. *Choon-ho Park*, *Fishing Under Troubled Waters: The Northeast Asia Fisheries Controversy*, *Ocean Development and International Law Journal*, 1974, 93-135 (maps at 112-113).
11. *Park* (n.10), 114-115 and 120-121.
12. For the Chinese text, see TYJ (n.9), Vol. 12, 1963, 254-272; for the English translation, see *Current Background*, No. 724, Dec. 6, 1963, 1-2 and 4-16; for the German translation, see VdVRC (n.9), XII-4, 1968, 168-178; and for the Japanese text, see *Nitchu Kankei Shiryō* (n.9), 345-355.
13. For the Chinese text, see *People's Daily*, Dec. 18, 1965; for the English translation, see *Survey of China Mainland Press* (SCMP), No. 3613, 1966, 27-42; for the German text, see VdVRC (n.9), XII-4, 1968, 178-183; and for the Japanese text, see *Nitchu Kankei Shiryō* (n.9), 355-369.
14. For the English text and a map (revised), see *Limits in the Seas*, No. 70 (n.5); and for subsequent revisions, see *Sankei Shinbun*, morning ed., Dec. 10, 1978, 3.
15. For details, see chapter II, section 3.
16. *Mark W. Clark*, *From the Danube to the Yalu*, 1954, 150; *Choon-ho Park*, *The 50-Mile Military Boundary Zone of North Korea*, AJIL, 1978, 866-875 (872-873); and on the military uses of the sea in general, see *Uwe Jenisch*, *Das Recht zur Vornahme militärischer Übungen und Versuche auf Hoher See in Friedenszeiten*, 1970.
17. *Park* (n.16), 866-875.

18. *Hungdah Chiu* and *Choon-ho Park*, Legal Status of the Paracel and Spratly Islands, *Ocean Dev. and Internat'l Law J.*, 1975, 1-28; and *Choon-ho Park*, The South China Sea Disputes: Who Owns the Islands and the Natural Resources, *Ocean Dev. and Internat'l Law J.*, 1978, 27-59.
19. White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands, Ministry of Foreign Affairs, Republic of Vietnam, 1975, 85.
20. *Chiu* and *Park*, and *Park* (n.18); also see *Rodney Tasker*, Territorial Claims: Stake-Out in the Spratlys, *Far Eastern Economic Review*, Feb. 24, 1978, 11-12.
21. For a list of the Chinese and English names of the South China Sea islands, see *Zheng Zi-yue*, *Nanhai Zhudao Dili Zhilue*, 1948, 83-94. On the South China Sea islands in general, see *Chen Dongkang*, *Woguode Nanhai Zhudao*, 2nd ed. 1964 (the English translation: Our Country's South Sea Archipelagoes), in: Joint Publications Research Service -- JPRS, US Dept. of Commerce, No. 18-424, 1963; and *Dieter Heinzig*, *Disputed Islands in the South China Sea*, 1976.
22. *Zheng* (n.21), 85-87; and *Chen* (n.21), 31-32; and *Huang* (n.2), 85.
23. Chinese Vice-Premier *Deng Xiao-Ping* was reported to have said in Tokyo in Oct. 1978: "The present generation is not wise enough to settle such a difficult issue. It would be an idea to count on the wisdom of the following generation to settle it" (author's translation; *Sankei Shinbun*, Oct. 26, 1978, morning ed., 3 : 1). For the contentions of China and Japan, see *Choon-ho Park*, *Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy*, *Harvard International Law Journal*, 1973, 212-260 (253-258). On the Japanese attempt at joint development of oil from the disputed area, see *Sankei Shinbun*, July 24, 1979, morning ed., 4 : 1; and Aug. 2, 1979, morning ed., 1 : 5.
24. Maritime boundary issues of these countries are so closely inter-related that it is appropriate to discuss them together. The 200-mile fishing zone of Japan came into force in July 1977 (Law No. 31, May 2, 1977: English text in UN Doc. ST/LEG/SER.B/19, Preliminary issue, 1978, 226-240). Since the provisional measures do not apply in waters beyond Japanese territorial sea and certain specified areas on the west (toward China and Korea), it is not discussed here. For details with a map, see *Seiichi Yoshida*, 200-Kairi Jitai: Wagakuni Gyogyo Suiekinimo (The 200-mile era [has arrived] in our seas as well), *Tokino Horei* (Current laws), No. 974, 1977, 11-19 (15).
25. ECAFE (see also n.26), *Geological Structure and Some Water Characteristics of the East China Sea and Yellow China Sea*, Technical Bulletin Vol. 2, Technical Advisory Group, 1969.
26. Retitled as Economic and Social Commission for Asia and the Pacific (ESCAP) in 1974.
27. *Park* (n. 23), 218-225.
28. For an English summary of this Law, see *Summary of Mining and Petroleum Laws of the World*, Vol. 2, East Asia and the Pacific, Bureau of Mines International Circular IC-8514-1971, US Dept. of the Interior, 1971, 47-50.
29. For the Korean and English texts of the Law, see *Law for the Development of Submarine Mineral Resources*, Ministry of Commerce and Industry, Republic of Korea, 1970.
30. For the Chinese text of this Law, see *Lifa Chuan-kan* (Journal of legislation), No. 30, 1970, 70.
31. For the text of Taiwan's ratification, see *International Legal Materials*, 1971, 452.
32. ICJ, *The North Sea Continental Shelf Cases*, 1969, 53.
33. *Park* (n.23), 227-229.

34. People's Daily, Dec. 4, 1970; Peking Review, Dec. 11, 1970, 15-16; and also quoted in *Park* (n.23), 230.
35. UN Sea-Bed Committee Report (n.6), 74.
36. Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8/Part II, May 7, 1975, Article 62; Revised Single Negotiating Text, A/CONF.62/WP.8/Rev.1/Part II, May 6, 1976, Article 64; Informal Composite Negotiating Text, A/CONF.62/WP.10/Corr. 2, July 20, 1977, Article 76; and Revised ICNT, A/CONF.62/WP.10/Rev.1, April 28, 1979, Article 76(1).
37. UN Sea-Bed Committee Report (n.6), Twenty-Seventh Session, Supplement No. 21 (A/8721), 1972, 180-182 (180).
38. For the Declaration of Santo Domingo by Caribbean countries of June 7, 1972, see UN Sea-Bed Committee Report (n.37), 70-73; for the Yaunde Report of the African states regional seminar on the law of the sea, see *op. cit.*, 73-78; and for a comparative analysis of these two and the Kenyan versions, see *Douglas Johnston and Edgar Gold, The Economic Zone in the Law of the Sea: Survey, Analysis and Appraisal of Current Trends*, Occasional Paper No. 17, Law of the Sea Institute, University of Rhode Island, 1973 and *Jorge A. Vargas, The Legal Nature of the Patrimonial Sea -- A First Step Towards the Definition of the EEZ's Legal Nature*, in this issue.
39. Limits in the Seas (n.5), No. 36, National Claims to Maritime Jurisdictions (Jan. 18, 1979, update).
40. For the English text and a map, see Limits in the Seas (n.5), No. 75, Continental Shelf Boundary and Joint Development Zone: Japan-Republic of Korea, 1977; and for a political background of the agreement, see, (anon.) Kokusai Keizai (International economy) Feb. 1977, 39-45; and for a general comment, see *Chiyuki Mizukami, Dairiku Dana Mondai* (Continental shelf problems): *Nikkan Dairiku Dana Kyoteio Keikishite* (On the occasion of the Japan-South Korea agreement), *Juristo* (Jurist), No. 647, 1977, 60-67.
41. *Shinhua Weekly*, Feb. 11, 1974, 27.
42. Under Japanese parliamentary procedures (The Constitution of Japan, Article 61), the Lower House approval is sufficient for the ratification of a treaty, provided that the Diet remains in session for a minimum of 30 days beyond such approval. In May, 1977, the Diet had to extend its session in any event to approve the Japan-USSR fisheries agreement, and the extension automatically (without any action by the Upper House) effected the approval of the Japan-South Korea continental shelf agreement. For a comment on the Sino-Japanese relations with respect to the agreement, see *Jerome A. Cohen and Choon-ho Park, China's Oil Policy, Post-Mao China and US-China Trade*, Shao-chuan Leng, ed., 1977, 129-133; and a chronology of events on the agreement, see *Yomiuri Shinbun*, June 15, 1978, morning ed., 9:1.
43. For a map of the hypothetical median-lines, see Potential Maritime Zones of Northern East Asia, Office of the Geographer, US Dept. of State, map no. 503591 12-77.
44. For the English text of the "Decree on the Establishment of [the] Economic Sea Zone," see *Pyongyang Times*, July 9, 1977; and Foreign Broadcast Information Service (FBIS), Vol. IV, Asia and Pacific, July 1, 1977, D 2; and an analysis on the zone, see *The People's Korea*, July 13, 1977.
45. For the text and details, see FBIS (n.44), May 24, 1977, K5-K6.
46. See chapter I, section 3; *Park* (n.16).
47. For the text, see FBIS (n.45).

48. Limits in the Seas (n.39), 221; and for the now-defunct South Vietnam's 3-mile territorial sea limit (Decree No. 81, April 27, 1965), see op. cit., 222.
49. Chinese Vice-Premier *Li Xian-nian* as quoted in *Sankei Shinbun*, Sept. 29, 1978, morning ed., 5 : 11.
50. For a map and subsequent developments, see *Petroleum News: Southeast Asia*, Vol. 7, No. 10, Jan. 1977, 46-47 (46); and for further details, see *Selig Harrison*, *China, Oil, and Asia: Conflict Ahead?*, 1977, 204.
51. *Beijing Review*, May 4, 1979, 10-18 (17). "Beibu Gulf" is the Chinese name for the Gulf of Tonkin, which is called Vinh Bac Phan in Vietnamese, both meaning the "northern bay."
52. For the territorial disputes between Kampuchea and Vietnam, see *Nayan Chanda*, *That's far enough*, says Hanoi, *Far Eastern Economic Review*, Aug. 19, 1977, 11-13.
53. US Delegation Report, Eighth Session, UNCLOS III, Geneva, March 19-April 27, 1979, 3 and 33.
54. *Sankei Shinbun*, August 2, 1979, morning ed., 4 : 1.
55. Letter, to the author, of Robert Smith, Office of the Geographer, US Dept. of State, July 16, 1979.
56. For oil development activities taking place in the China seas, see *Petroleum Intelligence Weekly*, June 11, 1979, 1-2; and *New York Times*, Aug. 4, 1979, 1 : 2. For an annual report of such activities taking place throughout Northeast and Southeast Asian seas, see the January (feature) issues of *Petroleum News: Southeast Asia*.

UPDATES

The updates attached provide information on recent developments regarding the PRC's offshore oil jurisdiction in the Yellow Sea, the East China Sea, and the northern part of the South China Sea.

South China Sea Update (*Petroleum News*, June 1984)

In the six months since BP spud off-shore South China, the new contract areas have failed to yield much more than a trace of hydrocarbons. Though only three operators have spudded, the disappointing results from six wells in the Pearl River Basin leave an air of uncertainty where once unbridled optimism reigned. At a cost of between \$12-\$15 million/well, optimism doesn't come cheap.

No one is talking pessimistically, however. There is still a lot of ground to be covered, and to the southwest of these new areas Arco resumed exploratory drilling to delineate and confirm their large gas find of last year. Total will apparently begin production in its contract area to the west.

BP, now drilling its fifth well in the Pearl River Basin (its sixth in China), has moved from block to block spudding one well in each of its four South China Sea blocks (BP's fifth block is in the South Yellow Sea). The first two wells, Enping 18-1-1A in block 14/29 and Kaiping 1-1-1A in block 27/31, were dry holes according to BP, as was the fourth well in block 28/27. The third well, Yangjiang 26-1-1 in block 26/14, was reported to have a "little oil." BP, using the semi *Nanhai 2*, is now back at the first block for its fifth well.

Esso, the second operator to drill, spudded its first well back in February with the semi *Jim Cunningham*. The Wenchang 19-1-1, in contract block 40/01, was abandoned in April after being judged noncommercial. No official flow figures were released. Esso has moved to block 4/27 in the eastern part of the Pearl River Basin for its second well. A noncommercial show was also the verdict for Occidental's first try in block 28/23. The well was abandoned in April, and the semi *Sedco 602* has moved on to Oxy's second area, 26/29, for another attempt.

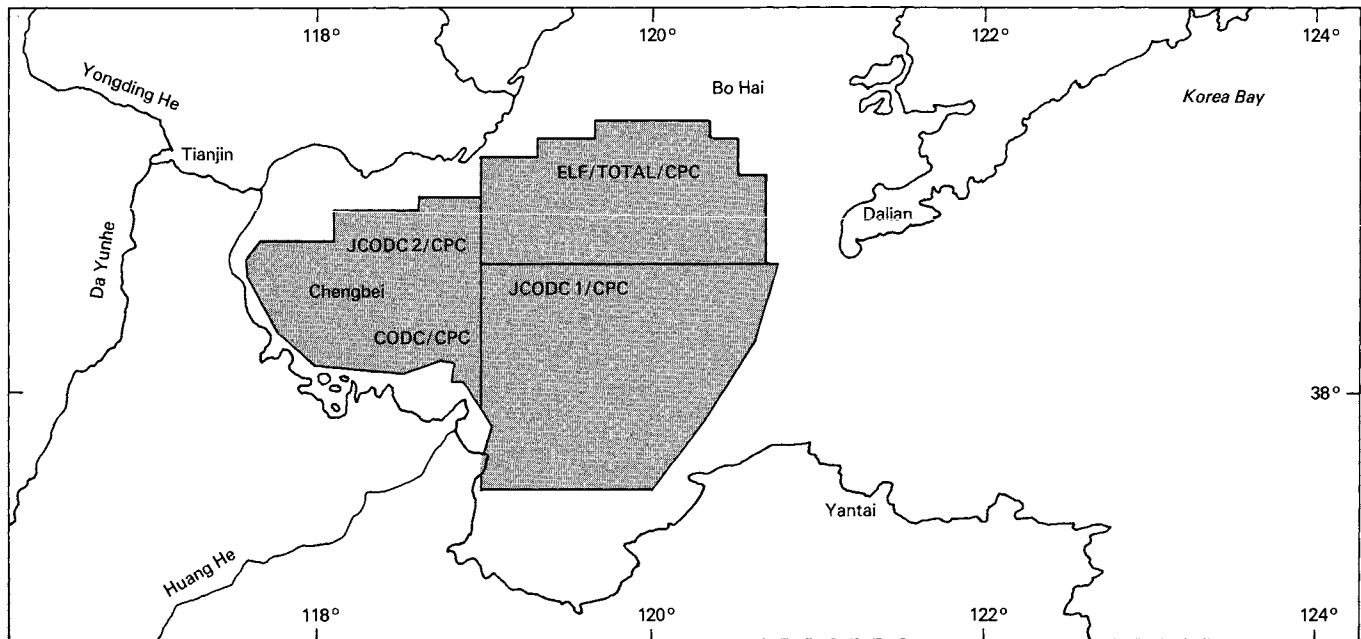
Arco, whose block in the Yinggehai Basin operates under a different arrangement than the new areas, resumed drilling for the first time following the sinking of the *Glomar Java Sea* last October. Two rigs, the semi *Zapata Arctic* and the drillship *Wodeco 9*, have been mapping out the gas find Yacheng 13-1-1, discovered by the *Java Sea* last year. The *Arctic* is drilling where the *Java Sea* was drilling, and is understood to have encountered gas and extremely high temperatures at around 3000 m. Planned depth is 5000 m.

Other operators yet to begin their drilling programs in the South China Sea are:

- Agip-Chevron-Texaco (ACT), whose drilling program is scheduled to commence in June; PN understands the start-up may be deferred until later in the year;
- Pennzoil/Sun, who will spud in succession using the same rig, starting with Pennzoil in September, and
- Phillips, scheduled to begin drilling in the autumn.

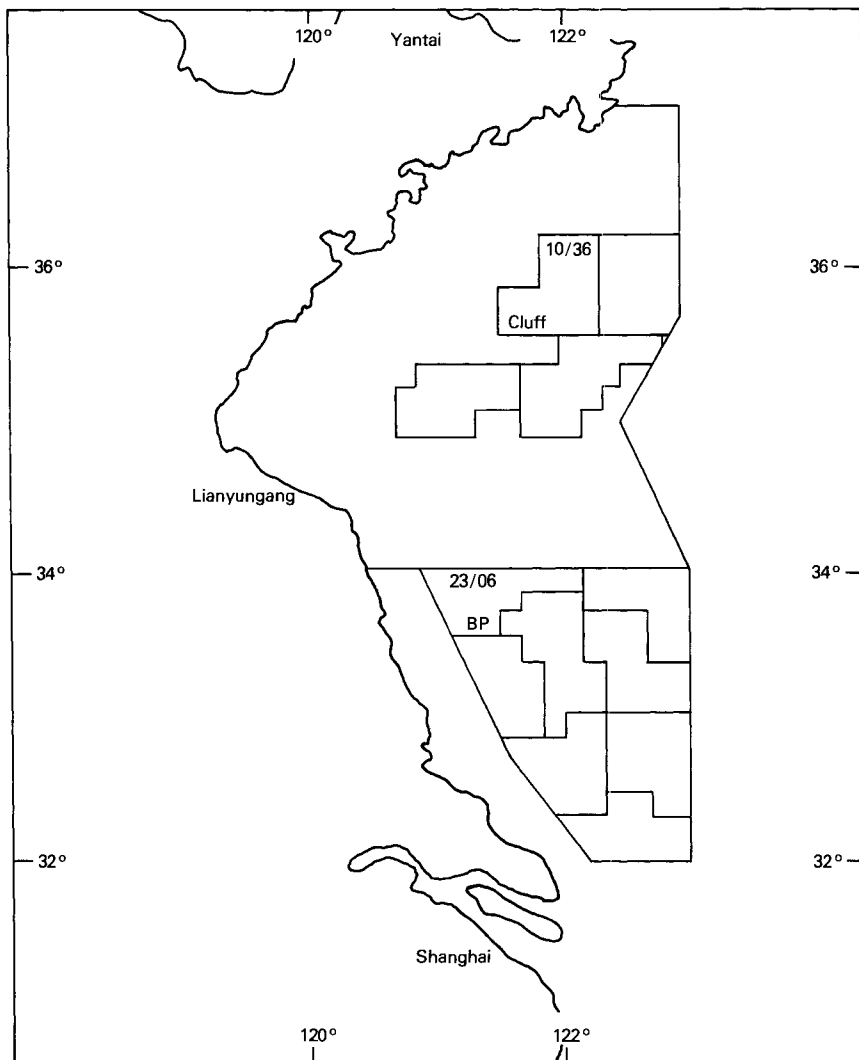
OFFSHORE OIL CONTRACTS

Consortium	Interest	Block(s)	Size (Km2)	Geographic Area	Estimated Exploration Expenditures	Drilling Commenced
ARCO China Inc	80%	Beibu Gulf	9000	BB-Yinggehai	\$100-\$200 million	January 1983
Santa Fe Minerals (Asia), Inc	20%					
BP Petroleum Development Ltd	45%	14/29	3199	PRB	\$50-100 million	Nov 1983
Petrobras SA	15%	27/31	2256	PRB		1st Qtr 1984
Broken Hill Proprietary Co Ltd	20%	28/87	1286	PRB		
Petro-Canada Exploration Inc	10%	26/14	3209	PRB		
Ranger Oil Ltd	10%	23/06	4136	SYS		
Chengbei Oil Development Corp		Chengbei Field	24	BH	N/A	April 1982 (est. production to commence late 84, early 85)
Japan National Oil Corp (operator)	60%	In West Bohai				
plus 47 Japanese companies	40%	block				
Cluff Oil PLC	100%	10/36	4458	SYS	N/A	N/A
Elf Aquitaine	34.3%	Central block	9400	BH	N/A	November 1980
Compagnie Francaise des Petroles (Total Chine)	14.7%	Bohai Sea				
CNOOC	51%					
Esso Exploration Inc	50%	40/01	2580	PRB	\$100 million during	1st Qtr 1984
Shell Exploration China Ltd	50%	04/27	2540	PRB	Initial 3 yrs	
Idemitsu Oil Development Co	60%	22/22	963	BB-Yinggehai	N/A	N/A
Natomas (Far East) Ltd	30%					
Cluff Oil Ltd	10%					
Japan National Oil Corp (JNOC)	100%	28/14	1283	PRB	N/A	N/A
JNOC	N/A	15/33	1279	PRB	N/A	N/A
Getty Oil International (Orient) Inc	N/A					
Sun Orient Exploration Co	N/A					
Texas Eastern Orient Inc	N/A					
Japan-China Oil Development Corp		West block in	11,400	BH	600 million	August 1981
JNOC (operator)	60%	Bohai Sea				
plus 47 Japanese Companies	40%	South block	14,100	BH		December 1980
Occidental Eastern Inc	55%	28/23	1284	PRB	\$60 million during	4th Qtr 1983- 1st Qtr 1984
Hispanica de Petroleos SA	15%				Initial 3 yrs	
Ampol Exploration Ltd	10%					
CSR Ltd	10%					
Tricentral North Sea Ltd	10%					
Occidental Eastern Inc	50%	26/29	1286	PRB	\$60 million during	N/A
Elf Aquitaine	27.5%				Initial 3 yrs	
Total Exploration	12.5%					
Tricentral North Sea Ltd	10%					
Total Chine	30.9%	Beibu Gulf	8800	BB	\$120 million	January 1981
CNOOC	51%					
Elf Aquitaine	13.2%					
Promet	N/A					
Japanese consortium	N/A					



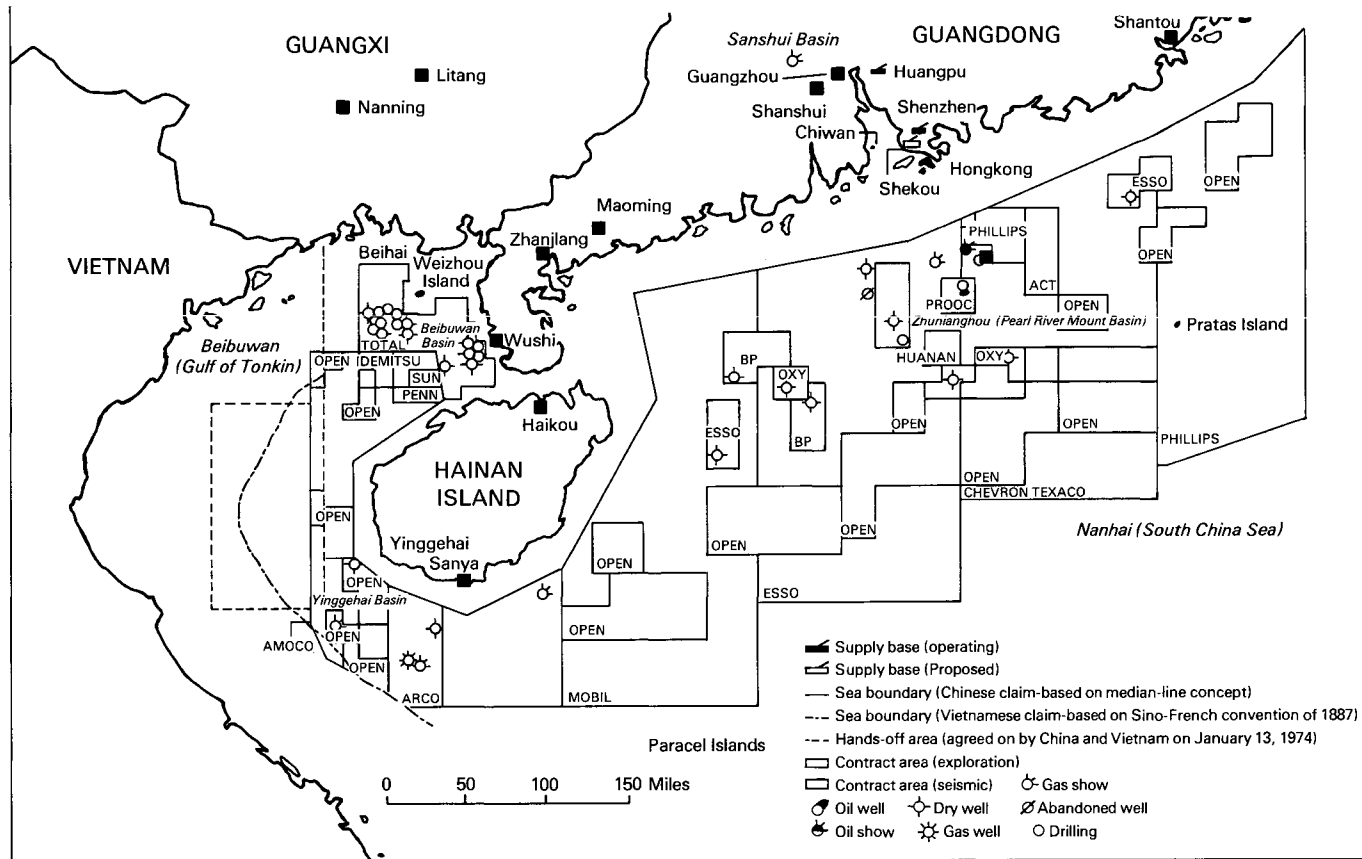
Bohai Sea: Contract areas

Source: November 1983 *Petroleum News*.



Yellow Sea: Contract areas

Source: November 1983 *Petroleum News*.



Source: *Petroleum News* reprinted in *Far Eastern Economic Review*, 28 June 1984.

DISCUSSION

Lee Kimball: Are there any questions on Dr. Park's speech?

Jon Van Dyke: Have there been any effective protests to the zones that China has set up by maritime nations sailing their warships through those zones?

Choon-ho Park: The United States sailed its warships in the Taiwan Strait in 1958. When the PRC declared a twelve-mile limit, the U.S. Navy, in coordination with the Taiwan navy, showed the flag to demonstrate that the U.S. did not recognize it. I haven't heard about effective challenges, nor is it clear whether the PRC still enforces the military zones.

Jon Van Dyke: Do you have any prediction as to whether the People's Republic will eventually ratify the Convention?

Choon-ho Park: I'd bet on the PRC's ratification reasonably sooner than her problems with other countries might suggest, because, having said so much in support of the Convention and the Third World position, now China would really need a very good reason not to ratify it. But one point: when someone asked him about advance notice provisions in the territorial sea law, a very senior Chinese scholar on the law of the sea is known to have replied, "Well, the domestic law would have to be adjusted to be in keeping with the Convention." Of course, that doesn't mean that they are going to do this without fail, but at least that remark would explain their attitude towards the Convention.

Chen Chi: You mentioned the Spratly Islands in the South China Sea. You said that "with the exception of China, each claimant is in control of some islands in a group consisting of over seventy islands altogether." I have been in the Spratly Islands and know them in some detail. As far as I know, during recent years, mainland China has come to the Spratly Islands and has occupied at least one island. These islands are now owned by Chinese Communists; on mainland China they are called the *Nanxia*. So "with the exception" should be "without the exception" of China. A book called *Contests in South China Sea* is relevant here.

Choon-ho Park: You mean the book by Samuels of Vancouver, Canada.

Chen Chi: Also, the recent publication of the *Far Eastern Economic Review* is the most up to date on South China's offshore oil.

Choon-ho Park: Yes, I saw that article. My article in the *German Yearbook of International Law* was published in 1978, so it's fairly up to date, but thank you for updating me with this mention of the occupation by the PRC of one island; I hadn't heard about it. I read the manuscript of the Samuels book published by Methuen in New York and London. I found it very good as a very futile, boring history; he cited mostly German and other sources. He was carrying on some mistakes other authors had made earlier on. For instance, the name of one of the islands was *Hongxiu*, but he called it *Hongma* because another author made that mistake. I had to write to some places to correct this; *Hongxiu* was the name of the deputy commander of the Republic of China

fleet that actually conducted an expedition there in 1947. The book is very good but would be a cure for insomnia.

Myron Nordquist: Dr. Chee?

Choung Il Chee: I just want to make a couple of comments and ask one question of Mr. Smith. First the comment. Protection Zone One, in the map that we have just seen of the fishery zone, lies in the high sea area. The PRC has declared neither an EEZ nor an EFC (Exclusive Fishing Zone), so her claim to Protection Zone Number One can be opposed by Japan as a matter of international agreement but cannot be opposed by Korea. Korea is not party to the agreement. Nevertheless, Korea has restrained herself from entering into that area. It's written in my paper that we are in a curious situation: the Republic of Korea which is not a party to the agreement is observing it on the basis of self-restraint.

The second comment is that the PRC's practice of international law puzzles me. Professor Chen Chi made a reference to the occupation of one of the Spratly Islands. I don't know whether this occupation has taken place after that dispute had begun; the date is critical. Sending troops would not really be an effective means of establishing the PRC's legal title to that particular island. I don't know why they did that.

Another question: was the map that shows Protection Zone One prepared by the Department of State on a hypothetical basis?

Robert W. Smith: I'm not sure that any of the maps that Professor Park just showed us were made by the Department of State. They were made in the early 1970s but I personally do not know by whom.

Choon-ho Park: Those maps were made by another agency of the U.S. government, which sometimes doesn't volunteer to identify itself but people would know anyway.

Robert W. Smith: All right.

Choung Il Chee: Anyone in this room can answer this question: what has been the reaction of the PRC to that line? Are they happy with that line? Do they like the line we have just seen in the map prepared not by the Office of the Geographer but by some other agency of the government?

Robert W. Smith: When you say "that line" you mean the hypothetical one.

Choung Il Chee: The hypothetical median line.

Robert W. Smith: I've gotten no response from anybody on that matter except for ...

Choung Il Chee: You mean the PRC has never either informally or formally expressed whether they will go by that line?

Robert W. Smith: We in the Office of the Geographer have not heard one way or the other.

Choung Il Chee: All right, thank you.

Myron Nordquist: The gentleman in the rear? Would you mind introducing yourself?

Kuen Chen Fu: I am a journalist and a lawyer from the University of Virginia and National Taiwan University. One question and also a brief reflection on this discussion about the Spratly Islands. Inspired by the Japanese and Korean cooperative development scheme, I myself wrote a book three or four years ago and proposed a program of cooperation among the Republic of China, the PRC, the Philippines, and several Western companies in the Spratly Islands area. I proposed so on the basis that, to my best knowledge, the scientific surveys in the Paracel Islands and the Spratly Islands area are very good in terms of oil reserves. Those islets are in those deep-water, so-called high construction areas which are good for reserving oil, if I'm not wrong. Dr. Park and Dr. Robert Smith, who is the geographer here, I wonder how you would evaluate the possibility of this cooperative program? By establishing such a program of cooperation, I believe we can achieve several purposes. First, we can develop those natural resources, if it's worthwhile. Secondly we can, in my opinion, resolve sovereign disputes among these countries. Thirdly, these countries or companies can enjoy their rights without disputing over sovereignty and also can prevent the Vietnamese and the Soviet Union from occupying these islets together. The Philippines, geologically very close to the Spratly Islands, can offer excellent logistic support to developing programs. The Western countries have technology and capital. The ROC and PRC, especially ROC, have been occupying the largest and the best island in the Spratly Islands, in Chinese called *Tai ping* Island, which has fresh water.

Choon-ho Park: I would say that the ownership claims are still very symbolic. Nobody has seriously explored the promise of oil there even though the Philippines is doing some exploration on the Reed Bank area's northeastern tip of the whole island group. But the depths are so great, 2500 meters in some places, that for those countries to develop oil under joint development schemes would not be commercially justifiable with current technology, even if these coral islands were sitting on a huge lake of oil. Oil prices would have to go so high that boys would give their fiancées drops of oil to be mounted on rings. Otherwise nobody would spend money to explore for and get oil from that depth. Legally or symbolically it might be conceivable, but not in commercial terms.

Myron Nordquist: Dr. Smith, do you have a comment?

Robert W. Smith: I see the dispute in this area as not only resource-oriented but involved with a whole lot of nationalism. Although I would very much like to see a settlement come about by any means, be it by joint development for resources or by creation of a zone of peace, I think some political will will have to be developed in this area to diminish the nationalism that presently exists here and cuts well deeper than any resource considerations.

Masaki Saito: Is the People's Republic of China seeking some way to be a pioneer investor under the terms of the PIP Resolution? I noticed from some articles in the *People's Daily* or some other magazine that they constructed some special exploration ship and they carried some samples of manganese nodules from the mid-Pacific ocean several months

ago. So under the PIP Resolution, the LDC can be a pioneer investor as of January 1 next year, spending some amount of money on some specific site. So if you have some secret information on this map ...

Choon-ho Park: Well, if I had secret information, probably I would keep on smiling like a real Chinese. But, from my own reading of the many Chinese interventions at the Conference, and given the current state of China's technology, the efforts they are making in deep sea mining are really to train themselves to that level in preparation for what might happen in the future. But I don't foresee any practical reasons for which they would really go into deep sea mining, given the heavy investment required. But, as one of the major political powers, the PRC wants to follow the development very closely, doing its own work in its own very small way. But I would be greatly surprised indeed if the PRC came up with real, active investment as a pioneer or otherwise.

Myron Nordquist: Noegroho?

Noegroho Wisnoemoerti: I think it's quite right to say that the territorial dispute in the South China Sea, whether it's Paracels or Spratlies, is primarily for non-economic reasons. To be precise, I think that it is more related to the security considerations of those laying claims. Those who have control of those islands will have control of the sea lanes which are very important in the area. And I think this is where strategy is really important in relation to the claims. But, at the same time, I think there are certain economic reasons. I agree with you, Choon-ho, that the seabed in those areas is simply too deep for technologically feasible exploration or exploitation of its mineral resources, so those considerations will be of lesser priority to those who are laying claims. But I think they have good reasons to start on activities that relate to the living resources. Could you give us your views on this living resources in those areas? I think there is some prospect other than security which has prompted those countries to lay claims.

Choon-ho Park: Among specialists watching the South China Sea's living resource problems, it has been said that the catch could be really doubled -- some optimists would go even higher than that. And Thailand is the leading fishing country in the region, hence is having more problems with the Kampuchians and Vietnamese and even with, to some extent, the Malaysians. But coastal fishing is the main thing in the region; distant water fishing -- in the sense of "distant-water fishing" in the North Pacific, West Africa or Samoa -- is still yet to be developed. The potential is much higher than the actual catch now suggests. The FAO has been doing a lot to promote the fishing industry in the region, but so far the results haven't been very impressive.

Noegroho Wisnoemoerti: You have enlightened me on the basic problem, but do you have specific information about the area just around the Spratly Islands?

Choon-ho Park: I don't think the fishing grounds around the Spratlies are very fertile, because the current between Palawan and the Spratlies flows more or less northeast so that fishermen with limited capabilities in navigation cannot fish there. It's difficult to cross over to

the islands because of the meteorological or physical conditions, and there's no reason to cross over the deep areas there; the islands are just a forest of coral outcroppings, not fertile fishing grounds.

Myron Nordquist: Professor Chiu?

Hungdah Chiu: Dr. Chee raised the question of whether the Chinese occupied one of the Spratly Islands before the dispute arose or after that. From the points of view of both the Republic of China and Communist China, this is not the problem because, in 1947, the Republic of China sent troops to take over all these islands from the Japanese and also proclaimed them as Chinese territory. The question did not arise until 1955 when certain Filipinos occupied certain islands in the Spratly Islands group and then raised the question of Chinese ownership.

The People's Republic of China's attitude towards the law of the sea for many years has been a problem for study because there have been no scholarly writings -- protests, but no analysis -- on the Chinese attitude towards international law since 1966. Starting in 1979, they began to publish articles in international law, but Chinese writers such as Professor Wang Tieya, a very famous Chinese international lawyer under the Nationalists and later under the Communists, made it clear that their articles represented individual views. So now we can read more Chinese articles on international law, but often on the same problem they reflect different views. On maritime boundaries, less than ten articles have been published in China, and most of them study those cases decided by the International Court of Justice. Only in the most recent one, in which Professor Park was denounced with Professor Oda, the Chinese writers took the position that there are still two different maritime boundaries, one for the seabed and another for the water column, because in the East China Sea area if all countries applied the Exclusive Economic Zone, the continental shelf claimed by China would also be claimed by Japan and South Korea.

Choon-ho Park: I read the article -- thanks to Hungdah -- and found it very interesting. From the footnotes cited there, perhaps they want to have Oda and me exterminated.

Myron Nordquist: You're condemned in good company. Professor Rhee?

Sang-Myon Hee: Professor Chiu, are those views by the mainland Chinese scholars prevailing and do most of them disagree among themselves?

Hungdah Chiu: No, most of them do not necessarily agree among themselves. They are in competition. They study international law primarily in Beijing University, Wuhan University, and Hudan University in Shanghai; these are the three main centers. Professor Wang Tieya also compiled a book like a casebook on the law of the sea which was published in 1974 for internal use. I asked him to send me a copy but he had difficulty in doing so. He is now revising that book. Their main source of information, I think, is Gary Knight's *The Law of the Sea*; they very frequently refer to that book.

Sang-Myon Rhee: That's interesting. Professor Park, you listed three interesting maps at the bottom of your paper showing the joint development contract areas in Bohai Bay, in the Yellow Sea, and in the nor-

thern part of the South China Sea. Could you elaborate on the peculiar aspects of the Chinese contracts in regard to these joint development petroleum projects?

Choon-ho Park: They have different formulas. One is called the Japanese formula, the Bohai Bay formula, where the contracting terms are very different from those applied in the southern part of the Yellow Sea. The terms applied in the northern part of the South China Sea are all different, and they deal with individual companies. And the terms in one contract are not really communicated to the others. The only common interest the companies have is to get more for their side; that's all, so far. But observers have classified the contract formulas in different terms. They came up with a broad classification that the Bohai Bay terms are different from the southern part of the Yellow Sea and, in turn, these are different from what applied in the northern part of the South China Sea.

Sang-Myon Rhee: Do you notice any peculiar aspects of these contracts compared to other regions in the Persian Gulf or in Europe or in other parts of the world?

Choon-ho Park: The contract terms are broadly general. Making them so is very clever from their standpoint. When the contract terms are put to the test of actual practice and the development comes into conflict with the original contract, then they add a proviso saying that, in case of conflict, the original contract will be superseded by subsequent developments.

The same process is seen in their law. They proclaimed many laws -- foreign joint ventures, foreign taxation, etc., but basic laws are very broadly general. It took three years for them to come up with some enforcement measures, which are more specific, for in those three years' time, they did some homework. They had dozens of American and Western business executives lining up, hats in hand, in Beijing to tutor them all this time and they are now fairly sophisticated. If you negotiate, I understand, with the same Chinese bureaucrat with whom you did business ten years ago, you'll find now an entirely different person in terms of the level of expertise.

JAPAN AND THE LAW OF THE SEA

JAPAN AND THE LAW OF THE SEA

Thomas Clingan: This morning we shift our focus to Japan's perspective on the law of the sea, and we are very fortunate to have for this purpose Professor Tadao Kuribayashi. Professor Kuribayashi received his B.A. and M.A. from Keio University and his Ph.D. from Australian National University. He is presently a professor in the Faculty of Law and Dean of Students at Keio University. He is a fellow member of the Executive Board of the Law of the Sea Institute and a member of the Board of Directors of the International Institute of Space Laws, the Japanese Association of International Law, the study group on Law of the Sea of the Ministry of Foreign Affairs in Japan, and the Japanese branch of the American International Law Association. He's written over 200 articles on international law.

THE UNITED NATIONS CONVENTION
ON THE LAW OF THE SEA
AND THE JAPANESE MUNICIPAL LAWS

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Introduction

The fundamental position that Japan took during the Third United Nations Conference on the Law of the Sea (hereafter, UNCLOS III), was as follows: the establishment of an order for joint use of the ocean would contribute to the interests of the world community as well as to the long-term interests of Japan.

The United Nations Convention on the Law of the Sea (hereafter, the new Convention) was adopted in April, 1982, after nine years of prolonged negotiations. Although Japan signed only the Final Act at the signing session held in Montego Bay, Jamaica, in December, 1982, she later signed the new Convention on 1 February 1983.

Owing to Japan's complicated and diversified maritime interests, wide-ranging issues are involved in the legal relationships between the new Convention and Japanese municipal laws. Since little systematic study has been done on the legal regime of the sea in the field of municipal law, the adoption of the new Convention is accelerating study and research in this area. Systematic research on how to adjust municipal law to the new Convention is regarded as of urgent necessity. This paper will address the main problems that may arise concerning the relationship between Japanese municipal law and the new Convention with respect to the ocean spaces: territorial sea, exclusive economic zone, continental shelf, high seas and deep seabed. The paper will then deal with problems in the areas of marine pollution, marine scientific research, and marine installations.

Territorial Sea

Japan enacted the Law on the Territorial Sea on 2 May 1977 which came into effect on 1 July 1977. By this law, Japan abandoned the principle of three nautical miles for the territorial sea which she had advocated since 1870 and instead introduced twelve nautical miles as its maximum breadth. The reason for establishing the territorial sea of twelve nautical miles before UNCLOS III reached a final conclusion was to protect Japan's fishery interests; that is, Japan was driven by a desire to protect the interests of coastal fishermen against the activities of foreign fishing vessels, particularly the Soviet fishing fleet, which recently advanced *en masse* into Japanese waters.

The Japanese Law on the Territorial Sea is of brief content consisting of Article 1 (Extent of the Territorial Sea), Article 2 (Baseline) and Supplementary Provisions (Extent of the Territorial Sea pertaining to the Designated Areas). It does not contain detailed provisions on the regime of passage of foreign vessels as is in the case of legislations of other nations on the same subject. The Japanese lawmakers did not consider detailed regulations on the regime of passage as required, for it is submitted that, by virtue of Article 98 (2) of the Japanese Constitution ("The treaties concluded by Japan and established laws of nations shall be faithfully observed.")

transformation of international treaty provisions into Japanese municipal law will not always be necessary, their acceptance being made by the domestic promulgation of the treaty.

The new Convention divides international straits into two categories: one to be applied by the regime of transit passage and the other by the regime of no suspension of innocent passage. However, Japan adopted an unprecedented policy of freezing the three-nautical-mile territorial sea in the five straits: the Soya, the Tsugaru, the Eastern Channel of Tsushima, the Western Channel of Tsushima, and the Osumi Straits. Hence, before Japan ratifies the new Convention, it will be necessary to review the adequacy of selecting these five straits, which are "designated areas" with three-nautical-mile limits in the Japanese Law on the Territorial Sea. The definition of "international straits" as adopted by the new Convention appears to be much wider in its scope than that of the Japanese definition in the Law on the Territorial Sea. Therefore, certain conflicts are foreseen between the new Convention and this Japanese municipal law in this area.

Another problem relates to transit passage by foreign aircraft through international straits. The new Convention permits foreign aircraft, military or civilian, to fly over international straits in the exercise of their right of transit passage without their routes being limited. In other words, irrespective of the legal status of the subadjacent waters as the territorial sea, this new regime modifies the current law of the air. The current law of the air prohibits the flight of foreign aircraft over the territorial sea without the permission of the coastal states.

Perhaps the most controversial issue is the problem of the relationship between the new Convention and the Japanese national policy of the "Three Non-Nuclear Principles": 1) not possessing nuclear weapons, 2) not manufacturing nuclear weapons, 3) not permitting the entry of nuclear weapons into Japan. These principles have been maintained by successive administrations of the Japanese government as their basic national policy on nuclear weapons. However, according to the new Convention, the coastal states must permit transit passage of "all ships and aircraft" through international straits, whether they are equipped with nuclear weapons or not. This gives rise to an apparent conflict with the principle of not permitting the entry into Japan of nuclear weapons if the breadth of the territorial sea in those five straits is extended to twelve nautical miles. It is submitted that the solution to this problem will be as follows.

The first solution is to harmonize the conflict by a constructive method, namely, to interpret the concept of "transit passage" as "navigation and overflight solely for the purpose of continuous and expeditious transit" which does not fall into the concept of "not permitting the entry into Japan of nuclear weapons." This means that the mere passage of ships and aircraft with nuclear weapons through or on international straits has no relevance to that principle unless they enter Japan's seaports or airports. However, although the Japanese government had once adopted this construction, it was discarded when Japan acceded in 1968 to the Convention on the Territorial Sea and the Contiguous Zone of 1958. Indeed, it is unlikely that it will regain support under the existing sentiment of the Japanese nation.

The second solution is to declare or make a statement in accordance with Article 310 of the new Convention that provisions relating to transit passage in the new Convention should not be applied with respect to the passage of foreign ships with nuclear weapons through

Japan's international straits, although "reservations" as such are prohibited in the new Convention (Article 309). However, it is unlikely that this position may be widely supported by Japan's public opinion in view of her national security circumstances.

The third option is to evade the application of the Non-Nuclear Principles in Japan's international straits by relying upon the standpoint that the regime of transit passage has been established in international law and that therefore Japan may not derogate from the new rule of international law by reason of national policy. In weighing national policy of one nation against the requirement of international law, this standpoint gives preference to the latter once Japan ratifies the new Convention.

On the other hand, with respect to the passage of foreign ships with nuclear weapons through the Japanese territorial sea other than international straits, the view may differ according to how one interprets Article 19 (1) of the new Convention providing for the general meaning of "innocent passage" which succeeds Article 14 (4) of the Convention on the Territorial Sea and the Contiguous Zone and also according to how one understands the relation between Paragraph 1 and Paragraph 2 of the article.

At any rate, problems relating to the application of Japan's Three Non-Nuclear Principles to the territorial sea including straits are intricate and important ones peculiar to Japan and unavoidable if Japan ratifies the new Convention.

Exclusive Economic Zone

Japan enacted Law Number 31 of 2 May 1977 on Provisional Measures Relating to the Fishery Zone (as amended, thereafter), encouraged by the general trend that a number of coastal states had begun to regulate their own 200-nautical-mile zones, whether it be exclusive economic zones (EEZ) or fishery zones. Under this law, Japan has jurisdiction over fishing, catching, and taking of marine animals and plants within the 200-nautical-mile fishing zone around Japan (Article 2). It provides, *inter alia*, that foreigners shall not engage in fisheries or in the catching and taking of marine animals and plants within this fishing zone without obtaining permission from the Minister of Agriculture and Forestry (Article 6), and that where a foreigner is granted a permit, he shall pay fishing fees to the State (Article 8 (1)). According to the Enforcement Order of 17 June 1977 of this law, the main provisions of the law relating to the control of foreigners do not apply to the nationals of Korea and China. And, at the same time, the establishment of fishing zones as such is not permitted in some areas of the Japan Sea and the East China Sea. These exceptions were established on a reciprocal basis *vis-a-vis* the two countries in the Law on Provisional Measures Relating to the Fishing Zone and its Enforcement Order.

Japan is involved in territorial disputes not only with the USSR over the Northern Territories issue but also with Korea over Takeshima Island and with China over the Senkaku Islands. However, since the Japanese law on the 200-nautical-mile fishing zone does not establish fishing zones in the western part of the Japan Sea and the East China Sea, territorial issues on Takeshima and Senkaku Islands remain untouched for the time being. In this sense, the setting up of Japan's fishing zone was nothing but a counter-measure against the USSR's 200-nautical-mile fishing zone which was designated recently as the exclusive economic zone. However, if it establishes an EEZ, Japan

should review whether the points and baselines from which the current 200-nautical-mile fishing-zone line is measured are also applicable for the EEZ, since "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf" in accordance with Article 121 (3) of the new Convention. It should be pointed out that the present law does not mention Japan's sovereign rights but merely her jurisdiction within the 200-nautical-mile zone; the legal basis for the extra-territorial application of national law in the zone is therefore not clear.

If Japan establishes her own exclusive economic zone, new legislation will be necessary. The new legislation must provide clearly for the following: 1) Japan's sovereign rights for the purpose of exploration and exploitation of living and non-living resources; 2) Japan's sovereign rights for the production of energy from the water currents and winds; 3) Japan's jurisdiction with regard to the establishment and use of artificial islands, installations and structures; and 4) Japan's jurisdiction over the protection and preservation of the marine environment, marine scientific research, etc. It must also clarify the rights and duties of foreigners within this zone.

Continental Shelf

Japan has not enacted any special law on the continental shelf situated around her except the Law on Special Measures Concerning the Development of Petroleum and Inflammable Natural Gas for Implementation of the Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries (enacted in June 1978) for the implementation of the Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries and the Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries (enacted 5 February 1974, entered into force 22 June 1978). By these agreements, the northern parts of the continental shelves between the two countries were demarcated in accordance with the rule of equidistant lines. Their southern parts extending offshore from the western coast of northern Kyushu Island were not demarcated, but Korea and Japan established a joint development zone for the term of fifty years, both countries sharing the benefits extracted from the development. However, the method for establishing the joint development zone has been criticized by political and even academic circles in Japan in view of the rule of international law concerning the delimitation of the exclusive economic zone and continental shelf between states with opposite or adjacent coasts (see Article 74 and Article 83 of the new Convention).

Generally speaking, Japan's position seems to be that, by virtue of her acceptance of established international law on the continental shelf, she as a coastal state has logically acquired the interests and privileges accruing from her sovereign rights over the Japanese continental shelves so that there is no necessity to enact special national laws and regulations on her continental shelf (cf., a recent decision of Tokyo District Court (22 April 1982), the reasoning of which is on the same line).

Perhaps there are two ways in which the continental shelves may be regulated by national legislation; one is to enact some comprehensive Continental Shelf Act and the other is to apply relevant provisions of each national law and regulation to continental shelf activities

respectively. The choice will be a matter of legislative policy; but, it is submitted that, for the prevention of possible disputes, Japan should at least adjust, on the basis of Japan's sovereign rights over the exploration and exploitation of natural resources of the continental shelf, the existing laws and regulations including the Mining Law, the Mine Safety Law, and other laws and regulations concerning labor, the protection and preservation of the marine environment around Japan, etc., so as to make them applicable to foreigners, particularly when they are granted mining rights for mineral resources of the Japanese continental shelf. In doing so, consideration should be duly paid to the Korean and Chinese claims over their respective adjacent continental shelves.

High Seas

In Japan, the Maritime Safety Agency (MSA) is charged with maritime policing under the Maritime Safety Agency Law (Law No. 28, promulgated on 27 April 1948). However, matters falling under the Agency's jurisdiction are not clearly defined in this law. Moreover, the waters within the scope of jurisdiction of its respective District Branches are limited to the area of each municipality and its coastal waters which are generally regarded to be within the territorial sea of Japan. For this reason, it has been said that the enactment of more substantive laws and regulations and inclusion of parts of the high seas into its jurisdictional scope are necessary for the Agency's activities on the high seas. In particular, for the regulation of the activities of foreigners outside of the territorial sea, it is necessary to make not only laws and regulations with substantive contents but also procedural ones conferring the legal basis for the exercise of the Agency's power, including the right of hot pursuit on the EEZ or superjacent waters of the continental shelf.

Although problems arising from submarine cables and pipelines are covered by the existing laws and regulations such as the Law for the Protection of Submarine Telegraph Cables, and the Law for Punishment of the Breaking or Injury of a Submarine Cable, etc., with Respect to the Implementation of the Convention of the High Seas, the current Japanese criminal laws lack provisions to directly act against acts of piracy. Radio Law and the Law Relating to the Prevention of Marine Pollution and Maritime Disaster are not generally applicable to foreign ships and maritime installations on the high seas and EEZ; hence adjustment by national legislation will also be necessary in this area.

Deep Seabed

According to the Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules, which was adopted at UNCLOS III on 30 April 1982, Japan's national project for deep seabed mining has been described as one of the pioneer investors within the meaning of the Resolution. The Law on Interim Measures for Deep Seabed Mining was passed in the Japanese Diet on 9 July 1982 and was enacted 20 July 1982 with the relevant Cabinet and Ministry Orders. This law is declared to be a provisional measure until the new Convention becomes effective for Japan. It requires those who are intending to carry out deep seabed mining to receive permission from the Minister of International Trade and Industry (MITI). The law, however, does not purport to place the deep seabed under the sovereignty or jurisdiction of Japan in any sense. This law also imposes other duties upon deep seabed miners authorized under the law and regulates their activities.

In addition, it may designate a country carrying out deep seabed mining as the "deep seabed mining State" and provides for the confirmation and necessary adjustment of the duplication between the applied sites in the designated deep seabed mining States and those in Japan. The Deep Ocean Resources Development Co., Ltd. (DORD) was established on 16 September 1982 as an applicant to promote the exploration and exploitation of manganese nodules after the preparatory work, mainly on the undertakings concerned with nonferrous metals, was accomplished. The new Convention provides that: "activities in the Area shall be carried out in association with the Authority by state enterprises or natural or juridical persons when sponsored by such states" (Article 153 (2) (b)), and that: "States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States parties or state enterprises or natural or juridical persons, shall be carried out in conformity with this Part (Article 139 (1))." National legislation to set up the regime regulating sponsorship of applicants for plan of work, etc., will be required for the implementation of these provisions. Measures to give aid to development by natural or juridical persons will include amendments of existing laws and regulations relating to finance and tax, etc. On the other hand, national laws in respect to the granting of licenses, the mining sites of other states, preservation of the marine environment, maintenance of safety on the high seas, emergency measures in case of accidents, and other related matters will be necessary until the new Convention enters into force.

Marine Pollution, Marine Scientific Research, and Marine Installations

Existing laws and regulations concerning marine pollution from land-based sources and from or through the atmosphere will continue to apply until new international rules and standards are adopted in the future. When new international rules and standards are adopted, some adjustment of national laws will be necessary to avoid conflict between national rules and international rules. The Japanese regulations relating to dumping, which were revised in November 1978 with the entry into force of the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft of 1972, will satisfy the requirement of the new Convention. However, national laws and regulations must be revised or newly adopted when the international rules and standards concerning pollution from seabed activities subject to national jurisdiction are adopted and when the International Seabed Authority establishes international rules and standards for the prevention of marine pollution in respect to pollution from activities in the Area. The present basic Japanese legislation concerning vessel source pollution is the Law Relating to the Preservation of Marine Pollution and Maritime Disaster (25 December 1970, Law Number 136, as amended thereafter). It will be necessary to apply this law to the EEZ, either by amending it to have extra-territorial effect or by adding totally new legislation if Japan establishes its own EEZ.

Marine scientific research on the high seas and in the international seabed areas is free as a rule. As for marine scientific research in other areas, the new Convention introduces the regime of "consent." The current Japanese laws and regulations, including the Law for Hydrographic Activities, the Law for Conservation of Fishery Resources, and the Mining Law, may be applied to marine scientific research conducted by foreigners within the territorial sea by amending them respectively. But it is regarded as more desirable to enact a

single law regulating scientific research which will be applicable to the territorial sea, the EEZ, and the continental shelf in a consolidated form.

Laws and regulations relevant to maritime installations exist in various forms including the Building Standards Law (Law Number 201, 24 May 1950) and the Fire Service Law (Law Number 186, 24 July 1948). However, the above mentioned two laws are enacted mainly for installations on land. Here again is the problem of whether to apply them *mutatis mutandis* to maritime installations or to enact a totally new legislation.

Conclusion

The traditional international law of the sea is now being changed largely by the new regime of the ocean, some parts of which have already become international customary rules and some of which have not. Moreover, the legal nature of the continental shelf and the newly established regime of the EEZ has not been clearly established and some ambiguity exists with respect to the legal status of the deep seabed which was defined as the "Common Heritage of Mankind" in the new Convention. One should therefore recognize this reality of international law in adjusting national legislation to the emerging international law of the sea.

As we have already seen, existing national laws and regulations in Japan are not sufficiently harmonized to the new ocean regime, particularly in such matters as (1) ambiguous relationships between the passage regime through territorial sea and international straits as stated in the new Convention and the Japanese national policy of Non-Nuclear Principles; (2) the ambiguity of the jurisdictional basis of the Law on Provisional Measures Relating to the Fishery Zone; (3) the arbitrary application of existing laws and regulations to the continental shelf with extra-territorial effects; (4) the negative application of national legislation in respect to the policing matters on the high seas; and (5) the lack of a definite national policy on deep seabed mining. The analysis in this paper refers only to these main problems.

The preparatory work for reviewing the national legislation is now being conducted both in the governmental offices concerned and in certain academic circles, where thorough comparative study on foreign legislation and consolidation of various national laws and regulations are urgently required. It must be added that in carrying out this research sufficient consideration should be given to the role expected of Japan in providing technical and economic assistance to the developing nations for their exploration, exploitation, and full development of their marine resources.

DISCUSSION

Thomas Clingan: Thank you very much, Professor Kuribayashi. You've certainly given us a fine survey of the relationship between your municipal law and the Convention and raised a number of issues on which the panel may have some questions. Mr. Craven?

John Craven: In the Japanese courts, what is the relative priority given to domestic legislation as against treaty in the event of conflict?

Tadao Kuribayashi: It does not give priority to domestic law over international agreement. It simply says that it is not necessary to enact legislation on the continental shelf since it has been already implied in Japan's sovereign rights over the continental shelf. One foreign company did start mining activities on the continental shelf around Japan and was charged with non-permission by the Japanese authorities. This decision clarified that it is not necessary to have specific legislation as the legal basis for prohibiting foreigners' activities on the continental shelf without permission. Is that clear?

John Craven: I was wondering if in the Japanese constitution there is any statement as to the relative supremacy of treaty law as against either domestic legislation or Japanese constitutional law. Is there a provision in the Japanese constitution that defines the status of treaty law?

Tadao Kuribayashi: No, the Japanese constitution does not mention specifically continental shelf problems and there is no relevant international agreement in this case, and also Japan is not a party to the Continental Shelf Convention. Japanese legislation on the continental shelf, which is the most specific law yet except for the law on the joint development between ROK and Japan, seems to be based upon the idea that by virtue of her acceptance of established customary international law on the continental shelf Japan as a coastal state has logically acquired the interests and the privileges accruing from sovereign rights over that area. Therefore there is no necessity to enact special national laws and regulations on the continental shelf. This was affirmed by the decision of 1982. I'm inclined to think that some uniform legislation is necessary on the Japanese continental shelf for the prevention of possible disputes. That's what I want.

Thomas Clingan: You said the transformation of international treaty provisions into Japanese municipal law will not always be necessary. Does this suggest that there are certain circumstances under which domestic law would be necessary to implement the treaty and if so what kinds of circumstances would they be? I'm interested because we have the same problem in the United States.

Tadao Kuribayashi: In certain circumstances and also dependent upon the content of the treaty, Japanese domestic laws to implement the treaty are necessary. But in other cases it is not always regarded as necessary.

Robert Friedheim: Professor Kuribayashi, your fine paper illustrates something that has been bothering me for the last day or so. The subject of this conference is "East Asia and the Law of the Sea." What we're really talking about I think you've illustrated very well. That is, in dealing with ocean problems we're at the stage of adapting what the world did over the last nine years and trying to make it work. Japan and many other countries around the world are trying to solve problems in light of general trends and the specific requirements of the UNCLOS treaty. Significant problems will arise in adapting to what was accomplished in Montego Bay, and many of these problems are particularly important for East Asia. What we have here is a whole series of multiple-use problems; Japan used a territorial sea provision in order to partially solve a fisheries problem, oil and gas problems overlap with these, non-ocean problems are mixed in with ocean problems -- in Japan's case, the three non-nuclear principles. Obvious problems of sovereignty and jurisdiction may or may not be separable. These problems are extraordinarily complex and lead to what people have been complaining about: overlapping zones, lack of clarity, lack of a single conceptual framework to deal with. I don't see any way to go back to a single simple conceptual framework. For whatever faults the freedom of the seas idea had, it had one great benefit: it was simple, it was symmetrical. Everybody could understand what his legal requirements were in light of the general principle. Today, it is very difficult to see the general principle that came out of UNCLOS III when you actually apply it to the oceans. What does extension of national jurisdiction mean? There are no easy answers, no single answer. There are going to be multiple answers leading to many mixed systems that are going to confuse a lot of people and result in a long period of adaptation. I would suggest that Professor Kuribayashi was illustrating in the areas of territorial sea, fisheries zones, economic zones, transit, and deep sea minerals the adaptations that in some cases are going to take many years to make.

I think the talks up to today also illustrate the difficulty of adapting the UNCLOS Convention. In some respects, I think the trend toward extension of national jurisdiction is irrelevant to many of the interests of this particular region. Extended national jurisdiction, as you know, historically came about because Latin American states wanted a tool to work with vis-a-vis the United States on fishing problems. And it worked out very well. In fact, by Caracas the United States and the Soviet Union did 180-degree flip-flops from opposing extensions of national jurisdiction to accepting them.

It was all very well for the United States, the Soviet Union, Canada, and other broad states that have relatively open coastlines and few new neighbors, although they have their problems of adjacency. But applying the Convention to East Asia raises some very important questions about the general adequacy of these trends. Broad shelves, difficult fisheries problems, islands, broad bays make adaptation extremely difficult and lead one to consider the general adequacy of applying broad national jurisdiction. Now this isn't to suggest that we're going to go backwards. We can't. The days of a large international common beyond some narrow band of national jurisdiction are over. But the problems are going to be overlapping ones; neighbors will have to deal creatively with neighbors because I don't think they'll get that much help from the general nature of the Law of the Sea Treaty.

I also think we're going to have to go back to and look at first-order questions, particularly for East Asia, because of the problems of complexity. That is, what do you want to do with your ocean areas? Look also at questions of technical adequacy. What can you do? Is it possible? If you can exploit it, how should you do it? How can you control unacceptable kinds of pollution? With much better fishing technology at work in East Asia, with more and more states going further out, and with the restrictions on distant water fishing which result from UNCLOS and its trends, what's going to happen? A tragedy of the commons in East Asian waters? This is going to be a serious subject of discussion in the next couple of years.

Can we have overlapping zones and reduce complexity and the possibilities of conflict? The possibilities of conflict are all around us, and I think we've been able to see them. And I think that's going to be the first order of business.

Thomas Clingan: Professor Friedheim, I think your comment is an appropriate and interesting one, particularly when you raise the broader questions of cooperative use and adaptation within the general framework of sovereignty and national interests as we now perceive them. At many of the meetings I've been attending this is the kind of struggle that is going on. That's what I see as the major value of these kinds of meetings. It's very difficult for governments to sit down and talk about problems of adaptation without being dictated to by problems of sovereign rights and feelings of national interest, and I think that these kinds of meetings provide a perfect forum for starting to address these first-order questions as well as these other very realistic questions.

Choon-ho?

Choon-ho Park: Just two points. This is to confirm my understanding. As I remember, the Japanese constitution establishes a commitment to international treaty. The text states that Japan shall endeavor to observe international commitments faithfully or in good faith or something to that effect. I don't think there is any specific reference to the continental shelf, but am I correct that that article in a way connects Japanese domestic law and international commitment?

Tadao Kuribayashi: You're right.

Choon-ho Park: Could you give me the article number if you happen to have it there?

Tadao Kuribayashi: Article 98, the second sentence.

Choon-ho Park: Thank you. And my second point, Professor: you also mentioned the case of the Peruvian offshore business company that did some work outside of Japanese territory but on the Japanese continental shelf and then was charged by the Japanese government some amount of tax on what it earned. The company argued that since the business was outside of Japanese territory and Japan was not a party to the 1958 Geneva Convention, the company should be exempt from the taxation. A local court judged against that company on the grounds that the continental shelf doctrine or regime is customary international law. I want to know whether there has been any follow-up either for or against the defendant or whether that first judgment was final?

Tadao Kuribayashi: That judgment is not final. It is only the decision of the district court. The company can appeal to the Court of Appeals and finally to the Supreme Court.

Choon-ho Park: So the case is still pending?

Tadao Kuribayashi: Is pending.

Choon-ho Park: I see.

Thomas Clingan: Lee Kimball?

Lee Kimball: Professor Kuribayashi, you mentioned the existing Japanese deep sea mining law and said that a miner could in effect receive permission now from the Minister of International Trade and Industry (MITI) and that under the law you can designate other countries with which Japan has resolved overlaps. Later you said that prior to the Convention's coming into force additional national laws in respect of granting licenses and mining sites to other countries would be required. I just want to ask: which is the case? Before the Convention comes into force can Japan issue licenses to deep sea miners, or are additional laws required?

Tadao Kuribayashi: At present Japan has enacted interim laws for deep seabed mining. When Japan ratifies the new Convention, national laws will be required to implement its seabed provisions. National laws in respect of the granting of licenses, the mining sites of other states the preservation of the environment, maintenance of safety on the high seas, and emergency measures in more elaborate forms than the present laws will be necessary.

Lee Kimball: But the latter would apply only after the Convention comes into force?

Thomas Clingan: Mr. Saito.

Masaki Saito: To answer the question: yes. The present law covers the period prior to the ratification of the Convention.

Lee Kimball: Licenses could be issued under that law?

Masaki Saito: Yes.

Lee Kimball: Do you have any idea of the timing of such issuances? As you know, under U.S. law licenses can be issued now, given certain regulations and procedures which have to be completed. Basically, the possibility of doing so exists. When would you think any permissions might be issued under the Japanese mining law?

Masaki Saito: Well, if conditions are fulfilled, we can issue licenses at any time prior to ratification.

Lee Kimball: Is it your impression that the Japanese have any intention of signing additional agreements with some of the other deep sea mining countries to deal with this question of overlaps?

Masaki Saito: To some extent it's private companies, entities, and I assume they are talking about the overlapping questions with some of the relevant entities. And we have to wait and see the result of those talks.

Lee Kimball: But I thought that talks among the private companies had been concluded and the next step would be whether or not there would be a government confirmation of that process.

Masaki Saito: Well, we are still waiting to see the result.

Thomas Clingan: Professor Chee.

Choung II Chee: In Paragraph 99 of the North Sea judgment, the Court states that in case of overlap, a joint jurisdiction zone is desirable. But the trouble is that the Court didn't say under what circumstances. Is this an overlap of the continental shelf on the one hand and the EEZ on the other? Or between the two EEZs? The only assumption that we can draw is that since it is the common continental shelf, the surrounding geographical circumstances were taken into account. We have some clue or guide to go by but only in the context of the circumstances in the North Sea judgment.

The other observation I'd like to make involves state practice on the one hand and the Montego Bay Convention on the other with special reference to the EEZ. The EEZ under the Montego Bay Convention, as we all know, is a dual regime. You have rights on the one hand and on the other you have obligations. State practice offers no evidence that they will accept the obligation, the conservation and so forth. What's the upshot? The upshot is that within exclusive jurisdictions, we don't care what you say, you have to get our license.

The EEZ of the Montego Bay Convention, as was pointed out in O'Connell's book, is really the exclusive fishing zone. Article 56, Paragraph 3 of the Montego Bay Convention says that continental shelf matters shall be guided by Article 76 and not by the articles dealing with the EEZ, so we can always assume that the EEZ under the Montego Convention is predominantly, as the book suggests, the EFZ. I have read the legislation on Japanese practice over their EFZ. Is it true that Japan has drawn the straight baseline for her EFZ from the straight baseline from which the territorial sea is drawn?

My second question: you referred to the Japanese law on interim measures for seabed mining under which licenses are going to be issued. Then you also referred to the ambiguity in the legal status of the common heritage of mankind. You add those two elements and begin to wonder if Japan is interested in joining the reciprocating state treaty regime on an interim basis and then, when the treaty goes into effect, join the pioneer activities under the PIP Resolution.

Tadao Kuribayashi: Dr. Chee found the clue for the joint development system in the *North Sea Continental Shelf* case of 1969. Certainly the decision referred to the joint management, development, and use of the overlapping continental shelves; and, in my view, the decision put too much emphasis upon the territorialization of the continental shelf. Since then the continental shelf and EEZ have assumed a different legal nature. The continental shelf is the natural prolongation of the land territory while the EEZ asserts the coastal state's functional rights into the offshore resources in the 200-mile zones. And I think the new

Convention takes the position that the EEZ and the continental shelf differ in their legal nature since, in a provision like Article 56, Paragraph 3, of the new Convention concerning the exclusive economic zone, it is written, "the rights set out in this article" -- that means the rights, jurisdiction, and duties of the coastal state in the EEZ -- "with respect to the seabed and subsoil shall be exercised in accordance with Part VI" -- which means the part concerning the continental shelf. Although I think the best solution to the limitation of narrow, semi-enclosed sea like the East China Sea would be the median line simply because it has the merit of simplicity, since both regime are different, the EEZ and the continental shelf, the delimitation line could be different in these two cases.

As to whether Japan adopted the straight baseline for her EEZ, as far as I know, there's no establishment of the straight baseline in the Japanese 200-mile fisheries zones.

When I wrote in my paper about the ambiguity of the concept of the common heritage of mankind, I intended to say that although many provisions concerning this concept have been laid down in the new Convention, the exact means by which this concept can be realized is not unanimously agreed upon.

Some developing states are in favor of adopting the general provision that the Area and its resources are the common heritage of mankind, but in detail they are not agreed, and some developed countries are now making so-called mini-treaties. I just wanted to point out the reality of the present state of international law on this concept. That was my intention in writing this passage.

Choung Il Chee: As Japan adopted the interim legislation under which licenses would be issued, I was under the impression that Japan is leaning toward, if not joining, the mini-treaty. Then, once the Convention came into effect, Japan would join the pioneer investors. I wasn't too clear on this.

Tadao Kuribayashi: Looking at this interim law on deep seabed mining, it's very hard to reconstruct the real intention of Japanese policy on deep seabed mining. In this law we sometimes see phrases like the definition of the Area, which is defined as the seabed under the high seas. I can also see some intention to adjust domestic law to the mini-treaty side. But the law was officially declared to be an interim measure until Japan ratified the Convention. I must confess that the law is very difficult to interpret.

Thomas Clingan: Professor Van Dyke.

Jon Van Dyke: Two questions related to fishing matters. Yesterday, in Dr. Chee's paper, he referred to the 1965 fishery agreement between the Republic of Korea and Japan as an anachronistic legal instrument which represents a heavy concession made by Korea to Japan. I wondered what your thoughts were about that agreement, whether it would be renegotiated in the near future or still serves the interests of the region appropriately. My second question is with regard to the distant-water fishing activities in the Pacific, what the Japanese perspective would be on the obligations that are required by Article 64, particularly whether or not Article 64 requires a new international organization, regional organization, to be created in the Pacific to deal with the problem of the highly migratory species.

Tadao Kuribayashi: The Japanese law does not apply to Korean and Chinese people because the present existing agreements are working well, and 200-mile fishery zones are not demarcated between the two countries. May I reserve my answer to your second question about the Pacific regions' cooperation on highly migrating species? I'm not too well qualified to talk about this.

Thomas Clingan: Mr. Noegroho.

Noegroho Wisnoemoerti: My first point concerns the three non-nuclear principles, which may create problems for the government if it asks the Parliament to ratify the treaty. It seems to me that this problem will arise not only in relation to straits used for international navigation but to innocent passage through the territorial sea. Is there any particular reason why you have excluded these problems from your discussion?

My second point concerns the provisional measure relating to the fishery zone. Although it is modestly designated as a provisional measure, it is really a rather comprehensive law because it covers fishing activities in the zone, requirements for permissions, fishing fees, and enforcement. "Provisional measures" would more likely fit situations relating to, for instance, delimitations which have been developed in the Conference. Professor Kuribayashi, could you also give us some background information concerning why the Japanese government decided to use the word "jurisdiction" instead of the term "sovereign rights"? As I remember, when the law was enacted in 1977 the concept of economic zone and the terms of its regime had already been developed. I thought that it was rather peculiar to use "jurisdiction," which has special connotations, instead of "sovereign rights," which has developed into a very clear concept.

Tadao Kuribayashi: In my paper, I mentioned three possible solutions for the harmonization of the three non-nuclear principles with the requirements of the new Convention. But if Japan retains the frozen state of three nautical miles of territorial sea in five straits, then the high seas parts would remain in those straits, and there will be no conflict between the principles and the new Convention.

In my paper I also discussed problems relating to the territorial sea and how to interpret Paragraphs 1 and 2 in Article 19. At present Japan does not require any prior notification or authorization from foreign war ships entering the Japanese territorial sea; but if she finds them loaded with nuclear weapons, the Japanese government will require them to leave the Japanese territorial sea. This Japanese practice is not against international customary law on the regime of innocent passage. In earlier sessions there was much discussion on warships and passage rights in the territorial sea, and certainly there was no express provision on that matter in the new Convention except that, well, all ships have the right of innocent passage in the territorial sea.

On whether the amendment proposed by many coastal states was withdrawn or not withdrawn, I think the truth lies between the two views. I was watching the discussion at that time as an observer, and I remember that the representatives of many coastal states left that room to protest against the innocent passage of foreign warships without prior notification or authorization. Indeed, some coastal states interpreted the declaration in accordance with Article 309, and on this matter I

think that international customary law is moving to go either way. We have to wait and see. The direction depends upon states' practice.

Noegroho Wisnoemorti: Professor Kuribayashi, you said that in accord with customary law coastal states could ask ships carrying nuclear weapons or nuclear substances not to exercise the right of innocent passage. But, if I'm not mistaken, Article 23 does not give that same interpretation. Read in conjunction with Article 17 about the right of innocent passage, Article 23 only requires 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." I think the purpose of this provision is to give additional safeguards for the coastal states but I don't think that it goes beyond that. The problem that you have exposed concerning the three principles will also apply to innocent passage in the territorial sea. When you have established the twelve-nautical-mile limits of your territorial sea, and it's wide enough that ships will need to pass through it, they will invoke these same articles and the Japanese government will not be in a position to deny innocent passage.

Tadao Kuribayashi: Article 23 demands certain duties for nuclear-powered ships and ships carrying nuclear or inherently dangerous or noxious substances. The ship is required to carry documents and observe special precautionary measures established for such ships by international agreements. I think that this article would cover all of the foreign warships with nuclear weapons passing through the Japanese territorial sea. I am inclined to think that Japan can rely upon Article 19, Paragraph 1, which broadly allows the coastal state to take measures for the prevention of acts prejudicial to its peace, good order, and security, rather than upon Article 23. The provisional measures on the 200-mile fishery zones of Japan were mainly enacted to counter the USSR's setting up a 200-mile fishery zone at that time. In my view, the law was promulgated to develop constellations for the proper management of 200-mile zones around Japan. But the law lacks a sound legal basis for extending the extra-territorial effects of the various domestic laws and regulations to the activities occurring in this zone. So I think the law should clarify Japan's sovereign rights even on the specific matter of living resources within this zone. In this way I think Japan would be able to prevent concurrence of jurisdictions with other countries within these zones. I must add that Japan does not officially recognize the economic zones of foreign countries, but of course she does not challenge them. Until we establish the EEZ, we have to elaborate on and clarify this law although, as Mr. Noegroho appreciates, its contents are varied.

Thomas Clingan: Mr. Saito, did you want to comment on this point?

Masaki Saito: As for the usage of "jurisdiction" or "sovereign rights" let me add a few comments from the administrator's point of view. If my memory is correct, the usage of "sovereign rights" appeared in the Convention on the Continental Shelf in 1958 as one of the four Geneva Conventions. Since we did not join this international convention, the term "sovereign rights" did not appear in our national legislation. In 1977 when we drafted these interim measures covering fishery zones we

discussed whether to use "jurisdiction" or "sovereign rights." In our tradition of national legislation, to use new words we have to have very strong determination, such as jumping from the top of this Shilla Hotel to the ground, so we carefully avoided such new usage of "sovereign rights." "Jurisdiction" we used, in a broader sense, to cover sovereign rights. Since "sovereign rights" is used commonly in international law, we are carefully studying whether to change "jurisdiction" to "sovereign rights." But for now we put broad sense into "jurisdiction."

Thomas Clingan: Professor Kim?

Jung-Gun Kim: This question was initially raised by Dr. Craven and I think it is crucial in understanding the position of the Japanese government on the whole question of the law of the sea. I refer to your analysis or interpretation of Article 98, Section 2, of the Japanese constitution, "The treaties concluded by Japan and established laws of nations shall be faithfully observed." Granted that not all international agreements require necessarily this domestic legislation but considering that the ocean regime and related issues do have an international aspect, and considering also that Japan like many other countries pursues unilateral actions, if that is the expression, I think an attempt to resolve the question of supremacy between international agreements and municipal law in the case of a non-self-executing treaty is crucial. I am aware that the Japanese constitution does provide the judiciary view. I am aware of the stipulations of Article 98, but it assumes no controversy or conflict between domestic statutes and international agreements. Could you possibly highlight for us, either based upon precedents or practices, the relationship between the statutes of Japanese municipal law and the 1982 Montego Bay Law of the Sea Treaty?

Tadao Kuribayashi: There have been many discussions on the priority problems in the Japanese constitution between international treaties or international customary law and Japanese domestic law. Most of the constitutional lawyers give preference to the constitution, and most of the international lawyers do the opposite. Most of the Japanese court decisions, particularly at the level of the shipping court, have evaded those problems as political questions. I interpret Article 98, Paragraph 2, to give preference to international law over domestic law. But we still need domestic law to incorporate international law into domestic law. This can be done either by directly promulgating the treaty or by enacting detailed domestic law. I agree with you that Japan has many diversified interests in ocean programs and many of them contain jurisdictional problems. At the moment scholars, including me, are drafting -- of course on an academic level -- Japanese laws on the territorial sea and on the continental shelf as future guides. I don't think the present state of Japanese municipal law in these two areas can adequately implement the new Convention.

THE REPUBLIC OF CHINA AND THE LAW OF THE SEA

THE REPUBLIC OF CHINA AND THE LAW OF THE SEA

Thomas Clingan: Our next speaker is Professor Kuo-tsai Chao, Associate Professor of International Law and Secretary of National Chengchi University in Taipei. He has a distinguished list of academic credentials beginning with public school in Hong Kong and an LLB and LLM from Chengchi University. He has certificates from the University of Oslo and the Hague Academy, an LLB from University of Cambridge, and a Ph.D. from the University of Edinburgh, which gives him quite a variety of accents. Professor Chao.

THE REPUBLIC OF CHINA AND THE LAW OF THE SEA

Kuo-Tsai Chao
National Chengchi University
Republic of China

Republic of China and the First and Second United Nations Conferences on the Law of the Sea

Territorial Sea

In 1912, the ROC began to consider the question of the width of the territorial sea. On 10 July, a letter was written from the Minister of the Navy to the Ministry of Foreign Affairs stating that:

the boundary of the territorial sea should be limited to three nautical miles [off the coast]. However, this limit was formulated according to the range of a cannon shot. Presently, the range of a cannon shot is much farther; therefore, *Hall's Public International Law* book said that at the Paris International Law Conference, the majority of the members approved the theory that the territorial sea should be extended to six nautical miles. As a matter of fact, the farthest range of a cannon shot now can reach ten nautical miles, so it seems that we should extend our territorial sea [to such a width] so as to protect our maritime rights.

But no decision was made on whether China should accept the three-nautical-mile limit or should widen its territorial sea.

In 1921, the President of the ROC approved a proposal of the Ministry of the Navy for setting up a Committee on Maritime Boundary to discuss the question of China's territorial sea. The Committee held on 8 September 1921 that China should follow the practice of other countries by prescribing its territorial sea as three nautical miles.

On 5 July 1929 the Vice-Commander of the Navy and member of the Northeast (Manchuria) Political Council, General Shen Hung-lieh, sent an official communication to the Ministry of Foreign Affairs proposing that the Chinese territorial sea should be prescribed as twelve nautical miles and the Gulf of Pohai (Chili) as entirely within China's territorial sea as a matter of historical right. The Foreign Ministry did not take action on the proposal of a twelve-nautical-mile territorial sea.

At the Hague Conference on Codification of the International Law, the ROC pronounced that the width of the territorial sea should be three nautical miles measured from the low-water marks along the coast. This position did not mean, however, that China was satisfied with the regime of a three-nautical-mile territorial sea.

In 1930, the Headquarters of the General Staff of the ROC prepared a draft proposal on the boundary of the territorial sea and submitted it to the Executive Yuan in January 1931. It concluded that it is advantageous for a weak country to support a regime of extended territorial sea. The Headquarters of the General Staff, therefore, proposed that China should have a twelve-nautical-mile territorial sea. It also added that by claiming a twelve-nautical-mile territorial sea China could claim the entire Gulf of Pohai as internal waters.

After seriously considering the matter, the Executive Yuan of the ROC took a compromise approach to the question. In the Order Prescribing the Scope of the Territorial Sea as Three Nautical Miles in April 1931, it explicitly provided that China would adopt the three-nautical-mile territorial sea.

When the United Nations International Law Commission began to discuss the codification of the law of the sea, the ROC government instructed the Chinese member of the Commission, Hsu Shuhsi, that China preferred a twelve-nautical-mile territorial sea. At the 166th meeting held on 17 July 1952, Dr. Hsu said that he was convinced that a twelve-mile limit was the best solution to the problem of delimiting the territorial sea.

On 9 June 1955, at the 308th meeting of the ILC, he proposed the following amendment to Article 3 (Breadth of the Territorial Sea) of the Draft Articles on the Law of the Sea:

The coastal State may, however, extend the territorial sea up to a limit of 12 nautical miles from the baseline.

He observed that the three-mile-limit was not wide enough to satisfy many states in the Far East and in Latin America which

although ... like ... China, had previously adopted the 3 mile limit, now desired to extend their territorial sea beyond 3 miles partly in order to defend themselves against subversive activities and partly in order to protect their small fishery industry against ruinous competition by well-organized foreign fishing concerns.

Dr. Hsu's position on the twelve-nautical-mile limit of the territorial sea was softened after repeated requests from the U.S. government. At the 361st meeting of the Commission held on 6 June 1956, he proposed the following compromise amendment to Article 3 of the Draft Articles:

1. The breadth of the territorial sea may be determined by each coastal state in accordance with its economic and strategic needs within the limits of three and twelve miles, subject to recognition by States maintaining a narrower belt.
2. In the event of disagreement, the matter shall be referred to arbitration.

The amendment was rejected by nine votes to three with two abstentions at the 363rd meeting of the Commission held on 8 June 1956.

In the 1956 Draft Articles concerning the Law of Sea, there was no provision for the breadth of the territorial sea, and the report to the General Assembly merely noted that the Commission "considers that international law does not permit an extension of the territorial sea beyond 12 miles" and that the breadth should be fixed by an international conference. When the Draft Articles were sent to member states of the UN for comments, the ROC government's comment on Article 3 was essentially the same as proposed by Dr. Hsu at the Commission in 1956. It said that the Conference

may probably establish a maximum permissible breadth based on the findings of the ILC [i.e., 12 nautical miles], and, at the same

time, leave to each State the right of not recognizing the breach exceeding the maximum permissible limit, if greater than that of its own.

With regard to the method of delimiting the territorial sea provided in Article 5 of the Draft Articles, the Chinese government, in principle, agreed that a straight baseline could be used in delimiting the territorial sea. However, it was asserted that a maximum permissible length of the straight baseline should be worked out to avoid confusion and dispute.

At the Geneva Conference on the Law of the Sea, held in the spring of 1958, the ROC did not make any proposal on the limit of the territorial sea but it rejected the view that the territorial sea could be unilaterally delimited by a coastal state to meet its particular need. It observed that there must be a proper balance among three kinds of interests in deciding the limit of the territorial sea: the justifiable needs of coastal states, the general interests of the international community, and the interests of the maritime powers. The interests of coastal states should be given priority and then the general interests of the international community. The ROC also asserted that the interests of the maritime powers should not be overlooked, however, since many states whose maritime activities were underdeveloped, in addition to the landlocked countries, depended on these powers for essential services.

From a historical examination, it is evident that the ROC has not been satisfied with the traditional three-mile limit of the territorial sea. It has not, however, taken any action to extend the breadth of its territorial sea beyond this limit.

Contiguous Zone

In the Order Prescribing the Scope of the Territorial Sea as Three Nautical Miles in April 1931, the ROC claimed a twelve-nautical-mile limit for investigating smuggling. In 1934, a Custom Preventive Law was enacted which set the limit for enforcing that law as twelve nautical miles off the coast. (For recent developments, see later.)

In the Measures on Permitting Japanese Fishing Vessels to Fish in the High Seas Off the Coast of China, Korea, and the Ryukyus of February 1947, it was explicitly provided that Japanese fishing vessels should not fish within twelve miles of the Chinese coast. The decree seemed to indicate that in addition to customs preventive measures, China would claim a twelve-mile limit to protect its economic interests in coastal fishing.

When the 1956 Draft Articles concerning the Law of the Sea were sent to member states of the United Nations for comments, the ROC supported the idea that coastal states should have exclusive fishing rights in their contiguous zone.

Continental Shelf

The ROC participated in the 1958 First United Nations Conference on the Law of the Sea and signed the Convention on the Continental Shelf on 29 April 1958 without any reservations. However, it took no action to assert its claims until the late 1960s. On 17 July 1969, the Executive Yuan of the ROC declared that "it may exercise its sovereign rights over all the natural resources of the seabed and subsoil adjacent to its coast outside its territorial sea." In late 1969, the

Executive Yuan referred the Convention on the Continental Shelf to the Legislative Yuan for ratification.

The Legislative Yuan of the ROC ratified the Continental Shelf Convention early in 1970, with two reservations: a) that the boundary of the continental shelf appertaining to two or more states whose coasts are adjacent to, or opposite, each other, shall be determined in accordance with the principle of the natural prolongation of their land territories; and b) that in determining the boundary of the continental shelf of the ROC, exposed rocks and islets shall not be taken into account.

It is noteworthy that the U.K. in the *Anglo-French Continental Shelf Arbitration* alleged that the proposition that both mainland and islands can have continental shelves as a natural appurtenance to the land territory is based both on the 1959 Continental Shelf Convention and on customary international law and so could not be affected by any reservations which parties to the Convention might make. In an explanatory comment on the ROC's reservations, it was stated in debates in the Legislative Yuan that the principle of the coastal states' rights over the natural prolongation of its land territory had been established in the *North Sea Continental Shelf Cases* and that, significantly, exposed rocks and islets were part of the continental shelf on which they were situated. For this reason, it was claimed, no separate right could be asserted over the continental shelf surrounding them on the basis of independent *insular* status. What does *insular* mean? It may be recalled at the 196th meeting of the ILC in 1953, Yepes proposed that the term "continental shelf" refer to:

The seabed and subsoil of the submarine areas contiguous to the *continental or island coasts* of a State, but outside the area of the territorial sea...

Although Alfaro accepted Yepes' pertinent qualification "submarine areas contiguous to the continental or island coasts," he thought the term *insulaire* in the French text of Yepes' proposal might be better rendered in English by the word "insular" rather than "island."

In 1956, Garcia Amador explained that the 1953 draft not only excluded "continental" and "insular terrace" but also certain other submarine areas adjacent to a state's territory which were already being exploited or were liable to be exploited in the near future. He then proposed that the expression "submarine areas" refer to "the soil and subsoil of the submarine shelf, continental shelf and *insular terrace* ... adjacent to the coastal State outside the territorial sea..." Francois, however, expressed his doubt about the real meaning of the term "continental and insular terrace." He stressed that the Commission's draft was not intended for study only by experts.

Coming back to the ROC reservation, it was chiefly aimed at the delimitation of the continental shelf of the Tiao-Yu-tai (Senkaku) Islands in the East China Sea. In practice, however, it is equally possible that these reservations could act as a double-edged sword which might have adverse effects on the determination of the Chinese continental shelf in the vicinity of the Hsi-sha (Paracel) and Nansha (Spratly) Islands in the South China Sea.

It is well established that under Article 311, Paragraph 1, the 1982 Convention on the Law of the Sea shall prevail, as between States Parties, over the 1958 Continental Shelf Convention.

The ROC and the Third United Nations Conference on the Law of the Sea

The ROC adhered to a very conservative posture with regard to the law of the sea until long after it could have justifiably adopted a more assertive stance in view of customary state practice.

Since 1950, the effective area under ROC control has been limited primarily to the island of Taiwan at the same time that the ROC has become a significant maritime power. It has engaged in large-scale distant-water fishing, its fishing fleets operating from the Indian Ocean through the South Pacific and into the Atlantic. As a major medium-size maritime power, the ROC would not benefit from an expanded territorial sea.

In 1966-1967, several ministries and governmental agencies of the ROC again studied the questions of China's territorial sea, fishing zone, contiguous zone, and continental shelf. After receiving their report, the Executive Yuan made the following decision on 20 June 1968:

(a) Concerning the question of the breadth of the territorial sea, our country should have a flexible position, and take measures in response to the need of national interest and international situation.

(b) Concerning the question of the breadth of the fishing zone, our country should prescribe a 12-nautical mile limit in order to protect our fishing resources and in response to international trends. However, this limit may be adjusted in response to the need of reciprocity in international relations.

In 1969, the United States requested the ROC to comment on a new U.S.-USSR Draft Articles on the Law of the Sea which provided, *inter alia*, that a coastal state may extend the breadth of its territorial sea to twelve nautical miles and, for a state which has a narrower breadth of the territorial sea, may establish a fishing zone contiguous to its territorial sea. However, the total breadth of the territorial sea and fisheries zone should not exceed twelve nautical miles. A preliminary study by the ROC Foreign Ministry recommended that the ROC should accept this rule.

It is generally accepted that "the coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes." Thus, the Executive Yuan meeting in the regular session on 17 July 1969 declared that:

The ROC is a State signatory to the Convention on the Continental Shelf which was adopted by the United Nations Conference on the Law of the Sea in 1958. For the purpose of exploring and exploiting natural resources and in accordance with the principles embodied in the said Convention, the Government of the ROC declares that it may exercise its sovereign rights over all the natural resources of the seabed and subsoil adjacent to its coast outside its territorial sea.

The Statute for Exploration and Exploitation of Petroleum In Off-shore Areas, which was enacted by the Legislative Yuan and promulgated by Presidential Decree on 3 September 1970, "governs the exploration and exploitation of petroleum in offshore areas, including the territorial sea and the adjacent continental shelf of the ROC."

On 4 December 1970, the ROC delegate to the First Committee of the United Nations General Assembly said that

the Chinese delegation believes that the establishment of a 12-mile limit for the territorial sea to be embodied in a new treaty, as announced by President Nixon in his declaration on United States Ocean policy on 23 May 1970, is consonant with customary international law as expounded by the International Law Commission.

In the past, the ROC participated in the First and Second United Nations Conferences on the Law of the Sea and is not only a contracting party of the 1958 Convention on the Continental Shelf but also engaged in the first session of the UNCLOS III; however, ever since its withdrawal from the United Nations in 1971, the ROC has been unable to participate in these conferences.

While the ROC was a member of the UN, it voted in favor of the following resolutions of the United Nations General Assembly, namely:

1. Resolution on the Ad Hoc Committee to Study the Peaceful Uses of the Sea-bed and Ocean Floor beyond the Limits of National Jurisdiction (1967).
2. Resolutions on the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction (1968).
3. Resolutions on a Conference on the Law of the Sea and Resolution on a Moratorium Concerning All Activities of Exploitation of the Resources of the Sea-bed and Ocean Floor, and Subsoil thereof, beyond the Limits of National Jurisdiction (1969).
4. Declaration of Principles governing the Sea-bed and Ocean Floor, and Subsoil thereof, beyond the Limits of National Jurisdiction (1970).

Current Practice of the ROC

It is recognized that the coastal state has the right to legislate and regulate sea activities in the territorial sea as well as in the EEZ in such a way that marine resources are preserved.

Declaration on the Territorial Sea and Economic Zone

As late as 1979, the ROC still adhered to a three-mile limit for its territorial sea, with a broader defense identification zone and no exclusive fishery or economic zones.

In 1979, a position study for the Commission on Research and Development of the National Executive Yuan of the ROC recommended adopting a twelve-mile territorial sea, with a 200-mile exclusive economic zone and full implementation of the Republic's authority over its continental shelf.

After several months of study, the National Executive Yuan, on 6 September 1979, adopted a decree incorporating these recommendations as the new position of the ROC on law of the sea questions. On 6 September 1979, the Executive Yuan made the following declaration:

1. The territorial sea of the Republic of China shall be measured from the baselines and shall extend to the outer limits of the water area of twelve nautical miles from such baselines.
2. The exclusive economic zone of the Republic of China shall be measured from the baselines from which the territorial sea is

measured and shall extend to the outer limits of the water area two hundred nautical miles from such baselines.

1) The Republic of China shall have in the exclusive economic zone sovereign rights for purposes of exploration and exploitation, conservation and utilization of the natural resources, and such jurisdiction the exercise of which is recognized under international law.

2) Where the exclusive economic zone of the Republic of China extends over any part of the exclusive economic zones as claimed by other states, the boundaries shall be determined by agreement between the states concerned or in accordance with generally accepted principles of international law on delimitation.

3) Other states may enjoy in the exclusive economic zone of the Republic of China the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and engage in such other activities with respect to navigation and communication as permitted by international law.

3. The sovereign rights enjoyed by the Republic of China over the continental shelf contiguous to its coast as recognized by the Convention on the Continental Shelf of 1958 and the general principles of international law shall not be prejudiced in any manner by the proclamation of the present economic zone or the establishment of such zones by any other state.

Respect for Other Countries' Fishing/Economic Zones

It had been recommended at that time that the ROC enact a new fishery conservation and management act as the first step in implementing its authority under the adopted territorial sea or exclusive economic zone.

On 30 April 1981, the Executive Yuan approved the "Measures for Strengthening the Control over Fishing Vessels and Fishermen," the main points of which are as follows:

1. A fishing vessel which illegally enters a foreign territorial sea or economic zone shall have its fishing license suspended from six months to one year. If a violation is repeated or a crew member lands on shore in disregard of regulations and infringes upon the life, property, and personal freedom of the local people, the fishing license shall be revoked.

2. A fishing vessel which violates an international fishery agreement or a cooperation contract shall have its fishing license suspended from four months to one year after the expiration of the contract.

3. If a fishing vessel illegally enters into the territorial sea or economic zone, the captain's license shall be suspended from six months to two years and, in a serious case, the license shall be revoked.

4. If a fishing vessel violates an international fishery agreement or a cooperation contract, the captain's license shall be suspended from six months to one year.

Protection of Whales

To help maintain the survival of whales, the Ministry of Economic Affairs announced on 16 July 1981 that all fishing boats of the Republic of China are banned from whaling either within the nation's territorial waters or in the waters of any foreign nations.

The issuance of licenses for whale catching was suspended immediately following the announcement.

The ministry added that all foreign fishing boats are also prohibited from whaling in the Republic of China's economic zone.

Establishment of Contiguous Zone

In 1984, the 1934 Custom Preventive Law was amended which extends the limit for enforcing the law to twenty-four nautical miles off the coast.

Question of Delimitation

Islands in General: Waters between an island and the coast are considered to be territorial seas if they are between twelve and twenty-four miles wide. The legal regime of islands and the delimitation of sea areas in relation to islands should be noted as two separate problems. Whereas the former concerns an island's right to its own exclusive area of jurisdiction, the latter weighs up the convenience or otherwise of taking an island as the basepoint for drawing delimitation. In particular, small islands give rise to legal problems of a difficult and complex sort in the delimitation of continental shelf or exclusive economic zone boundaries between adjacent and opposite states. Under Article 121, Paragraph 3 of the 1982 Convention of the Law of the Sea, only "rocks which cannot sustain human habitation or economic life of their own" cannot serve as a basis for claiming an economic zone or continental shelf. In other words, an island, in principle, can have an economic zone or continental shelf. However, under certain circumstances, inequitable results will arise from giving full effect to an island in delimitation.

While the ROC did not participate at the UNCLOS III, its reservation to Article 6 of the 1958 Convention on the Continental Shelf seems to support Article 121, paragraph 3 of the 1982 Convention on the Law of the Sea.

Tiao-Yu-Tai Islands: One of the difficult problems in delimiting the East China Sea boundaries is the presence of the Tiao-Yu-Tai Islands, contested by China and Japan. Both the PRC and the ROC consider the islets to be China and under the administrative jurisdiction of Taiwan Province. The Tiao-Yu-Tai islets consist of five uninhabited islets and three rocks in the East China Sea northeast of Taiwan. They are all situated at the edge of the southeast part of the East China Sea continental shelf extending from mainland China and Taiwan; they are separated from the continental shelf of Japan and the Ryukyu Islands by the Okinawa Trough, which is more than 1000 meters in depth. The largest of the islets, "Tiaoyu," seems large enough to be able to claim a continental shelf or economic zone under Article 121 of the 1982 Convention on the Law of the Sea. If this is the case, then the ownership of these islets becomes very important in delimiting the maritime boundary in this area. Japan's ownership of these islets would provide it with a base to claim a continental shelf or economic zone to the disadvantage of China. On the other hand, the ROC can use these islets to extend its exclusive economic zone vis-a-vis Japan's Ryukyu Islands.

In the context of the East China Sea, the applicable "equitable principle" for delimitation of seabed boundaries could be the equidistance principle, as advocated by Japan, or the "natural prolongation principle," as advocated by China (the ROC and PRC), or a combination of both and/or other principles. In fact, the thrust of state practice, judicial decisions, and Articles 83 and 74 of the 1982 Convention on the Law of the Sea is that the applicable principle is to be determined

by agreement on the basis of international law in order to achieve an equitable solution.

On 29 August 1980, Spokesman Liu Ta-jen of the Foreign Ministry said at a regular press conference that "the Republic of China government has reiterated once and again her sole sovereignty over the Tiaoyutai Islands. Today I confirm that the free Chinese government's sovereignty over these islands and the continental shelf extending from the islands will never be affected by any others' decisions."

Bashi Channel: The maritime boundary between the southern part of Taiwan and the northern part of Luzon Island of the Philippines has been in dispute between the ROC and the Philippines in recent years. The Philippines' extensive territorial sea claim based on the 1898 U.S.-Spanish Peace Treaty is hardly supported by customary rules of international law and the 1982 Convention on the Law of the Sea and therefore should be disregarded in such delimitation. On the other hand, the archipelagic principle provided in the 1982 Convention can be applied. Be that as it may, the Philippines could rely on a more favorable baseline under this principle as the basis for delimitation. On the other hand, it seems that the ROC could invoke Article 51, Paragraph 1 of the 1982 Convention, which preserves "traditional fishing rights and other legitimate activities of the immediate adjacent neighbouring state in certain areas falling within archipelagic water," to protect its fishing rights, since the distance between the southern part of Taiwan and northernmost islands claimed by the Philippines is less than sixty-two miles and thus the ROC can be considered an "adjacent" state.

With respect to rules of delimitation, it appears that the equitable principle of the delimitation of the continental shelf, enunciated in the *Anglo-French Continental Shelf Arbitration* and the *Tunisian-Libyan Continental Shelf Case*, can *mutatis mutandis* be applied to the delimitation of the maritime boundary.

How to Resolve the Problem of ROC Participation in the 1982 Convention on the Law of the Sea

The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, accession, or by any other means if so agreed. The problem of the ROC participation in the 1982 Convention is so crucial that it is necessary to explain this matter in some detail.

Signature: The treaty itself may provide that it is to enter into force upon signature, in which case the act of signature definitively expresses the consent of the signatory state to be bound by the treaty.

Under Article 305 of the 1982 Convention on the Law of the Sea, the Convention

shall be open for signature by

- (a) all states;
- (b) Namibia, represented by the UN Council for Namibia;
- (c) all self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations ... which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;

- (d) all self-governing associated states which ... have competence over the matters governed by this Convention ...;
 - (e) all territories which enjoy full internal self-government ...
 - (f) international organizations
- This convention shall remain open for signature until December 9, 1984, at the Ministry of Foreign Affairs of Jamaica and also ... at the United Nations Headquarters in New York.

According to traditional practice, a government does not admit a foreign representative to the exercise of his full functions until he has presented his *credentials*. The representative from the ROC may not be allowed to sign the 1982 Convention due to the lack of diplomatic relations between the ROC and Jamaica.

Moreover, the UN Credentials Committee is a committee of nine members, set up at the beginning of each session by the General Assembly. It examines the credentials presented by the leaders of the delegations to the particular session and reports on them to the Assembly. As the PRC is represented in the United Nations, the UN Credentials Committee may not accept the ROC delegates' credentials in signing the 1982 Convention on the Law of the Sea.

Ratification: From the point of view of form, ratification constitutes a solemn act on the part of a sovereign or by the president of a republic whereby he declares that a convention has been submitted to him and after examining it he has given his approval thereto and undertaken its complete and faithful observance.

Ratification can be used to describe the actual document or instrument whereby a state expresses its consent to be bound by the treaty. The legal point of significance is that ratification, being in part a confirmation of a *signature* already given, must relate to what the signature relates to and must therefore relate to the treaty in its entirety.

As the ROC did not participate in signing the 1982 Convention on the Law of the Sea, it has no need at the moment to ratify the Convention.

Accession: Accession is the traditional process whereby a state may, in certain circumstances, become a party to a treaty of which it is not a signatory. The use of accession as one of the means whereby a state can become party to the 1982 Convention on the Law of the Sea is provided by Article 307. It states that this Convention shall remain open for accession by states and the other entities referred to in Article 305. Since the challenge of the PRC, the ROC may not be able to accede to the Convention.

Approval and Depositary: Where a treaty is made open to "approval" without prior signature, the process is akin to ratification. That approval may be regarded as equivalent to ratification of, formal confirmation of, and accession to the 1982 Convention on the Law of the Sea under Article 319 that "the Secretary-General of the UN shall be the depositary of this Convention." Due to the fact that the ROC is no longer a member of the United Nations, the Secretary-General of the United Nations may reject the approval of the ROC.

Unilateral Declaration or Statement: The term "declaration" is indistinguishable from any other treaty intended to have an obligatory

character. According to Oppenheim, "there are unilateral declarations which create rights and duties for other states." The term "declaration" is also used to describe the action taken "when states communicate to other states, or *urbi et orbi*, an explanation and justification of a line of conduct pursued by them in the past, or an explanation of views and intentions concerning certain matters." In 1974, the ICJ had occasion to consider the extent to which oral declarations made by a head of state, a minister for foreign affairs, or another government minister may give rise to a commitment binding on the state concerned. In the *Nuclear Tests* case (Australia v. France), the Court attributed special weight to a series of statements made by the President of the French Republic, the French Minister of Defense, and the French Minister for Foreign Affairs subsequent to the oral proceedings in the case. These statements, according to the Court, indicated the intention of France to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests. In analyzing the legal significance of these statements, the Court made the following remarks:

With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form.

In view of the above analysis, it appears clearly that the ROC may issue a unilateral declaration or statement to accept the 1982 Convention as binding on the ROC. However, in order to protect its national interest, it is likely that the ROC would prefer to have its acceptance of the Convention based on reciprocity as will be discussed in the next section.

Bilateral Official/Unofficial Agreement: Agreement means a treaty intended to have an obligatory character, but usually of a less formal or significant nature than a treaty or convention. It should be governed by international law, or should operate within the sphere of international law, or should be intended to produce legal effects under international law.

Sometimes agreements are concluded between a government department in one country and a government department in another. It depends on the circumstances whether such "interdepartmental agreements" are binding under international law or whether they are merely private law contracts.

As with treaties in the restricted sense, bilateral official/unofficial agreements may be concluded between heads of state, between states, between governments and government departments for the reciprocal enforcement of certain provisions of the 1982 Convention on the Law of the Sea to which the ROC is not a party. For example, when the 1974 International Convention for the Safety of Life at Sea, to which the ROC is not a party, entered into force on 31 March 1981, a bilateral agreement between the ROK and the ROC was reached on the basis of reciprocity and equality to mutually implement the 1974 Convention that has given mutual desire to ensure the continuation of uninterrupted maritime trade and the safety of life at sea.

Another example, as we shall see, is the exchange of Notes between the ROC and the Kingdom of Tonga. A Note CE-1811 dated 10 June 1982 from the Embassy of the ROC to the Minister for Foreign Affairs of the Kingdom of Tonga reads in part as follows:

In view of the fact that the International Convention on Tonnage Measurement of Ships 1969 ... will come into force on July 18, 1982, and further in view of the fact that although the Republic of China is not a party to the said Convention, it is nevertheless willing and has so decided to abide by the provisions of the said Convention in the interest of international shipping, the Government of the Republic of China would wish to propose, on the basis of principles of equality and reciprocity and further in view of the friendly relations existing between the two countries, that the Republic of China and the Kingdom of Tonga undertake to abide by the provisions of the said Convention, recognize the validity of the International Tonnage Certificates issued by the competent authorities of either Government so as to enable and facilitate the call at the various international ports by the merchant ships of the Republic of China.

If such a proposal as appears here above is acceptable to the Government of the Kingdom of Tonga, then the present Note and the Note in reply from the Minister confirming such acceptance shall be considered as constituting an agreement between our two countries on this matter.

Again, on 12 July 1982, a Note from the Minister for Foreign Affairs and Defense of Tonga to the Ambassador of the Republic of China stated that "His Majesty's Government accepts the aforementioned proposal and that Note CE-1811 of 10 June 1982 and this Note of reply will constitute an agreement between our two countries in this matter."

It is crystal clear that the ROC may use bilateral official/unofficial agreement to bilaterally implement the 1982 Convention on the Law of the Sea to which the ROC is not a party.

Accepting those Parts of the Convention that Codified Customary International Law: The ROC was unable to sign the 1982 Convention because of its exclusion from UNCLOS III at the insistence of the PRC. The ROC, however, could accept those parts of the Convention that codified customary international law. For example, on 12 January 1983, the ROC Foreign Minister Chu Fu-sung at the sixth plenary session of the Committee on Foreign Affairs of the 70th session of the Legislative Yuan declared, "After the Law of the Sea Convention enters into force, our attitude is that in principle we will comply with its terms." It is obvious that a statement of this nature given by the ROC Foreign Minister on behalf of his Government will be of legal significance.

DISCUSSION

Thomas Clingan: Thank you very much, Professor Chao. Are there any questions or comments?

Rong-Jye Chen: I would like to make a very brief supplementary comment concerning the law of the sea and the Republic of China. As the conference is academic in nature, so my comments are based on my personal research and do not reflect the view of the government of the Republic of China.

With its withdrawal from the United Nations in 1971, the Republic of China was not invited to attend the Third UN Conference on the Law of the Sea. Therefore, the Republic of China was unable to negotiate and sign the UN Convention. According to the principles of international law as codified in the Vienna Convention on the Law of Treaties neither obligations nor rights are created for a third state without its consent. Therefore, the UN Convention is not binding upon the Republic of China even after its entry into force unless and until the provisional convention is accepted by the law community as customary international law. However, due to the importance of this Convention in connection with national defense, natural resources, navigation, scientific research, and the marine environment, the government of the Republic of China has watched very closely the development of the law of the sea. The foreign minister had informally indicated a willingness to accept the provisions of the Convention that codify international custom or those provisions of the Convention that will become international custom in the future. However, the issue here is how much of the Convention codifies international custom and how much of it is likely to become binding upon non-contracting states as customary rule of international law recognized as such as mentioned in Article 38 of the statutes of the ICJ. According to Article 308 of this Convention, the Convention shall enter into force twelve months after the day of deposit of the sixtieth instrument of ratification. So far, eleven states have ratified. Even when the UN Convention has secured a sufficient number of ratifications to enter into force, it seems to me that more time will be needed for the Convention to be developed into so-called international custom. With this understanding in mind, it seems to me that the government of the Republic of China, in view of the complexity of the Convention and the uncertainty of its entry into force, is very unwilling to make premature statements in this connection. That's the first comment I would like to make.

The second comment I would like to make is this: according to our regulations, prior consent is required for a foreign warship to reach one of our ports through the territorial sea of the Republic of China. The request shall be made at least ten days before its intended arrival, except in cases of distress or so-called *force majeure*. I think the legality of this regulation is controversial but it is justified by the needs of our national security and is supported by much state practice.

Thomas Clingan: Thank you very much for your additional comments. Now, Professor Craven?

John Craven: I have two comments that I'd like to make on this excellent paper. First, as a citizen of the state of Hawaii, I have a great

deal of sympathy with the position of the Republic of China. The state of Hawaii has very strong and correct views on the nature of the law of the sea, but these views are disregarded by the United States of America and also by the United Nations. Both of these authorities claim that the state of Hawaii has no independent standing to make its position on the law of the sea. So I want you to know that I make my second comment in full sympathy with the dilemma that you face at the present time.

I want to make my second comment not as a citizen of Hawaii but as though I were a citizen from a different planet who had come here and attended this conference and had made some observations. If I were, I would report back to my government that there was a large governmental entity called the PRC which claimed sovereignty over a large continental mass and a large offshore island with appertaining islands, and that this sovereignty was acknowledged by a large part of the world community. And I would report to my government that this notion on the part of that continental nation was at best a political statement and not a *de facto* statement because I would observe that no official of the People's Republic of China could be carrying out his responsibilities on the offshore island. At the same time I would report that there was on the offshore island a governmental entity called the Republic of China which claimed sovereignty over this island plus a large continental mass and that this government, too, had made a statement which could be at best declared political because the *de facto* situation is that I could find no officials of the Republic of China on the continental mainland. And then I would say, "What difference does this make to my planetary government?" I would say, "Well, I found a number of uncertainties that deal with the law of the sea as it relates to the area around this continental island." And I would have two questions, one specific and one general, which I would like to ask in this capacity. The first specific question is: are the Tiaoyutais a part of the province of Taiwan or are they a part of some other province of China; and secondly, would it be appropriate policy in the furtherance of the understanding of the dilemma that you find yourself in if, on a continuing basis, the Republic of China would delineate those problems which are peculiar to and relate to the province of Taiwan and those which are considered general to the entire country of China?

Kuo-Tsai Chao: I think Professor Chiu is willing to answer that question.

Hungdah Chiu: On the first question I sympathize with the citizens of Hawaii. In fact, I did receive several publications from the University of Hawaii claiming that archipelagic principles should be applied to the Hawaiian archipelago and I did ask my students to discuss the problem. They seemed all in favor of the state of Hawaii's position.

Second, on the legal status of the People's Republic of China and the Republic of China, I think, as you correctly point out, both claims are political and not legal. If the U.S. immigration office wants to deport someone originally from Taiwan, it never deports them to the mainland, so the demarcation of jurisdiction is clear. Also, there's a *de facto* cease fire line in the Taiwan Strait. Usually it's about twelve miles off the coast of the mainland. Fishing boats from the Republic of China are instructed not to enter the area; otherwise they take the consequences themselves.

The Republic of China's claim to the mainland is political because sovereignty includes the use of force to control your territory and in 1958 the ROC renounced the use of force against the mainland. So its claim is primarily a political one. We look on the People's Republic of China's claim to Taiwan as a political one, but from the PRC's point of view it's a legal one because they continue to advocate the right use of force if necessary to unify power with the mainland.

John Craven: Are the Tiaoyutais part of the province of Taiwan?

Kuo-Tsai Chao: Taiwan is actually in the hands and jurisdiction of the Republic of China, as one of *de facto* as well as *de jure* government. hereby draw attention to Article 7, Paragraph 2, of the Charter of the United Nations on non-interference by the United Nations in matters which are essentially domestic affairs of any state. But if the domestic situation is likely to endanger the maintenance of international peace and security, under Articles 34, 35 and 99 of the Charter of the United Nations, the United Nations may step in.

Thomas Clingan: Professor Van Dyke?

Jon Van Dyke: Professor Chao talked about how the Republic of China could adhere to the Law of the Sea Convention and Dr. Chen then said, if I understood him correctly, that the present position of the Republic of China was that it would certainly adhere to those parts of the Convention that were viewed as custom but that it would not be bound by those parts that were not now custom.

I want to explore that idea with a specific question regarding the anadromous species, salmon, which under Article 66 of the Convention has a new regime imposed upon it. People generally feel that Article 66 is not customary but a new innovative part of the Convention because it gives to the state of origin jurisdiction over the salmon throughout their life cycle. There have been a number of reports that fishing boats from the Republic of China have been going up to the Alaskan fishery outside the 200-mile zone and have been fishing for salmon that originate in Alaskan waters. And so my question is, what would be the Republic of China's position on the legality of that activity at the present time?

Hungdah Chiu: Mr. Chen said that most likely this case would be handled in accordance with the Republic of China/U.S. unofficial agreements on fisheries in which the Republic of China made some commitment for the protection of salmon fishing.

Jon Van Dyke: This case would be handled through bilateral negotiations?

Hungdah Chiu: Yes.

Choung-Il Chee: Professor Chao referred to customary international law other than the Montego Bay Convention as binding on the Republic of China. Several provisions of that Convention which reflect customary rules of international law are binding anyhow. An analogous situation is the binding effect of the Geneva Convention on the treatment of prisoners and The Hague Convention of 1907 on land warfare. You don't have to be a party to be bound.

Kuo-Tsai Chao: International law in consensual in nature. Whether it is customary international law or not depends on international practice, in Latin *opinio juris sive necessitatis*. The practice must comply with the *opinio juris* requirement which may be implied from the fact that a rule has been generally and consistently followed over a long period of time, and accepted to become a rule of obligation. See, e.g., *North Sea Continental Shelf* cases (1969) *ICJ Reports* 4. Judgments from international arbitral precedents, such as *B.P. Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic* (1973-1974) 53 *ILR*, 300, *Texaco v. Libyan Arab Republic* (1975-1977) 53 *ILR* 393 and the *Icelandic Fisheries Jurisdiction* cases (1974) *ICJ Reports* 3, the Court held that it cannot deliver its judgment based on *lex referenda*, they only can base its judgment on *lex lata* which, unless it crystallized as customary international law that results from a general and consistent practice of states followed by them from a conviction of legal obligation, otherwise it is only binding upon contracting parties.

Thomas Clingan: Mr. Noegroho?

Noegroho Wisnoemoerti: I am particularly intrigued by the question of the ROC's participation in the Convention and Mr. Chao's reference to the traditional practice in which the government does not admit a foreign representative to exercise his full function until he has presented his credentials. I know that the participation of the ROC will be very controversial and politically difficult to obtain. But the question of credentials that Mr. Chao has raised seems to be inappropriate because the only qualifications that have to be met to be a party to the Convention are to have the status of a state under international law. There's nothing in Article 305 of the Convention, particularly in Paragraph 1, which bars the participation of the ROC. It could be argued that ROC is a state although it's not a member of the United Nations. So I think what Professor Chao said about the lack of diplomatic relations with Jamaica as hampering the process for signing is not really the case, because signing or being a party to a Convention is not related to the status of diplomatic relations between that particular country and those who are designated as depository states.

I also do not agree that the U.N. credentials committee would be relevant. It has jurisdiction only over the United Nations Assembly sessions, not over the participation of a country, including a U.N. non-member, in the 1982 Convention.

Kuo-Tsai Chao: Under traditional international law, what does it mean to be a state? It is usually agreed that a state must satisfy the following three conditions:

- a. A state must have a territory.
- b. A state must have a population.
- c. A state must have government capable of maintaining effective control over its territory, and of conducting international relations with other states.

Judging from these criteria, the Republic of China is absolutely a state. However, the problem of credentials for delegates may arise. The process of treaty-making requires that the delegates who conduct the signature on behalf of the states concerned should be able to prove that they are authorized to do so. That is to say that they should be able to produce their credentials. If a Convention is to be signed at a multilateral conference, representatives must be provided with full

powers. When we sign a treaty in practice, not in theory, we have to have a full-power credential to certify our status. We may send a delegate or representative of the government of the Republic of China to Jamaica, but it is not possible for him to sign the 1982 Law of the Sea Convention because he could not be accredited as a representative of the sending government of the Republic of China since there are no diplomatic relations between the Republic of China and Jamaica.

There is not the slightest doubt that disqualification of credentials would actually happen. At a multilateral conference it is customary for a credentials or a full powers committee to be established by the secretariat for the sole purpose of confirming the powers and authenticity of the delegates. In the practice of the United Nations, states like Southern Rhodesia which meet all the criteria for statehood are not recognized in reality because the Smith regime was not widely recognized. South Africa is another example; it is a state, no doubt about it. But the United Nations credentials committee disqualified the credentials presented by the leaders of the South Africa delegations to the General Assembly. By virtue of the fact that the Republic of China is not a member of the United Nations, it could be difficult for it to deposit its ratification of accession with the Secretary-General of the United Nations. Perhaps Professor Chiu will also reply.

Hungdah Chiu: I think from the viewpoint of international law you are absolutely right. But the problem is that the UN and its affiliated agencies and a lot of member states don't act on international law. For instance, the General Assembly Resolution inviting people to participate in the Law of the Sea Conference includes not just UN members but also members of the affiliated agencies. At that time the Republic of China was a member of the World Bank International Monetary Fund. But they simply disregarded that part of the Resolution and refused to issue an invitation to the Republic of China. Under the Convention's provisions the Republic of China is entitled to at least a seat in the Conference. But if we send our accession document to UN headquarters or invoke the General Assembly resolution, the PRC says it is the only representative of China. If you send it to the Jamaican government, again they will refer to the General Assembly resolution but decline to accept the accession document from the Republic of China. So this is primarily a political question and that's why, as Deputy Director Chen said, they arrange bilateral agreements -- some are unofficial -- with different countries, such as the United States, Korea, and Hong Kong. If we have formal diplomatic relations with a country, as we do with the Republic of Korea, the international agreement is formal. With the United States we have an unofficial agreement. The Republic of China has also concluded several technically unofficial agreements with Indonesia, but everyone knows that they have official effect.

Rong-Jye Chen: The gentleman has just pointed out that since the Convention is open to all states or entities, any entities qualify to participate in this Convention. Legally speaking, that's right. But the issue presented in this case is: who can sign the Convention on behalf of China? Since the U.N. recognizes the PRC as the only legitimate government of China, under UN policy it is impossible for the Republic of China to sign the Convention.

Thomas Clingan: That concludes our session. Thank you.

MALAYSIA AND THE LAW OF THE SEA

MALAYSIA AND THE LAW OF THE SEA

Hungdah Chiu: Now we shall move our attention to the Southeast Asian countries, and we have two papers in this session. The first of the two is Dr. B. A. Hamzah's on the law of the sea in his country, Malaysia. Dr. Hamzah graduated from the University of Sains Malaysia with a Bachelor's degree. He received a Master of Arts in Law and Diplomacy in 1978 and a Ph.D in 1980 from the Fletcher School of Law and Diplomacy. He is now head of Strategic Studies and International Relations, Armed Forces Defense College of Malaysia, and among his many publications is a book, *Malaysia and the Law of the Sea*, which was published in 1983. It is my pleasure to present Dr. Hamzah.

MALAYSIA AND THE LAW OF THE SEA: POST-UNCLOS III ISSUES

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Introduction

In replacing the 1958 Conventions on the Law of Sea with a new legal regime, the drafters of the new sea constitution held one primary objective: to create an international legal regime that was acceptable to all because it would minimize conflicts, reduce uncertainties in ocean politics, and establish greater order and stability. The Third United Nations Conference on the Law of the Sea (UNCLOS III) has for over a decade attempted to produce a new consensus and reinforce established norms for an ocean regime. On the whole UNCLOS III has met the primary objective it set out to achieve. There was so much excitement, expectation, and hope before delegates finally met in Jamaica in 1982. Despite non-commitment of some major maritime nations, UNCLOS III was concluded.

The 1958 Geneva Conventions left many grey areas unaddressed. Various attempts to clarify these areas had been made without success before UNCLOS III began to reassert itself as an instrument to manage ocean politics. Between 1958 and 1982, there were many uncertainties as new technologies developed to explore, extract, and exploit the resources from the sea bottom.

The sea has become a new frontier in human development. New technologies have made it possible not only to exploit its abundant resources profitably but also to enhance the military capacity to protect these resources and to deny their use to others. Without some kind of legal regime the sea would become the monopoly of those who have control over technology. A potentially explosive conflict of interests could develop between those who control technology and those who lack technology yet have other forms of control over or access to resources.

Like all profitable activity, exploitation has given rise to political issues. In particular, it raises the issues of ownership, jurisdiction, and access as well as of management. UNCLOS III has resolved most of these issues but in the process has created new problems. Admittedly, problems relating to territorial ownership are long-standing and are not easily dissipated through multilateral agreements.

The uncertainty surrounding the outcome of the attempt to create a consensus for a common future of the law of sea has left many countries -- Malaysia included -- with few options but to preempt some of the provisions before their final adoption in Jamaica. In an effort to minimize further uncertainty and to create positive conditions for regional order, Malaysia declared the twelve-mile territorial limit in 1969 (see the Emergency (Essential Powers) Ordinance No. 7, 1969), the outer limits of the continental shelf (1979), and the exclusive economic zone (1980). Malaysia also recognized the Indonesian archipelagic concept in 1983. Various treaties demarcating Malaysia's maritime boundaries with its immediate neighbors were also ratified over the years, though some boundaries have yet to be formally demarcated.

Besides the effective management of its newly-acquired maritime zone, Malaysia's major concern was the right of access through the territory of Indonesia following the general consensus on the right of Indonesia to establish an archipelagic state. In 1982 Malaysia signed a bilateral treaty with Indonesia on the archipelagic doctrine mainly for two reasons: to maintain regional order and to obtain right of access through the Indonesian archipelagic territory. In 1971 Malaysia and Indonesia attempted to alter the status of the Straits of Malacca and Singapore -- also for access reasons -- but without much success. Access through the Straits of Malacca will be discussed separately. It is sufficient to note for the time being that the traffic congestion in the Strait of Malacca with its attendant problems requires an integrated traffic management scheme incorporating the present traffic separation scheme. The congestion could also be minimized if the very large cargo carriers (VLCC) avoid the treacherous waterway and pass instead through Lombok Strait. The proposed canal through the Isthmus of Kra could also divert traffic from the Straits of Malacca and Singapore.

This paper will address specific problem areas in Malaysian waters. The National Maritime Council through the Maritime Enforcement Coordinating Centre (MECC) is expected to streamline and coordinate enforcement relating to the management of the exclusive economic zone. I will introduce the MECC and then address two specific issues. The first issue is the conflicting claims in Malaysian waters. The paper does not discuss the overlapping claims in the Spratlies, as this has been the focus of more serious studies elsewhere, but fills the gap left by others in the discussion of the disputed ownership of certain islands or areas within Malaysian waters. The treatment is only cursory, however. The other issue is the problem of the Indonesian archipelagic doctrine and its implications for the right of access through the area.

Management Problems

Malaysia's immediate concern following the conclusion of UNCLOS III was the management of its newly-acquired maritime space. The provisions of the Law of the Sea Convention have transformed Malaysia into a relatively large maritime nation. The EEZ has added approximately 160,000 square miles of sea area. Its problem is further compounded by a 3,000-mile coastline and the separation of two of its states, Sabah and Sarawak, from the other eleven states in Peninsular Malaysia by a vast expanse of the South China Sea -- 400 miles at its widest point.

An enlarged EEZ (and territorial sea) demands an effective management system. Crucial to this is the machinery to coordinate the diverse functions of governmental and non-governmental agencies and their activities, especially in the EEZ. On 12 October 1982, the National Security Council, the highest decision-making body on security, directed that a Maritime Enforcement Coordination Centre be created to coordinate enforcement procedures. The directive did not detail its non-enforcement or other management aspects as the MECC would fall within the orbit of the proposed National Maritime Council.

As the MECC is an enforcement agency, the major responsibility for it lies with the Royal Malaysian Navy (RMN). The Royal Malaysian Police (RMP), traditionally responsible for enforcement functions within the territorial sea, has now an extended area to police -- twelve miles of territorial sea. The RMN will be responsible for all enforcement activities (as well as coordinating the enforcement functions of

related agencies) within the remaining 188 miles. Presumably the RMN would assume responsibility for all the functions within the contiguous zone, too.

Even though the RMN has a large influence on it, the MECC does not come directly under the RMN for purposes of command and control. It would presumably come under the direct responsibility of the National Maritime Council, once established. However, for administrative reasons the MECC is co-located with the RMN Fleet Operations Command (FOC) Headquarters at Lumut, the new naval base. While on paper MECC is outside its direct control, in practice it is very much an arm of the RMN. The ships belong to the RMN and the Chief Coordinating Officer is also a senior RMN officer. Permission of the RMN Headquarters will have to be obtained before any deployment of RMN ships except those placed under the direct command of the MECC.

Even though MECC is not responsible for marine scientific research or for exploitation and discovery of marine resources (e.g. hydrocarbon resources), it maintains an indirect link with all other agencies, which will be required to inform the MECC of their activities. In this respect the MECC will assume the functions of data collecting, monitoring, and a clearing house.

Under Malaysian laws all hydrocarbon resources are vested with the National Petroleum Company or PETRONAS (the Malay equivalent). The other resources will come under the jurisdiction of their respective ministries or statutory bodies. For example, the Fisheries Department within the Ministry of Agriculture will be the governing body for managing all fish resources and related activities.

The functions of the proposed National Maritime Council would be to coordinate all these activities and to clearly establish the areas of responsibility to avoid duplication. The NMC cannot, however, interfere in the internal affairs of each agency. It would be unthinkable, for example, for the NMC to interfere with the management of the hydrocarbon resources as that is clearly the concern of PETRONAS. However, should an operator in the process of drilling a well, for example, ignore pollution control regulations, the NMC through its enforcement agency would be authorized to act.

The National Maritime Council is expected to perform the following functions:

- * Fisheries management not directly related to those functions exercised by the Ministry of Agriculture.
- * Coordination of disaster relief activities.
- * Law enforcement in respect of illegal activities, e.g., smuggling, unauthorized intelligence-gathering activities, unauthorized fishing, mining, and similar activities.
- * Marine environment control, which is a real issue in the Malaysian waters. The Malacca Strait is a very congested waterway. Any tanker accident could cause an environmental nightmare. Oil exploration and other marine activities require effective management as well as a control system to prevent any negative impact on the environment.
- * Marine shipping control. About 600 ships transit through the Strait of Malacca every day. Although there is a traffic separation scheme regulating ship movements in the Straits of Malacca and Singapore, it is evidently insufficient to take care of other problems associated with transit passage in the straits. For instance, there is a need to monitor hazards and provide aids to navigation as well as to ensure compliance with Malaysian laws. The NMC is expected to undertake this broad function of marine control, too.

Malaysia not only inherits a large EEZ area but also the airspace above it. There is certainly a need to control the use of airspace above the EEZ. Indeed, to discharge its enforcement duties effectively the RMN needs to have air support. Currently, the RMN has no air wing component. It relies on air support from its sister service, the Royal Malaysian Air Force (RMAF). In my view it would be very practical to provide the RMN with an autonomous air capability. The RMN can have an independent air wing or a fleet of aircraft can be assigned to the RMN for use with the MECC. Either method could resolve the operational constraint.

Some Issues

Conflicting Claims

In pursuance of certain provisions in the Law of the Sea Convention -- albeit prematurely -- Malaysia published a new map of its continental shelf in December, 1979. The map drew protests from some of the neighboring countries -- Vietnam, Indonesia, Singapore, the Philippines, and more recently Brunei.

While the issue of conflicting claims in the South China Sea has been the subject of much debate and academic discussion, very little has been written about conflicting claims in Malaysian waters. The 1979 map was drawn to ascertain precisely the outer limits of its continental shelf as defined in international law. This boundary has evidently overlapped areas claimed by Malaysia's immediate neighbors. Central to the problem is the presence of ill-defined boundaries, unilateral claims, and the imprecision of some old treaties. Much of the present-day confusion arises from uncertainty. None of the conflicting or overlapping claims occur in areas where the boundaries are well established or defined. The Malaysian map of 1979 was an honest attempt to offset potential maritime boundary problems to create a less ambiguous regime.

With the exception of the controversy over the ownership of two islands -- Ligitan and Sipadan off Sabah -- Malaysia has defined by treaties its "maritime boundaries" with Indonesia. Singapore has protested the inclusion of the Horsburgh Lighthouse and Pulau Pisang into the Malaysian map in 1979. Singapore claims the two islands. Vietnam has contested the inclusion of Amboyna Cay into Malaysian territory. The Philippines has challenged the legality of the Malaysian map as it has, they allege, transgressed into the Kalayan territory.

It is interesting to note that in 1966 Malaysia enacted two legislations known as the Continental Shelf Act and the Petroleum Mining Act (later repealed and replaced by the Petroleum Development (Amendment) Act of 1975).

In 1969 Malaysia extended its territorial sea from three to twelve miles. Conscious that boundaries are usually non-negotiable once proclaimed, Malaysia took extra caution in redefining its maritime boundaries by initiating the following bilateral as well as multi-lateral agreements:

- a. The agreement on the delimitation of the continental shelves of Malaysia and Indonesia. This treaty, signed on 27 October 1969, deals with the delimitation of the continental shelf in the Malacca Straits, in the South China Sea off the east coast of West Malaysia, and off the coast of Sarawak. The Agreement came into force on 7 November 1969.
- b. On 17 March 1970, Malaysia and Indonesia reached an agreement on the delimitation of their territorial seas.

- c. On 16 November 1971, Malaysia, Singapore and Indonesia made a statement concerning the safety of the Straits of Malacca. In this joint statement Singapore only took note of the common position of Malaysia and Indonesia, which did not recognize the Straits of Malacca and Singapore as international straits.
- d. Concerned about the likely dispute that might arise from overlapping claims in the Gulf of Thailand, Malaysia and Thailand agreed to find a way out by establishing a joint authority to exploit the resources of the seabed on 21 February 1979.
- e. Precisely ten months later (21 December 1979) Malaysia notified the world of its new continental shelf map.
- f. On 25 April 1980, Malaysia proclaimed the 200-nautical-mile EEZ. By this time PETRONAS had already been exploiting hydrocarbon resources in the EEZ. Without this proclamation it would have been quite difficult for Malaysia to justify its offshore oil explorations, although the exploitability clause in the 1958 Geneva Convention could be relied upon in the event the Law of the Sea Convention was not approved by the UN.

Ligitan and Sipadan

The confusion over Ligitan and Sipadan is in my mind unnecessary. Both islands are in the Malaysian territory by virtue of the following:

- * These islands were ceded to Great Britain (now Malaysia through the succession rights) in 1878 and 1903 by the Sultan of Sulu and are now part of the Semporna District.
- * These are alienated territories. Private individuals hold titles to these islands.
- * Indonesia did not treat these two islands as its territory when it drew the archipelagic state boundary.
- * Malaysia has effectively occupied and administered the islands without any effective protest from Jakarta.
- * The light beacons and the marine research station on the islands have been put up and maintained by Malaysians without any protection from the Indonesian authority. This suggests some elements of acquiescence on the part of Indonesia. Anyhow, it would not have been proper for Jakarta to protest.

Pulau Pisang and Pulau Batu Putih

There is some confusion on the status of the two islands. Pulau Pisang in the Straits of Malacca (103 degrees 15' E. longitude, 1 degree 27' N. latitude) lies off Pontian Kechil, a few miles from the Malaysian mainland. The island belongs to Malaysia and is the alienated territory of some private citizens as are Sipadan and Ligitan. In 1900 an indenture was made giving Singapore administrative right to man the lighthouse on a prescribed area (one acre, one rod, and eighteen poles) on Pulau Pisang. Such administrative functions cannot be confused with ownership or sovereignty of the whole island.

A similar argument can be advanced for Pulau Batu Putih on which stands the Horsburgh Lighthouse. The Lighthouse was officially opened in 1851 in honor of James Horsburgh, hydrographer of the East India Company.

It is important to put things in their proper historical perspectives. It is an incontestable point in law and fact that the present Johore Sultanate has exercised sovereignty over both islands since 1513. The old Johore-Riau-Lingga Sultanate was founded circa 1513 by Sultan Mahmud who abandoned Malacca to the Portuguese in 1511. The

present Sultanate inherits all the property and the territories except those which have been legally acquired by other nations through the normal modes of territorial acquisition, e.g., cession. The Federation of Malaysia formed in 1963 has succeeded to these rights as Johore is now a component state in the Federation of Malaysia.

The cession of Singapore was governed by a series of treaties; the most important is the Johore Treaty of 2 August 1824. Article II of the Treaty states:

Their Highnesses the Sultan Hussain Mohamed Shah and Datu Temenggong Abdul Rahman Sri Maharajah hereby cede in full sovereignty and property to the Honourable the English East India Company, their heirs and successors forever, the island of Singapore, situated in the Straits of Malacca, together with the adjacent seas, straits, and islets to the extent of ten geographical miles from the coast of the said main island of Singapore.

The above proviso contradicted the first Anglo-Dutch treaty as some of the islands in the Riau Archipelago awarded to the Dutch were less than ten miles from Singapore. The anomaly did not cause any difficulty as Indonesia and Singapore agreed to the 1824 division. However, with regard to Johore the contradiction was rectified by the Johore Territorial Waters (Agreement) Act of 1928 by retroceding to the Sultan of Johore all waters and islands within three nautical miles from the Johore coast. The agreement also made use of the deep water channel of the Johore Strait as the dividing line in demarcating the Singapore-Johore boundary.

Neither Pulau Pisang nor Batu Putih were ceded to Great Britain in 1824 or 1828 as both islands are beyond three miles from Singapore. There is no evidence of any separate cession to Great Britain at any time in history. There is possibly an arrangement similar to the case of Pulau Pisang for Great Britain to supervise and man the Horsburgh Lighthouse. An administrative arrangement should not be confused with sovereignty or ownership. Prescription of title through succession of right can be valid only if, in this case, Great Britain had incontestable rights to title. Moreover, the British could not transfer more rights than it actually possessed. More importantly, the original title must in the first place be correctly transferred for the recipient state to succeed to the rights. It is maintained here that the sovereignty as well as the ownership of the islands has always remained Malaysian and never abrogated to a third party.

No attempt is made to examine the legal status of Commodore Reef, Amboyna Cay and the area off Brunei as this has been exhaustively treated elsewhere.

Malaysia recognizes that a dispute is a point of law and fact, a conflict of legal views of interest between two parties or more. As a strong advocate of international stability through international co-operation, Malaysia emphasizes the need for diplomatic negotiations before a justifiable dispute can be referred to international arbitration. It is our view that states are under legal obligations to resolve their disputes through negotiations. The use of force to settle disputes has no place in international relations, practice to the contrary notwithstanding. Only criminal states continue to resort to force.

The Archipelagic Doctrine and Its Implications

The Law of the Sea Convention makes provisions for archipelagic regimes. Two ASEAN states which gain from these provisions are Indonesia and the Philippines. This paper will focus only on the Indonesia archipelagic regime, incidentally the subject of a more detailed inquiry elsewhere.

On 25 July 1982, Malaysia and Indonesia signed an important document relating to Malaysia's new rights and privileges in the Indonesian archipelagic treaty. This agreement could be traced back to the Memorandum of Understanding (MOU) of 1974 in which Malaysia reaffirmed its conditional support for Indonesia's doctrine of an archipelagic regime in return for an assurance that Indonesia would grant safeguard and guarantees to protect Malaysia's legitimate interest in the area.

The change in the legal status of the area as defined in the Treaty (ratified June, 1984) will certainly have implications on access to it. Article 52 of the Law of the Sea Convention permits the archipelagic state to suspend innocent passage of foreign ships in archipelagic waters after due notice. The provision does not specify the duration of the suspension, which can be indefinite for security reasons.

Such a closure would not effectively cut off access between East and West Malaysia as there are alternative routes to the north of the archipelago. The extra costs involved would be minimal as the alternative route is only fifty miles longer. The additional distance would make little difference to ships coming from the West Pacific to the Indian Ocean. International shipping from Northeast Asia would not be affected as it can bypass the archipelagic territory. Most affected by the closure would be coastal traffic from Central Philippines, Brunei, Sabah or Sarawak to South Sumatra and West Java, as the additional distance would be double.

Communication by cable would be affected if the closure of the archipelagic territory also prohibits the use of cable links and their immediate repairs. Communication via domestic satellites and tropospheric scatter links is limited in capacity.

From the security point of view, the Indonesian archipelagic doctrine can pose security problems to Malaysia should there be a change in Jakarta's foreign policy posture and direction. For instance, in a conflict involving a third party hostile to Malaysia's interest, the situation could become precarious should Indonesia adopt a non-friendly attitude or even a neutral position. Neutrality in this sense would mean closing the territory to Malaysian vessels and aircraft. Of course, Malaysia can bypass the archipelagic territory at a minimal inconvenience, but the alternative routes could prove hazardous without prior navigation experience. As a hedge against such a political uncertainty (though it has been argued elsewhere that the option to close the territory carries a great political cost) it would be advisable for Malaysian vessels to familiarize themselves with alternative routes. Re-routing may become necessary in times of crisis. However, re-routing is only one aspect of the security problem. In my mind it may even be necessary for Malaysian policy makers to review its present defense strategy and policy for the defense of Sabah and Sarawak from Peninsular Malaysia.

Protecting the newly-acquired maritime territory and its resources is an important aspect of policy planning in Malaysia. Defense planners are expected to formulate a set of policies that could provide answers to some of the following questions:

* How can marine resources be protected? Alternatively how can the use of these resources be denied to hostile or unfriendly powers? Of primary importance are the protection of oil rigs and other installations associated with the exploitation of hydrocarbon resources in offshore areas. Related to this is the denial of illegal fishing.

* How much money should be spent on maritime forces to achieve a sufficient level of confidence in maritime power to defend the additional maritime territory? What should be the form of force structure of maritime power required by Malaysia in the future, considering new developments in ocean politics?

Protection of Oil Installations

Since 1980 petroleum has replaced rubber as Malaysia's major export. In 1984 crude petroleum forms 28% of the total export of the country and this figure is likely to increase in the future with the production of liquified natural gas (LNG). It was estimated in 1982 that the output of 169 million tons of LNG would actually increase the real output in Malaysia's mining sector by 20.2%. Total revenue collected from the petroleum trade amounted to M\$7,600 million, expected to reach M\$8,560 million in 1984. The daily output of crude petroleum in 1984 hovers around 400,000 barrels a day. With that kind of real estate at stake in its exclusive economic zone, Malaysia has every reason to worry about its maritime power.

What are the sources of threat to the oil installations in peacetime? By far the most important is the possibility of accidents. This could range from blowout of production platforms to structural collapse to damage or destruction caused by ships colliding with installations. The installations are also vulnerable to terrorist activities. The pipelines are equally vulnerable to hostile activities.

Effective deterrence is the best defense against such threats. This can only be achieved by demonstrating the placement of warships and aircraft in the area and the willingness to apply force in time of crisis. This requires an efficient maritime power. The present Navy is too small to undertake a credible task of protecting the EEZ and its resources. The government of Malaysia has recognized the need to upgrade its maritime forces. Efforts are now being made to provide the Navy with better firepower and surveillance systems. Overall, the offensive capability of the Royal Malaysian Navy will improve considerably by 1990. Other contingencies are being planned in the interim.

Illegal fishing (i.e., fishing without license by foreigners) can develop into a serious problem in the Malaysian waters. The following figures illustrate the extent of the problem. In 1982 there were 861 foreign trawlers "sighted" in Malaysia, 769 sights in 1983. But in the first quarter of 1984, the Royal Malaysian Navy has sighted few more than 40 foreign vessels in Malaysian waters compared with 409 in 1982 over the same period. The drop in the figure seems to correspond with an increase in enforcement activities. Presently, Malaysia conducts joint patrols with Indonesia and Thailand in patrol zones in an effort to prevent illegal fishing in each other's territory.

As to what kind of maritime force Malaysia should have in view of new developments in ocean politics in the region is a difficult question to answer. It is a question that requires a political response. Nonetheless, the proposed maritime force should be able to do the following:

* provide efficient protection within the EEZ;

- * prevent hostile powers from operating within the EEZ;
- * deter potential aggressors from asserting their foreign policies in the Malaysian EEZ.

In military strategy it is important for the maritime forces to possess sufficient capability to exercise control within the country's maritime territory.

Conclusion

Malaysia will have to make a few adjustments in its maritime policies following the conclusion of UNCLOS III. A few uncertainties also have to be resolved. Topping the list is of course the problem relating to the delimitation of offshore boundaries, in particular the outer limits of the continental shelf and the EEZ.

In an effort to establish some kind of regional order in the South China Sea, Malaysia has taken various steps to negotiate with its immediate neighbors their common boundaries. Indeed, all the maritime boundaries were actually delineated before the Law of the Sea Convention was adopted in Jamaica, 1982. Despite the treaties there are still some grey areas. Malaysia is, however, convinced that it will be able to resolve all boundary problems by peaceful means.

The other problem deals with the management of the EEZ and its resources. The MECC concept is certainly a step in the right direction. Some problems are anticipated, however, because what is now the Malaysian EEZ was in the past treated by many nations as high seas. Their rights in the EEZ have been limited to navigation and other rights which Malaysia is willing to accord them. Fishing in Malaysian waters by foreign vessels is now illegal without a valid license. This may pose a problem to those who have traditionally been fishing in the area.

Coordinating the diverse activities in the EEZ requires an efficient enforcement system. It has been maintained in this paper that Malaysia has taken steps to upgrade its enforcement capability. The Royal Malaysian Navy will be expanded to take on new roles in addition to the defense of the area. It is extremely important for Malaysia to upgrade the capability of its maritime forces to a level where it can have sufficient control of the EEZ and access through the sea lanes of communication.

In the final analysis, it would be fair to suggest that the future of maritime order in the South China Sea would depend very much on the ability of states to cooperate with each other. Even if states can on their own enforce jurisdictions in their respective EEZs, there are bound to be some conflicting interests that can be resolved only through cooperation.

DISCUSSION

Hungdah Chiu: Thank you. Now the floor is open for discussion. Mr. Smith.

Robert Smith: I thought that was an outstanding presentation; it was well worth a trip to Seoul to hear that speech. Thank you, Dr. Hamzah.

I have three questions. First of all, with regard to the infamous 1979 map and since then the claim of your EEZ, can we assume that Malaysia claims the same limits for the EEZ as it did for the continental shelf?

Second, with your emphasis on management and enforcement over your EEZ, what is your assessment of the piracy problem in this whole area? In Malaysian waters, is it a severe problem? Is it giving the coastal states in that region some economic as well as political problems?

Thirdly, the proposed canal across the Isthmus of Kra has been an ongoing consideration. Have the economics of oil these days put it on the back burner or is it still of vital interest to Malaysia and the other coastal states in the region?

B. A. Hamzah: With regard to the first question of whether we would like to overlap the EEZ and the continental shelf, personally I think the best policy would be to have a unitary line. I do not endorse multiple lines as boundary lines because they're bound to create a lot of problems. Where possible, the EEZ line should actually overlap with the continental shelf line. I'm not privy to the discussion on delimitation of Malaysia's EEZ, but in my mind it's very likely that in most areas the lines may overlap.

I have not given any thought to piracy problems. We do have some problems in the Strait of Malacca and in the Bay of Thailand. I think that question can best be answered by my friend from Thailand because they have more piracy problems to worry about than we do in Malaysian waters.

With regard to the canal, Malaysia has got no say in the construction of the Kra Canal. There have been some discussions by various organizations in Thailand. There is also a private organization headed by a Mr. Chao who is extremely keen to build the canal. Some of the sponsors have actually received moral support from Japanese businessmen to construct the canal. But I am not sure whether discussions have been very serious primarily because the whole issue of the Kra Canal goes back in history to as early as 1800. Constructing the canal could definitely relieve some congestion in the Straits of Malacca. 600 vessels pass through it every day. When possible the very large crude oil cruisers should avoid the use of the Straits of Malacca; they don't help to alleviate the congestion by traversing it.

Hungdah Chiu: Mr. McDorman.

Ted McDorman: I'd like to get further clarification of two issues. In light of yesterday's long discussion on joint development, would you comment on the agreement that exists between Brunei and Malaysia? In particular, is it a joint development type of arrangement, a unitization type of agreement, or what kind of procedures are in place in that issue? Secondly, in your excellent paper you talk about joint fisheries patrol zones and I wonder if you'd comment on how these are operating.

B. A. Hamzah: Let me take the second question first. The joint patrol zone has been established under a different set of regulations under the auspices of the respective Joint General Border Committees. There is a General Border Committee between Malaysia and Thailand as well as between Malaysia and Indonesia. Under this arrangement certain areas are designated for joint patrols. For example, Malaysia maintains a joint patrolling area with the Thais in the northern sector and with the Indonesians within the Straits of Malacca. "Joint" means that wherever possible the actual patrolling of the area is done together.

Now your first question. The Brunei-Malaysia joint authority is less formal than the joint authority with Thailand, which is similar to what exists between the Republic of Korea and Japan. With regard to the Malaysia-Thailand Joint Development Authority the Memorandum of Understanding (MOU) is to last for fifty years. Malaysia does not have a very formal treaty with Brunei. Malaysia maintains only an informal understanding between PETRONAS, which is the national oil company, and Brunei Shell, the oil company which is exploiting oil or hydrocarbon resources in Brunei. The other oil company operating on the Sarawak side also belongs to Shell. So that simplifies the whole matter. It is an intra-company kind of arrangement. But PETRONAS comes into the picture as it manages exploitation of hydrocarbon resources in Malaysia. There was some kind of snag at one stage because oil was found in a pool astride the common boundary. The question of whose oil was being extracted became an issue for a while. But I think we have resolved that snag. I'm sorry I have no more information to offer; very little has been written about this as it's very much an intra-company arrangement which precludes public enquiry.

Ted McDorman: That field is fairly close to the shore?

B. A. Hamzah: It's between seventeen to twenty miles from the shore; it's called UNITAS Fairley-Baram Field.

Ted McDorman: So that's well beyond the Orders in Council, 1958.

B. A. Hamzah: Very much beyond; the boundary approved by the 1958 Orders in Council, 1958, stopped short of the 100-fathom line. And the 100-fathom line is not very far beyond that point.

Hungdah Chiu: Professor?

Unidentified Speaker: I have some supplementary comments to Dr. Hamzah's excellent paper. In his conclusion he said, "The Royal Malaysian Navy would be expanded to take on new roles in addition to the defense of the area. It is extremely important for Malaysia to upgrade the capability of its maritime forces to a level where it can have sufficient control of the EEZ and access through the sealanes of communication." So far as the sealanes of communication are concerned, and I think as Professor Park also noted with the Republic of China, the Republic of Korea, Japan, and the United States, we initiated a Sea and Air Communications Study Group in all four countries. We held our first conference in San Francisco two years ago, in 1982. The second conference of the Sea and Air Communications Study Group took place in Tokyo last year, 1983. And the third will take place in Singapore in May, 1985.

Dr. Robert Smith raised the question of sea piracy in Southeast Asia. I think that very famous or infamous aspect of Southeast Asian seas is an important topic for the Sea and Air Communications Study Group to concentrate on in Singapore in May, 1985. That and sea rescue.

My second comment is about the point Dr. Hamzah made in his conclusion, "In the final analysis, it would be fair to suggest that the future of maritime order in the South China Sea would depend very much on the ability of states to cooperate with each other." I agree that international cooperation is a very important thing, of course. We now have a so-called Pacific Basin community; that means both South and North America, Japan, Australia, New Zealand, and ASEAN countries. But I think the Pacific Basin community in a micro sense should be a South China Seas Community. There are about twelve countries all around the South China Sea, and I think that we have to have some kind of South-China-Seas-based community to discuss international cooperation, the law of the sea, and other sea issues.

B. A. Hamzah: Can I butt in here? I made a mistake when I responded to Professor McDorman just now. I think the 1958 Orders in Council lines were drawn in such a way as to divide the two oilfields. I'm sorry. If the lines were to be redrawn in reference to the general practices of international law, you would find that Malaysia tends to get roughly about 300 square nautical miles of maritime territory. The only reason why it was so drawn was to give one oil field to Sarawak, which was then also a British colony, and the other oil field to Brunei, and this is the area in which I just suggested to you that we have some kind of informal, intra-company kind of arrangement.

Hungdah Chiu: Professor Van Dyke.

Jon Van Dyke: Two questions. Under the heading *Management Problems* you talk about the need to control the use of air space above the EEZ. Are you literally going to control your air space?

B. A. Hamzah: I'm suggesting the upgrading of air surveillance capability for the maritime forces. Presently the Malaysian Navy does not have its own air wing.

Jon Van Dyke: In order to control the fishing in the EEZ?

B. A. Hamzah: Yes.

Jon Van Dyke: But not to control the passage through the air space.

B. A. Hamzah: No.

Jon Van Dyke: Under the heading *Protection of Oil Installations* you're talking about the illegal fishing situation. Could you explain the basis on which Malaysia is issuing licenses at the present time? Is the license issued to anybody who can pay the charge or are you making judgments with regard to different applicants?

B. A. Hamzah: I'm not very well informed on this; Malaysia is about to introduce changes in the licensing rights for fishing in Malaysia.

Noegroho Wisnomoerti: I'd like to raise several points with my colleague, Dr. Hamzah. First, under *Conflicting Claims* you say that "The Malaysian map of 1979 was an honest attempt to offset potential maritime boundary problems." Could you elaborate on this statement?

In the following sentence you say, "With the exception of the controversy over the ownership of the two islands -- Ligitan and Sipadan off Sabah -- Malaysia has defined by treaties its 'maritime boundaries with Indonesia.'" As far as I can recall, there are pending maritime boundary delimitations relating to the area of the Celebes Sea that is between Kalimantan and Sulawesi, on the continental shelf as well as the economic zone delimitation, and there is a pending delimitation of the economic zone in the South China Sea as well as in the Straits of Malacca.

B. A. Hamzah: I think you're quite right. And even the maritime boundaries that we have with Indonesia actually refer to the boundaries of the seabed. This Malaysian map of 1979 was an honest attempt to actually offset possible maritime boundary problems in that area. I do not know how other people would view it, but to me it was definitely an honest attempt on the part of Malaysia to prepare conditions for greater maritime stability and order in the South China Sea.

Noegroho Wisnomoerti: The third point is in the following paragraph, where it is stated, "Conscious that boundaries are usually non-negotiable once proclaimed, Malaysia took extra caution in redefining its maritime boundaries by initiating the following bilateral as well as multilateral agreements." The word "proclaimed" -- does it mean that you are referring to the map or a unilateral claim?

B. A. Hamzah: No. The 1969 agreement with Indonesia on the delimitation of the continental shelf, for example, and then the Malaysian and Indonesian agreement of 1970 -- these are different from the map itself. And then there's the 16 November 1971 statement concerning the safety of the Straits of Malacca. We have not actually proclaimed a map of the EEZ even though we have proclaimed the EEZ itself. I'm not sure whether the boundaries would overlap, but I do hope, as I said, and I think it's very likely, that the EEZ line would coincide, overlap, with the continental shelf area. Otherwise they're bound to create many more problems in that area.

Noegroho Wisnomoerti: Another point. In the section concerning Ligitan and Sipadan, I note that the Indonesian position is not reflected. And then under the heading *The Archipelagic Doctrine and Its Implications*, you deal with the problem of suspension of innocent passage in archipelagic waters. This problem arose only recently because of the application of the archipelagic state principles with respect to navigation and security. I think there are other equally important aspects considering your interests -- for instance, the fisheries and criminal jurisdiction in the area.

B. A. Hamzah: Sure.

Noegroho Wisnomoerti: And the final question: in discussing a proposed Malaysian maritime force you have spelled out certain measures or areas of jurisdiction which you would like to see implemented -- for

instance, to "deny hostile powers from operating within the EEZ." Could you elaborate a little bit on this?

B. A. Hamzah: I think Mr. Noegroho raised some relevant issues. He is in a much more fortunate position than I am because he is a member of the negotiating team of his country on the delimitation of boundaries with Malaysia. I'm not a member; I'm only a simple researcher on the law of the sea. I fully support and agree with you on the question of archipelagic state rights, and I think I have addressed these issues in a separate paper which was published in *Marine Policy*. I just had a glance at your paper; I'm sure you must have addressed the problems of the archipelagic territory much more comprehensively than I have done. Thank you very much; I take note of your position.

What I meant by the ability to "prevent hostile powers from operating within the EEZ" is not that we would like to prevent, say, super-powers from operating in that area. But certainly we'd like to have the capability to keep unfriendly forces from operating in our region. We must have that capability; it is an important element in any state security system to protect your interests within the area. It is not our intention to stop, for example, the Soviet Union from operating within our area. But suppose the Soviet Union sends, say, some fishing trawlers equipped with electronic intelligence-gathering equipment; then perhaps we need that capability to tell them to get out of our territory. It is in that context that I was talking about upgrading the capability of the maritime forces in my country. I'm not suggesting that at the moment we do not have that capability; what I'm suggesting here is merely that we upgrade the capability because of the additional maritime space. This is what I hope my government will do.

Hungdah Chiu: Mr. Nordquist.

Myron Nordquist: You referred to the Straits Commission back in 1971, presumably set up for some reason. It's been a number of years since that effort got under way; have there been any undesirable consequences because the Commission hasn't functioned as some thought it might back then?

B. A. Hamzah: You're referring to the traffic separation scheme within the international straits of Malacca and Singapore?

Myron Nordquist: Yes, but I think it was more than just a traffic separation scheme, wasn't it?

B. A. Hamzah: I think the statement of 1971 was an attempt by Malaysia and Indonesia to "nationalize" the international strait. I think it is now quite clear that we have accepted that the Straits of Malacca and the Straits of Singapore are international straits. So the 1971 statement is no longer valid in that context.

Myron Nordquist: I was thinking more about the concerns that were expressed at the time: the problem with local fishing when the vessels are going through. I recall that practical as well as political concerns were raised, and I was just curious whether those kinds of problems have persisted, how they've been handled, and how the real world works when you're bordering on a strait?

B. A. Hamzah: I don't think we have any problems with that area right now, actually, but some problems may arise when we start drilling for oil in that area because it will then affect the safety of navigation. I am not sure what arrangement Malaysia is making at the moment. We plan to drill some oil fields in that area; we have actually been exploring in the northern sector, and we have reportedly found some traces of oil. I'm sure we will be able to resolve any problems with navigation, and we will not hamper any innocent passage through that area should oil exploration or drilling start in the Straits of Malacca.

Hungdah Chiu: Dr. Manansala.

Mario Manansala: I only have one political comment and an observation. First, I should like to express my admiration for the presentation of my good friend, Dr. Hamzah from Malaysia, especially with his reticence in discussing at length our problems in the Spratlies, in Commodore Reef especially. These problems of delimitation, I'm sure, could be settled in the spirit of cooperation and unity.

I'm fascinated by the seating arrangements in this conference. The ASEAN states are all seated together: Thailand, Malaysia, Indonesia, Singapore, and the Philippines. I don't know if this was done on purpose -- Professor Choon can tell us this -- but I don't mind sitting beside my good friend Chao here from Singapore; it's just like old times. In the settlement of disputes among the Asian countries, I'm especially encouraged by the express words of my friend Hamzah that this could be settled in the spirit of willingness to negotiate and discuss the problems common to our countries.

Hungdah Chiu: Professor Clingan.

Thomas A. Clingan: One comment and one question for clarification, Mr. Hamzah, if I could. The comment goes back to the prevention of hostile powers from operating within the economic zone. I was fairly satisfied with your answer until you started talking about electronic surveillance. It seems to me that when you're talking about hostility in the economic zone, the question of whether activity of a vessel is hostile or not is really controlled by Articles 300 and 301 of the Treaty; 300 deals with abuse of rights and 301 deals with a threat of force. It seems to me that they are the controlling articles that might give the coastal state certain powers within the economic zone with regard to hostility within that zone. I'm a little uncomfortable about electronic surveillance; it is certainly not a threat of force, and I'm not convinced it's abuse of rights.

My question is one for clarification only. Under the heading, *The Archipelagic Doctrine and Its Implications*, you refer to suspension of passage under Article 52 in archipelagic waters, with which I have no quarrel. You make no mention of Article 53 passage. You seem to infer that either Malaysia does not intend to declare any Article 53 passage zones or, if it does, that it would still claim the right to suspend passage in those waters. Am I reading an improper implication into that?

Hungdah Chiu: Mr. Hamzah?

B. A. Hamzah: I did not address the issue of access through the Indonesian archipelagic territory in great detail. This has been the subject of a much more serious inquiry elsewhere. But I think it's not quite proper to imply that, and I think my good friend here will address the same issues again tomorrow.

SINGAPORE AND THE LAW OF THE SEA

SINGAPORE AND THE LAW OF THE SEA

Hungdah Chiu: The second paper will be presented by Mr. Chao Hick Tin. He was born in Singapore in 1942 and obtained his Bachelor of Law degree in 1965 and Master of Law degree in 1966 from the University of London. He was admitted by the Middle Temple, London, as a Barrister at Law in 1965. Mr. Chao is presently a Senior State Counsel in the Attorney-General's Chambers in the Republic of Singapore. He attended the Vienna Conference on the Law of Treaties in 1968, the United Nations General Assembly meeting in 1970; he represented Singapore at the UN Sea-bed Committee from 1971 to 1973 and served the United Nations Conference on the Law of the Sea from 1974 to 1981. It is my pleasure to introduce Mr. Chao.

SINGAPORE AND THE LAW OF THE SEA

Chao Hick Tin
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Singapore

(The views expressed in this paper are entirely those of the writer and do not necessarily reflect the views of the Singapore Government or the Department to which he belongs.)

History was created when the new UN Convention on the Law of the Sea was adopted in New York on 30 April 1982, and opened for signature in Kingston, Jamaica on 10 December 1982. The Convention was the result of almost ten laborious years of negotiations beginning in 1973 and, before that, six years of preparatory work undertaken by the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction. This Convention is undoubtedly the most complex international instrument that has been negotiated and drawn on a global basis. Its adoption is a milestone in the promotion of international law and cooperation.

The implications of the Convention for most, if not all, countries are immense. Indeed, the consistently full participation by all states in the many sessions of the Conference is clear proof of its importance. Further evidence of the Convention's importance is that, to date, 134 states have signed it -- a record for any Convention. It affects all kinds of states, those with long coastlines, with broad continental shelves, in semi-enclosed seas, landlocked, or in geographically-disadvantaged situations.

For Singapore this is one of the most important conventions, if not the most important, that she has been actively engaged in. Singapore had participated not only in all the sessions of the Conference but also in the preparatory meetings of the Sea-bed Committee from 1971 to 1973. It should not be difficult for anyone glancing at a map to appreciate why the sea is so important to Singapore. Singapore is a nation that borders on two of the busiest straits in the world, the Malacca and Singapore Straits, and is also dependent on shipping for its economic development (see the statement of the Singapore representative at the Conference on 9 July 1974, in the Official Records of the LOS, Volume 1, page 135). Further, the extended jurisdiction that the new Convention grants to the coastal states is a matter of considerable concern to us. Not only will our fishing interests be affected but also our interests in other activities that we carry out under high seas principles.

In a sense the writer bemoans the fact that the Conference representatives did not have the courage and foresight to adopt a Convention that is more equitable. Indeed, it gives too much to some states and very little or nothing at all to others. The irony is that those states that gain most out of the Convention are also the wealthier states, and many of those states that got little or nothing at all out of the Convention are amongst the poorest nations. The wealth of the oceans should have been somewhat more equitably distributed to those of the poorer states that happen also to be landlocked states. However, that is not to be so. Perhaps that is reality. Third World solidarity was certainly an ideal that was rarely voiced during the negotiations. Each state was only interested in obtaining more resources for itself and more extensive jurisdiction over a greater part of the marine space.

Notwithstanding the Convention's obvious shortcomings, one must accept the fact that it was the best that could be achieved. It is not the ideal. Indeed, it is not even satisfactory. But the alternative would have been chaos. For most countries, I believe, except for the most powerful and arrogant, it is probably better to have some rules than none at all. Small countries like Singapore would have most to lose if the law of the jungle were to prevail. States considering ratification should bear in mind that what the Convention represents is a series of compromises and trade-offs. If states ratify only a treaty which completely satisfies their interests and aspirations, very few states will be able to ratify this Convention. If states denounce the Convention because a part or parts therein are not satisfactory, others may be encouraged to do likewise and thus set the trend for the unravelling of the entire Convention.

Singapore's Maritime Jurisdiction

Singapore is one of the countries that still adheres to the three-mile territorial sea limit. Its law on this point is governed by the Territorial Waters Jurisdiction Act, 1878, of the United Kingdom. This Act applied in Singapore because she was previously a British colony. Although Singapore gained independence in 1965, this Act is still in our laws because we have not enacted any new legislation to replace it. Under that Act the territorial waters of Singapore are extended from the low-water mark up to a distance of one marine league from that mark.

Under the new Convention a coastal state is entitled to extend the limit of its territorial waters up to a maximum of twelve nautical miles. Furthermore, a state can further claim, geography permitting, an area up to a breadth of 200 nautical miles as its exclusive economic zone (EEZ). In view of its very enclosed situation, there is very little scope for Singapore to claim any extended area as its territorial sea or EEZ. The first step that Singapore may have to undertake, in view of its close proximity to its neighbors, is to negotiate and demarcate common boundaries with them. Only unless and until that is done should one country which is in close proximity with others draw and publish its boundaries.

Singapore's northern boundary with Malaysia is governed by an agreement signed on 19 October 1927 between the United Kingdom and the Sultan of the State of Johore. Under that agreement, the boundary between our two countries is to be an imaginary line following the center of the deep water channel in Johore Strait. In 1974 Singapore also concluded an agreement on its southern boundary with Indonesia. While a number of methods were used in drawing up that southern boundary, it appears that the median line rule was resorted to most frequently.

In establishing our maritime jurisdiction, what remains to be drawn are the boundaries at the eastern and western entrances to the Singapore Strait and the boundary for the Horsburgh. For all these locations a tripartite negotiation will be necessary among Indonesia, Malaysia, and Singapore. Because these as yet undemarcated areas are relatively small, the writer does not foresee any great difficulty in the way of reaching an agreement. There is, however, one problem. This arises out of the inclusion of the Horsburgh as Malaysian territory in a map issued by the Malaysian authorities in 1978. The writer believes that this inclusion was due to a technical error and that it will be corrected before long.

The Navigational Question

The question of unimpeded transit rights through straits for all vessels irrespective of their flags is one of fundamental importance to Singapore. With the extension of the territorial sea limit from three to twelve miles, this question becomes very critical for Singapore. As early as 1974, Singapore's representative and many other representatives had made it quite clear that this was a key issue for the Conference and that a satisfactory solution must be found for it if the Conference were to conclude successfully.

The regime of transit passage as set out in Articles 37-44 of the Convention does go a fair way in meeting the preoccupations and concerns of Singapore and other states interested in unimpeded navigation. Article 38 provides that all ships and aircraft "enjoy the right of transit passage, which shall not be impeded." Transit passage is the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait. Certain duties and responsibilities are placed on ships and aircraft while in transit, among which is the duty to comply with internationally-accepted rules and regulations regarding safety, including compliance with properly-designated sealanes and traffic separation schemes.

As early as 1971, the three littoral states bordering the Straits of Malacca had come together to work out certain standards concerning safety of navigation in the Straits. After five years of discussion, the states finally agreed on a scheme which introduces traffic separation in three critical areas, i.e., the One Fathom Bank area, the main Strait and the Philip Channel, and off Horsburgh Lighthouse. It also prescribes that all vessels passing through the Straits must maintain an under-keel clearance of at least 3.5 meters at all times. It also requires all tankers and large vessels navigating through the Straits to be adequately covered by insurance and compensation schemes.

This agreed traffic scheme for the Straits of Malacca and Singapore was presented by the coastal states to the Maritime Safety Committee of IMO (formerly IMCO) in November, 1977. The scheme was adopted by IMO in that year. The procedure to which the three coastal states had resorted to promulgate the scheme set a useful precedent which is reflected in Article 41 of the Convention.

The three coastal states have since, with the assistance of Japan, established a revolving fund in order to combat pollution caused by vessels. Japan has also assisted in the provision and maintenance of navigational aids. Through these tripartite consultations they have indeed established a working machinery whereby continuing dialogues are being held on various aspects of navigation to ensure that the interests of both the coastal states and the user states are not in any way adversely affected. The intentions of the three states are clear. They have accepted the articles on transit passage in the Convention, notwithstanding some initial reservations. The writer is confident that, through consultations among themselves and with user states, whatever difficulties that may arise can be resolved.

One area of cooperation and understanding between the user states and the coastal states relates to the application of Article 233 of the Convention. In a statement read out by the President of the Conference, the parties agreed that if a vessel fails to observe the 3.5 meter under-keel clearance, that breach will be deemed to have caused or threatened major damage to the marine environment of the Straits within the meaning of Article 233. The writer believes that this precedent established an excellent working relationship which will promote

further cooperation and understanding between the coastal states and the user states. It demonstrated a willingness on both sides to meet the concerns of the other.

EEZ, Fishery, and Other Uses

The incorporation of the EEZ concept in the Convention marks a significant development in the law of the sea. For Singapore this development has three main implications. First is the question of navigation and overflight. Second is the question of fishing rights. Third is the question of other activities that states may carry out in, on, or above the marine areas which were previously high seas.

Article 58 clearly states that all states enjoy in the EEZ the freedoms of navigation and overflight and of the laying of submarine cables and pipelines. Since the provision on this point is abundantly unambiguous there is therefore no need for Singapore to be concerned.

On the other hand, the question of fishing rights in the EEZ is certainly not so clear. In the EEZ the coastal state is given sovereign rights for the purpose of exploring, exploiting, conserving, and managing the natural resources, whether living or non-living. The coastal state is also given the power to determine the allowable catch of the living resources in its EEZ, though in exercising such a power the coastal state is required to take into account the best scientific evidence available to it. The coastal state is to determine its capacity to harvest the living resources of the EEZ, and where it does not have the capacity to harvest the entire allowable catch, it shall give other states access to the surplus.

Article 70 sets out the rights of geographically disadvantaged states (GDS). Singapore falls within that category of states. In accordance with that article, a GDS shall have the right to participate on an equitable basis in the exploitation of an appropriate part of the surplus of the living resources of the EEZ of coastal states of the same subregion or region. The terms and modalities of such participation of GDS shall be established by the states concerned through bilateral, subregional, or regional agreements. But where the harvesting capacity of a coastal state would enable it to harvest the entire allowable catch of the living resources in its EEZ, the coastal states and GDS shall cooperate in the establishment of equitable arrangements on a bilateral, subregional, or regional basis to allow for participation of GDS in the exploitation of the living resources of the EEZ of coastal states of the subregion or region.

It is still too early at this stage to state the way in which coastal states as well as GDS would interpret and apply the relevant provisions of the Convention. For Singapore, some bilateral or subregional arrangements may be necessary. Suffice it to say that the provisions lay down a general framework within which the parties can work out the details. In any event, coastal states have just acquired these new rights over their EEZs. They will need time to assess their own positions and to acquire technical knowledge and data about the resources of their EEZs. I would imagine that in good time Singapore may raise the question with its neighbors and reach agreement with them as to how it will exercise the rights conferred upon it under Article 70.

As regards the third aspect, other uses of the sea, the rights of other states in the EEZ are also somewhat ambiguous. Article 58(1) provides that other states enjoy, besides freedoms of navigation and overflight and of the laying of submarine cables and pipelines, "other

internationally lawful uses of the sea related to these freedoms, *such as those associated with the operation of ships, aircraft and submarine cables and pipelines.*" Article 59, on the other hand, provides that in cases where the Convention does not attribute rights or jurisdiction to the coastal states or other states within the EEZ and a conflict arises between their interests, "the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

The drafting of Article 58 was carefully argued and negotiated in a special group of the Conference. It certainly does not represent the best form of drafting. But it was the best that could be achieved in the small negotiating group short of a breakdown in the negotiations. Those states that favored more rights for other states in the EEZ argued that all existing internationally lawful uses of the high seas should be allowed. Other coastal states contended that the principles of the high seas should no longer be applicable in the EEZ, which will thereafter come under national jurisdiction.

For Singapore the question of what other activities may be carried out in the EEZ is of direct interest. In view of her limited territorial sea and the limited EEZ that she could claim, it is essential that as many of the existing uses of the sea should still be made available to her. She is, for example, a major shipbuilding and ship-repairing center. As part of such activities, trial runs are necessary for ships built or repaired there. With regard to the words italicized above, it is clear that an activity such as the conducting of trial runs in the EEZ is a lawful use of the sea associated with operation of ships and is therefore permitted.

Another activity that Singapore may also be involved in relates to scientific research. Article 246 provides that coastal states have the right to regulate, authorize, and conduct marine scientific research in their EEZs. Other states that wish to conduct scientific research in the EEZ must obtain the consent of the coastal state, though in normal circumstances the coastal state is expected to grant its consent. A researching state may proceed with the research if within six months after application (with full particulars) it does not hear from the coastal state concerned (see Article 252). In itself, the consent regime set out in Article 246 does not appear to be unreasonable. If these provisions are applied with good faith, there should be little room for controversy. Further, under Article 254, as a GDS Singapore is also entitled to ask for an opportunity to participate in marine scientific research projects which are to be undertaken by other states or by competent international organizations.

There are also other activities that Singapore is currently carrying out, e.g., naval exercises, search and rescue operations, etc. These are clearly within the ambit of Article 58(1).

Archipelagoes

Situated as she is, Singapore is surrounded by two archipelagoes, the Indonesian and the Philippine. The Indonesian Archipelago is of more direct concern as it is closer to Singapore. Under Part IV of the Convention, an archipelagic state may draw straight baselines connecting the outermost points of the outermost islands so that the waters enclosed within will become archipelagic waters. There are, however, a few objective criteria with which an archipelagic state must comply. Firstly, the ratio of the area of the water to the area of the

land must be between 1:1 and 9:1. Secondly such baselines shall not exceed 100 nautical miles except that up to 3% of the total number of such baselines may exceed that limit up to a maximum length of 125 nautical miles. Thirdly, the drawing of such baselines must not depart to any appreciable extent from the general configuration of the archipelago.

Singapore is concerned about two aspects of the archipelagic concept. One relates to navigation and overflight and the other relates to fishing and other lawful activities that may be carried out on the sea. On the first point, the provisions in Article 53 setting out the right of archipelagic sealane passage for ships and aircraft of other countries appear to provide a reasonable safeguard for third states. The essential characteristics of this right are very similar to those applicable in the regime of transit passage for straits.

Article 51(1) (this provision was inserted at the joint request of Indonesia and Singapore) recognizes the traditional fishing rights of an immediately adjacent neighboring state in areas falling within archipelagic waters. In addition, the archipelagic state is also to recognize other legitimate activities of such immediate neighbors. The terms and conditions for the exercise of such rights and activities, including the nature, the extent, and the areas to which they apply, shall, at the request of any of the states concerned, be regulated by bilateral agreements between them. There may eventually have to be consultations between Singapore and its adjacent archipelagic states to work out the details regarding these rights. Singapore has excellent relations with its neighbors, and there are fair prospects that early agreement could be reached on these matters if and when they may be raised.

Pollution of the Marine Environment

Under the Convention all states are obligated to protect and preserve the marine environment. In addition, it also requires that measures be taken by states to prevent, reduce, and control pollution of the marine environment from all sources, e.g., land-based, vessel-source, seabed exploration and exploitation, dumping, and atmospheric. Because of the indivisible nature of the marine environment, joint and cooperative action is required of all the states in a region or sub-region to effectively combat and prevent pollution. Indeed, in many provisions of Part XII of the Convention, states are asked to harmonize their policies in this regard and to cooperate on a global and regional basis.

However, the obligation of states to take measures to prevent, reduce, and control pollution is subject to this qualification: "using for this purpose the best practicable means at their disposal and in accordance with their capabilities." Obviously, in particular circumstances this qualification could be the cause of dispute. A state whose waters have been seriously polluted by substances that emanate from the marine environment of another state or from activities carried on in the territory of the latter state may not accept the excuse that it is beyond the capability of the other state to do anything more. How far this kind of difficulty is taken care of by Article 194(2) is certainly a moot point. This article requires states to take all "necessary measures to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or

activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights."

Singapore has always taken a strict view about pollution and the measures needed to prevent it. She has adequate laws to deal with pollution. There are at present no problems between Singapore and its neighbors concerning pollution. As regards pollution caused by vessels traversing the Straits of Malacca and Singapore, the three coastal states -- Indonesia, Malaysia and Singapore -- have already taken joint action to deal with the problem. This has been discussed above.

Regional Arrangements

The South China Sea is a semi-enclosed sea. Problems and tensions could arise unless concerted actions are taken by all states in the region as many marine questions are transnational in character, e.g., fishery, pollution, shipping, etc. Article 123 urges (as it uses the word "should" instead of "shall") the states in a semi-enclosed sea to cooperate with each other in the exercise of their rights and in the performance of their duties under the Convention, particularly in the following areas: management, conservation, and exploitation of the living resources, preservation of the marine environment, and marine scientific research.

ASEAN is one existing body that could promote regional cooperation and action. While its membership is limited to only six members of the region, as Laos, Vietnam, Cambodia and China are not a part of it, it is nevertheless a useful body which could serve this purpose. ASEAN is already in the process of working out a contingency plan for pollution. Further, under the UNEP Regional Sea program, the formulation of an action plan by the ASEAN countries is underway.

As yet there exists no institution in the region which is in a position to undertake effective fisheries management. The Indo-Pacific Fishery Commission (IPFC) of the FAO has a wide area under its jurisdiction, and because of budgetary constraints it has not been effective in promoting management and conservation. The South China Sea Program was established in 1974 with financial assistance from both UNDP and the Canadian Institute for Development Assistance. This program's main area of achievement would appear to be in data acquisition and analysis. The International Centre for Living Aquatic Resources Management (ICLARM) and the Southeast Asia Fisheries Development Centre (SEAFDEC) are doing excellent work of a technical nature.

To have a really effective regional approach to fisheries, the states in the region must be made to recognize the need and appreciate the benefits that could accrue therefrom. The work done and results obtained by those bodies mentioned in the preceding paragraph will be useful in putting the message across. However, it would be unrealistic to expect rapid results, especially when the coastal states have just acquired sovereign rights over the exploration and exploitation of their natural resources. They do not wish to commit themselves unless they see the advantages in adopting a regional approach. ASEAN is therefore an excellent forum which could provide the impetus.

For example, the ASEAN Council on Petroleum (ASCOPE) is currently looking into the question of pollution from offshore wells. In view of the number of such wells operating in this region, this is a pressing problem. In Europe there is the Offshore Pollution Liability Agreement, 1974 (OPOL). Under OPOL an operator who is a party will accept strict liability for damage and clean-up costs for an oil pollution incident arising from his operation up to a limit of US \$25 million.

There are two other points to make about regional arrangements. The first relates to funding and how costs are to be shared. This is very important. With the proliferation of international and regional institutions, states are generally wary of creating more such institutions and the costs that would arise therefrom. Secondly, there is a general concern to ensure that regional arrangements do not necessarily mean more talking and less action. Of course, much will depend on the political will of the countries in the region and how they tackle particular issues.

Apart from the ideological differences between some countries in the region, (e.g., Vietnam, Laos, Cambodia, China from the rest), there is one more difficulty in the way of effective regional action. This is the question of conflicting territorial claims over certain important island groups in the South China Sea.

In the short and medium term, I do not foresee any regional action involving all the countries in the South China Sea. However, at the ASEAN level, the current efforts with regard to pollution will be further intensified. More time is required before ASEAN members can agree to any form of joint action on management, conservation and allocation of the fishery. Co-operation will have to be step-by-step, starting with learning about the fish stocks and their environment.

It is the writer's belief that it would be in the interest of all states in the region, including Singapore, to participate in joint action on the transnational issues identified above. In this way maximum benefits will accrue to the states concerned and any possibility for tension or conflict will be removed or reduced.

Conclusion

The new law of the sea has created a vast new opportunity for growth and development for coastal states. But it also contains seeds for possible discord among states unless they actively seek to understand each other's needs and concerns. States must proceed slowly in these matters. The full implications of the Convention must be examined, more importantly with a view to ratifying it. Singapore is doing that. States must then identify the particular issues on which they think joint or regional action is necessary. The writer does not believe that this region is lagging too far behind when compared to other regions. Action will come in time. The assistance rendered to date by international bodies such as UNDP, UNEP, and FAO is useful. Ultimately the driving force must come from within.

DISCUSSION

Hungdah Chiu: Thank you for your very concise presentation. Now the floor is open for discussion.

Myron Nordquist: I can't help but observe something. I know that the United States delegation to Caracas was well in excess of 100, maybe 125 to 130 people. It's a little known fact, but throughout most of the Law of the Sea Conference, the delegation of Fiji, which usually consisted of Satya Nandan, and the delegation of Singapore, which often only consisted of Tommy Koh and Chao, would have joint delegation meetings at breakfast. I'm totally convinced that their breakfast meetings had much more impact on that conference than all of the U.S. delegation put together.

Choung Il Chee: After hearing your presentation, I can see why Tommy Koh was able to propose the compromise suggestion in Geneva that provisionally, in accordance with international law and so on and so forth, meant no rule at all, as far as I can see.

Chao Hick Tin: I think we did not participate in the negotiations on the article on demarcation that you're talking about because we have no real interest in the question of delimitation principles. Other countries with much bigger areas will be interested in delimitation principles because whatever principles they can use to their advantage will make sense. In the limited area between Singapore and my neighbor here, whatever principle applies, I don't think I can get over a couple hundred yards more. So the delimitation question is not really a question for us. But I mentioned this equidistance because when we drew this line with Indonesia, again we faced the problem of being so close. If I could think of some other principle to use against my friend, I would use it, but I look at the map and I say, "Well, where do we go from here? Cut by half?" and that seems to be a logical answer. But I'm not suggesting that cutting by half should apply in all situations. Think of Turkey and Greece at each other's throats. Their problems cannot be solved by just drawing a line and dividing by two.

Hungdah Chiu: McDorman of Canada.

Ted L. McDorman: My question has to do with the use of terms. Under the heading **The Navigational Question**, you refer to "user states" in negotiations. How broad is the category "user states"? Usually, Japan is referred to as the user state, but were there other states that you negotiated with?

Chao Hick Tin: More states than just Japan were involved: the United States, the United Kingdom, Germany, France, I believe. Maybe Tom could give you the full list. We were talking mainly to Tom and our Japanese colleagues, and sometimes the United Kingdom also, but they carried then the credentials of twenty, thirty?

Hungdah Chiu: Professor Clingan.

Thomas A. Clingan: My friend Chao is correct; we came to an understanding that it would be easier if we could talk within a small group.

The United States, by agreement among the maritime powers, became the spokesman for the so-called user states. We were in very close contact with a small number of states -- those that Chao has mentioned plus the Soviet Union -- and then as the agreement, the understanding, became closer, we took it upon ourselves to consult with about twenty states to show what we had done, to see if there would be any last-minute surprises that might come out before we presented it to the Chairman of the Second Committee.

Hungdah Chiu: Dr. Park.

Choon-ho Park: I have a few very simple, even naive, questions, but they are very specific. The first one is, what would the maximum spatial distance Singapore could extend towards Indonesia or other countries by the median line or other criteria? My second point is, physically Singapore is also an archipelago, but how does it fit on the basis of the definition given, the land-to-water ratio? The third question is to our five ASEAN friends there. Would there be any chance of a concerted effort to ratify the Convention, or would you be doing it one by one at different times?

Chao Hick Tin: The maximum space that we could claim around the original main island of Singapore would be five miles from the coast. That, at the eastern side. But we have claimed one mile of the sea as land, so I must reduce it to four miles, four to five. But then the boundary with Indonesia has been fixed, so it's quite all right.

Your second question is whether we can claim ourselves as an archipelago. We cannot for the simple reason that the ratio has to be between one-to-one and one-to-nine. If I add all our land area and then draw the straight baseline, I think there will definitely be more land than water. While we have thirty or forty islands to the south of Singapore, they are all very small and very close. A good athlete could probably throw a stone across. It's that close. So I don't think we could come within the archipelagic concept.

On the third point, I think there's no real joint action on ratification. The Philippines has already put in its instrument of ratification; it's the first country in the ASEAN region to do so. I think the other countries are not so sure when they're coming in; they're still working on their ratification process.

Choon-ho Park: Another simple question out of my curiosity. Japan is also physically or geographically an archipelago. Has someone tried to come up with a land-to-water ratio in the case of Japan?

Chao Hick Tin: Some expert tried to satisfy those qualifications at the Convention, but unsuccessfully. I don't remember the ratio, but Japan does not satisfy those conditions.

Hungdah Chiu: Professor Van Dyke.

Jon Van Dyke: I want to ask a question about the regional arrangements that your paper talks about. I was delighted to see your enthusiastic endorsement of such arrangements. Under the heading **EEZ, Fishery, and Other Uses**, when you're talking about Article 62's requirement for sharing the surplus stocks, you say, "the coastal state is also given the power to determine the allowable catch of the living resources in

its EEZ though in exercising such a power the coastal state is required to take into account the best scientific evidence available to it." That's a very carefully written sentence. Could you give us your thoughts about your argument that the coastal state is required to take into account that evidence? Could we go further and say that there could be a requirement that nations work together to get better information? Might there be a requirement that some regional organization would gather that data so that it would have certain objective neutrality rather than allowing a nation to perhaps manipulate the data for political reasons of its own?

Chao Hick Tin: I said, based on a perusal of Articles 61 and 62, that the coastal state is required to take into account the best scientific evidence available. I'm aware that the articles themselves do not use so many words. Article 61, says, "The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone." Paragraph 2 states: "The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of living resources in an exclusive economic zone is not endangered by over-exploitation." I'm reading the two together to some extent and interpreting them. But, just as a matter of common sense, any country has to determine the allowable catch based on certain criteria, on some objective data. Now, I agree with you that the best solution might well be for some kind of regional action to collect the data so that it will be more objective. But on the other hand, this may be too early in the day to expect such kind of action. Coastal states must be allowed, at this point in time, to do their own research and data collection. After some time they may realize, "Look, it's to our advantage to establish some kind of body to look into the question of fish stock data and then to make the proper recommendation." Then any possible conflicts could be avoided and nobody could say that the data were being fixed or things like that. So I share that objective that the coastal states eventually will come together to acquire the proper technical knowledge and data regarding the living resources within their own economic zones.

Hungdah Chiu: Professor Craven.

John Craven: My question follows the line of Professor Van Dyke's. What remedies are available to geographically disadvantaged states in the event that their rights in the economic zone are not fully honored? Are you satisfied with the remedies that appear in the Treaty, or is it a matter of concern for you?

Chao Hick Tin: The remedies provided do not meet our expectations. We are concerned, but we are hopeful. Now, that's somewhat contradictory, but our original position was that disputes of this kind should be subject to compulsory dispute settlement procedure in Article 59. In the process of negotiation on this question of dispute settlement, this issue was downgraded from compulsory jurisdiction to compulsory conciliation. I think disputes relating to fisheries will not lead to any form of judicial, but to some kind of conciliatory, settlement. In the context of our region and of ASEAN, I think we can look forward to something being worked out along those lines.

John P. Craven: But you might worry a little about your fishing boats off Africa.

Chao Hick Tin: Well, that's too far away.

Hungdah Chiu: Mr. Wisnoemoerti.

Noegroho Wisnoemoerti: I think Chao has shown extreme modesty when he said that Singapore does not gain anything from the Law of the Sea Convention. Extreme modesty because I think Singapore and other like-minded nations have fought very hard to protect their traditional rights over the uses of the sea. They have devised a negotiating technique and format which has been very effective: the exclusive club of the LLGDS, the land-locked and the geographically disadvantaged states. This group was very effective and has succeeded, to a large degree, in protecting their traditional rights. Article 62, Paragraph 2, refers particularly to the LLGDS. It says that the coastal state shall give other states access to the surplus of the allowable catch, having particular regard to the provisions of Articles 69, that is, the land-locked, and 70, that is, the geographically disadvantaged states, one of which is Singapore, of course. So in my interpretation of the provisions, their legitimate concern has been sufficiently accommodated in the Convention.

The second point which I would like to raise concerns the cooperative effort that he sees as very important in the area. I cannot agree more with him about this point, and it has also been stressed by Dr. Hamzah and Mr. Manansala. There are explicit provisions which require that kind of regional cooperation: pollution control in Section 2, so-called struggling fish stocks in Article 63, highly migratory fisheries in Article 64, anadromous species in Article 66, and catadromous species in Article 67. Those provisions specifically require cooperation within a particular region, so I can support these arguments.

The third point, which is related to the second, is about the allowable catch. It is correct to say that to determine the allowable catch is very difficult technically and also expensive, and I think we need not only to cooperate with each other to collect the technical data but also to cooperate with the relevant international organizations like the FAO, which has the expertise and capability to do things under these provisions to determine the allowable catch.

Hungdah Chiu: Mr. Chao?

Chao Hick Tin: I just want to clarify a point. When I say we gain nothing, I'm thinking in terms of marine space. Of course, in relation to the Convention itself, we have been very active in trying to fix up whatever position we could. But now that we have finished our job, the question is whether we can live with it or not. And I think we probably can.

INDONESIA AND THE LAW OF THE SEA

INDONESIA AND THE LAW OF THE SEA

Masaki Saito: Today we continue the discussion of the law of the sea in ASEAN countries, first of all, Indonesia. I'd like to introduce Mr. Noegroho Wisnomoerti, who is a graduate of the Faculty of Law of the University of Indonesia, a graduate of the Columbia University School of Law, and now, as you know, a state official. He has served his mission to the UN in New York for nearly five years, and now is the head of the political section of his mission to the UN in Geneva. Mr. Noegroho.

INDONESIA AND THE LAW OF THE SEA

Noegroho Wisnomoerti
Permanent Mission of Indonesia to the United Nations
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It is a pleasure and a privilege for me to address this distinguished gathering. I wish to express my gratitude to the co-sponsors of this workshop for giving me this opportunity. The subject assigned to me, namely "Indonesia and the Law of the Sea," is indeed very broad. As an archipelagic state, Indonesia attaches great importance to many issues of the law of the sea. In view of the time constraint, I will discuss some of the most important issues but will have to exclude some aspects of the law of the sea which are equally important to Indonesia, such as the regime of straits used for international navigation and the regime of the international seabed.

Indonesia and the Archipelagic State Concept

To the people and the Government of Indonesia, the law of the sea is almost identical to the archipelagic state concept. The signing of the 1982 UN Convention of the Law of Sea, which includes a legal regime on archipelagic states acceptable to us, constitutes a significant milestone in our national history. Let me first describe briefly the essence of the archipelagic state concept and its place in the people's conscience and philosophical outlook and in the national legal system.

Indonesia has a unique geographical configuration and unique characteristics. The archipelagic state of Indonesia comprises more than 13,000 islands; its combined coastlines are longer than the equator. It is situated between the Pacific and the Indian Oceans at the cross roads of busy international shipping and air routes. From time immemorial, the Indonesian people have regarded all of their islands and the waters around and interconnecting those islands as one entity. The term "fatherland" in Indonesian is *tanah air* which means "land and water." The nationhood of Indonesia is built on the concept of unity between the Indonesian islands and the inter-connecting waters. Those seas are regarded as a unifying, not a separating, element. Such a foundation for our nationhood is indeed essential and imperative for the survival of our nation, which consists of hundreds of ethnic origins with different cultural and social backgrounds as well as regional languages.

The Youth Pledge of 1928 expressed the ideals of one nation, one language, and one *tanah air* or fatherland. It was the first political manifestation of the concept of national unity which had inspired the nationalist movement, started in 1908, to lead the national struggle for independence.

After national independence was gained on 17 August 1945, Indonesia continued to promote the concept of unity. Until 1957, Indonesia's maritime jurisdiction was governed by the 1939 Territorial Sea and Maritime Areas Ordinance (from the Dutch colonial government) which stipulated that the width of the territorial sea surrounding the Indonesian islands was three nautical miles, measured either from straight baselines connecting the outer edges of a group of two or more islands or from the low-water mark of the islands. It was apparent at the time that such a law did not sufficiently safeguard the unity and territorial integrity of Indonesia. "Pockets" of high seas in the

middle of our archipelago 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 made the Djuanda Declaration, which in effect proclaimed Indonesia as an archipelagic state. It stated 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 its land territory and therefore form part of the internal waters under the absolute sovereignty of the Republic of Indonesia. Underlying this concept is the principle of the unity of the land and the waters of Indonesia.

The special responsibilities of Indonesia towards the interests of the international community, especially the maintenance of international maritime traffic, were taken care of in the Declaration of 1957, conscious as we were of the importance of the seas as a means of communications. It states, *inter alia*, that innocent passage of foreign vessels in the internal waters enclosed by straight baselines drawn by means of the new method (now called archipelagic waters) is guaranteed as long as and as far as it is not contrary to or does not disturb the sovereignty or the security of the Republic of Indonesia.

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 Waters. The Law confirms and elaborates the archipelagic state concept as contained in the Djuanda Declaration and also stipulates that Indonesian waters consist of the Indonesian territorial sea and Indonesian internal waters as specified in that Declaration.

The implementing regulation is Government Regulation No. 8 of the year 1962 on Innocent Passage of Foreign Vessels through the Indonesian Waters. The Regulation 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 non-commercial government ships.

The archipelagic state concept therefore reached its ultimate legal form in Law No. 4 of the year 1960 on Indonesian Waters, which gives a legal and territorial meaning or framework for the national philosophical outlook of Indonesia known as the *Wawasan Nusantara*, the concept of the unity of the land, the waters, and the people. *Wawasan* means outlook, while *Nusantara* means archipelago.

The *Wawasan Nusantara* as a national outlook for the attainment of the objectives of national development found a prominent place in Indonesia's history when in 1973 the People's Consultative Assembly made a decision (Decision No. 4/MPR/1973) to the effect that *Wawasan Nusantara* manifests the Indonesian archipelago as one political unit, one social and cultural unit, one economic unit, and one defense and security unit. Thus the *Wawasan Nusantara* is a national philosophical outlook while the archipelagic state concept or regime is the legal and territorial framework or form of the *Wawasan Nusantara*.

The Indonesian Government has always been determined to ensure that the archipelagic state concept receives international support and recognition, without which the concept would remain a unilateral action. Indonesia and the Philippines introduced the archipelagic state

concept to the First UN Conference on the Law of the Sea held in 1958 with a view to obtain international recognition. The joint effort did not, however, achieve any tangible results, primarily for the following reasons:

- (a) the archipelagic state concept was strongly opposed by the maritime countries which at the time dominated the conference;
- (b) the archipelagic state concept was new and not yet fully understood by the majority of Conference participants.

The bitter reality it faced in 1958 did not discourage the Indonesian Government from finding the ways and means to obtain international recognition of the archipelagic state concept. For that purpose, it adopted a two-pronged approach. The first approach was to get international recognition by an indirect method, i.e., by negotiating and concluding continental shelf boundary delimitation agreements with our neighbors using the straight baselines of Law No. 4 of the year 1960. An important basis for this approach, besides the 1960 Law No. 4, was the Declaration of the Indonesian Government on the Continental Shelf of Indonesia issued on 17 February 1969. The Declaration was intended to implement the 1958 Geneva Convention on the Continental Shelf to which, for technical reasons, Indonesia is not a party. Like the 1958 Geneva Convention, the Declaration states that the outer limits of the Indonesian continental shelf are determined on the basis of the "exploitability" criterion. The Declaration was later made into law, namely Law No. 1 of the year 1973. Indonesia has concluded a number of agreements with its neighbors based on these legal instruments. Another indirect method was to include a territorial clause based on Law No. 4/1960 in bilateral agreements dealing with economic, financial, social, cultural, or technological matters.

The second approach to getting international recognition was through multilateral international fora, such as The UN Sea-bed Committee and the Third UN Conference on the Law of the Sea. Other fora were the Asia Africa Legal Consultative Committee (AALCC), the Islamic Conference Organization, the Organization of African Unity, and the Non-Aligned Conference.

The archipelagic state concept developed significantly when Indonesia, the Philippines, Fiji, and Mauritius submitted draft principles and articles concerning this concept to the United Nations Sea-Bed Committee, the committee entrusted with the preparation of the Third United Nations Conference on the Law of the Sea. Some of the basic elements of the concept spelled out in the Four Power Draft were as follows:

Firstly, for reasons of its national unity, territorial integrity, and political and economic stability, an archipelagic state shall have the right to draw straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago.

Secondly, the archipelagic state exercises sovereignty over the waters within the baselines, the airspace above these waters, the water column, the seabed and the subsoil thereof as well as over the resources contained therein.

Thirdly, the extent of territorial sea, the economic zone, and other jurisdictions of the state with regard to the sea around it shall be measured from these baselines.

Fourthly, the legitimate interest of the international community in passage through the archipelagic waters for the purpose of transit from high seas to high seas shall be respected by allowing innocent passage in accordance with the national laws of the archipelagic state.

However, such innocent passage shall not prejudice the peace, good order, and security of the archipelagic state.

The archipelagic state concept was further elaborated in draft articles submitted by the four archipelagic states to the second session of the Third United Nations Conference on the Law of the Sea held in 1974 in Caracas, Venezuela. The Caracas Draft elaborates the concept by, among others, defining 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 jurisdictions are to be measured; defining the nature and characteristics of the waters inside such baselines designated as archipelagic waters, and defining sealanes passage and the rights and obligations of the archipelagic states as well as those of foreign vessels exercising passage through the archipelagic waters and the designated sealanes.

The Draft Articles received understanding and general support from developing countries attending the Caracas Session. The major opponents of the Draft Articles were, of course, the major maritime countries who feared that freedom of navigation through archipelagic waters would be hampered or impeded.

To reach a mutually acceptable solution to the conflict of positions with regard to the archipelagic state concept, intensive negotiations were held between the most directly interested countries, namely between the four archipelagic states and the major maritime powers, basically represented by the U.S. and the USSR.

Several years of intensive direct negotiations have finally borne 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 Sea.

Major Elements of the Legal Regime of the Archipelagic State

Sovereignty of an Archipelagic State

The significance of the legal regime of the archipelagic state contained in the 1982 UN Convention on the Law of the Sea lies in its embodiment of the basic principles of the archipelagic state concept as prescribed in the Djuanda Declaration of 1957 and Law No. 4/1960. Article 47 firmly recognizes the right of an archipelagic state to draw straight archipelagic baselines joining the outermost points of its outermost islands. Article 49 recognizes the sovereignty of an archipelagic state over the waters enclosed by archipelagic baselines, designated as the archipelagic waters, over the subjacent seabed and subsoil thereof and the resources contained therein, as well as over the airspace above the archipelagic waters. The incorporation into the 1982 Convention on the Law of the Sea of these principles which Indonesia had advocated since 1957 is indeed a source of satisfaction to us. It signifies the recognition by the international community of the legitimate concern and interest of archipelagic states to safeguard and protect their territorial, political, economic, social, and cultural unity and thus signifies their survival.

Regimes of Passage

It might be argued that what we achieved at the Third Conference on the Law of the Sea is less than what is prescribed in Law No. 4/1960

in one important respect. Article 49(3) of the 1982 Convention provides that the sovereignty of an archipelagic state is subject to other relevant provisions of the Convention. This provision actually refers to the regime of archipelagic sea lanes passage provided for in Articles 53 and 54. Paragraph 2 of Article 53 stipulates that in archipelagic waters all ships and aircraft enjoy the right of archipelagic sea lanes passage in the designated sea lanes and air routes thereabove. The regime of archipelagic sea lanes passage is a compromise between the regime of innocent passage advocated by Indonesia (on the basis of the 1957 Djuanda Declaration and the 1960 Law No. 4) and the other archipelagic states, on the one hand, and the regime of freedom of navigation advocated by the maritime powers on the other hand. Paragraph 3 of Article 53 defines archipelagic sea lanes passage as

the exercise in accordance with this 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.

Such a regime of passage was inconsistent with the position of archipelagic states which would only accept, as a concession to the maritime powers, the regime of innocent passage. Indonesia nevertheless accepted the regime of archipelagic sea lanes passage as an element of a package on the regime of archipelagic states and the regime of straits used for international navigation, for the following reasons:

1. Acceptance of the regime of archipelagic sea lanes passage would ensure the acceptance by the major maritime powers of the basic principles of the archipelagic state concept advocated by Indonesia and the other archipelagic states.

2. The definition of archipelagic sea lanes passage in Paragraph 3 of Article 53 contains specific restrictions on ships and aircraft exercising the right of archipelagic sea lanes passage. 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. The provision that archipelagic sea lanes passage is "solely for the purpose of continuous, expeditious ... transit" also constitutes specific restrictions to be observed by ships and aircraft.

3. Article 39 (applicable *mutatis mutandis* by virtue of Article 54) provides for the duties of ships and aircraft during archipelagic sea lanes passage which would safeguard against any actions which might endanger or threaten the security of an archipelagic state. Paragraph 1 of the article states that ships and aircraft while exercising the right of archipelagic sea lanes passage shall:

- (a) proceed without delay through and over the strait;
- (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, 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 this Part [Territorial Sea and Contiguous Zone].

Any violation of the provisions I have just spelled out would certainly render the passage a non-archipelagic-sea-lanes-passage. In such a case, the archipelagic state has the right to take appropriate action to protect its vital security interest.

4. 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.

5. The regime of archipelagic sea lanes passage according to Paragraph 4 of Article 49 will not affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic state of its sovereignty over such waters and their airspace, seabed, subsoil, and the resources contained therein. This provision is necessary to prevent any diminution of the sovereignty of the archipelagic state which might be inferred from the regime of archipelagic sea lanes passage.

6. The regime of innocent passage through archipelagic waters provided for in Article 52 also takes into account the security interests of the archipelagic state. Paragraph 2 of the article stipulates that the archipelagic state may 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.

With all the essential safeguards that I have just mentioned, the security interests of the archipelagic state would not in my view be compromised by the acceptance of the regime of archipelagic sea lanes passage. In practice, security would of course depend on many factors such as the universality of the Convention, the political will of the parties to abide by the provisions of the Convention, the practical implementation of the archipelagic state regime, particularly the designation of archipelagic sea lanes and air routes, and above all the enforcement capability of the archipelagic state, supported by modern surveillance equipment and techniques.

The designation of archipelagic sea lanes has a particular feature which I shall briefly touch upon. According to Article 53,

[a]n 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 the adjacent territorial sea.

However, before designating sea lanes, the archipelagic state is required by the provisions of Paragraph 9 to submit to the competent international organization proposals on the sea lanes to be designated "with a view to their adoption." The paragraph also provides that the organization may adopt only sea lanes that may be agreed upon with the archipelagic state. The essence of this provision is that the archipelagic state can designate sea lanes only if they have been mutually agreed upon by it and the international organization concerned. If there is no agreement and consequently no sea lanes are designated,

Paragraph 12, which provides that, in such a case, the right of archipelagic sea lanes passage may be exercised through routes normally used for international navigation, will apply.

The designation of sea lanes would therefore require the political will of both the archipelagic state and the competent international organization (particularly its members which are most directly concerned, the maritime powers) to negotiate and to reach a mutually acceptable agreement on the sea lanes. Such a negotiation would most probably be focused on the interpretation and implementation of Paragraph 4 of Article 53, 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 waters." One could expect that the major maritime countries which are members of the competent international organization and party to the 1982 Convention would give the widest possible interpretation to that provision, while the archipelagic states would do the exact opposite. It is imperative, in my opinion, that the legitimate security interests of the archipelagic state be taken into full account. To be more precise, the security of the archipelagic state would certainly be more vulnerable if there were more sea lanes designated in the archipelagic waters than those really essential for maintaining international sea and air communication. For this reason, only those sea lanes and air routes that are absolutely essential for maintaining international communications should be designated through mutual agreement, and such sea lanes should traverse the archipelagic waters through the shortest possible routes. The archipelagic state concept would be meaningless if we allowed the designation of sea lanes which criss-crossed all parts of the archipelagic waters.

Archipelagic States and the Interests of Immediately Adjacent Neighboring States

One of the contentious issues relating to the archipelagic state regime during the negotiations in the Third Conference on the Law of the Sea was the possible effect of the application of the archipelagic state regime on the interests of immediately adjacent neighboring states. Indonesia has always held the view that in the application of the regime of the archipelagic state, certain legitimate interests of immediately adjacent neighboring states should be taken into account. On the basis of this position, Indonesia negotiated with its neighbors during the Conference and, as a result, the parties agreed on the provisions that now appear in the 1982 Convention as Article 51 on existing agreements, traditional fishing rights, and existing submarine cables, and Article 47(6) which deals specifically with the case of the maritime area between West and East Malaysia which was to be a part of Indonesian archipelagic waters.

An important feature of Article 51 is the provision of Paragraph 1 which stipulates in part that "an archipelagic state shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighboring states" and that "the terms and conditions for the exercise of such rights and activities ... shall, at the request of any of the states concerned, be regulated by bilateral agreements between them." No requests to negotiate such agreements have yet been received. We have held preliminary discussions on fisheries with some of our neighbors, but only with Malaysia has anything emerged. That will be dealt with later. The terms and conditions to be negotiated should of course be based on the relevant

laws and regulations of Indonesia. It may prove difficult in future negotiations to interpret the terms "traditional fishing rights" and "other legitimate activities." Another potential difficulty lies in Paragraph 2 of Article 51, which specifically mentions only the maintenance and replacement of existing cables and not the laying of new submarine cables.

A very important development has occurred relating to the implementation of Article 47(6). On 25 February 1982, Indonesia and Malaysia signed the "Treaty Between the Republic of Indonesia and Malaysia Relating to the Legal Regime of the Archipelagic State and the Right of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace above the Territorial Sea, Archipelagic Waters and Territory of the Republic of Indonesia Lying between East and West Malaysia." The Treaty entered into force on 25 May 1984. The origin of the Treaty lies in the intensive consultations carried out between the two countries in 1974 to solve the problem raised by Malaysia about the envisaged effect of the application of the archipelagic state regime on the unity of that country. The drawing of straight baselines for the territorial sea from the outermost points of the outermost Indonesian islands, in this case the Natuna Islands, would separate West Malaysia from East Malaysia.

Malaysia promoted its interests during the Second Session of the Third Conference on the Law of the Sea held in Caracas in 1974 by submitting a proposal to the Conference (UN Doc. A/Conf.62/C.2/L.49). Aware of the need to reach a just solution to a problem raised by a good neighbor and friend, Indonesia agreed to hold consultations during the sessions of the Conference and in the inter-sessional periods. Such consultations led to a Memorandum of Understanding (MOU) reached on 27 July 1976. The basic elements of the 1976 MOU are as follows:

(a) Indonesia and Malaysia agree on a provision to replace Paragraph 7 of Article 119 of the Revised Single Negotiating Text (Document A/Conf.62/WP.8/Rev.1/Part II) which reads:

If a certain part of the archipelagic waters of an archipelagic state lies between two parts of an immediately adjacent neighboring state, all existing rights and all other legitimate interests which the latter state has traditionally exercised in such waters and all rights stipulated under agreements between those two states shall continue and be respected.

(b) Malaysia reaffirms the policy of its government to recognize and support the archipelagic state regime.

(c) Indonesia reaffirms the policy of its government to continue to respect the legitimate and existing rights traditionally exercised by Malaysia in the Indonesian archipelagic waters lying between West and East Malaysia, especially the rights of access and communication through those waters whether by sea or by air, civil or military.

The 1982 Treaty between Indonesia and Malaysia is an elaboration of the 1976 Memorandum of Understanding. The Treaty contains a provision explicitly stating Malaysia's recognition of and respect for Indonesia's application of the archipelagic state regime (Paragraph 1 of Article 2). Paragraph 2 of the same article provides that Indonesia shall continue to respect existing rights and other legitimate interests which Malaysia has traditionally exercised in the territorial sea and archipelagic waters as well as in the airspace above the territorial sea, archipelagic waters, and the territory of Indonesia lying

between East and West Malaysia. But those rights and legitimate interests are defined and regulated in the Treaty in such a way that they would not endanger or undermine the archipelagic state regime and the legitimate interests of Indonesia. The rights of access and communication of Malaysian ships, under the terms of the Treaty, must be exercised through two designated corridors defined by a series of continuous axis lines in a map, where permissible deviation is ten nautical miles to either side of the axis lines, provided that the ships shall not navigate closer to the coasts than three nautical miles. A fishing area where Malaysian traditional fishermen may continue to exercise their traditional fishing rights has also been designated. The Treaty, perhaps the only one of its kind, represents a mutually beneficial and balanced package. It also represents an immediate implementation of the 1982 Convention.

Regime of the Continental Shelf

As I have mentioned earlier, Indonesia has concluded a number of agreements on continental shelf boundaries with its neighbors. The agreements are based on the 1958 Geneva Convention on the Continental Shelf, the Declaration of the Indonesian Government of 17 February 1969, and Law No. 1 of the year 1973 on the Continental Shelf of Indonesia. Indonesia began exploration and exploitation activities on its continental shelf in 1969, up to the median line. Most intensive activities have been carried out in the South China Sea. The right of an archipelagic state to its continental shelf is sanctioned by Article 48 of the 1982 Convention.

The most significant development that occurred during the Third UN Conference on the Law of the Sea was the consensus reached on a new definition of the continental shelf as now appears in Article 76 of the 1982 Convention. Paragraph 1 of the Article provides:

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Thus the definition uses several criteria. Where the outer edge of the continental margin does not extend up to 200 nautical miles, the distance criterion or legal criterion will apply. Where the outer edge of the continental margin extends beyond 200 nautical miles, the geological criterion will apply. And, in such a case, the maximum outer limits of the continental shelf will be determined on the basis of a distance criterion or a combined distance/geomorphological criterion as stipulated in Paragraphs 4-6 of Article 76.

The definition of the continental shelf in the 1982 Convention has therefore departed from the definition in the 1958 Geneva Convention to a rather significant degree. The new definition has indeed strengthened the position of Indonesia in negotiations with its neighbors. Indonesia now has a much stronger legal basis upon which to contend that, irrespective of the geological or geomorphological features of the seabed within 200 nautical miles or whether or not there is a deep trough or even a continental margin situated within 200 nautical miles, the continental shelf of Indonesia extends at least up to a distance of

200 nautical miles measured from the archipelagic baselines. Any delimitation of the continental shelf must be based on this legal position if an "equitable solution" called for by Article 83 of the 1982 Convention is to be reached.

It is regrettable that the Third UN Conference on the Law of the Sea could not agree on a specific principle or criterion for delimitation of the continental shelf between states with opposite or adjacent coasts. Paragraph 1 of Article 83 merely provides that delimitation of the continental shelf "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." Interpreting the meaning or essence of the words "international law" will certainly become one of the most difficult tasks confronting the negotiators. In this regard, there are at least two rules of international law that could be cited. First is the provision of Article 76 of the 1982 Convention which -- even though the Convention has not entered into force -- has an international legal force by way of its universal acceptance. Second is the median line or equidistance principle prescribed by the 1958 Geneva Convention which has been strengthened by state practice. Attached to the median line or equidistance principle is the legal notion of "special circumstances" which, through state practice, has developed into a rather precise legal principle. "Special circumstances" is considered to exist when an island or a group of islands belonging to a coastal state lies closer to the coast of the opposite or adjacent state and thereby permits deviation from the median line or equidistance principle.

Indonesia is at present negotiating with Australia on the continental shelf delimitation in the Timor Sea (the so-called "Timor Gap"), the area to the west of the westernmost point of the 1972 Agreement, and in the area between Christmas Island and Java. With Vietnam, Indonesia is negotiating the continental shelf boundary in the South China Sea.

Regime of the Exclusive Economic Zone

One of the major innovations of the 1982 Convention is the regime of the exclusive economic zone, a legal regime *sui generis* which is in effect a response to the concern of the international community over the real threat of depletion of the fishery resources of coastal waters. Such depletion was primarily due to the then-existing regime of freedom of the high seas, in particular the freedom to fish, which had led to overfishing by fishing vessels of far-distant states.

The regime of the exclusive economic zone was introduced for the first time by Kenya in 1971 as the culmination of ideas promoted by developing countries. The regime could be described as a compromise between those states (mostly Latin American countries) advocating a territorial sea of 200 nautical miles and those in favor of maintaining the freedom of the high seas.

According to Article 56 (1), the coastal state has in the exclusive economic zone:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone ...

- b) jurisdiction ... with regard to the establishment and use of artificial islands, installations, and structures, ... marine scientific research, ... and the preservation of the marine environment;
- c) other rights and duties provided for in this Convention.

In the exclusive economic zone, the freedoms of navigation and overflight and of the laying of submarine cables and pipelines continue to be recognized.

With regard to the relation between the regime of the exclusive economic zone and that of the continental shelf, Paragraph 3 of Article 56 stipulates that the sovereign rights of the coastal state with respect to the seabed and subsoil which constitutes a continental shelf shall be governed by the regime of the continental shelf.

The Indonesian position on the provisions of the 1982 Convention concerning the delimitation of the exclusive economic zone between states with opposite or adjacent coasts in Article 74 is the same as that on the continental shelf delimitation I spoke about earlier.

On 21 March 1980, the Indonesian Government issued a Declaration on the Exclusive Economic Zone of Indonesia, establishing Indonesia's exclusive economic zone to a breadth of 200 nautical miles, measured from the archipelagic baselines, and Indonesia's sovereign rights and jurisdiction in this zone in accordance with the provisions of the EEZ regime which at the time had already appeared in the Informal Composite Negotiation Text/Rev.1. The Declaration also states that with respect to the seabed and subsoil of the exclusive economic zone, Indonesia's laws and regulations concerning its waters and its continental shelf and international agreements and international law relating to the continental shelf shall remain in force. The Declaration also reaffirms that Indonesia will continue to recognize the freedom of navigation and overflight and of the laying of submarine cables and pipelines. With regard to possible overlapping jurisdiction with neighboring countries, the Declaration states that the Indonesian Government is prepared, at an appropriate time, to enter into negotiation with the state concerned with a view to reach an agreement.

The Declaration of 1980 was followed by a provisional arrangement announced by the Indonesian Government on 30 September 1980, under which foreign fishing vessels operating in the Indonesian EEZ were required to obtain prior authorization from the Indonesian competent authorities. The provisional arrangement was considered necessary to give sufficient effect to the Declaration pending the promulgation of the Law on the Exclusive Economic Zone of Indonesia. Under the terms of the provisional arrangement, no license fee was charged to foreign ships.

An important development that occurred after the Declaration of 1980 was the signing on 29 October 1981, of the Memorandum of Understanding between Indonesia and Australia concerning the implementation of a provisional fisheries surveillance and enforcement arrangement. The MOU, which entered into force on 1 February 1982, establishes a provisional fisheries line pending agreement on a permanent fisheries line.

The provisional fisheries line is the result of difficult negotiations. Both sides easily agreed to use the principle of the median line in drawing the provisional fisheries line. The problem was to agree on the base points to be used. Australia's position was to use the outlying Australian islands, including the Ashmore and Cartier

island groups which are situated much closer to the Indonesian coast than to the Australian coast. Indonesia's position was to disregard most of the Australian islands situated far from the Australian coast. Indonesia argued that a median line measured from Australia's outlying islands would be seriously inequitable and insisted that those islands should fall under the legal notion of "special circumstances." Under the compromise finally reached, the outlying islands such as Ashmore and Cartier island groups and Browse Islands and Scott Reef were not used as base points from which to measure the median line. The provisional line, however, touches the southernmost point of the twelve-nautical mile territorial sea limit of Ashmore Reef.

The Law on the Exclusive Economic Zone of Indonesia was promulgated on 18 October 1983, as Law No. 5. The Law lays down the sovereign rights and jurisdiction of Indonesia in its exclusive economic zone already declared in 1980 and regulates specific aspects of the EEZ regime, such as access of nationals of other states, imposition of fees, and law enforcement. Up to now Indonesia has not yet concluded any agreement with another country on access to its exclusive economic zone or on the delimitation of the exclusive economic zone or fisheries zone (except the provisional arrangement concluded with Australia referred to earlier).

Concluding Remarks

The regime of archipelagic states in the 1982 Convention on the Law of the Sea is more than just a legal regime or a legal concept to Indonesia. It is the legal and territorial manifestation of Indonesia's philosophical outlook. Its adoption by the Third UN Conference on the Law of the Sea reflects international recognition of the whole concept of national and territorial unity of Indonesia embodied in the *Wawasan Nusantara*. However, the signing of the 1982 Convention signifies not only the end of our long and arduous journey but the beginning of the monumental task of giving substance to the achievement. First and foremost is the completion of the process of ratification, which is now in its final stages. Parallel to that process is the preparation of a set of new laws and regulations as a consequence of the ratification. The 1982 Convention calls for wide-ranging negotiations with certain countries, in particular negotiations concerning archipelagic sea lanes and air routes, delimitation of maritime boundaries, and access of third parties to the exclusive economic zone of Indonesia. The Indonesian Government and people are strongly committed to such a monumental task.

DISCUSSION

Masaki Saito: Thank you, Mr. Noegroho, for your precise and intensive analysis. Now the floor is open. Mr. Clingan, please.

Thomas A. Clingan: I'd like to draw your attention to a statement under the heading *Regimes of Passage* that, to me, is somewhat surprising, and I'm not sure I can agree with it. After listing the duties of ships going through the archipelagic waters, you say, "Any violation of the provisions I have just spelled out would certainly render the passage a non-archipelagic-sea-lanes-passage. In such a case, the archipelagic state has the right to take appropriate action to protect its vital security interest."

My question is: what is your basis for making that particular statement? First, if you are analogizing to innocent passage, I see clear distinctions between the two. Article 19 is headed "Meaning of innocent passage." Paragraph 2 of Article 19 clearly says that if any of those events listed there occur, the passage is prejudicial and therefore non-innocent. So it is clear that, in the territorial sea, certain activities would render the passage "non-innocent." Secondly, I recall quite clearly that at least one state was very concerned that violation of the "duties of ships and aircraft during transit passage" listed in Article 39 would only incur legal liability. The concern was expressed that if there were a violation, for example, of pollution laws under Article 42, the chapter does not clearly state that the littoral state would have the right to exclude the vessel from archipelagic sea lanes passage. And for that very purpose, the second sentence in Article 233 was inserted to make clear that for violation of pollution and navigation regulations the coastal state would have the right to exclude that vessel. Now, it seems to me that that is the only circumstance that would, in your terms, render a vessel non-archipelagic. I don't see the basis in either the straits chapter, as referred to in the archipelagic chapter, or in the archipelagic chapter for saying that the violation of any of these provisions renders the vessel non-archipelagic. I'm not arguing that there would not be international liability arising from a violation of the duties.

Noegroho Wisnomoerti: Thank you, Tom. I expected that you might raise this question with me. I can only say that this is the way I read the Convention. Paragraph 1 of Article 39 provides for specific duties, and it seems to me that any passage that does not comply with the requirements imposed by the paragraph is not passage under the notion of archipelagic sea lanes passage. And for that reason, it will trigger a mechanism which might or might not already be covered by the Convention because the Convention does not comprehensively deal with the enforcement aspect of the provisions concerning the archipelagic state regime. I agree with you about laws and regulations concerning environmental protection which are stipulated and enforced in another part of the Convention and which will apply, of course, in case of violations. I deliberately used very precise language in this statement that the archipelagic state has the right to take appropriate action, whether through diplomatic channels, international organizations, or other means. That is what I meant by the word "appropriate." I hope this will clarify my position.

Thomas A. Clingan: Yes, thank you. I wasn't arguing about the "appropriate action" part of it; I was just a little surprised at the "non-archipelagic" aspect of it. Of course, my good friend, I still must disagree, as we have in the past, on your interpretation, which would simply render unnecessary the second sentence of Article 233. You might as well take it out.

Masaki Saito: Mr. Craven.

John P. Craven: I'd like to ask one or two questions as a citizen of Hawaii. First, we are indebted to you for stating that the fundamental aspect of an archipelagic state is that its peoples regard the land and the sea as an integrated totality in their whole lifestyle. That's indeed the situation in Hawaii. The fundamental spiritual document of Hawaii is a document called the *Kumulipo* which describes all of the aspects of Hawaiian life and continuously points out that for every land use there is a counterpart sea use, and that total living requires that these two uses be integrated. It's that spirit which, in Hawaii and, I'm sure, in Indonesia, gives the people, who with their ancestors have spent their lives there, a very strong feeling about the archipelagic concept.

But my questions relate to the practicalities of the archipelagic state. What is your view of the flexibility of the archipelagic state with respect to the designation of sea lanes? Paragraph 4 of Article 53 states that such sea lanes and air routes "shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight." That statement would imply that the archipelagic state would have no choice but to designate sea lanes within all such routes. But the end of that paragraph states, "provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary." That clause indicates to me that the archipelagic state might have the right to designate sea lanes through alternate routes.

Let me just phrase my question in a specific example. Supposing that an archipelagic state has three islands. The normal route used for navigation is between Islands B and C. The archipelagic state concludes that it is every bit as convenient to use the route between Islands A and B. Is it your view that the archipelagic state may then designate sea lanes only in the passage between A and B and has the right to indicate that the normal route between B and C does not have a sea lane because there is an equally convenient sea lane through a parallel route?

Noegroho Wisnomoerti: It's a pleasant surprise to know that in your country of origin, Hawaii, the people have the same conceptual or philosophical outlook as in Indonesia. I should have added that this philosophy is widespread along the archipelagos of other countries.

I think you are correct to say that there's no room for flexibility in Paragraph 4 of Article 53; it says clearly that the sea lanes should include all normal passage routes. However, I think we should consider this paragraph in conjunction with other relevant provisions. Paragraph 1 of this article actually grants the archipelagic state the right to designate sea lanes, so total flexibility seems to be given to the archipelagic state. And then comes Paragraph 4, which requires that the designation should include all normal passage routes. But we

should also read Paragraph 4 in conjunction with Paragraph 12, which says if an archipelagic state does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation. To my logic, Paragraph 4 does not have to be read in isolation, because it says it should include all normal passage routes, and if it should include all, why do we have this provision when we have Paragraph 12? Paragraph 12 actually deals with the status quo, and Paragraph 4 provides that the archipelagic state has to include all normal passage routes, while Paragraph 1 says that it has the right to designate sea lanes. So there are some inconsistencies -- by accident, of course -- which might create different interpretations. But the sense remains, as I have said in my statement, that there have to be goodwill and political will on the part of all negotiators to lead to an equitable solution. And, though I don't consider as immaterial the security or strategic interest of the maritime powers, in the designation of sea lanes the legitimate concern for the security of the archipelagic state should be taken into full account.

John P. Craven: I appreciate that answer because I hadn't recognized that Paragraph 12 can't exist if the archipelagic state in all circumstances provided sea lanes through all normal passages.

Masaki Saito: Professor Van Dyke.

Jon Van Dyke: At a meeting we had in Honolulu in January, Hasjim Djalal, now ambassador to Canada from Indonesia, said that in his judgement the straits states would have the power to deny transit passage to those nations that have not signed and adhered to the Convention. Could you give us your thoughts about that interpretation?

Noegroho Wisnomoerti: What Dr. Djalal stated is more or less in line with my view. Theoretically, straits countries could take a different position with regard to states that have not signed or ratified the Convention; they might not consider themselves bound to respect obligations with regard to non-parties. Theoretically and legally that is possible. But whether politically it is feasible is another question. This is precisely the problem that can be envisioned in the near future because some of those who have a political interest in strategically important aspects of the Convention are not party to it. I don't know the views of other archipelagic states or other straits countries, but in my view this may create a problem.

Masaki Saito: Mr. Nordquist.

Myron Nordquist: I have an observation and then two pointed questions on your paper. I think the Indonesian delegation to the Conference achieved a major diplomatic victory, as evidenced in your paper, in getting an accommodation on the archipelagic concept. Among the results of the Conference, it's probably second in priority only to the exclusive economic zone itself as a major alteration in the existing law, and it reflects on the diplomatic skill of your own delegation. The problem from the maritime powers' point of view is that huge expanses of ocean are involved. Being out in the middle of the Java Sea is quite different from being in the Straits of Singapore. If you're hundreds of miles from shore it's not possible to be in tight little

formations; you have to be spread out for military reasons. The problems of passage through those kinds of waters are sometimes characterized as similar to the problems one has going through a strait, but in fact they're quite different. As you know, it isn't even possible to go submerged through the Straits of Singapore, whereas it would be totally impractical not to go submerged in those much broader areas. So I think it's a credit to the skill of both sides that some kind of accommodation has been reached, and I assume that you will have to have some kind of practical arrangements, as indeed you had anyway, with respect to the non-party states, because this concept is, after all, in a Convention that hasn't entered into force. There may well be a long time before this Convention does enter into force, so the provisional arrangements that you make are likely to become the permanent ones.

I have two questions. Your aside that Indonesia had not become a party to the 1958 Continental Shelf Convention because of technical reasons arouses my curiosity. And you also said as an aside that there had been negotiations with Vietnam. What is the status of those negotiations? How far have you progressed?

Noegroho Wisnomoerti: Thank you, Myron, for your kind words to Indonesia. First, the technical reasons were simply that though the Indonesian Parliament agreed to ratify the Convention, the ratification instrument was not accepted by the Secretary-General of the United Nations because it contains reservations which relate to Article 1 and 2, and the Convention explicitly prohibits reservations. Nevertheless, since we have ratified, nationally speaking, we adhere to the provisions contained therein.

The negotiations with Vietnam are still going on. We have had several meetings. What I can disclose at this point is that we still have certain difficulties which are based on the different principles employed. As you know, we adhere to the principle of median line simply because there is not a single feature which requires consideration under the notion of special circumstances. Of course, Natuna is there, but we always contend that Natuna should not be regarded as an island subject to an island regime but as a part of the archipelagic state regime. If Natuna is considered to be an individual island of Indonesia, special circumstances might be invoked by the other party, but since it is a part of an archipelagic state, it is in fact considered as land territory of Indonesia. Vietnam holds a different view altogether. They have changed their positions several times with different theories, but apparently they realized that some progress had to be made and we did make some progress, in fact, in the negotiations. But we still have a small disputed area to resolve and we have attempted to resolve it for the last two years. We hold meetings irregularly, sometimes once a year, sometimes once in two years, depending on the moods of our two countries; maybe sometime this year there will be another round of negotiations. But what I can say is that we have made progress.

Masaki Saito: Choon-ho Park.

Choon-ho Park: I have some brief but specific questions with regard to the archipelagic doctrine. The Convention defines an archipelago as the ratio of land to water as 1:1 to 1:9. Would you give us the basis of that numerical definition? The second question: how many other countries are geographically archipelagic but legally not? Like Japan

and Singapore, for example. My third question is: on Natuna Island or the boundary delimitation between Vietnam and Indonesia, there were six meetings alternately in Hanoi and Djakarta, and the sixth was the last I was able to trace. What is the situation now? Any agreement reached or ready to be signed? My final question is: you list twelve agreements Indonesia has signed. Are these all being enforced? I understand there are a few others that have been signed but not enforced yet.

Noegroho Wisnomoerti: We came to this ratio with the situation existing at that time in mind. That is, we wanted to include all those archipelagic states that had indicated their interest in being included. 1:1 is applicable to Indonesia and 1:9 is applicable to the Bahamas. These are the two extremes and in between are some of the archipelagic states like Papua New Guinea. Some states are geographically but not legally archipelagic, include the Maldives, Mauritius, and probably Japan and Hawaii, but we have never really done any specific studies on this subject. You are correct to say that Indonesia and Vietnam have had about six negotiating meetings and one preliminary discussion leading to a seventh. Again, we have made some progress, but not enough to make us happy at this stage. We have a definite disputed area now, which is much reduced. Vietnam has moved substantially from its initial position; Indonesia has moved slightly. This is not really the formal stage of the negotiations; we just exchange and negotiate ideas and it seems that the area of difference, in terms of geography, has been very much reduced. I think I can say for sure that the agreements listed at the end of my paper are now in force. At the moment I don't have the dates of the entry into force of Number 2, the Agreement between Republic of Indonesia and Malaysia concerning the Territorial Sea Boundary signed in 1970 and Number 7, the Agreement between Indonesia and Singapore signed on 25 May 1973.

Choon-ho Park: I was asking about the Natuna Island situation because Vietnam was very keen about that; they had the Gulf of Tonkin situation in mind vis-a-vis the Chinese, and this I will come back to tomorrow morning.

Masaki Saito: Mr. Chen.

Rong-Jye Chen: I would like to comment very briefly on the delimitation questions in your paper under the heading of **Regime of the Continental Shelf**. I think that the delimitation of the continental shelf and the EEZ provided by the UN Convention is governed by the same test: that is, to decide in accordance with international law and to achieve so-called equitable solutions. According to Article 38 of the Statutes of the International Court of Justice, there are several sources of international law: treaty, custom, general principles of law, judicial decisions, and writers' opinions. To the best of my knowledge, there is no so-called treaty nor is there custom governing the delimitation of the EEZ or continental shelf so far. However, there are certain judicial decisions on the delimitation of the continental shelf -- for example, the *North Sea Continental Shelf* case, the *Anglo-French* case, the *Tunisia-Libya* case. But the legal or theoretical bases of the regimes of the continental shelf and of the EEZ are entirely different. The concept of the continental shelf is based on so-called natural prolongation and the EEZ on an arbitrary line drawn by the Convention.

With this understanding in mind, do you think the judicial decisions in connection with the delimitation of the continental shelf are applicable to the delimitation of the EEZ?

Noegroho Wisnomoerti: We are talking about two different things, the definition and the delimitation, that may come together in the negotiations. Delimitation under the *North Sea Continental Shelf* case is more or less influenced by the principle of natural prolongation. It is, in fact, a part of international law. That is the reason why the natural prolongation principle is incorporated into Article 76. At the same time we have to bear in mind that delimitation also requires a certain specific criterion. Of course, Article 83 only indicates, as you said, that delimitation should be effected by agreement on the basis of international law, and it doesn't say much about that. To my mind two principles should govern or guide in delimitation. I think it is incorrect to say that there is no state practice on this aspect. Of course there are the decisions of the Court; we have the *Anglo-French Arbitration* award, the agreement between Italy and Yugoslavia in 1970, the *Iran-United Arab Emirates* agreement in 1975, the *Australia-PNG* in 1978. Those decisions have indicated certain principles which have been developed through state practice, and that leads to the "special circumstances" legal notion, and particularly I am referring to the role of islands in the delimitation. That is the reason why, although Article 38 refers only to international law, those negotiating the boundary delimitation, or the Court, have to bear in mind those facts, those state practices, judicial awards, and so on, to reach an equitable solution to the problem.

Rong-Jye Chen: Another question: in the same section of your paper you indicate that "the 1982 Convention, even though it has not entered into force, has an international legal force by way of its universal acceptance." What do you mean by this expression?

Noegroho Wisnomoerti: Again, this is my interpretation of the legal status of those provisions of Article 76. I consider that this particular definition is universally accepted because the Conference adopted it by consensus. Of course, some reservations are expressed, but those expressions do not in any way affect the consensus that has been reached. Of course, that has to be strengthened further by state practice, but I think it will be strengthened in the very near future.

THAILAND AND THE LAW OF THE SEA

THAILAND AND THE LAW OF THE SEA

Masaki Saito: We move to the next item, "Thailand and the Law of the Sea." The reporter is Mr. Chalermpon, who graduated in law from Thammasat University, received his diploma in International Relations at the Institute of Social Studies, The Hague, and after that studied at Columbia University, New York, earning an M.A. in International Law and Relations. Now he is a senior legal officer of the Thai Ministry of Foreign Affairs and occupies various posts, as member or secretary, on such committees as the Committee on Law of the Sea and Maritime Boundaries of Thailand, the Sub-committee on the Drafting of National Legislation concerning the Maritime Zones of Thailand, and the Committee on Prevention and Abatement of Maritime Pollution from Oil.

Mr. Chalermpon.

THAILAND AND THE LAW OF THE SEA

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With the conclusion of the United Nations Conference on the Law of the Sea, new developments in the law of the sea that had been going on for more than ten years were finally formalized. The changes brought about by the Convention are of great importance to most countries in Southeast Asia, especially with respect to their ocean resources development and management. Thailand is no exception.

This paper will outline the maritime jurisdiction as well as other bilateral and multilateral issues of Thailand in the light of the United Nations Convention on the Law of the Sea, signed at Montego Bay, Jamaica, on 10 December 1982.

Brief Geography and Thailand's Interest in the Sea

In order to appreciate problems faced by Thailand as a result of new developments in the law of the sea, it is appropriate, at the outset, to mention briefly the geographical location of the country and its interests in the sea.

Thailand is situated in Southeast Asia. It has two coastlines: one abuts on the Gulf of Thailand, the other on the Andaman Sea. Ships navigating from one of its coasts to the other have to pass through the Straits of Malacca. In spite of its long coastlines, Thailand is far removed from the open oceans because both the South China Sea in the East and the Andaman Sea in the West are semi-enclosed seas. Furthermore, Thailand is a developing nation. Its national interests insofar as the use of the sea is concerned are primarily of an economic nature. It is neither a military power nor a maritime nation. Its main maritime interests traditionally lie in access to and from the high seas and fishing. As a developing country, Thailand's economic viability and stability as well as opportunity for development depend heavily on export of its products to overseas markets. Thus, access to and from the high seas is essential not only for its foreign trade but also for Thai fishermen who have to venture out to fish in the high seas for their living. There is, indeed, another peculiarity in the economic structure of Thailand. It is a developing country but to some extent can be considered as a distant fishing nation: it was ranked seventh among the world's top fishing countries in 1972. In the daily life of the Thai people, fish constitutes an indispensable source of food and an essential part of their diets. A substantial number of our countrymen and their families depend on fisheries for their livelihood. Therefore, the availability of supply of fish is a key factor in the life of Thai people and for the economic development of Thailand. In other words, fisheries constitutes an important part in the social and economic life of the country both in terms of a major source of relatively cheap animal protein for the population and in terms of employment and the significant means of foreign exchange earnings.

Enough has been said about the background of the country; let us now turn to Thailand's maritime jurisdiction.

Maritime Jurisdiction

Apart from internal waters, the maritime zones of Thailand consist of the territorial sea, the continental shelf, and the exclusive economic zone.

Territorial Sea

Thailand has a twelve-mile territorial sea measured from the baselines. This breadth of territorial sea was established on 6 October 1966, after Thailand became a party to the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958. As for the baselines from which the territorial sea is measured, it should be pointed out that on 22 September 1959, Thailand declared that the Bight of Thailand, i.e., the inner part of the Gulf of Thailand, is an historic bay. Thus, the waters north of the closing line are internal waters of Thailand and Thailand's territorial sea would be measured south of the baseline closing the bight. Moreover, on 12 June 1970, Thailand proclaimed three segments of straight baselines along its coast; two were on the west and east coast of the Gulf of Thailand, while the third followed the coast in the northern reaches of the Strait of Malacca. Thus, the territorial sea of Thailand in these four areas is twelve miles in width measured from the baselines concerned.

Insofar as the delimitation of the territorial sea with adjacent countries is concerned, Thailand has, so far, concluded a treaty with Malaysia relating to the delimitation of the territorial sea of the two countries in the Gulf of Thailand and the northern part of the Strait of Malacca. Thailand has also reached agreement with Burma with respect to the outer segment of the boundary of territorial seas of the two countries. The inner segment of the territorial sea between Thailand and Burma up to the end of the land boundary, however, remains to be negotiated in the future. Another area where delimitation of the territorial sea has to be effected is at the end of the land boundary between Thailand and Kampuchea.

Continental Shelf

Since Thailand has two coasts, there are two areas of continental shelf appertaining to Thailand: one in the Andaman Sea, the other in the Gulf of Thailand.

In the Andaman Sea, petroleum exploration blocks were announced in September 1971 for the purpose of granting concessions to qualified companies and enterprises. This claim has never been reiterated since Thailand was able to reach agreement with her neighboring countries relating to the delimitation of the continental shelf or seabed boundary. Agreement was concluded with Indonesia on the delimitation of a continental shelf boundary between the two countries in the northern part of the Strait of Malacca and the Andaman Sea on 17 December 1971. A few days later, on 21 December 1971, Thailand concluded a tripartite agreement with Indonesia and Malaysia on the delimitation of the continental shelf boundaries in the northern part of the Strait of Malacca. Thereafter, on 11 December 1975, Thailand entered into an agreement with Indonesia relating to the delimitation of the seabed boundary between the two countries. On 22 June 1978, Thailand concluded an agreement with India relating to the delimitation of the seabed boundary and a tripartite agreement with India and Indonesia concerning the determination of the trijunction point and the delimitation of the related boundaries of the three countries. The latest agreement Thailand concluded with her neighbor is the agreement between Thailand

and Burma on the delimitation of the maritime boundary between the two countries of 25 July 1980. This agreement effected the delimitation of both the continental shelf boundary, the boundary of the exclusive economic zone, and the outer segment of the territorial sea boundary of the two countries. What remains to be negotiated are only the determination of the trijunction point among Thailand, Burma, and India and the delimitation of those segments of boundaries of continental shelf between Thailand and Burma on the one hand and between Thailand and India on the other hand in the direction of and up to the trijunction point.

The situation in the Gulf of Thailand is rather different. Thailand had announced petroleum exploration blocks in January 1968, well before she deposited her instrument of ratification of the 1958 Geneva Convention on the Continental Shelf on 2 July 1968. On 18 May 1973, Thailand formally proclaimed the outer limits of her continental shelf in the Gulf of Thailand in response to the claims of Kampuchea and South Vietnam made earlier. The chance of negotiation with Kampuchea and Vietnam on the delimitation of the continental shelf boundary seems remote since the present political situation in Kampuchea is not conducive to such talks. In this connection, it should be emphasized that straight baselines declared by Vietnam and the Heng Samrin regime as well as the so-called "historical waters" established by agreement between them in 1982 are clearly contrary to the generally accepted principles of international law.

As regards the delimitation of the continental shelf boundary between Thailand and Malaysia in the Gulf of Thailand, the two countries already reached agreement with respect to the inner segment of the boundary. However, the two countries could not agree on the outer segment of the boundary of the continental shelf. Consequently, in the spirit of friendship and co-operation, Thailand and Malaysia concluded a Memorandum of Understanding establishing a Joint Authority for the exploitation of non-living resources of the seabed and subsoil in the overlapping area of claims. Joint exploitation under the Joint Authority will subsist for fifty years. Meanwhile, the two countries will go on resolving the problem of delimitation. If the boundary of the continental shelf has not been settled in fifty years, the existing arrangements regarding joint development will continue.

This accord significantly demonstrates the ever-widening cooperation between the two neighboring countries. Yet, joint development is not free from problems in its implementation. There are, in fact, considerable legal and institutional problems involved. For instance, the two countries have different legal and administrative systems. They also apply different systems in their present exploitation of seabed resources, to wit: Malaysia applies the production-sharing system while Thailand uses the system of concession. Moreover, once formally established, the Joint Authority has to operate under a defined legal system as concerned parties have the right to know what system of law is applicable over the joint development area. These kinds of problems have to be resolved before the actual exploitation of the seabed resources in the area gets started. So far, a uniform production-sharing system was adopted as a common system of exploitation. And officials of the two countries have been working on the preparation of draft parallel implementing legislation -- identical in content -- for the formal establishment of the Joint Authority under their respective legal systems. An appropriate production-sharing contract for the joint

development area is being formulated and other regimes, such as taxation, are being devised.

Exclusive Economic Zone

The concept of the exclusive economic zone has received wide acceptance in the practice of states as evident from the fact that a large number of states have established their exclusive economic zones. The adoption of this zone by a great number of states can be regarded as having materialized this concept into customary international law. Thus, although it hesitated in the beginning, Thailand had no alternative but to follow this trend in the new law of the sea by proclaiming its 200-mile exclusive economic zone on 23 February 1981. Delimitation of the exclusive economic zone between Thailand and neighboring countries with opposite or adjacent coasts has so far been made with Burma only. Discussions on this matter with Indonesia, Malaysia, and India are planned for the future.

Since the exclusive economic zone is the new zone of jurisdiction established by Thailand, in which Thailand will have new rights and obligations according to the United Nations Convention on the Law of the Sea, it is necessary, under the Thai legal system, to amend the existing domestic laws or to enact a new internal law to implement it. For this purpose, the Committee on the Law of the Sea and Maritime Boundaries of Thailand has appointed a Sub-Committee to draft a new law on the maritime zones of Thailand. Although progress has been made on some portion of the drafting work, it is expected that this task will be arduous and time-consuming.

Other Issues

The new law of the sea as materialized by the United Nations Convention on the Law of the Sea will have a far-reaching consequence for Thailand. This is due to the peculiarity of Thailand's geographical location and the nature of its interests in the sea.

Among various provisions of the new Convention, those provisions concerning the exclusive economic zone will have great impact upon and pose considerable problems in their application to Thailand. Some of these problems will now be discussed.

First, because Thailand is situated in the semi-enclosed seas both on the west and east coast where the width of these seas is less than 400 miles, it could not reap the maximum benefit allowed by the Convention; that is to say, it could not extend its exclusive economic zone to the maximum limit of 200 miles. Agreement has to be reached with the opposite or adjacent countries in the delimitation of the exclusive economic zone. In this respect, the provision of the Convention regarding the delimitation is somewhat vague and offers little practical guidance. One thing is certain, however. A boundary delimitation must be effected by agreement on the basis of international law in order to achieve an equitable solution. But apart from this, the Convention in no way indicates the principles or criteria on which the parties should carry out their negotiations with a view to achieving an agreed boundary line. The reference to international law in the provision of the Convention only begs the question. In the end, one has to look to the decisions of international tribunals for general guidance in this matter.

Second, the proclamation of the exclusive economic zone by other countries would change the legal status of many of Thailand's traditional fishing grounds in the former high seas into zones under

national jurisdiction. It is estimated that the creation of the exclusive economic zone by neighboring countries would result in Thailand's loss of about 300,000 square miles of fishing grounds, with the implication that about 40 percent of the present total annual catch would dwindle. This would cause economic dislocation to Thailand's fishing industry which requires effective adjustments. To help alleviate the plight of the fishing industry, attempts were made, at both public and private levels, to enter into joint venture arrangements in fishing with other countries. Progress has been made in the setting up of joint ventures with Oman, China, India, and Australia. Moreover, Thailand has intensified its efforts to develop inland fishery resources and to promote aquaculture. It has also tightened its fishery zoning and management in its own exclusive economic zone to prevent overfishing.

Third, while the concept of the exclusive economic zone confers sovereign rights to the coastal state, it imposes obligations upon it, too. The most important obligation in this regard is the duty to conserve and manage living resources to meet the objective of optimum utilization. It is doubtful that developing countries, Thailand not excepted, could have the capabilities to perform this duty effectively since they lack necessary technology, machinery, or qualified personnel. For instance, Thailand at present has problems with respect to the determination of the allowable catch of the living resources in its exclusive economic zone. It also has problems concerning monitoring, control, and surveillance of the zone. In this connection, it is earnestly hoped that the international organizations concerned will play an important role in assisting a developing country like Thailand to develop its capabilities.

Fourth, with the advent of the exclusive economic zone, Thailand would be able to exercise jurisdiction with regard to the preservation and protection of the marine environment within that zone. This is essential since both parts of the exclusive economic zone of Thailand, in the Gulf of Thailand and the Andaman Sea, are areas which could be termed "concentration areas" as far as marine pollution is concerned. However, the main problem in this matter is also the lack of technology and machinery to prevent or abate marine pollution. Moreover, since pollution recognizes no boundary, cooperation from neighboring countries is needed. In this connection, it should be noted that Thailand and other members of ASEAN, with the assistance of the United Nations Environment Programme (UNEP), have devised an Action Plan for the Protection and Development of the Marine Environment and Coastal Areas of the East Asian Region. It remains to be seen whether there will be any problem in the implementation of this Action Plan.

Conclusions

Thailand has established its maritime zone in accordance with the provisions of the United Nations Convention on the Law of the Sea. Delimitations of these zones with its neighboring countries in the Andaman Sea are now almost complete. In the Gulf of Thailand, however, Thailand had reached agreement with Malaysia only.

Due to its geographical position, Thailand has not much to gain from the new concept of the exclusive economic zone. But it has to live with it. It is hoped that, finally, it can adjust itself to the new situation.

DISCUSSION

Masaki Saito: Thank you, Mr. Chalermpon. Now the floor is open for questions. Mr. Rhee.

Sang-Myon Rhee: I have two questions. First, according to your presentation, Thailand would like to revise or reestablish some maritime boundaries with your neighboring countries, mainly because of your interest in fisheries. On what principle do you really want to establish some kind of fishing or joint venture arrangement, or would you like to establish a new boundary? Second, according to your presentation, Thailand suffered a lot because of the new regime of the archipelago. There are two kinds of archipelagoes: the mid-ocean and the coastal. Of mid-ocean archipelagos there are two types: those that are independent states and those, like Hawaii, that are not. I was curious about the process at UNCLOS III because the coastal states that have a lot of coastal archipelagoes were not that noisy, even though these countries are quite numerous. Certainly there are some conflicting interests between Indonesia and Thailand, and Indonesia and other countries which have coastal archipelagoes. How could you settle this kind of conflict with an archipelagic country? The archipelagic regime was recognized as the law of this Conference, but the coastal archipelagic concept was not recognized.

Chalermpon Ake-Uru: As regards your first question, I didn't say we would revise the maritime boundary. I said we have a problem on fisheries and we would like to conclude an arrangement on both the public and private levels with other countries. I said we have so far concluded at the private level joint-venture arrangements with Oman, China, India, and Australia.

Masaki Saito: Mr. McDorman?

Ted McDorman: First question: a number of commentators have made much of the fact that Thailand is an outer strait state, whatever that may be. How much navigation goes between the coasts of Thailand? Is it mostly fishing or is there transport of other types that goes between the two coasts? Secondly, what is the nature of the private joint-venture agreements on fisheries that you mentioned?

Chalermpon Ake-Uru: As far as navigation is concerned, our vessels have to pass through the Strait of Malacca. Our fishing vessels are not very large and may encounter difficulties in the Strait from the implementation by the state bordering the Strait of the regulation on marine pollution, for example. But our fishing vessels go out from both coasts so the number of vessels which pass through the Strait of Malacca will be less and less, and we hope that in the ASEAN spirit we can talk with our friends. Regarding your second question, our Thai companies usually contact the authorities and companies in those countries, for example in Oman, India, or Australia, to try to agree on the joint-venture investments in fishing in the EEZs of those countries. I don't have full information on these arrangements because they are made on the private level.

Masaki Saito: Professor Van Dyke.

Jon Van Dyke: Does Thailand consider itself a geographically disadvantaged state?

Chalermpon Ake-Uru: We consider ourselves as a GDS but we are not accepted by the group of LL and GDS in the Conference.

Jon Van Dyke: Your immediate neighbors don't accept your claim under Article 70 for preferential rights?

Chalermpon Ake-Uru: We have approached Indonesia and other friends in ASEAN and there has been some talk in the ASEAN permanent committee on fisheries, but I don't know every detail of that talk.

Masaki Saito: Choung Il Chee.

Choung Il Chee: Throughout your paper I haven't detected any specific method of delimitation of the territorial sea and EEZ and continental shelf. Can you tell us what kind of criteria you have used in concluding agreements with neighboring states and, on the basis of your experience, what can you tell us in terms of the circumstances involved?

Charlermpon Ake-Uru: We adhere to the principle of equitable delimitation. Sometime we can use a modified equidistant principle, and we have concluded agreements with our ASEAN friends in a spirit of mutual understanding. I cannot tell you for certain which kind of principle we particularly adopted. So far as I can say, we adopted equitable principles, making use of many methods.

Choung Il Chee: Median line ...

Chalermpon Ake-Uru: Modified median line, for example. Negotiation on the delimitation of a boundary of a continental shelf depends very much on the political relations between the two or three parties, so if the political situation is propitious, it will sometimes be very easy, among friends, to delineate a boundary.

Masaki Saito: Professor Choon-ho Park.

Choon-ho Park: I have two brief questions. One is about the historic bay, the Bight. Have there been some protests from other countries since it was declared historic? The second question is about your land-locked neighbors. Altogether there are five land-locked countries in East Asia, namely Afghanistan, Bhutan, Laos, Mongolia, and Nepal. But has Laos given any indication that it wants to use your territory to reach the sea or is there any likelihood that Laos will eventually make life difficult for Thailand because of that right of access to the sea? I say this because of what might happen between Mongolia and China; from Ulan Bator, the capital of Mongolia, the nearest way to reach the sea is right through the capital city of Beijing, China, and through Pohai Bay, and these are very sensitive places security-wise and otherwise.

Chalermpon Ake-Uru: Our declaration in 1959 of the inner part of the Gulf of Thailand, the Bight of Thailand, as a historic bay didn't meet

with any protest because before we declared it, we sought out ideas in the first Conference on the Law of the Sea at Geneva in 1958. We concluded an agreement some time ago with Laos on the transit of goods, but so far Laos has not approached us on access to the living resources in the sea in the exclusive economic zone of Thailand. They may know that in the Gulf of Thailand there are not many fish left.

Masaki Saito: Mr. Chen Chi.

Chen Chi: When you talk about Thailand's joint ventures with China, do you mean with the Republic of China or the China mainland, or both?

Chalermpon Ake-Uru: With the People's Republic of China, in fact with Hainan Province. It's on the private level. One of our fishing companies got an agreement to fish around that area, but they have to transport all of their fish to China to sell there. It's the effort of Thai fishing companies to go out faraway and contact other countries at the private level.

Masaki Saito: Robert Smith.

Robert Smith: I have a question concerning the exploration/exploitation of oil and gas in the Gulf of Thailand. Has there been any protest by Vietnam or Kampuchea on your activities on oil and gas in that area, and have there been any problems at the national level for Thailand in expanding your search for oil and gas because of the disputed areas in that region?

Chalermpon Ake-Uru: We instruct our companies not to explore/exploit in the overlapping area with Kampuchea and Vietnam.

Masaki Saito: Mr. Kuribayashi.

Tadao Kuribayashi: I want to comment on the question raised by Professor Rhee on coastal archipelagoes. The concept of coastal archipelagoes had already been adopted in the ICJ's decision on the fisheries case between the United Kingdom and Norway, and it was embodied in the Territorial Sea Convention of 1958 and also in Article 7 of the new Convention. There was a discussion on the concept of offshore archipelagoes, like the Galapagos Islands, but this notion was not adopted in the United Nations Conference on the Law of the Sea. Only the notion of archipelagic states situated in the middle of the ocean, like Indonesia and the Philippines, was approved in the Conference. Maybe Mr. Chalermpon will add something about Thailand's coastal archipelagoes.

Chalermpon Ake-Uru: You raised a question about the coastal archipelago?

Sang-Myon Rhee: Yes. Sometimes there are conflicting interests between an archipelagic state and a state with coastal archipelagoes. For example, between Indonesia and Malaysia, or possibly Indonesia and Thailand, or Indonesia and Australia, or the Philippines and the Republic of China possibly.

Chalermpon Ake-Uru: Thailand doesn't have much of a coastal archipelago, and we have concluded agreements about the delimitation of the continental shelf and the seabed boundary with Indonesia. Our problem, in fact, is about the adoption of the archipelagic state concept, which now could enable Indonesia to expand her vast expanse of the sea and cause Thailand to lose traditional fishing grounds. So we have to adjust ourselves to that problem.

Sang-Myon Rhee: When there was a sea boundary negotiation between Malaysia and Indonesia years ago, there was some reciprocal arrangement in drawing baselines. Indonesia could use an archipelagic baseline so naturally its length could be much longer, but since Malaysia is not an archipelagic state, the length of its baseline could not be as long as Indonesia's. I think there was some understanding of reciprocity that allowed Malaysia to draw longer baselines. Is that true?

B.A. Hamzah: I'll ask Mr. Noegroho to explain that because he drew the map.

Noegroho Wisnoemoerti: Indonesia had drawn its archipelagic baselines according to the 1960 law while Malaysia's baselines were those on which the three-mile territorial sea limit was measured. For the purpose of that particular delimitation, it was agreed that Malaysia could use a certain island that actually lies outside the territorial sea as a basepoint. This is a concession on our part to reach agreement with our neighbor as soon as possible. It is a historic accident which would, of course, have to be reconsidered in the future if we want to delimit other maritime boundaries to take into account the recent development of the law concerning special circumstances. On the principle of the coastal archipelago, I think you are referring to situations like the Galapagos or the Andaman and Nicobar Islands. In fact, India, Colombia, and some other countries wanted to apply the archipelagic state concept or regime to this kind of archipelago which is not an archipelagic state but is owned by a coastal state. The proposal was defeated by strong opposition, especially from those countries like Tunisia and Libya that had foreign archipelagoes lying just offshore. I was not a party to the negotiations but I can recall that, basically, the median line was used throughout the delimitation with Thailand and India.

Chalermpon Ake-Uru: I would like to add that, at the beginning, the median line or the equidistant line was the basis for negotiations, and then accommodations or compromises had to be made, so it could be called a modified equidistant line in the delimitation with our friends.

Choon-ho Park: May I quickly interject about the length of the baselines? For your information only, Mr. Cooper, a retired geographer in the Canadian government, has conducted a survey on the length of baseline sectors throughout the world and has given the rank order in a long list. It's very useful in seeing who are the bad guys and the good guys in this connection.

Masaki Saito: Mr. Chen.

Rong-Jye Chen: Would you please tell me the reason why Thailand abstained from the voting at the beginning but signed the Convention later on?

Chalermpon Ake-Uru: We abstained in the adoption of the Convention because we thought, at that time, that the introduction of the new concept on exclusive economic zones would be prejudicial to Thailand and we needed some time to review all of our interests. That's why we signed the Convention on 10 December 1982. In balancing pros and cons, in my own personal opinion, I think Thailand should ratify this Convention, because it will be better to have rules than chaos. I think our position here is like the position of my friend, Mr. Chao Hick Tin, as regards Singapore.

Rong-Jye Chen: My second question is on a statement in the section **Other Issues** in your paper. "A boundary delimitation must be effected by agreement on the basis of international law in order to achieve an equitable solution." Does the state concerned have the obligation or duty under international law to negotiate to reach such an agreement?

Chalermpon Ake-Uru: On the delimitation of a maritime boundary, you cannot unilaterally do it yourself to have an international effect, so I think agreement from the other side is needed.

Masaki Saito: Kuo-Tsai Chao.

Kuo-Tsai Chao: The application of the archipelagic principle will enclose large areas of the waters which have traditionally been part of the high seas as maritime resource zones for the exclusive exploitation of the archipelagic states. Thailand does substantial fishing, mostly off the coasts of the neighboring states, and now these fishing grounds have been enclosed. Do you think that the new regime of the law of the sea will be prejudicial to Thailand's position? Under this new regime, Thailand is in fact a loser. How do you cope with this situation? My second question is: what are your opinions on the preferential right and the historical right? In the 1974 ICJ *Icelandic Fisheries* case, the same sort of situation appeared, the United Kingdom's historic rights vis-a-vis Iceland's preferential rights.

Chalermpon Ake-Uru: We have to adjust ourselves to this new concept in the law of the sea which encloses many of our traditional fishing grounds in the exclusive economic zones of others. We have to arrange joint ventures with other countries, intensify our efforts in promoting inland fisheries and aquaculture in Thailand. The delegation of Thailand raised the matter of preferential fishing rights during the Conference, and as much as we can get is the provision on the exclusive economic zone that, when the coastal state has a surplus of allowable catch, it will allow the traditional fishing state to fish the surplus.

Kuo-Tsai Chao: But the problem is, you have historic rights, prescriptive rights for a very long time, and now you reach an agreement with some other country which transfers the prescriptive rights into contractual rights. You have a joint venture for ten years, for thirty years, and then the contract expires.

Chalermpon Ake-Uru: Our joint venture agreements do not involve our traditional fishing grounds. We have a joint venture agreement at the private level with Oman, far away, with Australia, India, and China. So it's not a question of turning historic rights or traditional fishing rights into contractual rights.

Masaki Saito: Mr. Chao Hick Tin.

Chao Hick Tin: I notice in your paper that Thailand has two Memoranda of Understanding with Malaysia. The first one establishes the joint authority to develop the disputed area. Subsequently you have an understanding demarcating a certain boundary. Initially did the two countries have some problems in demarcation? Later on, in October, 1979, you managed to reach agreement on a certain length of the boundary. Am I right in that understanding? My second question is: After the agreement with Malaysia in October, 1979, did Thailand have to modify the continental shelf demarcation line?

Chalermpon Ake-Uru: As I said, with respect to the delimitation of the continental shelf between Thailand and Malaysia, we could reach agreement only on the inner segment of the boundary line. But on the outer segment we could not reach an agreement, so we decided to resort to joint exploitation of the zone.

Chao Hick Tin: My point is that you decided on the joint exploitation first, because that agreement --

Chalermpon Ake-Uru: Yes, yes, but the negotiation was started at the same time.

Chao Hick Tin: I see.

Chalermpon Ake-Uru: It was a political decision, in fact, between the two prime ministers in Chiang Mai to conduct joint exploitation ...

Chao Hick Tin: First.

Chalermpon Ake-Uru: First. And then we reached agreement on delimitation of the inner segment of the boundary line of the continental shelf. With regard to your second question, we have since modified our claims in our negotiations with Malaysia.

Chao Hick Tin: I see.

Chalermpon Ake-Uru: And that was the beginning of the overlapping claims between Thailand and Malaysia which resulted in the creation of the joint development zone.

Masaki Saito: Mr. Robert Smith.

Robert Smith: I've gotten the impression throughout the last few days that most people are very concerned with the impact of a particular country's baselines on the activities resulting from national claims of jurisdiction and also on the delimitation of maritime boundaries with a country's neighbors. We need to clarify what baselines are all about. Almost everyone in this room realizes quite painfully that maritime

boundaries were one of the main sticking points throughout the entire LOS negotiations because every coastal state has boundaries with neighbors and therefore had a great interest in those particular articles. An equitable solution is the prime requirement for the resulting boundary, but we should note that an equidistant line is but one method, and not always the right one, by which to achieve that equitable solution. A baseline should be viewed first and foremost as the inner limit from which to claim maritime jurisdictions. But in bilateral negotiations with a neighboring state, that baseline may or may not be a relevant circumstance for the delimitation. I look, for instance, to the Indonesia/Malaysia example. Mr. Noegroho's term to describe the drawing of Malaysian baselines to include an island outside of the territorial sea was "historic accident." I would call it an imaginative way to come to an agreement; in that situation the "construction line," on the Malaysian side was used to counter the Indonesian straight baseline in what could otherwise have been an inequitable solution. Yet the Malaysian construction line served not to claim national jurisdiction but purely on a bilateral matter. The United States was involved in a similar situation in our negotiations with Cuba. Cuba claimed a straight baseline system, portions of which the United States did not agree with because we didn't believe it met the international requirements, yet there it was. We had a stalemate in our negotiations until we proposed constructing somewhat similar lines on the U.S. side. But by no means did we want to use that construction line for the establishment of our maritime jurisdiction. The non-use of islands is the reverse. In certain circumstances baselines are not given full weight or artificial lines are thrown in for boundary negotiations and then disregarded for other matters.

Masaki Saito: Choung Il Chee.

Choung Il Chee: A definition of "archipelago" is found in Article 46(b); it says "'archipelago' means a group of islands," it doesn't refer to coastal archipelagic islands. Now that's just a point of clarification. Dr. Chen referred to the obligatory nature of the agreement that you have to reach to find an equitable solution. The Convention text is clear enough, is mandatory, "shall be effected," but on what terms it doesn't say, so it's begging the question more than solving it. In my reading, it was intended to preclude the unilateral claim of the delimitation. Dr. Chao raised the question of a prescriptive right versus a contractual right. I don't think the term "prescriptive" is correct. Better terms would be either "historic" or "traditional" fishing rights. You have two kinds of prescription, the acquisitable prescription and the extinctive prescription. The former refers to the original presence; title should be legal to start with. The latter involves time.

Masaki Saito: Thank you very much. Here we close this morning's session.

THE PHILIPPINES AND THE LAW OF THE SEA

THE PHILIPPINES AND THE LAW OF THE SEA

Robert W. Smith: Our speaker this afternoon will tell us about the Philippines, where all the issues we've been discussing in the past few days are relevant. Our speaker today has formal training in mining engineering and civil engineering, and he was the Chief Geophysicist of the Bureau of Coast and Geodetic Surveys in Manila from 1965 to 1972. Presently he is a consultant to the Law of the Sea Secretariat, Ministry of Foreign Affairs, and a consultant to the Development Academy of the Philippines in the Marine Development Program. But, perhaps most importantly, he was a member of the Philippine delegation to the UN Conference on the Law of the Sea from 1971 to 1982, so he is well aware of all the intricate and complex issues related to the law of the sea. I present Dr. Mario Manansala.

THE PHILIPPINES AND THE LAW OF THE SEA

Mario C. Manansala
Philippine Coast and Geodetic Survey
The Philippines

Introduction

The Convention on the Law of the Sea was adopted by the Third United Nations Conference on the Law of the Sea in New York City on 30 April 1982, with 130 countries voting in favor, 4 against, and 17 abstentions. The Philippines was one of 119 countries that signed the Convention when it was first opened for signature in Montego Bay, Jamaica, on 10 December 1982. That event marked the successful conclusion of what has been described as the most ambitious, most complex, most comprehensive undertaking of the United Nations since its inception in 1945.

The Convention seeks to provide a global legal order for the seas and oceans which would facilitate international cooperation while promoting their peaceful uses and the equitable and efficient utilization of their resources. The codification and progressive development of the law of the sea achieved in the Convention should contribute to the strengthening of peace, security, cooperation, and friendly relations among all nations of the world in conformity with the principles of justice and equality.

The Convention is now, undoubtedly, the subject of an extensive study and analysis by most countries of the world, with the end in view of ratification or accession. For it is inherent in diplomatic negotiations that cherished aspirations or perceived national interests shall be tempered with the needs of the international community. A fine example of this accommodation concerns the traditional freedom of navigation. This heretofore sacrosanct tenet of the open sea has been largely modified by the extended maritime jurisdictions now recognized in the Convention. In the final analysis, a nation will adhere to the Convention only if the benefits to the country outweigh the negative implications or losses.

This paper briefly outlines some Philippine aspirations in this international codification exercise. It also presents an insight into the analysis and assessment of the Convention undertaken by the nation in preparation for a decision on whether to sign the Convention or not, including possibly eventual ratification by the proper constitutional body. Finally, some current activities in the country related to the new law of the sea are briefly reviewed.

Background

Geographical Setting

The Philippines is an archipelago situated about 600 miles (966 km) off the southeastern coast of the Asian mainland and lies at the western margin of the Pacific Ocean. Its component islands stretch in an arc from the southern tip of Taiwan to the northern parts of Malaysia and Indonesia. Lying between the north latitudes of 4 degrees 30' and 21 degrees 30' and the meridians of 114 degrees East to 127 degrees East longitude, it is bounded by three large bodies of waters, namely the South China Sea on the west, the Pacific Ocean on the east, and the Celebes (Sulawesi) Sea on the south.

The archipelago is made up of over 7,100 islands and islets clustered in a compact group over some 200,000 square nautical miles of ocean space. Indeed, international publicists have often referred to the Philippines and Indonesia as classical examples of outlying or mid-ocean archipelagoes. It has a total land area of about 115,850 square st. miles (300,000 sq. km) and a population of over 52,000,000.

Economic Setting

Because of the archipelagic nature of the country, it is reasonable to expect that the ocean sector should contribute substantially to the national economy. In a recent study undertaken by several government agencies, it was noted under the item on economic indicators that the total contribution of four ocean-based industries (Fisheries, Energy, Transportation, and Communications) was about 10 percent of the GNP for 1981. These ocean-based industries generated a total amount of about 30,565.7 million pesos in 1981. The ocean sector accounted for an average of 7.9 percent (1978-1980) of total foreign exchange earnings. The ocean sector employed about 7.4 percent of the total labor force in 1981. However, counting other ocean-linked economic activities for which data are not available, this employment figure could go up to about 10 percent. Considering the current unemployment rate of 24 percent, it is apparent that ocean-based industries contribute significantly to national employment.

In spite of the meagerness of this background information, the analytical observer could readily discern the vital role that the seas and oceans play in the Philippine national economy.

Philippine Concerns in the Law of the Sea

The primary interest of the Philippines in the Law of the Sea Conference is the recognition of the archipelagic principle. Since the concept derives from the integrity of the nation and the unity of land, water, and people into a single entity, in the Philippine perception, the success of the Conference hinges on the recognition of the archipelagic principle. Parenthetically, it may be observed that while the Philippines participated in the First U.N. Conference on the Law of the Sea in 1958, the country has not ratified the Geneva Conventions, perhaps because they did not include a provision dealing with archipelagoes.

The three basic premises of the concept, presented to the Sea-bed Committee in 1973, are summarized as follows:

1. An archipelagic state may draw straight baselines connecting the outermost points of component islands from which the territorial sea, etc., may be determined;
2. The waters within the baselines, the subsoil, the airspace above as well as all their resources belong to the archipelagic state;
3. Innocent passage of foreign vessels through the waters of the archipelago shall be allowed in accordance with national legislation.

A second overriding concern of the Philippines in the Law of the Sea discussion was the recognition of her historic right to a territorial sea beyond the islands of the archipelago to the limits specified in the Treaty of Paris of 1898. The nation advocated this position as an exception to a uniform width of the territorial sea which was agreed upon at the Conference.

The concept of the exclusive economic zone as a resource-oriented jurisdiction advocated by many Third World countries was also endorsed by the Philippines. At the first substantive session in Caracas in

1974, the Philippines indicated an interest in the problems of passage through straits used for international navigation and in the legitimate aspirations of land-locked and geographically disadvantaged states to an equitable share of the benefits to be derived from the resources and uses of the sea. Interest was also indicated on the continental shelf problem, marine scientific research, the preservation of the marine environment, and the international regime of deep seabed mining.

Assessment of the Law of the Sea Convention from the Philippine Perspective

After the summer session of UNCLOS III and with the imminent conclusion of its work on international sea law, the President of the Philippines, on 3 October 1981, created by executive order a Cabinet Committee (CabCom) with a mandate to undertake studies and consultations on the implications and impact of the provisions of the Law of the Sea Convention as they relate to Philippine national interests, especially on the political, economic, strategic, and security aspects. The CabCom is chaired by the Minister of Foreign Affairs and includes the Ministries of Natural Resources, National Defense, Energy, Justice, National Economic and Development Authority, and several members of the Philippine Delegation to the Law of the Sea Conference. Two major tasks of the Committee described in its priority programs are: (1) to conduct an assessment of the LOS Convention in terms of Philippine national interests; and (2) to prepare a Development and Management Plan for the Philippine Exclusive Economic Zone and other marine areas. Realizing the immensity of this task of reviewing and analyzing some 320 articles and 8 annexes of the Convention, the Committee formed five Study Teams on the following issues:

- * Study Team 1: Territorial waters, archipelagoes, historic waters, baselines, islands, straits used for international navigation, enclosed and semi-enclosed seas.
- * Study Team 2: Exclusive Economic Zone and the continental shelf.
- * Study Team 3: Seabed mining, high seas, and the International Sea-bed Authority.
- * Study Team 4: Functional areas -- shipping, overflight, communications, marine environment, marine scientific research, and transfer of technology.
- * Study Team 5: Dispute settlement, general provisions, and final clauses.

Involved in the studies were seven ministries, twenty agencies and offices under these ministries, and the academic sector, the University of the Philippines Law Center and the scientific community. The Study Teams analyzed the LOS from various sectoral viewpoints and individual agency concerns. After several workshops, meetings and extensive discussions, the analyses of the study teams were presented and evaluated by a Legal Committee in a conference convened for that purpose.

The assessment identified positive elements of the LOS Convention that directly benefit the country and others that adequately address expressed concerns. Among these are:

- (a) recognition of the principal elements of the archipelagic concept;
- (b) the provisions on resources jurisdiction over an adjacent area called the exclusive economic zone;
- (c) the natural prolongation definition of the continental shelf to the outer edge of the continental margin;
- (d) the international regime and machinery for the exploitation of the resources of the deep seabed;

(e) the provisions on the preservation of the marine environment, prevention of marine pollution, marine scientific research, and marine technology transfer.

The assessment, however, pointed out the negative aspects of the Convention from the perspective of Philippine interests, namely:

(1) the territorial sea of a coastal state as a belt of sea with a maximum width of twelve nautical miles from baselines. The Philippine claim to historic title to a wider territorial sea did not find acceptance at the Conference.

(2) the mandatory designation of sealanes through archipelagic waters for the passage of all ships and aircraft of foreign states.

The overall assessment was that, by and large, the benefits that the country gains from adherence to the Convention outweigh the negative aspects and therefore the Cabinet Committee recommended signature by the Philippine Delegation and eventual ratification. On the problem of the Philippine territorial sea, a quotation from the statement of Minister Arturo Tolentino on signing the Convention for the Philippines is worth repeating. He stated:

Mr. President, we have some problems with the provisions of the Convention on the breadth of the territorial sea. During the sessions of the Conference, my delegation had, on various occasions, explained the unique nature and configuration of our territorial sea and proposed that it be an exception to the 12-mile rule. We claim these waters under historic and legal title Our problem on the matter of the territorial sea is indeed a difficult one, but not insurmountable. Somewhat lightening this problem is the new concept of the exclusive zone under the Convention Our satisfaction with the EEZ may be better appreciated when we consider that the Philippine EEZ is more than 132,000 square nautical miles bigger than our historic territorial sea and therefore has a compensating effect.

Current Activities and Status

The next problem faced by the CabCom after the signature of the LOS Convention in Jamaica was the question of ratification. The Batasang Pambansa, the Philippine legislative body, which under the Philippine Constitution is the ratifying authority of the country, held a series of public hearings on this new code of the sea. Since many people, even lawyers, were meeting the new Convention with its many new innovative concepts for the first time, the CabCom Secretariat was of immense help in disseminating information, data, study/analysis, and other records. Finally, on 27 February 1984, the Batasang Pambansa passed the resolution for Philippine ratification of the Convention.

With the ratification program successfully concluded, the Committee devoted more effort to the second of the two tasks originally laid out: the preparation of a Marine Development Program. Several line ministries play lead roles in this phase of the national effort: Natural Resources, National Defense, Transportation, and Communication. As stated in the rationale, it was realized that "the full exploitation of the development potentials and opportunities accruing from the various maritime areas and zones could only be achieved if a concrete national policy and attendant development measures would coherently direct the diverse efforts not only of government agencies but the private sector as well."

The plan initially sought to (a) evolve a national marine policy or a set of policy guidelines; (b) implement programs; (c) conduct

agency projects and prepare proposals. The Program had three major phases:

- (a) A Diagnostic Orientation Workshop where common policy and planning premises were developed, key issue areas identified;
- (b) A Seminar Planning Workshop where policy goals were determined, program options set, and strategies proposed;
- (c) A Policy Conference where resolutions on policies, directions, initial programs, and projects were adopted.

The Cabinet Committee has also initiated what has been called the Legal Development Program, which is aimed primarily at the harmonization of domestic laws, rules, and regulations with the relevant provisions of the new Law of the Sea Convention.

Conclusion

The Law of the Sea Convention enters into force twelve months after the date of deposit of the 60th ratification, as provided in Article 308. Nobody can say with certainty when that 60th ratification and the subsequent entry into force of the Convention will occur. A nation, however, need not wait for that event to come to pass before preparing plans for the implementation of the provisions and the utilization of the available resources from the various maritime zones legalized in the Convention.

The Philippines has ratified the Convention, thereby assuming the duties and responsibilities and asserting the rights of a Contracting State. For better or for worse, we are married to the Convention. For the present, the country is exerting the utmost effort to make good on this union.

DISCUSSION

Robert W. Smith: Thank you very much, Mario. I will first turn the floor over to Mr. Saito.

Masaki Saito: I have some questions on the manner of ratification by the Philippine government. I remember at the time of signature you expressed some understanding consisting of eight points, and again, at the time of ratification, your government repeated those eight points in full terms. Your National Diet passed a resolution to ratify the Convention at the end of February, 1984, and ratification came in early May. Is it a normal procedure to delay by two months the deposit of the instrument of ratification?

In reading those understandings or interpretive statements, it seems that your present constitutional or legal system remains unchanged after your ratification of the Convention. Is your government preparing to accommodate your present legal framework, such as the historical territorial sea, or your present constitutional framework concerning archipelagic passage or covering those rules and regulations of navigation of those waters, to the Convention? If you are preparing some new legislation, when will it come into force?

Mario Manansala: The instrument of ratification was prepared by the Ministry of Foreign Affairs several weeks after we received the official notification that the Batasan has concurred in the signing of the Convention. The Ministry of Foreign Affairs provided the instrument of ratification for the Office of the President for the President's signature. Then it was returned to the Ministry of Foreign Affairs for transmittal to the Secretary-General of the United Nations. All this took some time, but there was no intentional delay.

The constitutional and international lawyers who assessed the Convention decided that there was no need to change our constitution. We are, however, contemplating new legislation that will be in harmony with the provisions of the Convention. We will also amend existing statutes that are not in consonance with the Convention. Unfortunately, this legislation has not yet been formulated, but the Minister of Justice has recommended that the legal development group come up with actual laws that he can simply endorse and send to our lawmaking body.

Robert W. Smith: Professor Kuribayashi.

Tadao Kuribayashi: What is the relationship between the so-called historic waters and the Philippines' economic zone, which was established several years ago? At the signing session of Montego Bay in 1982, the Philippine delegation said that the EEZ would compensate enough for the historic waters. What is meant by this compensating effect? Are you going to accommodate the notion of historic waters to the framework of the new Convention? You said there is no need for a constitutional change, but certainly the notion of historic waters does not have a sound seat in the new Convention. I don't know; it may be apart from the new Convention and in the field of general international customary law. Could you disclose a little bit more about this point?

My second question is: do you think the regime of passage in the archipelagic sea lanes has been established as customary international law or is it still only provisions in the Convention?

Mario Manansala: On the first question, we call them historic waters but they are the waters within the limits set by the Treaty of Paris of 1898. This treaty, the agreement between Spain and the United States in 1900, and the agreement between the United Kingdom and the United States of 1930 -- all these three together set out maritime boundaries in definite latitudes and longitudes. We call them historic waters because they are founded on historical documents. Our exclusive economic zone has already been proclaimed by the President under Presidential Decree 1599 and it conforms more or less with the provisions of the Convention. The operative paragraph says that the breadth of this zone is 200 nautical miles from the baselines of the archipelago. The Presidential Decree also states that where you cannot extend these boundaries to 200 nautical miles because you will meet waters claimed by neighboring states, the common boundary will be set by agreement between the two countries.

Now when Senator Tolentino used the term "compensation," this is what he had in mind. The total area of the country, land and water within the international treaty limits, is 520,700 square nautical miles. The total area within the exclusive economic zone, measured from the baselines, is 652,800 square nautical miles. Subtract one from the other, you have what they call the compensation. In other words, the area within the treaty limits is smaller than the area given to us under the terms of the Convention. So there is a compensating effect, but what does it mean? We lose. Our sovereign rights are diluted, because we claimed this area as territorial waters but now it is given to us as exclusive economic zone -- in other words, resource jurisdiction. But the area is larger, so there is a small "compensating" effect.

On your second question about customary international law, although I am an engineer, not a lawyer, I believe that the nation will stick to conventional international law because the Convention will now replace customary international law.

Robert Smith: Dr. Chen.

Rong-Jye Chen: To my knowledge, the straight baseline segment employed by the Republic of the Philippines across the mouth of Moro Gulf is longer than 125 miles, the maximum length permissible under the U.N. Convention, Article 47. I would appreciate your comment on the legality of that particular segment of baseline.

Mario Manansala: The Moro Gulf line is 140 nautical miles in length, exceeding the limit set by the Convention by fifteen nautical miles. We are going to rectify that line to conform to the Convention.

Rong-Jye Chen: The Republic of the Philippines claims a special regime of territorial sea generally known as treaty limits. These treaty limits were based on the Treaty of Paris signed in 1898 by which Spain ceded the Philippine archipelagoes to the U.S. But under the existing rule of international law there are just two kinds of baselines, the so-called normal baseline and the so-called straight baseline, but not a so-called "treaty limit." According to the letter and the spirit of Article 3 of the Paris Treaty, its intent was to cede the land area but not the water found within the treaty line. With this understanding in mind, I would appreciate your comment on the legality of your special claim over the territorial sea.

Mario Manansala: The legality of the Philippine claim to the limits set by the Treaty of Paris is perhaps debatable. It was debated before the United Nations in 1958, and volumes have been written from the both the Philippine and the internationalist side whether it is allowable under customary international law or generally recognized principles. But the Convention as it has now been adopted and signed does not accept the limits set by the Treaty of Paris. To that we are resigned.

Rong-Jye Chen: The Balabac Strait and the Mindoro Strait, entrances to the Sulu Sea, are more than twenty-four miles wide, thus leaving a vital lane of high seas area into the Sulu Sea. Many Chinese fishermen have been fishing there for the past fifty years, so do you think the Republic of China's fishermen have traditional or historical fishing rights as provided by Article 51 of the U.N. Convention and supported by the *Anglo-Norwegian Fisheries* case?

Mario Manansala: Do you realize that Apo Island lies in the middle of Mindoro Strait, dividing it into the East Pass and the West Pass? According to our cartographers, the widest area from the island to the shore is only twenty-two miles. There is a problem on traditional fishing rights. Are they traditional in the sense that there is an instrument or a treaty or an understanding between nations just because the fishermen go there once in a while? Perhaps it's not traditional fishing but traditional poaching.

Robert Smith: Professor Van Dyke.

Jon Van Dyke: Was there any statement made at the time of ratification about which of the dispute settlement procedures available under Article 287 was chosen? Were any exceptions made to the compulsory dispute settlement procedures under Article 298?

Mario Manansala: We did not make any statement. We had no choice among the different means of dispute settlement. Perhaps a choice should be made after some time. The ambassador made a statement at the signing in Caracas; I think it's Paragraph 8.

Jon Van Dyke: Yes, the statement is made that the agreement of the Republic of the Philippines to the submission for peaceful resolution under any of the procedures provided in the Convention or disputes under Article 298 shall not be considered as a derogation of Philippine sovereignty --

Mario Manansala: That's right --

Jon Van Dyke: -- so it's referred to, but no choice is made.

Mario Manansala: We have not progressed beyond this.

Jon Van Dyke: One final question. When you were discussing archipelagic sea lanes passage I thought I heard you mention the question of submarines and whether they have to surface. Could you comment on your understanding of the meaning of Article 53 (3) which says that the rights of navigation and overflight in the normal mode are permitted? Would it be your understanding that a submarine would have to surface when it passed through the Philippine archipelagic waters?

Mario Manansala: We fully understand the term "normal mode" and we realize what its implication is. In our assessment we did not mince words because we do not want to hide anything from the security people, from the navy. They saw this and were very unhappy with this provision. It hampered our signature and ratification. However, with more under-water surveillance we would know they are passing anyway, and while we may not know what nationality they are, at least we know that they are there. We realize the implication of the normal mode and we are going to permit this perhaps.

Robert Smith: Dr. Chee.

Choung Il Chee: Going back to this Treaty of Paris of 1898, what kind of legal claim did you really present before the Law of the Sea Conference? Do you remember the Island of Palmas arbitration when the judge rejected the U.S. claim that it had inherited the title to the island of Palmas by virtue of the Treaty of Paris, 1898? The judge said, "You can't inherit something that they didn't have to pass on to you." In view of that decision, what line of argument do you have at present?

In the Convention, archipelagic claims includes air space above the archipelagic waters. Now then, you claim sovereignty. Article 49, Paragraph 2, states, "This sovereignty extends to the air space over the archipelagic waters..." Then you read Article 53, Paragraph 2: all ships and aircraft enjoy the rights of archipelagic sea lanes passage. I'm sure that you made a contribution in drafting these articles and then pushing them through, but why do you use the term "sovereign"? Of course, it's a stronger claim than jurisdiction.

Article 1 of the ICAO Convention refers to complete and exclusive sovereignty over the air space above the territorial sea. You enjoy this right in the air space above the archipelagic waters. Now, let's assume that you have been sent to the next ICAO as a delegate. Would you like to propose an amendment to add the air space over the archipelagic waters?

Mario Manansala: On the Treaty of Paris and the Palmas Island case, when our constitutionalists and our international lawyers proclaimed the limits of our territorial waters, I understand that they were considering those limits as boundaries. In other words, everything included within those boundaries had been ceded by Spain to the United States and consequently to the Philippines. I think that's the way they premised their legal stand on the Philippine claim to the territorial waters.

Choon-Ho Park: Does that include the subsoil or just the water column or surface?

Mario Manansala: I think everything.

Choung Il Chee: How about the subsoil?

Mario Manansala: In fact they say, internal waters.

Choung Il Chee: So, in other words, you have presented a claim that the U.S. had already lost against The Netherlands. You cited a wrong reference.

Mario Manansala: While the island of Palmas is within the boundaries specified in the Treaty of Paris, the preponderant evidence was that it was occupied by the citizens of Indonesia at that time; the island belonged to The Netherlands. And this evidence of occupation was given greater weight by the arbitrator than a claim based on, let's say, historic rights. As a matter of fact, this is the basis for Indonesia's possession of the island of Miangas.

The right of overflight is extended to the international community only over the archipelagic sea lanes, not over all the archipelagic waters. Those points are set in Article 53.

We realize that the ICAO Convention will have to be changed because of this new development in international law. As a matter of fact, it has already passed my desk. ICAO will have an assembly some time in September and one of the items is this change. I have been asked to comment on this by the Ministry of Foreign Affairs.

Robert Smith: Professor Chao.

Kuo-Tsai Chao: I come back to the point that the Philippine claim to the 1898 Treaty limit of the territorial sea is based on historic title. It is argued that the United States exercised jurisdiction over the full area ceded to the Philippines upon independence. I put it to you that there is almost no evidence that the United States did assert a claim over the sea area enclosed by the treaty line while it was sovereign over the islands. The late Professor Okano said that the references throughout the treaty are to islands, not to waters. The expressions employed are the same for both the Philippine and the Borneo sides of the boundary, and the British cannot be thought to have been endorsing sovereignty over the waters on their side. The eminent lawyer Sorensen also concludes in his article that the treaty refers to islands, not to the area of sea within the specified lines. I would very much like your comment on this.

The other question is: the Philippines enclose the whole of the Sulu Sea, an area of about 56,000 square miles where the Republic of China is fishing. So traditional fishing rights or, as you call it, historic rights are infringed. I would like to have your opinion on this.

Mario Manansala: Perhaps these international lawyers, these legal experts, have written volumes on historic titles. The book that I have here reproduces the Treaty of Paris, and the islands and the water are spoken of in one term. But that's beside the point; the truth of the matter is that the Treaty of Paris limits have not found acceptance, and so there is no need to talk about them.

Kuo-Tsai Chao: No, the problem is really the interpretation of treaties. In the eyes of the law you interpret the treaty according to the intention of the party who signed the treaty at that time. You have to look back to the preparatory work. A country cannot freely interpret what it likes.

Mario Manansala: On the Sulu Sea and traditional rights, perhaps there is a problem that we are going to face. We realize that there is this provision in the chapter on archipelagic waters.

Kuo-Tsai Chao: In law, there's a certain difference. The Palmas Island case is a case of acquisition of territory by prescription. And prescriptive rights display sovereignty for a long time, continually and peacefully without objection. That means you have used the sea for a very long time, right from the beginning, from time immemorial. Chinese fishing vessels have been fishing there for more than fifty years.

Robert Smith: I must interrupt. Time is escaping us and one more person wishes to speak. Mr. Noegroho.

Noegroho Wisnoemoerti: In your paper, Mario, you refer to the negative aspects of the Convention from the perspective of Philippine interests. One of them is the mandatory designation of sea lanes. I think you could just exclude that from the list, because according to the relevant provisions in Article 53, the designation of sea lanes is not mandatory. Paragraph 12 gives an option to an archipelagic state not to designate sea lanes.

I still remember that Indonesia for one was fighting very hard to exclude any provisions to the effect that we would be required to get an agreement from the international organization. What we have here is really a compromise, not an ideal situation. We have a double veto here in these provisions. The international organization must agree, but at the same time it cannot adopt any sea lanes without the agreement of the archipelagic state.

Your comment about the Philippines being a pariah* sounds extreme to an ASEAN colleague. I remember that, even at the last minute, even after a consensus was reached, or after the Philippines decided not to participate in the negotiations, Indonesia continued to consult with the Philippines in order to take care of her rights. But we did not succeed in that respect.

The last point: With or without the Treaty of Paris has the Philippines decided, through its ratification, to apply the archipelagic state regime as contained in the Convention? And if so, what would be the effect on the treaty itself?

Mario Manansala: While it's true that we are not forced to designate the sea lanes, the moment we don't, Paragraph 12 operates. So it is in our interest to designate the sea lanes, and that's why I call it mandatory.

About the Philippines as a pariah, I agree that you have been consulting with us, but the maritime powers shun us because the Philippines is radical in its concept of the archipelago.

You ask if we are prepared, since we have ratified the Convention, to designate archipelagic baselines and thereby declare ourselves as an archipelago. Remember, the Convention says that even if we fit the qualifications for an archipelagic state, we are not compelled to declare ourselves as an archipelago until we set our archipelagic baselines. It's only then that we have crossed that bridge and Part IV will apply to us.

Robert Smith: Thank you very much.

*Editor's note: In his speech, though not in his paper, Mr. Manansala commented:

Let me digress a little from the paper. In his presentation, my good friend Noegroho this morning stated that the Philippines was not included in the consensus on the archipelagic chapter. Let me tell you why the Philippines was not included. It is because of our concern, our dissatisfaction with the archipelagic chapter.

There are three aspects -- we have stated this in the conference -- in the archipelagic chapter with which we are dissatisfied. First, the overflight provision. It's been expressed by the chairman of the Philippine delegation that overflight should not be included. It should be in some other instrument like the law of the air perhaps. And then the normal mode. We realize that this is for submarines but it is something that we didn't want to contemplate. And then finally the referral to an international organization. To us it means that it's a derogation of our sovereignty. Why do we need to refer for approval -- of course it's not stated that way in the convention. But the referral, from our point of view, means whether they approve or disapprove the designation.

It's because of this that we were not included in the consensus among the archipelagic states. And for some time, I suppose, it is known that the Philippines is a pariah among the states participating in the discussion at the Third UNCLOS, because we are the only nation left out of the Archipelagic Club. However, perhaps it's that way; it's a sort of give and take and we made that point by being the first one to ratify the Convention.

VIETNAM, KAMPUCHEA, AND THE LAW OF THE SEA

VIETNAM, KAMPUCHEA, AND THE LAW OF THE SEA

Robert L. Friedheim: At this late stage in the conference, it is difficult to introduce Choon-ho Park. He's hardly a novelty, but he's going to say some novel things.

Choon-ho Park: I have two countries to cover, and these are Indochinese countries. As it relates to their law of the sea positions, not much really has been known outside of their own countries. I was very fortunate in having been able to get hold of a copy of a doctoral thesis written in French by a Kampuchean scholar, M. Khim Y., now living in France.

First, on Vietnam, I'll just go through the national legislation and treaties Vietnam has published so far. The first one is the 12 May 1977 declaration, a very comprehensive one regarding all major aspects of its maritime jurisdiction. It was closely patterned after the formula established at the Third UN Law of the Sea Conference. At that time probably the Draft Convention wasn't quite ready but they followed the earlier versions of the UN documents very closely, with the exception of some significant points like baselines or contiguous zones. Incidentally, you'll find an excellent analysis of the Vietnamese position in one of the *Limits of the Seas* series done by Bob Smith, the Office of the Geographer, Volume 99.

Then in November, 1982, Vietnam made another very important declaration on its baselines. But the French government protested about the baselines or at least some sectors, namely from points 8 to 7 which covers from the Kampuchean-Vietnamese border counter-clockwise through the South China Sea, halfway up to the Gulf of Tonkin. The French government said they were "at variance with well-established rules of international law" applicable to the matter. At the same time, Vietnam also declared part of the Gulf of Tonkin and some areas in the Gulf of Thailand, mainly in the areas between Kampuchea and Vietnam, to be its historic waters. The French protest also said that their government wouldn't recognize this. The text of the original Vietnamese declaration was reproduced in the United Nations Law of the Sea Bulletin No. 1. The Office of the Special Representative of the Secretary General is running a Law of the Sea Bulletin series; No. 3 is the latest one.

Now I turn to the continental shelf/EEZ part of Vietnamese maritime jurisdiction. To put it briefly, Vietnam's delimitation of its continental shelf and exclusive economic zone has been made really difficult by its territorial disputes with China and other coastal states. The delimitations are quite complicated; let me show you some maps (Maps 1 and 2) on this. The overlaps are not very substantial in terms of space, but legally and politically they're really very complicated.

Vietnam has territorial disputes with China, with the Philippines, with Malaysia, and, on the strength of its claims in the Spratlies, even with Indonesia. Thus any country willing to own the entire Spratlies would run into some problems with the other claimants (Map 1).

The Paracels were the scene of a two-day war between the People's Republic of China and what was then South Vietnam. The Vietnamese garrison was wiped out by the Chinese and some four dozen prisoners were taken to China. They were repatriated later. The Chinese have since been solidly under control, although Vietnam doesn't recognize

Chinese sovereignty. China simply smiles off whatever Vietnam says in the way of protest.

The Spratlies are really a quagmire for the coastal states, but a gold mine or a honey bucket for people doing international maritime boundary studies. We have heard a lot, and yesterday Mario Manansala gave me some more of this. Mario is so nice and so cheerful in accommodating all these questions and comments, but I think the Philippines has to argue hard against China and Vietnam. The Philippine claims are very strong indeed. In fact, the Philippines itself is also a latecomer in the sense that it was not until 1978 that the proclamation or the claim was put in and a new name was given: Kalayaan, which I understand means in Tagalog "Freedom Land." But the Freedom Land can possibly be a scene of war in the future. The territorial dispute there is thus quite similar to what we have in the Sea of Japan between Japan and Korea and in the East China Sea between the Chinese and the Japanese over *Sinkaku* in Japanese and *Diaoyutai* in Chinese. There are cartographies and historic writings of the disputed islands in major Western libraries. There are also some references in ancient sailors' logbooks which the parties would want to use as evidence of their ownership. But in a court of law, it's doubtful whether any single piece of evidence will really prevail over all the other arguments put forward by the other side. I would say that ultimately it would have to be decided on what I may call the cumulative effect of all these minor claims, historic and otherwise.

The maritime security zone: Vietnam in its declarations didn't say anything about its maritime security zone. The legal status of the contiguous zone as referred to in its declarations is more than what was defined in the Geneva Convention of 1958. So it is in fact more on the side of a security zone than a simple contiguous zone.

Then, on 7 July 1982, Vietnam and Kampuchea signed an agreement on the historic waters between the two countries. They simply said boundary delimitation would be effected eventually through negotiations in the future. So they left delimitation open. Their historic waters are both in the Gulf of Tonkin and in the Gulf of Thailand.

This has been a very brief rundown of what Vietnam has done with regard to its maritime jurisdiction. I will now move on to Kampuchea, because the two are so closely interlocked in terms of maritime problems that it's better to speak of the two together and then see the slides before opening up for questions, answers, and comments.

It was in 1957 that Kampuchea came up with what it called its maritime jurisdiction through a rough line along its coast. The evolution of its maritime claims is given in the fifteen cartographies in the above-mentioned Khim thesis. There is a little reminder about the maps. They are used here without the author's permission, but I'm now negotiating with him to use one of them in our proceedings with English captions (Map 3). They show us what Kampuchea has been doing with regard to its maritime jurisdiction.

In 1957 and 1969 Kampuchea came forward with slight extensions and a bit more specificity in terms of the legal status of the area claimed. It was not until 1972 that the final statement, not the statement by the Foreign Ministry but a bit more specific one, came up in the form you would expect in other countries. But it was not until 1978 that the Foreign Ministry issued a statement very similar to that of Vietnam, and this was very comprehensive. The territorial sea, economic zone, contiguous zone, etc., were styled after the UNCLOS III formula, but that was simply a statement made by the Foreign Ministry. Then this

was made a more formal statutory law on 31 January 1982; the Kampuchean government formally enacted a law, the Maritime Zones and Continental Shelf Delimitation. My source on this point is the Tokyo-based South-east Asia Research Institute. There is a very good digest in Japanese of the original text which I haven't yet been able to obtain. I shall have to ask Professor Kuribayashi or Mr. Saito to see if they can come up with the original announcement, in French probably. But this law is very comprehensive indeed. It covers all aspects of maritime jurisdiction and also some references to the 1907 agreement between France and Siam (now Thailand) on the land and sea boundaries between the two countries.

The territorial claims: Kampuchea also has some territorial problems with Vietnam. Off Kampuchea, the government once said there were forty-four islands under Kampuchean sovereignty, but Vietnam contests this. The biggest island, Phu-Quoc, has always been contested in terms of ownership, but Vietnam is controlling it. Kampuchea doesn't recognize Vietnamese claims even though the issue is now somehow not in the forefront; it comes to the forefront when their political relations deteriorate.

Now let me turn to the slides, which will tell you more about the problems than I can do.

Map 1: This is in fact what I showed you yesterday when I was talking about China. In the Gulf of Tonkin, Vietnam insisted that the natural prolongation of land territory criterion should be applied. The Chinese don't want this, they don't like this. China has been pressing this criterion on the two Koreas and Japan. This is one situation where China's natural prolongation theory would work against its own interest, if rigidly applied in the Gulf of Tonkin, especially in the south-western part of Hainan Island. This is also therefore the only place so far where China would want to apply the median line principle. At the end of my paper on China there's one cartography that gives the median line as claimed by China. It would be very interesting to watch how Vietnam and China settle the problems here.

This is what we were talking about yesterday between Indonesia and Vietnam off Natuna. This is really illustrative of the problems we have. It's interesting; Vietnam meant to or would have liked to see Indonesia ignore the large Natuna Islands or, in other words, Vietnam didn't want to recognize the legal status of Natuna Islands. It would be really too much to try to do so. If Vietnam wanted to apply the *thalweg* principle or deepest-ridge principle there, Indonesia simply didn't accept it. I understand that now Vietnam has backed down from that position. But if it were solely between Indonesia and Vietnam, maybe Vietnam wouldn't really have tried so hard to press that principle against Indonesia. But there's a reason. Because of the Gulf of Tonkin situation where the *thalweg* principle would be more advantageous to Vietnam, Vietnam tried this on Indonesia, so that, eventually negotiating with the Chinese, it could possibly use the same precedent against China. But Indonesia didn't give in; the Vietnamese are now somewhat very ambiguous about this. But China has quite a serious problem here against the Vietnamese, because China has said too much on the natural prolongation criterion to compromise this. And, on balance, China would really gain more by pressing the natural prolongation than the median line. Specifically there is more for it to gain in the East China and the Yellow Seas from relying on the natural prolongation than to give up in the Gulf of Tonkin because of it.

Map 2: This is now off Kampuchea. You can see the overlaps between Vietnam and Kampuchea. Again this is not very exact; it's simply an illustration of what would be the overlaps if the claims from other coastal states were also shown. Foreign oil companies don't bother about boundaries; they simply go ahead and want to get oil. Again, off Vietnam, the shaded areas are contract areas (Map 1). Immediately south of Ho Chi Minh City (formerly Saigon), in fact Mobil was reported to have found oil about six months before South Vietnam collapsed. When there was some very promising sign of oil from the sea, they had to look at the political situation to see how long the government in Saigon would survive. They weren't very sure so they just capped their find and left. Later, when the country was unified, the Communist regime came out to say that they were ready to reopen negotiations. But Western countries weren't very keen to go ahead with the new unified socialist regime.

Now there's a Russo-Vietnamese oil exploration company and some joint ventures are going on. But recent reports say their findings weren't very encouraging indeed. Vietnam boasted two or three years ago that it could very well be self-sufficient in oil and that they could even export some. They never say this any longer.

This is a rough sketch of the overlaps. I think the map is about ten years old, but still the claims are more or less the same as before. On this one, the Malaysian-Thai joint development zone isn't shown. (It's shown on Map 1). Oil companies are working in the Gulf of Thailand. When foreign oil companies are involved in the overlapping areas they have one foot in the one country and another in the other. They sometimes operate beyond their oil interests. This has happened in the East China Sea and the Yellow Sea and is happening here as well.

Now the security zones (map not reproduced here): Vietnam's and Kampuchea's are only twenty-four nautical miles each, and they both call the zones "the contiguous zone;" they don't use the term "security zone," but foreign ships are not really welcome without advance notice or even authorization here.

Map 3: Now we are coming to the Kampuchean part. The 1957 base-line is shown here. The island on the right-hand side is Phu-Quoc Island, which has been very controversial in terms of sovereignty between Vietnam and Kampuchea. In this one, since in 1957 Kampuchea claimed only a three-mile territorial sea limit, they don't enclose that island within their line. But, in 1969, they go beyond this when they extend their territorial sea to twelve nautical miles. The source of this map is M. Khim Y., *Le Cambodge et le Problème de l'Extension des Espaces Maritimes dans le Golfe de Thaïlande*, doctoral thesis prepared for the *Université de Droit, d'Economie et de Sciences Sociales de Paris*, 1978.

Kampuchea also had a peculiar thing: a fifty-meter depth isobath, which was their fishing limit. The same limits shown off the Thai-Kampuchean border areas are now shown around the border area with Vietnam (map not reproduced here). And all these claims were documented in detail. There are piles of French-language declarations and ministerial-level decrees on its fishery zone.

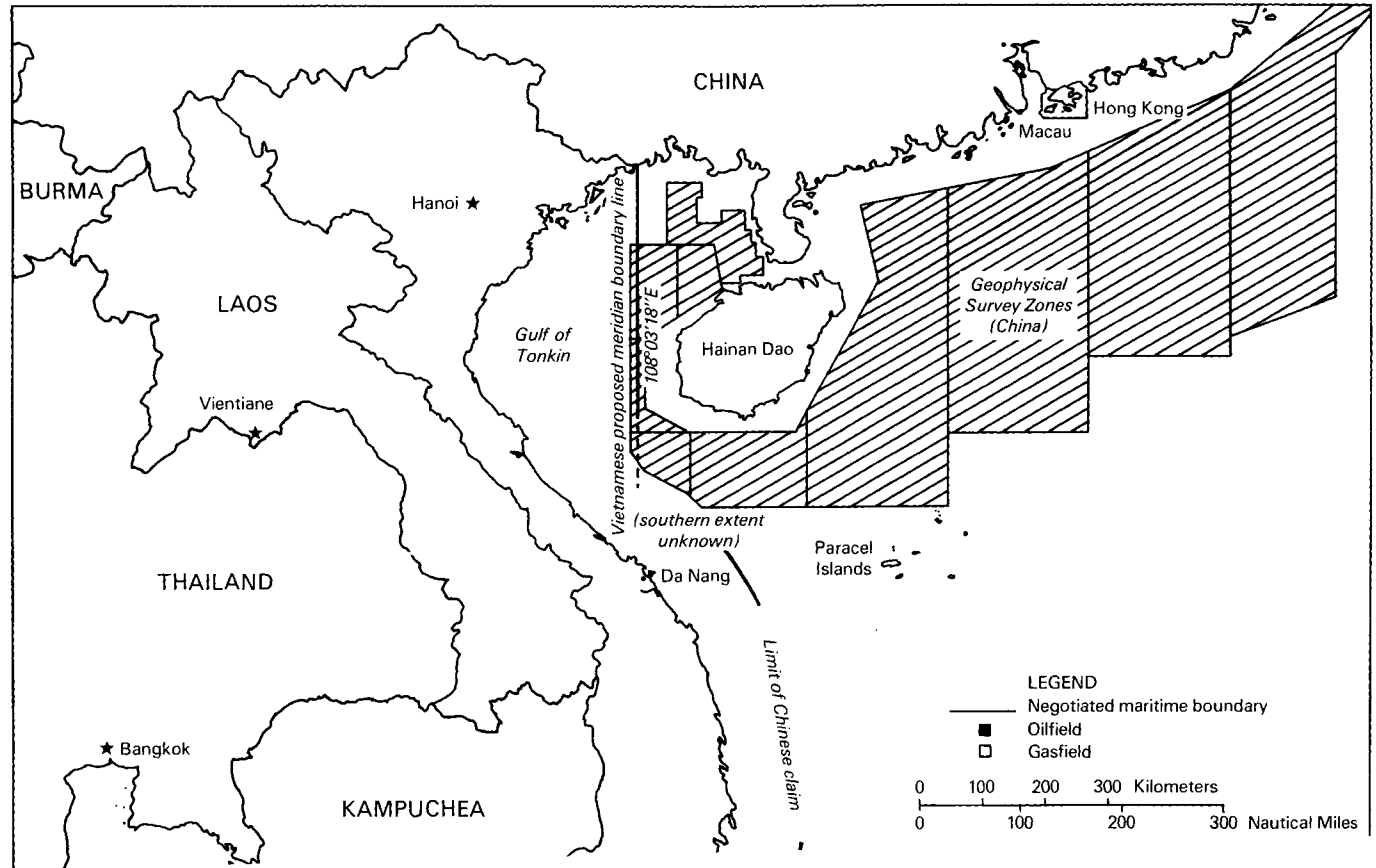
Map 4: Now we are coming to the economic zone claims, and overlaps are beginning to emerge. This is a rough sketch of the overlaps that were also shown in Map 2.

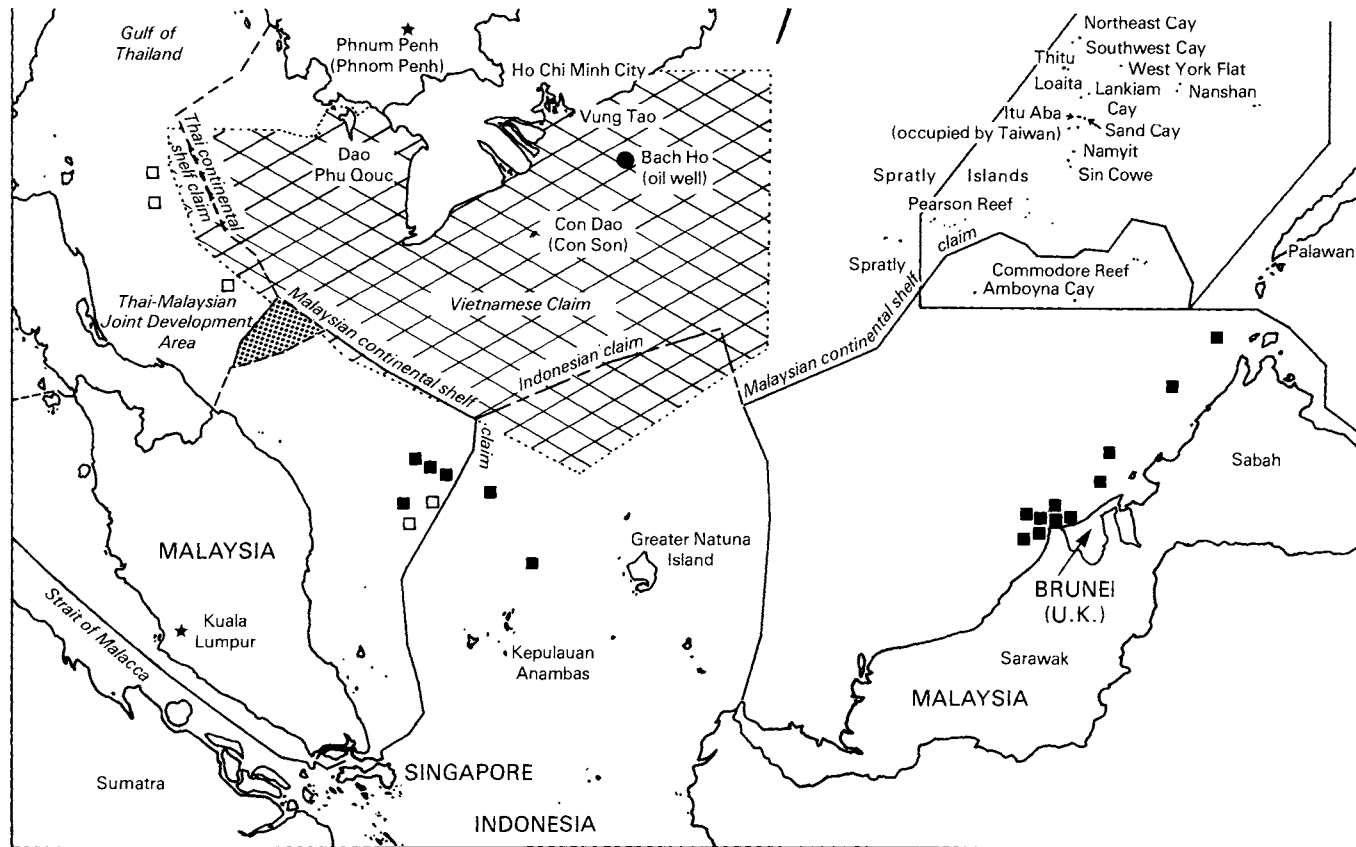
Map 5: Now this island, Phu-Quoc. That line was drawn in 1939 and is called the Brevie Line, named after the French governor of Indochina who drew that line simply for the convenience of his administration there. Vietnam insists that should be the boundary, but Kampuchea doesn't accept it. Shortly after Vietnam was unified, there were negotiations over territorial problems. At one point, Vietnam was said to have agreed to return some islands in the border areas except this one, Phu-Quoc. But then the political situations on both sides changed, so that Vietnam suddenly withdrew its gesture.

I think that's all about slides.

Kampuchea and Vietnam both have problems between themselves as well as with their adjacent and opposite states, namely Thailand and Malaysia. Also in the Gulf of Tonkin, with the People's Republic of China.

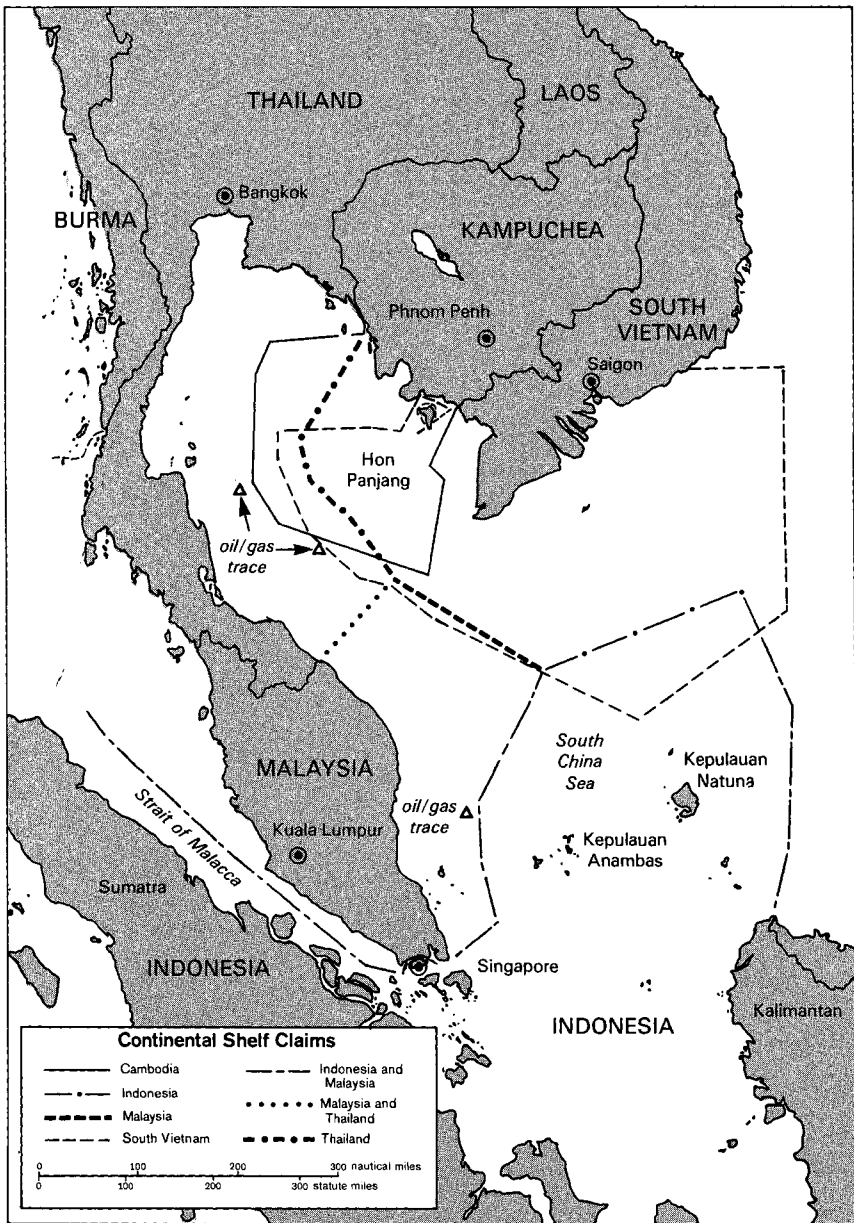
On the political side, given the fact that the Soviet Union is really enjoying the use of former U.S. bases in Vietnam like Cam-Ranh, Danang and Ho Chi Minh City, if China presses Vietnam too hard, that much more quickly it will be pushing Vietnam toward the Soviet Union. As the legal problems involving maritime jurisdictions of the two countries become more political, the Soviet Union couldn't have a better excuse to come in there. So I don't foresee any simple solution in legal terms in the case of Vietnam and Kampuchea or between them and their adjacent and opposite countries. But it could be encouraging that, once the Convention on the Law of the Sea comes into force, then these countries would feel obliged to seek negotiations at least in a more positive way than otherwise. With so many coastal states involved, however, the problems in the South China Sea and in the Gulf of Tonkin are far more complicated than those in the East China Sea and the Yellow Sea.





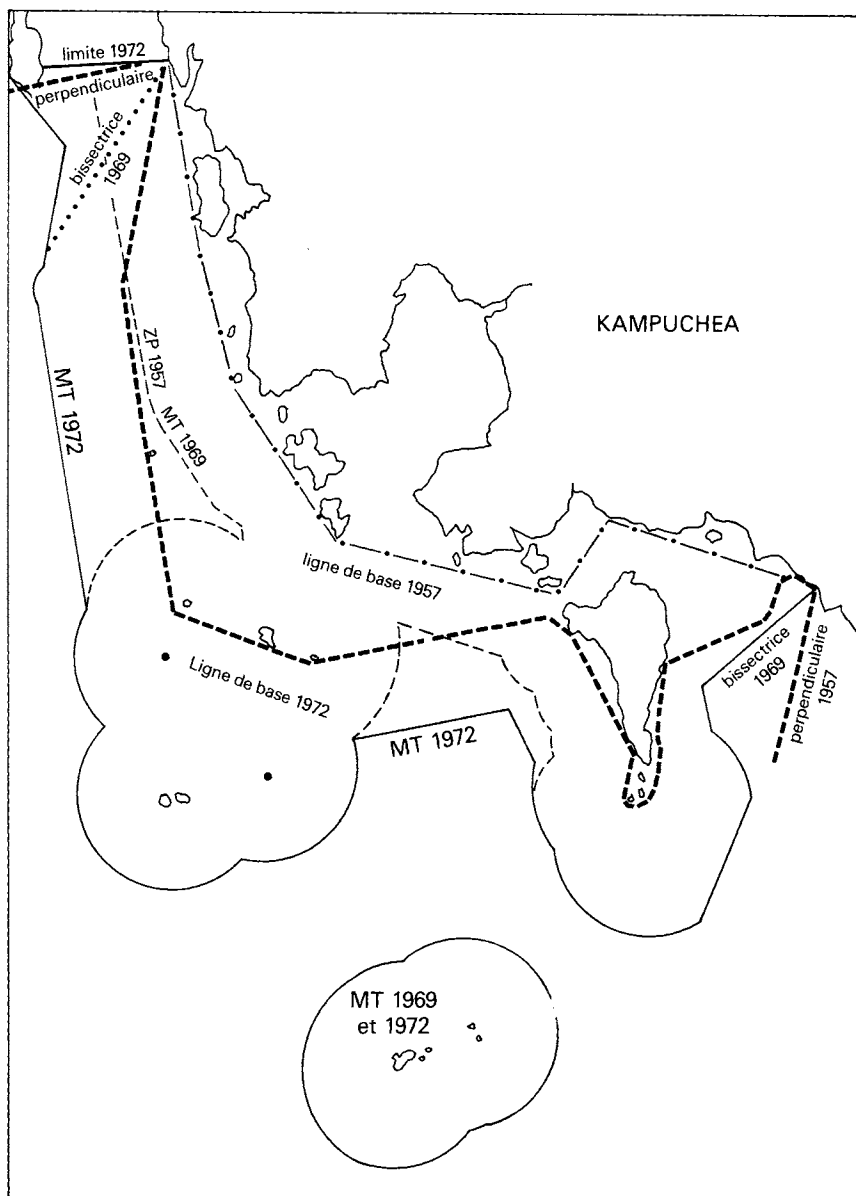
From 504849 (546154) 5-81.

Map 1: South China Sea: Petroleum Politics.



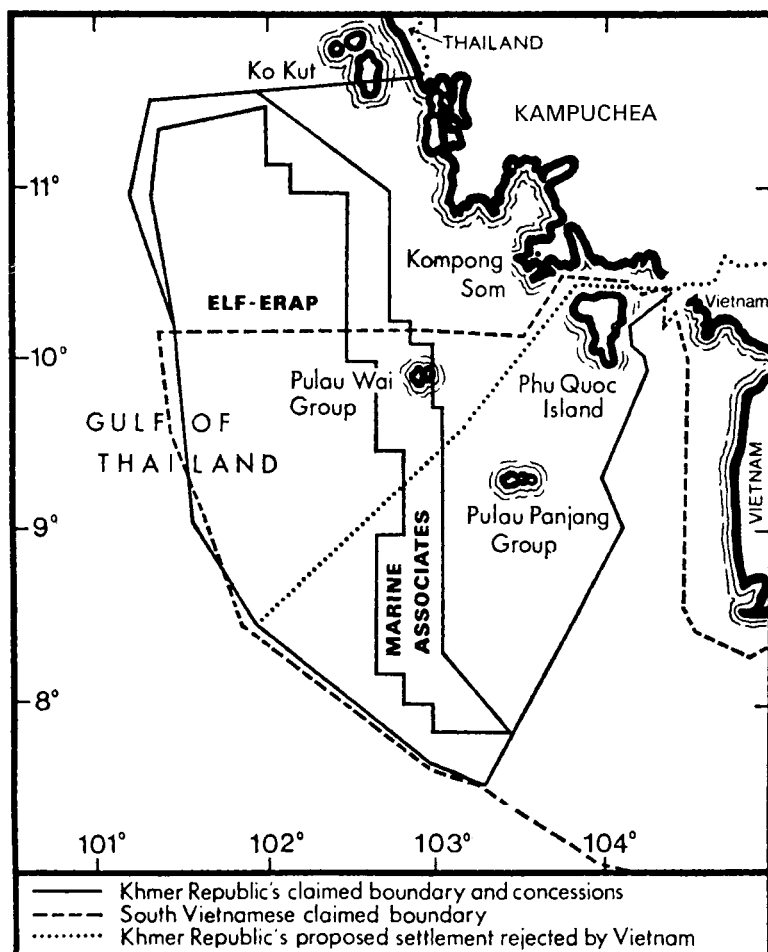
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Map 2: Southeast Asia: Conflicting Continental Shelf Claims.



Map 3: Kampuchea's Extension of Jurisdictions (1957-1969-1972)

Source: M. Khim Y., 1978.



Map 4: Claims in the Gulf of Thailand.

LEGAL STATUS OF THE PARACEL AND SPRATLY ISLANDS

Hungdah Chiu and Choon-ho Park

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Introduction

On January 19 and 20, 1974, after a week of controversy over the ownership of the Paracel and Spratly islands in the South China Sea, an armed conflict broke out between the air and naval detachments of the People's Republic of China (PRC) and the Republic of Vietnam (RVN) in the vicinity of the Paracels. In the series of skirmishes, the Vietnamese were hopelessly outmatched by the Chinese, who are now in control of the three islets on which the fighting took place (see Figure 1).¹ However, nothing was legally settled as a result of this first military encounter, and the South China Sea is now relatively quiet. Needless to say, each party still firmly maintains its uncompromising position.² The fact that the piece of territory in question has only negligible value in itself suggests that, aside from their respective national prestige, the real interest of the parties in this issue has been prompted not only by territorial but also by economic and strategic considerations, as shall be seen below.

Historically, ownership of the Paracel and Spratly islands has been assumed by different dynasties and governments of both China and Vietnam, but often without the awareness of the other claimant and seldom with resort to force. During recent decades, frequent assertions of ownership made by different claimants finally culminated in what may be called a fitful competition among different regimes of China and Vietnam at various times.³ Each claimant merely repeated its previous assertions on each occasion. There were also two short-lived claimants, France and Japan. During the 1920s and 1930s, France claimed jurisdiction to the islands on behalf of Vietnam, then its protectorate. Japan placed them under its jurisdiction from 1939 up to the time of its defeat in the war in 1945. The Republic of China (ROC) and the Republic of the Philippines have also been in control of some islets in the Spratlies prior to the recent clash of arms between the PRC and the RVN. As recently as 1956, a private claim was also made with respect to part of the Spratlies by a Filipino, whose assertion of its discovery invited a chorus of protests from the above claimants (see p. 462). The only prospective party that has thus far withheld its claim is the Democratic Republic of Vietnam (DRVN), which, because of its relations with the PRC, is evading the issue by saying that the parties involved should settle such disputes by negotiation. Probably no other islands have ever been claimed by so many for so long and with so much persistence.

As general background, it is necessary to look at the present issue in the context of territorial disputes in East Asia. In this region, there are already three other territorial disputes that have arisen from conflicting claims to the ownership of "a few fly-specks" on the map. These are the disputes between the Soviet Union and Japan over the Northern Islands,⁴ between Korea and Japan over the Tokdo-Takeshima Islands,⁵ and between China and Japan over the Tiaoyut'ai-Senkaku Islands.⁶ Each of these disputes has flared up into an acrimonious political issue between the parties at one time or other and

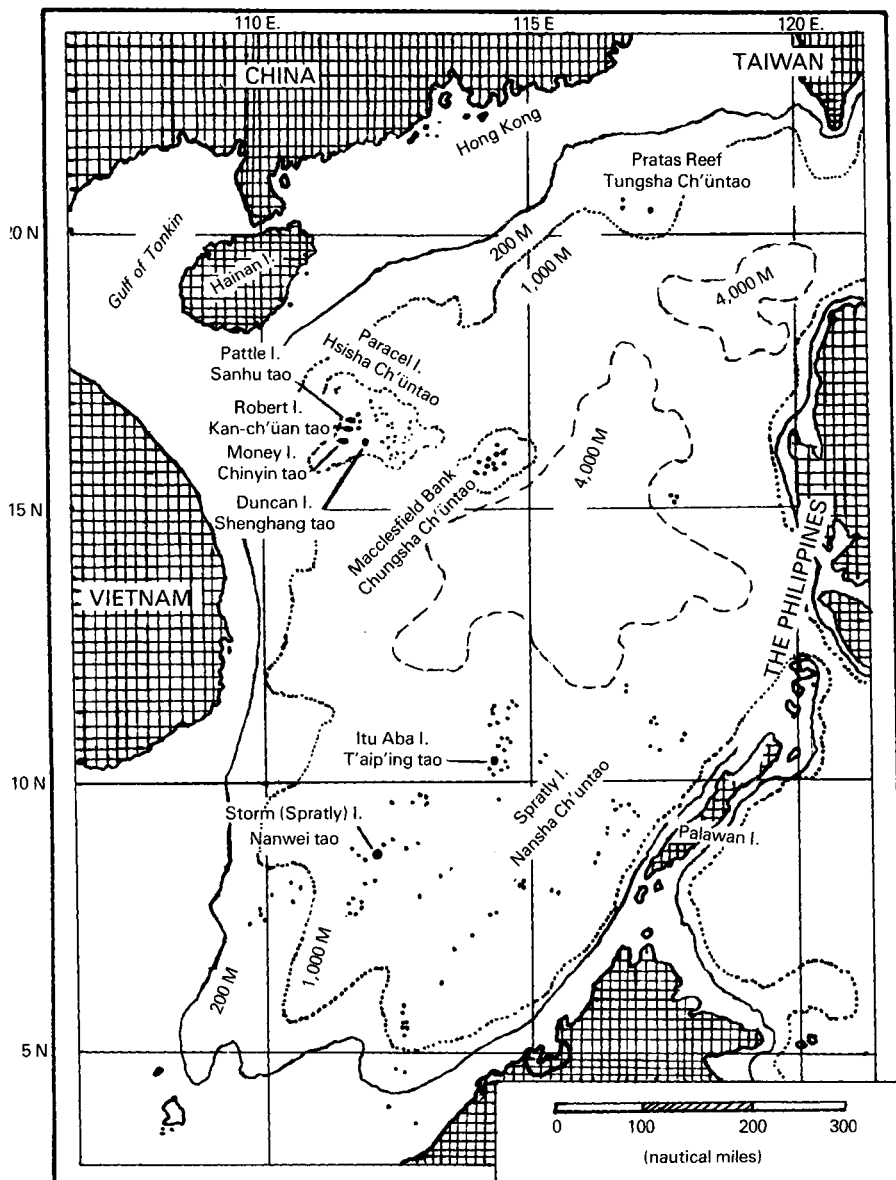


Figure 1: The South China Sea.

each remains potentially volatile. For historic reasons, the East Asian countries are particularly sensitive to territorial issues. International disputes within the region are further complicated by the unique fact that three of the four divided nations of the world (China, Germany, Korea, and Vietnam) are situated in East Asia. In connection with the present dispute, it is also important not to overlook the fact that the Tiaoyut'ai-Senkaku dispute between China and Japan in the East China Sea is strikingly similar in many ways to this Paracel-Spratly dispute between China and Vietnam in the South China Sea. These two disputes are interlocked not only by the fact that China is a common party to both, but also by the substantial economic interest both are thought to involve. For these reasons, neither dispute is likely to be settled independently of, or differently from, the other.

Essentially a territorial issue like its companion in the East China Sea, the present dispute has been brought to the fore by two nonterritorial factors, one economic and the other strategic. These are reflected in the attitude of the parties. The contribution of the economic factor can be seen from four developments that took place in the periphery of the South China Sea prior to the PRC-RVN clash of January 1974. First, in July 1973, the RVN opened 30 of the 40 offshore tracts along its south coasts for bidding. Oil and gas exploration contracts were awarded to four Western oil companies initially with respect to eight tracts.⁷ Second, in September 1973, the Interior Ministry of the RVN placed 11 islets of the Spratly group under the jurisdiction of Phuoc Tuy Province. Reportedly this was done at the recommendation of the RVN National Petroleum Board, in order to preempt the continental shelf between the Spratlies and the mainland.⁸ It was in response to this incorporation that the PRC made a strong protest on January 11, 1974.⁹ This protest was followed by a series of statements from both sides and from the ROC and led to the armed clash in the vicinity of the Paracels 1 week later. In other words, the controversy began over the Spratlies, although actual conflict occurred over the Paracels. Third, on the side of the Philippines, a consortium of local and foreign oil companies began the biggest oil exploration in the Philippines along the offshore waters of Palawan in September 1973.¹⁰ The Spratlies are much nearer to Palawan than to the territories of the PRC or the RVN. Also in September 1973, it was reported that the Philippines was seeking cooperation with the Soviet Union for the development of its oil resources.¹¹ Fourth, it was reported in September 1973 that the DRVN had been discussing the development of oil in the Gulf of Tonkin with Japanese companies. The existence of oil in that area had reportedly been confirmed with Soviet technical aid.¹²

Concurrent with these events, in the southwestern sector of the South China Sea, active exploration and exploitation of oil have been in progress, especially in the coastal waters off Borneo, Cambodia, Indonesia, the Malaysian Peninsula, and Thailand.¹³ The search for seabed oil was thus expanding northeastward at a rapid pace, by gradually encircling the Paracel and Spratly islands, except on the northeast where the depth does not permit drilling using currently available technology. It is inconceivable that this could have escaped the attention of the PRC, or any other country for that matter, toward which this expansion was taking place. In assessing the contribution of oil to the present dispute, however, it should be pointed out that the prospect of seabed oil in or around the disputed areas is yet to be substantiated by further exploration.¹⁴ What is thought to be really at stake in the dispute, then, is not necessarily the oil to be found in

or around the piece of territory in question, but rather the right to the oil yet to be found in the adjacent continental shelf, a right to which a party to the dispute may eventually be entitled by virtue of sovereignty over the islets and coral reefs. This view of the dispute is substantiated by a description of the geographical features of the area.

In analyzing a territorial dispute from the standpoint of history and international law, facts of geography are important, but should not be allowed, as so often happens, to obscure the historic and legal grounds of the argument. For this reason, discussion of the geography of the Paracel and Spratly islands is confined to a sketchy illustration of their physical circumstances. According to a detailed survey conducted in 1946-1947 under the sponsorship of the ROC Ministry of Internal Affairs,¹⁵ the South China Sea has 127 uninhabited islets, shoals, coral reefs, banks, sands, cays, and rocks. They are grouped in four midocean coral archipelagoes (see Figure 1): the Pratas Reef (Tungsha in Chinese), the Macclesfield Bank (Chungsha), the Paracel Islands (Hsisha), and the Spratly Islands (Nansha).¹⁶ The ownership of the Pratas Reef and the Macclesfield Bank, both situated closer to China than to either Vietnam or the Philippines and smaller than the other two groups, has not been contested; they are Chinese, although with respect to the submerged Macclesfield Bank, it is questionable whether what lies underwater may be owned. Not surprisingly, the contested Paracel and Spratly islands both have their Vietnamese names as well: Hoang-Sa and Truong-Sa, respectively.

In contrast to the Yellow Sea and East China Sea, which for the most part comprise shallow continental shelf with smooth bottom, the South China Sea is a steep basin abruptly dropping off to abyssal plains at the center. There is virtually no continental shelf along the Philippines side, the 200-m isodepth line on the southeast running very closely along Palawan and Luzon (see Figure 1). Only on the side of the Chinese mainland, Taiwan and, to a lesser extent, Vietnam is there some breadth of continental shelf. On the southwest, the whole area between Vietnam and Borneo is less than 200 m deep. From this topographical description, it is apparent that the Paracel and Spratly islands, about 230 nautical mi apart, are sitting midocean where the depth drops immediately to almost 1,000 m around the Paracels and to about 3,000 m at some points northeast of the Spratlies. Consequently, ownership of the two archipelagoes alone is not likely to affect to any significant extent either party's share of the continental shelf, especially under the 200-m depth criteria. Furthermore, exploitation of oil or mineral resources from waters as deep as those in the Paracel-Spratly areas is either technologically impossible or commercially unprofitable at this time. At present, it is doubtful whether the areas have been sufficiently explored to determine the promise of oil.¹⁷

The impact of the strategic factor should be briefly noted. On the surface, this may not appear to be as immediate or direct as the economic factor. However, the South China Sea emerges as one of the few, if not the only, enclosed areas of the sea to which none of the four major powers, China, Japan, the Soviet Union, and the United States, can afford to remain indifferent. On the southwest, it communicates with the Indian Ocean through Malacca-Singapore Straits, and on the northeast with the East China Sea which, in turn, communicates with the Sea of Japan through Korea Strait. This makes the sea-lane between the Paracel and Spratly islands a major route for the navies of the Soviet Union and the United States, especially for the Soviet navy on

its way to and from its base in Vladivostok. For Japan, an economic superpower heavily dependent on maritime trade, the South China Sea is also a major navigation route for its oil tankers and merchant marine vessels. Although the difficulty of passing through the bottlenecks in Malacca-Singapore Straits causes some supertankers to bypass the South China Sea route, except in ballast, that does not diminish the importance of this major navigation route. This analysis makes clear the importance of controlling or owning the Paracel and Spratly islands, especially from the standpoint of the PRC whose offshore waters, the two China Seas, will witness increasing density of traffic by foreign vessels.

As in the case of the Tiaoyut'ai-Senkaku dispute between China and Japan, each party to the present dispute has come forward with a rather lengthy list of historical writings as the basis of its argument. However, most of the early works are merely old records that describe occasional use of the disputed islets by claimants' fishermen or sailors at one time or another. However, some recent works describe acts that, in modern terms, would seem to constitute acquisition of territory by discovery, occupation, or prescription. Thus, from the viewpoint of international law, the claims that warrant more serious consideration are the ones based on the events that took place since the beginning of this century.

As the Paracel-Spratly dispute is basically a territorial issue, the claims of the parties should be evaluated with reference to international law. In doing so, some fundamental questions arise. For example: Is modern international law concerning acquisition of territory applicable to what had taken place before the East Asian countries entered the community of nations? Or, more broadly, is the law of nations as developed in Europe applicable to an Asian situation? In the present dispute, a second line of questions arises from the fact that, at various times, each party rightly or wrongly assumed that the territory in question had not been claimed by the other or by any other party. Moreover, there are a number of discrepancies in the facts presented by each side relating to its discovery, use, and claim. The claims of the parties will have to be evaluated with these points taken into consideration. The present study intends to analyze the Paracel-Spratly dispute against this background, on the basis of the numerous historic facts each party has given as its ground of argument.

The Vietnamese Position¹⁸

The Paracel Islands

According to the RVN, "from time immemorial, (the Paracels) have been frequented by Vietnamese fishermen who went there for tortoises, sea-slugs and other marine creatures. In recent times, the Paracels have attracted exploiters of phosphates,... produced by the interaction of guano ... and coral limestone."¹⁹ However, the earliest historic reference to the use of the islets invoked by the RVN dates from 1802. The RVN claims that, according to *Dai-Nam Nhu Thong-Chi* (Annals of Vietnam)²⁰ which were published during the reign of Emperor Tu-duc (1848-1883), Emperor Gia-long (1802-1820) formed a special company called the Hoang-Sa Company consisting of 70 experienced seamen chosen from the village of Vinh-an to supervise the exploitation of the Paracels. The team would leave for the islets in the third month of each year to stay there for about 6 months. The sea products they collected would be brought to the port of Tu-hien. In 1816, the emperor finally

annexed the archipelago to Vietnam. In 1835, Emperor Minh-mang (1820-1841) built a pagoda on one of the rocks called the Ban-na Rock, together with a stone monument to mark the event. The Paracels were recorded for the first time in Vietnamese maps in *Detailed Map of Dai Nam*²¹ published by Emperor Minh-mang's Hue Court in 1838, together with a sketchy description of 130 islets listed in the geography. In addition to these old court documents, there are Western writings that attest to the Vietnamese ownership of the Paracels -- such as Monseigneur Taberd's *History and Description of the Religion, Customs, and Morals of All Peoples* (1838) and J.B. Chaigneau's (1769-1825) *Memoires sur la Cochinchine*.²² Taberd specifically recorded the Paracels as the dependencies of Cochinchina (an old name given to part of Vietnam), which had been occupying them for 34 years, and the Chaigneau referred, among other things, to Emperor Gia-long's 1816 annexation.

According to the RVN, in 1895 and 1896, there were two shipwrecks around the Paracels that involved foreign vessels. The *Bellona* wrecked on the north reef in 1895 and the *Imezi Maru* on the Amphitrite group in 1896, both laden with copper insured by British companies. When Chinese nationals salvaged part of the cargoes, took the copper to the Chinese island of Hainan, and exhibited an intention to resell them to the ship-owners, a complex case of conflicting claims arose, involving Britain, China, and France (Vietnam was then a French protectorate). On the ground that the Paracels did not belong to China, the local Chinese authorities refused to accept any responsibility either for the shipwrecks or for the salvaged cargoes.²³

In 1909, the absence of any physical sign denoting Vietnamese ownership of the Paracels led the Chinese governor-general (viceroy) of Kuangtung to send two gunboats on a reconnaissance mission on June 6. They left the islets within 24 hours, after drawing a map of the area. Subsequently, increased Chinese activities on the Paracels alerted the French authorities in Vietnam, making them realize the importance of the islets for the security of Vietnam. From 1920 on, customs patrol vessels made frequent visits from Vietnam to the Paracels, which were then a convenient haven for smugglers of arms and opium. In 1925, the French ship *De Lanessan*, undertook a scientific exploration designed to discover rich beds of phosphates on the islets. Publicity on this expedition aroused economic interest in the Paracels, and some Japanese firms applied to the French authorities in Vietnam for permission to work the phosphate deposits there. Finding the business not particularly profitable, however, the Japanese later abandoned the enterprise.²⁴

On June 15, 1932, the French governor-general of Vietnam made the Paracels an administrative unit of Thua Thien Province by Decree No. 156/SC, which was subsequently confirmed in Emperor Bao Dai's Ordinance No. 10 of March 30, 1938. On May 5, 1939, the administrative limits of the Paracels were reconfirmed in the governor-general's "Delegation Administrative du Croissant et Dependances."²⁵

On the eve of World War II, Japan announced its decision on March 30, 1939, to place the Paracels and the Spratlies under its jurisdiction. On April 21, 1939, France protested against this Japanese decision. However, the islets remained under Japanese control until the end of the war in August 1945.²⁶ Then, on September 7, 1951, at the 51-nation conference held in San Francisco to sign a peace treaty with Japan, the Vietnamese delegate made the following statement reaffirming Vietnam's ownership of the archipelagoes, and was met with no objection at all: "And as we must frankly profit from all the opportunities

offered to us to stifle the germs of discord, we affirm our right to the Spratly and Paracel islands, which have always belonged to Vietnam."²⁷

Between 1956 and 1964, a naval convoy of the RVN made regular visits to both archipelagoes to supply the logistic needs of the detachments stationed on some of the islets.²⁸ During the 1960s, two domestic measures were taken by the RVN government: the Paracels were reassigned from Thua Thien Province to Quang Nam by Presidential Decree No. 174-NK of July 13, 1961; and a similar decree (Decree 709-BNV/HC) was issued on October 21, 1969.²⁹

The Spratly Islands

In 1927, the *De Lanessan*, which had been sent on an expedition to the Paracels in 1925, was sent to the Spratlies on a similar mission. This was followed by another expedition by the *La Milicieuse* in 1930, on which occasion, a French flag was planted on one of the islets.³⁰ The French government finally decided to take possession of the archipelagoes and sent an expeditionary team consisting of three ships (the *Alerte*, the *Astrolabe*, and the *De Lanessan*) in 1933. During this expedition, Chinese fishermen and some mining machines left by the Japanese guano-phosphate collectors were found on some of the islets. Upon completion of this expedition, the French government placed six groups of the islets under its control by Decree No. 4762 of July 21, 1933, attaching them to Baria Province. Only the Japanese government protested, stating that there had been "a solemn occupation carried out from 1917 onwards by Japanese subjects with the support of the Imperial government."³¹

In 1938, a weather station was built on one of the major islets by the Indochina Meteorological Service. From March 1939, when Japan decided to place the Paracels and the Spratlies under its control on the eve of World War II, the development was the same as stated above with respect to the Paracels.

When, on May 15, 1956, a Filipino named Tomas Cloma, director of the Maritime Institute of the Philippines, issued a "Proclamation to the Whole World" claiming "ownership, by discovery and occupation, of all the territory, 33 islands, sand cays, sand bars, coral reefs and fishing grounds (in the Spratlies) of 64,976 square nautical miles," naming them "Freedomland," the PRC, the ROC, and the RVN set off a chain of protests against the Philippines. The RVN issued a communique on June 1, 1956, reaffirming its ownership of the Paracels and the Spratlies and making a specific reference to the San Francisco statement of 1951.³²

On October 22, 1956, the RVN government assigned the Spratlies to Phuoc Tuy Province by Decree No. 143/NV. This was followed by two more decrees (No. 76/BNV/HC 9 ND of March 20, 1958, and No. 34/NV of January 27, 1959), whereby the 1956 decree was either reconfirmed or adjusted. The above-noted incorporation of 11 islets in the Spratlies must in September 1973, therefore, have been a final readjustment of the three decrees issued by the RVN.³³

The Chinese Position

The ROC and the PRC have both consistently maintained that the Paracel and Spratly islands are Chinese territory. The Chinese claim to these islets is based on historical records, long-time use by Chinese people, treaties, and principles of international law. The following

summary of the Chinese position is derived from an analysis of Chinese official documents and scholarly writings.

The earliest reliable Chinese historical reference to the Paracel Islands is found in the famous thirteenth-century book entitled *Chu-fan-chi* [A description of barbarous peoples], written by Chau Ju-kua while he was inspector of foreign trade in Fukien Lu (Province) during the Southern Sung Dynasty (A.D. 1127-1279).³⁴ The Paracel Islands were described in the section dealing with Hainan Island³⁵ of the Southern Sung Dynasty as: "To the east (of Hainan) are the 'Chien-li chang-sha' [Thousand *li* banks], and the 'Wan-li shi-ch'uang' [Ten thousand *li* rocks], and [beyond them] is the boundless ocean"³⁶ The Western sinologists who translated this work identified these two places as the Paracel Islands.³⁷

In 1292, during the Yuan Dynasty (A.D. 1280-1368), an expedition force was sent to Java. Records of the voyage report that it sailed through "Ch'i-chou yang" [The ocean of the seven islands] and the "Wan-li shih-t'ang" [Myriad on ten thousand *li* rocks].³⁸ The "Ch'i-chou" (Seven islands) were the seven east islands of the present Paracel Islands and "Wan-li shih-t'ang" apparently referred to the present Spratly Islands.

When the famous Chinese navigator Cheng Ho of the Ming Dynasty (A.D. 1368-1644) sailed seven times through the South China Sea and the Indian Ocean between 1403 and 1433, his fleet passed through the Paracel and Spratly islands several times and his staff recorded the location of these two islet groups on a detailed map drawn between 1425 and 1430 (the exact year cannot be determined). The Paracels were referred to as "Shin-t'ang" [Rocks] and "Wansheng shih-t'ang-yu" [Islands of ten thousand rocks], and the Spratlies as "Shih-hsing shih-t'ang" [Stone star rocks].³⁹ A subsequent Ming Dynasty publication on the products and geography of the sea entitled "Hai-yu" [On the sea] also rather clearly described the location of these islet groups. The text explicitly states that the "Wan-li chang-sha" [Myriad on ten thousand *li* sand banks] is located southeast of "Wan-li shih-t'ang" [Myriad on ten thousand *li* rocks].⁴⁰ This description accords with the fact that the Spratly Islands are indeed located southeast of the Paracel Islands.⁴¹

In the Ch'ing Dynasty (1644-1911), a Chinese scholar, Ch'en Lun-chiung, again described the islets' geographical position in a book entitled *Hai-kuo wen-chien lu* [Notes on lands across the sea], published in 1730, and charted the two islet groups on his map *Szu-hai tsung-tu* [General map of four seas]. The Paracels were referred to as "Chi-yang chou" and the Spratlies as "Shih-t'ang" [Stone banks]. It should be noted that, in other Chinese historical records, the Paracels are also referred to as "Ch'i-li shan" [Mountain of seven *li*] and "Ch'i-chou yang shan" [Mountain in seven islands ocean]; among other names, "Chiu-chou yang" [Ocean of nine islands] apparently referred to the nine western islets of the Paracels.⁴² But, during the late Ch'ing Dynasty, the name Sisha (Hsisha) Islands gradually became the commonly used Chinese name for the Paracel Islands. References to the Spratly Islands occur less frequently in Chinese historical records, and these islands are sometimes confused with the Paracels. In addition to being referred to as "Wan-li chang-sha" or "Shih-t'ang," the islet group is also referred to in Chinese records as "Ti-ja tan" [Sluice gate bank] or "Tuan-sha ch'un-chaio" [A group of sand rocks].⁴³ Despite the confusion of names, there is no doubt that the Chinese people from Hainan Island have since the ancient time continued to use the Spratly

Islands. This has been reported in several authoritative Western sources. For example, the 1923 British official publication *The China Sea Pilot* records:

Hainan fishermen, who subsist by collecting trepang and tortoise-shell, were found upon most of these islands; some of them remain for years amongst the reefs. Junks from Hainan annually visit the islands and reefs with supplies of rice and other necessities, for which the fishermen give trepang and other articles in exchange.⁴⁴

After the establishment of the republican government in 1912, the Spratly Islands were referred to as "Tuansha ch'ün-tao" [A heap of sand archipelago]⁴⁵ but as early as 1934, China began to call them "Nansha ch'ün-tao"⁴⁶ and finally in 1947 the ROC government decided to adopt this name for the Spratlies.

Until the 1930s, the Chinese claim to the Paracel and Spratly islands appeared to be unchallenged. It was, in fact, confirmed by several international and Chinese domestic acts. In 1883, the German government tried to survey the Spratly Islands, but stopped when China protested.⁴⁷ After Vietnam (Annam) became a protectorate of France in 1884, a Convention respecting the Delimitation of the Frontier between China and Tonkin (Vietnam) was signed on June 26, 1887. Article 3 of the Convention provided:

Au Kouang-Tong Les îles qui sont a l'est de méridien de Paris 105 degrees 43, de longitude est, c'est-à-dire de la ligne nord-sud passant par la pointe orientale de l'île de Tch'a Kou ou Quanchan (Tra-co) et formant la frontiere sont également attribuées a la Chine. Les îles Gotho et les autres îles qui sont a l'ouest du ce méridien appartiennent a l'Annam.⁴⁸

Chinese government spokesmen and independent writers have on a number of occasions pointed out that both the Paracels and the Spratlies lie east of the delimitation line as provided in the 1887 Convention and are therefore Chinese territory.⁴⁹

In 1907, a Japanese merchant tried to explore the resources of the Pratas Islands (Tungsha ch'ün-tao) but was expelled by the Chinese government.⁵⁰ This incident prompted the Chinese government to take precautionary measures with respect to the Paracel Islands. On instruction from Chang Jen-chun, the governor-general of the Kuangtung Province, Admiral Li Chun led a naval contingent of three warships to inspect the Paracel Islands. They found only Chinese on a few of the islets. In 1907, the naval contingent visited the Paracels again and established a Chinese territorial marker on Drummond Island (Fu-po-tao) to commemorate the inspection.⁵¹ After completion of its mission, the inspection team reported to the governor-general, proposing that, in view of the confusion arising from the different names given to the islets by Chinese and foreigners, all 15 islets of the Paracels be renamed. The proposal was subsequently approved by the governor-general.⁵² Between 1921 and 1932, the Kuangtung provincial government approved at least five times the application of Chinese nationals to explore the guano and other resources of the Paracel Islands.⁵³ In 1928, the Kuangtung provincial government sent a naval vessel, the *Hai-jui*, with an investigation team organized by the provincial government and the Chung Shan (Sun Yat-sen) University, to investigate and survey the islets.⁵⁴

It was not until December 4, 1931, that France, on behalf of its protectorate Vietnam, suddenly asserted its claim to the Paracel Islands. On that date, the French Quai d'Orsay sent a note to the ROC legation in Paris, claiming Vietnamese sovereignty over the Paracel Islands. The note based the claim on historical incidents, among them that in 1816 the Vietnam King Chia-lung [Gia-long] formally governed these islets and in 1835 King Minh-mang sent some of his subjects to build a pagoda and a stone tablet on one of them.⁵⁵ On July 27, 1932, the ROC foreign ministry instructed its legation in Paris to protest to the French Quai d'Orsay, rejecting the French claim over the Paracel Islands. The Chinese note of September 29, 1932, referred to the 1887 Sino-French Convention and the Kuangtung provincial government's approval of the applications submitted by Chinese nationals to explore the resources of the islets. It also referred to the long-time use of these islets by Chinese people as well as to France's implied recognition of Chinese sovereignty over them at the 1930 Hong Kong Far Eastern Meteorological Conference at which the French delegation, joined by other delegations, requested the ROC to build a weather station on one of the islets in the Paracels. With respect to the evidences of Vietnamese control over the islets cited in the French note, the Chinese note requested the French government to identify the particular islet on which the stone tablet and the pagoda were alleged to have been built. Moreover, the note pointed out that, when the alleged Vietnamese acts were taken, Vietnam was under the suzerainty of China and that it was against logic and common sense that a vassal state could arbitrarily occupy a piece of territory of its suzerain state.⁵⁶ The French government did not respond to the Chinese note until a year later.

Approximately at the same time that France asserted its claim over the Paracels, it also made claim to the Spratlies. On July 25, 1933, France announced in its official gazette that it had occupied nine islets in the South China Sea and placed them under its sovereignty. However, France also acknowledged that, when the occupation took place, the only persons found on them were Chinese.⁵⁷ On August 4, 1933, the ROC government notifies the French government that, pending a thorough investigation of the matter, it "reserved its rights with respect to the said French occupation."⁵⁸ Subsequently, China protested to France that the Spratlies were Chinese territory, primarily on the ground that there were Chinese residing on them.⁵⁹ In the meantime, Japan also refused to recognize the French occupation of the islets as valid in international law. It referred to the Japanese exploration of mineral resources on them during the 1920s as well as other grounds.⁶⁰

In response to the Chinese note on 1932, the Quai d'Orsay delivered a note to the Chinese legation in Paris on September 27, 1933, saying, among other things, that the 1887 Sino-French Convention was not applicable to the Paracels, because the islets are 200 mi east of the delimitation line, which should be considered as a local one applicable only to the Mancay area in northern Vietnam. Otherwise, the French note said, the line would cut across the central part of Vietnam, making that region and many Vietnamese islands part of Chinese territory. It further stated that China purported to incorporate the islets as late as 1909 (actually it was 1907), when Admiral Li Chun's naval contingent was sent to the Paracels for investigation, while Vietnam claimed them as early as 1816. With respect to the act of the French delegation at the 1930 Far Eastern Meteorological Conference, the French note said that the conference was a scientific one and did

not deal with political questions. It did not respond to the other arguments given in the Chinese note of September 29, 1932.⁶¹

On March 20, 1934, China again instructed its legation in Paris to deliver a note to France to refute the French arguments. With respect to the delimitation line, China pointed out that the treaty specifically referred to "islands" (*les îles*) and certainly had nothing to do with the central part of mainland Vietnam. It also explicitly referred to the island east of the line ("*les îles qui sont à l'est ... de la ligne nord-sud ...*") and to the fact that no exception was made in this provision. Concerning the so-called Vietnamese occupation of the Paracels in 1816, the Chinese note again called the attention of the French to the fact that, at that time, Vietnam was a tributary of China and that references to the islets could be found in much earlier Chinese historical records. Finally, the Chinese note pointed out the effective control exercised by China in recent years.⁶² France did not respond to this note and apparently withheld its claim for several years. Then, in early July 1938, taking the opportunity of China's preoccupation with resisting the large-scale Japanese invasion which started in July 1937, France suddenly occupied the Paracels. The Chinese Ambassador to France, V. K. Wellington Koo, immediately protested to France.⁶³

In 1939, Japan took over the Hainan, the Paracel, and the Spratly islands. On March 30, 1939, Japan's Office of Taiwan Governor-General announced in the Japanese official gazette that the Shinnan Gunto (new name given by the Japanese to the Paracels and the Spratlies) was placed under the jurisdiction of Kaoshiung Chou (County) of Taiwan,⁶⁴ then a territory of the Japanese Empire.

On August 26, 1945, soon after Japan surrendered to the Allied Powers, Japanese forces withdrew from the Paracel and Spratly islands. In November 1946, the ROC government sent a naval contingent, with officials from the Ministry of Internal Affairs and the Kuangtung provincial government, to take over the islets. This group of officials made a survey of each of the major islets. Garrison forces were subsequently stationed on several islets of the Paracels and the Spratlies. Chinese territorial stone tablets were erected on Yung-hsing Island (Woody) and T'ai-p'ing Island (Itu Aba). A weather station and a radio station were also built on these two islets.⁶⁵ Administratively, they were proclaimed to be under the jurisdiction of the Kuangtung Province, but on March 15, 1947, the ROC government issued an order to place them "temporarily under the administration of the Navy."⁶⁶ On December 1, 1947, the ROC Ministry of Internal Affairs published new names for each of the islets for use in all Chinese maps ever since.⁶⁷ At that time, neither Vietnam nor any other country protested to China regarding their takeover of the islands from Japan, their new names, or their inclusion within the territorial scope of China.⁶⁸

In May 1950, the PRC forces landed on Hainan Island and the ROC withdrew its forces on Hainan Island and the Paracel and the Spratly islands to Taiwan. In September 1951, the Japanese peace conference was held at San Francisco. A peace treaty was signed on September 8, which provided in Article 2(f) that "Japan renounces all right, title, and claim to the Spratly Islands and to the Paracel Islands."⁶⁹ Recently the RVN has repeatedly pointed out that, at the time of signing the treaty, it claimed both the Paracel and Spratly islands and was not challenged by the participating states. However, neither the PRC nor the ROC was invited to participate in the peace conference. Before the conference was held, the then PRC Foreign Minister, Chou En-lai, made a statement on August 15, 1951, to the effect that:

Whether or not the U.S.-British Draft Treaty contains provisions on this subject and no matter how these provisions are worded, the inviolable sovereignty of the People's Republic of China over Nanwei Island (the Spratly Islands) and Sisha Island (the Paracel Islands) will not be in any way affected.⁷⁰

After the signing of the San Francisco Peace Treaty, a bilateral peace treaty was signed between the ROC and Japan on April 28, 1952, which provided in Article 2:

It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco in the United States of America on September 8, 1951, Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands.⁷¹

According to the ROC Foreign Ministry, such an arrangement in the bilateral Sino-Japanese peace treaty clearly indicated that these two island groups were renounced in favor of the ROC and "was clear evidence [that] China has complete sovereignty over those islands."⁷²

The situation in the Paracel and Spratly islands appeared relatively stable until the summer of 1956 when the Filipino Cloma suddenly announced the "discovery" of the Spratly Islands by a team under his direction (see p. 462). The ROC government immediately protested to the Philippine government. A naval contingent was sent to patrol the Spratly Islands but found the Filipinos had already left.⁷³ Later Chinese garrison forces were sent to T'ai-p'ing Island (Itu Aba) and have remained there ever since.⁷⁴ At that time, the official Central News Agency (CNA) released an article asserting, among other points, that the Philippines has no right over the Spratly Islands because the islet group is situated well outside the territorial scope of the Philippine Islands as defined by Article 3 of the Peace Treaty between the United States and Spain signed on December 10, 1898.⁷⁵ Concurrently, the PRC Foreign Ministry spokesman issued a statement on May 29, 1956, reasserting that the Spratly Islands are Chinese territory.⁷⁶ Faced with the Chinese opposition, the Philippines apparently dropped its claim for the time being, if an official claim was intended, over the Spratly Islands.

At the time when the ROC and the Philippines were both claiming ownership of the Spratly Islands, the RVN joined the dispute by reasserting its claim over both the Paracel and Spratly islands. The ROC resolutely rejected this Vietnamese claim⁷⁷ and protested strongly when it learned that a RYN naval unit had landed on Storm Island (Nanwei) of the Spratly Islands.⁷⁸

In 1957, the PRC's New China News Agency (NCNA) reported that the "South Vietnam Ngo Dinh Diem troops" illegally occupied Robert Island (Kan-ch'üan) and several small islets nearby, such as Pattle Island (Sanhu) and Money Island (Chin-yin) of the Paracel Islands.⁷⁹ Then, on September 4, 1958, the PRC issued a Declaration on Territorial Sea, extending its territorial sea to 12 nautical mi and stipulating use of the straight base-line method to delimit its territorial sea. It also provided that the provisions "likewise apply to ... the Hsisha (Sisha) Islands, the Chungsha Islands, the Nansha Islands, and all other islands belonging to China."⁸⁰ Surprisingly, the RVN did not respond to the PRC's reassertion of Chinese sovereignty over the Paracel and Spratly islands. Subsequently, however, according to the PRC, on Feb-

ruary 22, 1959, the RVN navy invaded Duncan Island of the Paracel Islands and arrested 82 Chinese fishermen who were later released upon a strong protest by the PRC.⁸¹ A month later, the PRC reported that a RVN gunboat again invaded the same islet for the purpose of "pillaging" Chinese fishermen. A strong protest was issued again by the PRC.⁸² In mid-1960, the PRC government disclosed that it had issued 19 "serious warnings" to the United States before 1960 for violating the territorial airspace of the Paracel Islands.⁸³ From 1960 to the end of 1971, the PRC issued several hundred "serious warnings" to the United States for violating its territorial sea or airspace, and a substantial number of these "warnings" concerned the Paracel area. For instance, in 1963, the PRC issued 47 "serious warnings" altogether (numbers 227 to 274), 11 of them relating to the Paracel area.⁸⁴ The last PRC "warning" against the United States (number 497), issued on December 25, 1971, also happened to be related to the Paracels.⁸⁵ With the recent improvement of relations between the United States and the PRC, no "warning" against the United States has been reported in the PRC press from late 1971 to February 15, 1974. It is not clear whether the absence of such "warning" was due to a more tolerant attitude on the part of the PRC toward U.S. "intrusion" into China's territorial sea and airspace or to U.S. abandonment of reconnaissance activities near the Chinese coastal areas.

On the ROC side, according to the information released by the ROC government, since 1956, the Chinese navy has periodically sent a contingent to inspect the various islets of the Spratly Islands and to resupply Chinese garrison troops on Itu Aba Island. From October 6 to 27, 1963, the Ministry of National Defense, the Ministry of Internal Affairs, and the Naval General Headquarter jointly organized an inspection team to visit Itu Aba, Storm, Amboyna Cay (An-po sha-chou), Thi-Tu (Chung-yeh), S.W. Cay (Nan-tzu-chiao), N.E. Cay (Pei-tzu-chiao), West York (Hsi-Yüeh), Loaita (South Island of Horsbung, Nanyao in Chinese), Sandy Cay (Tun-ch'ien sha-chou), and Namyit (Hung-hsiu) islands of the Spratly group. In 1966, the ROC sent a naval contingent to erect Chinese national boundary tablets on S.W. Cay, N.E. Cay, Thi-Tu, and Namyit islands.⁸⁶ It was also reported that on September 26, 1972, a Chinese patrol boat captured a Japanese fishing boat entering the territorial sea of Itu Aba Island (T'ai-p'ing). The Japanese boat was released after an inspection by the Chinese patrol boat, which found nothing illegal.⁸⁷

The ROC never delayed in asserting its claim over these islets on appropriate occasions. At two recent sessions of the United Nations Cartographic Conference for Asia and the Far East, a statement was made by the ROC delegation reaffirming Chinese sovereignty over the islands.⁸⁸ Similar statements were issued by the ROC Foreign Ministry in response to the RVN and the Philippines assertions of sovereignty over the Paracel or Spratly islands.⁸⁹ In addition, the ROC on a number of occasions made diplomatic protests or representations to these two states rejecting their challenge on Chinese sovereignty over them.⁹⁰ It may also be added that the ROC government has even extended postal service to the Spratly Islands since August 1974 "for the benefit of the garrison troops and their families."⁹¹

Analysis of the Arguments of the Parties

Having presented the respective positions of the parties, the validity of their claims may be analyzed as follows.

The Paracel Islands

Analysis of the RVN position reveals that its claim must be based either on occupation or on prescription, or on both. The RVN cannot readily rely on occupation, because under international law only *terra nullius* (land belonging to no state) can be the object of occupation. However, the RVN does not have this relationship with the Paracels.⁹² As noted above, there is no doubt that China discovered and used the Paracels for several hundred years before Vietnam began asserting its claim in 1802.⁹³ At that time, China at least had a so-called inchoate title and, under international law, "has a privilege to perfect its title ... though any other State has an equal privilege to frustrate it by taking more final and decisive sovereign act."⁹⁴ Did Vietnam or its protecting state, France, ever take such "final and decisive sovereign act" to frustrate the Chinese claim? A careful reading of the RVN's arguments does not seem to support an affirmative reply to this question. In the 1920s, it was reported that even the acting French governor-general of Indochina acknowledged that "*jusqu'à plus ample informé les îles Paracels doivent être considérées comme appartenant à la Chine*".⁹⁵ A French navigator in the early 1930s also said that "*il semble qu'à l'heure actuelle l'Annam [Vietnam] n'ait plus aucune relation avec les îles Paracels*".⁹⁶

Moreover, as noted earlier, after Vietnam (or France in its capacity as the protecting power of Vietnam) began to assert claim to the Paracels in the early nineteenth century, China took a series of actions to consolidate its claim to the Paracels. Neither Vietnam nor France took any steps to challenge these Chinese actions until the 1930s. Although France, on behalf of Vietnam, did reassert its claim to the Paracels in the 1930s,⁹⁷ this was immediately challenged by China, and France apparently dropped its claim after 1945.

In August 1945, when Japan surrendered to the allied powers, the allied supreme commander issued an order which, among other matters, instructed Japanese forces north of the 16th northern latitude of Vietnam to surrender to China.⁹⁸ As a result, the northern part of Vietnam was placed under Chinese military occupation. Subsequently, when China turned over the occupied part of Vietnam to France in March 1946,⁹⁹ France did not inquire into title to the Paracels and the Spratlies. Nor did France or Vietnam protest when China took them over again in late 1946,¹⁰⁰ renamed the islands in 1947,¹⁰¹ and included them in the 1952 ROC-Japan bilateral peace treaty.¹⁰²

Although Vietnam did raise the question of the Paracels and the Spratlies at the 1951 San Francisco Japanese Peace Conference,¹⁰³ it did not take sufficient action to substantiate its claim before 1956, as may be seen from facts presented in the discussion of the Vietnamese and Chinese positions. Only after 1956, did the RVN renew its interest in these islets and try to assert its claim, but almost each assertion was immediately challenged by China.

With respect to the question of the RVN's invocation of the principle of prescription, the evidence it presented did not even approximate the requirement of "continuous and undisturbed exercise of sovereignty over [a territory]."¹⁰⁴ Its actions concerning the Paracels were sporadic and were frequently challenged by China.

Finally, neither Vietnam nor France has ever persuasively responded to the Chinese invocation of the 1887 Sino-French Convention respecting the Delimitation of the Frontier between China and Tonkin (Vietnam),¹⁰⁵ which explicitly provided the islands east of a deli-

miting line should belong to China. Both the Paracels and the Spratlies are situated east of that line.

The Spratly Islands

France, on behalf of Vietnam, began to claim the Spratly Islands in 1933, acting on the assumption that these islets were *terra nullius*.¹⁰⁶ The official Chinese challenge to the French action was based primarily on the ground that Chinese nationals had continuously used the islets or resided on them, thus evidencing Chinese sovereignty.¹⁰⁷ Although international law has questioned claims of territorial sovereignty based on settlement or use by private persons, it has been pointed out by Professor O'Connell that:

In short, acts of private individuals are in themselves insufficient for occupation, but nonetheless there may be no occupation without them. In the *Minquiers and Ecrehos* case, the Court treated the "actual and permanent settlement" of Englishmen on the islands among the acts indicative of sovereignty. Judge Carneiro went even further and said that "presence of private persons who are nationals of a given State may signify or entail occupation by that State Such individual actions are particularly important in respect of territories situated at the border of two countries which both claim sovereignty in that region."¹⁰⁸

The Chinese discovery and historic use of or settlement on these islets¹⁰⁹ could at least establish that in 1933 China did have some rights to them, though these rights might be of an inchoate nature only.¹¹⁰ Consequently, unless France took a "more final and decisive sovereign act" to frustrate the Chinese rights, the French occupation of the Spratlies cannot be considered valid in international law. It does not appear that France did in fact take any action which can be considered as a "final and decisive sovereign act."

The post-World War II developments relating to the Spratlies (1945-1952) paralleled what is noted above with respect to the Paracels. Therefore, even if France did validly occupy the Spratlies in 1933, which is doubtful, it apparently relinquished its sovereignty over them after 1945. As a successor to French rights in Vietnam, the RVN clearly cannot invoke what was previously relinquished by its predecessor.

Moreover, between 1950 and 1956, when the ROC did not station any garrison on the Spratlies, Vietnam and France did nothing to establish their control over the islets. After making a statement at the 1951 San Francisco Japanese Peace Conference, Vietnam did not even take a symbolic act to substantiate its claim to the Spratlies. As in the case of Paracels, only after 1956 did Vietnam renew its interest in the Spratlies.

Finally, the 1887 Sino-French Convention mentioned earlier is equally applicable to the Spratlies case, and neither France nor Vietnam has responded to the Chinese invocation of this treaty.

Recently the Republic of the Philippines has also renewed its interest in the Spratlies and has claimed that the status of the islands is "undetermined." It is said that the 1951 Japanese Peace Treaty merely provided for the Japanese renunciation of the islands, without specifying in whose favor the renunciation was made, that therefore they "are under the trusteeship of the victorious allied

powers of World War II," and that their status should be decided jointly by the allied powers of the United Nations.¹¹¹

The weakness of the Philippine theory is that after Japan's renunciation of the Spratlies, the islands in theory would become a *terra nullius* subject to occupation by China or any other states. Moreover, none of the other contracting parties of the 1951 San Francisco Japanese Peace Treaty has indicated its support for this theory, and the alleged "trusteeship" simply did not exist.¹¹²

Conclusion

While both China and the RVN referred to a number of historical facts, some of which date back several hundred years, it appears that only those events that took place since the 1930s are relevant to the analysis of the present dispute. This dispute originated in the early 1930s when France, in behalf of its then protectorate Vietnam, asserted claim to the Paracels and the Spratlies. Assuming that France did validly establish sovereignty over these islands for Vietnam in the 1930s, one can hardly understand why it neither tried to take them over after the Japanese defeat in 1945 nor protested China's taking them over in 1946. The only logical reason to explain this must be that France either considered its acquisition of the Paracels and the Spratlies as invalid in international law or, if it were valid at all, decided to relinquish its claim. Therefore, even if one disregards the other Chinese arguments to support its claim to the Paracels and the Spratlies and assumes that China did not have a valid claim in the 1930s, it could still establish its sovereignty over them in 1946. It was not until 1956 that the RVN began to assert its claim to them. During the period from 1946 to 1956, except for a short statement made at the 1951 San Francisco Peace Conference, neither France nor Vietnam did anything to challenge the Chinese sovereignty over the islets. By that time, it appears that China had already taken possession of them, established administration there, and thereby acquired their sovereignty by occupation.¹¹³

In view of the foregoing analysis, it appears that China has a stronger claim to the sovereignty of the Paracels and the Spratlies than does Vietnam.

Apart from the legal aspect, this dispute raises two practical questions. The first question surrounds the prospect for the parties to settle the dispute as a purely legal issue, while the second concerns the dispute's possible impact on the development of marine resources in the two China seas. Neither party admits the existence of any legal dispute, because each party regards the islets in question to be indisputably its own. Furthermore, one of the parties (PRC) strongly prefers direct negotiation to other means of settling international disputes. These attitudes may in fact foreclose the prospect of third-party involvement in the present dispute, be it in the form of international litigation or arbitration. The parties' reliance on force may have stemmed from the belief that it was the only practical means to achieve a breakthrough in what would have otherwise been an endless legal controversy. These tactics were undoubtedly a concern to Japan, who is a party to the other territorial dispute in which China is at present embroiled -- namely, over the ownership of the Tiaoyut'ai-Senkaku Islands.

With regard to the second question, resources development of the troubled waters will require sea-boundary agreement, which will, in turn, require settlement of the territorial ownership of the islets.

Even if the territorial dispute is settled to the satisfaction of the parties involved, a further problem may arise as to whether the numerous uninhabited coral islets deserve to be used as base points in drawing median lines or measuring 200 mi or even applying the archipelago theory. In the South China Sea, as in the East China Sea, nowhere does the distance from one piece of land to another exceed 400 mi. The coastal states have yet to agree on their sea boundaries. Because of the similar nature of the disputes in the two China seas, therefore, what happens in one with respect to legal and territorial issues is likely to affect what happens in the other.

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Postscript

After this paper had been typeset, the Republic of Vietnam published a *White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands* on February 14, 1975. There is, however, nothing in this paper to compel significant changes in our conclusions.

NOTES

1. The background and progress of the military actions taken by the PRC, the RVN, and the Republic of China (ROC) were: Reportedly at the recommendation of the National Petroleum Board, the RVN Interior Ministry placed 11 islets of the Spratly group under the jurisdiction of Phuoc Tuy Province in September 1973, in order to preempt the continental shelf between the Spratlies and the mainland of Vietnam. In response to this incorporation by the RVN, the PRC made a strong protest on January 11, 1974, to the effect that "the Chinese Government will never tolerate any infringement on China's territorial integrity and sovereignty by the Saigon authorities" (*Peking Review*, no.3 [January 11, 1974], p. 3). The RVN charged that Chinese nationals landed on three islets of the Paracels (*New York Times*, January 17, 1974, p. 5) and, on January 17, 1974, p. 5) and, on January 17, challenged the PRC's "indisputable sovereignty" over the three islets by landing naval detachments on Robert Island (Kan-ch'üan in Chinese and Cam Tuyen in Vietnamese). They drove out the Chinese and removed the PRC flag (*New York Times*, January 19, 1974, p. 3). The RVN forces also landed on Money Island (Chinyin-tao) and, on January 19, tried to land on Duncan Island (Shenhang-tao), but were repulsed from the entire area by the PRC forces (*Jen-min jih-pao* [People's Daily], Peking, January 20, 1974, p.1; *New York Times*, January 20, 1974, p.1, and January 21, 1974, p.2).

After their defeat in the Paracel area, the RVN forces moved southward and occupied several uninhabited islets in the Spratly group (*New York Times*, February 1, 1974, p. 8). This prompted the ROC to make

a strong protest against the RVN on February 7 and to reaffirm Chinese sovereignty over the Spratlies (*Free China Weekly*, Taipei, February 10, 1974). On the same day, the ROC garrison on Itu Aba Island (T'ai-p'ing-tao), the largest island in the Spratlies and also the operational base of the ROC in the area, was instructed to strengthen its defense posture in the area (*Chung-yang jih-pao* [Central Daily News], Taipei, March 6, 1974, p. 2, international edition). It was also reported that four ROC naval vessels had been dispatched to the Spratly area but that no encounter took place with the RVN (*Nan-yang shang-pao* [South Ocean Commercial News], Hong Kong, February 13, 1974). Subsequently, the RVN was reported to be building combat bunkers on several islets in the Spratlies and shipping tons of ammunition, fuel, and food there (*New York Times*, March 12, 1974, p. 9).

2. For example, see the statement of the PRC delegate at the thirtieth meeting in Tokyo of the UN Economic Commission for Asia and Far East (ECAFE) on March 30, 1974 (*Peking Review*, no. 14 [April 5, 1974], p.8); the report of a Taiwanese visitor who describes the defense readiness of the ROC forces on Itu Aba (*Chung-yang jih-pao*, April 25, 1974, p. 1, or *Hsin-wen t'ien-ti* [Newsdom], Hong Kong, no. 15 [April 13, 1974]); the statement of the PRC delegation at the fifty-sixth session, UN Economic and Social Council, New York, May 6, 1974, as reported in *Foreign Broadcast Information Service* (FBIS), May 8, 1974, pp. A10-11; and the exchanges between the PRC and RVN delegations at the second session, UN Law of the Sea Conference, Caracas. June 20 - August 29, 1974 (UN Doc. A/Conf.62/SR.22, July 3, 1974, pp. 4-5; SR.25, July 4, 1974, p. 8; and SR.26, July 8, 1974, 0.23).

3. Vietnam became a French protectorate in 1884 and was occupied by Japan during World War II. On September 2, 1945, Ho Chi Minh, leader of the nationalist resistance movement then known as the Vietminh, established the so-called Democratic Republic of Vietnam (DRVN or North Vietnam). After France returned to Vietnam in 1946, the Vietminh initiated military action against France on December 19, 1946, after their negotiation failed. In 1949, France recognized Bao Dai, the former Emperor of Annam (Vietnam), as chief of state of an independent State of Vietnam within the French Union. Treaties conceding full Vietnamese independence in association with France were signed in Paris on June 4, 1954. On July 20-21, 1954, the Geneva Agreements provided for a temporary division of Vietnam along the 17th parallel into two separately administered zones -- Communist DRVN in the north and the State of Vietnam in the south (see Richard P. Stebbins and Alba Amoai, eds., *Political Handbook and Atlas of the World*, 1970, p. 413). By a referendum held on October 23, 1955, the State of Vietnam abolished its monarchy to adopt a republican system called the Republic of Vietnam (RVN) (see *Results of Referendum in Viet-Nam*, 33 *Department of State Bulletin*, no. 854 [November 7, 1955], p. 760). The ROC was established in 1912, but since late 1949, territory under its effective control has been limited primarily to Taiwan and other small islands. The PRC was established on October 1, 1949.

4. For an informative summary of this dispute, see *Tokino Ugoki*, a Japanese language bimonthly on current topics, edited by the Office of the Prime Minister, "Hokpō Ryōdo Mondai" [Problems of the northern territory], no. 431 (August 15, 1973), pp. 14-19; and *Hokpō Ryōdo* [Northern territory], Office of the Prime Minister, Tokyo, March, 1973.

5. For the Korean position, see Hwang Sang-ki, *Tokdo Ryungyukwon Munje* [Ownership problem of Tokdo] (Seoul: Kunlo Haksangsa, 1965); and for the Japanese position, see Taijūdo Kanae, "The Dispute between Japan

and Korea Respecting Sovereignty over Takeshima," *Japanese Annual of International Law*, vol. 12 (1968), pp. 1-17.

6. For the Chinese position, see Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study*, vol. 1 (Princeton, N.J.: Princeton University Press, 1974), pp. 346-353; and Hungdah Chiu, ed., *Hsien-tai kuo-chi fa* [Modern international law], vol. 1 (Taipei: San-min Shu-chü, 1973), pp. 355-361. For the Japanese position, see Okuhara Toshio, "The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf," *Japanese Annual of International Law*, vol. 15 (1971), pp. 97-106; for collection of general references to the Japanese argument, see *Okinawa*, a monthly on Okinawa in Japanese, no. 56 (Tokyo: Nampō Dōhō Engokai, March 1971); for the official position of the government, see the statement of March 8, 1972, by the Foreign Ministry, an English translation of which may be found in Cohen and Chiu, vol. 1, pp. 351-352; and for a collection of dissenting opinions, see Inoue Kiyoshi, *Senkaku Retto* [The Senkaku Islands] (Tokyo: Gendai Hyoronsha, 1972).

7. *Oil and Gas Journal*, May 21, 1973, p. 69, and July 16, 1973, p. 8 and *Washington Post*, December 10, 1973, p. A16. Eleven more companies obtained concessions for nine more tracts in May 1974. For further details, see *FBIS*, May 23, 1974, p.L10, and May 31, 1974, pp. L7-8; and *Nihon Keizai Shinbun*, a Japanese language economic daily, August 18, 1974.

8. Central News Agency (CNA) from Saigon, September 24, 1973.

9. *Peking Review*, no. 3 (January 18, 1974), p. 3.

10. *FBIS*, September 10, 1973, p. P2.

11. *FBIS*, September 10, 1973, p. P2, and September 26, 1973, p. K1.

12. *FBIS*, October 31, 1973, p. C9, and December 27, 1973, p. C4; and *Ocean Science: On Station* (Washington: Nautilus Press, January 4, 1974).

13. For the distribution of seabed oil concession blocks, see *Europa Yearbook: Far East and Australia 1973* (London: Europa Publishing Co., 1973), p. 389; and *Oil and Gas Journal*, July 16, 1973, p. 80. For details on the discovery of oil off Thailand and South Vietnam, see *Nihon Keizai Shinbun*, September 2 and September 7, 1974, respectively.

14. For details on the exploration of the South China Sea continental margin, see M. L. Parke, K. O. Emery et al., "Structural Framework of the Continental Margin in the South China Sea, *Technical Bulletin*, Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas, UN Economic Commission for Asia and Far East (UN ECAFE, CCOP Tech. Bull.), vol. 4 (June 1971), pp. 103-142 (reprinted from *Bulletin, American Association of Petroleum Geologists*, vol. 55 (1971), and also reproduced in *Collected Reprints*, Contribution No. 2543, Woods Hole Oceanographic Institution).

15. Cheng Tzu-yüeh, *Nan-hai chu-tao ti-li chih-lueh* [General records of the geography of southern islands] (Shanghai: Shang-wu ying-shu-kuan, 1948).

16. The Pratas Reef (Tungshal ch'un-tao) consists of 2 banks and an island; a fishermen's settlement was once reported on the island (Cheng Tzu-yüeh [General records], pp. 26, 83). The Macclesfield Bank (Chung-sha ch'un-tao) consists of 24 shoals, 3 reefs, and 2 banks, all of which are under water. This archipelago runs from northeast to southwest and is about 75 mi long and 35 mi wide at its widest point (Cheng Tzu-yüeh [General records], pp. 37, 85). The Paracel Islands (Hsisha ch'un-tao) is an archipelago consisting of 15 islands, 5 reefs, 5 banks, 4 sands, and a rock, all clustered in three groups. The largest

island (in the four archipelagoes of the South China Sea), Woody Island (Ying-hsing-tao), situated on the northeast, is about 1,950 m long and 1,350 m wide. The 3 islands on which the military clash took place between the PRC and the RVN in January 1974 are much smaller than Woody Island, being only 800, 400, and 1,400 m long (Cheng Tzu-yüeh [General records], pp. 28, 30, 32-33, and 83). The Spratly Islands (Nansha ch'ü-tao), the largest of the four archipelagoes, consists of 26 reefs, 21 shoals, 10 banks, 5 islands, and 3 cays. This archipelago covers a wide expanse of the sea between Vietnam and the Philippines. Itu Aba Island (Taip'ing-tao), about 1,270 m long and 350 m wide, is the largest, as well as the most important, in the Spratlies; it was used by the Japanese navy during World War II. Storm (Spratly) Island (Nanwei-tao), which is about 500 m long and 300 m wide, probably comes next in strategic importance (Cheng Tzu-yueh [General records], pp. 39, 45, 52, 87). Both Itu Aba and Storm islands (see Figure 1) were included in the 11 islands which the RVN incorporated into Phuoc Tuy Province in September 1973, and were also referred to in the PRC protest of January 11, 1974. These details may be compared with those given by Ch'en Tung-k'ang, *Wuokuo ti Nanhai Chu-tao* (Peking: Chungkuo Chingnien Ch'upanshe, 1962). An English translation of this work is: *Our Country's South Sea Archipelagoes*. Joint Publication Research Service (JPRS) no. 18-424 (U.S. Department of Commerce, March 28, 1963). For an almost exhaustive list of literature of the four groups of islands, see *Chungkuo Nanhai Chuch'üntao Wenhsien Tzuliao Chanlan* [Exhibition of literature on the four archipelagoes of the South Sea], a brochure on the exhibition given by the Taiwan Branch of the National Central Library of China, Taipei, May 10-14, 1974.

17. See note 14.

18. The description of the Vietnamese position here is based mainly on the following eight papers made available by the Embassy of Vietnam in Washington, D.C.: *Press Release*, vols. 5 and 6 (March 16, 1959); *Foreign Ministry Note*, on 1858/AC/TBD (April 10, 1971), to the Embassy of Malaysia in Saigon; *Press Release*, no. 3/74 (January 17, 1974); *Press Release*, no. 4/74 (January 21, 1974); *Press Release*, no. 5/74 (January 21, 1974); *Fact Sheet*, no. 2/74 (January 28, 1974); *Vietnam Bulletin*, vol. 9, no. 4. Special Issue on the Paracels Incident (February 8, 1974); and *Fact Sheet*, no. 04/74 (February 15, 1974). The source of historic claims or other facts as given in these Papers need to be more precisely identified for them to be usable in analysis.

19. *Fact Sheet* (January 28, 1974), p. 2.

20. *Press Release* (March 16, 1959), p. 4.

21. See Republic of Vietnam, Ministry of Foreign Affairs, *White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands* (Saigon, 1975), pp. 31-33.

22. *Press Release* (March 16, 1959), p. 5.

23. *Ibid.*, p. 6. However, China argued that it could not find any records of the case in its files. The RVN or France did not come forward with any evidence to establish the existence of the alleged case. See the summary of the Chinese note in *Wai-chiao pu kung-pao* [Gazette of the Ministry of Foreign Affairs], vol. 6, no. 3 (July - September 1933), pp. 209-210.

24. *Ibid.*, p. 7. The RVN's assertion here is tenuous. China presented evidence showing that, in 1921, Japanese merchants induced a Chinese named Ho Jui-nien to apply for a permit to establish a firm by the name of the Hsi-sha ch'un-tao shih-yeh kung-szu [Paracel Islands Industrial Company]. After the Chinese government granted Ho's government the

right to explore the island's resources, it secretly assigned the right to the Japanese merchants. In 1927, in view of the growing anti-Japanese movement in Kuangtung Province, the Japanese merchants quietly withdrew from the islands. For details of the Japanese exploration of the islands' resources under cover of the Chinese company, see Shen P'eng-fei, ed., *Tiao-ch'a Hsi-sha [Sisha] ch'un-tao pao-kao-shu* [Reports on the investigation of the Paracel Islands] (n.p., 1928), pp.36-51.

25. *Press Release* (January 17, 1974), p. 3.

26. *Ibid.*

27. *Conference for the Conclusion and Signature of the Treaty of Peace with Japan, San Francisco, California, September 4-8, 1951, Record of Proceedings* (Washington, D.C.: Government Printing Office, 1951), p. 263; and for other references to the Paracels and the Spratlies, see *Press Release* (January 17, 1974), pp. 119, 314. Neither the PRC nor the ROC participated in the peace conference; see notes 70 and 71 below, and the accompanying texts.

28. *Foreign Ministry Note* (April 10, 1971), p. 3.

29. *Press Release* (January 17, 1974), p. 3.

30. According to the Chinese version of the event, the French flag was planted on Storm (Spratly, or Nanwei in Chinese) Island, but after the French left the island, Chinese fishermen from Hainan Island replaced it with a Chinese flag. See Ling Ch'un-shen, "The Geography of the French Occupied Small Islands in the South Sea," *Fan-chih yüeh-k'an* [Geography Monthly], vol. 7, no. 4 (Nanking, April 1, 1934), p. 2.

31. *Press Release* (March 16, 1959), pp. 9-12. Although the RVN claims that only Japan protested against the French decree of July 21, 1933, there is proof that China also protested. For the Substance of the Chinese protest, see Cho Min, "The Triangular Relationship Among China, France and Japan and the Question of Nine Islands in South Sea," *Wai-chiao yüeh-pao* [Diplomacy Monthly], vol. 3, no. 3 (Peiping [Peking], September 15, 1933), p. 78; Cheng Tzu-yüeh [General records], p. 80; and notes 58 and 59 below and the accompanying texts.

32. *Press Release* (March 16, 1959), p. 2; and R. Hughes, *Far Eastern Economic Review*, October 22, 1973, p. 27.

33. *Press Release* (March 16, 1959), p. 12 and *Fact Sheet* (February 15, 1974), p. 4.

34. Translated from the Chinese and annotated by Friedrich Hirth and W. W. Rockhill under the title *Chau Ju-kua: His Work on the Chinese and Arab Trade in the Twelfth and Thirteenth Centuries, Entitled Chu-fan-chi* (St. Petersburg: Printing Office of the Imperial Academy of Sciences, 1911).

35. *Ibid.*, pp. 175-190, on Hainan Island.

36. *Ibid.*, p. 176. A *li* is about 1/2k or 1/3 mi.

37. *Ibid.*, attached map.

38. *Ibid.*, p. 185, note 6. Hirth and Rockhill rightly regarded "ch'i-chou" (seven islands) as the Paracel Islands.

39. The map was later printed in Mao Yuan-i, *Wu-pei chih* [Records of military art and science], vol. 240 (1621), pp. 1-24. The Paracels and Spratlies appear in a map on p. 11 or this work. For a study of Cheng Ho's navigational route through the Paracels and the Spratlies, see Chou Yü-sheng, *Cheng-ho hang-hai kao* [A study of Cheng Ho's navigation], 213, 245-246 (Taipei: Hai-yun ch'u-pan she, 1959). Mao Yuan-i's map was reprinted in Chou Yü-sheng, pp. 3-48 (Paracels and Spratlies at 21).

40. Huang Chung (1474-1553), *Hai yu* [On the sea], vol. 2, pp. 1-2, in Chou Hsin-ju, ed., *Fen-hsin-ko ts'ung-shu* (1827).
41. See *Chung-yang jih-pao*, June 11, 1956, p. 6.
42. Cheng Tzu-yüeh [General records], p. 15.
43. *Ibid.*, p. 43.
44. *The China Sea Pilot*, 2nd ed., vol. 3, *Western Side of the China Sea, Singapore Strait to Hong Kong* (London: Published for the Hydrographic Department of the Admiralty of His Majesty's Stationery Office, 1923), cited from Shao Hsun-cheng, "Chinese Islands in the South China Sea," *People's China*, no. 13 (Peking, 1956), p. 27.
45. See *Hsien-chen Kuang-tung fen-hsien ming-hsi-tu* [Pocket detailed country map of Kuang-tung Province] (Shanghai: Pai-hsin shu-tien, 1941).
46. See the map in Hu Han-yung, "The Southern Sea Islands coveted by France and Japan," *Wai-chiao p'ing-lun* [The foreign affairs review], vol. 3, no. 5 (May 1934).
47. This was disclosed by the Kuangtung Provincial government in 1933. See Cho Min, "The Triangular Relationship," p. 82, note 4.
48. *Hertslet's China Treaties*, 3rd ed., vol. 1 (London: Printed for His Majesty's Stationery Office, by Harrison and Sons, 1908), p. 315. Before 1884, Vietnam was a tributary state of China.
49. See Shao Hsun-cheng, "Chinese Islands in the South China Sea," p. 26 (Spratly Islands); Lu Tung-ya, "What [We] Should Know About the Hsisha Islands," *Wai-chiao p'ing-lun* [The Foreign Affairs Review], Shanghai, vol. 2, no. 10 (October 1933), pp. 64-65 (Paracel Islands); and the note from the ROC legation to the French government dated July 26, 1932, in *Wai-chiao-pu kung-pai*, vol. 6, no. 3 (July-September 1933), p. 208.
50. See Cheng Tzu-yüeh [General records], pp. 70-73; and Shao Hsun-cheng, "Chinese Islands in the South China Sea," p. 25.
51. See "On Li Chun's Patrol of the Sea," *Kuo-wen chou-pao* [National News Weekly], vol. 10, no. 33 (August 21, 1933), p. 6. Recently a Hong Kong magazine published a photograph, presumably supplied by the PRC, showing a stone marker on an islet of the Paracels. The Chinese inscription on it says "Hsun-yueh chi-nien" [In commemoration of inspection], and is dated 1902 (*Ch'i-shih nien-tai* [The Seventies], no. 3 [March 1973], p. 39). The exact year of this inspection cannot be determined by the authors.
52. See *Wai-chiao-pu kung-pao*, vol. 6, no. 3 (July-September 1933), p. 208.
53. *Ibid.*, p. 210.
54. See Shen P'eng-fei [Reports on the investigation of the Paracel Islands].
55. See summary of the French note in *Wai-chiao pu kung-pao*, vol. 6, no. 3 (July-September 1933), pp. 208-209.
56. See summary of the Chinese note in *ibid.*, pp. 209-210. Information on the date of delivery of the note is based on unpublished material in the possession of the authors.
57. See Hsu Kung-su, "The Incident of French Occupation of Nine Small Islands," *Wai-chiao p'ing-lun*, vol. 2, no. 9 (September 1933), pp. 13-14, 21.
58. *Wai-chiao-pu kung-pao* vol. 6, no. 3 (July-September 1933), p. 219.
59. Cheng Tzu-yüeh [General records], p. 80. The date of the Chinese note was not reported in Cheng's book, nor is it mentioned in the "Memorandum on Four Large Archipelagoes of the Republic of China in South Sea," issued by the ROC Ministry of Foreign Affairs in February

1974. See *Lien-ho-pao* [United Daily News], overseas edition, February 25, 1974, p. 3.
60. Ohira Zengo, "The Acquisition of Shinnan Guntō and the International Law of Occupation," *Gaikō Jihō* [Diplomatic Times], Tokyo, vol. 91, no. 5 (September 1, 1939), pp. 92-103.
61. Based on unpublished material in the possession of the authors.
62. The exact date of delivery of the note cannot be determined.
63. *Time*, July 18, 1938, pp. 16-17.
64. *Kampō* [Official gazette], Office of Governor-General, Taipei, no. 3683 (April 18, 1939), p. 720.
65. Cheng Tzu-yüeh [General records], pp. 80-81.
66. Order Chu No. 442, cited in "Memorandum on Four Large Archipelagoes," ROC Ministry of Foreign Affairs (February 1974).
67. For a list of these names, see Cheng Tzu-yüeh [General records], pp. 83-94 and "Memorandum on Four Large Archipelagoes."
68. Recently, in early 1975, the RVN alleged that France did protest and also did occupy the Pattle Island. See *White Paper*, p. 43.
69. United Nations Treaty Series (UNTS), vol. 136, p. 48.
70. *Chung-hua jen-min kung-ho-kuo tui-wai kuan-hsi wen-chien-chi* [Collection of documents relating to the foreign relations of the People's Republic of China], vol. 2, 1951-1953, (Peking: Shih-chieh chih-shih ch'u-pan-she, 1958) p. 32; English translation cited from Shao Hsun-cheng, "Chinese Islands in the South China Sea," p. 27.
71. UNTS, vol. 138, p. 38. The treaty came into force on August 5, 1952. At the time of the negotiation of the territorial article, the Japanese delegates insisted that the Article should include only those areas related to the Republic of China. The Chinese delegates then explained that the Paracel and Spratly islands were Chinese territory and should therefore be included in Article 2. See Minutes of Sino-Japanese Peace Negotiation dated March 5, 1952, in *Chung-hua min-kuo tui-jih ho-yueh* [Peace treaty between the Republic of China and Japan] (Taipei: Chung-hua min-kuo wai-chiao wen-t'i yen-chiu hui, 1966), pp. 52, 53. Japan apparently accepted the Chinese position. See the Third Draft on the "Peace Treaty Between the Republic of China and Japan" submitted by Japan (March 28, 1952). *Ibid.*, p. 190.
72. Statement made by the ROC Foreign Ministry on June 10, 1956, summarized in "Vietnamese Claim of Sovereignty Refuted," *Free China Weekly*, June 26, 1956, p. 3.
73. See note 32 above, and also *Chung-yang jih-pao*, May 31, 1956, p. 1 and June 6, 1956, p. 1. At the First Flight Conference for the Pacific Area of the International Civil Aviation Organization, held on October 27, 1955, at Manila, a resolution (No. 24) was adopted that requested the ROC to supply the observation of high-altitude weather conditions of the Spratly Islands four times a day. At that time, French delegate Momhez, then representing Vietnam, did not question Chinese sovereignty over the Spratly Islands. Nor did the Vietnamese government raise the issue after the conference. In 1960, the ROC expanded its weather station on Itu Aba Island and broadcast the ground and high-altitude weather conditions of the Spratly Islands four times a day, in accordance with the resolution of the above conference. See "Memorandum on Four Large Archipelagoes," ROC Ministry of Foreign Affairs (February 1974).
74. "Chinese Ships Land Unit on Taiping Island," *Free China Weekly*, July 17, 1956, p. 2.
75. *Papers Relating to the Foreign Relations of the United States, 1898* (Washington, D.C.: Government Printing Office, 1901), pp. 832-833.

For the CNA article entitled "Irrefutable Evidences Showing the Nansha Islands Belong to our Country," see *Chung-yang jih-pao*, May 29, 1956, p. 1.

76. *Chung-hua jen-min kung-ho-kuo tui-wai kuan-hsi wen-chien-chi*, vol. 4, 1956-1957, pp. 61-62.

77. See note 72 above.

78. "Infringement of Nansha Islands Protested," *Free China Weekly*, September 4, 1956, p. 4. On August 30, 1956, the authoritative *People's Daily* in the PRC also carried an article by "Observer," the pseudonym for a senior Communist official, denouncing the Vietnamese intrusion on the Spratly Islands. "Peking, Tientsin Papers Condemn Diem Intrusion on Nansha Islands," NCNA, Peking, August 30, 1956, in *Survey of China Mainland Press (SCMP)*, no. 1363 (September 5, 1956), pp. 2728.

79. "South Vietnam Troops Illegally Occupy Chinese Island," NCNA, Peking, March 6, 1957, in *SCMP*, no. 1486 (March 11, 1957), p. 22.

80. "Declaration on China's Territorial Sea," *Peking Review*, vol. 1, no. 28 (September 9, 1958), p. 21.

81. "Statement of the Ministry of Foreign Affairs on the Encroachment upon Our Territorial Sovereignty and the Capture of Our Fishermen by the South Vietnamese Authorities," February 27, 1959, in *Chung-hua jen-min kung-ho-kuo tui-wai kuan-hsi wen-chien-chi*, vol. 6, 1959, pp. 27-28.

82. "Further Statement by the Ministry of Foreign Affairs of the People's Republic of China Protesting the Illegal Acts of the South Vietnamese Authorities on the Encroachment of Our Territorial Sovereignty, Capture and Mistreatment of Our Fishermen," April 5, 1959, *ibid.*, pp. 37-38.

83. "Talks of the Spokesman of the Ministry of Foreign Affairs on the Question of Encroaching Upon the Territorial Airspace of Our Country by the American Military Aircraft," May 13, 1960, in *Chung-hua jen-min kung-ho-kuo tui-wai kuan-hsi wen-chien-chi*, vol. 7, 1960, p. 154.

84. See Jen-min jih-pao t'u-shu kuan pien, *I-chiu liu-san nien Jen-min jih-pao so-yin* [Index of 1963 *People's Daily* (Peking: Hsin-hua shu-tien, 1965)], pp. 288-289. Nine of the warnings were in reference to the intrusion of airspace, one related to the sea area of the Paracels, and another to the territorial sea of the Paracels.

85. See "Major Events" in *I-chiu ch'ierh Chung-kung nien-pao* [1972 Yearbook on Chinese Communism] (Taipei: Institute for the Study of Chinese Communist Problems, 1972), p. X-13.

86. See "Memorandum on Four Large Archipelagoes," ROC Ministry of Foreign Affairs (February 1974).

87. *Chung-yang jih-pao*, international edition, September 27, 1972, p. 1.

88. The statement was made at the fourth session of the conference held at Manila in November 1964 and the sixth session held at Teheran in October-November, 1970. See "Memorandum on Four Large Archipelagoes," ROC Ministry of Foreign Affairs (February 1974).

89. See ROC Foreign Ministry statement of February 10, 1974, in *Free China Weekly*, February 10, 1974, p. 1.

90. On July 12, 1971, ROC Foreign Minister Chow Shu-kai made a diplomatic representation concerning Chinese sovereignty over the Spratly Islands to the Philippine foreign minister at Asian-Pacific Council conference held at Manila (*Chung-yang jih-pao*, international edition, July 12, 1971, p. 1). See also "ROC Note to Manila Re-asserts Claim Over Spratly Islands," *FBIS*, February 12, 1974, p. B1, and "Foreign

Ministry Protests Saigon's Claim to Nanshas," *FBIS*, February 8, 1974, p. B1.

91. *FBIS*, August 12, 1974, p. B2. In this regard, it may also be noted that "over the past ten years or so postal services [of the PRC] have been extended from Yunghsing Island to PLA [People's Liberation Army] units and the militiamen stationed on nearby islands, while the telephone system encompasses other islands besides Yunghsing Island (FBIS, September 25, 1974, p. H2).

92. The RVN claimed that China had renounced its claim to the Paracels "a long time ago," citing the *Bellona* and the *Imezi Maru* shipwrecks case of 1895 and 1896 as evidence of Chinese renunciation. See *Press Release*, January 21, 1974, p. 5; for the story of the case, see *ibid.*, pp. 9-10. The existence of such a case was challenged by China, see note 23 above. Even assuming the alleged case to be true, it is still doubtful whether such an act of the local officials may be treated as an act of renunciation on the part of China with respect to the Paracels.

93. See note 18 above, and the accompanying text.

94. D.P. O'Connell, *International Law*, vol. 1, 2nd ed. (London: Stevens & Sons, 1970), p. 416.

95. Olivier A. Saix, "Iles Paracels," *Terre Air Mer, La Geographie*, vol. 60, nos. 5 and 6 (Paris, November-December 1933), p. 240.

96. *Ibid.*, p. 241.

97. See notes 25 and 55 above, and the accompanying text.

98. Majorie M. Whiteman, *Digest of International Law*, vol. 3 (Washington, D.C.: Government Printing Office, 1964), pp. 487-488.

99. Exchange de lettres relatif a la releve des troupes Chinoises par les troupes Francaises en Indochine du nord, February 28, 1946. *Treaties between the Republic of China and Foreign States, 1927-1961* (Taipei, 1963), p. 150.

100. See Cheng Tzu-yüeh [General records], pp. 80-81, and note 68 above.

101. See Cheng Tzu-yüeh [General records], pp. 83-94.

102. See note 71 above, and the accompanying text.

103. However, at the time of signing the treaty (September 8, 1951) and depositing its instrument of ratification (June 18, 1952), Vietnam did not attach any statement to clarify its position on the Paracels and the Spratlies.

104. L. Oppenheim, *International Law*, 8th ed., vol. 1 (London: Longmans, Green, 1955), p. 576.

105. See note 48 above, and the accompanying text.

106. See notes 31 and 57 above, and the accompanying text.

107. See note 59 above, and the accompanying text.

108. O'Connell, *International Law*, p. 418.

109. See notes 38, 39, and 40 above.

110. A Chinese scholar pointed out in the 1930s that "even if there were a few Chinese from Hainan [Island] residing on the [Spratlies], whether this fact might be the basis of our country's occupation of the islands is questionable in international law." Lu Tung-ya, "What [We] Should Know About the Hsisha Islands," p. 73. On the other hand, another Chinese scholar took a different view by saying that "it is questionable whether a land having human beings residing on it may be characterized as a so-called *terra nullius* in international law and acquired by another state [France] through occupation." Hsu Kung-su, "The Incident of French Occupation of the Nine Small Islands," p. 21. For a similar view, see Ling Ch'un-shen, "The Geography of the French

Occupied Small Islands in the South Sea," p. 4.

111. *Situation in Spratlies Being Watched "With Interest," FBIS*, February 4, 1974, p. P1. The same source indicated that the Philippines also occupied three islets in the Spratlies. See also, *Nan-yang shang-pao* February 7, 1974, citing an Associate Press (AP) release from Manila. On February 11, 1974, the ROC sent a note to the Philippines reaffirming Chinese sovereignty to the Spratlies. *ROC Note to Manila Reasserts Claim Over Spratly Islands*, *FBIS*, February 12, 1974, p. B1.

112. It should be noted that a similar theory was made with respect to other territories which Japan renounced in the 1951 Peace Treaty, such as Taiwan and Penghu. Both the ROC and the PRC governments and their writers have refuted this theory on various legal grounds. For a discussion of this question, see Hungdah Chiu, ed., *China and the Question of Taiwan: Documents and Analysis* (1973), pp. 127-141, and the materials cited therein.

113. See Oppenheim, *International Law*, vol. 1, pp. 557-558.

THE SOUTH CHINA SEA DISPUTES:
WHO OWNS THE ISLANDS
AND THE NATURAL RESOURCES?

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Introduction

The South China Sea has nearly 200 uninhabited islands that are hardly visible on an ordinary map.¹ Most of them are coral reefs that cannot support human habitation. Until recently they had been little used by man, except by fishermen and sailors in need of shelters or landmarks. In recent decades, countries in the region have placed claims on them at one time or another. Two major claimants, China and Vietnam, refer to these "flyspecks" as "the sacred territory of our fatherland," and are prepared to risk war over them, as happened in 1974.

Over territorial issues, feelings run high and senses low in East Asia, partly for historical reasons but, in the case of the present dispute, for other important reasons as well. The parties rightly feel that although the islands have only negligible physical value in themselves, their owner will be entitled to enormous wealth from the sea, including oil and gas. In fact, the Philippines reported discovery of oil and gas off the Reed Bank in early 1976 (Figure 1).²

The location of the islands is also highly strategic, because merchant marines, oil tankers, and major navies have to use the sea route here, which links East Asia with Africa and Europe. Hence, to the countries of the region and the major powers of the world alike, it is a matter of vital importance into whose hands the islands will ultimately fall, whether into the hands of a small country without global ambitions or those of a major power with the world's third largest navy.

Thus, the present study involves territorial ownership of uninhabited midocean islets as well as natural resource jurisdiction in the same waters. These two basically separate issues are so closely interlocked that the one has to be settled first for the other to be negotiated.

In January 1974, the People's Republic of China and what was then South Vietnam resumed a long-standing dispute over who owned the Paracels and the Spratlies, the two groups of tiny islands situated in the middle of the South China Sea. When each party began to repeat its earlier claims, strongly warning the other to leave the islands alone, tension built up to the point of clash. Within a week, their armed forces engaged in a fierce battle to gain control of the Paracels. In the face of devastating Chinese attacks, the Vietnamese troops collapsed within two days, suffering heavy casualties.³ This dramatic incident came to an end when, soon afterward, China released from its mainland 48 Vietnamese prisoners through the International Red Cross.⁴

With the Paracels firmly in its hands, China instantly moved on to consolidate its claims on that group of islands. Ancient relics

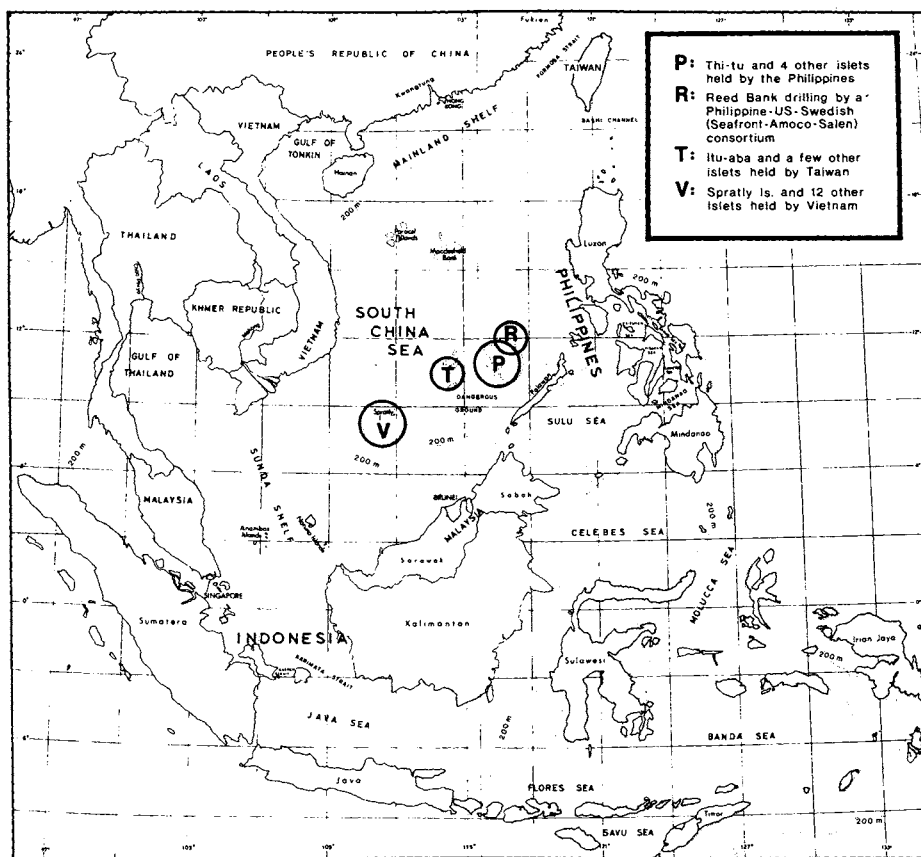


Figure 1: The Spratly Islands under divided control.

unearthed at "a randomly selected site" on one of the islands are presented as a proof that Chinese had been active there for centuries. A four-story building erected on the main island now houses the Revolutionary Committee, whose jurisdiction includes the Spratlies, the other group of islands that "have not yet been returned to the hands of the Chinese people." Military installations have been expanded, and the fishing industry has also been modernized, with the construction of new port facilities. Since the spring of 1975, China also places some sea products, such as turtles and tunas, from the Paracels on display at the biannual (spring and autumn) sessions of the Canton Trade Fair.⁵

The Chinese argue that, in an act of self-discipline, it simply resumed control of a piece of its own territory. Had South Vietnam won the battle, it would have made exactly the same argument. Conceding its defeat by China, however, South Vietnam hastened to add that "the temporary loss of physical control over a territory does not mean the relinquishing of a legitimate right."⁶ To prepare itself better for a resumption of hostilities, Saigon also began to fortify five islands in the Spratlies 300 nautical miles south of the Paracels within weeks of the first clash.⁷ Strictly speaking, therefore, the armed conflict of 1974 has not helped to improve the prospects for settling the dispute as a whole. On the contrary, the outlook has been greatly complicated by the fall Saigon to Hanoi in April 1975 and by the winds of change that have since been blowing throughout Southeast Asia.

It is also necessary to recall how Hanoi reacted at the outbreak of the Paracel incident in 1974. In relation to China over the territorial issue, the interests of Hanoi and Saigon were identical. Neither of them could allow their internal strife to prejudice the territorial integrity of their country as a whole. On the other hand, for the conduct of a prolonged civil war against the other half of its own nation, Hanoi needed what support it could enlist from China. Caught between its southern compatriots and northern comrades, therefore, Hanoi cautiously evaded the issue by saying that a negotiated settlement was preferable to the use of force.⁸ But, since April 1975, when Saigon collapsed and Hanoi took over the burden of argument against China, the dispute has become an extremely delicate political issue between the two socialist neighbors.

Since, on the Vietnamese side, Hanoi -- not Saigon, now renamed Ho Chi Minh City -- has become the principal party to the dispute, it is important to take note of its attitude toward the issue. A number of points should be noted. First, soon after the South was "liberated," the North Vietnamese placed under their control that part of the Spratlies that had been held by the South Vietnamese forces.⁹

Second, signs of strain between Hanoi and Peking began to appear in late September 1975, when Vietnamese Workers' Party Secretary Le Duan visited China. In a "cordial, fraternal and friendly atmosphere," agreements were signed to facilitate interest-free loans and a supply of goods to Vietnam in 1976, but no joint communique was issued in the end, although it is the usual practice on such occasions. This was in sharp contrast to what happened in Moscow during Le Duan's visit to the Soviet Union less than a month later, and was suspected to have been a reflection of strained relations between China and Vietnam, presumably because of the territorial issue. Le Duan's departure from Peking without staying on for the October 1 Chinese national holiday cast further doubt on their friendship.¹⁰

Third, in early November 1975, shortly after Le Duan's return from the Soviet Union and East Europe, official dailies in Hanoi like *Nhan*

Dan (The People) and *Quan Doi Nhan Dan* (The People's Army) carried articles describing Vietnamese use of the Paracels and Spratlies since the early 19th century. The old map that was reprinted in these newspapers, the *Detailed Map of Dai Nam*, had previously been used by Saigon in support of Vietnamese claims to the islands.¹¹

Fourth, on his *Tet* (New Year) visit to the Camau naval base in the South in late January 1976, Defense Minister Giap was reported to have emphasized the importance of defending "Vietnamese territories including all islands and archipelagoes." Hanoi repeated its claims on relevant occasions, such as at the time of its general election in April 1976. After North and South were unified in June 1976, a commemorative postage stamp was issued showing the two disputed groups of islands as Vietnamese. (Two other stamps issued by Hanoi in 1970 do not include them.) For its part, Peking responded in November 1975 and May 1976 to Hanoi's Paracel-Spratly campaign by widely publicizing its own side of the controversy through its news media both at home and abroad.¹²

However, Hanoi and Peking, unlike Saigon previously, no longer level charges against each other. They just continue to make their respective positions emphatically clear. Also, in one of the *Quan Doi Nhan Dan* articles of March 1976, Hanoi referred to the Spratlies but not to the Paracels, as the Provisional Revolutionary Government in the South did in June 1976.

Nevertheless, it would be premature to agree with some observers¹³ that such an omission is a possible sign that Vietnam is relinquishing its Paracel claims. Although the Paracels are already under Chinese control, if Vietnam abandoned its claims to what it surrendered under pressure of arms, it would not only imply acceptance of a *fait accompli* but might even tend to encourage China to try similar means on the Spratlies in the future. The discussion that follows will outline the dispute as it now stands and will argue on the prospects for its resolution in the 1980s.

Bases of the Claims

Historical Background

In support of their claims to the territories in dispute, China and Vietnam have relied primarily on historical records. The following passages, as articulated in their official statements, are indicative of this approach.

China: More than 2,000 years ago, Chinese people were already sailing on the turbulent waves of the South China Sea, as recorded in ancient Chinese literature. By the time of the Western and Eastern Han dynasties (206 B.C. - 220 A.D.), the South China Sea had become an important navigation route for China. As navigation steadily developed, long years of sailing the seas enabled the Chinese people to become the first discoverers and the masters of the South China Sea Islands. Surveyed and named time and again and worked and administered without a break, these valuable islands became an inalienable part of our beautiful motherland.¹⁴

Vietnam: From time immemorial, these islands have been frequented by Vietnamese fishermen who went there for tortoises, sea slugs, and other marine creatures. In recent times, the Paracels have attracted exploiters of phosphates, rich beds of which are produced by the interaction of guano of seabirds with the tropical rains and coral lime-

stone. Like the Paracels, the Spratlies are closest to Vietnam geographically and have been part of her territory early in history. In 1834, under the reign of Emperor Minh Mang, the Spratlies appeared in the first Vietnamese map as an integral part of the national territory.¹⁵

Since 1974, China and Vietnam have been engaged in what may be called a chronicle contest. The authenticity of these documents apart, neither country is short of historical records to cite as the basis of its claims to the islands. In the case of China with its long history, libraries and archives of its own as well as those abroad are known to be virtually encyclopedic as sources of such records. Hence, and for no other reason, its list of "evidences" is longer than Vietnam's.

From their conflicting claims, however, it is possible to imagine that at various times until the late 19th century each party was, or simply pretended to have been, unaware of the claims made by the other or by any other party. For the purpose of the present study, it seems unnecessary to trace in detail claims made prior to the 1880s, because it was not until then that the tug-of-war for the control of the islands really began -- not only between China and Vietnam, but also between China and newcomers such as France and Japan.¹⁶

When, in 1884, Vietnam became a French protectorate, China had a new party to argue the same issue against. Three years later it signed a boundary pact with Vietnam whereby the Paracels and the Spratlies fell on the Chinese side.¹⁷ This motivated China to tighten its control of the Paracels until the 1910s. During this period, the French also maintained customs patrols to the Paracels, which had by then become a haven for arms and opium smugglers. At the same time the Chinese and the French discovered rich deposits of guano on the Paracels, which in turn attracted Japanese interest there.¹⁸

Out of economic and strategic interest, France suddenly reasserted claims to the Paracels in 1931 and to the Spratlies in 1933. In 1938, a year after the Japanese invasion of China, France occupied the Paracels. The next year, however, Japan occupied both the Paracels and the Spratlies, incorporating them into Taiwan (then its own territory) under the name Shinnan Gunto (the New South Archipelagoes). During the Pacific war, which ended in 1945, the islands remained under the control of the Japanese, who used the Spratlies as their submarine bases.

After the war, the two original claimants, China and Vietnam, resumed the dispute over the two archipelagoes. Private ownership over part of the Spratlies was claimed in 1956 by a Filipino. The claim was based on his alleged discovery of the islands. Currently the Paracels are under the control of China, while the Philippines, Taiwan, and Vietnam each hold part of the Spratlies. China and Vietnam, nevertheless, are the central parties in the present dispute.

Legal Aspects

Both China and Vietnam have presented numerous contentions in support of their respective claims. Each side bases its argument on the discovery and use of the islands by its own countrymen, a condition modern international law regards as one of the requirements for acquisition of territory. On this account, China undeniably has a stronger position than Vietnam. Discovery, however, is not a sufficient but only a necessary condition, because it must be sustained by "continuous and uninterrupted exercise of sovereignty."¹⁹ On this point, neither side appears sufficiently persuasive.

Besides historical records, the parties also rely on foreign literature and cartographies. China cites some atlases and encyclopedias published in Britain, France, Germany, Japan, the Soviet Union, and the United States in recent years, and Vietnam quotes some 19th- and 20th-century writings of French priests and explorers.²⁰ Strictly speaking, however, the evidentiary value of such foreign references must be considered at best doubtful, for the obvious reason that such materials cannot reach beyond information originating from the countries to which they refer.

As noted above, China also relies in part on an important boundary pact it signed with Vietnam in 1887. This agreement stipulated that all islands situated east of a specified line -- as the Paracels and the Spratlies were -- belonged to China. From the standpoint of Vietnam, it might be argued that a boundary line drawn in the middle of its mainland could not have referred to the ownership of midocean islands situated several hundred miles from it.

For its part, Vietnam cites an example of interest. In 1895 and 1896, two ships laden with copper were wrecked off the Paracels. When Chinese nationals salvaged part of the cargo and offered it for resale to the shipowners, complicated legal problems arose involving British (the underwriters), Chinese, and French interests. The local Chinese authorities on Hainan Island refused to accept any responsibility on the ground that the Paracels were not Chinese territory.²¹

China might, of course, question the validity of this action by its remote local authorities, especially if it were taken without authority from the central government. Since each party has a host of such samples, the legal effect of each must be weighed against that of previous and subsequent ones.

A dispute over ownership is generally a legal issue. But the present case is replete with highly complicated extralegal factors that will tend to limit the role of international law as a means of settlement greatly. The prospect of a legal solution is not encouraging. Three basic reasons support this rather pessimistic view.

The Nature of Territorial Issues in East Asia. For historical reasons, countries of East Asia are particularly sensitive to territorial disputes. When, in the mid-19th century, China began to lose its own territorial integrity in the face of Western powers, its authority as a "superpower" of the region as well as its suzerain position over vassal states like Korea and Vietnam also began to erode. With the stabilizing influence of China gone, they were often forced to cede part of their land or their rights to it to foreign invaders, few of them having been powerful enough to dispute, much less to resist, such cession or concession. Consequently, with the exception of Japan and Thailand, all the East Asian states underwent different forms of colonial experience and territorial humiliation, continuing up until the 1950s.

When sovereignty was restored to these former colonies or near-colonies during the postwar years, each state became highly conscious of its new status and desirous of preserving it. Only within this context is it possible to appreciate their sensitivity to whatever affects their territorial integrity, a sensitivity that has yet to subside.

Thus, a territorial dispute, especially one between a former ruler and the ruled, instantly touches the raw nerves of the people of a former colony and causes their nationalist sentiments to flare up, even if

the piece of territory involved is scarcely worth arguing over. The controversy thus ceases to be a strict legal issue but becomes a political problem, to be resolved in the language of diplomacy.

This is demonstrated not only by the present case, but also by three other interrelated territorial disputes in East Asia, all involving obscure islands: the disputes between Japan and the Soviet Union over the four Northern islands, between Japan and Korea over Takeshima-Dokdo Island, and between Japan and China over the Senkaku-Tiaoyut'ai islands.²² For instance, the Japan-Korea case concerns a cluster of midsea rocks without vegetation, a piece of territory currently under Korean control but hardly worth keeping except perhaps for reasons of national sentiment.

Contemporary International Law and New Nations. Of every three countries in the world, two became independent during the three postwar decades (1945-1975). This rapid growth of membership in the community of nations has engendered a serious crisis in traditional international law, itself a product of Christian civilization over the past 400 years. The majority, if not all, of these newly independent nations seek to reform those parts of international law which they feel are detrimental to their interests.

Since all the new countries are developing economies, one of their first targets for reform is the international law relating to the regulation of international economic activities. The reform of the law of the sea and the adoption of the New International Economic Order and its supplements, both under UN sponsorship, are two conspicuous examples of their endeavors. The argument of the new nations rests on their refusal to be bound by a system of law in whose formation they did not participate. A statement made by a Chinese delegate at the Third United Nations Conference on the Law of the Sea (Geneva, 1975) may be noted with interest:

Many of those rules had been established before the majority of developing countries became independent and did not conform with their interests. The world had changed, and developing countries could not be asked to accept out-of-date laws that operated to the sole advantage of the superpowers.²³

This attitude of the new nations in turn generates reluctance to rely on contemporary international law to settle such important issues as territorial disputes. This point is best illustrated by the paucity of cases before the International Court of Justice. Since its inception in 1945 as one of the five component organs of the UN, the Court has handled only 26 cases in addition to 14 requests for advisory opinions. Of the more than 150 states in the world, only eight have used the Court more than once, 26 just once each, and the vast majority, including most of the socialist states, never.²⁴

In the case of the East Asian states, with the exception of Cambodia and Thailand, none -- not even China or Japan -- has ever appeared before the Court. The risk of losing has made these states reluctant to submit important cases to judicial settlement, and such reluctance is in direct proportion to the importance of the case. Thus, a case would have to be far less important than a territorial dispute to be left to international adjudication or other means of third-party involvement, such as arbitration or conciliation. Given the above-described attitude of East Asian states toward territorial issues, the reluctance of the

present parties to the South China Sea dispute to rely on judicial means of settlement is easily understood.

Complexity of the Issue. When China was still the "Middle Kingdom" whose authority reigned virtually unchallenged in what is now East Asia, Chinese officials on their missions abroad customarily recorded in reports or logbooks the discovery of numerous uninhabited islands in remote waters. Over time, ownership of such pieces of otherwise unclaimed land was assumed as a matter of course. The Paracels and the Spratlies were no exception to this long-standing practice. Vietnam claimed the two archipelagoes under a similar theory, but such claims embraced only that period since the early 19th century, by which time China had allegedly controlled the islands for over ten centuries. During the postwar decades, the claims of both parties have remained basically unchanged.

At this point, an important question arises as to whether, at the time of the Chinese discovery, a discoverer of new territory was required to exercise uninterrupted control over such territory to become its owner. Obviously, the discovery in the present case took place long before such control was thought to be necessary under international law. The key question is whether modern principles of international law can properly be applied to actions occurring in premodern times.²⁵ The evidentiary value of the numerous historical records presented by each party will depend on the answer to this question. Fairness would seem to require that significance of the facts relating to each party's discovery and use of the disputed islands should be interpreted in the context of the time when they occurred rather than in the context of the modern law of nations.

In the final analysis, international law can effectively resolve only disputes that are basically legal, whereas the most important disputes, like the present one with its highly complicated historical background, are political in nature and susceptible therefore of political resolution only. Furthermore, states are generally inclined, for obvious reasons, to keep important issues fluid and thereby manageable instead of relying on an inflexible judicial framework for settlement. This point is especially relevant to China; China has a series of other extremely difficult territorial disputes, including another island dispute, strikingly similar to the present one, with Japan over the Senkaku-Tiaoyut'ai islands. For these reasons, neither party, China in particular, is likely to seek or agree to any type of legal settlement of the Paracel-Spratly dispute.

Coastal States' Claims to Natural Resources

Fishery Resources. Currently the world's annual catch of fishes amounts to some 70 million metric tons, of which the South China Sea contributes a modest share of approximately 5 million tons. This area is known to have potential for higher sustainable yields, so that its annual catch may be increased by another 3 million tons. The statutory claims of the coastal states to fishery jurisdiction have not been extravagant. With the exception of the Philippines which, under modified archipelago claims, does not maintain a uniform limit, and Singapore, which claims a 3-mi limit, they have adopted the popular 12-mile limit.

Once the regime of a 200-mi economic zone is put into practice -- and that it will be has become a virtual certainty -- however, the

entire waters of the South China Sea will be divided into numerous sectors of national jurisdiction (Figure 2), because, with the Paracels and the Spratlies taken as base points, all the coastal states are situated within 400 mi of one another. In the years ahead, when the fishing industries of the coastal states will have greatly improved, fishery disputes will arise from high competition in what is sometimes called "the fishing Olympic games in national lakes."

In order to avoid overfishing or depletion of resources, conservation measures will have to be taken, measures that are not possible without regional cooperation. Fortunately, the South China Sea falls within the jurisdiction of the Indo-Pacific Fisheries Council, a regional organ of the Food and Agricultural Organization (FAO) of the UN, to which Cambodia, Indonesia, Malaysia, the Philippines, and Thailand already belong. In fact, the Council is currently running a five-year special project called the South China Sea Fisheries Development and Coordinating Program, to be completed in 1979.²⁶

In the interest of developing fisheries in the South China Sea area, where food and energy pose the two most serious problems, it would seem highly desirable for Hanoi and Peking to join the Council. On the other hand, it is possible that, as parties to a dispute over an issue more important to them than fisheries, either or both may prefer to stay outside of an organization that might eventually seek agreement on fishery zone boundaries in areas including the Paracels and the Spratlies.

Protection of the marine environment is another problem area calling for regional cooperation. In recent years, coastal states of enclosed seas have made a number of regional arrangements to protect their marine environment. But such arrangements have usually been concluded only when these states felt that they could no longer safely ignore strong warnings from the scientists. The coastal states of the South China Sea have not yet been warned in any serious fashion, but there are reasons to believe that unless they turn to the examples of other regions now, such warnings will be forthcoming sooner than they might anticipate. In general, these states remain indifferent to marine environmental problems, except in their coastal waters, where land-based pollution has been on the increase. Despite the increasing density of sea traffic and fishing operations, no serious marine pollution incident has occurred in the area except off Singapore,²⁷ but this seems to have been more a matter of luck than anything else.

For these reasons, it is becoming increasingly important for the South China Sea coastal states to institute antipollution measures similar to those being employed in the Baltic Sea,²⁸ the Mediterranean Sea,²⁹ and the North Sea,³⁰ among others. In the case of China, at the UN Stockholm Conference on Human Environment in 1972, its attitude toward regional regulation of marine pollution was made unequivocally clear.³¹ However, the political relations among the South China Sea countries are not yet favorable to multilateral regional arrangements.

On the other hand, pollution problems are apolitical and ideologically neutral, and must be treated accordingly. A patch of oil spillage floating in the middle of an enclosed sea allows for no political or ideological ping-pong games between the coastal states. A state refusing multilateral arrangements for political reasons might deprive itself of the benefit of compensation, scientific and technical exchanges, and environmental funds that such arrangements would facilitate.

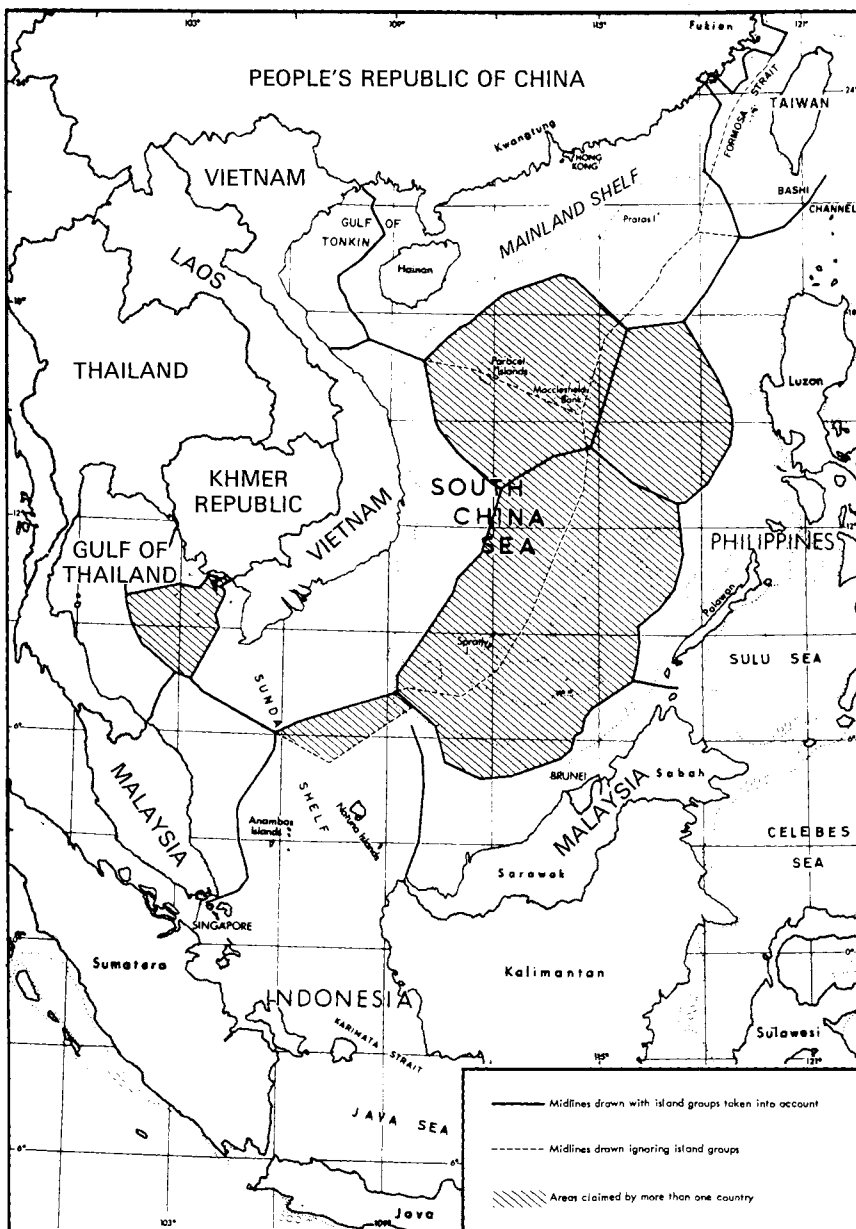


Figure 2: Hypothetical boundaries in the South China Sea.

Mineral Resources. Unilateral claims by coastal states on the periphery of the South China Sea to offshore mineral resources -- mainly oil and gas -- conflict at many points, especially in shallow waters where the same continental shelf is contiguous to the coasts of different claimants. Off the coast of Cambodia, for instance, the claims of Cambodia, Malaysia, Thailand, and South Vietnam overlapped (Figures 3 and 4). In the adjacent area south of the Mekong River Delta, Indonesia and Malaysia are also claiming some parts of the seabed claimed by South Vietnam (Figure 3). A major conflict in the entire South China Sea was thus between South Vietnam on one side and these four states on the other, which claim nearly half of the 40 blocks into which South Vietnam divided the seabed claimed by it (Figure 3).³²

In the main basin of the South China Sea, a serious seabed controversy took place in June 1976 when China strongly protested against Philippine oil operations at the Reed Bank of the Spratlies (Figure 1), asserting that "China has indisputable sovereignty over [the Spratlies] and their adjacent sea areas and that the resources there belong to China." In other areas of the Spratlies as well as off the Paracels, where the depth of the sea drops abruptly to 1,000-3,000 m, development of oil is thought to be either technologically unfeasible or commercially unprofitable at the present time. In the Gulf of Tonkin, no specific claims have been made as yet either by China or by Vietnam, although Hanoi has been reported to be in touch with foreign oil concerns interested in oil exploration in the region.

In order to rebuild its economy from the ashes of a 30-year civil war, Hanoi is making enormous efforts to develop oil and other energy resources both on and offshore. In the context of the present study, three points are worth noting. First, in August 1975, within four months of its "liberation" of Saigon, thirteen concession contracts for drilling rights between the former Saigon government and foreign companies were invalidated by the Provisional Revolutionary Government, which at the same time voiced its readiness to negotiate similar agreements on its own behalf with interested foreign companies.³³ Second, Hanoi has been actively seeking the cooperation of foreign governments and private firms in more than 12 countries for the development of Vietnam's oil resources. For instance, under the terms of a five-year (1976-1980) economic and technical cooperation agreement with the Soviet Union, Russian geologists are to assist Vietnam in prospecting for oil and other mineral resources, and a French oil company is to build a logistic base at Vung Tau for offshore operations.³⁴ Third, foreign oil companies like Gulf and Shell that had previously operated in Vietnam have reportedly been invited by the new regime to resume their Vietnamese operations.³⁵

From the standpoint of international law, four of the principal coastal claimants to offshore resources in Southeast Asia -- Cambodia, Indonesia, Malaysia, and Thailand -- rely on the so-called median-line principle for offshore boundary delineation. There is no argument here, as there was in the cases of the Yellow Sea and the East China Sea, over which of the two conflicting principles, the median-line principle or the natural prolongation of land territory principle, should be adopted. Instead, controversies over boundary delineation in the Gulf of Thailand and Sunda Shelf have all arisen from the ambiguous legal status of offshore islands, especially of those situated near the coasts of other countries as well as those whose ownership is in dispute.

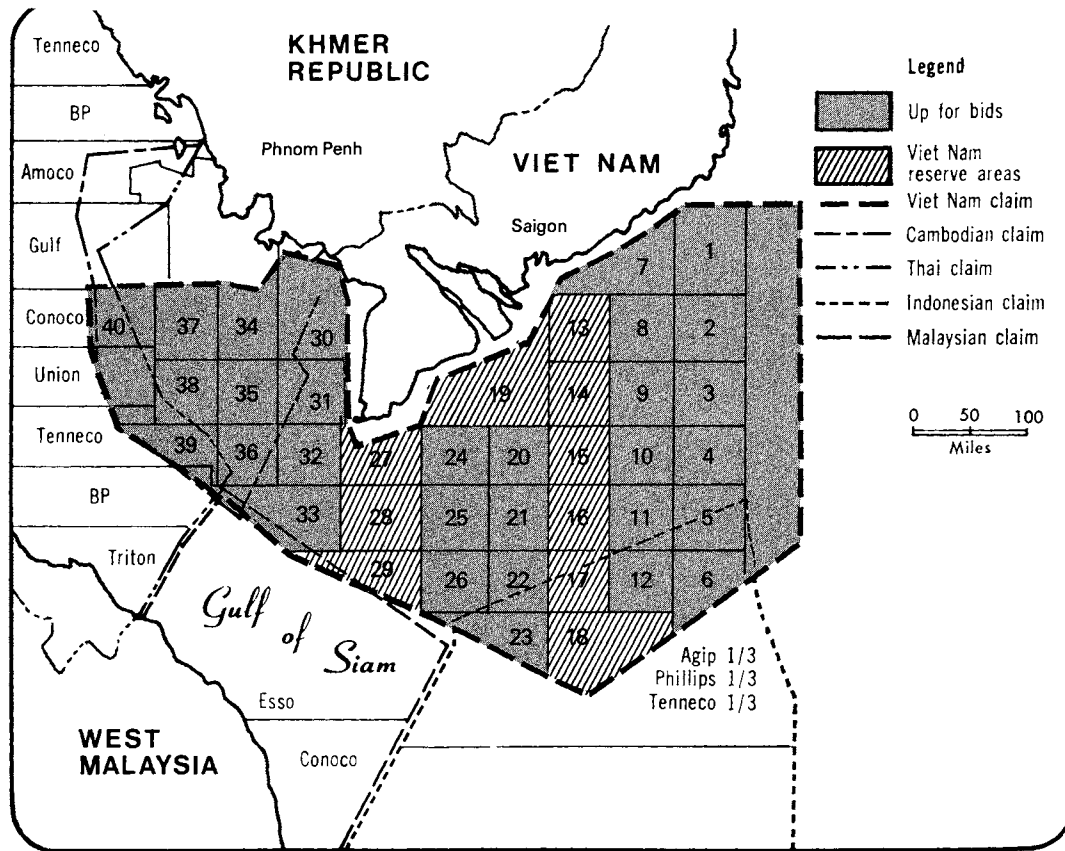


Figure 3: Overlapping claims between the former South Vietnam and other states.

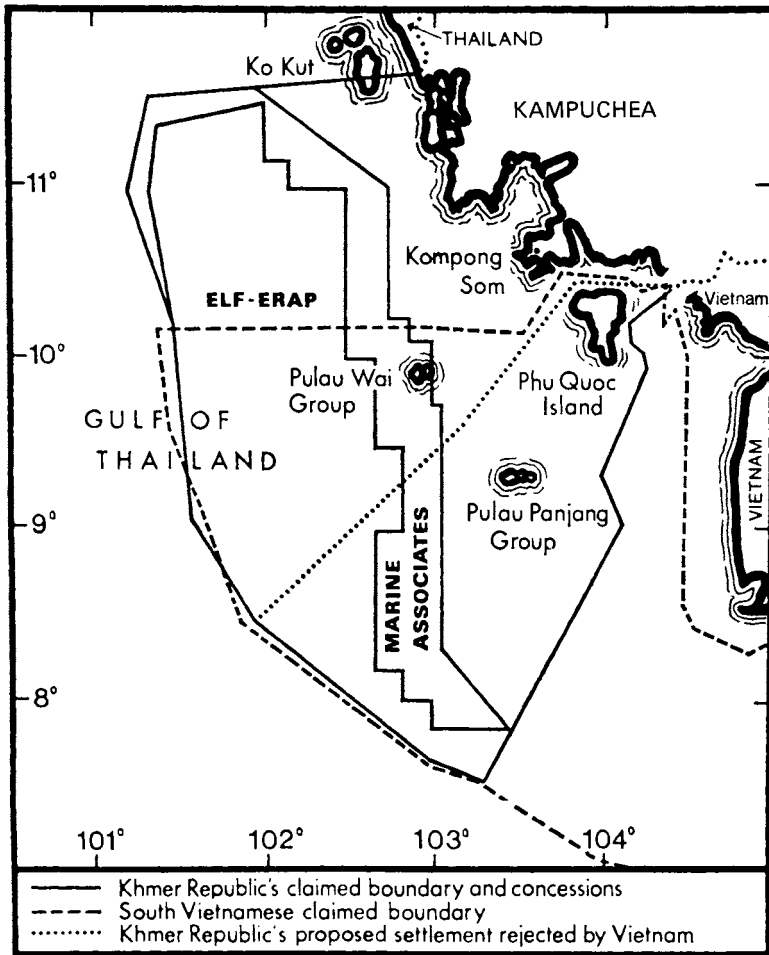


Figure 4: Claims in the Gulf of Thailand.

Taken as a base point for the measurement of distance, even the most obscure island situated between two claimants of the same continental shelf can substantially affect the division of the seabed greatly in favor of its owner. The problem of islands is further complicated in this region by the important fact that Indonesia, with nearly 14,000 islands, and the Philippines, with over 7,000, are not at all likely to compromise their common position favoring the so-called "archipelago theory," whereby all outlying islands may be enclosed for purposes of delimiting a state's territorial sea and establishing its maritime jurisdiction.³⁶

The other principal claimants, China and Vietnam, have yet to specify their claims to seabed resources. China has on many occasions objected to the specific claims of other states like Japan, the Philippines, South Korea, and South Vietnam, without, however, advancing any specific claims of its own. The only principle of international law mentioned in its numerous statements so far has been that of "agreement between states concerned." While certainly a major principle of international law, nevertheless, in the present context, it seems to be little more than a multipurpose noncommittal phrase of indeterminate meaning.³⁷

This ambiguity in the Chinese position can be attributed to the fact that, having made extravagant claims to the resources in the Yellow, East, and South China seas, the three waters troubled with almost every conceivable problem in the law of the sea, China can only get specific at its peril. Hanoi has neither made its claims specific with regard to its continental shelf resources nor supported or renounced former South Vietnamese claims. There is no reason to expect Hanoi's position to be substantially different from that of its predecessor. Thus, it seems reasonable to say that, since the fall of Saigon in April 1975, the seabed controversy in this region remains potentially as volatile as ever, although dormant at the present time.

Potential for Resolution

As noted earlier, neither China nor Vietnam is likely to agree to a legal approach to the settlement of their dispute. Nor are the claims of the parties flexible enough to be negotiated directly; each side has gone too far with its legal claims on its "sacred territory." For the settlement of international disputes, China has been known to prefer direct negotiations to the use of third parties; but this preference clearly does not extend to negotiation over legal ownership of territory that it has consistently claimed as its own. From all indications, therefore, it appears inconceivable that either party, China in particular, will accept any form of divided ownership.

In search of a breakthrough in an otherwise endless war of nerves and battle slogans, China might be tempted to go a step further and place the Spratlies under its control, thus closing the dispute for good. This would involve the cumbersome task of removing the Filipinos and Vietnamese from the Spratlies, and the fraternal gesture of pardoning the Taiwanese there. For Vietnam to terminate the dispute in its favor would involve, on the other hand, fighting the Filipinos and Taiwanese off the Spratlies and the Chinese off the Paracels. Taiwan poses no threat to the other claimants and its interests in relation to them ultimately coincide with those of Peking. The interests of the Philippines lie more in drilling for oil in the Spratly area despite Chinese objection than in claiming territorial ownership, which is tenuous in any event.

In terms of physical capability alone, China could easily accomplish this task, as it did in 1974, when it gained control of the Paracels, while Vietnam could not. However, hasty reliance on force is as much taboo for China as it is for Vietnam. The party casting the first stone will be forced to pay dearly for it. Provoked by Vietnam, for instance, China could hardly have a better excuse to launch a blitzkrieg and take over at least that part of the Spratlies currently under Vietnamese control. This would greatly simplify the solution of the dispute in favor of China.

On the other hand, should China take over the islands without an urgent cause, many nations in the region, as well as the major users of the South China Sea like Japan, the Soviet Union, and the United States, would regard such an incident as a clear threat to their national interests. Furthermore, China has said so much against super-power hegemony that, in the absence of provocation, it can hardly use force against small nations without itself looking hegemonic in their eyes.

Causes of Increasing Tension

The above is an oversimplification of the goals of the parties to the dispute and of the inhibitions that will prevent them from hastening to attain these goals. In any case, disquieting factors exist that will tend to increase tension in the South China Sea and its periphery in the next decade or so. Three such factors may be noted:

"Creeping Jurisdiction." In the fashion of the time, virtually every state has begun to extend its offshore jurisdiction in recent decades. By virtue of a new concept that ocean resources are the common heritage of mankind, 30 landlocked states have claimed their share of the resource to be found in waters beyond the limits of national jurisdiction. Only two decades ago, talk of a 12-mi limit of the territorial sea was considered a daydream, but now it has been accepted by almost every state. Until as recently as the early 1970s, a 200-mi limit of maritime jurisdiction was little heard of, except in some Latin-American quarters and as a conspiracy against the traditional law of the sea. Today, the regime of a 200-mi exclusive economic zone has become a certainty. Even if by any chance the current United Nations Law of the Sea Conference fails to write these two regimes into an international treaty, they will be adopted as a popular practice. In fact, three of the major maritime states in the Americas -- namely, Canada, Mexico, and the United States -- have already adopted the 200-mi fisheries zone, as have many other countries, including the Soviet Union. Even Japan, traditionally the most conservative claimant of maritime jurisdiction, has adopted it.

In applying the 12-mi limit of the territorial sea and the 200-mi limit of the economic zone to their offshore waters, the coastal states of the South China Sea will face serious conflicts of interests arising from the ownership as well as the legal status of the islands in dispute. If each reef were given full status as an island, the South China Sea would be studded with numerous circular patches of Chinese or Vietnamese territorial sea, and if the archipelago theory were applied instead, large expanses of sea and air space could be closed to foreign vessels and aircraft. This would render the strategic value of even the tiniest islands incalculable. Furthermore, if these islands were used as base points for the measurement of a 200-mi distance vis-a-vis other coastal states, most of the South China Sea and, of course, the natural

resources in it, would come under the jurisdiction of the states that own the islands.

From current trends in the law of the sea, it can be foreseen that for purposes of sea boundary delineation in the future, an island will not be defined solely in terms of its physical size or usefulness, because even an obscure low-tide elevation can be reinforced with artificial construction on it. Some South China Sea coastal states might eventually be tempted to expand a few strategically situated islands in this way, in order to foreclose argument against their legal status as base points. Thus, it would appear that in order to "own" the South China Sea and its resources, a claimant has only to own the "fly-specks."

While the territorial issue mainly concerns China and Vietnam, the question of seabed boundary delineation in the South China Sea area involves as many as nine coastal states altogether, including British Brunei. Between and among these states, over a dozen continental shelf agreements will be required, of which only a few have been concluded to date with respect to less controversial areas.³⁸

Among the natural riches with which the South China Sea is known to be endowed are food and energy resources, the two most pressing needs in the region. Since, in enclosed waters, agreement on boundaries is prerequisite to resource development, it is imperative that the coastal states of the South China Sea determine one another's share of the seabed first in order to avoid what has taken place in the Yellow Sea and the East China Sea -- an endless delay in oil development, pending agreement on boundaries.³⁹ Once the United Nations adopts a new law of the sea treaty in Caracas (where, at its 1974 session, the UN Law of the Sea Conference decided to sign its final agreement back here), these coastal states of the South China Sea will have to seek agreement on their seabed boundaries, an inherently difficult undertaking which, in their case, will be further complicated by their geopolitical circumstances.

Demand for Food and Energy Resources. As a region, Southeast Asia is richly endowed with a number of important natural resources, among them bauxite, copper, lumber, oil, rubber, and tin. But the geographical distribution of these resources within the region varies widely from country to country. For instance, Indonesia meets nearly 60% of its government expenditure with oil revenue, but it has to import rice. In contrast, Thailand exports rice and other farm products, but it has to import oil and other industrial needs. Although none of the countries in Southeast Asia is a single-commodity economy to the extent that most of the oil-producing countries in the Middle East are, the export of raw materials plays an important role in their economic upkeep.

On balance, however, the region as a whole is plagued by the shortage of two basic needs in a modern economy; namely, food and energy resources. In fact, this is a global phenomenon but, in the case of Southeast Asia, where population grows at an impossibly high rate of about 3% per year and every state seeks to industrialize its economy, the pressure of such shortages is as high and the urge to seek a solution to them as strong as anywhere else.⁴⁰

Naturally, as a potential source of both food and energy, the sea has become very important for the countries of Southeast Asia. Nevertheless, they have a rather modest record in their use of the sea to date. For instance, the entire catch of fishes by these countries is

surpassed, although narrowly, by that of China alone. But current trends in world fisheries show that developing countries are becoming increasingly competitive with developed countries. In fact, the countries in this region already have ambitious plans to improve their fisheries and are looking beyond their own coastal waters into the South China Sea. As may be seen from the examples of other enclosed waters, therefore, fishing rights disputes such as that between South Vietnam and Thailand of 1972-1974 are likely to be on the increase in the South China Sea in the future.⁴¹

As for energy resources, the prospects are far more complicated than for fishing rights. Developing countries with the promise of oil in their offshore waters tend to regard it as a possible panacea for their economic difficulties, and readily stake out claims that are usually extravagant. In the case of South China Sea coastal states, the need for energy resources from the sea is equally pressing on all of them, except perhaps China, which has sufficient supplies inland. But no country has too much in the way of natural resources, much less China, with over 900 million people to care for.

In the present context, however, the most important country to be watched is Vietnam, because once it specifies its offshore claims, it is bound to run into conflict with all the other coastal states. The tension that will arise from such confrontation will be much greater than that from the current Reed Bank oil dispute between China and the Philippines. Thus, as potential causes of tension, demand for sea resources and the "creeping jurisdiction" noted above are complementary to each other.

Safety of Passage. As a potential cause of tension, the issue of safe passage in the South China Sea is a concern more of noncoastal users of the seaway than of the coastal states themselves. Foremost among the major users are Japan, the Soviet Union, and the United States.

Japan, the world's third largest economy without domestic supply of important mineral resources, relies on maritime commerce to import as much as 600 million tons of raw materials and to export 60 million tons of manufactured goods a year. With a negligible domestic production of crude oil -- barely 0.03% of its annual demand -- Japan imports approximately 1,800 million barrels every year. Over 70% of it comes from the Middle East and other sources for which the South China Sea is the main shipping route. A break in the shuttle chain of some 200 tankers en route would mean a fatal clot on Japan's "lifeblood." The oil embargo of 1973-1974 was an eloquent testimony of Japan's vulnerability to disruptions in its oil lifeline.

The Soviet Union and the United States use the South China Sea for both naval and commercial purposes. On its cruises to and from the Indian Ocean the Vladivostok-based Soviet Pacific Fleet, reported to comprise 750 vessels of various sizes and functions, finds the South China Sea route ideal for showing its flag to friends and foes alike.

The old dictum that trade follows the flag remains as valid as ever. The rapidly growing Soviet merchant marine is also making its presence felt by Japanese and Western shipping industries. Operating as an outsider, the Soviet Far Eastern Shipping Company (Fresco Line) is reportedly charging rates as much as 60% below those of the conference lines.⁴²

In the case of the United States, the fall of South Vietnam in April 1975 has left this global power without a solid base on continen-

tal Southeast Asia, making U.S. naval mobility more vital than ever before. The South China Sea is also one of the four alternate east-bound routes used by tankers sailing for the West Coast of the United States from the Persian Gulf. Competing fiercely with each other for hegemony over the seas of the world, the two superpowers nevertheless share a common concern for free passage through the world's major seaways and regard anything endangering such free passage as jeopardizing their interests.

The use to date of the seaways by the south China Sea coastal states themselves is assumed to be more for maritime commerce than for military purposes. China, however, whose economy is for the most part self-contained, has so far depended on foreign trade only marginally. But, judging from its long-range economic plans, which project through the year 2000, we can predict that in the years ahead China's maritime trade will increase at a rapid pace, as will that of the other coastal states.

From all indications, therefore, traffic in the South China Sea is likely to become increasingly dense. Chinese concern on this point may be seen from a report in the *People's Daily* of May 1976 that "every day numerous foreign vessels and over a hundred aircraft, including those of the enemy, use the Paracel area. Those belonging to the enemy should be watched with vigilance."⁴³

Who is meant by "the enemy" is not made clear. If traffic density in the South China Sea is to cause tension, however, it is more likely to appear in the Spratly area than in the Paracel area. Major routes such as the Palawan Passage and other routes linking Hong Kong, Manila, and Singapore and leading to Northeast Asian ports all use the Spratlies rather than the Paracels.

Containment or Settlement?

In the foregoing discussions, the prospects for a judicial or a negotiated settlement of the dispute have been ruled out. Nor would any outside pressure to enforce settlement terms on the parties be effective. Vietnam, now the third largest state within the socialist camp, would stay equidistant from both China and the Soviet Union rather than closer to either of its mutually hostile supporters. The chances for a peaceful settlement of the dispute are thus foreclosed, leaving containment as the next best remedy. Since, in terms of power and political influence, China is by far the superior of the two parties, the dispute could more easily be contained through outside leverage on China than on Vietnam. Four such leverages, each with different weight, are conceivable.

Developments in Indochina. As it relates to the Paracel-Spratly dispute, Hanoi's victory over Saigon has placed China in an awkward position. Now China has to argue the same issue against an important ally, which also happens to be an important ally of its own adversary, the Soviet Union. At present, opinions vary over whether the territorial dispute with China will push Vietnam closer to the Soviet Union than to China. But it would require more than a hasty conclusion based on isolated incidents to ascertain the truth. For instance, if the lack of a joint communique at Le Duan's visit to Peking in September 1975 had any meaning, his silence in Moscow the next month on the Soviet proposal on collective security in Asia should have meant something equally significant. In reality, however, Hanoi's primary concern is not to manipulate its relations with the two socialist superpowers but

to build its postwar economy with aid available, no strings attached, from any sources.⁴⁴ Pressed hard by China on the territorial issue, therefore, Vietnam can easily choose to swing in the Soviet Union's favor, to China's peril.

Association of Southeast Asian Nations (ASEAN). ASEAN has had little to do with the Paracel-Spratly issue to date. This is not going to be the case in the future, however. One of ASEAN's primary objectives is to promote peace and security in Southeast Asia through political neutrality. Although the organization still consists only of its original five members, it will seek to include the three Indochinese and other Southeast Asian states. In fact, at its Seventh Foreign Ministers' Conference held in Jakarta in May, 1974, which Cambodia and Laos attended as observers, the members reaffirmed their willingness to invite all states in the region to its future meetings. At the Ninth Conference, held in Manila in June 1976, the newly independent Papua New Guinea was also present as an observer.

For their part, the attitude of Cambodia and Vietnam is also noteworthy. Cambodia opened diplomatic relations with four of the five ASEAN members (all except Indonesia), and with three of them -- Malaysia, the Philippines, and Singapore -- within a week in the spring of 1976. Even more significant is the fact that soon after its unification in June 1976, Vietnam exchanged good-will missions with all the ASEAN members to negotiate diplomatic relations with them. ASEAN and the socialist Indochina are thus moving toward peaceful coexistence, which may prove to be the beginning of a more cooperative system, such as the one ASEAN upholds in earnest.

At the Seventh Foreign Ministers' Conference of May 1974, the first to be held after the Paracel incident four months before, ASEAN members agreed to set up "effective measures for the peaceful settlement of disputes in the region." China cannot comfort itself with the fact that Vietnam is not a member of ASEAN. On this account, however, ASEAN's involvement in the Paracel-Spratly dispute would be, at best, indirect.

It is the Reed Bank oil controversy between China and the Philippines that, if aggravated, will bring ASEAN into play. The Philippine position on the present dispute may be seen more clearly from its statement that, in the interest of regional security, the Spratlies should under no circumstances be allowed to fall into the hands of any one country.⁴⁵ However, in July 1976, the Philippine national oil company advanced a bold proposal that the Paracels be divided between China and Vietnam and that the entire Spratlies be owned by the Philippines.⁴⁶ With the exception of the claimants themselves, most other countries interested in the South China Sea would perhaps go even further to say that, for exactly the same reason, no one country should be allowed to own both the Paracels and the Spratlies.

ASEAN came into being in 1967 with high-sounding slogans and has made great strides in its first decade. In recent years, its status has been enhanced by two important events: by the oil crisis of 1973-1974, which has become a global crisis of natural resources, and by the withdrawal of the United States from Vietnam, which has hastened ASEAN's pace toward neutrality. Two examples of ASEAN's endeavors to enhance its identity may be noted with interest. The Sarawak branch of the Malaysian History Society proposes to call the South China Sea "the ASEAN Sea," because more than half of it is enclosed by ASEAN members.

The Philippines plans to build "ASEAN cars" for sale within the region and to run an "ASEAN cruise" for tourists.⁴⁷

ASEAN derives its influence from the economic potential of the states it comprises and it now seeks to style itself as a local version of UN, EEC, and OPEC combined. Without reference to its economic potential, therefore, it is difficult to conceive of ASEAN as an outside leverage for the containment of major disputes in the South China Sea community.

As a supplier of raw materials and as a market for manufactured goods, Southeast Asia is of great importance to industrial nations, Japan in particular. Japanese dependence on Southeast Asia for major resources such as lumber, oil, and tin (to name a few) is substantial. No wonder that 92.7% of the Japanese government's overseas development aid between 1970 and 1974 went to Southeast Asia, most of it for mining and other economy-related fields.⁴⁸ Now East Asia is also Japan's largest market; in 1975, Japanese exports to the United States reached \$11.1 billion, while those to East Asia reached \$12.5 billion, almost half the amount to the ASEAN members.⁴⁹

In excess, however, interdependence communicates economic depression, as is currently happening between Japan and Southeast Asia. ASEAN seeks to avoid this by diversifying its foreign trade relations, particularly with China, Europe, and Oceania on one hand, and by promoting intraregional exchanges on the other. Reportedly, efforts are being made to exchange Indonesian oil and Thai rice and to produce fertilizer within the region under the so-called ASEAN Fertilizer Plan. A higher level of self-sufficiency in fertilizer, one of the essential needs of the region, is thought to be feasible with ammonia from Indonesian and Malaysian natural gas, phosphate from Philippine copper, and potassium from Thai kalium, with Singapore cooperating with capital and marketing. In fact, a Tennessee Valley Authority study predicts that Southeast Asia can produce 1.8 times as much ammonia in 1980 as in 1975.⁵⁰

However, the economic potential of the ASEAN members has to be seen in regional context, because most of them are beset with such debilitating problems as food, energy, population, race, and even border insurgency. In many parts of the region, the development of infrastructure is lagging, if not lacking entirely. In the case of Indonesia, for instance, only about 1,000 of the nearly 14,000 islands are inhabited and over 6,000 of them are unnamed. It is also a novelty for Malaysia to have to "consult with Thailand on ways to eliminate piracy in the South China Sea and with Indonesia to prevent illegal activities in the Malacca Straits."⁵¹

For the ultimate solution to their problems, the ASEAN members have turned to their natural riches. From the beginning, ASEAN has thus made it completely clear on many occasions that its goal is to build a self-contained regional economy in an environment of political neutrality, a goal which they feel confident of reaching in time. Anything that interferes with their access to natural resources or threatens peace and security in the region would instantly arouse strong reactions, and the Paracel-Spratly dispute fits squarely into both situations. Therefore, China is compelled to act much more cautiously should it choose to risk another miniwar as in 1974. Certainly it would be in no way in China's interest to estrange a group of nations in which Japan, the Soviet Union, and the United States are also keenly interested. On the other hand, it may be argued whether a strong ASEAN, useful as an outside leverage on China with respect to the Paracel-

Spratly dispute, would be equally advantageous otherwise to these three major powers as well as to other countries interested in Southeast Asia.

The United Nations. At the outbreak of the Paracel incident in January 1974, South Vietnam requested an urgent meeting of the UN Security Council to consider what Saigon called "the blatant violation of territorial sovereignty" of Vietnam by China. The president of the Council responded that, since China as a permanent member of the Council had the veto power, there was no hope for constructive debate or action and that these communications to the Council were aimed only at drawing attention to the situation.⁵² This is a procedural barrier that Vietnam or any other state trying to introduce the Paracel-Spratly issue to the United Nations will find insurmountable. As one of the parties to the dispute, China will certainly foreclose in the Security Council any decision against itself. Furthermore, a statutory barrier exists as well: according to Article 2(7) of the Charter, the United Nations is not authorized to take up matters that are "essentially" the internal affairs of a state. On account of these two barriers, the role of the United Nations as it relates to the present dispute will end before it can even reach the merits of the issue.

Major Powers. Now that the Paracels are firmly under Chinese control, the three major powers -- Japan, the Soviet Union, and the United States -- are concerned with the fate of the Spratlies. For political reasons, the Soviet Union openly supports the Vietnamese claims, while Japan and the United States prudently assume the attitude of a silent watcher. Although, in the South China Sea, each of them has a different stake in the dispute, they have two important concerns in common: free passage of vessels and development of sea resources.

So far as navigation is concerned, it would not be in their interest for the Spratlies to belong to either claimant alone, much less to the one already in control of the Paracels. By the same token, it would be to their advantage for the dispute to be frozen at its current status rather than to be changed in either party's favor. However, if the situation remains unchanged, the sea boundary delineation would be delayed, which would in turn delay the sea resource development. To the extent that the coastal states require foreign participation to develop their sea resources, this would not be in the interest of the three major powers. For them, clearly, a conflict exists between their strategic and their economic interests.

Since the demand for sea resources is growing rapidly everywhere, such a conflict can in time be resolved between the coastal states and the major powers. The least desirable situation for the major powers would be if both the Paracels and the Spratlies fell into the hands of one claimant and if that claimant chose to develop its sea resources without foreign participation. Undoubtedly, this is exactly the kind of situation that China would prepare itself to step into. As reported in the *People's Daily* in early July 1976, with two self-built 10,000-ton marine science vessels (the *Hsiang-yang-hung* No. 5 and No. 11), China has conducted extensive oceanographic research in the Pacific Ocean.⁵³ Thus, in its own way, China has emerged as a competitor with Japan, the Soviet Union, the United States, and a few West European countries in the Pacific. Furthermore, in terms of tonnage alone, those two new vessels signify a great leap forward from the level of China's previous marine science vessels, such as the 2,500-ton *Tung-fang-hung*, launched in 1954, and the 3,000-ton *Shih Chien*, built during the Cultural Revolution of 1965-1968.⁵⁴

Since the situation of the dispute itself is thus subject to different variables, it is not necessary to discuss in detail here the leverage the major powers can exert on China with respect to the Paracel-Spratly case. On the negative side, however, some factors that will limit the impact of such leverage may be considered in general terms. First, a territorial dispute like the present one is not readily open to third-party involvement, unless it really endangers regional or international peace and security. Second, the fact that China itself is also a major power makes this country much less vulnerable to outside pressure than others with lesser influence. Third, with sufficient natural resources inland, China is under no pressure to develop sea resources quickly; its policy is to develop them by itself at its own pace.⁵⁵ Fourth, being ideologically incompatible with Japan and the United States, and politically hostile to the Soviet Union, China is under no obligation to cooperate with them, unless such a policy is dictated by its own interests. Fifth, between and among these four major powers, as many as ten (six bilateral and four trilateral) combinations of alignments are possible, out of which only one trilateral and three bilateral cases exclude any one of them. It may be seen from this that the probability of any two or all three of them turning against any one is basically low. On balance, therefore, major power leverage on China in the present case is not likely to be effective, except under grave conditions.

Conclusion

The South China Sea disputes involve two issues that are basically different from each other -- namely, ownership of territory and jurisdiction over resources. The one is between China and Vietnam, with the Philippines edging in as a third party on the margin. The other is, for the most part, between Vietnam and each of the other coastal states. China and Vietnam are the most deeply involved, each having to argue not only against the other but also against almost all the other parties. From this it follows that peace in the South China Sea will depend, to a large extent, on what these two socialist states are prepared to do in the way of resolving the issues and, in turn, on the future relations between these strange bedfellows.

Negotiations to agree on continental shelf boundaries between Vietnam on the one hand and Cambodia, Indonesia, Malaysia, and Thailand on the other will begin once the current United Nations Law of the Sea Conference adopts sea boundary rules to be applied by states situated opposite or adjacent to one another. Of course, that agreement will not be easy to reach, but in the face of growing demands for food and energy the parties cannot endlessly delay sea resource development by delaying boundary delimitation. It is also reassuring that Vietnam as one of the principal parties is taking an increasingly realistic approach in its external relations. In sum, the sea controversy in the Gulf of Thailand and Sunda Shelf is not likely to drag on very far beyond the current decade.

In sharp contrast, the delineation of shelf boundaries between China and the other coastal states, and Vietnam in particular, is likely to remain undecided for a longer period of time, for two reasons. First, China cannot consider the Paracel-Spratly dispute separately from the Senkaku-Tiaoyut'ai dispute with Japan and, faced with two serious issues of a similar nature, it has to think harder and longer to decide how and when to settle them. Second, the Chinese position relative to shelf boundary delineation has been mired in

contradiction. The position most favorable to its own interests does not coincide with the one it publicly supports in the name of Third-World interests. So far, this dilemma has been effectively obscured in its carefully guarded statements. China will, therefore, make every effort to remain unspecific on this point as long as it can manage to do so.

In the case of the Yellow and East China Sea, China has flatly ignored the sustained efforts of Japan and South Korea to seek boundary agreement. From its own standpoint, there has been no real need to hasten to do so. But now it is doubtful whether it is going to be able to react in the same way in the South China Sea. As a self-styled advocate of Third-World interests, China has said too much about the value of natural resources in developing countries. The reluctance to negotiate with Southeast Asian states for sea boundaries will be contradictory to its stated position, especially if the resources involved represent the greatest needs in the countries concerned. Certainly, these countries will feel no need to be as patient with China as Japan has been in the interest of its China trade and South Korea has been in the absence of choice. They have no reason to grant China the kind of noncooperator's benefit that it has reaped in Northeast Asia.

The confrontation here, however, is between a big power with all kinds of important natural resources and a group of small states in need of its aid. For instance, the Philippines are trying to challenge Chinese sovereignty over part of the Spratlies on one hand and seek to continue import of Chinese oil at a reduced price and on a steady basis on the other. As a matter of fact, when China suspended shipment of oil to the Philippines in early April 1976, Manila found itself in a mini-emergency situation and had to seek oil even from Japan. In the case of Thailand, its import of Chinese crude is at times paid in kind with rice. Vietnam has been receiving Chinese oil for over 10 years. China calls such deals with countries in need "a friendship price" or "a friendship trade."⁵⁶ These examples betoken the futility of bilateral effort, whether for sea boundary delineation or for territorial settlement, and show the need for a collective approach. This is exactly where ASEAN finds a mission to fulfill.

ASEAN is building up its competence to handle the affairs of the region. The Philippines will use the influence of ASEAN to protect its Reed Bank oil operations from Chinese intervention. Malaysia will do the same, if its claims conflict with those of China off Sarawak in the future. Oil development will gradually expand seaward off the coasts of Malaysia, the Philippines, and Vietnam. But the situation will become formidably difficult for China should Vietnam decide to join ASEAN. In the long run, the chances for Vietnamese membership in ASEAN cannot be ruled out; in fact, China can improve or even hasten such chances by pressing Vietnam too hard over the territorial issue.

Other occupiers of the Spratlies will not have to be concerned about the immediate future of their occupation, because the Chinese claim to sovereignty over the islands is one thing and expeditions to take them over are quite another. In the Senkaku-Tiaoyut'ai case, China cannot be unaware of what has been happening on the disputed islands in the East China Sea ever since the Sino-Japanese "war of claims" in the early 1970s: Japanes patrols from Okinawa occasionally chase Taiwanese "intruders" haunting the area for flying fish and birds' eggs.

Taken at face value, Chinese claims include the entire South China Sea and all its resources. In fact, maps printed in China customarily place Chinese border lines off the coasts of Malaysia, the Philippines,

and Vietnam. With Vietnam, ASEAN, and the three major powers vigilantly watching its every word and deed regarding the South China Sea disputes, however, it is not likely that China will take the initiative to assume control of the Spratlies, unless provoked overtly or a grave situation, such as a war, occurs. Nor will it allow Vietnam or the Philippines to make any further advances, however insidiously. In the final analysis, therefore, their war of nerves and battle of mouths will, under normal circumstances, continue into the 1980s and beyond, with each of them testing the others' patience and trying not to lose face.

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NOTES

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2. *Nihon Keizai Shinbun*, Japanese economic daily, 3 August, 1976, morning edition, p. 4. Reportedly, the announcement was made originally by the Office of the Philippine President, but subsequent reports from other sources say that "the wildcat was plugged and abandoned [on] August 10, 1976 after minor gas shows from two zones below 10,000 ft." *Petroleum News: Southeast Asia*, vol. 7, no. 10 (January 1977), p. 37.

3. For reports on the armed clash, see the *Washington Post*, 17 January, p. A2:1; 19 January, p. A11:1; 20 January, p. A1:1; 21 January, p. A1:4, 1974; and for the reaction of the United States and

- the Soviet Union to the incident, see the *New York Times*, 22 January, 1974, p. 3:1; and the *Washington Post*, 23 January, 1974, pp. A20:6, A21:1.
4. *Hsinhua Weekly*, 18 February, 1974, p. 13.
 5. *New York Times*, 8 December, 1974, p. 1:19:1; *Jinmin Chugoku*, Peking monthly in Japanese, March 1975; *Asahi Shinbun*, Japanese daily, 13 May, 1975, morning edition, p. 7; *Ta Kung Pao*, English weekly edition, 23 October, 1975, p. 8; and *People's Daily*, 31 August, 1975, p. 4.
 6. *White Paper*, note 1, above, p. 85.
 7. *Foreign Broadcast Information Service (FBIS)*, vol. 4 (31 January, 1974), p. L1.
 8. *FBIS*, vol 4 (22 January, 1974), p. P1.
 9. *FBIS*, vol. 4 (7 May, 1975), p. K1.
 10. *Peking Review* (26 September, 1975), p. 6; and *Yomiuri Shinbun*, Japanese daily, 1 February, 1976, morning edition, p. 4.
 11. *Yomiuri Shinbun*, 1 February, 1976, morning edition, p. 4. The map the Vietnamese dailies used was also reproduced in *White Paper*, note 1, above, p. 32. *Mainichi Shinbun*, Japanese daily, 2 February, 1976, morning edition, p. 4. The stamp was reproduced in *Newsweek*, 2 August, 1975, p. 14. One of the two 1970 stamps was to commemorate Lenin's 100th birthday and the other to call for a united struggle of the four Indochinese governments (including the Provisional Revolutionary Government in South Vietnam) "against the US imperialists." A full-page article describing the Chinese side of the controversy was published in both *Kwangming Daily* (24 November, 1975, p. 2) and *People's Daily* (25 November, 1975, p. 2), and the English version in *Peking Review* (12 December, 1975), p. 10.
 13. *Asahi Shinbun*, 30 March, 1976, morning edition, p. 7; and *Nihon Keizai Shinbun*, 6 June, 1976, morning edition, p. 5.
 14. *Peking Review* (12 December, 1975), p. 10.
 15. *Fact Sheet*, no. 2/74, South Vietnamese Embassy, Washington, D.C., 28 January, 1974, p. 2.
 16. For details of the Chinese and the Vietnamese arguments, see Hungdah Chiu and Choon-ho Park, "Legal Status of the Paracel and Spratly Islands," *Ocean Development and International Law*, vol. 3 (1975), p. 1; and Tao Cheng, "The Dispute Over the South China Sea Islands," *Texas International Law Journal*, vol. 10 (1975), p. 265. See also Keishiro Iriye et.al., *Gendai Chugokuno Kokusai Kankei* [The International Relations of Modern China], 1975, p. 167.
 17. Chiu and Park, note 16, above, p. 11.
 18. For details of the historical background, see Chiu and Park, note 16, above, p. 3.
 19. Oppenheim, *International Law*, 8th ed., 1955, vol. 1, p. 576.
 20. *People's Daily*, 12 December 1975, p. 2; and *White Paper*, note 1, above, pp. 16, 23.
 21. Chiu and Park, note 16, above, p. 7.
 22. Each of these disputes still remains a major political issue between the parties. It may be noted in passing that the Sino-Soviet dispute of March 1969 over the Ussuri River boundary also involves ownership of the islands. The Ussuri river system is known to have about 700 mid-stream islands, out of which the Soviet Union claims some 600; China is reported to disagree (*Asahi Shinbun*, 4 December, 1976, morning edition, p. 4).
 23. *Third United Nations Conference on the Law of the Sea, Official Records*, vol. 4, pp. 97-98.

24. John K. Gamble and Dana D. Fisher, *The International Court of Justice: An Analysis of the Failure* (1976), p. 84.
25. Huber, *Reports of International Arbitral Awards*, vol. 2, *The Island of Palmas Arbitration* (1928) p. 845.
26. Food and Agricultural Organization, *South China Sea Fisheries*, FAO (Indo-Pacific Fisheries Council)-UNDP, South China Sea Fisheries Development and Coordinating Programme series, Rome, 1973-; and John C. Marr, *Fishery and Resource Management in Southeast Asia*, Paper 7, Program of International Studies of Fishery Arrangements, Resources for the Future, Inc., Washington, D.C., 1976.
27. The Showa-maru accident of January 1975 was the most serious one in recent years. The Japanese tanker (237,698 deadweight tons) ran aground in Indonesian territorial waters south of Singapore and spilled more than 1 million gallons of crude oil. It took 10 days to control the spreading slick. For compensation, Indonesia demanded of Japan \$13.5 million, and Malaysia and Singapore somewhat less each. For details, see Senkuttuvan, "The Showa Maru Sails On," *Far Eastern Economic Review* (13 February, 1976) p. 45; *Asahi Shinbun*, 7 February, 1977, morning edition, p. 6; and *Yomiuri Shinbun*, 25 February, 1977, morning edition, p. 5.
28. Convention on the Pollution of the Marine Environment of the Baltic Sea Area, signed at Helsinki, 22 March 1974; text reproduced in *International Legal Materials* (ILM), vol. 13 (May 1974), p. 544.
29. United Nations Environment Programme: Final Act of the Conference on the Protection of the Mediterranean Sea, signed at Barcelona, 16 February, 1976; text reproduced in *ILM*, vol. 15 (March 1976), p. 285.
30. Agreement Concerning Pollution of the North Sea by Oil, signed at Bonn, 9 June, 1969; text reproduced in *ILM*, vol. 9 (March 1970), p. 359.
31. *Peking Review* (16 June, 1972), p. 6.
32. For a detailed description of the oil situation in Cambodia, Hong Kong, Laos, the Philippines, Thailand, and Vietnam, see Murakami, "Tonan Ajiyani okeru Sekyu Keizaino Doko" [Trends of Oil Economy in Southeast Asia], part I, *Refaransu* [Reference], no. 297, Tokyo, 1975.
33. Murakami, note 32, above, p. 42.
34. Awanohara, "The Rush for Vietnam's Oil," and Chanda, "Hanoi Keeps its Option Open," *Far Eastern Economic Review* (20 February, 1976), p. 36; and *Nihon Keizai Shinbun*, 30 April, 1977, morning edition, p. 1.
35. *New York Times*, May 5, 1976, p. 3:1.
36. O'Connell, "Mid-Ocean Archipelagoes in International Law," *British Yearbook of International Law*, vol. 45 (1971), p. 1; and Kusumaatmadja, "The Legal Regime of Archipelagoes: Problems and Issues," in *Needs and Interests of Developing Countries, 7th Annual Conference Proceedings*, ed. Alexander (Kingston, R.I.; Law of the Sea Institute, University of Rhode Island, 1972), p. 166.
37. For details of the seabed controversies in which China is directly involved, see Choon-ho Park, "Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy," *Harvard International Law Journal*, vol. 14 (1973), p. 212; "The Sino-Japanese-Korean Sea Resources Controversy and the Hypothesis of a 200-Mile Exonomic Zone," *Harvard International Law Journal*, vol. 16 (1975), p. 27; and "Marine Resource Conflicts in Northeast Asia," in *Marine Policy and the Coastal Community*, ed. Douglas M. Johnston (London, 1976) p. 215; and Selig Harrison, *China, Oil and Asia: Conflict Ahead?* (New York: Columbia University Press, 1977), chapters IV, VII, VIII, and IX.

38. Ruster, "Staaten und Vertragspraxis zum Festlandsockel im sudasiatischen Raum," *Jahrbuch für Internationales Recht*, vol. 17 (1974), p. 225.
39. In the Yellow Sea and the East China Sea, foreign oil companies are not seeking extension of exploration-exploitation contracts. For details, see *Petroleum News: Southeast Asia*, vol. 7, no. 10 (January 1977), a feature issue giving current offshore oil activities of 19 countries in Northeast and Southeast Asia.
40. Tonan Ajiya Chosakai [Southeast Asia Research Council], *Tonan Ajiya Yoran* [Southeast Asia Manual], annual issues of recent years.
41. *Tonan Ajiya Yoran*, 1975, p. 5:47.
42. For a nine-page feature article on Soviet naval activities, see *Spiegel* (5 January, 1976), p. 54; and for articles on Soviet merchant marines, see *Far Eastern Economic Review* (13 February, 1976), p. 46; and *Christian Science Monitor*, 16 March, 1976, p. 16.
43. *People's Daily*, 15 May, 1976, p. 6.
44. For the draft of a 25-article guidelines on foreign investment, see *Asian Wall Street Journal*, 14 March, 1977, p. 10:4; and for comments on it, see the *New York Times*, 19 March, 1977, p. A16:1.
45. *Tonan Ajiya Yoran*, 1975, p. 9:9.
46. *Nihon Keizai Shinbun*, 25 July, 1976, morning edition, p. 4.
47. *Asahi Shinbun*, 5 May, 1976, morning edition, p. 6.
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DISCUSSION

Robert Friedheim: Thank you, Choon, for a very thorough but succinct presentation. The speakers' list is open. Mr. Chao?

Chao Hick Tin: Just a short question. The island of Phu-Quoc, is it being occupied by anyone at the present moment?

Choon-ho Park: I understand it's under Vietnamese control.

Chao Hick Tin: No, the sort of inhabitants -- are they Kampucheans or Vietnamese or...

Choon-ho Park: Vietnamese.

Chao Hick Tin: Is this a recent influx of Vietnamese or were the Vietnamese there even before the secession by Kampuchea to Vietnam?

Choon-ho Park: Unlike the island where the *Mayaguez* nightmare took place, this one is more under Vietnamese control.

Chao Hick Tin: You mean, Vietnamese have been occupying that place for a long time?

Choon-ho Park: Yes, because in 1939 Governor-General Brevie included this island under Vietnamese control. But he didn't intend to give sovereignty to either side; he meant this simply for the convenience of his administration at the time.

Chao Hick Tin: If and when there's a change of regime in Kampuchea, do you think they have a case to reopen the issue of this island?

Choon-ho Park: As long as Kampuchea is under different leaderships, each claiming ethnic authenticity or legitimacy, it would be very difficult for Vietnam to negotiate.

Robert L. Friedheim: Jon Van Dyke.

Jon Van Dyke: Choon, can you describe what role the Vietnamese and the Kampucheans played during the negotiations -- whether there were any issues they were particularly concerned about -- and are there any clues as to what their thoughts about ratifying the Convention might be?

Choon-ho Park: I would say that the Vietnamese were more active than the Kampucheans and sometimes like North Korea: they seldom missed any occasion to make political statements. But, other than that, they followed more than took any active role with respect to any particular issue. They were alert to guard their own interests, to see how things would shape up for them or against them. The fact that the Conference had started before Vietnam was unified gave them some problems, too. For instance, the Caracas session was attended by the South Vietnamese; North Vietnam didn't come for political reasons. One of the senior members from what was then South Vietnam happened to be sitting next to us. He was in his early thirties, directing the national oil company at

that time. He ended up somewhere in Minnesota; he was lucky, he was a refugee. When I tried to pursue the Vietnamese position with him further, he said, "Well, I am not in a mood to talk about the law of the sea. The law of the land back at home is at stake, so I don't do that." So he simply lapsed somewhere into obscurity.

Robert L. Friedheim: Dr. Craven?

John P. Craven: As I look at Figure 3 in your second paper, I see some nation-states that I have not previously recognized. I see the nation-state of Tenneco and the nation-state of Gulf and of Union and of Triton and of Esso all appearing on this map. And, every so often in your discussion, you refer to some of these independent entities. What do the oil companies do when they want to either explore or exploit in these areas? How do they approach the problem, or do they just sneak in at night and explore?

Choon-ho Park: Mobil found oil in the fall of 1974, about six months before the South Vietnamese regime collapsed. They thought that any report of a major find of oil off the Mekong or the Gulf of Thailand could in fact encourage the Viet Cong in the north or boost their morale to move southwards quickly. Another consideration was that they weren't very sure -- whichever side was going to win -- that the new unified leadership would be in a situation to negotiate over oil matters. Then in came France to say, "Well, the bloody Americans aren't leaving Vietnam because there is oil offshore," politicizing the situation. But where there is oil, there are oil companies; they are above politics. If, underneath the Kremlin there is oil, then oil companies will go in one way or another; they might even start digging from Scotland or from London. So they were simply waiting; there was no pressing reason for any company to make haste to get oil from offshore Vietnam at that time. But when Vietnam was unified, the new communist regime was dying to get oil to build up the economy. But Vietnam approached the oil companies in a very cautious way. It sent oil missions to Norway, Mexico, and other medium-sized countries to learn more about oil. The Vietnamese didn't go to, say, Japan or the United States or major countries with oil technology and capabilities. When they came to the United Nations General Assembly, one of the Vietnamese leaders approached Michael Tanzer, now an oil consultant in New York, to see how they could go about getting oil. Tanzer wrote a very nice book called *International Oil Politics and Developing Countries* put out by Boston's "notorious" Beacon Press, which puts out many controversial books. (The *New York Times* reported that after the publication of that book the IRS people came to Boston to look at the company records.) So Mobil and other companies that found oil off South Vietnam simply waited it out until the Vietnamese leadership was in a solid position.

John P. Craven: But, as a general policy, do the oil companies seek permits from somebody to give them title, or do they just take a chance and go out there and explore without benefit of clergy?

Choon-ho Park: No oil company would go in without a guarantee at a governmental level. This is exactly what happened between the new communist leadership in Vietnam and American oil companies. The oil companies wanted to explore, but there was some law forbidding business or even contact with a hostile government. So they pressed the Ford

administration, I understand, to go into some formal arrangement -- not formal recognition between the countries -- just to enable them to contact Vietnam because the Japanese, Canadians, Australians, Italians, and French were all fumbling around in the Gulf of Tonkin and off the Mekong delta. The American companies didn't want to miss the bus.

Robert L. Friedheim: Dr. Ake-uru?

Chalermpon Ake-uru: I have two observations to make, the first one about the 1907 treaty between France and Siam. That treaty delimits only the land boundary and not the sea boundary, as Professor Park has said. In that treaty, Ko Kut, which is at the terminus of the land boundary, was re-ceded by France to Siam (now Thailand). But Kampuchea claims they drew a line to intersect Ko Kut, and that is quite strange.

My other observation is about Phu Quoc. Phu Quoc is, indeed, a controversial issue between Kampuchea and Vietnam. But Vietnam and the Heng Samrin regime already concluded an agreement in 1982 proclaiming their common historic waters. In that agreement, if you read carefully, Phu Quoc is already ceded to Vietnam.

Choon-ho Park: Kampuchea certainly has a separate article on the 1907 border in its 31 January 1982 Maritime Zone and Continental Shelf Delimitation Law. They simply said that it would be the basis for negotiating the boundaries, not used as the final boundary. On historic oil sites, the announcement also said that they would negotiate in the future; it didn't say that was the final agreement.

As for Phu Quoc, given the fact that Kampuchea is under different leaderships, from a third-party standpoint, if one agreement in any form is made, the opposing side of the leadership makes statements. So, depending on which side is going to be the final winner in the political leadership, that agreement over Phu Quoc could be called off at any moment. Vietnam says: we'll keep this, this is our bottom line, other small islands we can give up. This has happened more than once. I agree with you, but still the situation is really not quite solid; it could change any time. Kampuchea will use Phu Quoc as a kind of bargaining tool to make life harder for Vietnam. I don't think any leadership in Kampuchea would aim at eventually getting it back under its own sovereignty. Vietnam wouldn't really let it happen.

Chalermpon Ake-uru: It could become controversial again under a new leadership of Kampuchea, for example. Under Heng Samrin, Phu Quoc belongs to Vietnam, according to the 1982 agreement, and Phu Lo Wai, another small island, was given to Kampuchea.

Choon-ho Park: I don't think Vietnam will give it up. But the Soviet Union and China are behind each of the two countries, and Kampuchea is under divided leadership. Heng Samrin lacks solid control to the extent that he has opposition groups, not within the party or within the country, but there are exile-style leaderships still in operation. The Kampuchean claims to the forty-four islands include Phu Quoc, of course, and Phu Lo Wai.

Chalermpon Ake-Uru: You mean the old Kampuchean claims?

Choon-ho Park: Yes.

Chalermpon Ake-uru: Related to this there was a denunciation that Heng Samrin cannot represent Kampuchea in ceding Phu Quoc to Vietnam, and the statement issued by Democratic Kampuchea is that Vietnam has stolen the territory of Kampuchea.

Choon-ho Park: Ultimately, the point is going to be which leadership within Kampuchea will come up as the winner.

Noegroho Wisnomoerti: There was an exchange of islands between Vietnam and Kampuchea, Phu Quoc for Phu Lo Wai. Do you know what was the reason behind the exchange?

Chalermpon Ake-uru: I don't know, but I can read from the text of the agreement.

Robert L. Friedheim: Let's come back to that point. Dr. Chee?

Choung Il Chee: I have two questions on the security zone claims that several Southeast Asian countries have made. What's the extent of the security zone? Are these countries claiming the security zone in conjunction with, or independent of, the claim of a contiguous zone? And the third question: is the continental shelf of Hainan Island common to both Vietnam and the PRC? What's the geological formation?

Choon-ho Park: To answer your third question first, the Gulf of Tonkin is shallow and fairly smooth. In fact, the area southwest of Hainan Island looks more like the natural prolongation from the Vietnamese territory than from China. So China really has a problem there. China doesn't say so, but when China doesn't say so, it speaks more than when it says something on this point.

The security zone claims of Vietnam and Kampuchea are both in the name of contiguous zones. The proclamations both say that these zones will be twelve nautical miles from the outer limit of the territorial seas. But they never use the word "security zone." Then why is it a security zone? To the extent that the passage of foreign vessels and entry into the Vietnamese or Kampuchean territorial waters are both controlled very strictly, they are security zones.

Choung Il Chee: State practice since 1900 includes few states with security zones. In my doctoral dissertation of 1964, I detected about four or five states with security zones, and their extent was six miles. Neither the 1958 Geneva Convention nor the draft articles produced by the International Law Commission nor the Montego Bay Convention refer to a security zone, which means that the claim of a security zone within or without the context of the contiguous zone is not valid under international law.

Choon-ho Park: By the latest count -- a very rough one -- there are over thirty states with security zones. Thirty-three, they say, depending on how you interpret the proclamations. The most extreme one is Somalia's, which claims 200 miles because of the political situation there, at the entry of the Red Sea. But there again, proclamation is one thing, enforcement is another. When Ethiopia and Somalia were good friends, enforcement measures differed from when their friendship deteriorated. Milder enforcement measures we find off Vietnam and Kampuchea. But, as early as 1956, the International Law Commission

draft on the continental shelf in preparation for the 1958 Conventions explicitly stated that one of the main reasons why the security zone couldn't be recognized in international law was that it's subject to abuse. I think that's right; the security zone is really subject to abuse. I don't think we can find any recognition of this in any of the international agreements in force.

Robert L. Friedheim: Noegroho?

Noegroho Wisnomoerti: You have correctly stated that Indonesia will be involved in the Spratly issue. But I don't think our involvement will lead to a dispute or a problem. The Spratly group has always been considered as a factor, even in our 1969 agreement with Malaysia. For that reason, we stopped short at Point 25 on the eastern part of the boundary; we considered that, beyond that point, we would have to include those who will have title over the Spratly group in negotiating a trilateral boundary agreement. And in the negotiations with Vietnam, we also made clear that we considered that the Spratly entitlement was still under dispute, so we left out that point in drawing a line.

Choon-ho Park: In fact, there's no Indonesian involvement anyway or interest affected by the territorial dispute as such. But what I meant was, if the Chinese claims were allowed to run full course, the outer limits of the Chinese claim and the Indonesian claim would meet somewhere, despite the fact that Malaysia is there or Vietnam is there. So who is going to own all these Spratly Islands? Is the owner going to be allowed to use them as base points? China is very extravagant on that point. Potentially, the Indonesian and Chinese zones would meet if China were allowed to use all the Spratly Islands like Amboyna Cay and other islands which Malaysia is also claiming. But Indonesia already has 13,000 islands; why should it wish to have one more?

Noegroho Wisnomoerti: I get your point and I think it's quite a valid one: Spratly will be a more serious problem if those who are finally recognized as the owners of the islands claim a full maritime jurisdiction around them.

Choon-ho Park: Chinese cartographies show a very rough line along the edge of the South China Sea, but the Chinese have been very skillful. They don't say "this is our official claim," but their official cartographies always show this line very close to the Palawan area, supposing the Vietnamese and the Filipinos simply are smiling at this. So the Chinese position seems to be to stake out as far out as possible, then back down as negotiations go by. By staking out unilaterally, at this stage, neither Beijing nor Taipei would lose anything by just saying, "it's ours." China tends to view this Malaysian claim into the southern part of the Spratlies in the same way: Malaysia has no business coming in there, but in 1979 it simply staked out the continental shelf claims. So the Chinese and even Vietnam are saying, "Okay, everybody's claiming the Spratlies, and why not me?" That is the attitude as perceived by the Chinese.

Noegroho Wisnomoerti: One more point of clarification, Choon-ho. You have shown a slide of the South China Sea in which you illustrate the contract areas with shaded blocks. But you do not show very clearly who

actually has issued those contracts, Vietnam or Indonesia. Will the contract area that is granted by the Vietnamese government stop short of the median line, or will it go to the southern part of the median line?

Choon-ho Park: In fine print the countries are named under each block. Foreign oil companies could never even go close to the median line with Indonesia. The contract areas are well within the Vietnamese side; indeed they are very cautious about this. The same thing is happening in the Gulf of Tonkin.

Robert L. Friedheim: Bob Smith?

Robert W. Smith: The straight baseline that Vietnam has recently claimed deviates to a small island twenty or twenty-five miles off their southeast coast. Do you think that Vietnam's baseline system follows international law here? Are you aware of any objective analyses of straight baselines that attempt to define what "general direction of the coast" is?

Choon-ho Park: To answer the second question first, there aren't many solid analyses on baselines, probably because geographical circumstances throughout the world are so widely variegated. The Canadian scholar Cooper has done some studies, but not in comprehensive form. His would be a very good reference.

As for your first question, towards the main basin of the South China Sea, the coastal indentation is really quite smooth so that the Vietnamese straight baseline makes no marked departure from the general direction of the coast. But in the Sunda Shelf area, I think the French protest has some merit indeed because the baseline is simply a kind of a wild enclosure of the area. There aren't many islands off Vietnam along that coast, and their density wouldn't justify enclosure with these long sectors.

Robert L. Friedheim: Dr. McDorman.

Ted L. McDorman: Three small points, Dr. Park. Is the 1974 PRC-Vietnam "hands-off" agreement an official agreement or just a working understanding, and has it been effectively operating? In other words, have there been any major problems in that area? The second point of clarification: you commented that the 1939 Brevie line favored Vietnam over Kampuchea, but it was my understanding from Prescott's analysis that it was, in fact, the other way around. And the third point: since the historic waters agreement between Kampuchea and Vietnam in July 1982, there has been a land boundary agreement between them that also relates to maritime boundaries. Are you aware of what that particular agreement said?

Choon-ho Park: The third question first. They don't use the word "land boundary" or "sea boundary," but simply say "the frontier agreement" that includes both.

As for the Brevie line, at the time of the 1939 agreement, Indochina was under French domination and the national boundary there was not what you would expect between, say, the Korean peninsula and China or between two European countries. The Brevie line placed Phu Quoc under Vietnamese administrative control, not sovereignty as such.

It could very well be that the Brevie line favored Kampuchea landward, but certainly on the maritime side it favored Vietnam.

The "hands-off" agreement between Vietnam and China was occasioned by the fact that Western oil companies involved on both sides in the Gulf of Tonkin were reluctant to go ahead with oil exploration negotiations unless they were assured that boundary problems wouldn't make life difficult for them. Many companies simply told them, "Unless we are not going to be pushed around again over the boundary issues, as in the Yellow Sea and the East China Sea, we are not interested in going ahead." It's a *modus vivendi*; it isn't boundary delimitation or jurisdiction, much less sovereignty.

Robert L. Friedheim: Dr. Rhee.

Sang-Myon Rhee: Dr. Park, in your maps some of the lines proposed by Kampuchea are inconsistent. Some lines take just a slice of that island and some lines detour around it. What is Kampuchea's exact position on this boundary?

Choon-ho Park: The 1957 claims don't include the major island in dispute, Phu Quoc, because the original claim was only up to three miles; there was no need to enclose that island. But we can question why there was no delimitation around Phu Quoc Island if Kampuchea really meant to claim sovereignty over it. Otherwise, the fifteen maps simply show the creeping seaward movement of Kampuchean claims. It claimed three miles first, and then five miles, and then a fifty-meter depth fishing limit, and then twelve miles. This is a marvelous example of what some people -- including John Craven -- call "creeping jurisdiction."

Sang-Myon Rhee: Are the Kampuchean positions on the continental shelf, the territorial sea, and the economic zone consistent?

Choon-ho Park: Yes, indeed, but one novelty you find in the 1982 proclamation is that the economic zone shall be up to 200 miles. Kampuchea hasn't got room to go even half that far. By implication, therefore, it would eventually use the median line principle to determine its maritime boundaries. But just agreeing on the principle to be applied doesn't resolve the problem because the base points or baselines would be at issue again. Given the complicated facts there, even the adoption of charts would involve another round of pro and con arguments. This is happening in the Strait of Malacca, I understand. The three coastal states, in the early days of their joint efforts, were insisting on the adoption of different charts -- one made by the Dutch, another by the Americans, and so forth. Applying the same latitude and longitude to establish even one navigation mark, a buoy or something, the three parties ended up hundreds of yards from one another. This is what the head of the Tokyo-based Malacca Council told me.

Robert L. Friedheim: Dr. Chao?

Kuo-Tsai Chao: Professor Park, it seems that there's some dispute between the Chinese communist regime and Vietnam on the interpretation of the 1887 treaty, especially on the Gulf of Tonkin and also on the Bac Bo Gulf. Do the Chinese have any response to Paragraph 3 of the

Vietnamese Declaration on Baseline of Territorial Waters? Could you explain a bit more about the problems in Gulf of Tonkin and in the Bac Bo Gulf?

Choon-ho Park: *Bac Bo* in Vietnamese and *Bei Bu* in Chinese mean "the Northern [Bay]," because it's situated at the northern end of the South China Sea. The name we use internationally is the Gulf of Tonkin.

This statement to use the 1887 treaty in determining the maritime boundary with the PRC is not a convincing negotiated position but simply a unilateral insistence, so to say, which China does not accept. In substance, it is simply a reiteration of what the Vietnamese had been saying ever since the dispute started. In 1887, France and the Qing Dynasty agreed on the land boundaries. Paris issued an eastern longitude measure in the Gulf of Tonkin and drew straight down from it, but didn't specify the southern end of that line. Vietnam says that the line is final, but China has never thought so. The position of each is that the 1887 treaty favors Vietnam through the use of the median line. China wants to extend far beyond the median line, and since this is not possible under the 1887 treaty, it simply doesn't want to go along with it. No third party involvement is allowed. The original text was in French and Chinese. I was told, by Professor Chiu, in fact, that there is some ambiguity or error in the French translation and in the English translation, so that we've got to be very careful in looking at all this.

Robert Friedheim: Dr. Manansala?

Mario Manansala: Choon, you mentioned the Chinese claim to the entire South China Sea area up to the shores of Palawan. How serious is this claim? You also mentioned that the claim includes coral islands which grow at the rate of four inches per year. According to my computation, it would only take about eighteen years before the coral islands would come up over the water level and qualify as islets.

Choon-ho Park: This "growing upwards and surfacing in 100 years" referred specifically to the central group around Macclesfield Bank (Zhong-xia), not the Spratlies. The tallest one there is about ten meters below the surface at low tide; therefore, at the rate of four inches or ten centimeters a year, ten meters would take 100 years. The Chinese geographer says "in a few years," or "in some years' time." But the Spratlies are much higher and so will emerge that much earlier. The Chinese proclamation of 1958 specifically mentioned that these submerged coral outcroppings would have straight base lines as well as twelve-mile territorial seas around them. The Republic of Korea has a submerged coral island west of Cheju Island, and we would love to see this principle articulated in legal language by China. Then we could bank on that, you see.

Robert L. Friedheim: Thank you, Choon. I thank all of you for a very lively session. It's been very interesting and, I think, very informative, but as a political scientist I'd like to point out one very obvious difference between yesterday and today: yesterday, we were talking about problems which, technically, were equally as complicated as those we were talking about today, but they were problems between states -- basically ASEAN states -- with whom there are reasonable political relationships. Today, the problems are complicated by the

fact that there aren't reasonable political relationships and therefore the probability of these being resolved in the foreseeable future is really quite different. Thank you.

Choon-ho Park: Thank you, Bob. This has been a very interesting session. Of course, the many situations of the past are interpreted differently and I'm reminded of what the editor of a Soviet encyclopedia said. He said, "It's increasingly difficult to predict the past now." Thank you.

ANTARCTICA AND THE LAW OF THE SEA

ANTARCTICA AND THE LAW OF THE SEA

Robert L. Friedheim: Some like it hot, but others like it cold, and our next speaker is one who apparently likes it cold. Lee Kimball is the Executive Director of Citizens for Ocean Law, a non-profit educational organization launched in 1980 in the United States to conduct an educational campaign on changing ocean legal regimes and the importance of agreed international law. She also serves as a consultant to the United Methodist Law of the Sea Project on ocean law matters and to the International Institute for Environment and Development on Antarctic Ocean Law and Policy. As a non-governmental public interest representative, she has advised the U.S. government on Antarctic and ocean policy matters since 1978. Ms. Kimball has published numerous articles on oceans, the Antarctic, and other common areas in question. She is a graduate of Stanford University and she's received a Master's degree in International Relations from Johns Hopkins School of Advanced International Studies.

ANTARCTIC ISSUES TODAY

Lee Kimball
Consultant

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I was asked to speak today about current Antarctic issues and developments in the legal/political arena. I will begin by giving some background on the existing legal/political situation in Antarctica before turning to what I see as the three major topics of today. While I will address these topics individually, there are obvious links among them:

- (1) the objectives and problems in the on-going negotiations to draft a legal regime to govern the possibility of Antarctic mineral resources development;
- (2) how to ensure the protection and preservation of the vital Antarctic environment and its associated ecosystems, including the conservation of Antarctic marine living resources; and
- (3) the future of the Antarctic Treaty System in light of a recent increase in international and public interest in Antarctica, primarily as a result of attention focused by the first two topics.

Background

The Antarctic Treaty and its derivative legal instruments and institutions are commonly known as the Antarctic Treaty System. These include the 1959 Antarctic Treaty, which entered into force in 1961; the 140-odd recommendations agreed to by those countries with decision-making status under the Antarctic Treaty -- the Antarctic Treaty Consultative Parties (ATCPs); the 1972 Convention for the Conservation of Antarctic Seals (Seals), which entered into force in 1978; the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), which entered into force in 1982 and established a Commission, a Scientific Committee, and a secretariat headquartered in Hobart, Tasmania, Australia; and the Scientific Committee on Antarctic Research (SCAR) -- a committee of the non-governmental International Council of Scientific Unions (ICSU) charged with initiating, promoting and coordinating continued international scientific cooperation in Antarctica. The proposed Antarctic mineral resources regime will add another element to the Antarctic Treaty System.

The Antarctic Treaty

The 1959 Antarctic Treaty resulted from a U.S. initiative to preserve the peaceful spirit of international cooperation that prevailed among the countries active in Antarctic scientific research efforts during the International Geophysical Year (IGY) of 1957-58. These twelve countries met in Washington, D.C. to conclude a treaty whose purposes were threefold:

- (1) to maintain Antarctica as a demilitarized zone of peace and a nuclear-free zone -- free from the East-West confrontation prevailing elsewhere during this Cold War period, from a resurgence of territorial disputes between Argentina, the United Kingdom and Chile, whose claims in Antarctica overlap, and from the possibility of conflict between those countries claiming portions of Antarctica and those which do not recognize these claims. (Of the original twelve signatory nations, seven -- Argentina, Australia, Chile, France, New Zealand, Norway and

the United Kingdom -- and the other five -- Belgium, Japan, South Africa, the U.S.S.R. and the U.S. -- do not recognize any claims. Approximately 15 percent of Antarctica is unclaimed); (2) to provide for continuing international cooperation in scientific research efforts in Antarctica of benefit to all countries and peoples, and that the results of such scientific activities shall be freely and publicly available; and (3) to establish a mechanism for continuing consultation and consensus agreement on matters relating to Antarctica and the purposes of the Antarctic Treaty, including the preservation and conservation of living resources in Antarctica.

The Antarctic Treaty relies on international cooperation in science as a vehicle to defuse potential disputes over national rights and jurisdictions in Antarctica. It permits freedom of scientific investigation but specifies that nothing in the Treaty, nor acts nor activities taking place while the Treaty is in force, shall in any way affect the status of claims to territorial sovereignty in Antarctica, the basis for claims, or the positions of those parties to the Treaty that recognize or do not recognize asserted claims or bases for claim.

The Treaty also establishes a unique system of inspection that allows observers designated by ATCPs free access at any time to all areas of Antarctica including stations, installations and equipment and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica. Aerial observation may be carried out at any time in any area of Antarctica.

The Antarctic Treaty does not establish any permanent institutions. ATCP members take turns in hosting and servicing regular biennial consultative meetings. These meetings consider and adopt recommendations on technical, administrative, and procedural issues relating to scientific research, meteorology, telecommunications, transport, logistics, tourism, and environmental protection and conservation in Antarctica. In addition, special consultative party meetings have been convened for specified purposes. Three of the five to date took place to admit new consultative party members: 1977-Poland, 1981-Federal Republic of Germany, 1983-India, and Brazil. Another evolved as a series of meetings to conclude negotiation of the CCAMLR: 1977 - 1980. The fourth special consultative meeting is the ongoing schedule of meetings to conclude an Antarctic minerals regime: 1982 - ?.

Finally, the Antarctic Treaty includes provision for a review at any time after the Treaty has been in force for thirty years -- that is, after June, 1991. The review make take place only if one of the ATCPs so requests.

There are currently sixteen ATCPs -- the original twelve signatories to the 1959 Treaty and the four admitted at special consultative meetings: Poland, the Federal Republic of Germany, India and Brazil. Consultative status is open to those countries that have acceded to the Treaty and have conducted substantial scientific research in Antarctica, such as the establishment of a scientific station or mounting a scientific expedition to Antarctica. Any member country of the United Nations may accede to the Antarctic Treaty, as may any other state with the consent of all ATCPs.

In addition to the four countries that have already moved from acceding to consultative status, the following fifteen countries have acceded to the Antarctic Treaty since its entry into force: Czechoslovakia-1962, Denmark-1965, Netherlands-1967, Rumania-1971,

German Democratic Republic-1974, Bulgaria-1978, Uruguay-1980, Italy, Papua-New Guinea and Peru-1981, Spain-1982, People's Republic of China-1983, Hungary, Finland and Sweden-1984, Two to three of these countries have indicated within the last year that they intend to qualify for consultative status. In April, 1983, the acceding states were invited for the first time to attend the XII ATCP meeting in September, 1983, as observers. They have since been invited as observers to the XIII ATCP meeting in 1985 and to future meetings of the minerals regime negotiations.

Recommendations

Recommendations are adopted by consensus among those countries with consultative status and must be approved by their governments to enter into effect. Among the most commonly referred to recommendations are Rec. III-8: the Agreed Measures for the Conservation of Antarctic Fauna and Flora, including provision for specially protected areas (SPAs) to preserve unique natural ecological systems; Rec. VIII-3: providing for designation of sites of special scientific interest (SSSIs), to protect scientific research activities and areas of exceptional scientific interest from interference; Rec. VIII-6: providing a standard format for the annual exchange of information on national scientific research plans and their results and on national implementation of the Agreed Measures; and Rec. VIII-11: providing a code of conduct for Antarctic expeditions and stations with respect to waste disposal and environmental impact assessments on proposed major Antarctic projects.

Seals

During the 1800s ships from Europe and the U.S. exploited seals in the Southern Oceans. Their voyages decimated seals populations but produced many early discoveries and aroused public interest in the southernmost continent and its surrounding seas. Reports on experimental sealing expeditions undertaken by Norway in 1964, however, and later by the USSR in 1971-72, gave rise to speculation that renewed sealing in the area might again deplete populations there. In 1968 SCAR reported on the scope of the problems, and this ultimately led to the negotiation of the 1972 Seals Convention.

Under the terms of the Convention, SCAR is to monitor sealing statistics and reports on the implementation of the Convention and to recommend scientific research programs and other measures to further its purposes. Once commercial sealing has begun, a system of control may be established by a two-thirds majority vote and the concurrent vote of all original Treaty signatories present at the meeting. Participation in the Convention is limited to the twelve original ATCPs and to countries invited to accede with the consent of all parties.

The Seals Convention has never been implemented because there has been no commercial sealing in Antarctica since its negotiation and entry into force.

Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)

As the distant-water fishing nations applied increased efforts and improved technologies during the 1960s and 1970s, they depleted their conventional fishing grounds in northern waters. Many coastal states closed offshore areas to them with the introduction of 200-mile fishing and exclusive economic zones, so the distant water states began to seek

new opportunities in the southern oceans. The Soviet and Japanese began in the 1960s to harvest krill, the Southern Ocean shrimp-like creature. Later Poland, the GDR, FRG, Chile, Taiwan, Spain, Norway, and the Republic of Korea joined in with smaller-scale, experimental harvesting and product development efforts. The latter have since largely come to a halt. With respect to the harvest of marine species other than krill in the Southern Ocean, the Soviet Union is also the major harvester of finfish in the Southern Ocean.

In IIED's publication *The Management of the Southern Ocean*, Barbara Mitchell and Richard Sandbrook argue that the distance of Antarctica from the home ports of the fishing fleets, Antarctica's harsh climate and short harvesting seasons, the difficulty of locating swarms of Antarctic krill -- a significant problem during the 1983-84 Antarctic summer -- as well as lack of efficient and economical processing techniques combine to make a rapid build-up in this fishery unlikely, at least among the world's free market economies.

In Antarctic Treaty meetings, marine living resources other than whales and seals were first considered informally in 1972. Reports of increasingly intensive fishing around Antarctica in the mid-seventies prompted the ATCP decision in 1977 to negotiate a conservation agreement for Antarctic marine living resources. They wished to conclude the agreement before the onslaught became too great and the possibility of disputes over fishing arose. Recommendations VIII-10 in 1975 and IX-2 in 1977 led to the special meetings to conclude the 1980 CCAMLR.

The CCAMLR establishes a unique concept of "ecosystem management" as the standard for the conservation of Antarctic marine living resources. This standard bases conservation measures not on the more conventional approach of protecting the sustainable yield of harvested species, but rather on taking into account inter-relationships among species and their environments in order to maintain and restore ecological relationships between harvested species and related or dependent species. Moreover, the Convention area extends north of the Antarctic Treaty area's boundary at 60 degrees South latitude to cover those waters that fall within the natural boundary of the Antarctic marine ecosystem -- the convergence between cold, low-saline Antarctic waters and warmer, higher-saline northern waters moving south. The Treaty covers all fish, crustaceans, squid, creatures of the continental shelf, and birds.

It provides for the establishment of a decision-making Commission and an advisory Scientific Committee. Conservation measures must be adopted by consensus in the Commission. Those countries whose representatives may participate in decision-making are the original signatories once they have ratified the Convention, and nations that have acceded to the Treaty, during such time as they are engaged in harvesting or research activities related to marine living resources. The original signatories are the first twelve ATCPs, Poland, the GDR, and the FRG. The European Economic Community has also acceded to the Convention and is a member of the Commission.

In order to help coordinate Southern Ocean conservation efforts, the CCAMLR provides that it shall not derogate from the rights and obligations of parties under the Antarctic Seals Convention and the 1946 International Whaling Convention (IWC); that to avoid inconsistencies the Commission is to take account of relevant measures and regulations approved in ATCP meetings and in existing fisheries commissions responsible for species that may enter the area of application of the CCAMLR; and that the CCAMLR institutions shall cooperate with the UN Food and Agricultural Organization (FAO) and with other inter-

national organizations as appropriate and invite them to send observers to attend Commission and Committee meetings. When the Commission and the Scientific Committee convened at their second meeting in September, 1983, observers present represented the IWC, FAO, the Intergovernmental Oceanographic Commission (IOC), the International Union for the Conservation of Nature and Natural Resources (IUCN), SCAR, and ICSU's Scientific Committee on Oceanographic Research (SCOR).

The Commission and the Scientific Committee will convene their third meeting from 3-14 September 1984. So far they have completed most organizational and budgetary arrangements to implement the Convention. Their present focus is to collect data and information in order to knowledgeably implement and apply the CCAMLR conservation standard. They will require not only substantially more data than currently exists on southern species, but also greater understanding of species' interactions. Predictions in the early sixties produced expectations that the abundance of krill and the depletion of Southern Ocean whale stocks that feed on krill would result in a large, sustainable krill harvest up to several times the total annual world fish harvest of approximately seventy million tons. More recent scientific investigations and analyses suggest that changes in the populations of seal, squid, bird, and even some whale populations compensate for reduced numbers of krill-feeding whales and are leading to a new equilibrium in Southern Ocean ecosystems that may leave a significantly smaller "surplus" of harvestable krill.

In September, 1983, the CCAMLR Scientific Committee recommended that an *ad hoc* meeting of technical experts on Data Collection and Handling be convened to consider the kinds and amounts of data required for assessing the state of fish and krill resources. This meeting took place in Woods Hole, Massachusetts, last month and will report back to the 1984 CCAMLR meetings. The Scientific Committee must also consider means for dealing with data to be submitted by the Antarctic fishing nations in compliance with CCAMLR. In addition, it will draw on results from the ten-year BIOMASS program (Biological Investigations of Marine Antarctic Systems and Stocks), which is in its second phase of seeking to acquire a better understanding of Antarctic marine ecosystems. BIOMASS is sponsored by SCAR, FAO, and other organs of the ICSU.

The Scientific Committee on Antarctic Research (SCAR)

The SCAR is the final element of the Antarctic Treaty System, As noted above, it is a non-governmental unit whose role is to work with Treaty party governments in carrying out the purposes of the Antarctic Treaty, the Seals Convention, and the CCAMLR. It both initiates and implements recommendations and decisions adopted under these instruments. Each ATCP has a national Antarctic committee that is a member of SCAR, SCAR convenes in biennial assemblies, sponsors conferences and symposia, and publishes a bulletin three times a year.

Let me turn now to the three major issues and developments of today that I mentioned at the onset.

The Antarctic Minerals Regime Negotiations

Potential offshore oil is the primary mineral of interest in Antarctica. Yet while there is compelling circumstantial evidence of offshore oil there, none has yet been discovered. Moreover, the difficulties and hazards associated with offshore oil development in this frontier polar area would present major impediments to extraction. Today's glut in worldwide oil supplies discourages interest in commer-

cial development in Antarctica, as do higher costs associated with transport to distant markets and the absence in Antarctica of any infrastructure, labor, or other supplies. Recent comments by two minerals experts indicate that no oil company would contemplate going to Antarctica in this century, and that it would take discovery of a giant, if not a supergiant, oilfield (.5 billion to 5 billion barrels) off Antarctica to sustain economic recovery of oil in the harsh Antarctic environment.

What is known about onshore minerals in Antarctica does not reveal deposits of potential commercial worth. Moreover, alternative sources of the trace occurrences identified are more accessible elsewhere and would be less costly to extract than in Antarctic circumstances.

After the CCAMLR was concluded in 1980, the ATCPs turned to the question of Antarctic mineral resources, which had first arisen informally at their 1970 meeting. In 1981 they adopted Recommendation XI-1, calling for a special consultative meeting to negotiate a regime governing the possibility of Antarctic mineral resources development. Rec. XI-1 sets out the principles that are to serve as a basis for the negotiations. To date, there have been five sessions of the IV special consultative meeting. The last one took place in Japan from May 21-31, 1984. The next session will convene in February-March, 1985, in Brazil.

Incentives to complete the minerals regime were threefold. First, the ATCPs recognized that the disputed territorial status of Antarctica would complicate agreement on resources development arrangements, in particular with respect to jurisdiction over and rights to non-renewable mineral resources. They determined to complete the mineral resources regime to round out the legal regime for Antarctica and thus to avoid potential future difficulties. Second, the 1973 oil embargo, rising oil prices, and the discovery of traces of methane, ethane, and ethylene in Antarctica's Ross Sea in 1972-73 stimulated interest in the possibility of discovering offshore oil around the Antarctic continent. These events further strengthened ATCP resolve to complete the minerals regime prior to actual discovery of any commercially attractive resources. Third, growing interest in Antarctica among countries not party to the 1959 Treaty began to cause some anxiety among the ATCPs that other nations might wish to challenge their exclusive decision-making role in Antarctica. These countries were becoming concerned, bearing in mind the conclusion of the Law of the Sea (LOS) Convention in December, 1982, and its application of the common heritage of mankind concept to the deep seabed and its mineral resources beyond national jurisdiction, that the ATCPs might appropriate Antarctica's mineral wealth for themselves. In their view, the continent's territorial status and thus ownership of mineral resources were unclear. The ATCPs' sense of urgency in completing a minerals regime further fueled their suspicions and also produced misperceptions about the timing for possible minerals development in Antarctica.

Within the minerals regime negotiations, there are three major issues to be resolved:

- (1) how to ensure protection of the Antarctic environment and associated ecosystems and preserve Antarctica's value as a pristine scientific laboratory;
- (2) how to avoid prejudicing either the claimant or the non-claimant position in establishing administrative, regulatory, and enforcement responsibilities under the regime; and

(3) how to design a regime that responds to international community concerns for wider international cooperation in Antarctica so as to command recognition, respect, and stability for the regime.

The minerals negotiations are not intended to produce a detailed set of rules for minerals development. They will draft a framework regime that will specify basic principles and standards in accordance with which all minerals activities in Antarctica must be conducted. It will provide for institutions and decision-making procedures to implement and apply these principles and standards, and to elaborate more detailed regulations if and as minerals activities become feasible.

A fundamental element of environmental protection under the minerals regime is that no development activities may proceed absent a positive consensus that such activities would be acceptable under terms and conditions that derive from the principles and standards set forth in the regime. This would guarantee Antarctica's protected status unless there is a consensus agreement that minerals activities may proceed.

Equally important are the principles set forth in the regime. They must be strictly and clearly elaborated. The principles would be analogous to the basic conservation standard in the CCAMLR, and should be implemented in coordination with implementation of the CCAMLR standard. One critical principle in the minerals regime would be the information sufficiency principle: that all decisions taken under the regime must be based on information adequate to judge potential damaging effects. This would require information on the Antarctic environment and associated ecosystems, on potential impacts and environmental hazards such as weather and ice conditions, and on the nature and effectiveness of equipment and operational procedures. Additional principles could provide, for instance, that no Antarctic mineral resource activity may be conducted until an environmental impact assessment has been prepared and a determination made that the activity will not directly or indirectly adversely affect unique biological communities or areas of special biological, scientific, historical or aesthetic importance. Others could require use of best available technologies and provision for adequate contingency plans and restoration of the environment.

The decision-making procedures complement the principles. They must guarantee stringent and effective application of the principles to all decisions taken under the regime and include effective application of monitoring and enforcement requirements.

The institutions contemplated in the draft minerals regime -- the first text of which was published one year ago by an environmental organization coalition -- include two plenary institutions like those established by the CCAMLR -- a Commission and a Scientific, Technical and Environmental Advisory Committee -- as well as a secretariat. In addition, limited-membership regulatory committees would be established for restricted geographic sections of Antarctica. They would be responsible for more detailed regulations and some decisions with respect to minerals development activities in these sections of Antarctica. Regulatory Committee decisions would be taken pursuant to more general guidelines and standards elaborated by the plenary institutions and applicable to all Antarctic minerals activities. The division of responsibilities among the institutions established by the minerals regime and between the institutions and individual states parties to the regime will contain the "internal" agreement between

claimant and non-claimant parties.

With respect to the issue of "external" acceptability of the minerals regime, the interests of countries not party to the Treaty may be divided into four aspects: interest in benefits from development, such as revenue-sharing; interest in being able to participate actively in development activities through, say, joint venture arrangements that facilitate developing nations' involvement; interest in having a role in decision-making with respect to minerals activities; and interest in being kept informed on matters relevant to minerals development in Antarctica -- or the notion of ATCP accountability for their decision-making role in Antarctica.

These are all issues under consideration by the ATCPs in their negotiations. Recommendation XI-1 provided that the minerals regime should not prejudice the interests of all mankind in Antarctica, and the ATCPs clearly recognize that the regime they are drafting must be internationally acceptable if it is to provide stability for minerals activities. But countries not party to the Antarctic Treaty have not been much consulted on how to accommodate their concerns. As a first step in increasing their accountability and the range of participation in the minerals regime discussions, the ATCPs at their May, 1984, meeting in Japan decided to invite the acceding states party to the Antarctic Treaty to attend future meetings of the minerals negotiations as observers. They will have access to all the documentation of the negotiations and may speak freely in discussions. They may not take part in decisions. Because Antarctic Treaty meetings are not conducted as exercises in voting but rather as discussions leading to consensus, however, the distinctions between ATCP and observer participation will probably diminish over time. The next step may be to consult with countries not party to the Treaty to explore their interests in Antarctica.

Environment and Conservation

There are a number of issues that arise in this area which apply both to the minerals regime and to the whole of the Antarctic Treaty System. To begin with, Antarctic Treaty regimes must be built upon sound principles, such as the conservation standard in the CCAMLR and those referred to above in the minerals regime discussion, if they are to effectively guarantee protection of the Antarctic environment and conservation of the region's living resources. Sound principles must go hand in hand with decision-making procedures that ensure their stringent application to all relevant decisions taken. Providing effective procedures for monitoring, enforcement, and responsibility is a third important area for environmental protection. The ambiguous territorial status of Antarctica and therefore of jurisdictions and rights there make agreement on these questions particularly difficult if one is to avoid prejudicing either the claimant or the non-claimant position. For instance, a number of environmental organizations have criticized a decision by the French government to build an airstrip in Antarctica, which they feel may be in violation of the Agreed Measures for the Conservation of Antarctic Fauna and Flora. Whether or not construction of the airstrip, now on hold, was in violation of these measures, there has never been a formal questioning of the French decision within Antarctic Treaty meetings. The lack of specified procedures to ensure compliance by member states with Antarctic Treaty provisions stems partially from the desire to avoid formally addressing in treaty documents the rights of claimants and non-claimants.

Similarly, agreement on conservation measures under the CCAMLR may pose difficulties that stem from jurisdictional claims in Antarctica. The possibility of establishing national quota allocations was not addressed in the framework CCAMLR convention; if they are to be established, this will be decided by consensus. This was done partially to avoid confronting potential claims to offshore jurisdiction over marine living resources in 200-mile zones. Although the issue has yet to arise in the implementation of the Convention, the effectiveness of specific conservation measures ultimately agreed to may be watered down by efforts to side-step claimant/non-claimant sensibilities on offshore rights and jurisdictions.

Under the minerals regime, when it comes to determining detailed provisions on monitoring, enforcement and responsibility in regulations and contracts, the need to avoid explicitly addressing the claimant/non-claimant issue *may* detract from their effectiveness.

Given the structural ambiguity on jurisdiction inherent in the Antarctic Treaty System, it may not be possible to formalize significant improvements in responsibility and enforcement provisions within the legal instruments of the system. If this is the case, however, if the ATCPs wish to preserve this structural ambiguity that underlies the Antarctic Treaty System, they should take steps to hold themselves accountable to the wider international community for effectively carrying out their stewardship role in Antarctica. For when countries not party to the treaty system criticize its exclusiveness, their primary rationale is that they are indeed affected by Antarctic events because of Antarctica's role in world climate patterns and oceanic currents, both of which affect their own territories.

Numerous mechanisms exist to improve upon accountability under the Antarctic Treaty system. These include increasing public availability of information, particularly with respect to inspection and reports on compliance with treaty regimes; allowing observers to comment on proposed decisions and measures; insulating, as far as possible, expert technical advice and inspection provided the Antarctic regime from national political and economic considerations and ensuring their continuity; institutional review within each regime of decisions taken under it and of compliance with it; the possibility of judicial review initiated by parties to the regime, or even possibly by those not party to the regime.

A fourth major issue with respect to environmental protection and conservation is the integration and coordination of the legal instruments and institutions within the Antarctic Treaty System and the consistent application of standards established by them. For as harvesting of marine living resources and the possibility of minerals development combine with increasing tourism, scientific research and logistics and supporting activities, including navigation, the potential for congestion, accidents, and cumulative environmental impacts grows.

I have already noted how the CCAMLR provides for institutional coordination with relevant international organizations and existing fisheries regimes. The new minerals regime will also have to encompass mechanisms to facilitate coordination, including due regard for protecting the scientific uses of Antarctica and its value as a pristine laboratory as well as areas of unique biological, historic, or aesthetic significance.

One of the difficulties in this regard is the absence of any permanent institutional structure under the 1959 Antarctic Treaty.

Another is the Antarctic practice of depositing and/or headquartering the different legal instruments and institutions in different countries. (The U.S. is the depositary for the Antarctic Treaty, the United Kingdom for the Seals Convention and Australia for CCAMLR and the headquarters for the CCAMLR institutions. No determination has yet been made with respect to location of the minerals regime depositary/headquarters.)

Cross-referencing the various legal instruments and providing for observers' representation among their secretariats and other relevant international organizations will help ensure coordination and consistency. But the question of how to improve upon these mechanisms merits further consideration.

Fifth, sufficient data is needed to be able to implement the CCAMLR and minerals regime standards as noted earlier. The BIOMASS effort with respect to CCAMLR and the efforts of the CCAMLR Scientific Committee will help, but additional research will be required to collect and analyze data. Under the minerals regime, a prohibition on minerals activities absent adequate data will provide incentives for would-be operators to produce the requisite information. Nevertheless, pressure to develop mineral resources at some time in the future, combined with national budgetary constraints, may undermine stringent application of the data requirements in the regime.

I should not abandon environmental questions without noting that a number of environmental organizations worldwide have called for the designation of Antarctica as a world preserve, fully protected from any minerals development, at least for the foreseeable future. They advocate that Antarctica should continue as a scientific laboratory and be protected for its aesthetic or "wilderness" values.

Evolution of the Antarctic Treaty System

In September, 1982, Malaysia raised the question of Antarctica in the United Nations General Assembly. The Non-Aligned Movement summit took it up in March, 1983, and called for a widening of international cooperation in Antarctica. During the summer of 1983, Malaysia and Antigua and Barbuda successfully co-sponsored an initiative to place Antarctica on the UNGA agenda.

Following a November, 1983, debate on this topic, the UNGA approved by consensus a resolution calling for the Secretary-General to produce a comprehensive, factual, and objective study on all aspects of Antarctica. He is to report back to the Fall 1984 UNGA when the Antarctic agenda item will be reconsidered.

The UN secretariat has nearly completed the report to be submitted to the 1984 UNGA, allowing time for its translation into the six UN languages. It is a descriptive report covering Antarctica and the Antarctic environment and resources, national scientific activities there, and the history of political/legal developments in Antarctica. Although all countries were requested to submit views on this item, very few have yet done so, Nor have the many international organizations and UN specialized agencies yet had time to complete their submissions.

Neither the countries that have promoted UN involvement in Antarctica nor the parties to the Antarctic Treaty have a clear idea of what they would like to see as the outcome of UN involvement. The ATCPs would have preferred no UN involvement, but they did not oppose the UN initiative as long as it did not prejudice the maintenance of the Antarctic Treaty System. In their view, more widespread "outsider"

interest in the system is a fairly recent phenomenon. They believe that the Treaty System may evolve to take account of the call for wider international cooperation in Antarctica in a manner acceptable to the international community as a whole.

Another focus of "outsider" interest in Antarctica stems from the environmental community. The prospect of minerals development in Antarctica has heightened their concern for the pristine Antarctic environment. Their doubts about effective stewardship of the present system of management in Antarctica have become more numerous and more visible. As I noted earlier, there are a number of potential solutions to improving the accountability of the Antarctic Treaty System to take account of the environmental concerns.

What are the primary concerns raised by countries not party to the Treaty System? I have reviewed these questions and the ATCP response as they emerged during the UN debate last fall. In summary, they relate to:

- (1) the limited international participation in Antarctic Treaty meetings and the costs of achieving decision-making status under the Treaty;
- (2) the secrecy surrounding Antarctic Treaty meetings; and
- (3) questions about the ownership of Antarctic mineral resources and the possibility of declaring them the common heritage of mankind like those of the seabed beyond national jurisdiction.

The ATCP response is that:

- (1) they have taken steps recently to begin to address information flow and accountability problems;
- (2) the recent increase in interest in the Antarctic Treaty has brought six new accessions since 1981; two more states achieved consultative status in 1983 -- India and Brazil; accession to the Antarctic Treaty is open to any member state of the UN; and Antarctic decision-making requires a certain amount of experience and expertise in Antarctic affairs; and
- (3) with respect to the common heritage concept, that Antarctica is not an area beyond national jurisdiction as far as the claimant states are concerned and is already subject to an effective legal regime whose maintenance would be automatically foreclosed by attempts to alter the ambiguous territorial status of Antarctica. They believe that the Antarctic Treaty may only be replaced in accordance with procedures set forth in the Treaty.

The basic question on this issue of the future of the Antarctic Treaty System is whether the system itself will evolve to take account of "outsider" concerns or whether there will be attempts to replace the existing system with a new international regime and institutions. The former course will require willingness and initiative on the part of the ATCPs to broaden the base of Antarctic decision-making. They may do so by creating circumstances that allow additional countries to acquire expertise and experience in Antarctic affairs -- the criteria for consultative party or decision-making status. First, they could take additional steps to inform interested outsiders about Antarctic affairs by increasing publicly available information, by expanding observer participation in Antarctic meetings from larger-membership international organizations whose expertise is relevant to Antarctic affairs, and by developing more ample working relationships with these organizations that could help inform their memberships and allow input and comment from them. Second, they could seek to promote collaborative research programs through international and regional organizations as

well as on a bilateral basis to involve a wider spectrum of the international community in activities in Antarctica. This would provide the experience necessary to make them eligible for decision-making status without their having to mount expensive, individual national research projects in Antarctica. Of course the financial implications of this latter course would have to be further considered.

The ATCPs must recognize that international acceptance of the treaty system is fundamental to avoiding that Antarctica become "the scene or object of international discord," as set forth in the 1959 treaty. If disagreements prevail, neither the continuity of peaceful international scientific cooperation there nor adequate concern for the protection of the Antarctic environment and conservation of its living resources can be guaranteed.

Countries outside the system have certain responsibilities as well. Many expressed support for the purposes of the Antarctic Treaty during the 1983 UN debate and for its effective role in peace-keeping, denuclearization and environmental protection in Antarctica. Before moving to jettison or disrupt the present management system in Antarctica, they should first take the time to explore the responsiveness and the adaptability of the Antarctic Treaty system to the concerns they have so recently raised. They must also grant adequate time to the process of finding mutually acceptable ways to build upon the treaty system.

The major difference they must acknowledge between the application in the LOS context of the common heritage regime and its application in Antarctica is that they are not beginning with a clean slate in Antarctica. This does not preclude devising new and creative ways to use the elements of the common heritage concept to build upon the Antarctic Treaty system in an internationally acceptable manner. These elements, as enumerated by Arvid Pardo of Malta are: peaceful uses, benefit for future generations (environmental protection and conservation), non-appropriation, benefit-sharing, and international management. For if they succeed, the Antarctic Treaty system may become a very compelling model for international problem-solving.

DISCUSSION

Robert L. Freidheim: Thank you, Lee. Dr. Hamzah.

B.A. Hamzah: I would like to make the point that Malaysia is not the first country to bring up the issue of the need to internationalize the Antarctica question. Actually, in 1956 -- long before the Antarctic Treaty was signed in 1959 -- the Indian permanent representative to the United Nations, Arthur S. Lal, I believe, requested the United Nations to inscribe on the provisional agenda of the General Assembly the whole issue of Antarctica to be discussed universally -- in other words, to take into account the interests of all the other countries. That request was rejected by the United Nations purely because Chile and Argentina opposed it and the United States and the United Kingdom did not support it at a time when, as you all remember in the history of the international organization, they were in control. Then in February, 1958, India tried again to have the issue put on the agenda, but they also failed. There was then some discussion that the 1959 treaty would come into being, but it did not. Then in 1967 or 1976 (I'm not sure of my date here), the representative of Sri Lanka also requested that the whole thing be inscribed on the agenda. He failed. The Prime Minister of Malaysia made a statement in September, 1982, and then in 1983 and the question of Antarctica was inscribed on the agenda. So the issue of internationalizing the Antarctica question did not come out of the blue, it was not a sudden issue.

Now, why are we interested in Antarctica? For the same reasons that other countries are interested in Antarctica. But what must be clearly understood is the universal implication of Antarctica. Anything that happens in Antarctica will definitely have universal or international impact. For example, as Ms. Kimball stated very clearly, one of the resources of Antarctica is, of course, ice. Ninety-eight percent of the continent is actually covered by ice; the total volume of ice in Antarctica is roughly about thirty million cubic kilometers. If it all melted, the world oceans would rise between 45 and 90 meters! That is just one way that anything that happens in Antarctica would happen to the world.

I also want to raise a question on the issue of resources. Other states share the concerns of Malaysia. The general concern of the non-parties to the Antarctica Treaty is that Antarctica should not be the monopoly of just a few countries who were there earlier than we were. We can discuss this issue on the question of sovereignty. The use of the Arctic sector principle is untenable because it has geographical flaws when applied to Antarctica. The Arctic sectors are actually extended on the basis of the prolongation of the mainland, national territories which reach the polar circle. But this is not the case in Antarctica. The polar circle for the Antarctic is at sixty degrees south. Very few countries actually can claim the Antarctic. No countries can claim sectors. Now, if the polar circle were drawn at fifty degrees south, only Argentina and Chile would be able to make claims. And at forty degrees south, only New Zealand and Australia could justify claims. If you reach to the Equator, Singapore and Malaysia can also make legitimate claims to the Antarctic.

My country is interested in Antarctica, but that's not why I must make the case. No. It is not the intention of Malaysia or the international community to start a confrontation. I was slightly unhappy with

the statement that was made by the ambassador of Australia at a meeting in Rhode Island, when he said that Malaysia is making a lot of noise on Antarctica for no reason, and the Prime Minister of Australia also made a statement to the United Nations that it would be the cause of international discord. No. I think there is an international obligation to create a greater certainty about Antarctica. We want to be involved in Antarctica, we want to know what's happening. One of the greatest problems in Antarctica is the secrecy surrounding it. We must also bear in mind that many of the things happening in Antarctica are beyond, outside, the Treaty's stipulation. For example, nowhere in the Treaty is exploitation of resources allowed. The fact that it has been discussed is indicative of a trend of action. Therefore, I think that all our countries who are non-partisan should be responsible for it and should know what's happening. As Ms. Kimball mentioned, France tried to put up an airstrip. That action is also incompatible with the Treaty stipulations. There were discussions on the issue of dragging the icebergs; there were some business transactions between a French company and a Jeddah company to tow the icebergs. That is also incompatible, outside the jurisdiction of the Treaty. These are some of the things we are questioning; should we allow the Antarctic continent, the last frontier, to be governed by the strict rules of a few?

No one disputes the fact that the Antarctic Treaty countries have done a marvelous job on Antarctica. They've been able to keep Antarctica for peaceful purposes; no nuclear weapons have been taken there. But our fear is that they are now moving outside their jurisdiction. For example, Chile and Argentina have proclaimed a 200-mile exclusive economic zone. What is the basis of their claims? Australia insisted on sovereignty purely because they want to exploit the resources. What is the basis of this claim? The whole question of sovereignty in Antarctica can be questioned legally.

There are certain recommendations I would like to make here with regard to Antarctica. Firstly, we should not see the Antarctica question as one of confrontation. It is one of accommodation, it's the need to look for a mechanism that would balance the interests in the whole thing. And therefore I think the involvement of the United Nations on Antarctica is the first step in the right direction. I would also urge that there should be a committee set up on Antarctica within the framework of the United Nations to provide neutrality, objectivity, to the whole question. Secondly, I think there is an obligation on the part of the Antarctic Treaty countries to stop discussing subjects that could lead to further international discord. For example, there is a lot of opposition to the discussion on the exploitation of mineral resources. Perhaps we can slow down discussion on this issue for a time. In my view there is a need for the United Nations to review the activities on Antarctica simply for the reasons that I have cited, that many things happening in Antarctica are not compatible with the very basis of the agreement.

Lee Kimball: It seems to me that you're really asking two separate questions. One is the question of sovereignty in Antarctica; is it legitimate? It's certainly possible to challenge the existing claims in Antarctica; there are various procedures one could employ to do that. But that question differs from the one about the forum in which decisions about Antarctica are taken, whether that's a UN forum or one based on an existing treaty system. I think that question remains to be worked out. I do think there is some value in exploring whether

decisions can be made satisfactorily in the eyes of the international community on the basis of the Antarctic Treaty system. Challenging the claims would automatically destroy the treaty system. That system was built on an ambiguous attitude toward claims; it preserves the balance between the claimants and non-claimants. If you want to challenge the claims and say, "they're not legit; let's see whether we can get rid of them," I think you automatically open a lot of questions of possible conflict among the overlapping claims and between the claimants and non-claimants there. So, as I indicated, the best basis on which to pursue the future of the system is first, to explore the adaptability of the existing one and then, to see whether or not that is satisfactory.

I couldn't agree with you more on the universal implications of what happens in Antarctica, and that's why I would stress the need for accountability on the part of the existing system and actions by the consultative parties. I don't believe the consultative states are making any attempt to appropriate the resources; what they're trying to do is set up management systems that would provide for their rational, equitable exploitation.

I disagree, I guess, with the contention that the French airstrip building is incompatible with the provisions in our treaty system. I think that system does provide for logistics and transportation arrangements to be carried out by the states active down there. The question is, rather, whether the environmental considerations were adequately taken into account. But as far as building the airstrip, there's no kind of prohibition on it.

Certainly there is no explicit reference in the Treaty to mineral resources development. There is a reference to decision-making by the consultative states on the conservation of living resources, and the Marine Living Resources Convention derives from that right given to the consultative states. I do think it makes sense, if you're going to develop a mineral regime, to develop it on the basis of the effective legal regime that does exist in Antarctica, and that was the rationale for the consultative states to get involved in it. On this question of the 200-mile claims off Antarctica, the position of the states with claims is that because under customary international law and, one might claim, conventional law with the Law of the Sea Convention which is not yet in force, coastal states have the right to an EEZ and automatically acquire that right off Antarctica, but they have not applied it in the case of Antarctica.

Robert L. Freidheim: Myron Nordquist?

Myron Nordquist: I have a distinct sense of *déjà vu*. I think that a baton has been passed from the deep seabed people to the new generation dealing with Antarctica.

Robert L. Freidheim: Well, to be perfectly cynical about it, Myron, there are those who think that this whole debate is based upon the fact that there are so many unemployed ex-diplomats who spent two sessions a year in either Geneva or New York and now need something to do.

Myron Nordquist: Well, actually, my first question relates to whether, among the claimants, there is a distinction made between their territorial rights -- the rights to permanently frozen ice -- and the rights to offshore water. To my mind, it would be quite sensible, if a deal is

struck, to give the deep seabed bureaucracy something to regulate. One of my concerns, since I started to hear this sort of thing back in 1967, was that we have what I call an inverted pyramid with several commissions, dispute settlement sites, assemblies, executive bodies, and so on, which are supposed to meet. But, as best I can tell, it's all geared to regulate a couple of vessels. While it's very interesting to hear the debate that goes on about the principles that are involved, it strikes me that we could give meaning to that international bureaucracy if, in fact, they did have something such as the area off Antarctica to regulate.

My second question is: has the decrease in whaling resulted in the whales' eating more krill? Has there been, in other words, a decrease in the productivity of the waters around Antarctica as a result of the ban on whaling?

Lee Kimball: Initially scientists thought that the decrease in whale populations would increase the amount of krill available for harvest. But other populations of birds and seals and squid have grown so much that there are not anywhere near the surpluses of krill that were initially predicted. During the 1983-1984 Antarctic summer, the scientists and the fishing fleets found a 20 to 80 percent reduction in the krill swarms, which some people attribute to changes in weather patterns around El Nino, but they don't really know at this point. We still lack a lot of information on Antarctic ecosystems.

As for your first question, the ice and ice shelves are considered territory by a claimant under the Antarctic Treaty. Claimants take the view that customary international legal rights of a coastal state to an EEZ in effect grant them EEZ rights off Antarctica, but they have never exercised them in the area. One country -- I think it was Australia -- actually declared an EEZ off Antarctica which was in effect for one day to make the statement, but it's not currently in effect. And the Antarctic Treaty itself provides that the waters south of sixty degrees south latitude to which it applies are high seas waters.

Robert L. Freidheim: Dr. Chee?

Choung Il Chee: You said that participation was restricted to states that are members of the United Nations. Why? Who is objecting strongly to non-members coming into the treaty area? The 1959 treaty apparently has frozen the claim to ownership of this Antarctic area. You are excluding someone over whom you have no titles, no legal basis. The EEZ proposal presupposes that you have to have a baseline, you have to have a coast, you have to have a territory over which you have sovereignty. Countries do claim sovereignty, but that hasn't been universally recognized. Still there are claiming EEZ lines; why are they doing so?

Lee Kimball: The Antarctic Treaty does provide that states that are not members of the United Nations may accede to the Treaty with the consensus of the consultative states. So the possibility exists. Why that language is in the Antarctic Treaty, I don't really know. My guess is that the UN was a relatively new body at that time and that seemed like a logical stipulation.

The basis for "freezing" the claims is to do nothing while the Treaty is in force to support either the claimant or the non-claimant position. The claimants continue to claim, those countries that don't recognize the claims continue to refuse to recognize them. And because

claimants maintain that they have claims, they maintain the right to EEZ off the areas.

Robert L. Freidheim: Jon Van Dyke?

Jon Van Dyke: In thinking of the analogy between the deep seabed and the Antarctica situation, the United States position on the deep seabed against the international regime apparently has been in part based on a reluctance to see new international governmental agencies of any sort created, and I'm wondering whether that attitude transfers over to the Antarctica situation, too. You talk in your paper about the lack of a secretariat and the lack of any current regulatory scheme. Is it your impression that the Reagan administration opposes moves towards establishing a more permanent secretariat with some real power in this regime, and do you notice any other distinctions between the Reagan negotiating position and that of President Carter's administration?

Lee Kimball: Frankly, I think they haven't considered a permanent secretariat to date. They would certainly be opposed to a global institution on Antarctica like the global institution created in the law of the sea context for deep seabed mining. Other distinctions between Carter and Reagan are not readily apparent. Certainly I think there's less consideration given to things like environmental protection than there would have been under the Carter administration.

Robert L. Freidheim: Mr. Chen Chi.

Chen Chi: As a delegate of the Republic of China I am here to urge, on the basis of two fundamental facts, that we should be invited to Antarctic activities. The first one is that our oceanographic ship has been in the Antarctic circle several times. The second reason is that we are a 100-percent oceanic country. My last question is: do you know if the PRC has any activities around Antarctica, for example a geographical survey? I don't think so. But the Republic of China has, so we should be invited in the future.

Lee Kimball: The PRC is an acceding state and as such doesn't have to do anything; all it has to do is accede to the Treaty and recognize its purposes and principles, and that's all that the PRC has done. It is not a state with decision-making rights. It has not had to qualify by virtue of activities in Antarctica. To take part in Antarctic Treaty matters, a state requests to the depositary government to accede to the Treaty; it's not a question of the Treaty parties inviting the Republic of China.

Robert L. Freidheim: Rong-jye Chen.

Rong-Jye Chen: As I understand it, the existing treaties concerning Antarctica are basically designed for the peaceful uses and conservation of the South Pole areas, but those treaties provide no solutions to the various claims by Chile, Argentina, and the United Kingdom, and so on, over territorial sovereignty of the area. The U.S. position is that no state shall exercise sovereignty over the South Pole area. I would appreciate your comment on the legal basis of the U.S. position, particularly in view of the geographic distance of the United States from the area.

Lee Kimball: Well, as I said, the United States doesn't recognize the claims in Antarctica, but they do accept the ambiguous status of the claims in the Antarctic Treaty. The United Kingdom delegate said, during the United Nations debates last fall, that "the essential requirement for maintaining the peace and stability of the Antarctic is that none of the states involved, whether they be claimant or non-claimant, must push its view about the legal basis for Antarctic management to the limit, that the Treaty system rests on this non-resolved territorial status of Antarctica." That Treaty system is one that the U.S. government fully supports.

Choon-ho Park: Thank you very much for these very active discussions.

DEEP SEABED MINING

DEEP SEABED MINING

Jon Van Dyke: During the previous sessions we've looked at East Asian states country by country. This afternoon we'll look at a couple of pervasive issues that affect the nations of the Pacific region and discuss the views of East Asian countries on these questions.

The first topic is deep seabed mining. The impetus for putting this on our agenda came a few months ago from Professor Bernie Oxman from the University of Miami. He pointed out during planning discussions that there was a certain irony with regard to deep seabed mining. Even though the nodules that are most likely to be looked at first are in the Pacific and even though a number of Asian nations such as Japan and India are now looking very seriously at the possibility of doing polymetallic nodule mining, and even though other Asian nations such as Indonesia have significant land-based minerals that would be affected by deep seabed mining, nonetheless the Preparatory Commission that is drafting the regulations to govern this activity is dominated not by Asians but rather by Africans. Bernie thought it would be useful to hear a group of distinguished Asian scholars and diplomats talk about whether there might be an Asian perspective on this issue that is different from the one being developed at the Preparatory Commission.

By way of background, I want to read the written statement submitted by Japan at the time they signed the Law of the Sea Convention on 9 February 1983, which is relevant to the discussion we're about to have.

The government of Japan intends to participate actively in the work of the Preparatory Commission. Japan finds, as do other major industrialized countries, the regime concerning deep seabed mining as laid down in the Convention to be unsatisfactory and has prepared the ways and means for improving the aspects of the regime through close consultations with other interested states. The government of Japan will make the final decision regarding the ratification of the Convention by taking into account all important relevant factors such as the results of the Preparatory Commission's work and the positions of other states including industrialized countries on the question of ratification.

I think that Japan and probably a number of other nations will base their decisions to ratify the Convention primarily on what the Preparatory Commission does, what kind of regulations it ultimately establishes. Let's talk for a few minutes on what types of regulations should be adopted.

We're very fortunate to have as our principal speaker Mr. Mario Manansala from the Philippines. He speaks to us not only from his personal background but also as the only representative here of a country that's actually ratified the Convention.

DEEP SEABED MINING

Mario C. Manansala
Philippine Coast and Geodetic Survey
The Philippines

Introduction

It is generally admitted that the world concern for a new international legal order in the oceans was inspired by Dr. Arvid Pardo, the then Maltese representative at the United Nations, at the 1967 General Assembly. In a four-hour presentation, Dr. Pardo proposed international action to regulate the uses of the seabed and to insure that its exploitation would be for peaceful purposes only and for the benefit of all mankind.

He noted that the deep seabed area had not yet been appropriated for national use because, until recently, it had not been technically feasible to exploit its resources or potential. He warned of the possibility of a competitive struggle for sovereign rights over the seabed, leading to the escalation of the arms race:

In view of the rapid progress in the development of new techniques by technologically advanced countries, it is feared that the situation will change and that the seabed and ocean floor, underlying the high seas beyond present national jurisdiction, will become progressively and competitively subject to national appropriation and use. This is likely to result in the militarization of the accessible ocean floor through the establishment of fixed military installations and in the exploitation and depletion of resources of immense potential benefit to the world for the national advantage of technologically developed countries.

Aroused, perhaps, by the eloquence of the Maltese delegate, but certainly motivated by the concern for international peace and order, the General Assembly established a Committee to Study the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction. It is this "Sea-bed Committee" that recommended the convening of a Third Conference on the Law of the Sea. And, in December, 1970, the General Assembly adopted the Declaration of Principles Governing the Sea-bed and Ocean Floor (Resolution 2749), which stated that the area shall be reserved exclusively for peaceful purposes and that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole.

The ninth paragraph of this Declaration contains the underlying premises now incorporated in Part XI of the Convention. This paragraph reads:

On the basis of the principles of this Declaration, an international regime applying to the area and its resources and including appropriate machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The regime shall, *inter alia*, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof, and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the

interests and needs of the developing countries, whether land-locked or coastal.

Having laid down the foundation for this discussion on Deep Seabed Mining, we can now go into the relevant provisions of the Convention.

International Metal Market

Before dissecting the seabed mining chapter of the Convention, let us first answer a natural logical question -- why seabed mining, what is its importance or significance in the international scene?

The presence of manganese, nickel and other metals in potato-sized nodules found in the deep ocean bed had been known before the turn of the century, following the exploratory voyage of the ship *Challenger* in 1873-1876. However, it was only about two to three decades ago that their potential as a source of essential industrial metals like nickel, cobalt, and copper began to be recognized. These nodules are composed mostly of oxides of iron and manganese but in some places relatively rich in nickel, copper, and cobalt. It is this potential as a source of vital strategic metals that has generated worldwide interest in deep seabed mining. These interests warrants a look into international metal profiles.

Nickel

Nickel is vital to the \$50 billion iron and steel industry; it has also played a key role in the development of the current \$36 billion aerospace industry. Nickel's greatest value is in alloys with other elements, where it adds strength and corrosion resistance over a wide range of temperatures.

World nickel deposits fall into three general classifications: Nickel-copper sulfides, nickel silicates, and nickel laterites. The general distribution of the world's principal nickel reserves, estimated at 60,000,000 tons, is as follows: New Caledonia, Canada, Europe (USSR), Indonesia, Philippines, Australia, etc. Total world nickel mine production in 1977 amounted to 851,000 tons coming from: Canada, USSR, New Caledonia, Australia, Cuba, Dominican Republic, South Africa, Philippines and Indonesia.

Outlook: growth in the demand for nickel in the world is forecast at between 2.6% to 4.5% from 1977 to the year 2000. The cumulative demand for nickel based on a probable demand growth of 3.5% per year during that period amounts to about 26.6 million tons. The world's nickel reserves of 60 million tons, coupled with the high probability of additional discoveries of workable laterite deposits, indicate that the supply of nickel up to the year 2000 is entirely adequate to meet world demand.

Operating factors, problems and other considerations: nickel is one among a group of metals whose use in times of war increases faster than the growth of the overall economy. As the cost of energy increases, its effect on the price of nickel becomes greater. Environmental considerations increase metallurgical costs which in turn stimulate researches on new methods.

Cobalt

Cobalt is a strategic metal, essential in many alloys. It is a vital element in aerospace and electrical-product industries, imparting qualities such as heat resistance, high strength, wear resistance, and

superior magnetic properties. Major uses include cutting tools, jet engine parts, electrical devices, catalysts, pigments, and paints.

Cobalt occurs in nature associated with nickel and copper. It is therefore mined as a by-product in the extraction of those major commodities. The principal production of cobalt in the world is from mines in the following countries: Zaire, New Caledonia, Australia, USSR, Morocco, Zambia, Cuba, Finland, Philippines, and Canada.

Much of the world's identified resources of cobalt are in the form of lateritic nickel ores in tropical regions, but most cobalt currently comes from sulfide and oxide deposits in Zaire, Zambia, Finland, and Canada. In terms of estimated reserves, Zaire ranks first, then New Caledonia, the USSR, Philippines, Zambia, and Cuba.

Outlook: the world's primary demand for cobalt in the years 1985 and 2000 is forecast at about 66 and 108 million pounds, respectively, corresponding to a growth rate of 3.4%. This increased growth rate is due to accelerating expansion of high technology in Japanese industries, increased use of super alloys in Western Europe, and the use of cobalt alloys for efficient industrial development in other countries. The probable cumulative demand for primary cobalt from 1977 to 2000 is estimated at 1.76 billion pounds. Considering the primary cobalt reserves of 3.2 billion pounds at 1978 prices, the potential supply is easily adequate to meet potential demands.

Copper

Copper, used by man for at least 6000 years, has been one of the important materials in the advance of industry, technology, and the arts. Initially, in unalloyed form, it was used for tools, weapons, and ornaments. By adding tin, bronze is produced; brass is an alloy of copper and zinc which has been used for about 2000 years. The age of electricity, dating from 1840, is intimately linked with copper. A more recent development is the use of cupronickel alloys, particularly in marine and desalination applications.

Most copper deposits occur in nature as (1) porphyry deposits (almost two-thirds of world's copper resources), (2) strata-bound deposits in sedimentary rocks, (3) massive sulfide deposits in volcanic rocks. The United States is the world's leading copper-producing country followed by, in 1978 in ranked order: Chile, the USSR, Canada, Zambia, Zaire, and others. The leading consumers of refined copper in 1977 are (in order of consumption): the United States, Japan, the USSR, West Germany, United Kingdom, France, and others. The world reserve base of copper in ore is estimated at 543 million tons of copper.

Outlook: the forecast for the probable world demand for copper is estimated at 11.2 million tons for 1985 and 19.5 million tons for 2000, with a probable annual growth rate of 3.8% (1977-2000). The cumulative forecast for the world's primary copper demand between 1977-2000 shows that reserves would be sufficient for the entire demand range. Demand for copper beyond 2000 is anticipated to strain supply sources. However, deficiencies can be met by a combination of new discoveries, improved technology, or the exploitation of seabed nodules.

Manganese

Manganese is essential for the production of steel. There are no satisfactory substitutes for this purpose. Some manganese dioxide ores are strategically significant, although in relatively small quantities, for the production of dry-cell batteries and for certain chemical uses.

Oxides constitute the most important manganese ore minerals. Pyrolusite, a mineral form of manganese dioxide, is the more commonly identified manganese oxide. Geologically, manganese deposits occur in a wide variety of types. These could be flat-lying sedimentary deposits of relatively recent geologic age, or metamorphic deposits in tabular lenses. The Indian lateritic deposits in Bihar are residual deposits. Manganese could be mined in small pick-and-shovel operations, though the greater part of the world's manganese ore production comes from open pits using mechanical excavators.

The manganese ore producers of the world are distributed throughout the tropical, sub-tropical, and warmer temperate zones, among approximately thirty countries. The principal manganese producers are the USSR, China, Australia, Brazil, Gabon, Ghana, India, Mexico, Morocco, the Republic of South Africa, and Zaire. The demand for manganese is directly related to steel production. World production was estimated at 10 million tons (contained manganese) in 1978.

Outlook: the total world demand for manganese in 1985 is forecast at 13.9 million tons while for 2000 it is 21.4 million tons with a probable average annual growth (1977-2000) of 2.9%. The estimated world supply of 1.8 billion short tons at current price level indicates that the supply of primary manganese during the forecast period is more than adequate to meet the probable or even the high forecast for total world demand.

Strategic considerations, economic factors: manganese is essential in steel production. In times of war, the use of manganese increases directly with steel requirements. The large tonnages involved and the remote location of most manganese deposits makes transportation a significant factor in development and extraction.

This brief glance into international profiles of the metals most likely to be mined from the nodules in the deep seabed: nickel, cobalt, copper, and manganese -- provides an insight on the importance of seabed mining and its inclusion in the Law of the Sea Convention.

Deep Seabed Mining under the Convention

The articles in Part XI of the Convention, the International Seabed Area, are among the most innovative provisions in the new body of international law intended to regulate the exploration and exploitation of the resources of the deep seabed, that part of the ocean bottom beyond the limits of national jurisdiction. Essentially, the deep seabed exploitation system shall be under the control of an International Seabed Authority and shall be carried out on behalf of all mankind.

The Authority, which is composed of all States Parties to the Convention, shall have for its principal organs an Assembly, a Council, and a Secretariat. All deep seabed mining will be under the control of the Authority under a "parallel system" which allows it to conduct its own mining operations through an organ called the Enterprise, and also enables private and states ventures to contract with the Authority for mining rights in the Area. Under this system a private or public firm shall apply to the Authority for activities in an area of the seabed it regards as having commercial possibilities. The Authority would allot half of this area for exploitation by the firm under a contract with the Authority; the other half would be reserved for the use of the Enterprise or by developing countries. The relationships between the Authority and the private or public contractors and the requirements in the submission of plans of work are carefully elaborated in the different provisions. Among the more difficult of these are those relating

to (a) financing of the Authority and the Enterprise; (b) transfer of technology; (c) the review conference; and (d) the production policies.

To generate funds for the Sea-bed Authority and thereby ensure that the international community, especially developing countries, shares in the benefits derived from the exploitation of these resources, prospective seabed miners would be required to pay:

- (1) an application fee of \$500,000;
 - (2) an annual fixed fee of \$1 million before the commencement of commercial production; and
 - (3) either a production charge based on a percentage of the market value of the processed metals produced from the nodules extracted from the contract area; or
 - (4) a combination of the production charge and a share of net proceeds.
- The details of these production charges (fixed fee), called the "single system," or the combination of the production charge and the share of net proceeds, called the "mixed system," are elaborated in the text. One significant feature of the mixed system is that it is tied to the profitability of the operation. The Enterprise shall also be provided with the funds necessary to exploit and explore one mine site. These funds would be divided evenly between long-term interest-free loans in accordance with a suitable scale of assessment and guaranteed interest-bearing loans.

Contractors, in submitting proposed plans of work to the Authority, are obliged to make available on fair and reasonable commercial terms and conditions the technology which they use in carrying out activities in the area. The period under which this transfer of technology could be effected was set at ten years from the start of the commercial production of the Enterprise. In the event that the Enterprise is unable to obtain appropriate technology on fair and reasonable commercial terms and conditions to commence the recovery and processing of minerals from the area, the Authority may convene States Parties engaged in activities in the area for the purpose of consulting together to take effective measures for this technology transfer. In case of joint ventures with the Enterprise, technology transfer will be in accordance with the terms of the agreement.

Fifteen years from the date of the earliest commercial production, the Authority shall convene a Review Conference to consider whether this system of exploitation and exploration of the deep seabed has achieved its aims in all respects, including whether it has been of benefit to mankind as a whole, and whether during the fifteen-year period, reserved areas have been exploited in an effective, balanced way similar to non-reserved areas, and whether the sharing of benefits has been effected in an equitable manner. Five years after the commencement of the Review Conference, if agreement has not been reached on the system of exploration and exploitation, amendments changing or modifying the system may be adopted by a three-fourths majority within a period of twelve months. Such amendments shall enter into force for all States Parties twelve months after ratification by three-fourths of all States Parties.

The production policies on the development of the resources of the deep seabed were the subject of long and intensive discussions. Activities in the Area shall be carried out in such a way as to foster healthy development of the world economy and balanced growth of international trade and to promote international cooperation for the overall development of all countries, especially developing States. These policies are intended to ensure, among others, (a) an orderly, safe

development and rational management of the resources of the Area; (b) increase in the availability of the minerals produced from the resources of the area; (c) promotion of just and stable prices remunerative to producers and fair to consumers; (d) the protection of developing countries from adverse effects on their economies. The compromise formula in the Convention was devised in such a way as to ensure that enough minerals from seabed resources will be produced to benefit consumers, while countries which mine the same minerals on land are protected from the adverse effects of seabed production. The formula specified in Art. 151 establishes a production ceiling linked to the growth of world nickel consumption; seabed production of nickel would be limited to 60% of that growth, while the balance of 40% would be left for land-based producers. Nickel mines on land would thus be able to keep their existing production levels and participate in up to 40% of any increase in growth consumption. However, a minimum allocation ceiling or "floor" has been included in the formula using 3% as the annual rate of increase. This is intended to guarantee a rising market for seabed producers by basing their share on the assumption that nickel consumption will rise by at least 3% each year, whatever the actual increase turns out to be. To protect land-based producers from market loss during times of low growth situations, seabed miners are limited to 100% of the actual increase in consumption. The production limits for the three other metals found in quantity in the polymetallic nodules on the oceans floor -- cobalt, copper and manganese -- would be fixed in relation to the formula for nickel. This could be done by calculating how much of each of these other minerals could be extracted from the tonnage of nodules needed to fill the nickel quota and then fixing these amounts as a ceiling for the other minerals.

The question of decision making in the Council of the International Authority was one of the most delicate problems faced by the Conference. It was only at the Tenth Session that the elements of an acceptable compromise finally emerged. The voting formula for decision making would require different majorities for each of four categories of decisions -- one procedural and three substantial. It is based on the premise that the more sensitive the subject matter, the greater the support a proposal would require to have in the Council before it could be adopted. Decisions on three types of questions could be taken only by consensus. These are: special actions to protect land-based mineral-producing developing countries against adverse economic effects caused by seabed mining; adoption of rules, regulations, and procedures that constitute the basic framework for seabed mining; and adoption of amendments to the seabed part of the Convention. A second category of issues would require three-fourths majority of members present and voting, while a third one will require two-thirds majority. Decisions on procedural questions would be taken by a majority of members present and voting. It has also been decided that consensus in the Council is defined as the absence of any formal objections. A special procedure would be followed to promote consensus. The composition of the Council of the Authority shall be thirty-six in number, with representatives from States with special interests, and also based on geographic consideration, all detailed in Art. 161.

This, in brief, is the essence of the deep sea mining provisions of the Convention. One could very well inquire why it took twelve years (including the preparatory work) for a document of this nature to be agreed upon. There are several reasons for this. In the first place,

deep sea mining is an entirely new concept. While other issues dealt with in the Law of the Sea Conference, such as navigation, fisheries, the continental shelf, and many others, are traditional concepts, the potential resources of the deep seabed and their exploration and exploitation are comparatively recent developments. The delegates, therefore, were discussing concepts and technology that oftentimes are not yet existing but are merely in the realm of possibilities. This problem is compounded by the growth in social, political, and economic realities faced by the world in recent times. States which were formerly colonies of the major powers are attaining independence and their social and economic aspirations must be included in the priorities of the international community. It was also realized that for a universally acceptable law of the sea, a new international economic order must be devised, one that should seek to bridge the gap between the powerful industrial nations and the vast majority of small developing countries.

Before winding up the discussion on Part XI of the Convention, let us look back and see whether the Conference adhered to the Declaration of Principles -- the common heritage of mankind. It is thus easy to explain the policies and spirit behind the various articles in this part of the treaty.

Thus, Article 140 specifically provides that activities in the Area shall be carried out for the benefit of mankind as a whole and that the area (Art. 141) shall be open to use exclusively for peaceful purposes by all states. The promotion of the effective participation of developing states in activities in the Area is also specifically provided (Art. 148). This also is the overriding consideration in choosing the "parallel system" for the exploration and exploitation of the deep seabed. Several of the issues previously mentioned: transfer of technology, financing of the Enterprise, the review conference, are deemed essential to ensure the operation of the parallel system. The production policies, on the other hand, are aimed to strike a balance between the needs of the consumer industrialized countries and the protection of land-based producers from adverse effects of activities in the Area. This explains the production limitation and the imposition of the floor and the safeguard clauses. It is generally felt that all these provisions would lead to a universally acceptable Convention.

The Preparatory Commission and Pioneer Investment Protection

After the signature of the Convention by over 100 countries in Jamaica in December, 1982, a Preparatory Commission (PrepCom) came into being in pursuance to a Resolution adopted as part of the package with the Convention. The PrepCom is intended to pave the way for the two major institutions to be set up under the Convention, the International Sea-bed Authority and the International Tribunal for the Law of the Sea.

The Commission, as part of its preparatory work, will draft rules, regulations, and procedures for deep seabed mining and other matters of concern to the future Authority to be applied provisionally by the Authority until such time as it adopts them formally. The PrepCom, however, has a more demanding task for immediate application: to implement a special regime which will allow "pioneer investors" in seabed mining development to acquire internationally recognized rights. The future Authority will have to act in accordance with the Commission's decisions in this regard and with another resolution establishing the pioneer investment scheme.

With such powers and functions, the PrepCom is unique among international organizations. It is in a position to make the initial decisions which may well shape the future course of deep seabed mining, both by states and commercial entities, and by the International Seabed Authority through its seabed mining organ, the Enterprise.

Two special commissions to be established by the PrepCom are worthy of note. The first is the commission mandated to study the possible economic effects of deep seabed mining on developing countries which export the same minerals as those that will be mined from the seabed and is supposed to recommend ways to overcome any negative impact. One approach would be the establishment of a compensation fund. The other commission will be called upon to take all necessary measures for the early entry into effective operation of the Authority's Enterprise and to carry out those functions of the PrepCom which relate to the activities of pioneer investors of the Authority.

All signatories and adherents to the Convention are members of the Commission. Signatories of the Final Act but not of the Convention participate in the PrepCom as observers but take no part in decision-making. The Commission will adopt its own rules of procedure. Its rules governing decision-making will be particularly important because of the lasting effects many of the decisions will have. Some will be immediately applicable while others will bind the Sea-bed Authority later.

All recommendations made and actions taken by the PrepCom will be presented, in a final report, to the Assembly of the International Seabed Authority at its first session. The report will point the way for much of the future of the international seabed area and the operations of the Authority.

The Law of the Sea Conference, before adjourning its final negotiating session in April 1982, endorsed an interim scheme designed to authorize exploration of the seabed pending the Convention's entry into force. Its provisions are contained in Resolution II which is not a part of the Convention but was adopted as part of the package. The resolution permits eight or more potential mine sites to be explored and evaluated -- but not mined -- by so-called "pioneer investors" who have committed large amounts of time and money in prospecting and developing the technology for deep sea mining.

In brief, the scheme permits those states and consortia which have been holding back on major investments in specific sites to proceed in the knowledge that they will be guaranteed priority over all other applicants -- except for the Enterprise, which is to be allocated two sites -- once the Convention takes effect. Although many developing countries saw this as an enormous concession to the industrialized countries, there was wide recognition that research and development had reached a point where the next step would require investing large amounts of funds in site-specific activities.

Under the resolution, each pioneer investor is limited to one mine site. To qualify as a pioneer, a state enterprise or consortium must have spent at least \$30 million on seabed activities by 1 January 1983 with 10% of the amount on a specific mine site. Developing countries have until 1 January 1985 to qualify. The pioneer is also required to continue these investments during the interim period.

The procedures for allocation of sites and payment of fees are similar to those provided for under the Convention, except that the pioneer investor would initially be registered by and pay half its registration fee to the PrepCom. All other fees are to be paid retro

actively to the Authority. All information on each mine site is to be kept confidential. The mine site shall not be larger than 150,000 square kilometers. The pioneer investor is required, on request, to carry out exploration of the reserve site on a cost-reimbursable basis, and to train personnel as requested by the PrepCom.

Present Status

As of this writing, the Preparatory Commission has completed its organization of work during its First Session in 1983 (including a resumed session in the summer of that year). Its second session was adjourned last 13 April 1984, and is scheduled to be resumed in Geneva from 13 August to 5 September 1984. Four Special Commissions have been created with specific mandates, while the Plenary also meets in informal sessions considering specific tasks assigned to the PrepCom under Resolution I. The work delegated to these five bodies is as follows:

(a) Plenary (Informal)

Preparation of rules, regulations and procedures relating to the various organs of the Authority.

Preparation of rules, regulations and procedures for pioneer investment protection under Resolution II.

(b) Special Commission I (Land-based Producers)

Studies on the problems likely to be encountered by land-based producer states which may be adversely affected by the production of minerals from the deep seabed.

(c) Special Commission II (Enterprise)

To prepare and undertake all necessary measures for the early entry into effective operation of the Enterprise.

(d) Special Commission III (Seabed Mining)

Preparation of rules, regulations, procedures for the exploration and exploitation of the deep seabed area.

(e) Special Commission IV (International Tribunal)

Study and prepare recommendations for the establishment of the International Tribunal for the Law of the Sea.

Conclusion

It is evident that the Preparatory Commission is determined to assume a key role on the practical application of many of the Convention's provisions on seabed mining in the years to come. Given its firm legal foundation, its authorization to make certain binding decisions, the time frame in which it has to work, and almost universal participation in it, the Commission should be in a splendid position to make the concept of the Common Heritage of Mankind a reality.

DISCUSSION

Jon Van Dyke: Thank you for that very fine summary of the background and present status of the negotiations on seabed mining. We'd now like to invite all participants to discuss this matter.

John Craven: As a prelude to a question, I'd like to report on two major developments in the United States. The first has been the discovery of polymetallic sulfides, pipes or chimneys from the geothermal vents. These pipes contain the same metals but in sulfide combination and therefore can be more easily refined. The polymetallic sulfides can be mined not from the hot vents but from the cold vents, and it's suggested that they will be the preferred metals to be mined.

A more significant immediate development has been a two-fold decision on the part of the Department of Interior. First, it decided that though cobalt is not in rare supply and indeed could be developed to the point of flooding the market from non-U.S. sources, it is nonetheless a rare strategic material within U.S. territory. Therefore it would be of importance to the U.S. if there were sources of cobalt within the 200-mile economic zone that could be leased for commercial exploitation. Now it turns out that on seamounts, not only in Hawaii but throughout the Pacific and the Philippine area, manganese crusts occur at a much shallower depth than manganese nodules but are rich in cobalt and titanium and very poor in nickel and copper. For that reason the Department of Interior is now conducting rather rapidly two environmental impact statements for the leasing of manganese/cobalt areas, one on the Gorda Ridge, which is some 200 to 205 miles to the west of the West Coast. Whatever deity looks over the world, that deity reads the Convention before letting man learn what the future is and locates all the cobalt crusts and the polymetallic sulfides at somewhere between 200 and 210 miles from the coast of any coastal state. Therefore their legal status will require a refined determination of ocean boundaries to find out whether they are deep seabed minerals of the Area or minerals of the coastal state.

In addition to this activity, some of the Pacific island nations have been looking at what kind of minerals are in their own 200-mile zones. This all leads to my question. In light of this activity, which if successful will defer the mining of manganese nodules for several decades in favor of cobalt crusts and polymetallic sulfides, what kind of attitudes are nations like the Philippines taking, and what kind of explorations are they undertaking, to preserve their own interests in this changing view of deep seabed mineral resources?

Mario Manansala: Yesterday I mentioned an assessment of the Law of the Sea Convention that took place in our country. To answer your question, John, I will give you a little more detail on a particular aspect of that assessment. One of the stated themes was concerned with only three questions: the International Seabed Authority, the regime, and the high seas lumped together. To carefully assess the implications of Part XI of the Convention, we asked some academicians from the State University to study the provisions, and they came up with a volume that thick. Then we told the mining community of the Philippines about the potential effect of deep seabed mining, introduced the Convention to them, and pointed out specific provisions in Part XI. I was a little discouraged by their reaction; they didn't see the significance. Their attitude was

that "it's a long way from affecting us." I thought that they would be interested in the adverse effects on prices, on supply, on copper and nickel, on the export production of the Philippines. Right now they haven't taken any particular interest in deep seabed mining. Perhaps in the future they will be deeply interested, but for the present they are not. Just before the end of the Eleventh Session in 1982 there was a paper saying that polymetallic sulfides had been discovered and the question was raised: are these covered by Part XI of the Convention? The answer is yes. All resources in the area beyond national jurisdiction are covered by the deep seabed mining provisions of the Convention.

Jon Van Dyke: Do any other commentators in the Asian group want to comment on this point? Dr. Kim, could you give us your thoughts from the Korean perspective?

Dr. Kim: These resources: cobalt, nickel, manganese, and copper -- are mainly used by the industrialized countries. If they sign the treaty, that means they choose to mine under UN control. I think there are not any other countries to go into deep sea mining except the industrialized countries. If that is so, then in the future how do you think that the International Seabed Authority can be managed and financed, and how can deep sea mining be practicable when there are plenty of resources within the 200-mile exclusive economic zones, areas into which countries will go first rather than go into the deep seas? I would really like to hear about what the future will be in deep sea mining.

Jon Van Dyke: Dr. Friedheim.

Robert Freidheim: You've demonstrated in the first part of your paper that these minerals are quite available at depressed prices, and as a result -- even before we consider the points that John raised -- you have the problem of whether Part XI is going to come into actuality. Those with pioneer status will have to subsidize that activity and they're going to have to compete with the mining of minerals that are readily available in the world market at a lower price.

Thomas Clingan: All of the detailed provisions of Part XI deal with polymetallic nodules. I assume that the crusts are under the heading of "other minerals" and I believe the treaty provides only that the Authority within a period of three years shall develop rules, regulations, and procedures for dealing with other minerals. But what happens if the Authority fails to come up with rules and regulations within three years? There are two options: (1) a continued moratorium on the development of those minerals until and unless the Authority comes up with such rules, or (2) they're open for free exploitation. Did your study deal with that question, and, if so, what were your conclusions?

Mario Manansala: No, we didn't touch on this problem, but perhaps we should. I understand from the leaflet passed around in the Eleventh Session that the sulfides may be easier to process into metals than the nodules which will take an elaborate metallurgical process to get.

Jon Van Dyke: Lee Kimball.

Lee Kimball: I want to go back to the question that you raised at the outset of this discussion: what might be the role of some of the Asian countries within the Preparatory Commission in light of the discovery of other kinds of minerals, the current state of minerals markets. You referred to the Japanese statement, when they signed the Law of the Sea Convention, which made clear that, prior to their ratification, measures taking account of the views of the industrialized countries would have to be agreed upon within the Preparatory Commission. This statement was made not only by the Japanese but by the French, the Dutch, and the Canadians -- mining states that did sign the Convention -- and by the mining states that didn't sign the Convention but are taking part: the British, the Germans, the Italians, and the Belgians. It seems to me that the fundamental question now facing the Preparatory Commission is to what extent that body is willing to accommodate some of the concerns that the mining states have specified and have indicated would influence their decisions on whether or not to ratify that Convention. In effect, to what extent is the Preparatory Commission willing to make adjustments that respond to current economic, technological realities? For instance, in light of the current minerals market, why continue with seabed mining? Is it appropriate to insist upon the stringent diligence requirements of Resolution II when mining might not take place for twenty years? Similarly, for economic reasons, wouldn't it make more sense to gradually build up the institutions created under the Convention than to erect them in a short time frame? What would be the effect of applying the production ceiling formula in 2005 when it was originally conceived to apply in 1985 or 1990? It's up to the states involved in the PrepCom to raise these and other questions so that it will make realistic regulations.

Mario Manansala: The production ceiling formula starts from the date of commercial production. If it's 1985, they say "five-year build up" and things like that. If it's 2005, then it will operate in that time. But for the present it's certainly not going to be in operation.

Lee Kimball: But the figures that feed into that formula would be quite different in the year 2005 than those contemplated when negotiating that formula.

Mario Manansala: That's correct. I appreciate the statement made by the Japanese ambassador and the delegates from France and the Netherlands. This adds to the responsibility of the chairman of the Prepcom to make it a success; if it is a success, these developed countries will sign or ratify the Convention. I'd say that's quite a goal to be attained, and perhaps that is why he has a hard time getting things going there.

Jon Van Dyke: Myron?

Myron Nordquist: I advise some companies that are interested in offshore mining and initially was asked about legal title. I advised that I thought there would be a cloud on title from the multi-national consortia that are working out their bilateral arrangements because I think the Soviets predictably will overlap with whatever they claim. I also said that I thought there was a cloud from the UN because its political activities could have an impact. I therefore advised that it was much more stable to go to a government that had an undisputed right

to give the title if that choice was available. As Dr. Craven has indicated, the polymetallic sulfides and manganese crusts and other surface deposits are at depths of about a third of where the manganese nodules are. Therefore they can be extracted more economically with existing technology. Our studies also show that these surface deposits are four to eight times as valuable and that there is no major breakthrough in processing technology required to extract the minerals. The target resources that are commonly talked about in the manganese nodule context -- copper, nickel -- are not likely to be the same as those within the two hundred mile zone. Having noted all that, I would ask you, would you advise investors to seek manganese nodule leases from the United Nations or from, say, the United States under its so-called interim legislation, or would you advise them to go to the Republic of the Philippines to see about mining? Do you want to add to the question?

Robert L. Freidheim: Yes. If investment in the foreseeable future is the question, should we look to the current availability of resources on the world market instead of any form of seabed mining?

Mario Manansala: I approach the problem in several ways. First, the political impact has to be analyzed. For example, how soon will, or will, the United States sign the Convention? The Philippines has ratified the Convention; we can be a sponsoring state. We are included in the Preparatory Commission and our voice will be heard there and in the commissions established by the Treaty itself.

Another consideration would be the economic one. There seems to be no future in seabed mining, at least for the present. When I left Manila, copper prices were picking up a little, but our nickel mining industry has stopped operations and is looking for a way to start up again. So, considering the world market now, there is no need for seabed mining. But in twenty years, there may be.

Jon Van Dyke: Dr. Chee?

Choung-il Chee: Has the Prepcom at any time seriously studied the economic uses of the seabed? I have the impression that those people who are attending the Prepcom aren't really well versed in exploration technology, how much it's going to cost, and the marketing conditions in totality. Most of the delegates are diplomats, not businessmen. Is that your impression?

Mario Manansala: We did look into that in our assessment. One of the comments was that mining involves enormous sums of money which is not available locally, not even in the big mining companies. So let us put that kind of money into our own mining industry instead of out there in the deep seabed.

Jon Van Dyke: Mr. Saito.

Masaki Saito: I will comment on the Japanese statement after their signature of the Convention. We did not sign the Convention at the Montego Bay session. We discussed whether or not to sign it, but as a maritime nation we rather prefer the maritime order that is based upon the Convention. So on 7 February 1983 we signed it with the reservations on automatic ratification that the Japanese government usually

places on international agreements, especially multilateral ones. There had to be some improvement or some international cooperation based on this new Convention, so we said we would have to wait and see the attitudes of other countries vis-a-vis ratification or concrete results of the Preparatory Commission. After signature we actively participated in the Preparatory Commission; there have been some results but we are still waiting to see future results. The same attitudes were shown by the French and other governments.

On Ms. Kimball's point about the flexibility of the Prepcom to improve the framework of the Convention, we tried to improve it from the viewpoint of industrialized countries, countries capable of deep seabed mining, but there is a limit. Of course, the Convention sets the legal framework, but we have some flexibility in drafting the rules and procedures on the mining code or on special commissions. For example, on the venue question, Resolution I says that the Commission shall meet at the seat of the Authority if facilities are available. We discussed this matter over the first and second Preparatory Commission meetings and it was really a tug-of-war between regional groups. Many groups were in favor of changing the site of the meetings to Geneva or New York. But the Latin American and African groups said that facilities were already available. Some argued for a wider interpretation because of the number of embassies or the telecommunication facilities available in Kingston. After a heated debate we decided to have a session in Kingston every spring but a summer session in Geneva this year. Next year we may meet in Geneva, New York, or Kingston. New formulas can be adopted through discussion if the majority of people can agree. Japanese people and some other like-minded people are trying to accommodate to a budgetary program which does not include the participation of the U.S or some other major contributor; we have to think of the new joint venture on a very reasonable scale. The G-77 or some other countries may think that this accommodation is a violation of the spirit of the Convention, but I personally think that there is some flexibility when it comes to concrete rules and procedures of the Preparatory Commission.

DISTANT-WATER FISHING

DISTANT-WATER FISHING

Jon Van Dyke: At this time let's talk about East Asian perceptions of changes in fishing for highly migratory species brought about by the 1982 Convention. As you know, the Convention brings the living resources of the sea within the Exclusive Economic Zone under the jurisdiction of the coastal nations. Article 64 of the Convention introduces a certain ambiguity to the nature of coastal state jurisdiction, with regard to the highly migratory species:

The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.

The Forum Fisheries Agency in the South Pacific interprets the first sentence as allowing them the option to cooperate either directly or through an appropriate international organization, and they have declared that they will cooperate directly with the distant-water fishing nations rather than through an international organization. But the second sentence seems to say that the establishment of an international organization is required. I don't see a way to get around the ambiguity created by the first and second sentences. Earlier this week I asked Dr. Kuribayashi what the Japanese position was on this and he reported that the Japanese have not felt the need for an Article 64 organization to be created at this time. I would hope that we could have a bit of discussion on that, as we have here in this room representatives of most of the major distant water fishing nations of the world: Japan, Korea, Republic of China, Thailand, and the United States, and others.

We're honored to have Dr. Hyung-tack Huh as our principal speaker. He is the Director of the Korea Research and Development Institute, KORDI, where he has worked for many years. He has a distinguished background, having gotten his B.S. at the National Fisheries University of Pusan, his M.S. and Ph.D. at the University of Wisconsin. He worked in the United States on a number of fisheries-related projects in the late 1960s and early 1970s and came back to Korea in 1978 to work at KORDI. I was delighted to see that he's a member of the Law of the Sea Institute. Dr. Huh.

KOREA'S DISTANT-WATER FISHERIES

Hyung-tack Huh
Korea Ocean Research and Development Institute

Introduction:

Korea has joined the ranks of leading countries in the world's fisheries since the early 1970s. Korea harvested 2,644,000 M/T of living resources and exported fishery products amounting to about \$1 billion in 1982. Among them, distant-water fisheries account for about 20% of the total yield. Korea's distant-water fisheries have grown most remarkably during the last twenty years. Catches by the distant-water fisheries increased from less than 700 tons in 1962 to 528,000 tons in 1982, which is an increment of more than 700 times. Catches reached up to 724,000 tons in 1976, but they have leveled off considerably since then.

Two noteworthy developments have resulted in the decline of distant-water fisheries. One is unbalanced foreign trade and declining profitability of the distant-water fishing industry caused by high operational costs due to the rise in the price of oil. The other is a substantial loss of fishing grounds which resulted from the expansion of jurisdiction by most coastal states due to the advent of a new international law of the sea.

Coastal nations can be divided into three groups in relation to their fishery resources and activities. The first group consists of the distant-water fishing nations. These are generally countries with large domestic needs for fish that cannot be met from their own coastal fishery resources. Japan and the USSR are by far the most important countries in this category in terms of the extent of their operations. Poland, Spain, South Korea, and Taiwan are included in this category.

Another group of countries consists of the "developed coastal states" with fishery resources surplus to their own needs. The most important countries in this group are probably the United States, Canada, South Africa, New Zealand, and Australia. The third group consists of "developing coastal states" that have large fishery resources but are not in a position at present to fully harvest their resources.

Obviously, the question of new relationships between these groups of coastal states is being raised. Better cooperation among these nations is necessary to develop fully and utilize wisely the fishery resources of the world oceans.

The Settlement of UN Law of the Sea Treaty

I would like to look into some problems arising from the new international ocean regime. As the Third UN Convention of Law of the Sea came to be concluded in April, 1982, 88 states among 141 coastal states declared their 200-mile zones in the form of EEZ, EFZ or territorial sea by the end of 1983. As a result, 35% of the world's ocean is estimated to be under the jurisdiction of such coastal states. Table 1 shows the status of 200-mile zones claimed by coastal states.

The trend toward the expansion of coastal jurisdictions is expected to continue in the future, and only the high seas, which are assumed to have about 10% of the world's total fishery resources, will be left to distant-water fishing nations. Since the coastal states are provided with all sovereign and exclusive rights to explore and exploit

Table 1

STATUS OF CLAIMED 200-MILE ZONES

Region	Number of states claiming 200-mile zone					
	Coast. Sts.	Total	Terr. Sea	EFZ	EEZ	Others
Total	141	88 (93)*	13	23	56	1
Asia	32	13	--	1	12	---
Africa	37	25	6	4	15	---
America	33	32	7	8	16	1
Europe	27	11	--	5	6	---
Oceania	12	12	--	5	7	---

* United States, Dominica, Antigua and Barbuda, and USSR claimed both EFZ and EEZ. Uruguay claimed both territorial sea and EFZ.

Source: UN Law of the Sea Bulletin, No. 2, Dec., 1983.

the natural resources as well as the right to determine the total allowable catch (TAC), the distant-water fishing nations will face more and more difficult situations.

Article 62 (4) of the UN Law of the Sea Treaty allows other states access to the surplus of the total allowable catch of the coastal states which do not have the capacity to harvest. However, nations with such access will be subject to a variety of conditions and regulations by the coastal states and they are required to pay unreasonable fees for the access or are asked to offer economic assistance to the coastal states.

Status and Problems of Korea's Distant-Water Fisheries

Status

Korea's distant-water fishing grounds are roughly grouped into three areas as shown in Table 2: Pacific Ocean, Atlantic Ocean, and Indian Ocean. The Bering Sea and Alaskan waters are major fishing grounds for trawl fishing, the Atlantic Ocean for shrimp trawl fishing, and the Indian Ocean for tuna fishing.

However, Korea's distant-water fishing fleets are increasingly faced with serious problems such as unreasonably high fees for access, limits on the number of fishing boats, forced joint venture arrangements, etc.

Korea's trawl fishing fleets had a peak production of 340,000 M/T in the North Pacific off the USSR coast, but they had to withdraw from the Okhotsk Sea and Kamchatka Sea when the USSR proclaimed its EFZ in March, 1977. Since then, distant-water fishing production could not exceed the level of 1976.

Table 2 STATUS OF KOREA'S DISTANT-WATER FISH CATCH
BY SPECIES AND FISHING AREAS IN 1981 (UNIT: M/T)

Species	Pacific	Atlantic	Indian	Total
Tuna	67,498	32,036	36,138	135,672
Trawl				
Shrimp		4,005		4,005
Others	322,155	70,923	9,602	402,680
Subtotal	322,155	74,928	9,602	406,685
Total	389,653	106,964	45,740	542,357

In addition, Korean fishing vessels are being driven out of the waters off Morocco and Mauritania, one of the major fishing grounds in the Atlantic Ocean off the coast of northwestern Africa.

Even the United States is taking some actions to allocate quotas in proportion to the purchase fee paid by access nations and is imposing pressure to increase it. Moreover, Mr. G. Gordon, Director of the Office of Fisheries, United States, who visited Korea last March, announced that the United States will eventually end the fishing quota system for foreign countries except under the joint venture.

Problems

Increasing Operational Costs and Decreasing Fish Price

The rising price of oil is becoming a major part of the financial difficulties to which the fishing industry is exposed. Table 3 shows the proportion that the cost of oil contributes to fishing costs, which may be as high as 43%.

Table 3 THE PORTION OF OIL IN THE FISHING COST

	Size of Vessel	Fishing Cost (A)	Oil (B)	B/A (%)
Tuna Vessel based at Korea-Port	130 G/T	74	15	20
Trawl	5,500	2,775	1,138	41
Tuna Vessel based at foreign Port	400	536	230	43

Aging of the Fishing Boats

It is known that most of Korea's distant-water fishing vessels are obsolescent, mainly due to their age; of the total 750 distant-water fishing vessels, 414 vessels (55.2%) are more than 11 years old, 220 vessels (26.4%) are 16 years and over.

This problem is more serious in the case of tuna fishing vessels: of the total 220 vessels, 139 vessels (63%) are more than 16 years old. These figures suggest that the major portion of Korea's distant-water fishing fleet needs to be replaced with new and more efficient vessels.

Weakness in Financial Status

In the early 1970s, the time of peak productivity in the distant-water fishing industry, almost every company expanded production facilities through government assistance or foreign loans, which led them to heavy dependence on borrowed capital.

Therefore, they now face severe financial difficulties due not only to a heavy burden of repayment of principal and interest but also a shortage of working capital.

Low-Quality Crews and Low Added Value

The strong point in Korea's distant-water fishing industry during its initial and growing stages was low-wage labor. As onshore industries grew rapidly, it became difficult to recruit low-wage and high-quality laborers. The situation was aggravated by the low profitability of the distant-water fishing industry. Moreover, most of the fish caught have been exported unprocessed.

I have mentioned some problems encountered in Korea's distant-water fisheries arising from the changes in international fisheries and the domestic business environment. Now I would like to discuss the joint venture arrangement as a strategy to improve the unfavorable fishing environment in distant-water fisheries.

Future Strategy: Joint Venture Arrangements

Types of Joint Ventures

A joint venture is an association of two or more partners who share the risks and benefits of a commercial -- or in some cases, non-profit -- venture. In world fisheries, such partnerships typically involve private or government interests of a host country (usually where the base of operations is located) and a foreign partner. In most cases, the host country is the one with the resource, while the foreign partner has a technologically advanced fishing industry.

There are generally two types of joint venture arrangements:

- * Contractual venture: temporary or single purpose arrangements, such as survey projects of experimental operations that may precede establishment of an equity arrangement.

- * Equity arrangements: jointly owned companies that are formed to conduct regular commercial activities.

Contractual joint ventures, although they may be short-lived, may still effectively integrate foreign interests into local interests. For example, a joint fishery research operation might be arranged in which a foreign partner contributes personnel and vessels in exchange for partial financing, fuel, or other support (such as the use of port or repair facilities) from the host country.

Most joint ventures, however, are equity arrangements, commercial fishing companies which play an important role in world fisheries. In

either case -- contractual or equity -- cooperative arrangements between partners may differ greatly from one operation to another. Some partners may be fully involved in the research and design of a project as well as in its operation. In such cases, both partners are likely to be fully integrated in the venture and share equally the benefits and risks of their involvement. Other ventures may involve more simplified cooperative arrangements, such as a purchasing agreement between local fishermen and foreign processing vessels.

Basic Approach, Methodology and Sources

All fishery joint ventures are characterized according to their location, number, partners involved, species harvested, and regional setting. The following items should be taken into consideration as important interrelationships in fishery joint ventures:

- * Abundance of resource and the location of the venture.
- * Economic status of host and foreign partners (developing or developed) and their interest to enter into cooperative fishery arrangements.
- * The ability of a coastal nation to harvest, process, and consume its biological resources.
- * The joint venture partners' interest (or lack of it) in export opportunities in the world's fish commodities market.

Goals and Objectives

Goals and objectives may also be extended to include more general social concerns. For example:

- * Increase of aggregate consumption: joint ventures may help increase the supply of fish products and seafood consumption (Nigeria, South Yemen, Bangladesh).
- * Income redistribution: joint ventures may contribute to increased income levels for additional fishing industry groups (fishermen, processors, brokers, etc.) or to geographic regions which otherwise may remain stagnant (Patagonia, Alaska, Namibia).
- * Increase in employment (or reduction of employment): providing jobs in the fishing industry may improve regional and national economies (Peru, Mauritania, India).
- * Development of self-reliant industry: joint ventures may contribute to developing a self-reliant fishing industry. In some cases, however, they may even increase the host country's dependence on developed fishing nations.

Finally, it should be noted that a certain number of joint ventures are established for political reasons or as a result of "package deal" arrangements between the foreign and host countries. The objectives in these instances may be to exchange technology or increase quota allocations in the partner's country.

Status of Korea's Joint Venture

As of the end of 1983, more than thirty Korean enterprises were making direct foreign investments that totalled \$8 million. Host countries are Argentina, Chile, Mauritania, Morocco, Mexico, Oman, New Zealand, the United States, and Panama. The fishing areas are the middle-east part of the Pacific, the southern part of the Atlantic coast, the coasts of Morocco and New Zealand, the middle-east part of the Atlantic, and the region below the latitude of 40 degrees south. It appears that direct foreign investment by Korean companies is insuffi-

cient in respect to the number of host countries, investing businesses, fishing waters, and the volume of investment.

In addition, the fisheries business is faced with several difficulties: insufficient experience in foreign investment, weakness in international competition and financial ability, lack of information, and exclusivism and unstable political situations in the host countries.

Table 4 NUMBER OF VESSELS AND CATCHES OF DISTANT-WATER FISHERIES BY YEAR

	1972	1975	1976	1977	1978	1979	1980	1981	1982	1983
Fishing Vessels	455	833	849	850	816	779	750	725	683	646
Catches 1000 M/T	224	566	724	596	566	490	457	542	528	615

Table 5 NOMINAL CATCHES BY COASTAL AND FOREIGN COUNTRIES
C = Coastal, F = Foreign

AREA	1970-74		1975-79		1980		1981	
	C	F	C	F	C	F	C	F
NW Atlantic	48	52	67	33	89	11	90	10
CE Atlantic	37	63	37	63	37	63	42	58
SE Atlantic	62	38	44	56	43	57	42	58
NE Pacific	21	79	32	68	40	60	41	59

Countries with 200-mile zone	11	15	16	78	84	87

Table 6 FISHING FEE PAID BY DISTANT WATER FISHING INDUSTRY
(UNIT: \$MILLION)

Year Nation	1977	1978	1979	1980	1981	1982	1983	1984
U.S.A.	.4	.5	1.3	2.7	3.6	6.1	9.1	11.5
New Zealand		.85	.66	.19	.30	.41	.69	.72
Guinea			1.1	2.6	.35	.32	.74	.84
Mauritania	3.6	3.7	1.6	4.5	7.9	8.3	1.3	5.0
Morocco			.95	.87	6.7	8.5	6.5	3.8
Seychelles				.54	.40	.50	1.25	1.25
Total	4.0	5.1	5.6	11.6	20.6	25.3	23.4	24.0

Table 7

STATUS OF CLAIMED 200-MILE ZONE

1970		1971	1972	1973	1974	1975	
Chile (1955)	Brazil Ecuador	Sierra Leone	Somalia	Madagascar	Bangladesh	Costa Rica	
El Salvador (1960)							
Argentina (1966)							
Panama (1967)							
Uruguay (1969)							
Angola							
Netherlands							
Solomon Islands							
South Africa							
(9)	(2)	(1)	(1)	(1)	(1)	(1)	
1976		1977	1978	1979	1980	1981	1982
Benin	Bahamas	Barbados	Iceland	Australia	Dominica	Antigua	
Comoros	Burma	Colombia	Kenya	Guinea	Oman	and	
France	Canada	Kampuchea	Nicaragua	Honduras	Manit		

W. Germany	Cape Verde	Fiji	Peru	Indonesia
Guatemala	Congo	Grenada		Morocco
India	Cook Islands	Guinea		Samoa
Liberia	Cuba	Bissau		
Mexico	N. Korea	Mauritania		
Mozambique	Democratic	Nauru		
Pakistan	Yemen	Nigeria		
Senegal	Dominican	Niue		
Sri Lanka	Republic	Papua New		
USSR	Gambia	Guinea		
UK	Ghana	Philippines		
USA	Guyana	Sao Tome		
	Haiti	and Principe		
	Ireland	Spain		
	Ivory Coast	Suriname		
	Japan	Tonga		
	Kiribati	Tuvalu		
	Mauritius	Venezuela		
	New Zealand			
	Norway			
	Portugal			
	Seychelles			
	Togo			
	Vietnam			

(15)

(25)

(18)

(4)

(6)

(3)

(1)

Source: UNCTOS Bulletin, No. 2, December, 1983

Conclusions

Prior to 1970, few coastal nations claimed exclusive zones or jurisdictions greater than twelve miles over living marine resources.

In the latter part of the 1970s, however, the majority of the coastal nations had unilaterally declared various jurisdictions or exclusive resource zones extending to 200 miles from the baselines delimiting their territorial seas. By 1981 only a few coastal states had not declared EFZs or EEZs.

Under the new order of sea, most of the ocean resources have fallen into the coastal nation's jurisdiction. It is roughly estimated that over 60% of the world's fishery resource potential is found off the coastal areas of the developing coastal states which are not capable of fully utilizing it.

Nevertheless, coastal states are imposing excessive regulations upon the distant-water fishing nations. In addition, some industrialized nations are imposing tight regulations on the access right to the surplus stocks by the distant-water fishing nations.

The surplus stocks of marine resources in the waters off the coastal states should be managed wisely and be developed rationally by the joint efforts of concerned nations to reap the benefits of mutual interests. Therefore, I would like to conclude my remarks by saying that new international fisheries relations between the nations that have surplus stocks and the nations that need them should be established in such a fashion that a more rational use of the world's fishery stocks can be achieved.

Overseas Base (as of Dec. 31, 1981)

No. of Vessel	725
Total Tonnage	296,608
Base	24
Crew	19,840

Pacific (319)

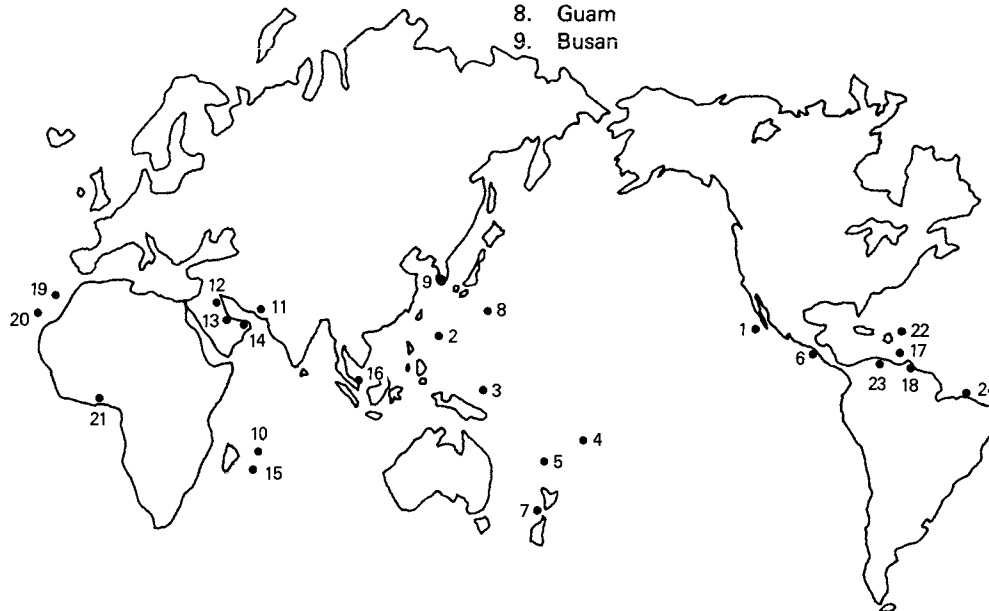
1. Ensenada
2. Palau
3. Rabaul
4. Samoa
5. Fiji
6. Puntarenas
7. Wellington
8. Guam
9. Busan

Indian Ocean (155)

10. Port Louis
11. Karachi
12. Dammam
13. Bahrain
14. Qboos
15. Reunion
16. Singapore

Atlantic (251)

17. Port of Spain
18. Paramaribo
19. Las Palmas
20. Tenerife
21. Teina
22. St. Martin
23. Cumana
24. Belem



Map 1: Overseas base for Korean distant-water fisheries as of 31 December 1981.

DISCUSSION

Jon Van Dyke: Thank you very much for that very good summary of Korea's attempt to adapt to the new regime.

You told us that in the future the only quotas the United States will allow to distant-water fishing nations will involve joint ventures. Chao Hick Tin in his paper described Articles 61 and 62 in a way that would indicate that the coastal nations' obligation is to determine its allowable catch using the best scientific evidence and then, if it does not have the capacity to harvest the entire allowable catch, "it shall give other states access to the surplus." Would the U. S.'s requirement that access be given only through joint ventures be consistent with the obligations under Article 62?

You also refer to the unreasonably high fees that are being charged for fishing licenses. What would be a reasonable fee and how would it be determined in the view of the Korean fishing industry?

Hyung Tack Huh: I'm not in a position to give any good answer to that question. Most of the distant-water fishing industry has large foreign debts and is in a weakened financial condition. Therefore, although \$11 million does not appear to be very much for an entire country, divided among a few companies it's quite a burden.

Choung Il Chee: In the African coastal countries, the licensing fee is charged, let's say, at \$800 per ton. If the world fish market is stable, that's something else. But if the market price of the fish fluctuates because supply and demand fluctuate...

Jon Van Dyke: Right. As I understand it, a number of formulas have been used: per ton of vessel size, a flat fee per season, or a percentage of the gross revenues of the boat. Which formula do the fishing companies prefer?

Choung Il Chee: In Africa the charge was based on the fish catch. It was very high and the fishing fleet lost money frequently. If the U. S. raises the license fee, the profits of the Korean fishing industry will be eaten up.

Hyung Tack Huh: Most of the coastal nations are asking for some type of assistance. For example, in an agreement with Mauritania, signed in September 1983, they required an unconditional contribution. In Morocco \$1.5 million, in Senegal we were asked to contribute a training center and refrigerated vessels. Even Spain was asking for a \$5.5 million loan for allowing Korean fishing vessels along their coastal areas. So the burdens of the Korean fishing companies add up.

Choung Il Chee: But many of these fish are exported to other countries, and so, as with deep seabed mining, the market influences whether you're going to have a profitable fishing operation or not. So there's great uncertainty, not to mention the high price of oil.

Jon Van Dyke: Chao, did you want to answer?

Chao Hick Tin: Yesterday I said that in determining the allowable catch of a particular economic zone, the coastal state must use the

best scientific evidence available to it. You asked me whether the United States, in disallowing the quota system and only allowing distant water fishing through joint ventures, would be in accord with the Convention. Now Articles 61 and 62 are not specific on this point. But I think that any coastal state's insistence that foreign fishing vessels may only fish the surplus of its economic zone on the condition that they enter into joint ventures with its nationals will be contrary to the spirit if not the letter of Article 62. Articles 61 and 62 give the coastal state the right to determine the allowable catch and its own capacity to harvest. Once that is done, Paragraph 2 of Article 62 obliges the coastal state to give other states access to any surplus. It does not say that access to the surplus can only be granted by way of joint venture agreements. Joint venture could be one, but need not be the only, method.

Jon Van Dyke: Tom Clingan.

Thomas Clingan: I would disagree, which I rarely do, with my friend Chao, and the reason that I do so requires a little negotiating history. Article 62, Paragraph 3, gives the conditions for granting of access to coastal fisheries. And one of the things it says there is that:

In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests...

Now that phrase, "its other national interests," was forced into the text not by the United States -- at the early stages of the negotiation we would have preferred to have that language out -- but by certain Latin American countries that made it very clear that they had in mind non-related fisheries matters such as trade when allocating access to surplus. So the phrase was put in there deliberately. Certainly, under that interpretation, if a country feels that the joint ventures are in its national interests, putting that condition on the access agreement is appropriate. As we all recall, these articles would not have been accepted in the Conference unless those coastal states that wanted almost unbridled discretion over the fisheries in their zone were allowed to apply this kind of interpretation. For that reason, I would think that joint ventures is an appropriate consideration for the coastal state when allocating the access.

Jon Van Dyke: You think then that Article 62 gives the coastal state unbridled discretion to do whatever it wants with regard to its fisheries?

Thomas Clingan: Perhaps I shouldn't have used the word "unbridled," but it gives extremely broad discretion to the coastal state in allocating its resources. When the Conference first began, people felt obliged to agree that the coastal state should, if it has a surplus, grant access to it. But this "national interest" language was inserted later, and I think it serves as a restriction on the initial intent of the negotiators and committee.

Jon Van Dyke: Mr. Noegroho.

Noegroho Wisnoemoerti: When Korean fishing vessels are operating in the exclusive economic zones of other countries, are the arrangements made on the basis of private to government or government to government as required by Article 62? Which type of agreement prevails?

Hyung Tack Huh: As best I know, joint venture arrangements are made between companies in the two countries. However, they are supported by the governments of both countries.

Noegroho Wisnoemoerti: Are the joint venture arrangements based on a bilateral agreement for granting access, as provided by Article 62? Is there any bilateral agreement that Korea has concluded, government to government?

Hyung Tack Huh: Yes, government to government.

Noegroho Wisnoemoerti: I do not entirely agree with Chao's reading of Paragraph 2 of Article 62 nor do I think that Tom presented all the points on this question. I do not think that a coastal state's requirements for joint venture arrangements will be contrary to the spirit of Paragraph 2 because Paragraph 2 says very clearly that access will be granted under all kinds of bilateral arrangements or agreements. Under these terms the parties are free to agree on any kind of arrangement that they deem fit and acceptable to both of them; nothing compels parties to agree to any specific type of arrangement.

I read Paragraph 3 to mean that not only the national interests of the coastal state but also the interests of the countries in the region or subregion and of states whose nationals have habitually fished in the zone must be taken into account.

Jon Van Dyke: Chao?

Chao Hick Tin: I will just say that we share different views on how Paragraphs 2 and 3 should be read. I can see Tom's argument that the expression "other national interests" could be wide enough to cover all kinds of situations, but I feel that it should not be so widely interpreted to include matters altogether unrelated to fish. I note in particular Paragraph 4 which states that coastal states can lay down laws and regulations on "terms and conditions relating to joint ventures or other co-operative arrangements." That reference is merely permissive; in other words, coastal states can draw up laws on this matter. But it seems to me that it's a different thing entirely to say that the coastal state can draw up laws to entitle fisherman from third countries to enter and fish in the economic zone only through joint ventures.

I have a question about this table that you have passed around, Dr. Huh. It shows that the fees Korea has paid for fishing rights go up or down but, in the case of the United States, go up and up. Are Korean fishermen fishing a lot more in the United States, or have they raised the fees, or both?

Hyung Tack Huh: The United States allows us more quota every year. As a matter of fact, in Alaskan waters Korea is the second largest fishing nation after the USSR. That's why the fees are going up.

Jon Van Dyke: Tom?

Thomas Clingan: I think there is going to be a broad interpretation of this article by coastal states. I'm a little pessimistic in that regard.

Jon, I think your comments about the ambiguity in the first two sentences of Article 64 are very important, though I had always read it less as ambiguity and more as an element of flexibility. The first sentence does say "either directly or through appropriate international organizations" which is correct. The second sentence says "In regions for which no appropriate international organization exists..." I believe the word "appropriate" has significance there. If you read the two together they're not necessarily inconsistent. In certain circumstances it would be appropriate to have an international organization; in such a case all states shall participate in its work. But there also could be circumstances where no such organization is appropriate, in which case the "directly" part of Sentence 1 would have significance. You may recall that at one time Articles 64 and 65 were a single article so that marine mammals and highly migratory species were dealt with together. As I recall, there were certain species of seals, for example, that were of interest to only Chile and Peru, and therefore they wanted "directly" added so that within that limited area they could deal just between themselves. As they said, it was no one else's business. There were other areas like this. Now when highly migratory species and marine mammals were separated into two articles, that language stayed in there, but still I think it would apply. The states in the area would have to decide amongst themselves what is appropriate.

Jon Van Dyke: Do U.S. policy-makers consider the Pacific an appropriate area in which to have an international organization governing highly migratory species?

Thomas Clingan: Yes. I haven't been in touch on this subject for some time but I doubt that the policy has changed very much. The United States would probably view an international organization as appropriate because there are just too many countries involved for direct country-to-country contact. I'm certain that they consider it appropriate in the eastern tropical Pacific and probably in the western Pacific as well.

Choung Il Chee: Article 64 refers to ensuring conservation and promoting the objective of optimum utilization of such species, meaning tuna primarily. It says nothing about the coastal state's being able to prohibit fishing within the 200-mile zone or the non-coastal state's being able to catch within it. It says nothing. Can you tell us the negotiating history?

Thomas Clingan: You're quite right, Article 64 is deliberately silent; if it hadn't been, the United States and other states would have disagreed. We tried on several occasions to put more detailed provisions into it, but the formal United States position has been that highly migratory species do not come under the headings of Article 61 and 62, whereas just about every other state in the world takes exactly the opposite position. Article 64 requires the establishment of an international organization, when appropriate, for the management of the species. Suppose there is no international organization. What happens?

Are the tuna then free for fishing within the 200-mile zone by anybody or do the tuna come within Articles 61 and 62 and within coastal state jurisdiction? Because of the basic jurisdictional differences between the United States and certain other coastal states, it was impossible to do more than just call for international cooperation, hoping that if an international organization were subsequently to be formed, this extremely difficult question could be worked out within that organization. In my judgment that's probably the best solution anyway, because conditions vary all around the world and each organization should be able to deal with that question in accordance with the circumstances that exist in that area.

Choung Il Chee: The Republic of Korea has been concluding agreements with South Pacific countries under which they recognize 200-mile EEZ jurisdictions over tuna. So state practice is really going in a direction contrary to what has been written here, or at least not consistent with what the U.S. has been thinking.

Thomas Clingan: Absolutely. I make no value judgment; I simply point out that the United States is isolated on this position.

Jon Van Dyke: Now it's time for you to give your paper, Tom. We'll have further discussion after that.

UNITED STATES OCEAN POLICY AND EAST ASIA

UNITED STATES OCEAN POLICY AND EAST ASIA

Jon Van Dyke: Tom Clingan has already been introduced earlier in the week and I trust most of you have had a chance to know him if you did not already. He attended all the sessions of UNCLOS III and was acting head of the United States delegation at the signing session of the Conference in Montego Bay, Jamaica, in December, 1982. He is a professor of law at the University of Miami and is also the presiding officer of the Law of the Sea Institute.

UNITED STATES OCEAN POLICY AND EAST ASIA

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

On 9 July 1982, the President of the United States announced to the world that the United States would not sign the Law of the Sea Treaty. As is widely recognized, this decision was taken because of the view of his administration that the deep seabed mining provisions of the Treaty were "fundamentally unacceptable." But at the same time, he stated that the Treaty contained many positive and significant accomplishments. In particular, he said, "Those extensive parts dealing with navigation and overflight and most other provisions of the Convention are consistent with U.S. interests and, in our view, serve well the interests of all nations."

This announcement, along with the decision of several other nations not to sign the Treaty, has produced the uncertain position in which we now find ourselves. This situation raises some extremely important questions, both of a legal and of a practical nature. On the legal side, the question of most importance facing diplomats and scholars is the degree to which, if at all, any of the principles contained in the Law of the Sea Treaty have any legal force even though the Treaty is not yet in force. This is an extremely complex question upon which there is a broad spectrum of opinion. The relationship of conferences and treaties with customary international law is a subject upon which volumes have been written. There is considerable authority to the effect that the work of conferences, and, in particular, the treaties that emerge from them, have a special impact upon the state of the law. But there is much disagreement concerning the precise nature of that impact. If a multilateral treaty, signed by all of the interested states, is expressly declaratory of international law, there is force in the argument that it is the best evidence of existing customary law. The late Richard Baxter, for example, takes this position, arguing that such a treaty reflects the views of the participants, in a contemporary setting, of the state of the law. This argument, of course, may not be valid when the treaty is not declaratory of law in expressed terms. With respect to the Law of the Sea Treaty, there is considerable confusion. Javier Perez de Cuellar, Secretary-General of the United Nations, declared in his address at Montego Bay that "international law is now irrevocably transformed" and that "we need not wait for the process of ratification of the Convention to begin." President T. T. B. Koh, however, said that the Convention was "not a codification Convention" and that "The argument that, except for Part XI, the Convention codifies customary law or reflects existing international practice is factually incorrect and legally unsupportable." However, in the preamble to the Treaty itself, there is reference to "the codification and progressive development of the law of the sea achieved in this Convention." This reflects the view of the conference that at least some parts of the Treaty are a codification of existing law, while others reflect a "progressive development" of the law. Time does not permit an extensive analysis of this extremely important question today. I am sure there will be much scholarly debate on the issue. Instead, I would like to address the more practical question: How does the *United States* view the present

state of the law, and what can we expect its policies to be with respect to its conduct in relation to other countries insofar as ocean usage is concerned? On this question, we now have some preliminary indications which I would like to review and discuss with you. I emphasize that these are my personal opinions, and do not reflect, necessarily, the views of the United States government.

On 10 March 1983, the President of the United States took the first step toward clarifying U.S. oceans policy by declaring for the United States a 200-nautical-mile exclusive economic zone. In doing so, he claimed for the U.S. the essential coastal state rights set forth in the Treaty (Article 56), including jurisdiction over the economic resources of the zone. He did not, however, assert jurisdiction over marine scientific research which, he said, ought to be encouraged in the zone. At the same time, he recognized the rights of other states to exercise jurisdiction over marine scientific research in their own zones in accordance with international law. He stressed that the U.S. would protect within its zone non-resource related freedoms of the high seas beyond the territorial sea, saying: "This means that the freedom of navigation and overflight and other internationally lawful uses of the sea will remain the same within the zone as they are beyond it." In this same set of papers, he reiterated the policy that in the view of the United States, deep seabed mining is a lawful exercise of the freedoms of the high seas, and that he would permit U.S. firms to explore for, and when market conditions permit to exploit, the minerals of the deep seabed. Furthermore, he stated that the United States would not claim a territorial sea in excess of three nautical miles, but that it would recognize claims of others up to twelve nautical miles provided that U.S. rights and freedoms in such areas under international law are respected by those claimants.

The Proclamation, and the explanatory statement and fact sheet that accompany it, must be read together to fully comprehend what might be the future direction and intentions of the United States with respect to the oceans. These documents reflect the attitudes of the U.S. administration, the policies it intends to pursue, and the kinds of relationships it will seek with other countries regarding the law of the sea. They indicate, in essence, that the U.S. is prepared to accept and to follow most of the non-seabed provisions of the Treaty that it views as consistent with its national interests, as though these provisions were declaratory of international law. In this sense, the documents were apparently intended to assure the international community that it should expect no major departures in practice by the U.S. from those modes set forth in these chapters of the Treaty. At the same time, the documents confirm the U.S.'s desire that it should be accorded reciprocal treatment in jurisdictional areas claimed by other countries under the Treaty. In some cases, recognition of the claims of others is conditioned upon this reciprocity.

The documents do not resolve all possible questions, nor were they intended to do so. They, taken together, constitute broad statements of policy and much remains to be done to clarify ambiguities and to develop specific plans for their implementation. That evolutionary process will take time. It is of note, however, that the Congress of the United States has before it legislation that would establish an Oceans Policy Commission of independent experts. This commission would be charged with aiding the process of evaluating policies and making recommendations for specific action to the President and to the Congress, as appropriate. It is quite apparent that while the major

responsibility for developing and implementing ocean policy falls to the executive branch of government, the Congress must also play an important role, enacting authorizing legislation where required.

Two basic elements emerge from a reading of the 10 March documents that I believe are significant for an understanding of the U.S. approach. The first, as mentioned above, is the element of reciprocity. For example, the documents show that the U.S. will recognize the rights of other states in its economic zone, as long as the rights and freedoms of the U.S. are also recognized by these other states. And the U.S. retains its claim to a three-mile limit for the territorial sea, but it will recognize broader claims of three to twelve miles *if* the U.S. is accorded "its full rights under international law" in the territorial sea of such claimants. These examples illustrate offers of certain conduct by the U.S. in exchange for like conduct from others.

The second element is what is known as the exercise of rights. This, obviously, is related to the first. It is reflected in the policy fact sheet:

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.

And it is also reflected in the President's statement:

... the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

When the elements of reciprocity and the exercise of rights are examined together, U.S. policy becomes more predictable. First, the U.S. will seek to obtain the benefits accorded by the non-seabed provisions of the Treaty by reciprocal exchanges of understandings with others. Should a particular coastal state, however, decide against conferring these benefits, or should that state act in a manner that is not compatible with the Treaty, the U.S. is then prepared to "act" to ensure the retention of its rights, particularly with respect to navigation, overflight, and related ocean uses. The level of action to be taken is not specified, but, by implication, it would be in proportion to the level of denial. The obvious first level of response would be diplomatic. And, if the right denied were one offered on a reciprocal basis, clearly the U.S. would not be obliged to recognize a claim by the denying state to exercise that right in U.S. jurisdictional zones. Beyond that, however, I think that it is fairly clear that when important national interests of the U.S. are engaged, the U.S. would be prepared to exercise its navigation and overflight rights, as set forth in the Convention, in order to secure them for itself, in any appropriate manner.

Let me now turn to some specific issues in which the countries of East Asia may have some interest.

First -- deep seabed mining. It is on this issue that the policy of the United States differs most from nations who are signatories to

the Convention. The U.S. view, as previously mentioned, is clear. Let me read the precise words used in the President's statement:

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

This is not, as many of you will recognize, a new position for the United States. It reflects the stand taken consistently by its delegates throughout the Conference. I can best illustrate this by the following excerpt from a speech made in 1978 by Ambassador Elliott Richardson, then the President's Special Representative to the Law of the Sea Conference. He explained:

[I]t has ... been our consistent position that the exploration and exploitation of the deep seabed beyond areas of national jurisdiction are freedoms of the high seas enjoyed by all nations.

And, in further elaboration, he said:

Legal restraints may be imposed on national action beyond the limits of the jurisdiction of any state only by their inclusion in rules of international law. With respect to seabed mining we are unaware of any such restraints other than those that apply generally to the high seas and the exercise of high seas freedoms States will become subject to additional restraints when they adhere to a treaty that establishes an international authority to manage and oversee seabed mining. They will then have voluntarily accepted the alteration of those freedoms in the broader interest of creating a stable legal regime for the use and management of the world's oceans and their resources. But we cannot accept the suggestion that other states, without our consent, would deny or alter our rights under international law by resolutions, statements, and the like.

Obviously, this view of the state of the law is not universally held throughout the world. At Montego Bay, for example, Ambassador Arias Schreiber, speaking for the Group of 77, noted:

The new Law of the Sea Convention, drawn up at a United Nations Conference with the participation of 164 States, negotiated by consensus through 11 sessions, and adopted in accordance with the rules of the Conference, will, when it enters into force, constitute the prime instrument of international law in this field. One of its basic achievements is the establishment of rules for the administration of the international zone of the seabed as the common heritage of mankind, in accordance with principles which have already become customary international law. No State or group of States will be able to act legally in contravention of those rules.

And Minister Kusumaatmadja of Indonesia said:

The world community has agreed since 1970 that the exploration and exploitation of deep seabed resources beyond the limits of national jurisdiction can be undertaken only under an international regime yet to be established. Thus, there has never been any regime in international law dealing with deep sea-bed mining. Moreover, the world community has also declared on a number of occasions the illegality of unilateral legislation on deep seabed mining and has declared reciprocal arrangements, such, for example, as the so-called mini-treaty among a few like-minded industrialized countries, to be illegal and unacceptable. It is therefore the conviction of my Government that the exploration and exploitation of the deep sea-bed resources can be legally undertaken only under the regime established by this Convention.

Despite these divergent views, however, it is quite clear that the U.S. has undertaken a firm policy in support of seabed mining as a high seas freedom if, and when, it becomes commercially feasible to do so. It is my personal judgment that this policy is not likely to change in the foreseeable future. Unfortunately, I cannot predict beyond what is foreseeable.

Shifting now to navigation and related issues, I would note that the President's decision to retain for the U.S. a three-mile territorial sea is most likely prompted by domestic considerations arising from the fact that the U.S. is governed by a federal constitution. But the decision is also consistent with the desire to maximize the freedom of navigation and overflight. As previously mentioned, the U.S. will recognize broader claims on the understanding that the rights of the U.S. under international law are guaranteed. This reference to "international law" seems to be a reference both to the relevant provisions of the Treaty and to customary law. The U.S., then, would expect, for example, that the provisions relating to innocent passage through the territorial sea would be respected. This brings to mind another sensitive point. It has been the position of the U.S. that warships are entitled to innocent passage in the territorial sea without prior authorization or notification. Although the issue was hotly debated during the Conference, nothing occurred to change the U.S. position, and there is no reason to believe it will be different in the future. At the Conference, the issue was never put to a vote. It was dealt with at the final negotiating session of the Conference when a formal amendment was withdrawn in exchange for a statement on the record by President Koh referring to the "rights of coastal states to adopt measures to safeguard their security interests, in accordance with Articles 19 and 25" of the Convention. Since these are the prime articles for the protection of coastal state security interests, President Koh's statement does not affect the right of warships to innocent passage, so long as they are otherwise in compliance with the Convention. In recognizing a twelve-mile territorial sea claim of others, therefore, it seems clear that the U.S. would expect this right to be recognized. Should the coastal state be of a different view, however, the U.S. would most likely reject the claim to a territorial sea beyond three miles and would continue to exercise its rights under the Treaty as it interprets it.

With respect to the exclusive economic zone, the Presidential Proclamation attempts to track the Treaty language as closely as possi-

ble. The U.S. claims, for itself, exclusive resource jurisdiction while at the same time making clear that the EEZ remains an area beyond the territory and territorial sea in which all states enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea. Here, again, the President stressed the element of reciprocity by stating that the U.S. would recognize the rights of other states in waters adjacent to their coasts as reflected in the Convention, so long as the rights and freedoms of the international community under international law are recognized by those other states. The Proclamation constitutes a declaration by the United States to follow the resource/non-resource balance struck by the Law of the Sea Treaty.

There are some differences, however, in the treatment of the EEZ by the U.S. and in the Treaty. First, the U.S. has declined to exercise jurisdiction over marine scientific research in its EEZ. This decision is in line with its traditional position that marine scientific research, being beneficial to the international community as a whole, ought to be encouraged. I do not believe this particular variation should be bothersome, since most such research is normally conducted under bilateral understandings between governments, or informal arrangements among scientists themselves, or both. Nonetheless, there are some indications that some countries may be hesitant to enter into arrangements with the U.S. for the conduct of research in their zones along the lines of the Treaty unless the U.S. adheres to the Treaty.

The Proclamation also excepts "highly migratory species of tuna" from U.S. jurisdiction, since the U.S. does not believe that these species should be managed by coastal states as a consequence of their EEZ jurisdiction. This is arguably a departure from the Treaty in two respects. First, the U.S.'s position on the jurisdictional point is not universally accepted. Most coastal states having an interest in tuna have taken the position that, lacking an international agreement to the contrary, the coastal state has jurisdiction over tuna and other highly migratory species in the same way it has jurisdiction over other stocks of fish within its zone. The U.S. interpretation of the Treaty on this point has not been pressed, to my knowledge, by any other state. The second difference is that the Proclamation exempts only tunas from U.S. jurisdiction, while the Treaty applies to all highly migratory species, such as billfish. These species are listed in an annex to the Treaty. This difference, it is safe to say, was generated by intensive lobbying by sport fishing interests in the U.S. These interests seek to preserve such species as marlin and swordfish for U.S. sport fishermen, to the exclusion of others. Thus, the U.S. will continue to maintain jurisdiction within the EEZ over such fishes. The U.S. position with respect to tunas is a long-standing one, and is supported by the tuna industry. I see no sign that one could expect any change of policy on this issue for the foreseeable future. The U.S. will, however, continue to seek regional arrangements with relevant coastal states, although the differences in juridical positions makes negotiation of such arrangements extremely difficult and perhaps unlikely. For the present, one might expect tuna fishing to take place under private arrangements obtained by the industry itself, rather than under government-to-government agreements, if at all.

As to other species of fish, the U.S. recognizes and follows the relevant provisions of the Treaty. The President stated that the Proclamation does not change existing U.S. policy concerning fisheries,

except as noted above. The U.S. apparently feels that its existing legislation over fisheries is consistent with the provisions of the Treaty, particularly Articles 61 and 62. This is a supportable position, in my view, since the Treaty gives extremely broad discretionary management powers to a coastal state with respect to the EEZ. The Magnuson Act, which is the U.S. law governing fishing arrangements in the EEZ, would thus seem almost entirely within that management discretion, thus one would not expect any major changes in U.S. policy on this point. The President obviously views the principle of the EEZ to have found its way already into customary law, and thus the U.S., even as a non-party, would be bound by those principles.

Returning again to the question of navigation, it was certainly no secret during the Conference that the U.S. placed considerable emphasis upon the right of navigation and overflight through, under, and over straits used for international navigation. The introduction into the Treaty of the concept of archipelagic waters created the need to take the same position with respect to routes in those waters normally used for such navigation. While the Proclamation, since it deals only with the economic zone, is silent on these questions, it could come as no surprise should the United States continue to stress the importance of such rights. The Fact Sheet accompanying the Proclamation declares that:

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.

Some have maintained that the Treaty rights related to straits and archipelagic waters are contractual in nature, and thus a non-party may not claim them. Others, such as the United States, maintain that the underlying principle of the enhancement of international communication is a principle honored by nations for centuries, and thus should apply in these cases. Despite the particular merits of the legal argumentation, the President's statement makes it quite clear that the U.S. will accept and act in accordance with the Treaty provisions so long as it itself is accorded rights under international law as it interprets it. These rights, it believes, are reflected best in the Treaty provisions which constitute the best possible set of rules for the protection of the interests of the littoral states as well as those of the maritime states, and thus the most beneficial results for all concerned would obtain from following them. Accordingly, one could expect that U.S. vessels of all kinds, in navigating these waters in the future, would respect the rights of coastal states guaranteed by the Treaty, and would act themselves in a manner permitted by the Treaty. Recent events have only underscored the need for a universal understanding on this matter.

On the question of marine pollution, existing U.S. laws will continue to be in effect in the U.S. EEZ. With respect to the international scene, the President announced that the U.S. will continue to work through the relevant international organizations, including, in particular, IMO, to develop appropriate international measures for the protection of the marine environment which impose no unreasonable burdens upon shipping. This, also, is consistent with the Treaty. However, as a non-signatory, the U.S. could neither utilize nor be affected by the dispute settlement provisions of the Treaty for the

resolution of pollution-related disputes. This is a major drawback and it should be addressed in the future.

The Proclamation does not speak of the continental shelf, except to state that should the geological shelf of the U.S. end short of 200 nautical miles, the U.S. will exercise jurisdiction over resources to that distance. Article 76 of the Treaty, of course, provides a more precise definition of the outer limits of the continental shelf beyond the economic zone than did the 1958 Convention. If one takes as gospel the announced intention of the U.S. to follow the non-seabed provisions of the Treaty, one would expect the U.S. to define, in the future, the outer limits of its shelf beyond 200 miles by the use of the criteria set forth in Article 76. President Koh, among others, has taken the position that this article is also new law, thus not available to a non-participating coastal state. Whether his legal interpretation is correct or not, I believe it is in the best interests of all, including the International Sea-bed Authority, should it come into existence, if all coastal states used this useful formula. After all, it would seem to be important to the Authority to have well-defined, uniform understandings as to the extent of its own jurisdiction. In addition, if the U.S. is encouraged to believe that Article 76 does not apply to it, some in the U.S. may be tempted to fall back on the Truman Doctrine of 1945 and urge limits further seaward. This in turn could trigger departures on the part of other states, whether they have signed the Treaty or not. The U.S., to the best of my knowledge, has not taken a decision with respect to its policy concerning the outer shelf, except that its own domestic legislation, based upon the 1958 Convention, remains in place. This legislation, however, as presently applied, is not in conflict with the Law of the Sea Treaty.

Another aspect of the continental shelf/exclusive economic zone package relates to the resolution of boundary disputes between opposite or adjacent states. As to the shelf, the Proclamation is silent, but with respect to the EEZ, it states that the U.S. will apply equitable principles in the event of a dispute. One must assume that the same approach would be taken by the U.S. with regard to the shelf. U.S. views on these subjects are consistent with its interpretation of the Treaty and of customary international law, and have been advanced recently before an arbitral panel of the international court. Its opinion is expected to be announced later this summer.

With these few examples, I have attempted to outline emerging United States ocean policy. Obviously, this is only an outline and there are problems and some contradictions yet to be dealt with. In summary, however, it appears that there have been no major changes in U.S. attitudes, and one could predict that there will be no immediate changes in U.S. law as it affects the EEZ. Also, other countries can expect no major changes in U.S. practices with respect to ocean usage -- in other words, no surprises. The only major departure from the new treaty remains U.S. policy with respect to deep seabed mining. Accordingly, it can be expected that the U.S. will continue to pursue alternative arrangements for mining which it views as economically more feasible. This means, of course, that the U.S. will continue its policy of non-participation in the Preparatory Commission, although, as a signatory to the Final Act, it is authorized to do so.

In conclusion, I wish to refer to the question most often asked of U.S. commentators. Is there any chance that U.S. policy with regard to the Law of the Sea Treaty will change? The answer to that must be a firm negative. The U.S. views the mining provisions of the Treaty as a

failure to accommodate an important national interest. This, I must emphasize, is not only the view of the administration, but it is widely shared among influential members of the U.S. Senate, who have the responsibility for advising and consenting to the ratification of any treaty. These views are not new in that body, and they preceded this administration by at least two others. The President's decision was taken, in part, in recognition of this opposition, as well as the public opposition of various segments of American society. I cannot see any sign that this opposition has decreased since 1982. If anything, it has become more entrenched. I cannot say that U.S. policy will never change. I think we have ample evidence that it can. However, I am saying that there is no reason to suppose that even were there to be a change in administration in the near future, the opposition to the mining provisions of the Treaty would disappear or even lessen. As a former member of the U.S. delegation, I find the state of affairs in which we find ourselves after many years of intensive effort extremely sad. But I am also a pragmatist. And I hope that what I have had to say today will indicate that U.S. policy is pointed toward reassuring the world that the United States is approaching its own situation with a sense of responsibility to the world community.

DISCUSSION

Jon Van Dyke: Thank you very much. We have time for a few questions to Professor Clingan. Mr. Manansala?

Mario Manansala: Under the Convention the maximum limit is twelve miles for a territorial sea, but it does not compel a state to declare twelve miles. The U.S. claims a three-mile limit, but other nations will be declaring a twelve-mile limit. What is the regime that will be followed from three to twelve miles by the United States under international law?

Thomas Clingan: I think we would view it as contiguous zone and also part of the economic zone.

Mario Manansala: The United States will recognize freedom of navigation, is that correct?

Thomas Clingan: Freedom of navigation and overflight will be recognized by the United States in its economic zone outside of three miles. But the United States recognizes the rights of other states to declare a territorial sea to twelve miles provided it's granted its rights under international law. Now I view that expression as saying, for example, that we are entitled to innocent passage in that twelve-mile zone. If the coastal state should in some way deny that innocent passage, then we would not recognize their rights beyond three nautical miles. That raises the very difficult question: what if the coastal state does in fact deny us innocent passage, what is the United States going to do about it? I have no idea.

At the present time, the United States claims a twelve-mile contiguous zone. An old customs enforcement law that came up during Prohibition allows the President to declare a special zone out to sixty-two miles and as much as 100 miles wide for temporary purposes, but basically it's a twelve-mile contiguous zone. Reagan does not say in his statement whether we would claim twelve or twenty-four miles; but if you read that he's trying to be as consistent as possible with the Treaty, I assume we would claim a twenty-four-mile contiguous zone.

Masaki Saito: Your position is that, except for Part XI, the Treaty articles, at least those on the exclusive economic zone and navigation and overflight, are just a reflection of customary international law. But I cannot understand how to accommodate the idea of reciprocity in this basic position. If you admit those provisions on the exclusive economic zone or overflight, you have to obey those provisions independently or you have to ask other countries to obey them independently without any linkage between your attitude and theirs. So I think that if you start from that basic position, there is no room to insert the idea of reciprocity.

Thomas Clingan: It's a good point; I'll convey that to the President. There are some inconsistencies that I can point out in his statement as well, but I'm not in a position to explain them. I agree with you. I think that if the United States were to really take a firm position on this, it would say that the treaty provisions apply, that we will demand our rights under them, and that's that. But I read this as an

attempt to soften a hard-line position and say, "We want to be cooperative, fellas; we hope you'll be cooperative with us."

Jon Van Dyke: Professor Kim.

Jung Gun Kim: In your last statement you say, "I hope that what I have to say today indicates that U. S. policy is pointed toward reassuring the world that the United States is approaching its own situation with a sense of responsibility to the world community." Then, a few pages preceding that, in a passage regarding the U.S. position, you say that "the U.S. will accept and act in accordance with the treaty provisions so long as it itself is accorded rights under international law" -- the important part is what follows -- "as it interprets it." I'm reminded of the Connally Amendment when the question of jurisdiction is being debated. I'm sure that we all recall that the United States provided itself an option for any matter which involved domestic jurisdiction as determined by itself. If the circumstances relating to the Connally Amendment are similar to what you describe here, how do you handle world public opinion?

Thomas Clingan: I can only answer that I quoted almost directly from the policy papers of the United States with regard to the reciprocity element. My last statement is more of a fond hope than a statement of fact. I hope it's a statement of fact.

Jon Van Dyke: Chao.

Chao Hick Tin: In determining the emergence of a new customary international law, would you agree that at some time in the future when a vast number of countries, including some who mine the deep seabed, have ratified the Convention, that all the rules in the Convention might as a result be transformed into customary international law, and therefore the United States may be bound by it? And if the United States should act contrary to it, it might be acting as an international outlaw?

Thomas Clingan: You've put me a difficult position, my friend, as you're very good at doing. If I answered your question precisely -- I emphasize "precisely" -- as it was asked, I would say, "No," because I would not agree that all the rules in the Convention would be customary international law. If you had asked me if all the principles contained in the Convention under your scenario could become customary international law, I'd be much more hard pressed. I will go out on a limb and I'll get myself in trouble for saying so, but in my personal, academic point of view the answer to that question would be "Yes." When you're talking about, for example, the institutional arrangements contained in Part XI, I think most commentators say that institutional arrangements can never become customary international law. They just don't work that way. I mean, you establish institutions like the deep seabed authority by agreement, and that's about the only way that one can do it. If you're talking about the common heritage of mankind as a principle, I've already said in another forum, in response to a question by Ambassador Beesley, that in my academic judgment the principle of the common heritage of mankind is now customary international law. But that does not answer the problem, however, because then you get into the debate: what is the principle of the common heritage of mankind? As you know, the U.S. argument has always been, from the time that we agreed to the

General Principles in the General Assembly, that that principle was yet to be defined and that that definition was the one spelled out in the Law of the Sea Treaty. You can argue about it, but I think you can draw an analogy to the exclusive economic zone. Everyone in this room probably agrees to the principle of an exclusive economic zone, the idea that that kind of resource jurisdiction is probably already either customary international law or so close to it that it's not worth arguing about. But how many of the detailed provisions in the treaty regarding the exclusive economic zone are customary international law, that I cannot answer. It's going to take a long time to answer that question. We have to carefully analyze all of the state decrees and legislation on the economic zone to see if there are any common principles involved, and I think the same applies to Part XI. That is not the view of my government.

Chao Hick Tin: Thank you, Tom. I think you managed very well.

Jon Van Dyke: Dr. Chen is next.

Rong-Jye Chen: I would like to comment very briefly on your statement, "the U.S. has undertaken a firm policy in support of seabed mining as a high seas freedom if, and when, it becomes commercially feasible to do so." As I pointed out earlier, it will take time for the Convention to enter into force. Theoretically speaking, before that happens, the U.S. could proceed alone to mine the deep seabed. Would you please comment on the political feasibility of that action, in particular on the potential embargo and the sanctions that may be imposed by the world community.

Thomas Clingan: International lawyers and particularly law professors are going to love to debate on that issue. As a practical matter, it's a non-issue. I can't conceivably see the beginning of deep seabed mining before the Convention enters into force. In the meantime, as the President has pointed out, he will encourage United States industry when and if economic conditions permit to go out and exploit the deep seabed. But I view it as a hypothetical question at this point.

Jon Van Dyke: Mr. Noegroho?

Noegroho Wisnoemoerti: You have mentioned the argument that says that if the Convention is ratified by the majority of states, one would assume that it is a part of customary international law. If the U.S. accepts only part of the provisions of the Convention, then as a lawyer do you think that the U.S. has a sustainable argument in saying that it is one Convention but consisting of two parts, one which represents customary international law and one which does not? I think a legal convention is a legal instrument which cannot be divided *per se*.

My second question is about the U.S. position that it will unilaterally accept certain provisions of the Convention if a particular party will also do the same. I assume that means that in passage through straits or through archipelagic sea lanes, the U.S. will obey the provisions of the Convention. Can you invoke a right under the Convention if a particular country, whether it's a coastal, archipelagic, or straits state, denies you that precise right because you are a non-party? What remedy can you envisage short of, of course, force.

Thomas Clingan: My friend, as usual, you come right to the point. On your first question, I was talking about the kind of convention that expresses itself to be declaratory of customary international law. These are extremely rare. Most treaties do not do so. That's why I went on to point out that there are differing views here on this treaty. President Koh has said that this is not a codification convention, that it is not declaratory. He made that express statement in Montego Bay, and if we take that view, none of the provisions codify customary international law. The Preamble suggests that some of our codifications are declaratory to the development of international law, which means that they are not customary international law. I think you can distinguish between parts of the treaty and say that some are customary international law, some are not customary international law, and some are evidence of the evolution of customary international law which can be expected to ripen into international law. You can't pin me down on particular articles; I've lost my crystal ball. We just wait for state practice to evolve. But I do think you can break the Convention into pieces, and which pieces go where I'm not yet prepared to comment on.

On the reciprocity question with regard to straits, my first response would be: of course, the United States hopes that this just doesn't become an issue. The United States is making clear that it is prepared to accept its responsibilities. In return, it hopes that it gets the rights. If it does not, you ask, what do we do next? Well, among friends, next we talk. We take a broader perspective. We tend to put this issue in terms of the United States as a maritime power versus littoral states and straits states and so forth. But one of the benefits of the straits chapter is the uniform set of rules which we all worked so hard on and think on balance is beneficial. If a straits state denies the so-called rights to one or a group of states and grants them to another, that kind of differentiation would raise severe political problems.

So the first answer to your question is: you talk among friends and try to work it out. You have to find the right way to talk, as you and I well know. Let's pose the example which I think you have in the back of your mind: if Indonesia were to deny rights to the United States and if I were to come to you and say, "I'm a lawyer and, by gosh, we have a right under customary international law," I know what your answer would be. But as good friends and good diplomats, we would find other ways to deal with these very difficult problems. Sometimes if one doesn't ask the question, one doesn't get the wrong answer. Everybody recognizes the importance of these "rights" or the necessity for United States vessels to transit through certain areas. The important thing is that somehow that necessity gets accommodated.

And I would hate to see the question left solely to international lawyers. Mochtar and I, both academicians, would love to argue it for hours. As an academic exercise it's fine but it's also an extremely dangerous scenario to get into. I guess I can't say more to you.

Jon Van Dyke: It's now my sad duty to bring this session to a close.

Choon-ho Park: Thank you, Jon, for a wonderful session. Now John Craven is going to speak in Korean or in English. John.

John Craven: I had intended to close this session by expressing the tremendous gratitude of the Law of the Sea Institute to the East-West Center and to the Institute for Far Eastern Studies and to the two Drs.

Park and to all the participants for what has been a superb lawyers' conference -- even with a few engineers like our good friend from the Philippines and myself behaving as lawyers. But I'm not going to do that because I was given an instruction by my boss in the Law of the Sea Institute, President Clingan, who said, "John, I want you to keep it short and close with a poem. Probably one of those *sijos*, which is short enough." He said the poem must do the following. First, it must mention and acknowledge all the participants. Secondly, the poem must synthesize the theme of this conference, namely that it is in the world's intent that the rule of law be promulgated, taking into account the special circumstances of each land-sea configuration in the context of real politics and particularly of the complexities of East Asia. At the same time the poem must imply gratitude for the contributions to the law of the sea which are so excellently put forth by the conference participants. "In addition," he said, "make the poem rhyme." So here it is:

Korea, the Philippines, Malaysia, Thailand, Vietnam.
ROC and PRC, the U.S.A., also Japan.
Singapore, Indonesia, who are these states?
Sea-law lands.

Choon-ho Park: Thank you, John. Now, Dr. J. K. Park is going to give you the final story.

Jae Kyu Park: Thank you. Conference chairman Professor Park, Dr. Craven, Dr. Clingan, conference participants, and distinguished guests: we have come to the end of this four-day conference. The problems we have discussed, intensively and extensively, are often complicated and sometimes very sensitive, but all of you have handled them gracefully. I think one of the merits of informal sessions such as these is that people can speak freely when they would be reluctant to do so at formal meetings. I would like to see more conferences like this held in succession so that issues can be discussed gradually, in depth. International problems like ocean resources issues cannot be solved in haste. They take time and patience and, more important, the spirit of cooperation. I hope this conference has helped you to understand better that other countries in the region have similar problems. What can we do under such circumstances? The only sensible thing that we can do is to cooperate with, not confront, each other. I hope the conference has promoted, even in a very small way, the spirit of cooperation. Finally, I hope that all foreign participants will return with fond memories of Korea. Thank you very much.

Choon-ho Park: Thank you very much, Dr. Park. Now I give the floor to Mr. Noegroho.

Noegroho Wisnomoerti: Mr. Chairman, with the permission of all the participants present around the table, I take the liberty to speak on their and my behalf. Now that we are at the end of these intensive and productive sessions, I would like to express our deep thanks and appreciation to the co-sponsors of this workshop, particularly Dr. Choon-ho Park, Dr. Jae Kyu Park, Dr. John Craven, Professor Yum, Mr. Lee, and Mr. Kim for having taken valuable initiative in organizing this workshop. They have organized this very important meeting very efficiently, and we appreciate the atmosphere they have created. Our thanks also go

to the staff of the Institute for Far Eastern Studies of Kyungnam University for making these excellent arrangements possible. The meeting has been instructive, educational, intellectually enlightening, and informative. We need this kind of forum because we are now entering a new stage in which all countries, especially in this big region, are confronted with practical, legal, technical issues related to the need to implement the Convention to the fullest extent. I don't think that any individual country can manage to do it alone. This meeting has given the opportunity to us lawyers, diplomats, and academicians to provide in our respective countries ideas and practical advice to the government on how best to implement the provisions of the Convention. We will leave Seoul with a beautiful impression of the city as well as of the people of South Korea. Thank you.

Choon-ho Park: Thank you very much, Mr. Noegroho. In fact, we owe so much to those gentlemen sitting beyond: Professor Yum and David Kim and other staff there, including our photographer. The formal part of the conference has ended.

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