The Law of the Sea: New Worlds, New Discoveries

Edited by
Edward L. Miles
Tullio Treves

The Law of the Sea: New Worlds, New Discoveries

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Bernard Oxman
School of Law
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The writer Dante, presumably the only Italian writer that uneducated Americans can quote, began his monumental work, *La Divina Commedia*, with the words, "Nel mezzo del cammin di nostra vita." These words are, I think, a useful reminder that the law of the sea is in the middle of the road of its own life and is likely to remain in the middle for quite some time to come. The beginnings of the law of the sea are to be found in the dawn of seafaring civilizations and in modern times in the dawn of modern international law itself. The future horizons of the law of the sea are as far removed as those of civilization itself. What better place to celebrate this long journey than in a city whose very name evokes humanity's long ties to the sea and in a country that has enjoyed throughout the ages a very special place in the history of humanity's struggle for law and justice, private and public, national and international.

Our panelists today are uniquely qualified to address some of the current issues in the law of the sea but to address them with a profound sense of history -- where have we been? -- and with a profound sense of policy goals -- where are we going?

Our first panelist, Levan Imnadze, is currently legal counsel and a member of the board of the new Russian Foreign Policy Foundation and has continued his association with the Institute of World Economy and International Relations of the former Soviet Academy of Sciences, now the Russian Academy of Sciences. He is also an advisor to the Russian government and other governments on various international law questions.

Our next speaker, Rüdiger Wolfrum, is professor of international and national public law and Director of the Institute of International Law at the University of Kiel. His paper is on a subject so current that it concerns a matter now before the International Court of Justice. Although decisions of the World Court bind only the parties in the particular dispute before the Court, in reality the paper that we will hear and the decision the Court has been asked to render address questions of importance not only to the two states before the Court but to many others in the world and has potential relevance to geographical areas far removed from this particular case.

Our third speaker, Admiral William Schachte, is a decorated naval officer with advanced training in international law and combat experience in both naval and diplomatic engagements. He has been active in formulating and implementing the policies of the United States government regarding the law of the sea for many years. He is currently the Deputy Judge Advocate General of the Navy as well as Department of Defense Representative for Ocean Policy Affairs.

Our first commentator, Susan Biniaz, is the Assistant Legal Advisor for Oceans, Environment, and Scientific Affairs of the U.S. Department of State. She comes to us almost directly from the UNCED conference in Rio, and she has been asked to brief you on the United States freedom of navigation program and she is free to comment on the papers that have been presented.

Our second commentator, Ambassador Manuel Lacleta Munoz, served as Legal Advisor of the Spanish Foreign Ministry and represented Spain at the Third UN Conference on the Law of the Sea. As coordinator of the Spanish Language Group at the Conference, he worked arduously with some of us who are here: with Professor Treves who was the Coordinator of the French Language Group and with Professor Clingan and me as Coordinators of the English Language Group, and together we tried to make sure that a Convention text of hundreds of pages in six different official languages didn't contradict itself too often. He was elected by the General Assembly of the United Nations to the International Law Commission and most recently served as Spain's ambassador to the Council of Europe. He will bring us up to date on developments with respect to one of the most important international straits in the world, the Strait of Gibraltar, and to the extent he wishes, to comment on remarks of other speakers.

INNOCENT PASSAGE: RUSSIA AND ITS NEIGHBORS

Levan B. Imnadze
Russian Foreign Policy Foundation
Moscow, CIS

Article 2 of the Enactment of the Supreme Soviet of the Russian Federation dated December 12, 1991,[1] states that all the legislative norms of the USSR continue to be in force within the territory of Russia, provided that they are not at variance with the Constitution and other legislative acts of Russia, until they are replaced by the appropriate new Russian laws that have entered into force.

This provision refers, undoubtedly, to the Law on the State Border of the USSR dated November 24, 1982[2] -- the basic act that determines the regime of the territorial sea of Russia -- as well as to other acts of the former Soviet Union, which are based on the aforementioned law and develop it, regulating the regime of the Russian territorial sea and the exercise of innocent passage within its limits.

That provides us with an opportunity, while describing the international legal position and legislation of Russia, to concentrate on the analysis of approaches and practices of the former Soviet Union pertaining to the right of innocent passage in the territorial sea.

The right of indisputable innocent passage of commercial and other non-military vessels in the territorial sea has been traditionally recognized in Soviet international legal doctrine and legislative practice. That is quite natural, since the recognition of such a right for commercial vessels is an objective prerequisite for the normal conduct of international trade, which has never been interrupted, even during the worst periods of the Cold War. Indeed, the regulation of the right of innocent passage in contemporary international law and domestic legislative practice and, in particular, the problem of innocent passage of ships with so-called special characteristics are of considerable interest to a scholar. But with regard to these issues, the position of Russia, as did the Soviet position in the past, coincides to a great extent with the position taken by other industrially developed maritime nations and is not distinguished by any particular features.

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[1] *Vedomosti S'ezda Narodnykh Deputatov i Verkhovnogo Soveta RSFSR*, 1992, No. 1.

[2] *Vedomosti Verkhovnogo Soveta SSSR*, 1982, No. 48.

A totally different matter is the innocent passage of naval vessels. The position of the Soviet government on this subject has been invariably shaped under strong ideological and political pressure. It is relatively easy to observe that, during the periods of the most fierce confrontation in the international arena, the regime of innocent passage of foreign warships through the territorial sea became more stringent. It is also evident that the Soviet government's position on the issue was influenced by the actual balance of naval forces at a given moment as well as by the perception of national sea power and the priorities of its use, which were reflected in its naval doctrine.

The evolution of Soviet and Russian international legal and legislative practice on the issue of innocent passage of foreign warships in the territorial sea can be subdivided into four stages.

The first, most protracted stage encompasses a period from 1918 to the beginning of the Third UN Conference on the Law of the Sea. During this stage, in both Soviet domestic legislation and international legal practice, innocent passage of foreign warships has been rigidly and unambiguously made conditional upon the prior consent of the Soviet State.[3] Both the very first Statute on Frontier Guards of 1918 and the subsequent Regulations on Guarding the State Frontier of 1923, 1927, and 1960 made provisions for a consent regime of the exercise of innocent passage by foreign warships in the Soviet territorial sea. (A consent regime of innocent passage for foreign warships in the territorial sea has been established by a number of neighboring states to the Soviet Union -- by Bulgaria[4], Romania[5], Poland[6] and Turkey.[7])

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[3]See *A Course of International Law: Vol. 3. Main Institutions and Branches of Contemporary International Law*, Moscow: Nauka, 1967, p. 206 (in Russian). The procedure of obtaining a permission for warships' passage through the Soviet territorial waters was described in detail in "Regulations on visiting the territorial waters and ports of the USSR by foreign warships" approved by the Order of the Defense Minister dated June 25, 1960 (*Izveshcheniya moreplavatelyam Gidrograficheskoi Sluzhby VMF*, August 6, 1960, No. 4360).

[4]Article 4 of the Decree of the Presidium of the People's Assembly of Republic of Bulgaria on Territorial and Internal Waters dated October 10, 1951. See *Naval International Legal Handbook*, Moscow, 1966, p. 347 (in Russian).

[5]Article 8 of the Decree of the Presidium of the Great National Assembly of Romania on the Regime of Territorial Waters dated January 21, 1956. See *ibid.*, p. 344.

[6]The Order of the Minister of National Defense of Poland dated March 29, 1957. See *Studies in International Law of the Sea*, Moscow: Gosyurizdat, 1962, p. 19.

Proceeding from that, when signing the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, the Soviet Union, Ukraine, and other East European states held reservations about Article 23. The reservations concerned the right of a coastal state to establish a consent regime for the passage of warships through its territorial waters. Elaborating on a concept prevailing at that time in Soviet international law doctrine, the authors of an authoritative six-volume *Course of International Law* stated that "in accordance with international law... in all cases the establishment of rules regulating the access and passage of warships in foreign territorial waters constitutes an exclusive competence of a coastal state" and that the latter has a right to introduce, at its own discretion, a consent, a notification, or an unrestricted regime of innocent passage for foreign warships.[8]

The approach of the USSR and of the other socialist states to the right of innocent passage of foreign warships was determined by the predominant doctrine and psychology of a "besieged fortress." Its essence can be described as follows: first one socialist state alone, and later a group of these states, were surrounded by a hostile imperialist environment. At that time these states, and first of all the USSR, had neither a powerful navy nor significant strategic interests in the world's oceans. In 1987, a group of authors of the most recent Soviet course on international law of the sea justified the limitation of the right of innocent passage for naval vessels by the fact that until at least the mid-1970s "the imperialist powers, bearing their aggressive plans, have threatened the security of coastal states."[9]

One has to recognize, though, that the USSR and other socialist states were not alone in introducing a notification or a consent regime for the passage of foreign warships. The same steps have been undertaken by a number of countries, including European ones. The majority of them proceeded from the fact that the Geneva Convention's provisions, which required vessels just to comply with "the

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[7]On July 29, 1925. See *Naval International Legal Handbook*, p. 351.

[8]*A Course of International Law: Vol. 3. Main Institutions and Branches of Contemporary International Law*, p. 205.

[9]*World Ocean and International Law: A Legal Regime of Coastal Offshore Spaces*, Moscow: Nauka, 1987, p. 50.

peace, good order or security of the coastal State,"[10] were highly ambiguous and did not adequately ensure the security interests of that coastal state.[11] A more concrete formulation and a more detailed regulation of innocent passage in the 1982 UN Convention on the Law of the Sea overcame this shortcoming and resulted in a growth in the number of countries that recognized the unconditional right of foreign warships to exercise innocent passage in their territorial seas.

The second stage of evolution in the Soviet international legal and domestic legislative practice on the issue of innocent passage for warships mainly coincides with the period of the Third UN Conference on the Law of the Sea. In the course of the Conference, the Soviet delegation actively cooperated with the delegations of other leading maritime powers, striving to assert the right of indisputable innocent passage of warships through the foreign territorial sea, as well as to secure for these vessels the right of transit passage in straits used for international navigation.

Eventually, the 1982 UN Convention on the Law of the Sea provided a right of innocent passage through the territorial sea for all categories of vessels, including naval ones.[12] Moreover, the Convention made it absolutely clear that "the coastal state shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention" and that

> in the application of this Convention or of any laws and regulations adopted in conformity with this Convention, the coastal State shall not:
> (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
> (b) discriminate in form or in fact against the ships of any State...."[13]

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[10]Convention on the Territorial Sea and the Contiguous Zone (Done at Geneva on 29 April 1958), Art. 14(4). In Renate Platzöder and Horst Grunenberg (eds.), *Internationales Seerecht*, Munich, 1990, p. 687.

[11]See *World Ocean and International Law: A Legal Regime of Coastal Offshore Spaces*, p. 50.

[12]United Nations Convention on the Law of the Sea, Art. 17, in *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, New York: United Nations, 1983, p. 6.

[13]United Nations Convention on the Law of the Sea, Art. 24, in *ibid.*, p. 8.

As is well known, the Soviet Union (and therefore the Russian Federation) has signed the Convention; it has not, however, been ratified by Russia, but for totally different and also well-known reasons.

As was mentioned above, the universal recognition of the indisputable right of innocent passage for both commercial and naval vessels in the 1982 Convention has been considerably facilitated by the fact that in the course of UNCLOS III consensus has been achieved as to the precise contents of the criteria that made it possible to determine whether the passage was innocent or not.[14] The Convention also determines clearly enough the limits of legislative competence[15] of coastal states with regard to the regulation of innocent passage as well as their rights to establish sea lanes and traffic separation schemes in the territorial sea.[16] These factors, together with several other undoubtedly progressive innovations, have contributed to changing the Soviet attitude towards the right of innocent passage for naval vessels.

Still, of far greater significance were radical changes in the overall strategic balance of power, and especially the creation of a modern ocean-going Soviet navy capable of performing strategic and political missions during both war and peacetime. The existence of such a navy and the appearance of an independent Soviet naval doctrine have resulted in a much greater concern for securing the freedom of navigation of warships, including the right of innocent passage of warships in foreign territorial seas.

The realization of an independent role for the Soviet navy and the appearance of Soviet naval doctrine are reflected in a book entitled *Sea Power of the State*, written in the late 1970s by the Commander-in-Chief of the Soviet Navy, Admiral Sergei Gorshkov.[17] Stating that "the creation in our country of the ocean-going navy armed with nuclear missiles has caused profound changes in views on its role within the system of the nation's armed forces and the methods of its utilization,"[18] Admiral Gorshkov also stressed that "with the entrance

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[14]United Nations Convention on the Law of the Sea, Art. 18, in *ibid.*, p. 6-7.

[15]United Nations Convention on the Law of the Sea, Art. 21, in *ibid.*, p. 7-8.

[16]United Nations Convention on the Law of the Sea, Art. 22, in *ibid.*, p. 8.

[17]Gorshkov S.G., *Sea Power of the State*, 2nd rev. ed., Moscow: Voenizdat, 1979, 416 pp.

[18]Gorshkov S.G., p. 409.

of the Navy on ocean expanses the Soviet Union has acquired new, much broader capabilities for its utilization in peace time in order to secure its state interests."[19]

It goes without saying that this statement was accompanied by ideological rhetoric in the sense that the Soviet naval tasks in foreign policy missions were radically different from those pursued by the imperialist states' navies. The practical consequences, however, were very much the same, since both the U.S. and the USSR strived to maintain their naval presence in various regions of the oceans and were equally interested in creating favorable legal conditions for maintaining this presence. Such rhetoric not only reflected the hypocrisy typical, at least at that time, of Soviet politicians, but was very characteristic of the Soviet ruling circles during the Brezhnev era.

An inclination to use double standards in Soviet policy has to some extent been revealed in the fact that, despite radical changes in the Soviet international legal position on the issue of innocent passage of warships during the Third UN Conference on the Law of the Sea, domestic legislation in the USSR has still remained unchanged, providing for the consent regime of the passage of foreign warships.

This inconsistency has determined the contents of the third stage in the evolution of the Soviet doctrinal and legislative approach to the right of innocent passage of foreign warships in the territorial sea.

The beginning of this stage was marked by the adoption, on November 24, 1982, of the new Law on the State Border of the USSR[20] by the Supreme Soviet of the USSR. This law has superseded previous Regulations on Guarding the State Frontier and is still in force at present (with amendments and addenda). The law for the first time asserted the right of innocent passage in the territorial sea of the USSR at the highest level of state authority and secured the right of innocent passage in the territorial sea of the USSR, reproducing the main corresponding provisions of the UN Convention on the Law of the Sea. The law formally applied the unconditional right of innocent passage not only to commercial vessels, but to foreign warships as well. Thus the consent regime of innocent passage for foreign warships in the Soviet territorial sea has been legally abolished.

In practice, however, the new law had the effect of denying, in most cases, the right of innocent passage for foreign warships. Such was the effect of one of the provisions of this law, namely the final

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[19]Gorshkov S.G., p. 381.

[20]*Vedomosti Verkhovnogo Soveta SSSR*, 1982, No. 48.

part of its Article 13. According to this Article, "foreign warships and submarine vessels exercise innocent passage through the territorial waters (territorial sea) of the USSR in accordance with the order established by the Council of Ministers of the USSR."[21]

Such an order has been prescribed by the Council of Ministers in "Regulations concerning navigation and sojourn of foreign warships in the territorial waters (territorial sea), internal waters and ports of the USSR,"[22] approved by Enactment No. 384 of April 28, 1983. According to Article 12 of the Regulations, "innocent passage of foreign warships in the territorial waters (territorial sea) of the USSR exercised with the aim of traversing the territorial waters (territorial sea), without entering the internal waters or calling at ports of the USSR, is permitted along sea lanes usually used for international navigation:

in the Baltic Sea, along traffic separation schemes in the region of Kypu Peninsula (island Hiyumaa) and in the area of Porkkala Lighthouse (presently the territory of independent Republic of Estonia);

in the Sea of Okhotsk, along traffic separation schemes in the regions of Cape Aniva (Sakhalin Island) and the Fourth Kuril Strait (islands Paramushir and Makanrushi);

in the Sea of Japan, along traffic separation schemes in the region of Cape Krilyon (Sakhalin Island)."[23]

As regards the innocent passage of foreign warships in all other cases and areas, it could be exercised, according to the Regulations, only with the prior consent of the USSR Council of Ministers, utilizing the designated sea lanes and traffic separation schemes, or along a route previously agreed upon.

The exercise of the aforementioned Regulations meant a significant limitation of the right of innocent passage of foreign warships, was evidently at variance with the provisions of the UN Convention on the Law of the Sea, and had the practical effect of renouncing, as applied to its own territorial sea, the position held by the Soviet delegation at the Third UN Law of the Sea Conference.

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[21]See *Legislative Acts and Instructions of the State Bodies of the USSR on the Matters of Navigation*, Leningrad: GUNIO MO SSSR, 1986, p. 14.

[22]Ibid., p. 71-78.

[23]*Ibid.*, p. 73.

While attempting to substantiate the lawful character of the limitation of the right of innocent passage for foreign warships, Soviet officials have cited, in particular, Article 22 of the UN Law of the Sea Convention, which says that "the coastal State may, where necessary, having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships."[24] The purpose of Article 22, however, is to enhance the safety of navigation, and nothing in its text can or should be interpreted as grounds for a legislative or practical limitation of the right of innocent passage of commercial or naval vessels in the territorial sea.

The provisions of Soviet legislation restricting the right of innocent passage of foreign warships have been repeatedly appealed by other countries, in particular the United States. According to American sources, the U.S. since 1979 "has had a program of both protesting illegal claims and operationally asserting our (U.S.) navigational rights and freedoms."[25] While practicing this program, the U.S. cruiser *Yorktown* and destroyer *Caron*, pleading the exercise of the right of innocent passage, entered Soviet territorial waters in the Black Sea, off the coast of the Crimea Peninsula, on March 13, 1986, and February 12, 1988, and stayed in the territorial sea about six miles offshore for fairly long periods of time. During the second incident, they were intentionally bumped by Soviet naval units.

The political expediency and usefulness of similar actions has appeared to be (and still is) extremely doubtful; we shall, however, focus our attention on the legal aspect of the issue.

According to Article 18 of the UN Convention on the Law of the Sea, "passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility."[26] At the same time, "passage shall be continuous and

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[24]*The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*. p. 8.

[25]Schachte, William L., Jr. "The Black Sea Challenge," *United States Naval Institute Proceedings*, June 1988, p. 62.

[26]*The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, p. 6.

expeditious."[27] Article 19 of the Convention stresses that "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."[28] Similar provisions are included also into the Geneva Convention on the Territorial Sea and Contiguous Zone.[29]

While considering these provisions, Soviet authors, Yuri Barsegov and Artemy Sagiryan, pose the following question in their article published in 1987: "Should innocent passage mean navigation in territorial waters in general or should there be reasonable limits to such a right?"[30] In answering it, they stress absolutely correctly that "the very notion of passage means the using by a foreign ship of the *shortest and most convenient* route across the territorial sea of a coastal state with the purpose of entering the territorial waters or calling at the ports of neighboring states, sailing out at high seas, or moving from one part of the high seas to another."[31] In other words, passage in the territorial sea can be considered lawful and well-grounded when and if it is caused by a normal navigational need and is exercised continuously and expeditiously.

It is quite evident that the entry of the U.S. warships and their prolonged sojourn in Soviet territorial waters in the Black Sea in 1986 and 1988 could not be caused by a normal navigational need. Whatever country the U.S. warships might have been sailing to in the Black Sea, there was no need for them to enter the Soviet territorial sea. Therefore, those actions on the U.S. part have clearly gone beyond the limits of what is considered permissible in international law and have constituted an attempt to interpret arbitrarily the well-established norms of international law consolidated in the UN Convention on the Law of the Sea. It goes without saying that the entry of the U.S. warships into Soviet territorial waters off the coast of the Crimea has posed a threat to international peace and security, which in itself is a

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[27]*Ibid.*

[28]*Ibid.*

[29]Platzöder and Grunenberg, p. 687.

[30]Barsegov, Yuri, and Artemy Sagiryan, "U.S. Naval Provocations and International Law," *International Affairs*, 1987, No. 3, p. 113.

[31]*Ibid.*

serious breach of the principles of contemporary international law and cannot be justified by the fact that the Soviet legislation at that time ran contrary to the international norms concerning innocent passage.

At the same time, as has already been mentioned, one cannot dispute the fact that by introducing specific restrictions on the exercise of the right of innocent passage for foreign warships, as distinct from commercial vessels, the Soviet legislature, in its turn, has also unduly loosely interpreted the well-established norms of international law.

The only way to overcome this fundamental contradiction between the approaches of the two leading maritime powers was to reach an agreement concerning the interpretation of the right of innocent passage on the basis of a mutually acceptable compromise. The two parties have managed to arrive at such an agreement only due to the radical changes in the character of international relations as a result of internal processes in the former Soviet Union.

September 23, 1989 can be considered the date when the fourth stage in the evolution of the Soviet approach towards the innocent passage of warships started. It is at this date that the Soviet Foreign Minister Eduard Shevardnadze and the U.S. Secretary of State James Baker signed in Wyoming a Joint Statement where the Parties agreed to undertake the steps necessary to bring their domestic legislation, rules, and practice into accord with the document attached to the Statement. The document was entitled "Uniform Interpretation of Rules of International Law Governing Innocent Passage."[32]

This document, consisting of eight paragraphs, asserts the adherence of both states to the norms of international law regulating innocent passage in the territorial sea contained in the UN Convention on the Law of the Sea. It also sets forth a common interpretation by Parties of the most important of the above provisions, as well as joint approaches to a peaceful settlement of disputes. In particular, it states unambiguously that

> [a]ll vessels, including warships, regardless of cargo, armament or the means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification no authorization is required. (paragraph 2).

It also stressed that

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[32]See *Vestnik Ministerstva Inostrannykh Del SSSR*, November 15, 1989.

[s]hips exercising the right of innocent passage shall comply with all laws and regulations of the coastal state adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage." (paragraph 5).

In implementation of the above agreement, the Council of Ministers of the USSR by its Enactment dated September 20, 1989, has approved the new wording of Article 12 of the 1983 "Regulations concerning navigation and sojourn of foreign warships in the territorial waters (territorial sea), internal waters and ports of the USSR," bringing it in accordance with Article 22 of the UN Convention on the Law of the Sea with regard to sea lanes and traffic separation schemes in the territorial sea. The new wording of the Article excludes any possibility of an arbitrary discriminative restriction of the right of warships to exercise innocent passage in the territorial sea of the USSR, and currently of Russia. (We are reminded that the corresponding legislation and regulations of the USSR still preserve their legal force within the territory of the Russian Federation.)

In their turn, the United States has pledged not to send their warships into Soviet territorial waters in the Black Sea if there is no necessity to exercise a lawful call into the internal waters or at the ports of the USSR, or no other normal navigational need. The agreement has been implemented by the exchange of notes between the diplomatic agencies of the USSR and the U.S.

We are presently at the threshold of the next, fifth stage in the development of domestic legislation on the issue of innocent passage, which would become the first stage for the new Russia. It is quite probable that this fall already the Supreme Soviet of the Russian Federation, in accordance with its plan of legislative activities, will approve of the new Russian Federation Law on the Territorial Sea.

It is too early now to elaborate on the concrete provisions of the future law, since the work on its drafting was initiated by a representative group of experts headed by Professor Anatoly Kolodkin just three weeks ago. Still, as a member of this group, I have good reason to believe that the provisions of the new Russian Law on the Territorial Sea will fully comply with the requirements of the UN Convention

on the Law of the Sea, as well as with the U.S.-Soviet agreement concerning the common interpretation of the rules of international law regulating innocent passage.

INTERNATIONAL STRAITS AND NAVIGATIONAL FREEDOMS

William L. Schachte, Jr.*
Rear Admiral, Judge Advocate General's Corps, U.S. Navy
Department of Defense Representative for
Ocean Policy Affairs

It is good to see so many old LOS hands both on the panels and in the audience. My remarks today cause me once again to think back to the seventies and the long hours and memorable moments we all spent crafting the 1982 United Nations Convention on the Law of the Sea (hereafter "LOS Convention"). We all knew we couldn't spell out every conceivable permutation and combination of ocean space problems. What we tried to do -- what we did -- was carve out a strong framework, with basic rules that apply across the board, to solve the specifics of any given issue. One such current issue here in Europe is the question of bridges across straits used for international navigation, particularly the Danish proposal for a bridge over the Great Belt.

As you may know, Finland filed an application instituting proceedings before the International Court of Justice on 17 May 1991 in the case entitled *Passage through the Great Belt (Finland v. Denmark)*. Finland complains that the proposed bridge across the Great Belt (the only deep draught route through the Straits connecting the Baltic with the North Sea) would be a fixed span with 65 meters' clearance, preventing Finnish drilling rigs from being towed in their vertical position under the bridge and thus, in Finland's view, contrary to international law. Denmark filed its Memorial with the ICJ 31 December 1991. Finland filed its Counter-Memorial by the 1 June 1992 deadline.

The United States is not a party to the ICJ case, but my government feels strongly that the basic rules codified in the LOS Convention control. Although the LOS Convention straits articles do not *per se* address the issue of bridges across straits, the transit passage articles would clearly prohibit the unfettered, unilateral construction of a bridge across a strait used for international navigation (hereafter, an "international strait").

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*I wish to express my appreciation to Mr. J. Peter A. Bernhardt, Office of Ocean Affairs, U.S. Department of State, for his assistance in preparing these remarks.

My paper is not confined merely to the issue of bridges (although it does attempt to provide the requisite legal analysis for determining how bridges should "legally" be built across international straits). Although LOS old timers were, as Dean Acheson might have said, "present at the creation" and have a sound knowledge of the *lingua franca* of the Convention's navigational terms of art, I have observed that there now is a whole new generation of lawyers and officials in the U.S. government, as well as in foreign ministries, who may not appreciate the vital significance of the technical terms in the navigational articles -- and the role those navigation articles play -- in precisely regulating the various types of navigation regimes and the six categories of international straits recognized in the Convention.

Some elements of the United States' position regarding the straits articles have been made in U.S. delegation statements to the Conference during the Conference years as well as in remarks contained in U.S. official documents since then. I should add that we operate our freedom of navigation program in complete conformance with international law as reflected in the navigation articles of the 1982 LOS Convention. I believe it well worth our while here to recap the official United States position on the LOS Convention's navigational articles. Please note I say "official" for these remarks, for once, do not come with the usual caveat that they are my personal views only and do not necessarily represent the views of the United States -- they do.

My discussion is organized into five sections. The first deals with the very practical problems that bridge building poses for international maritime navigation and commerce. The second section identifies and explains the LOS Convention's navigational terms of art, with primary emphasis on their relationship and relevance to transit passage. It also comprehensively sets forth the correlative duties and obligations of both user and coastal States. The third section sets forth the six categories of international straits the Convention recognizes and the important juridical distinctions involved. The fourth section examines in more detail the overlay that exists between the regime applying to Article 38 straits ("normal" straits) and the regime in Article 35(c) straits (straits governed in whole or in part by long-standing conventions in force). The fifth section presents an international approach the United States suggests for appraising future proposals for the construction of bridges over international straits, the reasons why we believe it is justified, and the reasons why we believe it protects navigation interests while equitably balancing the legitimate interests of both coastal and user States, thus furthering the central principle underlying the navigation articles of the LOS Convention.

Bridges Pose Practical Problems in International Straits

The problem a bridge poses is obvious -- it can impede, if not stop, navigation. If it is a non-fixed span, such as a drawbridge, and the width of the non-fixed span is of sufficient width, the problem is greatly reduced, assuming, of course, that the main channel is under the non-fixed span and it is of sufficient depth to allow deep draught vessels to pass. In important straits of restricted width and congested traffic, a single movable span would also cause problems if its width were not sufficient to allow sufficiently broad traffic separation schemes for traffic to pass in both directions. Even if these criteria are satisfied, problems with the strait's hydrographic characteristics, such as severe tides and currents, and perhaps even habitually occurring strong winds, may effectively negate an otherwise acceptable design.

Another issue that is squarely joined in the Danish Bridge case currently before the Court is "how high is high enough," i.e., how much vertical clearance must there be under a fixed span in the main channel? Should it be of sufficient height to allow all existing ships to pass through, or enough to permit all ships presently under construction or planned for construction, or even more than that so as to allow for as yet uncontemplated designs to pass through? As was the case in balancing user and coastal State interests in formulating the Convention, the United States believes the correct response is between the two extremes. An acceptable fixed span bridge should clearly accommodate ship designs that are reasonably foreseeable.

Part and parcel of this question is what constitutes a "ship," again an issue that clearly will have to be addressed on the merits. It is the view of the United States that a ship in this context includes any seagoing vessel that is designed for and is capable of self-propulsion and such propulsion is incident to the primary purpose for which it is normally used. Thus a drilling rig or other mobile unit that is self-propelled, and such means of propulsion is normally used for transporting it and positioning it in place for exploitation, would be a ship. A corollary of this view, of course, is that an object being towed would enjoy the same rights of navigation provided it did not exceed the same height criterion.

Convention Navigational Regimes and Terms of Art With Emphasis on Their Relevance to Transit Passage and Applicable U.S. Interpretations

Central to any meaningful understanding of the navigation rights and correlative duties of user and straits States is an appreciation of

the rationale behind the terms of art and definitions in the navigation provisions of the LOS Convention, which in the U.S. view reflect customary law. These terms and definitions are not dead verbiage. They must be grasped and applied carefully. They enable the practitioner to trace logically through complex factual situations which arise, such as the Great Belt. The LOS Convention provides excellent analytical tools to come up with a very logical, persuasive conclusion. I shall next discuss various words of art, necessary facts, and official United States interpretive positions on which analysis of the various straits regimes depend.

Genesis of the Regime of Transit Passage

The regime of transit passage in straits used for international navigation arose from: (a) the emergence of twelve-mile territorial sea claims; (b) the distinction between the right of innocent passage and high seas freedom of navigation; (c) geography; and (d) reality.

Even before the Third UN Law of the Sea Conference first convened in the early seventies, the critical importance and unique nature of international straits was recognized. These choke points form the lifeline between high seas areas. In order for the high seas freedoms of navigation and overflight to be preserved in international straits that would be overlapped by twelve-mile territorial sea claims (displacing the earlier recognized three-mile territorial sea norm), the navigational regime in international straits would have to share similar basic characteristics with these high seas freedoms. General support existed in the Conference for a twelve-mile territorial sea. Such support depended, however, on ensuring that in international straits less than twenty-four miles wide at their narrowest point, an adequate navigation regime be preserved to ensure essential elements of the right of freedom of navigation and overflight. The lesser navigational right of non-suspendable innocent passage was simply not enough.

Reality, in terms of fundamental international commerce and security interests, required open access through international straits. Regardless of the breadth of the strait, whether five or twenty-four miles, certain freedoms had to apply, such as continuous and expeditious transit in, under, and over the strait and its approaches. Any codification of the law of the sea had to reflect this state practice and political and military reality.

Before we proceed further, it is important to underscore that the regime of transit passage is crucial to the maintenance of world peace and order. By relieving littoral states of the political burdens associated with a role as gate keepers, the transit passage rules minimize the possibility of straits states being drawn into conflicts.

Innocent Passage

A separate concept, different from the right of transit passage through international straits, is innocent passage through a coastal state's territorial sea.

The customary international law definition of innocent passage prevailing before the LOS Convention was that contained in Article 14 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

Article 14(2) provides that "passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters or of making for the high seas from internal waters." Article 14(4) provides that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." Other than a provision that submarines were required to navigate on the surface and to show their flag (Article 14(6)) and one relating to fishing vessels (Article 14(5)), what conduct "is not prejudicial to the peace, good order or security of the coastal State" was nowhere defined, thereby constituting a fundamental definitional lacuna. The important correlative restrictions on the coastal State in the territorial sea were that it must not hamper innocent passage through the territorial sea (Article 15(1)) and that there would be "no suspension of the innocent passage of foreign ships through straits which are used for international navigation." A final important geographic caveat (Article 5(2)) provided that "[w]here the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage...shall exist in those waters." This was retained in the LOS Convention.

To my mind, the most significant change in the territorial sea regime is the exhaustive elaboration in LOS Convention Article 19 of what constitutes non-innocent passage and in Article 21 of what laws and regulations relating to innocent passage the coastal State can enact and enforce. Although the ILC prior to the 1958 Convention recommended a list of coastal State laws and regulations similar to those contained in Article 21 of the LOS Convention, it was never incorporated into the 1958 Convention.

It is the United States' view that the enumerations in Articles 19 and 21 are all-inclusive, i.e., a ship may engage in any activity while engaged in innocent passage if it is not prejudicial or proscribed in Article 19(2), and a coastal State can only enact those laws and regulations that are contained in Article 21.

Perhaps the most important factor to be noted in this connection is the unwavering position of the United States and other major maritime powers that Article 21 does not permit a coastal State to require prior permission from, or notification to, a coastal State in order for a vessel to exercise the right of innocent passage. A number of developing coastal States maintain that although the Convention is silent on this point, earlier customary international law permitted a coastal State to require prior notification. They thus believe that this competence still exists. This is incorrect. The *travaux preparatoires* of the Convention unequivocally indicate that such is not the case. During the Sea-Bed Committee (1970-73) discussions, which were intended to produce a draft convention text, many developing States prepared amendments to the predecessor of Article 21(1) that would recognize such a coastal State right. The effort reached a climax during the final sessions of the Conference in 1980-82 and included the so-called Seven Power Proposal (Argentina, China, Ecuador, Peru, Madagascar, Pakistan, and the Philippines), which was introduced in both the ninth and eleventh sessions, and subsequently styled the Twenty Power Proposal, having gained additional developing State sponsors. A Twenty-Eight Power Proposal attempted to secure the same objective by adding "security" to Article 21(h), which enumerates the competences the coastal State can enforce in its territorial sea. The process culminated in a statement by the President of the Conference in Plenary that the sponsors of the amendment at his request had agreed not to press it to a vote. Although the erstwhile sponsors attempted to accomplish the same objective via declarations during the signing session, such declarations are *ultra vires* in that Article 310 of the LOS Convention prohibits declarations which exclude or modify the legal effect of provisions of the LOS Convention.

Lastly in this regard, if there is any doubt as to the law existing prior to 1982, the International Court of Justice, in the 1949 *Corfu Channel* Case, clearly stated that there is no right for a coastal State to prohibit innocent passage in time of peace, nor any right to subject the exercise of the right of innocent passage to obtaining previous authorization from the straits State.

Two final points should be noted under the innocent passage regime. Article 23 of the 1958 Convention and Article 30 of the LOS Convention provide that "if any warship does not comply with the laws and regulations of the coastal State concerning passage in the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately." Second, I believe a useful document that

illustrates the interpretation given to the innocent passage regime is the 23 September 1989 Joint Statement by the United States and the former Soviet Union on the Uniform Interpretation of the Rules of International Law Governing Innocent Passage. Since it sets forth the positions of two major maritime powers, I find it highly persuasive evidence and have included it at the end of this paper.

Non-Suspendable Innocent Passage

Under Article 16(4) of the 1958 Convention, non-suspendable innocent passage applied to ships through straits used for international navigation between one part of the high seas and another part of the high seas or territorial sea of a foreign State. It was important because it recognized that in straits overlapped by opposite three-mile-wide territorial seas, the international community had unquestionable rights of navigation not subject to interference by the coastal nation. These rights have evolved into a regime guaranteeing transit in, under, and over international straits, codified as "transit passage" in the LOS Convention. The more limited regime of non-suspendable innocent passage is now applicable to international straits governed by Article 38(1) of the LOS Convention (the so-called "Messina Exception") and Article 45(1)(b) (the so-called "dead end strait exception").

The regime of non-suspendable innocent passage under current customary law of the sea is extremely limited in application. It has in almost all cases been superseded by the transit passage regime applying to straits connecting one part of the high seas or an exclusive economic zone with another part of the high seas or an exclusive economic zone. The dead end strait exception is only applicable in those few geographic instances in which high seas or exclusive economic zone areas connect with a territorial seas area of one state by means of a strait bordered by one or more other states. Without the right of non-suspendable innocent passage, the state at the end of the cul-de-sac would effectively be "landlocked" with a territorial sea leading nowhere.

The law reflected in the LOS Convention, with its elaboration of what constitutes innocent passage, its statement of when non-suspendable innocent passage applies, and its precision as to straits used for international navigation, is a great improvement over the *status quo ante*. Had it existed in 1946, it would have cleared up any confusion regarding navigational rights, which led to the *Corfu Channel* case in 1949.

The Corfu Channel, it will be remembered, is an example of a "Messina Exception" strait in which non-suspendable innocent passage

applies. The legitimacy of the actions of the Royal Navy in steaming through the Corfu Channel on 22 October 1946, would not have been open to question. Albania would not have been able to maintain that the Corfu Channel was not a strait used for international navigation on the grounds that it was only a route of secondary importance and that it was not a necessary route between two parts of the high seas.

Articles 34 and 38 would have provided ready answers, but in 1949 it required the International Court of Justice to state clearly that the Corfu Channel was used for international navigation and that it was additionally a useful route for international maritime traffic. The inspiration for Article 38(1) and Article 45(1)(a) is directly attributable to the 1949 *Judgment*.

Transit Passage

One of the two most important achievements of the drafters of the LOS Convention was the codification of the transit passage regime under Articles 37-44. The regime is applicable in straits that are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The right of transit passage, unlike non-suspendable innocent passage, includes the right of overflight and submerged transit.

Following are some important United States interpretative positions applicable to the transit passage regime. First, the language referring to "straits which are used for international navigation" signifies all straits which are used or which may be used for navigation, i.e., straits which are capable of being used are included. This interpretation is not based solely on geography; prospective navigational use must be based on need, e.g., new commercial trade routes superseding the old, or a former trade route no longer suitable due to a change in tides or currents, environmental problems, change in depth, etc. Essentially, we place less emphasis on historical use and look instead to the susceptibility of the strait to international navigation.

Second, it is the United States' position that the right of transit passage applies not just to the waters of the straits themselves but to all normally used approaches to the straits. It would make no sense at all to have the right of overflight, for example, apply only within the cartographers' historical delineation of a certain strait, but not apply to restrictive geographical areas leading into/out of the strait, thereby effectively preventing exercise of the right of overflight.

It would defy navigational safety to require ships or aircraft to converge at the hypothetical "entrance" to the strait. It would also effectively deny many aircraft the right of transit passage if the pilot had to zigzag around the territorial seas of rocks and islands during the approaches to a strait. For transit passage to have meaning, open over-water access through the approaches must be included.

Third, when the right of transit passage applies, it applies throughout the strait. The width of the transit corridor, in effect, is shore to shore (this is, of course, subject to any IMO-approved traffic separation scheme that may be in place).

It is perfectly legitimate for a strait state to avoid this shore-to-shore result by limiting its territorial sea claim. Japan, for example, has chosen to limit its territorial sea claim in five straits, thus creating a high seas corridor of similar convenience down the middle of those straits. In such a case, innocent passage applies within the territorial sea areas and high seas' freedom of navigation applies throughout the corridors. This is so because Article 36 provides that Part III does not apply when a high seas corridor exists through the strait: "... the other relevant Parts of this Convention, including the provisions regarding the freedom of navigation and overflight, apply."

The foregoing is what I would call the interesting "hard law" scenario in which Article 36 applies. Of course, Article 36 was intended to apply in most instances to straits wider than twenty-four miles. Article 36 provides that "this part [straits used for international navigation] does not apply to a strait used for international navigation if there exists through the high seas or through an exclusive economic zone a route of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply."

Given the comparative complexity of the situations the "hard law" scenario of Article 36 envisages, it is useful to illustrate the various hypotheticals.

Consider an international strait eighteen miles wide with a different straits State on each side. State A extends its territorial sea to twelve miles; State B remains at three miles, thus leaving a high seas corridor three miles wide. In this instance, innocent passage applies in both territorial seas as Article 36 is correctly invoked so as to make freedom of navigation apply only in the high seas corridor if it is a route of similar convenience. This is to a degree inequitable for State B, since State A gains full benefit from State B's restraint. However, if State B extends its territorial sea to nine miles (presumably it would force State A to roll back its claim to the equidistance line, or nine

miles), State B would force State A by its action to have transit passage apply in both States' territorial seas as no high seas route of similar convenience would then exist. If both State A and State B extend to seven miles, however, innocent passage would apply in each territorial sea with freedom of navigation applying in the high seas corridor beyond.

Fourth, it is the unequivocal United States' position that transit passage is customary international law, which the provisions of the LOS Convention reflect. This is independent of the question whether or not the 1982 Convention is in force and whether or not States signatory to it have ratified or non-signatories have acceded to it. The fact that the vast majority of States today claim a twelve-nautical-mile-wide territorial sea and that the majority of coastal States claim exclusive economic zones, concepts both not recognized (indeed, the latter not even conceived) prior to the 1982 Convention, clearly reflects the validity of this position.

Fifth, and in parallel vein to the all-inclusive list of the user/-coastal States rights/duties under Article 19 and 21 of the innocent passage regime, Article 42 is an all-inclusive list of the laws and regulations that straits States may adopt relating to transit passage.

The Six Categories of International Straits

I shall now discuss the different categories of international straits provided for in the LOS Convention, for the regimes differ to some degree both in content and in area of application depending on the nature of the strait involved. The categories are: (1) the normal international strait connecting one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone, as provided under Article 37 and overlapped by opposite territorial seas; (2) the Article 36 strait in which a route through the high seas or exclusive economic zone of similar convenience with respect to navigational and hydrographic characteristics exists; (3) the Article 38(1) strait, the so-called "Messina Exception" strait; (4) the Article 45(1)(b) strait, the so-called "dead end strait exception" strait; (5) international straits that occur within archipelagic waters of archipelagic States as provided for in Articles 46-54; and (6) the Article 35(c) strait in which passage is regulated by long-standing international conventions in force, which is discussed separately in Part IV of this paper.

(1) The "Normal" Strait Used for International Navigation

Having discussed at length the five official United States' interpretative positions on transit passage, I shall note other points in the regime important to United States interests.

The "normal" international strait is from a geographic vantage the most frequently occurring strait of importance to international commerce and navigation. There are well over one hundred such international straits at present.

As I mentioned at the beginning of the discussion of transit passage, with regard to straits "used" for international navigation, there is no list of such straits. It is not a static concept -- the only exception to this being the number of Article 35(c) straits, i.e., ones subject to long-standing conventions, which number is limited.

In the United States' view, it is immaterial whether or not ice covers such a strait during most or all of the year, as the right of transit passage, it will be remembered, covers overflight as well as submerged transit. Submerged transit of submarines through international straits is addressed in Article 39(1)(c), which provides that ships and aircraft, while exercising the right of transit passage, shall "refrain from any activities other than those incident to their *normal* modes of continuous and expeditious transit...." (emphasis added). As the normal mode for submarines to transit is under the surface, such an unquestionable right is accorded them under the Convention both in transit passage and archipelagic sea lanes passage. While this is not explicitly included under Article 38 (right of transit passage) as it is under Article 53(3) (definition of archipelagic sea lanes passage), such a distinction is not a substantive one and does not diminish the right. This was done in order to avoid any ambiguity in the archipelagic sea lanes passage articles in that the duties of ships and aircraft under Article 54 incorporate *mutatis mutandis* the transit passage Articles 39, 40, 42, and 44. The drafters wished there to be no doubt that subsurface navigation was included in such waters, although archipelagic waters also constitute the waters within archipelagic sea lanes. This conclusion is confirmed by comparison with Article 20(2) in the innocent passage articles, which requires submarines to navigate on the surface and to show their flag. Moreover, since the waters of international straits were formerly high seas until overlapped by twelve-mile territorial seas, it is a conservative interpretation to maintain that what was specifically allowed before continues to be allowed unless specifically prohibited.

"In the normal mode" also means in the case of transit passage (and archipelagic sea lanes passage) that a ship's aircraft may both land and

be launched. (As an example, it is normal practice for military ships to have fixed-wing or helicopter assets aloft during transit, consistent with the security needs of the force). This conclusion is corroborated by comparison with Article 19(2)(e) regulating innocent passage, which prohibits the launching, landing, or taking on board of any aircraft. If such were not permitted under transit passage, a prohibition would have been included under those articles.

Another unambiguous duty provided under Article 44 requires that straits States "shall not hamper transit passage" and that "there shall be no suspension of transit passage." This is a far greater navigational right than that accorded ships under innocent passage, as Article 25(3) recognizes the right of a coastal State to "suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises." If suspension of innocent passage in the territorial sea occurs, it must be done "without discrimination in form or in fact among foreign ships" and "only after having been duly published."

As in the case in all maritime jurisdictional belts, i.e., the territorial sea, the exclusive economic zone, and archipelagic waters, warships and other government ships operated for non-commercial purposes enjoy sovereign immunity. In the straits articles, this is provided under Article 34(2), which states that "the sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law" and Article 42 (laws and regulation of States bordering straits relating to transit passage), paragraph (5), which provides that "the flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results in States bordering Straits." The applicable articles for the territorial sea are Articles 30-32.

(2) Article 36 Straits

As discussed above with relation to transit passage, Article 36 in its most interesting "hard laws" applications refers to straits in which one or more straits States choose not to extend their territorial sea out to twelve miles or out to a limit that results in no territorial sea overlap and the continued existence of a high seas corridor.

It may also apply to international straits that are wider than twenty-four miles in their entirety, which was the principal situation envisaged by the United Kingdom when it introduced the original version of Article 36 in the Single Negotiating Text in 1975. As a

practical matter, of course, there is a point at which this becomes meaningless as the strait is no longer a strait but merely a high seas area in which freedom of navigation applies and the transit passage articles are inapplicable.

(3) Article 38(1) Straits

This category of international straits, conceived due to the Strait of Messina, provides that "transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics." It is to note that the regime of *non-suspendable innocent passage* shall apply in an Article 38(1) strait in the area between the mainland and the island.

(4) Article 45(1)(b) Straits

This category, conceived to provide an adequate regime of navigation in dead-end straits, also provides that the regime of non-suspendable innocent passage shall apply in an international strait between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State. In that such a strait does not in its entirety fit the Article 37 definition of a strait to which transit passage applies, and as a regime of innocent passage would not be sufficient to meet a 45(1)(b) State's interests, the Convention recognizes the right of non-suspendable innocent passage in these situations.

(5) International Straits that Occur within Archipelagic Waters

This important category of international straits is treated slightly differently from straits in which transit passage applies in that they fall in whole or in part within the archipelagic waters of mid-oceanic archipelagic States, a creation the genesis of which in the first instance originated as a recognized concept of international law with the nailing down of all the necessary elements and archipelagic rights in the 1982 Convention.

The concept of the mid-oceanic archipelagic State permits States that fulfill the definition and criteria of land/water ratios contained in Articles 46 and 47 to enclose within straight baselines surrounding their outermost islands ocean areas previously high seas in nature, subject to the navigational right of archipelagic sea lanes passage. This concept is customary international law as reflected in Articles 46-54 of the LOS Convention, requiring the archipelagic State to recognize and respect the navigational rights and freedoms applicable within archipelagic waters. Archipelagic sea lanes passage applies to all

international straits as well as to all other international sea lanes and air routes.

One of the key navigational freedoms is the right of archipelagic sea lanes passage as provided in Article 53. This regime applies to all sea lanes and air routes designated by the archipelagic State. The lanes and routes shall include all normal passage lanes and routes used for international navigation and overflight and be approved before their designation by the International Maritime Organization. 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.

Article 53(3) defines archipelagic sea lanes passage as "the exercise in accordance with the Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone (the definition being almost verbatim to that of the right of transit passage). Article 54 provides that certain of the transit passage articles (Articles 39, 40, 42, and 44) apply *mutatis mutandis* to archipelagic sea lanes passage. In straits within the archipelago, the only substantive difference between archipelagic sea lanes passage and transit passage is the 10 percent rule continued in Article 53(5).

Four interpretative positions regarding the right of archipelagic sea lanes passage are, from our view and that of the international community, controlling.

First, as the territorial sea of an archipelagic State extends seaward of the baselines enclosing the archipelagic waters and therefore surrounding the latter, the approaches to the archipelagic sea lanes (and thus international straits) through the territorial sea are subject to archipelagic sea lanes passage and not innocent passage. If this were not the case, a right of archipelagic sea lanes passage existing within archipelagic waters would be meaningless.

Second, only mid-oceanic island States such as Fiji and Indonesia qualify as archipelagic States. Mainland or continental States that have island possessions cannot treat those islands as archipelagic States even if they would otherwise fulfill the definitions and land/water ratios.

Third, if an archipelagic State designates only a percentage of its sea lanes and air routes, this does not mean that only those so designated may be used; on the contrary, the other normal sea lanes and air routes will still be subject to the exercise of archipelagic sea lanes passage even if they are never so designated.

Fourth, Article 52 means what it says; the right of innocent passage applies to all archipelagic waters that do not comprise sea lanes. I mention this only because some doubt was earlier expressed by an archipelagic State representative whether or not Article 53 on archipelagic sea lanes passage obviated the need for innocent passage in archipelagic waters as contained in Article 52.

Straits Governed in Whole or in Part by Long-Standing International Conventions in Force

The issue of bridges over international straits has focused attention during the past year on straits that are governed in whole or in part by long-standing international conventions in force, simply because Denmark claims Great Belt Strait over which the controversial bridge is to be constructed happens to be such a strait as provided for under Article 35(c). Article 35(c) provides that transit passage articles do not affect "the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits."

During the Conference years, the Baltic straits were the subject of much discussion. The Treaty for the Redemption of the Sound Dues of 14 March 1857 and the parallel Convention for the Discontinuance of the Sound Dues between Denmark and the United States of 11 April 1857 ensure free navigation, and from that perspective, it is somewhat academic whether or not the Belts are considered 35(c) straits. My friend, Peter Brueckner, however, maintained that subsequent Danish domestic law (such as the claimed restrictions on warship passage) also applied as a form of retroactive overlay on the 1857 provisions, a position the United States cannot accept. If such straits constitute 35(c) straits, subsequent domestic legislation, absent concurrence of at least the maritime states, cannot restrict navigational freedoms enjoyed under the applicable "long standing convention." Article 35(c) straits were recognized as a special exception to Part III of the LOS Convention only on the understanding that the 35(c) navigation regimes would not unilaterally be restricted. It is the U.S. position that if such restriction occurs, the basis for this special exception disappears and Part III and transit passage apply.

At this point, it will be useful to discuss several United States interpretive positions regarding Article 35(c) straits.

To my mind, a most interesting linguistic issue presented in Article 35(c) is the words "in whole or in part." The phrase is susceptible of two interpretations.

The first interpretation might be called pre-emptive. If a 35(c) convention regulates the strait regime: (a) only in certain aspects (e.g., commercial vessels but not airplanes, airplanes and commercial vessels but not warships); or (b) in whole (e.g., airplanes, commercial vessels, and ships entitled to sovereign immunity), that strait regime is totally independent of the normal transit passage regime, which does not apply. This is so because the chapeau of Article 35 states "[n]othing in this part affects" Article 35 subparagraphs (a), (b) and (c). Under this interpretation those categories of vessels not regulated by the regime are regulated by other rules of customary international law as evident in State practice.

The second interpretation would support the position that if a 35(c) regime regulates only in part certain classes of ships (e.g., commercial vessels, but not airplanes or vessels entitled to sovereign immunity), only those vessels so regulated fall within the Article 35(c) regime, and the non-regulated categories are governed by the transit passage regime. This interpretation is truer to the intent of the straits articles. Transit passage is the norm, and 35(c) a narrow exception. In circumstances where the exceptional regime does not cover every angle, the normal regime should be used to fill in the gaps.

Usage plays a role in each 35(c) strait in determining more precisely the nature of the applicable 35(c) convention regime. As each 35(c) strait regime is *sui generis* depending on the regime established under the "long standing convention" in question, the precise nature of the regime can most accurately be determined by the extent and nature of the navigational use developed therein. This usage is more indicative and determinant in cases in which the regime itself is imprecise. It is also valid to maintain that the less usage is evinced, particularly in the case of an imprecise conventional regime, the greater the justification in maintaining that "normative" customary international law standards will define the regime. A caveat, however, should be noted in the case in which separate bilateral agreements are in existence collaterally with the long-standing convention regime. For the parties to these bilateral agreements, their provisions will determine the precise relationship, in that the specific prevails over the general.

Another characteristic of an Article 35(c) strait is that it be recognized by the international maritime community as such to qualify. This does not mean that all States must be parties to the convention regulating the specific strait. The 1885 Convention governing the Magellan Strait has but two parties (Chile and Argentina), but all States enjoy the international transit rights enshrined in

its provisions. As another example, the United States is not a party to the 1936 Montreux Convention, but we always have complied with its longstanding provisions.

The only caveat attaching to this status is that 35(c) conventions, although they can be amended by the original parties, have created rights affecting non-parties. Thus, as a general principle, such amendments are not binding on non-parties, since they share neither the longstanding character nor international acceptance of the original provisions. Common sense must be applied in instances in which a strait State, bound by a 35(c) convention, is faced with significantly altered conditions, and reasonable changes gain wide acceptance. (Example: Strait state bound by the 35(c) convention to accept Weimar Republic currency which subsequently becomes worthless.) This is, however, a subject that requires its own examination and is outside the scope of this paper. Suffice it today that we recognize that ancillary provisions (those not having to do with fundamental navigation rights) contained in a 35(c) convention are not necessarily treated as immutable.

Third, Article 35(c) straits can only be those governed by long-standing conventions in force -- this is corroborated by the *travaux preparatoires* of the LOS Convention. However, it is equally important to observe in this connection that if the Article 35(c) convention lacks specificity or its language is obscure due to terminology that has fallen into desuetude, this does not absolve the straits State of its duty under customary international law to follow the appropriate customary international law norm even though the "long-standing Convention" language at issue may appear to be narrower than that norm.

At this point, it will be useful to discuss the 35(c) principles in relation to the only straits that were submitted by the straits negotiating group as falling within the 35(c) exception (an exception which was espoused actively from the very beginnings of the negotiations by Denmark): the Danish Straits, the Aaland Strait, the Turkish Straits (Bosphorus and Dardanelles), and the Strait of Magellan.

(a) The Danish Straits

The Treaty for the Redemption of the Sound Dues of 14 March 1857 and the parallel Convention for the Discontinuance of the Sound Dues between Denmark and the United States of 11 April 1857, among others, recognized "entire freedom of the navigation of the Sound and the Belts" (Article I) and "free and unencumbered navigation" (Article II). Although only surface navigation and neither overflight nor submerged transit was in the contemplation of the parties in 1857, one

cannot reasonably maintain that they are *ipso facto* excluded from the central intent of the agreement, i.e., transit rights free from dues and interference. In a similar vein, as the regime established was ostensibly as broad a regime as it was possible to grant, subsequent developments in customary international law would be a legitimate means of interpreting its continued significance. The regime would preclude the Danes from applying their domestic laws to foreign flags transiting the straits except as recognized under modern international law (LOS Convention) and preclude them from applying their internal 1976 Ordinance to foreign warships.

(b) The Turkish Straits

The Convention Regarding the Regime of the Straits signed at Montreux 20 July 1936, commonly styled the Montreux Convention, regulates transit and navigation in the Straits of the Dardanelles, the Sea of Marmara, and the Bosphorus, and replaces the Lausanne Convention of 24 July 1923, which formerly regulated the Straits. It is a multilateral convention signed by the significant maritime powers of the day. It is comprehensive and explicit in regulating passage and is the classic example of an Article 35(c) convention. The major provisions state that in time of peace, merchant vessels enjoy complete freedom of transit and navigation (Article 2), as well as in time of war subject to certain provisions. Warships consisting of light surface vessels, minor war vessels, and auxiliary vessels enjoy in time of peace freedom of transit, subject to certain conditions; and other warships in time of peace enjoy a right of transit subject to certain conditions (Article 10). Submarines of Black Sea Powers may transit on the surface by day for the purpose of rejoining their base, provided prior notification is given (Article 12). Warships in transit cannot launch or otherwise utilize any aircraft (Article 15). Civil aircraft in order to pass between the Mediterranean and Black Seas may use air routes prescribed by Turkey and must remain outside of forbidden zones established in the Straits, and must give prior notification (Article 23).

In that the Convention is detailed, it is a convention that can be said to regulate the regime of passage "in whole," and the regime is *sui generis*. The United States has not protested any of its provisions, although it is clearly less than the right of transit passage and in certain facets less than the right of non-suspendable innocent passage.

(c) The Aaland Island Strait

The Convention on the Non-Fortification and Neutralization of the Aaland Islands signed at Geneva 20 on October 1921 is a multilateral convention to which the United States is not a party but conducts itself consistent with the treaty's terms. Article 5 thereof provides that "the prohibition to send warships into the zone described in Article 2 or to station them there shall not prejudice the freedom of innocent passage through the territorial waters. Such passage shall continue to be governed by the international rules and regulations in force." This regime regulates warship passage within three miles of the islands. The three-mile zone takes up a small corner of the strait between Sweden and Finland. Some have argued that the no-warship rule applies to the strait as a whole, but this is totally inconsistent with the terms of the 1921 treaty itself. Historically, it might be interesting to note that the three-mile zone was independent of Finland's territorial sea claim, which was four miles.

(d) The Strait of Magellan

The Boundary treaty between the Argentine Republic and Chile signed at Buenos Aires 23 July 1881 provides in Article 5 that "Magellan's Straits are neutralized for ever, and free navigation is guaranteed to the flags of all nations." The applicable juridical regime is free navigation. I already mentioned some thoughts on that phrase in my discussion of the Danish 1857 Convention.

An International Approach to Future Bridge Proposals over Straits Used for International Navigation

From the foregoing, it should be evident that the construction of a bridge across a strait used for international navigation, if not subject from its inception to certain internationally accepted safeguards and readily applicable standards, could destroy the carefully crafted balance of strait State/user States rights and obligations that form the essence of all the Convention's navigational articles.

In crafting a reasonable international solution, we should look to the system whereby the international community, working through the International Maritime Organization as the "competent international organization," establishes sealanes and traffic separation schemes through international straits.

To designate a sealane or traffic separation scheme under that system, a State would first submit a proposal to the International Maritime Organization with a view toward adoption by that body. To be adopted, the sealane or traffic separation scheme must conform to

generally accepted international standards and regulations, and the State must give "due publicity" to its proposal.

Since sealanes and traffic separation schemes affect navigation, it is only reasonable and practical that similar steps be followed in the case of bridges.

This is particularly so since the United States does not believe that customary international law permits a State unilaterally and without prior international approval to construct a fixed bridge over an international strait that in many instances is the sole practical deep water route available. In order, therefore, to unify State practice, the United States suggests that all future construction plans for bridges over international straits be submitted to the International Maritime Organization.

Our suggestion consists of three elements. First, prior to referral of a proposal by a straits State of plans to construct a fixed bridge over a strait used for international navigation, the straits State should be required to provide actual notice of the proposal well in advance through the International Maritime Organization to all States.

Second, all States that are then notified about the proposal by the International Maritime Organization would be given adequate opportunity to communicate their views to the proposing straits State, which would be obliged to seek to accommodate such views.

As part of this process, the International Maritime Organization should first establish internationally recognized guidelines and standards to ensure that construction of bridges does not hamper or impede navigation through international straits. These guidelines and standards would in part be based on and vary with the type of international strait involved and other considerations, such as the nature and density of the traffic through such a strait, the availability of equally practicable alternate routes, and the associated additional costs, if any, of the proposed bridge construction.

Finally, the straits State initiating the bridge construction proposal could only proceed with actual construction upon determination by the International Maritime Organization that the proposal conforms to the established International Maritime Organization guidelines and standards.

By way of reference, the United States notes that Denmark gave notice to all States of its construction plans sixteen years ago and requested that interested States submit their views to it with a view to their accommodation. The only State to submit such views prior to construction was the former Soviet Union, which requested that the clearance of the main central span over the deep water channel be increased to 65 meters, a request Denmark duly incorporated into the

final construction plans. The United States believes that notice through the International Maritime Organization would ensure that the international community had effective notice of the opportunity to address so potentially serious a threat to effective international navigation.

The United States looks forward to working with other interested States to help develop these procedures within the International Maritime Organization. We believe that international acceptance of such a procedure, which involves the International Maritime Organization and internationally recognized guidelines and standards that would apply to future bridge construction, would be the most equitable and effective means to address the issue. It would also reduce the potential for the establishment of adverse precedents in this field.

Recently we have been informed of suggestions to build bridges across other international straits. I wish to make it clear beyond any doubt that the United States would not acquiesce in the construction of such bridges unless internationally recognized procedures are already in place and complied with. To accept anything less after the international community worked so many years in the Law of the Sea Conference to establish a universally accepted navigation regime would place us all in unacceptable, uncertain dangers in a field in which the international community requires predictability, stability, and the orderly development of a universally endorsed body of traditional law of the sea norms.

BRIDGES OVER STRAITS

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Introduction

The project of the Danish government to span the Great Belt -- one of the straits and the only deepwater passage connecting the Baltic and the North Sea -- with a bridge not only presents technical difficulties but at the same time raises a series of legal questions. In the coming weeks these legal questions will be decided upon by the International Court of Justice. Taking this into consideration, my presentation will be restricted to highlighting the various legal problems involved and the arguments advanced by both sides. I shall, however, refrain from pronouncing a judgment of my own on the merits of these arguments nor shall I attempt to predict the judgment of the International Court of Justice.

Problems similar to those raised by the project of the Danish government are likely to be triggered by any other project to bridge an international strait, although each individual case will have its own particularities defined through the special regime by which it is governed. So far, several straits have been crossed by bridges, namely the Bosphorus Bridges in Turkey built in 1973 and 1988, the Kanmon Bridge in Japan, the Bisan Seto Bridge connecting Honshu and Shikoku, and the Akashi Kaikoy Bridge crossing the international navigation channel adjacent to the port of Kobe. None of the bridges have been claimed to restrict the freedom of passage through the given strait. The crossing of the Sound between Denmark and Sweden, as mutually agreed upon, will consist of a tunnel and a bridge and thus may not have the same implications as the projected Great Belt bridge.

Before I enter into the legal specifics of the Great Belt bridge case, let me give a brief account of the relevant facts.

Factual Background Concerning the Project to Cross the Great Belt

The entrance from the North Sea to the Baltic consists of three straits, properly speaking the Little Belt, the Sound, and the Great

Belt.[1] The passage of the Little Belt, being part of Danish internal waters, is situated between Jutland and Fyn and has a length of 68 miles and a minimum depth of 11.8 meters. The width of the Little Belt varies between 700 meters and 27.5 kilometers. In May 1935, a bridge was opened over the Little Belt connecting the Jutland peninsula with the island of Fyn. The Sound, being the easternmost of the three entrances from the Kattegat to the Baltic, is situated between Sjaeland and the southwest coast of Sweden. The Sound is divided at its northern part into an eastern and a western channel by the island of Ven. Although the Sound is the shortest route between the eastern Baltic and the North Sea, the passage is limited by its minimum depth of 7.7 meters in the channel on the Danish (Drogden) side and 7.1 meters on the Swedish side. In 1991 the Danish and the Swedish Governments agreed in principle to establish a fixed link across the Sound. However, the project provides for the building of a tunnel under the Drogden, hence this project is not expected to affect the passage of ships. The Great Belt is situated between the Danish islands of Fyn and Langeland in the west and Sjaeland and Lolland in the east. It is divided by the island of Sprogø into a western and an eastern channel. The depth of the Great Belt varies between 20 and 25 meters.

Traditionally the Sound was the shortest and busiest passage between the Baltic Sea and the Kattegat, but with the increasing size of ships, the East Channel of the Great Belt has become the most frequently used route for the passage of large vessels.

According to IMO Resolution A. 339 (IX) of November 1975, the Danish authorities established a transit route passing through the East Channel of the Great Belt with an offical depth of 17 meters, the effective depth being 15 meters. The Danish government plans a crossing of the Great Belt by a fixed link consisting of a 6.6 kilometer road and a rail bridge spanning the Western channel. This bridge will have a navigational clearance of 18 meters. The crossing of the East Channel will be accomplished by a railway tunnel and a high-level road bridge having a clearance of 65 meters. The project has already been started and the bridge crossing the East Channel is expected to be opened to traffic during 1994. The Government of Finland maintains that the clearance of the bridge crossing the East Channel impedes the freedom of navigation through the Great Belt, since ships and oil rigs built in Finland have a height exceeding the clearance and

[1] For the geological and economic background see Gunnar Alexandersson, *The Baltic Straits 1982*, 63 et seq.

a draught in excess of that of the Sound.[2] The Finnish government maintains that international law guarantees the right of free passage of ships, including oil rigs and drill ships, through the Great Belt and that there is no justification for Denmark to unilaterally limit that right.

The Danish Argument of Acquiescence

However, before the Court will get down to the merits of the arguments advanced by the Government of Finland concerning the alleged interference with the freedom of passage through the Great Belt, it will most likely tackle the problem of whether Finland has forfeited the right to object to the building of the bridge as presently designed. This argument, brought forward by the Government of Denmark in the proceedings concerning the request of Finland for indication of provisional measures, invokes the principle of acquiescence by stating that the Government of Finland has objected belatedly to the project although it was informed by the Danish government in due time. According to the Danish government, the Great Belt project was already initiated in 1948 with the setting up of a Governmental Commission to study the feasibility of crossing the Great Belt. After further investigation, the Danish Parliament passed an act in 1973 on the construction of a bridge across the Great Belt. The Foreign Diplomatic Missions accredited to Denmark were informed in 1977 through a Circular Note about the Great Belt Project which included a high-level bridge across the East Channel with a free clearance for passage of 62 meters above sea level.[3] Unlike the Governments of the USSR and Poland, the Government of Finland did not react to that information. In 1978 the Danish authorities decided to postpone the implementation of the project and it is disputed as to whether this postponement was regarded as temporary or permanent.

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[2] ICJ, *Application Instituting Proceedings Passage Through the Great Belt*, Finland v. Denmark, 2.

[3] The Danish Circular Note of 12 May 1977 reads in its relevant parts: "... The planned Great Belt Bridge will feature a high level bridge across the eastern channel (Osterrenden) and a low level bridge across the western channel (Vesterrenden). The construction of the section across the eastern channel will, in conformity with International Law, allow international shipping between the Kattegat and the Baltic Sea to proceed as in the past. ... the free vertical clearance for passage under the bridge will be 62 in above mean sea level ...".

In 1987 the Danish Parliament passed an act on the construction of a fixed link across the Great Belt for rail connection and a motorway. Again the Foreign Diplomatic Missions accredited to Denmark were informed accordingly. The information stated that the traffic link crossing the East Channel would be either a high-level bridge or a tunnel. The decision on the final version of the project -- crossing of the East Channel by a high-level bridge with a clearance of 65 meters -- was only taken in 1988-89. The Foreign Missions were informed by a Circular Note of 24 October 1989 on the final version of the bridge. All three Danish Circular Notes stated that the erection of the bridge would allow for the maintenance of free passage for international shipping as in the past. That phrase might be taken as an indication that future developments in shipbuilding were not taken into account.

The Government of Finland requested information in July 1989 concerning the project and its possible implications for Finnish shipping, and after having first requested informal talks later asked for negotiations to secure the free passage of Finnish offshore units to be initiated prior to any final decision on the bridge project in June 1990.

The Court will have to decide whether the lack of reaction from the Finnish government to the information received from the Government of Denmark through 1989 amounts to an acquiescence to the Great Belt Project. The doctrine of acquiescence is a concept well known in international law and has been applied in international adjudication as a principle of substantive law.[4] According to the doctrine of acquiescence, inaction with respect to foreign actions or claims which, according to the general practice of states, usually call for protest in order to preserve or safeguard rights, amounts to a tacit recognition of

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[4] Case *Concerning the Arbitral Award made by the King of Spain on December 23, 1906 (Honduras v. Nicaragua)*, ICJ Reports 1960, 213; *Right of Passage over Indian Territory* Case *(Portugal v. India)*, ICJ Report 1960, 6; *Grisbadarna* Case in: Scott (ed.), Hague Court Reports 1916, 121-133; *Temple of Preah Vihear* Case *(Cambodia v. Thailand)*, ICJ-Reports 1962, 6; Case *Concerning the Interpreation of the Air Transport Services Agreement Between the United States of America and France*, 27 March 1946, RIAA XVI, 5; *Fisheries* Case (*U.K. v. Norway*), ICJ Reports 1951, 116; *Minquiers and Ecrehos*-Case, ICJ Reports 1953, 47; see also I.C. MacGibbon, "Customary International Law and Acquiescence", *BYIL* 33 (1957), 115-145; I.C. MacGibbon, "The Scope of Acquiescence in International Law", *BYIL* 31 (1954), 143; E. Suy, *Les actes juridiques unilatéraux en droit international public*, 1962, 61 et seq.; M. Waelbroeck, "L'acquiesement en droit des gens", *Riv. Dir. Int.* 44 (1961), 38-53; J. P. Müller/ T. Cottier, "Acquiescence", R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 7 (1984), 5-7.

such action as being in conformity with international law.[5] However, inaction vis-à-vis foreign actions has a binding effect only if certain criteria have been met. The existing case law[6] does not provide for full guidance in this respect. It suggests differentiation between those cases where acquiescence has resulted in the creation or the alteration of international customary law and where relations settled by agreement have been modified by subsequent deviating conduct which remained unchallenged by the other party. The leading cases with respect to the former are the Fisheries Case,[7] although not expressly referring to acquiescence, and the Grisbadarna Case,[8] and with respect to the latter are the Temple of Preah Vihaer Case[9] and the France-United States Air Transport Services Agreement Case.[10] Especially in the France-United States Air Transport Services Agreement Case, the Arbitral Tribunal emphasized that the conduct of French authorities resulted in a modification of the Air Transport Services Agreement. The Arbitral Award, however, does not indicate what the conditions are for acquiescence. No further clue for interpretation of the doctrine of acquiescence can be finally gained from article 45 (b) of the Vienna Convention on the Law of Treaties,

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[5] Separate Opinion of Judge Alfaro in the Temple of Preah Vihear Case, ICJ Reports 1962, at 39 et seq.

[6] See note 4.

[7] See note 4, at 138 et seq. The Court referred to the general toleration of the international community, the United Kingdom's interest in these questions and its prolonged abstention which lasted for more than 60 years. The judgment in the case concerning Right of Passage over Indian Territory (note 4) at 39 et seq. followed the same approach.

[8] See note 4, at 121; the tribunal stressed the co-existence of expenditure and acquiescence in the following words: "The stationing of a light-boat, which is necessary to the safety of navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons where established there without giving rise to any protests".

[9] See note 4, at 23 et seq. The Court held that the circumstances, namely the communication of maps, were such as called for some reaction, within a reasonable period. The Court then concluded: "They did not so, either then or for many years, and thereby must be held to have acquiesced. Qui tacet consentire videtur si loqui debuisset ac potuisset."

[10] See note 4, at 63 et seq.

1969[11] since this provision merely contains a reference to acquiescence as to the validity of treaties.

The preceding cases indicate that at least two conditions have to be met before silence or inactivity of a state amounts to acquiescence and thus modifies the international legal relationship between the states concerned, namely knowledge of the activity in question and prolonged abstention from reaction thereto on the side of the state alleged to have acquiesced. In the Grisbadarna Case[12] special weight was given to the fact that recent Swedish installations for the security of navigation in the disputed area had not given rise to any protests from Norway. The case indicates that a short lapse of time may be compensated by the intensity of the claims and assertions on the one side and by the obvious toleration on the other. As far as the modification of an international agreement is concerned, it has to be taken into consideration that the concept of acquiescence must not lead to an encouragement to unilaterally breach existing agreements. Hence, in these cases it is of paramount importance to establish that the inaction or silence of one state can be properly interpreted as tacit recognition of previously established facts resulting in à subsequent agreement according to article 39 *et seq.* of the Vienna Convention on the Law of Treaties.[13]

If these are the yardsticks to be applied in assessing whether Finland has acquiesced in the infringement of its rights regarding free passage through the Great Belt, the Court may wish to establish first whether the Government of Finland was informed about the Great Belt Project in such a manner that an objection was to be expected. The first Circular Note of 12 May 1977 emphasized that the high-level bridge across the eastern channel would not in any way restrict passage through the Great Belt by existing ships which had navigated these waters in the past and would have a free vertical clearance for passage under the bridge of 62 meters above sea level. The Circular Note of 30 June 1987, however, mentions that it had not yet been decided whether the crossing of the East Channel was to be undertaken by a high-level bridge or a tunnel. The third Circular Note of 24 October

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[11] ILM 8 (1969), 679.

[12] Note 4, at p. 131.

[13] The Arbitral Award in the France-United States Air Transport Services Agreement Case speaks of "an agreement that implicitly came into force at a later day (at 66) or of an implicit agreement" (note 4, at 77).

1989 again refers to a high-level bridge as the projected means to cross the East Channel of the Great Belt having a vertical clearance for passage of 65 meters. The Court will have to consider whether the Government of Finland, by the time of the first Circular Note of 1977, had already received sufficient information on the Great Belt project to mandate an objection to safeguard its legal position. In making this assessment, the Court may take into consideration whether the planning of 1977 had to be regarded as definite and whether in 1977 shipbuilding already provided for the construction of ships and oil rigs with a height exceeding the vertical clearance of the Great Belt bridge as designed. Another consideration may be whether the sentence in the 1977 Circular Note indicated that the freedom of shipping was protected only as exercised in the past or mandated if it wanted to protect the freedom of shipping under future developments. A further element in this assessment procedure may be for the Court to ascertain the weight of the state interests involved and to establish whether this should have had an impact upon the course of action taken by the two Governments. If the Court finds that, after receiving the information in 1977, Finland was already under an obligation to object to the project of the Great Belt bridge, it will have to establish whether the lack of objection amounts to Finland's tacit consent and, accordingly, to an agreement being concluded between Finland and Denmark. If the Court's answer is affirmative, it will further have to establish whether such an agreement can, generally speaking, alter the legal situation pertaining to passage through the Great Belt. This is doubtful since the regime governing the Danish straits constitutes a multilateral treaty which may only be altered under special circumstances by one or some of its parties.[14] This decision requires an assessment of the activities or non-activities of the other members to the regime relating to the Danish straits. After all, the case of passage through the Great Belt offers the International Court of Justice the opportunity to further elaborate its ruling on the conditions for acquiescence and the impact of acquiescence on legal situations governed by multilateral treaties.

The Finnish Arguments Concerning the Right to Freedom of Passage through the Great Belt

The part of the Great Belt over which the building of the bridge is being considered belongs in its entirety to the Danish territorial sea.

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[14] See articles 40 and 41 of the Vienna Convention on the Law of Treaties.

According to international law, the Danish government has the right to erect constructions in and above the Danish territorial sea as long as this does not result in an unjustified curtailment of the rights of other states.

The Finnish Government maintained in its application that international law guarantees to Finland the right of free passage of ships, including oil rigs and drill ships, through the Great Belt and that the building of the bridge across the Great Belt as projected would restrict that freedom. This assertion is based upon international treaty law, namely the Treaty for the Redemption of the Sound Dues, Copenhagen, 14 March 1857,[15] the Convention on the Territorial Sea and the Contiguous Zone, 1958[16] and -- although not yet in force -- the United Nations Convention on the Law of the Sea, 1982,[17] as well as on international customary law.

The relevant part of the 1857 Treaty for the Redemption of the Sound Dues reads:

> Sa Majesté le Roi de Danemark prend envers Sa Majesté la Reine du Royaume Uni de la Grande Bretagne et d'Irlande, ...
>
> 1. De ne pas prélever aucun droit de douane, de tonnage, de feu, de phare, de balisage ou autre charge quelconque, à raison de la coque ou des cargaisons, sur les navires qui se rendront de la mer du Nord dans la Baltique, ou vice versâ, en passant par les Belts ou le Sund, soit qu'ils se bornent à traverser les eaux Danoises, soit que des circonstances de mer quelconques ou des opérations commerciales les obligent à y mouiller ou relâcher. Aucun navire quelconque ne pourra désormais, sous quelque prétexte que ce soit, être assujeti, au passage du Sund ou des Belts, à une détention ou entrave quelconque; mais Sa Majesté le Roi de Danemark se réserve expressément le droit de régler, par accords particuliers, n'impliquant ni visite ni détention, le traitement fiscal et douanier des navires appartenant aux Puissances qui n'ont point pris part au présent Traité;..."

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[15] Marten NRG XVI, Partie II, 345-357.

[16] UNTS 516, 205.

[17] UN Doc. A/Conf. 62/122 and Corr.

Before it is possible to analyze whether this treaty protects against the alleged infringements of the freedom of passage through the Great Belt, it has to be ascertained whether the Government of Finland can refer to it, since Finland is neither a party to the treaty nor has it later adhered to it nor become a party by way of state succession.[18] However, the wording of article 1 para. 1 of the Treaty indicates that Denmark not only renounces the levy of strait tariffs from the parties to the Treaty (first sentence) but that the King of Denmark commits himself henceforth not to subject the passage of any ship in the Sound or the Belts to any detention or hindrance (second sentence). That this second sentence of article 1 para. 1 of the Treaty provides for an *erga omnes* obligation[19] is not only manifested through the use of the words "aucun navire quelconque" but also through the fact that the second part of this sentence explicitly refers to non-parties. To provide for the freedom of passage not only for parties but also for non-parties is quite common and the rule rather than the exception for international treaties governing international straits or canals. This is true for the treaties on the Turkish Straits[20], the Strait of Magellan,[21] the Suez Canal,[22] and the Panama Canal.[23] Taking into account state

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[18] Note should be taken of the fact, however, that Finland then being a Grand Dukedom of the Russian Empire contributed to the compensation, consisting of seven million rubles in silver, to be paid by the Russian Government to the Government of Denmark for the lifting of the Danish Strait Tarifs; see His Imperial Majesty's Gracious Ordinance to Introduce a Provisional Levy to be Collected in Respect of Goods Entering Finland in Lieu of the Repealed Strait Tarif, 22 January 1859.

[19] See also Erik Brüel, *International Straits*, vol. II, 1947, 40.

[20] Convention concernant le régime des Détroits, Montreux, 1936 (Martens, Nouveau Recueil Général de Traités, 3ième Série, Tome XXXIV, 649. Article 2 reads: "En temps de paix, les navires de commerce jouiront de la complète liberté de passage et de navigations dans les Détroits, de jour et de nuit, quels que soient le pavillon et le chargement...".

[21] Traité de délimitation entre Argentine et Chili, 1881 (Martens, *Nouveau Recueil Général de Traités*, 2ième Serie, Tome 12, 491). Article V reads: El Estrecho de Magellanes queda neutralisado á perpetuidad y asegurada su libro navegacion para la banderas de todas Naciones.

[22] Treaty of 1888, Martens, *Nouveau Recueil Général de Traités* 2ième Série, Tome XV, 557. Article I para. 1 reads: "Le Canal Maritime de Suez sera toujours libre et ouvert, en temps de guerre comme en temps de paix, à tout navire de commerce ou de guerre, sons distinction de pavillon...". The Israeli-Egyptian Peace Treaty of 26 March 1979 (ILM 18 (1979) 362) explicitly recognizes that the claim of Israel as a non-party for free passage

practice vis-à-vis right of passage for merchant vessels through international straits since the nineteenth century, this right has become international customary law.[24] In any case, the Government of Finland may invoke the 1857 Treaty although it never has become a party thereto.

If the International Court of Justice holds that it cannot apply the Treaty of 1857 to the present case, it will have to inquire if Denmark has acquiesced in the free passage of Finnish ships.

The next question arising in this context is to establish the obligations assumed by Denmark through this Treaty, namely exactly which obligations of Denmark flow from the words "Aucun navire ... ne pourra désormais ... être assujeti ... à une détention ou entrave quelconque ...", which ships benefit from such obligation, and finally, whether such obligation extends to already existing ships only, or whether it is meant to take into account future developments in shipbuilding, too.

The Treaty of 1857 presupposes that the Straits are navigable waterways. Hence it does not impose upon Denmark any positive duty to take steps to maintain them as such. However, although the Treaty does not oblige Denmark to maintain the Straits as navigable waterways, the fact that it presupposes them to be such puts an obligation upon Denmark not actively to deprive them of their character.[25] In this respect the original French text of the treaty, being alone

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of its ships through the Suez Canal is based upon the Convention of Montreux.

[23] Treaty of 1901 (Martens, *Nouveau Recueil Général de Traités 2ième Série*, Tome XXX, 631). Article III para. 1 reads: "The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects..." and Treaty of 1903 (Martens, *Nouveau Recueil Général de Traités*, Tome 31, 599); Treaty concerning the Permanent Neutrality and Operation of the Panama Canal, 1977, ILM vol. 16 (1977), 1022. It provides: "The Republic of Panama declares that the Canal, as an international transit water way, shall be permanently neutral in accordance with the régime established in the Treaty" (Art. 1). The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality" (Art. 2).

[24] See Erik Brüel, *International Straits*, vol. I, 1947, 102.

[25] Brüel (note 18), 43 qualifies the building of embankments or bridges without openings wide enough for navigation as being in violation of Denmark's obligation under the Treaty.

conclusive for the interpretation of Denmark's obligation, uses the word "entrave," which excludes not only an absolute hindrance but every measure by Denmark that could render the passage of ships through the Great Belt more difficult. This obligation is quite far-reaching.[26] Not only does it prohibit the closing of the Great Belt for ships or a given category of ships but it would also forbid any deterioration of the navigability of the Danish Straits created by Denmark.

At this point it may be necessary to establish whether the Treaty refers to all the three straits together or to each of them individually. Phrasing the question differently, does the Treaty prohibit the hindrance in one strait as long as the passage at least in one of the others remains unimpeded? If the word "entrave quelconque" is taken literally, it is the objective of the Treaty to rule out any hindrance in each individual strait, and therefore one cannot argue that unimpeded passage through one of the other straits remains possible.

Thus, at first sight it seems as if the Treaty on the Redemption of the Sound Dues of 1857 endorses the Finnish claim.

However, it is quite questionable whether the Treaty really covers all the ships and offshore installations (Mobile Offshore Drilling Units), the passage of which, according to Finnish views, has been put into jeopardy. These are, according to the application of Finland to the International Court of Justice, drill ships (height of 80.3 meters and a transit draught of 7.3 meters), semi-submersible rigs (height of 80 to 110 meters and a transit draught of 15 meters) and jack-up rigs (transported by heavy load transport vessels with a transit draught of 10 meters and a height reaching close to 150 meters).[27] The Government of Finland has alleged that for at least six out of 23 of the Mobile Offshore Drilling Units built between 1974 and 1990 the Great Belt was the only available passageway and that their height exceeded 65 meters.[28] It has been further emphasized that Finnish shipyards will in the near future build even higher Mobile Drilling Offshore Units for which the passage under the Great Belt Bridge as planned

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[26] See E. Brüel, "Die Brücke über den Kleinen Belt und das Völkerrecht," *Zeitschrift für Völkerrecht* 19 (1935), 327-332.

[27] ICJ, *Application* (note 2) at 8.

[28] ICJ, Pleadings CR 91/10, 14.

would be impossible. Further, Finland has argued that the building of the bridge would impede the passage of ferries and luxury cruisers.[29]

The Treaty on the Redemption of the Sound Dues refers only to ships ("navires") without qualifying what the term means. As far as ferries and luxury cruisers are concerned, they will clearly come under the provisions of the Treaty. Such inclusion, however, seems to be more questionable concerning some types of Mobile Offshore Drilling Units.[30] International treaty law gives little guidance for the definition of the terms "ship" or "vessel," which are often used without being defined, as for example in the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958[31], the Geneva Convention on the High Seas,[32] or the Convention on the Law of the Sea.[33] Some exceptions, however, do exist. Some Conventions, especially some of the ILO Conventions concerning sea-men,[34] connect the term "vessel" with maritime navigation. Other conventions rather adopt a more technical approach by referring to the mode of propulsion.[35] A third group, especially related to the protection of the marine environment, have the broadest approach and include in the definition of the term "ship" any floating object[36] or even fixed platforms.[37] The agree-

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[29] ICJ, Pleadings CR 91/10, 13.

[30] According to M. Srensen, "Brückenbau und Durchfahrt in Meerengen", in: *Recht im Dienst des Friedens*, Festschrift für E. Menzel, 1976, 551 (557 et seq.) denies that such units would fall under the Treaty since it covers only, in this view, ordinary navigation.

[31] Note 16.

[32] UNTS vol. 450, 11.

[33] Note 17.

[34] ILO Convention Concerning Sea-Men's Articles of Agreement, 1926, UNTS 38, 295; Concerning the Repatriation of Sea-Men, 1926, UNTS 38, 315; International Convention on Salvage, 1989, UN Law of the Sea Bulletin No. 14 (December 1989), 77.

[35] ILO Convention Concerning Hours of Work on Board Ship and Manning, 1936, Hudson, *International Legislation*, VII, 470.

[36] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualities, 1969, ILM 9 (1970), 25; International Convention on Civil Liability for Oil Pollution Damage, 1969, ILM 9 (1970) 45; Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972, UNTS vol. 1046, 120.

ments mentioned seem to indicate that the term "ship" has been defined with a view to most efficiently serve the objective of the treaty in question. Since the Treaty for the Redemption of the Sound Dues refers in its preamble to the need to facilitate and increase commercial and maritime relations, and hence focuses on navigational aspects, it suggests interpreting the term 'ship' as used in other international agreements having the same objective. However, the whole issue is perhaps less relevant than might be expected. The extra height of the Mobile Offshore Drilling Units is caused by the derricks or, with respect to jack-ups, by the legs. Even if these derricks or the jack-ups when towed or carried are not regarded as being part of a ship defined as craft or being used as means for transportation,[38] such devices would have to be qualified as cargo. However, since article I para. 1, first sentence of the Treaty for the Redemption of Sound Dues especially protects cargo and sentence 2 rules out any hindrance under any pretext whatsoever, it is made quite clear that the cargo may not serve as a motive to interfere with the right of passage.

The final problem to be dealt with in interpreting article I para. 1 of the Treaty for the Redemption of the Sound Dues is to determine which generation of ships it protects. In the Circular Notes by which it informed the other governments about the bridge project, the Danish government emphasized that international shipping between the Kattegat and the Baltic Sea would be allowed to proceed as in the past. Evidently, the Danish government is of the opinion that international law only requires it to provide for the free passage of those types of ships that at the time of planning of the bridge are in use and already have passed through the Great Belt. Whether the Government of Denmark has lived up to that requirement is a factual rather than a legal question.

The Government of Finland, however, objects to the project from the perspective that the building of the Great Belt Bridge would

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[37] Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 1972, ILM 11 (1972) 262; International Convention for the Prevention of Pollution from Ships, 1973, ILM 12 (1973) 1319; Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1974, ILM 13 (1974) 546.

[38] See Convention on the International Regulations for Preventing Collisions at Sea, 1972, UNTS 1050, 16; 1143, 346, Rule 3.

interfere with the free passage of ships already designed, but still to be built in the 1990s.[39]

The question as to which generation of ships the Treaty for the Redemption of the Sound Dues applies can only be answered by recourse to the Treaty's object and purpose. Article II para. 5 of the Treaty might be read to indicate that the Treaty not only intends to preserve the freedom of navigation and maritime trade on the basis of the status quo of the navigability of the Baltic Sea but takes into account future developments concerning routes and canals connecting the North Sea and the Elbe river with the Baltic Sea for the purpose of facilitating and increasing commercial and maritime relations.[40] To what extent this makes it necessary for the Government of Denmark to include in its planning of the Great Belt Bridge future developments in shipbuilding will be for the International Court of Justice to decide. However, the Court may not find it necessary to involve itself in this very intriguing question. Since the restrictions that the Bridge may have upon passage through the Great Belt will materialize only in 1997, the Court may find that the state of shipbuilding, not at the state of the planning process of the Bridge but in 1997, is decisive. For if it comes to the assessment of whether an act of the Government of Denmark constitutes an impediment to the free passage of ships through the Great Belt, the relevant date is when the act will materialize, not when it is planned.

Besides the Treaty on the Redemption of Sound Dues, the Government of Finland has invoked the right of innocent passage as enshrined in the Geneva Convention on the Territorial Sea and the Contiguous Zone. The Geneva Convention only deals with straits in article 18 para. 4, asserting that innocent passage through straits which join one part of the high seas to another part of the high seas or to the territorial sea of a foreign state and which serve international navigation shall not be suspended. In laying down this rule, article 16 para. 4 reiterates the ruling of the International Court of Justice in its judgment in the Corfu Channel case[41] but straits joining the high seas to a territorial sea which were not mentioned in the judgment.

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[39] Application (note 12) 8, 10, 14. On p. 14 para. 29 the Application refers to the "right of free passage ... for reasonably foreseeable cruisers, ferries etc. over 65 meters...".

[40] See Preamble of the Treaty for the Redemption of Sound Dues of 1857 (note 15).

[41] ICJ Reports 1949, 4 (28).

According to article 15 para. 1 of the Geneva Convention, the essential element of the principle of innocent passage -- having for an objective to strike a balance between the interests of navigation and those of coastal states exercising sovereignty over those parts of the sea -- consists of the obligation, incumbent upon the coastal state, not to hamper the innocent passage of foreign ships through the territorial sea. Accordingly, the ships of all states have the right of passage through the territorial sea as long as passage is innocent.[42] Although the Geneva Convention on the Law of the Territorial Sea and the Contiguous Zone -- unlike the Convention on the Law of the Sea -- does not offer any assistance for the interpretation of the term of "innocent passage," it is acknowledged that the term as such implies two limitation prerequisites: that the passage must not be of such a nature as to affect the security or welfare of the coastal state, and activities such as anchoring or hovering are not covered. The question of what exactly is meant by the term "innocent passage" may be of little relevance for the case under consideration since it hardly seems possible to argue that ships with a height exceeding 65 meters would not be eligible to exercise the right of innocent passage when navigating through the Great Belt. It is, however, a different question whether the Danish government can invoke article 17 of the Geneva Convention. According to article 17, foreign ships exercising the right of innocent passage have to comply with the laws and regulations enacted by the coastal state in conformity with these articles and other rules of international law. The Government of Denmark might contend that since the project of the Great Belt Bridge was enacted by law, ships passing through the Great Belt were under an obligation to adhere to the limits following therefrom. Article 17 of the Geneva Convention does not seem to indicate any limits as to the subject of the laws and regulations to be enacted by the coastal state[43] unless the words "in conformity with these articles and other rules of international law" are meant to limit the legislative powers of the coastal state rather than the exercise of the right of innocent passage. Nevertheless, the provision contains at least one underlying precondition for the

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[42] For further analysis of the principle of innocent passage see: Slonim, "Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea", *Columbia Journal of Transnational Law* 5 (1966), 96-127; Gosh, "The Legal Régime of Innocent Passage through the Territorial Sea", *IJIL* 20 (1980), 216-298; O'Connell, *International Law of the Sea*, vol. I (1982), 259-298; Dahm/Delbrück/Wolfrum, vol. I/1, 2nd ed., 430-433; Dupuy-Vignes, *A Handbook on the New Law of the Sea*, 1991, vol. 2, 906-924.

[43] This view is been taken by Dupuy-Vignes, (note 41), 917.

exercise of the legislative powers of the states concerned. The laws and regulations to which the provision refers may regulate innocent passage; however, they may not abolish the right of innocent passage be it for all ships or certain categories of them.

Hence, as far as the Government of Finland has based its claim for the freedom of passage through the Great Belt upon articles 14 and 15 of the Geneva Convention on the Law of the Territorial Sea and the Contiguous Zone, the International Court of Justice will have to establish under the Treaty on the Redemption on Sound Dues whether the Finnish ships and Mobile Offshore Drilling Units are eligible for the right to freedom of innocent passage.

The Government of Finland has further invoked article 38 para. 1 of the Convention on the Law of the Sea (LOS). According to this provision, in straits used for international navigation all ships and aircraft enjoy the right of transit passage which shall not be impeded. Since the Convention on the Law of the Sea has not yet entered into force, the regime of transit passage may only be invoked if it has already become international customary law. Several states, especially those most interested in navigation, such as the U.S.,[44] the United Kingdom, and France[45] and others, have issued declarations upon the extension of their respective territorial seas[46] so that in fact this case may be argued. However, article 38 para. 1 LOS does not apply to straits referred to in article 45 para. 1 (a) LOS, nor to straits described in articles 36 or 35 subpara. c LOS.[47] According to the latter provi-

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[44] The U.S. has declared that "in accordance with international law, as reflected in the applicable provisions of the 1982 Convention on the Law of the Sea ... all countries enjoy the right of transit passage through international straits". Proclamation of 27 December 1988, United Nations, *The Law of the Sea, Current Developments in State Practice*, No. II, 1989, 83.

[45] France and the United Kingdom have made a similar proclamation on the occasion of signing an agreement on the delimitation of the territorial sea in the Street of Dover, *BYIL* 59 (1989) 524.

[46] For further details see Tullio Treves, "Codification du droit international et pratique des Etats dans le droit de la mer", *RdC* 223 (1990 IV), 9-302 (at 126 et seq.).

[47] For details, see John Norton Moore, "The Régime of Straits and the Third United Nations conference on the Law of the Sea", *AJIL* 74 (1980), 77-121; Reisman, "The Régime of Straits and National Security: an Appraisal of International Law making", AJIL 74 (1980), 18-76; Robertson, "Passage through International Straits: a Right Preserved in the Third United Nations Conference on the Law of the Sea", VJIL 20 (1980) 801-857.

sion, the Convention on the Law of the Sea regime on transit passage does not apply to straits "in which the passage is regulated in whole or in part by longstanding international conventions in force specifically relating to such straits." The ambiguous wording of this provision has given rise to some discussion as to which straits will come under this provision. From the negotiating history, however, it is evident that article 35 subpara. c LOS was meant to refer to the Turkish Straits, the Strait of Magellan, and the Danish Straits.[48] To these straits neither the right of transit passage nor the right of innocent passage applies. Hence, it seems to be less promising for the Government of Finland to refer to article 38 para. 1 LOS as a basis for its claim to the right of free passage of the Great Belt.

The Problem of Abuse of Rights

Assessing the legal validity of the claims raised by the Governments of Denmark and Finland respectively may not result in a balanced outcome. This feeling may have prompted the formulation of the motion submitted by the Government of Finland, namely to declare that there is a right of free passage through the Great Belt that extends to drill ships, oil rigs, and reasonably foreseeable ships; that the construction of the bridge as currently planned would be incompatible with that right; and that Denmark and Finland should start negotiations on how the right of free passage shall be guaranteed.[49]

This wording indicates that the Government of Finland is not attempting completely to deny the right of Denmark to build the Bridge across the Great Belt but that it seeks to accommodate its alleged rights and the rights of Denmark. A different approach might have amounted to an abuse of rights by Denmark.

Although in state practice abuse of rights has often been alleged by governments, no international judicial decision or arbitral award has so far been explicitly founded on the prohibition of abuse of rights. Nevertheless, the principle has been mentioned in several cases as a possible basis for a claim without actually having been used for that

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[48] Dupuy-Vignes (note 41), 954; doubtful, Graf Vitzthum, "The Baltic Straits", in Choon-ho Park, (ed.), *The Law of the Sea in the 1980s*, Proceedings, Law of the Sea Institute, Fourteenth Annual Conference, 1983, 537-597.

[49] Application (note 2), 16.

purpose.[50] It seems quite appropriate in this context, however, to invoke the prohibition of an abuse of rights, since article 300 LOS contains an explicit reference thereto. This mirrors the fact that all rights concerning the utilization of the marine environment are interrelated and are to be exercised only with due regard for the interests of other States in exercising their rights. This principle of interrelated rights, although only explicitly voiced regarding the exercise of the high seas freedoms, has to be regarded as a common denominator for the exercise of maritime rights in general.

The assessment of whether the Government of Denmark or the Government of Finland may have to modify their respective rights so as to provide room for the exercise of competing interests has to take into account legal as well as factual considerations.

On the legal level, it might be appropriate to establish which requires priority: the construction of installations such as the Great Belt Bridge or freedom of passage. Although neither the Geneva Conventions on the Law of the Sea nor the United Nations Convention on the Law of the Sea provides for any such priority, some clue in this respect may be had. For example, articles 78 para. 2, and 60 para. 7 provide that installations for the exploration and exploitation of the continental shelf may not interfere with recognized sea lanes essential for international navigation. These provisions may be taken as an indication that the law of the sea attributes a certain priority to navigation vis-à-vis other maritime uses.

On the factual level, it might be necessary to establish what impact the construction of the Great Belt Bridge is expected to have upon the Danish infrastructure compared to its expected negative impact upon Finnish shipbuilding activities. The Danish government has emphasized in its Written Observations submitted to the Court[51] that a fixed link was needed as to the transport services between the Nordic countries and the rest of Europe. Further items in this assessment are the costs involved in an alteration of the bridge project and the difficulties encountered by building a tunnel (besides the railway tunnel).

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[50] In the case concerning certain German interests in Polish Upper Silesia, the Permanent Court of International Justice concluded that a misuse of right had not taken place (PCIJ Series A, No. 7 at 37); in the Case of the Free Zones of Upper Savoy and the District of Gex the Court held that an abuse of rights could not be presumed (PCIJ Series A/B, No. 46 at 167).

[51] Written Observations by the Government of the Kingdom of Denmark Relating to the Request for Indication of Provisional Measures, June 1991, 2 et seq.

Conclusion

The case of passage through the Great Belt raises more general international law questions than specific law of the sea issues. It further illustrates that conventions dealing with the law of the sea, in general, are not completely appropriate to accommodate the conflicting interests of particular states concerning the use of the sea. Such accommodation can more appropriately be provided for in specific agreements regulating a particular conflict. Taking this into consideration, the drafters of the Convention on the Law of the Sea were correct in not attempting to provide for a regime governing all straits used for international navigation but to preserve the particular regimes already in existence. Finally, the case very clearly demonstrates that states exercising high seas freedoms not only have to pay due regard to the interests of other states exercising high seas freedoms but to the interests of coastal states, too. This aspect is recognized in the Law of the Sea Convention only partially and may become more relevant in the future. The Law of the Sea Convention has not yet been fully successful in balancing the conflicting interests between coastal states and those making use of the high seas freedoms. Any further intensification of the utilization of the marine environment brought about by technical or other developments might result in the establishment of further conflicts to be ameliorated by a progressive development of international law.

THE U.S. FREEDOM OF NAVIGATION PROGRAM

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I'll start my paper with the premise that the 1982 Law of the Sea Convention with respect to traditional uses of the oceans generally reflects international law and practice. In this regard, I would note that the preponderance of state practice today reflects conformity with the non-seabed provisions of the 1982 LOS Convention. There was an important reaffirmation of this fact at the UNCED Conference in Rio. In the oceans chapter of Agenda 21, the international community recognized that the international law basis for protection and sustainable development of the marine and coastal environment and its resources is that contained in the 1982 LOS Convention. With respect to navigational issues, the trend is also for states to bring their practice into line with the provisions of the 1982 Convention.

This latter trend is the objective of the U.S. Freedom of Navigation program. Its aim is to protect and promote the rights and freedoms of navigation and overflight guaranteed to all states under international law, including the rejection of excessive maritime claims.

The Freedom of Navigation program was begun in 1979 under the Carter Administration and has continued under both the Reagan and Bush Administrations. President Reagan's 1983 ocean policy statement provided, on this point:

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

The Freedom of Navigation program implements this aspect of U.S. ocean policy.

The program combines diplomatic action and the operational assertion of navigation and overflight rights. In this regard, it is appropriate that the Department of State and Defense are jointly responsible for the program.

With respect to both its diplomatic and operational aspects, the program is peaceful, i.e., not intended to be provocative; is impartial,

in the sense that it rejects excessive maritime claims of both friendly and unfriendly states alike; and has as its objective preserving navigational freedoms on behalf of all states.

Regarding the diplomatic aspects of the program, it has two elements within it. First is the bilateral consultations element. Under this element, the United States engages in consultations on a bilateral basis with other states in which it stresses the need for other states to adhere to international law as reflected in the 1982 Convention. An example of a result of such bilateral consultations is the 1989 Joint Statement on Innocent Passage between the U.S. and the former Soviet Union, which Mr. Imnadze referred to earlier today. The second prong after bilateral consultations is the formal diplomatic protest route the United States uses to protest claims that are excessive, going beyond the 1982 LOS Convention. In the past these protests have objected to excessive claims in the following areas: improper historic waters claims, improperly drawn baselines, territorial sea claims beyond twelve nautical miles, impermissible restrictions on innocent passage or transit passage, and impermissable restrictions on non-resource-related high seas freedoms in 200-mile zones. There have been about 120 protests under the program since 1979, including many in each of these categories that I mentioned. A recent volume of *Limits of the Seas*, one of an ongoing series published by the Department of State, focuses on United States responses to excessive maritime claims and spells out in useful detail the kinds of protests that have been made. That is the diplomatic prong of the program.

To complement these diplomatic efforts, i.e., the bilateral consultations and the formal diplomatic protests, the Freedom of Navigation Program also includes an operational component. Under this component, U.S. naval and air forces exercise rights and freedoms of navigation and overflight in areas of excessive claims, i.e., the claims that go beyond the 1982 Convention. The purpose of the operational aspect of the program is to make tangible, in a way that simple diplomatic notes would not, the U.S. determination not to acquiesce in maritime claims that do not conform to the 1982 Convention. Since 1979 when the program began, operational assertions against excessive claims of over fifty countries have been made at a rate of approximately thirty to forty per year. Some of these operations, such as the bumping incident in the Black Sea that occurred in 1988, get public attention, but most do not.

The reaction of coastal states to these operational assertions is generally minimal. Occasionally there will be a diplomatic communication from one of these states telling us that they disagree with our

operational activities and disagree with our interpretation of international law.

It is fair to say that the program has been a successful one. In each category of protest, a certain percentage of such claims has been changed by that state to conform with the 1982 Convention. For example, the United States has protested eighteen out of the twenty territorial sea claims greater than twelve nautical miles. Nine of those claims that we protested were brought into conformity with the Convention. In addition, certain countries, including the former Soviet Union and Turkey, have dropped requirements of prior authorization and notification for innocent passage of warships. It could also be said that the program may have also dissuaded countries from making excessive claims simply because the program exists.

Finally I would like to raise a few questions that we are often asked about the program and then try to answer them. The first is, "Why is the United States the only country to have such a comprehensive program?" The first answer is that only the United States has a worldwide requirement for maritime mobility, and the preservation of such maritime mobility is vital to our national security. The United States has more to lose, therefore, than any other state if navigational rights are undercut. Second, as a major maritime power, the United States must actively promote compliance with international law as reflected in the 1982 Convention. It may be more difficult for other countries to challenge illegal claims in their regional spheres because, by being part of a particular region, they may entail higher political costs than the U.S., which operates such a program worldwide. I would also note that while there is no other country with as comprehensive a Freedom of Navigation Program as the U.S., many countries do carry out Freedom of Navigation activities on an *ad hoc* basis, but they generally do not have the forces necessary to carry out a comprehensive worldwide program, or they have political sensitivities given the region they are in.

The second question is whether the operational aspect of the Freedom of Navigation Program as opposed to the diplomatic aspect is actually legally necessary. This is not a simple question to answer, because it depends on what is meant by 'legally necessary.' 'Legally necessary' to achieve what? The diplomatic protest is probably sufficient to maintain a country's legal position strictly speaking, i.e., it does demonstrate that a country has not acquiesced in another country's claim. It seems that this would have to be the correct legal answer, because most countries do not have the resources to make operational assertions, and even those that do, including the United

States, do not make them absolutely comprehensively. However, the picture is much more complicated than that. If the goal is actually to be able to exercise rights, and further and perhaps more importantly, to prevent the erosion of certain rules of international law, operational assertions add a critical dimension to a program such as the Freedom of Navigation Program. First, they demonstrate to the world the U.S. resolve to preserve navigational rights. Second, routine challenges emphasize that the U.S. will not pay a political price to operate in maritime areas subject to illegal claims, let alone in a crisis situation. Third, diplomatic protests alone may actually result in permitting the coastal state to achieve its desired change in the actual behavior of maritime states. Finally, operational assertions may have a deterrent effect on states that would otherwise make claims inconsistent with the Convention. Some might say that the operational aspect of the program is the U.S. way of addressing the problem of "use it or lose it."

The final question is whether excessive maritime claims are intended to flout the LOS Convention's provisions. In other words, are they intentionally made by a state knowing that they are inconsistent with the 1982 Convention? The answer to that is, not necessarily, because in many cases of such excessive claims, the claims were made long before the conclusion of the 1982 Convention and simply have not been changed, perhaps due to inattention. In fact, some of these claims are made by states that currently support the 1982 Convention.

I would also note that in the forthcoming *Digest of U.S. Practice in International Law*, which will cover the years 1981 to 1988, there will be an even fuller description of U.S. responses to excessive maritime claims.

THE STRAIT OF GIBRALTAR TODAY

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I think the reason why you have invited me to speak on the Straits of Gibraltar is that, besides being a member of the drafting committee and the coordinating group on delimitation, I was a member of the Spanish delegation, which fought a long and losing battle as leader of the Straits Group, that is, the group of states -- eight at the beginning -- riparian to the most important straits in the world: Gibraltar, Malacca, Bab el Mandeb, and Hormuz. I am glad to have the opportunity to speak frankly and personally on this question without the responsibility of representation nor the burden of instructions.

Perhaps it would be convenient to start by recounting, for those who did not participate in or follow the discussions during the Third UN Conference, a short description of Spain's position at the beginning of this conference. In my own personal opinion, this position was legally solid and well-justified. It was based on undisputed customary international law -- that is to say, the rule of innocent passage through territorial waters, which cannot be suspended by the coastal state. This was based on the Codification Conference in 1930 on the sentence of the International Court of Justice in the *Corfu Channel* case, in the Report of the International Law Commission for the First Law of the Sea Conference, and in the Convention approved at the First Law of the Sea Conference. So, I repeat, from a legal point of view, that was a very solid position, but perhaps not so from a political or a strategic point of view.

Spain established the breadth of its territorial sea at six miles in 1760. Morocco adhered to three miles. Both jurisdictions covered the strait for a stretch of at least ten miles, where the width of the channel is not more than nine miles. The Spanish law did not and does not contain specific dispositions concerning navigation through straits. In consequence, the rules concerning navigation through territorial waters were and are to be applied. But it has to be stressed that these dispositions did not and do not require notification, much less authorization, for the passage of foreign warships. No rule existed nor exists concerning overflight.

On its side, Morocco, by a Dahir of 1973, which extended its territorial waters to twelve miles, established navigation through and overflight over straits, which were permitted on the conditions set out

in international agreements to which Morocco was a party and in accordance with the principle of innocent passage as defined in international law. I shall say a few words on this text later on. This opens again the question of which specific international agreements concerning navigation through the Strait of Gibraltar could exist.

Some authors and some delegations during discussions at the Third UN Conference sustained the thesis that the customary regime of free transit existed in the Strait of Gibraltar as a consequence of the Franco-British Declaration of 8 April 1904, when both governments agreed not to permit the erection of fortifications on the Moroccan coast between Melilla and the River Sebou in order to secure free passage through the Strait of Gibraltar. The delegations of both Spain and Morocco contested this assertion during the Conference. I shall not repeat here the arguments used; you may find them in the documents of the Conference. I would only add that, if the intention of France and Great Britain had been to secure a special regime of free transit by prohibiting the erection of fortifications, the decision should have applied to both shores of the strait. Moreover, immediately after the consolidation of the Spanish protectorate in the north zone of Morocco, which obviously included the southern shore of the Strait, Spain did fortify that shore.

Allow me to tell you a personal souvenir. I was a young boy when my father became the colonel of the coastal artillery regiment on the south shore of the strait. It was during the Second World War, and I had the opportunity to view through the rangefinder of the coastal battery the spectacle of the Allied convoys transiting the Strait of Gibraltar. I never noticed that such action -- that is to say, the fortification, not my looking through the rangefinder -- was raising any objection by any other state. But in any case, it is clear that Spain, fortification or not, has never attempted to interfere in navigation through the Strait of Gibraltar, despite the absence of any specific arrangement to guarantee this freedom.

Another point to consider is Spain's position regarding the waters of the narrows. By the extension of the territorial waters of Morocco and Spain to twelve miles, Morocco in 1973 and Spain in 1977, this stretch of thirty-three miles' length is narrower than twenty-four miles and covered by the territorial waters of the two countries. Until the Third UN Law of the Sea Conference, the big maritime powers refused recognition of territorial waters wider than three miles. To understand the Spanish attitude, it is necessary to underline that Spain never attempted to impose on third parties the consequences of its assertion and always refrained from interfering with navigation through the strait. To emphasize this point, let me recall also that in

the First World War, in 1914, Spain, without abandoning its traditional claim concerning the width of its jurisdictional waters -- one league, six maritime miles -- enacted a disposition stating that in all matters regarding its legal position as a neutral power, it would refrain from any action beyond three miles from its shores.

Let's come now briefly to the evolution of the attitude of Spain during the Third UN Conference. As I have said at the beginning, Spain was the most fervent defender of the right of innocent passage without possibility of suspension. It is clear that such a position went against the desires and, I would say, the needs of the big powers in their strategic and political scenario of the World War. On the other hand, the Spanish felt -- and the Spanish are a very passionate people -- that in addition to the presence of the British colony on Gibraltar, the package deal that was offered by the big powers was not a fair deal. To Spain the package appeared to be a triangular relation where A, the big powers, gave to B something, twelve and two hundred miles, against the price that had to be paid by C, the straits states, which were either not very much interested in what B was receiving, the twelve or the two hundred miles, or considered that it had already been established by customary law. So during the initial stage of the Conference, the efforts of Spain and the other members of the group were centered on the rules concerning innocent passage. Later on, this position was abandoned. Because of this matter, the effort of the group had to fail, and it failed. There were also some internal contradictions in supporting innocent passage because for some members of the group, such as Spain, innocent passage did not entail previous authorization for warships, whereas for other members of the group it did.

The only success achieved by the Straits Group was, I think, the change from the big powers' request for the same freedom of navigation and overflight that existed on and over the high seas to a regime of transit passage where it is admitted that, except for transit, the regime of the waters within the straits is that of territorial waters. This was not at all clear in the initial position of the big powers. In successive meetings and save for the opposition to overflight by some hardliners, among them Spain, the group began to progressively disintegrate and was discouraged by the publication of the Informal Single Negotiating Text. From then on, the efforts of the former members of the group were directed only to decide what continuous and expeditious transit was, where, as I said, some of them opposed overflight. A gentlemen's agreement reached by Spain with the U.S. in 1980 concerning the acceptance of some of the amendments proposed by this delegation could not be implemented because of the

position of a third delegation that was not directly involved. It was, if I may say so, a pity.

Finally, the agreement could not be implemented, and then despite the request of my good friend, President Koh, the Spanish delegation submitted some final amendments concerning straits, which were put to the vote and rejected. Spain abstained from voting on the text of the draft convention as a whole. In explaining this vote, the Spanish delegate -- it was myself -- under very precise instructions of his government stated that it had abstained because it considered that its position on a very important question which affected it very radically had not been properly reflected in the text. To dispel any doubts, Articles 38, 39, 41, and 42, the fundamental articles on the straits, were mentioned. In its declaration, the Spanish government declared that, in relation to the questions mentioned, the text approved by the Conference did not constitute a codification or expression of international customary law. This is one of the questions discussed at present. I am still personally convinced that this official declaration was correct from a legal point of view.

I do not wish to speak at length now on this point, but allow me to say that it would be extraordinary to affirm that customary law is established or codified by the package deal. Excuse me for this long explanation about the situation in the Strait of Gibraltar and the position of Spain in the conference, but I think it was necessary to make clear my opinion concerning the present situation, which, by the way, is a very simple one. I think that it has not changed. Navigation and overflight continue to be as free as they were before, despite the declarations of both main riparian states, Morocco and Spain.

Let us take the case of Morocco. I have mentioned before that in 1973, just before the formal beginning of the conference, Morocco had enacted a legal disposition, a dahir, extending its territorial waters to twelve miles, and Spain followed suit in 1977. But the most interesting disposition of the dahir appears in Article 3. It says that where the distance between the Moroccan coast and that of an opposite state does not exceed twenty-four miles (and this only happens in the Strait of Gibraltar), or forms a strip of the high seas that is too narrow to allow unimpeded passage by ships or aircraft, the right of transit passage through and over Moroccan territorial waters shall be granted in accordance with the conditions laid down in the international conventions to which Morocco is a party *and* in conformity with the principle of innocent passage as recognized and defined by international law. It refers to overflight in the context of innocent passage in accordance with international law, and all this before the

Convention, in 1973. I do not understand all these cross references. In any case, Morocco signed the Convention and made no declaration. The question of the interpretation of the dahir is open. But I repeat that the combination of international convention and principle of innocent passage, including aircraft, is not easy to explain. In any case, and to my knowledge, Morocco has not protested the passage of submarines nor the overflight of state aircraft through its territorial waters. We should conclude that this implies a new concept of innocent passage or that the problem is purely a nominalistic one. We could also compare the several countries that still maintain two hundred miles of territorial waters, where freedom of navigation and overflight exist. That is again purely a nominalistic question.

Spain, to the surprise of many people, did sign the Convention -- just a few days before the end of the time allowed, but signed. In doing so, Spain made several declarations on the articles concerning straits. It is not my purpose to discuss these declarations now. An interpretive declaration has no legal consequence until the entry into force of the Convention for the declaring party. The most the declarations could do was to mark the moderate qualifications under which Spain would have been ready to accept transit passage as regulated in the Convention. I personally consider reasonable such clarifications, above all the one concerning the right of the coastal state to issue air regulations so long as they do not hinder transit passage of aircraft. The other interpretation deprives of any meaning the disposition of Article 42, paragraph 5, which provides for international responsibility of the state when its aircraft, entitled to sovereign immunity, have acted in a manner contrary to the laws and regulations of the coastal state or to other provisions of Part III of the Convention. I think that it would have been reasonable to accept explicitly the right of the coastal state to designate, for instance, corridors or heights, including specific altitudes for flights in opposite directions. This was included in proposals at the beginning of the work of the Preparatory Commission.

As I said before, the Spanish are a passionate people. But it was a passionate debate on both sides. I would dare say that the result was somewhat punitive, which made it impossible to discuss questions that would have permitted the equalization of the right of military planes in transit to security and the right of everyone involved to safety.

But, I repeat, Spain did sign the Convention, and there are some consequences of this signature that concern the straits. According to the Vienna Convention on the Law of Treaties, it is clear that Spain as well as Morocco, who has also signed, have to refrain from acts bending and frustrating its object and aim. Whatever the attitude

concerning navigation or overflight, a political attitude that might change at any time, there are old problems mentioned before by other speakers.

The question of the fixed link through the strait is an old idea; it was first proposed in the 1920s. Now, in the last decade, this old idea has been on the table again. In fact, two entities, one in Spain and one in Morocco, are studying how to consider projects or anti-projects proposed by technicians. Some of them have already been discarded as incompatible with this duty not to obstruct the Convention. For instance, there was a project for a floating bridge that would restrict the passage to relatively small surface vessels and whose moorings would constitute almost an anti-submarine net. In my view, this project is absolutely prohibited because of the fact of having signed the Convention. Another possibility was the submerged bridge, or the semi-floating tunnel. This project has the advantage of allowing the structure to be established in the narrowest part of the straits, and consequently it would be much shorter than a true tunnel or a suspended bridge. But in principle, and only in principle. Another proposal is a submerged bridge linking two artificial islands with the continent. That is even more complicated, and I would not comment on it. There were also some other technical contraptions, as for instance an artificial barrage linked by relatively small bridges to the shores, or a dam with two sets of locks at both extremities. These last two ideas, in my view, are not only incompatible with the duty of Spain and Morocco in accordance with the Vienna Treaty and the fact of having signed the Convention but would also be contrary to any older rule because they would transform the natural straits into something artificial for navigation. So I conclude that the signature of the Convention makes almost mandatory a true tunnel, or perhaps a suspended bridge on some very strict conditions concerning its influence or its hazardous character for navigation by surface ship or submarine. The height of the proposed bridge is about seventeen meters, five meters more than the Danish project. I mention these examples to show that there are legal consequences to the fact of having signed the Convention.

To finish my commentary, I would say a few words about navigation and overflight today. As I have pointed out, my impression is that in practice there has been no change, and the situation is the same as it was in 1982 or 1977 or in 1914. *De facto*, I believe there has always been free transit, although *de jure* Spain has maintained that the regime is that of innocent passage. The Spanish government has made no statements on this question since its signature of the Convention,

so there is every reason to think that it does not consider itself under an obligation to apply the regime of the Convention as customary law. The opinion that the Convention does not reflect customary international law in force, which I expressed at the end of the Conference, has been strongly supported by the Spanish doctrine and by the Spanish government as a constant objector, at least concerning overflight. So I don't try to explain this situation, and I refer only to the declaration on this precise question by the Prime Minister of Spain, speaking to the press after what I will call the Libyan incident in 1986. On this occasion, Mr. Gonzalez explained to the press -- I repeat this was an official declaration -- that in a situation like the one existing in the Strait, constituted by the territorial waters of Spain, Morocco, etc., the transit of aircraft does not violate Spanish airspace. How this declaration corresponds to the thesis of innocent passage or to the regime of the Convention is a question open to your comment.

My final question is: How long can this situation continue? That is to say, the corpus apparently in conformity with the regime established in the Convention is still not in force, and the animus opposed to it does not conclude that the proposed Conventional rule becomes customary law for a constant objector. I shall not try to answer that question now, since my comments were addressed only to the Strait of Gibraltar today, but I would note that when I speak of the proposed Conventional rule in the singular, I refer to the fundamental principle of freedom for transit passage, not to all the regulations contained in the Conventional text.

DISCUSSION

Bernard Oxman: To start the ball rolling, I would like to invite David Anderson to pose a question or make a comment. As the Deputy Legal Advisor of the British Foreign and Commonwealth Office, he has given a great deal of thought to these questions and, in fact, has written on the question of straits. Many would say he wrote the straits articles themselves. Mr. Anderson?

David Anderson: All my remarks in Genoa will be in a personal capacity. I was interested in Ms. Biniaz's account of the U.S. program, including the point that it is the only one. We in the United Kingdom don't have a program, nothing so grand, but we do look at the legislation of other countries and we do make our views known, either by protest or reservation of rights or perhaps by asking questions. We still do that quite actively, although I don't think we have the resources to look at all the legislation of all the countries in the world these days. It is very difficult.

We were doing this at the time of the *Corfu Channel* case, and fortunately the International Court of Justice upheld the practice of asserting rights by exercising them when they have been questioned or denied by another government. It is particularly nice to be able to inform everyone that we have just reached an agreement with Albania about the outcome of that case. It has been forty-three years since the International Court awarded us compensation, and we have now reached an accommodation with the new government in Tirane. That's a good outcome to that rather sad incident. A lot of people lost their lives. But perhaps international law was strengthened. Admiral Schachte mentioned the *Corfu Channel* case, and it is a very important underpinning of the straits articles in the new convention.

Before I leave the question of our practice, I should just note also that we now discuss these questions with our partners in the European Community. The Community and its member states have made their views known to some countries, and we continue to discuss these things together.

A second comment, if I may, is about bridges. I won't say anything about the case that is pending. I think we have to leave that to the wisdom of the judges in The Hague. But I would like to draw attention to practice in the Straits of Dover, where we and our French partners have an advanced project to build a tunnel. Before we decided upon a tunnel, we made several studies with our French col-

leagues of the options: a bridge, or a bridge-tunnel-bridge, or a tunnel. Each had a different price tag attached to it. The bridge and the bridge-tunnel-bridge were noted in several reports drawn up in the 1970s and early 1980s as affecting international rights of navigation through the Straits. Indeed, this point was put to the planners and designers in the invitation to submit plans for what was then described as a "fixed link." So we did give regard to the international legal aspects and also to the safety factor in considering the options. I have drawn together all these various reports and invitations to tender in a piece that is going to come out shortly in the *Journal of Marine and Coastal Law*. But, as I say, we must look forward to the ICJ's decision.

Just one final word about overflight of straits. As a non-signatory, we have legislated to give effect to the provisions in the Convention -- Article 38 about overflight of straits -- in our domestic law. So it is possible to implement these overflight provisions without having to provide complicated arrangements for heights and things.

Bernard Oxman: Questions? Yes?

Dale Krause: I have a question for Ms. Biniaz about the operation of research vessels in the exclusive economic zones of countries that don't conform to the provision under the Law of the Sea Convention that permission will ordinarily be granted if certain conditions are fulfilled. In the past, there have been many refusals, even when the conditions seemed to have been properly adhered to, and in many cases there has been no response to requests, certainly during the 1960s and 1970s. What is the record in recent years for U.S. research vessels to get permission or to have it denied, and what is the present policy of the U.S. State Department in pursuing matters where the permission is denied under conditions that don't seem to correspond with the provisions of the Convention?

Susan Biniaz: I am not able to answer the question about what the record has been or whether it has improved. Perhaps Tucker Scully would know the answer to that question. I was personally involved in one case where another foreign government asked the United States to join it in protesting a seemingly inaccurate reading of the marine scientific research provisions of the Convention where a state withheld permission that seemed to go beyond the legitimate bases set forth in the Convention. But I don't know about the comparative records of ten years ago as opposed to now. Sorry.

Bernard Oxman: Mr. Scully, did you want to add anything on this?

Tucker Scully: I'm not sure I can give a definitive answer. I'm the director of the office in the State Department that handles U.S. research vessel clearance requests for research in areas under the jurisdiction of other states. Since 1982, the U.S., though a non-signatory, has taken the view that it will act in accordance with the provisions of the 1982 Convention with respect to the coastal state consent regime. We have tried to establish and influence state practice to conform with the provisions of the Convention, including timely response to requests for consent for research in the EEZs of other coastal states. We have done some statistical studies that show a trend toward more regular observance of these consent requirements. The real difficulty, one you alluded to, is the question of non-response. Research vessel cruises, as you are well aware, are expensive in terms of both resources and scientists' time. More than absolute rejections of requests, we have seen delays in response that have in many instances led research institutions to change their plans.

Another area of potential difficulty is port calls. In some instances, port calls for research vessels, which are critical for the conduct of research cruises and which are subject to a different set of arrangements, have not been granted.

On the bright side of things, I think that there has been a growing awareness within the marine scientific research community, certainly in countries like the United States, of the need to establish relationships with research institutions in countries where research activities are desired. Building institution-to-institution relationships and connections within the marine scientific research community itself, in the long run, has been the best way to begin to resolve these issues. A constituency within the coastal country itself is probably the best guarantee of increasing the percentage and the positive response to research vessel clearance requests.

Maria Teresa Infante: I have a question for Mr. Imnadze concerning navigation in the Arctic. Are you envisioning any change in the traditional sector theory the Soviet Union used to support?

Levan Imnadze: Navigation in the Arctic, primarily because of safety and environmental reasons, is subject to specific regulations; and these rules are still valid. We have a special administration that is in charge of this North Pole route and we have certain competence, but in the course of drafting new maritime legislation, these provisions will be

improved or changed. This is the general answer that I can give for right now.

Gerald Kirkpatrick: I too have a question that I would like to address to Dr. Imnadze. In your remarks, you said that, in your view, innocent passage should be justified by need for such passage. By that, I assume you were referring to a demonstrated need. Could you comment on what, in your view, constitutes such need, how it is determined, and by whom?

Levan Imnadze: First of all, according to both the Geneva and the 1982 Conventions, passage should be passage. It should have a certain navigational sense, namely traversing from one point on the high seas to another or entering internal waters and ports. The second requirement is that innocent passage should be continuous and expeditious. If the passage does not match those requirements, in my view it is not innocent passage in the strict terms of international law. In other words, innocent passage is different from freedom of navigation in the high seas and is limited by its function.

Bernard Oxman: In strictly mathematical terms, a ship can go from one point on the high seas into the territorial sea and out to another point on the high seas, take a rest, come back, and so on and so forth much as we might swim in an Olympic swimming pool for exercise.

Levan Imnadze: Again, if it is required by some obvious and natural reason. I doubt whether the captain of a vessel will do the same things as people sometimes do in a swimming pool because it is beyond any sense.

Bernard Oxman: Well, that has interesting implications. I come from Florida and there have been very significant political pressures as a result of an accident off the Florida Keys to restrain navigation in that area where there are delicate reefs and other ecosystems. One argument that goes to the heart of this question is that, after all, ships navigating in that immediate area don't have to enter the territorial sea of the United States. They could stay on the outside. I think there is a question here in light of what you've said. I'm just offering you the opportunity to follow up on it. I have difficulty with that argument.

Levan Imnadze: First, if I am not wrong, the Convention contains additional provisions with respect to the exercise of innocent passage,

such as certain requirements concerning anchoring. This is an additional argument for concluding that innocent passage is not as free as navigation on the high seas. More generally speaking, territorial waters are part of national territory; they fall under national sovereign rights, and so on. This right of innocent passage is an exemption, an exclusion from coastal state jurisdiction in favor of the rest of the community. So this exception should be somehow justified. The only justification in my view is that it is necessary to provide all vessels rights to pass through territorial waters, through national territory if it is required by obvious and reasonable reasons, navigational reasons. But if states just use this freedom of innocent passage -- especially for warships -- for reasons that are obviously different from just navigation, I don't think that this kind of action can be justified by international law. That was the very idea of this part of my presentation.

William Schachte: I would suggest that perhaps I disagree. The joint statement between the United States and the former Soviet Union that was signed at Jackson's Hole is appended to my paper; I was on the delegation to those talks. The illustrative articles in that uniform interpretation of the rules of innocent passage would support a much broader view of what is provided for in the Convention. It was certainly a part of the understanding that we had with the former Soviet Union. It is an interesting question and I am glad it has come up.

Tullio Treves: Two small unrelated points. One, I think it may be of interest to those who follow matters of navigation in the 1982 Convention to know that in the arbitral award delivered on 10 June between France and Canada on the *St. Pierre Miquelon Delimitation* case, there is an *obiter dictum* in which the tribunal says that Article 58 of the 1982 Convention undoubtedly represents customary international law, as much as the institution of the two hundred miles itself. I think this is quite an interesting point, because sometimes there is a trend to consider as customary whatever the coastal state can get and not whatever obligations are connected with the power of expanding jurisdiction.

My second point follows up a point made by Ambassador Lacleta in his examination of the Spanish position on transit through Gibraltar. He quoted a declaration made to the press by the Prime Minister of Spain, Mr. Felipe Gonzalez, in 1986 following overflight of the strait by United States military aircraft directed to Libya. It is a bit puzzling, because Mr. Gonzalez said that such transit was all right because it did not affect Spanish air space, which of course the air

space over Gibraltar *is*. So there is no doubt about that. But he very wisely -- perhaps because he is a former member of the Spanish Foreign Office -- left to us the interpretation of that statement. Well, to me, it is very simple. The Spanish did not protest the overflight of Gibraltar by military aircraft because they did not wish any more to insist on the view upheld for many years that transit passage does not apply to overflight. It is a pity that politicians don't better check their legal terminology; it matters quite a lot in underlining a radical change in the Spanish position.

Manuel Lacleta Muñoz: I would like to comment further on what you have said, Professor Treves. In a way it is a pity that high politicians do not express themselves with legal precision. On the other hand, it is happy; it gives to ourselves, the lawyers, some work. But what lies behind this declaration? Several interpretations could be read. One could be that the question had been discussed, and I don't mean authorization requested but denial not opposed. In any case, simultaneously in our press information, it would say that the authorization had been requested for overflight of territory, and not only Spain's, and that this authorization was refused. Who knows? I don't know what happened as a consequence of this refusal. An agreement perhaps, and another eventual route? It can also be interpreted as a way of expressing that Spain had decided to follow the practice in accordance with the text of the Convention. The important point is not only in this case where some documentation exists, but also in everyday practice. Everyday practice in the Strait of Gibraltar shows that neither Spain nor Morocco, despite their position during the Conference and despite the disposition of their own internal laws, has protested or opposed either submarine navigation or overflight by military planes on any occasion since then.

How long can this situation continue without having to conclude that a new customary rule has appeared? Not that the Convention codifies customary law -- this I do not believe and would not accept -- but that new custom is appearing.

Lew Alexander: The 1982 Convention does not speak of international straits; it speaks of straits used for international navigation. It defines them as naturally-formed water bodies connecting two parts of the high seas or EEZs with one another, used for international navigation. Do you think the term 'used for international navigation' is a throwaway based on the wording of the Court decision in the *Corfu Channel* case and therefore is not a restriction beyond the geographic limits of

the straits, or do you think this is a problem that may haunt us in the future as new waterways are opened up through the Pacific Islands or in the Arctic Basin or in areas such as that?

Bernard Oxman: The term, 'straits used for international navigation,' for all intents and purposes, is the same both in the 1958 and the 1982 Conventions. Is the term a throwaway based on the language, used by the Court in the *Corfu Channel* case, that both the International Law Commission and the Conference -- although not on the official records -- unsuccessfully attempted to restrict? Or does it have actual content, in which case it would raise questions regarding areas geographically identified as straits but which have not historically been used very much, if at all, for international navigation.

Rüdiger Wolfrum: I do agree with Professor Alexander that these words come from the *Corfu Channel* case decision and have some intention to restrict the movement of ships. However, and now I come to what Bernie hinted at, neither in the Law of the Sea Convention nor in the Geneva Convention is a real restriction imposed, apart from the ones already mentioned. Even if ships are navigating in an area that is not very much used for international navigation -- let's say, the Antarctic area -- they will be covered under the freedom of international navigation. We should read this term as any navigation established now or in the future. It does not matter whether a given strait is used or not. It means a strait that you have to use for that kind of navigation; that's the purpose and therefore there is limitation involved.

William Schachte: I definitely agree with that interpretation and I think it is within the ambit of the framework of the Convention, providing ways to handle conditions and situations as they develop and arrive.

Bernard Oxman: Textually the question is whether the passive voice 'used' means 'has been used' as some might interpret it, or even more, 'has customarily been used,' or as others, including our two panelists, would interpret it as 'is being used' -- that is, at the time of the actual passage.

Lew Alexander: The late Judge Baxter, in his book on international waterways, suggested that what the Court had in mind in its use of the

phrase "used for international navigation" was that such a waterway could be a useful route for international maritime traffic.

Bernard Oxman: 'Could be used' remains to me -- and that's not to disagree with Professor Baxter -- academic. Until you get to the 'is being used' you don't face a question, except in the light, oddly enough, of the subject we were discussing today. What is the situation with respect to the proposal to build a bridge over an area that geographically constitutes a strait that has never been used? I'm not sure we have all that much worry about that question, but I take your point, Professor Alexander. There is a nuance difference between 'could be used' and 'is being used.'

I should note in fairness that the Canadian official statement that Canada supports the provisions of transit passage because Canada has no straits used for international navigation is presumably a comment on that question that may be at variance with what we've heard here. The question is mooted by Dr. Infante's question to Dr. Imnadze, because the issue is presumably dealt with under the special provisions for environmental regulation in the Arctic to which Dr. Imnadze adverted, although as part of that package it was agreed by Canada and the Soviet Union and the United States that the arrangement regarding coastal state rights to regulate navigation in ice-covered areas both in the economic zone and in the territorial sea landward of that, which would include straits, does not apply to warships. That was an extremely complicated formulation.

Anatoly Kolodkin: I would like to comment on the question asked by Maria Teresa Infante from Chile with regard to the Arctic. In the light of Article 234, we insist upon some specific conditions in this case, but we don't refuse to allow navigation. In accord with ex-President Gorbachev's speech in Murmansk in 1987, we recognize that international navigation is permitted, but on the basis of the provisions of Article 234, the Ministry of the Merchant Marine of the USSR on 14 September 1989 endorsed the regulations that provide that each shipowner has to submit an application. If the ship is in compliance with the technical requirements of these rules and regulations, it may be allowed to go through the Northern Route. In a legal sense, that means that we don't refuse navigation, but in the light and on the basis of Article 234 we establish these rules and regulations. So we deviate from the Canadian position. We are more liberal and democratic, as I see it, because my Canadian colleague, Professor Donat

Pharand, said that they don't recognize that Canadian straits can be used for navigation.

The second point concerns the attitude of my friend and my former student, a very able man, Dr. Imnadze, and I fully support his position. Yes, we have a single interpretation on the basis of the Baker-Shevardnadze agreement in the law of the sea. I fully support his argument that the navigation of warships through the territorial waters in Black Sea under the flag of United States violated the provisions of the UN Convention, but on the other hand our regulations, which were adopted by the Council of Ministers in 1983, also violated international law, in particular Article 22 and other articles of UNCLOS. That is why the Council of Ministers, as Dr. Imnadze has said, amended these rules. We removed mention of the three sectors and reproduced completely Article 22.

My last point concerns Dr. Imnadze's main subject: Russia and her neighbors. He was right when he said that we now have no contradictions with Georgia and Ukraine, our neighbors on the Black Sea. But we are starting to have some contradictions with our Baltic friends: Lithuania, Latvia, and Estonia -- actually, not Latvia because we share no border at the sea. Estonia, I would like to stress on this occasion, started its activity in the law of the sea with a violation of UNCLOS; Estonia protested that she is not going to allow our ships, warships and certain nuclear ships, to go through her territorial sea. This is in violation of UNCLOS.

The Baltic republics want to return to the situation before 1940 in the law of the sea. But I would remind them that in accordance with the data collected by the Committee of Experts before the League of Nations Conference for Codification of International Law, 1930, all these republics had territorial waters of three miles. If they return to the situation before 1940, they will also return to that width of territorial sea. It seems to me that you understand what I mean.

Bernard Oxman: I would like to thank our panelists and commentators for joining us today and to thank the members of the audience who contributed such excellent comments and questions.

LUNCHEON SPEECH

LATIN AMERICA AND THE LAW OF THE SEA: PAST, PRESENT AND FUTURE

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Introduction

I have been asked to make a brief presentation on "Latin America and the Law of the Sea: Past, Present and Future". Althought this is a very broad subject, my task today is simplified by the fact that I know this audience is quite familiar with the efforts made by the countries of that region to develop, or perhaps I should say to change, the norms and principles of the law of the sea that prevailed for over three centuries.

In the next few weeks, on August 18 to be precise, the Santiago Declaration will celebrate its fortieth anniversary. This, as you know, was the first international legal instrument where a number of Latin American countries -- Chile, Ecuador and Peru -- proclaimed "as a principle of their international maritime policy, that each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast."

These early manifestations of change were aimed at controlling the exploitation of ocean resources, an idea that later led to the acceptance of the Exclusive Economic Zone regime.

Each of you is acquainted with the important contribution of the Latin American countries to the framing of the 1982 Convention. Consequently, one would expect that most of these countries would have ratified the Convention after passage of a reasonable period of time. This, however, has not been the case.

As of today only four out of twenty Latin American countries[1] -- Brazil, Cuba, Mexico and Paraguay -- have ratified the 1982 Convention, while three -- Ecuador, Peru and Venezuela -- never signed. Of the remaining thirteen countries that signed the 1982 Convention, a

[1]For the purpose of this paper we shall refer to the practice of the following Latin American States: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

number of them are well advanced in the constitutional process of ratification.

In many cases, the absence of signature or ratification, or even a vote against the 1982 Convention, has not implied a corresponding negative attitude vis-a-vis the 1982 Convention. In fact, an overview of Latin American State practice leads us to the general conclusion that Latin American countries have been guided, to a large extent, by the norms of the 1982 Convention.

In this brief presentation, I shall look at the practices of (a) the Latin American States parties, (b) Latin American signatory countries, and (c) those that have not signed the 1982 Convention.

Latin American States Parties to the Convention

Of the Latin American countries that have ratified the Convention, Brazil, Cuba, and Mexico have adopted legislation or constitutional changes implementing the Convention's provisions. Paraguay, a land-locked State, ratified the Convention in 1986 but has not adopted implementing legislation.

Mexico

Amongst the small group of States Party, Mexico's ratification is interesting given that it was the first Latin American country to adopt domestic legislation inspired by law of the sea evolving at the Conference in 1976.

In 1986, Mexico enacted the Federal Act relating to the Sea.[2] In an Explanatory Memorandum accompanying the draft Act, then President de la Madrid described the Convention as "a general framework or outline which the international community has adopted for itself, on which States must base their policies." He added that "national legislation thus becomes the basic tool of a country's policy regarding the sea."

Signatory Latin American States

Thirteen Latin American countries have signed the 1982 Convention. The basic trend in State practice amongst them reflects steady movement towards general acceptance of the scheme for marine areas embodied in the 1982 Convention.

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[2]Mexico, *in* the *Diario Oficial* of 8 January 1986.

Of these, I shall only mention a few signatory States which are of particular interest given their characterization as members of the so-called "territorialist group" during UNCLOS III.

Argentina

In 1966 Argentina's legislation extended that country's sovereignty over the sea adjacent to its territory up to 200 nautical miles.[3] Its sovereignty extends to the sea-bed and subsoil of the submarine areas adjacent to its territory up to a depth of 200 meters or, beyond this limit, to where the suprajacent waters permit the exploitation of the natural resources. Article 3 of this legislation adds that "freedom of navigation and overflight will not be affected by the norms of this law". Nowhere in the law is the term "territorial sea" used. In fact, several other decrees and regulations have complicated the interpretation of the legal nature of Argentina's 200-mile zone.

On 5 October 1984 Argentina signed the 1982 Convention with a declaration which only refers to Resolution III in Annex I to the Final Act of UNCLOS III, in relation to the "Question of the Malvinas." Ratification by the Executive Power, as required by the Argentine Constitution, is pending before the Argentine Congress.

Argentina's practice is reflected in two fishing agreements it concluded with the Soviet Union and Bulgaria in 1986. The operative part of both of these treaties grants flag ships of the two countries access to a portion of the surplus of the allowable catch in "the Exclusive Economic Zone of the Republic of Argentina."

Another important agreement, the Treaty of Peace and Friendship between Argentina and Chile, signed on 29 November 1984, provides that "the Exclusive Economic Zone of the Argentine Republic and of the Republic of Chile shall extend, respectively, to the East and to the West of the boundary line," as described in a map annexed to the Treaty.

In 1991 Argentina adopted legislation[4] on Maritime Areas establishing a twelve-mile territorial sea and a 200-mile exclusive economic zone. This Legislation effectively brought Argentina in line with the 1982 Convention.

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[3]Argentina, Law 17094 of 29 December 1966, Article 1.

[4]Argentina, Act No. 23.968 of 14 August 1991.

Chile

In 1986 Chile amended its Civil Code on matters dealing with marine spaces.[5] Article 593 of the Code establishes a twelve-mile territorial sea and a twenty-four-mile contiguous zone. Article 596 proclaims a 200-mile exclusive economic zone. These amendments conform to the norms of the 1982 Convention, effectively eliminating Chile from the list of "territorialist States."

Uruguay

In 1969 Uruguay, another member of the "territorialist group," extended its territorial sea to 200 miles and applied the regime of innocent passage in the twelve miles adjacent to its coast. Freedoms of navigation and overflight are not affected beyond that distance.[6]

In 1973 Uruguay and Argentina signed a Treaty Concerning the La Plata River and its Maritime Limits.[7] In it both parties guarantee freedom of navigation and overflight beyond twelve nautical miles, measured from the corresponding baselines and commencing from the outer limit of the mouth of the La Plata River.

Upon signature of the 1982 Convention in Montego Bay, Uruguay made a declaration stating that its provisions "concerning the territorial sea and the exclusive economic zone are compatible with the main purposes and principles underlying Uruguayan legislation in respect of Uruguay's sovereignty and jurisdiction over the sea adjacent to its coast and over its bed and sub-soil up to a limit of 200 miles."

The Non-Signatory Latin American States

Ecuador, Peru, and Venezuela are the only Latin American countries not to have signed the 1982 Convention.

Ecuador

Ecuador has always maintained that a 200-mile territorial sea is a national sovereign right to protect the natural renewable and non-renewable resources. Article 633 of the Civil Code of Ecuador (Article 628 as amended in 1970), extends the territorial sea and the national

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[5]Chile, Law No. 18565 of 13 October 1986.

[6]Uruguay, Presidential Decree 604 of 3 December 1969.

[7]Signed at Montevideo on 19 November 19 1973.

domain to 200 nautical miles, including the air space above that territory. The latter provision specifically differs from Articles 2 and 3 of the 1982 Convention, pursuant to which coastal State sovereignty is limited to the air space over the twelve-mile territorial sea.

In 1981 the Ministers for Foreign Affairs of the Parties Members to the Permanent Commission for the South Pacific -- Chile, Colombia, Ecuador, and Peru -- with a view towards strengthening the development of the South Pacific system and evaluating the status of negotiations at UNCLOS III, signed the Cali Declaration. The Declaration, which was circulated as an official document of the Conference, noted "with satisfaction" the incorporation into the Draft Convention on the Law of the Sea of "the modern doctrine of the 200 mile limit."[8] The following year, the same countries addressed a letter to the President of UNCLOS III expressing their satisfaction with the draft Convention, which in their words "incorporates into international law principles and institutions which are essential for a more appropriate and fairer exploitation of the resources contained in coastal waters, to the benefit of the overall development of the peoples concerned, on the basis of the duty and the right to protect those resources and to conserve and guarantee the natural wealth for those peoples."[9]

These documents reflect a more flexible attitude towards the "200-mile limit" than had been previously displayed by the Parties Members to the Permanent Commission for the South Pacific. In them the four Latin American countries refrain from using language which speaks of a "territorial sea," limiting their reference to the functional aspects of the 200-mile limit, rather than to territorial claims.

These expressions notwithstanding, Ecuador has never abandoned its 200-mile territorial claim. A 1985 Presidential Proclamation reiterated Ecuador's stance in relation to the territorial sea surrounding

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[8]Note Verbale dated 9 March 1981 from the representatives of Chile, Colombia, Ecuador and Peru to the President of the Conference, Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XV, p.93, Doc. A/CONF.62/108 (1981).

[9]Letter dated 28 April 1982 from the representatives of Chile, Colombia, Ecuador and Peru to the President of the Conference, Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVI, p.249, Doc. A/CONF.62/L.143 (1982).

the Galapagos Islands."[10] However, even though the Proclamation asserts "that the international law of the sea recognizes that coastal States have the power to delineate the limits of their continental shelves up to a distance of 100 miles from the 2,500 metre isobath," it is apparent that this concept does not find its origin in the pre-Convention law, but rather has been taken from Article 76(5) of the 1982 Convention. This selective incorporation of some conventional language is evidence of the 1982 Convention's indelible impact on non-signatory States.

The Presidential Proclamation further states that the Ecuadorian authorities will propose the appropriate legal reform to protect the sovereign rights of the Republic with respect to the continental shelf, consistent with subsequent developments in both national legislation and international law of the sea principles accepted by Ecuador and the international community. In this regard, it remains to be seen how Ecuador's future practice conforms with the provisions of the 1982 Convention.

Peru

Peru, another Member of the Permanent Commission for the South Pacific, did not sign the 1982 Convention for many of the same reasons as Ecuador.

The 1979 Peruvian Constitution defines its "dominio marítimo" as comprising the sea adjacent to its coast as well as its bed and subsoil up to a distance of 200 nautical miles measured from the baselines established by law. Peruvian sovereignty and jurisdiction extends over the air space of its territory and the adjacent sea up to a limit of 200 miles. According to the Constitution, these rights are exercised "*in accordance with the law and international agreements ratified by the Republic.*" (emphasis added).

Some Peruvian diplomats have proposed that the 1979 Constitution does not present an obstacle to its becoming a Party to the 1982 Convention.[11] The first reason is the assertion that nowhere in the

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[10]Ecuador, Presidential Proclamation of 19 September 1985, Registro Official, No.335, 16 December 1985, English translation *in*, New Directions in the Law of the Sea, Oceana Publications (Simmonds, ed.) (1987).

[11]*See* Arias Schreiber, Alfonso "Nuestros intereses marítimos y la Convencion sobre el derecho del mar", in Revista de la Comisión Permamente del Pacífico Sur, No. 17, p. 46 (1989); *also* Bakula, Juan Miguel "El dominio marítimo del Perú", Lima (1985) p. 259.

Peruvian legislation is the 200-mile limit referred to as the "territorial sea." In most cases, the term used is "jurisdictional waters." The second is a consequence of the first, arguing that Peru has never adopted a definition of the territorial sea.[12]

The most sensitive oceans policy topic in Peru has been that of fisheries, especially the question of access of foreign fishing vessels to the living resources within the 200-mile zone of "dominio marítimo."

On 4 January 1988 Peru adopted a new General Fishing Law,[13] abrogating the previously criticized law of 1971. The new Law reaffirms the principle that the hydrobiological species contained in the adjacent waters up to a distance of 200 miles are State property. It also declares that fishing activities are of national and social interest, and that the optimum utilization of that area is intended to safeguard the nutritional needs of the population and the just distribution of economic benefits.

The participation of non-nationals in the exploitation of the living resources within the 200 miles "dominio marítimo" is subject to two conditions: (a) that the non-nationals prove to be the real owners of the fishing vessels; and (b) that the Peruvian Ministry of Fisheries and the Institute of the Peruvian Sea determine that there is an allowable catch that cannot be harvested by Peruvian shipowners. In the case of foreign shipowners, fishing permits can only be granted through international agreements between Governments. A Supreme Decree enacted in March 1988[14] established the specific modalities for foreign fishing within 200 miles. Without going into detail, I would note that some of these modalities resemble those enumerated in Article 62(4) of the 1982 Convention dealing with the requirements for participation by foreign nationals in fishing activities in the exclusive economic zone. In fact, the terminology used both in the 1988 General Fishing Law and the 1988 Supreme Decree is, in several

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[12]Although Peru established a three-mile territorial sea in 1930, various laws, decrees and regulations since 1947 have extended Peruvian jurisdiction to cover the sea adjacent to its coast up to a distance of 200 nautical miles. According to some Peruvian diplomats, this area closely resembles the exclusive economic zone and is quite different from the territorial sea.

[13]Peru, General Fishing Law, Law 24790 of 4 January 1988.

[14]Peru, Supreme Decree 010-88-PE, 1988.

cases, quite similar to the 1982 Convention; namely, allowable catch, capacity to harvest the living resources, surplus of the allowable catch, etc.

Under the 1988 General Fishing Law, the Peruvian Government concluded Fishing Agreements with Cuba, Poland, and the Soviet Union. These treaties gave rise to objections from the private Peruvian fishing industry and the Peruvian Bar Association, thus eventually politicizing the issue.

The objections directed at the fishing agreement with the Soviet Union were particularly strong, specifically allegations that the conditions imposed by the Agreement were too lenient. Although the Peru/Soviet Agreements have since been abrogated due to the break-up of the former Soviet Union, some have argued that the conditions and modalities for foreign fishing in the exclusive economic zone as established by the 1982 Convention are stricter than those set forth in the current Peruvian legislation and in their practice.[15]

Venezuela

As we all know, Venezuela was one of the four countries that voted against the 1982 Convention, citing very specific reasons whose examination falls outside the scope of this brief presentation. Incidentally, Venezuela's vote was somewhat paradoxical given that its delegation was one of the major architects of the 1982 Convention.

Venezuela's problems with the 1982 Convention can be traced to Articles 15, 74, and 83 (on delimitation of the Territorial Sea, Exclusive Economic Zone and Continental Shelf, respectively) and specifically to Article 121(3), which provides that "rocks which cannot sustain human habitation or economic life of their own shall have no Exclusive Economic Zone or continental shelf."

Other problems of interpretation arose with respect to Article 298, regarding the optional exceptions to applicability of compulsory procedures entailing binding decisions. In 1982, attempting to overcome these difficulties, Venezuela introduced an amendment to Article 309 which would have allowed reservations to Articles 15, 74, 83 and 121(3). At that time Venezuela also made a statement on its

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[15]Ferrero Costa, Eduardo "El Perú frente a la Convención sobre el Derecho del Mar," Centro Peruano de Estudios Internacionales, Editorial Acuario (1985).

interpretation of Article 298.[16] However, when a Turkish amendment to delete Article 309[17] was rejected, Venezuela did not press for a vote on its amendment, and consequently voted against the adoption of the 1982 Convention.

Nonetheless, Venezuela, having claimed a territorial sea of twelve nautical miles in 1956, established a 200-mile Exclusive Economic Zone around its continental and insular coasts in 1978.

Closing Remarks

The development of Latin American State practice related to the law of the sea is consistent with the 1982 Convention. True, there are some countries -- particularly Ecuador and Peru -- whose domestic legislation retains the concept of a 200-mile territorial sea or a sea under coastal state sovereignty, but most of those countries that were members of the territorialist group during UNCLOS III, like Argentina, Brazil, and Chile, now follow the Convention's approach.

In an excellent report recently prepared by Professor Orrego, he explains why only four Latin American countries have ratified the Convention in spite of the positive attitude of most countries in the region. In his opinion, this situation can be explained by three elements that impact on the ratification process.

The first relates to the uncertainty associated with Part XI of the Convention, not only in terms of the regime of exploitation itself, but also in terms of its financial implications.

A second element is the success of the Convention inasmuch as most of its principles have become customary international law and, therefore, demand no urgent measure to proceed with ratification.

The third element has to do with questions of diplomacy. Because of Ecuador's and Peru's difficulties in signing the Convention, other countries participating with them in regional and subregional mechanisms have felt that it might be better to withhold ratification until those difficulties have been resolved.

Orrego rightly points out that these three issues have a common characteristic, i.e., they constitute transitory situations.

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[16]Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVI, p.223, Doc. A/CONF.62/L108 (1982).

[17]Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVI, p.226, Doc. A/CONF.62/L120 (1982).

I entirely agree with his analysis and would like to add a fourth element. Since 1982, the same year the Convention was adopted, a number of Latin American States have been confronted with very serious economic, social, and political problems, namely, the foreign debt, the collapse of military regimes, the emergence of democratic governments, and the Central American conflict, just to name a few. Understandably, these critical problems became the focus of governmental attention, while ratification of the Convention was placed on the back burner.

Last year the Permanent Commission of the South Pacific sposored a meeting of legal experts in Santiago, Chile on "Latin America and the UN Convention on the Law of the Sea." This Meeting gathered many former Latin-American delegates to UNCLOS III, including the heads of delegations of Peru and Ecuador, together with members and former members of the UN Secretariat.

The debate reflected the prevailing positive attitude in the region towards the Convention. The participants noted the contrast between Latin America's active efforts to change the traditional norms of the law of the sea throughout the Sea Bed Committee and UNCLOS III, and the present quietness and lack of agreement in the region. The abandonment of their previous militant position -- it was said -- is less justified if one takes into account the serious problems endangering sustainable development of coastal zones, such as fisheries in the high seas beyond and adjacent to Exclusive Economic Zone and the complete lack of scientific and technological resources affecting the region. Coordination and consultation mechanisms are urgently required in this area.

Another concern expressed was the uncertainty over the future of the Convention. The absence of ratifications by the industrialized countries and the apparent lack of interest and hesitation of developing States -- it was stated -- threatened the universality of the Convention. These prospects emphasize the need to urgently revitalize the role of Latin America in order to promote the general acceptance of the Convention.

The legal experts acknowledged the important role of State practice in consolidating and developing the law of the sea, as it provides the material elements needed to fill lacunae in the Convention, and to elucidate ambiguities or to respond to problems not foreseen in the Convention. On this point, the need for an exchange of information on State practice among the countries of the regions was considered essential.

Reference was also made to the fact that the political and economic circumstances prevailing at the time of UNCLOS III -- that led to the

adoption of certain norms related to the exploration and exploitation of the Area -- have substantially changed. As a result, those norms have become inadequate and should be adapted to the present realities.

How should this be done? Several procedures to deal with Part XI were examined. The legal experts concluded that the best procedure would be that of progressive interpretation and regulation of the international sea bed regime by the Preparatory Commission.

The protection of the marine environment was also a matter of concern. The legal experts stated that the recent UN Conference in Rio could provide the basis for the promotion of sustainable and equitable development of coastal zones within a framework of international solidarity.

A final issue discussed had to do with the rational use of the oceans and the challenge this poses for the Latin American countries. The experts identified the need for training of their human resources with the assistance and cooperation of international organizations.

On the basis of the foregoing, the following recommendations were adopted:

First, to reactivate, at all levels, the interest in the problems related to the consolidation and development of the law of the sea, particularly, in the universal acceptance of the Convention in order to attain the coherence necessary for the use and exploitation of the oceans for the economic and social development of the Latin American people.

Second, to adopt measures to ensure the effectiveness of the Convention, including its ratification or accession, and to establish mechanisms to allow for the adjustment of its norms to changing circumstances.

Third, to promote the exchange of information and to intensify consultations among the States of the region, to facilitate coordination of their ocean policies and to ensure a uniform interpretation and application of the Convention that can satisfy the needs and legitimate interests of the Latin American States.

Fourth, Latin-American delegations to the Preparatory Commission must intensify their participation in that forum and promote, as far as possible, acceptable solutions with respect to Part XI, so as to achieve the universality of the Convention.

Fifth, to support the initiative of the UN Secretary General to convene informal consultations aimed at achieving universal participation in the Convention.

Finally, the legal experts recommended that the national priorities in the areas of marine science and technology be defined, in order to reinforce the capacity of the Latin-American countries to fully exercise the rights and obligations provided for in Part XIII.

I believe that gradually, as some of the most pressing economic, political, and social problems affecting Latin America become less critical, the law of the sea will again be a matter of priority in the region.

Being in Genoa, I would like to conclude my remarks with a tribute to the memory of Professor Mario Sceoni, Professor Emeritus of the University of Genoa, a distinguished expert in maritime law and law of the sea, a member of the Italian delegation to UNCLOS III, and a great friend of Latin America.

PANEL II:

THE PROTECTION OF THE ENVIRONMENT AND THE UN CONFERENCE ON ENVIRONMENT AND DEVELOPMENT

INTRODUCTION

Lee Kimball
Washington, D.C.

The Earth Summit concluded in Rio de Janeiro on June 14, nine days ago. This panel will look at the results of the Conference in the oceans areas, as well as its implications for the future.

The first speaker will be Tucker Scully, the Director of the Office of Ocean Affairs at the U.S. Department of State and the principal U.S. representative for ocean issues at UNCED. He also served as contact group coordinator on the most controversial issue on the UNCED oceans agenda: straddling stocks and highly migratory fisheries. He will discuss highlights of *Agenda 21* in the oceans area, controversies that ensued, and next steps.

Tucker Scully will quote the introductory language to the *Agenda 21* chapter on oceans, which states that the protection and sustainable development of the marine and coastal environment and its resources must be based on international law as reflected in the provisions of the 1982 UN Convention on the Law of the Sea. The next sentence reads: "This will require new approaches to marine and coastal management and development at national, sub-regional, regional and global levels," which must be integrated approaches, precautionary approaches, and approaches that seek to anticipate any adverse effects on sustainable development and avoid and reduce them from the outset. Our next speaker, Dr. Ezekiel Okemwa, will discuss one such new approach -- large marine ecosystem management -- as it applies to marine pollution control, protecting habitats and marine biodiversity, and managing offshore fisheries, with particular emphasis on the need for scientific data and information as well as international assistance in collecting that data and international cooperation in scientific investigations. Dr. Okemwa is presently the director of the Kenya Marine and Fisheries Research Institute in Mombasa. He is a Ph.D. in Biological Oceanography, he worked in Uganda from 1974-1977 under the now defunct African Community on Lake Victoria Scientific Research. Much of his research has been in zooplankton, and he specialized in copepods, published many papers, and is a member of several societies in Africa and editor of the journal *Aquatica.*

I would like to note that regional and sub-regional follow-up are heavily emphasized throughout *Agenda 21*, in part in order to better deal with transboundary and regional ecosystems. *Agenda 21* calls for

regional scientific and technical information networks, regional capacity-building programs, and donor consortia to support regional action plans for sustainable development. In the scientific area, it suggests the possibility of special donor arrangements to fund sustained data collection and assessment efforts. The new Commission on Sustainable Development, agreed at UNCED, is to discuss how to improve regional and sub-regional coordination early on, as soon as the UN Secretary-General completes an "expeditious" survey of the many regional and sub-regional initiatives proposed by UNCED. It implies that recommendations to improve coordination and adjust the mandates and responsibilities of existing organizations may result.

The third paper was prepared by Miranda Wecker, Senior Fellow with the Willapa Alliance and a former colleague of mine for five years at the Council on Ocean Law. She has gone from working on international ocean law, where she participated in the negotiation of the protocol on protected areas and species to the Cartagena Convention on Protection and Development of the Wider Caribbean, adopted in 1990, to local community involvement in sustainable coastal development.

With this paper, we are shifting gears again to look at another aspect greatly emphasized in UNCED, local community involvement in policy-making and "participatory processes" -- not only as a means of informing policies with the direct knowledge and experience of those who carry out development activities, but also as a means of creating a stake for all affected constituencies in *implementing* agreed policies. This will be a significant UNCED follow-up issue at national, regional, and global levels. When I asked Miranda to do this paper, I asked her to pretend that Willapa was located in the Gulf of Mexico and to consider how she would translate her community-based experience, and through what type of process, to inform a regional policy forum of the type she had been engaged in in the Caribbean. Unfortunately, the Willapa Alliance is not yet far enough advanced for her to do this. Yet the *Agenda 21* call for all inter-governmental organizations, including the international finance and development agencies, to review and enhance procedures and mechanism for non-governmental organizations to contribute to policy design, decision-making, implementation and evaluation, and for the UN General Assembly to examine ways of enhancing NGO involvement in the UN system in relation to UNCED follow-up "at an early stage," mean that we all need to consider this question.

Our panelists have raised a number of issues which bear further exploration. These include:

(1) the further elaboration of LOS Convention principles in relation to highly migratory and straddling fish stocks;

(2) the respective roles of global and regional initiatives in dealing with land-based sources of marine pollution;

(3) NGO involvement in inter-governmental policy-making processes and policy implementation; and

(4) the profusion of regional approaches -- both institutions and legal agreements -- and how to cohere different regimes at the regional level, such as marine pollution and fisheries management, or watershed management and marine pollution control, as well as inter-regional coordination and exchange of information and experiences.

Two broader questions relating to UNCED could also be considered. These are:

(1) The relative merits of what I call the "compact" approach to international treaties, where the recent treaties on ozone, climate change, and biodiversity could be seen as vehicles to launch an on-going process of international collaboration and dialogue on the topics considered, contrasted with the more precise "legal" approach taken in the LOS Convention regime. Relatedly, those of you involved in the UNCLOS negotiations will recall the legacy of the deep seabed mining regime, which established mandatory financing and technology commitments to secure its implementation, contrasted with the more hortatory approach taken in the LOS Convention to encouraging international support and cooperation in marine scientific research and marine technologies. The "compact" approach falls somewhere in between, linking the achievement of binding treaty obligations by developing nations with the provision of international financial and technical assistance.

(2) In relation to implementation and compliance, one could contrast international treaty obligations tied to compulsory, binding dispute settlement procedures with the approach of the new Commission on Sustainable Development, which will bring to bear public and international attention to monitor progress in implementing the non-binding commitments spelled out in *Agenda 21*, à la Amnesty International in relation to human rights. A third alternative is what is normally referred to as "conditionality," whereby the development assistance agencies pay closer attention to ensuring that projects funded are consistent with agreed treaty obligations as well as soft law standards and guidelines. What is the wave of the future? How will these different approaches influence the development and implementation of international law during the next decade?

Our commentator is David Freestone, professor of international law at the University of Hull Law School and editor of the *International Journal of Marine and Coastal Law*.

REPORT ON UNCED

Tucker Scully
Office of Ocean Affairs
U.S. Department of State

UNCED, the UN Conference on Environment and Development, took place in Rio from June 3 to June 14. It resulted from a two-year process in which the Preparatory Committee, chaired by Ambassador Tommy Koh of Singapore, met four times to prepare for the Conference. The first of those sessions in August 1990 was an attempt to develop a list of issues. There were two sessions of the PrepCom in 1991 and a final long session in New York in March of this year (1992).

The list of issues developed for the conference probably justifies the title of "the UN Conference on Everything," because the scope of the subject matter of the Conference was probably the most ambitious ever set forth for an intergovernmental gathering. From another perspective, it was a commemoration of the 1972 Stockholm Conference on the Human Environment, which took place twenty years earlier. It also drew upon the World Commission on Environment and Development, the Brundtland Commission Report, which gave currency to the concept of sustainable development. Sustainable development, as a concept, seeks to integrate environmental and economic policies. The agenda of UNCED, the Rio conference, was to develop a comprehensive program for nations in pursuing sustainable development. Like the Stockholm Conference, it sought to develop agreement on a set of principles relating to sustainable development and a detailed set of recommendations to give effect to those principles. In Rio parlance, these were known respectively as the Rio Declaration on Environment and Development, originally known as the Earth Charter; and *Agenda 21*, the agenda for the twenty-first century.

The conference was the media event par excellence, particularly the summit segment of the conference, which took place from June 11 through June 13 and attracted over a hundred heads of State and governments. Media attention focused on two issues which were not originally directly related to the UNCED but became linked with the UNCED process, specifically two conventions: the conventions on climate and on biodiversity, which were rushed to conclusion to be

open for signature at the Rio summit. In addition, one of the major issues at the conference was the question of finances and particularly what kind of financial commitments developed countries were prepared to announce in Rio to further the program set forth in *Agenda 21*. But whatever the hype that surrounded Rio, the results of UNCED in the long run will turn more directly on what happens to *Agenda 21*, whether *Agenda 21* is implemented, and how it is implemented. It is a massive document; it includes forty chapters of which the topic of this presentation, oceans, is but one. That chapter itself is almost forty pages long.

Neither the oceans chapter nor the text of *Agenda 21* as a whole is yet available in a final form. A final clean text has not yet been produced by the secretariat. Those who participated on the U.S. side in the oceans negotiations have put together a text of the oceans chapter which includes all of the final amendments. I would note that it is still informal. We think it is accurate, but it is still an informal version. The final official text is not yet available.

The format of *Agenda 21*, and each of its chapters, was one of the issues that was negotiated in some detail during the conference itself. Let me sketch, as an introduction, the structure in which these forty chapters is presented. Each chapter includes, first, a basis of action, essentially a brief description of why international cooperative activity is necessary, and to some extent assessing the specific problems facing environmental and development objectives in the particular area; second, a set of objectives setting forth whatever degree of agreement could be reached as to the international community's general goals for the issue area concerned, and third, each of these parts of *Agenda 21* was broken down into activities and means of implementation. Activities include specific management-related recommendations, data and information requirements, and requirements for international and regional coordination and cooperation. Means of implementation subsections include financial and cost evaluations, scientific and technological means, the human resource requirements, human resource development, and capacity building. This format applied to each chapter of *Agenda 21*.

Within the oceans chapter, there are in turn seven specific program areas:

1. The integrated management and sustainable development of coastal areas, including EEZs;
2. Marine environmental protection;

3. The sustainable use and conservation of marine living resources of the high seas;
4. The sustainable use and conservation of marine living resources in areas under national jurisdiction;
5. Addressing critical uncertainties for the management of the marine environment and climate change;
6. Strengthening international, including regional, cooperation and coordination.
7. Sustainable development of Small Islands Developing States.

Each program is broken down in the format that I identified. So you can see, simply by multiplication, that the document is quite lengthy.

The negotiation of the list of issues and the negotiation of the program areas themselves were the subjects of some controversy. Specifically, two areas became subjects of lengthy debates. The first was the question of marine living resources. There were strongly held views, on the one hand, that a program area on marine living resources should not distinguish between the high seas and areas under national jurisdiction, emphasizing that the general conservation obligations under international law with respect to marine living resources are basically identical. On the other hand, there were equally strong views that the issue area should be divided on the basis of where coastal states exercise jurisdiction. There was particular interest and concern focused on issues that relate to those fish stocks that are found both on the high seas and within exclusive economic zones, specifically straddling stocks and highly migratory species. Thus the issue of whether there would be one or two program areas related in part to the issue of what kinds of recommendations would be developed with respect to straddling stocks and highly migratory species. At the end of the day, a compromise emerged with two program areas, as I mentioned, but the conservation obligations (not the jurisdictional obligations) were expressed in identical fashion in each program area.

A second, though less contentious, issue arose with regard to the program area on marine environmental protection, and there was a dispute as to whether again there should be one or two program areas. A number of countries took the view that the highest priority in the oceans chapter of *Agenda 21* should be the question of dealing with impacts upon the marine environment from land-based activities. For that reason, because of that priority, and one I personally share, it was agreed that the marine environmental protection section should be divided between land-based activities and impacts upon the marine environment from what are called sea-based activities, vessel source

pollution. In this case, it was decided not to have two separate program areas but a set of objectives that applied to both areas; but with respect to the activities and means of implementation, divided between impacts upon the marine environment from land-based activities and from, as they are called in this chapter, sea-based activities.

From the organizational point of view, these issues signalled some of the substantive points that arose. Earlier it was mentioned that the chapter on oceans was linked very closely to UNCLOS, the UN Convention on the Law of the Sea. In many ways the discussions on oceans in Rio benefitted from the fact that the 1982 Convention exists and that it offered a framework upon which consensus could be achieved as the basis for taking action, for identifying future steps with respect to the marine environment and its resources. I think Sue Biniaz in her presentation mentioned this point.

To illustrate this point, I would like to quote the introduction to the chapter on oceans of *Agenda 21*. The introduction, which precedes the identification of the specific program areas, indicates that the marine environment forms an integrated whole and that, "international law as reflected in the provisions of UNCLOS referred to in this chapter of *Agenda 21* (the oceans chapter) sets forth rights and obligations of states and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources." That general statement illustrated the basis upon which the seven program areas were constructed in what could have been a very contentious chapter. As we will see in looking at the specific program areas, references to UNCLOS became the basis for finding a way forward in a number of specific areas, the glue that held the oceans chapter together.

In a number of the program areas there was quite a long discussion on the question of what approach should be taken to international obligations and cooperation, specifically in the area of marine living resources, in the area of data and information, and most particularly in the area of marine pollution, marine environmental protection. There were long and potentially divisive debates on whether one should pursue a regional or a global approach to developing international commitments, international obligations to respond to what were identified as the specific problems facing the marine environment. What was done, and here I return to the question of objectives, was to set forth in each of the program areas a set of commitments that States undertook. The commitments are largely "soft law." They are not legally binding obligations. They are set forth in the terms that "States

should" but the objectives that are identified in each program area will be a useful basis for looking at priorities for the future. Further, in a number of instances, the commitments of States are specifically linked to obligations of the UN Convention on the Law of the Sea; for example, in the areas of marine environmental protection, of conservation and sustainable use of marine living resources, both on the high seas and in areas under national jurisdiction, and of the conduct of marine scientific research.

In the area of marine environment, to be more specific, States commit themselves to protect that environment in accordance with the provisions of UNCLOS, and then a series of specific objectives are identified. In each case, following a general reference to UNCLOS, there is then a reference "to this end it is necessary to" and specific objectives are articulated. In reading *Agenda 21* on oceans, if one took the sections on objectives out of each of the program areas, one would have a reasonably clear statement of the priorities as identified during the Rio conference.

Turning to the issues of contention and to what emerged in terms of the specific program areas, the major negotiation in the oceans chapter took place at the fourth and last PrepCom in New York in March 1992. What was referred to Rio was an agreed draft oceans chapter of *Agenda 21* with one exception. This exception was the area of high seas fisheries: specifically issues of straddling stocks and highly migratory species, which, it should be noted, are not issues limited to the high seas. It was an issue area that had high political visibility largely because of dispute between the European Community and Canada over fishing on areas of the Grand Banks off of Newfoundland that extend beyond 200 miles from the Canadian coast. The particular issue concerned the stocks of cod that straddle the 200-mile EEZ limit off Canada. To the straddling stock issue was grafted the issue of highly migratory species, again an issue relating to the fishery stocks that are found both on the high seas and within the exclusive economic zone.

These fisheries issues were the ones that remained to be resolved in Rio. At the final session of the PrepCom in New York, a proposed compromise package had been articulated, which was the product of very long and arduous negotiation. Most of those who came to Rio were of the view, and I think it proved to be a correct view, that there was very little room for maneuver in terms of alternatives to that compromise. The compromise that came out was a proposal that there be a conference on high seas fisheries under UN auspices to be convened as soon as possible, with a strong provision calling for the

work of such conference to be based upon the implementation of the provisions of the Law of the Sea Convention relating to highly migratory species and relating to straddling stocks. Those issues were considered as distinct issues.

The compromise provided an alternative to proposals made by Canada, by Pacific island states and others contained in the Santiago Declaration that in the minds of many would have altered the provisions of UNCLOS on straddling stocks and the provisions of Article 64 relating to highly migratory species. What was agreed was that there will be a conference under UN auspices to be held, I would expect, in 1993. The UN General Assembly will have to deal with specific terms of reference this fall, but they will center on how to better implement the provisions on straddling stocks and on highly migratory species of UNCLOS.

A final word on the compromise. There was a dispute in the negotiations over whether the conference would deal with the question of straddling stocks and highly migratory species only as they are found on the high seas or throughout their range. The compromise involves the call, in the chapter of *Agenda 21* on oceans, for the conference dealing with high seas fisheries, but not limiting the terms of reference of the conference to the high seas portions. I think that when the conference itself takes place, the provisions of UNCLOS and how to develop better practical means of implementing those provisions will be the focus.

That, as I mentioned, was one of the primary political issues addressed in the program area of oceans in *Agenda 21*. In my view, the most important issue addressed was not the high seas fisheries or straddling stocks and highly migratory species but the marine environmental protection, specifically from land-based activities. The section on land-based activities in the program area on marine environmental protection was in large part based on specific discussions that took place in a special meeting in December 1991 at UNEP in Nairobi. During the Prepcom, and in light of the emphasis that was placed upon land-based sources of marine pollution, it was agreed that there would be a series of special meetings held to develop recommendations for *Agenda 21* on oceans with respect to land-based activities. The first of those special meetings took place in May 1991 in Halifax, followed by an intergovernmental meeting of experts held in Nairobi at UNEP in December. The section on land-based activities, among other things, also calls for the UNEP Governing Council to consider convening a conference to deal with land-based activities as soon as practicable.

It can well be argued that of the obligations that are identified in the chapter in UNCLOS on marine pollution, dealing with that involving land-based sources is clearly the most difficult. It is the area which requires the most action by states individually and collectively to deal with protection of the marine environment. It involves those areas, coastal areas and estuarine environments, that are most critical to the health of the marine environment. There was quite a long discussion as to what sort of approach should be developed, whether one should have a global convention on land-based pollution, whether one should look at a regional approach, or whatever.

The issue was resolved in a way that had not entirely been expected in the initial discussions. It was recognized that the primary requirements to deal with land-based pollution ultimately fall at the national and even local level. Therefore, what was agreed in this program area was first to set forth a series of commitments based upon the provisions of UNCLOS for states to undertake action at the national level to deal with issues relating to impacts on the marine environment from land-based activities. The second step would be to develop a process for identifying where the fulfillment of that commitment could be assisted and facilitated by action at either or both the regional and global levels. There was a recognition that important work has already been done within the international community with respect to land-based pollution, and there was a call to base the various actions at both the national, regional, and global levels upon the Montreal Guidelines on land-based sources that had been developed as a UNEP initiative during the mid-1980s. States commit themselves to begin to implement the Montreal Guidelines, but also as part of the process to review how those guidelines could be updated and improved.

Agenda 21 sets forth a number of recommended priority actions that could be taken with regard to land-based activities and specifically links the program areas on coastal zone management and marine environmental protection. To be fully implemented, these program areas have to be carried out in close conjunction.

In my view, the highest priority area within *Agenda 21* on oceans relates to land-based activities. There will be an intergovernmental meeting to be convened by UNEP. An international conference is also called with respect to the high seas fisheries issues. Let me touch upon several other issues before concluding.

The issue of institutions is one that will have to be given great attention in the implementation of *Agenda 21* on oceans. There is a specific program area that deals with international, including regional,

cooperation and coordination. It specifically refers to the need for the General Assembly on a regular basis to review the ocean activities of the UN system to insure that they are taking place in coordinated and complementary fashion. How this relates to the specific proposals in the institutions chapter of *Agenda 21*, which calls for a sustainable development commission as a commission of ECOSOC to look at the followup to *Agenda 21* is a question to which I think some thought needs to be given. How the Commission on Sustainable Development, which was negotiated with great pain and suffering during the Rio process, relates to this area and to other specific areas will be a major item for the UN General Assembly.

Another aspect of institutions that I would note is the mention that is made of the desirability of the colocation of various secretariats relating to oceans activities, proposals aimed at how those institutions working with respect to oceans can better pool their efforts.

Finally with respect to institutions there was an emphasis upon the UNEP Regional Seas Programme. In a number of the program areas within the oceans chapter, there is a recognition that the Regional Seas Programme is potentially an important contributor to the achievement of objectives throughout the oceans chapter and that the Regional Seas Programme needs to be made a more effective catalytic agent for so doing.

The question of data and information was also one that became a source of considerable discussion, particularly the Global Ocean Observing System (GOOS), which is being elaborated specifically within the Intergovernmental Oceanographic Commission (IOC). There was some division of view with respect to the GOOS. There was clearly a very strong emphasis upon the need for reliable data and for information systems that are not prohibitively costly. At the same time, there was also recognition of the need to involve the countries who do not necessarily have the most advanced technology or capability in marine scientific research in programs of monitoring, in programs of establishing baseline data. What emerged was a call for the implementation of the Global Ocean Observing System, with those states with the science and with the resources to bear primary responsibility for the GOOS. There was also a call for promoting widespread involvement in the program, not only in the blue water component but in the coastal component of the GOOS.

There was an emphasis -- and I think it is a healthy one -- in those parts of each program area dealing with means of implementation, on the need, particularly in developing countries, to develop cadres of people who are capable of dealing with scientific research

and monitoring, as well as related management issues. There is an important role that could be played by the Regional Seas Programme.

There are a number of other issues that seemed to be important at the time but in retrospect were not necessarily major issues. There was a long debate over Antarctica, which to some extent repeated the debates that had taken place in the General Assembly over whether or not the Antarctic Treaty was the most wonderful thing since the beginning of history. At the end of the day those issues, which pitted the Treaty Parties on the one side and a group of countries led by Malaysia on the other side, reached consensus. A reference was inserted on the importance of Antartica as a place for studying global processes. Having a reference was important for the Malaysian side. It included a favorable characterization of the Antarctic Treaty, which was important to the other side. So what had been a very contentious issue at the beginning of the Rio process was resolved on a consensus basis.

The oceans chapter of *Agenda 21* is a hard beast to summarize. It is a very long chapter. I've tried to give the flavor of some of what I think are the priorities. The highest priority is, in my view, the question of dealing with marine pollution from land-based activities. Politically there will be a strong emphasis on the followup to the high seas issues, straddling stocks and highly migratory species. At the end of the day, that process will simply provide guidance for what will have to be very specific negotiations, either on a regional or on a bilateral basis.

Agenda 21, it seems to me, though it is not the kind of document that is susceptible to the same kinds of sound bites as biodiversity conventions and the like, is in fact what will tell the tale as to whether UNCED was or was not a success. How its implementation is approached will determine whether or not this conference has any lasting impact on the behavior of states. I think it is recognized that the oceans chapter is a very good one. But having said that, I think it will take a great deal of effort to implement it, to ensure that it does in fact bear fruit from the promise that it has established. To return to the LOS context, I should note that it certainly proved the value of the eight years spent in negotiating the Convention, in developing an agreed legal basis for action. Whether or not the Convention is in force, it certainly provides an agreed legal basis for action in these important areas that were identified in *Agenda 21*.

LARGE MARINE ECOSYSTEMS CONCEPT APPLIED TO MANAGING OFFSHORE ZONES AND MARINE RESOURCES: KENYA'S CONTRIBUTION

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Background

Large Marine Ecosystems (LMEs) are large areas of global exclusive economic zones -- greater than 200,000 sq. km -- characterized by unique bathymetry, hydrography, productivity, and community trophodynamics. On a global basis, nearly 95 percent of the biomass yields from the oceans are produced within the currently identified boundaries of LMEs. Economically important activities ranging from fishing to coastal tourism are dependent on the maintenance of robust biological diversity and sustained health of these ecosystems.

LMEs are becoming increasingly stressed from pollution, over-exploitation of living resources, and natural environmental perturbation. In addition, LMEs experience regional effects of global problems associated with atmospheric increases in the levels of greenhouse gases and decreases in the ozone layer. Against this background, scientists and resource managers have identified LMEs as the appropriate regional units for the implementation of monitoring and management actions leading to sustained and predictable development of marine resources.

Monitoring and management based on units of LMEs (i.e., based on ecological principles) are more economically efficient than monitoring and management based on politically-bound management units. Most LMEs are international in scope, such that water and economically important living marine resources move freely throughout the ecosystem regardless of political boundaries. Overfishing, coastal habitat degradation, and pollution in any of these countries' waters has negative impacts on the resource sustainability and biodiversity of the entire ecosystem. To ensure the sustainability of these shared, economically important resources, it is advantageous for all LME-adjacent nations to cooperate in ecosystem-wide monitoring and management. The LME approach also avoids costly duplication of effort by the individual countries in marine monitoring, research management, and enforcement and fosters international cooperation.

At present, the LME in the Kenya-Somalia area is not adequately monitored. This has led to a situation in which coastal habitats (e.g., mangroves, coral reefs) are degraded, living marine resources are overexploited, and pollution levels increase, while inadequate data are collected to characterize impacts on natural resources and biodiversity. The problem is particularly acute in LMEs such as the Somali Current where rising human populations as well as unchecked coastal development threaten extensive damage to adjacent LMEs.

Development Problems

Kenya is experiencing significant and widespread environmental degradation as a result of increasing pressures due to human population growth and expansion and intensification of land use. A primary result of this degradation is the changes induced by altered sediment flux in coastal areas. This causes the disappearance of species, ecological communities, and the genetic diversity they contain.

The Kenya coast represents one of the most unique biotic regions of the world, containing a wide variety of ecosystems: mangrove forest, seagrass, coral reef, and open sea. A rich diversity of plants and animals, many endemic, are found within these ecosystems. Kenya's coastal biodiversity resources, both economic and environmental, are of critical value to Kenya and to the global community.

Continued loss of biodiversity forecloses opportunities for future generations to benefit from the many known and potential values in increases of biodiversity. The maintenance of biodiversity is essential to meet present and future development needs. The ecological integrity of natural communities, particularly Kenyan ones rich in diverse marine wildlife, represents an important prospective and actual economic value through tourism and marine wildlife utilization.

What is Known About the Western Indian Ocean

Information on the biomass yields of the LMEs of the Indian Ocean has been largely limited to the reports of the Food and Agricultural Organization (FAO) of the United Nations.

Very little is documented on the abundance of zooplankton, by species, for the Somali Current. This makes it difficult to determine which species of copepods, euphausiids, salps, and doliolids dominate the shelf and oceanic zooplankton assemblages of the Western Indian Ocean. Within the coastal upwelling zone off Somalia, the dominant calanoid species found during the upwelling season (southwest

monsoon) include the large copepods *Calanoides carinatus, Eucalanus elongatus* and several species of smaller copepod genera including *Paracalanus, Clausocalanus, Centropages, Temora,* and *Acartia* (Fleminger and Hulsemann, 1973; Smith, 1982). Most of the taxa persist throughout the northeast monsoon as well, with the notable exception of *C. carinatus*. There seem to be no striking differences in abundance of copepods between the northeast and southwest monsoon (Smith, 1982; 1984) nor in the total zooplankton biomass. In addition to this list, a species that is probably important in warmer coastal regions and offshore waters is *Undinula vulgaris* (Binet, 1977).

The food chain of the Somalia LME is peculiar. During oligotrophic periods, bacterial production is high and the biomass of zooplankton is much too high for the observed primary production, using ratios of the Sargasso Sea as a standard (Smith, 1982). During the July-September monsoon period, one species of zooplankton, which is absent in oligotropic periods, blooms and dominates the biomass, supplying intense grazing pressure on phytoplankton (Smith, 1982). Biomass of fish is dominated by myctophids. A short and well-coupled food chain could accelerate the flux and cycling of carbon and nitrogen in this LME.

Comparison of zooplankton biomass estimates from upwelling areas including the Somali Current, southern African waters, west Africa, South America, and the Oregon region reveals that all of these productive areas have similar biomass. The biomass of the Somali area is 4 g dry weight per square meter (all of the biomass data refer to total zooplankton biomass composed primarily of crustaceans). It is possible to estimate the relative contribution of euphausiids systems. Probably euphausiids make up 25 percent of the total biomass, and copepods make up most of the remainder. As for contribution of salps and doliolids to total biomass, there is no information whatsoever.

The anchovy-sardine complexes that characterize the world's coastal upwelling systems, *Engraulis, Sardinops* and *Sardina* spp., are replaced in warm productive water by different genera: the anchovy (*Stolephorus* spp.) and sardine (*Sardinella*). There is a substantial fishery for the oil sardine, *Sardinella longiceps*, along the Kenyan and Somalia coasts from September through December. This is a coastal pelagic fish and is almost certainly a key species in terms of controlling the biomass of phytoplankton and copepods in the coastal zone. It is not known how far this fish ventures to sea, but given its high growth rates, and thus high metabolic requirements, it is probably restricted to the coastal zone. Aspects of the fishery and biology of the oil sardine have been summarized by Longhurst and Wooster (1990).

As in other coastal upwelling systems, scombrids are prominent in the Western Indian Ocean, with the Kingfish Barracuda (*Scomberomorus commerson*) and Indian mackerel (*Rastrelliger kanagurta*) being the dominant forms. There is a strongly seasonal pattern of fishing activities in the region, with the lower effort in June to August, the southwest monsoon period, and with peak landings from October through January. Large pelagic fish comprise about 35 percent of total landings and include the tunas, barracuda, kingfish, large jacks, and an array of rare species. All are voracious apex predators and many are migratory, in response to seasonal production. It is well known that in tropical ocean environments most of these species require about 5 to 20 percent of their biomass per day to grow and thrive (Longhurst and Wooster, 1990).

The United Nations Environment Programme and the FAO Fisheries Department are involved in joint studies with the maritime nations around the Indian Ocean rim fostering research and management programs aimed at implementing a balanced strategy for ensuring sustained yields of the living marine resources within the regional LMEs.

In the attempt to piece together a global map of marine productivity Cushing, Krey, and Rao in Zeitschel, (1973) show that the intensity of primary, secondary, and tertiary production all reach their regional maximum in the Arabian Sea. Production reaches a temporal maximum during the southwest monsoon, reflecting some aspect of that persistent circulation or the changes it induces in the upper ocean. The causes are unknown in details. The southwest monsoon seems set to change with global warming.

Though we are unsure of the mechanism that connects the production maximum of the Arabian Sea with the southwest monsoon, and even less sure of its future course, the productive significance of this area justifies the initiation now of a sufficient effort in plankton monitoring to establish the baseline against which the effects of climate change may be detected and with which the mechanism of change can be understood.

Concerned Parties/Target Beneficiaries

The problem of monitoring LMEs in general has been well defined and outlined in the world conservation strategy (FAO/WWF/IUCN). The inextricable linkage between environment and development is now universally acknowledged by the development assistance community of which UNDP is a partner.

Direct beneficiaries include the Government of Kenya through Kenya Marine and Fisheries Research Institute (KMFRI), Kenya training and education Institutions, and relevant non-governmental organizations. Other government and non-governmental agencies responsible for development, and the global community at large, directly and indirectly benefit from the conservation of biodiversity.

Pre-Project and End-Project Status

At present in Kenya there are the Kenya Marine and Fisheries Research Institute, local universities, Kenya National Museums, Kenya Wildlife Services, and the Fisheries Department that provide capacity for LME. These departments and research institutes are designated with specific responsibilities to develop the capacity to protect biodiversity. There are a few individuals with technical training relevant to the protection of LME.

Overall, national efforts to develop LME strategies and to implement integrated, national-level programs to protect LME are severely constrained by a lack of essential financial support.

As a result of this project, a number of incremental improvements are expected to result in a permanent strengthening of institutional and human resource capacities, at both the national and regional levels. These include:

a. establishment of effective LME conservation planning units to coordinate with ministries responsible for planning and finance;
b. improvement of educational, training, and research facilities for professionals who study marine wildlife; and
c. improvement of survey, monitoring, and data processing capabilities.

What Can Kenya do to Support the LME Concept

Kenya lays an important emphasis on the sustainable exploitation and conservation of her aquatic resources in marine waters. Such meaningful sustainable exploitation and conservation requires management that is banked with scientific research and training. Apart from KMFRI, marine research in Kenya is also carried out by national universities, Kenya Wildlife Services, the National Museums of Kenya and the Fisheries Department. Given funds, Kenyan scientists can monitor Large Marine Ecosystems in the Western Indian Ocean (Kenyan portion).

Kenya Marine and Fisheries Research Institute

The Kenya Marine and Fisheries Research Institute was started in 1979 out of the defunct East African Marine Fisheries Research Organization (EAMFRO) and the East African Freshwater Fisheries Research Organization (EAFFRO), which were established in 1984 and 1950, respectively, as International Service Organizations to serve the East African countries. The main objective of the Institute is to promote and develop genuine local expertise by propagating general research activities in both freshwater and marine ecosystems.

The Institute is a governmental para-statal organization and is currently under the Ministry of Research, Science and Technology. It is managed by a Board of Management appointed by the Minister. It has two main divisions, the Marine Science Division housed at the headquarters in Mombasa and the Inland Waters Division with laboratories in Kisumu on the shores of Lake Victoria, Kalokol on Lake Turkana, at Lake Baringo, Sangoro on the river Miriu, Kegati, Lake Naivasha, and Nairobi.

Staff

The Institute started in 1979 with only five Kenyan scientists and a small supporting staff. Today, however, KMFRI has 120 scientists who carry out research in both fresh and marine waters. Of all these scientists, only two have Ph.D. degrees, 33 have Master of Science degrees, and the rest hold Bachelor of Science degrees. To date the Institute has a supporting staff of about 1,300 people.

Research Programs

There are several research programs that the laboratory in Mombasa undertakes.

One of these is in the field of fisheries research in which the goals are to assess the stocks of commercially important fin fishes and shellfish and to study the ecology of coral fishes. The fact that Kenya's coastline has several sites suitable for rearing of fish means that research oriented to mariculture is very important. Currently research on the culture of prawns, oysters, and algae as well as finfish is underway. There are also attempts to integrate salt mining activities with the rearing of the brine shrimp, *Artemia.*

Kenya has a long history of a strong interest in preservation and conservation of her wildlife resources and protection of critical habitats through the creation of parks. Coastal marine parks in Kenya are also a major attraction to tourists. Kenya has also gained financially in creating parks as thousands of tourists and local visitors are

attracted by the high diversity of life in the parks. As regards health, there is every need to monitor pollution in order to avoid diseases and possible elimination of intolerant species.

The environmental programs deal with problems that range from increased sediment loads from the land to the sea, sewage and solid waste disposal from urban areas, overexploitation of reef resources, overcutting of mangroves, oil pollution, and wastes disposed from industries.

Kenya has many species of marine organisms that could be used as a source of active ingredients of pharmaceutical and nutritive value. These extractions could be beneficial to the country in saving lives and generating foreign exchange. However, studies on extraction of active ingredients from marine organisms are scanty and still at the rudimentary stages. Crustacean shells, easily available from crabs, lobsters, and prawns, could be used as a source of chitin. The reef flats support rodophytes from which agar could be extracted. There are also harvestable quantities of echinoderms and sponges from which various active ingredients can be extracted.

There is also a program on food science and technology dealing specifically with the problem of spoilage of fish. The conventional methods of curing fish are under study with a view to find alternative ways of reducing fish spoilage. The laboratory is also active in oceanographic research covering the biological and chemical as well as the physical aspects of our marine waters. Finally our marine geologists are involved in a comprehensive study of the geology of the Kenya coastal systems, especially the relationship between the distribution of mangrove areas and oceanographic processes.

Attempts to Model a Mangrove Ecosystem in Kenya

On the Kenya coast at Gazi Bay, various parameters are measured on a monthly basis or even at shorter intervals with a view to understanding the structure and function of this mangrove ecosystem. To achieve this aim, research groups studying nutrient and nitrogen fixation, production, phytoplankton and sea grasses, mangrove primary production by their litter fall and decomposition, fisheries productivity, and hydrodynamics have been established at the Institute in Mombasa. These teams are multi-disciplinary, and it is hoped that all the data will be brought together and a meaningful model for this mangrove ecosystem will be produced.

This is a collaboration program, and the institutions involved are KMFRI (Kenya), University of Nairobi (Kenya), Free University of Brussels (Belgium), State University of Ghent (Belgium), Delta Institute for Hydrobiological Research (Netherlands), Catholic

University of Nijmen (Netherlands), University of Florence (Italy), and Center for Study of Tropical Faunistics and Ecology of Italy.

Cooperation in Marine Research

The Kenya Government encourages bilateral and multilateral cooperation in marine science research with other countries. Cooperation such as this minimizes duplication of efforts and is instrumental in training Kenya scientists in various marine research techniques by experienced experts. This approach has proved really useful and must be encouraged in the region and especially among local scientists.

One of the oldest and most successful of such bilateral projects in marine science research is the Kenya Belgium Project (KBP). It was started in 1985 and its main objective is to link training, research, equipment, and marine science literature. In this project research is carried out in the country by Kenyans and by visiting Belgian scientists and studies. Under the auspices of the project, too, the Belgian government provides fellowships for Kenyans to go abroad for specialized training in marine sciences and research. While initially the cooperation was between KMFRI and the Free University of Brussels (VUB), it has expanded to involve other universities and institutions in Belgium, the Netherlands, and Italy as well as Nairobi and Kenyatta Universities in Kenya.

The success of the KBP attracted other relevant marine science activities in Kenya. As mentioned earlier, the Kenya-EEC Project, whose aim is to describe structure and function of mangrove ecosystems along the Kenya coast, came into being in 1989 as an offshoot of the KBP cooperation in marine sciences. In 1989 also the Regional Cooperation in Scientific Information Exchange in the West Indian Ocean (RECOSCIX-WIO) was initiated by the IOC with the KMFRI-KBP computer section as the Regional Dispatch Center (RDC). It is currently funded by the Belgian government through the University of Limburg. The main objective of the project is to promote communications between marine scientists in the West Indian Ocean and amongst them with the international community of marine scientists, institutions, and organizations. It should be noted that in the two years of its existence, RECOSCIX-WIO has satisfied the needs of marine scientists by responding to their requests for information. Indeed RECOSCIX-WIO has opened channels of communication that have encouraged exchange of information between scientists in an area geographically so wide that traditional communication, as in most developing countries, is slow, difficult, and expensive.

If the achievements of the RECOSCIX-WIO can be seen as beneficial, other IOC regional bodies may wish to initiate activities along similar lines.

The Kenya-Dutch expedition on the Indian Ocean started on 13 June 1992 from Mombasa, Kenya. One part of this expedition on board the Dutch ship, *R.V. Tyro*, will be to study the effects of the monsoons on coastal ecosystems in Kenya. The other part will study the mangroves, seagrass, and coral reef ecosystems on the coastal fringes of Kenya from a land-based camp on the south coast of Kenya.

Kenya will also participate in the Coastal and Marine Research in Africa (COMARAF) project and will from 1992 to 1996 undertake research into the ecology of coral reefs along the Kenya coast. To fit into the objectives of the COMARAF project, the Kenya research will focus on describing the range of coral reefs with respect to and in comparison with the other coastal ecosystems, the taxonomy of the various groups, as well as the effects of human and natural aggression on coral and suggested steps to limit their consequences.

Kenya participates fully in the East African Action Plan, which was started by a joint mission of UN agencies in 1991 to the eight states of the region. KMFRI has received an atomic absorption and a gas chromatograph under the auspices of the regional project on Assessment and Control of Pollution in the Coastal and Marine Environment of the East African Region (EAF 6) as part of the aims of the East African Action Plan.

The Regional Committee for the Cooperative Investigations in the North and Central West Indian Ocean (IOCINCWIO), at its second session in Arusha, Tanzania (December 1987) approved the development of a regional component of the Global Sea-level Observing System (GLOSS). Since then, four extra sea-level stations have been established to fully support the GLOSS program. A workshop on causes and consequences of sea level change in the Western Indian Ocean was held in Mombasa in 1991. The theme of this workshop was to promote the use of sea level data and products in the IOCINCWIO region.

The Swedish Agency for Research Cooperation in developing countries (SAREC) has supported the development of marine research in East Africa directly. In 1990 SAREC concluded an agreement with the IOC for a joint regional program in whose light SAREC and SAREC/IOC have recently organized seminars, workshops, and training courses to which Kenyans have actively participated.

Besides research linkages made at the government-to-government level in UN bodies, individual researchers who have their research grants and skeletal equipment can be allowed to undertake their research at KMFRI and use the latter's facilities for their research purposes. Some foreign researchers who have already established professional links with their counterparts in Kenya, find it cheaper to undertake joint research with their Kenya counterparts rather than to bring groups from abroad to assist them. This also enhances professional links and speeds up the buildup of confidence of local researchers with their foreign counterparts. Cases of affiliations of research individuals to KMFRI are therefore also encouraged. One such current project is the "Coral Reef Conservation International." The foreign scientist works with a total of six Kenyan researchers, some of whom receive academic training and are drawn from KMFRI, Kenya Wildlife Service, and University of Nairobi.

Although all of the above-cited assistance provides important support, the nature and scale of donor involvement is still insufficient to meet all critical needs related to biodiversity conservation in Kenya. It is expected that the proposed project will complement and significantly enhance existing and proposed activities in this area and will fill important gaps to ensure the conservation of biodiversity in the region.

Design of a Monitoring Strategy

At a recent meeting to design strategies to provide information on which to base marine resource stress mitigation and development action, a core monitoring program was devised consisting of two modules: (1) productivity and population monitoring using continuous plankton records (CPRs), and (2) fish community surveys using vessel survey charters (VSCs). CPRs are towed behind ships-of-opportunity collecting phytoplankton and zooplankton and measuring up to eighteen biological, physical, and chemical parameters including temperature, salinity, turbidity, dissolved oxygen, chlorophyll, primary productivity, nutrients, and petrogenic hydrocarbons. The CPR system is user-friendly, downloads easily to a computer database, and is inexpensive to operate because minimal dedicated ship time is required. VSCs augment the CPR module by providing a means for measuring important fish trends in other economically important population levels, habitat conditions, and changes in other economically important populations. This module utilizes stratifed sampling strategies, acoustics, and satellite technology. When combined, the two modules provide an inexpensive means whereby developing countries

can monitor conditions in their LMEs, with obvious implications for improved management.

LME Core Monitoring Strategy

Information will be required on the temporal and spatial scales of variability of selected ecosystem components if progress is to be made in understanding the processes controlling the structure and functioning of marine ecosystems. This necessitates the monitoring of the key components of LMEs on a long time scale and on a large spatial scale.

The core monitoring strategy includes:

a. A continuous plankton recorder/undulating oceanographic recorder (CPR/UOR) sampling strategy to measure variability in LME health. Such a program will provide useful knowledge on marine pollution, fisheries, and coastal zone management.
b. The CPR/UOR sensor package with components for measuring:
   (1) zooplankton species composition, biomass, biodiversity, and size;
   (2) phytoplankton species composition, biomass as chlorophyll, a pump and probe sensor for productivity, diatom/flagellate ratios, and size;
   (3) salinity;
   (4) temperature;
   (5) hydrocarbons;
   (6) light;
   (7) oxygen;
c. A small, coastal vessel sampling program using nets acoustics to:
   (1) measure species abundance, biodiversity, and stock levels;
   (2) gather data on fish age, growth, size;
   (3) gather data on predator-prey interactions from stomach sampling;
   (4) make observation on gross pathology;
   (5) obtain simultaneous measurements on gross pathology;
   (6) obtain simultaneous measurements of temperature and salinity;
   (7) sample for pollutants and photograph macrobenthics on an opportunistic basic.
d. Use of satellite images for characterizing water mass movements and use of chlorophyll and temperature data for satellite intercalibrations.

For monitoring inshore-offshore extension of nutrients and eutrophication, systems of towed CPRs should be deployed and where

possible, moored buoys for collecting chlorophyll and productivity data.

Regional Coordinating Centers are proposed to be established at KMFRI, staffed facilities will serve as a center for training, sample processing for center staffs in plankton identification and processing will occur at the Sir Alister Hardy Foundation Laboratories in Plymouth, England and at NOAA facilities in the United States. An international advisory board comprised of ecosystem scientists, managers, and host country representatives will oversee all project activities.

The training component will be strengthened and opportunities for expanded LME coverage explored through the cooperation of IUCN (the World Conservation Union). IUCN will provide the staffing needed to establish the LME networks.

The Somalia Current LME

The justification for monitoring plankton changes across the global production center of the Arabian Sea has been described in IOC/INF-869 UNESCO (1991). The need is to lay down a system capable of recognizing the ecosystem effects that are expected to arise through climatic modulation of the southwest monsoon.

One route has been selected which runs from East Africa to the Persian Gulf (Figure 1). This route offers the following benefits: it is a frequently travelled and therefore easily-worked shipping route; it transects the Somali current and the Arabian Sea; it provides both the large-scale context and the "open ocean" contrast for one of the likely key sites of the Large Marine Ecosystem study (the East African-Somali Current Domain). There are already a small but sufficient number of CPR tows from this route to confirm the validity of the CPR survey technique in these waters.

Kenya Conference on LME

As follow-on to the Monaco conference, scientists in Kenya and Belgium are collaborating in "twining" activity between a developing and developed country to organize a symposium on the LMEs of the Indian Ocean to be convened during August 1992 in Mombasa, Kenya. The symposium will contain workshops that will inform participants on the methodology of the LME approach, demonstrate the use of modelling and identify scientific data needs for LME studies.

Project Objectives

The development objective is to strengthen the capacity of the participating country (Kenya) for sustainable use and conservation of LME. This holds true in both the context of protecting marine parks and reserves from effects of isolation and surrounding development and of developing areas for fisheries, mining, and other economic activities. This development objective will be achieved through the following immediate objectives:

a. support to Kenya Marine and Fisheries Research Institute and marine science research in local universities;
b.institutional support to programs in LME conservation;
c. provision of field and laboratory equipment to survey and monitor elements of LME and to organize biological, physical, and chemical oceanographic data and technical assistance as needed to ensure the best use of data of field and laboratory equipment; and
d. the establishment of effective LME conservation planning units to coordinate with ministries responsible for planning and finance.

Rationale for Funding

The government of Kenya has set up Marine National Parks and Reserves. This shows that the government of Kenya has already demonstrated that its strong commitment to conserve biodiversity can thus be expanded to cover the EEZ within its borders. The Western Indian Ocean can be approached as an LME on a regional basis. Under existing projects alone, attainment of adequate conservation standards is not possible in most existing protected areas over the next three years because of resource and staff constraints.

Without additional funds, the development of the capacity to manage and conserve species, habitats, and genetic diversity unique to the Western Indian Ocean (Kenya coast) will not be possible.

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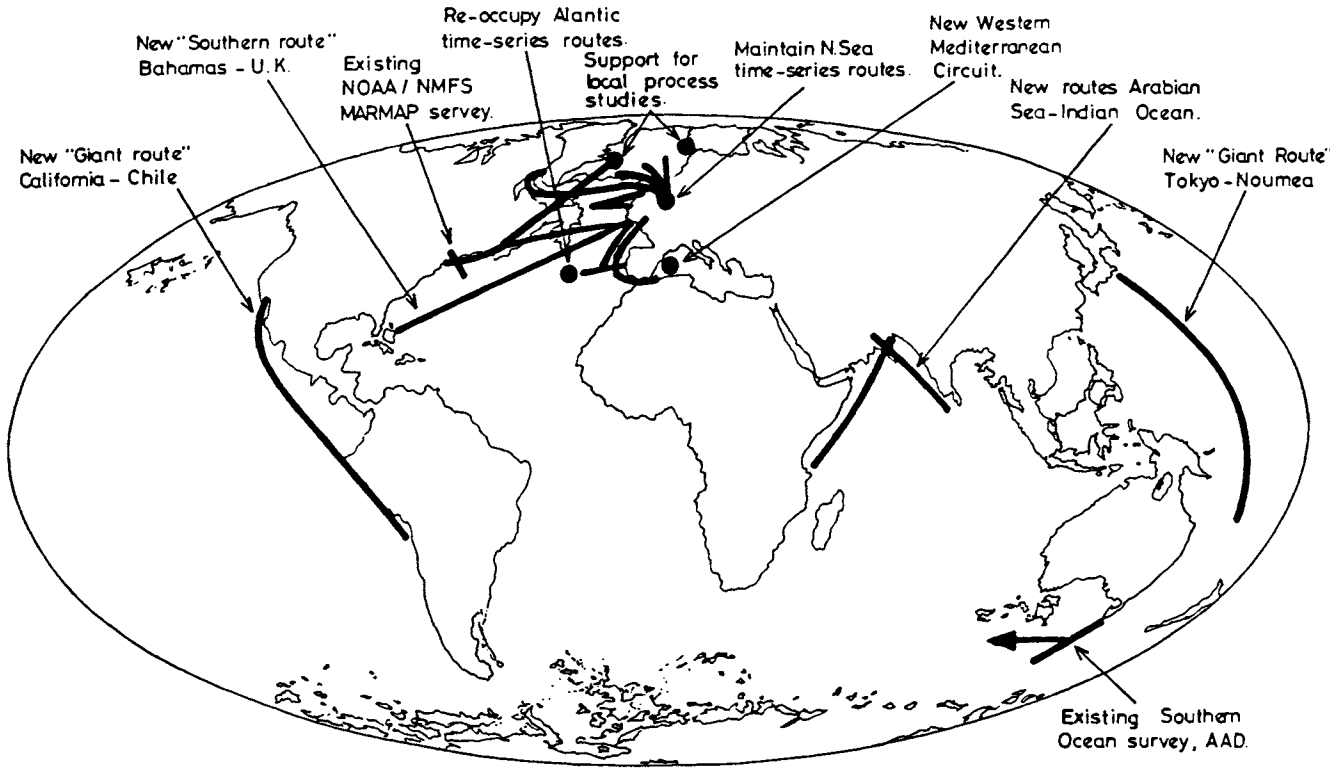

FIG. 1. Towards Global Ecosystem Monitoring: The Developing CPR Survey.

ON BEYOND HIGH-MINDED PRINCIPLES: MAKING A DIFFERENCE

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Are We Too Vague?

"International environmental obligations are often vague and unspecific."

"There are almost no mechanisms to enforce the legal norms that *are* clearly spelled out."

"Most obligations allow nations too much room for interpretation."

These are some of the common complaints heard about international diplomacy. Despite its failings, the community of international law and policy specialists of which we are all a part, hold fast the faith that the articulation of high-minded general norms move the world's nations in the right direction. The United Nations Conference on Environment and Development (the Earth Summit) stimulated governments and citizens around the world to devote thousands of hours to develop high-minded yet non-binding principles on the complete range of environmental and developmental challenges. Estimates suggest that tens of millions of dollars have been spent on this meeting and its preparatory work. Added to these direct costs are the opportunity costs: substantive progress on many regional environmental priorities was sidetracked pending the outcome of the Earth Summit. For example, the beginning of negotiation of the Caribbean protocol on land-based sources of marine pollution was delayed for a year while nations prepared for global discussions. Now the question must be asked: do the high-minded principles and hortatory agreements produced justify the costs? Do they really make a difference in terms of the day-to-day conduct of human activities?

What about the critics' charges that international legal principles are too often vague or full of clauses that give nations means to avoid compliance with the spirit of the agreement without appearing to violate them in a technical sense. Of course, progress towards achievement of environmental goals does not hinge exclusively on having clear and fast rules, heavy-handed enforcement, and little national discretion. Progress comes about because of a mix of motiva-

tions: voluntary sense of ethical responsibility, avoidance of reciprocal harmful treatment by other nations, economic pressures and other political threats, and the potential for more efficient, less-polluting ways to do business. Faith in the beneficial effects of general international legal developments can best be understood as reflective of an understanding of the array of interactive influences at play in international politics. There is a need to reconfirm this vision of international law as a constructive force in the ecology of real politics.

At the same time, I believe there is an equal need to scrutinize international fora and demand that they make cost efficient and measurable contributions. Even the most high-minded international agreements can undermine progress in the overall development of international environmental law if they are impractical to implement or disconnected from the sincere intentions of nations that sign them.

I suggest that the international community of diplomats and experts take greater heed of the practical realities that can undermine the value or relevance of general principles and treaties. International diplomacy needs to be introduced to and incorporate such concepts as "backward mapping."[1] Backward mapping is a "from the ground up" approach. It presupposes that good policy is "implementable" policy. If policies are designed in a way that stymies implementation, then the policies themselves are flawed. Backward mapping entails making explicit likely preferences and designing policy in accordance with the behavior of targeted populations. For example, once desirable behavior -- recycling of plastics rather than disposal into waterways -- has been identified and the likely reactions and preferences of user groups such as merchant mariners and fishermen have been considered, the regulatory or supportive actions required to encourage those behaviors can be described and translated into activities or programs at higher government levels. That is, in the earliest stages of policy formulation, considerations of implementation feasibility affect the definition of the problem and the remedial action prescribed.

Only if international policymakers grasp the realities of, for example, land-based sources of marine pollution *at the local level* can they create relevant and practical strategies. Similarly, if diplomats are versed in the facts regarding use conflicts and transboundary pollution, then they are in a better position to solve problems, share information and strategies, and avoid vague generalities that give little

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[1] R. F. Elmore, "Backward Mapping: Implementation Research and Policy Decisions," in Aaron Wildavsky (ed.), *Methodological and Administrative Issues,* Chatham, New Jersey: Chatham House Publishers, Inc., 1982.

guidance. There is a need to focus on state practice as it is evidenced by the daily conduct of human activities within nations, not just the rhetorical expressions of national policies. Only then can we know whether the principles and obligations that are being developed are having an impact on the problems they are meant to address. There is a need to bring to the negotiating sessions, people who have direct experience of the problems at hand so that pragmatic strategies are developed.

Unfortunately much of what the Earth Summit set out to address are problems of such complexity and the human capacities are so limited that the painstaking negotiation of principles appears a very small step indeed when compared with the long and immensely difficult road ahead of putting these ideals into practice.

This paper may be seen as a call to "take heed of practical realities," to seek ways to bring people who are "in the trenches" of work at the local level into the process of defining international policies, and to seek to make international abstractions work for measurable improvement in the condition of people and their environments. Making the links between local realities and international policies may lead to greater specificity in international law and policy. In this paper, I will describe a project underway in Washington State in the United States that is an attempt to "ground truth" some of the most popular but thus far unspecific high-minded principles circulating in most international fora today: sustainable development, integrated ecosystem management, and local participation in decision-making.

One example of the harmful disconnection between local realities and global level abstractions is the issue of land-based sources (LBS) of marine pollution. According to the 1990 assessment of the Group of Experts on Scientific Aspects of Marine Pollution (GESAMP), LBS presents the biggest threat to ocean and coastal water quality. LBS is also the most difficult pollution source to do anything about because it involves all of us -- the thousands upon thousands of human activities that are bound up with our economic survival. It is my view that much of the discussion about LBS at the global level has been absurdly general and unhelpful in meeting this almost unimaginably big and complex problem. A number of scholars have pointed out that some issues are better addressed at the regional level.[2] I join in their skepticism about the wisdom of expending a great deal of money fine

[2] Boczek, Boleslaw Adam, "Global and Regional Approaches to the Protection and Preservation of the Marine Environment, 16 *Case W. Res.J. Int'l L.* 39 (1984).

tuning global LBS guidelines, when so much of the real work will take place at the regional, national, and local levels.

To make measurable progress in controlling LBS we must crack a multitude of mysteries: we must make progress in moving towards ecologically-sound economic development and integrated coastal ecosystem management. In the U.S. we call these "very tall orders." If we move towards sustainable development, we will in the process replace land-based polluters with businesses that produce less or no waste stream. We will ensure that new businesses do not repeat the wasteful practices of the past. Those of us who want to promote solutions to LBS must face up to the fact that without feasible alternatives to offer people, our most articulate exhortations will have no real impact.

What *Is* Sustainable Development?

As an abstraction, the concept of sustainable development has considerable charisma: it suggests that harsh trade-offs can be avoided or re-fashioned as win-win situations. Human needs can be met *and* the health and productivity of the natural systems upon which we depend sustained. But when theoreticians try to be more specific they have difficulties spelling out just what must be done.

The UN Commission on Environment and Development (the Brundtland Commission) defined sustainable development as the way "to meet the needs of the present without compromising the ability of future generations to meet their own needs."[3] They went on to add: "sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs. We do not pretend that the process is easy or straightforward."[4]

Nobel Prize Laureate and economist Robert Solow of the Massachusetts Institute of Technology recently suggested that sustainability cannot be defined in terms of specific obligations, but rather should be seen as a general moral obligation "to preserve the capacity to be

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[3] *Our Common Future*, The World Commission on Environment and Development, Oxford University Press, Oxford. (1987), p.8.

[4] Ibid. p.9

well off, to be as well off as we are."[5] As an economist, he sees it as a question of inter-generational equity. This understanding of sustainability supports preserving the productivity of ecosystems. It also supports investment rather than short-term consumption. And it promotes reliance on renewable resources as a substitute for ones that are non-renewable. But our desire to care for future generations raises intellectual difficulties. Dr. Solow cautioned that we only have to remember how different America was four generations ago to see vividly that we cannot know what will be the preferences of and the decisions facing future generations. In addition, Dr. Solow observed that there is an inherent paradox in the popular thinking about sustainability: "There is something inconsistent about people who profess to be terribly concerned about welfare of future generations but do not seem to be terribly concerned about the welfare of poor people today." He went on to point out that "the record of the U.S. is not very good on either the inter-generational equity or the intra-generational equity front. We tolerate, for a rich society, quite a lot of poverty, and at the same time we don't save or invest a lot."

My colleague Michael Colby has written extensively on the subject of sustainable development and has concluded:

> The notion of sustainable development involves a conceptual integration or internalization of social and environmental problems. It has achieved a relatively high degree of acceptance since the publication of the "Brundtland Report," *Our Common Future* (WCED 1987). At the same time, there has been great frustration over defining this concept operationally and putting it into practice; compendiums have found dozens of different definitions (e.g. Brown et al, 1987)...We would argue that sustainable development is best viewed as a societal-level analog to a corporate "mission statement." As an ideal, it is fairly simple to understand. But like all ideals, it is probably impossible to achieve with ex ante certainty...We need to organize society in ways that facilitate learning and increasing adaptability -- to seek ever better approximations of the ideal.[6]

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[5] Solow, Robert M. "Sustainability: An Economist Perspective," 18th J. Seward Johnson Lecture, Woods Hole Oceanographic Institution, Marine Policy Center, June 14, 1991.

[6] Colby, Michael E. and Jay Schulkin, "Eco-logic, The Evolution of a Philosophy and Economics of Nature," *World Futures 1992*, (in press).

Refocus from the Global to the Local

Environmentalists often complain that the "charismatic megafauna" such as rhinoceros and whales get all the attention. They say it is much more difficult to draw the interest of donors to arduous, uncharismatic, and slow work that must be done to move people over the long term into better ways of doing what they need to do. Among the most pressing of the uncharismatic things that urgently needs to be done is human population control. We need to ensure that women have a choice about reproduction, and we also have to be realistic about the carrying capacity of our planet to sustain the kind of lifestyle of consumption and disposal to which many of us in the industrialized nations are accustomed.

Population growth, economic pressures, and environmental stress are obviously connected, but in no simple fashion. But speaking of these interconnections in the abstract produces little true understanding of how we can in practice satisfy human needs without sacrificing the health and wealth of the future. Sustainable development will probably have to be defined over and over again within the context of particular ecosystems and human communities. But how will we know it when we see it? How do we make it happen over the long haul? I will describe our efforts to answer these questions.

The Willapa Watershed Project

In 1991 a rather remote estuary and its watershed on the Pacific coast of Washington State was selected to be the site of an experiment in putting into effect changes at the community level needed to move towards an ecologically sustainable economy. Willapa Bay has been described as the healthiest, most productive estuary left in the continental U.S., an approbation that Willapa admittedly earned by default as other estuaries elsewhere slid into profound decline. A distinquished local writer has described the area as follows:

> It is a soft green place where rain rules and mildness moderates the proceedings; where the grass grows in January, and the airways and waterways run together in a near constant interchange of water and mist; where ferns and moss swaddle all surfaces left out in the weather for any length of time; and where the rivers and the

sea and the clouds conspire to lend the land a verdancy that never quite runs dry -- this is a wintergreen world.[7]

Suitable adjectives to apply to Willapa's physical beauty include: muted, subtle, gentle, and intimate. Its full magnificence only becomes apparent over time. In part its beauty lies in the remarkable changes that take place daily: the wild and quick winds that blow from the Northern Pacific Ocean bringing dramatic weather fluctuations, the immense ebbing and flowing of the tides that alternately reveal and hide miles of life-enriched mud, and the spectacular wildfowl migrations. Knowing this estuary means learning the endless stream of its new faces.

Sharing this productive and secluded environment are approximately 19,000 people, many of whom directly depend on the resources of the Bay and its watershed for their livelihoods. Into this unusual setting walked two successful professional environmentalists -- Spencer Beebe, founder of Conservation International and more recently Ecotrust, and Elliot Marks, the director of the Nature Conservancy's Washington State Chapter. Although both had extensive experience working in other countries, they shared a sense of distaste for demanding that the people of the developing world do (develop in an ecologically-sound way) what has not been done in the industrialized countries. They had decided that before solving the rest of the world's problems, U.S. environmentalists should show that "gospel of sustainable development and ecosystem management" they preach abroad can be put into practice at home. Beebe and Marks decided to form a partnership between their respective organizations for the purposes of a demonstration project.

Headquartered in Oregon, Ecotrust was established in 1991 to demonstrate how local communities can build strong local economies based on the sustainable use of natural resources. Ecotrust is affiliated with Conservation International, a highly regarded U.S. environmental group that has sponsored community-based sustainable development projects in developing countries. The Nature Conservancy's purposes are to "find, protect, and maintain the Earth's rare species and natural communities by preserving the lands they need to survive." TNC's forty-eight U.S. chapters have purchased thousands of acres of the most pristine examples of ecosystems that remain in the U.S. and have

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[7] Pyle, Robert Michael, *Wintergreen: Listening to the Land's Heart*, Boston: Houghton Mifflin Co., 1986, p.8.

collaborated with state governments to establish natural heritage programs.

Both groups have notable fund-raising and project design expertise. Before selecting the sites for their new venture in sustainable development, they hired respected consultants to undertake what they referred to as a reconnaissance of their ecological backyard -- the coastal temperate rainforest environs of the Pacific Northwest. Interested in the global picture, they also employed consultants to identify similar coastal temperate rainforest ecosystems around the world. Through this exercise they discovered that many of the most pristine examples remaining of the world's temperate rainforest watersheds are located in the Pacific Northwest U.S. and Canada.

The consultants identified four watersheds that appeared to present suitable sites for experiments in sustainable development. Limited to working within the boundaries of Washington State, the Nature Conservancy's Seattle office offered to collaborate with Ecotrust for the purposes of carrying out the Willapa watershed project. Three other similar projects are being sponsored by Ecotrust alone in British Columbia and Alaska. Each project has as its goals sustainable development, local capacity building, ecosystem conservation, and resource restoration. Strategies to achieve those goals are tailored to the particular challenges present in the different watersheds. I will only discuss the one I am directly engaged in -- the Willapa project.

A Reconnaissance of The Human Environment and the Willapa Bay Ecosystem

A scouting report commissioned by The Nature Conservancy and Conservation International suggested that Willapa offered a promising context for an attempt to put into effect a comprehensive approach to sound environmental and economic development.[8] Among the factors taken into consideration was the relative health of the estuary: according to the report, Willapa Bay probably represents the most productive intact estuarine ecosystem in the continental United States.[9] Its productivity suggests that "unlike many of its national

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[8] Tice, Ty and Louise Forrest, "Preliminary Assessment of Willapa Bay Watershed, Washington: Biological and Socio-Economic Overview," Final Report to Conservation International and the Nature Conservancy, October 1990.

[9] Ibid., p.1.

counterparts it has not yet reached the point of no return, either in a biological or economic sense."[10] The small population of 19,000 share a watershed of approximately 1060 square miles. (The state of Rhode Island is of similar size but is home to over a million people). Almost all of the Willapa watershed is contained within Pacific County, but quite fortunately the portion of the watershed outside the county is nearly identical in size and use characteristics as the part of the county that is not part of the watershed. Data for Pacific County thus approximates information that would be compiled if the ecosystem were the designated unit for data gathering purposes. In addition, the Willapa watershed is a relatively compact drainage basin with only a little over eight acres of upland for each acre of bay. The Chesapeake Bay's drainage basin, in contrast, is over 200 times larger than the bay itself.

Of overriding importance to maintenance of the health of Willapa Bay are two physical factors: the extensive wetlands that continue to buffer the Bay from the full impacts of upland activities and the rapid exchange of marine waters that takes place as a result of the large tidal range and shallow character of the Bay. This unusual tidal cleansing has diminished the impacts of human discharges into the Bay but has augmented the extent of oceanic influences in the estuary. El Niño events, for example, are thought to have a very profound influence on Willapa Bay's ecological processes and natural resource population fluctuations.

For purposes of comprehensive planning, the ecosystem falls within one growth management planning region and one county jurisdiction. Most of the land in the watershed and much of the tidelands within the bay are under private ownership. The state owns a small portion of the watershed and the federal government even less. There is therefore little federal involvement in decision-making. Local activism and community involvement are honored traditions.

The area's economy is dependent on natural resources and therefore a productive and healthy environment. The five major economic sectors are forest products, seafood products (clams, oysters, crabs, fish), agriculture (dairy cows, beef cattle, cranberries), tourism, and the retirement community. Local commercial oystergrowers have been particularly vocal advocates for a clean environment, because of their absolute dependence on high water quality. In addition, the communities have a surprising wealth of technical, intellectual, and creative expertise because many highly-educated people have migrated

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[10]Ibid., p.1.

into the area to escape the pressures of urban life and enjoy the coastal beauty and rural lifestyle. Officials of the corporations with the largest property holdings in the area -- the Weyerhaeuser Timber Corporation and the John Hancock Insurance Company -- indicated interest in sustainable forestry practices. Willapa's drainage basin no longer contains old growth forests; the internecine war over spotted owls and ancient forest rages elsewhere.

Taking into consideration these findings, Ecotrust and TNC concluded that the Willapa Bay watershed is a microcosm of the human condition. If it is not possible for a relatively stable and modest population of 19,000 people to enhance or even maintain their quality of life in one of the richest, most diverse and productive ecosystems on earth, in one of the most stable and strongest economies and political systems anywhere, what are the prospects for mankind generally?

The Willapa project began with the recruitment of local advisers. The first local leader to join in this project was Lee Wiegardt -- a third generation oystergrower. Lee agreed to become chair of the ad hoc group that would provide local guidance -- Willapa Advisory Group. Some of the most prominent and successful entrepreneurs in the area were invited and agreed to participate. They are a representative cross section of the livelihoods found within the watershed including a cranberry grower, crabber, fisherman, cattle rancher, dairy farm owner, small business owner, bed and breakfast hotel owner, minister, forester, and department store owner. They also represent a diverse array of local views on issues: some clearly identify themselves as environmentalists, others vigorously shun that label.

The Willapa Advisory Group makes up one element of the three-way partnership called the Willapa Alliance. The Nature Conservancy and Ecotrust are the other partners, each contributing in accordance with their expertise. TNC and Ecotrust built into the design of the Willapa demonstration project flexibility to accommodate the natural unfolding of complex human dynamics that would inevitably take place. To give it some structure and momentum, TNC and Ecotrust provided funding for the Willapa Advisory Group to hire consultants to gather useful information for strategic decision-making, stimulate local community involvement, and provide visible benefits.

Elements of the Demonstration Project

The project as originally conceived had four major components: community development, scientific capacity building, ecological economic development, and fisheries resource restoration. Each

element of the project will be discussed briefly below. Emphasis will be placed on the work I am personally involved in to "empower" local people to participate in setting the long-term policies that will determine their future.

Community Development

American poet and conservationist Wendell Berry wrote:

> The answers, if they are to come, and if they are to work, must be developed in the presence of the user and the land; they must be developed to some degree by the user and the land.

One aim of the demonstration project is to stimulate the formation of an organization rooted at the local level that would permit citizens to help make the decisions that profoundly affect their futures. Before agreeing to assist with the creation of a community organization, the Willapa Alliance decided that a realistic understanding of the attitudes prevalent in the communities of the watershed should be developed. Once local views were canvassed, it would be possible to size up accurately the feasibility of catalyzing the formation of a local non-governmental group.

Both the outside environmental groups and the local advisory group members felt the need to understand local attitudes, but for somewhat different reasons. For the environmentalists, positive community attitudes were an essential ingredient of a successful project. Environmental groups are under very rigorous competitive pressures to show results and be effective in order to secure funding for their work. The successful ones have learned to be pragmatic and carefully scope out the feasibility of their goals. Without the prospect of local commitment and real engagement in this effort, the project would not produce results and as a result the competitive position of the professional environmental groups would be compromised.

The locals, on the other hand, faced different pressures. Living in small communities, they risked lasting embarrassment and the wrath of their neighbors if they allied themselves with a group that caused problems for the wider community. Secondly, the feasibility of the effort was a large factor for each member of the local group in determining whether the time and effort were worth expending. Many of the members of the group have businesses and families to take care of and serve their communities through a variety of other voluntary activities.

In November 1991, I was contracted to help the Alliance determine the feasibility of starting a community-based group that would

influence long-term policies on the environment and development. For three months, I surveyed local leaders including bankers, lawyers, business owners, mayors, council members, commissioners, port managers, fishermen, farmers, and real estate developers. The findings of my interviews were presented to the Alliance at a strategic planning session in April 1992. The local attitudes and opinions were grouped into: initial attitudes about the Alliance, attitudes about government performance, attitudes about the status of the environment, and suggestions about what a local group could do, and how it should do these things.

Local leaders expressed moderate levels of distrust associated with the intentions of the two conservation groups involved in the project. They feared that outsiders were there to impose their view of what the Willapa and surroundings should be: an area for affluent city dwellers to play and own vacation homes. When asked to describe local views on environmental policy, most confirmed that locals have a very strong commitment to maintaining the beauty and health of their surroundings. They all called themselves "environmentalists of a type," but nevertheless quickly pointed out their discomfort with the confrontational style and tactics of environmental groups. They want to see a common sense approach to maintaining environmental quality. That is, one that gives sufficient importance to meeting human needs. Still many acknowledged that differences of view are not likely to go away, so it is important to accept and respect them and avoid personal insults. People in small communities have to get along with each other.

Locals reported current environmental practices are much better than those of the past in relation to logging, fishing, farming, waste disposal, and pest control. Recycling is routine in many families. Still many residents remember the days when there were many more fish in the streams, clams on the beach, and wildfowl in the bay. They see this long-term depletion of resources as a threat to the continued vitality of the local economy. In addition, population growth has raised the specter of much more serious and costly water supply and waste disposal problems.

Locals reported feeling that the sensible environmental perspective on issues has not been well represented within the communities of the Bay, because they have been in a defensive mode. Environmental regulatory agencies at the state and federal level often force inappropriate policies and take an adversarial approach in dealing with local people. They claim that many constructive private local initiatives have been derailed by the state government. Bureaucrats are perceived as lacking the urgency and pressure for efficiency that motivate private entrepreneurs. Local governments were also the object of

widespread criticism. Local governments were described as overwhelmed by their responsibilities as a result of state and federal government mandates that have shifted a number of burdens to the counties and cities. These responsibilities take time and energy away from the locals and prevent them from responding to their own priorities.

The interviews produced the following suggestions regarding what a citizens group could contribute:

(1) a strong, unified, and clear voice for the communities of the Bay;
(2) influence government policies through advocacy and /or professional analytic work;
(3) help government get public support for positive goals;
(4) bridge some of the divisiveness that has fragmented the communities;
(5) bring in expertise, new ideas, new economic resources;
(6) spur the creation of jobs that don't harm the environment;
(7) bring more scientific understanding into the dialogue over issues;
(8) generate educational materials on the environment and sound businesses for the schools and communities.

Issues were identified as among the local priorities were: job retention and creation, population growth management, exotic weed eradication, intertidal pest control, waste disposal, habitat and wildlife restoration, overall directions for economic growth, inadequacy of the infrastructure, wetlands regulations, the property rights question, integrated pest management, non-point pollution, erosion, soil compaction, sedimentation, demographic changes in the human populations, and the sustainability of natural resource uses.

Suggestions made by local leaders interviewed during this survey included:

(1) that the citizens group should reach out to all people in the area and its board should have cross section of users and viewpoints;
(2) that it should try to speak to people in words that are easy to understand not garbled bureaucratic language so often used to muddle issues;
(3) that the group should make efforts to show respect for all views by avoiding a "know it all" and condescending attitude;
(4) that it should emphasize community-oriented education activities, including those targeted for the schools and for locals who have not had the opportunity to enjoy the bay;

(5) that it should show an interest in alternatives for displaced resource users;
(6) that to some lesser extent the group should provide for the education of tourists; and
(7) that it should be the catalyst for local volunteer efforts to monitor and understand the dynamics of the Bay.

The interviews served as a means to listen to local perspectives. Rather than following the environmental community's traditional tactic of imposing views brought in from "enlightened" outsiders, the Alliance made extensive efforts to learn about problems from local points of view. This interest in "hearing out" the locals was greatly appreciated and removed some of the early resistance to the involvement of The Nature Conservancy and Ecotrust.

Willapa Science Study

The second element of the demonstration project is to analyze the need for further scientific understanding of the ecosystem and for greater local research capabilities to serve the Willapa community. Dr. Michael Colby, an experienced professional consultant who has done pioneering work on the interconnections between healthy economies and sensible environmental policies, was hired to provide the leadership for this aspect of the project. His work in the fall of 1991 analyzing the economy of the watershed and suggesting a means to better factor in environmental costs and values was well received.[11] Colby has met citizens, county, state, and federal officials to discuss the goals of the Alliance, seek advice, create an inventory of existing monitoring and research programs, and identify scientific information needs. He will be developing a plan to meet the continuing needs for scientific understanding of the ecosystem over the long term and for public education regarding the status and trends of natural resources.

Fisheries Enhancement Study

Bruce Suzumoto, a well-regarded biologist with long experience in fisheries enhancement in Alaska, was contracted to study and assess the status of fisheries stocks in Willapa Bay. He has gathered data and analyzed historic trends with regard to all Willapa's salmon species. Two of the most valuable species -- coho and chinook -- have only been maintained at historic population level by intensive hatcheries

[11] Colby, M.E. "Eco-Accounting and the Human Activities of the Willapa Economy," A Report to the Willapa Alliance, April 1992.

and other enhancement programs. A less valued species -- chum -- has not been promoted through enhancement and has declined substantially from historic levels. This information suggests there are realistic opportunities for enhancement. Suzumoto is now preparing a number of pragmatic suggestions regarding possible directions for the near term work of the Alliance, including a thorough stream survey and salmon inventory of the watershed. He will also develop recommendations regarding the development of a comprehensive and integrated approach to fisheries enhancement that could overcome the lack of cooperation and distrust among all those involved in using and managing the resources.

Eco-Development

The fourth element of the project addresses the need for economic development that does not degrade the productivity and health of the ecosystem. Ecotrust will collaborate with the Alliance to provide investment capital and business development advice to promote better environmental practices. Ecotrust's Director for Eco-Development, Alana Probst, will serve as liaison to local entrepreneurs and has developed a series of criteria to identify businesses and economic practices that should be encouraged and supported. Among the criteria identified thus far are: waste minimization, energy efficiency, durability of product, and whether value has been added to native resources.

Strategic Planning: The Local Perspective

Members of the Alliance meet monthly to exchange information about the problems they share. Each meeting provides the setting for discussing the interconnections and conflicts that arise as these neighbors use the bay and its watershed: oystergrowers talk with cattle ranchers about the impacts of animal wastes on shellfish beds downstream; crabbers discuss with oystergrowers the use of chemicals that affect crabs; and fishermen talk with loggers about the impacts of erosion and siltation on finfish habitat. For two days in mid-April, the Alliance convened a strategic planning session to map out the future of the partnership and in particular discuss immediate steps and long term directions. The group reached agreement on a statement which describes the mission of the Willapa Alliance: To enhance the diversity, productivity, and health of Willapa's unique environment, to promote economic development, and to expand the choices available to the people who live here.

The group also developed a list of the objectives which it would support:

(1) strengthening of a sustainable natural resource-based economy,
(2) enhancement of water quality and reduction of pollution,
(3) resolution of problems associated with population growth,
(4) increased understanding of environmental problems,
(5) improvement in government agency decision-making regarding management of resources, and
(6) the building of community consensus around the watershed for achieving the above-mentioned ends.

Among the chief challenges discussed during the session were: the lack of understanding and/or agreement on the status of the environment; loss of productivity and decline in natural resources; water quality deterioration; lack of high quality, ecologically sound jobs; inappropriate and burdensome regulations; and threats posed by exotics and pests.

The group decided to move forward with formal incorporation of the Willapa Alliance as a non-profit organization. Foremost at issue in designing the non-profit is the question of whether a community-based science facility should be closely connected with a citizens advocacy or policy group or whether two separate organizations should be formed. Community-oriented education will be a central part of the future work of the Alliance.

The Willapa project is in its earliest stages. It has the backing of two experienced and successful environmental organizations that are committed to local participation in the setting of sustainable policies. Adequate funding has been raised for a start-up period of three years. It is contemplated that Ecotrust and The Nature Conservancy will provide assistance as needed for a much longer period. The partnership is considered a beneficial and symbiotic relationship. Without local participation, gains made by outside intervention often fade or evaporate once the outsiders leave. Without outside assistance, local groups often face insuperable financial and political weaknesses.

Conclusions

Dr. Solow's criticism of those who simplemindedly advocate caring for the future but have little or no regard for present human needs has merit. When the ghettoes in Los Angeles recently exploded with rage, even conservative President George Bush pointed to the need to pay attention to "underlying causes." Economic and social poverty that

leads to rage and despair undermine communities and nations until individuals feel they having nothing at all to lose. The frequent lack of interest in the plight of poor people displayed by often affluent and privileged environmentalists threatens to lead to a backlash by working people both in the U.S. and in other nations. Environmentalists need to confront the "underlying causes of environmental degradation" in both North and South. In beginning to do so, they have found the solutions are not neat, not quick, and not easy. I believe the work being undertaken in our small part of the U.S. serves as an example of the "cutting edge" or pioneering efforts by professional environmentalists to do the hard, slow, long-term work of changing the multitude of ways people impact their environment.

Now that UNCED is over, can we honestly say that the output of this Earth Summit has been worth the millions of dollars that were invested in its production? As an educational experience bringing together officials and citizens from around the world, UNCED probably has stimulated incalculable benefits for years to come. But UNCED also revealed the enormity of the chasm between admirable goals and intentions on one side and wherewithal and abilities on the other. Has this moved us ahead or served as a wedge to pull us apart?

The experience should at minimum prompt us to question: What is practicable at the centralized global level? For example, is it reasonable to spend scarce international funds on global discussions about land-based sources of marine pollution when the Caribbean forum desiring to develop a method to attack the problem closer to the ground level is literally starving from lack of attention and money? Perhaps before we undertake to advocate policy development at the global level we should explore the cost efficiencies of such. And perhaps it is time we focus more international attention on how to funnel the money and resources to the community level so that international high-minded principles make a difference in reality.

COMMENTARY

David Freestone
Law School
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It is a daunting task to comment on these three most interesting and diverse papers. However, I would like to say something about three aspects of the papers we have heard. First, on the UNCED process itself, I would add a short comment to the masterly review by Tucker Scully, and then its significance for two issues: the protection of marine ecosystems and the related issue of the control of land-based sources of pollution.

First UNCED. Although the Rio Meeting was the precondition for and the culmination of the whole process, I would wish to draw a distinction between the two. The UNCED process as a whole, the work of the PrepCom, and the expert and national studies that have fed into them seem to me to have been a most valuable exercise. While I take Miranda Wecker's point that regional and national work may have been delayed or set back by the requirements of UNCED, this must be weighed against the educative effects and the political impetus that this process has given to environmental concerns. Few people here, I think, would say that the years spent negotiating the Law of the Sea Convention were a waste of time, even though ten years later the Convention is not in force. I hope I am not being excessively idealistic in thinking that environmental concerns will never be the same again, or that international environmental law has taken a significant leap forward. Against this background, the Rio Meeting itself was simply the beginning of a new equally important process.

I suspect I am not alone in not yet having had the opportunity to see all the documentation and examine it in detail. I look forward to many fruitful weeks ahead reading and thinking about *Agenda 21*. I was horrified to hear that it was 800 pages and might be opposed to its wide circulation on environmental grounds alone! It is the inevitable consequence of the meeting of two obvious injunctions: to think globally rather than locally, and holistically rather than sectorally. What has been attempted is a global holistic approach; it is inevitably massive.

Only a few of us -- and in this I do not include myself, although I would include our chair, Lee Kimball -- have the capacity to deal

with issues of this magnitude. Although I am a very firm supporter of regional cooperation and action, I do recognize the importance of a global agenda being set for regional action. Again, the Law of the Sea Convention provides a good illustration of the significance of providing a global framework for local and sectoral programs.

The global agenda has, of course, changed considerably even in the ten years since Montego Bay, and the marine environmental agenda in particular has moved on to other things, notably global warming and sea level rise, marine biodiversity, recognition of the importance of the unity of large marine ecosystems such as the one that we have heard about this morning, and the fundamental impacts on them of all forms of land-based marine pollution.

But the 1982 Convention does still provide the starting point. Article 194 does require "measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other forms of marine life." It is possible to read into the provisions of Part XII of the Convention endorsement for a marine ecosystem approach to marine conservation even on the high seas, although these obligations are even less precise than those relating to pollution control. It is indeed also possible to find endorsement for an anticipatory or precautionary approach (which *Agenda 21* now urges upon us in many points of its text as well as in its preamble) to marine environmental impacts.

Incidentally, a marine ecosystem approach has also been taken by the Parties to the 1983 Cartagena Convention (Caribbean Regional Seas Framework Convention) in their Protocol on Specially Protected Areas and Wildlife (SPAW) by the simple but innovative expedient of designating corals, mangroves, and sea grasses as protected species that "may only be utilised on a rational and sustainable basis."[1] The relevant paragraph of the interpretative statement made by the Parties at the plenipotentiary Meeting in June 1991 may well be worth reading in full :

> (6) in the case of species essential to the maintenance of fragile and vulnerable ecosystems (such as mangrove forests and coral reefs), the listing of such species was felt to be an 'appropriate measure to ensure protection and recovery' of the ecosystem which they constitute and hence to fulfil the requirements for listing under Article 11(c) of the Protocol; because these systems as a

[1]See Article 1 (1), Protocol on Specially Protected Areas and Wildlife. Further Freestone (1991) 22 *Marine Pollution Bulletin* pp. 579-581.

whole are subject to anthropogenic changes, as well as large scale natural disturbances (such as the consequences of sea-level and temperature rise induced by global warming), appropriate protection should be focused on the system as a whole, rather than on individual specimens; this approach was thought to be appropriate to foster comprehensive national and regional policies for managing these fragile and threatened ecosystems."

But as we can see from the description that Dr. Okemwa has just given us of the East African Large Marine Ecosystem, the more sophisticated our knowledge of marine ecosystems becomes, the more we appreciate the interconnections between the ocean systems and between the oceans and other systems such as the atmosphere. For example, the impact of atmospheric depositions, subject of the 1986 Protocol to the 1974 regional Paris Convention (on the prevention of marine pollution from land based sources) is still not fully appreciated. Traces of DDT found in coral tissue in Florida are thought to have originated from Africa.

Again the 1982 UNCLOS provides a starting point. Part XII provides a very general obligation to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, *taking into account* [emphasis added] internationally agreed rules, standards and recommended practices and procedures"[2] and "to establish global and regional rules, standards and recommended practices and procedures."[3]

The 1985 UNEP Montreal Guidelines, which the 1982 UNCLOS will oblige parties to take into account when the Convention comes into force, were derived from the existing treaty law -- the 1974 Paris Convention, the Helsinki Convention of the same year, and the 1980 Athens Protocol to the Barcelona Convention. They do provide important assistance, but to date legal instruments on land-based sources have been exclusively regional, three like the Athens Protocol are under the auspices of the UNEP Regional Seas Programme (in addition to the Athens Mediterranean Protocol, the 1983 Quito Protocol in the South East Pacific and the 1990 Kuwait Protocol to the Gulf Convention). I note that *Agenda 21* calls for state cooperation to "consider updating, strengthening and extending the Montreal

[2]Article 207, 1982 UNCLOS.

[3]Article 207 (4), 1982 UNCLOS.

Guidelines" and to "initiate and promote the development of new regional agreements"[4] but it also invited the UNEP Governing Council "to convene, as soon as practicable, an intergovernmental conference on the protection of the marine environment from land-based activities."[5] The primary objective of such a conference is deliberately left open, but it is clearly designed to leave for further discussion and consideration the desirability and/or feasibility of a global convention on land-based sources, such as that proposed by many bodies including the London- based Advisory Council on Pollution of the Seas (ACOPS).[6] In its submission to UNCED, ACOPS claims that some 80 percent of marine pollution is from land-based sources and calls for a global framework convention with regional protocols. The UNCED figure is 70 percent, but there is no argument that it is both qualitatively and quantitatively by far and away the worse single cause of marine pollution. It is therefore worth looking at the background to this recommendation in *Agenda 21.*

At the Third UNCED PrepCom Session last summer (August/September 1991) in Geneva, there was consideration of a report by an intergovernmental Meeting of Experts on Land-based Sources of Marine Pollution, which met in Halifax in May 1991. PrepCom members also had available to them the results of a UNEP study of action taken to implement or respond to the Montreal Guidelines since 1985. At the national level, only thirty-four replies were received -- a large proportion of this small number of replies amounted to nothing of substance. At the international level there have been a number of bilateral agreements (including the 1989 U.S./Canada Agreement on the Gulf of Maine), and the Regional Seas Kuwait Protocol of 1990. Regional Seas Protocols were also reported to be in preparation for the Caribbean under the Cartagena Convention and for West and Central Africa under the Abidjan Convention. To that list must now be added the recently completed Black Sea Convention, which includes a LBS protocol, and the new 1992 Helsinki Convention for the Baltic.

Three possible options were discussed by the PrepCom.

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[4]Agenda 21, Chapter 17, Protection of the Oceans, all kinds of seas, including enclosed and semi-enclosed seas, coastal areas and the protection, rational use, and development of their living resources. Paras 17.26 (a) and (c).

[5]Ibid, para 17.27.

[6]For details, see "Land-based Sources of Marine Pollution; Marine Issues for the 'Earth Summit,'" *Marine Policy* vol. 1, no. 1 (1992) special issue.

First, a global convention. The advantages of this were said to be that the same obligations would be imposed on all parties, thus creating a "level playing field" in economic terms for all parties. A treaty was also said to be more likely to contain supervisory mechanisms. The disadvantages of a convention were that it would take a long time to negotiate and maybe even longer to come into force, that it would only be binding on the parties, and that in the search for the widest possible consensus it would be unlikely to introduce radical new elements.

Second, a non-treaty instrument, a declaration or resolution similar to the 1972 Stockholm Declaration or now the Rio Declaration, or the 1982 World Charter for Nature which was enacted by UNGA Resolution, as of course was Resolution 2997 which set up UNEP itself. The contents of such a declaration might be a statement of principle and an Action Plan, perhaps with its own institutional machinery.

Third, a combined approach. In such an approach, a treaty might provide a statement of general principles and duties of states perhaps with an institutional framework. This would be combined with an Action Plan.

I have always been, and remain a firm supporter of, regional action, but I have to admit that in reviewing these three options I am a late convert to the idea of option three: a treaty supported by an Action Plan. In supporting such a move I would not seek to undermine the important regional work already being done on this, particularly by the UNEP Regional Seas Programme, but the experience of the 1985 Montreal Guidelines suggests that their primary function has been in providing a model for the converted -- providing the international criteria that those countries and regions already committed to the development of legal instruments can follow. We need to be moving beyond this; we should be urging on the "foot-draggers" and providing serious assistance to those who simply do not have the resources to take effective national action.

Let me take some examples from two rather different regions with which I have some familiarity: The Caribbean and the North Sea. As far as the Caribbean region is concerned, the control of land-based pollution comes closest in the marine environment to the Environment versus Development dilemma. In the small states of the Caribbean, development is coastal development, pollution is marine pollution -- in a small coastal state, virtually everything ends up in the sea. The development of effective controls over land-based sources has in some influential national quarters been seen as a potential drag on development.

The Caribbean Environment Programme has already developed through its CEPPOL programme a list of priorities and, as Miranda Wecker's paper points out, it is about to start the process of negotiating a land-based sources protocol to the Cartagena Convention.[7] But even when that process is complete, the protocol will need detailed implementation in a myriad of small legal systems, in each of which the national experts, or more probably expert, who negotiated the Protocol will have to convince his/her government of the importance of implementing a measure that may be seen in the short term as an impediment to developments that will earn urgently needed foreign revenue.

The North Sea is a very different region. It has been described as "a regional sea with possibly the densest population and industrial hinterland and the greatest riverine input and seagoing traffic of any sea area in the world".[8] It was the first region to have its own land based sources treaty, the 1974 Paris Convention. Other regional bodies, too, have taken responsibility for land-based pollution, including the European Community and the Rhine Action Programme, which regulates the biggest riverine input to the North Sea. I would not want to make too much of this, but there is not always convergence between the criteria they each adopt and the substances they regulate.[9] In addition, there are other regional regimes that have often overlapping marine environmental powers and responsibilities: the Oslo Convention (now being merged with the Paris Convention), the 1983 Bonn Agreement, the Wadden Sea Secretariat, and the Paris MOU on Port State Control.

It was in order to try and provide an holistic overview of the problems of the North Sea that the German government called the first International North Sea Conference on the Protection of the North Sea (INSC) in Bremen in 1984. Further conferences were held in London in 1987 and The Hague in 1990. A fourth is planned for Copenhagen in 1995. The INSCs act by declaration -- a non-treaty instrument. The declarations are then implemented by the relevant existing institutions.

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[7]For an assessment, see UNEP Caribbean Environment Programme RCU, "The Land-based pollution protocol to the Cartagena Convention" in *Marine Policy*, ibid.

[8]P.C. Reid, "The Work of the North Sea Task Force," in Freestone and IJlstra, *The North Sea: Perspectives on regional environmental co-operation* (Graham and Trotman/Martinus Nijhoff, 1990) pp. 80-88.

[9]This has been carefully analyzed by A. Nollkaemper, "The Rhine Action Programme," in *The North Sea*, Annex, pp. 136-138.

It has incidentally been suggested that the INSC process itself should be codified into a "North Sea Treaty." To be convinced of the need for such a move myself, I would want to see evidence of some "value added," of some additional power or benefit that could be achieved by this which could not be achieved by the existing arrangements. Inevitably such a debate forms part of a general discussion as to whether the INSC process is a success, but it cannot be denied that it has provided the overview that was needed, and has synchronised the multifarious activities already being undertaken.

I use these two examples to flag up what I see to be the two main advantages of this combined approach -- a framework convention on land-based sources together with an Action Plan. First, it would provide a detailed global agenda for implementation that would do more than the Montreal Guidelines in "bringing on" those states or those regions that have as yet demonstrated little or no interest in implementing effective national measures. It would also provide a vehicle for global aid support.

Second, it would provide a forum for a global overview and co-ordination of the issues. Action would be taken regionally and nationally, but the experience and insights of the leaders in the field would be readily available to all. Baseline standards could eventually be developed at the global level (I would not see this as possible in the short term). In this, a comparison could be made with the role developed by the London Dumping Convention (or the Non-Dumping Convention, as it is now being called).

I would not see such a global framework as a whistle-blower (supervisory) so much as a co-ordinator and facilitator. Action -- in the form of the negotiation and strengthening of regional agreements -- would continue to be taken at the regional level to meet specific needs. And, of course, ultimately action would have to be at the national level.

In other words, we are back to the well-tried adage, "think globally; act locally." The papers this morning have reflected this important approach in a most poignant way. Mr. Scully's review of UNCED provides the global holistic overview, Dr. Okemwa's introduction to the East African Large Marine Ecosystem provides an holistic approach to a large marine ecosystem, and Miranda Wecker's paper on the Willapa Project provides a vivid and unfortunately rare attempt to provide an example of sustainable development in the North at a very local level. I am grateful for the opportunity to have been able to comment on them.

DISCUSSION

Lee Kimball: David did an excellent job of bringing us back to a whole series of questions of a more legal and institutional nature regarding follow-up to the Rio Conference in the oceans area, but let me just mention a few things. We heard this morning about some of the steps following the Rio Conference. Those include (1) the area of international fisheries management for highly migratory species and straddling stocks; (2) the questions that will arise in trying to enhance non-governmental involvement in reviewing and implementing *Agenda 21*; (3) questions related to the profusion of regional agreements in the marine area -- where David described some of the cohesion that needs to occur and that is occurring in some regions, among existing agreements. This will become even more important as the regional agreements continue to be elaborated, not only with respect to purely marine issues but also extending to atmospheric and watershed management components affecting the marine environment. Also between regions, as he pointed out, if you have a whole series of agreements on land-based sources, how do you cohere on the global level? And (4) what I would call the compact approach to international lawmaking. We've seen more of this recently with the climate change and biodiversity treaties, whose purpose is in part to start a process and bring on board a large number of international participants in treaty negotiation and implementation, and in part to link the policies with the means to implement them. This is a very important part of what was discussed throughout the Rio Conference.

For those of you who have been so long involved with the law of the sea, you are well aware of issues raised by a binding approach to financial and technical assistance in implementing the treaty's deep sea mining regime, and where we have ended up on that issue as opposed to the more non-binding, hortatory approach to international cooperation that occurs in the treaty's articles on marine science and technology, and fisheries. In the international treaties (compacts) we're entering into now, commitments to implement obligations are linked to the availability of financial and technological resources under, say, the ozone protocol and climate treaty, even biodiversity in its own way; there is *Agenda 21*, which relies more on public and media-related pressure to implement the agreements, including the new UN Commission on Sustainable Development. *Agenda 21* doesn't contain binding commitments, but by keeping public attention focused on it, you may give impetus to its implementation, including the provision

of adequate financial and technical assistance. And then there is the third option, which is usually referred to as "conditionality" in development assistance programs, which puts pressure on recipients of assistance to implement international legal agreements and even some soft law measures. The respective emphasis of these three mechanisms for financial and technical assistance in the post-Rio era will be interesting to follow.

Are there any questions?

Louis Sohn: What impressed me about what has happened in Rio -- and it's really a sequel to Stockholm -- is the increase in the normative content of everything that is being adopted. We call it *Agenda 21* or we call it something else, but slowly somehow norms seep into it. We call them guidelines or recommendations and so on, but after a while people forget about the form; they concentrate on the content. This is, of course, a common process in international law. We have seen how the Helsinki Accords about human rights resulted in a revolution in Russia and the tremendous changes that happened in Eastern Europe because of those hortatory, supposedly non-binding declarations.

The environment is now the second area after human rights in which the United Nations system is slowly developing norms that somehow become binding even if they are not called binding. In this particular area of our own, the law of the sea, we have also a sequel. People forget that at the Law of the Sea Conference, as far as the environment is concerned, there was absolute general agreement by everybody that those norms are subject to international adjudication. There are four different systems of possible adjudication in the Convention, and everybody who accepts the Convention by that very fact accepts one of those four systems. If they don't actually choose one, then arbitration becomes binding on them anyway. We carefully provided that not only on the high seas but even on the continental shelf and in the exclusive economic zone area, provisions on dispute settlement are completely binding subject to no reservations. Once those provisions come into effect, it is one of those tribunals that is going to interpret them. It is not enough to have binding or non-binding norms. What is even more important is to have proper implementation. Implementation can be a tribunal, can be a commission, can be something else. For example, in the International Labor Organization they don't go to the International Court very often, but they have a committee of experts that every year interprets some labor conventions, and everybody accepts that these are binding interpretations because they are adopted by people who understand, who know

the Convention, the process of drafting, etc. The same is true already in the uniform laws area. Uniform laws have to be uniformly interpreted; the work of ten or fifty years of drafting a uniform law is no good if the day after it is adopted people start interpreting it in different ways.

So it is very important to remember this connection; we have gone one step further in the normative development, but we still have to proceed one step further also in the development of implementation. This kind of Commission on Sustainable Development might be the first step in the right direction, unless the state discovers it and becomes too scared.

Barbara Kwiatkowska: I have some questions for Tucker Scully, all on UNCED. The first is on the non-signature by the United States of the Biodiversity Convention. Did it have any influence on the oceans negotiations in terms of attitudes or atmosphere around the oceans-related negotiations, and is there any chance of the United States coming to the Biodiversity Convention? The other question is on the highly controversial migratory, straddling stocks. You mentioned, Tucker, that the issue would be discussed by a United Nations conference to be convened in the future, with emphasis on regional solutions. Will regional solutions solve the issue? This is part of the unfinished business of UNCLOS III; the problem has continued for the last ten years, and all efforts taken regionally somehow haven't worked. Don't we need some guideline diplomacy or effort to have a more general formulation of the rights and duties of states involved? In the negotiating text that you yourself presented in March 1992, there was a specific provision that the guidelines concerning high seas living resources should be formulated. Is there any chance that such guidelines, or eventually a United Nations General Assembly resolution perhaps, will be developed? As we know, the resolutions on driftnet fishing or on fisheries in Africa have accelerated further developments in state practice.

The last issue, of course, is the position of the United States itself concerning the Bering Sea where, according to the draft I saw recently, the United States has pursued very clearly special interests with regard to stocks in the Donut Hole in the Bering Sea. American documents presented during UNCED also testified to a tendency in this direction.

Tucker Scully: First, the issue of biodiversity. Maybe I didn't give adequate time to this in the summary of the provisions of *Agenda 21*.

The program areas on coastal zone management and on marine living resources referred to issues relating to biodiversity both in a general and a specific sense. As Dr. Freestone has mentioned, the provisions of Article 194 of the Law of the Sea Convention are specifically referred to as objectives in the program areas relating to marine living resources in both the high seas and under national jurisdiction. The program area dealing with marine living resources under national jurisdiction specifically calls for states to take special measures to deal with areas exhibiting high levels of productivity and biodiversity, with specific priorities given to coral reefs, mangroves, sea grass beds, and other areas which are critical to the life cycle of marine species. The concept of ecosystem management is well reflected in the provisions.

A number of provisions with regard to marine biodiversity are strongly emphasized in the program areas of oceans. Those provisions, I would note, were concluded at the March session of the PrepCom, and thus I don't think that the dispute over the Biodiversity Convention had an impact on the oceans negotiations. The oceans negotiations were completed first, and frankly I think those who were involved in the biodiversity negotiations would have been well advised to take a look at the oceans provisions as well as another instrument that I think was mentioned by Dr. Freestone, which is the SPAW Protocol (the Protocol on Specially Protected Areas and Wildlife of the Wider Caribbean Region). The SPAW Protocol could have been very usefully drawn upon with respect to the conservation aspects of the Biodiversity Convention.

I don't know that I can speculate on what the future will be with regard to the Biodiversity Convention vis-à-vis the United States. The U.S. attitude was largely driven by finances and by biotechnology issues, not by biodiversity issues themselves. Personally, having worked on these issues with respect to the oceans chapter, I think the Biodiversity Convention in its conservation aspects is poorly drafted and a weak instrument. I don't think it would be worth signing other than for the idea that has been mentioned of developing a process to take the issues further. One could read its obligations as a setback since they apply, in my view, a concept of ownership to biodiversity based on assumptions about endemic species. But the convention is not limited to endemic species. It also deals with species that are migratory and are found across national borders.

Turning to the fisheries issues, I think the mandate of the conference is clearly expressed in *Agenda 21*. What the UN General Assembly will need to do, since the conference is part of this package deal compromise that emerged in Rio, is to discuss the modalities for

convening of the conference. I am quite convinced that there will be an effort to renegotiate the mandate of the conference, since it was a highly politicized and very controversial issue. I am also quite convinced that, whatever words are spilled in New York, the mandate will probably end up being framed in exactly the same fashion that it is expressed in *Agenda 21*. As to the question of guidelines or whatever, I think that the concept of developing better means of implementing the obligations of the 1982 UNCLOS is very much reflected in the provisions dealing with marine living resources in the chapter on oceans. The effort to develop more specific provisions as to how 1982 UNCLOS should be given effect will be very much the center of attention in the future conference convened under UN auspices. Controversy arose as the result of a very strong view that some of the proposals that were put forward with respect to straddling stocks or to highly migratory species were in fact flatly inconsistent with the provisions of 1982 UNCLOS. That is why, in fact, those proposals became so controversial. What was agreed was an attempt to deal with this through a future meeting. But I think it was very clearly expressed that the intention of the conference would not be to renegotiate the legal principles with respect to straddling stocks or to highly migratory species but to deal with how to give practical effect to those principles that are contained in the Law of the Sea Convention.

Finally, and this may relate to the point you raised about the United States and the Bering Sea, while the United States has ended up being a broker in this particular circumstance, it does have straddling stock problems in the Bering Sea, in the so-called Donut Hole, which we are seeking to negotiate. Negotiations have been instituted with respect to those populations of pollock found in the Bering Sea. But the end result of this is intended to be the specific regulations, the specific management measures that should apply to particular areas for particular fishery stocks. That is not what has been negotiated in 1982 UNCLOS, what was negotiated in *Agenda 21*, or what will be negotiated in a future conference. What will be negotiated, I think, are ways of giving guidance to those who must apply and deal with the management on a day to day basis. The implementation of management measures to deal with the sustainability of fishery stocks will have to be undertaken on a regular, regional, or in some instances on a bilateral basis to protect straddling stocks and to deal with highly migratory species. So, to respond to your question, yes, we -- the international community -- will be very much looking at guidelines, not guidelines that are aimed at altering the legal principles

that are contained in 1982 UNCLOS but guidelines that are aimed at giving practical guidance to those who are seeking to implement those principles in the real world.

Charles Higginson: I'm sorry I'm putting you in the docket further, Mr. Scully. As you said, *Agenda 21* very much emphasizes the importance of the 1982 UNCLOS as the basis for further implementation, but then the next paragraph says that implementation by developing countries of the activities set forth shall be commensurate with their individual technological and financial capabilities. Doesn't this possibly detract from what Professor Sohn just said about going one step further in the development of implementation by making the obligations of the 1982 UNCLOS dependent for developing countries on their financial capabilities?

Tucker Scully: I would think that the potential of countries, developed or developing, to implement the 1982 UNCLOS or any other international obligation does depend on their financial and technical capabilities. At UNCED this was part of the D side, the development side. But I would argue that that is simply a statement of the obvious. To state that in implementing these obligations one has to do it within one's financial and technological capability is a limiting factor, and one of the elements that was addressed in *Agenda 21* is the need to mobilize through appropriate international mechanisms ways of increasing the capacity of developing countries to give effect to these obligations.

Dale Krause: I have a couple of comments. I thought the paper by Dr. Okemwa was interesting because it raises some important issues. In that particular region, in the Northwest Indian Ocean, the international intergovernmental structures are really quite inadequate to deal with the problem. It is the most active ocean in the world, outside of the Antarctic, due to the reversing monsoon seasons, so the kind of infrastructure that Dr. Okemwa has developed is needed to tackle this problem. But it has to be tackled on a regional basis because the area is so incredibly complicated. With the combination of satellite imagery and modelling of the Indian Ocean, plus conventional research, one now has the capability of dealing with it. Kenya is quite capable of taking the sophisticated approach required, but it requires some help from the outside.

In dealing with these problems, intergovernmental organizations tend to be top down and driven by personal agendas. I think that, as

Dr. Okemwa indicates, the society in the region is doing very well in its development of marine science. We should probably look more closely at actually creating NGOs to do the job. I have an example from Asia. At UNESCO we had a large project on the mangrove ecosystem that stretched from Pakistan to Fiji and, if we follow what the United Nations Development Programme said, it was the most successful project they had ever had. When we considered the follow-up, we asked: Should it become an intergovernmental body? Should it be attached to an intergovernmental body? Should it be attached to an existing NGO? What we chose, or I should say what the scientists, environmental managers, and legal people of the project chose to do was to form an NGO. They formed the International Mangrove Society, which is now acting as follow-up and, thanks to Japan, there is money to fund the coordinating office. But this was a case where the existing intergovernmental structure could not handle it and where we really had to look at creating an NGO to get the grass roots involved.

David Anderson: Personal comments again. First of all, I'd like to ask Dr. Okemwa about IOMAC, the Indian Ocean Maritime Affairs Commission, which has some interesting programs for the Indian Ocean. We attended the meeting that was held at Arusha eighteen months ago. We have a very real interest in the Indian Ocean. We have recently established a 200-mile zone around the Chagos; we found that there are lots of problems over tuna in that area. So we're quite interested in IOMAC, and I'd be very interested in a Kenyan perspective on the work of that body. I think it may perhaps help with some of the problems you informed us about this morning.

Secondly, I would like to comment on the importance of grass roots as Miranda Wecker's paper stressed, and of NGOs, as Dr. Krause has just pointed out. Lee Kimball mentioned the proposal we have to call a conference in London of NGOs in the environmental field. We felt that the NGOs have played a very positive role in enhancing public awareness of human rights problems around the world. We have a lot of NGOs in London, including Amnesty International and Article 19. They have from time to time done things that have annoyed or upset governments, but on the whole the reading must be positive. In the environmental field there's a need. Governments shouldn't attempt to do everything, and NGOs have a very important role to play in bringing these grass roots opinions to the attention of decision-makers in government.

Finally, I'd like to ask Tucker a question if I may. I found his briefing on Rio very helpful. But one thing I'm not sure about is why we have linked the straddling stocks problem to the problem of highly migratory stocks. The straddling stocks problem isn't just on the Grand Banks and in the Donut Hole in the Bering Sea but can be perceived in several other parts of the world's oceans, probably as a result of increased fishing effort, which is now being exercised on the high seas beyond the 200-mile limits. But my impression has been that the problems over the highly migratory stocks, specifically the tuna problem in the Pacific, say, were well on the way to solution if not actually solved. It seems to me that the two problems are different. Perhaps we're having a conference with two discrete subjects on the agenda. Could Tucker tell us something more about the background to the decision to include in the agenda of the conference the highly migratory species?

Lee Kimball: Dr. Okemwa, do you want to respond to the question about IOMAC? You're not that familiar with the operation. Okay. Tucker.

Tucker Scully: I hope the Willapa Alliance will be invited to London to share its experience when you have your conference on NGOs.

On the question of highly migratory species and straddling stocks, you have noted one of the points that was an issue throughout the discussions. Clearly the management obligations that are set forth in the 1982 UNCLOS are quite different with respect to straddling stocks on the one hand and highly migratory species on the other. The reason that the two are both, though separate, to be the subject of the conference is basically a political rather than substantive or legal matter. Those who were seeking to focus the attention of UNCED on the straddling stock issue and who were seeking to raise the issue to the highest political visibility within the conference sought as many allies as possible, and included among those allies were a number of countries whose primary interest in fisheries had only to do with highly migratory species. What was put together was an alliance of countries that had differing interests but that sought through the UNCED process added support or added ammunition for their positions with respect to the fisheries stocks of greatest political concern to them. Those countries supported what was known as the Santiago Declaration, which articulated a number of principles with respect to the management of those species. A number of countries, including the United States, reacted strongly against the declaration. We believed

that an effort was being made to amalgamate the need for action with respect to the species in a way that was inconsistent with the principles of the Law of the Sea Convention, which, as I've noted, set forth very different conservation and management obligations with respect to those two stocks. The compromise was that those principles were not accepted the way they were articulated by that group of states. What was agreed -- and I think it has been made clear through the *Agenda 21* -- was that there would be an international conference with two very distinct issues on the agenda. They ought to be treated in respect to the law of the sea principles in distinct ways.

The result of covering two issues in the conference was political rather than legal. If you will note the difference between what went into Rio and what came out in terms of that provision, there was a strengthening of the point that the work and the results of any such conference should be fully consistent with the provisions of the 1982 UNCLOS, and that was designed to make clear that the provisions on highly migratory species and on straddling stocks are very different principles.

Carola Bjorklund: My questions are to Mr. Scully. Why did the UNCED process urge states to concentrate on national actions based upon the Montreal Guidelines, when we have regional actions, regional conventions, with detailed programs and more detailed agendas for dealing with land-based sources of marine pollution? Mr. Freestone referred to several regional programs, especially to the North Sea program, which contains two major conventions. I would like to refer to the Oslo Convention and to the Paris Convention, which also are dealing with land-based sources. I would also like to ask Mr. Scully how the U.S. delegation envisaged that the legal institutional follow-up will take place with regard to national actions. I can see certain problems with the control mechanism if the program and the follow-up of UNCED will solely concentrate on national actions.

Tucker Scully: The objectives of the program area on marine environmental protection start with the question of undertaking commitments at the national level; this is a different point than to say that the only action is at the national level. Regional action and global action are ways of providing and pooling effort in order to see that commitments are undertaken. Those commitments with respect to land-based activities have to be taken at the national level, or as we've heard from Miranda and others, even at the local level. The specific moves by

which one deals with the impact of land-based activities on the marine environment are at the local level; in the world in which we live at this stage, such commitments are undertaken by the nation-state. As Dr. Freestone pointed out, the Montreal Guidelines have been drawn on rather widely in the development of other instruments. They also sought to summarize the experience that resulted from the Helsinki and Paris Conventions of the mid-seventies. The Montreal Guidelines have not been applied very widely, and I think part of the reason for that is simply the difficulty in dealing with land-based activities and the fact, as has been pointed out, that one is getting into an area in which the choices are hard. One is often having to trade off development for economic activities and to find ways of integrating environmental development in that area. When you're talking about those areas that are of most economic importance to most countries, it becomes a very difficult issue. But I think the point was not to try to reinvent the wheel. Dr. Freestone made the point that several alternatives were taken or identified in the Halifax meeting in the runup to *Agenda 21*'s treatment of land-based activities and the impact thereof.

I think what happened in the discussions was that the issue of national versus regional versus global was seen as a false dichotomy. This is more a sense than a specific formulation, but I think it will prove to be true when the parties return to the table in UNEP or wherever that commitments need to be undertaken at the national level, and in many instances collective implementation or pooling of information at the regional level is necessary, and such activities as linking regional seas programs and other regional efforts, establishing clearing houses on information relating to marine pollution, marine pollution technologies, development of agreed advice to multilateral funding mechanisms, etc., will also need to be done at the global level.

There was a feeling that ultimately the implementation of measures to deal with the impact of land-based activities on the marine environment required commitments at the national level, which could then be translated to the local level, but that this should not be seen as a competition with regional and global means of stimulating and assisting that effort, of pooling and dealing with transboundary situations where multilateral efforts are required. A combined approach of some sort is what will emerge from the further discussions if, say, UNEP takes the initiative for the next round of international conference.

Lee Kimball: I'll let David Freestone have the last word.

David Freestone: Such an introduction may give undue importance to what I was going to say. I was simply going to stress the unique nature of land-based marine pollution. It relates to activities that emanate from areas under national control which then impact on international areas. It is therefore an activity that is particularly difficult to regulate by international mechanisms. This has been the experience even in the European Community, which has probably the world's most developed regional system of regulation of land-based pollution as well as an unusually efficient system of regional enforcement. There have been some long running and quite bitter debates over the methods the EC should adopt for assessing water quality -- notably whether it should use an ambient water quality (immission) or a point source (emission) approach. There is regulation in place establishing standards for bathing and other waters and there is reported to be in preparation a directive on the ecological quality of waters. Although it is said to be in its tenth or eleventh draft, it is not freely available because it is expected to run into political difficulties with some Member States. As I left the UK on Sunday, there was a report that Jacques Delors, President of the EC Commission, was considering proposing the withdrawal of the EC from the whole program because it is such a major issue of political controversy. I do not know if anything will come of this suggestion, but it does indicate the very real problems that exist in moving from national to regional controls. Taking it to the global level would be even more problematic; it would be impossible, as I sought to suggest, to establish baseline standards at this stage at a global level. We just do not currently have the facilities, at a scientific, technical level, or at an institutional, coordinating level.

Lee Kimball: I'd like to thank our whole panel for their presentations and their question-and-answer session here. It has been very useful.

PANEL III:

THE MEDITERRANEAN: SELECTED ISSUES

INTRODUCTION

Dale C. Krause
Marine Science Institute
University of California, Santa Barbara

I have been asked to chair this session, which was organized by Professor Tullio Scovazzi. I think it is appropriate to hold this program here. The Mediterranean Regional Seas Programme was the first UN Regional Seas Programme to be developed, and it was developed very well, serving as a model for the remainder of the programs. The papers that will be given here are examples of the high expertise and consciousness that exists in the Mediterranean, and we can see how the evolution has occurred.

The first speaker is Barbara Kwiatkowska, who is the Vice Director of the Netherlands Institute for the Law of the Sea at the University of Utrecht in the Netherlands. The second speaker is Professor Jose Juste Ruiz from the Faculty of Law at the University of Valencia, Spain. Then we will hear from Professor Maja Seršić of the Faculty of Law at the University of Zagreb in Croatia, followed by a paper from Professor Umberto Leanza of the International Law Faculty of the University of Rome II. Next, a paper from Dr. Maria Clara Maffei of Faculty of Jurisprudence at the University of Parma, and finally, a paper from Dr. Gianpiero Francalanci of the Hydrographic Institute of the Italian Navy and the former Director of Cartography at Agit, the Italian oil company.

GENERAL FISHERIES COMMISSION FOR THE MEDITERRANEAN (GFCM): PROSPECTS FOR THE FIFTH DECADE

Barbara Kwiatkowska
Netherlands Institute for the Law of the Sea
University of Utrecht

Introductory Remarks

I greatly appreciate opportunity of being here and I would like first to thank Professor Tullio Scovazzi for inviting me to join this panel. In fact, Tullio's invitation coincided with another invitation I received last year from Dr. Peter Sand, Principal Legal Officer of the Geneva Secretariat of the United Nations Conference on Environment and Development (UNCED), to contribute to an evaluation of the existing fishery treaties. This evaluation was undertaken by UNCED with a view to examine possible areas for further development of international environmental law in the light of the need to integrate environment and development, especially taking into account needs and concerns of the developing states. Since one of the treaties covered by my consultancy was that establishing the General Fisheries Council -- now Commission -- for the Mediterranean (GFCM), I welcomed Tullio's invitation as enabling me to continue my specific interest in the development of cooperation in fisheries of the Mediterranean.

Objectives and Main Characteristics

The GFCM is one of the regional bodies of the UN Food and Agriculture Organization (FAO) created -- as was the Indo-Pacific Fisheries Commission (IPFC) -- under Article 14 of the FAO Constitution in 1949. The term "Council" used originally in the name of GFCM was replaced by the term "Commission" as a result of Amendments adopted at the GFCM 19th session held in Livorno, Italy, in 1989. The GFCM -- along with the IPFC (created in 1948) -- is one of the oldest of the now nine FAO regional fishery bodies.

The GFCM provides a cooperative forum for member states of the United Nations having, as the 1976 Amendment specifies, "a mutual interest in the development and proper utilization of the living marine resources of the Mediterranean and the Black Sea and connecting waters" (preamble). This area coincides exactly with FAO Statistical Area 37, and comprises five subregions: Baleares and the Gulf of Lions, the Adriatic, the Central Mediterranean, the Eastern Mediter-

ranean, and the Black Sea. The GFCM Agreement has a bearing on the environment and the protection and sustainable development of fishery resources outside the region, since some species covered by the Agreement are migrating in both the Mediterranean and the Atlantic Ocean. The GFCM area wholly falls under the competence of the International Commission for the Conservation of Atlantic Tunas (ICCAT). Three GFCM members (France, Monaco, and Spain) participate in the International Whaling Commission (IWC).

As a result of the 1976 Amendments, the GFCM (as the IPFC) evolved from a fisheries research organization into an organization competent in all matters pertaining to conservation and rational management of fisheries. As is the case with many other fishery organizations, the detailed recommendations and other activities of GFCM contribute to the implementation of broad policy objectives laid down in the GFCM Agreement.

Both the Mediterranean and the Black Seas are semi-enclosed and are thus characterized by very slow water exchange and cumulative effects of pollution. The Mediterranean is connected to the Atlantic through the narrow Gibraltar Strait and to the Red Sea by an artificial waterway, the Suez Canal. The Black Sea is in turn connected to the Mediterranean through the Turkish Bosphorus and Dardanelles Straits. Both the Mediterranean and the Black Seas are shelf-locked, while the Black Sea -- as the North Sea and the Baltic -- is also zone-locked by 200 mile exclusive economic zones established by the four bordering states. The Mediterranean remains one of but a few regions worldwide not covered by overlapping 200-mile zones (such zones having been proclaimed by only Egypt and Morocco). Whereas four of the major Mediterranean GFCM members (France, Italy, Greece, and Spain) are member states of the European Community (EC), the internal and external EC Common Fisheries Policy (CFP) established in the context of 200-mile zone extensions does not apply to the Mediterranean.

Another major characteristic is the GFCM membership, which reflects location of the Mediterranean between the three continents of Europe, Africa, and Asia, and of the Black Sea between those of Europe and Asia. The GFCM members comprise at present eleven developing countries along with nine developed states. The latter states include East and West European countries having very different levels of development, and one mini-state, Monaco. The cooperative activities of the GFCM thus reflect the complexity of problems encountered in both North-South and East-West relationships.

The total fish catch in the Mediterranean and the Black Seas amounted in 1988 to 2,012,300 tons. The highest catches of regional states were those of: Turkey, 582,940 tons; Italy, 435,698 tons; Spain,

135,638 tons; Algeria, 106,434 tons; Greece, 105,899 tons; and Tunisia, 102,674 tons. France, Yugoslavia, Morocco, and Egypt each caught below 50,000 tons. The catch of the then Soviet Union amounted to 347,301 tons, most of which was presumably taken in the Mediterranean and thus amounted to the highest catch by a non-bordering state.

A notable aspect of the GFCM functioning that makes it distinct from many FAO and other fishery organizations is an emphasis on integrated ocean management in the context of inclusion of fisheries into the wider socio-economic coastal management and protection of the environment. In fact, it was at the meeting held in 1974 under the auspices of the GFCM that the guidelines for the UNEP Barcelona Convention were formulated, providing an important stimulus for the development of the whole UNEP Regional Seas Programme (RSP). These guidelines go, in turn, back to the Principles Suggested for Inclusion in a Draft Convention for the Protection of Living Resources and Fisheries from Pollution in the Mediterranean, known as the "Carroz Draft" from the name of then FAO Senior Legal Officer (International Fisheries), Mr. Jean Carroz, under whose directorship they were prepared.

The 1975 Barcelona (Blue) Action Plan -- and likewise those subsequently agreed upon for the other (by now twelve) UNEP RSP regions -- included "integrated planning of the development and management of the resources" as one of its major components, taking into account, within the concept of "unity in diversity," that the Mediterranean ecosystem was "a common heritage and one of the most important assets of the Mediterranean eco-region." Accordingly, improvement and better utilization of the living resources, in particular aquaculture, became one means of reconciling the demands of sustainable development with adequate protection of the Mediterranean environment. All the Mediterranean GFCM members and, in addition, the EC (along with its members) are the parties to the UNEP Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution. The Action Plan for the Black Sea, forming the twelfth UNEP RSP region, has been under preparation since 1990. The Draft Convention on the Protection of the Black Sea Against Pollution and the related draft protocols were finalized at the Ankara Meeting on 28 March 1991. The main issue yet to be resolved is the status of the former Soviet republics and the now-independent states of the Commonwealth bordering the Black Sea.

The GFCM area is in addition covered by activities of several other organizations, including two located in Monaco, the International Commission for the Scientific Exploration of the Mediterranean (ICSEM) and the International Laboratory of Marine Radioactivity

(ILMR) of the International Atomic Energy Agency (IAEA), as well as the Mixed Commission for Black Sea Fisheries (MCBSF), the ICCAT, and several programs within the United Nations other than those mentioned above.

Participation

The membership of GFCM, as that of some other organizations comprising developing countries, underwent transformations resulting from independence gained by such states, the original parties to the GFCM Agreement having included only six states, i.e., France, Greece, Italy, Lebanon, Turkey, and the United Kingdom.

The GFCM Agreement is open to acceptance by all FAO member states (Article I). Membership in GFCM of other (non-FAO) members of the United Nations and of its specialized agencies or the IAEA requires the two-thirds majority decision of the GFCM and is contingent upon the assumption of such proportional share in the expenses of the Secretariat as may be determined in the light of the FAO Financial Regulations (Article XI). The provisions concerning membership do not affect membership status in the GFCM of states non-members of the United Nations that may have become parties to the GFCM Agreement prior to the date of its 1963 Amendments. The GFCM members, when accepting the Agreement, state explicitly to which territories their participation extends; in the absence of such declaration, participation is deemed to apply to all the territories for the international relations of which the member is responsible (Article XIII).

The GFCM Agreement permits its acceptance subject to reservations that shall become effective only upon unanimous approval by the GFCM members (Article XI). The FAO Director-General is obliged to notify all members of any reservations, members not having replied within three months from the date of such notification deemed to have accepted the reservation. Failing the above approval, the state making the reservation shall not become a party to the Agreement. This possibility has so far not been used in practice.

The present twenty -- eleven developing and nine developed -- members of the GFCM comprise only the coastal states of the two regions covered. The Black Sea members of the GFCM comprise three coastal states, i.e., the developing Turkey (also bordering the Mediterranean) and Bulgaria and Romania, which formally qualified as developed. The latter two Eastern European states -- and likewise the former major Black Sea state non-member of GFCM, the Soviet Union as now replaced by the Commonwealth of Independent States

(CIS) -- are however characterized by a low level of development as a result of four decades of the devastating one-party system coupled with a centrally planned economy. The Soviet Union participated in the GFCM as an observer, which status is now continued by Russia. The two other newly independent states of the CIS, which border the Black Sea and now potentially also qualify for GFCM membership, are Georgia and Ukraine.

The Mediterranean membership involves all eleven developing members of the GFCM, namely: Albania, Algeria, Cyprus, Egypt, Lebanon, Libya, Malta, Morocco, Syria, Tunisia, and Turkey. In practice, most likely due to the lack of financial resources required, developing states are not attending the GFCM meetings as regularly as the developed countries, although some developing countries (e.g., Morocco, Algeria, and Tunisia) have a very good record of attendance.

The seven developed Mediterranean members include: France, Greece, Italy, Spain, Israel, Monaco, and Yugoslavia, the first four of which are member states of the EC. The three newly independent states, Bosnia and Herzegovina, Croatia, and Slovenia, became members of the United Nations as of 22 May 1992 and thus also potentially qualify for GFCM membership.

As regards EC membership, in contrast to the North Atlantic fishery organizations, in particular the International Baltic Sea Fishery Commission (IBSFC), the Northwest Atlantic Fisheries Organization (NAFO), the North-East Atlantic Fisheries Commission (NEAFC), and North Atlantic Salmon Conservation Organization (NASCO), in which the Community participates to the exclusion of its members, the EC is not a member of the GFCM, although it participates in it as an observer. Similar observer status is maintained by the Community in several other fishery organizations, e.g., IWC, IPFC, ICCAT, and Inter-American Tropical Tuna Commission (IATTC).

Community membership in the GFCM cannot, however, be excluded in the future, especially if the Mediterranean states decide to establish 200-mile zones. While providing for such zones in the North Sea and North-East Atlantic, the 1986 Hague Resolution of the EC Council mentioned that in due course the proposal would be made for extension of such zones in the Mediterranean, but so far it has not taken place. Meanwhile, the Community is a party to the UNEP Barcelona Convention, though not (as in the four organizations specified above) to the exclusion of but simultaneously with its Mediterranean members (the same four which participate in the GFCM). This, in combination with its observer status in the GFCM and the 1991 Council Regulation No. 3499 referred to further below, testifies to the Community concern with the developments in the

region. Two of the GFCM developing members, Malta and Turkey, have shown interest in accession to the Community which, however, does not seem feasible in the foreseeable future.

Implementation

In contrast to fishery organizations elsewhere, whose functions diminished as a result of the exclusivity of coastal state fishery rights within the 200-mile zones, lack of such extensions in the Mediterranean prevented comparable changes in GFCM functioning. Instead, the GFCM evolved towards a wider scope of functions to permit its more sound contribution to "the development, conservation, rational management, and best utilization of living marine resources." The GFCM functions, under Article III of its Agreement, are:

(a) to keep under review the state of these resources, including their abundance and the level of their exploitation, as well as the state of the fisheries based thereon;
(b) to formulate and recommend ... appropriate measures:
    (i) for the conservation and rational management of living marine resources, including measures: regulating fishing methods and fishing gear, prescribing the minimum size for individuals of specified species, establishing open and closed fishing seasons and areas, regulating the amount of total catch and fishing effort and their allocation among members,
    (ii) for the implementation of these recommendations;
(c) to keep under review the economic and social aspects of the fishing industry and recommend any measures aimed at its development;
(d) to encourage, recommend, coordinate and, as appropriate, undertake training and extension activities in all aspects of fisheries;
(e) to encourage, recommend, coordinate and, as appropriate, undertake research and development activities, including cooperative projects in the area of fisheries and the protection of living resources;
(f) to assemble, publish or disseminate information regarding exploitable living marine resources and fisheries based on these resources;
(g) to carry out such other activities as may be necessary for the Commission to achieve its purpose as defined above.

The GFCM comprises all members, each having one vote, and takes decisions by a two-thirds majority vote, provided there is a quorum of the majority of members (Article II). As in the case of other fishery organizations, no GFCM member will be bound by a recommendation on management measures to which it objected within 120 days from the date of notification of such recommendation to it by the Commission's Chairman (Article V). Any other member may similarly object to a given recommendation within a further period of 60 days. A member may also at any time withdraw its objection and give effect to a recommendation. A recommendation objected to by more than one-third of the members will have no binding force whatsoever, although any or all members may agree among themselves to nevertheless give effect to such recommendation.

The GFCM operates the Executive Committee and the Secretariat, and may establish other committees and working parties, such as the Committee on Fisheries Management, to study and recommend on specific problems. Until the 19th GFCM session in 1989, this committee had the name of Committee on Resource Management, which was changed as being too restrictive in emphasis on the resource (biological) aspects. The Committee's new name reflects socio-economic and environmental aspects, which are also involved in modern management techniques. Similarly, the GFCM restructered the names and the terms of reference of its two working parties. The one on Resource Appraisal and Fishery Statistics was renamed as the Working Party on Fisheries Economics and Statistics, while the Cooperative Programme of Research on Aquaculture was renamed as the Working Party on Artificial Reefs and Mariculture.

For the purpose of implementing the GFCM Agreement, the member states are expected to attend the meetings of GFCM and its subsidiary bodies, provide fisheries statistics on a timely basis, and comply with recommendations formulated by the Commission (formerly: Council). The observance of recommendations is assisted by the Secretariat through sending reminders to contracting parties and asking them to report verbally during sessions of specialized subsidiary bodies. A recommendation that was particularly followed up is the one concerning the mesh size for trawl nets. Fifteen years after the formulation of this recommendation by GFCM, it appears that although several countries did change their legislation to this effect, the recommendation is not fully complied with by fishermen.

The essential matter of statistics supply is dealt with by a Working Party on Fisheries Economics and Statistics, referred to above, whose new terms of reference reflect an increased attention to the economic

and social aspects of fishery management. The Working Party is charged with:

* determining the most relevant catch, effort, social, and economic data on fisheries needed for bio-economic analysis, reviewing the quality of collected data, and recommending cost-effective methods for obtaining such data;
* promoting bio- and socio-economic research on fisheries and strengthening economic expertise among the GFCM members;
* studying the economic and social effects of fishery management measures; and
* developing analytical tools, such as computerized bio-economic models, to facilitate research in fishery economics.

For the purpose of specific research and recommendations, the GFCM has developed since its 8th 1965 session a cooperative form of intersessional Technical Consultations. They include Technical Consultations on Stock Asessments in: the Adriatic and Ionian Seas, the Eastern Mediterranean, the Balearic and Gulf of Lions Statistical Divisions, the Central Mediterranean, and the Black Sea, as well as those on the Utilization of Small Pelagic Species in the Mediterranean Area and on Red Coral in the Mediterranean. The Balearic and Gulf of Lions Technical Consultation recommended establishment of a special Technical Consultation on Crustaceans, but it was not realized due to financial constraints. Two *ad hoc* Working Groups include those on Management of Stocks in the Western Mediterranean and on Assessment of Pelagic Stocks in the Alboran Sea and Those Jointly Fished by Morocco and Algeria.

Based on the above structure, the GFCM undertakes, encourages, and coordinates scientific research, publishes relevant information, as well as recommends measures regarding standarization of equipment, techniques, and nomenclature, and the rational utilization of fisheries.

Parallel to its increasing emphasis on socio-economic aspects of fishery management referred to above, the GFCM continuously accentuates the necessity to intensify efforts within the organizations concerned, such as UNEP, International Maritime Organization (IMO), and Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO), with a view to monitor and control various sources of environmental degradation. At the 19th 1989 session, the GFCM adopted the recommendation of its Committee on Fisheries Management that the Technical Consultations continue to pay attention to

environmental issues that affect regional fisheries. It also requested the Secretariat to approach other organizations, including IOC, IMO, UNEP and EC, with a view of holding a scientific meeting on these problems and initiating the project on Long-Term Trends and the Interaction of Fisheries with the Environment in the GFCM Area, with particular involvement of the IOC/FAO Ocean Science in Relation to Living Resources (OSLR) program.

The specific question of marine protected areas is covered by some GFCM activities, in particular those of its Working Party on Artificial Reefs and Mariculture referred to above. The new tasks of this Working Party reflect the importance of open-sea shellfish culture in association with artificial reefs and, in general, of all structures and technologies designed to boost coastal production. The Working Party is authorized to recommend improved administrative procedures for the granting of concessions of marine areas and to promote actions aimed at defining, for each country, a legal framework for integrated coastal zone management that would facilitate the creation of marine zones in which artificial reefs and mariculture installations could be placed. At its 1989 session, the GFCM recommended an interesting new international scheme to rationalize the exploitation of red coral resources. In particular, designated areas of the continental shelf would be closed on a rotating basis; they would stay closed to harvesting except in designated years agreed to by the participating states. The opening of each area would be the subject of an agreement scheduling the years when harvesting is permitted. In this way, in any one year, there would be at least one zone open for harvesting by licensed fishermen. Harvesting would be supervised and certain biological norms would be observed so that abundance would not fall below critical levels. Thus, the resources would be still nationally managed but in a coordinated fashion. These activities and the GFCM Fisheries Management Plans contribute to the implementation of the 1982 UNEP Protocol Concerning Mediterranean Specially Protected Areas, to which all the GFCM members are the parties, with another Protocol Concerning Mediterranean Specially Protected Wildlife, possibly to be considered in the near future.

The various management measures recommended by the GFCM include conservation measures such as closed seasons and areas (e.g., experimental closure of the trawl fishery in most of the Italian waters) or mesh size regulation, and measures aimed at fishing effort control, including regulation of the amount of total catch and fishing effort and their allocation among members. The latter measures -- apart from those related to marine protected areas referred to above -- are exemplified by recommendations: that the GFCM members, in view

of the ICCAT recommendation, should not increase fishing effort with respect to bluefin tuna; that the members concerned should reduce progressively the number of their small trawlers fishing juveniles close to shore; and the proposal for recommendation on the reduction of fishing effort in the Gulf of Lions to about two-thirds of the estimated level considered to produce the maximum sustainable yield. Since objectives of fishery management other than biological ones are taken into account, the tasks of fishery policy-makers have become more sensitive and are complicated by wider socio-political considerations. Therefore, while recommending in 1989 to give more attention to such considerations, the GFCM emphasized benefits from the intensification of exchange of expertise in this field among its members.

A major drawback in the case of both conservation and utilization measures remains non- or scarce availability of the respective data, be they very elementary (such as total catch by species and number of vessels) or the more detailed (such as size of fish and distribution of catch and effort). For instance, in small-scale fisheries, Tunisia encounters problems in recording data partly because the fishermen do not understand the reporting forms and, as providing the information is voluntary, there is a reluctance to give details on private business matters. Spain uses the marketing system to check reported catch data under which some information on the small-scale sector inevitably escapes recording.

By 1989 no country had yet responded to the FAO enquiry concerning catch and effort statistics (initiated in 1988 for 1987 data) and only two-thirds of the Mediterranean states had replied to an aquaculture questionnaire (introduced in 1984). As data collected by FAO on fleet size and structure is on a global and national basis, such data does not permit one to distinguish between fleets operating in different areas for distant-water fishing or coastal states of the Mediterranean. Nevertheless, the GFCM Secretariat agreed in 1989 to produce a document summarizing data on Mediterranean fleets to facilitate the availability of data in this field. The GFCM recommended that its members maintain up-to-date fishing vessel registries in which all categories of actively fishing units would be indicated and licensed, and that this information be sent to FAO regularly via the STATLANT forms distributed by the Secretariat.

The improvement of regional research and data systems is accelerated to various degrees by several scientific organizations, including the ICSEM, EC and programs of UNESCO and its IOC, such as the IOC/UNESCO study of the Physical Oceanography of the Eastern Mediterranean (POEM), IOC/ICSEM Programme of Interna-

tional Research in the Western Mediterranean (PRIMO), and the IOC/FAO Programme of OSLR. The Cooperative Investigations of the Mediterranean (CIM), jointly sponsored by IOC, GFCM, and ICSEM, was one of the first cooperative research initiatives in the region. The OSLR (including the component of water exchange between the Atlantic-Mediterranean-Black Sea) is to play an essential role in the project concerning interaction of fisheries with the environment referred to above. The 1990 Resolution on OSLR (EC-XXIII.1) of the IOC Executive Council stressed the importance of expanding its International Recruitment Programme (IREP) to the Mediterranean (along with the Indian Ocean and the Central Eastern Atlantic).

In 1989 GFCM recommended, wherever possible, the gathering of data on tuna and swordfish catches by the administrators concerned. The driftnet fishing involving these species in the Mediterranean differs from the oceanic industrial activities, such as in the South Pacific Forum area (SPF), both in dimension and in socio-economic characteristics, as it is conducted only by regional states and, except in Italy, mainly with small boats. The Italian larger scale driftnet fleet (of over 700 boats with nets varying from 2 to 40 km, on the average 12 km in length) was estimated to harvest 5,000 tons of swordfish and 1,000 tons of albacore tuna annually. The by-catch includes medium- and large-scale pelagic fish, turtles, and large and small cetaceans, official statistics having reported about 100 marine mammals taken in 1988.

In 1988-1989 Italy took a series of measures aimed at freezing the number of licenses and at limiting the length of the gear (maximum 2.8 km for coastal and 9.3 km for offshore fishing) and the fishing season. Subsequently, in July 1990, a decree suspended driftnetting for swordfish and albacore by all Italian nationals until the adoption of further measures in that respect, and allocated a compensation of 10 billion lire for each of the years 1990 and 1991 to some 4,000 people who lost their jobs. Most other countries use rather small driftnet fishing vessels, including some 10 to 40 artisanal Moroccan vessels fishing for tuna in the western Mediterranean, some 50 small Spanish vessels (using driftnets between 1.5 and 3.5 km in length) taking swordfish in the Gibraltar area, and two French vessels (operating with driftnets about 1 km in length) in the Gulf of Lions. In accordance with the 1992 EC Council Regulation No. 345, since 1 June 1992 all vessels operating in waters within the jurisdiction of the four EC members of the GFCM and, outside these waters, all vessels flying the flag of, or registered in, an EC member state are prohibited from using driftnets longer than 2.5 km.

Since the poor quality or absence of the respective data for the Mediterranean hampers the ICCAT assessments, the joint ICCAT/ GFCM Expert Consultation on Evaluation of Large Pelagic Fisheries in the Mediterranean was held in June 1990 at Bari, Italy, with a view to bringing forth data that might be available in the countries and to commence the required sampling scheme. The ICCAT offerred its assistance in this respect through making its database available to GFCM members and providing expert assistance for setting up statistical data-collecting systems for tunas. The 1990 Bari Consultation concluded that further work and analysis were needed before reliable assessments of the state of the main stocks could be made. Pending the outcome of further research, the Consultation recommended that driftnet fishing in the region was in need of regulation, particularly through limitations of the size of the nets and through licencing schemes controlling the fishing effort. The GFCM members have agreed upon a plan to follow-up this work for 1990-1991.

Within its concern with the Mediterranean, the EC -- apart from concluding its standard fishery agreement with one GFCM member, Morocco (eighteen other such agreements having been concluded with the EC Lomé African partners) -- committed itself to make available to the GFCM Secretariat the studies commissioned by the EC on various aspects of Mediterranean fisheries since 1978. In 1988, the Fisheries Subcommittee of the European Parliament took an initiative towards eventual conclusion of a Mediterranean Fisheries Convention. At the 1989 GFCM session, the EC emphasized that the efficiency of fishery cooperation depended on the adoption of binding conservation measures that should be strictly complied with by all fishermen, including those from non-Mediterranean states (paradoxically, the EC being one of the most non-complying parties in the Northwest Atlantic area). The EC Fisheries Commissioner called for an international conference, bringing together the eighteen Mediterranean states and other countries that fish there, including Japan and the then Soviet Union.

At the end of 1991, the EC concern culminated in its Council's Regulation No. 3499 Providing a Community Framework for Studies and Pilot Projects Relating to the Conservation and Management of Fishery Resources in the Mediterranean. With regard to the EC CFP, the Regulation emphasizes that implementation of a policy for the conservation and management of fishery resources "is becoming more and more vital in the Mediterranean region in order to preserve its fishery assets and to turn them to good account for the benefit, in particular, of the coastal populations" (preamble). Therefore, as part of the gradual introduction of a common system in this respect, the

Regulation envisages granting by the EC Commission of a financial contribution for studies and pilot projects under conditions to be determined by the Commission (Article 1). The five priority areas of such studies and projects are: the structures of traditional fisheries; the development of specialized fisheries (such as sponge, coral, sea urchin and seaweed fisheries); the control of fishing activities; the development of a statistical network; and the coordination of research and of the use of scientific data (Article 2). The studies and pilot projects are to be decided upon by the EC Commission after consulting the Standing Committee on the Fishing Industry.

The GFCM Agreement contains a dispute settlement clause that provides for referring any dispute not settled by the GFCM to a committee composed of one member appointed by each party to the dispute and an independent chairman chosen by the members of the committee (Article XV). The recommendations of such a committee, while not binding, are to become the basis for renewed consideration, by the parties concerned, of the matter out of which the disagreement arose. If, as the result of this procedure, the dispute is not settled, it shall be referred to the International Court of Justice (ICJ), unless the parties to the dispute agree to another method of settlement.

Although not concerning fisheries, it is significant that two of the recent maritime delimitation disputes settled by the ICJ, both instituted on the basis of Special Agreements of the respective parties, involved the Mediterranean developing states. They resulted in the 1982 *Tunisia/Libya Continental Shelf* and the 1985 *Libya/Malta Continental Shelf* Judgments of the Court, subsequently fully implemented by the Agreements between the states concerned. Malta in the first and Italy in the second of these cases sought permission to intervene, but it was denied by the Court in both cases. Apart from the above two agreements implementing the ICJ Judgments, only eleven maritime boundaries have so far been established in the Mediterranean and Black Seas by bilateral treaties, which partly results from the non-extension of 200-mile zones in the Mediterranean. The Aegean Sea, included in the Mediterranean basin, involves one of the most difficult instances of maritime delimitation worldwide, the large number of Greek islands being situated close to Turkey (on the so-called "wrong side of the median line").

Information

The text of the GFCM Agreement as amended is available in E nglish, French, and Spanish languages, all versions equally authentic,

and is published and disseminated in the *FAO Basic Texts* and in the *United Nations Treaty Series* (UNTS). The Reports of GFCM sessions, *GFCM Statistical Bulletin*, and the *GFCM Circular* are published by the FAO. The GFCM considers the need to improve statistical reporting and to review data included in the *Statistical Bulletin* to be essential, both for catch reporting and in assembling an improved data base on fleet size and fishing effort.

Information concerning the operation and implementation of the GFCM Agreement is made available to governments by reports of the meetings of the Commission and its subsidiary bodies. For the general public, an information brochure published in 1989, *40 Years of GFCM*, is available.

Operation, Review, and Adjustment

The GFCM consists of the Commission (until the 1989 Amendments, called the Council) comprising all members, each (in particular delegate, but not expert or adviser) having one vote, and meeting at least every two years; the Executive Committee meeting at least once between regular sessions of the Commission; and the Secretariat. The Executive Committee consists of the Commission's Chairman, two Vice-Chairmen, and the Secretary. Other committees -- such as the existing Committee on Fisheries Management -- and working parties may be established only subject to the availability of the necessary funds in the approved FAO budget (Article VII). The same relates to the recruitment or appointment of specialists at the expense of the FAO for consideration of specific problems. The GFCM Technical Consultations depend on availability of funds as well. Before taking any decision involving expenditures in connection with the establishment of committees and working parties and the recruitment or appointment of specialists, the GFCM must have before it a report from the FAO Director-General on the administrative and financial implications thereof. Due to a limited budget, only some three Technical Consultations have been held per biennium, whereas the need for such Consultations exists in each of the five GFCM subregions.

The GFCM Secretariat is provided by the FAO Fisheries Department, with the FAO Director-General appointing the GFCM Secretary who is administratively responsible to him (Articles II and IX). The GFCM Secretary may rely on specialists from the FAO Fisheries Department in various disciplines. Until 1989 the GFCM Secretary was Mr. Michael Savini, subsequently followed by Mr R.C. Griffiths

(formerly posted in IOC), both of them FAO Senior Liaison Officers (International Fisheries) of the Fishery International Institutions and Liaison Unit. The site of the GFCM is the FAO headquarters in Rome, Italy, where all GFCM sessions are usually held. The first session outside this headquarters was the 19th GFCM session hosted by Italy in Livorno (on the 40th anniversary of GFCM). The GFCM, in consultation with the FAO Director-General, decides on the time and place of the sessions, taking into account the GFCM requirements and the terms of the invitation of the country in which the session is to be held (Article II). The expenses of the Secretariat, including publications and communications and the expenses of the Chairman and Vice-Chairmen of the Commission, are determined and paid by FAO. Technical support is provided mainly by officers in the relevant divisions of the FAO Fisheries Department and, where required, by officers in FAO's Regional Offices and by experts assigned (with the concurrence of the FAO Director-General) to regional projects.

The expenses of participation by delegates and their alternates, experts and advisers in the GFCM sessions, and committees and working parties are covered by their respective governments (Article IX). The same relates to the expenses of research and development projects undertaken by individual members, whether independently or upon the GFCM recommendation. In addition, the members cover expenses of the cooperative research projects in the mutually agreed form and proportion. Cooperative projects must be submitted to GFCM prior to implementation, and contributions to such projects be paid into a Trust Fund of the FAO and administered by FAO according to its Financial Regulations. In some cases the GFCM Secretariat was able to negotiate with developed states the establishment of a Trust Fund to facilitate participation by developing countries in the respective meetings.

The GFCM sessions and other meetings are attended by observers from the non-participating Commonwealth of Independent States and several international organizations, such as UNESCO and its IOC, EEC, ICCAT, International Council for the Exploration of the Sea (ICES), and FAO Committee on Fisheries (COFI).

The GFCM adopts and amends by a two-thirds majority vote its own Rules of Procedure, which must be consistent with the FAO General Rules. The GFCM Rules and any amendments come into force upon their approval by the FAO Director-General, subject to confirmation by the GFCM (Article II).

Ater each session, the GFCM transmits to the FAO Director-General a Report embodying its views, recommendations, and decisions, and makes such other reports to him as may seem to it

necessary or desirable (Article VI). Reports of the committees and working parties are transmitted to the FAO Director-General through the GFCM.

Since its 13th session held in 1976, the GFCM has considered the possibility of establishing its autonomous budget, as is permitted for the bodies (thus also IPFC) created under Article 14 of the FAO Constitution. Meanwhile, less binding funding mechanisms (such as voluntary contributions to specific GFCM activities) are being considered.

While the FAO input to accelerating the cooperative fishery actions in the GFCM area is considerable, this input was and remains limited due to FAO budgetary constraints. Within the FAO's Regular Programme, the budget of the Fishery International Institutions and Liaison Unit devotes totally some US$1.4 million annually to the preparations and direct servicing of all the FAO nine regional bodies. This includes the costs of preparing, translating, and publishing the required documentation, the direct costs of running the sessions and meetings (including interpretation as is necessary in GFCM), and travel costs. The annual budget of GFCM is about US$300,000, with one GFCM member -- Monaco (which is not a FAO member) -- contributing in cash to the GFCM activities. This figure is noticeably below the annual budget of US$450,000, which is estimated as required for adequate GFCM functioning.

In recent years, not only have the overall financial constraints faced by FAO prevented any significant increase in the budgetary allocation for its servicing, but the costs involved have consistently risen (due to, among other factors, an increased number of meetings). At the same time, increasing difficulties have been faced in negotiating the extra-budgetary funds needed to implement the associated technical assistance programs, whose interactions with the relevant regional bodies have proven to be so valuable and effective. In fact, only two of the FAO programs, both involving the Indian Ocean Fishery Commission (IOFC), are directly supported by associated technical assistance projects, whereas the burden of technical support for other regional bodies, including GFCM, increasingly falls upon the FAO Regular Programme-funded professional officers based at the Rome headquarters.

The FAO's limited regular funds, including inadequate use of Trust Funds for cooperative projects within regional bodies such as GFCM, and the difficulties in raising extra-budgetary funds for technical assistance programs result from a broader phenomenon of industrialized donors' preferring to pursue bilateral assistance, which directly serves their foreign policy objectives, rather than multilateral

development programs. This is regrettable because, in the case of any ocean-related (including fisheries) activities, the multilateral programs are both indispensable and far more effective than the bilateral ones.

As regards the eleven Mediterranean developing states, they are not included in the EC Lomé system (otherwise applicable to sixty-eight African-Caribbean-Pacific [ACP] states), and only in individual cases are these states covered by bilateral development assistance of the developed EC member states, such assistance usually not including marine affairs as a priority field of bilateral cooperation. At the same time, due to their proximity to Europe, the Mediterranean developing states are not covered by the otherwise extensive ocean development assistance of either the United States or Canada, which focuses rather on the Caribbean, South Pacific, and some other regions, of which the first two are also supported by the EC within the Lomé system. However, the 1990 Community's New Mediterranean Policy regards the environment in general as one of the priority fields of cooperative actions between the Community and the Mediterranean non-EC countries in 1992-1996. Accordingly, the EC Fifth Action Programme on the Environment in 1993-1998 envisages implementation of regional projects (concerning, e.g., marine pollution and coastal zone management) by means of horizontal cooperation with the Mediterranean non-EC states, within horizontal allocations of 230 million ECUs. In addition, bilateral allocations for environmental protection amount to 1,075 million ECUs, and 1,300 million ECUs in loans of the European Investment Bank. The development of fisheries cooperation in the region may be accelerated specifically by the 1991 EC Regulation No. 3499 referred to above.

The existing unsatisfactory funding and lack of its adequate coordination between the donors concerned may improve as a result of the new initiative undertaken by FAO in 1991 with respect to a global Strategy on Fisheries Needs of Developing Countries. The Strategy, emphasizing the need to strengthen research at national and regional levels (including efforts to improve regional integration of research programs) in all fields of fisheries, states that any initiative for securing extra-budgetary funds for such activities is welcomed, and that the proposed concerted action among donor agencies will result in a better use of available funds. The Strategy also envisages establishment of the FAO Technical Secretariat and Scientific Forum (with a high scientific standing and good experience from work in developing states) to support a coordinated approach to fisheries research through scrutinizing research proposals submitted for funding and suggesting on its own initiative new research fields. Ultimately, the donor community must appreciate that the effectiveness of

fisheries assistance depends on this coordinated action, which would not remove the flexibility of donors to accommodate their geographic or subject matter preferences.

Codification Programming

Although, unlike most fishery treaties, the GFCM Agreement does not expressely refer to the 1982 UN Law of the Sea Convention, the latter is of importance for cooperative actions of the GFCM members. The Law of the Sea Convention was signed by sixteen of the GFCM twenty members as well as the non-participating Soviet Union. The four non-signatories are: Albania, Israel (which, however, signed the Final Act of the Third UN Law of the Sea Conference), Syria, and Turkey (due to its conflicting claims with Greece in the Aegean Sea). Four GFCM members -- Cyprus, Egypt, Tunisia, and Yugoslavia -- are among fifty-one countries that have so far ratified the Law of the Sea Convention, Yugoslavia being one of but two (along with Iceland) of the developed states among them. The GFCM Agreement provides an instance of compatible implementation of Part V on the Exclusive Economic Zone (in so far as the Black Sea is concerned), Part VII on High Seas, Part IX on Enclosed and Semi-Enclosed Seas, Part XII on Protection and Preservation of the Marine Environment, Part XIII on Marine Scientific Research, and Part XIV on Development and Transfer of Marine Technology of the Law of the Sea Convention.

As a regional body of FAO, the GFCM is directly led in its activities by the 1984 FAO Strategy for Fisheries Management and Development that, for the first time, and without prejudice to the Law of the Sea Convention, formulates guidelines to be taken into account by coastal states in order to achieve rational management and optimum use of the living resources. The progress achieved by the Strategy and the associated five Programmes of Action is reviewed every four years, the first such evaluations having taken place in 1987 and 1991. At the 19th 1989 session, GFCM agreed with the existing orientation of the five Programmes of Action, suggesting their new orientation in relation to the long-term environmental fluctuations, which problem is characteristic for the GFCM functioning. The new FAO Strategy on Fisheries Research Needs of Developing Countries referred to above will also be of essential importance for the GFCM's future functioning.

Amendment of the GFCM Agreement (in accordance with its Article X) would be required in case an autonomous budget is established for GFCM. Under Rule IV of the GFCM Rules of Procedure, the agenda of each regular session of the Commission

should include an item dealing with proposals for amendment to the GFCM Agreement.

Conclusions

Taking into account difficult hydrographic and ecological characteristics of the marine areas involved, the shelf/zone-locked character of both seas, limited fishery resources, the serious level of marine pollution, particularly pronounced political and socio-economic differences between the twenty parties, and the strategic sensitivity of the areas in question, the GFCM's evolution from a primarily scientific into an all-encompassing focus on fishery conservation and management, and the fact that forty years of the GFCM's functioning represents -- from the perspective of the economic development of its eleven developing members -- an extremely short period, the GFCM appears to have achieved notable progress towards rational fishery conservation and management of regional fisheries. Since the GFCM was established, total fish catches in the region have almost tripled, although it is difficult to ascertain what exactly was the influence of the GFCM's work on this figure.

The main remaining drawbacks relate to the scarcity of adequate -- even very elementary -- scientific data and catch statistics, difficulties in applying research findings to complex socio-economic situations, and insufficient enforcement. To a major extent, these drawbacks result from not only innumerable financial, scientific, and technical problems of the developing (and likewise the East European) states concerned, but also from deficiencies of the existing mechanisms of development assistance, which are not always effectively ameliorated by the largely paternalistic measures promoted by the developed states. Yet, in spite of those difficulties on both sides, the GFCM has proved capable to an important degree of activating the cooperative efforts of its heterogenous members and may even evolve -- as some other former UN bodies -- into an independent organization of the coastal states concerned.

The case of the GFCM confirms Lee Kimball's analysis, made at the International Conference on Ocean Management in Global Change, that the problem with integrated ocean management "is not the will, it is the way", which will require "a far greater effort on the part of the industrialized nations." Further progress in cost-effective implementation of the GFCM collaborative program appears, thus, to depend to a great extent, as Lee Kimball has suggested, on whether regional strategies will receive priority attention of the multilateral agencies and other donors concerned. The major efforts of FAO

presented in my paper and a favorable climate resulting from the 1992 Rio Summit of UNCED provide in any event a good basis for increased effectiveness of the GFCM in the fifth decade of its operation.

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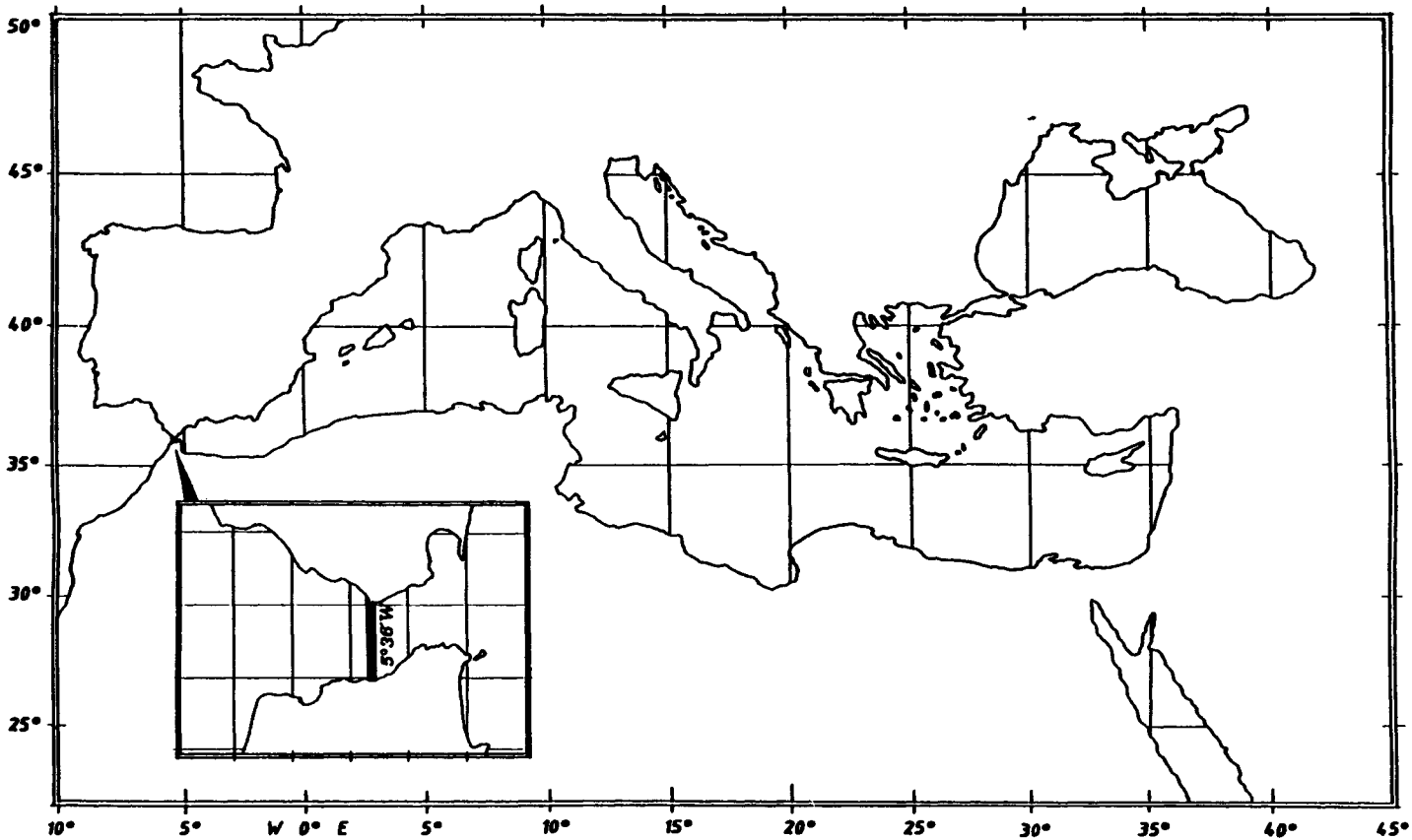

Figure 1: Area of Competence of GFCM.
Source: Savini, FAO Fisheries Circular FIP/C835/Rev. 1

THE CONTINENTAL SHELF OF THE MEDITERRANEAN SEA AND THE DELIMITATION THEREOF

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A glance at the physical geography of the Mediterranean tells the story of its tormented geological past. The present morphology of the basin, located over the line of collision between the African and the Eurasian continents, attests to the complexity of its geological origins. Most areas of the Mediterranean Sea are very deep and, therefore, still almost inaccessible; only very limited regions are less than 200 meters in depth. The main areas of this kind are situated in the northern Adriatic, on the Tunisian shelf, on the shelf between Sicily and Malta, on the shelf on which Sardinia and Corsica are located, and in the Aegean. The deepest basins are to the east and the west of Sardinia and to the south of the Italian peninsula where the Ionian trough and the long Hellenic ridge extend to the east.

The areas of the Mediterranean measuring over 200 meters in depth have not yet been explored for oil and gas, but they will be as technology progresses. At the moment, the two areas of major interest are found on the eastern part of the Tunisian continental shelf stretching towards Medina, and on the continental shelf between Sicily and Malta. A third area of interest is the island-dotted Aegean Sea. With respect to mineral resources, the geomorphological origins of the Mediterranean have given rise to complex and differentiated situations of different oil and gas potential: highly developed and highly promising areas alternate with basins of little interest. Little is known about the oil potential of the Mediterranean seabed: offshore exploration started in the 1960s in the areas up to 200 meters' depth, but results have not been uniform. As a consequence, and in proportion to their offshore oil potential, the Mediterranean States have varyingly regulated the exploration and drilling of oil with complex and incentive-providing provisions.

Unfortunately, only 20 percent of the Mediterranean is less than 200 meters deep. The remaining 80 percent reaches over a thousand meters in depth. Thus, even when the mining technologies are available, mineral structures must be of significant size to justify operations. Research activity beyond the 200-meter limit is still in its initial stages. The areas over 1000 m in depth have, however, provided some indications of oil potential. In particular, an area situated in the Western Mediterranean between Sardinia, the Balearic Islands, and the

French coast is considered particularly interesting in terms of oil potential, but industrial operations will only be possible when deep sea prospecting technologies have improved, making production at 2500/3000 meters feasible.

Mineral interests have led to a trend among Mediterranean coastal States to extend their control beyond territorial waters and the contiguous zone. This has mostly been justified by rules concerning the continental shelf now generally accepted as customary law; in a few cases, however, reference has been made to the exclusive economic zone provided for by the Montego Bay Convention of 1982. Important for the extension of the continental shelf are the provisions of the national legislation of Mediterranean coastal States regarding the determination of seabed areas for exclusive mineral resource activity. Examination of those provisions and the relative practice of States reveals the extent to which each has fixed the outer limit of its continental shelf. The legislation of Mediterranean States generally refers to that exclusive area without setting any spatial limits to its potential exploitation: while few national provisions refer to the criterion of 200 meter depth, most mention the criterion of exploitability unrelated to the breadth or the structure of the seabed. Despite this kind of legislation, Mediterranean States have, to date, rarely undertaken the mineral resource activities in the underwater areas adjacent to their coasts permitted by the limits of modern technology, probably as a result of costs/benefits considerations. In addition, the most recent legislation in the matter in Mediterranean States seems to follow the orientation now prevailing in the international community in favor of recognition by each coastal State of the exclusive right to exploitation of the mineral resources located within 200 miles of its coastline.

Given the size of the Mediterranean Sea, there can be no question of extending the continental shelf beyond the 200 mile line, nor of creating an international seabed area. Indeed, even the 200 mile limit is unrealistic in the Mediterranean, as there is no point in which two coasts are more than 400 nautical miles (nm) apart. It is, therefore, essential that the Mediterranean coastal States enter into a series of agreements to delimit their respective continental shelves in consideration of the sea's size and configuration. Almost all legislation passed by the Mediterranean coastal States on the exploration and exploitation of mineral resources contained in the continental shelf, contains a declaration of intent to reach a consensual delimitation of the continental shelf with interested neighboring States. This cannot but lead to the territorialization of the Mediterranean seabed, considering that the powers exercised by coastal States over the continental shelf

and its subsoil, with respect to control over mineral resource activities, are essentially sovereign.

Given the vastness of the marine areas claimed by the coastal States and the limited size of the Mediterranean, the problem of delimiting the continental shelf between States with opposite or adjacent coastlines has gained in importance and topicality; the same could happen in the future with the delimitation of the exclusive economic zone. Today, the approach to the problems of exploration and exploitation of the continental shelf and, therefore, of its legal regime are in many ways influenced by the solution of the legal problem of delimitation.

For this reason, definition of the problems relating to the delimitation of the continental shelf in the Mediterranean has become of the utmost importance for all littoral States. Delimitation would also definitively answer the question of whether exclusive economic zones can be established in such a small area as the semi-enclosed Mediterranean Sea, and this could, in turn, have decisive effects on the freedom of navigation in the sea. To have a complete picture of the regime relating to this matter and its applications to the sea in question, an examination follows of the rules and criteria of international law applicable to the delimitation of the continental shelf and, more generally, of the seabed in the Mediterranean Sea. These are based on the 1958 Geneva Convention on the continental shelf and international and national practice and case law, and on the orientations that emerged during the Third United Nations Conference on the Law of the Sea and were set down in the 1982 Montego Bay Convention.

The problems relative to the delimitation of the continental shelf are peculiar in a semi-enclosed sea like the Mediterranean, where relations between coastal States and the States opposite them are strongly intertwined and reciprocally conditioning. The shape, size, depth and, above all, distance from the opposite shore, of the coastline of enclosed or semi-closed bodies, as well as the provisions of both customary and conventional international law, make the problem of the delimitation of waters of coastal States more complex. In a semi-enclosed sea like the Mediterranean, artificial delimitation, that is, legal delimitation by means of international agreement or, absent that, by the decision of the International Court of Justice, a court of arbitration, or a conciliation commission, must be resorted to in all cases.

A review of the contents of the pertinent customary and conventional rules and of the relations between them will provide the basis for a reconstruction of the problems regarding the delimitation of the

continental shelf in the Mediterranean. There are two likely explanations for the lack of delimitation in the Mediterranean. First, the Mediterranean is very deep in many areas, and, therefore, inaccessible. As the exploration of gas and oil is not yet of particular interest in these areas, the economic incentive for delimiting the borders of the shelf is lacking. Second, the sea contains thousands of islands, which constitute one of the most difficult factors for consideration in the delimitation of marine areas.

The vagueness about respective national areas on the Mediterranean continental shelf creates a situation of legal uncertainty, which has a dampening effect on the mobilization of the enormous investments required to explore and exploit offshore oil resources. Oil companies may be willing to take the financial risk of challenging the depths with the most advanced technology in search of oil, but not the political risk of exploring in contested areas. The convergence of both risks would determine the failure of any undertaking: hence, the importance of peacefully defining the boundaries of the continental shelf in the Mediterranean.

Only analysis of the conventional status of the delimitation of the continental shelf in the Mediterranean can provide a complete picture of the situation in the entire area. At the Third UN Conference on the Law of the Sea, two opposing theories on the delimitation of the continental shelf were put forward. One was in favor of the criterion of equidistance: in the proposal presented by Greece, for example, no State has, in the absence of a specific agreement, the right to extend its sovereignty over the continental shelf beyond the median line, each point of which is equidistant from the closest points on the base lines, be they continental or insular, from which the breadth of the continental shelf of each of the two States must be measured. The other proposal was less straightforward and was inclined to take into account any number of pertinent factors and special circumstances: the proposal presented by Turkey, for example, called for delimitation by means of an agreement in keeping with the principles of fairness and taking into consideration all pertinent factors, including the geological and geomorphological structure of the seabed in question, and special circumstances, such as the general configuration of the respective coastlines and the presence of islands, islets, or reefs. As is obvious from the examples given, Mediterranean coastal countries supported both of the proposals.

Examining the bilateral agreements relative to delimitation in force today, it is immediately obvious that the number does not meet the need. It would take more than thirty bilateral agreements to completely delimit maritime boundaries among Mediterranean States, but only

six agreements that can be defined as complete delimitation of separate areas of the continental shelf have been entered into to date. For total delimitation of the seabed, twenty-six more agreements are required. Of the approximately twenty States lying along the shores of the Mediterranean, Italy is the only State that has already entered into four definitive agreements with as many coastal States: the former Yugoslavia, Greece, Tunisia, and Spain. It has also agreed upon partial or temporary delimitation with Malta (limited to the Malta Channel) and with France (limited to the Strait of Bonifacio), and has concluded negotiations but not yet signed an agreement with Albania. France also has an agreement with Monaco, and in two other cases in the Mediterranean, delimitation has been reached by decisions of the International Court, subsequently applied in agreements: between Libya and Malta and between Libya and Tunisia. Thus, of the thirty or more agreements required to delimit the Mediterranean seabed totally, only eight are in place.

In the 1968 Italo-Yugoslavian Agreement on the Adriatic, the respective areas of the continental shelf were delimited by means of a relatively regular median line, not specifically defined as such, 350 nautical miles in length. Negotiations were complicated by the presence of three Yugoslavian islands, Jabuca, Pelagosa and Caiola, and the Italian island of Pianosa, which lie at some distance from their respective coastlines. If all the Yugoslavian islands had been used as base points, the median line would have lain to Yugoslavia's advantage, much closer to the Italian coast. But the irregular coastlines of both States and the presence of islands both near the coast and in proximity to the median on both sides forced the line to shift back and forth. Little consideration was finally given to Jabuca and Pianosa, and the Yugoslavian claims for the other two islands, Pelagosa and Caiola, were limited to arcs with a radius of 12 nm. In addition, a certain number of mainly Yugoslavian islands and islets, among which Pomo and Sant'Andrea, were totally ignored. In this way, deviations from the original median line were reciprocally compensated, satisfying both parties; in fact, no controversies have ever arisen. The aforementioned agreement was subsequently completed with the 1975 Treaty of Osimo delimiting the territorial waters of the Gulf of Trieste and the relative seabed. That delimitation follows a line that can be defined as equitable: after continuing in the same direction as the final segment of the land border towards the centre of the Gulf, it curves west and then southwest until it reaches the outermost limit of territorial waters to the west of Piran, now in Slovenia.

The disintegration of Yugoslavia now poses the problem of the succession to the new emerging States of the legal obligations deriving

from the two bilateral accords. As the agreements concern delimitation of the continental shelf, of territorial waters, and of the seabed, they should fall into the category of so-called localized agreements, that is, treaties having to do with the use of certain spaces by the States Parties. Even the agreements on the delimitation of the continental shelf, although not strictly territorial in the sense that they do not specifically concern control over the communities located in a territory, seem to enter this category, as they are relative to spaces in which the States Parties exercise some sovereign rights, albeit limited to the exploitation of mineral and to some extent biological resources. Thus, the principle whereby the States which replace others in the exercise of sovereign rights are automatically bound by the localized treaties signed by their predecessors is applicable to these agreements.

In 1970, Italy also signed a partial *modus vivendi* with Malta on the part of the Malta Channel in which the two States lie directly opposite one another, that is, the only point in which it is possible to trace a median line between them. The segment agreed upon is very short, since the difference between the length of the Sicilian coastline and the length of the Maltese coastline makes it imperative that other factors be taken into consideration in delimiting the continental shelf between the two States: there must be some kind of proportionality between the respective coastlines and the continental shelves attributed to each State. Another factor to be taken into consideration in delimitation between Italy and Malta is the effect to be attributed to the Pelagie Islands, now delimited with respect to Tunisia. Thus, the partial and temporary *modus vivendi* delimits only a short segment of the median line between the opposite shores of Sicily and Malta in the Channel of Malta and cannot be extended beyond those limits because of the notable disproportion between the two coastlines. Undue extension of the segment by Malta was one of the reasons leading to Italy's application in 1985 for permission to intervene in the international legal proceedings between Libya and Malta.

The 1971 Agreement between Italy and Tunisia relative to the Strait of Sardinia and the Strait of Sicily also refers expressly to equidistance, although it is not established as a principle. Yet, this agreement could be the one in which delimitation of the continental shelf deviates the most from the median -- this time to Italy's disadvantage. While full account is taken -- to the advantage of Tunisia -- of the island of La Galite in the western segment of delimitation, the presence in the eastern segment of the Italian Pelagie Islands and Pantelleria lying, like the Yugoslavian islands off the Italian coast, in the Strait of Sicily off the coast of Tunisia, is almost

ignored. The delimitation extends from a point to the west equidistant between the coasts of Tunisia and Sardinia to an endpoint to the east of the Pelagie Islands. The 443 nm delimitation generally follows the median (disregarding the Pelagies) and describes two semi-circles around the Italian islands. Around the islet of Lampione, Italy limited its claims to twelve nautical miles in the direction of Tunisia; around the other Pelagies, Lampedusa and Linosa, and around Pantelleria, Italy claimed thirteen nautical miles. The end point of the last segment of the delimitation line is halfway between Lampedusa and Malta, rather than halfway between Lampedusa and Tunisia. This is one of the reasons for Malta's refusal to recognize the delimitation. A fairer delimitation would have placed the median line 30 nm from the Tunisian coast, to the north of the Kerkenna Islands. It seems that in this agreement, unlike in others, consideration was given to geomorphological criteria in addition to distance.

In both of Italy's agreements with Yugoslavia and with Tunisia, deviations are taken from the median line as a result of the presence of islands: in the Adriatic, these islands are mainly Yugoslavian, lying nearer to the coast of Italy; in the Strait of Sicily, they are Italian islands closer to the coast of Tunisia. Naturally, the position of the islands dictates the kind of deviation from the median line. In delimiting the continental shelf between Italy and Tunisia, the special circumstances related to the presence of the Pelagie Islands (the difference in length between the coastline of the islands and that of Tunisia; the fact that the islands are on the "wrong" side of the median line and are geologically located on the African continental shelf) were taken into consideration to Italy's disadvantage.

In the 1974 Agreement between Italy and Spain on the Western Mediterranean, the median line is explicitly taken as a principle. It establishes the boundaries of the continental shelves of Sardinia and the Balearic Islands, in particular Minorca, with a slight concave bulge to the advantage of Sardinia to take into account the greater length of this coastline as compared to that of the Spanish island. The line extends for 137 nm and is defined in ten points. The triple points on either end of the line still have to be worked out with France in the north and with Algeria in the south. In this case, as in all others with the exception of the Italo-Tunisian agreement, the only criterion taken into consideration was distance; troughs and other geomorphological features in the area were ignored.

The agreement on the Ionian Sea signed between Italy and Greece in 1977 expressly refers to a median line and, given the regular shape of the respective coastlines, delimitation of the continental shelves of the two States approximately follows that line. The line, 268 nm in

length, is defined in 16 points. There are no deviations of any importance, as the concavities and convexities of the coastlines have been compensated for on both sides. Some minor deviations were needed to reduce the effect of the Greek islands of Othoni and Strophades and to compensate for the Italian base lines linking the Cape of Otranto to the Cape of Santa Maria di Leuca and closing the Gulf of Taranto and the Gulf of Squillace. In spite of the presence of the Ionian Basin, which is over 4000 meters deep, geomorphological criteria were not taken into consideration in delimitation of the seabed, which was based solely on the criterion of distance. The agreement provides for the extension of the line of delimitation towards triple points to be worked out with other neighboring States: Albania in the north and Libya in the south.

Following the judgement by the International Court of Justice in 1982 on the dispute between Tunisia and Libya over delimitation of the continental shelf, an agreement, which does not substantially differ from the delimitation ordered by the Court, was reached by the two countries in 1988. The line traced by the Court of the Hague and set down in the agreement consists of two segments: one projects the terminal point of the land border at Ras Ajdir, 33° 55' N and 12° 00' E, with a northeast bearing of 26° to the meridian east of Ras Ajdir and parallel 34° 10' 30" N. These coordinates take into account the westernmost point of the Gulf of Gabes, considered the point on the Tunisian coastline subject to the greatest change of direction, and the point in which a line passing through it was informally respected by both parties for a number of years as the limit for respective concessions to oil companies. From the point of intersection with parallel 34° 10' 30" N, the second segment continues seaward with a northeast bearing of 52°. This direction was determined by drawing one line from the westernmost point of the Gulf of Gabes to Ras Kapoudia and another from the same point in the Gulf of Gabes to the easternmost extremity of the Kerkenna Islands and dividing the angle formed by the two lines in half. The terminal point of the second segment is not specified, owing to the interests of third States, namely Italy and Malta. The 1982 judgement required further clarification after the emergence of facts that had not been considered during delimitation procedures. Moreover, although Tunisia had asked the Court for an interpretation as well as a revision of the 1982 judgement, the subsequent 1985 judgement was merely interpretative.

While fixing the breadth of the territorial waters of the contracting parties, the 1984 agreement between France and Monaco does not refer specifically to the continental shelf; it does, however, determine the marine areas subject to the sovereignty of the parties. In particu-

lar, since the French and Monacan coastlines are partly neighboring and partly opposite, the agreement sets the limits of the marine areas beyond Monacan territorial waters over which the Principality exercises or will exercise sovereign rights in accordance with international law. The Principality of Monaco is assigned a narrow maritime corridor, 1.69 miles wide and 47.51 miles long, for a total area of 280 sq km. The distance between the two parallel lines is equal to the length of the Monacan coastline. The outermost limit is a line equidistant from the continent and the coast of Corsica. Given the narrowness of the Monacan corridor, approximately three kilometers, exploitation of oil resources contained in the subjacent continental shelf seems difficult.

The 1986 Libyan-Maltese agreement on the delimitation of respective continental shelves applied the special agreement entered into by the two parties in 1976 and executed the 1985 judgement of the International Court of Justice on the Libya-Malta case. In keeping with the solution adopted by the International Court of Justice, the agreement is relative to the rather limited area located to the south of Malta and, therefore, the area lying directly between the island of Malta and the coast of Libya, from Ras Ajdir to Ras Zarrouk. The Court applied two criteria that were later reproduced in the agreement -- equidistance and proportionality: the median line was tempered by a considerable deviation in Libya's favor to take account of the difference in the lengths of the coastlines. Delimitation was carried out by first drawing an equidistant line between the two States, ignoring as a base point the small Maltese island of Filfla, and then drawing another equidistant line between Sicily and Libya. The area of continental shelf thus defined, measuring 18 nm in width between the two initial lines, was then divided between Malta and Libya. As a result, the 77 nm line of delimitation is not equidistant, but lies somewhere between two-thirds and three-quarters of the distance between Libya and Malta. This could represent an important precedent for the future solution of controversies between Italy and Malta. As the agreement implements the judgement mentioned previously, all comments relative to the judgement also hold for the agreement. Of note is that the criteria of equidistance was used to obtain the equitable solution sought, but that the line of delimitation is restricted to those areas of the continental shelf in which there are no claims by third parties.

In 1986, another agreements was concluded between Italy and France, delimiting the marine spaces in the Strait of Bonifacio between Corsica and Sardinia. Although it only makes explicit reference to territorial waters, it is obviously also applicable to the

subjacent continental shelf. But with reference to the continental shelf, the said agreement is part of a broader ongoing negotiation between the two parties concerning not only the Strait of Bonifacio, but also the areas lying to the south of the Tuscan archipelago in the Tyrhennian Sea and to the north of Corsica in the Ligurian Sea. Here, also, a kind of median line was drawn between the southern coast of Corsica and the northern coast of Sardinia. Still very short and limited to the area in which the two coastlines are directly opposite, the present line extends to the east and to the west for a total length of 12 nm the line between Corsica and Sardinia previously drawn by the Italo-French convention of 1908. The agreement considers the result equitable.

In 1992, Italy and Albania concluded negotiations on the delimitation of the continental shelf situated between their respective opposite coastlines in the Adriatic and the Ionian Basins. Equidistance was once again adopted as the best criterion for delimitation. In defining the coordinates of latitude and longitude, two triple points, one to the north and one to the south, still have to be determined through separate negotiations with the neighboring States. The base lines on which the median line was calculated link points on the mainland and on islands agreed upon by the two parties and do not take into account the straight base lines of the parties. This delimitation between Italy and Albania completes delimitation of the Italian continental shelf in the Adriatic Sea and settles the problem in the event of the discovery of oil by either party close to the median line, in such a way that no objections can be raised by the other party. Technically, no particular problems other than the diverging directions of the two coastlines (the Albanian coast lies in a north-south direction, while the Italian coast, from the Gargano to Santa Maria di Leuca runs distinctly northwest-southeast) came up during negotiations; the median line criterion was applied and led to an equitable solution for both sides. Albania has not negotiated any other maritime delimitations with neighbouring States. With Greece, it will eventually have to solve the problem created by the presence of the Greek islands of Kerkira, Erikousa and Othonoi close to the Albanese coast, shifting the median line and restricting the potential claims of Albania in that area.

Of the few conventional delimitations in the Mediterranean -- many of which have been entered into by Italy -- the majority are based on the criterion of equidistance or a median line, modified to take into consideration the presence of islands or the curvature of the coastline. Without taking into account geographic circumstances, most of these agreements were signed in the 1960s and 1970s, that is, before the conclusion of the 1982 Montego Bay Convention. Despite

appearances to the contrary, the legal prevalence of the criterion of equidistance or a median line, reinforced by the criterion of distance with respect to that of natural prolongation, and tempered by consideration of special or relevant circumstances, does not seem to go against the open opposition to equidistance manifested during the Third Conference on the Law of the Sea and set down in the Montego Bay Convention. The provisions of that general convention are to apply in those cases in which a bilateral agreement for delimitation cannot be reached and, therefore, in those cases in which recourse is made to courts or boards of arbitration or conciliation for an objectively equitable solution.

In at least two of the agreements on delimitation in the Mediterranean (of those directly involving Italy), the criterion of equidistance has been only partially applied: the 1968 agreement with the former Yugoslavia, which deviates slightly from it, and the 1971 agreement with Tunisia, which deviates more substantially. Italy has already signed four agreements for total delimitation based mainly on equidistance, but also on the consideration of special circumstances which impose deviation from that line. The majority of other littoral States have not yet entered into complete agreements. However, in some treaties concluded in the Mediterranean, the disadvantages for one of the contracting parties of delimitation of the continental shelf have been compensated by political or economic benefits, trade or fishing agreements, or settlement rights.

In the future, those Mediterranean States that have not already done so will have to enter into bilateral agreements delimiting their respective continental shelves in accordance with the criteria of international law established by convention and by international case law. This will be quite independent of the entry into force of the Convention on the Law of the Sea of 1982 or the ratification of that Convention by States, as these rules and criteria seem to have become a part of customary law. The Mediterranean coastal States that have not delimited their continental shelves are: Algeria, Cyprus, Egypt, Israel, Lebanon, Morocco, Syria, and Turkey; except for the Principality of Monaco, all Mediterranean States still have unsolved problems of frontal or lateral delimitation with neighbors.

Study of the bilateral delimitation agreements already in force and of recent international case law on the subject has revealed that the problems of delimitation of the continental shelf in an enclosed sea such as the Mediterranean can best be dealt with multilaterally. This means that even in the stipulation of bilateral agreements on delimitation or the adoption of judgements for the solution of disputes on delimitation between two States, the Contracting Parties or the

international court should take into account the multilateral situation in order to be able to compose contrasting interests more effectively. Criteria for delimitation of the continental shelf for each of the geographic areas into which the Mediterranean is divided could be set down, even if those criteria would then be applied bilaterally between contracting parties or disputing parties, while each delimitation completed would have a validity *erga omnes*.

More thorough study of the geographic and geological conditions of the continental shelf in the Mediterranean leads to the conclusion that bilateral relations among coastal States are not sufficient to solve the problem of delimitation of the entire continental shelf correctly. Distinctions should be made between geographic areas, and the problems of delimitation then seen essentially in the light of the multilateral relations among the three distinct groups of adjacent and opposite States located in as many distinct areas of the Mediterranean.

The Mediterranean continental shelf can, in fact, be broken down into three separate geographic areas: the Western Mediterranean, the Central Mediterranean, and the Eastern Mediterranean. The countries composing those regions and therefore involved in multilateral relations are: in the west, Italy, France, Spain, and Algeria; in the center, Italy, Malta, Libya, and Tunisia; in the east, Italy, the States of the former Yugoslavia, Albania, and Greece. But in the western Mediterranean, relations among Spain, Gibraltar, Morocco, and Algeria are also important, as are, in the eastern Mediterranean, those among Greece, Turkey, Cyprus, on the one hand, and Syria, Lebanon, Israel, Egypt, and Libya, on the other. Moreover, while the problem of delimitation in the Western and Central Mediterranean is mainly of a technical nature; the same problem in the Eastern Mediterranean is much more complex and political, given the situation of political and territorial uncertainty of some of the coastal States in that region.

The situation in each of these areas will now be examined. In the Western Mediterranean, Spain claims the British territory on the one side of the Strait of Gibraltar and defends its own territory projecting into Morocco on the other. Spain and Morocco share common problems of delimitation on either side of the Strait of Gibraltar, in both the Atlantic and the Mediterranean. Moreover, delimitation between these two States of both the continental shelf and territorial waters is complicated in the Mediterranean by the presence of the large Spanish enclaves of Ceuta and Melilla on the Moroccan coast and of Spanish islands and islets off the shores of Morocco, all of which are disputed by Morocco. With respect to claims to maritime spaces, Ceuta is certainly the more important of the two enclaves, in that it

allows for claims on the Strait of Gibraltar, while the waters off Melilla are of no strategic importance. On the westernmost extremity of the maritime border between Morocco and Algeria, only four miles from Cap de Agua and the Moroccan border, are located the Spanish Chafarinas Islands, composed of Congreso, Isabella II and Rey. The position of these islands, at the end of a promontory, with no other islands in the vicinity, causes a deviation in the median line in favor of Spain that brings to mind the situation of the French Channel Islands in the English Channel. Finally, at the center of the Sea of Alboran is situated the Spanish island by the same name, the continental shelf of which the Moroccans feel should be regarded as *semi-enclavée*. As for Gibraltar, under British protection, Spain has always claimed that it should not be attributed any continental shelf.

The three bilateral negotiations between Spain, France, and Italy have to date led only to the Spanish-Italian Agreement on the delimitation between Sardinia and the Balearic Islands and the French-Italian Agreement on the delimitation between Sardinia and Corsica. Otherwise, they have succeeded only partially in eliminating the other divergences between the States, in spite of the pressure exerted by mineral resource interests and the common Community context. With reference to the agreement on delimitation of the continental shelf between Italy and Spain, France has declared the unobjectionable nature of the Agreement with respect to the French claims which are perceived to be threatened in that area, but Italy and Spain would have to modify their Agreement considerably in order to satisfy those claims. France refuses to apply the criterion of equidistance in delimitation with Spain because of the concavity of the Gulf of Lyons. As an alternative, it has proposed giving a reduced effect to the Spanish Balearic Islands. The French view is that the area around the Balearic Islands is so limited, like that around the Channel Islands in the English Channel, that there is no room for correction of the line of delimitation.

Negotiations between Italy and France have been more successful; yet, the two States still have divergent positions on Corsica. The areas involved in delimitation are the following: the largest, but economically least interesting, is situated between continental France, Corsica, and Sardinia; the second is in the Gulf of Genova and the Ligurian Sea, the most interesting part -- given its shallow depth -- is to the north and east of Corsica; and the third area is the Strait of Bonifacio, the western and eastern areas of which are small in size but very important. Italy and France have, however, tried to reduce areas of dispute by signing the agreement on the Strait of Bonifacio and by

providing for correction of delimitation to the south of the Tuscan archipelago in the Tyrhennian Sea and to the north of Corsica in the Ligurian Sea. France contests the line of delimitation between Sardinia and the Balearic Islands agreed upon between Italy and Spain in 1974 and does not accept the complete encirclement of the Corsican continental shelf. Negotiations between Italy and France for the delimitation of the continental shelf in the Upper Tyrhennian were opened in 1971, but it immediately became clear that a positive outcome would be difficult, given French opposition to the criterion of equidistance. At that time, France made an unusual proposal based on the global division of the Western Mediterranean among France, Italy, Algeria, and Spain. France also proposed to Spain and Italy to set up a zone of economic interest encompassing the continental shelves of the three States in the Mediterranean for the common exploration and exploitation of natural resources. This led to the suspension of negotiations, as both Italy and Spain considered the proposal incompatible with their interests. A fair solution in delimiting the continental shelf could take into consideration all the islands, not only Corsica and Sardinia, and the agreements already in force between Italy and Spain in the Sardinia-Balearic area and between Italy and France in the Straits of Bonifacio area.

To date, Italy and Algeria have not shown any interest in frontal delimitation of their respective continental shelves, since the seabed lies at over 2000 meters and is, therefore, not considered exploitable in the short term. Interest in lateral delimitation between Algeria and Tunisia was, however, manifested, but negotiations came to a standstill because of Tunisia's claims to the island of La Galite, situated in that area. Given the French position in favor of an atypical division of the Western Mediterranean, the continental shelf lying between Italy and Algeria may be delimited when Algeria solves its problems with Spain and Tunisia. From a technical point of view, it would seem fair to adopt the criterion of a median line, while taking into account other elements such as the relative lengths of the coastlines in the area.

In the Central Mediterranean, the area most involved in the process of delimitation is the Strait of Sicily, in which Tunisia, Italy, Malta, and Libya have to delimit their continental shelves. Malta has always advocated the criterion of equidistance during negotiations with neighboring States. In fact, in addition to the conventional delimitation with Italy of the Strait of Malta and the Agreement with Libya applying the judgement of the International Court of Justice, Malta also applied for permission to intervene in the dispute between Libya and Tunisia. The application was, however, turned down by the International Court in the Hague with the provisional judgement of

1981 proclaiming it inadmissable. Italy was also interested in intervening in the dispute between Libya and Tunisia, given that the line of delimitation could be of relevance to that State. The application to intervene was never submitted, however, and, as it turned out, Italy did not suffer from the delimitation. As Libya and Tunisia are neighbouring and not opposite countries, the International Court of Justice, in delimiting the continental shelf between them, drew an unending line seawards that does not damage Italian interests in any way.

Delimitation between Malta and Italy remains a problem. If Maltese demands -- the adoption of the criterion of equidistance in the Malta Channel between Sicily and Malta and the recognition of special circumstances in favor of Malta with regard to the Pelagie Islands in the Strait of Sicily -- were satisfied, Italy would be unjustly disadvantaged. This would, in fact, result in the separation of the continental shelf of the Pelagies from that of Sicily. But Italy could also invoke special circumstances in favour of Sicily which would make it possible to reach a more equitable and reasonable solution. The judgement of the International Court of Justice in the dispute between Malta and Libya, which leaves Italian interests in the area unscathed, constitutes a favorable premise for a similar solution in this case, taking into consideration the respective lengths of the Maltese and Sicilian coastlines. The circumstance considered by the Court, that is, the proportionality of the size of the continental shelves attributed to the States and the lengths of their respective coastlines, measured as the bird flies, is gradually becoming a principle of international law. As such, it is the fundamental factor to be considered in delimitation between Italy and Malta and is the only one that can lead to an equitable and just solution.

In the event of frontal delimitation of the continental shelf between Italy and Malta, the special circumstances in that area would all play in favor of Italy and would lead to the application of the criterion of proportionality between the length of coastlines and the size of the continental shelf in mitigation of the criterion of equidistance which would be less favorable for Italy. Special circumstances of relevance to the area considered include: the Sicilian coastline which, added to that of the Pelagie Islands, is clearly much longer than that of the Maltese archipelago; the location of the Maltese archipelago on a continental shelf that is the natural prolongation of the Sicilian continental shelf, while it is separated from the Pelagie Islands by a natural basin 650-750 m deep; the land mass of Sicily and the Pelagies is much greater than that of the Maltese archipelago. Such a delimitation would ensure Italy a permanently acceptable solution in the

central area between Malta and Sicily; in the area to the west-southwest of Malta, allowing for the continuity of the continental shelf between the Pelagie Islands and Sicily; and in the area to the east-southeast of Malta, allowing for the extension of the Italian continental shelf in that direction and basically correcting the relation between the Italian, the Maltese, and the Libyan continental shelves in the Central Mediterranean.

The problem of delimitation of the continental shelves of Italy and Libya is complicated by its real or presumed link to delimitation of the continental shelf of Malta. Here, account must be taken of the judgement of the International Court of Justice relative to the dispute between Malta and Libya, and of the subsequent Agreement between the Parties, which considerably reduced Malta's excessive claims in the area. In any case, making adjustments to a hypothetical median line between Italy and Libya (not taking into consideration the Maltese archipelago) for the length and the direction of the respective coastlines does not seem difficult. But the conclusion of an Italian-Libyan Agreement on the continental shelf is also particularly delicate because of Libyan claims concerning the baseline from which the continental shelf should be measured in the Gulf of Sidra. The Arab Jamahiriya of Libya has closed the Gulf of Sidra, declaring the entire area between the coastline and the line drawn internal waters. Difficulties would, in fact, arise, if Libya were to claim that the median line between that country and Italy were calculated, taking the line closing the Gulf as the baseline. An appropriate solution could be an agreement delimiting the continental shelf that does not prejudice the status of the Gulf of Sidra. In that case, the above-mentioned 1985 judgement of the International Court in the Hague and the subsequent agreement would provide a favorable premise for a solution satisfying the interests of both States.

In the Eastern Mediterranean, new agreements will be needed among the new States emerging from the disintegration of Yugoslavia and between these and Italy to determine certain triple points at sea required for delimitation of the continental shelf in the Adriatic. This will not be easy, as there is already disagreement between Slovenia and Croatia about the coastal border between the two countries, and overt conflict between Croatia and Bosnia Herzegovina and Croatia and Montenegro about Croatia's southern borders, especially where the Croatian coastline is interrupted by the Bosnia-Herzegovinian corridor and then continues on to the border with Montenegro. It is obvious that no delimitation of the continental shelf will be possible until the land borders among the emerging States are definitively established.

The best-known and most persistent dispute about maritime delimitation in the Eastern Mediterranean concerns Greece and Turkey in the Aegean. On at least three occasions -- in 1976, 1984, and 1987 -- the two allied States almost reached the point of armed conflict. But the dispute over the delimitation of the marine boundaries, that is, territorial waters and the continental shelf, is only a part of a broader controversy between the States, which involves marine scientific research, control of the air space in the Aegean, the demilitarization of the Greek islands in the Aegean, and the status of Cyprus.

Some factors that have made the aspects of delimitation of marine spaces prevail over other aspects of the dispute are: developments since 1958 in the international law of the sea, which have favored the extension of national jurisdiction in marine spaces; the complex configuration of the Aegean coastline and islands; and the discovery of important oil reserves close to the continent. On the basis of international law, the myriad Greek islands scattered throughout the Aegean put Greece in a favorable position. With a territorial sea of only six miles, Greece controls 43.68 percent of the Aegean, while Turkey controls only 7.46 percent; the remaining 48.85 percent is high sea. The continental shelf constitutes the crux of the dispute. A median line drawn between the Greek islands and the Turkish coast would give Turkey a very narrow continental shelf. As sovereignty over the islands is beyond doubt -- they are Greek -- Turkey claims that the islands should not be given full weight for the purposes of delimitation.

According to the Turks, the problem is not only one of access to resources, but also one of freedom of navigation in the high seas and through the straits constituting an important trade route between the Mediterranean and Black Seas. For many years, the Turkish position seemed weak both geographically and legally, and it was for this reason that Turkey became a permanent opponent of all international provisions, be they conventional or customary, that could prejudice its interests. There is, however, reason to believe that the process of delimitation, which now seems aimed at an equitable solution on the basis of both customary law and the Convention of the Law of the Sea, will to some extent correct the legal imbalance between the two positions.

Turkey prefers delimitation by agreement, in keeping with equitable principles and taking into consideration all pertinent factors, including the geomorphological and geological structure of the seabed in the area in question, and special circumstances, such as the general configuration of the respective coastlines and the existence of islands,

islets, and reefs in the area. Given the presence of the Greek islands close to the Turkish coast, a median line would overly restrict the Turkish continental shelf. Turkey is of the opinion that fairness is of the essence in solving this dispute: since the total area of the Greek islands in the Aegean is no more than 5000 sq km and their total population no more than half a million people, the Turks claim that Greece should not have a continental shelf larger than that of Turkey, which has a much larger area and a population of 8 million people. Furthermore, the Turkish authorities claim that since the Greek islands are situated on the Turkish continental shelf, they cannot claim more continental shelf than that attributed to their land mass.

The Greeks, on the other hand, claim that, in the absence of an agreement, no State has the right to extend its sovereignty over the continental shelf beyond the median line, each point of which is equidistant from the closest point on the base lines -- continental or insular -- from which the breadth of the continental shelf of each State is measured. Greece refutes Turkish objections and draws attention to the fact that the islands can be used as points on which to base claims on the continental shelf. Furthermore, it affirms that the Aegean islands are inhabited and that their density is uniform throughout the area in which they are found, from the Greek to the Turkish mainland.

Whatever the solution found for the Aegean islands, the Greek islands lying to the east of that sea, namely the Kastellorizo (in Greece) or Megisti (in Turkish) or Castelrosso (in Italian) Islands, pose a separate problem. This small group of islands, occupying an area of 4 sq nm, and lying 60 nm to the east of Rhodes, the nearest Greek island, but only one mile from the Turkish shore, is the cause of the greatest deviation of the median line in favour of Greece. Greece directly gains an area of 5240 sq nm of sea and continental shelf through sovereignty over that island. During the course of negotiations between the two States, it seemed as though Greece would be willing to relinquish the effect produced by those islands in return for Turkish concessions in the Aegean.

To date, all attempts -- whether unilateral, diplomatic or arbitrational -- made by Greece and Turkey to solve the dispute have been unsuccessful and have not led to delimitation. In spite of the apparently unresolvable nature of the dispute, the changes in the international situation and the passing of time will ease the conflict. Turkey has applied for membership in the European Community, but that membership will be much more difficult to attain than admission into NATO. In any case, as members of the European Community, both States would have much less individual control over political and

economic problems of interest to them. But then again, Greece and Turkey have already committed themselves to cooperation for the protection and the conservation of the marine environment in the Aegean and have undertaken bilateral cooperation in marine scientific research through their participation in the Mediterranean Action Plan.

The last thorny dispute in the Eastern Mediterranean concerns Cyprus which, as is known, is divided into two parts, controlled respectively by Greek Cypriots and Turkish Cypriots. It seems unlikely that Cypriot authorities will permit any marine delimitation, especially with Turkey, until the island has been reunified.

The legal, as well as political and economic importance of solving the problems of delimitation of the continental shelf in the Mediterranean, especially in view of exploitation of mineral resources, is self-evident. Not only the interests of Italy, which lies at the center of the sea, but also those of the other coastal States, whatever their geographic and geopolitical position, are influenced by delimitation.

In the absence of total delimitation, it seems that no State has the right to exploit the (mainly mineral and therefore non-renewable) resources or to grant concessions for their exploitation in the areas still disputed and subject to claims by adjacent or opposite States. Delimitation of the continental shelf can be determined only through agreement of the States involved, and until such agreements have been entered into, none of the coastal States can claim exclusive use of the disputed area. Practically, this criterion blocks exploitation of mineral resources until delimitation is completed or a joint agreement on mineral resource activities concluded.

The delimitation agreements in force since 1982, and in particular, those entered into by Italy, were almost all concluded at a time in which the exclusive economic zone had not yet been conceived. They cannot, therefore, be used as precedents in delimitation of the continental shelf by Italy or other coastal States. Other agreements will have to be reached, especially if States decide to establish exclusive economic zones in the Mediterranean. The trend to make the limits of the exclusive economic zone correspond to those of a State's continental shelf has brought more significance and value to conventional delimitation of the latter, almost turning it into a maritime boundary in view of the possible institution of the exclusive economic zone.

Naturally, the solutions already reached by means of bilateral agreements or international judgements will be used as points of reference in future delimitation of the various areas described. In this regard, those coastal States that have undertaken bilateral delimitation have done well, as the latter, especially if undisputed, will remain in force and will influence future delimitations among third States,

avoiding any prejudice to the interest of the States that were the first to delimit.

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THE EVOLUTION OF THE BARCELONA CONVENTION AND ITS PROTOCOLS FOR THE PROTECTION OF THE MEDITERRANEAN SEA AGAINST POLLUTION

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General Aspects

Origins

In 1974, the Governing Council of the United Nations Environment Programme (UNEP) drew up its oceans program contemplating cooperation in different regional seas and in particular in the Mediterranean. As a follow-up on this initiative, an Intergovernmental Meeting on the Protection of the Mediterranean was held in Barcelona from 28 January to 4 February, 1975,[1] where the Mediterranean Action Plan (MAP) was adopted, covering four distinct areas of cooperation:

(1) integrated planning of development and management of the resources of the Mediterranean Basin;
(2) coordinated pollution monitoring and research program in the Mediterranean;
(3) framework Convention and related Protocols with their technical annexes for the protection of the Mediterranean environment; and
(4) institutional and financial implications of the Action Plan.

In order to develop the legal component of the MAP,[2] a Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region for the Protection of the Mediterranean Sea met in Barcelona from 2 to 16 February 1976. The legal framework for the cooperative regional program was adopted in the Final Act of the Conference, which approved, in particular, the text of three instruments, namely:

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[1] The Meeting was attended by sixteen States bordering the Mediterranean Sea (all except Albania and Cyprus).

[2] *Vide passim* E.G. Raftopoulos, "The Mediterranean Action Plan in a Functional Perspective: a Quest for Law and Policy", *MAP Technical Reports Series Nº 25*, UNEP, Athens, 1988.

* The Convention for the Protection of the Mediterranean Sea Against Pollution;
* The Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft;
* The Protocol Concerning Cooperation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency.[3]

The regional approach

The legal instruments adopted to protect the Mediterranean Sea against pollution, as well as the overall system of MAP, are indeed of a regional character, both *rationae personae* and *ratione loci*. In fact, the Barcelona Convention and its related Protocols constitute the starting point of a series of UNEP-sponsored "regional seas" agreements currently in existence for eight major marine areas of the world.[4] Nevertheless, given the special characteristics of the Mediterranean basin,[5] some general observations can be made in this context.

First of all, the Mediterranean regional system has a hierarchical normative structure. As a matter of legal coherence, the regional instruments under consideration shall not contravene the provisions of

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[3] UNEP. Mediterranean Action Plan and the Final Act of the Conference of Plenipotentiaries of the Coastal States of the Mediteranean Region for the Protection of the Mediterranean Sea (New York. United Nations, 1978). For a more complete historical background: J.A. de Yturriaga Barberan, "Convenio de Barcelona de 1976 para la protección del mar Mediterráneo contra la contaminación", *Revista de Instituciones Europeas*, 1976: 63-96.

[4] There are currently over twenty-three conventional instruments, adopted under UNEP auspices, in the following marine regions: the Mediterranean, the Persian/Arabian Gulf, the Gulf of Guinea, the Southeast Pacific, the Red Sea, the Caribbean, the Indian Ocean, and the Southwest Pacific. Other regional conventions, developed outside UNEP's regional seas programme, apply to the Baltic Sea, the North Sea, and the Northeast Atlantic. *Vide* the text of UNEP's sponsored legal instruments and a very interesting introductory study in P. Sand, *Marine Environment Law in the United Nations Environment Programme*, (London and New York: Tycooly Publishing, 1988).

[5] The Mediterranean is a semi-enclosed sea, with relevant geographical peculiarities, reaching across the shores of three continents and submitted to intensive utilization, both by riparian and non-riparian States.

the global conventions[6] to which the Mediterranean States are parties nor, for that matter, the general rules of international law. As with the other regional seas conventions, the legal instruments for the protection of the Mediterranean Sea against pollution shall introduce special rules that are better adapted to the specific conditions of the region, without prejudice to the rules already existing at the global level. More protective rules, but not more permissive ones, can therefore be established in the Mediterranean.

In the second place, as Professor Leanza has written, the international regime governing marine pollution in the Mediterranean region cannot be precisely construed solely by reference to conventions between its coastal States, but must also refer to other conventions on marine pollution with extra-Mediterranean States which may also apply locally.[7] The Barcelona Convention and related Protocols are not entirely isolated instruments but elements of a normative framework in which global, regional, and subregional rules interact for the protection of the marine environment concerned. This observation is particularly relevant since coastal States are not the only legal users of that sea, which means that the Barcelona regional rules alone are not able to guarantee full protection of the Mediterranean against pollution.[8]

Finally, the regional legal scheme for the protection of the Mediterranean Sea is enacted without prejudice to the strong disparities remaining among its Parties. Acting somehow as a microcosm, the Mediterranean mirrors the great cultural, political, and economic diversity among its riparian States. But if the protection of the common sea against pollution is to be successful, both its Northern and Southern neighbors will have to make an equitable and cooperative effort to that end.

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[6] As far as UNCLOS is concerned, its Art. 237, 2 provides that: "specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention."

[7] U. Leanza,"The Regional System of Protection of the Mediterranean Against Pollution," *Il regime giuridico internazionale del mare Mediterraneo*, a cura di Umberto Leanza, (Milano: Giuffrè, 1987): 381.

[8] *Ibid.*, p. 399.

The Framework Approach

According to J.A. de Yturriaga, the legal system for the protection of the Mediterranean Sea can be characterized as a "framework approach," lying somewhere between the comprehensive (Baltic Sea) and the piecemeal (North-East Atlantic) systems.[9] The Barcelona solution constitutes an intermediate original model, which has become quite extensively used in the environmental field. It is composed of a framework Convention, laying down the basic general rules, and several complementary Protocols covering specific sectors of marine protection.

The Mediterranean scheme is nevertheless original in some respects; namely, the instruments are interrelated, the Protocols are independent from each other, and the overall system is progressive. Firstly, the framework Convention and the sectoral Protocols are interrelated, since no one may become a Party to the Convention without becoming at the same time a Party to at least one of the Protocols and, conversely, no one may become a party to a Protocol without being, or becoming at the same time, a Party to the Convention. Secondly, the Protocols are independent of each other in that, on the one hand, they are binding only on the Parties to the Protocol in question and, on the other hand, only the Parties to a Protocol are empowered to make decisions concerning it. Finally, the system is also progressive in that the Parties shall cooperate in the formulation and adoption of additional Protocols covering new sectors of marine pollution, as has been the case in practice.

Participation and Geographical Scope

The Convention and its related Protocols may be subscribed by any State and by any regional economic organization, under the following criteria:

* The Convention and the two original Protocols may be subscribed at any time by any of the Mediterranean coastal States invited to participate in the Barcelona Conference of Plenipotentiaries,[10] as well as by the European Community and by any similar regional

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[9] J.A. de Yturriaga, "Regional Conventions on the Protection of the Marine Environment", *RCADI* 1979 I, vol. 162: 338-40.

[10] The Mediterranean coastal States that were invited to participate in the Conference were: Albania, Algeria, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libyan Arab Republic, Malta, Monaco, Morocco, Spain, Syrian Arab Republic, Tunisia, Turkey, and Yugoslavia. All but Albania and Algeria accepted the invitation.

economic grouping, at least one member of which is a coastal State of the Mediterranean Sea Area and which exercises competences in fields covered by this instruments.

* After the entry into force of the Convention and of any Protocol, any other State may accede to the Convention and to any Protocol, subject to prior approval of three fourths of the Contracting Parties to the Protocol concerned.
* After the accession of Albania in 1991, the Convention and the two original Protocols have been subscribed by all Mediterranean coastal States, as well as by the European Economic Community. The Protocol on land-based sources and the Protocol on specially protected areas are in force among all Mediterranean States, with the exception of Lebanon and Syria, and the EEC. For the time being, no other (Mediterranean or non-Mediterranean) State or regional economic organization has acceded to the Convention and to any of its Protocols.[11] The succession to the Barcelona Convention and its related Protocols by the States belonging to former Yugoslavia has not been officially examined so far.[12]

Participation as observers (without vote) in the meetings and conferences is open to the Mediterranean coastal States that are not Contracting Parties and, with the tacit consent of the meeting or the conference, to the United Nations, its competent subsidiary bodies, the International Atomic Energy Agency (IAEA), and the specialized agencies if they participate in the activities of the Mediterranean Action Plan. Any other State Member of the United Nations or its specialized agencies, as well as any non- governmental organization that has an interest in the protection of the Mediterranean Sea against pollution, shall be invited to send representatives to observe any public meeting or conference, with the tacit consent of two thirds of the Contracting Parties.[13] The Fifth Ordinary Meeting has adopted a recommendation amending the original rules of procedure, in order to

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[11] Observers from the United Kingdom, the United States, and the USSR attended the Conference of Plenipotentiaries in 1976 but, in spite of their strategic and political involvement in the Mediterranean Sea area, no subsequent action has followed.

[12] *Vide* M. Sersic, "The crisis in the Eastern Adriatic and the Law of the Sea", in this *Proceedings*, p. 237 ff.

[13] Rules 5 to 8 of the Rules of procedure.

allow interested NGOs to observe also "any meetings of technical committees."[14]

The geographical coverage of the Convention and its related Protocols extends to the Mediterranean Sea Area, defined as the maritime waters of the Mediterranean proper, including its gulfs and seas, within the following limits:

* Internal limits: The Mediterranean Sea Area shall not include internal waters of the Contracting Parties, except as may be otherwise stipulated in any Protocol of the Convention. In fact, as we shall see later, several Protocols extend their application to internal waters and even beyond.[15]
* External limits: the Mediterranean Sea Area is bounded to the West by the Meridian passing through Cape Spartel lighthouse, at the entrance of the Strait of Gibraltar, and to the East by the southern limits of the Dardanelles between the Mehmetcik and Kumkale lighthouses. For some historic and political reasons, both the Black Sea and the Sea of Marmara are thus left out of the protective reach of the Mediterranean legal instruments.[16]

Activities Covered

The Contracting Parties to the Convention and the Protocols undertake to take individually or jointly all appropriate measures to "prevent, abate and combat pollution" as well as to "protect and enhance the marine environment" of the Mediterranean Sea Area. They further pledge themselves to promote, within the international

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[14] UNEP(OCA)/MED IG.1/5, Annex V, A, 3.5, at p. 2.

[15] The application of the Protocol on land-based sources extends to internal waters and to saltwater marshes communicating with the sea (Art. 3); the Protocol on specially protected areas also applies to internal waters, including wetlands of coastal areas designated by each of the Parties (Art. 2); the emergencies Protocol can be interpreted as applying also to internal waters and to coastal zones.

[16] "(N)otwithstanding the fact that considerable pollution of the Mediterranean Sea comes through the Strait of the Bosphorus and the Dardanelles (particularly to the Aegean Sea) and from vessels navigating to and from the Black Sea." B. Vukas, "The Protection of the Mediterranean Sea Against Pollution", *Il regime giuridico internazionale del mare Mediterraneo*, a cura di Umberto Leanza, (Milano: Giuffrè, 1987): 418. For the legislative history of Art. 1, 1, see: J.A de Yturriaga Barberan, "Convenio de Barcelona..." *op. cit.*: 72-73.

bodies considered to be competent, measures concerning the protection of the marine environment in that Area.

Although these general undertakings include a specific reference to the protection and even the enhancement of the marine environment of the Mediterranean Sea Area, the action developed thus far has been heavily focused on regulating activities causing pollution. Furthermore, even typical sea polluting activities, such as shipping, have not been the object of any specific Protocol since, as Professor Leanza has written, it was considered to be more appropriately regulated at the global level:

> [T]he Mediterranean Sea has been designated a *special zone* in terms of the 1973 London Convention for the Prevention of Pollution from ships ... to which even non Mediterranean States that use that Sea for maritime activity adhere, and which is more attuned to the requirements of the Mediterranean."[17]

Moreover, out of the four Protocols adopted for the implementation of the Convention, only the one concerning specially protected areas has a broader scope than the mere prevention of pollution, inasmuch as it refers specifically to the protection of marine resources, natural sites, and even to the safeguarding of the cultural heritage in the region.[18] The 1985 Genoa Declaration formally mentions cooperation towards "sustainable development" and "the rational use of... resources" as objectives of the second Mediterranean decade.[19] However, activities concerning the exploitation of the living resources of the Mediterranean Sea have not been the object of specific regulation under the Barcelona system.[20] Only activities concerning exploration and exploitation of the mineral resources of the sea-bed and its subsoil

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[17] U. Leanza, *op. cit.*, 396; 406. *Vide* also B. Vukas, *op. cit.*, 423-424.

[18] Art. 2. This has been considered by M. Dejeant-Pons as an expansion of the scope of the Barcelona Convention, "Les Conventions du Programme des Nations Unies pour l'Environnement relatives aux mers regionnels", *AFDI* (1987): 711.

[19] The "Genoa Declaration of the Second Mediterranean Decade" was unanimously adopted by the participating States on 10 September 1985. Doc. UNEP/CRP.6, 10 September 1985. See also: UNEP/IG.56/5, pp. 21-22.

[20] Torregrosa Puerta, F. *Utilización y protección del medio marino: la ecogestión de la columna de agua y de los recursos biológicos del Mar Mediterráneo*, Doctoral Thesis, Valencia, 1991: 188-227.

have been the object of a draft Protocol, as we shall see later on.

Original Legal Instruments

The Convention

The Convention for the Protection of the Mediterranean Sea Against Pollution was adopted in Barcelona on the 16 February 1976. It entered into force on 12 February 1978 and today binds all the eighteen coastal States, as well as the EEC.

The Barcelona Convention is the basic instrument of the Mediterranean system in as much as it draws up the general normative, operative, and institutional provisions, acting at the same time as an "umbrella" for the different sectoral Protocols. Aside from the aspects already mentioned above, the main features of the Convention are as follows.

The Convention adopts a normative hierarchical approach[21] since, while admitting the prevailing force of general maritime law (and specifically of the codification and development of the Law of the Sea by UNCLOS), it formally provides in its Article 3 that:

> The Contracting Parties may enter into bilateral or multilateral agreements, including regional or subregional agreements, for the protection of the Mediterranean Sea against pollution, provided that such agreements are consistent with this Convention..."

Carrying on in this hierarchical approach, the Barcelona Convention also acts as the normative framework instrument for the Protocols adopted for its implementation.

The normative content of the Convention is, however, quite limited and it is generally drafted in soft legal terms, given that the Convention is intended to act mostly as a framework for further developments. Nevertheless, it expresses the general agreement of the Parties to undertake all appropriate measures to prevent, abate, and combat pollution,[22] to cooperate in the formulation and adoption of addition-

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[21] "The Barcelona Convention established a clear hierarchy among different international rules: a) general international law as codified and developed at UNCLOS III; b) the Barcelona Convention and its related Protocols; c) other international agreements. Article 3 clearly determines how possible incompatibilities should be solved". B. Vukas, *op. cit.*, 420-421.

[22] Art. 4, 1.

al Protocols,[23] and to promote within the competent international bodies measures concerning the protection of the Mediterranean Sea Area from all types and sources of pollution.[24]

The basic commitment to "prevent, abate, and combat" pollution is further spelled out with respect to four specific sources, namely pollution from dumping, from ships, from exploration and exploitation of the continental shelf and the sea-bed and its subsoil, and from land-based sources.[25] The Convention also contains several general provisions concerning different levels of cooperation in dealing with pollution in cases of emergencies, in pollution monitoring, and in the fields of science and technology.[26] Finally, according to Article 12, the Parties undertake to cooperate as soon as possible in the formulation and adoption of appropriate procedures for the determination of liability and compensation for damage resulting from the pollution of the marine environment deriving from violations of the Convention or its Protocols.[27]

In spite of the soft normative character of these substantive rules, which appear essentially as directives for further action both at the international and national regulatory levels, the Convention includes some provisions aimed at ensuring its own effective application. It asks the Parties to transmit reports on the implementing measures adopted.[28] and calls on them to cooperate in the development of compliance control procedures.[29] A settlement-of-disputes mecha-

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[23] Art. 4, 2 and art. 15.

[24] Art. 4, 3.

[25] Arts. 5-8.

[26] Arts. 9-11.

[27] A study prepared by two UNEP consultats, M. Lahlou and Loukili, entitled "Etude concernant le fonds interétatique pour la zone de la Mer Méditeranéeet la question de la responsabilité et de la réparation des dommages résultant de la pollution du milieu marin" has been presented to the First Meeting of the Parties (UNEP/IG.14/INF.18) and, after revision, to the Second Meeting in 1981 (UNEP/IG.23/INF.3), but no further substantive action has been pursued so far by the Contracting Parties.

[28] Art. 20.

[29] Art. 21.

nism is also provided for that includes the voluntary submission to arbitration,[30] an option never utilized thus far.

At the institutional level, the Convention designates UNEP as the Organization responsible for carrying out secretarial functions,[31] establishes the venue and the functions of the Meetings of the Parties,[32] and contemplates the calling of diplomatic conferences for the adoption of additional Protocols.[33] The Meetings of the Contracting Parties shall keep under review the implementation of the Convention and its Protocols, but the normative acts adopted to that end are considered essentially of a hortative character and it is common understanding that resolutions, recommendations, and decisions of the Meetings are not vested with strict legally binding force.

The rules of procedure for the meetings and conferences of the Parties, as well as their financial rules, have been adopted pursuant to Article 18.[34] They regulate the exercise of voting by the Contracting Parties,[35] and Article 19 of the Convention provides for the special exercise of voting rights by the EEC and other regional economic groupings entitled to become parties to it. In practice, though, all resolutions are adopted by consensus.

The Dumping Protocol

The Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft was adopted together with the Barcelona Convention and also entered into force on 12 February 1978. All Mediterranean coastal States are today Parties to it, as well as the EEC.

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[30] Art. 22 and Annex A.

[31] Art. 13. *Vide* also art. 3, 5 of the dumping Protocol, art, 2, (b) of the land-based sources Protocol and art. 8 of the specially protected areas Protocol.

[32] Art. 14.

[33] Art. 15.

[34] UNEP. Rules of Procedure for meetings and conferences of the Contracting Parties to the Convention for the Protection of the Mediterranean Sea against Pollution and its related Protocols, (United Nations, New York, 1985).

[35] *Vide* Rules 42-47 of the Rules of Procedure.

The dumping Protocol also follows the hierarchical approach in that, having been adopted in pursuance of the provisions of the umbrella Barcelona Convention, it appears as a regional instrument consistent with the global London Dumping Convention of 1972.[36]

With some mostly formal disparities in drafting, the Mediterranean Protocol follows the basic lines of the global London Convention with regard to the definition of dumping,[37] the listing of wastes and the permit system,[38] the *force majeure* and emergency-on-land exceptions,[39] the duties of the flag State, the port State, and the coastal State with regard to the implementation of the Protocol and the formal exclusion of its application to non-commercial State ships.[40]

Given the special characteristics of the Mediterranean Sea Area and its particular vulnerability to pollution, some specific aspects are nevertheless regulated in a more stringent manner in the Barcelona Protocol than in the London Dumping Convention. That is particularly the case with respect to the substances which are forbidden to be dumped in the Mediterranean Sea. The black list in Annex I formerly included organosilicon compounds[41] and still includes today acid and alkaline compounds that may seriously impair the quality of sea water. But the main accomplishment of Annex I is that it also formally bans the dumping of all kinds of radioactive wastes, by listing in its paragraph 6:

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[36] The Parties to the dumping Protocol stated in the fourth preambular paragraph that they concluded it "bearing in mind" the London Dumping Convention. For Yturriaga Barberan this phrase means that "the Barcelona Protocol places itself under the aegis of the Global Convention". *Op. cit.*, p. 366. *Vide* also B. Vukas, *op. cit.*, pp. 422-423.

[37] Art. 3. However, in contrast with Art. III, 1, (c) of the LDC, the disposal of wastes related to the exploitation of sea-bed mineral resources is not excluded from the scope of the Protocol.

[38] Art.4-7, 10 and Annexes I, II and III.

[39] Arts. 8 and 9.

[40] Art. 11.

[41] This has been deleted by the Fifth Ordinary Meeting. UNEP/IG. 74/5, 28 September 1987, p. 78.

High- and medium- and low-level radio active wastes or other high- and medium- and low-level matter to be defined by the International Atomic Energy Agency.

The grey list in Annex II (substances permitted to be dumped with a prior special permit from the competent national authority) also adds some minerals (beryllium, chromium, nickel, vanadium, selenium, antimony, and their compounds) as well as undesirable synthetic organic chemicals and acid and alkaline compounds not covered under Annex I.

Notwithstanding that, in the last few years, the dumping Protocol has not kept pace with the action taken at the LDC global level with respect to several issues. Sub-seabed disposal from the sea, which is considered as a form of dumping in the global Convention,[42] has not been formally declared the same in the Mediterranean Protocol. The termination of incineration at sea, a form of disposal that is to be phased out by the end of 1994 at the global level,[43] is still under discussion among the Parties to the Barcelona Protocol.[44] A similar situation exists with respect to the termination of dumping of industrial wastes at sea.[45]

Other issues, in contrast, have been dealt with in a manner more in line with the current evolution at the global level. For instance, the Sixth Ordinary Meeting requested the Secretariat to review the dumping Protocol in the light of the principle of the "precautionary

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[42] Resolution LDC.41(13), "Disposal of Radioactive Wastes into Sub-sea-bed Repositories Accesed from the Sea", Report of the Thirteenth Consultative Meeting, LDC 13/15, 18 December 1990, Annex 7.

[43] Resolution LDC.35(11) Status of incineration of noxious liquids at sea. See text in *The London Dumping Convention: the First Decade and Beyond*, (IMO, London, 1991): 235.

[44] Report of the Seventh Consultative Meeting, UNEP(OCA)MED IG.2/4, 11 October 1991, p. 14, para 101.

[45] According to Resolution LDC.43(13), "Phasing Out Sea Disposal of Industrial Wastes," dumping at sea of industrial wastes must cease by 31 December 1995. In the Mediterranean, the question of a possible amendment to the dumping Protocol to that effect is still under discussion: Report of the Seventh Consultative Meeting, UNEP-(OCA)MED IG.2/4, 11 October 1991, p. 14, para. 101.

approach," in order to identify any necessary amendments to it.[46] Moreover, the Seventh Ordinary Meeting adopted a recommendation concerning the transition to "clean production" which was declared to be applicable in particular in the context of the dumping Protocol.[47]

The Emergency Protocol

A Protocol Concerning Cooperation in Combating Pollution of the Mediterranean Sea By Oil and Other Harmful Substances in Cases of Emergency was also adopted together with the Barcelona Convention and entered into force on 12 February 1978. All Mediterranean States are today Parties to it, as well as the EEC.

Following also a hierarchical approach, the Preamble of the Protocol refers to several IMO global conventions which, according to doctrinal interpretation, will have priority in cases of incompatibility.[48] The adoption in 1990 of the IMO Convention on Oil Pollution Preparedness, Response and Cooperation, already signed by seven Mediterranean States,[49] should also be noted.

The emergency Protocol calls on the Parties to cooperate when the presence of massive quantities of oil or other harmful substances, resulting from accidental causes or an accumulation of small discharges, pollute or threaten to pollute the sea within the area, creating a grave and imminent danger to the marine environment, the coast, or related interest of one or more of the Parties.[50]

The manner in which the scope of the Protocol is defined in Article 1 does not make clear what is in fact its geographical reach. Neverthe-

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[46] The Meeting, recalling UNEP Governing Council decision 15/27, agreed to "fully adopt the principle of precautionary approach." UNEP(OCA)MED IG.1/5 1 November 1989, Annex V, A 3.6 at p. 2.

[47] UNEP(OCA)MED IG.2/4, 11 October 1991, Annex IV, p. 3.

[48] The Preamble to the Protocol refers to the "(b)earing in mind" of MARPOL 73/78, the INTERVENTION 1969 and PROT. 1973, and the Civil Liability Convention 1969. Although their scope is not identical, the INTERVENTION global instruments seem more susceptible to overlapping to a certain degree with this Protocol, in which case they would have priority. Cf. B. Vukas, *op.cit.*, p. 424.

[49] Egypt, France, Greece, Lebanon, Malta, and Morocco. See the intervention of the IMO observer at the Seventh Ordinary Meeting UNEP(OCA)/MED IG.2/4, 11 October 1991, p. 12, para. 85.

[50] Art. 1-2.

less, a joint interpretation of the relevant provisions of both the Protocol and the Convention shall bring us to the conclusion that it also covers emergencies in the high seas as well as in the internal waters of the Parties; moreover, the specific reference to danger to the coast (in Article 1) and to other territorial related interests of the Parties (in Article 3), could grant the interpretation that the protective action of the Protocol may also cover emergencies affecting saltwater marshes communicating with the sea as well as wetlands and other coastal areas.

In order to cooperate effectively, the Parties shall endeavor to take diverse preparedness and response measures such as setting up contingency plans,[51] performing monitoring activities,[52] disseminating relevant information,[53] and evaluating and reporting emergency situations.[54] In addition, the Parties shall cooperate in the salvage and recovery of harmful substances lost overboard so as to reduce the danger of pollution.[55] Resolution 5 of the Barcelona Conference calls upon the Contracting Parties and upon the IMO to do their best to make the reporting on incidents involving harmful substances also apply to ships and aircraft under the jurisdiction of States that are not Parties to the Protocol.

If the emergency by oil or other polluting substances materializes nonetheless, any Party may call for assistance from other Parties, which shall use their best endeavor to render it.[56] Furthermore, according to Article 9 of the Protocol, any Party faced with an emergency situation shall, after making the necessary assessments, "take every practicable measure to avoid or reduce the effects of pollution."

The Party concerned shall also immediately inform all other Parties and continue to observe the situation for as long as possible. Where action is taken to combat pollution originating from a ship, all possible measures shall be taken to safeguard the persons present on board and,

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[51] Art. 3.

[52] Art.4.

[53] Art. 6.

[54] Arts. 7-8.

[55] Art.5.

[56] Art. 10.

to the extent possible, the ship itself. Any Party that takes such action shall inform the IMO.

In spite of the fact that the emergency Protocol has been subscribed by all Mediterranean coastal States, its level of effective application is still today quite low. So far, the cases in which actual assistance in emergencies has been rendered are rather rare.[57] And the same can be said with regard to actual interventions in cases of major threats of marine pollution, whether by accidents or by an accumulation of small discharges. As Professor Vukas has written, in spite of the urgent call of the Genoa meeting,[58] the weakest point in the application of the Protocol is the lack of emergency plans and pollution containment equipment in the majority of the Contracting Parties.

In order to overcome this structural gap, efforts have been made to activate the role of the Regional Oil Combating Centre (ROCC) in Malta, established in pursuance of resolution 7 of the Barcelona Conference.[59] The Fifth Ordinary Meeting tried to set up a comprehensive framework to combat emergencies by adopting the "Guidelines for cooperation in combating marine oil pollution in the Mediterranean." These guidelines call on the Parties to acquire individually the necessary facilities to combat oil pollution in their territorial waters and extend the functions of ROCC to deal with emergencies caused not only by oil but also by other harmful substances.[60] At the Sixth Ordinary Meeting the functions of the ROCC have been further extended to permit it to act as a clearing house for different matters related to the prevention of emergencies, while its objectives have been enlarged even to foresee the possibility of initiating operations to combat marine pollution; but this latter possibility is conditional upon the approval by governments in light of previous achievements and availability of financial resources.

The Genoa Meeting recommended that ROCC develop proposals for subregional cooperation arrangements in cases of emergencies

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[57] In the case of the accident of the Cypriot tanker *Haven*, the Italian authorities disregarded the assistance offered both by France and Spain. *Vide El Pais*, 16 April 1991, at 26.

[58] Report of the Fifth Ordinary Meeting. UNEP/IG. 74/5, 28 September 1987, p. 83.

[59] Art. 11 of the Protocol and resolution 8 of the Barcelona Conference refer to the possibility of establishing sub-regional oil-combatting centers.

[60] Report of the Fifth Ordinary Meeting. UNEP/IG. 74/5, 28 September 1987, p. 83.

involving oil pollution.[61] At the last Ordinary Meeting, the Contracting Parties adopted principles and guidelines concerning cooperation and mutual assistance that should be incorporated into Part A of the Regional Information System.[62]

Additional and Prospective Protocols

The Land-Based Sources Protocol

Pursuant to a recommendation of the First Meeting of the Contracting Parties, a Conference of Plenipotentiaries met in Athens from 12 to 17 May 1980 and adopted the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources.[63] The Protocol entered into force on 17 June 1983 and has been subscribed by all Mediterranean coastal States except Lebanon and Syria, as well as by the EEC.

In the absence of global Conventions on land-based sources,[64] the Athens Protocol appears as one of the few regional instruments in this field.[65] The geographical scope of the Protocol covers not only the Mediterranean Sea Area as defined in Article 1 of the Convention but also internal waters extending, in the case of watercourses, up to the freshwater limits as well as saltwater marshes communicating with the sea.[66] The Contracting Parties undertake to take all appropriate

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[61] UNEP/IG.56/Inf. 6 June 1985.

[62] Report of the Seventh Ordinary Meeting, Cairo, 8-11 October 1991. UNEP(OCA)-/MED IG.2/4. Annex 4, p. 4.

[63] *Vide* UNEP. Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources, May 1980, Final Act and Protocol.

[64] The only global international instrument existing so far, of a purely recommendatory character, is the 1985 "Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources". *Vide* P. Sand, *Marine Environment Law in the United Nations Environment Programme*, (London and New York: Tycooly Publishing, 1988), 235-254.

[65] Other regional instruments concerning this source of marine pollution are the 1974 Paris Convention on the Prevention of Marine Pollution from Land-Based Sources (currently under revision) and the 1983 Quito Protocol for the Protection of the South-East Pacific against Pollution from Land-based Sources.

[66] Art. 3. The definition of "freshwater limit" is given in Art. 2, (c).

measures to prevent, abate, combat, and control pollution of this area caused by discharges from coastal establishments or other land-based sources within their territories,[67] including in particular:[68]

* direct pollution from outfalls discharging into the sea or through coastal disposal;
* indirect pollution through rivers, canals, and other watercourses, including underground watercourses, or through run off;
* polluting discharges from fixed man-made off-shore structures under the jurisdiction of a Party (which serve purposes other than exploration or exploitation of mineral resources of the seabed and its subsoil);
* pollution transported by the atmosphere under conditions to be defined in an additional annex (adopted by the Seventh Ordinary Meeting).[69]

In pursuance of this general commitment, the Parties undertake, in the first place, to "eliminate" pollution (but not necessarily discharges or emissions)[70] by the substances which are listed in annex I on the basis of their toxicity, persistence, and bioaccumulation. To this end, they shall individually or jointly elaborate, implement, and periodically review the necessary programs and measures which shall include common emission standards and standards for use (Article 5). As substances in annex I are presumably not to be discharged at sea, as much as possible, the Protocol does not provide explicitly for a system

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[67] Art. 1.

[68] Arts. 1 and 4.

[69] The Seventh Ordinary Meeting has approved the Text of a new annex IV to the Protocol defining the conditions of its application to pollution from land-based sources transported by the atmosphere, with the procedural reservation of one delegation (France). *Vide* Report of the Seventh Consultative Meeting, UNEP(OCA)MED IG.2/4, 11 October 1991, para. 99-100 and Annex IV, F. 9. 7.

[70] Art. 5. S. Kubakara has interpreted that "(t)he ultimate goal (of Article 5) is to prohibit the release of these substances into the Protocol Area: these substances being persistent and bioaccumulable, their discharges in any event would eventually lead to pollution of the area." Nevertheless, as the same author recognizes, the discharge of annex I substances is not totally excluded since the Parties are required to adopt programmes and measures that, as a minimum international prescription, must develop "common emission standards and standards for use." *Protection of the Mediterranean against Pollution from Land-Based Sources*, (Dublin: Tycooly Int. Publishing, 1984): 55-56.

of prior authorization. But, in spite of this important omission, it has been interpreted that all discharges of black-listed substances shall be submitted to authorization by the competent national authorities.

In the second place, the Parties shall also "strictly limit" pollution by substances or sources listed in annex II, which are generally less noxious or more readily rendered harmless by natural processes and therefore generally affect more limited coastal areas. To this end they shall individually or jointly elaborate and implement suitable programs and measures and subject discharges to the issue of an authorization by the competent national authorities, taking due account of the provisions of annex III (Article 6).

The Meeting of the Parties shall adopt, by a two-third majority, the programs and measures for the elimination or abatement of pollution from land-based sources that are provided for in articles 5 and 6,[71] taking into account the capacity to adapt and reconvert existing installations, the economic capacity of the Parties, and their need for development.[72] The Parties that are not able to accept a program or measures shall inform the meeting of the Parties of the action they intend to take as regards the program or measure concerned.[73]

Furthermore, the Parties shall progressively formulate and adopt, in cooperation with the competent international organizations, common guidelines and, as appropriate, standards and criteria dealing in particular with technical matters listed in Article 7, 1. When adopting and implementing such common guidelines, standards, and criteria, the Parties shall take into account local characteristics, their economic capacity, and their need for development and the relative absorptive capacity of the marine environment.[74]

The Protocol includes other provisions concerning cooperation in different actions related to the prevention of pollution from land-based sources. According to these provisions, the Parties shall carry out as soon as possible monitoring activities[75] and cooperate as far as

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[71] Art. 15, 1.

[72] Art. 7, 3.

[73] Art. 15, 2.

[74] Art. 7, par 2.

[75] Art. 8.

possible in scientific and technological fields;[76] they also shall implement as far as possible programs of assistance to developing countries.[77] If discharges from a boundary watercourse are likely to cause pollution to the marine environment, the concerned Parties shall also cooperate in order to ensure full application of the Protocol.[78]

The Parties shall inform one another through the Organization of measures taken, of results achieved and, if the case arises, of difficulties encountered in the application of the Protocol.[79] In particular, the Parties that are not able to accept a program or measure for the abatement and elimination of pollution from land-based sources shall inform the meeting of the Parties of the action they intend to take as regards the program or measures concerned.[80] When land-based pollution originating from the territory of one Party is likely to prejudice directly the interests of one or more of the others, the Parties concerned shall undertake to enter into consultations and, upon request, the matter shall be placed on the agenda of the next meeting of the Parties that may make recommendations with a view to reaching a satisfactory solution.[81]

In pursuance of the above undertakings, the Parties to the LBS Protocol have adopted eight common measures to eliminate pollution by annex I substances. These measures concern respectively the prevention of pollution by mercury (1987), by used lubricating oils (1989), by cadmium and cadmium compounds (1989), by organotin compounds (1989), by organohalogen compounds (1989),[82] by organophosphorous compounds (1991), by persistent synthetic

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[76] Art. 9.

[77] Art. 10.

[78] Art. 11.

[79] Art. 13.

[80] Art. 15.

[81] Art. 13.

[82] *Vide* UNEP, "Common Measures adopted by the Contracting Parties to the Convention for the Protection of the Mediterranean Sea Against Pollution", *MAP Technical Reports Series Nº 38* (UNEP, Athens, 1990): 1-21.

materials (1991), and by radioactive substances (1991).[83] With regard to substances listed in annex II, the Parties to the LBS Protocol have so far adopted only one common measure for the control of pollution by pathogenic micro-organisms (1991).[84]

The Parties to the Protocol have also adopted so far interim environmental quality criteria for bathing waters (1985), for mercury (1985), as well as environmental quality criteria for shellfish waters (1987).[85] With regard to concrete structural actions, the Genoa Declaration has expressed the commitment of the participating States to establish sewage treatement plants in all cities with more than 100,000 inhabitants and appropriate outfalls and/or equipment for all towns with more than 10,000 inhabitants, indicating 1995 as the target year for these actions.[86]

In spite of these actual and prospective actions, the application of the land-based sources Protocol is far from being satisfactory in terms of an effective protection of the Mediterranean Sea against pollution. The main reasons for the exceedingly slow pace in the implementation of appropriate measures are, according to A. Manos, the lack of sufficient internal financial resources as well as the absence of the political will for the transfer of the adequate scientific and technological elements.[87]

The Specially Protected Areas Protocol

The Protocol Concerning Mediterranean Specially Protected Areas was adopted in Geneva on 3 April 1982 and entered into force 23 March 1983. It has been subscribed by all coastal Mediterranean States with the exception of Lebanon and Syria, as well as by the EEC.

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[83] *Vide* Report of the Seventh Ordinary Meeting. Cairo, 8-11 October 1991, UNEP(OCA)/MED IG. 2/4, 11 October 1991, Annex IV, pp. 20-22.

[84] *Ibid.*, p. 20.

[85] *Vide* UNEP, "Common Measures adopted by the Contracting Parties to the Convention for the Protection of the Mediterranean Sea Against Pollution", *MAP Technical Reports Series Nº 38* (UNEP, Athens, 1990): 7-10 and 13-14.

[86] Report of the Fifth Ordinary Meeting, Athens 7-11 September 1987. UNEP/IG.74-/5, 28 September 1987: p. 41.

[87] A. Manos, "Mediterranean Action Plan: Experiences and Prospects, *The Mediterranean: Managing Environmental Issues* (Aspen Institute Italia, 1988): 28.

The 1982 Geneva Protocol is indeed the first of its kind and has served as a model for other regions.[88] Its purpose is to protect those marine areas that are important for the safeguarding of the natural resources and the natural sites of the sea, as well as for the safeguarding of the cultural heritage in the region.[89]

The Protocol applies to the Mediterranean Sea Area as defined in Article 1 of the Convention:

> [I]t being understood that, for the purposes of the present Protocol, it shall be limited to the territorial waters and may include (internal waters) extending, in the case of watercourses, up to the freshwater limits as well as wetlands and coastal areas designated by each of the Parties.[90]

In that respect, Professor Vukas has rightly pointed out that, "under the LOS Convention (Art. 211, para. 6) coastal States are entitled to define areas of special protection also in their exclusive economic zones. Once such areas are defined in the Mediterranean, the Protocol would almost certainly need some adjustments."[91]

The Parties shall, to the extent possible, establish specially protected areas and shall endeavor to undertake the action necessary in order to protect and, as appropriate, to restore them, as rapidly as possible.[92] They may strengthen the protection by establishing buffer areas in which activities are less severely restricted.[93] To establish such protected areas in zones contiguous to other States, the Parties shall endeavor to consult each other, or to collaborate to that end with third States, in order to reach agreements (with other Parties) or special

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[88] Protocol concerning Protected Areas and Wild Fauna and Flora, additional to the 1985 Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Text in P.H. Sand, *op. cit.*, 171-184). Preliminary Draft Protocol concerning Protected Areas and Wild Fauna and Flora in the South Asian Seas (document UNEP/WG.153/5, Annex IV).

[89] Preamble and Art. 1.

[90] Art. 2.

[91] B. Vukas, *op. cit.*, pp. 431-432.

[92] Art. 3. 1.

[93] Art. 5.

agreements (with other non-Parties) on the measures to be taken.[94] In any case, appropriate publicity shall be given to the establishment of protected areas, as well as to their markings and the regulations applying thereto.[95] Protected areas shall be established in order to safeguard in particular:

a) - sites of biological and ecological value;
   - the genetic diversity, as well as satisfactory population levels, of species, and their breeding grounds and habitats;
   - representative types of ecosystems, as well as ecological processes;
b) sites of particular importance because of their scientific, aesthetic, historical, archaeological, cultural or educational interest[96].

Once the protected areas have been established, the Parties shall give the appropriate publicity and notify the Organization.[97] They shall also progressively take the appropriate measures with a view to their protection and restoration, as appropriate, in conformity with the rules of international law[98] and taking into account the traditional activities of the local populations.[99] These measures may include, according to Article 7:

a) the organization of a planning and management system;
b) the prohibition of the dumping or discharge of wastes or other matter which may impair the protected area;
c) the regulation of the passage of ships and any stopping or anchoring:
d) the regulation of fishing and hunting and of the capture of animals and harvesting of plants;

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[94] Art. 6.

[95] Art. 8, 1.

[96] Art. 3, para. 2.

[97] Art. 8. The Organization shall compile and keep up to date a directory of protected areas *(Ibid)*.

[98] Art. 7.

[99] Art.9.

e) the prohibition of the destruction of plant life or animals and of the introduction of exotic species;
f) the regulation of any act likely to harm or disturb the fauna or flora, including the introduction of indigenous zoological or botanical species;
g) the regulation of any activity involving the exploration or exploitation of the sea-bed or its subsoil or a modification of the sea-bed profile;
h) the regulation of any activity involving a modification of the profile of the soil or the exploitation of the subsoil of the land part of a marine protected area;
i) the regulation of any archaeological activity and of the removal of any object which may be considered as an archaeological object;
j) the regulation of trade and import and export of animals, parts of animals, plants, parts of plants, and archaelogcal objects that originate in protected areas and are subject to measures of protection:
k) any other measure aimed at safeguarding ecological and biological procesess in protected areas.

Other provisions of the Protocol call on the Parties to develop scientific and technical research[100] and to inform the public as widely as possible.[101] The Parties shall also establish a cooperation program to coordinate their action with a view to creating a network of protected areas[102] and to exchange scientific and technical information and research for the selection, management, and monitoring of those areas.[103] In performing this cooperation, the Parties shall forward to the Organization information, reports, and publications on different specific matters, and shall designate persons responsible for protected areas (the so called "focal points").[104]

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[100] Art. 10.

[101] Art. 11.

[102] Art. 12.

[103] Arts. 12-14.

[104] Art. 14.

Finally, the Parties shall cooperate in formulating and implementing programs of mutual assistance and of assistance to those developing countries that express a need for it.[105] This last provision is particularly important in the Mediterranean Sea Area where the lesser developed riparian States have the most important sites, while the financial and technical means for protecting those areas lie primarily in the hands of the more developed Parties.[106]

In pursuance of the provisions of Article 4, the Fifth Ordinary Meeting took note of the proposed "Guidelines for the selection, establishment, management and notification of information on marine and coastal protected areas in the Mediterranean," adopted at the first meeting of focal points (Athens 1-4 June 1987), which were offered as a guide and not as a formal obligation for their application[107].

The Draft Offshore Sources Protocol

Following an initiative of the Fourth Ordinary Meeting (1985), a Protocol concerning the protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the sea-bed and its sub-soil has been prepared during the last few years.[108]

A draft version of the Protocol, elaborated by the Secretariat in cooperation with the International Juridical Organization for Environment and Development (IJO), was considered by the Fifth Ordinary

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[105] Art. 15.

[106] This is the spirit in which the agreements between MAP, on the one side, and respectively the Governments of Syria for the protection of its littoral (18 June 1988) and the Government of Turkey for the protection of the Bay of Izmir (20 June 1988), on the other side, were adopted. Cf. Menondes, Nº 20/1990:II, p. 6. The request for financial and technical assistance made by Morocco in order to establish a 100 km specially protected area on its Mediterranean littoral has not received a positive answer so far.

[107] UNEP/IG.74/5, 28 September 1987, Annex VII, Appendix, p. 1.

[108] M. Sersic, "Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Seabed and its Subsoil", in B. Vukas (editor), *The Legal Regime of Enclosed and Semi-Enclosed Seas: the Particular Case of the Mediterranean*: 279-309. B. Vukas, "Le projet du Protocole relatif à la protection de la mer Méditerranée contre la pollution résultant de l'exploration du fond de la mer et de son sous-sol", in J-Y. Cherot and A. Roux (directors) *Droit Méditerranéen de l'environment*, (Paris: Economica): 147-155.

Meeting (1987), which asked the Contracting Parties to send their comments to the Secretariat by the end of 1989. The Sixth Ordinary Meeting (1989) decided to convene a Working Group of Experts nominated by the Contracting Parties that met in Athens from 7 to 11 May 1990. The meeting reviewed the draft Protocol in depth and amended it, leaving a number of provision within brackets for further negotiations. The Seventh Ordinary Meeting (1991) authorized the Bureau to determine whether a further meeting of experts would be needed or whether to recommend the convening of the Conference of the Plenipotentiaries at the appropriate time.[109]

The main features of the draft offshore sources Protocol[110] can be summarized as follows. The geographical area covered includes the Mediterranean Sea Area (under the jurisdiction of the coastal States for the purposes of the draft Protocol) and the internal waters extending, in the case of watercourses, up to the freshwater limit; any of the Parties may also include in the Protocol area wetlands or coastal areas of their territory.[111]

Although the wording of the general undertakings of the Parties is still under discussion, the material reach of the Protocol is defined in very broad terms in order to cover all activities concerning exploration and/or exploitation of the (mineral) resources of the sea-bed and its sub-soil.[112] All activities in the Protocol Area shall be subject to the prior written authorization from the competent national authority of the Competent State. In particular, authorization for erection on the sites of installations should be granted subject to the submission of the corresponding environmental impact assessment and provided that the national competent authority is satisfied that the installation has been constructed according to international standards and practice, that the operator has the technical competence and the financial capacity, and that there are no indications that the activities are likely to cause

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[109] UNEP(OCA)/MED IG.2/4, 11 October 1991, p. 16, para. 118.

[110] *Vide* text in: UNEP(OCA/)MED WG.18/4, 11 January 1991.

[111] Art. 2.

[112] See the definition of "activities" in Art. 1 (d). The representative of Greece at the Working Group reminded those present that her country had requested "to extend it to the sedentary species so that it would be coherent with the Convention on the Continental Shelf and the Law of the Sea." *Ibid.*, p. 3, para. 16.

significant adverse effects on the environment.[113] The draft Protocol does not make explicit whether or not those provisions should also apply to reconstruction or extension of existing installations.

Rules concerning wastes and harmful or noxious substances and materials used for activities of exploration and exploitation are more permissive. The Parties shall impose a general obligation upon operators to use the best available, environmentally effective, and economically appropriate technology and to observe internationally accepted standards. Notwithstanding, disposal of harmful and noxious substances in the Protocol Area is subject only to the issuance of a previous permit by the competent national authority according to the black list, grey list, green list scheme and after careful consideration of all factors set forth in draft annex III. Disposal of oil and oily mixtures and drilling fluids is only subject to the formulation of common standards to be adopted pursuant to Article 10. The disposal of plastic and non biodegradable garbage shall be prohibited, as well as the discharge of sewage, except if it is previously treated.[114]

The Protocol asks the Parties to ensure that operators comply with some specific duties such as: to maintain onshore reception facilities, to take safety measures, to have contingency plans, to notify any event causing or likely to cause pollution, and to measure and report the effects of the offshore activities on the environment of the area.[115] The operator shall also be required either to remove any installation which is abandoned or disused or to "abandon and clean them inside" or to "bury and clean them inside."[116] Although the draft text is silent in this respect, if the non-removal option is followed, the IMO guidelines on the matter should be applied.[117]

The Protocol calls on the Parties to cooperate in promoting studies and research programs, in formulating international regulations, in giving scientific and technical assistance to developing countries, and in informing one another directly or through the Organization of

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[113] *Ibid.*, Arts. 4-7.

[114] Arts. 8-12.

[115] Arts. 13-17 and Art. 19.

[116] Art. 20.

[117] Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone. Doc. IMO A.672(16). See also UNCLOS, arts. 60, 3 and 80.

measures taken, of results achieved, and of difficulties encountered in its application.[118]

If a Party becomes aware of imminent danger or of actual transfrontier pollution, it shall immediately notify the Parties likely to be affected and provide them with timely information that would enable them to take appropriate measures.[119] In cases of emergency where the pertinent provision of the corresponding Protocol would not be applicable, the Parties may request help from other Parties, which shall do their best to provide it.[120] Pending the preparation and adoption of appropriate procedures for the determination of liability and compensation, the Parties shall take all measures to ensure that liability for damage caused by offshore activities is imposed on the operators and that they shall be required to pay prompt and adequate compensation, to be determined on the basis of strict and limited liability; they shall also endeavor to grant equal access to and treatment in administrative proceedings to persons affected by pollution in other States.

Recent Developments and Concluding Remarks

The adoption of the Genoa Declaration in 1985, which set up ten priority actions for its second decade, is an important landmark in the evolution of the Mediterranean Action Plan.[121]

With regard to its legal component, several relevant developments have also taken place in the last few years, many of which have already been pointed out in the preceding pages. At the present moment, other important initiatives are in progress, such as the adoption of a draft Action Plan for the Conservation of Cetaceans in the Mediterranean Sea and, most of all, the preparation of a regional draft Protocol on Transboundary Movement of Hazardous Wastes and their Disposal.

Other initiatives in progress are aimed at expanding the scope of Mediterranean legal cooperation, both in an extra or supra-regional dimension and in a sub-regional dimension. The first aspect shall be

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[118] Arts. 22-25.

[119] Art. 26.

[120] Art. 18.

[121] The text of the Genoa Declaration is annexed to this report.

underlined by the recent link established with the Black Sea Countries[122] as well as by the development, in association with the European Communities, of a long-term strategy for Euro-Mediterranean Environmental Cooperation in the Mediterranean Basin on the basis of the Nycosia Charter of 28 April 1990.[123] The second aspect is reflected in the various initiatives concerning sub-regional cooperation, one example of which is the "Adriatic Sea Declaration" signed recently by Albania, Greece, Italy, Yugoslavia, and the EEC.[124]

The Mediterranean legal framework is thus developing steadily at its various levels: an increasing degree of formal acceptance by the coastal States; normative improvement through Contracting Parties' decisions, recommendations, and resolutions as well as through their adoption of new Protocols; institutional and structural growth, especially with regard to the various Regional Centres; and progressive expansion of the scope of the activities regulated. Although these achievements are indeed important, there are also a number of reasons for dissatisfaction, such as, in particular, the low degree of fulfillment of reporting obligations by some Contracting Parties and their lack of a sufficient normative and structural action at the national level in order to make the Convention and its Protocols fully operative. The endemic delay of several Contracting Parties in making their financial contributions is also very disappointing and extremely negative for the effective implementation of the legal instruments.

In conclusion, it can be said that the Barcelona Convention and its related Protocols have positively contributed to de-accelerate the increasing degradation of the Mediterranean Sea by setting up a legal structure that is very ambitious in its material reach but quite modest in its binding force and financial support. A better understanding of the link between environment and development would be needed to bring the Nothern and Southern coastal States to accept and enforce more stringent commitments, for the sake of the *Mare nostrum*.

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[122] Bulgaria, Romania, and the USSR were invited to the Seventh Ordinary Meeting with the status of observers. The first two attended the Meeting in that condition. Report of the Seventh Consultative Meeting, UNEP(OCA)MED IG.2/4, 11 October 1991, p. 1.

[123] A Second Ministerial Conference on Euro-Mediterranean Environmental Cooperation in the Mediterranean Basin was held in Cairo, 28-30 April 1992. UNEP CAIRO/92/1, Revision 4.

[124] Report of the Seventh Ordinary Meeting, UNEP(OCA)MED IG.2/4, 11 October 1991, Annex III, p. 2.

ANNEX I

Genoa Declaration on the Second Mediterranean Decade

The Contracting Parties to the Convention for the Protection of the Mediterranean Sea against pollution and its related protocols, meeting in Genoa on 9-13 September 1985:

-Having reviewed their co-operation in the framework of the Mediterranean Action Plan over the past ten years and the role of the United Nations Environment Programme (UNEP) therein:

1. Consider that the actions already taken and the progress achieved are positive developments, while noting that the state of the environmental quality of the Mediterranean Sea requires great acceleration of action to improve it;

2. Firmly believe that their co-operation in the protection of the Mediterranean is a good example of the contribution of environmental protection towards sustainable development, and better understanding among the people of the region;

3. Consider that the health of the Mediterranean is of paramount importance to the well-being of the peoples of the Mediterranean in their totality;

4. Further consider that the political will and solidarity of all countries concerned are already in place and that the foundation is already established for more concrete action to protect their common heritage;

5. Reaffirm their commitment to the protection of the Mediterranean Sea through the implementation of the Mediterranean Action Plan which is a very useful mechanism to ensure their common action;

6. Reaffirm their determination to co-operate for the protection of the Mediterranean environment and the rational use of its resources, especially through the harmonization of legislation and developing common standards; strengthening research and monitoring centres; the establishment of training programmes; the transfer of know-how; and broadening the scope of technical co-operation with developing countries of the region to enable them to meet their obligations in the protection of the Mediterranean;

7. Commit themselves to accelerate the implementation of national and international programmes in order to achieve the objectives of the various components of the Action Plan;

8. Commit themselves to increase investment to combat pollution and to increase their vigilance on the application and adherence to the legislation on the protection of the environment;

9. Decide to use the budget of the Action Plan in a catalytic way in projects with organizations willing to contribute their own resources;

10. Decide to increase efforts, through all appropriate information channels, to make the aims and achievements of the Mediterranean Action Plan more widely known;

11. Recognize that the provisions of the Action Plan should constitute an important framework for national development activities;

12. Further recognize that the support of the international, regional and non-governmental organizations is essential for the full achievement of the goals of the Mediterranean Action Plan;

13. Consider that the protection of the Mediterranean requires major support of governments' efforts through a much greater acceleration of the action-oriented activities of parliaments, local authorities, industries, non-governmental organizations, the scientific community, the media and the public at large to reverse the trend of deterioration of the sea and of its coastal areas;

14. Appeal to the 350 million inhabitants of the Mediterranean Coastal States and to the 100 million tourists visiting the region, to become more aware of the exceptional natural, economic and cultural values of the Mediterranean and to commit themselves individually and collectively to its protection;

15. Invite the governments to proclaim an annual Mediterranean Environment Week to serve as the rallying point for local, national and regional initiatives for its protection;

16. Decide to launch a new phase of their co-operative efforts to accelerate ongoing activities and to achieve concrete targets during the second decade of the Mediterranean Action Plan;

17. Adopt the following ten targets to be achieved as a matter of priority during the second decade of the Mediterranean Action Plan:
    (a) Establishment of reception facilities for dirty ballast waters and other oily residues received from tankers and ships in ports of the Mediterranean;
    (b) Establishment as a matter of priority of sewage treatment plants in all cities around the Mediterranean with more than 100,000 inhabitants and appropriate outfalls and/or appropriate treatment plants for all towns with more than 10,000 inhabitants;
    (c) Applying environmental impact assessment as an important tool to ensure proper development activities;
    (d) Co-operation to improve the safety of maritime navigation and to reduce substantially the risk of transport of dangerous toxic substances likely to affect the coastal areas or induce marine pollution;
    (e) Protection of the endangered marine species (e.g. Monk Seal and Mediterranean sea turtle);
    (f) Concrete measures to achieve substantial reduction in industrial pollution and disposal of solid waste;
    (g) Identification and protection of at least 100 coastal historic sites of common interest;
    (h) Identification and protection of at least 50 new marine and coastal sites or reserves of Mediterranean interest;
    (i) Intensify effective measures to prevent and combat forest fires, soil loss and desertification;
    (j) Substantial reduction in air pollution which adversely affects coastal areas and the marine environment with the potential danger of acid rains.

THE CRISIS IN THE EASTERN ADRIATIC AND THE LAW OF THE SEA

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Introductory Remarks

The most important consequence of the crisis in the Eastern Adriatic -- "crisis" being a euphemism for the aggressive war and disasters Europe has not seen since Second World War -- is a dissolution of Yugoslavia and the emergence of new coastal States in the Adriatic Sea.

As Yugoslavia was a party to numerous treaties devoted to topics in the law of the sea, its disappearance and the emergence of its successor States at the eastern Adriatic coast bring necessarily the subject of succession of States with respect to treaties to the very forefront of interest in the law of the sea.

Having regard for the importance and actuality of the subject of succession of States with respect to treaties, we included it in this paper, together with the "classical" topics of the law of the sea, such as delimitation of maritime areas, fisheries, navigation, and marine environmental protection.

Succession of the New Coastal States of the Eastern Adriatic with respect to Treaties Devoted to the Law of the Sea Topics

As mentioned, after the dissolution of Yugoslavia, the question of succession of States with respect to treaties to which it was a Contracting State has become actual.

None of the successor States of the former Yugoslavia has so far become the Contracting State to any multilateral treaty concluded by Yugoslavia dealing with topics in the law of the sea.

The reason is not a lack of interest -- we could prove the contrary at least as far as the Republic of Croatia is concerned[1] -- but uncer-

[1]The Republic of Croatia declared its independence by its act of 8 October 1991 (Official Gazette of the Republic of Croatia - OGRC, No. 31/91). The Republic of Croatia has determined its position as to the treaties to which Yugoslavia was a Contracting State by the Treaties Conclusion and Application Act of 8 October 1991 (OGRC, No. 53/1991). According to the transitory provision of Article 33 of the Act treaties ratified by Yugoslavia or to which Yugoslavia acceded will apply in the Republic

tainty as to the content of binding norms of international law on succession of States with respect to treaties.

This uncertainty results from the fact that the 1978 Vienna Convention on Succession of States in Respect of Treaties is not in force[2] and the development of precise customary legal rules through general and uniform practice of States was hardly possible because, the phenomenon of decolonization aside, State succession occurs rather seldom and in relation to a relatively small number of States.

Only a few norms on succession of States with respect to treaties have general support as rules of customary international law. This is the case with treaties, or treaty provisions, establishing a boundary and territorial regimes. These treaties are not affected by the succession of States and it is an undisputed norm of customary international law that such treaties, or treaty provisions of territorial character, survive a succession of States and continue to bind their parties. This rule of customary international law on the automatic commitment of the successor State to treaties or treaty provisions establishing boundary and other territorial regimes is enshrined in Articles 11 and 12 of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

With respect to the status of other provisions of the 1978 Vienna Convention, the situation is not so clear. Namely, the existing practice of States concerning succession with respect to treaties is not consistent and subsequently an adequate *opinio iuris* could not be deduced from this practice.

This uncertainty as to the applicability of the provisions of the 1978 Vienna Convention on Succession of States in Respect of Treaties results in a disparity between the solutions of the Convention and the practice of depositaries in this matter. This disparity can be illustrated by the brief analysis of the provisions of the 1978 Vienna Convention and the experience of the Republic of Croatia, one of the successor States of Yugoslavia, as to the practice of some depositaries of treaties devoted to the law of the sea and maritime matters.

Having in mind the interest of the community of States in the stability and clarity of treaty relations, the drafters of the 1978 Vienna

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of Croatia if they are not contrary to the Constitution and the legal order of the Republic of Croatia, in accordance with the rules of international law on succession of States in respect of treaties.

[2]According to Article 49 of the Convention, fifteen ratifications or accessions are required for the entry into force of the Convention. So far only eight States ratified or acceded to the Convention.

Convention on Succession of States in Respect of Treaties accepted the principle of *ipso iure* continuity of treaties in the case of dissolution of States. Namely, according to Article 34, any treaty concluded by the predecessor State which is in force at the date of succession continues to bind the successor State.[3] This provision applies unless the States concerned otherwise agree or it appears from the treaty or is otherwise established that the application of the treaty with respect to the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. Thus, in the case of dissolution of States, the 1978 Vienna Convention provides for -- under the aforementioned conditions -- the automatic commitment of the successor States by the treaties in force at the date of succession, not even requiring the notification in this respect of the successor State to the depository.

The practice of depositories does not follow the solutions mentioned in the 1978 Vienna Convention. Usually a notification of succession, which expresses the consent to be considered as bound by the treaty concerned, is required. This practice, although not in conformity with the provisions of the 1978 Convention, is understandable. Less understandable, however, is the practice of some depositaries that not only ignore the provisions of the 1978 Vienna Convention but the institution of succession as well, not making the necessary distinction between the succession of States with respect to treaties and conditions which have to be fulfilled for becoming a Contracting State of a treaty. In this regard, the example of the International Maritime Organization (IMO), which performs a depositary function with regard to conventions adopted within that organization, should be mentioned.

Upon inquiry of the Republic of Croatia on the possibilities of continuing its participation in the "IMO" Conventions to which Yugoslavia was a Contracting State, the IMO considered that neither *ipso iure* continuation nor succession by making notification of succession are possible. For becoming a Contracting State to a convention adopted within it, the IMO required compliance with the conditions provided in that convention. Because most of the "IMO" Conventions require membership in the UN, its specialized agencies, the International Atomic Energy Agency or Statute of the Internation-

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[3]Article 34, para. 1 makes a distinction between treaties in force relating to the entire territory of the predecessor State, which continue in force with respect to each successor State, and treaties in force relating to the part of the territory of the predecessor State that has become a successor State, which continue in force with respect to that State alone.

al Court of Justice, the Republic of Croatia, not a member of the UN at that time, could not establish its status as a Contracting State to such conventions. The IMO considered that it was not possible with respect to its "open conventions" either, *viz.*, conventions containing an "open to all States" clause (e.g., the 1974 SOLAS Convention). Namely, according to the interpretation of the IMO, the expression "all States" in such conventions means States that are members to the UN or to one of the abovementioned organizations. We consider such an interpretation completely unacceptable, because, if that were the intent of the drafters, they would have expressly included restriction in this regard, as they do in the majority of the IMO Conventions. Quite opposite to the interpretation of the IMO, it could be argued that the drafters, not providing for any restriction as to the status of a Contracting Party, wanted to encourage the widest possible participation in treaties containing an "open to all States" clause.

Not yet in force, the 1982 UN Law of the Sea Convention falls into the category of treaties for which the 1978 Vienna Convention on Succession of States in Respect of Treaties contains special provisions: in the case of the dissolution of a State, the successor State may establish its status as a Contracting State to a multilateral treaty not in force to which the predecessor State was a Contracting State by making a notification in this respect (Article 36).

Thus, contrary to the provisions relating to the succession of States with respect to treaties in force, the 1978 Vienna Convention does not provide for *ipso iure* continuation in respect of treaties not in force at the date of succession. Unless it makes a notification of succession, the successor State is not bound by a multilateral treaty not in force to which the predecessor State was a Contracting State.

Yugoslavia was a Contracting State to the 1982 UN Law of the Sea Convention. None of its successor States has so far become a Contracting State to the 1982 Convention. To an unofficial inquiry of the Republic of Croatia into the possibilities of becoming a Contracting State to the 1982 UN Law of the Sea Convention before becoming a member of the UN, the response was not encouraging. As this condition, *viz.*, membership to the UN, was fulfilled in May 1992, it is to be expected that the Republic of Croatia will in the not too distant future become a Contracting State to the 1982 UN Law of the Sea Convention. If all the new States of the Eastern Adriatic do the

same, they will contribute to the earlier entry of the 1982 Convention into force.[4]

Bringing to a close the topic of succession with respect to treaties and having in mind the experience of the Republic of Croatia, we may conclude that in practice the succession of States with respect to treaties to a considerable extent depends on the practice of depositaries, some of them ignoring the institution of succession of States. Without minimizing the importance of the practice of depositaries, it must be said that depositaries exercise an administrative function and it is not part of their functions to decide on difficult or disputed questions of international law.

Para. 2 of the Article 77 of the 1969 Vienna Convention on the Law of Treaties makes plain that any difference between a State and the depositary as to the performance of the depositary functions should be brought to the attention of the Contracting States, or, where appropriate, of the competent organ of the international organization concerned. Having in mind controversies as to the content of binding norms on the succession of States with respect to treaties, it is to be hoped that any future disagreement between successor States of the former Yugoslavia and depositaries will be brought to the competent organ. It would, without doubt, contribute to the clarification of many uncertainties in this important field of international law.

Delimitation of Maritime Areas in the Adriatic Sea

In 1974 the former Yugoslavia extended its territorial sea to twelve miles and at the same time abolished its contiguous zone. For the time being, the new coastal States in the Eastern Adriatic have not changed the picture of the Adriatic as far as the maritime zones under national jurisdiction are concerned. Namely, none of them has, so far, reestablished the contiguous zone nor has proclaimed the exclusive economic zone.

The establishment of new coastal States in the Eastern Adriatic carries the problem of delimitation of maritime areas under national jurisdiction in the Adriatic.

According to the above-mentioned rule of customary international law, enshrined in Articles 11 and 12 of the 1978 Vienna Convention on the Law of Treaties, the existing delimitation of maritime areas in

[4]Sixty ratifications or accessions are needed for the entry into force of the Convention (Article 308, para. 1). So far 51 ratification or accession instruments have been deposited.

the Adriatic Sea effectuated by Italy and Yugoslavia is not affected by succession of States as treaties or treaty provisions establishing boundary and territorial regimes continue in force irrespective of succession.

The new delimitation, primarily between the maritime areas under national jurisdiction of the new coastal States of the Eastern Adriatic, will have to be effected between the States concerned.

Existing Delimitation Agreement

Italy and the former Yugoslavia have delimited the territorial sea in the Bay of Trieste and the continental shelf alongside of the whole Adriatic.

The boundary between Italy and Yugoslavia in the Bay of Trieste was agreed upon in the framework of the Osimo Agreements of 10 November 1975. On the basis of Article 2 of the Treaty of Osimo, the boundary has been textually described in Annex III and traced in the Map in Annex IV of the Treaty. [5] In Annex V of the same Treaty, containing an exchange of letters, it has been said that "in delimiting the territorial waters in the Bay of Trieste, each of the Parties has taken into account the principles resulting from the Geneva Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958." At the same time, Italy declared its intention to draw straight baselines in the Adriatic Sea and to indicate such baselines in accordance with that Convention. At any rate, the subsequent determination of baselines by the parties could not affect the agreed delimitation line in the Bay of Trieste.

Although the reference to the 1958 Geneva Convention is made in an unusual way ("each of the Parties has taken into account"), it means that the two countries delimited the territorial sea in the Bay of Trieste on the basis of the principles contained in Article 12 of that Convention. These principles are: (a) agreement between opposite or adjacent States; (b) the median line, where no agreement exists; and (c) other methods, where "by reasons of historic title or other special circumstances," the application of the median line is not justifiable. Article 15 of the 1982 UN Law of the Sea Convention contains the same principles for the delimitation of the territorial seas between opposite or adjacent States.

The delimitation line adopted for the Bay of Trieste is a median line corrected by one of the "special circumstances," namely, the

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[5] *Official Gazette of SFRY, International Agreements*, No. 1/1977. The Treaty entered into force on 3 April 1977.

necessity to enable navigation through the territorial waters of each State to their respective ports (Trieste, Koper).

As stressed, the boundary regime in the Bay of Trieste established by the above-mentioned provisions of the 1975 Osimo Treaty is not affected by the dissolution of Yugoslavia and succession of States. Thus, irrespective of the future destiny of the 1975 Osimo Agreements, the above-mentioned provisions of treaty of Osimo relating to the boundary regime in the Bay of Trieste continue to bind Italy and Croatia and Slovenia, the successor States of the Yugoslavia, which border the part of the Adriatic Sea to which the established boundary regime relates.

The sea-bed and subsoil of the Adriatic have been divided between Italy and Yugoslavia by their Agreement concluded in Rome on 8 January 1968.[6]

The 353-mile long boundary line of the continental shelf between the two States has mainly been determined on the equidistance principle, as a median line between the two coasts. Because of the location of some islands on the eastern side of the Adriatic, the continental shelf boundary departs in some instances from the median line. The deviation from the equidistance principle granted Italy areal concessions to compensate for the dislocation in the continental shelf boundary caused by islands Jabuka, Palagruza, and Galijula in the Eastern Adriatic.

The delimitation of the continental shelf effectuated by the 1968 Rome Agreement is in accordance with the 1958 Geneva Convention on the Continental Shelf. Namely, Article 6 of the 1958 Geneva Convention establishes as criteria for delimitation of the continental shelf (a) agreement; (b) the median or equidistance line, in the absence of agreement; (c) another boundary, if justified by the presence of special circumstances. In the case of the Adriatic, all three criteria have been taken into account.

In accordance with the above-mentioned customary principle of *ipso iure*, continuation of treaties establishing territorial regimes, the 1968 Rome Agreement on the delimitation of the continental shelf continues in force, irrespective of the dissolution of Yugoslavia and the succession of States, binding Italy and Croatia, Bosnia and Herzegovina, and Montenegro, successor States of Yugoslavia, as the said Agreement relates to their continental shelf.

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[6] *Official Gazette of SFRY, International Agreements*, No. 28/1970, p. 231. The Treaty entered into force on 21 January 1970.

As stressed, neither Italy nor the new coastal states of the Eastern Adriatic have so far proclaimed the exclusive economic zone.

The 1982 UN Law of the Sea Convention contains in Article 74, para. 1 the following rule for the delimitation of the exclusive economic zone between States with opposite or adjacent coasts:

> The delimitation of the exclusive economic zone between States with opposite or adjacent coasts 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.

For the eventual delimitation of the exclusive economic zones of Italy and the new coastal States in the Eastern Adriatic, another paragraph of Article 74 of the 1982 Convention is also important. It reads as follows:

> Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

In the case of the Adriatic Sea the only reasonable interpretation of that provision is that the eventual delimitation of the exclusive economic zone of Italy and the new coastal States should be effectuated in the same manner, by the same principles and methods as the delimitation of the continental shelf achieved in 1968.

Delimitation of Maritime Areas between New Coastal States in the Eastern Adriatic

After the dissolution of Yugoslavia, the major part of the eastern Adriatic coast -- 85 percent of the coastline, or nearly 95 percent, if islands are included -- belongs to the Republic of Croatia.[7] The northern Adriatic part of the coast belongs to Slovenia[8] and the

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[7]The length of the coastline of Yugoslavia was 2,092 kilometers (or, 6,104 kilometers including islands). Out of this, 1,778 kilometers of the coastline (or, 5,770 kilometers including islands) has belonged to the Republic of Croatia.

[8]44 kilometers of the coastline.

southern Adriatic parts of the coast belong to Bosnia and Herzegovina[9] and to Montenegro.[10]

The new coastal States of the Eastern Adriatic, having been part of the same State, did not precisely delimit their maritime areas. Therefore, one of the main tasks after dissolution is the delimitation of maritime zones of the new States.

As usual when delimitation is concerned, there are disagreements as to the principles on which the maritime delimitation should be effectuated.

As far as the delimitation of territorial seas of Croatia and Slovenia in the Northern Adriatic is concerned, it seems that Slovenia does not agree with the application of the median line in the Bay of Piran, considering that the delimitation should be based on other methods by reasons of special circumstances. As no official information on the negotiations is available, it is not possible to discuss the Slovenian arguments in more detail.

While possible disagreements between Croatia and Slovenia will probably be settled by agreement on delimitation that will satisfy both parties, much more serious problems exist between Croatia and Montenegro. Invoking the principle of equity and the necessity to control the entrance to its Bay of Boka Kotor, Montenegro claims the significant part of Croatian land territory east of Dubrovnik. Thus, to control fully the entrance to part of its maritime area, Montenegro claims the land territory of another State! This absurd claim evidently is based on a very "original" interpretation of one of the basic principles that "it is the land which confers upon the coastal State a right to the waters off its coasts."[11] This was a pretext for aggression and occupation of Croatian land territory and its maritime areas east of Dubrovnik, as well as for destruction of the old city of Dubrovnik by the Serbo-Montenegrin army.

Fishery Profile of the Eastern Adriatic

Due to its characteristics -- relatively high salinity and shortage of nutritive salts, especially of phosphoric and nitric salts -- the Adriatic Sea has relatively modest fish resources. This is compensated for by a

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[9]21 kilometers of the coastline.

[10]260 kilometers of the coastline.

[11]Fisheries Case, Judgment of 18 December 1951, *I.C.J. Reports 1951*, p. 131.

considerable variety of species, but they do not exist in large quantities as in some northern seas.[12]

As a fishery basin the Adriatic Sea is not homogeneous. Namely, because of the inflow of the fresh water and the sea depth, the eastern Adriatic coasts have always been richer in fish. This is the reason why bilateral fishery agreements of the Adriatic States related mainly to special conditions under which Italian fishermen were permitted to fish in the eastern Adriatic waters.

During the period from 1949 to 1973, Italy and Yugoslavia concluded a total of six agreements on the basis of which Italy obtained (for monetary compensation) the right to fish in specific areas of Yugoslav territorial waters. The provisions of those agreements specified: permitted fishing areas, number and types of authorized fishing boats, permitted catch quotas and fishing seasons, special permits for fishing, and the form of compensation for fishing access.[13] The last bilateral agreement between Italy and Yugoslavia terminated in 1980. Years of negotiations that followed in seeking more suitable solutions for structuring fishing relations of the two States did not result in a new agreement.

An exception was the agreement concluded by Italy and Yugoslavia in 1983,[14] relating to fishing in the Bay of Trieste, which continues in force between Italy and successor States of Yugoslavia -- Slovenia and Croatia -- until the conclusion of the new agreement. This agreement establishes a common fishing area in the Bay of Trieste, precisely defined by geographic coordinates within the territorial seas of the coastal States. Exclusive fishing rights in the common area are granted to fishermen belonging to the community of the Bay of Trieste, the Friuli-Giulia territory, and Slovenia and Croatia. The agreement provides for control and jurisdiction of Contracting Parties over fishing in the territorial waters in which fishing is conducted in the common area. The established Mixed Commission observes the fishing activity in the common fishing area for the purpose of protecting the biological resources of the sea. For

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[12]For a detailed analysis, see *Epikontinentalni pojas*, ed. by D. Rudolf, Split 1976, pp. 130-134.

[13]For a detailed analysis of bilateral agreements between Italy and Yugoslavia, see J. Muljacic, "Bilateral Agreements on Fishing in the Adriatic Sea," *Zbornik Pravnog fakulteta u Zagrebu*, 1991, No. 41 (2-3), pp. 203-216.

[14]*Official Gazette of SFRY, International Agreements*, No. 3/87.

this purpose it is entrusted to limit the number of authorized boats or to temporarily stop fishing in the area, if it deems necessary.

The aforesaid 1983 agreement is for the time being the only agreement on fishing in the Eastern Adriatic. In a short time, another agreement on fishing may be concluded. Namely, the negotiations between Slovenia and Croatia on the conditions under which the Slovenian fishermen will be permitted to fish in the Croatian territorial waters might soon result in the signing of an agreement. According to the available information, it seems that the future agreement will grant Slovenian fishermen fishing rights in the whole area of the territorial sea of Croatia. While it seems that no restrictions on the fishing areas will exist, the future agreement will provide for permitted catch quotas, probably 2000 tons of total catch of blue fish within the fishing year. As fishing of other species, especially of demersal stocks, reached a rather heavy level of exploitation, their catch will probably be forbidden by the future agreement. Namely, overfishing of the said species has reached the stage that requires serious restrictive measures even for domestic Croatian fishermen.

Protection of the Marine Environment

Because of its size and physical characteristics, the Adriatic Sea is especially vulnerable to pollution. It is a small, virtually closed sea area, waters of which are slowly renewed only through the Strait of Otranto.

The effective protection of the waters and coasts of the Adriatic requires the cooperation of all its coastal States. Besides cooperation at the subregional level, the coastal States should also take part in regional Mediterranean activities, initiated in 1975 by the Mediterranean Action Plan.

The foundation for active participation of the new States of the Eastern Adriatic in the common efforts of the Mediterranean States has already been laid in the framework of Yugoslavia. Namely, in implementing the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution and related protocols to which Yugoslavia was a party, its coastal republics enacted laws and regulations on marine environmental protection and started with the development of necessary programs and measures. In addition, numerous scientific and other institutions along the coast of the Eastern Adriatic have been actively taking part in all important regional projects and programs, such as the Program for Pollution Monitoring and Research in the Mediterranean, "Blue Plan," Priority

Action Program, Mediterranean Regional Aquaculture Project, etc. In this connection it should be stressed that the Priority Action Program is coordinated by a Regional Center established in Split, a Croatian town in the middle of the eastern Adriatic coast.

It is partly due to the active participation in the Mediterranean regional activities in the framework of the Mediterranean Action Plan that the Eastern Adriatic has largely unpolluted areas. This does not mean that there was total compliance with the standards and criteria formulated by the Mediterranean regional legal instruments, but it is beyond dispute that precisely due to the actions taken in the framework of the Mediterranean Action Plan the most serious pollutants, mainly from land-based sources, have been significantly reduced.[15]

As stressed, the protection of the Adriatic Sea requires the additional efforts of the Adriatic coastal States. Having a common interest in the shared sea, the Adriatic States should cooperate at the subregional level in order to ensure a coordination of their efforts for the protection and management of the Adriatic Sea area. In this connection, Article 3, para. 1 of the 1976 Barcelona Convention, providing for subregional agreements of its Contracting Parties, and Article 123 of the 1982 UN Law of the Sea Convention, providing for cooperation of the coastal States of enclosed or semi-enclosed seas, should be mentioned.

It should be said that at present, because of developments in the Eastern Adriatic, subregional cooperation between all the Adriatic States represent only a "wishful thinking." The war is still going on in the southern Adriatic, the part of the Croatian coast and maritime area east of Dubrovnik is still under the occupation of the Serbo-Montenegrin army. Even when the war stops, it will take time before all the destruction of the coast of Croatia and Bosnia and Herzegovina done by the Serbo-Montenegrin army -- suffice it to mention the destruction of the old town of Dubrovnik -- can be forgotten.

But, when the situation becomes calm enough to make possible the cooperation of all the Adriatic States, this cooperation should be aimed at the establishment of a joint plan for intervention in the case of incidents causing oil pollution, harmonization of national legislation concerning the protection and preservation of the sea, joint planning of the use of the Adriatic coast for the development of tourism, industry, etc.

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[15]In this respect, a decrease in concentrations of mercury in the Kastela Bay near Split should be mentioned.

In this respect the cooperation between Italy and the former Yugoslavia, i.e., its coastal republics, based on the 1974 Agreement on Cooperation for the Protection of the Waters of the Adriatic Sea and Coastal Zones from Pollution, could serve as a good example. Although the comparison of the results achieved and the objectives of cooperation as expressed in the 1974 Agreement itself, in the Rules of Procedure of the Mixed Commission and the tasks with which the Commission entrusted the subcommissions, shows that the implementation of that ambitious cooperation plan has progressed at a rather slow rate, the positive achievements of subregional cooperation in the framework of the 1974 Agreement should serve as a model for the future cooperation of all the Adriatic States.

Final Remarks

The increased number of coastal States of the Adriatic Sea, which resulted from the "crisis" in the Eastern Adriatic, gives greater importance to cooperation in managing the shared sea area. Although for the time being, cooperation between some of the Adriatic States is hardly possible, their interdependence will in the future necessarily lead to joint actions in the Adriatic.

When discussing the relations in the Adriatic *de lege ferenda*, a concept of "enclosed or semi-enclosed Seas," provided for in Part IX of the 1982 UN Law of the Sea Convention, should be taken into account.

Although the Third Conference on the Law of the Sea did not elaborate a precise definition, having adopted a single definition, for both terms, "enclosed" as well as "semi-enclosed seas," the Adriatic Sea is, beyond doubt, covered by the definition of Article 122 of the 1982 Convention.[16] Namely, it possesses all the elements required by that definition and satisfies the motives for the acceptance of specific rules for enclosed or semi-enclosed seas: (a) there are seven Adriatic coastal States; (b) the Adriatic Sea is connected with the Ionian Sea only by the Strait of Otranto; (c) it has a small surface area that does not permit the establishment of exclusive economic zones to the full extent permissible.

[16]Article 122 reads: "For the purposes of this Convention, 'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial sea or exclusive economic zones of two or more coastal States."

In additional to the definition, Part IX of the 1982 Convention contains provisions (Article 123) on the cooperation of coastal States in enclosed or semi-enclosed seas. Such States are invited to cooperate with each other in the exercise of their rights and in the performance of their duties under the Convention. They should coordinate the management, conservation, exploration, and exploitation of the living resources; the implementation of their rights and duties with respect to the protection and preservation of the marine environment; their scientific research policies. The coastal States should also, where appropriate, invite other States or international organizations to cooperation with them in furtherance of the above-mentioned provisions.

Thus, the specific provisions of the Convention on enclosed or semi-enclosed seas are not numerous and they are drafted more in the form of recommendations than strict legal obligation. They concern all the topics we are dealing with in this paper.

In spite of scarcity of the provisions contained in Part IX of the 1982 Convention, the impact of the introduction of the notion of enclosed or semi-enclosed seas in the 1982 Law of the Sea Convention and the recognition of the particular necessity of cooperation of States and international organization to such seas, should not be underestimated.

The concept of the enclosed or semi-enclosed sea should be a starting point for future cooperation in the Adriatic Sea and all States should be included at least in the fields of cooperation mentioned in Article 123. Land-locked States using Adriatic ports and waters (Austria, Hungary, Czechoslovakia) should also participate in the activities of the Adriatic States. Finally, cooperation with regional and international organizations (FAO, UNEP, IMO, European Economic Commission, International Oceanographic Commission) should be more intensive.

THE PROTECTION OF ENDANGERED SPECIES OF ANIMALS IN THE MEDITERRANEAN SEA

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Introduction

At an international level, the effective protection of endangered species[1] of wild animals is, at least at present, pursued through international conventions. Even if a customary rule of international law existed, it would be so general as to need more specific rules in order to be implemented properly. These specific rules, which relate, for instance, to the identification of the species to be protected and the most effective means of preserving them, cannot but be by international conventions.

In principle, every treaty that protects the environment also protects wildlife indirectly. Nevertheless, there are a certain number of conventions whose specific aim is to safeguard endangered species. Some of these conventions are open to the participation of all States and have a worldwide application: they are therefore universal. Others are regional as regards both the participation and the area covered by their provisions.

As far as the universal conventions are concerned, in this paper we intend to consider the following in chronological order and only insofar as they concern the Mediterranean: the International Convention for Regulation of Whaling (Washington, 2 December 1946, hereinafter the ICRW); the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar, 2 February

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[1]In the present context, the terms 'threatened,' 'endangered,' etc. are used irrespective of the meaning given to these adjectives in more scientific contexts. A detailed definition of these terms has been elaborated by the International Union for the Conservation of Nature and Natural Resources (IUCN). Some conventions, such as the Berne Convention, have employed these adjectives in the meaning given by the IUCN; see Council of Europe, Explanatory report concerning the Convention on the Conservation of European Wildlife and Natural Habitats (Strasbourg, 1979) 8.

1971, hereinafter the Ramsar Convention); the Convention for the Protection of the World Cultural and Natural Heritage (Paris, 23 November 1972, hereinafter the UNESCO Convention); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 3 March 1973, hereinafter the CITES); the Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979, hereinafter the Bonn Convention); and the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, hereinafter the 1982 UNCLOS).

The regional conventions will also be considered from the point of view of their connection with the Mediterranean. These conventions are: the African Convention on the Conservation of Nature and Natural Resources (Algiers, 15 September 1968, hereinafter the African Convention); the Convention on the Conservation of European Wildlife and Natural Habitats (Berne, 19 September 1979, hereinafter the Berne Convention); and the Protocol concerning Mediterranean Specially Protected Areas (Geneva, 3 April 1982, hereinafter the Geneva Protocol).[2]

In order to ascertain the relevance of these conventions for the Mediterranean, each of them will be examined as regards: (a) its application area, i.e. does it include the Mediterranean area?; (b) its contracting Parties, i.e. are they Mediterranean coastal States or are they distant States engaged in activities in Mediterranean waters?; (c) the species protected by it, i.e. are they native fauna of the Mediterranean or are they migratory species crossing this area periodically?; (d) the substantial aspects, i.e. the protective measures to be adopted by the Parties in order to enforce the conventions.

General problems

As clearly shown by their titles, not all the above-mentioned conventions are related strictly to the sea. However, their application may in some respects concern the protection of endangered species in marine areas, and in particular in the Mediterranean.

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[2]Most of these conventions are very interestingly commented on by Simon Lyster, *International Wildlife Law* (Cambridge: Grotius Publications Limited, 1985). On the protection of the Mediterranean see Jean Yves Cherot and André Roux (eds.), *Droit Méditerranean de l'environnement* (Paris: Economica, 1988) (esp. the contributions by Dejeant-Pons, Grenon, Flory, Imperiali, Vukas, and Kiss).

The Mediterranean is a semi-enclosed sea.[3] Because of its restricted size, no exclusive economic zone has yet been proclaimed or implemented by its coastal States. Thus, from a legal point of view, the Mediterranean waters are internal waters, territorial seas, and high seas.[4] This particular status of the Mediterranean waters has significant consequences as regards the implementation of the conventions on the preservation of endangered species.

The first problem to be dealt with concerns the area where the protection conventions are to be enforced. Wild animals cannot be confined to the jurisdictional boundaries of States. This makes the question of the territorial application of the treaties particularly interesting.

According to Art. 29 of the 1969 Vienna Convention on the Law of Treaties, "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." Some treaties clearly specify the geographical area, or even the legal status of the area, where they are to be applied. However, sometimes it is necessary to obtain this information from a more in-depth or teleological interpretation.

In any event, the application of the protection conventions cannot disregard the customary rules of international law concerning the exercise of jurisdiction in areas that are not under sovereign jurisdiction, that is, the high seas. This is particularly important for the Mediterranean, because of the legal status of its waters. In short, it is clear that a State can (and sometimes must) enforce without any limitation the protection treaties to which it is a Party in its territory, including internal waters. The same can be said for the enforcement of treaties in the territorial sea, although the limited rights of third States in this area, mainly the right to innocent passage, might interfere with some protective measures. On the contrary, on the high

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[3]For the definition of 'enclosed or semi-enclosed sea,' see Art. 122 of the 1982 UNCLOS. As regards the Mediterranean, see also, M. Benchikh, "La mer Méditerranée, mer semi-fermée," *Revue Générale de Droit International Public LXXXIV*, (1980): 284-97, and Budislav Vukas (ed.), *The Legal Regime of Enclosed or Semi-enclosed Seas: The Particular Case of the Mediterranean* (Zagreb: Birotehnika, 1988).

[4]In ratifying the UNCLOS, Egypt showed her intention of declaring an exclusive economic zone but this claim has not yet been implemented. Similarly Morocco, which has established an exclusive economic zone in its Atlantic waters, seems not to claim such a zone in the Mediterranean. In 1978 Malta established a 25-mile exclusive fishing zone, while Tunisia claims a fishing zone whose width varies.

seas the exercise of jurisdiction by States is limited to the ships flying their flag, according to Arts. 5 and 6 of the 1958 Geneva Convention on the High Seas and Arts. 92 and 94 of the 1982 UNCLOS. This means that, on the high seas, each State can enforce the protection treaties to which it is a Party only with respect to its nationals. This is expressly stated in the 1982 UNCLOS (Part VII, Section 2) with regard to the conservation and management of living resources, but the same principle seems to be applicable also to the protection of endangered species.[5]

The problems concerning the application area of the protection treaties are strictly connected to those relating to the participation in such treaties. On the one hand, it is necessary to ascertain which Mediterranean coastal States[6] are Parties to the protection conventions. This is important especially for the protection of coastal areas (internal and territorial waters), where each coastal State exercises its jurisdiction and may fully implement the conventions to which it is a Party. On the other hand, for the high seas, it is also necessary to take into consideration the participation in the protection treaties of the distant States engaged in the Mediterranean in activities affecting the protection of endangered species.

Another problem, which can be resolved through an accurate interpretation of the treaties, concerns the identification of the object, in other words the species, protected by them. Sometimes it is very easy to know which the protected species are if they are listed in an appendix to the convention and such a list is exhaustive. It may sometimes be difficult, however, to ascertain whether a species is covered by the convention if there is not a list or if the list is not exhaustive. In this second case, the identification of the protected species is derived from a careful interpretation of the convention.

It is not necessarily the case that the species protected by conventions applicable to the Mediterranean constitute Mediterranean native fauna. Due to the mobility of animals, the protection may extend to

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[5]As regards the conservation of living resources of the high seas in the Mediterranean, it is not clear whether the UNCLOS or the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas is applicable.

[6]The Mediterranean coastal States are : Albania, Algeria, Bosnia, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Morocco, Slovenia, Spain, Syria, Tunisia, Turkey, United Kingdom (Gibraltar), and Yugoslavia.

species such as birds that simply pass through the Mediterranean area. The latter constitutes a very important migratory route for birds that cross the sea twice a year in order to reach Africa in autumn and to return to Europe in springtime. Some of these birds avoid passing over the open sea and choose to pass over Gibraltar or the Bosphorus. Others rest on Mediterranean islands, such as Malta, Cyprus, and Sicily during their migration. The identification of the protected species may involve the use of both "geo-naturalistic" criteria (to identify, for example, the migration routes of certain species) and of legal criteria (to ascertain to what extent the protection treaties do cover such species).

The last issue to be dealt with concerns the measures to be taken by States in order to secure effective protection of endangered wildlife. Usually treaties provide for measures that directly protect species, as in the case of an absolute prohibition of killing or capturing animals belonging to those species. Indirect protection can be achieved through the adoption of measures aimed at habitat preservation.

Even when the protective measures are clearly and specifically mentioned in the treaties, problems can arise from the possible contrast between the implementation of such measures and different uses of the sea and its resources. This is particularly evident in the Mediterranean, which is intensively exploited for its fishery resources. Sometimes these contrasts are overcome by considering certain concurrent, but restricted, uses of the resources as exceptions to the protection. This is the case, to quote just one example, with scientific research. At other times, however, when a species is so depleted that it cannot sustain any kind of further exploitation, protection should prevail, at least from a logical point of view. The relationship between protection and exploitation of species is, in fact, one of the most delicate problems to be resolved, even when exploitation is conducted in such a way as to ensure the conservation of the resources.[7] It is

[7]Even though the different terminology is not always evident in the text of the agreements, the protection of wildlife does not coincide with its conservation. In the present context, the expression "protection treaties" refers to treaties aimed at avoiding the extinction of wildlife currently threatened by various causes, not necessarily by over-exploitation. On the contrary, the expression "conservation treaties" is here employed to mean the treaties aimed at regulating the sustainable exploitation of a not-yet endangered resource. The difference in scope entails a difference in content; conservation treaties usually provide only for "negative" obligations (i.e., the reduction of catches), while protection treaties frequently contain also "positive" obligations, namely those of restoring the conditions necessary for the survival of the endangered species or for the maintenance of their habitats.

possible, for instance, that one treaty permits the exploitation of species protected by another treaty. This may happen when scientific data on the conservation status of species are not available or univocal.[8] On the other hand, sometimes exploitation and protection do not relate to the same species but the former negatively affects the survival of the endangered species. This happens when a species on which an endangered species depends is exploited, or when non-selective fishing methods cause accidental catches of endangered species. The most interesting example of this type concerns the controversial use of driftnets.

Some of these problems may have a legal solution, while others need to be resolved by the subjects concerned in a spirit of co-operation. It is necessary to bear in mind that the problem of the survival of endangered species can no longer be postponed.

The universal conventions

The ICRW

The application area. The ICRW constitutes a good example of the principle of both territorial and extra-territorial application. In the present context, extra-territorial application means the application based on the nationality of ships. Art. I, para. 2, of the ICRW states that the Convention "applies to factory ships, land stations, and whale catchers under the jurisdiction of the Contracting Governments, and

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[8]For instance, States that abstained or voted against the 1982 moratoria on commercial whaling decided by the International Whaling Commission justified their position by affirming that there was a lack of scientific data on the status of cetacean stocks; see Patricia Birnie, *International Regulation of Whaling* (New York - London - Rome: Oceana Publications, Inc., 1985), II, 615 ff.

Even though the different terminology is not always evident in the text of the agreements, the protection of wildlife does not coincide with its conservation. In the present context, the expression 'protection treaties' refers to treaties aimed at avoiding the extinction of wildlife currently threatened by various causes, not necessarily by over-exploitation. On the contrary, the expression 'conservation treaties' is here employed to mean the treaties aimed at regulating the sustainable exploitation of a not-yet endangered resource. The difference in scope entails a difference in content; conservation treaties usually provide only for "negative" obligations (i.e. the reduction of catches), while protection treaties frequently contain also "positive" obligations, namely those of restoring the conditions necessary for the survival of the endangered species or for the maintenance of their habitats.

to all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers."

Notwithstanding the clear wording of Art. I, para. 2, some States have suggested that the ICRW only applies to the high seas beyond the areas in which coastal States exercise their jurisdiction, including exclusive economic zones.[9] This problem, however, does not occur in the Mediterranean, where exclusive economic zones do not exist. Accordingly, the provision of Art. I, para. 2, however it is interpreted, is such as to allow the enforcement of the ICRW also in the Mediterranean.

The reference of Art. I, para. 2, to the subjects engaged in whaling seems to restrict the application of the ICRW. The simple reference to all waters would entail that the subjects under the jurisdiction of the contracting Parties have to respect the ICRW.[10] In Art. I, para. 2, on the contrary, application of the ICRW appears to be limited to the mentioned subjects. This has some consequences as regards the Mediterranean. Cetaceans are killed in the Mediterranean not due to whaling activity but principally because of accidental catches. The ICRW does not mention this kind of catch. On the other hand, accidental catches can hardly be considered as whaling. Thus the first question is: does the ICRW apply in the Mediterranean where whaling (*stricto sensu*) is not prosecuted? Do the ships of the contracting Parties, which are not factory ships or whale catchers, have to respect the ICRW ? Can a ship engaged in fishing operations causing accidental catches of cetaceans be considered as a whale catcher, that is as "a ship used for the purpose of hunting, taking, towing, holding on to, or scouting for whales" (Art. II, para. 3) ? It is evident that a strict interpretation of the ICRW leads to the exclusion of the application of the Convention to accidental catches. Consequently, and rather surprisingly, the ICRW, which should in principle be applicable in the Mediterranean, cannot be enforced in these waters, in as far as

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[9]See P. W. Birnie, "International Legal Issues in the Management and Protection of the Whale: A Review of Four Decades of Experience," *Natural Resources Journal* 29, no. 4 (Fall 1989): 903-34, at 916-7.

[10]It is noteworthy that even though the ICRW refers to waters and concerns species living in the sea, according to Art. I of the Protocol of Amendment (Washington, 19 November 1956) helicopters are included in the definition of "whale catcher." In this case it was not deemed necessary to state that the ICRW also applies in the air space over the waters where whaling is prosecuted.

whaling activities are not prosecuted there. It must be remembered, moreover, that the Mediterranean Sea is not included among the area limits for factory ships mentioned in the Schedule issued annually by the International Whaling Commission (IWC).

The contracting Parties. The ICRW is particularly interesting from the point of view of its contracting Parties. Unlike many treaties concerning the exploitation of marine resources, the ICRW is open to all States, irrespective of the fact that they are whaling or non-whaling States (Art. X). This has brought about the progressive shift of the ICRW from that of an instrument for exploitation to an instrument for the protection of whales, since non-whaling States have urged, sometimes successfully, the other Parties to end whaling[11].

There are thirty-five contracting Parties of the ICRW; as regards the Mediterranean coastal States, France, the United Kingdom, Monaco, and Spain are Parties to the ICRW, while Egypt withdrew from the ICRW with effect as from 30 June 1989.

The protected species. The ICRW does not contain a list of whales to which it is applicable. There exists a Nomenclature of Whales annexed to the Final Act of the Conference which created the IWC. This Nomenclature includes the species which were at that time commercially exploited. It is not clear, and the Parties to the ICRW do not agree upon this question, whether the ICRW also applies to smaller cetaceans. The IWC only dealt with small cetaceans to the extent that they were commercially exploited. Among the species listed in the Nomenclature there are some that, at least in the past, used to enter the Mediterranean Sea, such as the right whale (*Eubalaena glacialis*), some rorquals (*Balaenoptera musculus, Balaenoptera physalus, Balaenoptera acutorostrata*) and the sperm whale.

Besides the geographical area limits for factory ships, the Schedule also mentions the species to which the regulations established by the IWC apply and contains the classifications and catch limits for the different whale stocks. The classification of whale stocks implies that the geographical range of whales is taken into account.

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[11]The role of the non-whaling States in the International Whaling Commission is however diminished by the possibility for each State of objecting to (and, consequently, not applying) the decisions of the IWC.

The protective measures. The most important measures for protecting cetaceans are not to be found in the ICRW itself, but in its Schedule. Since the ICRW was adopted to promote the orderly exploitation of whales rather than their protection, it contains provisions aimed principally at regulating the catches. The progressive depletion of many cetacean stocks, however, has forced the IWC to adopt measures, such as those concerning the establishment of sanctuaries, which grant whales a certain degree of protection.[12] As stated above, the ICRW only applies to ships engaged in whaling. However, it is possible to argue that the protective measures (in particular the absolute prohibition of taking certain cetacean species) contained in the decisions of the IWC must be respected by all the ships of the contracting Parties. Nevertheless, it is necessary to note here that measures such as the moratoria adopted by the IWC in 1982 concern only "commercial" whaling. The term "commercial whaling" can hardly include "accidental catches," especially when accidentally killed cetaceans are thrown back into the water. In conclusion, the ICRW, due to its limited application in the Mediterranean, cannot be considered a very effective international instrument for the protection of Mediterranean whales.[13]

Some domestic legislation also provides for the protection of cetaceans. For instance, according to the recent Italian law on hunting,[14] the killing, capturing, and detaining of cetaceans is prohibited (Arts. 2 and 30).

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[12]The possibility for the IWC to designate "sanctuary areas" is stated in Art. V, para. 1.

[13]It must be remembered that on 20 January 1981 the EEC Council adopted Regulation No.348/81 on common rules for imports of whales or other cetacean products [in *Official Journal of the European Communities (OJEC)* L39 of 1981, 1 ff.]. According to this Regulation, the introduction into the Community of the products listed in the Annex is subject to the production of an import license. See also the proposal for the Regulation submitted by the EC Commission (*OJEC* C121 of 1980, 5), the opinion of the European Parliament (*OJEC* C291 of 1980, 46), and the opinion of the Economic and Social Committee on the proposal (*OJEC* C300 of 1980, 13).

[14]See Law No. 157 of 11 February 1992 published in *Gazzetta Ufficiale della Repubblica Italiana*, Suppl. to no. 46 of 25 February 1992.

The Ramsar Convention

The application area. The main purpose of the Ramsar Convention appears to be the protection of wetlands. The conclusion is therefore that the convention only applies, in the Mediterranean, to the coastal areas where wetlands are located.[15] This is not completely true. In the first place, the Ramsar Convention also protects fauna, especially waterfowl,[16] which can be found on the high seas and in the air space over them during migration. Secondly, activities carried out on the high seas may affect the protection of coastal wetlands. Although the Ramsar Convention provides no indication of the area to which it is to be applied, it may be said that it is in some respects and in principle applicable also on the high seas.

Nonetheless it is necessary to remember that the scope of the Ramsar Convention is to protect habitats or "to stem the progressive encroachment on and loss of wetlands," as stated in the preamble to the Convention. This is a reference to a "static" component of nature. Moreover, the wording of the Convention is "soft." It seems excessive therefore to extend the application of the Convention to waterfowl and, in general, to fauna when found outside the protected wetlands.[17]

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[15]Wetlands are defined in Art. 1, para. 1, as "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six meters". On the application of the Ramsar Convention in the Mediterranean see C. de Klemm, La Convention de Ramsar et la conservation des zones humides cotires, particulirement en Mediterranee, *Revue Juridique de l'Environnement*, no. 4 (1990): 577-98; see also C. de Klemm, "Legal Aspects of Habitat Preservation for Western Palearctic Waterfowl," *Proceedings of the Second Technical Meeting on Western Palearctic Migratory Bird Management* (Paris, 11-13 December 1979).

[16]According to Art. 1, para. 2, waterfowl are birds ecologically dependent on wetlands.

[17]It is clear that confining the protection of fauna and waterfowl to the protected wetlands might partially prejudice the success of the Convention. Protection granted to endangered species dependent on wetlands even outside such zones could, however, constitute not a legal obligation deriving from the Convention, but a "strong implicit moral obligation." This expression has been used by IUCN in its document CONF/4 ("The Ramsar Convention - A Technical Review," paper presented at the Conference on the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Cagliari, 1980, paragraph 17) with reference to a series of obligations that

It is worth noting that during the 1987 Conference of the Parties held in Regina (Canada) the Parties referred explicitly to the Mediterranean in their recommendation that waterfowl hunting statistics should be collected "to allow better management of flyway populations of waterfowl, in particular in the Western Palaearctic region (and especially the Mediterranean)...". The Parties made no mention of the legal status of the Mediterranean waters.

The Mediterranean States that are Parties to the Ramsar Convention have designated many coastal wetlands for inclusion in the List of Wetlands of International Importance (hereinafter the List). These are frequently located at the mouths of rivers, as in the case of the Italian wetland of Marano Lagunare (mouth of the river Stella) and of the Greek wetlands Axios-Aliakmon-Loudias Delta, Nestos Delta, and Evros Delta. Sometimes coastal wetlands include wider sea water areas, as in the case of the Greek wetlands of the Amvrakikos Gulf and the Gulf of Mesolonghion.

The contracting Parties. From the point of view of its contracting Parties, the Ramsar Convention is a very successful treaty as it is binding for sixty-five States, eleven of which (Algeria, Egypt, France, Greece, Italy, Malta, Morocco, Spain, Tunisia, United Kingdom, and Yugoslavia) are Mediterranean countries.

The protected species. The Ramsar Convention does not contain any specific provision concerning the direct protection of endangered species. However, indirect protection is granted to faunal species through the protection of their habitats.

Despite the frequent specific reference to waterfowl, many of the provisions of the Ramsar Convention refer more generally to "fauna" (and flora).[18] Endangered species are not mentioned in the Convention but their presence in a wetland has been considered by the Parties to the Ramsar Convention as a criterion in the identification of

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States were not yet ready to undertake when concluding the Convention in 1971.

[18]See, e.g., the Preamble; Art. 4, para. 3; Art. 5, second sentence; Art. 6, paras 2 (d) and 3.

internationally important wetlands.[19] Another criterion for identifying those wetlands to be included in the List is the presence of waterfowl, whether endangered or not.[20]

As the Ramsar Convention deals in particular with habitat preservation, it does not include any list of species to be protected.[21]

The protective measures. The protection system organized by the Ramsar Convention is principally based on the drawing up of the List of the wetlands designated by the Parties. These wetlands are granted special protection. The Convention, which is drafted in very general (and soft) terms, does not mention precisely which measures are to be taken by States in order to promote wetland and waterfowl protection.

As stated above, fauna and waterfowl considered in the Ramsar Convention are not necessarily endangered species. On the contrary, many provisions of the Convention encourage the exploitation of these resources, although this exploitation has to be carried out in a

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[19]More precisely, a wetland should be considered internationally important if, *inter alia*, "it supports an appreciable assemblage of rare, vulnerable or endangered species or subspecies of plant or animal or an appreciable number of individuals of any one or more of these species;" see the Criteria for Identifying Wetlands of International Importance for Designation for the List under Art. 2 of the Ramsar Convention, adopted during the 1987 Conference of the Parties in Regina (*Environmental Policy and Law* 17, no. 5 (1987): 203-4).

[20]According to the Criteria adopted in Regina (see supra note 19), waterfowl indicative of wetland values, productivity, or diversity include: divers (loons), grebes, pelicans, storks, ibises, spoonbills, herons, flamingos, swans, geese, ducks, cranes, rails and coots, waders (shorebirds), gulls, and terns.

[21]A non-exhaustive list of birds was agreed upon in Ramsar during the conference, which ended with the adoption of the Convention and is embodied in the Final Act of the Conference (para. 19). Due to the variety of species living in wetlands, a list including at least the most endangered species needing protection would be extremely useful. It may be suggested that States, in order to identify the endangered species, make use of the existing studies (for example the Red Data Books edited by the IUCN) or, to the same end, encourage research and exchange of data and publications on this subject, according to Art. 4, para. 3, of the Ramsar Convention.

sustainable manner. References to the "management" and "wise use"[22] of wetlands, as well as the frequent utilization of the term "conservation" instead of "protection", seem to imply that the capturing and killing of waterfowl is allowed at least as far as it does not cause any damage to the wetland ecosystem.[23] The result is that endangered species, which can sustain no further exploitation, should be granted absolute protection. In other words the capturing or killing of any specimen belonging to such endangered species should be prohibited.

As regards the indirect protection of endangered species -- that is, the preservation of their habitats -- States Parties should refrain from activities which may affect the protection of wetlands located in their own territories or in the territories of other coastal States.[24]

The UNESCO Convention

The application area. According to Art. 2 of the UNESCO Convention, "geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation" shall be considered as "natural heritage" and, as such, protected by the Convention itself.

Art. 3 specifies that States Parties have to identify and delineate those areas situated on their territories. These also seem to include sea areas as shown by the practice of the Parties that have considered as

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[22]According to the Information on Wise Use of Wetlands Specified under Art. 3 of the Ramsar Convention, adopted during the Conference in Regina, "wise use involves the promotion of wetlands policies containing" *inter alia* "regulated utilization of wild fauna and flora, such that these components of the wetland systems are not over-exploited" (*Environmental Policy and Law* 17, no. 5 (1987): 204).

[23]Hunting is explicitly mentioned in Recommendation 9 adopted in 1971 during the Conference in Ramsar. According to this, international and national hunters' organizations should, *inter alia*, "make hunters aware of their responsibilities for conservation and wise use of waterfowl resources through proper hunting practices." The use of the word 'resource' applied to waterfowl in the Preamble of the Convention also seems to imply the exploitability of waterfowl.

[24]The obligation to protect ("conserve") all wetlands included in the List derives from Art. 3, para. 1, which, on the contrary, limits territorially the protection ("wise use") of wetlands not included in the List.

"natural heritage" parts of their territorial waters. As regards the Mediterranean, for instance, the Gulfs of Girolata and Porto and the Scandola Reserve under French jurisdiction, and Kotor and its gulf under the sovereignty of Yugoslavia, are included in the World Heritage List created by the UNESCO Convention (Art. 11).

The natural heritage is defined as "world" heritage by the Convention. However the reference to the "territories" means that the properties which constitute this heritage remain strictly under the jurisdiction of each State on whose territory they are situated. The concept of "world heritage" therefore has nothing to do with the concept of "common heritage of mankind," which is regulated by different principles. Indeed it is particularly interesting that the world heritage includes only areas under State sovereignty and does not refer to mobile elements, such as animals, which could "escape" from national boundaries.

The contracting Parties. There are one hundred twenty-five Parties to the UNESCO Convention. As regards the Mediterranean, Albania, Algeria, Cyprus, Egypt, France, Greece, Italy, Lebanon, Malta, Monaco, Morocco, Spain, Syria, Tunisia, Turkey, United Kingdom, and Yugoslavia are contracting Parties. While the absence of Bosnia, Croatia, and Slovenia as contracting Parties is probably due to their recent independence, it is noteworthy that among the other Mediterranean States, only Israel and Libya are not Parties to the Convention.

The UNESCO Convention has been very successful in terms of State participation. This is probably because the Parties, and in particular developing countries, can obtain both technical (see e.g. Art. 22) and financial support for their conservation effort. For this purpose the Convention set up a Fund for the Protection of the World Cultural and Natural Heritage (Art. 15, hereinafter the Fund), which is financed by the States.[25]

The protected species. The UNESCO Convention only provides for indirect protection of endangered species, as it protects only the habitats of such species. It is not altogether clear whether the reference of Art. II to the "outstanding universal value" concerns the

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[25]On different forms of assistance available under the World Heritage Fund, see Doc, WHC/2 Revised (27 March 1992), *Operational Guidelines for the Implementation of the World Heritage Convention*, at 20 ff.

areas or the threatened species. In the context of the Convention, this expression is usually used with reference to the areas, but the second interpretation is also possible.[26] It is worth noting that, according to the Operational Guidelines for the Implementation of the World Heritage Convention, a site can be considered as natural heritage to be included in the World Heritage List if it contains "the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value from the point of view of science or conservation still survive".[27]

Neither the UNESCO Convention nor the Operational Guidelines supply any criteria for assessing the "outstanding universal value" of species.[28] Where it is necessary to make a choice between species to protect, reference may be made to the criteria set out in the World Conservation Strategy.[29]

The protective measures. The UNESCO Convention does not specify the means to be employed by the Parties for the protection of the world heritage sites and species occasionally present there. Art. 5 mentions, in very general terms, a series of actions that Parties "shall endeavour" to carry out in order to ensure the "protection, conserva-

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[26]Simon Lyster (*International Wildlife Law* cit.) and P.W. Birnie ("Problems Concerning Conservation of Wildlife including Marine Mammals in the North Sea," *International Journal of Estuarine and Coastal Law* 5, no. 1-2-3 (February 1990): 252-70, at 266) seem to prefer the first interpretation. For this reason, Lyster (at 209) observes that "natural habitats which contain some interesting animals and plants but are not of exceptional significance will not benefit, at least directly, from the Convention." It must be noted that, if interpreted in this way, the second sentence of Art. 2 partly coincides with the last part of the same Article. In any case, it could be argued that the presence in an area of a species which runs the risk of extinction confers on that area the value of an area necessitating protection by the UNESCO Convention.

[27]See Doc. WHC/2 Revised cit. para. 36 (a) (iv).

[28]See Simon Lyster, *International Wildlife Law* cit., 214.

[29]The World Conservation Strategy (WCS) was launched by IUCN, UNEP, and WWF with the cooperation of UNESCO and FAO in 1980. Among other things, the WCS suggests some criteria to maximize the cost effectiveness of conservation. On this subject, see also N. Myers, "A Priority-Ranking Strategy for Threatened Species?" *The Environmentalist* 3, no. 2 (1983): 97-120.

tion and presentation" of the natural heritage situated in their territories.[30]

The most interesting feature of the UNESCO Convention is its institutional organization. The World Heritage Committee is responsible for running both the World Heritage List, which includes the properties forming part of the natural heritage, and the List of World Heritage in Danger. The Committee decides, with the consent of the sovereign State concerned, which properties are to be included in the Lists (Art. 11). It also decides on the requests for international assistance presented by the Parties and on the use of the resources of the Fund (Art. 13).

The UNESCO Convention does not provide for any kind of protection of endangered species outside the sites deemed to be natural heritage. It is very difficult to make any teleological interpretation of the Convention in order to grant protection to endangered species outside the protected areas and in particular in areas not subject to national jurisdiction. It is even more difficult than in the case of the Ramsar Convention where at least fauna and waterfowl are often mentioned. However, the UNESCO Convention has been concluded for the protection of the "world" heritage and it establishes a financial system aimed at overcoming national boundaries in a spirit of international cooperation. It is therefore very frustrating to find that its scope is limited to the protection of the mobile elements of such heritage in the restricted limits of a protected area. According to Art. 6, para. 3, the Parties undertake "not to take any deliberate measures which might damage directly or indirectly the (...) natural heritage (...) situated on the territory of other States Parties". This provision could be used to extend the protection to endangered species wherever they are,[31] including the Mediterranean high seas. The adverb "indirectly" with reference to damage has a very broad meaning. It could, for instance, be used to cover the damage caused to a world heritage site by the excessive exploitation of migratory birds that takes place beyond the limits of that site that is the birds' habitat.

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[30]See para. 61 (i) (a) of Doc. WHC/2 Revised cit. which refers to "poaching" as a factor that may cause a "serious decline in the population of the endangered species or the other species of outstanding universal value which the property was legally established to protect."

[31]See Lyster, *International Wildlife Law* cit., 227-228.

As with the Ramsar Convention, there is no list of the endangered species whose habitats are protected by the Convention. Nor is anything said about the best way to protect these species. This lack gives rise to practical difficulties. The Operational Guidelines appear to deal with this problem. Para. 36 (b) (v) specifies that "In the case of migratory species, seasonable sites necessary for their survival, wherever they are located, should be adequately protected. Agreements made in this connection, either through adherence to international conventions or in the form of other multilateral or bilateral arrangements would provide this assurance." This provision can be taken as evidence that the UNESCO Convention is not wide-ranging enough to ensure the protection of animals during their migration, in other words when outside the borders of the protected zones.

The CITES

The application area. The CITES does not contain any direct reference to its application area. From its contents, however, it is clear that it applies in the territories of the States Parties. Moreover, Art. X seems to extend the application of the CITES outside the territory of the Parties. In fact, the Parties to CITES must request, even from non-Parties, documentation comparable with that required for trade between the Parties.

The CITES also covers species that do not originate in the territory of the Parties. In particular, it regulates (Art. III, para. 5, and Art. IV, para. 6) the trade of the species "taken in the marine environment not under the jurisdiction of any State."[32]

The contracting Parties. There are 111 contracting Parties to the CITES. Among those, the Mediterranean countries are: Algeria, Cyprus, Egypt, France, United Kingdom,[33] Israel, Italy, Malta, Monaco, Morocco, Spain, and Tunisia. Greece is not a Party to the CITES but, as a member State of the EEC, it must apply the Conven-

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[32]Art. I (e) defining the "introduction from the sea" (emphasis added).

[33]The United Kingdom has expressly declared that the CITES also applies to Gibraltar.

tion according to EC Council Regulation 3626/82 of 3 December 1982.[34] This is a very important Regulation. Without it, any species introduced into Greece[35] could have circulated in the Community according to the free circulation rules embodied in the EEC Treaty.[36]

The protected species. The CITES is completed by three Appendices. These include the species the international trade of which is regulated by the Convention. Inclusion in Appendix I, II, or III depends on the different level of endangerment of species.

Some States have entered reservations with regard to certain species included in the Appendices of the CITES.[37] None of the Mediterranean Parties have entered reservations concerning Mediterranean species. Thus trade in the Mediterranean species included in the appendices between the Mediterranean Parties and all other States is regulated by the CITES. However, such species are not protected by the CITES as regards the trade between States which are non-Parties to the CITES, when specimens are captured in the territories of those States or on the high seas.

Moreover, Art. XIV, paras 4 and 5 (which, however, does not seem to be very relevant with regard to the Mediterranean) deals with the marine species included in Appendix II, which are protected by other treaties that were already in force when the CITES came into force. States that are Parties to both the CITES and to such conventions are relieved of some obligations deriving from the former. These

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[34]*OJEC* L384 of 1982, 1. At present the EEC cannot become a Party of the CITES, since the amendment to the Convention adopted in Gaborone in 1983, which provides for the participation of regional economic integration organizations, is not yet in force.

[35]Among the EEC Members, Ireland is also not a Party to the CITES.

[36]According to Art. XIV, para. 3, the CITES does not "affect the provisions of, or the obligations deriving from, any treaty, convention or international agreement concluded or which may be concluded between States creating a union or regional trade agreement establishing or maintaining a common external customs control and removing customs controls between the parties thereto insofar as they relate to trade among the States members of that union or agreement".

[37]According to Art. XXIII, specific reservations are admitted while general reservations are not.

exemptions concern trade in specimens of such species taken by ships registered in those States and in accordance with those treaties. The most outstanding example of this situation is represented by the ICRW.

The protective measures. The purpose of the CITES is to protect endangered species by strictly regulating their international trade. The CITES provides for a system based on the exchange of export and import permits and certificates. Such documentation is granted when certain conditions have been met and in particular when the trade is not detrimental to the survival of the species (see Arts. III, IV and V). This is an "indirect" method for limiting the over-exploitation of endangered species. No provision of the CITES expressly prohibits the taking or killing of specimens belonging to such species. This means that every activity that is detrimental to the species but does not lead to their international trade does not infringe the CITES. For example, the CITES protects cetaceans. It does not, however, prevent their being caught accidentally. If they are then thrown back into the water, often damaged or already dead, and are not commercially exploited at an international level, the CITES is useless. Nor does the CITES deal with internal trade or with the preservation of habitats.

The Bonn Convention

The application area. The Bonn Convention does not contain a specific provision regarding its application area. However, widespread implementation of the Convention is reached by the identification of the subjects that are bound to respect its provisions. Art. I, para. 1 (h) defines a "Range State," in relation to a particular migratory species, as a State which exercises jurisdiction over any part of the range of that species, or as a State whose flag vessels are engaged outside national jurisdictional limits in taking that species.[38]

Most of the obligations contained in the Bonn Convention concern the Range States. This means that the protective measures are to be adopted mainly by those subjects that may have the migratory species "at their disposal" both in their territories and wherever else they are carrying out taking activities that could negatively affect the species.

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[38]On further problems concerning the interpretation of these provisions see Maria Clara Maffei, *La protezione internazionale delle specie animali minacciate* (Padua: Cedam, 1992): 141 ff.

Clearly, not all the provisions of the Bonn Convention can have this wide application area, irrespective of the legal status of the place where the species are located. For instance, if it is true that a State can prohibit the catching of protected species wherever they are, the enforcement on the high seas of measures protecting habitats affects the rights of third States in such zones and is consequently contrary to international law.

The contracting Parties. There are thirty-seven Parties to the Bonn Convention. Among them, the Mediterranean States are Egypt, France, the United Kingdom, Israel, Italy, Spain, and Tunisia. The European Economic Community has been a Party since 1 August 1983;[39] this means that the provisions of the Bonn Convention are also binding for Greece and for the other member States of the EEC that might be engaged in taking migratory species in Mediterranean waters. Other Mediterranean States that are situated along the migration routes of migratory species and that play an important role in their protection, are still not Parties to the Bonn Convention.[40]

The protected species. The Bonn Convention is completed by two Appendices listing the migratory species covered by the Convention. Appendix I lists migratory species which are endangered (Art. III, para. 1). Appendix II deals with migratory species "which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement" (Art. IV, para. 1).

It must be remembered that during the negotiations of the Bonn Convention some States, including Australia, Canada, Japan, New Zealand, Soviet Union, and United States, tried to exclude the marine migratory species from the application of the Bonn Convention. The

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[39]See EC Council Decision 82/461 of 24 June 1982 published in *OJEC* L210 of 1982, 10.

[40]The participation of Malta and Turkey would be very important for the effective implementation of the Bonn Convention, due to the great number of migratory birds that periodically fly over these territories; on the migration routes see issue no. 54 of *Naturopa* (1986) dedicated to the migratory species.

African States, however, strongly opposed this proposal.[41] The final text of the Convention covers all migratory species.

Both Appendices include species which can be found in the Mediterranean waters or over them. To quote just a few examples, the monk seal (Monachus monachus), which is the only seal in the Mediterranean, is included in both Appendices, as well as the sea turtle (Caretta caretta) which breeds on the beaches of Greece, Turkey, and Cyprus. Some species of birds, which cross the Mediterranean and its coastal States during their seasonal migrations, are listed in Appendix I, such as Audouin's gull (*Larus audouinii*) which breeds on some of the islands located throughout the Mediterranean. The white stork (Ciconia ciconia), which passes over Gibraltar and the Bosphorus in migration, is listed in Appendix II. Cetaceans included in Appendix I, such as *Eubalaena glacialis*, occasionally used to be found in the Mediterranean waters or landed ashore. Cetaceans included in Appendix II, on the contrary, are not present in the Mediterranean Sea.

The protective measures. The protection granted to the migratory species varies according to their inclusion in Appendix I or II. While the species of Appendix I are directly protected by the Convention itself, for the species of Appendix II the Bonn Convention only constitutes a framework convention and effective measures are to be worked out in further agreements.

According to Art. III, para. 5, the taking of animals belonging to the species included in Appendix I is prohibited. The meaning of the term "taking" is very wide as it refers to "taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct" (Art. I, para. 1 (i)). The reference to "deliberate" killing has raised the question whether the term "taking" includes accidental catches. This is not a question of minor importance in the case of the Mediterranean area, where migratory species protected by means of the Bonn Convention continue to be accidentally caught by Parties to the Convention, due to the use of non-selective fishing methods (e.g. driftnets). The adjective "deliberate" referring to "killing" is difficult

[41]See the Declaration of African States, in Convention in the Conservation of Migratory Species of Wild Animals, Text and Appendices, I, 1979, Edited by the Federal Minister of Food, Agriculture and Forestry of the Federal Republic of Germany, 168.

to interpret.[42] On the one hand, it could mean that all the other activities (taking, hunting, fishing, capturing, and harassing), whether deliberate or accidental, are regulated by the Convention in as far as they do not cause the killing of the specimen, an action which has always to be deliberate. On the other hand, "deliberate killing" could be interpreted as a residual category of taking; consequently, accidental catches could be considered as "capturing" or "harassing" and prohibited as such by the Convention.[43] Moreover, it could be maintained that the killing is deliberate even when an animal has been killed accidentally (i.e. it does not belong to the targeted species), if its killing was foreseeable (and almost certain) and the State has failed to adopt the measures necessary to avoid such killing.

Although the Bonn Convention is a "dynamic" convention, as it protects typically mobile wildlife, it does not neglect the element of "static" protection, that is, the safeguard of habitats. According to Art. III, para. 4, Range States of a migratory species of Appendix I, "shall endeavour" (a) to conserve and restore those habitats, which are important to remove the species from danger of extinction; (b) to prevent, remove, compensate for, or minimize the adverse effects of activities or obstacles that seriously impede or prevent the migration of species; and (c) to the extent feasible and appropriate, to prevent,

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[42]The travaux prparatoires do not help to clarify the meaning of the provision. In the first draft of the convention submitted by the IUCN in February 1975, the definition of the word 'exploitation' (and not 'taking') did not contain any reference to the deliberate nature of the action. It could be maintained, however, that the term "exploitation" expresses the idea of the voluntary nature of the action and does not cover accidental catches. In the revised draft convention of August 1977 (*Environmental Policy and Law* 3, (1977): 185), the definition of the term 'exploitation' is no longer present, while Range State is defined (art. I, para. 1 (e)) as, *inter alia*, a State the nationals or ships of which "take, hunt, fish, kill, or capture" the migratory species covered by the Convention. Moreover, Art. III concerning the protection of species included in Appendix I prohibited "any killing or capturing of animals belonging to the migratory species concerned." It seems that the adjective 'any' with reference to killing includes both deliberate and accidental killing. Finally, in the second revised draft convention, submitted by the Federal Republic of Germany in December 1978, Art. I, para. 1 (f), stated that "taking" meant "taking, hunting, fishing, killing or capturing." In the explanatory notes annexed to the second revised draft convention, it is said that this definition "has been included to avoid repetition in drafting" (i.e. for technical and not political reasons).

[43]According to Lyster (*International Wildlife Law* cit., 287) accidental killing clearly constitutes "capturing" or "harassing". In any case, the definition of Art. I, para. 1 (i), seems to be excessive.

reduce, or control factors that are endangering or likely to further endanger the species. Notwithstanding their soft wording, the provisions of Art. III, para. 4, are likely to be applied in regulating the use of fishing methods, such as trawling and driftnets. These methods may well constitute an obstacle to migration and be very detrimental to the marine environment constituting the habitat of the migratory species. It must be said, however, that measures preserving habitats are likely to be enforced principally in the territories (including territorial waters) of the Parties for at least two reasons. First, on the high seas the Parties cannot adopt protective measures, such as transit restrictions, which would limit the rights and freedoms of third States in such waters. Second, the Parties are seldom motivated to enforce measures which restrict their own rights but which may be frustrated by other States not bound by the Bonn Conventions.

As regards the species included in Appendix II, Art. V contains the guidelines for the AGREEMENTS[44] that Range States of such species "shall endeavour to conclude" (Art. IV). The purpose of these AGREEMENTS is "to restore the migratory species concerned to a favourable conservation status or to maintain it in such a status." Notwithstanding the detailed provisions of Art. V, no AGREEMENT has been concluded by Range States for the protection of Mediterranean species of Appendix II.[45] This means that such species, in as far as they are not listed also in Appendix I, are not concretely protected by the Bonn Convention. Art. V, para. 4 (f), of the Bonn Convention is particularly interesting. It concerns the cetaceans and the AGREEMENTS which should regulate their conservation. According to Art. V, para. 4 (f), such AGREEMENTS should at least prohibit any taking that is not permitted under any other multilateral agreement. Moreover, such AGREEMENTS should be open to States that are not Range States of the species covered by the AGREEMENTS. Even though the ICRW is not expressly mentioned, the reference to it is clear, as is the attempt to coordinate the provisions of the AGREEMENTS with those of the ICRW.

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[44]Capitals are used in the text of the Bonn Convention to distinguish the AGREEMENTS regulated in the Convention from other agreements.

[45]To date there exists only one AGREEMENT, namely the agreement concerning the conservation of seals in the Wadden Sea concluded in 1990 by Denmark, Germany, and the Netherlands.

As regards the relationship between the Bonn Convention and other treaties, Art. XII, para. 2, states that the provisions of the Bonn Convention "shall in no way affect the rights or obligations of any Party deriving from any existing treaty, convention or agreement." This provision can bring about serious consequences if it is interpreted in such a way as to make the existing exploitation treaties, i.e. those concerning fisheries, prevail over the Bonn Convention. This might be detrimental to the survival of the migratory species protected by the Bonn Convention if the migratory species depends on the exploited species or if the fishing methods are non-selective or harmful for the marine environment.

The 1982 UNCLOS

The application area. The application of Part XII of the UNCLOS, which deals with the protection and preservation of the marine environment, is not limited to particular areas of the sea. Consequently, the provisions of Part XII concerning the protection of species should apply everywhere in the sea, with no distinction from the geographical or the legal point of view.

Other articles of the UNCLOS deal with the conservation of species in the exclusive economic zone[46] -- that is, in areas which at present do not exist in the Mediterranean. Only Art. 65, which concerns marine mammals, is relevant for the Mediterranean, given that Art. 120 extends its application to the high seas.

The contracting Parties. The UNCLOS is not yet in force. Consequently, reference to the States which have already deposited their instruments of ratification[47] is of little importance, at least at present. On the other hand, insofar as the UNCLOS embodies international customary rules, it has to be respected and applied by all States

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[46]These articles are Art. 63 (Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it), Art. 64 (Highly migratory species), Art. 65 (Marine mammals), Art. 66 (Anadromous stocks), Art. 67 (Catadromous species), and Art. 68 (Sedentary species).

[47]The Mediterranean States that have deposited their instruments of ratification are Cyprus, Egypt, Tunisia, and Yugoslavia.

irrespective of the fact that they are or are not Parties to the Convention.

The protected species. The approach of the UNCLOS to the protection of wildlife is very vague. Nevertheless, some articles deal with specific groups of species[48]. Apart from the already mentioned Art. 65, these articles are applicable only in the exclusive economic zone. Moreover, they do not concern the protection *stricto sensu* of such groups but rather their exploitation and conservation.

The UNCLOS does not specify the criteria to be followed in order to know whether a species is "depleted, threatened or endangered," to quote the words used in Art. 194, para. 5. Art. 65 is no more definite; it simply mentions marine mammals and, among these, cetaceans. Cetaceans are also mentioned in Annex I of the UNCLOS, which lists the highly migratory species. This fact is probably due to lack of coordination between Annex I and Art. 65. According to Art. 64, States must cooperate in order to pursue the objective of optimum utilization of highly migratory species. Art. 65, however, exempts States from pursuing this objective as regards marine mammals.

The protective measures. Besides the already mentioned Articles of the UNCLOS embodying the customary rules on the exercise of jurisdiction by States on the high seas, the UNCLOS contains substantial rules on environmental protection.

Art. 192 provides for a general obligation to protect and preserve the marine environment, which obviously includes marine species. A broad interpretation of Art. 192 leads to the conclusion that States must avoid over-exploitation of species even in their territorial waters and that they cannot destroy the marine species that are endemic to their own territories.

Art. 194, para. 5, states that the measures taken in accordance with Part XII "shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life." It is doubtful, however, that States will adopt measures protecting the habitats located outside their jurisdictional boundaries.

Finally, species, though not the endangered ones, are taken into consideration in Art. 196, para. 1. According to this, States "shall take all measures necessary to prevent, reduce and control (...) the inten-

[48]See supra note 46.

tional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto."[49]

It is noteworthy that all the rules relating to species contained in Part XII seem to be too general to be effectively implemented and to benefit wild fauna in a concrete manner.

As stated above, Art. 65 of the UNCLOS applies to marine mammals in the exclusive economic zone and on the high seas. According to this article, the rules on the regime of the exclusive economic zone do not restrict the right of States "to prohibit, limit or regulate the exploitation of marine species more strictly than provided for in" Part V (Exclusive Economic Zone). Art. 65 should not be overestimated. Its relevance for the protection of mammals is strictly related to the regime created by the UNCLOS. According to this regime, States must pursue the objective of optimum utilization of marine living resources. Art. 65 preserves marine mammals from this regime. It must be recalled, however, that such a regime does not seem to correspond to international customary law nor to the regime in force at present in the Mediterranean. In other words, Art. 65 reaffirms a right which has never run the risk of being affected in the Mediterranean. Art. 65 is, however, important from another point of view. It reflects recent trends in the protection of whales and cetaceans that do not take only the economic value of these species into account, but also involve considerations of a moral and ethical nature.

The regional conventions

The African Convention

The application area. The African Convention does not contain explicit and "general" provisions concerning its application area. However, some articles refer to areas where specific provisions apply. As regards faunal resources, for instance, Art. VII, para. 1 (b), refers to "coastal water" where aquatic environments are to be managed. As

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[49]On the introduction of exotic species, see D.J. Bederman, "International Control of Marine 'Pollution' by Exotic Species," *Ecology Law Quarterly* 18, no. 4 (1991): 677-717. The introduction of "exotic species" and "non-native species" as a factor endangering the protected species also has to be controlled according to Art. III, para. 4 (c) of the Bonn Convention, Art. 11, para. 2 (b) of the Berne Convention and Art. 7 (e) of the Geneva Protocol.

regards the protected species included in Class A of the Annex, Art. VIII, para. 1 (i), provides for their protection "throughout the entire territory of the Contracting States." Art. X refers to the conservation areas to be maintained and extended within the territory and the territorial waters of the contracting Parties. Even though such territorial limitations may entail consequences detrimental to the survival of species and partially frustrate the scope of the Convention, the clear wording of these provisions cannot be forced. Thus it seems that the African Convention does not apply on the high seas. Consequently, the Mediterranean species included in the Annex are protected by means of the Convention only when they are on land and in internal or territorial waters.

The contracting Parties. The African Convention is open to the participation of African States only. As regards the Mediterranean African States, Algeria, Egypt, Morocco, and Tunisia are Parties to the Convention, while Libya has signed but not yet ratified it.

The protected species. The African Convention is completed by an Annex, which lists the protected species of fauna and flora. These are divided into two categories: Class A and Class B. Species not yet listed in the Annex may be protected, where necessary, in the same way as the listed species (Art. VIII, para. 1).

The Convention does not specify that the species of Class A are more endangered than the species of Class B. This conclusion, however, may be inferred from the fact that the species of Class A are more highly protected than those of Class B. The Convention does not indicate the criteria for the inclusion of species in the Annex and the list has never been updated. The Annex includes species that can be found in the Mediterranean area, such as the Mediterranean monk seal (Monachus monachus), marine turtles, and some migratory birds.

The African Convention also deals with other animal species (significantly called "faunal resources") which are not threatened with extinction. According to Art. VII, para. 1, the Parties "shall ensure conservation, wise use and development" of such resources and their environment.

The protective measures. According to Art. VIII of the African Convention, species that are threatened with extinction or that may become so are granted "special protection." This means that the hunting, killing, capture, or collection of specimens of these species is prohibited except where such actions are authorized. For species of

Class A, authorization has to be granted by "the highest competent authority and only if required in the national interest or for scientific purposes." By contrast, for species of Class B, an authorization granted by the "competent authority" suffices.[50]

Besides this "direct" protection of species, the African Convention provides for an "indirect" type of protection. Thus Art. IX regulates the trade and transport of specimens belonging to protected species (para. 2) and to other animal species (para. 1). Art. X concerns the protection of habitats and ecosystems. The Parties shall maintain or establish areas where "conservation of all species and more particularly of those listed or which may be listed in the annex" is ensured (para. 1 (ii)).[51]

In conformity with the principles now embodied in the World Conservation Strategy and in some more recent treaties, the African Convention tackles the problem of the wise use of natural resources.[52] Hunting, capture, and fishing of those faunal resources that can sustain exploitation are to be conducted in such a way as to ensure their conservation. To this end, Art. VII, para. 2, contains a list of prohibited methods of exploitation.[53] It is noteworthy that Art. VII, para. 2 (c) (i) prohibits "any method liable to cause a mass destruction of wild animals." It is unclear whether or not driftnets fall into this group of methods. However, even if they should constitute a method causing mass destruction, the prohibition on using them would not extend beyond the limits of the territorial waters of the Parties, at least according to a strict interpretation of the Convention.

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[50]Given the lack of any further indication concerning the "highest competent" and the "competent" authorities, it is questionable whether the "authorization regime" for species of Class A substantially differs from that of species of Class B.

[51]"Conservation areas" include "strict nature reserves," "national parks" and "special reserves" as defined in Art. III, para. 4. It is noteworthy that the definitions both of "strict nature reserve" and of "national parks" stress that such areas have to be "under State control".

[52]The WCS uses the expression 'sustainable' use, but the two notions are similar.

[53]Art. VII, para. 2, makes a distinction among "prohibited," "particularly prohibited," and "as far as possible prohibited" methods.

Briefly summarized, in the light of its territorial restrictions the African Convention does not seem to be of much value for the protection of endangered species in the Mediterranean, because the application area is confined to coastal (national) areas.

The Berne Convention

The application area. The title of the Berne Convention refers to "European" wildlife. Despite this reference, the text of the Convention contains no geographical restriction as regards its application area.[54]

In this respect, the Berne Convention should not be considered as a regional convention, as it does not apply to a specific "region," but to the species of such a region, even when these species move out of it.

In addition to this "geographical" extension, some Parties have shown their intention to extend the application of the Berne Convention from a "legal" point of view.[55] According to this broad interpretation, the Convention should cover the actions carried out on the high seas by the nationals of the States Parties and by the vessels flying their flags.[56] In this case too, however, the provisions that are

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[54]It has been explained that "it was decided to leave out in paragraph 1 [of Art. 1] the words "in Europe" or "European" for two reasons: i) not to restrict the geographical coverage of the convention to the European continent, with a view to the fact that many species of flora and fauna of Europe are found outside Europe; ii) to include visiting migratory animals that are not confined to Europe" (see Council of Europe, Explanatory report cit., para. 17).

[55]It is not clear, however, whether this extension has been made on a voluntary basis or whether it was imposed by the Convention. On the territorial scope of the Berne Convention, see Simon Lyster, International Wildlife Law cit., 145 ff.

[56]According to Lyster (*International Wildlife Law* cit., 146 and 148) Parties should apply the Berne Convention even in the territories of third States. This opinion is, however, hardly acceptable. Moreover, it is worth noting that according to Art. 21, para. 1, "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which" the Convention shall apply. Presumably this declaration shall regard the territories under the jurisdiction of the State concerned ("overseas territories", see Council of Europe, *Explanatory Report* cit., para. 66). This seems to contrast with the application of the Convention based on the citizenship and nationality of ships. For instance, when the EEC decided to become a Party of the Berne Convention, it declared that the Berne Convention was not applicable in Greenland. The consequence would be that the

most likely to be applied beyond the boundaries of national jurisdiction will be those relating to the "direct" protection of species, namely those that regulate the taking of specimens belonging to the protected species.[57]

The contracting Parties. The Berne Convention was developed within the framework of the Council of Europe. Notwithstanding this, according to Art. 20, the Committee of Ministers of the Council of Europe, after consulting the Contracting Parties, may invite any non-member State of the Council to accede to the Convention. This means that every European or non-European State which can in some respect contribute to the safeguarding of European wildlife may be asked to become a Party of the Berne Convention.[58] In other words, the Convention is likely to protect European wildlife throughout its geographical range. This is very important for the protection of migratory species, especially for those that migrate periodically between Europe and Africa, crossing the Mediterranean.

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nationals of the EEC member States should have applied the Convention on the high seas, in areas not subject to State jurisdiction or subject to the jurisdiction of non-Parties, but not in a part of the national territory of a member State. On 23 February 1982 Greenland withdrew from the EEC; does this imply that the nationals of the EEC member States now have to apply the Berne Convention in Greenland, too? Is the declaration exempting that territory still valid even though Greenland is no longer under the EEC "jurisdiction"?

[57]A limited extra-territorial application of the provisions concerning habitat preservation may be envisaged as regards, for instance, the financing of development projects in third States. Before funding such projects, the Parties to the Berne Convention should make sure that actions to be undertaken are not harmful for the protected species and their habitats located in those third States. On this point see Simon Lyster, *International Wildlife Law* cit., 146.

[58]It is evident that the Berne Convention constitutes an improvement in comparison with the African Convention, both from the geographical point of view (the African Convention is open to African States only) and from the legal point of view (the African Convention seems to be limited to the territories of the Parties); on the problem of participation to the Berne Convention, see P.-H. Imbert, "La Convention relative à la conservation de la vie sauvage et du milieu naturel de l'Europe - Exception ou étape?" *Annuaire Français de Droit International* XXV, (1979): 726-52.

As regards the Mediterranean area, Cyprus, France, Greece, Italy, Spain, Turkey, United Kingdom, as well as the EEC,[59] are Parties to the Berne Convention. To date, none of the Mediterranean African or Asian States are Parties to it.

The protected species. The Berne Convention is completed by four Appendices. Appendix II lists "strictly protected animals," while Appendix III lists "protected animals." As regards the marine species of the Mediterranean area, the monk seal (*Monachus monachus*) and the sea turtle (*Caretta caretta*), for instance, are included in Appendix II, as well as many cetaceans which can be found in the Mediterranean.[60] Appendix II also includes a wide range of species of birds; among these are listed many migratory birds that habitually cross the Mediterranean during their migrations. All the species of cetaceans not mentioned in Appendix II are included in Appendix III.

The Appendices may be amended by the Parties according to the procedures provided for in Art. 17. The first inclusions were made on the basis of the lists of species threatened in Europe drawn up by the European Committee for the Conservation of Nature and Natural Resources.

The protective measures. The scope of the Berne Convention is to conserve wild flora and fauna and their habitats irrespective of their conservation status. Particular emphasis is placed on endangered and vulnerable species and endangered habitats.

Art. 4 provides for the protection of habitats. According to para. 3, special attention is devoted to the protection of wintering, staging, feeding, breeding, or moulting areas of migratory species of Appendices II and III.

Art. 6 deals with the protection of species of Appendix II. States must ensure the special protection of such species. They undertake to prohibit

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[59]See the decision 82/72 of the EC Council of 3 December 1981 (in *OJEC* L38 of 1982, 1).

[60]Some of the cetaceans included in Appendices II and III are also regulated by the ICRW; see Council of Europe, *Explanatory Report* cit., para. 72 and note 1.

a) all forms of deliberate capture and keeping and deliberate killing;
b) the deliberate damage to or destruction of breeding or resting sites;
c) the deliberate disturbance of wild fauna "if significant in relation to the objectives of the Convention;"
d) the deliberate destruction or taking of eggs from the wild or keeping these eggs (..);
e) the possession of and internal trade in these animals (...).

The reiterated use of the adjective "deliberate" gives rise to doubts as to whether Art. 6 covers accidental catches or not. One simple answer could be that the list of actions mentioned in Art. 6 is only exemplifying and not exhaustive. If accidental catches prove detrimental to wild fauna of Appendix II, States Parties must take measures to avoid such catches in compliance with the general provision of Art. 6 (first sentence).[61]

Art. 7 deals with the protection of the species of Appendix III. The exploitation of such species is allowed but it "shall be regulated in order to keep the populations out of danger."

In any case, for the capture of wild fauna of Appendix III and, as an exception,[62] of Appendix II, Parties

> shall prohibit the use of all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species and, in particular, the means specified in Appendix IV (Art. 8).

In this case too, it seems that the list of Appendix IV may be considered as non-exhaustive. In other words, if a method constitutes an

[61]On accidental catches due to the use of driftnets, see also below. On the interpretation of Art. 6 see Lyster (*International Wildlife Law* cit., 142 ff.).

[62]The possibility of making exceptions from some provisions of the Berne Convention is provided for in Art. 9.

indiscriminate means of capture and killing,[63] Parties shall ban it, even if this is not included in Appendix IV.[64]

Finally, Art. 10 of the Berne Convention provides for an additional obligation of cooperating for the protection of migratory species of Appendices II and III.

The Geneva Protocol

The application area. The Geneva Protocol is, among the treaties here examined, the only one that refers specifically to the Mediterranean. Art. 2 deals with the application area stating that

> For the purposes of the designation of specially protected areas (...), the area to which this Protocol applies shall be the Mediterranean Sea Area defined in article 1 of the Convention for the Protection of the Mediterranean Sea against Pollution[65] (...); it being understood that, for the purposes of the present Protocol, it shall be limited to the territorial waters of the Parties and may include waters on the landward side of the baseline from which the breadth of the territorial sea is measured and extending, in the case of watercourses, up to the freshwater limit. It may also include wetlands or coastal areas designated by each of the Parties.

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[63]The problem could be that of assessing when a method is to be considered "indiscriminate" or "non-selective," as almost every method implies a certain amount of by-catches.

[64]On the application of the Berne Convention in Italy in relation to the use of driftnets, see below.

[65]This convention was adopted in Barcelona on 16 February 1976. Its Art. 1 defines the geographical coverage of the convention, providing that "For the purposes of this Convention, the Mediterranean Sea area shall mean the maritime waters of the Mediterranean Sea proper, including its gulfs and seas, bounded to the west by the meridian passing through Cape Spartel lighthouse, at the entrance of the Straits of Gibraltar, and to the east by the southern limits of the Straits of the Dardanelles between the Mehmetcik and Kumkale lighthouses." According to para. 2 of Art. 1, "the Mediterranean Sea area shall not include internal waters."

This clear statement excludes any teleological interpretation aimed at extending the protection of wildlife on the high sea.

The contracting Parties. Albania, Algeria, Cyprus, Egypt, France, Greece, Israel, Italy,[66] Libya, Malta, Monaco, Morocco, Spain, Tunisia, Turkey, and Yugoslavia. Besides the three newly independent States of Bosnia, Croatia, and Slovenia, only Syria, Lebanon, and the United Kingdom are not Parties to the Geneva Protocol. The EEC is also a Party to the Protocol.[67]

The protected species. Like the Ramsar Convention and the UNESCO Convention, the Geneva Protocol protects species mainly indirectly through the protection of their habitat. Given the main purpose of the Geneva Protocol, there is no list or indication of the species to be protected.

According to Art. 3, the protected areas shall be established to safeguard, inter alia, "the genetic diversity, as well as satisfactory population levels of species, and their breeding grounds and habitats". Art. 9, para. 1 (b), mentions "migratory species and rare, endangered or endemic species" but does not define the meaning of these expressions.

The presence of species, endangered or exploitable, is taken into consideration for the selection and the establishment of protected areas according to the Guidelines adopted in June 1987 during the first meeting of focal points.[68]

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[66]It is noteworthy that the Italian legislation concerning the establishment of marine reserves does not mention the Geneva Protocol. See, for instance, the three recent Decrees of the Ministry of the Environment of 4 December 1991 (Natural marine reserve of Torre Guaceto) and of 27 December 1991 (Natural marine reserve of Isole Egadi and Natural marine reserve of Capo Rizzuto) (published in *Gazzetta Ufficiale della Repubblica Italiana* no. 115 of 19 May 1992, respectively at 6, 11 and 17).

[67]See Council Decision 84/132 of 1 March 1984 in *OJEC* L38 of 1984, 36.

[68]See Regional Activity Centre for Specially Protected Areas, *Guidelines for the Selection, Establishment, Management and Notification of Information on Marine and Coastal Protected Areas in the Mediterranean*, Tunis, 1987. These guidelines are not mandatory for the Parties to the Protocol.

The protective measures. According to Art. 7 of the Protocol, the Parties shall progressively take a series of measures to implement the Protocol. These measures "may" include, among other things, "the regulation of fishing and hunting and of the capture of animals;" "the prohibition of the destruction of (...) animals and the introduction of exotic species;" "the regulation of any act likely to harm or disturb the fauna (...) including the introduction of indigenous zoological or botanical species;" "the regulation of trade in and import and export of animals, parts of animals, (...) which originate in protected areas and are subject to measures of protection."

As the use of the verb "may" clearly shows, the adoption of these measures by the Parties is not mandatory. It is interesting to note, however, that these measures provide for direct protection of species, even if this is limited to the internal boundaries of the protected areas.

Art. 9 concerns the traditional activities of the local population which are to be taken into consideration by the Parties when adopting the protective measures. It is not clear what is to be considered a traditional activity, but this expression is likely to include, for instance, the activities of local fishermen. It is evident that fishermen may suffer economic (and cultural?) damage if they are prevented from fishing in an area which has traditionally been exploited for this. In this respect States have sometimes invoked economic reasons to justify measures which could turn out to be detrimental to the environment.[69] However, according to Art. 9 of the Protocol, "to the fullest extent possible" the exemptions shall not endanger the maintenance of the ecosystem as protected by the Protocol and shall not "cause either the extinction of, or any substantial reduction in, the number of individuals making up the species or animal and plant populations within the protected ecosystems, or any ecologically connected species or populations, particularly migratory species and rare, endangered or endemic species."[70]

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[69]For instance, economic reasons have been invoked by the Italian Ministry of the Merchant Marine to justify the use of driftnets by Italian fishermen; see below.

[70]On marine protected areas, see in general P.-M. Dupuy, "Les parcs marins dans le cadre international," *Revue Juridique de l'Environnement*, no. 4 (1980): 373-8; P. Baum, "Aspects cologiques des zones protégées en milieu côtier et marin, *ibidem*, 381-4. See also G. Cognetti and C. Da Pozzo, "Les parcs marins en Méditerranée," Union Géographique Internationale - Groupe d'étude sur la Géographie de la Mer, Cardiff, 3rd-6th July 1987.

Driftnets in the Mediterranean. A case study

Some of the problems attached to accidental catches of protected species and the use of driftnets have already been discussed above.[71] This question involves various problems concerning the exploitation of fishing resources and the concurrent uses of the sea. These will not be examined in detail here. In the present context we will consider only some of the aspects that are strictly related to the protection of species in the Mediterranean.

At present there is much international concern about the use of driftnets, which are extensively employed especially in the Pacific Ocean. Some States maintain that there is not enough scientific evidence that driftnets are detrimental to the marine environment and to the survival of endangered species in particular. Consequently, in their opinion there is no compelling reason to ban this fishing method. On the other hand, some States, international organizations, and conservationist movements would apply the precautionary principle to driftnets, although they admit that scientific data are as yet insufficient.[72] In this specific case the precautionary principle would mean that driftnets should be considered harmful to the environment until proved otherwise.[73]

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[71]Large-scale pelagic driftnet fishing is defined in the preamble of United Nations General Assembly Res. 44/225 of 22 December 1989 as "a method of fishing with a net or a combination of nets intended to be held in a more or less vertical position by floats and weights, the purpose of which is to enmesh fish by drifting on the surface of or in the water." On the problem of driftnets see FAO Legislative Study No. 47, *The Regulation of Driftnet Fishing on the High Seas: Legal Issues* (FAO: Rome, 1991) (papers by Hey, Burke, Ponzoni, Sumi).

[72]The precautionary principle is embodied, for instance, in Art. 11 (b) of the World Charter for Nature (Annex to the United Nations General Assembly Res. 37/7 of 9 November 1982, *International Legal Materials* XXII, no. 2 (March 1983): 455 ff.), and in Art. 7 of the Bergen declaration on sustainable development in the ECE Region of 16 May 1990 (*Yearbook of International Environmental Law* 1, (1990): 430). On the precautionary principle see also E. Hey, "The Precautionary Approach," *Marine Policy* 15, no. 4 (July 1991): 244-54.

[73]The adverse effects of driftnets on the marine environment and species continue after their loss or disposal at sea. This phenomenon is called ghost fishing and it is very detrimental to species like sea birds, turtles, and cetaceans. On this point see K. Sumi, *International Legal Issues Concerning the Use of Driftnets with Special Emphasis on Japanese Practices and Responses*, FAO Legislative Study No. 47 cit., 66 ff.

There exist a number of international acts dealing with the use of driftnets but most of these do not concern the Mediterranean.[74] One of the acts which has a certain importance for the Mediterranean is the United Nations General Assembly Resolution 44/225 of 22 December 1989 (Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world's oceans and seas).[75] According to this resolution "large-scale pelagic driftnet fishing (...) can be a highly indiscriminate and wasteful fishing method[76] that is widely considered to threaten the effective conservation of living marine resources, such as highly migratory and anadromous species of fish, birds and marine mammals." The resolution does not cover "small--scale driftnet fishing traditionally conducted in coastal waters." The resolution, however, does not specify the difference between large-scale and small-scale driftnet fishing. Res. 44/225 calls upon the members of the international community to cooperate in the conservation of living marine resources and to collect scientific and statistical data on the impact of driftnets. Moreover, res. 44/225, recommends, *inter alia*, that the same subjects agree to (a) moratoria on all large-scale pelagic driftnet fishing on the high seas by 30 June 1992 if and

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[74]See, to quote just some examples, the Tarawa Declaration of 11 July 1989 by the South Pacific Forum (*Law of the Sea Bulletin*, no. 14 (1989): 29); the subsequent declaration of Langkawi of 21 October 1989 giving support to the Tarawa Declaration; the Castries Declaration of 24 November 1989 by the Authority of the Organization of Eastern Caribbean States (*Law of the Sea Bulletin*, no. 14 (1989): 28). The most important binding international instrument on driftnets is the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Wellington, 24 November 1989) with its two Protocols (Noumea, 20 October 1990) (*International Legal Materials* XXIX, no. 6 (November 1990): 1454.

[75]On Res. 44/225 (published in *International Legal Materials* XXIX, no. 6 (November 1990): 1555) see W.T. Burke, *The Law of the Sea Concerning Coastal State Authority over Driftnets on the High Seas*, FAO Legislative Study No. 47 cit., 17 ff; and K. Sumi, *International Legal Issues* cit., 46 ff.

[76]According to the Tarawa Declaration, driftnets are an "indiscriminate, irresponsible and destructive fishing technique."

where measures to prevent the unacceptable[77] impact of such fishing practices and to ensure conservation have not been enforced; (b) the progressive reduction of large-scale driftnet fishing in the South Pacific leading to the cessation by 1 July 1991; (c) the immediate cessation of further expansion of large-scale pelagic driftnet fishing on the high seas of the North Pacific and all the other high seas outside the Pacific Ocean.

Res. 44/225 constitutes a compromise between the two positions mentioned above and, in particular, between the Japanese and the United States' approach.[78] Another more recent resolution by the United Nations General Assembly (res. 46/215)[79] calls upon the members of the international community to implement previous Res. 44/225 and 45/197. The members are required *inter alia* to reduce driftnet fishing operations on the high seas, so as to achieve by 30 June 1992 a 50 percent reduction in fishing effort, and to ensure the full implementation of a global moratorium on large-scale pelagic drift-net fishing on the high seas of the world's oceans and seas[80] by 31 December 1992.

As regards more specifically the Mediterranean, Res. 44/225 was brought to the attention of the Executive Committee of the General Fisheries Council for the Mediterranean (GFCM) in February 1990. After technical consultations, in June 1990, it was agreed that it was necessary to strictly regulate the use of driftnets in the Mediterranean

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[77]The interpretation of the adjective "unacceptable" is controversial as the concept of "unacceptableness" is a relative concept; on this point see W.T. Burke, *The Law of the Sea* cit., 28, and K. Sumi, *International Legal Issues* cit., 59.

[78]On this point, see M. Savini, "La réglementation de la pêche en haute mer par l'Assemblée Générale des Nations Unies," 1991, 32 ff. (paper to be published and kindly provided by FAO). It may be said that even though in some parts it reflects the compromise between the two approaches, res. 44/225 embodies a sort of precautionary approach. According to W.T. Burke (*The Law of the Sea* cit., 24), res. 44/225 "actually reverses the normal burden of proof, requiring that conservation measures be in place before the scientific data supporting specific action is available and before fishing may begin or be continued."

[79]United Nations General Assembly Res. 46/215 of 10 February 1992 is published in *International Legal Materials* XXXI, no. 1 (January 1992): 241.

[80]Res. 46/215 expressly mentions the enclosed and semi-enclosed seas.

as regards, in particular, the size of nets and the control of the fishing effort, in the spirit of Res. 44/225.[81]

As for the EEC, the Council of the Ministers of Fisheries during its session of 28 October 1991, agreed to prohibit the use of driftnets which were longer than 2.5 km. This prohibition should apply from 1 June 1992 to all vessels operating in waters under the jurisdiction of the EEC member States, and outside these waters to all fishing vessels flying the flag of one of the member States or registered in a member State.[82] Following this resolution, on 27 January 1992 the Council of the EEC adopted Regulation No. 345/92, amending Regulation No. 3094/86, laying down certain technical measures for the conservation of fisheries resources.[83] Reg. 345/92, which entered into force on 1 June 1992, explicitly mentions res. 44/225 and the Berne Convention (preamble); according to Art. 9a, para.1 (Article to be inserted according to Art. 1, para. 8 of Reg. 345/92), the use of driftnets of more than 2.5 km of length is prohibited.[84] According to Art. 9a, para. 4, the Article has the same application area of the above-mentioned Resolution of the Council of Fisheries Ministers,[85] and thus it applies also in the Mediterranean.

Some Mediterranean States have already adopted domestic legislation regulating driftnet fishing. For instance, according to Art. 1 of the Spanish Orden Ministerial (Ministerio de Agricultura, Pesca

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[81]On this matter, see FAO Fisheries Report No. 462, General Fisheries Council for the Mediterranean, *Report of the Eighth Session of the Committee on Fisheries Management*, Rome, 28-31 October 1991, 39 ff.

[82]Exceptions to this regime do not concern the Mediterranean.

[83]*OJEC* L42 of 1992, 15 ff.

[84]Para. 3 of the same article specifies that "the net must, if it is longer than one kilometre, remain attached to the vessel. However, within the 12 mile coastal band, a vessel may detach itself from the net, provided it keeps it under constant observation."

[85]In this case also derogations are possible but they do not concern the Mediterranean.

y Alimentacion) of 22 October 1990 on the use of driftnets,[86] driftnet fishing is prohibited, although some circumscribed exceptions are possible. The same act provides for indemnities for fishermen obliged to give up their fishing activities.

In the Mediterranean the most complex legislative situation concerning driftnets, which has now been finally resolved due to the entry into force of the EEC Regulation, is presented by Italy. The Italian legislation on driftnets represents a clear example of the close connection between economic and ecological necessities, and of their reciprocal influence. The question began with the administrative proceeding instituted before administrative courts by various Italian environmental organizations against the Ministry of the Merchant Marine. According to these organizations, the Decree of 30 March 1990 of the Minister of the Merchant Marine[87] establishing some technical measures on the width of meshes and the length and height of driftnets was contrary to art. 8 of the Berne Convention. The organizations maintained that driftnets are to be considered a non-selective method of capture causing the accidental death of species of fauna (cetaceans and turtles in particular) listed in Appendix II of the Berne Convention.[88] On these grounds, on 10 July 1990 the Lazio Regional Administrative Court ordered the suspension of the enforcement of the decree of the Minister of the Merchant Marine. The suspension was successively confirmed by the Council of State on 27 July 1990. Consequently, the Minister of the Merchant Marine

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[86]Published in *Boletín Oficial del Estado* no. 255 of 24 October 1990, 31217.

[87]Published in *Gazzetta Ufficiale della Repubblica Italiana* no. 76 of 31 March 1990, 12-13.

[88]According to the environmental organizations, the use of driftnets also infringes on the decrees of the Ministry of the Merchant Marine of 21 May 1980 and of 3 May 1989 which prohibit the fishing of cetaceans and turtles. Previously, the Ministry of the Merchant Marine had approved, on 20 July 1989 and on 25 October 1989, two Decrees (published respectively in *Gazzetta Ufficiale della Repubblica Italiana* no. 181 of 4 August 1989, 43-44, and in *Gazzetta Ufficiale della Repubblica Italiana* no. 255 of 31 October 1989) prohibiting the use of driftnets at first until 31 October 1989 and then until 31 March 1990. The temporary prohibitions were necessary to carry out the studies ordered by the Ministry, by other decrees of 11 October 1989, on the effects of driftnets; one of those studies had to identify technical measures to avoid the impact of cetaceans and dolphins with driftnets.

prohibited the use of driftnets for fishing swordfish and albacore[89] and provided for indemnities for fishermen who had been prevented from fishing.[90] On 9 May 1991 the Region Sicily Administration approved a Decree allowing the use of driftnets by vessels registered in Sicilian ports. Again, the Minister of the Merchant Marine, with a Decree of 22 May 1991,[91] provisionally allowed the use of driftnets until the adoption of a EEC regime on driftnets. This Decree provides for technical measures to make driftnets more selective. Art. 5 of the Decree provides for the establishment of a sanctuary for the protection of cetaceans in an area of the Ligurian Sea.[92] In this area the use of driftnets is prohibited except by those vessels registered in the maritime departments of Imperia, Savona, Genoa, and La Spezia, which are allowed to use driftnets for scientific purposes. The application of the Decree of the Region Sicily Administration was suspended by the Sicily Regional Administrative Court; similarly, the Lazio Regional Administrative Court, by order No. 642 of 1991, suspended the Decree of 22 May 1991. In the Decree of 18 July

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[89]See Decree of 18 July 1990 (published in *Gazzetta Ufficiale della Repubblica Italiana* no. 167 of 19 July 1990, 6), and Decree of 30 July 1990 (published in *Gazzetta Ufficiale della Repubblica Italiana* no. 177 of 31 July 1990, 14). By two others Decrees of 18 July 1990 (published in *Gazzetta Ufficiale della Repubblica Italiana* no. 179 of 2 August 1990, 18-19) the Minister of the Merchant Marine established an area for biological protection in the Ligurian Sea where the use of driftnets was prohibited except by vessels registered in the maritime departments of Imperia, Savona, Genoa, and La Spezia and specified in an Annex.

[90]See Decree-Law No. 213 of 4 August 1990 not converted into law (published in *Gazzetta Ufficiale della Repubblica Italiana* no. 181 of 4 August 1990, 7-8), and Decree-Law No. 280 of 5 October 1990 (published in *Gazzetta Ufficiale della Repubblica Italiana* no. 233 of 5 October 1990, 4), converted into Law No. 361 of 30 November 1990 (published in *Gazzetta Ufficiale della Repubblica Italiana* no. 282 of 3 December 1990, 6-7).

[91]Published in *Gazzetta Ufficiale della Repubblica Italiana* no. 121 of 25 May 1991, 14-5).

[92]This area has been widened by the Decree of 19 June 1991 (*Gazzetta Ufficiale della Repubblica Italiana* no. 145 of 22 June 1991, 22-23).

1991,[93] the Minister of the Merchant Marine once again prohibited the use of driftnets. Subsequently, in the Decree of 6 August 1991,[94] the Minister of the Merchant Marine allowed the use of driftnets with some restrictions concerning the size of meshes, the length, the height and the submersion. Again, the Lazio Regional Administrative Court was requested by the environmental organizations to declare null and void this new Decree for the same above mentioned reasons, and in particular, as it violated the Berne Convention.[95]

On 4 March 1992 the Lazio Regional Administrative Court rendered its decision on the merits as regards the three requests for declaring the Ministerial Decrees null and void. The Court rejected these requests after referring to the conclusions of the scientific bodies which had studied the effects of driftnets on protected species. The Administrative Court completely rejected the precautionary approach. It stated that there was not sufficient evidence that driftnets are a "large-scale or non-selective" method of capturing or killing and thus contrary to the Berne Convention. The Administrative Court, however, admitted that, under certain conditions, driftnets constitute an element of environmental imbalance, due to their proven "relative" selectivity.

It is interesting to examine further some of the reasons the Ministry of the Merchant Marine gave when appealing against the first order of the Lazio Regional Administrative Court. As regards the Berne Convention, for instance, the Ministry of the Merchant Marine maintained that the provisions of the Convention were not self-executing, as they needed to be implemented by further national laws. Consequently, according to the Ministry, the Decree of 30 March 1990 infringed neither the Berne Convention nor the law which ratified it. The Ministry denied that driftnets constitute a non-selective method, asserting *inter alia* that the provisions of the Decree of 30 March 1990

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[93]Published in *Gazzetta Ufficiale della Repubblica Italiana* no. 176 of 29 July 1991, 9.

[94]Published in *Gazzetta Ufficiale della Repubblica Italiana* no. 185 of 8 August 1991, 8-9.

[95]The Decree of 6 August 1991 seems to be more restrictive than the above mentioned EEC Reg. No. 345/92. The Decree provides for the minimum size of meshes (350 mm), for the maximum height of nets (30 meters), for the submersion of nets (at least 6 meters under the water surface) and for the linkage of nets with the vessel.

were suitable for the reduction of accidental captures of cetaceans and turtles, and for the limitation of the environmental damage.

It is noteworthy that the Ministry did not object to the interpretation of Art. 8 and Appendix IV of the Berne Convention given by the environmental organizations. However, even if the opinion of such organizations is probably in line with the spirit of the Convention, it seems that the interpretation of Art. 8 and Appendix IV may give rise to some problems. Actually, Appendix IV contains two lists of prohibited methods. The first refers to "mammals," the second to "birds." Both lists include "nets," which in the case of mammals are prohibited "if applied for large scale or non-selective capture or killing." The Italian decrees regulate driftnets when they are used for swordfish and albacore -- that is, for "fish".[96] The lack of a list is probably due to the fact that, when the Berne Convention was concluded, fish were not included among the protected species;[97] nevertheless, it is not self-evident that Appendix IV also applies to fish. Moreover, Art. 8 begins with the expression "In respect of the capture or killing of wild fauna species specified in Appendix III and in cases where (...) exceptions are applied to species specified in Appendix II...". This expression could mean that the methods mentioned in Art. 8 are prohibited only when the species of Appendix III (and exceptionally of Appendix II) are targeted species.[98] Thus, according to a first interpretation, driftnets that accidentally capture fauna included in Appendix III or II are not prohibited either by Appendix IV (as it only refers to mammals and birds as targeted species), or by Art. 8 (as it only refers to "deliberate" catches). If this reasoning is correct, however, the use of the adjectives "indiscrimi-

[96]The reference to "mammals" and "birds" seems to mean that they have to be the targeted species, or, in other words, that the listed methods are to be used with the purpose of capturing mammals or birds.

[97]At present, fish are included both in Appendix II and in Appendix III.

[98]It goes without saying that swordfish and albacore -- that is, the targeted species of the Italian driftnets -- are included neither in Appendix III nor in Appendix II.

nate" (in Art. 8) and "non-selective" (in Appendix IV) is hard to justify.[99]

A different interpretation is however possible. On the one hand, this latter is more in conformity with the object and the scope of the Convention;[100] on the other, it seems to contrast slightly with the wording of Art. 8. According to this second interpretation, the reference of Art. 8 to the capture and killing of the species of the two Appendices is likely to also cover accidental catches. In other words, the "indiscriminate" means of capture and killing should be prohibited irrespective of the target. Thus driftnets used for exploitable fish, although not prohibited by Appendix IV, should be covered by Art. 8 in as far as they capture and kill species of Appendices III or II. It is evident that this interpretation forces the wording of Art. 8 which, referring, for instance, to the exceptions allowed by Art. 9, entails a certain degree of deliberate intent in the capturing of species.

Another argument put forward by the Ministry concerned the economic consequences of the suspension of the enforcement of the Decree of 30 March 1990. The Ministry pointed out that this sudden suspension, without an appropriate gradual reconversion, would have caused serious social and economic damage for approximately 3,500 fishermen involved directly in fishing activities. It is noteworthy that the economic aspects of the ban of driftnets are not neglected in the above mentioned international acts, but they seem to be postponed with respect to environmental and conservation issues. For instance, Res. 46/215 recognizes "that a moratorium on large-scale pelagic drift-net fishing is required, *notwithstanding that it will have adverse*

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[99]These adjectives could refer to the size of the targeted species and not to the possibility of accidental catches.

[100]According to Art. 31, para. 1, of the 1969 Vienna Convention on the Law of Treaties, "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" (emphasis added). In this specific case, it is clear that the purpose of the Berne Convention is to safeguard wild species and that to this end deliberate catches are as detrimental as accidental catches. On this point see W.T. Burke, *The Law of the Sea* cit., 28: "As a practical matter, the difference between target catch and incidental catch does not appear to be a significant one. Anyone concerned about conservation and the high seas take of salmon would not limit concern to how the fish are taken. It is enough to know that fishing on the high seas for one species is expected also to take another species in appreciable quantities."

socio-economic effects on the communities involved in high seas pelagic driftnet fishing operations."[101]

Conclusions

Endangered species seem to enjoy a good degree of protection in the Mediterranean, at least as regards the obligations undertaken by States in the conventions. Unfortunately, these conventions are not always correctly implemented by States, even when their provisions are so clear and detailed as to be directly applicable. States must make further "goodwill efforts" to implement the protection treaties when their wording is soft and not obligatory. In particular, as stated above, as far as the application area of the conventions is concerned, different interpretations of the treaty provisions are sometimes possible. The extension, both spatial and quantitative, of the protection depends on the choice of either interpretation.

It is clear that the conventions dealing with the protection of typically mobile entities, such as animal species, can be extended more easily from a spatial point of view to protect specimens wherever they are. On the contrary, the conventions which protect habitats seem to be more strictly limited to particular zones, and so their wording cannot be pushed too far. Clearly, the best results can be achieved through the joint enforcement of the treaties protecting species and habitats.

The capturing and killing of endangered species is often also regulated by means of domestic legislation on hunting and fishing. However, protective measures adopted by different States can sometimes clash with each other and consequently be thwarted. For this reason, a stricter cooperation among the Mediterranean coastal States and an effective coordination of their protective measures would be extremely useful.

Finally, even soft law instruments can be used to improve species protection. If they are mostly technical or scientific, such as the World Conservation Strategy, they can be used by States to better carry out their treaty obligations or to formulate their national conservation plans. On the other hand, if such instruments are mostly political, such

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[101]Emphasis added.

as the UN General Assembly resolutions or the Brundtland Report,[102] they can help towards the development of new trends in the protection of the environment and of wildlife in particular. These developments can influence the contents of new treaties and make them more effective for protection purposes.

[102]By the short expression 'Brundtland Report' we refer to the 1987 Report of the World Commission on Environment and Development, *Our Common Future*.

A TECHNICAL PROBLEM IN THE NEGOTIATIONS FOR MARITIME BOUNDARIES: THE CHOICE OF THE MAP

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A geographical map showing the maritime area in question is an indispensable tool in every negotiation for maritime boundaries; the map has not yet been replaced by modern methods of analytical calculation. It is the first basis for beginning the discussion and for comparing the respective positions of the parties, and it is lastly the document on which the result of the negotiation is visually depicted.

A common agreement on the choice of the map is the first step in the negotiation. The characteristics of the map must be suitable for the technical problems that the parties are likely to face. The map should consequently be, as far as possible, precise, up to date, and satisfactory for the scale and frame of the area.

It is not always easy to combine all these qualities in the same map. It may also happen that an appropriate map is lacking and that it is not possible to produce a new one. Sometimes for political reasons a map is used because it is available, although it does not correspond to an ideal model.

Any negotiators delimiting a maritime boundary must first choose by mutual agreement a geographical map. During the negotiations, the map is used by the parties in order to examine, measure, and discuss the proposal of delimitation. If the negotiations are successful, the map is annexed to the treaty to show the line described in the text by geographical coordinates.

The problem of the choice of the map is today less crucial than it was before, because of the availability of calculation programs. The manual or graphical methods of drawing lines on maps are mainly utilized for illustrative purposes, especially for giving a broad picture of the situation and for clarifying the results of a proposal.

However, the map is the document that reflects the technical level of the country that produced it through the precision and reliability of geodetic surveys and the frequency of revisions.

The map consequently remains an indispensable working tool in every negotiation. The choice of the map, because of the slow evolution of cartographical techniques and the long delays in updating land and maritime cartography, still raises several technical problems. In other aspects, it raises political problems as well.

In maritime boundary delimitations, the map must show the sea areas that are adjacent to the coasts of the two States or interposed between them. The maps that normally present these characters are the nautical charts, intended for navigation.

Since the sixteenth century, nautical charts have been drawn according to the "direct" Mercator projection; the well-known cylinder tangential to the Equator or to a parallel, having its center of projection at the center of the Earth and showing parallels and meridians as straight lines. Under this projection, the scale of the chart is uniform only along the parallels. The scale increases northwards (for charts showing areas in the Northern hemisphere) or southwards (for charts showing areas in the Southern hemisphere). On such charts, measures of distances or areas cannot be precise. The more the distances or the areas are extended, the more relevant is the error. Likewise, angles are reliable only with short distances.

Moreover, not all Mercator maps are homogeneous, as not all are based on the same mathematical model of ellipsoid. Only in recent years has it been decided to standardize nautical cartography on the International (or Hayford) ellipsoid; but recent research, based on geodetic satellites, shows new data, still under evolution.

An old map and a recent one, though made under the same scale and projection, may sometimes differ. This has, however, slight influence on the determination of maritime boundaries, especially when they are to be drawn in areas distant from the coastline.

It follows that nautical charts, which have been produced as navigational aids, must be integrated, as far as practicable, with elements taken from the most recent land maps, depicting the coast with all its physical, natural, and artificial features. It is to be added that nautical charts, with some exceptions especially in the case of ports, have normally a small scale, which hardly exceeds 1:750,000. At this scale, to give an example, the graphical mark of the coastline (that is, the line that divides land and sea), having an average thickness of 0.3 mm., is equivalent to a strip of 225 m. in width.

There are, of course, other kinds of projections that would be appropriate for drawing maritime boundaries, since they have a homogeneous scale on the whole sheet and represent with sufficient precision the distances, angles, and areas. But very often the maps that are available on these projections represent mostly the land, together with a reduced strip of marine area. In other cases, although excellent for their scale and geometrical characters, they are intended for air navigation and lack adequate information on the seabed and coastline.

Marine maps in U.T. M. (Universal Transverse Mercator) are being prepared by certain States to be utilized as technical or thematic

maps dealing with geology, ecology, and fisheries. But this only applies to the zones falling under the jurisdiction of a few technologically advanced countries. The production of such maps is likely to increase when technology permits mineral exploration in the deep continental shelf; these maps will not only simplify the construction of international limits, but may also be used in defining mining sites in the Area. For the foreseeable future, this kind of cartography is limited to a few pioneer areas.

In maritime boundary making, the choice of the map is always the first question. Italy is a State that has been engaged in eight negotiations; six embodied in treaties, one waiting for the signature of the negotiated text, and one still incomplete. The Italian experience shows a wide range of problems and solutions.

During the negotiations with Italy (1966-1968) Yugoslavia expressed the intention to use its own nautical charts, which derived from the old Austro-Hungarian cartography, instead of the more recent Italian or international maps. The parties agreed that they would use their own maps. The boundary line, which was constructed graphically, has the same direction and the same turning points on both sets of maps, but the coordinates of the turning points on the Italian map differ from those on the Yugoslavian map to an irrational degree. In the text of the agreement, there are two lists of coordinates, one Italian and the other Yugoslavian. It was proposed to add a list of polar coordinates that would define every turning point by data, identical on the two sets of maps, of distance and azimuth from a given point on the Italian or Yugoslavian coasts. The proposal was rejected for reasons of expediency.

Despite the previous negative experience, the same criterion of double cartography was used later in 1975 in the second treaty with Yugoslavia, concerning the territorial sea in the Gulf of Trieste.

Yet, in the 1980s it was found that two gas pools straddled the boundary line. The efforts for finding a solution to harmonize the Italian and Yugoslavian coordinates (that is, the two cartographic grids) remained unsuccessful. The problem is still unresolved, at least from the cartographic point of view. Actually, present technology in geodetic and topographic surveys, which has greatly improved in the last years, would easily allow the coordinates of a few points, located on the opposite coasts, relevant in order to redefine the part of the boundary line in the vicinity of the two gas pools, to be determined in a uniform way.

This case is unique in the Mediterranean. Another instance of the double map solution is given by the 1978 agreement between the

German Democratic Republic and Sweden, perhaps again for reasons of national prestige.

During the negotiations with Tunisia (1971), Spain (1974), and Greece (1977), Italian maps were used for the graphical construction of the boundary line, as it was acknowledged that these maps were accurate and up-to-date. A Greek map, however, was also annexed to the agreement between Greece and Italy. Italian maps were also used during the negotiations between France and Italy for the delimitation of the continental shelf (1972-1974) and for the delimitation of the territorial sea in the area of the Bocche di Bonifacio, between Corsica and Sardinia (1986). In the latter case, a map was specifically produced by the Italian Hydrographic Institute, as the Italian and French geodetic networks were completely homogeneous.

As regards the negotiations between Albania and Italy, which began in 1985 and were concluded in 1992, it was decided to accept the Albanian request to use an Albanian chart produced in the Soviet Union. Even if it had not been possible to determine the geodetic datum of the map, its quality was excellent and it was perfectly compatible with the most recent Italian maps.

The scale of the chart, 1:500,000, was unusual but suitable for the area to be divided. The area was correctly framed within the map, at least for the part that it was appropriate to represent, although not for the whole area that was relevant to the calculations. Actually, in this case computer programs were used for the determination of the turning points of the equidistance line. The coordinates of the points chosen on the two coastlines were taken from large scale land maps, 1:25,000 and 1:100,000.

The Albanian chart is consequently annexed to the agreement as an illustrative and not authoritative document.

It could be added that the decision to rely on a calculation program is equivalent to the choice of the map. If the parties decide to utilize such a method (without, however, renouncing the indispensable maps), a preliminary agreement on the program has to be reached. In the negotiations between Albania and Italy, there was a slight difference in the results starting from identical coordinates of the relevant base points, because of the use of different programs.

Some final words will be spent on the agreements that are to be concluded in the Mediterranean, a region where an adequate cartography is often lacking. Several States are for the moment unable to produce their own marine cartography; certain States do not accept the cooperation of other States for the updating of old surveys. No doubt, hydrographic surveys require a lot of time, sophisticated ships, and an efficient organization on land. Nevertheless, a simple geodetic and

cartographic frame on the surface of the water may be completed within a few months for an extended area. Surveys from satellites can be used, as well as geodetic means for the determination of a network of a few points that could be linked in a homogeneous way to the European and world systems.

As maritime boundary treaties are usually not planned in a few days, it is to be hoped that the negotiators of future agreements take into consideration the issue of the choice of the map in advance of the beginning of the negotiation, to be provided in due time with recent and reliable documents. This is particularly important in the Mediterranean, but in other regions as well, as there are marine zones where surveys were carried out more than fifty years ago by methods and instruments now out-of-date. Not only will a wise choice of map lead to more precise results, but it will also contribute to the development of scientific research and the improvement of international cooperation.

Maps

The following maps aim at giving a cartographic impression of:

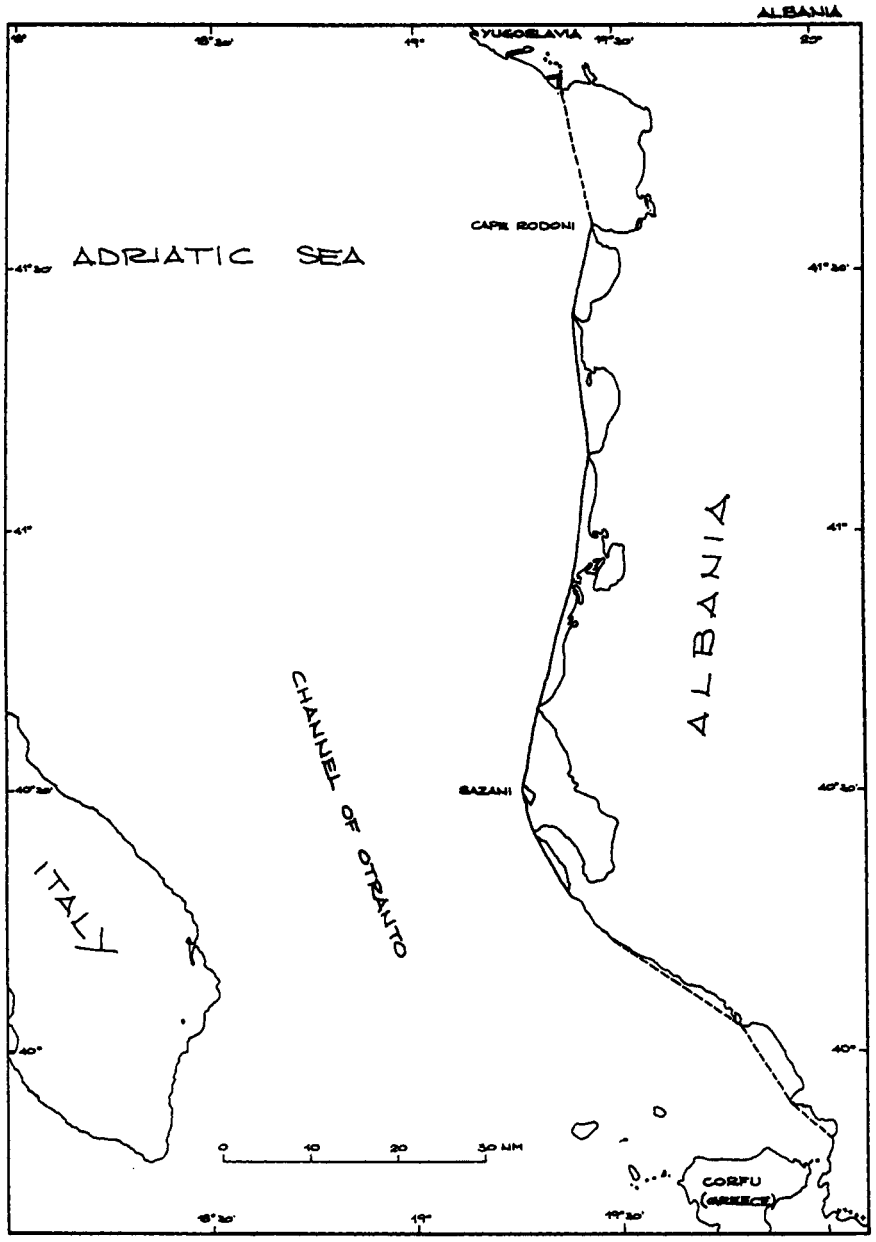
(a) the straight baselines systems claimed by the Mediterranean States (and the inclusion of a claim does not imply any conclusions on its conformity with international law);
(b) the maritime boundaries according to delimitation treaties concluded by Mediterranean States;

Abbreviations

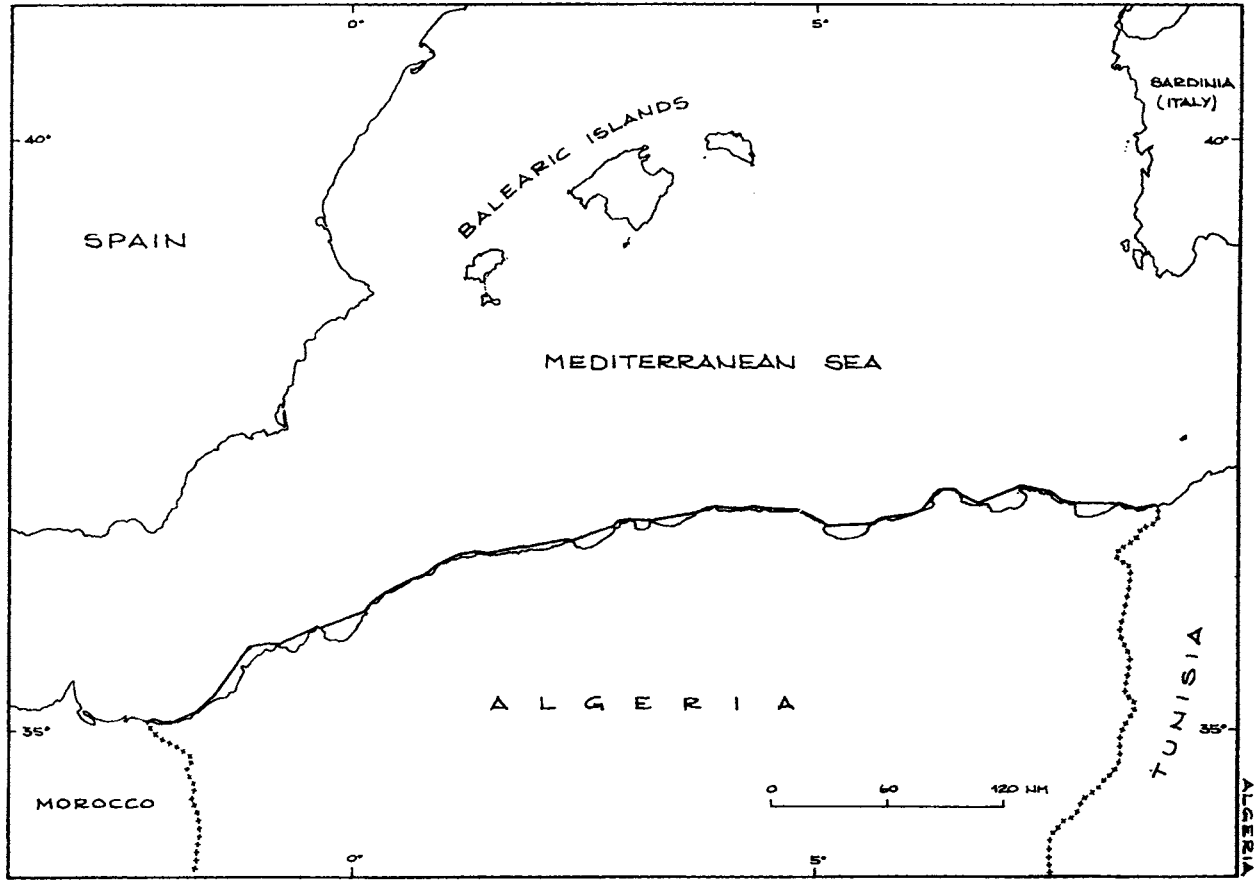
Conforti I: Conforti and Francalanci (eds.), *Atlante dei confini sottomarini* (Milano: Giuffrè, 1979).

Conforti II: Conforti, Francalanci, Labella and Romanò (eds.), *Atlante dei confini sottomarini, Parte seconda*, (Milano: Giuffrè, 1987).

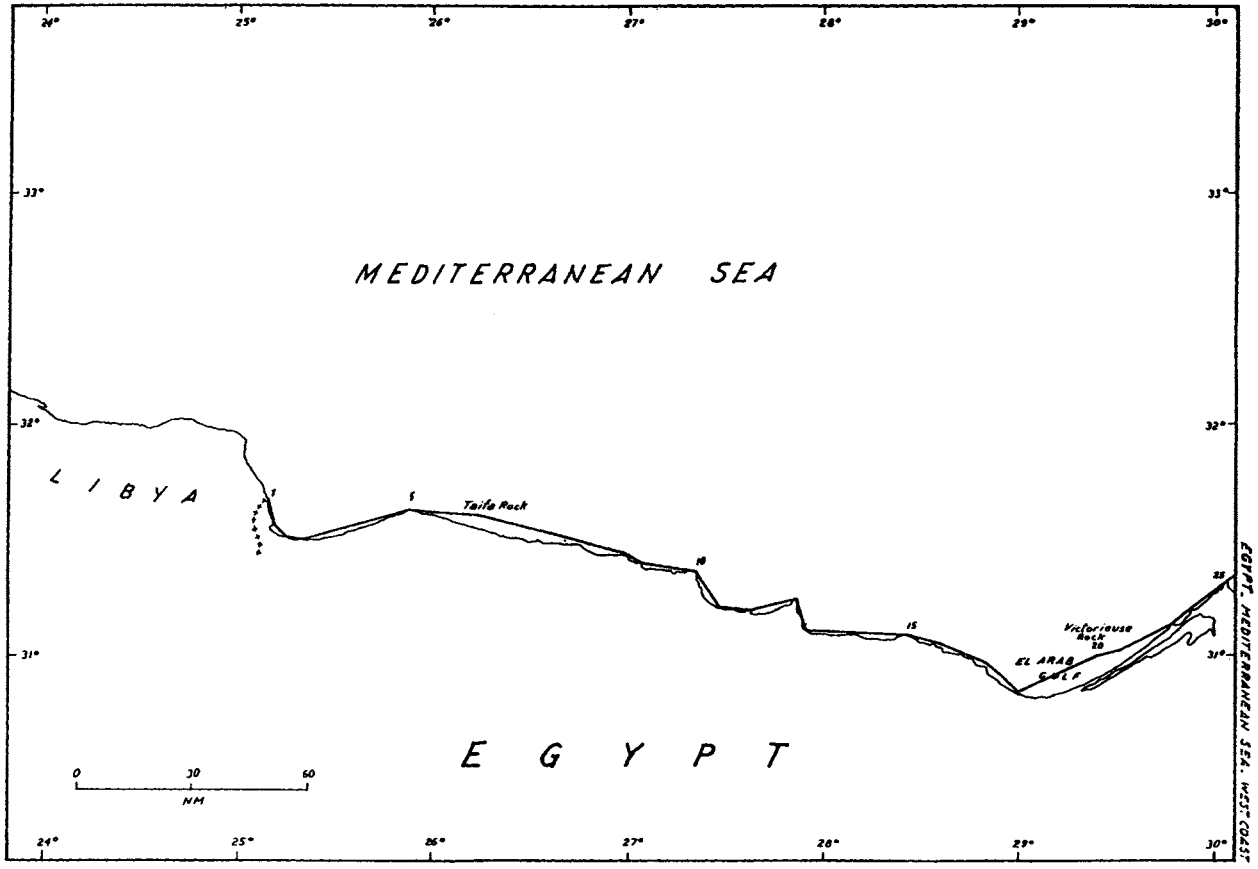
Scovazzi: Scovazzi, Francalanci, Romanò and Mongardini (eds.) *Atlas of the Straight Baselines*, 2nd ed., (Milano: Giuffrè, 1989).



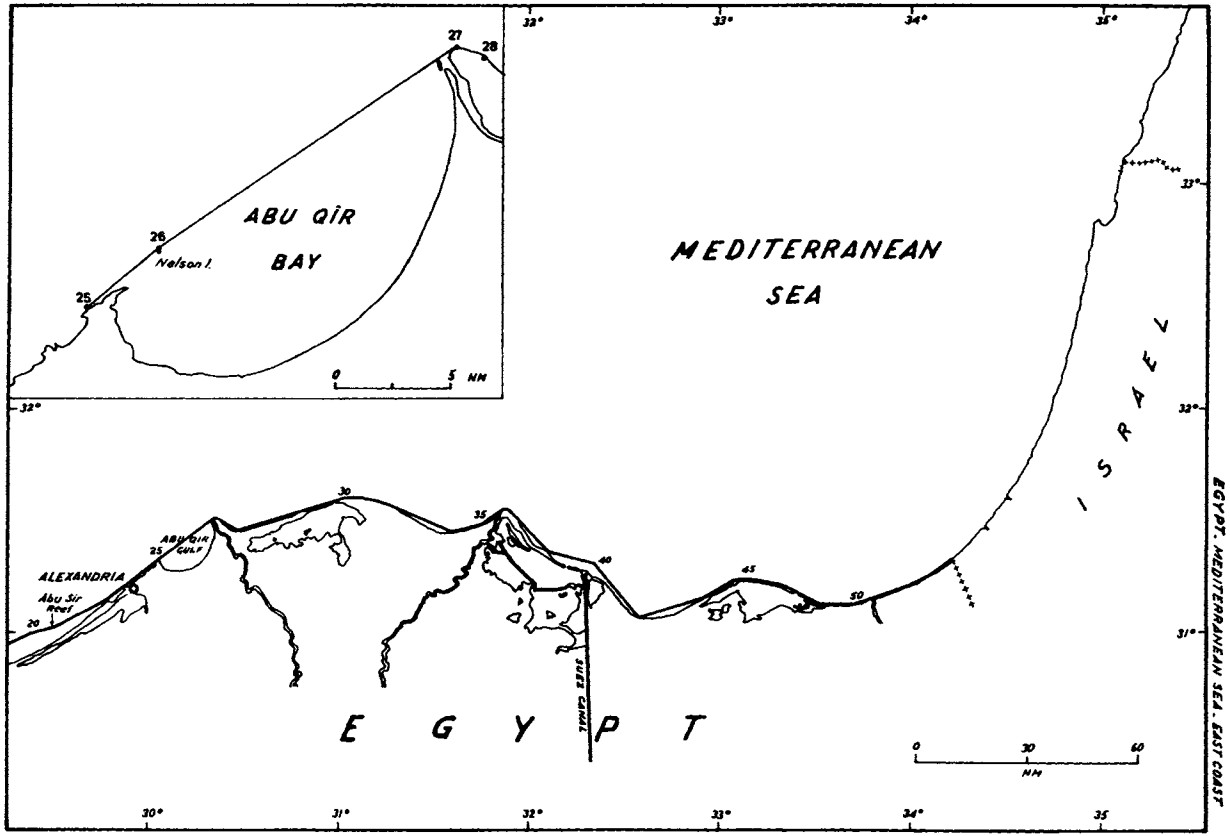
Map 1: Straight Baselines -- Albania
Decree No. 4650 of 9 March 1970, as amended by Decree No. 5384 of 23 February 1976.
Source: Scovazzi, p. 71.



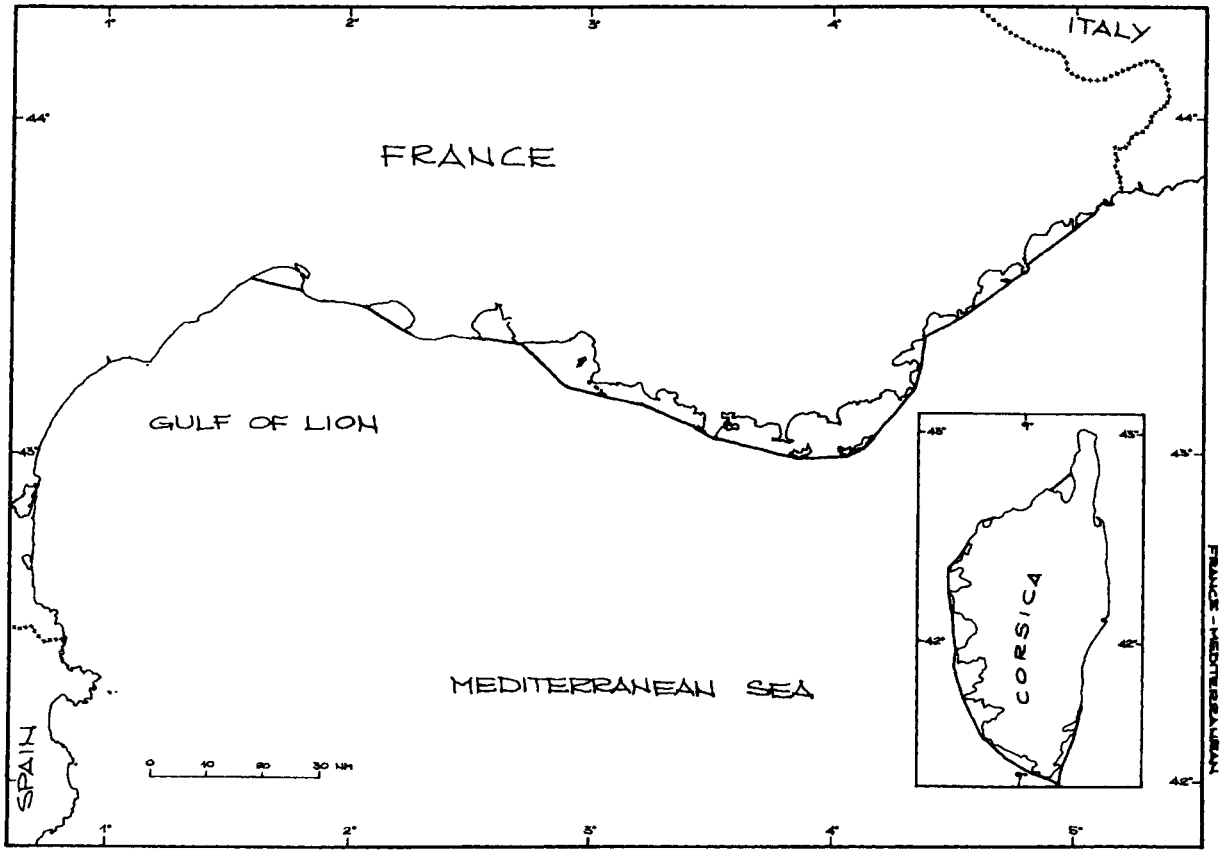
Map 2: Straight Baselines -- Algeria. Decree No. 84-181 of 4 August 1984. Source: Scovazzi, p. 73.



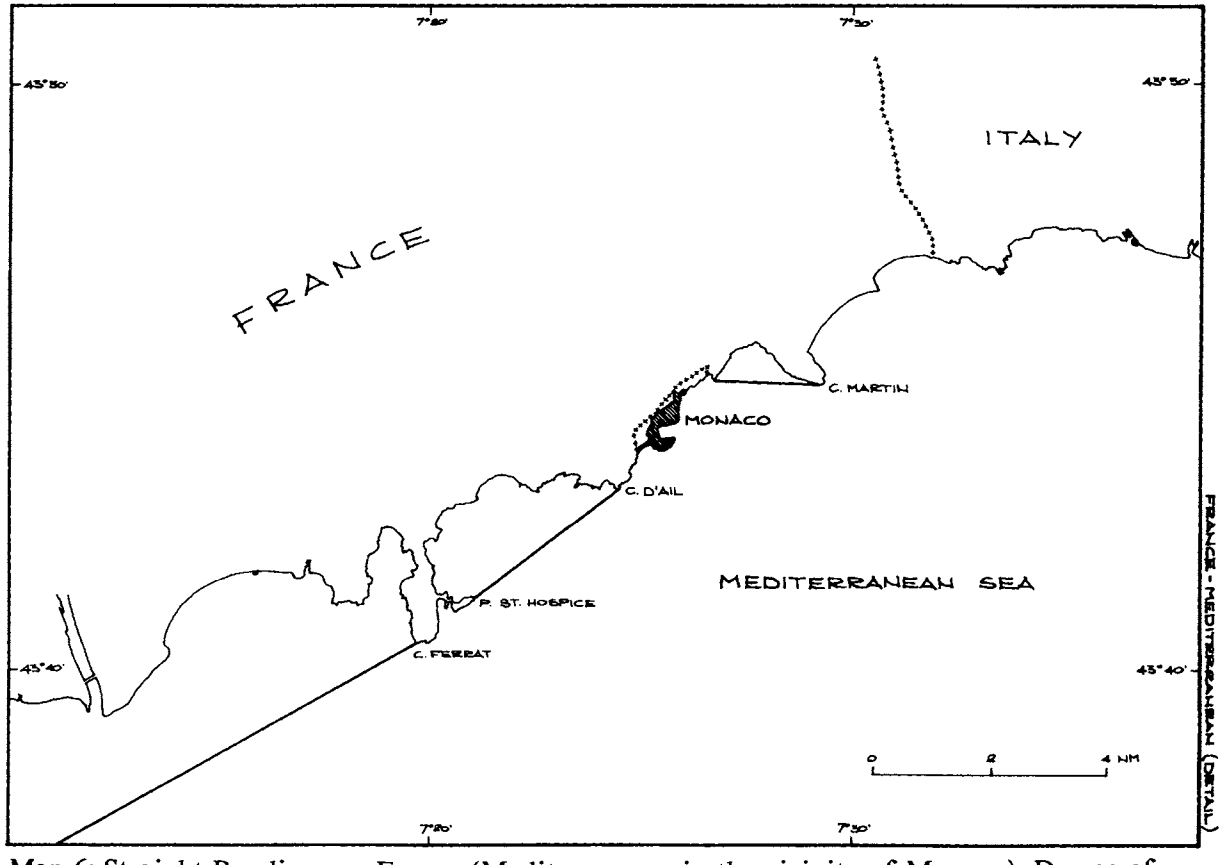
Map 3: Straight Baselines -- Egypt (West Mediterranean). Decree No. 27 of 9 January 1990.



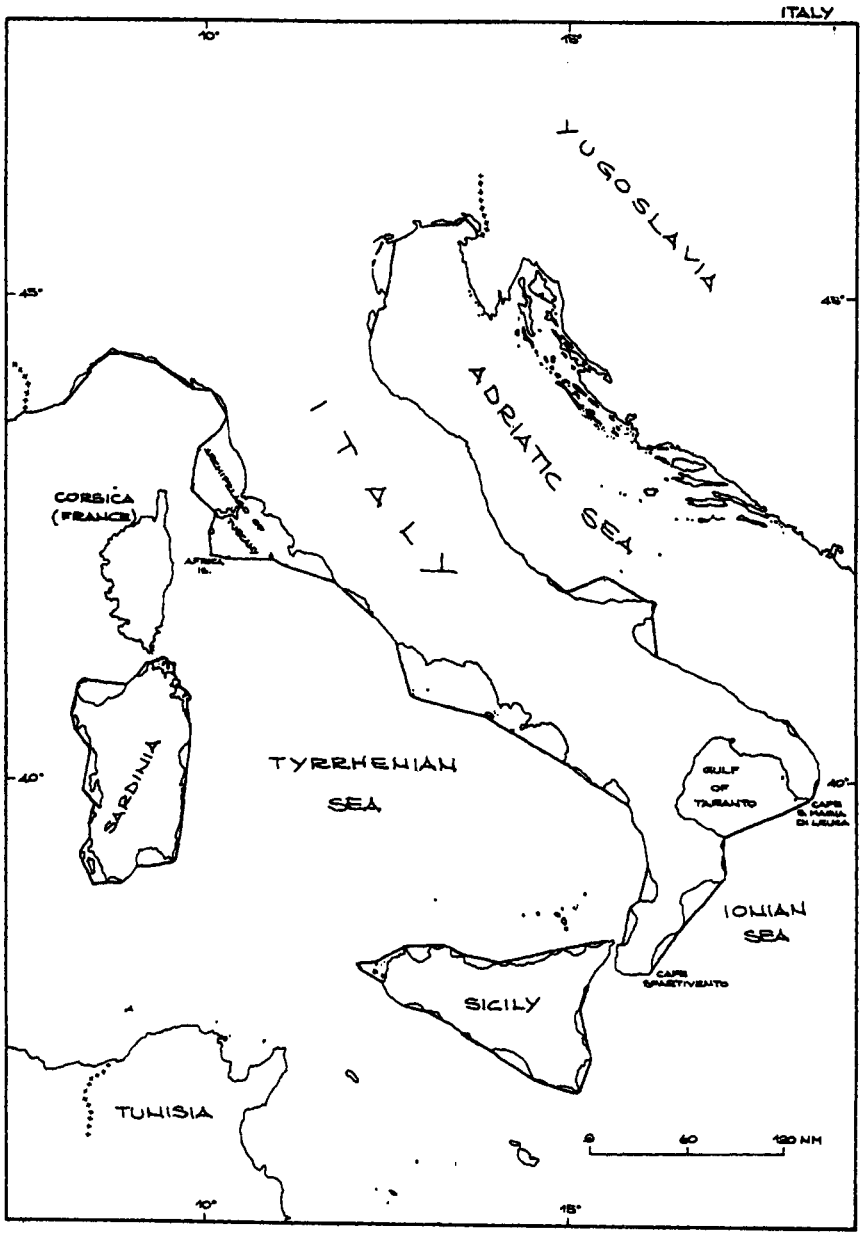
Map 4: Straight Baselines -- Egypt (East Mediterranean). Decree No. 27 of 9 January 1990.



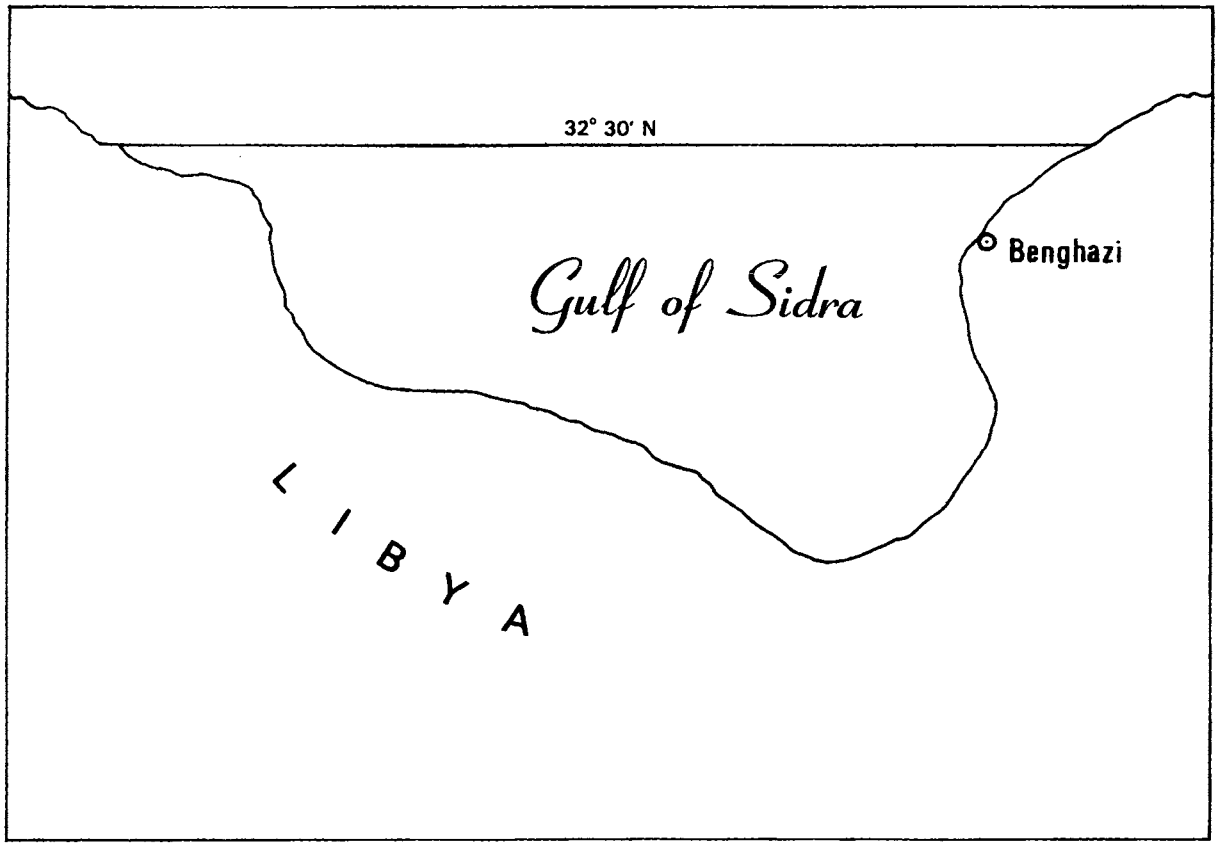
Map 5: Straight Baselines -- France (Mediterranean). Decree of 19 October 1967.
Source: Scovazzi, p. 130.



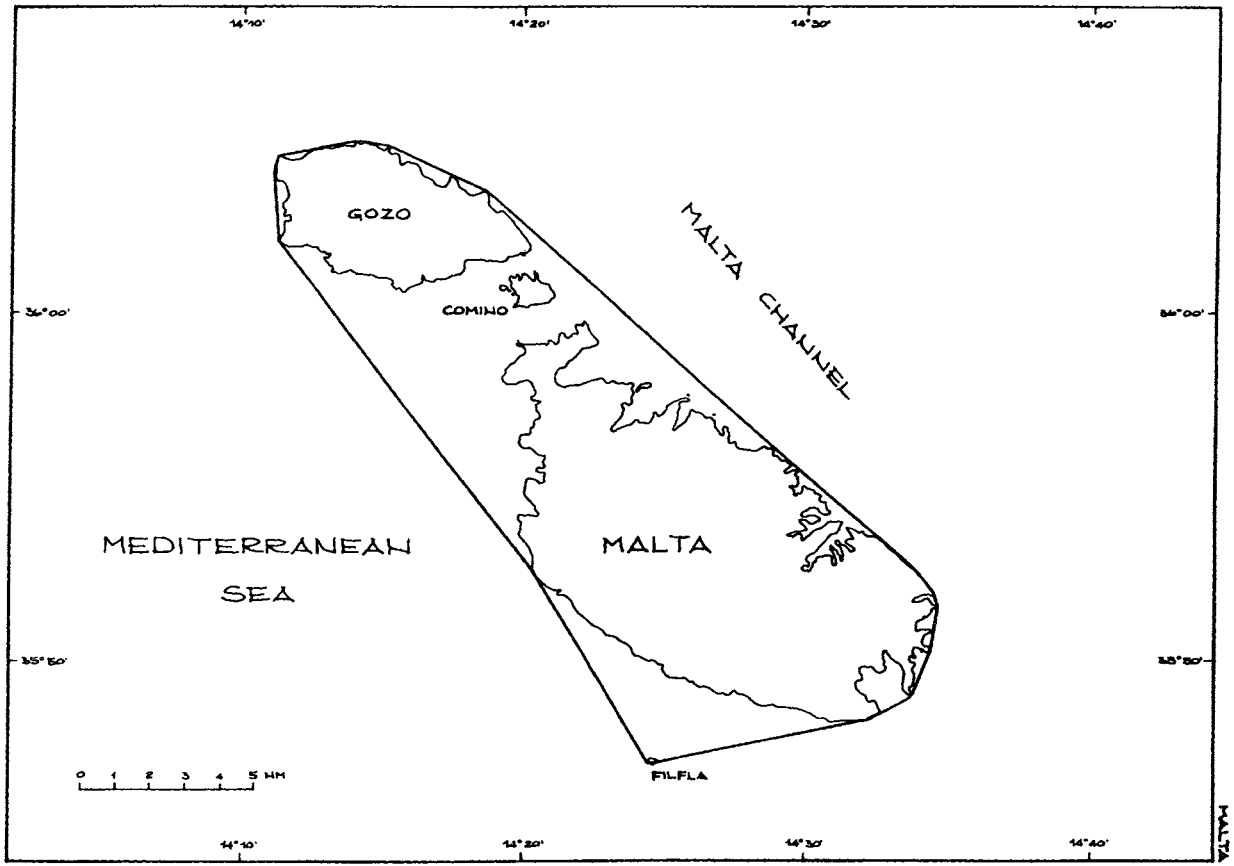
Map 6: Straight Baselines -- France (Mediterranean, in the vicinity of Monaco). Decree of 19 October 1967. Source: Scovazzi, p. 131.



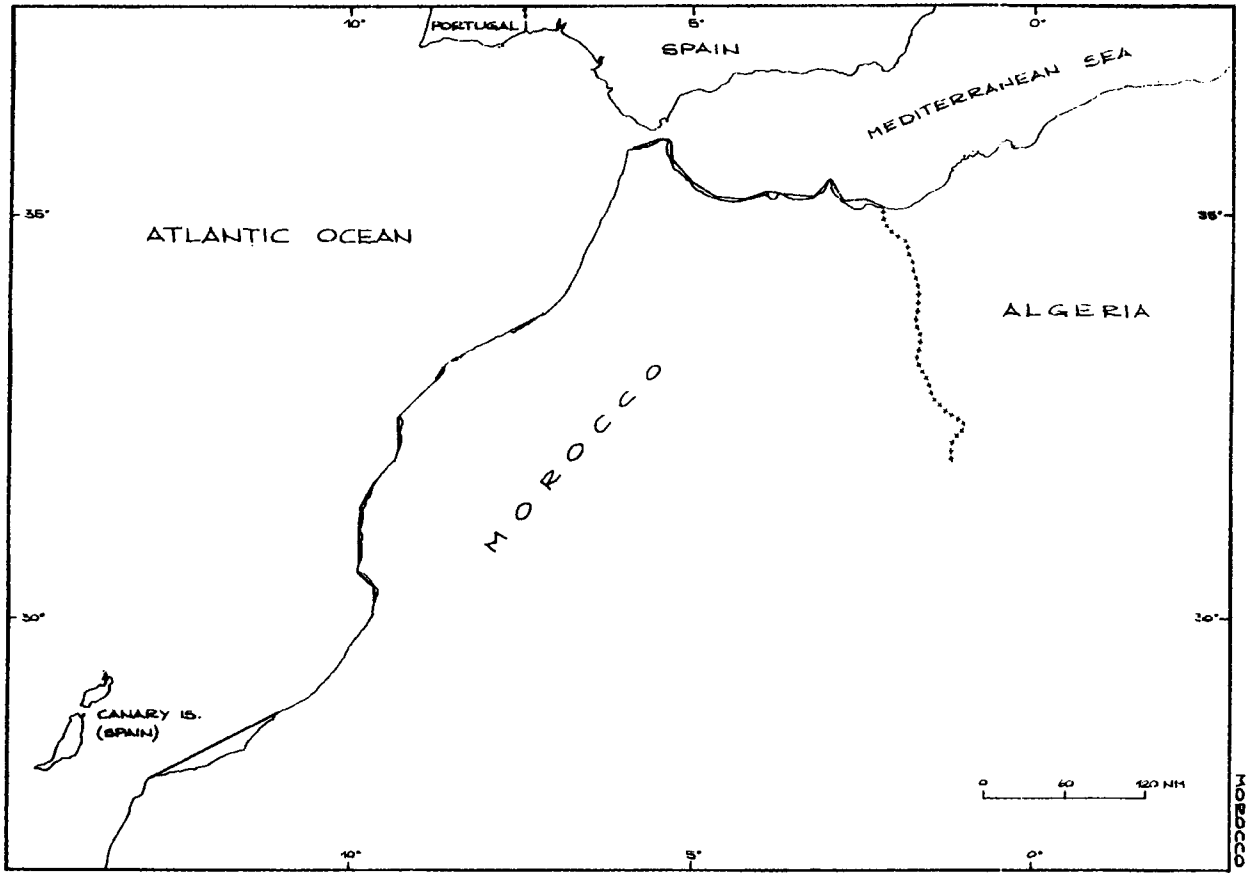
Map 7: Straight Baselines -- Italy
Decree No. 816 of 26 April 1977.
Source: Scovazzi, p. 157.



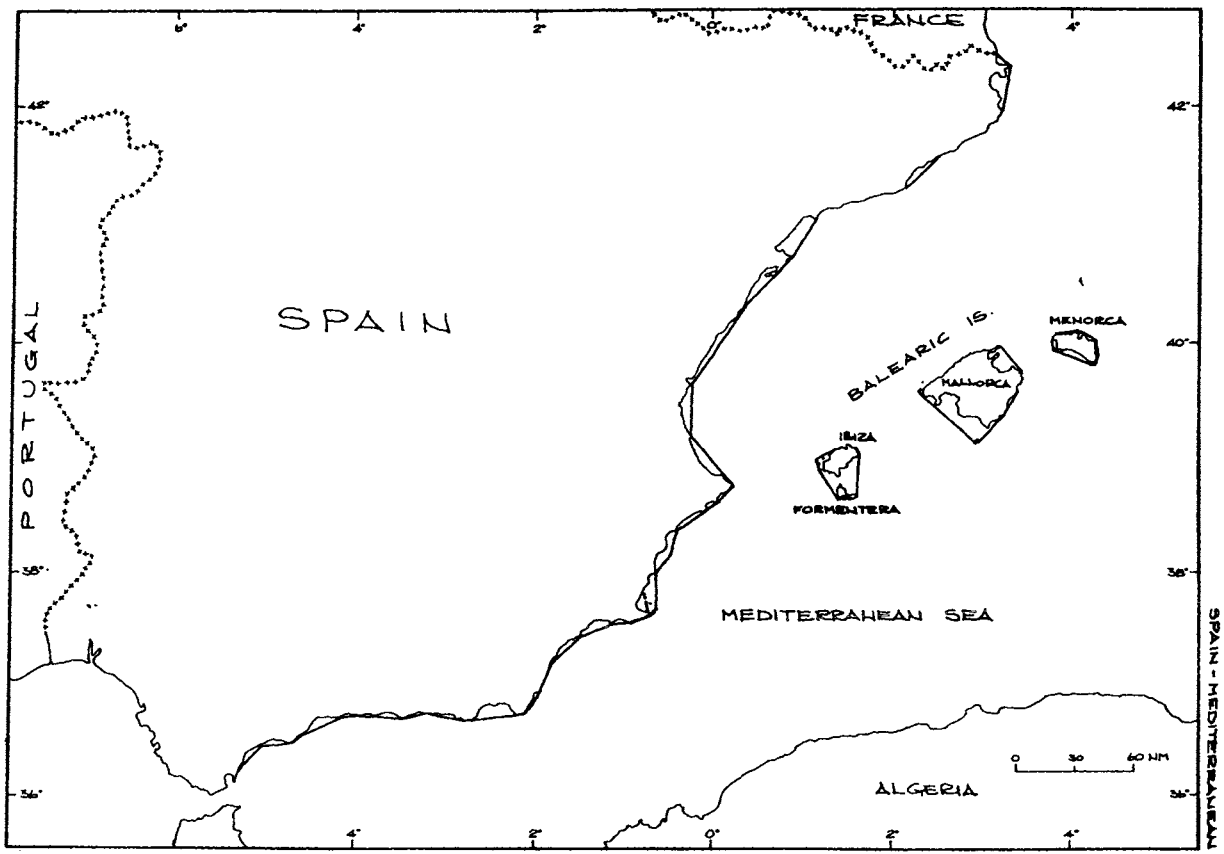
Map 8: Straight Baselines -- Libya. Delimitation of 9 October 1973.



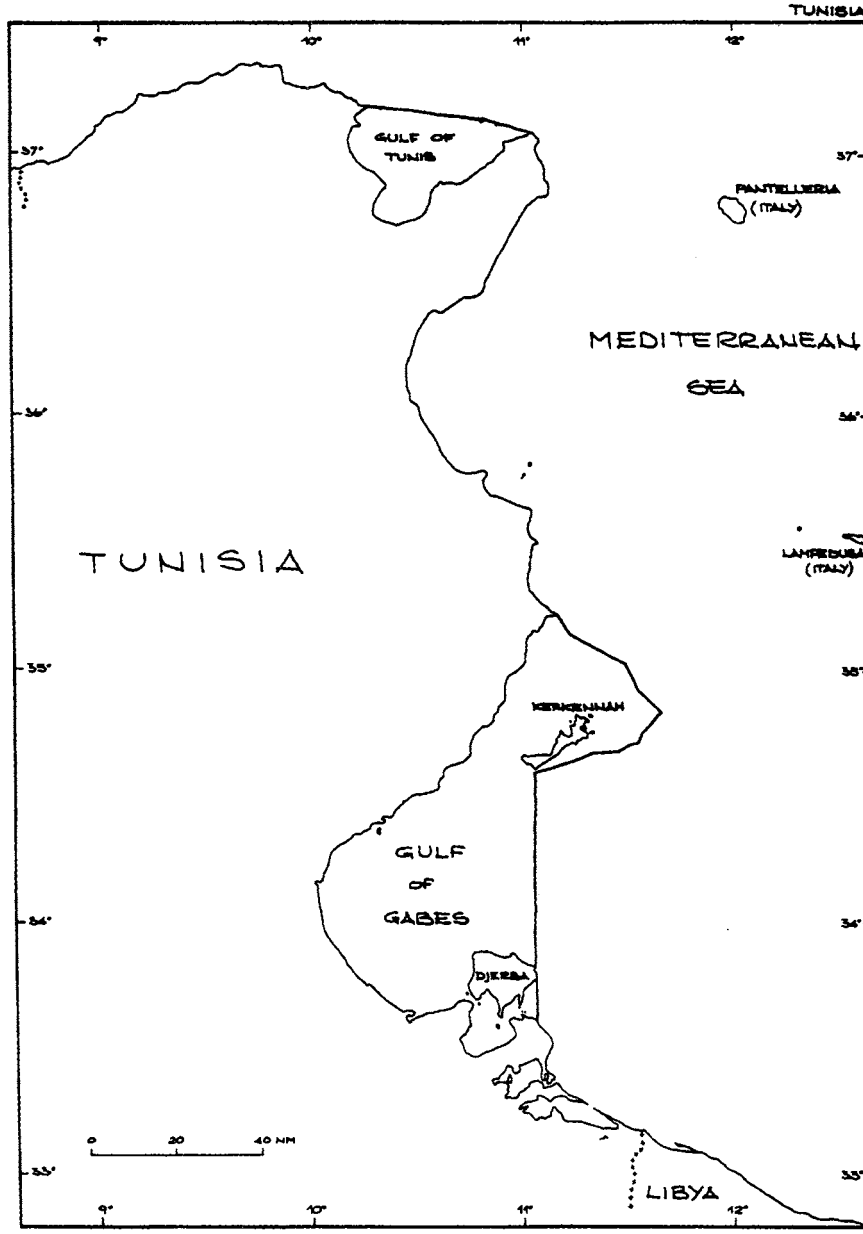
Map 9: Straight Baselines -- Malta. Information contained in a memorial submitted by Malta to the International Court of Justice on 26 April 1983. Source: Scovazzi, p. 167.



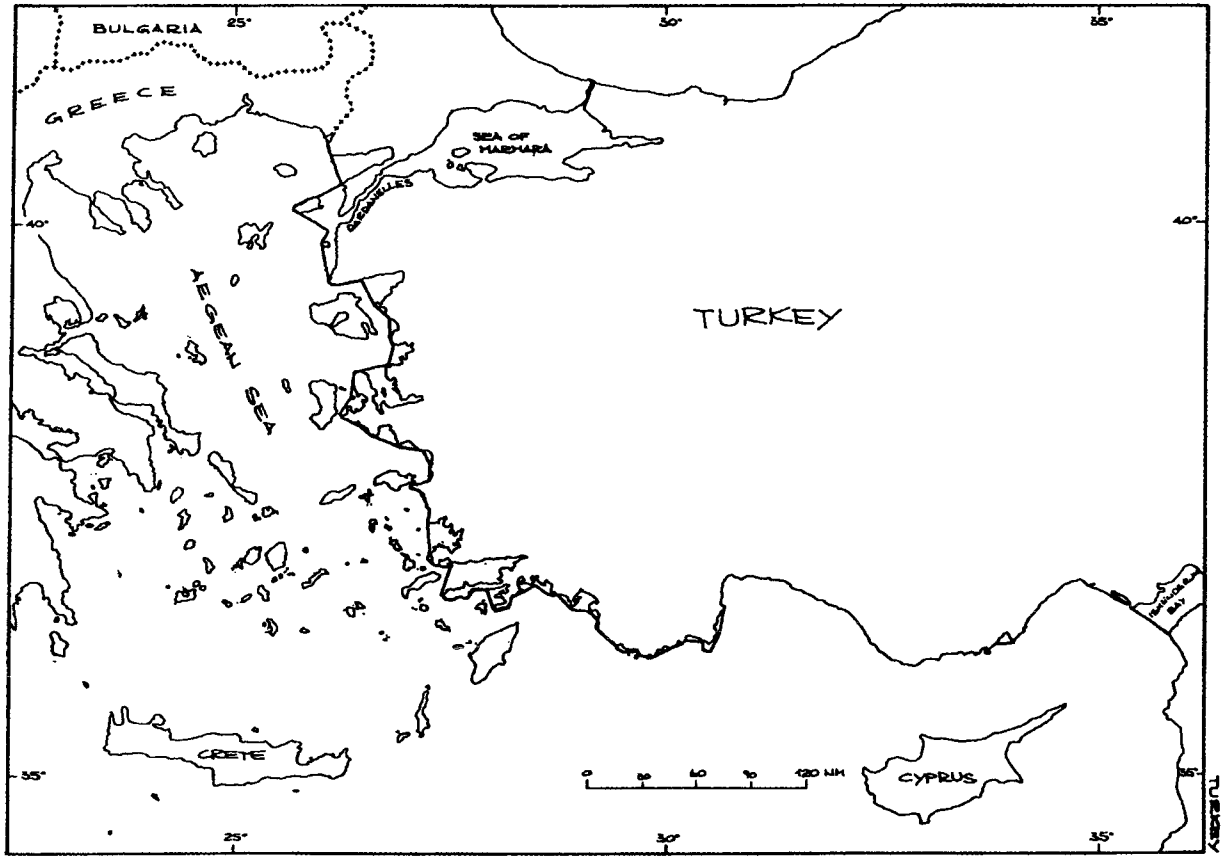
Map 10: Straight Baselines -- Morocco. Decree No. 2-75-311 of 21 July 1975.
Source: Scovazzi, p. 171.



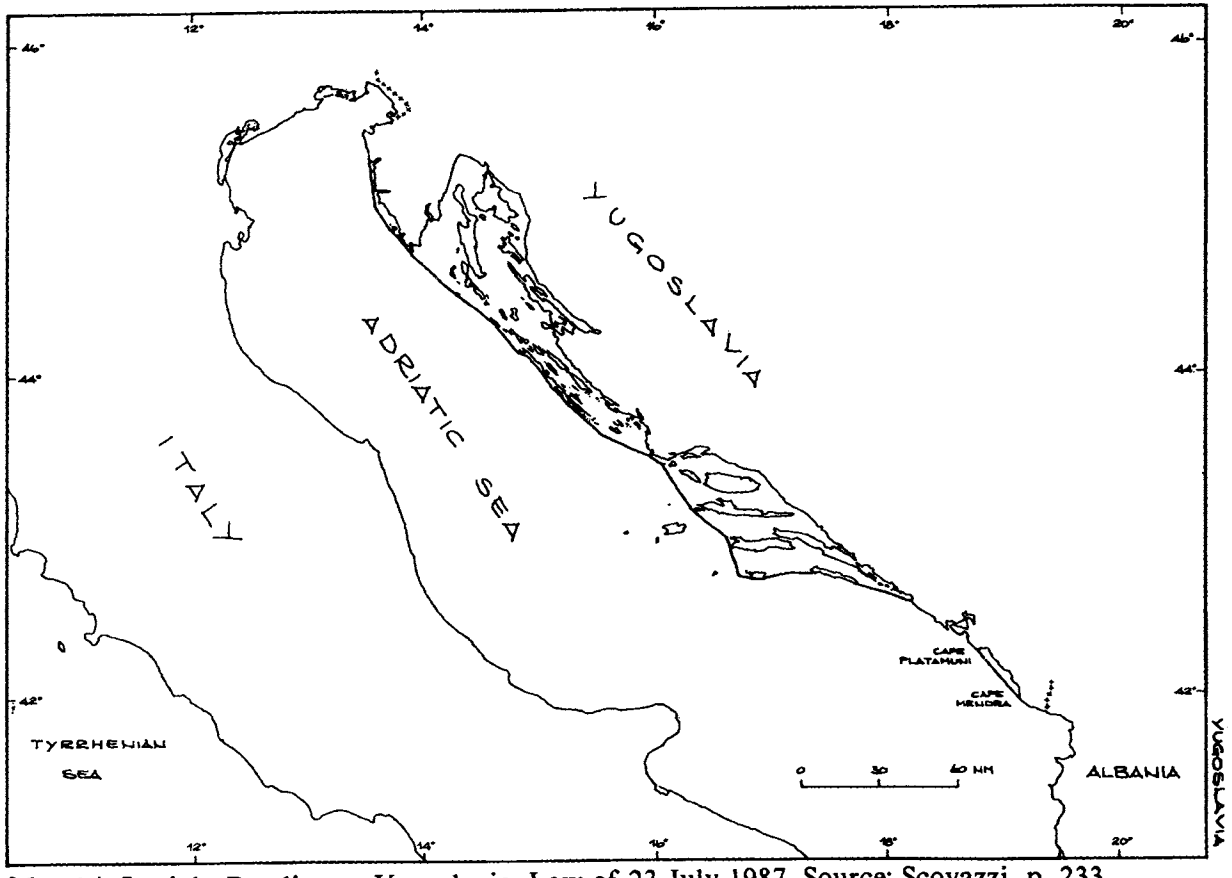
Map 11: Straight Baselines -- Spain (Mediterranean). Decree No. 2510/1977 of 5 August 1977.
Source: Scovazzi, p. 216.



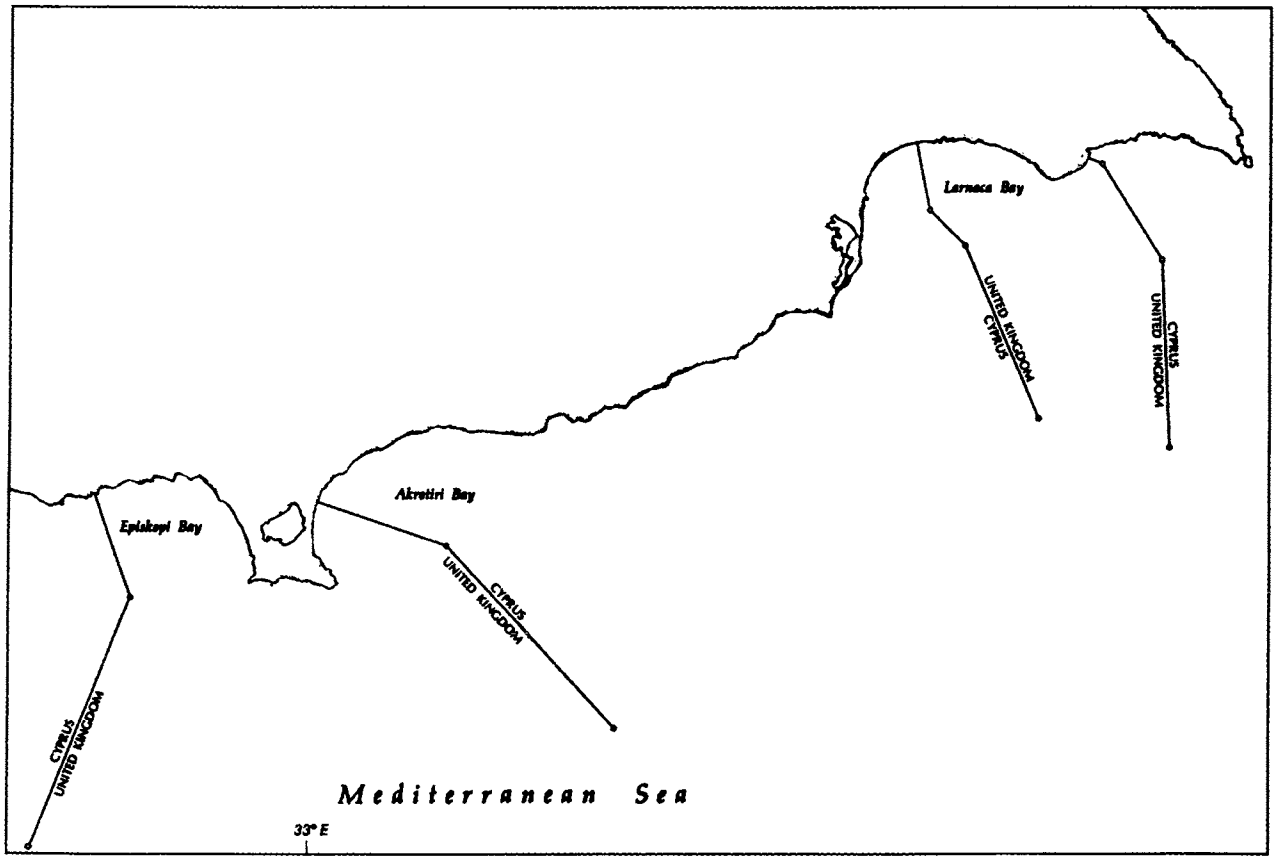
Map 12: Straight Baselines -- Tunisia
Law No. 73-49 of 2 August 1973 and Decree No. 73-527 of 3 November 1973.
Source: Scovazzi, p. 225.



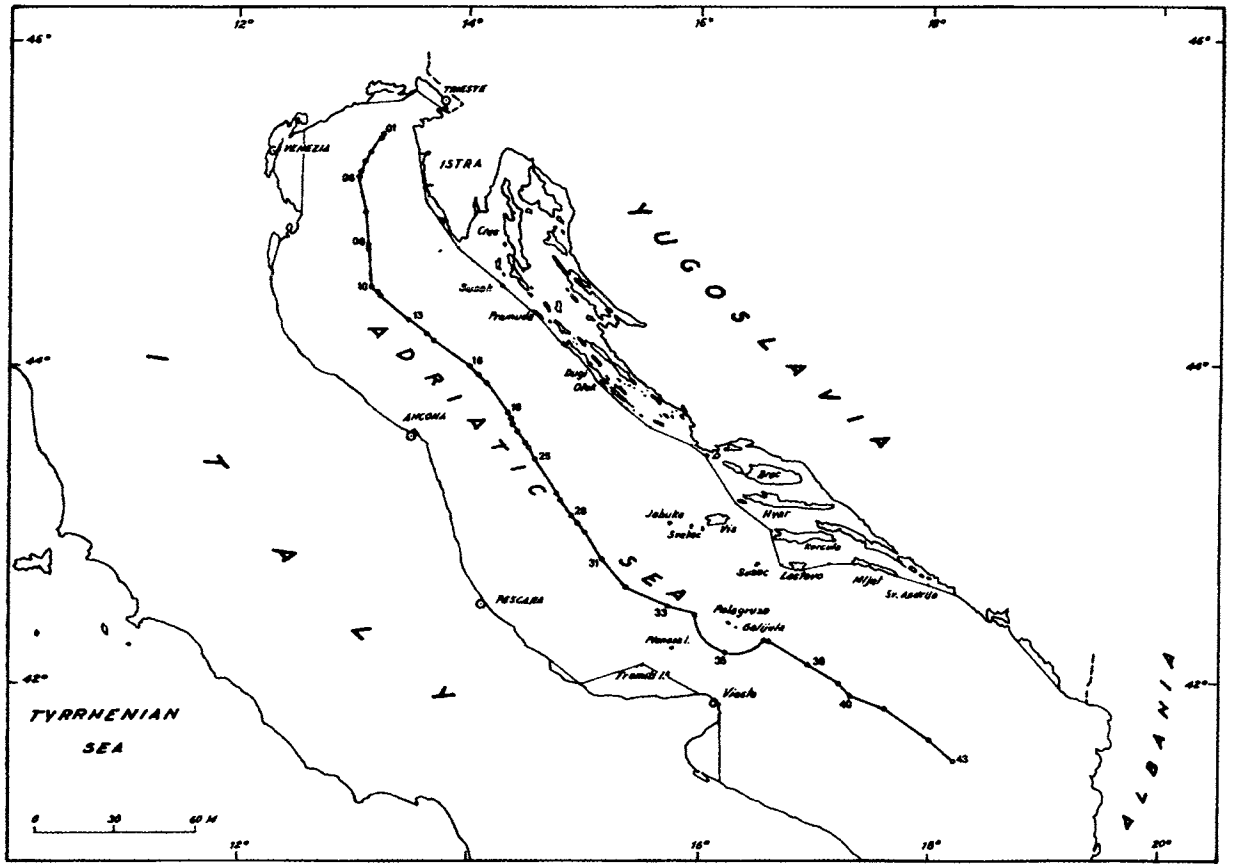
Map 13: Straight Baselines -- Turkey. Baselines represented on a map published by the Turkish Hydrographic Service on 17 May 1965. Source: Scovazzi, p. 227.



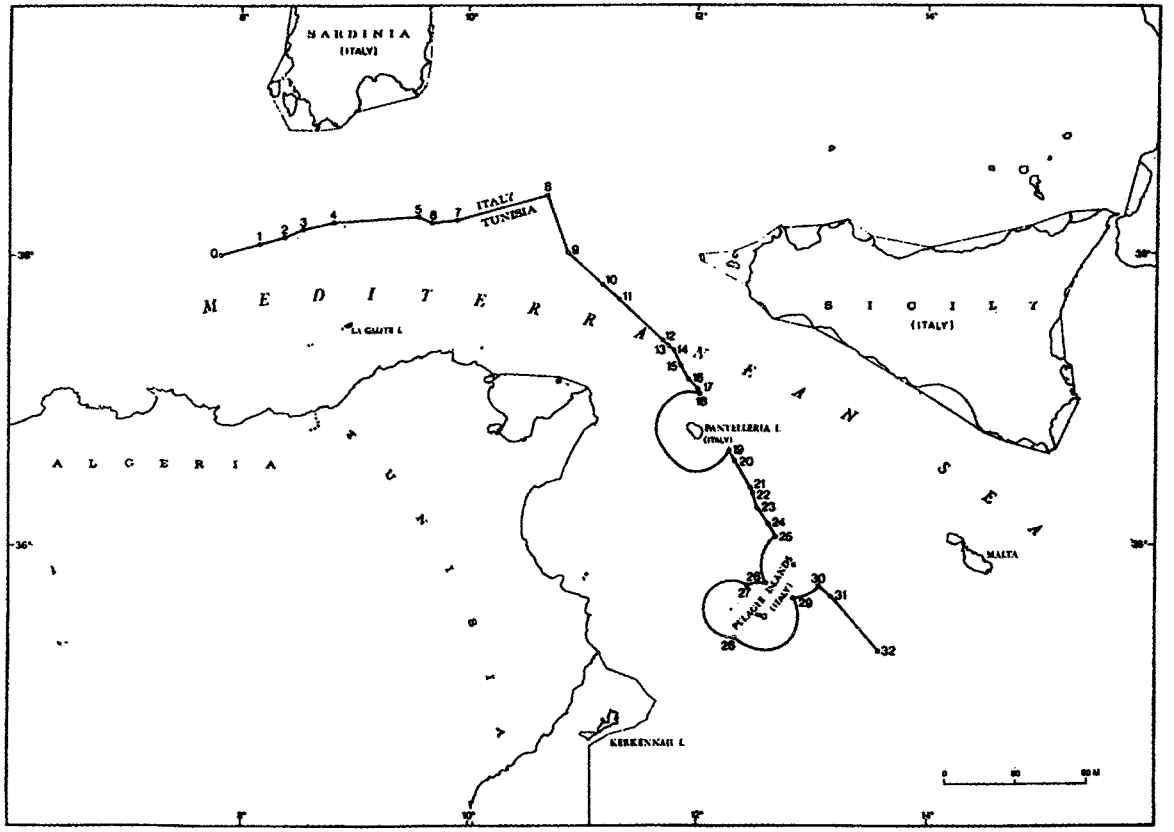
Map 14: Straight Baselines - Yugoslavia. Law of 23 July 1987. Source: Scovazzi, p. 233.



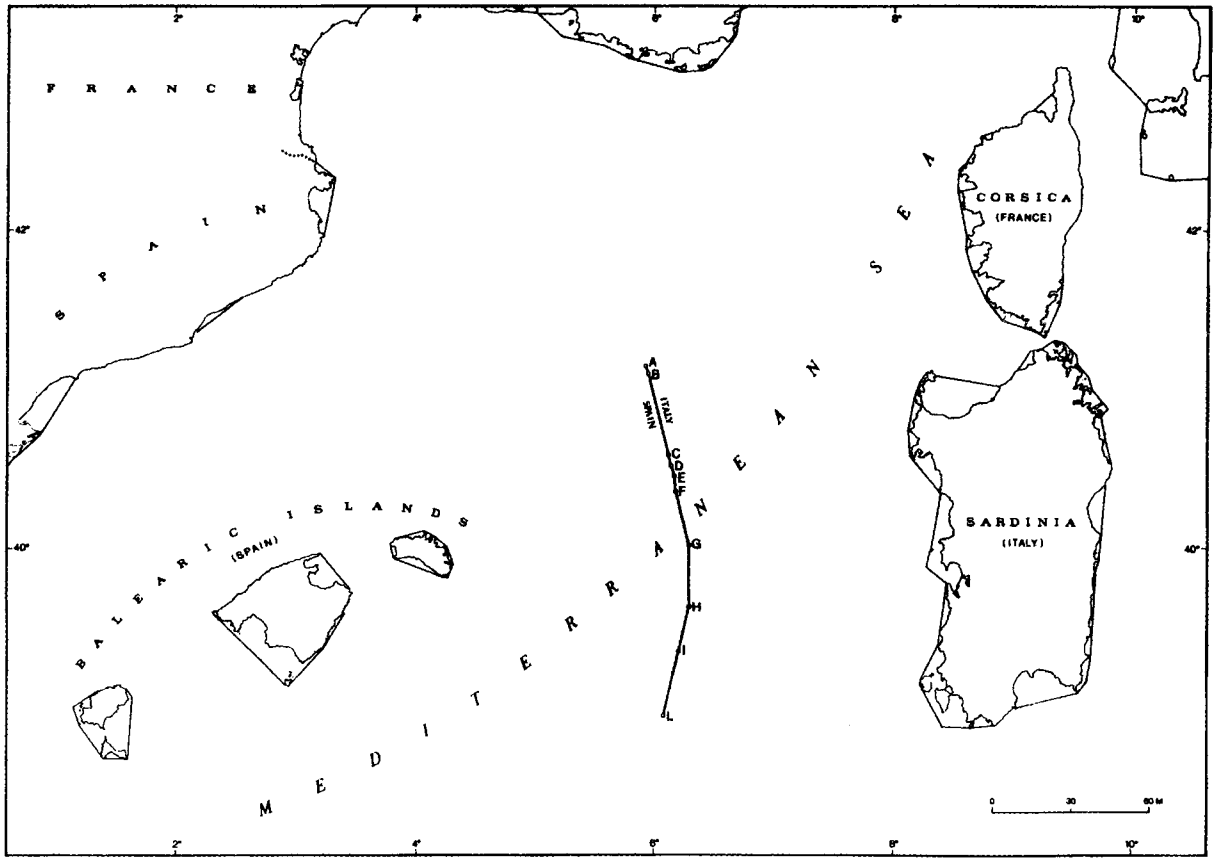
Map 15: Maritime Boundaries -- Cyprus-United Kingdom (Akrotiri, Dhekelia). Treaty concerning the establishment of the Republic of Cyprus (Nicosia, 16 August 1960)



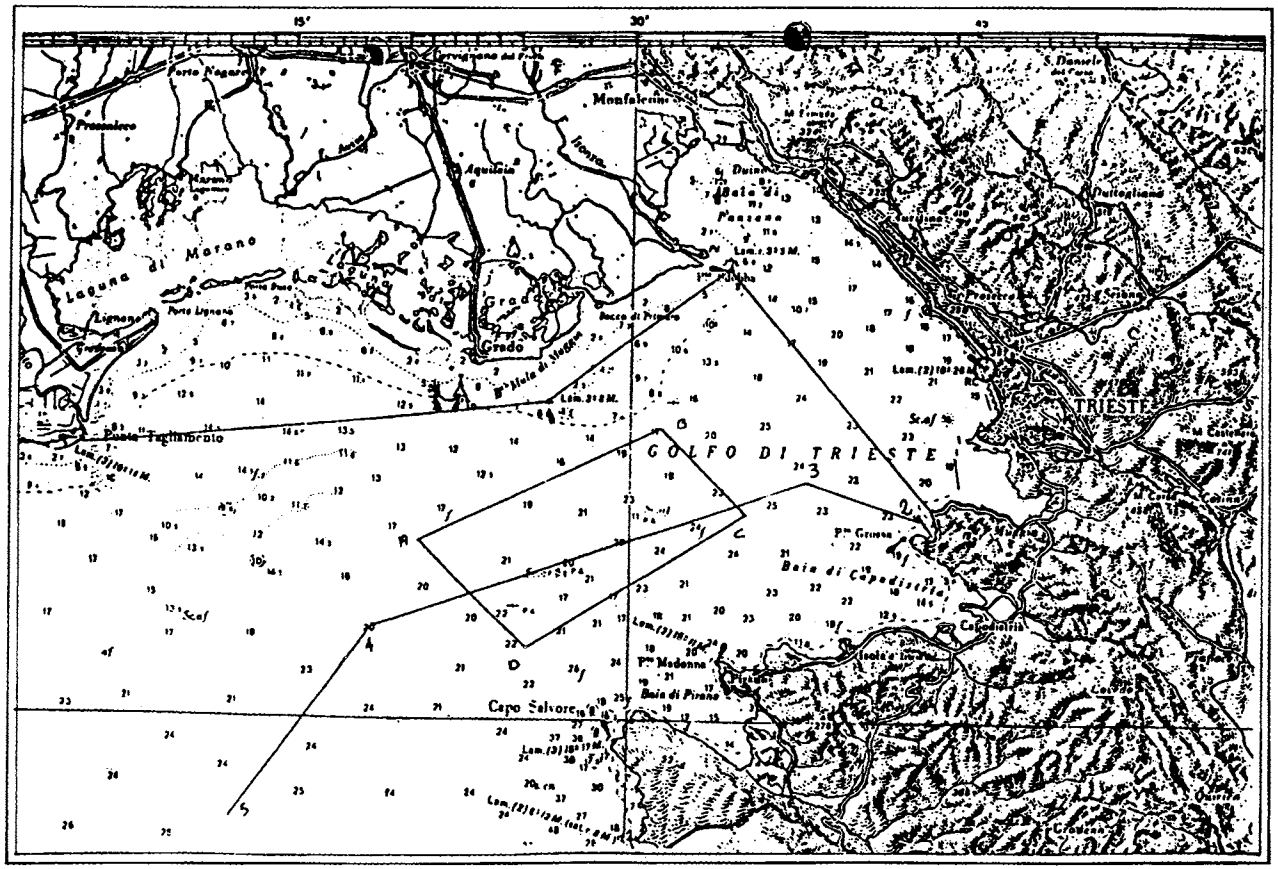
Map 16: Maritime Boundaries -- Italy-Yugoslavia (1968). Agreement concerning the delimitation of the continental shelf between the two countries (Rome, 8 January 1968).



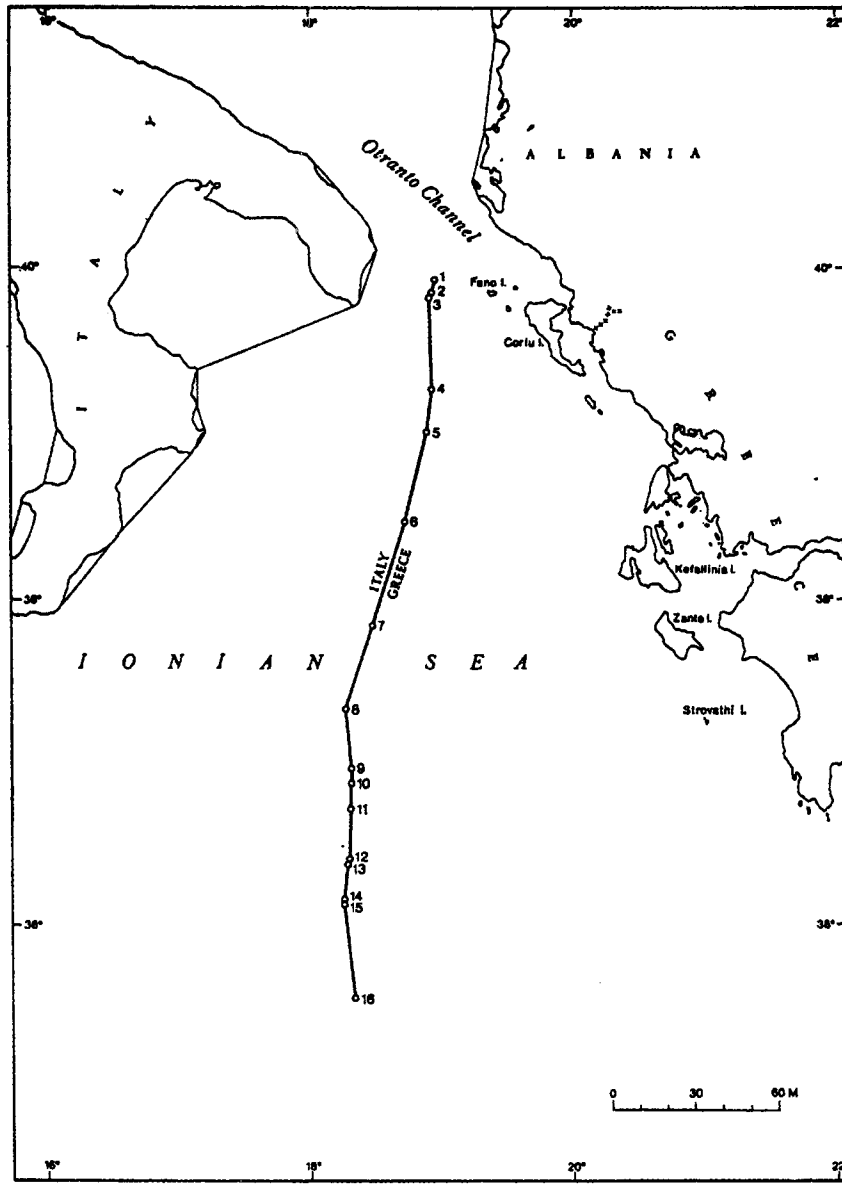
Map 17: Maritime Boundaries -- Italy-Tunisia. Agreement relating to the delimitation of the continental shelf between the two countries (Tunis, 20 August 1971).
Source: Conforti I, p. 83.



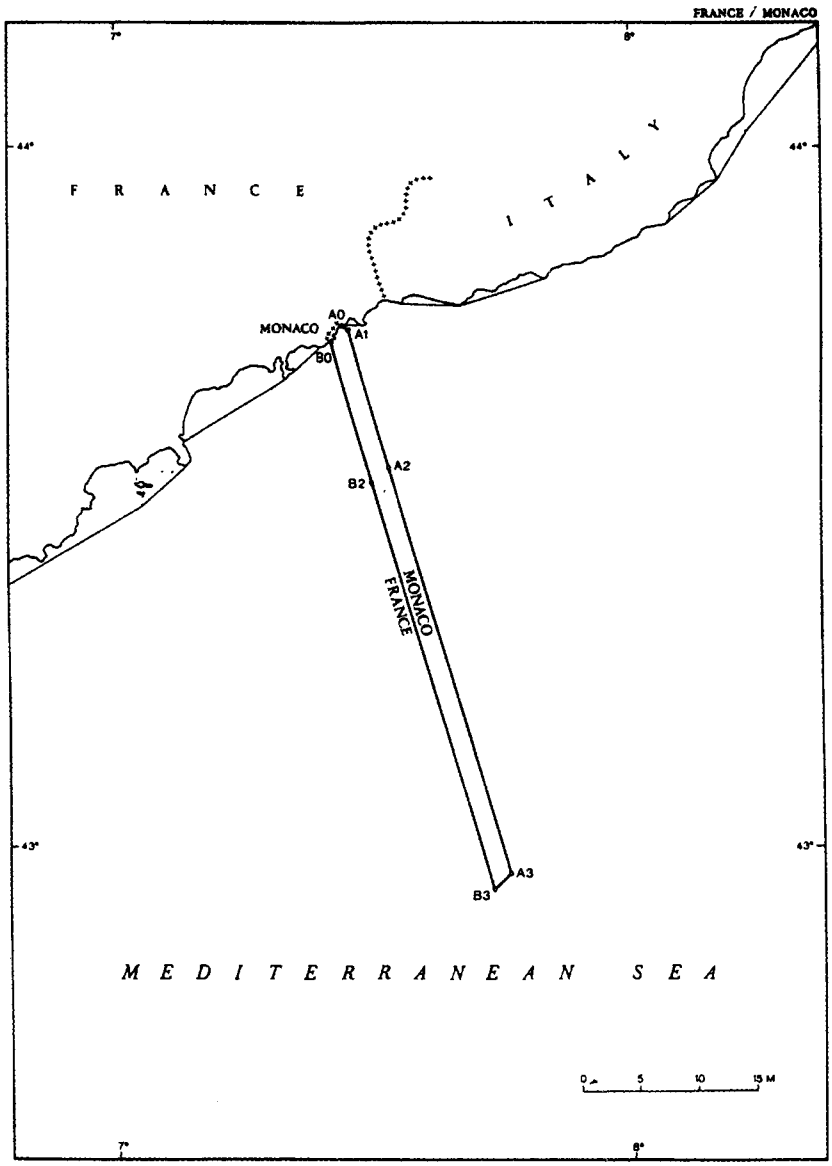
Map 18: Maritime Boundaries -- Italy-Spain Agreement relating to the delimitation of the continental shelf between the two countries (Madrid, 10 February 1974). Source: Conforti I, p. 77.



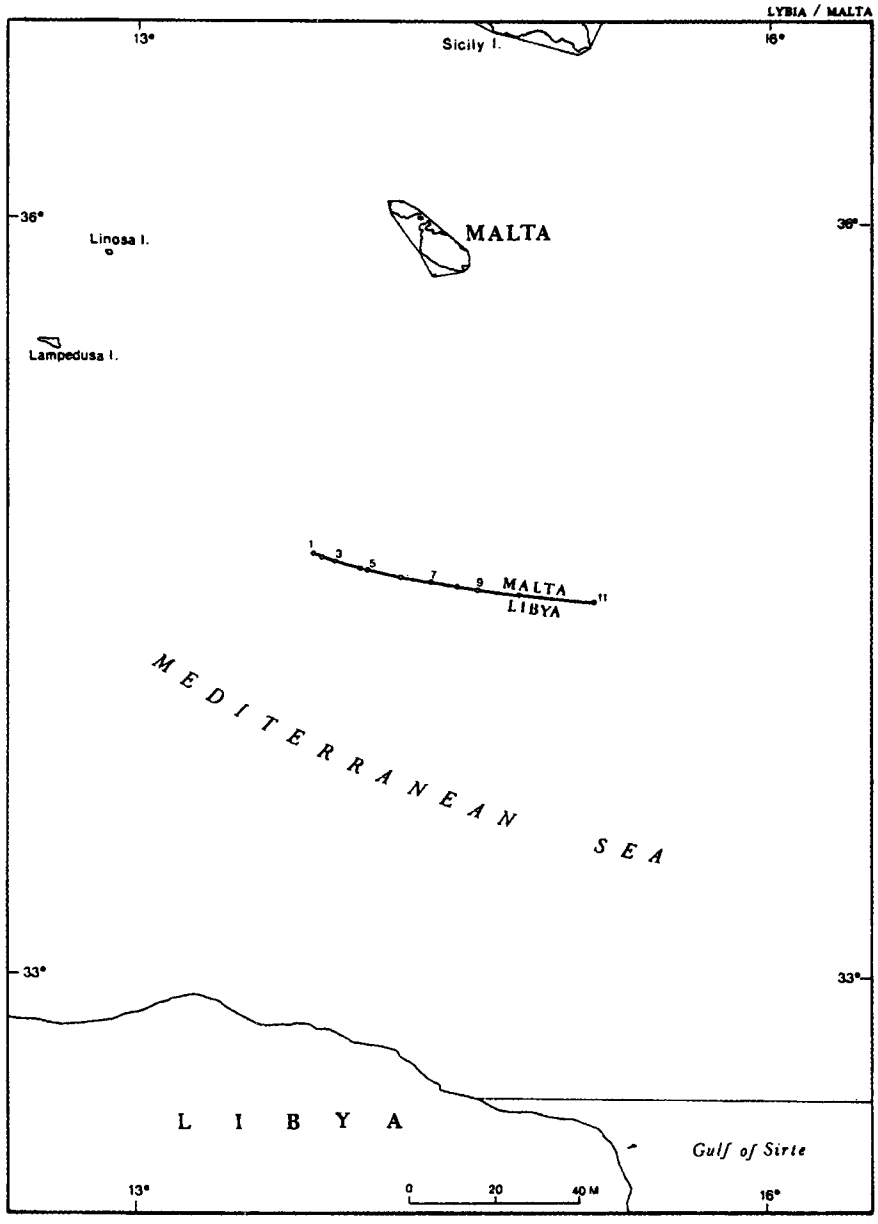
Map 19: Maritime Boundaries -- Italy-Yugoslavia (1975). Treaty (Osimo, 10 November 1975). Source: *Gazz. Uff.* No. 78 of 3 April 1987.



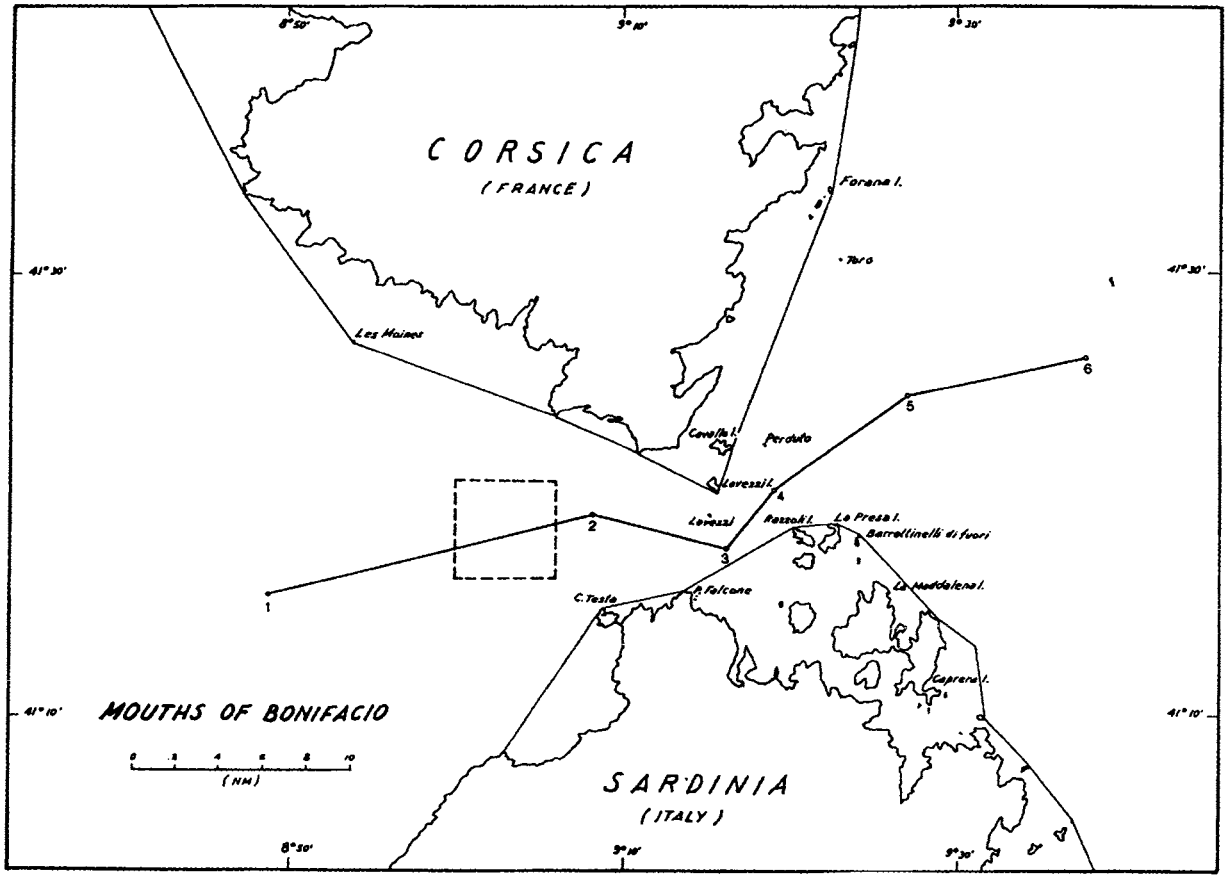
Map 20: Maritime Boundaries -- Greece-Italy
Agreement on the delimitation of the zones of the continental shelf belonging to each of the two States (Athens, 24 May 1977)
Source: Conforti I, p. 91.



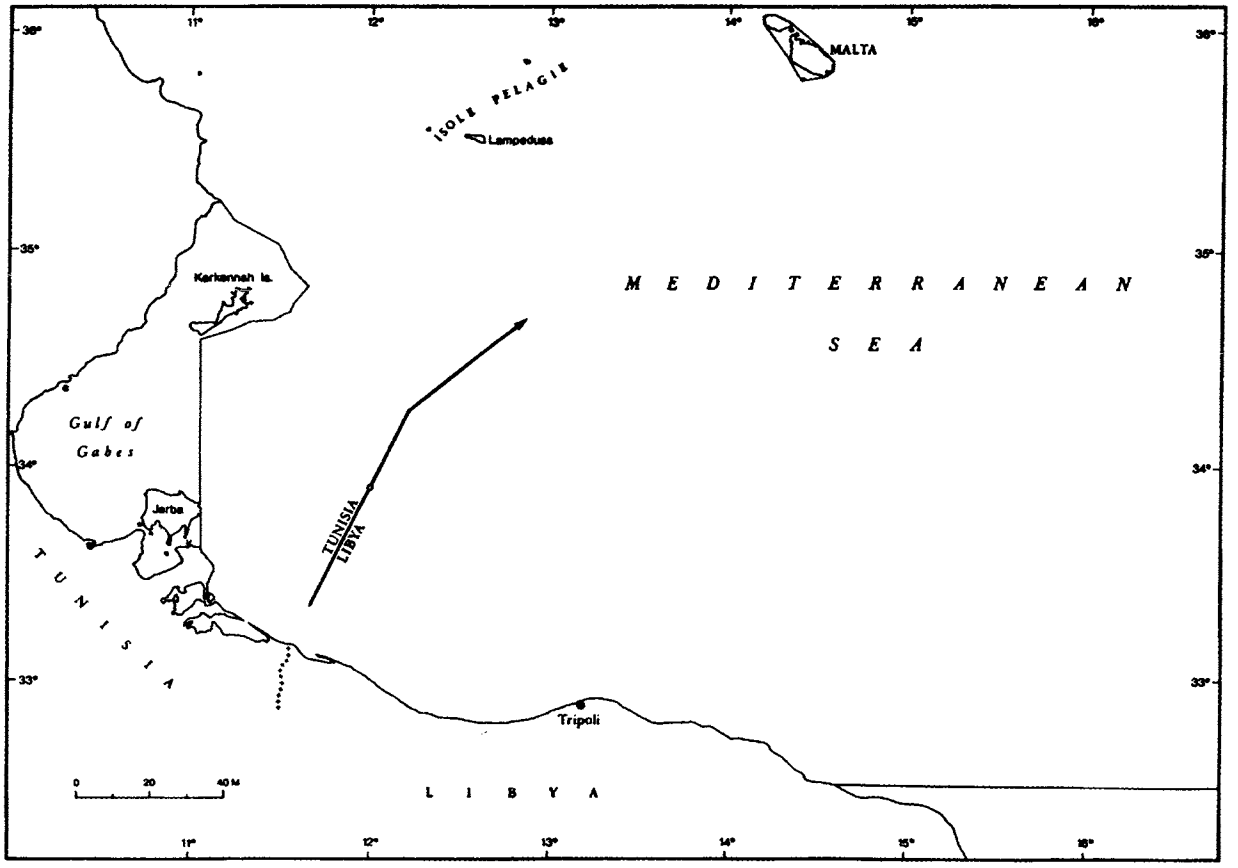
Map 21: Maritime Boundaries -- France-Monaco
Convention of maritime delimitation (Paris, 16 February 1984)
Source: Conforti II, p. 19.



Map 22: Maritime Boundaries -- Libya-Malta
Agreement implementing Art. III of the special agreement and the judgment of the International Court of Justice (Valletta, 10 November 1986)
Source: Conforti II, p. 31.



Map 23: Maritime Boundaries -- France-Italy. Convention relating to the delimitation of the maritime boundaries in the area of the Mouths of Bonifacio (Paris, 28 November 1986).



Map 24: Maritime Boundaries -- Libya-Tunisia. Agreement to implement the judgment of the International Court of Justice in the Tunisia-Libya continental shelf case (Benghazi, 8 August 1988). Source: Conforti II, p. 37.

DISCUSSION

Dale Krause: We now have time for a few questions.

Giorgio Bosco: I would like to ask a question of Professor Ruiz. As you rightly observed in your presentation, no legal system for liability has been formally adopted in the framework of the Barcelona Convention. This question is closely connected to the settlement of disputes, because if two or more states do not agree on the question of liability, a dispute arises between them and this dispute has to be settled.

In 1985, Professor Leanza organized a seminar in Castel Gandolfo on the legal issues in the Mediterranean. At that time I pointed out that the dispute settlement system in the Barcelona Convention is highly unsatisfactory because it is voluntary; it is based only on the goodwill of the parties. It contains no mention of third party settlement, no compulsory jurisdiction, nothing. It even introduces the notion of consultation, which is no help at all for the settlement of disputes. This situation has now changed, because some states that opposed third party settlement and compulsory jurisdiction have completely changed their attitudes. Is there any initiative going on to improve the dispute settlement system of the Barcelona Convention?

Jose Juste Ruiz: There was some action to develop a liability system according to the provisions of the Convention, and preliminary work was done by some Moroccan experts, but preparation of a liability-specific instrument has been put aside and has not been continued.

That makes irrelevant the development of a system of settlement of disputes better than the one that is already provided for, since the most likely occasion for using such a system is probably when a question of liability and compensation arises. If parties do, as they seem to voluntarily do now, foreclose any possibility of developing rules concerning liability and responsibility, the instrument for the settlement of disputes loses practically all its capability.

I don't know of any movements to change the rudimentary system that you mentioned for settlement of disputes.

Gunter Weiss: I would make two small comments on Barbara Kwiatkowska's paper. First, the fact that there is no fisheries zone or EEZ in the Mediterranean has nothing to do with the question of whether the Common Fisheries Policy would be applicable in the Mediterranean or not. It would, in principle, but common rules have not yet

been established for the Mediterranean. This would be something for another conference perhaps.

Secondly, the European Community has had only observer status in the CGPM because CGPM, as an FAO body established under Article 6 of the FAO statute, could not admit any members that were not also members of FAO. It was not possible for the EEC to become a member of FAO until two years ago. Last year, the European Community became a member of the FAO with full rights under its own competences, and those, of course, include fisheries. So now membership in CGPM for the EEC would be possible.

Maria Teresa Infante: I have a question for Professor Juste in relation to effective implementation of the Barcelona Convention and its Protocols. It seems to me that this is a question that must be addressed in a domestic setting, where those conventions and protocols should be applied. We have a similar problem in the eastern part of the Pacific because we are members of conventions and protocols that are similar to yours. You suggested that there might be some non-binding provisions in the Convention and the Protocols. Could you explain that further, because it looks rather strange in terms of legal commitments that governments have undertaken.

Jose Juste Ruiz: I agree that it may look strange, but that's the way it is. This particular issue -- the legal binding force of decisions, resolutions, and recommendations -- has not been addressed in the framework of the Barcelona Convention. It has been the case in the Oslo and Paris Conventions, and the issue has not had a clear answer as yet. In the Mediterranean framework, no matter what different kinds of normative acts are foreseen -- decisions, recommendations, resolutions, common programs and measures, guidelines, standards, and criteria -- none of them are considered by the parties to have legal binding force. They are of a hortatory character. The system of soft law on the international level is addressed to the contracting states so that they will incorporate those soft law provisions into their national legal frameworks and make them fully binding, fully operative, fully implemented.

Tullio Treves: Professor Juste notes that Barcelona dumping protocol is to a limited extent different from the general London Dumping Convention because in certain cases it is more protective, in others, less. So this might create some conflict for the states that are parties to both. As neither the Protocol nor the London Dumping Convention

has a provision on how to deal with this kind of situation, it has to be dealt with according to general interpretive criteria. But perhaps we should not look to the Vienna Convention for the law but to more general criteria of protection, so that it will not be possible for a state that is party to both conventions to claim that the weakest provision is applicable because, for instance, it belongs to the later of the two conventions or to the more particular of the two conventions. The state will have to abide by whichever of the two instruments in force is the most protective. The general purpose, the object or purpose of the two instruments, should be the basic interpretive criteria.

David Anderson: From my perspective as someone who looks out into the North Sea and is near the Baltic, I was struck with differences between those two rather narrow water bodies and the Mediterranean. In the Baltic and in the North Sea, we have an almost complete set of maritime boundaries, and we are now beginning to apply dumping jurisdiction on a continental shelf basis. And in the Baltic and the North Sea we have a complete suite of 200-mile zones. In the Mediterranean, we seem not to have 200-mile zones, and we seem to have more gaps than boundaries, despite the two cases that have been referred to in Professor Leanza's paper. Are we likely to see the introduction of 200-mile zones in the Mediterranean in the future, and what are the prospects for completing the outstanding boundaries, which seem to be very numerous? What has prevented the network from being enriched? Is it the presence of islands in the Mediterranean or the fact that there are more coastal states, or the depth of the water? Is there a reason why the Baltic and the North Sea states have managed to make more progress?

Ida Caracciolo: I will explain Professor Leanza's opinion about the institution of the exclusive economic zone in the Mediterranean. He is clearly against this institution because the Mediterranean is obviously an enclosed or semi-enclosed sea and a sea very important for navigation. The institution of the EEZ will limit the freedom of navigation, and for this reason he prefers to refer to the norms of the 1982 UNCLOS that deal with cooperation between countries on closed or semi-enclosed seas.

Tullio Scovazzi: Although Mediterranean States, as any other coastal States, have the right to establish EEZs, there are no such zones in the Mediterranean. Compared to other marine regions, the Mediterranean is an old-fashioned sea. Why? I can only suggest some reasons.

Perhaps one of the problems is freedom of navigation. Some States fear that EEZs could be a hindrance to freedom of navigation.

Perhaps another problem is illustrated by the difficult delimitation issues that are still open in the Mediterranean (for instance, those between Greece and Turkey or Morocco and Spain). The issues would become even more complicated if delimitations of the superjacent waters were to be added to seabed delimitations.

As regards fisheries, it should be noted that the living resources are in several cases concentrated in the waters close to the shore and thus fall within the territorial seas of Mediterranean States. However, the absence of EEZs and, consequently, the large extent of high seas still existing in the Mediterranean may cause problems in relation to driftnets, which are largely employed in high seas tuna fisheries. How is it possible to prevent the destruction of endangered species, such as marine mammals, which can be incidentally entangled in the driftnets? The legislation of a coastal State could apply within the twelve-mile limit of its territorial sea and, as regards the high seas, only with respect to vessels flying the flag of the State concerned. For instance, the fishery regime of the European Economic Community, which provides that driftnets shall not exceed 2.5 km in length, can apply only to the territorial seas of the four Mediterranean member countries (Spain, France, Italy, and Greece), but is surely not applicable to the vessels of non-member countries that fish on the high seas (i.e., beyond the twelve-mile limit). The situation would be different if EEZs were established.

In conclusion, the absence of EEZs in the Mediterranean, which might have some advantages, entails also some disadvantages, especially with respect to environmental matters. Mediterranean States should perhaps think more about the dilemma of EEZs.

Dale Krause: I regret that we have run out of time. We want to thank the speakers for their talks and thank the audience for their participation.

LUNCHEON SPEECH

ENFORCEMENT WITHOUT FORCE: NEW TECHNIQUES IN COMPLIANCE CONTROL FOR FOREIGN FISHING OPERATIONS BASED ON REGIONAL COOPERATION

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Food and Agriculture Organization of the United Nations

The extension of fisheries jurisdiction under the now well-accepted concept of the exclusive economic zone has induced considerable expectations on the part of developing coastal states. It has induced hopes of better fisheries management by ending the open access character of fisheries under international law. It has also encouraged visions of increased access for developing coastal states to the riches of the oceans and a more equitable division of the spoils. But, at the end of the first decade after the adoption of the Law of the Sea Convention, while most developing coastal states have already extended their fisheries jurisdiction, many of their expectations have yet to be realized.

Developing a national fishing fleet capable of harvesting the fishery resources of the exclusive economic zone is a costly and lengthy exercise. It is also a risky one, particularly in sectors requiring sophisticated fishing techniques, or presenting particular difficulties in the area of processing or marketing. It is perhaps partly for this reason that, while the development of a national harvesting capacity remains a primary goal for most countries, foreign fishing has continued to be an important part of the fisheries scene in a number of seas bordered by developing states. Examples are the South Pacific, the Southwest Atlantic and, though to a decreasing extent, the waters off the coast of West Africa. For many developing countries, licensing of existing foreign fishing operations is seen as the first step in establishing effective control over the resources now under their jurisdiction and an interim step from which coastal states may draw benefits in the form of information on the resources and financial rewards.

For the most part, the level of fees charged for foreign fishing operations has increased significantly over the last decade. Net benefits to the coastal state, however, have not always kept pace with

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this increase in view of the substantial costs involved in policing fishing operations in extended zones of jurisdiction. Surveillance and physical enforcement costs indeed can easily outstrip the financial benefits derived from licensing. Faced with this problem, many developing coastal states have been searching for new techniques for ensuring compliance with their national laws by foreign vessels -- techniques that do not depend upon costly means of physical enforcement. The importance of this search was emphasized at the FAO World Conference on Management and Development in 1984, which called for the design and establishment of "practical mechanisms of compliance control in exclusive economic zones at the national, bilateral and regional levels, that reduce the need for costly enforcement and do not hamper fishing activities more than necessary." Since then, considerable progress has been made in the development of cooperative means of compliance control, particularly at the regional level.

In my talk today, I would like to review three key developments, namely the regional register of foreign fishing vessels, flag state responsibility for compliance control, and regional cooperative enforcement arrangements, in the light of recent experience in the South Pacific, Caribbean, and West Africa regions. But first, I would like to say something about what I will call "the philosophy of cost effective enforcement," as it has been developed in particular in the South Pacific.

The Philosophy of Cost-effective Enforcement

Fisheries enforcement has two essential components. The first is the acquisition and collation of information about fishing activities, the second is the inducement, on the basis of the information acquired, of compliance by fishing vessel operators with desired modes of conduct. Economic efficiency depends on how the enforcement system is designed, what types of information are sought, in what form, how the information is collated, and the means by which compliant conduct is induced.

Let us deal first with the question of gathering information on fishing operations.

Traditional approaches have focussed primarily on the activities of individual vessels while operating in the waters of individual coastal states and have thus been heavily dependent on physical inspection of vessels at sea, an operation that is costly.

In a number of regions of the world and in particular in the South Pacific, new approaches have been developed on which primary reli-

ance is placed on self-reporting by the vessels themselves, verified by information from a wide range of sources collated on a regional as well as a national basis. Verification is partly through periodic aerial surveillance at the regional or sub-regional as well as the national level, and partly thorough comparison with data on fleet landings collected from the major landing places both within and outside the region. Information is collated, in part, through the regional register, which is in effect a computer nexus of information on foreign fishing vessels operating in the region, their characteristics and catching potential, their historical catches and fishing areas. All this enables a far clearer and more accurate picture of fishing activity to be built up on a region-wide basis than would ever be possible on an individual coastal state zone basis. Allocation problems among individual coastal state zones are minimized by harmonization of license fees and conditions and, ultimately, by the development of uniform regional licensing schemes.

To a large extent, the feasibility of the information collection and collation system described above will depend on the way in which the access arrangements and management systems are designed. In the South Pacific these are based on simple effort parameters, such as vessel numbers and size, rather than allowable catches or quotas. Access fees, though calculated in many cases on the basis of a percentage of the landed value of the catch, are expressed in terms of effort or catching potential rather than actual catch, thus reducing pressures on the information gathering and verification process. In simple terms, it is far easier and cheaper to monitor the number and size of vessels operating on the fishing grounds than to count the fish caught by an unlimited fleet. No minimum species sizes are in force for the major fisheries in the region, thus reducing information collection and verification needs.

Similar considerations apply in the area of compliance control. Traditional fisheries enforcement systems have always placed emphasis on physical inspection and enforcement by surface craft -- the so-called "cops and robbers" approach. While even developing coastal states will inevitably need to maintain some surface enforcement capability, the main orientation of regional cooperation in a number of regions has been to develop less costly means of compliance control, and mechanisms to share costs where physical enforcement is still necessary. In practical terms, this means increased reliance on aerial surveillance, in some cases on a regional basis, to detect possible violations, followed by non-physical methods of ensuring that the offender submits voluntarily to the jurisdiction of the local courts. I would now like to look at two of these methods; firstly, the threat of

"blacklisting" and secondly, the placing of pressure on the flag state to ensure that a vessel flying its flag either submits to coastal state jurisdiction or is punished through the flag state's own judicial system -- the so-called concept of flag state responsibility for compliance control.

The Regional Register

First the regional register.

The regional register had its conceptual origin in the discussions at the Eleventh Session of the FAO Committee on Fisheries in 1977. During the discussions on the Director-General's Comprehensive Program of Assistance to Developing Coastal States on the Management and Development of Fisheries in Exclusive Economic Zones (the so-called EEZ Program), a number of countries proposed the establishment of a global register of foreign fishing vessels and the blacklisting of vessels which were persistent violators of coastal state jurisdiction. The meeting noted the difficulties of establishing such a register at the global level but foresaw more potential for the establishment of registers at the regional level.

It was not until the early eighties, however, that more concrete expression was given to the concept. A draft arrangement setting up a sub-regional register was entered into in 1981 by the parties to the so-called Nauru Agreement in the South Pacific. The register never saw the light of day in its sub-regional form. However, the idea was taken up on a wider regional basis by the members of the South Pacific Forum Fisheries Agency meeting at a workshop in Suva in 1982. The workshop recommended the establishment of a register of all foreign vessels operating in the South Pacific region to be maintained by the Forum Fisheries Agency in Honiara: only vessels that were in good standing status on the register should be granted fishing licenses in the region. The recommendations were endorsed by the South Pacific Forum Heads of Government in 1982 and the register formally came into operation on 1 September 1983. To date, the regional register lists some 522 vessels, the newly adopted system of annual registration having served to eliminate obsolete entries (before that it included some 2,500 vessels). The register includes vessels from Japan, Korea, Taiwan, United States, and various other countries. The register is in fact a computer listing of information about vessels fishing or intending to fish in the area served by the FFA. The information includes details of the vessel, vessel marking, its ownership and vessel and fishing masters, its operational base, its gear and equipment, including freezing and storage capacity, bait storage

capacity and fuel capacity, and fishing or other activities carried out by the vessel. The register thus serves as an invaluable data bank that can be used for the purpose of economic research on the fishing fleets operating in the region and as a source of information for national fisheries administrators faced with licensing decisions for individual vessels, as well as providing the whole basis for surveillance operations under regional defence and surveillance cooperation programs.

Applications for listing on the regional register can be made directly to the FFA or indirectly through the member countries. Once the application is accepted, good standing status is automatically accorded to the vessel. This good standing status can be withdrawn basically in two situations: first, where the owner or master of the fishing vessel has been convicted of a serious offense under the fisheries laws of a member country and fails to comply with the judgment entered against him, and secondly where there is a prima facie case of a serious offense against the fishery laws and the offender has not submitted to the jurisdiction of the member country concerned. Quite complex procedures have been established governing the withdrawal of "good standing," designed to ensure that incidents are fully investigated and that good standing status is not withdrawn from any vessel arbitrarily. "Good standing" can only be withdrawn if the request is endorse by at least three out of the sixteen countries participating in the scheme and dissented to by none. There are also procedures for the suspension of good standing status that are more flexible and can be initiated by the Director of the FFA on the request of a single member country. Under a new procedure recently introduced, a total of three suspensions over a period of two years constitutes grounds for the withdrawal of good standing.

As can be imagined, the regional register scheme has engendered a fair amount of opposition from some of the foreign fishing nations operating in the region. But, on the whole, the register has now received general recognition and indeed the requirement for registration has been incorporated into the multilateral fisheries treaty signed with the United States in 1987, as well as into the most recent bilateral access agreements, such as those between Australia and Japan, and between Japan and Palau concluded in 1991.

How well does the regional register work in practice? I think the answer is well.

Although good standing status has never been formally withdrawn from any vessel operating in the region, the threat of black listing has been used on a number of occasions with considerable effect. The latest example was earlier this year, when Tuvalu threatened to request the black listing of a Taiwanese vessel that had been photographed

with its net in the water inside Tuvalu's exclusive economic zone. After the Government of Tuvalu threatened to initiate the black listing procedure, the owner agreed to pay a substantial penalty and indeed paid the fine in February 1992, without the Government ever needing to resort to physical enforcement measures.

In short, the regional register is now the center piece for regional cooperation and enforcement in the South Pacific region. It is also an innovation that is attracting attention in other regions of the world and is, in particular, being emulated by the small island Member States of the OECS in the Caribbean and the wider grouping of CARICOM countries, as well as by the sub-regional Commission grouping together the Northern countries of West Africa, although in the latter case the data bank aspects of the register seem to overshadow the compliance control aspects.

Flag State Responsibility for Compliance Control

I would like now to turn to another technique or principle that is being used as a means to attain cost effective enforcement, particularly in the context of regional cooperative schemes. This is the principle of flag state responsibility for compliance control. The underlying concept of flag state responsibility is very simple. It is that if a fishing state enters into an agreement with a coastal state providing for fishing rights for vessels flying its flag, then that flag state is ultimately responsible for the conduct of its vessels and should take measures to ensure that its vessels comply with the terms of the agreement. In this sense the concept is no more than an administrative expression of the fundamental principle of international law: *pacta sunt servanda.*

The theoretical advantages to the coastal state in eliciting the assistance of the flag state in ensuring compliance with the terms of an agreement and with its own laws and regulations are clearly evident. Active support from the flag state in bringing violators to task will not relieve coastal states totally of the onerous task of enforcing extended fisheries jurisdiction, but it will certainly reduce substantially the physical and financial burden. Indeed it was for this reason that the FAO World Conference on Fisheries Management and Development specifically addressed this issue in its Strategy for Fisheries Management and Development and adopted the following guideline:

> (xvii) Where access is granted to foreign fishing vessels, the flag states themselves should take measures to ensure compliance with the terms of access agreements and with coastal state fisheries laws

and regulations. Coastal states should consider including provisions to this effect in bilateral access agreements.

The underlying concept of flag state responsibility is as unobjectionable as motherhood. As such, it is usually given at least lip service in many fishing access agreements. It has, however, too often been honored in its breach. In my own experience, flag states have on more than one occasion entered into access agreements and then denied all responsibility for ensuring compliance by their vessels, leaving this aspect to the "sovereign" enforcement authority of the coastal state and the ultimate sanction of repudiation of the agreement.

The occasions when states have sought to go further than mere words, and to establish a system of flag state action to secure compliance, have been limited, though they do exist. One of the earliest examples followed the disputes over North Sea fisheries between the UK and Iceland. In that case, responsibility for ensuring compliance by the British fleets with the quota restrictions on the fleets operating in the Icelandic zone was placed squarely on the UK authorities. Physical inspection and enforcement was in fact carried out by British patrol vessels under the watchful eyes of the Icelandic enforcement vessels. Similar arrangements were in force between New Zealand and Japan, covering Japanese fishing operations in the three-to-twelve-mile exclusive fishery zone, before New Zealand's declaration of an exclusive economic zone in 1977.

No agreement or legislation, however, has yet taken the concept of flag state responsibility quite so far as the multilateral fisheries treaty concluded in 1987 between the South Pacific Island States and the U.S. This agreement spelled out for the first time not only the basic concept of flag state responsibility, but also detailed procedures for implementing that responsibility. Under the Treaty, the U.S. government undertook to enforce the provisions of the treaty and of licenses, and to take the necessary steps to ensure that U.S. nationals and fishing vessels refrain from fishing in the area covered by the treaty, including areas closed to fishing, except as duly authorized. The U.S. government is also obligated to assist, on request, in the investigation of alleged breaches of the treaty and to communicate the results of the investigation to the requesting party. It has a duty to take measures to facilitate service of legal process arising out of the activities of its fishing vessels, at least so far as civil suits or penalties are concerned. It also has a duty to take all measures to facilitate the prompt and full adjudication of any claim made under the treaty and full satisfaction of any judgment entered.

The above measures, while specified in more detail, go little further than the provisions of other similar access agreements. What is new in the U.S. Multilateral Treaty, however, is the detailing of procedures for the investigation by the U.S. government itself of offenses against the treaty and the Pacific Island States' laws, for the imposition of penalties, and for the payment to the Pacific Island States of the amounts of fines, penalties, or forfeitures actually collected. Under the treaty, the U.S. government is required to investigate fully any alleged offense, and where the investigation reveals a probable infringement of the treaty or applicable national laws, to take all necessary measures to ensure that the offending vessel either submits to the jurisdiction of the coastal state concerned or that the vessel is penalized under U.S. law. Penalties are to be set at the same level as for like violations by foreign fishing vessels operating in the U.S. exclusive economic zone. If a judgment is entered against the vessel, the U.S. government is required to pay over to the Treaty Administrator a sum of money equivalent to the total value of any forfeiture, fine, penalty, or other amount collected by the U.S. government as a result of its judicial or administrative sanctions. In a real sense, then, the U.S. government and the U.S. administrative and judicial machinery would be acting as agents for the Pacific Island coastal States in the area of fisheries compliance control. To date, I understand from the Legal Counsel of the FFA, Michael Lodge, that the U.S. sanctioning provisions of the Multilateral treaty have not yet been fully applied in practice, although the U.S. has recently been requested to initiate investigatory action under the treaty against a number of unlicensed U.S. flag vessels and has agreed to initiate such action. I would like to thank Michael for this and other information he has provided on the South Pacific experience.

In any case, this is certainly a far-reaching innovation and a model that must hold attraction both for the Pacific Island countries in their negotiations with other distant water fishing nations, and for coastal states in other regions. For this reason a new Treaty on Cooperation in Fisheries Surveillance and Enforcement in the South Pacific, scheduled to be signed later this year, seeks to make the acceptance of flag state responsibility for compliance control a standard feature of all future access agreements in the region. It remains to be seen to what extent its provisions can be transposed to other regions of the world.

Regional cooperation in physical surveillance and enforcement

While the above new concepts can bolster and supplement physical enforcement measures, some physical surveillance and enforcement

capability, however minimal, is still essential. In certain circumstances, and most particularly in the case of geographically proximate islands, regional cooperation can significantly reduce the cost and enhance the effectiveness of surveillance and enforcement operations. In the South Pacific, for example, regional surveillance flights operated by the Australian and New Zealand air forces and covering a number of island countries have long been an effective feature of the regional fisheries scene. A new Treaty on Cooperation in Fisheries Surveillance and Enforcement in the South Pacific, adopted by the Forum Fisheries Committee in May 1992 and scheduled for signature in July this year, provides for a panoply of regional cooperative action, including regionally agreed operational procedures, regional pooling of information, the authorization of surveillance and enforcement operations by other parties in a coastal state's exclusive economic zone, or even, under separate subsidiary agreements, in its territorial sea and archipelagic waters. Under the new agreement, the parties would agree to stand firm in the implementation of harmonized minimum terms and conditions for fisheries access, including regional register requirements, identification and reporting requirements, and the principle of flag state responsibility for compliance control. The agreement would also provide for regional cooperation in prosecutions, including the possibility of subsidiary agreements on extradition and reciprocal enforcement of judgments.

A similar agreement which, while not so broad in its scope goes further in certain directions, has already been signed by the members of the Organization of Eastern Caribbean States. The Agreement, which was signed in 1991 but has not yet entered into force, would provide directly for authorized officers of any member state to take enforcement action against vessels operating illegally in the waters of any other member state, including its territorial sea.

Finally in West Africa, the countries members of the new Sub-regional Commission on Fisheries have been considering for some time the adoption of an agreement that would provide for regional cooperation in enforcement and in particular for detailed procedures to govern hot pursuit by vessels of one member state into waters under the jurisdiction of a neighboring member state. While hot pursuit normally stops at the limits of the territorial sea, the agreement would provide for cooperation by a state, into whose territorial sea a fugitive vessel has fled, to seize the vessel and return it to the authorities of the pursuing state. The sub-regional Commission has also prepared a draft agreement on harmonized conditions of access for foreign vessels desiring to operate in the sub-region.

Conclusions

What lessons can be drawn then from the exciting new ideas in the area of cost-effective enforcement being developed in various regions of the world?

First, I think, is the impression that as experience with the new regime of extended jurisdiction deepens, so control of foreign fishing is evolving from a "frontier" type operation, with the accent on the use of force, to a more sophisticated operation within the day to day economic purview of the state. Secondly, like any other economic activity of the state, it must be subject to normal standards of cost-effectiveness. And thirdly, that the most cost-effective way of controlling foreign fishing operations, particularly where small island coastal states are concerned, may often be through regional cooperative efforts among the costal states concerned. All in all, these developments offer the hope of greater net benefits for developing coastal states, and, in short, the prospect of a more ordered and peaceful world, at least in this one small area renowned for its "cowboy mentality."

PANEL IV:

THE UN LAW OF THE SEA CONVENTION: TEN YEARS AFTER SIGNATURE

INTRODUCTION

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The United Nations Convention on the Law of the Sea was opened for signature about ten years ago, on 10 December 1982. We are all aware of the impact this document has had on the way States behave at sea. Whenever a problem concerning the uses of the seas arises, Foreign Affairs Ministries of all States -- as well as private lawyers -- look at the Convention for guidance. Although an accurate analysis shows that the Convention does not correspond in all cases to customary law, and that even when such correspondence exists it is not always complete, there is no doubt that the Convention has made an important contribution in the crystallizing of many customary rules.

These positive notes notwithstanding, the Convention has not become a universally binding treaty. While it may well enter into force within a couple of years, it may do so without the participation of many or most or all the main industrialized countries, the reason being the difficulties encountered by many of these states with Part XI on deep seabed mining. Currently important efforts are being made to try to find adjustments which that would take these difficulties as well as the new economic and industrial situation into consideration.

As said before, the Convention has had an immense influence on state practice, and from this viewpoint it certainly is an outstanding success. State practice, however, is a living thing, and it sometimes presents problems that were not directly envisaged by the Convention and which pose important challenges to this particular instrument. We have already heard something about it in the reports on UNCED, and we'll learn more in the present panel.

The first speaker is Ambassador Satya Nandan, who, as the head of the delegation of Fiji, was one of the stars of the Conference and later became the Special Representative of the Secretary General of the United Nations for the Law of the Sea and Under-secretary General. In that capacity he has made an immense contribution to the life of the Convention in many ways, including the blue books from the Office and the Law of the Sea Bulletins which are essential for spreading knowledge on the law of the sea. He has also, with his patience and incredible diplomatic skills, started the process of consultations chaired by the Secretary General, which are perhaps the lifeline of the Convention.

Our second speaker, Professor Jonathan Charney, has not been directly involved in the negotiations on the law of the sea but has been following them patiently throughout the years, producing interesting articles, most of which concentrate on the United States' position, which is a key element of the problems connected with the future of the Convention. May I add that Professor Charney has been responsible for a major project on delimitation agreements, which will certainly make an important contribution to the knowledge of this very complex chapter of the law of the sea.

Our third speaker will be Francisco Orrego Vicuna, an old hand from the Law of the Sea Conference, where he had a prominent role in the Chilean delegation. Professor Orrego is a former ambassador to the United Kingdom and a distinguished scholar. His books on Antarctica and on the law of the sea are well known to all of us.

Our fourth speaker is an old friend of the Law of the Sea Institute and an long-time member of the law of the sea community, Ambassador Igor Kolossovski. He was First Vice Chairman and then Chairman of the Soviet delegation to the Law of the Sea Conference and then, from the beginning, the Chairman of the Soviet delegation to the Preparatory Commission. Ambassador Kolossovski is now a counselor to the Ministry of Foreign Affairs of the Russian Federation and a member of the Executive Committee of the International Maritime Law Association in Moscow.

The first commentator is Professor Thomas Clingan, a former Presiding Officer of the Law of the Sea Institute and former head of the U.S. delegation to UNCLOS III.

The second commentator is Ambassador Alfonso Arias-Schreiber. As leader of the Peruvian delegation he was one of the most active and respected protagonists of the Law of the Sea Conference.

The third commentator is Luigi Ferrari Bravo, who is Professor of International Law at the University of Rome and Legal Advisor to the Italian Foreign Ministry. He has been following the law of the sea from the outside. He is a very interested observer and he has also been a protagonist in one particular phase when he was the driving soul of the IMO Convention on the suppression of illicit acts against the safety of ships, the so-called "Achillo Lauro Convention."*

*Unfortunately, Professor Ferrari Bravo's comments were not available for publication.

THE EFFORTS UNDERTAKEN BY THE UNITED NATIONS TO ENSURE UNIVERSALITY OF THE CONVENTION

Ambassador Satya N. Nandan
former Under-Secretary-General of the United Nations
and Special Representative of the Secretary-General
for the Law of the Sea
(1983-92)

The ten years that have elapsed since the Convention was adopted in 1982 have been eventful years. It has been a period of consolidation of the new regime for the oceans, which subsumed in a broad package many elements of the traditional law of the sea while introducing many new concepts. The result has been revolutionary. It has had a profound political, economic, and legal effect. It has in fact dramatically changed the political geography of the world.

When the Convention was opened for signature on 10 December 1982 at Montego Bay, Jamaica, it was hailed as the most significant achievement of the international community since the Charter of the United Nations was adopted. Ten years after, it can be said fairly that the Convention has been a remarkable success. It has become the dominant influence on the conduct of States on maritime issues. It has become the primary source and the pre-eminent authority for modern international law of the sea. Indeed, the Convention is a model for dealing with other issues of global concern.

The procedure for negotiation at the Third United Nations Conference on the Law of the Sea, which required that every effort should be made to reach consensus on all substantive issues, ensured that the provisions of the Convention, especially on the key issues, were the result of agreement among the most interested States. This in turn has been responsible for the rapid acceptance of the Convention provisions in national legislation even before its entry into force. A consequence of this has been the remarkable degree of consistency and uniformity that exists in State practice today.

The influence of the Convention can be seen in current State practice, in bilateral agreements, in subregional, regional and global cooperation arrangements on maritime issues, in the mandates and activities of global and regional inter-governmental organizations, and in the decisions and opinions of the International Court of Justice, arbitral tribunals, and other forums for dispute settlement.

When the Conference ended in 1982 the international community, which had labored for long years to achieve consensus, found itself

divided over the Convention. There was disappointment and acrimony in the air at the closing session of the Conference at Montego Bay and in the discussions in the General Assembly. There was also confusion and division on what should be the role of the UN Secretariat now that the Conference was over. At the same time, the Secretary-General was asked by the General Assembly (resolution 37/66 of 3rd December 1982) to assume all the responsibilities imposed upon him by the United Nations Convention on the Law of the Sea and the relevant resolutions of the Third United Nations Conference on the Law of the Sea.

In the absence of a clear policy directive by the General Assembly on how the responsibilities of the Secretary-General were to be discharged, the Secretary-General, through the Office of his Special Representative for the Law of the Sea, adopted two basic approaches for promoting the universality of the Convention. First, to ensure the widest possible acceptance of the Convention, and secondly, to ensure the widest possible application of its provisions in State practice. Both these principles were translated into the program for the Office of the Special Representative for the Law of the Sea (later the Office for Ocean Affairs and the Law of the Sea) adopted by the General Assembly in December 1983 (see A/RES/38/59 and report of the Secretary-General (document A/38/570)).

In practical terms the strategy that the United Nations has followed for the past ten years through the Secretary-General's Special Representative for the Law of the Sea may be summarized as follows:

(1) To encourage all States to sign the Convention by 9th December - 1984, the closing date for signature of the Convention, and to encourage the ratification of it or accession to it, thereafter.
(2) To promote the acceptance and application of the Convention in national legislation of States and in their relations on maritime issues with other States.
(3) To assist States, especially developing States, in the implementation of the Convention and in their development of national marine policies within the framework of the Convention.
(4) To effectively service the Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea. In doing so to ensure that the differences over the deep seabed mining part of the Convention would not be aggravated or widened.
(5) To maintain dialogue on ocean matters with all States whether signatories of the Convention or not, and to await the opportunity to promote dialogue on the difficulties that some industrialized

States have with Part XI of the Convention and to assist in resolving them.

With respect to the signature of the Convention, the efforts of the United Nations were highly successful. Through direct approaches to States it was possible to increase the number of signatures to 159 by the closing date in 1984. This was a record number for a complex and comprehensive instrument. Its significance in substantive terms was even greater in that 159 States and entities from all regions of the world and from all interest groups had agreed at least provisionally to accept the Convention even though some had reservations with respect to Part XI. It was an important step in building confidence in the Convention. This level of support certainly enhanced the status and authority of the Convention and made it easier for States to proceed to incorporate its provisions in their national legislation.

Promoting the acceptance and application of the Convention at national, sub-regional, regional, and global levels was perhaps one of the most important tasks. It does not serve the goal of universality of the Convention if States subscribed to it in formal terms but fail to apply its provisions in practice. It was equally important to ensure that State practice did not deviate from the provisions of the Convention to a point that would unravel the very delicate balance that was achieved on many key issues. The United Nations Office for Ocean Affairs and the Law of the Sea provided advice and assistance to States in an effort to encourage uniform and consistent application of the provisions of the Convention. This took many forms: Direct assistance to States in formulating certain legislation, reviewing and assisting with prospective legislation, clarifying certain provisions of the Convention, providing studies and publications on the antecedents of some of the key provisions, providing compendiums of national legislation on some key concepts, and providing information through the annual reports of the Secretary-General to the General Assembly and through the Law of the Sea Bulletin on current developments relating to the oceans.

The success that has been achieved in developing uniform and consistent application of the Convention is remarkable and beyond all expectations. The attached table of claims to maritime limits (Annex I) illustrates the progress that has been made in some key areas such as the breadth of the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf.

The Law of the Sea Convention is multi-faceted. It addresses all uses of the oceans and their resources. It creates a multitude of rights for States and imposes a multitude of responsibilities on them.

Effective implementation of this complex and comprehensive Convention requires the development of a national ocean management policy. The interrelated nature of the rights and duties and the interdependency of the different uses of the oceans presents a major challenge to many States, especially developing States. It was therefore imperative that if the Convention was to be meaningful to States, the United Nations and the United Nations' system provide States with assistance in implementing it. States do not see the need to adhere to a Convention if they cannot derive benefits from it. Addressing the needs of States in this context has been an important part of the strategy for promoting universality of the Convention. Two very useful reports on the needs of States in relation to the oceans have been presented to the General Assembly (A/45/721 and A/46/722). They together form a very valuable blueprint for continuing action in this area.

Since there is no consensus over the deep seabed mining provisions of the Convention, servicing the Preparatory Commission has been a very delicate and difficult matter. The United Nations Secretariat took the view that every effort should be made to avoid further polarization of the developed and developing States or to aggravate further the situation between signatories and nonsignatories of the Convention. This was made more difficult by the fact that one important State, the United States, had decided to boycott the Preparatory Commission. One of the measures taken by the Secretariat in this regard was to assume the responsibility for presenting the basic negotiating texts for the rules and regulations that were to be prepared by the Plenary and the Special Commissions, for the Mining Code, and for the setting-up of the various institutions under the Convention. This strategy had the effect, on the one hand, of preventing States from presenting their own draft rules with extreme positions which would have reignited the acrimonious debates and, on the other hand, of providing delegations with a common text for their negotiations from a neutral source. The maintenance of a smooth and harmonious atmosphere in the Preparatory Commission was essential to building confidence as a whole in the Convention, notwithstanding the differences that persisted on substance between the industrialized and the developing States with respect to Part XI. The Preparatory Commission, thanks to the leadership provided by its first chairman, Mr. Joseph Warioba, established from the beginning a record of a constructive and workman-like approach to its work. It systematically worked on those areas where broad agreement existed and set aside for discussion later those issues where major differences were well established.

A major challenge to the universal acceptance of the Convention lay in the implementation of the pioneer investors regime contained in Resolution II of the Conference. In these heady days of East-West cooperation, it is easy to forget the competition and the tension that existed between the East and the West until only recently. In the specific case of the deep seabed regime, this manifested itself in the competing claims to mine sites, most of which were concentrated in a narrow belt in the Northeast Pacific between the Clarion and Clipperton fractures. Given the limited area and the number of known claimants in that region, the potential for overlaps in areas to be claimed was recognized in Resolution II. It, in fact, prescribed the procedure for resolving such overlaps through negotiations and, if necessary, by arbitration before an application for registration as a pioneer investor was made.

In 1984, when the Soviet Union and then France and Japan deposited their respective applications for registration as pioneer investors with the Special Representative of the Secretary-General for the Law of the Sea, it became known that the overlap that existed between France and Japan had been resolved as had been the overlaps amongst a number of potential applicants based in the United States. There was, however, no dialogue on this matter between the Soviet Union, on the one hand, and France and Japan, on the other, nor with other potential Western applicants. The Soviet Union, in fact, insisted that its claim should be registered as a matter of priority since it was lodged before that of France and Japan. It also insisted that the Commission could not take into account any unilateral claims made outside the Commission, especially by the four consortia based in the United States, which included companies from the Federal Republic of Germany, the United Kingdom, and the U.S., nonsignatories to the Convention.

The Preparatory Commission and the United Nations were put in an extremely difficult position. Any precipitous action by the Commission not only would have aggravated the relations among States, but also had the potential to destroy Part XI of the Convention and with it the Commission itself. It would have possibly lost the cooperation of many industrialized States and threatened the viability of the Convention as a whole.

The Commission wisely insisted that the four applicants -- which included India whose claim was in the Indian Ocean -- exchange coordinates to ascertain if their claims overlapped and, if so, to resolve them before they could be registered as pioneer investors.

When, in 1985, the Special Representative of the Secretary General for the Law of the Sea in the exercise of his good offices convened a

meeting of the four applicants in Geneva for the purpose of exchanging coordinates, it was discovered that there were major overlaps in the areas claimed by France and the Soviet Union and a substantial overlap between the areas claimed by Japan and the Soviet Union. It was also apparent that there were further overlaps between the claim of the Soviet Union and the areas claimed by three of the four U.S.-based consortia.

The extent and the nature of the overlaps were such that the parties, especially France and the Soviet Union, did not find it possible to resolve them without help. Eventually, in August 1985, at a technical meeting convened by the Special Representative with the three States, an agreement was reached on three principles on the basis of which the parties would try to resolve the conflicts in their claims. These were as follows:

1) The three applicants will reduce their respective claims for pioneer areas to be allocated to them through advance relinquishment of one half of the area to be allocated to each of them, that is, from 150,000 sq.kms. to 75,000 sq.kms., thereby making it easier for them to divide the prime areas which were the subject of the overlaps. They were also entitled to identify up to 32,300 sq.kms. of preferred area that would be included in the areas to be allocated to each of them by the Preparatory Commission. There is no scientific basis for the figure of 32,300. It just happened to be one half of the total overlap that the Soviet Union had with France and Japan.

2) In resolving their own overlaps, the three applicants must jointly ensure that the Authority has a viable mine site qualitatively equivalent to the average of the mine sites allocated to the three applicants in the central zone where most of the first generation of prime sites existed and where the overlaps had occurred.

3) That the interest of potential applicants for pioneer investor status should be taken into account before registration could take place.

Early in 1986, on the basis of the first two principles, France, Japan, and the Soviet Union were able to resolve their overlapping claims through what is known as the "Arusha Understanding." The third principle could not be implemented without the participation of the potential pioneer investors, in particular the United States. Since the United States was not participating in the Preparatory Commission, its other partners in the four multinational consortia, namely, Belgium, Canada, the Federal Republic of Germany, Italy, Japan, the

Netherlands, and the United Kingdom opened a dialogue with the Soviet Union. This eventually culminated in what is known as the "midnight agreement" of 14 August 1987 on all overlaps following two-tier negotiations, one between the Soviet Union and the other signatories to the Convention, and the other, a less formal meeting between the Soviet Union and the other signatories plus the three nonsignatories -- the Federal Republic of Germany, the United Kingdom, and the United States. It should be noted that the actual technical negotiations to resolve the overlaps took place between the representatives of each of the consortium and the representatives of the Soviet mining entity.

The Arusha Understanding and the "mid-night agreement" with some further negotiations in the Preparatory Commission paved the way for the unanimous decision to register the applicants sponsored by France, Japan, and the Soviet Union as pioneer investors on 17 December 1987. India had been registered already on 17 August 1987. This was an historic achievement in international law. For the first time, States had acquired international areas in the deep ocean by the common consent of the international community. We now have six registered pioneer investors. In addition to those from France, India, Japan, and the Soviet Union, an application from China and one from an East European (formerly Socialist) consortium based in Poland have also been registered. Each pioneer investor has paid a registration fee of $250,000; and the Secretary-General of the United Nations has issued a certificate of registration to each of them.

The importance of recapitulating the process of resolving the conflicts that had arisen in the mining areas claimed by different States is to underscore that the States concerned (signatories and nonsignatories), the Preparatory Commission, and the United Nations played critical and constructive roles in ensuring that the broad support that the Convention enjoyed was not put into jeopardy. The responsible manner in which the Preparatory Commission acted in the matter augurs well for the future International Seabed Authority and argues in favor of the need for universal participation in the Convention.

An essential strategy that was followed by the Secretary-General and by me as his Special Representative over the past ten years has been to maintain dialogue on law of the sea matters with all member states of the United Nations whether signatories of the Convention or not. There was a deliberate effort on the part of the Secretariat to involve some of the nonsignatories together with signatories in the activities of the Office for Ocean Affairs and the Law of the Sea, such as participation in the meetings of groups of experts on a number of

technical matters arising out of the implementation of the provisions of the Convention. The purpose was to keep all States together and engaged in the implementation of the Convention provisions on which there was already a broad consensus while waiting for an opportunity to open up a dialogue on the outstanding issues relating to Part XI.

By 1989, the number of ratifications or accessions to the Convention steadily increased towards the required sixty. It stands at fifty-one today. At the same time, there was improvement in international relations, from tension and confrontation towards cooperation in resolving outstanding global issues. The Secretary-General, following an extensive sounding by his Special Representative with States and his own bilateral exchanges with some of the key nonsignatory States, decided to convene informal consultations on the outstanding issues. The first of these consultations took place on 19 July 1990 and by the end of 1991 six such consultations had taken place. The result of these consultations were summarized by me as acting chairman on 31 January 1992 and circulated to all States. Since there is not enough time for me to deal fully with this important matter, I have attached a copy of this summary as Annex II to this statement.

The participation in these consultations included a representative group of some thirty States from all regions and all interest groups including Germany, the United Kingdom, and the United States. After ascertaining the willingness of the participants to examine the outstanding issues relating to Part XI of the Convention, the Secretary-General identified nine areas that needed to be addressed. These are: (1) cost to States Parties; (2) the Enterprise; (3) decision-making; (4) Review Conference; (5) transfer of technology; (6) production limitation; (7) compensation fund; (8) financial terms of contract; and (9) environmental considerations.

Participants agreed to examine these issues one by one. To facilitate discussion, Information Notes on the issues were provided by the Special Representative. These contained background information, identified questions that needed to be addressed and suggested possible approaches towards their resolution. On 11 December 1991, Secretary-General Javier Perez de Cuellar summarized the results of the consultations as follows:

> In the process of examining the areas of difficulties, a solid foundation has been laid for resolving them which should be built upon. It is apparent that some of the issues need to be dealt with in detail at this stage. Others, however, can be resolved by way of agreement on certain fundamental principles, on the basis of which detailed rules and regulations may be established when

commercial production of metals from the deep seabed becomes feasible.

The Secretary-General also stated that the next step in the process was to give more precision to the emerging approaches towards resolving the issues. This suggests that the emerging understanding on each issue should be reflected in a series of concise statements as a step towards eventually converting them into draft articles of an agreement.

While the United States remains very hesitant and tentative about the process, all other States are committed to it. The fact is that the process of reconciliation on Part XI has begun, and it is the responsibility of every State to take advantage of this window of opportunity. I believe the most difficult task, that of engaging everyone in the process, has been accomplished. The Group of 77 (the group of developing States) must be given full credit for agreeing to participate in the dialogue without any precondition. They have already shown ample disposition towards resolving the outstanding issues in a manner satisfactory to all.

By identifying the key issues and by discussing possible approaches towards resolving them, the participants have already gone a long way down the road towards an agreement. I believe that the process, which has been carefully prepared over the past ten years and delicately and firmly launched over the past three years by Secretary-General Perez de Cuellar and myself, will eventually succeed. If it does, we would have indeed succeeded in making the Convention a truly universal instrument.

In conclusion let me recapitulate:

In the ten years that have elapsed, the United Nations has carefully nurtured the Convention. It has vigorously promoted its acceptance by States and has strongly supported the application of its provisions in State practice. It has succeeded in preventing further aggravation of the division over Part XI of the Convention. Finally, it has successfully launched a dialogue among States on the outstanding issues and suggested possible compromises on the basis of which an agreement can be reached.

The United Nations through the Office of the Secretary-General's Special Representative for the Law of the Sea has played a positive and constructive role over the past ten years in fostering the universal acceptance of the rule of law over what is seventy percent of the earth's surface and in promoting the peaceful uses of the seas and oceans.

Annex I

CLAIMS TO MARITIME LIMITS AS AT 18 JUNE 1992

STATES	CONVENTION RATIFICATION/ ACCESSION	TERRITORIAL SEA	CONTIGUOUS ZONE	EXCLUSIVE ECONOMIC ZONE	FISHERY ZONE	CONTINENTAL SHELF
Albania		12				200m/EXP
Algeria		12				
*Angola [a/]	5/12/90	20			200	
*Antigua and Barbuda	2/2/89	12	24	200		200/CM
Argentina		12		200		200m/EXP
Australia		12			200	200m/EXP
*Bahamas	29/7/83	3			200	200m/EXP
*Bahrain	30/5/85	3				
Bangladesh		12	18	200		CM
Barbados		12		200		
Belgium		12			Up to the median line with neighbouring States	Up to the median line with opposite and adjacent States
*Belize	13/8/83	12		200		
Benin		200				
*Brazil	22/12/88	200				
Brunei Darussalam		12			200	
Bulgaria		12	24	200		
Cambodia		12	24	200		200nm
*Cameroon	19/11/85	50				
Canada		12			200	200/CM
*Cape Verde	10/8/87	12		200		
Chile [b/]		12	24	200		200/350
China		12	24			
Colombia		12		200		200m/EXP
Comoros		12		200		
Congo		200				
Costa Rica		12		200		200m/EXP
*Côte d'Ivoire	26/3/84	12		200		200nm
*Cuba	15/8/84	12		200		
*Cyprus	12/12/88	12				EXP
Dem. Peo. Rep. of Korea		12		200		

a/ States indicated with an asterisk (*) have ratified the United Nations Convention on the Law of the Sea. States indicated with a double asterisk (**) have acceded to the Convention.

b/ A 350-nm continental shelf limit applies to Sala y Gomez and Easter Island.

STATES	CONVENTION RATIFICATION/ ACCESSION	TERRITORIAL SEA	CONTIGUOUS ZONE	EXCLUSIVE ECONOMIC ZONE	FISHERY ZONE	CONTINENTAL SHELF
*Democratic Yemen [c/]	21/7/87	12	24	200		200/CM
Denmark		3			200	200m/EXP
*Djibouti	8/10/91	12	24	200		
*Dominica	24/10/91	12	24	200		
Dominican Republic		6	24	200		200/CM
Ecuador		200				200/iso
*Egypt	26/8/83	12	24	200		200m/EXP
El Salvador		200				
Equatorial Guinea		12		200		
Ethiopia		12				
*Fiji	10/12/82	12		200		200m/EXP
Finland		4	6		12	200m/EXP
France		12	24	200		200m/EXP
Gabon		12	24	200		
*Gambia	22/5/84	12	18		200	
German Dem. Republic [d/]		12			Up to equidistance line with neighbouring States	200m/EXP
Germany, Fed. Rep. of [d/e/]		3/16			200	200m/EXP
*Ghana	7/6/83	12	24	200		200nm
Greece			6/10			200m/EXP
*Grenada	25/4/91	12		200		
Guatemala		12		200		200m/EXP
*Guinea	6/9/85	12		200		
*Guinea-Bissau	25/8/86	12		200		
Guyana		12			200	200/CM
Haiti		12	24	200		EXP
Honduras		12		200		200m/EXP
*Iceland	21/6/85	12		200		200/CM
India		12	24	200		200/CM
*Indonesia	3/2/86	12		200		EXP
Iran (Islamic Rep. of)		12			50	

c/ On 22 May 1990 Democratic Yemen and Yemen merged to form a single State. Since that date they have been represented at the United Nations as one Member with the name "Yemen".

d/ Through accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German States united to form one sovereign State. As from the date of unification, the Federal Republic of Germany has acted in the United Nations under the designation of "Germany".

e/ A Decree for Preventing Tanker Casualities in the German Bight was promulgated on 12 November 1984 extending the territorial sea of the Federal Republic of Germany in the North Sea to 16 nm.

STATES	CONVENTION RATIFICATION/ ACCESSION	TERRITORIAL SEA	CONTIGUOUS ZONE	EXCLUSIVE ECONOMIC ZONE	FISHERY ZONE	CONTINENTAL SHELF
*Iraq	30/7/85	12				
Ireland		12			200	
Israel		12				EXP
Italy		12				200m/EXP
*Jamaica	21/3/83	12		200		200m/EXP
Japan		12			200	
Jordan		3				
*Kenya	2/3/89	12		200		200m/EXP
Kiribati		12		200		
*Kuwait	2/5/86	12				
Lebanon		12				
Liberia		200				
Libyan Arab Jamahiriya		12				
Madagascar		12	24	200		200/iso
Malaysia		12		200		200m/EXP
Maldives		12		f/		
Malta		12	24		25	200m/EXP
**Marshall Islands	9/8/91	12	24	200		
Mauritania		12	24	200		200/CM
Mauritius		12		200		200/CM
*Mexico	18/3/83	12	24	200		200/CM
**Micronesia (Fed. States)	29/4/91	12		200		
Monaco		12				
Morocco		12	24	200		
Mozambique		12		200		
Myanmar		12	24	200		200/CM
Namibia		12		200		g/
Nauru		12			200	
Netherlands		12			200	200m/EXP
New Zealand		12		200		200/CM
Nicaragua		200				
*Nigeria	14/8/86	30		200		200m/EXP
Norway		4		200		200m+np h/
*Oman	17/8/89	12	24	200		
Pakistan		12	24	200		200/CM

f/ Maldives has proclaimed an exclusive economic zone which is defined by coordinates (see Status of the United Nations Convention on the Law of the Sea (United Nations publication, Sales No. E.85.V.10), p. 173).

g/ Namibia has proclaimed a continental shelf "as defined in the [United Nations] Convention [on the Law of the Sea]. No specific limits are given.

h/ Includes natural prolongation of the continental shelf.

STATES	CONVENTION RATIFICATION/ ACCESSION	TERRITORIAL SEA	CONTIGUOUS ZONE	EXCLUSIVE ECONOMIC ZONE	FISHERY ZONE	CONTINENTAL SHELF
Panama		200				
Papua New Guinea		12			200	200m/EXP
Peru		200				200nm
*Philippines	8/5/84			200		EXP
Poland		12		As determined by treaties	Up to a line to be determined by international agreement	Up to a line to be determined by international agreement
Portugal		12		200		200m/EXP
Qatar		3			Up to median line with neighouring States or international agreement	
Republic of Korea		12				
Russian Federation		12		200		200m/EXP
Romania		12	24	200		200m/EXP
Saint Kitts and Nevis		12	24	200		200/CM
*Saint Lucia	27/3/85	12	24	200		200/CM
Saint Vincent + Grenadines		12	24	200		200nm
Samoa		12		200		
*Sao Tome and Principe	3/11/87	12		200		
Saudi Arabia		12	18			
*Senegal	25/10/84	12	24	200		200/CM
*Seychelles	16/9/91	12		200		200/CM
Sierra Leone		200				200m/EXP
Singapore		3				
Solomon Islands		12		200		200nm
*Somalia	24/7/89	200				
South Africa		12			200	200m/EXP
Spain		12		200		200m/EXP
Sri Lanka		12	24	200		200/CM
*Sudan	23/1/85	12	18			200m/EXP
Suriname		12		200		
Sweden		12			Up to equidistance line with neighbouring States	200m/EXP
Syrian Arab Republic		35				200m/EXP
Thailand		12		200		200m/EXP

STATES	CONVENTION RATIFICATION/ ACCESSION	TERRITORIAL SEA	CONTIGUOUS ZONE	EXCLUSIVE ECONOMIC ZONE	FISHERY ZONE	CONTINENTAL SHELF
*Togo	16/4/85	30		200		
Tonga		12		200		200m/EXP
*Trinidad and Tobago	25/4/86	12	24	200		200m/EXP
*Tunisia	24/4/85	12				
Turkey[i/]		6			12	
Tuvalu		12	24	200		
Ukraine		12		200		200m/EXP
United Arab Emirates[j/]		3		Up to the boundary with neighbouring States. If no boundary, up to median line		
United Kingdom		12			200	200m/EXP
*United Rep. of Tanzania	30/9/85	12		200		
United States of America		12		200		200m/EXP
Uruguay		200				200m/EXP
Vanuatu		12	24	200		200/CM
Venezuela		12	15	200		200m/EXP
Viet Nam		12	24	200		200/CM
Yemen [g/]		12				
*Yugoslavia	5/5/86	12				200m./EXP
*Zaire	17/2/89	12		200		
Others under article 305, paragraph 1						
Cook Islands		12		200		200/CM
Niue		12		200		

i/ A limit of 12 nm applies in the Mediterranean Sea and the Black Sea.
j/ A limit of 12 nm applies to Sharga.

TERITORIAL SEA

Breadth (Nautical miles)	Number of States
3	7
3/16	1
4	2
6	2
12	114
20	1
30	2
35	1
50	1
200	12

CONTIGUOUS ZONE

Breadth (Nautical Miles)	Number of States
6	1
6/10	1
12	1
15	1
18	4
24	34

EXCLUSIVE ECONOMIC ZONE

Breadth (Nautical miles)	Number of States
200	82
Defined by coordinates	1
Determined by treaty	1
Boundary or median line	1

FISHERIES ZONE

Breadth (Nautical miles)	Number of States
12	2
25	1
50	1
Median line	2
Equidistant line	2
Determined by treaty	1
200	16

CONTINENTAL SHELF

Criteria	Number of States
200 metres depth plus exploitability (200m/EXP)	42
200 nautical miles (200nm)	6
200 nautical miles plus continental margin (200/CM)	21
Continental margin (CM)	1
200 nm or 100 nm from 2,500 metre isobath (200/iso)	1
200 or 350 nautical miles breadth (200/350)	1
Exploitability (EXP)	4
200 nautical miles plus natural prolongation	1
Median line	2
As defined in the Convention	1

Annex II

31 January 1992

Summary of the Informal Consultations on the Law of the Sea Convened by Secretary-General Perez de Cuellar During 1990 and 1991

1. In light of the decision of the General Assembly inviting States to make renewed efforts to achieve universal participation in the United Nations Convention on the Law of the Sea, the Secretary-General convened a number of informal consultations to promote dialogue aimed at addressing issues of concern to some States which have inhibited their participation in the Convention. In the course of these informal consultations nine such issues were identified: costs to States parties; the Enterprise; decision-making; the Review Conference; transfer of technology; production limitation; compensation fund; financial terms of contracts; and environmental considerations.
2. Participants agreed to examine all the issues before determining how to deal with them. Information Notes were provided by the Secretariat to assist in the examination of the issues. These contained background information, identified questions that needed to be addressed and suggested possible approaches towards the resolution of the issues.
3. The suggested approaches took into account that nine years had elapsed since the Convention was adopted during which time a number of important political and economic changes have taken place affecting international relations in general. Many of these have directly or indirectly affected the deep seabed mining part of the Convention. These include the following:

(a) the general economic climate has changed markedly in the last decade;

(b) the approaches to economic issues at national and international levels have also undergone a considerable transformation;

(c) prospects for commercial production of minerals from the deep seabed have receded into the next century, contrary to the expectations held when the Convention was being negotiated;

(d) the prolonged economic downturn that the world has experienced in the last decade or so has also seriously affected the world metal market to the extent that the premises on which certain provisions of the deep seabed mining regime were based have changed;

(e) as the work of the Preparatory Commission has progressed, there has been greater understanding of the practical aspects of deep seabed mining, as more information on them has become available.

4. With the changed circumstances, many of the issues of concern are more widely shared today, and the approaches towards resolving them are also more broadly accepted than was the case when the Convention was being negotiated. In addition greater knowledge of deep seabed mining activities has given States more confidence in addressing these issues.

5. In assessing the discussions that have taken place, the Secretary-General on 11 December 1991 stated that:

> In the process of examining the areas of difficulties, a solid foundation has been laid for resolving them which should be built upon. It is apparent that some of the issues need to be dealt with in detail at this stage. Others, however, can be resolved by way of agreement on certain fundamental principles on the basis of which detailed rules and regulations may be established when commercial production of minerals from the deep seabed becomes feasible.
>
> Given the pragmatism and the commitment that has already been demonstrated by States, I believe these issues can be resolved to the satisfaction of all. A generally acceptable and workable regime for the development of the resources of the deep seabed is in the interest of all States. It will provide a level of certainty regarding the regulatory environment in which prudent investment decisions can be made and at the same time encourage the development of the resources of the deep seabed for the benefit of all mankind. It is thus the responsibility of all to make a serious effort to reach an agreement on the outstanding issues, in the interest of international cooperation and the promotion of the rule of law in the oceans. I particularly urge those that have been hesitant or not as forthcoming as others to take advantage of the window of opportunity that we have here for resolving their problems.
>
> This informal forum has proved to be quite effective. Perhaps the next step in the process is to give more precision to the emerging

approaches towards resolving the issues. I also believe that the opportunity should be given to all interested States to participate in these consultations. This could probably be done through open-ended meetings, while maintaining a core group.

6. The nine key issues identified were examined during the six informal consultations convened by the Secretary-General in 1990 and 1991. The discussion on each of them may be summarized as follows:

I. Costs to States Parties

7. It was noted that there are a number of financial obligations for States when the Convention enters into force. States Parties are required to contribute towards the administrative costs of the Authority. These costs will be determined by the frequency and duration of the meetings of the Assembly, the Council, the Economic Planning Commission, the Legal and Technical Commissions and other subsidiary bodies established by the Authority. The cost of the Secretariat of the Authority will be determined by its size which in turn will depend on the services it is required to provide. In addition to the administrative costs of the Authority, States parties are also required to finance the first mining operation of the Enterprise. The Convention provides that fifty percent of the funds are to be provided by way of long-term interest-free loans while debts incurred by the Enterprise in raising the other fifty percent are to be guaranteed by States parties. States parties are also expected to contribute to the administrative costs of the twenty-one member International Tribunal for the Law of the Sea, an essential component of the dispute settlement system for the Convention as a whole.

8. Under the Convention the Commission on the Limits of the Continental Shelf is to be convened by the Secretary-General in New York and serviced by the Secretariat of the United Nations. This responsibility together with other substantive responsibilities imposed on the Secretary-General contained in different parts of the Convention and related resolutions of the Third United Nations Conference on the Law of the Sea were assumed by the Secretary-General of the United Nations, upon approval by the thirty-eighth session of the General Assembly.

9. It was noted that, because of the unanticipated prolonged delay in the development of the deep seabed mining industry, the Authority will not be expected to deal with commercial deep seabed mining activities for at least the initial ten to fifteen years. Its administrative functions would, therefore, relate to the various stages of pre-

commercial production activities. These will include receiving and processing of any new applications for mine sites and approving plans of work for the exploration phase; monitoring the implementation of the obligations of the operators in that phase; monitoring and reviewing trends and developments relating to deep seabed mining activities including those concerning the marine environment and the development of technology; assessing the feasibility of commercial deep seabed mining; monitoring the training program being carried out by operators; and studying the problems that may arise from deep seabed mining for the economies of developing land-based mineral producer States.

10. The discussions revealed that there exists a broad consensus on a number of matters that were raised in the Information Note. There was general agreement that costs to States Parties should be minimized; that all institutions to be established under the Convention should be cost effective. In this regard there was general agreement that the establishment of the various institutions should be based on an evolutionary approach, taking into account the functional needs of the institutions concerned in order to discharge their responsibilities effectively at each stage. These principles apply to the organs of the Authority and its subsidiary bodies.

11. There was general agreement also on the streamlining of the meetings of the various institutions so as to reduce costs. This applies to the structure of the institutions, including the need to phase in the subsidiary bodies and to the frequency and scheduling of meetings of the various organs. There was also general agreement that this functional approach should also apply to the establishment of the International Tribunal for the Law of the Sea and that the Tribunal should be phased in to reduce costs.

12. The principle of cost effectiveness will also apply to the Secretariat of the United Nations as regards the servicing of the Commission on the Limits of the Continental Shelf and other responsibilities of the Secretary-General under the Convention and resolutions of the General Assembly.

II. The Enterprise

13. It was recognized that, in the light of the prolonged delay in the development of deep seabed mining activities, it was unlikely that the Enterprise would be able to undertake operational activities on its own for quite some time. If seabed mining becomes technologically and economically feasible, consideration will need to be given to the various organizational and operational options for the Enterprise. In

doing so, it should be noted that the Enterprise was intended to provide an opportunity for all States, especially developing States, to participate in deep seabed mining. It should also be recognized that there is a growing global trend in favor of more efficient market-oriented commercial operations.

14. There was agreement, therefore, that the operations of the Enterprise should be based on sound commercial principles and that it should be autonomous and free from political domination. There was also agreement that in order to minimize costs to States Parties the Enterprise should begin its operations through joint venture arrangements and thus there would be no need to invoke the funding provisions of the Convention relating to the first mining operation of the Enterprise. This should not, however, reduce the future operational options of the Enterprise, nor affect its autonomy.

III. Decision-making

15. It was recognized that a generally acceptable decision-making procedure in the organs of the Authority and in its subsidiary bodies was essential to building confidence in the deep seabed mining system. Furthermore, a resolution of the concerns regarding the decision-making procedure would considerably enhance the prospect of agreement on other issues.

16. With regard to the Assembly, there was agreement that all matters of substance should be decided by two-thirds majority of States present and voting, as provided for in the Convention. The only issue raised, however, was the procedure to be followed by the Assembly with respect to certain specific decisions which require a prior recommendation of the Council and where the Assembly does not agree with that recommendation. In most of such cases the Convention provides that decisions of the Assembly are to be based on the recommendations or proposals of the Council. On certain matters the Convention goes on to provide that, if the Assembly does not approve the recommendations of the Council, it shall return them to the Council for reconsideration in the light of the views expressed by the Assembly. This procedure is not clearly indicated with respect to certain other matters, such as the adoption of the annual budget of the Authority proposed by the Council. Since this is an issue of particular concern to all States, it was agreed that the procedure ought to be clarified, so that the decision of the Assembly and the recommendation of the Council are consistent. It was also agreed that consideration should be given to establishing a relationship between the Council and

the Assembly with respect to the assessment of contributions of States Parties to the administrative budget of the Authority.

17. It was recognized that the Council, as the executive organ of the Authority, had a pivotal role in the administration of the mineral resources of the deep seabed. It was agreed that the nature and functions of the Council required that its composition should reflect a fair balance of interests. There are two principal interests: that of the international community as a whole and that of the investors in deep seabed mining activities. There are two other interests involved: those of the consumers of minerals to be produced from the deep seabed or importers of commodities which are produced from such minerals and those of the land-based producers of such minerals.

18. It was further recognized that the general structure as provided in the Convention for the membership of the Council, which is divided into five chambers consisting of different categories of States, represents the various interests involved. It was, however, accepted that certain aspects of the composition and structure of the Council needed to be updated, clarified and streamlined as suggested in the Information Note. In this regard further attention needs to be given to the following:

(a) a clearer identification of States in each category where this is necessary;

(b) whether a State can be listed in more than one category; if not, whether that State will have to elect the category it wishes to represent in the Council; and

(c) how to ensure that all States within a category will have an opportunity to serve in the Council if they so wish.

19. As regards decision-making in the Council, there was general recognition that the mechanism should be fair and equitable to all interests and that the process should reflect democratic principles. It must also provide equal safeguards to each of the interest groups, as well as to the international community as a whole. Furthermore, the procedure should encourage decisions by consensus and voting should be only a last resort. Most participants found that a chamber system of voting, as suggested in the Information Note, but based on the five categories as is provided for in the Convention, presented a mechanism that would achieve the above goals, provided that each chamber has equal possibility of protecting its interests. The Information Note suggested that decision-making in the Council on questions of

procedure should be by a majority of members present and voting. Decision-making on questions of substance should be by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers. Decisions within each chamber on matters of substance may be taken by a simple majority. There was general willingness to pursue this approach further, without prejudice to the consideration of other possible approaches.

20. As regards the Economic Planning Commission and the Legal and Technical Commission, there was general agreement that their procedures should be simple, as suggested in the Information Note. As far as possible they should work on the basis of consensus and voting should be only a last resort. The precise voting mechanism might depend on the procedure that will be adopted for the Council. There was agreement, however, that a special procedure for the approval of a plan of work in the Legal and Technical Commission was required, as has been envisaged in the Convention. There was also agreement on the special procedure suggested in the Information Note.

21. As far as the Finance Committee is concerned, it was noted that this was being discussed in the Preparatory Commission where considerable progress has been made already. It was pointed out, however, that if an agreement could be reached with respect to the decision-making procedure in the Council, this would considerably facilitate agreement in respect of the Finance Committee. Reference was also made to the relationship between the Finance Committee and the Council and the Assembly, and also to the need for representation in the Finance Committee of States, which will be among the highest contributors until the Authority becomes financially self-sufficient.

IV. Review Conference

22. There was general agreement that the problem surrounding the Review Conference must be addressed and resolved. There are two issues here, both relating to procedure: first, the procedure to be applied for the adoption of an amendment at the Review Conference, should a consensus not be reached within five years of the commencement of the Conference, and second, the procedure necessary for the entry into force of an amendment. The procedure prescribed in the Convention for both these issues, which in each case is based on a qualified majority, is a matter of concern for a number of States, since they are of the view that an amendment not acceptable to them could be adopted and imposed upon them.

23. With respect to the procedure for adoption of an amendment in the absence of consensus, there was considerable interest in the suggestion made in the Information Note that an amendment may be adopted by a two-thirds majority of members present and voting, provided that it was not opposed by a majority of members in any one of the categories in the Council. Such a procedure would ensure a broad support for the amendment and also would provide a safeguard, at the time when the amendment is adopted by the Review Conference, to those States which have special interest in deep seabed mining.

24. On the second issue, i.e., the procedure for bringing the amendment into force, it was suggested in the Information Note that, for this purpose, the ordinary rules for an amendment to the Convention should apply, i.e., ratification or accession by two-thirds of the States parties or by sixty States, whichever is greater, with the addition that such an amendment shall be binding on all States Parties in order to avoid having two régimes governing deep seabed mining at the same time. This was not considered entirely satisfactory to a few participants who felt that the amendment should be ratified by all States before it enters into force. It was, however, recognized that this could create practical difficulties by imposing a condition which would be almost impossible to fulfill, considering the large number of States involved. An all States formula may frustrate the bringing into force of a generally acceptable and necessary amendment. A suggestion was made that a possible solution to the problem may lie in building into the ratification procedure the chamber system suggested for the Council. The difficulty with this proposal is that the membership of the Council will change from the date of adoption of the amendment to the date of its entry into force which may take a number of years. Another suggestion was that the ordinary procedure for entry into force of amendments prescribed in the Convention might be combined with a decision of the Council regarding the effective date of entry into force of the amendment following the receipt of the required number of ratifications or accessions.

25. In general, the participants felt that there should be a combination of quantitative and qualitative approaches as regards the procedure for entry into force. The quantitative aspect will ensure that there is broad support for an amendment and the qualitative aspect will ensure that States in all categories are involved. The discussion concluded with the agreement that the search for an appropriate solution should be continued.

V. Transfer of Technology

26. Since there was already a convergence towards the view that the Enterprise should begin its operations through commercial joint ventures, there was general agreement that the availability of technology to the Enterprise should be part of the joint venture arrangement. This is consistent with the provisions of the Convention and the prevailing view in the Preparatory Commission. It was recognized, therefore, that the imperative provisions in the Convention on transfer of technology may no longer be considered as relevant as they were when the Convention was being negotiated. The Information Note had suggested that, in any case, there should be agreement on a general provision that the Authority may invite all contractors and their respective sponsoring States to cooperate with it in the acquisition of technology by the Enterprise or the joint venture on fair and reasonable terms and conditions, if the technology in question was not available on the open market. In addition, all States Parties should undertake in good faith to assist the Enterprise to become a viable commercial entity and to engage successfully in deep seabed mining operations. States sponsoring deep seabed mining operations and those whose nationals may develop such technology should agree to take effective measures consistent with this obligation.
27. Participants recognized that the issue of transfer of technology would have to be resolved. They found the approach in the Information Note a useful basis for the resolution of this issue. Some participants required more time to consider the proposal.

VI. Production Limitation

28. There was general recognition that the production limitation formula in Article 151 was no longer as practical as it was during the negotiations at the Conference. The formula was devised to limit for an interim period the production of minerals from the deep seabed to 60% of the growth in consumption of nickel, calculated on the basis of data of the previous fifteen years at the time when each production authorization was issued.
29. In the late seventies, the trend in the rate of growth of consumption of nickel was around 4%. This would have enabled eight to ten mining projects to operate under the formula by the year 2000. There has, however, been a dramatic decline in nickel consumption and in the metal market in general. The growth rate in nickel consumption which was around 3.7% for the period 1965 to 1979 had dropped to around 1.6% for the period 1972 to 1986. This would permit approxi-

mately two operations in the year 2000. The formula has thus been rendered more restrictive than was envisaged. Furthermore, it does not adequately protect land-based producers of the other three important metals to be produced from the deep seabed.

30. Land-based producers are concerned that the principle of free competition must be maintained and that their products are not displaced from the market by subsidized production of minerals from the deep seabed. There should be no preferential access to markets for such minerals through the use of tariff or non-tariff barriers. Developing land-based producers of similar metals also believe that the minerals they export should be given special consideration.

31. The discussion of the issues revealed that there was general agreement that due to lapse of time and the major changes in the economic situation that have occurred, and using the recent statistical data available, the formula is no longer as practical as when it was adopted in that it has become more restrictive than was intended and will, therefore, not accommodate all aspiring seabed miners. There was also general agreement that it was neither necessary nor prudent at this stage to establish a new set of detailed rules for the implementation of production policy in the light of the expected delay in commercial deep seabed mining and the lack of adequate data on its impact.

32. There was, however, a broad agreement that it was better at this stage to establish certain principles on the basis of which detailed rules and regulations may be established when commercial production was imminent. The principles that were considered for this purpose and on which there was a convergence were as follows:

(a) there should be no subsidization of production of minerals from the deep seabed;

(b) there should be no discrimination between minerals from land and from the deep seabed; in particular, there should be no preferential access to markets for minerals produced from the deep seabed by use of tariff or non-tariff barriers or for imports of commodities produced from such minerals, nor should any preference be given by States to minerals produced from the deep seabed by their nationals;

(c) the plan of work approved by the Authority in respect of each mining area should indicate a production schedule which should include the estimated amounts of minerals that would be produced per annum under that plan of work;

(d) the rights and obligations relating to unfair economic practices under the relevant multilateral trade agreements shall apply to the exploration and exploitation of minerals from the deep seabed area;

(e) any disputes concerning the interpretation or application of the rules and regulations based on the above principles shall be subject to the dispute settlement procedures under the Convention.

33. In the course of the discussion of the above principles, it was stated by some delegations that special consideration should be given to the exports of minerals from developing land-based producers. An observation was also made that the above principles may not be an adequate substitute for the production limitation formula.

VII. Compensation Fund

34. It was generally recognized that the economies of land-based producer States of the minerals to be derived from the deep seabed which are heavily dependent upon the export of such minerals are vulnerable to the impact of deep seabed mining. It was therefore agreed that the affected developing land-based producer States should be provided with some economic assistance. There were, however, a number of matters of detail which need to be fully elaborated and agreed upon, such as the level of dependency, the proof of adverse impact due to seabed activities, the nature of economic assistance or compensation to be provided, and the length of the period of adjustment during which assistance is to be provided. These and other related issues will need to be studied on a continuous basis. In this regard, it was noted that considerable ground-breaking work has been done by the Preparatory Commission which should be built upon by the Authority. The precise measures that may be taken in anticipation of possible adverse effects, however, can only be more realistically developed when commercial deep seabed mining has begun or is imminent. Factors that may influence the determination of these measures will include the amount of deep seabed minerals that might be actually produced, the market conditions prevailing at the time, the number of land-based producer States that may be affected and the nature of their problems.

35. Taking into account the delays in deep seabed mining and the uncertainty of the conditions that may be prevailing at the time when production from the deep seabed takes place, it was agreed that it may

not be prudent at this stage to develop a detailed system of assistance for affected developing land-based producer States. Instead, it was agreed that certain principles could be established which in the future would be the basis for the development of such a system of assistance.
36. It was generally agreed that the following principles could be the basis for development of a system in the future:

(a) an economic assistance fund should be established from a percentage of the revenues of the Authority over and above those necessary for covering the Authority's administrative expenses in accordance with Article 173 (2), provided that the amount accumulated in such fund does not at any time exceed a prescribed limit;

(b) the Authority should provide assistance from the fund to affected developing land-based producer States where appropriate in cooperation with existing global or regional development institutions which have the infrastructure and expertise to carry out such assistance programs;

(c) the extent and period of such assistance shall be determined on a case-by-case basis. In doing so, due consideration should be given to the nature and magnitude of the problems encountered by affected developing land-based producer States.

VIII. Financial Terms of Contracts

37. The main concerns regarding the present systems of taxation relate to such issues as whether the payments impose too heavy a burden on seabed miners and whether the two systems prescribed in the Convention are too elaborate. Some States interested in deep seabed mining are of the view that changed circumstances call for a review of the systems and the rates of taxation. The front-end payments that are to be incurred before mining income is generated are considered onerous by these States. They would prefer two levels of fixed annual fees -- one for exploration only and the other for exploration and exploitation.
38. Other States are of the view that before mining income is generated, some reasonable payment should be made once prospective deep seabed miners have secured exclusive mining areas and obtained exploration rights. They are also concerned that lower rates of taxation of the mining income would not only reduce the revenues of the Authority, but would also give rise to the possibility that deep seabed

miners would have a competitive advantage in comparison with land-based miners through a lenient tax system. They are further concerned that mining States would syphon away revenue benefits from the international community by seeking a reduction in tax revenues to the Authority while imposing their own national taxes on operators.

39. Both groups feel that some of the complicated accounting and bureaucratic tasks involved in determining the tax base and the tax payments under the present system may be too burdensome and expensive both for the Authority and the operator.

40. The Convention provides for two types of payments, those that are to be made before the exploitation stage and those to be made after exploitation begins. The first type of payment includes an application fee of $500,000 (US) per applicant and an annual fixed fee of $1 million (US). The annual fixed fee is to be paid from the date of approval of a plan of work throughout the period of exploration. It becomes a part of the overall taxes when exploitation begins. For the second type of payment, which begins with exploitation, two systems of taxation are provided for: one involving a "production charge" only and the other a combination of a production charge and a "share of net proceeds" attributable to the mining sector.

41. It was recognized that the historical reasons for the two systems of taxation were no longer valid in the light of the recent changes that have taken place in Eastern Europe. It was agreed that a simplification of the present complex system was necessary.

42. It was further agreed that it would be difficult at this stage to attempt to develop a detailed set of rules for the purpose of taxation since the seabed mining industry had not yet developed. It would be more appropriate to agree to certain principles which could be the basis for setting up detailed rules and regulations at a future time when deep seabed production was imminent. It was recognized that the system should be such as to generate a fair competition between the contractors and the Enterprise, notwithstanding that the Enterprise may need some incentives in order to be able to operate in joint venture as was agreed previously. The system should also not preclude the possibility of the Authority giving special incentives to operators where appropriate. The mechanism should be flexible enough to enable such adjustments as necessary.

43. It was also recognized that a production charge or royalty system of payment has several merits. First, it is a constant payment of a percentage of the gross value based on an established sliding scale related to volume and price from the time of commencement of commercial production. This would be helpful to the Authority as a stable source of revenue; at the same time, the operator would also

have a relatively well-defined and less uncertain basis for his tax payments. Secondly, it eases the task of the Authority with regard to monitoring the accounts of the operator and considerably reduces the accounting obligations of the operator. Thirdly, it relieves the Authority from having to monitor stages of exploitation beyond the "activities in the Area," such as transportation, processing and marketing of metals.

44. In the light of the above, there was general acceptance that a system of payment should be developed when commercial deep seabed mining was imminent based on the following principles:

(a) the system of financial payments to the Authority must be fair both to the operator and to the Authority;

(b) the rates of taxation under the system should be within the range of those prevailing for land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage;

(c) there should be a single system which should not be complicated and should not impose major administrative costs on the Authority or on the operator and therefore preference should be given to the royalty system;

(d) States must respect the extraterritorial nature of deep seabed mining in the international seabed area and should avoid or minimize double taxation on the proceeds of deep seabed mining in order to ensure optimum revenues for the Authority;

(e) the annual fixed fee to be paid by an operator during the exploration stage may be adjusted at the time of the approval of the plan of work in order to take account of the anticipated delay in reaching the exploitation stage and the risks involved in establishing an industry in a new and unstable environment;

(f) any disputes concerning the interpretation or application of the rules and regulations based on these principles should be subject to the dispute settlement procedure under the Convention.

IX. Environmental Considerations

45. It was noted that the Convention imposes upon all States the obligation to protect and preserve the marine environment from all

sources of pollution. In addition, the Authority has a specific mandate to adopt appropriate rules, regulations and procedures to prevent, reduce, and control pollution of the marine environment arising from the exploration and exploitation of the resources of the international deep seabed. Environmental aspects of deep seabed mining require continuous study at every stage of the activities and the submission of environmental impact statements before production of seabed minerals is undertaken.

46. It was agreed that this was not a controversial issue and was therefore qualitatively different from the other eight issues under consideration. It was noted that the Preparatory Commission has been considering a comprehensive set of rules concerning the environment, and that there has been no unsurmountable obstacle in the progress being made there.

X. Other Matters

47. The form in which any agreement is to be reflected has not been fully discussed. There is recognition, however, that the agreement should be of a binding character and the procedure by which it is adopted should be simple. Many States would prefer an "implementing agreement" using a procedure such as implied consent, which will not require those who have ratified the Convention to submit the agreement to their legislature for ratification. It was agreed that this matter should be discussed at a later stage.

THE UNITED STATES AND THE REVISION OF THE 1982 CONVENTION ON THE LAW OF THE SEA

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Introduction

After almost a decade since the 1982 Convention on the Law of the Sea was signed the Convention has not entered into force and the United States remains unwilling to become a party to it. Recent efforts at the United Nations might, however, open the way towards a reconsidered United States' position. I have long held the view that the United States erred in 1982. I have argued against the United States' decision not to sign and ratify the Convention because I believe that the deep seabed provisions that led to that decision are both unimportant and not as bad as some have maintained. The other parts of the Convention had and continue to have real current importance to the United States and the rest of the world. The deep seabed regime was likely to fail due to its impracticability and its limited economic and strategic importance.[1] I am, thus, more than sympathetic to efforts directed towards eliminating the objections to Part XI that would bring the United States back to the Convention.

I do not have, however, any inside information on the United States' position on the new efforts or its likely attitude in the future. As far as I can determine, the higher political levels of the United States government have not yet addressed the possibility of a new United States law of the sea position. Lower level officials are not in agreement. I am, therefore, left to base this paper on what the United

*The author wishes to acknowledge the support of the Vanderbilt University School of Law during the writing of this paper.

[1] *See* Charney, "The United States and the Law of the Sea After UNCLOS III--The Impact of General International Law," 46 *Law & Contemp. Probs.* 37 (1983); Charney, "Law of the Sea: Breaking the Deadlock," 55 *Foreign Aff.* 598 (1977); Charney, "The International Regime for the Deep Seabed: Past Conflicts and Proposals for Progress," 17 *Harv. Int'l L. J.* 1 (1976); Charney, "The Equitable Sharing of Revenues from Seabed Mining in Policy Issues" In *Ocean Law* (1975).

States representatives have stated publicly. I shall give my views on what I think the United States ought to do.[2]

The Current United States' Position on the Secretary General's Initiatives

At the present time, fifty-one states have ratified the 1982 Convention on the Law of the Sea.[3] Virtually all of these ratifications have been by third world states, very few of which could be classified as among the largest or wealthiest of those states. The limited sector of the international community that is represented in this group is clearly illustrated by the fact that the contributions of these states comprise less than five percent of the United Nations' budget.[4] No Organization for Economic Cooperation and Development (OECD) state has ratified the Convention. The principal obstacle to widespread participation is the regime of the deep seabed found in Part XI of the Convention.

The recently retired United Nations Secretary-General Perez de Cuellar hosted six informal consultations with a small representative

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[2]Portions of this paper borrow heavily from statements issued by the Panel on the Law of Ocean Uses that were drafted by me as a member of the Panel. The Panel permits members to use such papers in their own authored work. While I have used these papers as the basis for portions of this paper, I have made substantive and stylistic changes to them. In addition, I have used these papers to support conclusions not considered by the Panel. While this work for and by the Panel must be acknowledged, my use of these papers does not necessarily represent the views of the Panel. For those views one should consult the original texts of the Panel Statements. Those statements are as follows: *Deep Seabed Mining and the 1982 Convention on the Law of the Sea* (Sep. 25, 1987), in Panel on the Law of Ocean Uses, International Ocean Law and U.S. Oceans Policy 19 (1988); *Bringing into Force the 1982 Convention on the Law of the Sea* (July 1991); and *The Consequences of Entry into Force of the Law of the Sea Convention without United States Participation* (Oct. 12, 1990).

[3]United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf.62/122 (1982) reprinted in 21 *I.L.M.* 1261 (1982) (hereinafter cited as UNCLOS). The status of the Convention is reported at *Law of the Sea Bull.*, Oct. 1991, at 1-6.

[4]Statement of the Representative from the United Republic of Tanzania, UN General Assembly, 46th Sess., Provisional Verbatim Record of the 71st mtg. at 31, UN Doc. A/46/PV.71 (1991).

group of states. These consultations were designed to determine whether the objections of some states to the deep seabed regime could be satisfactorily resolved for all interested states. His objective was to find principles upon which solutions to these differences could be crafted that would permit universal participation in the Convention.[5] These efforts received considerable support from a wide range of nations. They were applauded by a variety of states at the United Nations General Assembly debates and led to the adoption of the Law of the Sea Resolution of December 12, 1991.[6]

The United States participated in these informal consultations. Nevertheless, if asked directly for the United States' position on the initiatives of the Secretary-General, United States officials would report that there is no position. The United States Ambassador to the United Nations, Thomas Pickering, was allowed to participate in these discussions in his capacity as the Ambassador to the United Nations. He had no authority to enter into negotiations. The United States Government retained deniability.[7]

Pickering's ostensible goal was to determine whether the other interested states were sufficiently flexible to make clear to the United States government that negotiations would be very likely to produce acceptable results. Thus, Pickering participated in these negotiations to provide and receive information and to probe the positions of other states. The United States did authorize Ambassador Pickering to abstain from the 1991 General Assembly resolution on the Law of the Sea (as opposed to voting in the negative) because the resolution did recognize for the first time that adjustments in the deep seabed regime

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[5]Summary of Informal Consultations conducted by the Secretary-General on the Law of the Sea during 1990 and 1991 (Jan 11, 1992), distributed under cover of letter to all UN ambassadors from Under Secretary-General Satya N. Nandan (Jan 11, 1992).

[6]UN General Assembly, 46th Sess., Provisional Verbatim Record of the 70st (sic) mtg. at 31 *et seq*, UN Doc. A/46/PV.70 (1991); UN General Assembly, 46th Sess., Provisional Verbatim Record of the 71st mtg., UN Doc. A/46/PV.71 (1991).

[7]In part, this need for deniability may be a result of the negative effects realized by the United States when, after many years of deep involvement in the Third United Nations Conference on the Law of the Sea negotiations it simply walked away from the Convention at the last moment. It would be difficult to do this again. Thus, the United States needs to be particularly confident that its reengagement will result in a positive product.

would be possible.[8] The United States did not vote in favor of the resolution since it also called on states to ratify the Convention and to bring it into force at the earliest possible date.[9] The United States does not support entry into force prior to the resolution of the deep seabed mining issues.[10] On the other hand, within two months of the vote on

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[8]The vote is recorded at UN General Assembly, 46th Sess., Provisional Verbatim Record of the 71st mtg. at 52-53, UN Doc. A/46/PV.71 (1991). Ambassador Pickering's explanation of the United States vote is found at UN General Assembly, 46th Sess., Provisional Verbatim Record of the 70st (sic) mtg. at 46, UN Doc. A/46/PV.70 (1991). The Law of the Sea Resolution is found at UN General Assembly, 46th Sess., Agenda Item 36, UN Doc. A/46/L.44 (1991). The key paragraphs state that the General Assembly:

> 5. *Recognizes* that political and economic changes, including particularly a growing reliance on market principles, underscore the need to re-evaluate, in light of the issues of concern to some States, matters in the regime to be applied to the Area and its resources and that a productive dialogue on such issues involving all interested parties would facilitate the prospect of universal participation in the Convention, for the benefit of mankind as a whole;
>
> 6. *Calls upon* all States that have not done so to consider ratifying or acceding to the Convention at the earliest possible date to allow the effective entry into force of the new legal regime for the uses of the sea and its resources and calls upon all States to take appropriate steps to promote universal participation in the Convention, including through dialogue aimed at addressing the issues of concern to some States....

Id. at 4.

[9]*See* paragraph 6 of the Law of the Sea Resolution, *supra* note 8. Ecuador, Germany, Israel, Peru, the United Kingdom of Great Britain and Northern Ireland, and Venezuela also abstained. Turkey was the only state to vote against the resolution. UN General Assembly, 46th Sess., Provisional Verbatim Record of the 71st mtg. at 52-53, UN Doc. A/46/PV.71 (1991).

[10]Statement of Mr. Pickering of the United States, UN General Assembly, 46th Sess., Provisional Verbatim Record of the 70st (sic) mtg. at 46, UN Doc. A/46/PV.70 (1991). Other states abstained for the same reason. *See* Statement of Mr. Wood of the United Kingdom, *id.* at 57. Italy spoke against entry into force of the Convention before a solution for the deep seabed regime is reached. Statement of Mr. Treves of Italy, *id.* at 27. In voting for the resolution, Tunisia, made it clear that it wished the Convention to enter into force before adjustments were made in order to preserve rights acquired by the Convention and not to prejudice the values that motivated the regime. *See* Statement of Mr. Belhaj of Tunisia, *id.* at 58. Others expressed the view that no solution could prejudice the fundamental doctrine that the deep seabed is the common heritage of

this resolution Ambassador Pickering was removed from this position.[11] One could interpret this development as a United States' rejection of the apparent progress made on the law of the sea within the Secretary-General's consultations. The United States' abstention may have been at the cost of the effort as a whole. It is more likely that other factors caused this change of personnel.

While the United States' antennae may still be up, there is not an overwhelming view within the bureaucracy that there is a need to join in negotiations or to become a party to the Convention. The United States continues to support the non-deep seabed portions of the Convention. It takes the view that those portions represent customary international law and that state practice has been consistent with those norms.[12] It has encouraged states to abide by the norms of the Convention (apart from Part XI). With this apparent success and the desultory state of deep seabed mining, the United States may have no pressing need to negotiate changes in the Convention or to become a party to it.[13]

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mankind to be carried out for the benefit of all countries. Statement of Mr. Hatano of Japan, UN General Assembly, 46th Sess., Provisional Verbatim Record of the 70st (sic) mtg. at 37, UN Doc. A/46/PV.70 (1991); Statement of Mr. Araujo Castro of Brazil, *id.* at 65.

[11]"Trading Down at the U.N.," *N. Y. Times*, Feb. 15, 1992, § 1, at 22, col. 1.

[12]Statement of Mr. Pickering of the United States, UN General Assembly, 46th Sess., Provisional Verbatim Record of the 70st (sic) mtg. at 46, UN Doc. A/46/PV.70 (1991).

[13]Some states are not as sanguine and have suggested that state practice is not necessarily consistent with the Convention and that failure to enter the Convention into force at an early date could result in an unraveling of the balance in the law of the sea found therein. The Secretary General's effort to settle the differences and bring the Convention into force at an early date has been founded, in part, on the latter fear. Concluding Remarks of the Secretary-General at the Informal Consultations on the Law of the Sea, Dec. 11, 1991 ("Secretary-General Finds 'Unsatisfactory' Present Number of Ratifications or Accessions to Law of Sea Convention: Calls for Wider Acceptance"), UN Press Release, No. SG/SM/4671, SEA/1286 (Dec. 13, 1991). Austria addressed the question of non-conforming behavior. Statement of Mr. Hajnoczi, UN General Assembly, 46th Sess., Provisional Verbatim Record of the 70st (sic) mtg. at 51, UN Doc. A/46/PV.70 (1991). Italy suggested that the balance may unravel. Statement of Mr. Treves, UN General Assembly, 46th Sess., Provisional Verbatim Record of the 70st (sic) mtg. at 23, UN Doc. A/46/PV.70 (1991).

Many believe that this attitude will not change if serious negotiations on adjustments to Part XI were to begin or if the Convention were to enter into force without the United States. They believe that entry into force will further solidify the customary law status of the non-deep seabed portions of the Convention and that the deficient Part XI will have no practical effect. Others within the United States Government may not be as certain that an unsatisfactory Part XI would be benign.

Of course, the United States might become fully engaged if high level policy makers are convinced that the outcome would produce results in Part XI that are consistent with United States' objectives. It is not likely that the United States would become engaged merely to enter into good faith negotiations that *might* produce an acceptable compromise. This lack of willingness to proceed without some strong assurances of result is derived from the negative feelings that were produced by the Conference negotiations that led to the Convention. These negative feelings appear to be strongly held by high United States officials who were involved in those early years, particularly Richard Darman[14] and James Baker.[15] Considerable effort would have to be undertaken to make them amenable to a direct United States involvement in a negotiating process.

Two other obstacles should not be forgotten. First, 1992 is a presidential election year. It is unlikely that President George Bush would take an initiative on the law of the sea in this highly political atmosphere. Since there is no serious domestic constituency for the Convention, it would not win him votes. It is even likely to create negative reactions in some quarters. Second, the United States Senate may have concerns regarding a number of issues, including the legal force of amendments to the Convention, the provisions affecting the marine environment, those affecting fisheries, revenue sharing for

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[14]Now Director of the Office of Management and Budget. Richard Darman was one of Elliot Richardson's top assistants when Richardson headed the United States Law of the Sea Delegation. Darman's hostility towards the New International Economic Order (NIEO) and the Group of 77 deep seabed objectives were well known at that time. Those views are found in his article, "The Law of the Sea: Rethinking U.S. Interests," 56 *Foreign Aff.* 373 (1978).

[15]Now United States Secretary of State, James Baker was Secretary of the Treasury during the latter period of the law of the sea negotiations and was concerned about the financial implications of it. Furthermore, Richard Darman became one of his top assistants.

liberation organizations, as well as the dispute settlement system. These concerns would have to be addressed.

Since the informal consultations of the Secretary-General in 1991, there have been significant developments that will affect the future course of efforts to forge a reconciliation between the United States and those interested in bringing the Law of the Sea Convention into force. As mentioned above, Ambassador Pickering has been replaced. It remains a question whether his personal diplomacy also can be replaced. Second, and perhaps more important, Perez de Cuellar has been replaced by Secretary-General Boutros Boutros-Ghali. While he supports the consultations initiated by his predecessor, the full nature of his commitment to the process is unknown. He has reorganized the offices and officials in charge of the law of the sea effort.[16] Those changes generate uncertainty regarding the future course and effectiveness of the efforts to promote a reconciliation. They also may have an impact on the United States responses to such efforts. Consequently, at this stage it would be impossible to make any prediction about the likely results of efforts to bring the United States back to the Law of the Sea Convention.

Why the United States Ought to Become Involved in the Process of Adjusting the Deep Seabed Regime

The Political Context

I believe that the United States ought to become involved in the process of seeking adjustments to the Convention. The United States' substantive interests in the law of the sea argue for it to become a party to the Convention. These substantive interests focus on the non-deep seabed portions but also include those of the deep seabed. Furthermore, due to recent developments the United States has a particularly strong opportunity to assert its leadership role and to realize its policy objectives in regard to the deep seabed regime.

Let me begin with the last point. Both United Nations Secretary-General Perez de Cuellar and Ambassador Pickering emphasized the dramatic changes that have taken place in international relations, in

[16]*See* "UN Reorganization," *Ocean Policy News*, Feb. 1992, at 1.

general, and in deep seabed mining.[17] The Cold War has ended with the demise of the Soviet Union. In most respects the United States has come out of this as a singular power. Other strong economic powers, such as Germany and Japan, share many of the United States objectives, particularly regarding the deep seabed regime. There is a sense that international relations will be more favorable to cooperation and coordination, with less emphasis on conflict and suspicion. The demise of the Soviet Union has also been connected with the decline of state socialism and centrally-planned economies. The free market and capitalism are now in vogue.

Nations have begun to realize that deep seabed mining is not likely to take place in any time soon and that it is unlikely ever to produce a bonanza of profits or technology. Many of the controls the Convention placed on deep seabed mining are now understood to be impracticable especially in light of changes in the metals market and the state of the world economy. While many states still favor ideas found in the New International Economic Order (NIEO), support is less widespread and less fervent. The practicalities of economic development and political relations allow more room for negotiation and compromise. The view that the deep seabed regime should be organized and managed on the basis of free market principles is likely to play a major role in the readjustment of the deep seabed regime. Consequently, the atmosphere for negotiating the law of the sea has changed from the 1970s and early 1980s. These changes have worked in favor of the objectives held by the United States during that period. From the perspective of acceptability, the change from the Reagan Administration to the Bush Administration should not be ignored. While continuity has been the buzzword, the Bush Administration has been less dogmatic and somewhat more pragmatic in regard to solving

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[17]Summary of Informal Consultations, *supra* note 5 at 1, 2; Concluding Remarks of the Secretary-General, Dec. 11, 1991, *supra* note 13. These views were also expressed in paragraph 6 of the UN General Assembly Resolution on the Law of the Sea that was passed on December 12, 1991, *supra* note 8. They were given further support in paragraph 5 of that Resolution, *supra* note 8. During the meetings of the General Assembly held to discuss this resolution, this view was expressed by a wide variety of states, including Australia, Austria, Brazil, Italy, Japan, Mexico, the Netherlands (for the EEC), Sweden, Tanzania, and the USSR. *See* UN General Assembly, 46th Sess., Provisional Verbatim Record of the 70st (sic) mtg. at 31 *et seq*, UN Doc. A/46/PV.70 (1991); UN General Assembly, 46th Sess., Provisional Verbatim Record of the 71st mtg., UN Doc. A/46/PV.71 (1991).

problems.[18] This might allow the United States a certain amount of flexibility that would permit the attainment of pragmatic solutions to issues that have highly political overtones. On the other hand, certain political problems with the Convention cannot be successfully resolved by pragmatic solutions only. Some of the political problems with the deep seabed regime may have to be resolved directly and expressly.

The end of the Cold War and the demise of the Soviet Union will inevitably change the way in which the United States approaches foreign policy.[19] It has been suggested that the United States will place less emphasis on foreign policy and more on domestic policy. Security interests and foci will also change. During the period in which the Law of the Sea Convention was negotiated, security interests strongly motivated United States' efforts to maximize freedoms of the seas, especially of navigation and overflight. These freedoms were part of the strategic effort to counter the perceived Soviet threat. While the transportation of commercial products also was important to the United States, that interest was not as compelling to policy makers as the military interest.

The termination of the Soviet threat may have various effects on the United States' oceans policy. With the perception that the security threat is lessened, the pressure to protect the interest in the freedom of the seas may decline. To put it bluntly, the important support given to the Law of the Sea Convention by the United States Department of Defense might decline since the Soviet threat is absent. More sophisticated analyses might suggest that these freedoms have become more salient with the demise of the Soviet Union. It should be clear that the security interests of the United States have become more diversified as a result of these changes. As a result of these uncertainties, the United States may require more flexibility for its security needs rather

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[18]The declining prospects for early deep seabed mining and changes in the mining industry have diminished the potential role and influence of the United States mining industry. During the law of the sea negotiations it generally took very inflexible and dogmatic positions that were well received by the administration. The passage of time may have also allowed it to become more sophisticated about the international environment.

Of course, it is almost impossible at this time (Spring 1992) to hazard a guess on the likely attitudes of a new President if George Bush is not reelected in November of 1992.

[19]*See* Friedman, "Baker Spells Out U.S. Foreign Policy Stance," *N.Y. Times*, Apr. 22, 1992, § A, at 6, cols. 1-3.

than less.[20] This would require greater mobility and thus increase the importance of the freedom of the seas for United States military and commercial transportation, especially passage through straits. This, in turn, would attract increased support for the solutions found in the Convention.

If the changes in security requirements cause the United States to become more domestically oriented, its projection of force abroad will decline. This reorientation combined with budgetary pressures may result in a smaller United States Navy. With fewer ships attending to more diverse interests, the Navy will have less ability to protect United States' interests in the freedom of the seas. The Department of Defense, as a whole, may also have less influence on United States policy. In order to protect these interests the United States will have to rely more heavily on international cooperation and international law. To that extent the freedoms of navigation and overflight guaranteed by the Convention on the Law of the Sea will become more important. Their continued viability will be substantially enhanced by the entry into force of the Convention with widespread participation.

The Substantive Context

In General

Substantively, the United States does have an interest in participating in the Law of the Sea Convention and in forging adjustments that will facilitate its entry into force with universal participation. It is my opinion that if the Convention were to enter into force without the United States some interests of the United States would be served quite well, others would not be so fortunate. The following section addresses those interests generically.

One of the variables that affects this analysis is the identity of the states that will be parties to the Convention. If the present trend is unchanged and principally minor third world states are parties, the impact of the Convention's entry into force could be minimal. Few important maritime and coastal states would be bound. The Convention's contributions to customary law and the stability of the law of the sea would be no greater than it is today. Furthermore, many of the organs of the Convention would not be likely to become operational.

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[20]*See*, Tyler, "Pentagon Imagines New Enemies to Fight in Post-Cold-War Era," *N.Y. Times*, Feb. 19, 1992, Late City edition, at A1, cols. 4-5. *See* also, Schmitt, "Senators Challenge Pentagon's War Scenario," *N. Y. Times*, Feb. 21, 1992, at A8, cols. 4-6.

The Convention's significance would be greater if a large number of third world states, including the more advanced and larger ones, were to join. Entry into force would be even more significant if there were participation by some of the leading developed nations. Germany, France, Japan, and probably the United Kingdom and Russia, will be tempted to give serious and sympathetic consideration to joining the Convention as the number of ratifications closely approaches the sixty states necessary to bring it into force. If participation were widespread it would be likely that the Convention and its systems would become operational. It would, in turn, have a greater impact on ocean related behavior and rules. As a consequence, United States non-participation would be more likely to give rise to significant difficulties.

When one considers the details of the Law of the Sea Convention, it becomes apparent that the consequences to the United States of non-participation are likely to be different depending upon the subject. An appreciation of these differences requires a detailed examination of the entire treaty text and the interests of the United States. I have identified seven different consequences among which many provisions of the Convention might be divided. These consequences are listed below along with examples drawn from the Convention. The Annex to this article divides many more provisions of the Convention among the following possible consequences:

Rules in the Law of the Sea Convention that will probably be accepted as reflecting customary international law upon entry into force of the Convention and by doing so would serve United States interests

For example, the United States participated actively to negotiate successfully the important regime of transit passage through straits used for international navigation that is found in Articles 37 through 44. These articles carefully balance coastal and maritime interests. While this regime is amenable to entry into customary law and it has guided states, state practice has varied and the Convention's unsettled status has weakened the influence of these provisions. Codification of this norm in a binding multilateral convention strengthens the legal arguments that the norm represents customary law and, consequently, encourages conforming state practice.

Rules in the Law of the Sea Convention that will bind the state parties only, but performance of whose obligations would benefit the United States, although it would be unable to object to violations on legal grounds

For example, Article 47 of the Convention contains certain mathematical limits on special baselines that may be established by archipelagic states. Landward of these baselines are archipelagic and internal waters within which the archipelagic state has significant jurisdiction; and seaward are its territorial sea, contiguous zone, exclusive economic zone, and continental shelf. The limits on these baselines were designed to protect high seas freedoms that are of particular interest to the United States. Due to the detailed nature of the limits specified in the Convention, however, they are unlikely to merge into customary law. Nevertheless, archipelagic states that are parties to the Convention will be obligated to abide by these limits. As a consequence, there is little chance that they will maintain and enforce different lines that would be applicable only to non-party states.

Institutions outside of the Law of the Sea Convention that are assigned important roles by the Convention in which the United States may participate

For example, many provisions of the Convention refer to the "competent international organization" for detailed rules that are binding upon states parties to the Convention. In regard to international shipping, that organization is the International Maritime Organization (IMO), of which the United States is a member. The IMO is an important source of standards with regard to the protection of the marine environment thereby incorporated into the Law of the Sea Convention.

Institutions within the Law of the Sea Convention in which the United States would be precluded from participating, but which are likely to promote United States interests

The Convention contains important compulsory dispute settlement systems that are open only to parties to the Convention and, in some circumstances, their nationals. The system will directly and indirectly cause states parties to the Convention to abide by the obligations found therein, even though the United States may not participate in the dispute settlement procedure.That inability to participate, of course, significantly detracts from the benefits to be derived from these dispute settlement systems. The United States would be unable to invoke or threaten to invoke these systems in regard to states that

violate obligations under the Convention to the prejudice of the United States. The dispute settlement system also will serve as an important restraining force on states parties to ensure that longrange interests protected by the Convention are not prejudiced by responses to short-term political problems. The United States would benefit from this effect. On the other hand, if it were a non-party, the lack of similar restraints on the United States may be a problem.

Rules of the Law of the Sea Convention that may enter customary international law that are of no direct concern to the United States, although they may have political significance

For example, Articles 69 and 70 are designed to benefit the interests of landlocked and geographically disadvantaged states. The United States is neither, and there are no such states in North America. The United States has at most an indirect general interest in these states' economic development and political stability.

Convention-based rules and systems to which the United States has been opposed, and by which it would not be legally bound, but which may directly or indirectly have an impact on United States interests

The United States has opposed certain details of the deep seabed regime found in Part XI of the Convention. As discussed below, once the Convention enters into force, it is likely to establish *de facto* a deep seabed regime for all.

Convention-based systems in which the United States may not wish to participate and would not be required to participate

An example might be the Article 82 obligation of coastal states to share revenues from development on their continental shelves beyond 200 miles from the coastline.

It appears from the above analysis that if the Convention were to enter into force for a significant number of states, most of the Convention would affect the United States *de facto* or *de jure*. Some of the Convention systems will benefit the United States even if it does not participate. In addition, the associated institutions would permit United States participation in decisions important to the implementation of the Convention. The United States' ability to influence decisions in those associated institutions may be diminished, however, by its exclusion from the Law of the Sea Convention.

Non-membership also incurs a loss of privileges. Numerous decision-making and dispute settlement systems to be established by

the Convention will be foreclosed to participation by the United States. Some of these are likely to serve United States' interests. Others may pose additional risks to those interests. Due to its absence, the United States would have a limited ability to influence outcomes, since it could not participate in discussions or exercise a vote. These disabilities are the greatest in the deep seabed regime and in the processes for amending the Convention.

United States non-participation may decrease the likelihood that important rules desired by the United States would enter into customary international law or remain stable. This would be especially true if, in the absence of the United States and its allies, the political balance within the Convention favored states with which the United States has significant differences. Such an unfavorable political balance could result in interpretations, practices, and decisions by the Convention's institutions and states parties contrary to United States interests. In such circumstances, the United States might be forced to distance itself from the Convention. It would be unable to invoke the Convention as the foundation for the rules of law it favors, requiring it to rely instead on the more difficult sources of customary law and provisions found in the 1958 Law of the Sea Conventions[21] that may continue to be viable.

The Deep Seabed Mining Regime

Even if we focus on the deep seabed mining regime, it is apparent that the failure of the United States to participate in the Convention and in negotiations directed towards improving the deep seabed provisions would produce mixed results. On balance, however, the best interests of the United States would be served by its participation.

When on July 9, 1982, President Ronald Reagan announced that the United States would not sign the 1982 Law of the Sea Convention, he supported his decision by identifying the following problems with the deep seabed mining regime. They were:

* Provisions that would actually deter future development of deep seabed mineral resources, when such development should serve the interest of all countries;

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[21]Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 206; Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 286; and Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 312.

* A decision-making process that would not give the United States or others a role that fairly reflects and protects their interests;
* Provisions that would allow amendments to enter into force for the United States without its approval....;
* Stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits; and
* The absence of assured access for future qualified deep seabed miners to promote the development of these resources.[22]

On March 10, 1983, the President's oceans policy statement declared that these aspects of the deep seabed mining regime were contrary to the interests and principles of the industrialized nations and would not permit developing countries to realize their aspirations. He added that the United States was joined by some important allies and friends who decided not to sign the Convention due to similar concerns, and that the United States would 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.[23]

The changed circumstances reported above make clear that President Reagan's difficulties with the deep seabed regime will not have practical importance for some time. At present, the United States has limited economic and security interests in deep seabed mining. Early studies suggested that access to deep seabed polymetallic nodules would be necessary for national security purposes. This interest was exaggerated. Not only are deep seabed mine sites highly vulnerable, but in addition economic conditions and the use of substitutes have depressed minerals demand, while alternative, cheaper land-based sources of some nodule minerals have been identified.[24] There is little

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[22]Statement by the President, 18 *Weekly Comp. Pres. Doc.* 887 (July 9, 1982).

[23] Statement by the President, 19 *Weekly Comp. Pres. Doc.* 383 (Mar. 14, 1983).

[24] United States deep ocean mining activities have been essentially dormant for the past two years. *See Ocean Minerals and Energy Division, U.S. Dep't of Commerce Deep Seabed Ocean Mining: Report to Congress* (1991); Researchers at the Woods Hole Oceanographic Institution Marine Policy Center have made a number of persuasive economic analyses of the future of deep seabed mining. *See* Broadus, "Seabed Materials," 235 *Science* 853 (1987); Emery and Broadus, "Overview: Marine Mineral Reserves and Resources--1988," 8 *Marine Mining* 105 (1989); and Hoagland, *Status of Technology, Recent Patent Activity and*

doubt that the market will not make deep seabed mining economically viable before 2025 and probably much later than that.[25]

If deep seabed mining were to take place, the United States would not necessarily need to participate as a sponsoring or flag state in that activity in order to benefit from it. Deep seabed minerals development by foreign states or United States nationals acting under foreign flags would not necessarily be adverse to United States' interests. Such a development would provide added minerals to the international market that would benefit the United States as a consumer. If such development took place under government subsidies, other governments would provide the subsidies.

While some know-how might not be immediately available to the United States industry, the technology necessary for deep seabed mining would not be so exotic or closely held that it would be unavailable to the United States were its companies to enter directly into deep seabed exploitation at a later date. As a consequence, potential detriments to the United States appear to be limited to possible tax revenues and loss of prestige if the United States was not among the first in the industry. Accordingly, the United States has no compelling need to enter deep seabed mining at an early date. It is not even necessary that a deep seabed regime be established immediately.

If, on the other hand, the commercial cost of producing minerals fell below other sources and there was an unsatisfied demand for those resources, a poor or uncertain deep seabed regime could be detrimental to the United States. An unsatisfactory regime could deter the industry from entering the field. As a result, deep seabed production could be low or the industry could require financial or other support that would add to the real cost of production. The current position of the United States government is that deep seabed mining remains a lawful exercise of the freedom of the high seas, open to all nations. Thus, the United States maintains that its firms have rights under international law to explore for and exploit these resources. Domestic legislation enacted in 1980 provides the vehicle to regulate deep seabed mining beyond national jurisdiction carried out by United States nationals. It also authorizes the President of the United States to negotiate reciprocal agreements with foreign nations to avoid any state's authorizing deep seabed mining activities that conflict with

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Technology Transfer Issues in the Field of Deep Seabed Mining (Jan.1992) (unpublished).

[25] See the Woods Hole studies, *supra* note 24.

priorities of right established by any other state designated as a reciprocating state.[26]

On the basis of this authority, the United States joined with France, Belgium, the Federal Republic of Germany, Italy, Japan, the Netherlands, and the United Kingdom to negotiate an agreement that would avoid conflicts. These governments also endorsed negotiations among their mining companies to resolve the overlapping mine site claims that then existed. The industry negotiations were completed by the end of 1983 and the outcome incorporated into the Provisional Understanding on Deep Seabed Matters signed by the eight governments on August 3, 1984.[27] The Provisional Understanding also provides for first-in-time priority of right with respect to subsequent claims filed with participating states. Officially, the United States Government considers the Provisional Understanding to be a significant step towards implementing its policy of developing an acceptable alternative to the mining regime set forth in the 1982 Law of the Sea Convention. Nevertheless, the Understanding has not brought United States deep seabed miners any closer to development. Not only is this mining not economically competitive, but the Understanding fails to provide a sufficiently secure right to the mine sites necessary to attract bank loans and investment capital.

The United States is the only one of the countries whose companies have pioneered deep seabed mining to have elected not to participate in the work of the Preparatory Commission that was established to facilitate the early and effective operation of the Sea-bed Authority and to facilitate the activities of pioneer investors. To a certain extent the interests of the United States are reflected in the comments by the other parties to the Provisional Understanding. Those states, however, do not have interests that coincide exactly with those of the United States. They cannot assert bargaining power equivalent to that enjoyed by the United States. Only if the United States were to participate actively in the negotiations to adjust the Convention and to complete the work of the Preparatory Commission would United States interests, in particular, and Western interests, in general, be fully represented.

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[26] Deep Seabed Hard Minerals Resources Act (DSHMRA), Pub. L. No. 96-283, 94 Stat. 553 (1980) (codified at 30 U.S.C. SS 1401-1472). *See* Ocean Minerals and Energy Division, *supra* note 24.

[27] Provisional Understanding Regarding Deep Seabed Matters, *entered into force* Sept. 2, 1984, 23 I.L.M. 1354 (1984); *See* Ocean Minerals and Energy Division, supra note 24.

Negotiations in the Preparatory Commission and elsewhere may be concluded without satisfactorily accommodating the interests of the United States and most other parties to the Provisional Understanding. This would result in two potential legal regimes for deep seabed mining. Under those circumstances, it is possible that legal and political uncertainties affecting any mining operation will prevent all deep seabed mining, regardless of whether it is sponsored by states, international organizations, or business organizations. It is equally possible, however, that the product of the Preparatory Commission and an additional agreement on a limited set of adjustments would prove satisfactory to some western developed states, such as Canada, France, Italy, Japan, and the United Kingdom. Those states, or some of them, might eventually engage in deep seabed mining under the Convention, even though the United States would consider the regime to be unsatisfactory.

If mining does eventually take place pursuant to the Convention under these circumstances, the United States arguments for significant changes in the regime will be weakened substantially. In such circumstances, mining pursuant to the Convention might even involve the very consortia in which United States companies have participated. United States nationals may well seek sponsorship from parties to the convention in order to secure clear rights to their mine sites, to protect against hostile reactions, and to maintain leadership in the industry. Ultimately, their participation might compel the United States to join the Convention as it would then exist.

A real possibility also exists that a United States-supported deep seabed regime outside of the Convention will be unworkable. If such a regime is not able to function, the United States would obtain little value from a threat that it could proceed on its own or in combination with other similarly interested states. Under such a circumstance, not only would the United States' deep seabed objectives be frustrated, but its greater interests in other aspects of the law of the sea also would suffer.

Notwithstanding the opposition of the United States to the deep seabed regime, the Convention's entry into force may have an effect on the United States' deep seabed mining activities. Supporters of the Convention may argue that the deep seabed regime and the principle of the Common Heritage of Mankind limit the authority of the United States in the area. More powerful political and practical arguments also support the view that it would be difficult for the United States to proceed with another deep seabed mining system in the face of a functioning Convention-based deep seabed regime, particularly if it is supported by widespread participation.

Furthermore, the same conclusion would be even more compelling for United States' companies interested in deep seabed mining. If the United States is not a party to the Convention, these companies are likely to be driven by commercial and public relations interests to proceed under the flags of states that are parties. On the other hand, the United States would be freed from a number of financial obligations, as well as the remote possibility that in the future it would have some obligations relating to the transfer of deep seabed technology.

An even more pragmatic view argues that little is to be gained or lost from non-participation in the deep seabed regime since it is unlikely that the industry will develop soon, if ever. Furthermore, most of the financial and technology transfer obligations from which the United States would like to be freed may never become operational. The United States' policy interests in deep seabed mining may really be derived from its interest in promoting the supply of minerals that might be produced from seabed mining. That interest will be prejudiced as a consequence of the international discord produced by United States non-party status and the inability of the United States positively to influence the seabed mining policy of the International Seabed Authority.

On the other hand, one could take the position that the defects in the deep seabed regime doom it to failure. Just as the socialist system of the Soviet Union collapsed, the seabed regime also will collapse and give the United States the opportunity to obtain a more acceptable and viable deep seabed regime in the future. If members of the international community do not appreciate the likelihood of this outcome they will be unwilling to negotiate appropriate solutions to the seabed regime this time. The United States may have little or nothing to lose by waiting for states to realize the futility of the Convention's deep seabed regime.

In conclusion, the advantages of participation leading to changes in the deep seabed regime and party status would appear to be greater than the alternatives. With regard to much of the substance, party or non-party status may not make a significant difference. Non-entry into force or entry into force without widespread participation would least serve United States' interests. United States' party status would promote the entry into force of the Convention with widespread and universal participation. That situation would maintain the substantive consensus reached at the negotiations, particularly in those areas that will continue to be truly important to the United States.

Solutions to the Problem of the Deep Seabed Regime

The current approach for resolving the impasse on the deep seabed regime that has been pursued by the Secretary-General is predicated upon the view that certain limited adjustments to the deep seabed regime are in order. Those changes would be directed towards meeting some or all of the specific concerns previously identified by the United States by crafting solutions that would attract a consensus. The basic structure of the deep seabed regime would be retained.

Some of the alternative procedures available to accomplish these objectives might be as follows:

1. Negotiate within the context of the Law of the Sea Convention's Preparatory Commission rules and regulations that meet the previously identified objections of the United States. By giving detail and substance to general provisions in the Convention and Annexes and other procedural fixes, objectionable provisions would be overridden.

2. Negotiate inside or outside of the Preparatory Commission a protocol to the Convention that would specifically address the United States' concerns and would supersede inconsistent provisions of the Convention. It would be agreed that the Convention and protocol would be linked in such a way that the Convention would not enter into force for any state without modification as required by the protocol.

3. Negotiate inside or outside of the Preparatory Commission amendments to the Convention that would address the United States' concerns and would supersede inconsistent provisions in the Convention. These amendments could come into force immediately after entry into force of the Convention through the Article 313 Amendment by Simplified Procedure in accordance with a previous agreement.

In my opinion, any effort to address some or all of the objections to the deep seabed regime must take account of the realities presented by the fact that deep seabed mining is not economically viable at this time and is unlikely to be so for the foreseeable future. From an economic and industrial perspective much of the organizational structure of Part XI appears to be unnecessary and unduly costly. In fact, that structure may be found to be very far off the mark, if and when deep seabed mining becomes a reality. Furthermore, the deep seabed regime reflects the politics and economic theories that were prominent in the 1970s. There has been considerable change since that time and more can be expected in the future. Thus, any detailed regime established today, even one that meets the above-stated United

States' objections, may be anachronistic when and if deep seabed becomes a reality.

On the other hand, there are portions of the deep seabed regime that address broader issues that continue to be important today and are likely to remain so in the future. The task, thus presented, is to find ways in which an accommodation can be reached that preserves those parts of the regime that are acceptable to all, that eliminate or solve problem areas, and that allow for the development of a detailed deep seabed mining regime when the economic, industrial, and political context in which deep seabed mining will be conducted is better known.

Some of the many potential alternative strategies that might permit the implementation of such an approach are the following:

1. Make no changes in the Convention, Annexes, rules, or regulations based upon the understanding (formal or informal) that the deep seabed system would remain inoperative during the period in which there is a lack of economic interest in deep seabed mining, leaving to a later date decisions regarding how the regime might be adjusted.

2. Negotiate an agreement to sever the deep seabed regime from the rest of the Convention, allowing the other portions of the Convention to enter into force alone while negotiations on the deep seabed regime proceed on a separate track.

3. Sever only the operational portions of Part XI retaining for immediate entry into force the general policies of the deep seabed regime that are acceptable to all. Negotiations on the severed provisions would proceed separately.

4. Enter the Convention into force, with the exception of Part XI and relevant annexes, which will be referred to an upgraded Preparatory Commission authorized to engage in some limited management of the deep seabed resources and to develop a full-fledged system, if and when specific events calling for development take place.

5. Enter the Convention into force provisionally pending the conclusion of negotiations on a new deep seabed regime. The present deep seabed management system would be put on hold, but a new committee or the Preparatory Commission would be authorized to engage in any management that might become necessary. If the negotiations are successful the Convention would be amended (or otherwise changed) and procedures for actually bringing the Convention into force would be activated. If the negotiations fail the provisional force of the Convention would cease.

6. Stop the Convention from entering into force and proceed to renegotiate the deep seabed mining regime before moving forward. If

the negotiations succeed, the Convention would be changed before a new process for bringing it into force commences.

7. Stop the 1982 Convention from entering into force and convene a Fourth UN Conference on the Law of the Sea.

In my opinion, all of the above approaches are worthy of serious consideration. The most important objective should be to bring as much of the Convention as possible into force at as early a date as possible. At the same time, provisions of Part XI that are either highly objectionable to particularly interested states or contain systems that will not be optimal when and if deep seabed exploitation does take place should not be brought into force.

These objectives might be balanced by any number of approaches. I would particularly like to address two solutions that combine aspects of the alternatives listed above. One would take the current deep seabed regime as the focus of negotiations. Efforts would be made to identify critical substantive items that have attracted controversy. Those items would thus be the subject of negotiated adjustments, including arrangements that would defer ultimate settlement. The other would defer establishing a detailed mining regime, retaining basic agreed principles and mechanisms to address current real needs.

The first approach calls for the negotiation of changes to particular salient institutional provisions of Part XI as a precondition to entry into force of any portion of the Convention. The agreed changes would be executed by a protocol to the Convention. At the first stage, this approach requires that certain politically salient issues regarding Part XI be identified and resolved. It is based upon the assumption that the United States and perhaps some other states would be unwilling to accept, even provisionally, portions of the Convention if certain objectionable features remained. If these issues could be resolved they would be willing to proceed towards a legal relationship with the Convention, even though other questions remain to be resolved. Secretary-General Perez de Cuellar identified nine prime issues arising out of the deep seabed regime that may require early resolution.[28] They are:

1. Costs to States Parties
2. The Enterprise
3. Decision Making

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[28] Summary of Informal Consultations, *supra* note 5; Concluding Remarks of the Secretary-General, December 11, 1991, *supra* note 13 at 2.

4. Review Conference
5. Transfer of Technology
6. Production Limitation
7. Compensation Fund
8. Financial Terms of Contracts; and
9. Environmental Considerations

This list does include all of the critical issues, although some may be viewed as more important than others. The Secretary-General's consultations appear to have made some progress on all nine of these priority items. As I understand it, there is some willingness to consider the following solutions:

Costs to States Parties

There appears to be a general and sincere desire to avoid the imposition of substantial costs on states parties to the Law of the Sea Convention arising from the deep seabed mining regime. These costs could be incurred if a substantial bureaucracy were established or if funds were required to start up the Enterprise as an independent developer. The Convention itself does not require these costs to be incurred. The discussions appear to have pointed the way towards limiting the costs by phasing in potentially costly activities over time as needed. This would include the organs of the International Seabed Authority, the Enterprise, and the Law of the Sea Tribunal.[29] Other cost items have been shifted to the budget of the United Nations and thus would not burden parties to the Convention based upon their party status. This includes the Commission on the Limits of the Continental Shelf and other activities of the Secretary-General.[30] Nevertheless, the participants in the consultations appear to support the application of similar cost-effective measures for these activities.

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[29] Summary of Informal Consultations, *supra* note 5, at 2-3. *See also* Information Note concerning the Secrtary-General's Informal Consultation on Outstanding Issues Relating to the Deep Sea-bed Mining Provisions of the UN Convention on the Law of the Sea, New York, July 23, 1991, 10:30 a.m., conference room 5, at 2, 3.

[30] UN General Assembly Resolution 37/66(1982) and Report of the Secretary-General, UN Doc. A/38/570 (1983), UN Doc. A/38/570/Add.1 (1983), and UN Doc. A/38/570/Add.1/Corr.1 (1983). *See* Summary of Informal Consultations, *supra* note 5, at 3-4. Information Note concerning the Secretary-General's Informal Consultation, July 23, 1991, *supra* note 29, at 3.

The Enterprise

Due to the delay in deep seabed mining and the trend towards market-oriented approaches to commercial development, serious consideration was given to the activities and orientation of the Enterprise.[31] Discussions centered on a phased development of the Enterprise as an autonomous market-based operation that would start activities in joint ventures with other commercial operators. This arrangement would enable the Enterprise to operate without requiring funding from the parties to the Convention.[32] The focus on a market-based philosophy and elimination of the need for state funding are important developments.

Decision Making

The decision-making structure of the International Seabed Authority found in the Convention is complicated.[33] It was designed to accommodate the political, economic, and industrial concerns of the negotiating states. It was based upon the geopolitical situation of the 1970s and early 1980s. The Secretary-General's discussions focused upon accommodating the interests of investors in deep seabed mining and the international community at large, with special attention to those of consumers and producers. In his informal note the Secretary-General suggested the retention of the thirty-six-member Council of the International Sea-Bed Authority (ISA), but with a division of representation among four interest groups rather than the five found in the present Convention. These four groups would comprise: importers of deep seabed resources (four states), investors in deep seabed development (four states), land based producers of these resources (four states, including two less developed states), and states chosen on the basis of equitable geographic distribution (twenty-four states, including six large less developed states, landlocked and geographically disadvantaged states, importers, producers, and least

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[31] The Enterprise would be established in accordance with UNCLOS Art. 170 and Annex IV (Statute of the Enterprise).

[32] Summary of Informal Consultations, *supra* note 5, at 4.

[33] See UNCLOS Arts. 159-162, 164, 165.

developed states).[34] Decisions on matters of substance would be decided by a two-thirds majority, but only if a majority of any of the first three categories of states was not opposed. This system is designed to give the relevant important interests a veto over such decisions but not allow a single state the opportunity to veto a decision. Disputes would be submitted to the International Tribunal for the Law of the Sea for decision. While the shift from five to four interest groups did not attract the support of the majority of participants at the consultations, the other parts of the suggestion in the Informal Note did.[35]

A similar attempt to address the balance between practicality and attention to the views of relevant interests was also discussed in regard to the Commissions through a required effort to reach a consensus before a vote, and adoption by the Council of Commission decisions absent a vote to disapprove in the Council by the voting system described above.[36]

I believe that it is important to review the decision-making system of the Authority. The full implications of the above ideas would require a detailed examination. My preliminary analysis of these proposals suggests that they might lead to changes that would be less attractive to the United States than the system now found in the Convention. I believe that the provisions now in the Convention are rather favorable to the United States. By eliminating the consensus rule for disapproving recommendations of the Commissions, the new proposal would diminish the United States' ability to sustain nonpolitical, expert recommendations produced by the Legal and Technical Commission. These changes may be particularly problematical in regard to the approval of plans of work, the adoption of rules and regulations, and the authorization of the distribution of revenue to liberation organizations. Each of these subjects is of particular interest to the United States.

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[34] Information Note concerning the Secretary-General's Informal Consultation of Oct. 14-15, 1991, at 4, 5. *See also* Summary of the Secretary-General's Informal Consultation on the Law of the Sea, New York, Oct. 14-15, 1991 (Unofficial), at 2.

[35] Summary of Informal Consultations, *supra* note 5, at 5.

[36] *Id.* at 5-6; *See also* Information Note concerning the Secretary-General's Informal Consultation of Oct. 14-15, 1991, *supra* note 34 at 6, 7.

Review Conference

The problem presented by the Review Conference[37] has been the fear that it could significantly change legal obligations in regard to the deep seabed regime over the objection of states that would be bound as a consequence of their party status. A number of states object to the possibility that changes would be binding upon them even without their consent. A required unanimity rule, however, would make changes to the regime virtually impossible. On the other hand, a system that would permit different systems for different states would be difficult to manage and would create inequities. Efforts to reach an accommodation in this area have focused on the need to reach a consensus, a required affirmative vote of two-thirds of the states present and voting, and the use of the interest-group voting system proposed for the Council in order to accommodate the views of the interested states. This last requirement would stop an amendment from being adopted if the majority of states in any one of the interest group categories in the Council was opposed.[38] Similar solutions were under consideration in regard to the entry into force of amendments. Further consideration of these matters will be required.

Transfer of Technology

Some in the western developed states have taken the position that the Convention's rules on transfer of technology would mandate substantial transfers in violation of intellectual and other property rights and create impossible obligations for resource developers. This potential problem appears to have receded in light of the limited and delayed potential of deep seabed mining. Many believe that if development is to take place it would be under a system of joint ventures that would assure the availability of technology without a mandatory transfer to the Enterprise or other organizations. In addition, there appears to be some willingness to adjust the system so that the obligation is clearly one in which states and developers would

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[37] UNCLOS, Arts. 151(3), 155, 314(2).

[38] Summary of Informal Consultations, *supra* note 5, at 6. *See also* Information Note concerning the Secrtary-General's Informal Consultation of Oct. 14-15, 1991, *supra* note 34 at 8, 9; Summary of the Secretary-General's Informal Consultation, Oct. 14-15, 1991, *supra* note 34 at 3, 4.

undertake to make good faith efforts to obtain the technology and not be compelled as a matter of convention law to do so.[39]

Production Limitation

There appears to be a general understanding that the production limitations in the Convention's seabed regime[40] are inoperable in light of new developments and understandings. Many facts have changed since these formulae were developed within the Convention. There has been a global economic recession; there is a depression in the relevant metals markets; substitutes for deep seabed metals have been more apparent and better appreciated; the formula based upon one metal (nickel) does not reflect the combination of needs to be served by such limitations, if any; and the limitations apply only to deep seabed mining, thereby placing such mining in an unfavorable position relative to other competing land-based mining. While no specific solution to these problems has been focused upon, the discussions identified some principles that appear to have attracted support. These principles include the views that there should be no subsidy of deep seabed mining, there should be no discrimination in favor of or against such mining, the plan of work should be formulated on the basis of all the metals to be produced from a mine site, there should be no unfair economic practices, and disputes should be resolved by use of the dispute settlement procedures under the Convention.[41]

Compensation Fund

The Convention provides for compensation to land-based producers adversely affected by deep seabed mining of minerals also produced by such land-based producers.[42] Such a system could be costly

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[39]Summary of Informal Consultations, *supra* note 5, at 7; Information Note concerning the Secretary-General's Informal Conltation, Oct. 14-15, 1991, *supra* note 34, at 9, 10. *See also* Summary of the Secretary-General's Informal Consultation, Oct. 14-15, 1991, *supra* note 34 at 4.

[40] UNCLOS, Art. 151.

[41] Summary of Informal Consultations, *supra* note 5, at 8-9; Information Note concerning the Secretary-General's Informal Consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of the Sea, New York, Dec. 10-11, 1991, 10:30 a.m. and 3 p.m., conference room 5, at 3.

[42] UNCLOS, Art. 151(10).

and invite abuse. Furthermore, some types of compensation could be incompatible with free market principles. The Secretary-General's discussions appear to have focused upon the following principles: that there should be established an economic assistance fund based upon a percentage of the revenues of the authority after expenses up to a fixed limit, assistance from the fund would be made available to affected less-developed-country land-based producers in cooperation with existing regional and global development institutions, and this assistance would be made available on a case-by-case basis.[43]

Financial Terms of Contracts

The financial terms of contracts found in the seabed regime[44] have been a matter of some concern to potential commercial developers and those interested in establishing a successful, well funded, international regime. It was feared that these obligations would be unduly burdensome, that they would require substantial payments at the front end that would deter development, that they would be inequitable as compared to land-based development, and that they would not result in funding for the ISA. The principles that have attracted interest at the Secretary-General's discussions call for the financial terms of contract to be fair to the commercial operators and to the ISA, to be equal in cost to competing land-based operations, to be simple to calculate and minimize administrative costs, to avoid double taxation by the ISA and sponsoring states, and to set a realistic annual fee. Furthermore, disputes arising with regard to financial terms of contract should be subject to dispute settlement. Many of these objectives might be met by utilizing a royalty system.[45]

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[43] Summary of Informal Consultations, *supra* note 5, at 9-10. *See also* Information Note concerning the Secretary-General's Informal Consultation, Dec. 10-11, 1991, *supra* note 41, at 4, 5.

[44] UNCLOS Annex III (Basic Conditions of Prospecting, Exploration and Exploitation), Art. 13.

[45] Summary of Informal Consultations, *supra* note 5, at 11-12; Information Note concerning the Secretary-General's Informal Consultation, Dec. 10-11, 1991, *supra* note 41 at 7.

Environmental Considerations

While the marine environment was a matter of serious concern during the law of the sea negotiations,[46] it has become more salient in recent years. As a consequence, the Secretary-General's discussions drew attention to the need to assure that deep seabed mining would not be inconsistent with contemporary concerns. In large part these concerns were dealt with by the Convention, while others have been addressed in discussions at the Preparatory Commission. Thus, it has not been a matter of primary concern or controversy at these consultations.[47] The Secretary-General did suggest that there is a need to optimize both the interest in protecting the environment and the interest in development. This interest may be effectively served by the polluter-pays principle that would impose liability on the operator for damage to the marine environment. In addition, the Secretary-General identified a number of important principles to consider in this regard. Thus, the rules regarding deep seabed mining bearing on the environment should be balanced to reflect the two interests, they should be periodically reviewed, the operator should be required to make analyses of the environmental impact of its planned activities for review, there should be rules on responsibility and liability, and these rules should be equally applicable to all operations including the Enterprise. Furthermore, disputes arising in this regard should be subject to compulsory dispute settlement.[48]

These developments in the discussion hosted by the former Secretary-General suggest substantial movement towards accommodations that should meet the objectives of the United States. The Secretary-General's discussions have identified matters that are classified as important problems to resolve. The apparent developments in these discussions bode well for positive results. At a certain level the Secretary-General identified real problems and produced important movement. The acceptance of a market-based philosophy for the Authority, including the Enterprise, would be sufficient. Similarly, efforts to keep costs down are important to all. Decision making in the Council in Commissions, and at the Review Conference are critical. Other issues are fundamentally politically based and these

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[46]UNCLOS, Art. 209.

[47]Summary of Informal Consultations, *supra* note 5, at 12.

[48]Information Note concerning the Secretary-General's Informal Consultation, Dec. 10-11, 1991, *supra* note 41, at 9.

efforts seek to address them. Thus, the technology transfer, production limitations, and compensation fund problems were highly unlikely to develop. With the possible exception of decision making in the Council, the solutions under consideration may put the political objections to these provisions to rest. These developments should encourage the United States to become more engaged in the process.

The question arises, however, whether adjustments made now will be appropriate when the time comes, if ever, to mine the deep seabed. Thus, the approach in the Secretary General's discussions carries forward many of the structural and institutional problems that, we have learned, burden the solutions reached in 1982.

In the last ten years dramatic changes have taken place; some of the most important of those occurred only in the last year or two. These developments have significantly changed the context within which revisions of the deep seabed regime must be considered. A slightly revised regime that reflects current political and economic realities could very well be inappropriate when, according to current estimates, deep seabed mining may begin in thirty or more years. One might seriously consider whether an alternative approach that left open considerable room for flexibility until this mining became more imminent might be a more appropriate alternative. This leads me to discuss the second approach.

The second approach would link entry into force of the Convention, including some parts of the deep seabed regime, with a framework regime. Such a framework regime would contain the outlines of a resource management system, but would not establish the system itself. Various triggering mechanisms and decision-making systems would be established. As a result, when serious interest in resource development is present an international management system would be established to serve the expected development. Certain policies and obligations, including the Common Heritage of Mankind and the protection of the environment, would be included in this framework system.

There appears to be widespread agreement that all parts of the Convention outside of the deep seabed regime are acceptable. Unlike the deep seabed regime, which addresses future contingent activities, the rest of the Convention has importance for current international activities in the seas. While many portions of the Convention may reflect existing customary international law, many others do not and cannot be made effective if the Convention is not in force. It is highly desirable for all states to bring these rules and institutions into force at an early date.

On the other hand, many states are unwilling to permit other states to benefit from the non-deep seabed portions of the Convention if they are not willing to accept important principles contained within the regime of the deep seabed. They fear that if the United States were able to become a party to the Convention with the exception of the deep seabed regime, it would never be motivated to reach an accord on that regime. Thus, the non-deep seabed rules have been held hostage to the deep seabed dispute.

The entry into force of the entire Convention with the exception of the parts of the deep seabed regime necessary actually to manage the exploitation of deep seabed minerals might provide a basis for a solution. States would be legally bound by the Convention.

As indicated above, I believe that no attempt to resolve all outstanding issues regarding the deep seabed regime should be made in the near term. Rather, the solution should be designed to permit the generation of a detailed regime if and when deep seabed mining becomes economically realistic. I, therefore, see the possibility of three stages in the development of the regime.

The first stage would take place prior to entry into force of the Convention. It would be designed to address the current situation in which there are pioneer investors who are interested in conducting limited activities in the Area. Currently, they have been conducted under the Preparatory Commission system.[49] This should be allowed to continue only if the investors satisfy commercially justifiable performance and monetary requirements to obtain and hold rights. In the absence of such requirements some would be encouraged to assert an interest and claim a status as a potential developer only for political or other non-economic reasons. Performance and other requirements would ensure that the international community, operating through the relevant institutional regime, would be compelled to incur financial, political, and institutional costs only if there is serious interest in deep seabed development that is economically justifiable. If investors and states were not encouraged to promote deep seabed activities simply

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[49]The Preparatory Commission was established by Resolution I, entitled "Establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea," adopted by the Third United Nations Conference on the Law of the Sea as a part of its Final Act of Dec. 10. 1982. The work of the Preparatory Commission has been reported in the *Law of the Sea Bull.* For information on the status of Pioneer investors *see* "Registration of Pioneer Investors in the International Seabed Area in Accordance with Resolution II of the Third United Nations Conference on the Law of the Sea," *Law of the Sea Bull.*, Special Issue III, Sept. 1991.

for political purposes, no significant activities would be likely for the foreseeable future. As a result, the international institutional burdens would be minimal.

At the initial stage, negotiations should be concluded on the framework and on the findings and decisions that would be required in order to move to the next stage. The scope of these negotiations would be limited to Part XI, including the relevant Annexes. It would also be appropriate to exclude from the negotiations certain fundamental principles, such as the Common Heritage of Mankind, applicable to the deep seabed. On the other hand, certain salient fundamental problems relating to decision-making would have to be addressed. Among the most important matters might be decision making in the Council, and the adoption and entry into force of amendments to the Convention directly or by review conference.

The second stage would be initiated after the Convention is in force, if and when a sponsoring state puts forward an investor that has a serious commercial interest in exploiting the resources of the area. Certain previously specified facts would have to exist in order to trigger this second stage. The trigger should operate once it is clear that such serious interest exists and that deep seabed mining is highly likely. At that point, negotiations should be commenced at a designated forum to design a resource development system that is attuned to the industrial, economic, and political realities of the time. Decisions would be taken in accordance with agreed principles and procedures established during the first stage. These decisions would result in a legal regime for deep seabed mining sufficient to address the projected activities. It would become legally binding on states in accordance with the agreed procedures. If an agreement on the detailed regime is not adopted within a specified period of time in accordance with required procedures or it fails to enter into force within a specified time, the entire Convention would terminate.

The third stage would commence once an investor proceeds to develop the resources of the Area under the regime established during the second stage.

The above approaches are not, of course, the only possible solutions to the deep seabed problem. All reasonable approaches should be explored with the view to disposing of the current obstacles. It is my view that an opportunity to eliminate the obstacles to universal acceptance may exist. That situation should encourage states to seek novel and creative solutions that properly take into account new understandings and future uncertainties.

Conclusion

The United States would benefit by the widespread entry into force of the Convention with it as a party. Recent political, military, and economic developments put the United States in a particularly good position to seek adjustments to the Convention that would meet its previously stated objections. If those states that have traditionally opposed the United States negotiating objectives clearly communicate a willingness to find solutions to the differences, some of the options and procedures under consideration could produce satisfactory solutions.

It is very difficult to predict if or when the United States will become reengaged in the Law of the Sea Convention process. In my opinion, the best interests of the United States would be served by reengagement at this time. Good arguments can also be made to support the view that the United States would lose little by continuing to sit on the sideline regardless of whether the Convention does or does not enter into force and regardless of whether the deep seabed regime is modified.

Negotiations to resolve the problems with Part XI do appear to be likely. Other developed states will participate in those negotiations with a view to ratifying the Convention. Since they will not have the negotiating leverage or identical interests of the United States, the resulting solutions may not be optimal from the United States' perspective. Nevertheless, if a solution is reached it is likely to attract widespread support and lead to entry into force of the Convention. Ultimately, the United States will be bound by that solution *de facto* or *de jure*. It may even be compelled to join the Convention at a later date. If this analysis is correct, the interests of the United States would be served best by its active and direct participation in efforts to resolve the problems with the deep seabed regime. Widespread entry into force of a Law of the Sea Convention that reflects the results of that process would provide maximum benefits to the United States.

The problem is that it will be difficult to get the United States government to reverse the Reagan Administration's decision to walk away from the Convention. Logical analyses of the United States' law of the sea interests probably will not be sufficient. If, however, it were clear that the Convention would enter into force with widespread European participation, the political levels of the United States government might be required to reevaluate the situation and find that its interests would best be served by its participation in renegotiation efforts and its adherence to the Convention.

Annex

The Impact of Selected Law of the Sea Convention Provisions on the United States If It Were Not A Party

A. Rules in the Law of the Sea Convention that will probably be accepted as reflecting customary international law upon entry into force of the Convention and by doing so would serve United States' interests:

1. Virtually all of the articles on the territorial sea and the contiguous zone, Arts. 2-45
2. Archipelagic waters regime, Arts. 46-54
3. Exclusive economic zone regime, Arts. 55-75
4. Continental shelf regime, Arts. 76-85
5. High seas regime, Arts. 86-120
6. Regime of islands, Art. 121
7. Enclosed and semi-enclosed seas, Arts. 122-123
8. Access to the sea by landlocked states, Arts. 124-132
9. The deep seabed regime:
    a. Definitions, Art. 1.1(1)-1.1(3)
    b. Legal Status, Art. 135
    c. Principles, Arts. 136-149
10. Protection and preservation of the marine environment, Arts. 192-233, 235-237
11. Ice-covered areas, Art. 234
12. Marine scientific research, Arts. 238-256

B. Rules in the Law of the Sea Convention that will bind the state parties only, but performance of whose obligations would benefit the United States, although it would be unable to object to violations on legal grounds:

1. Specific limits on archipelagic baselines, Art. 47
2. Specific criteria for the designation of archipelagic sea lanes and air routes, Art. 53.5
3. Specific limits on artificial island safety zones, Art. 60.5
4. Specific limits on the seaward extension of the continental shelf regime, Art. 76.4-76.6
5. Marine scientific research implied consent, Art. 252

C. Institutions outside of the Law of the Sea Convention that are assigned important roles by the Convention in which the United States may participate:

1. Provisions referring to decisions by and consultations with a "competent international organization":
    a. Sea lanes and traffic separation schemes in straits, Art. 41; and in archipelagic waters, Art. 53.9
    b. Safety zones around artificial islands, Art. 60.2
    c. Marine mammals, Art. 65
    d. Conservation of high seas resources, Art. 119.2
    e. Marine scientific research in the deep seabed, Art. 143.3
    f. Marine environment, Arts. 197-204
    g. Pollution from vessels, Art. 211; as well as special ecological zones in the exclusive economic zone, Art. 211.6; dumping, Arts. 214-216; vessel standards, Art. 217.1; bonding, Art. 220.7; enforcement proceedings, Art. 223
    h. Centers for development and transfer of marine technology, Art. 275-277
2. Provisions calling for international cooperation:
    a. Navigation and safety aids in straits, Art. 43
    b. Stocks of living resources in two or more states, Art. 63
    c. Highly migratory species, Art. 64
    d. Anadromous stocks, Art. 66
    e. Catadromous species, Art. 67
    f. Conservation of high seas resources, Arts. 117-118
    g. Enclosed and semi-enclosed seas, Art. 123
    h. The marine environment, Arts. 197-204
    i. Marine scientific research cooperation, Art. 242
    j. Development and transfer of marine technology, Art. 270, 278

D. Institutions within the Law of the Sea Convention in which the United States could not participate, but which are likely to promote United States' interests:

1. Commission on the Limits of the Continental Shelf, Art. 76.8 and Annex II
2. Protection of the marine environment by the International Seabed Authority, Art. 145

3. Accommodation of activities in the area with other ocean activities, Art. 147
4. Dispute settlement systems for activities in the area, Arts. 186-191
5. General law of the sea dispute settlement system, Arts. 279-299, Annexes V-VIII

E. Rules of the Law of the Sea Convention that may enter customary international law that are of no direct concern to the United States, although they may have political significance:

1. Rights of landlocked states, Art. 69
2. Rights of geographically disadvantaged states in the exclusive economic zone, Art. 70
3. Development and transfer of marine technology, Arts. 266-278

F. Convention-based rules and systems to which the United States has been opposed, and by which it would not be legally bound, but which may directly or indirectly have an impact on United States' interests:

1. The resources of the deep seabed are only to be exploited pursuant to the Convention, Art. 137.2
2. Development of resources of the area with production policies, Arts. 150-151; system of exploration and exploitation, Arts. 153; periodic review and review conference, Arts. 154-155; basic conditions, Annex III
3. The Authority, Arts. 156-185
4. Amendments to the Convention, Arts. 312-316

G. Convention-based systems in which the United States may not wish to participate and would not be required to participate:

1. Contributions for continental shelf development beyond 200 miles, Art. 82
2. Equitable sharing of deep seabed revenues, Art. 140, 160.2(f)
3. Transfer of deep seabed technology, Art. 144; Annex III, Art. 5
4. Financial support of the International Seabed Authority, Art. 171(a); the Enterprise, Annex III, Art. 11.3

TOWARDS AN EFFECTIVE MANAGEMENT OF HIGH SEAS FISHERIES AND THE SETTLEMENT OF THE PENDING ISSUES OF THE LAW OF THE SEA: THE VIEW OF DEVELOPING COUNTRIES TEN YEARS AFTER THE SIGNATURE OF THE LAW OF THE SEA CONVENTION

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Consolidation and Uncertainties of the Law of the Sea

A recent study on the effect of exclusive economic zones and exclusive fishery zones on world fisheries shows in a conclusive manner that developing countries have fared rather well in increasing their catches[1]. In point of fact, fifty-three developing countries that have enacted such zones of maritime jurisdiction have increased the tonnage caught out of a total of sixty-three countries that have made gains. On the other hand, only twenty developing countries have decreased their tonnage after these enactments, out of a total of thirty countries incurring losses. Two developing countries have not shown changes[2].

Among the most important winners are Chile, China, the Republic of Korea, Indonesia, Ecuador, Mexico, Turkey, and India. Among countries incurring the greatest losses are Peru, Angola, and Vietnam, whose setbacks can in large part be explained by internal political strife or the application of wrong policies rather than the operation of the law of the sea. In 1987, developing countries reached a share of 25.08% of world catch, up from 17.12% in 1970. The largest increases were realized by Chile (24.44%), Thailand (10.83%), Indonesia (9.27%), India (8.72%), the Democratic Republic of Korea (8.10%), the Philippines (7%), and Mexico (5.67%). Developed countries increased

[1]Lawrence Juda, "World Marine Fish Catch in the Age of Exclusive Economic Zones and Exclusive Fishery Zones," *Ocean Development and International Law* 22 (1991): 1-32.

[2]*Ibid.*, Table 3, at 5.

their catch in the same period from 51.44% to 52.38%[3]. The increase in the value of the catch has in many cases also been significant[4].

It should also be noted that among the top twenty fishing nations of the world several developing countries figure quite prominently: Chile (fourth), Peru (sixth), ROK (seventh), Thailand (ninth), Indonesia (tenth), India (twelfth), Korea (R.D.) (thirteenth), Philippines (sixteenth), Mexico (eighteenth), Ecuador (twentieth)[5]. The Republic of Korea and Taiwan operate important distant water fishing fleets, an activity that Chile is also beginning to undertake.

These figures, positive as they are, also indicate the existence of some important problems in relation to the exploitation of living resources of the sea. The first is that not all developing countries have been able to benefit from the new rules of the law of the sea, partly because of differing natural conditions, but also because of the inability to adopt appropriate management measures for the exclusive economic zone and related areas. We shall address this question further below.

The second problem evidenced by these figures is that the main fishing nations of the world, with few exceptions, have not substantially diminished their share of the world catch. This phenomenom is explained by the intensification of the fishing effort in areas adjacent to those countries, by the increase in the number of agreements granting access to the fishing zones of developing countries, and by the intensification of high seas fisheries, which gives place to a considerable set of new issues. Not least of all, illegal fishing has also increased[6].

From the above discussion, one can also draw an interesting legal inference as to the characteristics of world practice on the law of the sea during the past decade: while law and practice relating to areas under national jurisdiction have been fairly stable and consolidated during this period, law and practice relating to areas beyong national jurisdiction -- both the high seas and the seabed area -- have remained uncertain and in a state of flux, which is leading to new concepts and legal approaches in the field. While briefly examining the

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[3]*Ibid.*, Tables 6-7, at 8-9.

[4]*Ibid.*, Table 8 at 11.

[5]*Ibid.*, Table 9, at 12.

[6]*Ibid.*, 13-15.

main trends as to the first aspect, this article will concentrate on the pending issues of the law of the sea, with particular reference to the question of high seas fisheries.

The Law of the Sea in Areas Under National Jurisdiction: Towards Greater Harmonization

A recent survey conducted by the Department of Ocean Affairs and the Law of the Sea of the United Nations on the law and practice relating to the implementation of the Law of the Sea Convention in different regions of the world[7] reveals unequivocally that, although the Convention is not in force, there is a substantial compliance with its provisions and basic approaches. In point of fact, both developed and developing nations have followed the Convention quite closely and have to some extent proceeded to harmonize their national legislation with the international rules and standards approved in 1982.[8] There are, of course, areas and issues where discrepancies are evident, but these arise not so much from a situation of noncompliance as from differing interpretations of the Convention's provisions, and even here there is a noticeable trend to overcome such differences.

Questions such as the breadth of the territorial sea, the drawing of baselines, and the regime applicable to navigation and overflight in these waters, have basically been aligned with the criteria in the Convention, with a few exceptions that are rooted more on historial views than on contemporary intentions. It is also worth noting that these exceptional situations are evolving towards forms of compatibility with universally accepted standards. Similar conclusions can be reached with regard to the contiguous zones and archipelagic State claims.

The regime of Straits used for international navigation has not given rise to major problems as was once feared, passage generally having been conducted in an unimpeded manner. This does not necessarily mean that transit passage has become a rule of customary international law as it is occasionally claimed, since practice is based

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[7]United Nations Department of Ocean Affairs and the Law of the Sea, *The Implementation of the United Nations Convention on the Law of the Sea*, Meeting of experts held in New York on 27-29 January 1992.

[8]See generally Tullio Treves, "Condification du Droit International et pratique des Etats dans le Droit de la Mer," *Recueil des Cours de l'Academie de Droit International* 223, no. IV (1990): 9-302.

on a variety of other considerations, but the important thing is that navigation is flowing without serious obstacles.[9]

The Continental Shelf is another area that has become firmly consolidated under national jurisdiction, again following both customary law and the basic provisions of the Law of the Sea Convention. Some discrepancies have arisen in relation to the implementation of certain detailed provisions of Article 76 of the Convention, with particular reference to the continental shelf jurisdiction of islands located on submarine ridges[10], but these differences again relate to problems of varying interpretations and not to intentional noncompliance with the Convention.

The complex regime relating to the exclusive economic zone has generally been subject to a smooth implementation, with a few exceptions involving excessive claims, mainly arising from navigation and overflight. In no case, however, have these exceptions altered the central trend of a successful implementation of provisions of the 1982 Convention.[11] Similar trends can be noted in the regimes of artificial islands, installations and structures, scientific research, and the protection of the marine environment.

While there are no important discrepancies in relation to the basic provisions of the Convention in the various matters just mentioned, in some cases the detailed provisions that develop each of those particular regimes are not followed in national legislation and practice with the same degree of accuracy. This is also quite natural since the Convention is not yet in force and on many occasions, the subject matter concerned falls within the discretionary ambit of coastal states. This situation has, however, an important legal implication in that not all the Convention provisions can be considered as having entered into customary international law as has often been argued with relation to the nonseabed parts of the Convention. The regime on fishing and conservation of living resources in the exclusive economic zone offers a clear example of this last dichotomy. While there is no discrepancy

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[9]Francisco Orrego Vicuna, "State Practice and National Legislation Relating to the Exclusive Economic Zone, the Continental Shelf and Straits Used for International Navigation: Basic Trends," in Rudiger Wolfrum (ed.), *Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Regime*, 1991, 351-371.

[10]Chile, Proclamation of 15 September 1985, in United Nations: *National Legislations Concerning the Continental Shelf*, 1989; Ecuador, Declaration of 19 September 1985, *Ibid.*

[11]See generally Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature Under International Law*, 1989.

about the basic clauses on coastal state sovereignty over the resources of the exclusive economic zone, the specific mechanisms derived for the conservation and utilization of such living resources are not generally found in national legislation and practice, except in a rather loose manner. Concepts such as "total allowable catch" or "access to the surplus" have not been generally implemented and it would appear that some of them do not meet with a favorable reaction of State practice.

In any event, one of the most serious concerns relating to the exclusive economic zone in the aftermath of the Law of the Sea Conference, which consisted in its eventual territorialization by means of State practice, was proven unwarranted. In law and practice, the exclusive economic zone has been kept essentially in harmony with the sense of balance that is embodied in the 1982 Convention.

Economic Foundations of Fisheries Policy: the Need for a Review

As mentioned above, not all developing countries have successfully taken advantage of the exclusive economic zone in terms of the exploitation of its living resources. Technical and scientific shortcomings, the lack of a comprehensive policy for the fisheries sector, and international agreements granting access to third countries or joint-venture arrangements which are not always advantageous for the coastal State, have all been factors influencing this situation.[12] Inefficient mechanisms for international cooperation in the fisheries sector have not been helpful either on many occasions.

The underlying problem affecting the full utilization of the exclusive economic zone is not so much of a legal or technical nature but an economic one. Policies allowing for free access to the living resources of the sea have resulted in a well known phenomenon of economic inefficiency, overcapitalization, overexploitation and depletion of resources. Traditional regulatory instruments calling for various forms of State intervention, which have been frequently applied by most developing countries, have generally not proven successful. In light of this experience, an entirely new approach based on individual transferrable quotas is being implemented in a number of countries -- including Chile as a developing country -- with the

[12]FAO: "Oceans, Seas and Inland Fisheries: Protection, Rational Use, and Development of Their Living Resources," RLAC-CSD5, 1992, 15-16.

specifically recognizing individual fishing rights by an innovative mechanism of privatization and market-oriented regulations.[13]

The advantages of such a new approach have proven to be considerable, not only in overcoming the problems of inefficiency, but also in providing a useful tool for the full utilization of the resources of the exclusive economic zone. Difficult problems of implementation, however, have also been encountered, particularly at the stage of allocating fishing rights. This option, as well as the trend to adopt self-regulation as a mechanism for fisheries management, should be closely considered by developing countries and other groups.

These experiences clearly point to the need of reevaluating fisheries policies and the objectives that have been traditionally followed by many developing countries, considering new criteria for fisheries legislation and its institutional framework and the availability of information, training, and research.

Coastal States' Interests in High Seas Fisheries: the Search for New Approaches

If law and practice relating to maritime areas under national jurisdiction have been moving towards greater consolidation and harmonization with the Law of the Sea Convention, the same cannot always be said of the situation today characterizing high seas fisheries. In point of fact, since the Convention was opened for signature a number of new problems have emerged with respect to the conservation and utilization of the living resources of the high seas, an area being subjected to increasing pressures.

The current search for new legal solutions has been occasionally interpreted as an effort directed to enlarge national jurisdiction in a spatial sense beyond the 200-mile limit. The emerging trend, however, responds to an entirely different reasoning based on the recognition of the oceans as an integrated ecosystem and the fact that the coastal State cannot be indifferent to what happens in areas of the high seas closely related to the areas under national jurisdiction. The concept of ecosystem management is leading to a greater emphasis on rational management of living resources; while this is true in a broad sense, including in the exclusive economic zone, it has become more evident and pressing in relation to the high seas, where generally there is no

[13]Peter H. Pearse, "From Open Access to Private Property: Recent Innovations in Fishing Rights as Instruments of Fisheries Policy," 25th Annual Conference of the Law of the Sea Institute, Malmö, 6-9 August 1991.

regulatory authority whatsoever. Furthermore, conservation of resources in the exclusive economic zone has become mandatory under the Law of the Sea Convention, while the high seas follow looser arrangements in this matter. It follows that a new special interest is being expressed in this new context that is specifically related to the new issues affecting the high seas.

The paramount cases in which the rights, duties, and interests of coastal States in high seas fisheries have been recognized under international law are those related to straddling stocks, highly migratory species, marine mammals, anadromous stocks, and catadromous species. There is, however, a more general proposition that needs to be examined. It is quite clear that States can adopt conservation measures for their nationals on the high seas and that they must ensure cooperation with other States by means of the appropriate organization in order to apply common restrictions. The issue is whether this can be done without the participation of the relevant coastal State as the traditional law of high seas fisheries would suggest. In the light of the close interrelationship existing between the high seas and the exclusive economic zone, both in terms of biological and ecological interactions, it is submitted that such a divorce is no longer possible and that consequently conservation measures in the high seas need to ensure the participation of the relevant coastal State as a condition of their effectiveness. This trend in no way diminishes the validity of cooperation and binding dispute settlement as the preferred alternative, but it ensures that if all such mechanisms should fail or prove to be ineffective the interest of the coastal State will not remain unattended.

Highly Migratory Species and the Prevalence of Coastal States Interests

Highly migratory species provide one first important case where there is a very close interaction between the high seas and the exclusive economic zone. The Law of the Sea Convention promptly recognized this reality and called for the arrangements for cooperation embodied in Article 64. The long standing position of the United States, claiming that highly migratory species could be managed only through international arrangements and that no coastal State jurisdiction should intervene in the exclusive economic zone or otherwise, gradually began to change in the light of the specific problems that

have to be addressed in practice.[14] This was initially and indirectly done by means of the 1987 Treaty on Fisheries between a group of Pacific Island States and the United States[15] and next in a direct manner when in 1990 it began claiming jurisdiction over highly migratory species within the exclusive economic zone.[16]

The interpretation upheld in this matter by a number of developing countries proved not to be unwarranted, although regrettably Latin American initiatives in this field did not contribute to a positive solution. In point of fact, neither the 1983 Agreement and Protocol on tuna fishing between Costa Rica, Panama, and the United States,[17]nor the Agreement of 1989, establishing the Eastern Pacific Tuna Fishing Organization[18] seem to coincide with the balanced approach sought by the 1982 Convention, since, as concluded by an author, "they do not appear to meet the conditions required to ensure an ample participation of interested States."[19] In the first case, the approach is somewhat distorted to the detriment of the coastal State, since its role is minimized in the exclusive economic zone, a situation which basically responded to the views of the United States at the time. In the second case, the approach is somewhat distorted to the detriment of the interest of other States in high seas fisheries, which is not appropriately taken into account in a scheme controlled entirely by a group of coastal States. Future negotiations will have to be undertaken on different bases responding to the present state of understanding

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[14]William T. Burke, "Highly Migratory Species in the New Law of the Sea," *Ocean Development and International Law* 14 (1984): 273-314.

[15]Certain Pacific Island States-United States, *Treaty on Fisheries*, April 2, 1987, *International Legal Materials* 26 (1987): 1048-1090.

[16]United States, "*Aide-memoire*, Concerning Amendments to the Magnuson Fishery Conservation and Management Act: Amendment to Include Highly Migratory Tuna as Species of Fish Under United States Jurisdiction," 22 May 1991, *Law of the Sea Bulletin* 19 (October 1991): 21.

[17]Costa Rica, Panama, United States, *Agreement on Tuna Fishing and Protocol* of 12 April 1983.

[18]Ecuador, Mexico, Nicaragua, Peru and El Salvador, *Agreement Establishing the Eastern Pacific Tuna Fishing Organization*, 21 July 1989.

[19]Jean-Francois Pulnevis, "Vers Une Emprise des Etats Riverains Sur la Haute Mer au Titre des Grands Migraeurs?, Le Regime International de la Peche au Thon dans le Pacifique Oriental," *Annuaire Francais de Droit International* 35 (1989): 774-806.

and cooperation that characterizes the issue of highly migratory species elsewhere in the world.

Marine mammals constitute, of course, a different category of highly migratory species, being governed in part by the International Convention on the Regulation of Whaling and the work of the International Whaling Commission and in part by the more stringent provisions of Article 65 of the Law of the Sea Convention, applicable both within and beyond the exclusive economic zone as a further recognition of the intrinsic unity of ocean space.

Straddling Stocks: New Issues and Solutions

A second situation in which there is a very close interaction between the exclusive economic zone and the High Seas is that relating to the straddling stocks issue.[20] This has become a pressing question, affecting the interests of Canada, the United States, New Zealand, Mexico, Central America, Argentina, Chile, Peru, and others. The discussion on this question clearly shows that the underlying issue is coastal State interest in the fisheries beyond the exclusive economic zone, in stocks which are inseparable from such Zone in terms of management and conservation. Various countries concerned elaborated on this interest in the Conference on Conservation and Management of High Seas Living Resources held in St. John, Terranova, in 1990,[21] where the adoption of measures to avoid adverse effects of high seas fisheries on living resources under coastal State jurisdiction was emphasized, together with the concept that management of straddling stocks in the high seas must be consistent with the management regime applied in the exclusive economic zone. The new approach underlying this policy does not involve at all an issue of creeping jurisdiction of the coastal State, and it is conceived within the framework of the Law of the Sea Convention, subject to perfecting the meaning and extent

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[20]Edward l. Miles and William T. Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising From New Fisheries Conflicts: The Problem of Straddling Fishing Stocks," *Ocean Development and International Law* 20 (1989): 343-357. Ellen Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*, 1989. Rainer Lagoni (Rapporteur), "Principles Applicable to Living Resources Occurring Both Within and Without the Exclusive Economic Zone or in Zones of Overlapping Claims," International Law Association, International Committee on the Exclusive Economic Zone, *Report*, Cairo Conference, 1992.

[21]Conference on the Conservation and Management of the Living Resources of the High Seas, St. John, Terranova, 5-7 September 1990, mimeo.

of some of its provisions. Furthermore, this approach can be understood as preventing a kind of creeping jurisdiction in reverse of distant-water fishing States.

This process of elaboration was taken a step further by means of a meeting of experts from Canada, Chile, and New Zealand, which met in Santiago on 17 May 1991, followed by a larger gathering that met in New York on 26 July 1991 with the participation of Argentina, Australia, Barbados, Brazil, Canada, Chile, New Zealand, and the Forum Fisheries Agency. The scope of these discussions was broader since they addressed the whole range of issues relating to the conservation and management of living resources of the high seas and not only the question of straddling stocks. The issue has also been discussed in the context of the work of the 1992 United Nations Conference on Environment and Development.[22]

Anadromous and Catadromous Species: Functional Jurisdiction

Another area where special interests in the high seas have been duly recognized under international law is that related to anadromous stocks.[23] In accordance to Article 66 of the Law of the Sea Convention, the States in whose rivers these stocks originate shall have the "primary interest in and responsibility for such stocks," a provision which extends to the management of salmon in the high seas with only minor restrictions relating to the cooperation with other States concerned.

Significant legal changes have been prompted by the special characteristics of the salmon fisheries and the need to introduce effective conservation measures. The important development of ocean ranching has also contributed to this change in the legal approach.

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[22]Argentina, Barbados, Canada, Cape Verde, Chile, Fiji, Guinea-Bissau, Iceland, Kiribati, New Zealand, Peru, Samoa, Senegal, Solomon Islands and Vanuatu, "Conservation and Management of Living Resources of the High Seas," proposal submitted to the third session of the Preparatory Committee of UNCED, Geneva, 12 August - 4 September 1991, 24 *Law of the Sea Bulletin* 19 (October 1991): 42-44. See also UN Doc. A/CONF.151/PC/WG.II/L.16/Rev. 1, 16 March 1992, on "Conservation and Management of Living Resources of the High Seas," and the decision adopted by UNCED on the convening of a United Nations Conference on straddling stocks, highly migratory species and other high seas issues, A/CONF.151/4 (Part II), Chapter 17, par. 17.52 bis, 6 June 1992.

[23]William T. Burke, "Anadromous Species and the New International Law of the Sea," *Ocean Development and International Law* 22 (1991): 95-131.

Catadromous species are one further example of coastal States' special interest extending to fisheries and conservation in the high seas.

Other Expressions of Coastal State Interest in the High Seas

Various other interesting developments in high seas fisheries should be mentioned. One is the emerging trend of approaching marine affairs in terms of "Large Marine Ecosystems," which focusses on conservation, development, and research, not within the limited bounds of traditional jurisdictional areas, but in the light of broad geographical and biological realities.[24] The Large Marine Ecosystems approach is responsive to these requirements and consequently extends beyond national jurisdictional areas, not for the purpose of claiming jurisdiction, but for ensuring appropriate management of environmentally sustainable activities. It should be pointed out that the concept of Large Marine Ecosystems is not related to questions of exercising jurisdiction in a juridical sense, but to the rational management of biological realities, a distinction that has not always been clear and that many times has led to unnecessary difficulties in negotiations on marine affairs. While many Large Marine Ecosystems extend along the continents, a number of other involve large ocean expanses extending into the high seas.

Another development of importance relates to the practice of boarding and inspection of fishing vessels in the high seas in order to prevent illegal catching of salmon, particularly with driftnets or as incidental catch. The United States has been developing this practice in the North Pacific with Korea and Taiwan under bilateral agreements and with Japan under the International North Pacific Fisheries Commission and other arrangements; the Soviet Union follows a similar, albeit more limited, practice.[25] It would not be surprising if the same right of boarding and inspection is claimed in the near future for other species or situations where conservation is seriously affected by unregulated high seas operations. The same policy of boarding and

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[24]International Conference on the Large Marine Ecosystem (LME) Concept and its Application to Regional Marine Resource Management, Monaco, 1-6 October 1990.

[25]Barbara Kwiatkowska, "Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the 1982 Law of the Sea Convention and State Practice," *Ocean Development and International Law* 22 (1991): 153-187.

inspection has been followed by the United States with respect to the ships suspected of carrying narcotic drugs.

A third development of importance in State practice is the regulation of certain types of high seas fishing operations, with particular reference to the use of driftnets, again on the ground of the need to ensure conservation and avoid indiscriminate catches. The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific,[26] and the passing of the United Nations General Assembly Resolution 44/225 on Large-Scale Pelagic Drifnet Fishing, are recent examples of initiatives aimed at the regulation of high seas fisheries where they are clearly at odds with conservation criteria. The control of transhipment of driftnetting catches and the reflagging of vessels is another area where the role of coastal States will be increasingly felt in the near future.

The whole issue of the environmental protection of the seas and oceans is of course leading to the adoption of measures in the high seas, including, eventually, coastal State action. The management of marine ecosystems has made the influence of coastal States unavoidable; whether this influence is exercised directly, for example by means of the adoption of conservation measures in the high seas, or through mechanisms of international cooperation, which is of course the desirable option, depends on the effectiveness of the latter. The long term implication of this policy is more complex since it refers to the question of whether fisheries management will be introduced into the high seas in a manner comparable to what is now done within the exclusive economic zone. Given the fact that conservation problems are not intrinsically different in such areas, it can be expected that this development will take place in the future. In this regard Article 116 of the Convention has become particularly pertinent in relating the freedom of fishing to "the rights and duties as well as the interests of coastal States."

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[26]Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 1989, *International Legal Materials*, 29 (1990): 1449-1463.

The "Presential Sea": A New Unifying Concept Under International Law

A high-ranking Chilean naval officer has recently put forward the concept of a "Presential Sea,"[27] a concept that has been received with great interest in Chile and other countries, and that has also raised questions in some European capitals and other quarters about its compatibility with international law. The meaning and extent of the "Presential Sea" can well be explained in the light of the developments explained above, since it closely responds to the expression of a special interest of the coastal State, in this instance Chile, but which can also be applied to many other geographical situations throughout the world. To this extent the new concept can well serve the needs of many countries throughout the world, although of course in given narrow geographical situations it may be more difficult to implement.

The "Presential Sea," first of all, involves the participation in and surveillance of the activities undertaken by other States in the high seas areas of particular interest to the coastal State. In this regard it is not a question of excluding any State from such areas, but, on the contrary, of ensuring the active inclusion of the coastal State concerned. There is no question of exclusive coastal State rights involved in this concept, or the drawing of new maritime boundaries in a legal sense; neither should participation in such activities be understood as a kind of compulsory intervention by the coastal State in the activities undertaken by other countries, but only as ensuring its own right to operate actively in the area. The concept expressly safeguards the "legal status of the high seas established by the United Nations Convention on the Law of the Sea," and "does not purport to disavow the high seas as such." It follows that the approach has been conceived of in a manner entirely consistent with the current status of the law of the sea.

Next, the "Presential Sea" concept encourages the coastal State to undertake economic activities in the high seas in order to promote national economic development and to ensure that other activities therein are conducted in such a way as to avoid direct or indirect harmful effects upon such development. This element involves the

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[27]Jorge Martinez Busch: "La Gran Tarea de Esta Generacion es la Ocupacion Efectiva de Nuestro Mar,: Clase Magistral Dictada Por el Comandante en Jefe de la Armada de Chile, Valparaiso, 4 May 1990; *Ibid*, "El Mar Presencial, Actualidad, Desafios y Futuro," Clase Magistral Dictada Por el Comandante en Jefe de la Armada de Chile, Valparaiso, May 1991.

undertaking of legitimate forms of competition, while at the same time it requires the development of more active forms of cooperation and other measures in order to prevent adverse effects upon the interest of the coastal State. This type of situation has already been recognized in relation to issues such as straddling stocks, highly migratory species, salmon ranching and salmon natural stocks, marine pollution, and a number of other matters that have been mentioned, and that will probably be perfected in a variety of ways in the near future. Again here there is consistency with the current and evolving status of international law. The concept does not have as such a jurisdictional content or claim to the area of the "Presential Sea," but it can eventually have jurisdictional implications if mechanisms for international cooperation are nonexistent or ineffective. This would be the case, for example, if the coastal State has to introduce conservation measures in areas of the high seas in the absence of any other regulatory authority while negotiations conduce to a solution.

Thirdly, the concept of a "Presential Sea" is related to a broad view of national security, understood not in a strict military sense, but in terms of protection of the national interest, including the economic dimension mentioned above, with particular reference to the exclusive economic zone and the territorial sea. The same interest will of course be present in the continental shelf areas and eventually in the seabed beyond the limits of national jurisdiction, not to the detriment of whatever international regime might be brought into force, but in order to ensure that the interest of the coastal State will be expressed in the latter framework in an appropriate manner.

For Chile, the "Presential Sea" has been defined geographically as the high seas beyond the exclusive economic zone and located opposite to the continent, Antarctica, and Easter Island, in the broad quadrangle of the Southeast Pacific. A similar definition is contained in the Chilean fisheries law passed in 1991.[28] After the passing of this law the concept acquired a legal status in Chile, thus also becoming an official government policy. The geographical extent of application of the "Presential Sea" may of course vary from case to case, taking into account different national and regional realities. Since such a concept does not involve a jurisdictional claim over the high seas, it can well be adapted to such different realities.

The "Presential Sea" is a concept where all the trends, issues, and concerns described converge within a framework which, while fully consistent with present international law, is at the same time opening

[28]Chile, Law N. 19.079, *Official Journal*, 6 September 1991.

new frontiers for its development in the light of the changing reality of ocean management. It can therefore be expected that such a concept will lead to a number of changes in the law of high seas fisheries in the years ahead, not only because it represents the expression of interest of many developing countries, but also because it responds to the pressing and potential needs of developed countries as well. Just as happened with the exclusive economic zone, this new concept has the potential of evolving into customary international law, reflecting the interest of both coastal States and the international community. To a meaningful extent, the coastal State will be acting on behalf of the international community in the "Presential Sea" as long as the latter will not ensure adequate conservation in the high seas.

Renewed Efforts for Seabed Mining Joint-ventures

The law relating to the seabed area beyond the limits of national jurisdiction is also in a state of uncertainty as a result of the stagnation affecting Part XI of the Convention. This is not the occasion to repeat the debate surrounding this matter, the work of the Preparatory Commission or the conversations convened by the United Nations Secretary General, but only to reiterate the views expressed elsewere regarding a new effort to organize a joint-venture system.[29]

One of the existing possibilities for the renegotiation of the regime is that of reviving the joint venture alternative, possibly through an optional mechanism that could be introduced by an additional protocol to the Convention. This would in no way affect the principle whereby the seabed is the common heritage of mankind. On the contrary, it would make it immeasurably easier to solve many of the existing problems, notably the following:

* Ensuring the transfer of technology, which would take place within the individual joint ventures rather than through separate entities, as is presently the case.
* Harmonizing the financial terms of contracts, as it would not be so important to require the operators to make advance payments, since the Enterprise would be automatically funded within the joint venture.
* Eliminating in practice the advantages enjoyed by the Enterprise, which have been regarded as being discriminatory. All the

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[29]Francisco Orrego Vicuna, "The Deep Seabed Mining Regime: Terms and Conditions for Its Renegotiation," *Ocean Development and International Law* 20 (1989): 531-539.

operators interested in this approach would be treated on an equal and nondiscriminatory footing. This was a point that was even supported by some developing countries in the negotiations.

* Harmonizing the technical and financial requirements.
* Affording ready access, at known cost, to the training programs offered within the scope of the joint venture.
* Significantly scaling down the financial burden that the States Parties will have to bear in funding the Enterprise; many countries would otherwise find it impossible to cope with this financial burden in the climate of economic crisis now affecting them.

Under the existing system there are isolated provisions relating to joint ventures and even these make it possible to grant financial incentives in order to bring such ventures into existence, but they lack the consistency and scope needed to turn them into an attractive alternative mechanism.

Reordering High Seas Fisheries: A Priority Issue for the Agenda of the Next Decade

The decade that has lapsed since the signature of the Law of the Sea Convention has been enormously rich in terms of the development of the law and practice relating to the implementation of that Convention. A process of consolidation and harmonization is well under way as far as domestic legislation and the areas subject to national jurisdiction are concerned. Developing and developed countries alike have had a most important role in this process.

The characteristics of the next decade of developments in the law of the sea have already emerged quite clearly in that a similar process of consolidation will take place in relation to the areas beyond the limits of national jurisdiction, most particularly the reordering of high seas fisheries. The "Presential Sea" will become in this context an influential concept for such a purpose. Developing countries had not normally been actively concerned about high seas fisheries, which many times were beyond their capabilities. This is the fundamental point that has now changed since developing countries are today in the position of both competing in terms of high seas fishing and ensuring that such activities do not adversely affect the resources in areas under national jurisdiction. It is this new interest that is gradually being recognized under international law and which will inspire the pending issues of the law of the sea. The Conference on High Seas Fisheries convened by the United Nations for 1993 will mark the beginning of this process of redefinition and clarification.

PROSPECTS FOR UNIVERSALITY OF THE UNITED NATIONS LAW OF THE SEA CONVENTION

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Notwithstanding my status at the Ministry of Foreign Affairs of the Russian Federation, I am not going to present the Russian position concerning prospects for the universality of the United Nations Law of the Sea Convention (UNCLOS). Instead, the following will be the view of an individual who happened to be one of the leaders of the Soviet delegation to the United Nations Law of the Sea Conference, from its first to last sessions, and to the sessions of the Preparatory Commission for the International Sea-Bed Authority, from the very beginning of its activities, who participated in official, unofficial, and private talks, and has seen with his own eyes the sufferings and contradictions in which the Convention was born.

Certainly I do not blame anyone for this suffering and these contradictions. I think that all of us who participated in preparation and approval of Part XI have the duty to be the first to recognize its shortcomings, to discover their origin, and to suggest how they could be corrected.

In order to give a well-reasoned answer to the question of the prospects of the universality of UNCLOS, I will, in brief, first analyze:

* The present-day situation around the Convention;
* The consequences of the Convention's entry into force without participation therein of industrially-developed states; and
* The importance of the universality of the Convention.

The present-day situation around the Convention

After the ten years that have passed since the adoption of the 1982 UNCLOS, all members of the international community are concerned with the question of when the Convention will enter into force and whether this will take place as a result of its ratification by sixty countries, the majority of which are developing countries, or will enter into force as a universal international instrument. The international community is concerned also with the question of the conse-

quences of the first or second variant of the Convention's entry into force. This concern is quite understandable as by now the Convention is ratified by fifty developing countries and Iceland.

Statements made at international forums by the representatives of different groups of countries permit us to draw the conclusion that a considerable number of developing countries maintain that its ratification if only by nine more developing countries, will oblige all other countries to accede to the Convention. Therefore, they believe that the process of the Convention's ratification should be speeded up in every possible way.

The industrially-developed states do not intend to ratify the Convention before some substantial adjustments are made. There are a number of developing countries to which the idea of adjusting Part XI seems attractive, but which have not yet determined their final attitude.

This fact alone is indicative of the urgency and importance of the question concerning the further fate of UNCLOS, the time of its entry into force, and its parties.

The consequences of the Convention's entry into force through its ratification by developing countries

The entire experience of man's activities in the world's oceans is indicative of the possibility that the entry of the Convention into force through its ratification by one group of countries could be fraught with great risks for the situation in the world's oceans. This would actually mean a split of the international community in questions relating to legal order in the world's oceans. There is no doubt that, in such a context, maritime nationalism and "creeping jurisdiction" will revive and gain new force.

Such a course of events is quite probable, especially since attempts to interpret the Convention arbitrarily or to violate it overtly have already taken place. According to statistical data, nineteen countries have established the breadth of their territorial waters of 20, 30, 35, 50 or 200 nautical miles. Many countries fail to observe other conventional provisions on which, at the time of the adoption of the Convention, there was practically general concord among the participants to the Convention.

Great concern with regard to this situation was expressed by Satya Nandan, former UN Deputy Secretary-General, Special Representative of the Secretary-General for questions of the law of the sea, who as far as back as 1989 stated at the 23rd Annual Conference of the

Law of the Sea Institute and the Netherlands Institute for the Law of the Sea:

> From an examination of their legislation it is not surprising to observe that most States when asserting their rights as coastal States often go beyond what is permitted in the 1982 Convention. There is, therefore, a constant danger of erosion through divergent State practice of the very delicate balance reached at the conference.[1]

This process continued after 1989 as well. According to incomplete data for 1990, more than seventy states failed to observe over one hundred provisions of the Convention, which often resulted in formal protests on the part of states whose interests were prejudiced by such violations.

Anxiety is also caused by failures to ratify the Convention. According to a survey carried out by the Faculty of Political Sciences of the University of New Hampshire from September to December 1988 among the UN member states, a considerable number (over 15 percent) maintained that if they do not ratify the 1982 Convention, "the prevailing law" for them in questions concerning territorial waters, high seas, and the continental shelf will be 1958 Convention[2] whose provisions are far from being similar to the provisions of the 1982 Convention.

Moreover, if the 1982 Convention does not become universal, many countries may regard the comprehensive system of mandatory peaceful settlement of maritime disputes -- provided for by this Convention for the first time in the history of the international law of the sea -- as a system bearing no relation to them. Meanwhile, it is known that disputes on these issues do exist and constantly emerge in practically all regions of the world's oceans. There are grounds, therefore, to assume that today's flames of nationalistic passions in various regions of the world will lead to even more "maritime nationalism".

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[1]Speech by Satya N. Nandan at the 23rd Annual Law of the Sea Institute Conference, 12 June 1989.

[2]David L.Larson. "When Will the UN Convention on the Law of the Sea Come Into Force?" *Ocean Development and International Law* 20, (1989): 175-202.

The importance of the Convention's universality

In this climate of legal uncertainty and of increasing risk to peace and security, it is of special importance that a generally recognized, universal convention enters into force and not a convention convenient for only one group of countries. Only a universal convention can become a mighty breakwater against any waves of "maritime nationalism."

The sooner the universalization of the Convention takes place, the more successful will be the fulfillment of its principal task, which is the strengthening of peace and security in the oceans. At the same time, its other very important task will be fulfilled -- the creation of favorable conditions for promoting large-scale international cooperation with the view of just, effective, ecologically safe and advantageous exploitation of the world's oceans and their living and mineral resources. To transform the dreams and hopes for the Convention's universality into reality, it is necessary within the shortest possible period to agree upon the introduction of adjustments to the present text of Part XI that will be acceptable for all states.

Prospects for achieving universality of the Convention

What are the prospects for the earliest achievement of this objective? It seems to be that in order to give a well-reasoned answer to this question, it is necessary to get a clear idea of the reason which made it impossible, during the Conference's eight years of hard work, to prepare a convention, all parts of which, including Part XI, would be acceptable to all states. It is necessary to analyze why Part XI caused disagreement so sharp that it could not be overcome either at the Conference, or in the subsequent ten-year period.

Such analysis will make clear the obstacles to the Convention's universality and the remedies, the mistakes made during the elaboration of Part XI, and the means for avoiding them in future talks, and, at last, the sentiments and tendencies to be abandoned and, on the other hand, the sentiments and tendencies to be cultivated. Such analysis would be a reliable basis for evaluating the prospects for the Convention's universality.

In order to formulate suggestions for a solution, I will try to determine what the main reasons are for the objections by so many states to Part XI. It is my deep conviction that the principal reason is that the elaboration of the Convention took place in times when the winds of Cold War and sharp ideological struggle raged in the world and bloc diplomacy dominated in the world arena. It is only natural

that such a tense international situation would affect the United Nations Law of the Sea Conference where throughout there was an atmosphere of tough confrontation between the main groups of states -- between the former USSR and socialist countries of Eastern Europe, on the one hand, and the United States, Western countries, and Japan, on the other hand, between each of these groups and the developing countries' "Group of 77," and between all developing and all industrially-developed states.

Let me mention, in short, only two events that have not been noted in any documents of the Conference, but which, in my opinion, precisely reflect the atmosphere of the Conference.

In the very beginning of the 1974 Caracas session, when the Conference's Rules of Procedure were being formulated, the most heated discussions took place between those, on the one hand, who held that decisions on questions of substance affecting states' vital interests could not be taken without such states' consent and those, on the other hand, who believed that decisions on such questions, including adoption of the Convention on the whole, could be settled by voting.

When passions heated to the maximum, the most spirited representatives of the second group began to demand by shouting from the audience the closure of the debates and immediate adoption of the Rules of Procedure by voting. That was the first, but unfortunately not the last, attempt to depart from the adoption of decisions by consensus and to impose on the Conference a decision unacceptable for a number of states.

The chairman of the Conference, the late Hamilton Shirley Amerasinghe of Sri Lanka, a wise, experienced, and benevolent man, managed to quiet down the passions and to approve the Rules of Procedure by consensus, based on a compromise: the obstacles to the adoption of the Convention by voting were included, but the possibilities for this procedure remained. At the end of the Conference, this flaw of the Rules of Procedure appeared to be fatal -- the Convention was adopted by voting although certain states strongly objected its Part XI. As a result, the Convention remains unacceptable for them now.

This sad experience should be taken into account by those who participate in the consultations headed by the UN Secretary-General on the elaboration of adjustments to Part XI, in particular, on the question of adoption and entry into force of amendments to this part.

The second event is connected with the state of relations between Soviet and American delegations. The national interests of our countries in questions examined by the Conference were very much similar and often coincided. Looking back, however, we may say that

the delegates of our two countries followed in fact the principle: what is good for one side should be bad for the other side.

This atmosphere of mutual distrust, suspicion, and confrontation was outlined by Dr. Henry Kissinger, former U.S. Secretary of State, in a rather picturesque and hyperbolical manner typical of him.

After usual bilateral consultations he told me:

> Do you happen to know that you, Russian, have a rather specific manner of carrying out talks. In the very beginning, without allowing your interlocutors even to open their mouths, you start to club them on the head, club again and again and then suddenly propose: 'Now let us look for mutually acceptable compromises.' But at that moment your interlocutors are only thinking of where to get headache tablets.

I did not dispute this maxim and only noted that the American manner of talks differs from ours not in content, but only in form. Americans begin by talking about compromises and then pass on to boxing. They, however, punch not on the head, but in the pit of the stomach.

The result is the same. Kissinger made no objections, but just gave me his own sarcastic smile and then added: "Nonetheless, I still believe that you and we will come to understand each other sooner or later and find common language."

I answered that I shared this hope. But nothing in relations between our countries suggested such hope.

In that atmosphere of ideological struggle, the developing countries were also taking the road of pressure and confrontation by using the weapons they had, i.e., the majority of votes. By this method, they tried to secure the inclusion into Part XI of provisions that would oblige the industrially-developed states to commit themselves to financial and economic obligations which would make their seabed resources mining unprofitable, run counter to their economic and other interests, and, in general, be unacceptable to them.

The atmosphere of the Cold War in which the Conference was held naturally hindered the elaboration of coordinated decisions on all questions of the law of the sea. It especially adversely affected the formulation of Part XI, due to its specific nature, and due to the fact that by its content it was ideologized and politicized to a much greater degree than other parts of the Convention and contained intrinsic contradictions and lacked balance.

In fact, it provided for the industrial mining of seabed resources under the strict control of a giant bureaucratic organization rigidly

limiting and regulating seabed activities, while the results of such activities were to be sold in the international market where the laws of free competition apply. Moreover, the main expenditures regarding the setting up of this organization and its activities were to be borne by several industrially developed states.

These circumstances were still another reason that it was impossible to settle the disagreements concerning Part XI. Moreover, the majority of the Conference's delegates agreed to elaborate not just basic principles of future organization activities, but detailed rules and regulations for such activities.

Finally, this result was also predetermined by the fact that Part XI greatly differs from other parts of the Convention, which were well studied in practice and thoroughly elaborated theoretically. Accordingly, the rights and duties of the states determined by these parts appeared to be realistic and thoroughly balanced. And it was by no mere chance that these parts were approved by the Conference virtually by general consent, i.e., by consensus. Nothing of the kind was done nor could be done with issues relating to Part XI as each and all of them as a whole were equations with many unknown variables.

In this situation, it was practically impossible to evaluate the economic and financial feasibilities of the seabed activities concerning prospecting, exploring, and mining of resources and esseriouspecially to reveal such feasibilities with the view of possible commercial mining of these resources in the future. As a result, the regime of seabed activities provided for in Part XI was unrealistic and of no economic value. It has become a final reason for the unacceptability of Part XI for the industrially-developed states.

In recent years, the international situation has drastically changed, cooperation has replaced confrontation, former adversaries have become partners. As a result, it has become possible to start to reduce nuclear potentials and to regulate other important questions, both international and local.

It will be an inexcusable mistake if we do not take advantage of these historic changes and existing favorable conditions to get rid of still another heritage, of still another rudiment of the Cold War -- the disagreement on Part XI of the UNCLOS.

The ice has broken. The consultations on this issue chaired by the UN Secretary-General are successful. The results of seven consultations have shown that their participants recognized the need to adjust Part XI, made a list of questions needing adjustment, outlined the ways of their settlement, and discussed possible legal forms of agreement on the introduction of such adjustments. In particular, the possibilities of adoption of a protocol providing necessary adjustments and

formalizing principles of future seabed activities was mentioned. It seems to be one of the reasonable ways of action.

All this is good, and suggests certain hopes for the consultations' success. Nevertheless, one cannot disregard the fact that in the speech delivered before the participants of these consultations on 11 December 1991 by Javier Perez de Cuellar, former UN Secretary-General, obviously disquieting notes were heard. He noted that if the Convention does not become universal, there will be a practicable danger of the Convention's erosion. He called upon all participants "to make a serious effort to reach an agreement on the outstanding issues." He also stated: "I particularly urge those that have been hesitant or not as forthcoming as others to take advantage of the window of opportunity they have for resolving their problems."[3]

It ensues from this speech that among the participants there are those who still hesitate and doubt the need to adjust Part XI substantially. The historic background of the negotiations at the United Nations Law of the Sea Conference and in the PrepCom gives grounds to believe that such doubts and hesitations are rooted in the past and namely in the willingness to preserve Part XI unchanged with the view that the remaining states will have to accede to it. If certain participants to the consultations adhere to such aspirations, the outwardly favorable opportunities for the universality of the Convention will be lost and its fate will become quite indefinite.

To succeed in future negotiations for the adjustment of Part XI and the subsequent universalization of the Convention, it would be of special importance that all participants completely refrain from such aspirations and concentrate their efforts on the achievement of mutually-accepted solutions consonant with today's realities.

In this connection it seems appropriate to recollect the suggestion of Senator Claiborne Pell, Chairman of the United States Senate Foreign Relations Committee, who warned at the regular Annual Seminar held by the University of Virginia's Center for Oceans Law and Policy in April 1991 that "both sides must be willing to take off the ideological cloaks that they have worn during the many years of debate on these issues and approach them pragmatically and realistically."[4]

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[3]United Nations Press Release. Department of Public Information. New Coverage Service. New York. SG/SM/4671; SEA/1286, 13 December 1991.

[4]*Ocean Policy News*, Council on Ocean Law, Washington, D.C. March-April 1991, p. 7.

Certain optimism is inspired by the fact that not only developed countries seek adjustment of Part XI. The need for such adjustment is also recognized now by certain developing countries' prominent figures. For example, speaking at the 1990 Tokyo meeting of the Law of the Sea Institute, Jose Luis Jesus of Cape Verde, chairman of the Preparatory Commission, noted that the "alternative to adjustment would be to render it unimplementable." He also added a number of concrete considerations regarding the nature of adjustments and the procedure for their formalization.[5]

The United Nations General Assembly could presumably make a more valuable contribution to the success of the talks. The resolution adopted by its 46th session in December 1991, for all its merits, also has an important flaw -- it remains inconsistent and contradictory on the issues of the Convention's universality. In fact, the resolution's paragraphs 4, 5 and the second half of paragraph 6 recognize the need to reevaluate the provisions of Part XI, to give due consideration to questions causing concern of certain states, to express satisfaction with the UN Secretary-General's initiative to promote the dialogue aimed at examination of the above mentioned issues, and to urge all states to proceed with this dialogue. At the same time, paragraph 2 of the resolution and the first half of paragraph 6 express satisfaction that the number of the Convention's ratifications is nearing the sixty necessary for its entry into force, and urge all states that have not as yet ratified it to examine the question of the Convention's ratification and accession thereto at the earliest date, with the view of ensuring the entry into force of the new legal regime for the uses of the seas and utilization of the resources. It appears that the General Assembly urges the states to move simultaneously in two different directions: to the earliest universality of the Convention through the adjustment of its Part XI and to its earliest entry into force with an unadjusted Part XI, which would make the Convention's universality difficult or impossible. Such resolutions can hardly promote the progress of the negotiations on Convention universality.

To ensure significant progress of the negotiations, it would be of great importance that the United Nations General Assembly take a clear stand on the question of the Convention's universality. To this end, it would suffice to adopt a resolution that would contain only one paragraph urging the states, first to treble efforts with a view to ach-

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[5]Statement on the completion of the work of the Preparatory Commission and the universality of the Convention made by Ambassador Jose Luis Jesus of Cape Verde on the occasion of the 24th Annual Law of the Sea Institute Conference, 27 July 1990.

ieve an agreement on such adjustments and on the legal form of such agreement, and, second, to ratify the Convention without delay after the above-mentioned adjustments are introduced to its Part XI, or accede to it, thus making it a universal international legal instrument.

Such a resolution would convincingly demonstrate that the United Nations Organization definitely and resolutely stands for the Convention's universality. Another contribution could be the convocation of an international conference similar to those held by the Law of the Sea Institute for the purpose of discussing comprehensively only one question -- the universality of UNCLOS. It could be organized by joint efforts of the institutions of many countries connected with the activities in the ocean. Such a conference could become the logical continuation of a praiseworthy initiative undertaken in 1991, when the Institute of International Law at the University of Kiel held a seminar intitled "Law of the Sea at the Crossroads."

Conclusions

The above-mentioned considerations allow us to draw the following major conclusions concerning the prospects for the universality of UNCLOS.

1. If the participants in the consultations on the Convention's universality delay taking decisions acceptable for all states, there will be a considerable increase in the risk that the 1982 Convention will enter into force before the decisions on adjusting Part XI are taken. Such a course of events would have unfavorable consequences both for the Convention's universality and cooperation, peace, and security on the world's oceans.

2. The Convention may become a universal international instrument rather quickly if all negotiating sides, as well as member states of the United Nations renounce attempts to preserve the unrealistic and impractical provisions of the Convention's Part XI and display sufficient political wisdom and will to introduce the required adjustments to Part XI, making the regime of seabed activities conform with the principles of free market economy and mutual profitability, which at present almost all the countries are taking as a guide. In other words, the prospects for the Convention's universality may become quite favorable if all states follow the wise popular saying: "Where there's a will, there's a way."

COMMENTARY

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I had orginally planned to talk first about the deep seabed mining problem and then, secondly, the provocative thought presented by my friend, Francisco Orrego, but I have decided to reverse that and make those comments first, because I find his paper to be quite interesting.

Laying aside the areas of agreement that I have with my good friend, I am afraid I cannot just sit quietly by without expressing a bit of discomfort over the proposal that he has designated as the "presential sea." I think this will come as no surprise to him. That discomfort may be intensified because I suspect that my equally good friend Alfonso Arias-Schreiber may well agree with what Francisco has said, and if that is the case, my discomfort may turn into something closer to panic.

The problems relating to fishing on the high seas adjacent to the exclusive economic zone of coastal states are certainly well known and relatively well documented. Certainly it is a problem for my country as well as many others. I agree that the popular trend today appears to be at least in some circles toward what he has referred to as ecosystem management, however that is to be defined. I'm not quite sure exactly what that means. There is indeed a great deal of validity in the concept that there must be rational management of living resources wherever they may occur. I have no argument with that. But, to me, it doesn't necessarily follow that the only appropriate way to achieve that goal is through further extension of coastal state influence in areas beyond the exclusive economic zone, be those extensions political, military, or as Professor Orrego has espoused, economic. The treaty, as we all know, already contains provisions requiring a great deal of cooperation and, more important, making the fish on the high seas subject to, and I quote, "the rights and duties as well as the interests of coastal states provided for *inter alia* in Article 63 paragraph 2 and Articles 64 to 67." This is contained in Article 116 in the high seas section. I hasten to point out that any disputes arising from provisions of this kind, unlike those contained in the exclusive economic zone, are subject to binding dispute settlement. We know the provisions regarding fishing in the economic zone have almost no

binding force in terms of dispute settlement, but it is not so with regard to the high seas.

Now I might be persuaded by Professor Orrego that the proposed new idea that he is suggesting here is not jurisdictional. But I have problems concluding that they do not have jurisdictional implications. I just had this terrible feeling of *deja vu* when I read that section of the paper.

Finally, I would like to point out, I guess rather strongly, that adoption of an ecosystem approach for living resource management does not lead inescapably to the conclusion that it can be achieved only by an extension of coastal state influence. In my judgment, an equally persuasive argument could conclude that ecosystem management would be better achieved by an arrangement that might well be at the expense of coastal state influence or perhaps even coastal state jurisdiction. Jurisdictional issues of resource management were settled after a great deal of effort during the conference, and my friends and I participated in that hard work. Careful consideration of the agreed provisions in the Convention persuades me that the framework is already there to achieve what Professor Orrego identifies as valid coastal state interests, including the interests of the United States, I might add. If the future disproves this observation, then there will be no lack of opportunity to reconsider, I'm sure. Given proper use of existing texts, I don't believe that any new concepts will be needed for a long time, if ever. Obviously I am making an argument to adhere to the work that we have done and not introduce new concepts that would simply, in my judgment, muddy the waters. Other than that, I agree with him entirely.

Let me shift over to the other issue, if I may. Here my comments may refer to Professor Charney's paper, but I'm really talking about all three papers. I warmly welcome the comments of Ambassador Kolossovski, my old colleague in the Law of the Sea Conference; we were, as he has already noted, mostly adversarial colleagues, and now we're in a new era where we will be friendly colleagues from here on out.

I think that, despite the persuasive arguments that Professor Charney has made as to why the U.S. should participate further in the promising ongoing process -- represented primarily though not entirely in the Secretary General's consultations, which I strongly favor -- I'm afraid the signs, in particular the departure of Ambassador Pickering, do not augur well for the character of future U.S. participation, if any. Now I recognize that this is a gloomy statement, from one who among many in this room labored for many years for

the objective of a universally-accepted, global, convention on the law of the sea. I assure you, many have attempted to reach those in the United States in a position to make policy, but as yet I haven't seen one significant sign that anyone in or out of government, in or out of the United States, has been able to attract the attention of high-level U.S. decision makers. I for one do not believe that the present U.S. administration, taken as a whole, is hostile to the Law of the Sea Convention. In my judgment, it's worse. It is much worse because it weakens United States' influence in ocean usage and management policy for the future. Instead of hostility, there is pervasive indifference to the law of the sea. Some would argue that there are many explanations for this, and Jon Charney has pointed out, for example, the forthcoming United States elections and these are valid reasons. But, for my part, these reasons seem simply to serve as a placebo by lulling one into the belief that once the elections are over all will be well. I'm afraid, however, that the underlying indifference is endemic. Until now, I haven't been able to figure out a way to shake that loose. You know, sometimes hostility is better. One can engage a hostile force in dialogue, no matter how difficult, but there can be no dialogue with one who simply doesn't care. And it is ironic, I think, that the one who does not care in this case is the very nation whose president, whom I respect, very recently emphasized the leadership of the United States in environmental matters, including the oceans. And this in the face of the fact that one of the major environmental treaties that lay before the world at the time, the Law of the Sea Convention, has been rejected by that same administration.

On the other hand, I must say, lest I be misunderstood, that I am not a supporter of Part XI as it exists at present. I think, as Professor Charney has said, it is totally unacceptable, now and for the future. I want to make that perfectly clear. But I am encouraged by the Secretary General's initiative. This is clearly momentum. But to what end, absent U.S. participation, I am not sure. As others have done, I wish to emphasize that we are faced with a window of opportunity. Professor Charney has correctly explained in his paper that the U.S., having been burned once during the conference, is somewhat reluctant to engage in this new process for fear it may happen again. But it seems to me that the present version of the Secretary General's report puts enough on the table to help assure the United States of a reasonable prospect for a satisfactory accommodation. You know, negotiation is never risk free. Favorable odds are about all that one can expect. This window to which I refer to will not remain open long, through 1993, perhaps, through 1994, at the latest. If this treaty enters into force without changes, and Ambassador Kolossovski has made

reference to this, any residual interests that any segment of the United States government might have may well dissipate. And even if it did not, I think it would be difficult, if not impossible, to achieve further progress with Part XI once the present version enters into operational force. So I support the Secretary General's initiative. There have been, from time to time, initiatives in other directions. For example, some state or states might prefer to establish a special role for the Preparatory Commission during the interim period until such a time as exploitation is really ready to begin. I think this kind of initiative is misguided. It is my understanding that this initiative is dissipating in favor of the Secretary General's approach, and if that is true, I applaud the good judgment.

I have some comments that I wanted to make with regard to the Enterprise and decision making. The Enterprise. Some have suggested that the apparent trend toward emphasizing joint ventures is the road to go. Some conclude from the fact that mining will be conducted by means of joint ventures that there is no further role for the Enterprise to play and we should do away with it. I think that that would be a political mistake. I refer to one sentence that I think is important in the Secretary General's report. He says, "It should be noted that the Enterprise was intended to provide an opportunity for all states, especially developing states, to participate in deep seabed mining."

Now, it is my judgment -- I may be wrong, and my friends can correct me -- that this element of participation is important to developing states. So my suggestion would be that you don't do away with the Enterprise, but you convert it. There is no longer a need under a system of joint ventures for an operational arm of the Enterprise. But participation by developing states could be provided through a converted Enterprise. It would have a role to play in the creation of joint enterprises. It would also have an important role to play in training and such other matters that are still important operational aspects without the Enterprise getting into deep seabed mining itself. And I would simply add that this would seem to take care of the transfer of technology problem as well.

Turning to decision making, I noted that Professor Charney is uncomfortable with the Secretary General's solution because I suspect he does not like giving up the absolute veto on certain critical matters. If I'm wrong on that, he can correct me. That is a concern. I have to give more thought to that, but I simply note at this point that under the chambered voting approach of the Secretary General, there is not a veto but a very near veto, and it is not on three limited matters, but on the whole range of issues. Therefore, I think we have to give further study. And with that, I shall conclude. Thank you.

PERU AND THE REVISION OF THE 1982 CONVENTION ON THE LAW OF THE SEA

Alfonso Arias-Schreiber
Former Head of the Peruvian Delegation to the
Third United Nations Conference on the Law of the Sea

Needless to say, I am delighted to be here among so many and dear colleagues, sharing again the friendly sentiments that we developed at UNCLOS III. It gives me, in fact, a great deal of satisfaction to perceive that, despite our often divergent approaches and sometimes even very hard discussions, all of us tend to recall that experience as one of the most rewarding happenings of our lives. Therefore, we are grateful to the organizers and the cosponsors of this meeting for the pleasure of bringing us together in Genoa, within the framework of Christopher Columbus commemorations, for the opportunity to exchange our views on the rightfulness and endurance of the ambitious rules that we worked together to establish ten years ago.

Before expressing my opinions in this respect, and following the suggestion made by Professor Hugo Caminos in his inaugural luncheon address, I shall explain why Peru still refrains from adhering to the UN Convention on the Law of the Sea. It is generally believed that the only reason is the difference which exists between, on the one hand, the unitarian regime of full sovereignty provided for in the Peruvian Constitution from the coast to 200 miles and, on the other hand, the duality of a territorial sea with a maximum limit of 12 miles and an Exclusive Economic Zone from that distance up to 200 miles, where the coastal State is entitled to exercise sovereign rights and jurisdiction for specific, though very important, purposes.

In light, however, of the provisions that we agreed to include when shaping the institution of the Exclusive Economic Zone, the difficulty in question appears more nominal than substantial, and it might be overcome through a formula that would maintain unchanged the Constitution and relevant laws of Peru, provided that they would be applied in a manner compatible with the norms of the UN Convention on the Law of the Sea.

But the treaty poses additional problems for us that, notwithstanding our insistent proposals and warnings to avoid them, were disregarded by the maritime powers and other States. I shall mention only three, to be brief.

First, the omission of the requisite for prior authorization by, or notification to, the coastal State, in the case of innocent passage of foreign warships through the territorial sea of that State;

Second, the absence of appropriate provisions to protect, in the Exclusive Economic Zone, the national security of the coastal State; for instance, the obligation of foreign submarines to surface and display their flag when navigating close to the territorial sea, and the need for an explicit authorization from the coastal State for exercises with weapons by foreign warships or for the emplacement of military installations, structures and devices; and

Third, the obligation imposed on the coastal State to enter into arrangements with neighboring landlocked States for sharing the exploitation of living resources even when there is no surplus available.

To those problems I should add two others that were not perceived in Peru by the opponents to the Convention, but are being considered by the government itself. One is the inadequacy of the provisions concerning fishing by long distance fleets of migratory species in areas of the high seas adjacent to the zones of national jurisdiction; and the other is related to the financial implications that developing countries under severe economic conditions, as is now the case with Peru, would have to face for the implementation of the international seabed regime.

Having said this, let me offer some very personal and short remarks on the prospects for the future of the 1982 Convention. Those of you who attended UNCLOS III from the very beginning to its final outcome in New York will not be surprised nor disappointed today if I speak in all frankness, but with due respect, presenting views to some extent quite different from the ones expressed by other participants at this meeting.

1. I certainly share the opinion that the new Convention on the Law of the Sea succeeded in establishing more equitable and comprehensive rules for a correct utilization of ocean space.

2. Of course, as with all human achievements, it felt short of being perfect and complete. It included, with prevailing lights, some heavy shadows; and among the latter, many ambiguities, overestimations, and omissions. But in this respect we must depart from the illusion of believing that there is or can be a single reading of its merits and demerits.

3. It is also common ground to assert that the Convention on the Law of the Sea, like any other instrument of law, whether national or international, public or private, cannot be expected to remain

unchanged; but, on the contrary, it has to be progressively adjusted in accordance with the evolution of the facts that it intends to regulate.

4. This is why we all agreed to introduce in the Convention different provisions and procedures for amendments and revision, with specific requisites with respect to Part XI that were mainly proposed by the industrialized countries, and which included the lapse of very definite periods after the entry into force of the treaty or the commencement date of seabed commercial exploitation.

5. Therefore, any suggestion to change, at the present stage, the substance or the drafting of the text, whether it relates to a certain part of the Convention and annexes, or even to a single article thereto, would entail an infringement of the rules established and a clear violation of international law.

6. I know that this option is no longer being considered and that consultations have been taking place for freezing the seabed mining regime (with the exception of the general provisions of Chapters 1 and 2 of Part XI) or for adopting new articles through a complementary Protocol, alleging that fundamental changes of circumstances have occurred in that field which means invoking the proviso *rebus sic stantibus* as opposed to *pacta sunt servanda*, the basic principle of international law.

7. I ignore how far those consultations have gone and what kind of objections they have raised, if any. In my opinion, whether we like it or not, the procedure suggested in order to meet, most of all, the interests and concerns of some developed nations, would break in fact the integrity of the Convention and the gentlemen's agreement that we were committed to respect when we accepted the "package deal approach" for negotiating all the articles of the treaty.

8. To withdraw support of concessions made on parts of the text that do no longer fit our requirements, and at the same time, to demand other parties to maintain the concessions that they gave in return, in my view would not be sustainable, at least from a legal standpoint.

9. I believe that a similar reasoning is foreseeable in many capitals of the world if that sort of proposal passes unchanged from the informal and closed meetings undertaken in New York to the official level of governments, including those that up to now have not been consulted.

10. I am conscious that we need to find appropriate ways and means for ensuring universal adherence to a legal instrument designed to govern the conduct of all States in the oceans. But I also think that

this objective should be pursued in accordance with and not against the fundamental principles of international law.

11. Thus, we should better leave aside the 1982 Convention of Montego Bay, as we did in the early seventies with the 1958 Geneva Conventions, and undertake through the United Nations Secretariat formal consultations with Governments in order to convene first a Preparatory Commission and later a diplomatic Conference that would work out and adopt a new UN Treaty on the Law of the Sea.

12. Of course, consultations to that effect should be made under certain conditions in order to avoid reopening Pandora's box. For instance, they might anticipate the need to establish realistic rules and procedures with respect to the seabed regime that, while preserving the already agreed legal status of the Zone and its resources, as well as other basic provisions, would ensure an equitable and profitable participation of both developed and developing countries. On the other hand, the consultations should include very few additional matters of broad international concern, such as the ones relating to high seas fisheries in areas adjacent to the Exclusive Economic Zone, coastal States' requirements with respect to national security, and other interests unprotected in that zone.

13. The previous understanding that only those issues and perhaps other very specific ones that were not properly solved at UNCLOS III should be dealt with by the Preparatory Commission and the diplomatic Conference, would condition participation of States. The UN Secretariat should also propose that, once final agreement has been reached on those matters, the Conference would be entitled to assemble the new provisions in a single and integrated UN Treaty on the Law of the Sea, utilizing, as they are, the other articles that were prepared by UNCLOS III.

14. The formula *do ut des* is more valid than ever in these days, when the end of East-West confrontation should lead former opponents in the North to far reaching approximations with the South. Time has come for developed nations, and especially for major powers, to accommodate with an open mind the legitimate problems and concerns of developing countries that they used to neglect in the past because of their own worries.

These are the few comments that I submit to you at this meeting, with the hope that they may serve, in one way or another, our common goal to ensure a respected order in the ocean's space, for the benefit of mankind in the new century to come.

DISCUSSION

Tullio Treves: We have had a very substantial panel. And now the floor is open.

Giorgio Bosco: Since my paper has already been distributed, I shall go through it only very briefly. I would like to start by quoting two of my companions of legal battles at the United Nations, Moritaka Hayashi and Tullio Treves. In their opening speeches at this conference, both of them observed, as did other speakers, that -- with the exception of the deep seabed rules -- the major part of the provisions of the 1982 UNCLOS are currently implemented by States and constitute a term of reference. Even among those accepted provisions, however, some could be improved, as we shall try to demonstrate by examining a particular case.

Even before the conclusion of the Convention some States adopted in their domestic legislation some of the principles and rules that were emerging from one session to another and that resulted from the well known "Revised Single Negotiating Texts," later called "Informal Composite Negotiating Texts."

Very briefly will I recall some of the most important, just to give a historical frame to what I am about to say. First of all I would like to quote my own country, Italy, which on 26 April 1977 enacted a Presidential Decree, No. 816, on the drawing of straight baselines and on the closing of natural and historical bays, such as the Gulf of Taranto.[1]

On 1 March 1977 a United States law, approved in 1976, entered into force[2] to control foreign ships fishing in the American economic zone. The Soviet Union followed suit,[3] declaring an exclusive fishing

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[1]For an exhaustive commentary of the Decree, see R. Adam, "Un nuovo provvedimento in materia di linee di base del mare territoriale italiano," in *Rivista di Diritto Internazionale*, 1978, pp. 469-495.

[2]Fisheries Conservation and Management Act, in *International Legal Materials* 634 (1976).

[3]Decree of the Supreme Soviet Presidium of USSR, 10 December 1976, in *International Legal Materials* 1381 (1976).

zone of 200 miles. The European Community had done the same for the Northern Atlantic and the North Sea [4] as had Japan.[5]

The Union of Burma (today Union of Myanmar) took a similar action in the same period, with its Law No. 3 dated 9 April 1977 and entitled, "Territorial Sea and Maritime Zones Law." This normative instrument is not inconsistent with the main trends of the Law of the Sea Conference, with some exceptions.[6]

Indeed, Chapter II of the law relating to the territorial sea, Chapter III on the contiguous zone, Chapter IV on the continental shelf, and Chapter V on the exclusive economic zone reflect broadly the principles and rules of the Law of the Sea Convention. But the Annex to the law, which contains the schedule of the baselines along the three main coasts of the country (Arakan Coast, Gulf of Martaban, and Tenasserim Coast) is in accordance with neither the 1958 Geneva Convention nor with the 1982 Montego Bay Convention.

If you look at pages 88 and 89 of the *Atlas of the Straight Baselines*,[7] you notice for Burma twenty-one segments, the longest of which goes from Alguada Reef (Bassein Light) to the western point of Long Island, completely closing the Gulf of Martaban to international navigation.[8]This segment has a length of 222.3 nautical miles -- it is the longest straight baseline encountered in the world[9] -- that finds

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[4]Resolution of the EEC Council of Ministers, 3 November 1976, in *Bulletin of the European Communities* 10 (1976), pp. 23-25.

[5]Law on the Territorial Sea (N.30 of 2 May 1977); Law of Provisional Measures Relating to the Fishing Zone (N.31 of 2 May 1977).

[6]Owing to the limited nature of this paper, dealing with straight baselines, we will not dwell on other Burmese claims inconsistent with the 1982 Convention, such as for instance the one contained in Chapter II, n. 9 (a) about the necessity of prior express permission for foreign warships to pass through the territorial sea.

[7]Edited by T. Scovazzi, G. Francalanci, D. Romano, and S. Mongardini, 2nd edition, Milan, 1989.

[8]According to Limits in the Seas, No. 112, Washington, D.C., 9 March 1992, p. 20, "Burma, by drawing a 222-mile straight baseline across the Gulf of Martaban has claimed about 14,300 square nautical miles (49,000 sq. kilometers -- an area similar in size to Denmark) as internal waters which, absent the closing line, would be territorial sea or high seas."

[9]Straight Baselines: Burma. Department of State, Series A, Limits in the Seas, Washington, D.C., No. 14, p. 4.

According to Article 8, the procedure provided for by this Regulation may be applied when action by a third country or its agents restricts or threatens to restrict the access of shipping companies of another OECD country where, on a basis of reciprocity, it has been agreed between that country and the Community to resort to coordinated resistance in the case of restriction of access to cargoes.

Such country may make a request for coordinated action and join in such coordinated action in accordance with this Regulation.

Regulation 479/92 of 25 February 1992 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices between Liner Shipping Companies (Consortia)[45]

Ever since the adoption of Regulation 4056/86, there has been a dispute about the scope of that Regulation. The Commission, increasingly supported by shippers and shippers' organizations, maintained that the group exemption contained in Article 3b of that Regulation did not apply to consortia. The Commission was also of the opinion that the exemption for technical agreements laid down in Article 2 of that Regulation did not apply to consortia either. After a lengthy period of studying individual consortia agreements and the publication of a position paper, the Commission has finally come up with a proposal for consortia. The proposal met with some criticism from the shipowners' community. The shipowners opposed the Commission's proposal because in their view it deviated from Regulation 4056/86. Instead of spelling out the conditions for exemptions for consortia, the proposal grants the Commission the power to enact a group exemption by regulation. Shipowners also maintained that consortia agreements do not basically differ from conference agreements. In particular, they do not contain a joint marketing arrangement. As it is, the Commission has carried the day and the proposal was adopted by the Council more or less unscathed. The Regulation takes as its clue that liner shipping is a capital-intensive industry, that containerization has increased pressures for cooperation and rationalization, and that the Community shipping industry needs to attain the necessary economies of scale in order to compete successfully in the world liner shipping market. The preamble further stresses that there is a great variety of different consortia agreements and that the Commission should therefore be given the responsibility of defining from time to time the consortia to which the group exemption should apply. Like Regulation 4056/86, the exemptions may apply with retroactive effect. Similarly,

[45]OJ 1992 L 55/3.

Especially the extension of the principles of the Code to bulk trades is seen as a threat to Community shipowners.

According to Article 1:

> The procedure provided for by this Regulation shall be applicable when action by a third country or by its agents restricts or threatens to restrict free access by shipping companies of Member States or by ships registered in a Member State in accordance with its legislation to the transport of:
> - liner cargoes in Code trades, except where such action is taken in accordance with the United Nations Convention on a Code of Conduct for Liner Conferences;
> - liner cargoes in non-Code trades;
> - bulk cargoes and any other cargo on tramp services;
> - passengers;
> - persons or goods to or between offshore installations.
>
> This procedure shall be without prejudice to the obligations of the Community and its Member States under international law.

The coordinated action may be requested by a Member State. According to Article 4, it may consist of diplomatic representation to the third countries concerned or counter-measures directed at the shipping company or companies of the third countries concerned. The countermeasures may consist, separately or in combination, of:

1. the imposition of an obligation to obtain a permit to load, carry or discharge cargoes;
2. the imposition of a quota;
3. the imposition of taxes or duties.

According to paragraph 2, diplomatic representations shall be made before countermeasures are taken. Such countermeasures shall be without prejudice to the obligations of the European Community and its Member States under international law, shall take into consideration all the interests concerned, and shall neither directly nor indirectly lead to deflection of trade within the Community.

Article 6, paragraph 1 states that if the Council has not adopted the proposal on coordinated action within a period of two months, Member States may apply national measures unilaterally or as a group, if the situation so requires. According to paragraph 2 Member States may, in cases of urgency, take the necessary national measures on a provisional basis, unilaterally or as a group, even within the two-month period referred to in paragraph 1.

as well as the port interests and the shipping policy considerations of the Member States concerned.

Imposing redressive duties shall indicate in particular the amount and type of duty imposed, the commodity or commodities transported, the name and the country of origin of the foreign shipowner concerned, and the reasons on which the Regulation is based. The first and only application so far of the Regulation is the Council Regulation of 4 January 1989.[42] In this regulation the Council applies a redressive duty of 450 ECU per 20 feet of container or equivalent. The Regulation was addressed to Hyundai Merchant Marine Company of South Korea. The redressive duty imposed by the Regulation is quite high; it represents an increase in Hyundai's rates of no less than 26 percent. The duty will have to be collected by the customs services in the ports of the Community whenever containers are loaded on ships operated directly or indirectly by Hyundai. The duty is imposed on all containers loaded on ships destined for Australia irrespective of the actual destination of the containers. The case against Hyundai is presently before the Court of Justice of the European Community as Hyundai has appealed the Council Regulation.[43]

The Regulation Concerning Coordinated Action to Safeguard Free Access to Cargoes in Ocean Trades[44]

The previous Regulation concerned action against unfair practices by shipping lines of third countries. This Regulation concerns actions against governments protecting their merchant fleets unilaterally. They may do so through legislation, administrative measures, or through bilateral agreements with other countries. According to the preamble of the Regulation, certain countries have adopted practices which distort the application of the principle of fair and free competition in shipping trade with one or more Community Member States. The preamble also makes reference to the fact that increasingly third countries that are contracting parties to the Convention on a Code of Conduct for Liner Conferences interpret its provisions in such a way as effectively to expand the rights given under the Convention to both liner and tramp trades to the disadvantage of Community companies.

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[42]Regulation no. 15/89, OJ 1989 L 4/1.

[43]See note 3, Regulation 4057/86, OJ 1986 L 378/14.

[44]Council Regulation 4058/86 of 22 December 1986, OJ 1986 L 378/21.

A further important concept of the Regulation is that of injury. According to Article 2, second paragraph, a threat of major injury shall be examined along the lines of Article 4. According to Article 4, there is a presumption of injury if the freight rates of Community shipowners' competitors are significantly lower than the normal freight rates offered by Community shipowners. The effect will be judged looking at indicators such as sailings, utilization of capacity, cargo bookings, market share, freight rates, profits, return of capital, investment, and employment. When there is a threat of injury alleged, the Commission shall also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury. In this regard, account may be taken of factors such as:

(a) the increase in tonnage deployed on the shipping route where the competition with Community shipowners is taking place;
(b) the capacity that is already available or is to become available in the foreseeable future in the country of the foreign shipowners and the extent to which the tonnage resulting from that capacity is likely to be used on the shipping route referred to in (a).

Article 4(3) indicates that other factors adversely affecting Community shipowners must not be attributed to the practices in question.

According to Article 5, any legal person or association not having legal personality, acting on behalf of the Community shipping industry, who considers himself injured or threatened by unfair pricing practices, may lodge a written complaint. After the lodging of the complaint, the Commission shall consult the Advisory Committee consisting of representatives of each Member State. There is a lengthy procedure to establish whether there is injury or not. This is contained in Article 7. Article 9 provides that if it becomes apparent after consultation that protective measures are unnecessary, the proceeding shall be terminated. There is also a possibility according to Article 10 that the procedure may be terminated upon the acceptance of undertakings by the foreign shipowners. The undertakings seek to revise the rates to such an extent that the Commission is satisfied that the unfair pricing practice, or the injurious effects thereof, are eliminated. Where the investigation shows that there is an unfair pricing practice and that injury is caused and that the interest of the Community makes Community intervention necessary, the Commission shall propose to the Council a redressive duty (Article 11). According to Article 12, the Council shall in deciding on the redressive duties take due account of the external trade policy considerations

affected by certain unfair pricing practices of shipping lines of third countries. The Regulation is patterned after the EEC Regulation concerning anti-dumping.[40] According to Article 1 of the Regulation, the objectives are to respond to unfair practices by certain third country shipowners that cause serious disruption of the freight pattern on a particular route to and from or within the Community and cause or threaten to cause major injury to Community shipowners operating on that route and to Community interests. According to Article 2 of the Regulation, the response of the Community to such practices may be a redressive duty. The concepts of the Regulation are 'unfair pricing practices' and 'normal freight rate.' They are both defined in Article 3 of the Regulation. According to Article 3(b):

> 'unfair pricing practices' mean the continuous charging on a particular shipping route to, from or within the Community of freight rates for selected or all commodities which are lower than the normal freight rates charged during a period of at least six months, when such lower freight rates are made possible by the fact that the shipowner concerned enjoys non-commercial advantages which are granted by a State which is not a member of the Community.[41]

According to Article 3(c) 'normal freight rate' shall be determined taking into account:

(i) the comparable rate actually charged in the ordinary course of shipping business for the like service on the same or comparable route by established and representative companies not enjoying the advantages in (b);
(ii) or otherwise the constructed rate which is determined by taking the costs of comparable companies not enjoying the advantages in (b) plus a reasonable margin for profit. This cost shall be computed on the basis of all costs incurred in the ordinary course of shipping business, both fixed and variable, plus a reasonable amount for overhead expenses.

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[40]See: Bellis, J.F., Vermulst, E. and Musqua, P. "The New EEC Regulation on Unfair Pricing Practices in Maritime Transport: A Forerunner of Unfair Trade Concepts to Services?" *Journal of World Trade Law* 1988: 47.

[41]Council Regulation 4057/86, OJ 1986 L 378/14.

Member States that they would lose their powers to conclude bilateral deals completely. That Regulation provides for coordinated action in case of actual or potential restrictions to free access. The action does not include cargo-sharing arrangements. Like Regulation 4056, Regulation 4058 does provide for the possibility that Member States take action if the Council does not act swiftly.

Article 1, paragraph 3 provides that Articles 55 to 58 and 62 of the Treaty shall also apply to matters covered by this Regulation. This implies that the stand-still clause of Article 62 of the Treaty is also applicable. The prohibition of Article 5 to include cargo sharing arrangements in future bilateral agreements is a specification of Article 62. Articles 7, 8, and 9 of the present Regulation incorporate Article 59, paragraph 2, Article 60, paragraph 3 and Article 65 of the Treaty. From the point of view of legal drafting, it does not seem appropriate to make reference in Article 1, paragraph 3, to a certain number of provisions and to implement others in Articles 7, 8, and 9 verbatim.

Article 11 provides that the Council shall review the Regulation before 1 January 1995. One would have thought that 1 January 1993 should be set as a reference date. The last paragraph of the preamble states that provision should be made for reasonable transitional periods. This seems to apply to the periods for the phasing out in Article 4.

Conclusion

The Regulation paves the road towards a common market in maritime transport services as per 1 January 1993.

It is also interesting to note that the freedom to provide services does not extend to shipping companies trading with vessels under open registers. Article 1, paragraph 2, includes only shipowners if their vessels are registered in that Member State in accordance with its legislation. Regulation 4058/86 does not seem to exclude EC shipowners plying with open registry vessels when they face difficulties. The different Community position towards liner trade on the one hand and bulk trade on the other may once again offer an explanation.

Regulation on Unfair Pricing Practices in Maritime Transport[39]

The Regulation is based on the belief that the participation of community shipowners in international liner shipping is adversely

[39]Council Regulation 4057/86 of 22 December 1986, OJ 1986 L 378/14.

will report progress to the Commission. The Council and the Commission have to be notified if problems arise with the implementation of the just-cited provisions. If the bilateral agreements prove to be inconsistent with the rules of the Regulation and if the Member States concerned so request, the Council will, upon proposal of the Commission, take appropriate action. According to Article 5, cargo-sharing arrangements in future bilateral agreements are forbidden except for exceptional circumstances when liner companies of the Community would be excluded from the trade. In such circumstances, cargo-sharing arrangements may be authorized in accordance with the procedure of Article 6.[38] Member States experiencing a shut out in a particular trade shall inform the other Member States and the Commission. The latter submits a proposal on which the Council shall act by qualified majority. The action may include the negotiation and conclusion of cargo-sharing arrangements. If the Council does not decide within six months after the Member State has informed the Commission, it may take action necessary to preserve its opportunities in the trade. Such measures taken according to Article 6, paragraph 3, have to be in line with the Community legislation and have to provide for fair, free, and non-discriminatory access to the cargo by the nationals and shipowners of the Community. Such measures have to be notified to other Member States and the Commission immediately. The measures, so far, concerned liner transport. It is also possible that third countries seek to implement cargo-sharing in the bulk sector. If such is the case, Article 5, paragraph 2 charges the Council to enact appropriate measures following the rules laid down in Regulation 4058/86 concerning coordinated action to safeguard free access to cargoes in seaborne trades. It is not clear why there is a different regime for liner shipping than for bulk shipping. This is all the more striking because both liner shipping and bulk shipping are included in Regulation 4058/86. The present Regulation has been modified importantly in the final face of the negotiation in the Council. The original Commission proposal provided only for succinctly formulated rules for the freedom to supply services. The present extensive provisions of Article 6 have been supplemented in the final stage of the negotiations in the Council. It may be assumed that these provisions have been supplemented in order to allay fears of certain

[38]A first measure under Article 6 was Council Decision 87/475 (OJ 1987 L 272/37) authorising an Italian-Algerian agreement; this Decision has been challenged by the Commission, in its judgment of 30 May 1989, the European Court of Justice dismissed the Commission's appeal; Case 355/87, *Commission* v. *Council* , ECR 1989: 1517.

according to Article 1, apply between Member States and between Member States and third countries.

The Regulation applies to maritime transport between Member States and between Member States and third countries. The Regulation applies in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The Regulation is also applicable to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State if their vessels are registered in that Member State in accordance with its legislation. Article 7 of the Regulation gives the Council the power to decide whether the Regulation will be extended to nationals of third countries who provide maritime transport services and are established in the Community. Article 2 provides for a derogation from the basic principle of Article 1. Unilateral national restrictions in existence before 1 July 1986 shall be phased out according to a fixed timetable so as to achieve the elimination of all restrictions by January 1993. Apart from unilateral restrictions, there are bilateral and multilateral restrictions that result from agreements between Member States and third countries. According to Article 3, such restrictions shall be phased out or adjusted in accordance with Article 4. Read together with Article 4, the system is that, unless Article 4 provides for adjustment, cargo-sharing arrangements contained in existing bilateral agreements concluded by Member States with third countries shall be phased out. Article 3 fails to set a deadline for such phasing out. Article 4 provides that existing cargo-sharing arrangements that are governed by the Code of Conduct for Liner Conferences[36] shall comply with this Code and with the Community legislation contained in Regulation 954/79.[37] In trades that are not governed by the Code, the agreement shall be adjusted as soon as possible and in any event before 1 January 1993. This in order to provide for fair, free, and non-discriminatory access by all Community nationals to the cargo-shares due to the Member States concerned. The Commission and other Member States have to be notified immediately of national measures implementing these provisions. The consultation procedure established by Council Decision 77/587 shall apply. Member States

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[36]*UN Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences* (UN Sales Pub. E.75.II).

[37]OJ 1979 L 121/1.

outbound maritime transport. As a result of this fundamental position, the Community may claim jurisdiction in instances where authorities from third countries impair competition. Thus it is possible to counter unilateral actions by third countries. The Community has moved a long way from the traditional laissez faire policy of the countries of Western Europe. That policy has only resulted in negative powers contained in the so-called blocking statutes. The present procedure for resolving international conflicts of enforcement jurisdiction provides for adequate mechanisms. These provisions are also in line with public international law.

The Regulation is not only based on Article 87 as its title would suggest, but also on Article 84, paragraph 2. The reason for the latter inclusion is that, by embodying procedures for dealing with conflict of international law, the Regulation clearly contains elements of shipping policy.

The Regulation is very much designed to give rules for conferences. As a result of this the position of outsiders, liner services outside conferences, is underexposed. The block exemption only relates to conferences. Agreements by outsiders have to be judged as a result of individual complaints and by applications for individual exemptions. Yet the condition of Article 4 and the obligations of Article 5 are attached to the block exemption only. They are not applied to outsiders. It will therefore be important that the Commission, when judging individual complaints or applications for exemption, considers the application of the condition and obligations to outsiders.

Contrary to what one would expect, there is no provision for the revoking of Regulation no. 141 as far as it concerns liner transport. Regulation no. 141 should, of course, remain in force for the other sectors of maritime transport.

Finally it should be noted that the Council has recently adopted a block exemption for consortia agreements,[35] which will be discussed below.

Regulation 4055/86: Applying the Principle of Freedom to Provide Services to Maritime Transport between Member States and between Member States and Third Countries

Introduction

The Regulation is intended to apply the principle of freedom to supply services to the maritime transport sector. Such freedom shall,

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[35]OJ 1992 L 55/3.

the Code of Conduct, are not very stringent. In the light of the case law of the Court in judgments such as Hoffmann-La Roche,[34] their legality may be doubted. Such doubt is particularly appropriate in the situation where competition by outsiders is largely absent. Their demotion from conditions to obligations further erodes the legal nature of these provisions.

On the other hand, it may be noted that the Commission has ample powers to intervene in case of non-observance of obligations. A further positive point is the obligation for conferences to offer transport users free choice for inland transport operations and quay-side services.

The serious drawback is the legal uncertainty that is created by the Regulation. There is no provision declaring Article 85, paragraph 1 directly applicable. There is no obligation to notify prior to applying for an exemption. Similarly, the power for the Commission to apply Article 85, paragraph 3 in infringement procedures creates the impression that cartels in the shipping industry are generally accepted.

The shipping industry, of course, values matters differently. It feels that the block exemption was necessary because of the adoption of the Code of Conduct for liner conferences. Furthermore, the fact that the Code does contain ample regulations for conferences diminishes the necessity for the Community to adopt competition rules. It is, in view of the Code of Conduct, most undesirable that the Commission enacts rules which differ from the rules contained in the Code adopted on a world wide scale. Furthermore, shipping circles will point out that the position of conferences has recently been increasingly weakened by outside competition. In other words, there should be no fear that outside competition enabling the block exemption is lacking. The shipping industry values the provisions relating to the accommodation of conflicts of international law. The industry is, however, worried that the block exemption may be withdrawn in the absence of ship owners' anticompetitive action, solely because of measures from third countries. The industry also notes with pleasure that, contrary to the original proposal from 1981, the present Regulation does not embody compulsory notification. That takes away the fear that the European Commission will establish itself as a "European Maritime Commission."

The Regulation contains a well developed set of rules for conflicts of jurisdiction. The Community claims jurisdiction for inbound and

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[34]Case 85/76, *Hoffmann-La Roche & Co AG* v. *Commission ("Vitamines")*, 13 February 1979, ECR 1979: 461.

may also stay the proceedings and await the outcome of the Commission's decision. There is a fundamental difference with common procedure under Regulation no. 17. Under Regulation no. 17, agreements that have not been notified can never qualify for exemption. This enables the application of Article 85, paragraph 2 by national courts. In the absence of such a clear cut rule, one might even argue along similar lines as the Court employed in the *Bosch*[32] and the *Asjes* Case that agreements in the shipping sector enjoy temporary validity. Such an argument may be refuted by stating that the present Regulation does apply Articles 85 and 86. The Regulation does not specifically disapply Article 85, paragraph 2. Furthermore, it may be noted that contrary to the *Bosch* and the *Asjes* Case, the Commission and the defendants have the opportunity to respectively apply Article 85, paragraph 3 or to apply for an exemption. Finally, according to Article 12, paragraph 4, last sentence, the Commission may in its decision give effect to the exemption from a date prior to that of the application. This is the logical consequence of the fact that prior notification is not a necessary condition for the exemption.

The rules for the implementation of Article 12 and other procedures are laid down in a separate Commission Regulation 4260/88.[33]

Conclusion

There are two ways of evaluating the present Regulation. From the point of view of the competition lawyer, one may note that the present block exemption is stretching things quite far. Especially where the possibility of elimination of competition is concerned, the block exemption may defy the conditions of Article 85, paragraph 3. In view of the uncertainty concerning the eliminating of competition, it would have been more in line with the general competition policy to go for individual exemptions. It should also be noted that, in the course of the negotiations, several conditions were transformed into obligations, thereby, of course, softening the competition regime considerably. It should further be noted that there is neither a condition nor an obligation relating to currency adjustment factors. Currency adjustment factors are to shipping what monetary compensatory amounts are to agriculture. Furthermore, the provisions concerning loyalty arrangements, which are largely in line with the relevant provisions of

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[32]Case 13/61, *Kledingverkoopbedrijf de Geus en Uitdenbogerd* v. *Robert Bosch GmbH*, 6 April 1962, ECR 1962: 45.

[33]Commission Regulation 4260/88, OJ 1988 L 376/1.

tally changes the usual competition regime such as it is laid down in Regulation no. 17.

Article 12 provides for agreements that do not benefit from the block exemption a possibility to obtain an individual exemption. Article 12 embodies an opposition procedure.[31] If there is no opposition, the agreement shall be deemed to be exempt for a maximum of six years from the date of publication in the Official Journal. The procedure implies that prior notification is not necessary. Justifying this procedure, the preamble points to the special characteristics of maritime transport. It is, according to the preamble, primarily the responsibility of undertakings to see to it that their agreements conform to the rules on competition, and consequently their notification to the Commission need not be made compulsory. In this context it should be noted that the shipping industry has always been known for its self regulation.

The opposition procedure of Article 12 is similar to that of Regulation 1017/68. It differs from the opposition procedure in recent block exemption Regulations relating to patent licenses and research and development agreements. Contrary to the latter procedure, notification is not necessary. A further difference is that under Article 12 the Commission is obliged to publish a summary of the applications in the Official Journal and invite all interested parties and Member States to submit their comments. This difference creates more procedural safeguards than those contained in the recent block exemptions. The first difference, however, creates legal uncertainty. It enables interested parties at all times to go for an individual exemption. The absence of the obligation to notify and the possibility of Article 11, paragraph 4 to apply Article 85, paragraph 3, on the Commission's own initiative, creates a presumption that cartels are not prohibited. This presumption is further strengthened by the above-indicated omission in this Regulation concerning the direct applicability of Article 85, paragraph 1.

What should a national court do when during an application for nullification under Article 85, paragraph 2, the defendant applies for an individual exemption under Article 12? The answer should, I submit, be that the court should apply Article 85, paragraph 1 and declare the agreement void. If there is any reason to doubt, the court may raise a preliminary question before the Court in Luxembourg. It

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[31]See: Venit, J.S. "The Commission's Opposition Procedure -- between the Scylla of Ultra Vires and the Charybdis of Perfume: legal consequences and tactical considerations." *CML Rev. 22* (1985): 167-202.

As noted above, Article 9 contains rules for conflicts of international law. It may be that the application of the Regulation to certain restrictive practices or clauses may conflict with the provisions laid down by law or Regulations of certain third countries that would compromise important Community trading and shipping interests. If that is the case, the Commission shall at its earliest opportunity undertake consultations with the competent authorities of the third countries concerned, aimed at reconciling as far as possible the above mentioned interests with respect to community law. The Commission shall inform the Advisory Committee referred to in Article 15 of the outcome of these consultations. According to the second paragraph, the Commission shall make the recommendations to the Council in order to obtain authorization to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with the Advisory Committee.

It should be noted that there is a considerable amount of overlap between the procedure of Articles 9 and 7, paragraph 2. The original proposal only contained Article 9 for dealing with conflicts with international law. The procedure of Article 7 , paragraph 2 is the result of the desire to demarcate the block exemption as clearly as possible. It is also the result of a wish to put the flag up to third countries. Revoking the block exemption is the most clear cut instrument of the Regulation. It is therefore to be expected that the procedure of Article 7, paragraph 2 will take precedence over the more general procedure of Article 9.

There have been several notifications.[30]

Rules of procedure

This section is largely patterned after Regulation 1017/68, which means that there is no possibility for negative clearance as provided for in Article 2 of Regulation 17. A novelty is Article 11, paragraph 4. This provision allows the Commission, when acting on a complaint or on its own initiative, to conclude that an agreement satisfies the provisions of Article 85, paragraph 3. In other words, it allows the Commission to grant an individual exemption without prior notification. Together with the procedure for the application of an exemption under Article 85, paragraph 3, in Article 12, this provision fundamen-

[30]Sealink - SNCF, OJ 1989 C 17/8; Sealink - SMZ, OJ 1989 C 17/12; North Atlantic Conference - Independent Agreements: Agreement 1237, OJ 1990 C 59/2; Gulfway, OJ 1990 C 130/3; Eurocorde, OJ 1990 C 130/13; Ferry Services Helsingborg and Helsingør, OJ 1992 C 36/5.

Awards given at arbitration and recommendations made by conciliators that are accepted by the parties shall be notified forthwith to the Commission when they resolve disputes relating to the practices of conferences referred to in Article 4 and in points 2 and 3 above.

In case of a breach of an obligation the Commission may, in order to put an end to such breach, address recommendations or withdraw the block exemption. It may grant an individual exemption according to Article 11 instead. This is laid down in Article 7 of the Regulation. The second paragraph of Article 7 gives a detailed procedure for revoking the block exemption when the conditions for granting an exemption are no longer fulfilled. According to Article 7, paragraph 2, under b, special circumstances are, inter alia, created by:

(i) acts of conferences or a change of market conditions in a given trade resulting in the absence of elimination of actual or potential competition such as restrictive practices whereby the trade is not available to competition; or
(ii) an act of conference which may prevent technical or economic progress or user participation in the benefits;
(iii) acts of third countries which:
- prevent the operation of outsiders in a trade,
- impose unfair tariffs on conference members,
- impose arrangements which otherwise impede technical or economic progress (cargo-sharing, limitations on types of vessels).

If actual or potential competition is absent or may be eliminated as a result of action by a third country, the Commission shall, according to paragraph c, under 1, enter into consultations with the competent authorities of the third country concerned, followed if necessary by negotiations under directives to be given by the Council, in order to remedy the situation. In these circumstances the Commission shall withdraw the benefit of the block exemption. It may at the same time decide whether an individual exemption should be granted.

Apart from the block exemption for conferences, Article 6 provides for a block exemption for agreements between conferences and shippers. Such agreements may cover rates, conditions, and quality of liner services. This block exemption may also be revoked under the grounds provided for in Article 7. Similarly, it may be substituted by an individual exemption.

There is only one condition attached to the exemption. Article 4 requires conferences to refrain from causing detriment to certain ports, transport users, or carriers by applying for the carriage of the same good and in the area covered by the agreement, rates, and conditions that differ according to country of origin or destination or to port of loading or discharge, unless such rates or conditions can be economically justified. Agreements not complying with the condition shall be automatically void.

Apart from this condition, the exemption is subject to certain obligations.

1. There shall be consultations for the purpose of seeking solutions on issues of principle between transport users on the one hand and conferences on the other concerning the rates, conditions, and quality of scheduled maritime transport services. These consultations shall take place whenever requested by any of the above mentioned parties.
2. Loyalty arrangements.
   The shipping lines' members of a conference shall be entitled to institute and maintain loyalty arrangements with transport users, the form and terms of which shall be matters for consultation between the conference and transport users' organizations. These loyalty arrangements shall provide safeguards making explicit the rights of transport users and conference members. These arrangements shall be based on the contract system or any other system that is also lawful.
   Loyalty arrangements must offer transport users a system of immediate rebates or the choice between such a system and a system of deferred rebates. Furthermore, the conference shall indicate which cargo is covered by the arrangements and a list of circumstances in which transport users are released from their loyalty obligation.
3. Services not covered by the freight charges.
   Transport users shall be entitled to approach the undertakings of their choice in respect of inland transport operations and quayside services not covered by the freight charge or charges on which the shipping line and the transport user have agreed.
4. Availability of tariffs.
   Tariffs and related conditions shall be made available on request to transport users at reasonable cost.
5. Notification to the Commission of awards at arbitration and recommendations.

deep sea towage, and supply and salvage operations. In other words, such services are also excluded from the scope of the Regulation.

Furthermore, the Regulation only covers sea transport and not connected services such as stevedores and freight forwarders. This is contrary to Regulation 1017/68. It should also be noted that inland transport connecting with the sea leg is covered by Regulation 1017/68.

As such the Regulation does not cover the entire multi-modal transport chain. The Regulation does not fit the usual pattern of Regulation no. 17 and Regulation 1017/68. Contrary to Article 1 of Regulation no. 17 and the Articles 2 and 7 of Regulation 1017/68, there is no explicit provision saying that agreements shall be prohibited as incompatible with the Common Market, no prior decision to that effect being required. Curiously enough, Article 8 of the present Regulation does say that the abuse of a dominant position within the meaning of Article 86 shall be prohibited without a prior decision being required. Notwithstanding this omission it should be assumed that Article 85, paragraph 1, is directly applicable. The procedure laid down in Article 12 for applications for an individual exemption under Article 85, paragraph 3 of the Treaty would not make sense otherwise. Nevertheless, this omission does create uncertainty. This point will be further discussed below where Article 12 is reviewed.

Like Regulation 1017/68, there is an exemption for technical agreements. Article 85, paragraph 1, shall not apply to agreements, etc., that have as sole object and effect to achieve technical improvements or cooperation by means of separately enumerated practices and agreements. This is laid down in Article 2 of the Regulation.

Article 3 lays down the exemption for agreements between carriers concerning the operation of scheduled maritime transport services. The exemption practically condones the present conference practices. Agreements which have as their objective the fixing of rates and conditions of carriage and have, as the case may be, one or more of the following objectives:

a. the coordination of shipping timetables, sailing dates or dates of calls;
b. the determination of frequency of sailing or calls;
c. the coordination of allocation of sailing calls among members of the conference;
d. the Regulation of the carrying capacity offered by each member;
e. the allocation of cargo or revenue among members;

are exempted from Article 85(1).

preferable to exclude tramp vessel services from the scope of their regulation, rates for these services being freely negotiated on a case-by-case basis in accordance with supply and demand conditions. These arguments are not very convincing. The above enumerated arguments for the application of Articles 85 and 86 to shipping in general apply to the bulk sector as well. It has been argued that there are no cartels in the bulk sector. The fact is that even if this were true, it does not logically make sense. If there are no cartels, why then should one object to the application of Articles 85 and 86? More importantly, it may be argued that the bulk sector does know some cartels. Especially long term contracts for the maritime transport of certain important primary commodities have features that may fall foul of Article 85, paragraph 1. Rumor has it that one of the Member States maintained strong opposition against including the bulk sector. The exclusion of the bulk sector from the scope of the Regulation implies that in this sector the provisional validity of agreements, as pronounced in the judgment in the *Asjes* Case, will remain in force. Furthermore, the Commission lacks powers to apply Article 85, paragraph 3, in this sector. It would have been stronger to argue that the international character of the bulk sector warrants its exclusion. To a greater extent than in liner shipping, bulk shipping is governed by the international market. Suffice to point to the very strong international character of the supply side. The majority of the bulk transport is carried out under flags of convenience. Furthermore, legislation in Canada, the United States, and Australia also excludes the bulk sector.

Article 1, paragraph 3, of the Regulation defines bulk transport:

> 'tramp vessel services' means the transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailing where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand.

The original Commission proposal excluded bulk transport without further definition of the scope of the Regulation. The present definition allows for a clear distinction between liner and bulk transport. In particular, bulk transport in liner vessels is now covered by the Regulation. The original proposal did not address this matter. Even though the Regulation or its preamble does not say so, it should be assumed that tramp vessel services also include off-shore services,

1985[27]. This point is important because it will not always be possible to delineate the relevant product markets. The Olympic Airways decision has created uncertainty in the sea and air transport industry. It made people wonder how far the immunity under Regulation no. 141 would actually extend.[28]

Main characteristics of the Regulation

One of the most important issues in the discussion of the present Regulation has always been its scope. A first question was whether the Regulation should cover both in- and outbound traffic. The discussion was fuelled by the fear of being accused of extraterritorial legislation. It led several Member States to plead for a Regulation limiting itself to outbound traffic. Rather less practical was the proposal to limit the scope of the Regulation to c.i.f. agreements. The solution finally adopted is to apply the Regulation to maritime transport services to or from Community ports. It should, however, immediately be noted that this extensive scope is accompanied by a safety valve to regulate conflicts of international law. Such a mechanism is contained in Article 9 and to some extent in Article 7, paragraph 2.

The next question was whether to limit the scope of the Regulation to liner transport or to extend it to all maritime transport. It has been clear from the beginning that the Regulation would cover liner transport in toto and that it would not be restricted to conferences only.[29] Conference-only Regulation is found in Canada, the United States, and Australia. From the point of view of competition policy it would have been logical to extend the scope of the Regulation to all maritime transport. After all, sea and air transport are the only sectors of the Community industry which are not covered by a Regulation applying Articles 85 and 86. This logic has not been followed. In the beginning the Commission indicated that it needed more studies concerning the bulk sector. The preamble states that it appears

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[27]Commission Decision 85/121 of 23 January 1985 (IV/C/31.163 - *Olympic Airways*) OJ 1985 L 46/51; significantly, this decision was not challenged before the Court.

[28]Commission Decision of 13 July 1987 (IV/31.764 - *Baltic International Freight Futures Exchange Limited*), OJ 1987 L 222/24.

[29]It should be noted, however, that the main exemption of the Regulation laid down in Article 3 only concerns agreements, decisions and concerted practices of liner conferences. The Commission has expressed as its opinion that agreements, etc., between conferences or its members and outsiders have to be cleared under Art. 12 of the Regulation. See, e.g., the Eurocorde and European Stabilisation Agreement (see note 49).

complaints have finally led to an effort to develop an instrument to counter such policies at the level of the Community.

Ad 5

Apart from the developments described under 3 and 4, the sharp decline of the merchant marine of the European Community gave rise to a call for a Community maritime transport policy. In such a policy the application of Articles 85 and 86 could play an essential role to counter external pressure.

Ad 6

Contrary to sea and air transport, the inland transport sector has seen the application of Articles 85 and 86 within a couple of years after the enactment of Regulation no. 17. After studying the effects of the application of the competition rules to inland transport, it became clear that competition policy need not be very harsh. Regulation no. 1017/68, apart from an exemption for technical agreements, provided for a broad block exemption. Competition policy in the inland transport sector cannot be characterized as very burdensome. The first action of the Commission took place in 1985 with the enactment of the EATE decision.[26] Furthermore, actions before national courts have not been common after the enactment of the Regulation. It should be noted, however, that such a notable absence of national court actions may have been influenced by the exemption for technical agreements and the ample block exemption. On the whole, discussions in national administrations between officials responsible for sea transport have been influenced by the experiences of their colleagues in the inland transport sector. Furthermore, it should be noted that transport is increasingly multi-modal. The effect of this is that from the shippers' point of view there is very little reason to apply competition rules to one mode and not to another mode of transport. A final point worth noting is that the exemption of Regulation no. 141 is limited to transport only. Ancillary and connected services are not covered by the exemption. This can be seen from the Commission's decision concerning Olympic Airways of

[26]Commission Decision 85/383 of 10 July 1985 (IV/31.029 - French inland waterway charter traffic: EATE levy) OJ 1985 L 219/35; Decision upheld in Case 272/85 *Association Nationale des Travailleurs Indépendants de la Batellerie (ANTIB)* v. *Commission*, ECR 1987: 2201.

Ad 2

An increasing awareness that Articles 85 and 86 did apply to shipping makes individual court actions more likely. Until judgment in the *Asjes* Case it was not clear whether agreements would be automatically void according to Article 85, paragraph 2. It was clear, however, that the Commission lacked the power to grant exemptions under Article 85, paragraph 3.

Ad 3

The shipping relations between the United States and the countries of Western Europe have been under strain since the 1950s. At the heart of the dispute were fundamentally opposing views as to what sort of shipping policy should be adopted. The United States, guided by its anti-trust philosophy, had a very strong regulatory system, especially concerning liner shipping. The countries of Western Europe adopted a traditional "laissez faire" policy. There had been regular talks between the United States and the countries of Western Europe to discuss this controversy. In the end, such discussions have never been very fruitful because the United States has always been very reluctant to come to certain agreements: for example, concerning rebates or the discrimination of shippers. Furthermore, the United States has consistently pointed out that the countries in Western Europe would lack the necessary instruments to implement such agreements. To remedy such a situation would only be possible if Western European nations would develop their own instruments. Among such instruments was the application of Articles 85 and 86 to shipping.

Ad 4

Recently, international shipping relations have come under great strain. Several developing countries have severely restricted the competition in international shipping. These unilateral actions have largely been the result of a desire to protect national cargo shares due under the Code of Conduct or bilateral treaties. To the extent that the share of the conferences in the trade would decrease, it would undermine the national cargo share. In this context it should be noted that, owing to several developments in world shipping, the position of conferences in many trades has come increasingly under pressure. Community shipowners, whether or not organized in conferences, and to some extent also Community shippers, have been complaining increasingly about the policy of certain developing countries. These

case but an air transport case. Ironically, the judgment of the Court in the *Asjes* Case came when agreement on a Regulation applying Articles 85 and 86 to shipping was nearing. The *Asjes* Case is not only important for air transport but also for shipping. This is because some modes of maritime transport are excluded from the application of the Regulation.

The developments that have finally caused the acceptance of the present Regulation can be summarized as follows.

1. The necessity to complement the Code of Conduct for liner conferences.[24]
2. The extent of the application of Articles 85 and 86 to shipping and air had been clarified in the judgment of the Court in the *Asjes* Case.
3. The recent developments in the relations with the United States.
4. The Community has increasingly felt the need to develop instruments for an external policy.
5. The decline of the merchant marine of the countries of the European Community increased the necessity to develop a common transport policy.
6. The development of the competition policy in the inland transport sector allayed the fears of an excessive application of competition policy.

Ad 1

After the enactment of Regulation 954/79[25] the Code had been accepted and incorporated in the legal order of the Community, but the fundamental gap between the Code and Articles 85 and 86 remained. The present competition Regulation is first and foremost intended to grant conferences a block exemption. In that way the incompatibility between the Code and Articles 85 and 86 is taken away. As such the present Regulation may be viewed as one of the recent block exemption Regulations.

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[24]*United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences* (UN Publ., Sales no. E.75.II), hereafter referred to as "the Code".

[25]Council Regulation 954/79 of 15 May 1979 Concerning the ratification by Member States at, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences, OJ 1979 L 121/1.

86 to the inland transport sector was enacted in 1967. Regulation no. 141 exempted shipping and air transport from the application of Regulation no. 17 for an indefinite period.

Twenty four years passed before the present Regulation was enacted. It is striking that sea and air transport have been able to withstand the application of Articles 85 and 86 so long. There are several reasons for this.

1. For a long time it was debated whether the general rules of the Treaty and in particular Articles 85 and 86 apply to shipping. The judgment of the Court in the *Asjes* Case[21] finally decided this matter.
2. A particular characteristic of sea and air transport has always been the importance of the international dimension. This makes the drafting of a Regulation for competition rules very difficult. Furthermore, the example set by the Shipping Act of the United States and its application by the Federal Maritime Commission and the Courts have made shipowners very wary of competition rules.[22] This example has led West-European shipowners to fight competition rules for a very long time.
3. The informal character of the industry has forestalled the application of Articles 85 and 86. In the shipping industry the interests of shipowners and shippers are often closely connected. Loyalty rebates are very common in times of recession. There is ample consultation between shipowners and shippers and it is highly institutionalized. There is an "official code of practices"[23] jointly drafted by the Council of European Shipowners Association (CENSA) and the European Shippers Council (ESC). These close knit relations explain why shippers seldom go to court to solve disputes with shipowners. The court action that finally shed light on the relation of Articles 85 and 86 to shipping was not a shipping

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[21]Joint Cases 209-213/84, *Ministère Publique* v. *Asjes* (*"Nouvelles Frontières"*), 30 April 1986, ECR 1986, 1425.

[22]See for instance: Faucett, F., and D.C. Nolan. "US Ocean Shipping: the History, Development and Decline of the Conference Antitrust Exemption." *Northwestern Journal of International Law and Business* 1979: 537 and: Agman, R.S. "Competition, rationalisation and US shipping policy." *Journal of Maritime Law and Commerce* 8 (1976): 1.

[23]*Code of Practice for Conferences*, joint publication of the Council of European and Japanese National Shipowners' Associations and the European National Shippers' Councils, adopted Genoa, October 1971, amended Copenhagen, April 1975.

the criteria for national lines under the Code in order to avoid as much as possible the need to settle the dispute. It is therefore necessary to formulate a joint interpretation of "national shipping line." There have been several attempts in the EEC.[15]

In 1989 the Commission proposed a regulation on a common definition of a Community shipowner,[16] i.e., a natural or legal person who is a national of a Member State and is domiciled or usually resident in a Member State. If he is not domiciled or usually resident in the Community, his ships must be registered in the Member State of which he is a national. The proposal is still pending.

Regulation 4056/86 on the Application of the Competition Rules to Shipping

Introduction

This Regulation[17] was adopted on 22 December 1986 by the Council of Ministers of the European Economic Community.

Shortly after the enactment of Regulation no. 17, the basic competition Regulation in the EEC, the Council issued Regulation no. 141.[18] The latter Regulation exempted transport from the application of Regulation no. 17.[19] The preamble of Regulation no. 141 noted that for the inland transport sector the application of Articles 85 and 86 was to be expected shortly. For sea and air transport, it could not be foreseen whether and when such application would be enacted. The optimism regarding the prompt application to inland transport has not been wholly justified. Regulation 1017/67[20] applying Articles 85 and

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[15]See, e.g., the recent Commission proposal.

[16]OJ 1989 C 263/16.

[17]Council Regulation 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport; OJ 1986 L 378. Cf Ruttley, P. "International Shipping and EEC Competition Law," *ECLR* 1991, page 5 et seq.

[18]Council Regulation no. 141 of 26 November 1962 exempting transport from the application of Council Regulation no. 17, OJ 1962 no. 124, page 2751.

[19]Council Regulation no. 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 no. 13, page 204.

[20]Council Regulation 1017/68 of 19 July 1968 applying rules at competition to transport by rail, road, and inland waterway, OJ 1968 L 175/1.

The economic-political objective of the so called "Brussels Package," i.e., safeguarding free competition is, of course, secured by the redistribution scheme of Article 3, the possibility of participation by shipping lines of other OECD countries and by disapplying Article 2 of the Code in trades among EEC countries and between EEC countries and other OECD Members.

A further interesting feature is the disapplication of Article 14(9) of the Code concerning the rules for freight-rate increases. In combination with Article 14(1), which requires 150 days' notice for general freight rate increases, Article 14(9), requiring a minimum of ten months between two rate increases, makes for a period of fifteen months before rates can be increased. EEC Member States found this period too long for trades between them and for trades between them and other OECD Members.

The Regulation also seeks to promote commercial arbitration rather than the procedure for settling disputes of the Code. Therefore, Article 4(5) provides that lines and shippers from the EEC shall not insist on conciliation in EEC trades and in trades between the EEC and other OECD countries.

Contrary to what has been asserted by the Commission in its written observations in the proceedings, Article 1 of Regulation 954/79 does not oblige, according to the European Court of Justice in its judgment *Commission* v. *Council*,[13] the Member States to accede to the Code.[14]

A Common Interpretation of the Concept of "National Shipping Line"

Regulation 954/79 provides for the equal treatment for Community shipping lines applying for membership of a conference. An EEC line can only be admitted as a national line if it has successfully negotiated such admission on that basis with shipping lines of the same nationality that are already members of the conference or that also seek membership. The negotiations shall be on commercial principles, according to Article 2(1) of Regulation 954/79. The Member State concerned may settle the dispute, according to Article 2(2) of Regulation 954/79. For that purpose Member States wish to expand

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[13]Case 355/87, *Commission* v. *Council*, ECR 1989: 1517 at para. 19 on p. 1545.

[14]Nevertheless the majority of EC Member States have now become party to the Code: Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, and the UK.

As indicated above, the basic legal objectives of the regulation are to reconcile Articles 1 and 2 of the Code with the EEC Treaty. The basic political-economic objective was to safeguard free competition between OECD Members to the maximum extent possible under the Code.

The legal objections are remedied by giving shipping companies of other Member States equal access to conference membership and to cargo sharing. Access to conference membership is dealt with in Article 2 of the Regulation. Member States ensure equal treatment to shipping companies of other Member States if they are established on their territory. This is not a straight equal treatment. Shipping operators of other Member States have to establish themselves on the territory of the country in which they seek equality for the purpose of acquiring conference membership. Thus equality is achieved through the principle of freedom of establishment rather than through direct application of the principle of freedom to provide services. The latter would not require the intermediate step of establishment. Third countries may object that the EEC provision is not in line with the Code. It may give other shipping lines than those defined as national lines under the Code, preferential access. For that purpose the EEC countries will lodge a reservation when becoming parties to the Code. In economic reality the EEC provision will hardly create problems, since cross membership between EEC countries will normally even out the problems just outlined.[12] Furthermore, as many conferences are on a regional basis, i.e., the Hamburg-Bordeaux range, there was already a sort of common membership.

Equal access by all Community lines to cargo sharing is laid down in Article 3 of the Regulation. It provides that if a conference operates a pool, the volume of cargo to which shipping lines of the EEC will be entitled, either as national line or as crosstrader, shall be redistributed on the basis of commercial principles. This redistribution is open to shipping lines of other OECD countries subject to reciprocity (Article 4(1)). Article 4(2) stipulates that the cargo sharing rules of the Code do not apply in trades between EEC countries and between EEC countries and other OECD countries. This includes such important trades as the Europe-Australia route. Paragraph 3 provides for the disapplication of Article 2 of the Code and will not affect shipping lines of LDCs in their cross trading.

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[12]For a different view see, e.g., Juda, Lawrence. "Whither the UNCTAD Liner Code: The Liner Code Review Conference." *Journal of Maritime Law and Commerce* 1992: 101 at 104.

on their own during the negotiations of the UNCTAD Conference which ultimately led to the UN Convention for Liner Conferences (hereinafter: Code). A coordinated approach by the Member States making up the EEC at that time was further blocked by the fact that these states disagreed about the objectives of the conference.

The legal situation of shipping under the Treaty was greatly clarified by a judgment of the Court of Justice.[11] This strengthened the position of the Commission of the EEC. France, Belgium, and the Federal Republic of Germany were put on notice for failure to fullfil their treaty obligations by signing the Code. This legal dispute was forestalled with the understanding that the Community would make an effort to reach a common position on the Code. That effort has been made considerably more difficult by the accession of the UK and Denmark to the EEC. Both countries were at the time outspoken opponents of the Code. On the other hand, increasing political pressure from less-developed countries (LDCs) in general and from LDCs applying or threatening to apply unilateral cargo reservations changed the mood in the Community. A consensus on the Code was finally made possible by an intricate system implementing the Code.

Regulation 954/79

The Code raised several legal problems for the Community. The main contested provisions of the Code were Article 1 and Article 2. Article 1 of the Code gives national shipping lines a preferential right to become member of a conference. Such a preferential right is against the basic philosophy of the EEC Treaty, which establishes rights of equal access to the Market. This idea is laid down in Article 7 of the EEC Treaty, prohibiting discrimination on grounds of nationality. The basic idea is further expanded in Article 52 granting companies of other Member States the right of establishment in a Member State and in Article 59 on the freedom to supply services.

For similar reasons, Article 2 of the Code on cargo sharing was not acceptable. The cargo reservation implied in paragraph 4(a) of that Article defies the basic principle of the EEC. A final major obstacle to access by Members of the EEC were the rules of the Code pertaining to the regulation of competition. Conferences are cartels and as such prohibited by Article 85 of the EEC Treaty.

The first two problems are addressed in Regulation 954/79 and the third is addressed in Regulation 4056/86 on competition in the field of shipping.

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[11]Case 167/73, *Commission* v. *French Republic*, ECR 1974: 359.

basis of Article 11 of Regulation 4057/86.[4] The decision has given rise to several comments.[5] The Council Regulation has been appealed by Hyundai.[6] The case is presently still pending before the European Court of Justice.

With the adoption of these decisions, the EEC has demonstrated its willingness to implement the EEC shipping policy.[7]

In the next sector we will first summarize the main elements of the present EEC policy, i.e., Regulation 954/79;[8] the 1986 measures: Regulations 4055/86, 4056/86, 4057/86, 4058/86[9] and the recent consortia Regulation.[10] The next section will briefly describe the developments in the EEC applying the aforementioned measures. The subsequent section will discuss the areas where the EEC has not yet been able to formulate a common policy: the registration question including the proposal for a European shipping register (EUROS) and the related case law of the European Court of Justice, the discussion on state aids and miscellaneous measures. The final section of this paper will be devoted to some conclusions.

The Main Elements of the Present EEC Shipping Policy

Regulation 954/79 on the Implementation of the Code of Conduct

Introduction

The uncertainty about the legal regime for shipping which prevailed in the early 1970s precluded the formulation of a coherent approach by the EEC. Thus the individual Member States acted largely

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[4]Regulation 4057/86, OJ 1986 L 378/14.

[5]E.g., Seong Deong Yi and Chong Ju Choi. "The Community's unfair pricing practices in the maritime transport sector." *ELR* 1991: 279 et seq.

[6]Case C-136/89, OJ 1989 C 150/7.

[7]See in general: Greaves, R. *Transport Law of the European Communities.* London: 1991; Bredima-Savopoulou, A. and Tzoannos, J. *The Common Shipping Policy of the EC.* Amsterdam: 1990.

[8]OJ 1979 L 121/1.

[9]OJ 1986 L 378.

[10]OJ 1992 L 55/3.

THE EEC SHIPPING POLICY

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Introduction

On the first of April 1992 the Commission of the European Communities adopted a Decision relating to proceedings pursuant to Articles 85 and 86 of the Treaty. The Decision concerned French West African shipowners' Committees, which had been established in the trade between Western Europe and West Africa. The decision rose out of complaints submitted by the Danish Shipowner Association and the Danish Government pursuant to Article 10 of Regulation EEC 4056/86.[1] The complainant requested a finding that the competition rules had been infringed by the shipping companies operating between French ports and the ports serving West and Central African states within the framework of a cartel in the form of shipowners' committees set up for the purpose of sharing liner cargo among their members.

In an interview with *Lloyd's Maritime Asia* of May 1992, Nippon Yusen Kaisha's (NYK's) senior manager director Hiroshi Takahashi hesitated to comment upon the proposed European Stabilization Agreement (ESA) designed to address what is called the European problem, i.e., instability in the various European trade. The proposed ESA includes fifteen carriers in Far East trade, ten Conference lines, and five independents to take measures to stem rate erosion. Mr. Takahashi's reticence stems from the fact that the ESA has yet to receive the blessings of the EEC.[2]

On the fourth of January 1989 the Council of the European Communities enacted a regulation applying a redressive duty of 450 ECU per 20 foot container or equivalent on the Hyundai Merchant Marine Company of South Korea.[3] The Regulation is adopted on the

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[1]OJ 1986 L 378/4. The request of the Danish Government is unique; governments do not submit complaints.

[2]*Lloyd's Maritime Asia* May 1992: 9.

[3]Regulation 15/89, OJ 1989 L 4/1.

invited. All of the invited member States of the Community had specific sea-bed mining interests and belonged to G4 and G6. Another concern was the fact that the Community as such was not able to attend the consultations on the "production policy," a matter of its exclusive competence (the second phase of the consultations, which started last week [June 1992] in New York, is now open to all States and, therefore, also to the Community).

The Commission made known its concerns in a communication to the Council in September 1991 in which it referred expressly to Article 116 and to the provisions concerning EPC. The following discussions have allowed the Community to improve substantially the functioning of its coordination procedures. From the beginning of this year, the Group of Senior Officials had several intensive discussions on all aspects of the present negotiations and consultations and there were no serious disagreements.

It seems to be possible that, from now on, the Community and its member States will present more coherent positions and have a greater impact on the negotiations. As the Community is now better known to the other actors on the international scene, it will, I hope, not be misunderstood as the appearance of just another interest group in the law of the sea deliberations. It will be the sign that the Community and its member States have made progress in trying to speak with one voice.

This greater coherence would also show that the EC clause of the Convention is at the same time too simple and unnecessarily complicated: it is too simple because no declaration on competences could be comprehensive enough to conver all matters on which the Community might have to intervene and, perhaps, even to vote. It is, at the same time, unnecessarily complicated when it tries to protect the other State parties against a tactical switching of competences between the Community and its Member States. There is no better shield against unjustified claims of competence by the Community than the interests of its own Member States.

Community, which is a signatory of the Convention and which can ratify it only if the majority of its member States have done so before.

Even beyond the matters which represent a particular interest to the Community, the member States have committed themselves (by Article 30 of the Single European Act) not only to defend common positions in international negotiations, but to make at least an effort to agree among themselves on such positions:

> 2. (a) The High Contracting Parties undertake to inform and consult each other on any foreign policy matters of general interest so as to ensure that their combined influence is exercised as effectively as possible through co-ordination, the convergence of their positions and the implementation of joint action.
>
> (b) Consultations shall take place before the High Contracting Parties decide on their final position.
>
> (c) In adopting its positions and in its national measures each High Contracting Party shall take full account of the positions of the other partners and shall give due consideration to the desirability of adopting and implementing common European positions.....
>
> The High Contracting Parties shall endeavour to avoid any action or position which impairs their effectiveness as a cohesive force in international relations or within international organizations.

While member States were for a long time rather reluctant, as in other fields of international relations, to accept the obligations resulting from Article 116, the Senior Officials' Group did discuss various matters that belong to the sphere of European Political Cooperation (EPC): The phenomenon of creeping State practice gave rise to many discussions, prepared by the Legal Experts Group, in which common demarches to governments of third countries were adopted.

The present state of coordination

The EC Commission, already dissatisfied with the absence of a functioning coordination procedure in matters of member States' competence, was concerned that the informal consultations of the UN Secretary General on Part XI of the Convention (whose objectives it fully shares) might create additional problems because, in the first phase, only a limited number of particularly interested States had been

tion policy." Some of these are just the fringe of competences in completely different areas of Community activities (e.g. "accounting principles" for the Sea-bed Authority).

The obligation of member States to coordinate in matters that are not covered by Community competences

Even after the problems of decision making on matters of Community competence and of coordination concerning subjects in the "grey zone" have been resolved, the situation has remained unsatisfactory. The necessary coherence of Community and member States' action will be vulnerable as long as the interventions of the member States on matters of their own competence differ in tone and substance from the coordinated positions defended by the Community.

Article 116 of the EEC Treaty stipulates that

> member States shall, in respect of all matters of particular interest to the common market" (understood now as "to the activities of the Community") proceed within the framework of international organizations of an economic character only by common action. To this end, the Commission shall submit to the Council, which shall act by a qualified majority, proposals concerning the scope and implementation of such common action.[15]

It is obvious that the future of the Convention and the negotiations to make it universally acceptable are of a particular interest to the

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[15]During the negotiations of the Maastricht Treaty, it had been considered initially to include foreign policy matters into the decision making procedures of the Community. It was logical, therefore, to remove Article 116 from the EEC Treaty. Later, when agreement on the integration of foreign policy into Community-like procedures could not be reached, the removal of Article 116 was not corrected. However, after the entry into force of the Maastricht Treaty, the legal situation will not be very different, because Article 116 is only a specific expression of the overall principle of Article 5, which stipulates that

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's task.
>
> They shall abstain from any measure which would jeopardise the attainment of the objectives of this Treaty.

al organization, in which the member States are linked in a much closer relationship and to which they have transferred competences concerning, among others, the specific question forming the subject of the dispute, as several parties.

Finally, the Community has underlined that "any doubt on this point shall be settled by the decision of the Tribunal" (Article 17 (5) of Annex VI) and that this would be the only possible solution to a problem that may have very different aspects in each specific case.

Special commission no.4 has never returned to this question and it is not clear what will be the provisional conclusions that all special commissions are supposed to adopt at the comming session in New York.

The second phase

In 1986/87, the member States acknowledged the close links between the matters discussed in special commission no. 1 (land based developing producers) and the commodity policy of the Community. Since then, the Community delegation has intervened there on behalf of the Community and its member States. The content of these interventions is prepared in numerous coordination meetings of the "Sea-bed Experts Group" in Brussels and in the margin of the PrepCom sessions.

One subject, which the Community's declaration on competences had expressivly referred to ("...commercial policy, including the control of unfair economic practices"), was raised by some industrialized land-based producers who demanded the inclusion of a specific anti-subsidy clause into the rules and regulations of the Authority. The issue became a matter of early Community interventions in special commissions no. 1 and 3 ("Mining code").

When the Community, in its communication of 1987, drew the attention of the Council to the necessity of a coordinated ratification by the member States and the Community, it added that there was a need for the Group of Senior Officials to discuss in detail the provisions and procedures that, in the opinion of the member governments, could make Part XI universally acceptable.

In 1989, the Commission reminded the member States of the exclusive Community competence in matters of trade policy and stressed that this competence covered regulations of commodity markets and, therefore, the "production policy" (Article 151). This opened the way for the Community to special commission no.3 ("mining code"), the former *chasse gardée* of the interest groups, where it now plays an active role, and to matters other than "produc-

Anyhow, these will have to be adapted if the Convention is to become universally, and therefore also for the Community, acceptable.

It certainly would not be opportune, at the present time, many years before the first commercial operations on the sea-bed and the need for Authority decisions on such matters, to draft detailed provisions concerning the role of an "international organization" in the Council of the Authority. The Community and its competences will look very different when the need for such rules arise.

The status of an "international organization" as a party before the International Tribunal of the Law of the Sea has been discussed in early sessions of PrepCom's special commission no.4. The Community's position has been the following:

Article 20 (1) and Article 37 of Annex VI lay down that the Tribunal and the Sea-Bed Dispute Chamber shall be open to State Parties. That applies *mutatis mutandis* (Article 1 (2) (2) of the Convention) to "international organizations." The extent of their capacity to institute legal proceedings is specified by Article 4 (2) of Annex IX: it results from the declaration(s) on competences.

Therefore, the Community could not accept that the Tribunal determines -- on its own initiative, or at the request of another party -- whether the specific question forming the subject of the dispute falls within the competence of the "international organization." Every State Party would be assured of obtaining the necessary information on the distribution of competences through the application of Article 5 (5) of Annex IX. Nothing prevents the Tribunal itself from posing such questions.

Regarding the composition of the Tribunal in the event that an "international organization" becomes Party to a dispute, the Community has pointed out that, in accordance with Article 17 (2) of Annex VI, the organization could designate a person of its choice to participate as a member of the Tribunal if there is none having the nationality of one of its member States. The fact that the organization has no "nationality" is irrelevant because, in any case, the *ad hoc* judge must not have the nationality of the State that chooses him.

The opposite case would be that a party finds itself faced with a Tribunal in which several judges have the nationality of member States of the "international organization" that is the opposing party. That would be very similar to a situation that occurs whenever several parties make common cause. Article 17 (5) of Annex VI specifies that they be reckoned as one party only. The Community has pointed out that it would be completely illogical to reckon several States, bound only by a common interest, as one party, and to reckon an internation-

applicants." France, India, Japan and USSR/Russia, in the group of Pioneer investors (G4), concentrate on their specific interests, whereas Denmark, Ireland, the EFTA countries, and some Commonwealth members try, in the group of the "Friends of the Convention" (FOC), to assist the chairman. Last but not least, the non-participation of the United States in PrepCom does not mean that it does not exert influence, particularly on those States with which it has common interests related to deep sea-bed mining.

The Community, in all its fields of activity, had always proven its ability to produce compromises between different and often opposing interests. The first sessions of PrepCom seemed to indicate that it is much more difficult to reach an agreement between very specific and strong interests on one side and the absence of economic interests -- at least in a narrow sense -- on the other. Whereas some member States invest large amounts of manpower into the negotiations on the sea-bed mining regime, others see their first priority in bringing the Convention into force because of the usefulness of all its other Parts -- which is not really an opposite position.

For several years, it seemed nearly impossible to overcome this stalemate in the Community's coordination meetings. As the issues discussed in PrepCom were mostly of a very technical nature, this problem never came to the attention of the political levels: Since the signature of the Convention in December 1984, Ministers have -- neither in the EC Council nor in the intergovernmental European Political Co-operation (EPC) on matters of foreign policy -- discussed the stagnation of the PrepCom negotiations and the related coordination difficulties among the member States.

The first phase

During the first phase, from 1983 to 1986/87, the interventions of the Community's delegation concerned essentially the institutional and procedural consequences of the "EEC clause."

I have already mentioned the principle of "neither more nor less rights or obligations, including voting rights," than the member States would have without the transfer of competences to the Community.

This principle referred to the decision making procedures of the Assembly of the Authority. But, it could also concern the Council of the Authority where member States would not be able to participate in decisions of Community competence. For the moment, there seem to be few issues, to be decided upon by the Council, which could fall under this category. The most important one, the "production policy" (Art. 151), is part of the so-called "hardcore issues," presently discussed in the informal consultations of the UN Secretary General.

Parliament than to the executive institutions of an organization that has worldwide responsibilities and must quickly react to internal and external challenges: It interrupts its work nearly completely for a summer break (the month of August) and for short breaks around Christmas and Easter, and it expects everyone to be available for the rest of the year.

Therefore, conflicts between member States on Community positions in PrepCom, which arise on the level of the Senior Officials' Group, can often not be resolved by instructions from higher levels (COREPER or Council).

This situation also limits also the possibilities of the Commission representatives to request, as in other negotiations, new instructions from "Brussels" if they consider the position taken by the "special committee" too intransigent or not compatible with Community interests. The mere possibility of such a request often makes the positions of the member States' delegates more flexible.

The problem in PrepCom is particularly difficult if the conflict concerns the question of whether or not a specific matter falls within the Community competences. In such cases, the member States sometimes prefer to leave open the question of competence, but to try nevertheless to agree on a common position. Due to the difficulties of a referral to Brussels, the Commission representatives have sometimes to accommodate themselves to such an approach. If, on that basis, a common position can be agreed, it will then be defended in PrepCom by the Commission representatives "on behalf of the Community and its member States." The same formula is used if member States and the Commission agree that the subject in question is in the grey zone between the respective fields of competence.

Community coordination and the negotiations between "interest groups"

Colleagues who attended both the Third UN Conference on the Law of the Sea and PrepCom believe that if not the results, at least the intensity of Community coordination in the former had been superior.

The main reasons seem to be that from the beginning of the PrepCom sessions in 1983, the issue of the "pioneer investors registration" -- where no Community competences at all are involved -- played a prominent role, and that the conflict concerning the sea-bed mining regime polarized the debate and strengthend the role of the various interest groups. In all of them (except in the G77) member States of the Community are represented: Belgium, Germany, Italy, the Netherlands, the UK (and, originally, France) form together with Japan the group of "industrialized, like-minded countries" (G6). This group, enlarged by some other States, becomes the group of "potential

already established in 1977 and which is composed of the heads of delegation of the member States. This group has formed two sub-committees, the "Legal Experts Group" (composed mainly of foreign ministry officials) and the "Sea-Bed Experts Group" (composed normally of representatives from the ministries of Industry).

These groups meet regularly in Brussels and, sometimes, in the capital of the country that assumes the presidency. They also have, at least several times a week, meetings in the margin of PrepCom sessions.

However, there is one interesting difference between the Community's decision making procedures concerning PrepCom matters and those concerning other international negotiations:

Normally, the "special committee" assisting the Commission in the negotiations has to refer a matter back to Brussels if it cannot reach an agreement. The question is then taken up by the Council's "Committee of Permanent Representatives" (COREPER) and will be decided, if necessary, by the Council itself, i.e., on the level of ministers who meet at least once a month.

The fact that the LOS Convention is one of the youngest children of the UN family and that PrepCom therefore gets only "slots" for its sessions which have not been claimed before by older brothers or sisters, is the reason why the PrepCom summer session always takes place in August and the Spring session normally just before Easter.

The Council and Commission of the Community, which in the early years acted as mainly legislative bodies, still have some working methods which are more adequate to the law making activities of a

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The Working Party's terms of reference cover in particular the following points:

1. Development of the law of the sea and its effects on common policies;
2. Participation by the Community and its member States in the Convention on the Law of the Sea;
3. Proceedings of the Preparatory Commission;
4. Declarations and statements provided for under Article 310 of the Convention;
5. Other matters.

On all questions coming within Community competence the Community's position will be decided upon by the customary procedure.*

In matters of special interest to the common market (Article 116 of the Treaty),the same procedure will be applied to determine the joint action of the member States.

*Positions adopted by the Council authorities -- on-the-spot co-ordination -- possibility of referral to Council bodies in Brussels....

European Economic Community is, in alphabetical order, between Ethiopia and Fiji.

Internal decision making procedures

According to Article 228 of the Treaty establishing the EEC, the Community is represented by the Commission. In other cases of "mixed agreements," the Community is often represented by a "bicephalous delegation" (Council and Commission). But the "EEC clause" of the Convention is based on the hypothesis that a clear distinction between the two areas can be made in any concrete case. There is no room for a Council spokesman to intervene on matters outside precise Community competences, because they fall, by definition, under the competences of the member States.

Article 228 does not specify how Community positions have to be adopted, but it is general practice to apply the procedures of Article 113 (negotiations on trade agreements):

> 3. Where agreements with countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.
>
> The Commission shall conduct these negotiations in consultations with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.
>
> 4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

Before the first PrepCom session in 1983, the Council reconfirmed, as "special committee" in accordance with Article 113 (3), the role of the "Group of Senior Officials 'Law of the Sea,'"[14] which it had

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Ireland; absent: Portugal; observers without right to vote: Germany, UK), the Community, of course, did not participate in the vote.

[14] "The Working Party of Senior Officials on the Law of the Sea will continue to examine matters pertaining to the Convention on the Law of the Sea. Its proceedings will prepare for the deliberations of the Council and the Representatives of the Governments of the Member States of the European Economic Community, meeting within the Council, and it will contribute to Community co-ordination.

Council could, if necessary, divide the issue into two parts: it could first vote on the various items on the list of competences, on each with the specifically required majority, and then draw, by qualified majority, the conclusions for the act of ratification.

Such a procedure would give the Community at least the possibility to become a Party to the Convention for those matters for which it is solely competent.

The Community then could always make additional declarations on the distribution of competences, including on new transfers.[11] It could so complete its original declaration, e.g., with a reference to competences in the field of environmental protection, if and when the internal obstacles have been overcome.

In the meantime, the member States would not be able to take individual positions on such an issue because even if there had been no unanimous agreement to include it in the declaration of competences, it would still be a Community competence. The member States, in the framework of the Convention, could only act on the basis of a mandate from the Community. If, for instance, the Assembly of the Authority had to vote on rules to prevent, reduce, and control pollution of the marine environment from activities in the Area, and if the Community's declaration on competences did not refer to environment protection, the member States, in the absence of such a mandate, would have to abstain.

The Community in the Preparatory Commission

As a signatory of the Convention, the Community is a member of the Preparatory Commission[12] even if its voting rights are, obviously, limited to the matters of its competence. The question whether its declaration on competences of 1984 is incomplete can be left open, since, at least until now, the PrepCom does not vote on the draft rules, regulations, and procedures that it has to elaborate.[13] The seat of the

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[11]Annex IX, Article 5, paragraph 4.

[12]UNCLOS, Final Act, Resolution I, paragraph 1; Convention Article 1, paragraph 2.2.

[13]The only vote took place on 11 April 1985 on a draft resolution criticizing the non-signatory States, Germany and the United Kingdom, for having given exploration licenses under national law (LOS/PCN/78) While the member States did vote (against: Belgium, France, Italy, Luxemburg, Netherlands; abstention: Denmark, Greece, Spain,

however, that the evolution since 1988 of the general institutional debate in the Community has been in favor of the Commission's position. Thanks to the UN Secretary General's informal consultations on Part XI, which intend to make the Convention universally acceptable, the question may remain a theoretical one.

Voting requirements for the Council decision on ratification ("formal confirmation")

In 1984, the Council of the Community had decided unanimously to sign the Convention (with the non-signatories Germany and the United Kingdom abstaining). It had been argued that also the decision on ratification needed unanimity because the declaration on competences did not only contain matters on which decisions by a qualified majority were possible (e.g., trade policy and fisheries), but also the subject of environment protection, which needed unanimity.[9] The effect would be that the fate of the stronger competences depended on that of the weaker ones, much as the healthier Siamese twin cannot survive the other one. According to this theory, any member State could block the exercise of exclusive Community competences concerning commercial policies and fisheries by invoking the need for unanimity in the field of, for instance, environment protection.

Fortunately, the LOS Convention itself offers a solution to this problem: The instrument of formal confirmation must contain another declaration on the Community's competences.[10] Therefore, the

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[9]Until 1986, decisions on environment matters had to be based on the "implied powers" provision of Article 235 of the Rome Treaty which prescribes unanimity. Article 130r, introduced by the Single European Act, has now created a specific competence but unanimity is still necessary:

> 4.The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual member States. ...
>
> 5.Within their respective spheres of competence, the Community and the member States shall co-operate with third countries and with the relevant international organisations. The arrangements for Community co-operation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 228.
>
> The previous paragraph shall be without prejudice to member States' competence to negotiate in international bodies and to conclude international agreements.

[10]Annex IX, Article 5, paragraph 1.

The necessary parallelism between Community and member States participation

These provisions have already had practical consequences: It was only at the last possible date, on 7 December 1984, that Italy, Belgium, and Luxemburg opened through their signatures the way to the signing of the Convention by the Community, because together with the signatures of Denmark, Greece, France, Ireland, and the Netherlands (who had already signed in Montego Bay) the majority condition had been fulfilled.

Annex IX, Article 3, which links the "formal confirmation" by an international organization to the ratification by a majority of its member States, has a consequence that most of the delegations at the Third UN Law of the Sea Conference had certainly not intended: It restricts the possibilities of the member States to ratify, or to adhere to, the Convention. Under Community Law, member States cannot commit themselves in matters of exclusive Community competence. If they were to deposit individually their instruments of ratification, they would have to declare that they have transferred certain competences to the Community and that, to that extent, they could not commit themselves. But such a reservation would not be allowed under Article 309 of the Convention.

The Commission of the European Communities has therefore indicated -- in replies to questions from members of the European Parliament[8] and in 1987 in a communication to the Council -- that member States could not deposit individually their ratification or accession instruments but that at least a majority of them had to do it, at the appropriate moment, simultaneously with the Community. The Commission has pointed out that a depositing of instruments of ratification not coordinated with the Community would be an infringement of Community law, and it has reserved its right to take any appropriate measures.

At that time, officials of some member States had contested privately such a conclusion, but this aspect of the communication has never been discussed in the Council, or its subsidiary bodies, because no member State intends for the moment to ratify the Convention and because the Community institutions, as explained above, try to avoid theoretical discussions on institutional principles. One can say,

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[8]Answer to written questions no. 2067/84 and 2296/84; Official Journal of the European Communities no. C 226 pp 3-4 of 7.10.1985. Answer to written question no. 1981/85, *Official Journal* no. C 81 p. 27, of 9.4.1986

In other words, the international organization shall have neither more nor less rights and obligations than its member States, Parties to the Convention, would have.

In the PrepCom negotiations in 1988 on the rules of procedure of the Assembly, the Community therefore insisted that it should be entitled to cast, in matters of its competence, as many votes as member States of it are Parties to the Convention. At the beginning, this again caused some irritations, mainly because some PrepCom delegates, who had not attended UNCLOS, seemed to be confronted with a completely new problem, in spite of the fact that the East-West conflict and the resulting ideological obstacles had already to a large extent disappeared and that the Community had adhered to quite a number of other international conventions. However, I think that we have overcome the original difficulties in these discussions and that agreement on such a provision is now possible, in particular because other UN organizations, e.g., the FAO, have now found acceptable solutions to the problem.

The mistrust that prevailed in the Third UN Conference on the Law of the Sea with regard to the request for an "EEC clause" finds its particular expression in Annex IX, Article 2, which stipulates that international organizations can only sign or ratify the Convention if the majority of their member States have done so before, or simultaneously. This provision was made to prevent member States from choosing, through the international organization, an indirect representation for some specific matters, to obtain in such a way certain rights and benefits, to avoid the corresponding obligations, and to elude the interdiction of reservations and exceptions (Article 209).

At the bottom of this unsatisfactory compromise lies a profound misconception of the fundamental principles governing the decision making procedures of an entity such as the Community: It is inconceivable that the member States and the institutions of the Community, which covers a wide range of activities (more than 95 percent of which not related to the law of the sea) could tinker with its general rules on competences in order to give some of the member States an unfair advantage in the LOS Convention. The transfer of new competences with the inherent risk, for the member States, of unwanted precedences has always been considered politically highly sensitive. This will also be true for other "international organizations" that one day might wish to adhere to the Convention. The definition in Annex IX, Article 1 is sufficiently rigid to exclude entities of a lesser degree of integration.

then form the basis for a new exclusive "AETR competence" when the international organization later deals again with the same matter.[7]

The "EEC Clause" of the Convention

The fact that the so-called "EEC Clause" in the Law of the Sea Convention consists of a whole annex with very detailed provisions shows that, at the Third UN Law of the Sea Conference, the EEC member States had to overcome a lot of misunderstandings and mistrust, even among close allies.

The lack of understanding of the European Community's particular character appears already in the definition of an "international organization" in Annex IX, Article 1 as an

> "intergovernmental organization" constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters.

The term 'intergovernmental' hardly does justice to an EEC which has a complete set of legislative, executive, and juridical institutions, distinct and independent of its member States, and whose Parliament's legitimacy is founded on direct elections.

The basic principle of the "EEC clause" is laid down in Annex IX, Article 4 of the Convention which stipulates that an "international organization" shall exercise the rights and perform the obligations that its member States that are Parties would have under the Convention if they had not transferred the competences. In no case shall the participation entail an increase of the representation to which these member States would otherwise be entitled, or confer any rights to those member States that are not Parties to the Convention.

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[7]In the case of the "Washington Convention," the implementation by the Community had created exclusive competences with regard to those species that were listed in the annexes to the Convention. Any later modification of the rules of the Convention relating to these species could not be voted on by the member States. They claimed, however, the right to participate in the decision on the inclusion of new species into the annexes (which then would have to be implemented by the Community and become part of its exclusives competences!). The Single European Act, which created Community competences in the field of environment protection, has now changed the context.

* Non-exclusive (concurrent) competences, which the Community may exercise if the Council so decides, but which are not (yet) exclusive Community powers.[5]

As international agreements do not respect the internal distribution of competences between the Community and its member States, they often cover areas that straddle this demarcation line and therefore are called "mixed agreements" in the Community's jargon. The nature of the competences and their possible mixture have consequences for the way in which the Community is represented in an international organization: If the activity of that organization is limited to an area of exclusive EC competence, the Community replaces completely its member States and, normally, casts only a single vote (e.g. in fisheries conventions). If, on the other hand, the activities of the international organization concern a mixture of competences, member States and the Community will both be represented and the latter will cast -- in votes on matters of its competence -- as many votes as its member States otherwise would have had.

Decisions by international organizations in matters of concurrent competence, when not the Community but the member States have voted, are nevertheless often implemented by the Community (normally through "directives"), in order to assure by a coherent and uniform application the functioning of the common market.[6] This will

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[5]Lang, John Temple. "The Ozone Layer Convention: A new solution to the question of Community participation in "mixed" international agreements". *Common Market Law Review* 23: 157-176.

[6]E.g., The "Washington Convention" on International Trade in Endangered Species of Wild Fauna and Flora (CITES) had been signed by a majority of member States. An amendment allowing the EEC to accede had been agreed but not yet come into force. By Council Regulation (EEC) no.3626/82 of 3.12.1982 (Official Journal no. L 384, p.1, of 31.12.1982) the Community has implemented the Convention, referring to the facts, among others, that the aims of the Convention coincided with those of a previous Council resolution, that it used mainly commercial policy instruments, and that national implementation measures would not be uniform and might lead to distortions of competition within the Community.

the ratification by an international organization) is legally much more important. Another reason is the general dislike of the Community institutions to engage in protracted debates, earlier than absolutely necessary, on the precise demarcation line between member States' and the Community's competences. A precise declaration at the moment of signature would also have been of very limited use, as the dynamic development of the Community confers to any such declaration the character of a photographic picture whose truthfulness diminishes almost immediately after it has been taken. Finally, changes do not occur only because new legislation has conveyed new competences to the Community: new interpretation of existing provisions by its member States, its institutions, in particular by its Court of Justice, cause, more often than in a State, the "discovery" of new competences. When we tried to draft the "declaration on competences" in 1984, someone suggested that if we wanted to be sure that everything relevant was included, we should annex to it subscriptions for the Official Journal of the Community and for the European Court's jurisprudence.

The EEC's competences are not always clearly spelled out in the Treaty. This was particularly true at the time of the signature of the Convention -- that is, before the Single European Act came into force. In order to explain its competences concerning the protection of the marine environment, the Community simply cited the relevant regional conventions to which it had already adhered.

In the field of the law of the sea, the Community has the following types of competences:

* Exclusive competences where the competences are completely transferred from the member States to the Community. These are essentially the common commercial policy, the common fisheries policy,the so-called "AETR-competences,"[3] which are not laid down in the Treaty but have been developed by the European Court and relate to areas where international negotiations concern existing legislation in the Community or where at least the Community has powers to legislate on matters of that area).[4]

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[3]European Court, Case 22/70, *Commission v. Council*, (AETR), [1971]. ECR 263.

[4]European Court, Opinion 1/76. [1977]. ECR 741.

Community Competences

When the Community signed the Convention in December 1984, it made -- in accordance with Annex IX, Article 2 of the Convention -- a declaration[2] specifying the matters governed by the Convention in respect of which competence has been transferred to it by its member States.

This declaration does not refer to all relevant competences -- an obvious omission is, for instance, the subject of maritime transport -- and is rather vague with respect to others. One reason is that the declaration of 1984 was only of a preliminary nature. The one to be made at the moment of "formal confirmation" (as the Convention calls

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[2]Competence of the European Communities with regard to matters governed by the Convention on the Law of the Sea (declaration made pursuant to Article 2 of Annex IX to the Convention).

Article 2 of Annex IX to the Convention of the Law of the Sea stipulates that the participation of an international organization shall be subject to a declaration specifying the matters governed by the Convention in respect of which competence has been transferred to the organization by its member States.

The European Communities were established by the Treaties of Paris and Rome. In accordance with the provisions referred to above this declaration indicates the competence of the European Economic Community in matters governed by the Convention.

The Community points out that its member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence, in the field of sea fishing it is for the Community to adopt the relevant rules and regulations (which are enforced by the member States) and to enter into external undertakings with third States or competent international organizations.

Furthermore, with regard to rules and regulations for the protection and preservation of the marine environment, the member States have transferred to the Community competences as formulated in provisions adopted by the Community and as reflected by its participation in certain international agreements (see Annex).

With regard to the provisions of Part X, the Community has certain powers as its purpose is to bring about an economic union based on a customs union.

With regard to Part XI, the Community enjoys competence in matters of commercial policy, including the control of unfair economic practices.

The exercise of the competence that the member States have transferred to the Community under the Treaties is, by its very nature, subject to continous development. As a result, the Community reserves the right to make new declarations at a later date.

ANNEX

Community texts applicable in the sector of the protection and preservation of the marine environment and relating directly to subjects covered by the Convention ..... [complete text: United Nations, *Law of the Sea Bulletin*, No. 4, 1985: 16-19

Altogether, these contributions have given a clear and detailed picture of the legal aspects of the Convention's so-called "EEC-clause" and the Community competences involved. Since then, some new competences have been transferred to the Community, and its participation in multilateral organizations is now well established, even if the solution of specific problems continues to cause rather long and not always necessary discussions on very specific provisions -- as the debates preceding the accession of the Community to the FAO (26 November 1991) have shown.

As the "EEC in a multilateral convention" has become a less provocative subject and as new EC competences in areas governed by the LOS Convention do not call into question the conclusions reached in the debate of the late seventies and early eighties, I believe that I should not add another comprehensive study to those written by more distinguished specialists, but rather concentrate on the practical and political implications of the Community's role in the future Convention and in the present "Preparatory Commission."

Nevertheless, it might be useful to recall very briefly at the beginning

* the different types of Community competences in areas governed by the Convention,
* the provisions of the Convention dealing with the participation of international organizations.

Simmonds, Kenneth R. "The Community's Participation in the UN Law of the Sea Convention." O'Keeffe, Schermers (eds.) *Essays in European Law and Integration*. (Deventer, 1982): 179-195.

Simmonds, Kenneth R. "The UN Convention on the Law of the Sea and the Community's Mixed Agreements Practice." O'Keeffe, Schermers (eds.) *Mixed Agreements*. (Deventer, 1983): 199-206.

Treves, Tullio. "The EC, the UN and the Law of the Sea." Brown, Churchill (eds.) *The UN Convention on the Law of the Sea: Impact and Implementation. Proceedings of the Nineteenth Annual Conference of the Law of the Sea Institute*, 1988.

Vignes, Daniel. "La participation des entités non-étatiques à la Convention des Nations des Nations Unies sur le droit de la mer," in *Societé française par le Droit international, Perspectives du droit de la mer à l'issue de la 3ème Conférence des Nations Unies*" (Colloque de Rouen, Paris 1984): 83.

Vitzthum, Wolfgang Graf. "Die Europäische Gemeinschaft und das Seerechtsübereinkommen," *Archiv für öffentliches Recht* 1986: 33.

THE EUROPEAN COMMUNITY AND THE LAW OF THE SEA CONVENTION

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Introduction

"The EEC and the Law of the Sea Convention" had been the subject of quite an extensive discussion in the years just before and after the Convention was opened for signature. This was due to the fact that, for the first time, a universal international treaty, establishing an international organization with sophisticated decision making procedures, had to take into account the existence of an "entity" which, to a certain extent, had to be treated as a State.

Some of the contributions to this discussion concentrated on the analysis of the EEC's institutions, its competences and decision procedures. Others considered the subject more in the context of the EEC's growing network of contractual, bilateral, and multilateral links with third countries, which covers the whole field of objectives defined in Part One of the Rome Treaty.[1]

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[1]Buhl, Johannes F. "The European Economic Community and the Law of the Sea", *Ocean Development and International Law* 1982: 181 ff.

Daillier, Patrick. "La C.E.E. et la Convention de codification du droit de la mer." *Annuaire du Droit Maritime et Aérien* 1983: 171.

Daillier, Patrick. "L'évolution du droit international des activités maritimes et le progrès du droit communautaire depuis 1982." *Revue trimestrielle du droit européen* 23, no.3 (juillet-septembre 1987): 467-480.

Devine, Dermott John. "Le caractère indivisible de la Convention sur le droit de la mer et les implications de sa signature par la Communuaté économique européenne et ses Etats membres." *Revue du Marché Commun* 1987: 95-100.

Ederer, Markus. *Die Europäische Wirtschaftsgemeinschaft und die Seerechtskonvention der Vereinten Nationen von 1982* (München: VVF, 1988) with additional literature.

Giorgi, Cristina M. "Signature par la Communauté économique européenne de la Convention des Nations Unies sur le Droit de la mer." *Revue du Marché Commun* 1985: 91

Koers, Albert. "Participation of the European Economic Community in a new Law of the Sea Convention." *American Journal of International Law* 73 (1979): 426-443.

Riegert, Anne-Marie. "La participation communautaire à la Conférence et à la Convention sur le droit de la mer." *Revue du Marché Commun* 1983: 70.

Simmonds, Kenneth R. "The Community Declaration upon Signature of the UN Convention on the Law of the Sea." *Common Market Law Review* 23: 521-544.

published widely in the field of international law of the sea and international environmental law.

Our second commentator is Alastair Couper. After receiving his doctorate from Australian National University, he spent ten years in the shipping industry and acted as a consultant to UNCTAD and IMO. Since 1970 he has been a professor of maritime studies at the University of Wales at Cardiff. Before that he was a lecturer at the University of Durham, and he is also a founding editor of the journal *Maritime Policy and Management.*

External Relations he has been dealing with infringement procedures concerning external relations against member states, general legal questions, and for us most importantly, law of the sea.

Our next speaker is Professor Slot, a professor of economic law at the University of Leyden, where his main responsibility is the teaching of the law of the European Community. Areas of specialization include shipping, transport in general, energy, and competition law. He has been actively involved in drafting maritime legislation in a number of countries, for example Indonesia, the Philippines, Pakistan, and of course the Netherlands. He is also the editor of the ESCAP Guidelines for Maritime Legislation, a very useful document of which the third edition, I am informed, will appear by the end of this year.

Our next speaker is Dr. Laura Pineschi of our host country. She is a doctor of research in international law, now employed at the Institute of International Law of the Faculty of Law at the University of Parma. She is the author of articles on various aspects of international law and protection of the environment, particularly Antarctica, environmental impact assessments, and transboundary movement of hazardous wastes. Perhaps I should add that she has also been a visiting researcher at several foreign institutions, including the Netherlands Institute for the Law of the Sea, and we at NILOS still have very fond memories of her visit there.

Our next speaker is also from our host country. Professor Cataldi received his doctor of laws degree from the University of Naples where afterwards he was a researcher in the international law department and also an attorney at law at the Bar of Naples. He spent several periods abroad for research in Germany, the Hague, and IMO headquarters in London and was a visiting professor of international law in Portugal. He is now charged with the courses of private international law at the Faculty of Political Sciences at the Instituto Universitale Orientale in Naples. He recently published a book on innocent passage in the territorial sea, and has also published on other aspects of the law of the sea, the EEC fisheries regime, and other areas of public international law.

Our first commentator is Professor Patricia Birnie, who hardly needs any further introduction. She received her law degree from Oxford, then a Ph.D. from Edinburgh, where she also was a lecturer in public international law, and later held the same position at the London School of Economics. For the past three years, she has been the first director of IMO's International Maritime Law Institute in Malta, a post from which she is resigning this summer. She has

PANEL V INTRODUCTION

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It is a truism that the European Community is becoming an increasingly important actor in international relations, and this truism also applies to the area of the law of the sea and marine affairs. Since this LSI conference is taking place in one of the member states of the European Community, it is only logical that the program include a session on the EEC and the law of the sea, so that recent developments in this area can be discussed. For those of you who are not yet familiar with the Community as an actor in the law of the sea, this panel will provide some insight into this seemingly highly complex subject. And complex it can be, as will become immediately clear from our first speaker, Mr. da Fonseca Wollheim. Not all areas of the law of the sea in which the European Community is involved, however, will be dealt with in this panel. Indeed, it would be too much for one panel. Instead, we have chosen to focus on shipping and navigation and associated issues in view of the circumstance that this conference is taking place in Genoa. Only the first paper is of a more general nature. At previous LSI conferences, ample attention was paid to the legal aspects of the European Community's Common Fisheries Policy, so we have chosen not to do so again although it is perhaps the most important area of the European Community's involvement in the law of the sea. Although Professor Cataldi's paper is entitled, "The EEC and Fisheries: Some Recent Developments," as you will have noticed, it deals only indirectly with the common fisheries policy as such. However, one of our commentators, Professor Birnie, will in her comments also pay attention to the Common Fisheries Policy, which is confronted in the next few years with a number of major challenges. And there will be an opportunity to deal with this topic during the discussion.

Our first speaker will be Mr. Hermann da Fonseca Wollheim. He has had a distinguished career as a European civil servant, holding a number of posts within the European Community since 1968. He worked in the cabinet of the President, dealt with relations of the EEC Commission with the European Political Cooperation, was deputy head of the EEC delegation to the U.S., dealt with relations with the European Parliament, and since 1984 in the Directorate General of

PANEL V:

THE EUROPEAN ECONOMIC COMMUNITY AND THE LAW OF THE SEA

simplification. People talk about the creation of large bureaucracies. The proposals of the Secretary-General have considerably simplified the structure, and I don't know what one would substitute for what is there because you need a body that represents everyone, and you need an executive body to administer the day-to-day, technical aspects of mining activities. You cannot have an assembly of 175 states deciding how the applications should be dealt with, as would be the case for those who are saying that we should continue with the PrepCom. We have already established, in the framework of the PrepCom, a thirty-five member general committee, which acts as an executive body, a shadow of the council that will be established when the treaty comes into force.

Igor Kolossovski: In principle, I agree with my distinguished colleague, Ambassador Ferrari Bravo, that the international community and individual countries, including my own, who have spent money to have those sites registered, could leave Part XI for about twenty or twenty-five years, until the financial and economical conditions would be propitious for commercial exploitation of the resources of the seabed. But what would happen meanwhile? Many countries will not ratify the Convention with Part XI as it is now, so we would live without the universal convention for a prolonged period of time. I agree with Professor Lagoni that that would be bad, because the system of obligatory, peaceful dispute settlement provided for in Part XV of the Convention would not exist as law. It is not customary law; it should be conventional law. But there is another danger, which may be even bigger. Do you remember, all of you, that the conference was called in order to produce a universal convention as the only real barrier that could withstand the waves of maritime nationalism. But there is no doubt that, if there is no universal convention, another wave of maritime nationalism and creeping jurisdiction will appear. It is more dangerous now in an atmosphere of increasing nationalism in many countries. As you know, the fire of nationalism exists not only in Latin America, Asia, and Africa but also in the Near East, in my country, in the ex-Soviet republics of ex-Soviet Union, in Yugoslavia, and even in the northern part of Europe, which always was the cooler part of the globe. In such an atmosphere of rising nationalism on land, I am afraid that nationalism on the sea would be even more dangerous. So, the only way to prevent it is a universal convention.

these articles relating to the high seas, while recognizing that the coastal states do have an interest in light of their exclusive control of the living resources in the economic zone. The study did not imply that coastal states have any jurisdiction beyond that without common consent. The group has tried to promote the idea of establishing certain guidelines and mechanisms, or proposals for mechanisms, to further the cooperation that was intended in the Convention.

One difficulty is that in some of the areas where regional organizations do exist, such as in NAFO, there is no compulsory dispute settlement mechanism. Other areas have no organizations, and one has to look at how to promote them.

I just want to make a couple of other comments. Ambassador Arias-Schreiber has proposed a new convention or conference. He started off by saying that the package of 1982 was sacrosanct and ought not to be disturbed, and he referred to the work that is going on in the Secretary General's consultations. In the same breath he went on to say that there are specific issues that need to be negotiated and that we should have another conference and another convention. I see a lot of contradiction in the position taken with respect to that matter.

With regard to Part XI in general, let me say that I don't think that freezing is an answer to the problem. Already there are several developments already that have to be taken into account. States have claimed mine sites; at least six have been claimed through the international community, while others, of course, have been claimed unilaterally. Some machinery has to exist. You cannot leave them in a vacuum. One reason for making their claims through the PrepCom has been to give international legitimacy and protection to their claims. State practice with respect to deep seabed mining has already begun. People have paid $250,000 each to claim those sites, and they have been issued certificates by the Secretary-General. You cannot ignore the interests of the international community as a whole by saying, "Well, it suits me to freeze everything because there is going to be no mining." What is important is to try to improve what has been wrong with Part XI and to create an adequate framework so that claims can be made in an orderly way, so that other aspects can develop in due time.

I want to make two final points. It has been said that the voting system creates problems for denying the approval of a plan of work. Perhaps you missed one aspect of the proposal, recommended by the Legal and Technical Commission, which is that the approval of a plan of work has a special procedure requiring a consensus to reject illegitimate claims rather than to approve them, instead of a veto to deny the application. The other point concerns the question of

Jonathan Charney: Professor Oxman asked me about the proposed changes to the voting system. The Secretary General's initiative would in my opinion erode what amounts to a U.S. veto over three crucial decisions: the adoption of new rules and regulations, the denial of approval of a contract recommended by the Legal and Technical Commission, and the approval of revenue-sharing to liberation organizations. Those could be profoundly disquieting to the U.S. Senate.

With respect to David Anderson's comments about freezing Part XI, I agree with him; you can't freeze Part XI in toto but there is a big range between freezing it and fixing it in toto. Surely the basic principles must be retained. You need an interim management system, a decision making system for evolving the regime to manage the deep seabed mining if it takes place. But do you need the Basic Conditions found in the Annex? Do you need all the commissions? Do you need an Enterprise established now? Do you need the complex arrangements between the Assembly and the Council that we see in the system today? Will that be realistic in fifty, seventy-five, a hundred years from today?

With respect to the *mar presencial*, I think it is profoundly disquieting. I think it should give a warning to those states that are staying out of the Convention that the Convention needs to be brought into force. Initiatives such as this could then be viewed within the context of a treaty regime with written articles and a dispute settlement system that would help to make certain that all developments are consistent with the law of the sea as was agreed to in the 1982 Convention on the Law of the Sea.

Satya Nandan: On the specific question that was addressed to me regarding the high seas, I would like to say that I believe that Articles 116 to 119 in the Convention provide an adequate framework to develop further a conservation and management regime for the high seas. It was envisaged. The problems that have arisen regarding straddling stocks and highly migratory species are not new. They were known at the Conference. We did not, however, adequately develop a regime; it was left to the states to develop on a regional basis. I think the timing is right to look into that. In New York recently, I chaired a meeting of a group of experts on the high seas regime. The meeting had a fairly wide representation from distant water fishing states and some of the key coastal states, including Chile, that are concerned with this problem. I thought we came out with a very good study, which is to be published soon, that tends to interpret the purport of

throughout. That those islands are entitled under the Convention and international law to a continental shelf will be part of the general approach.

Dr. Fonseca just mentioned the question of boundaries. The presential sea is not related to boundaries. Boundaries entail jurisdiction, delimitation, competition, and, in a way, separation of jurisdiction between different states competing for exclusivity. Here again, since the presential sea is not a specific exclusive jurisdiction and certainly not any kind of territorial jurisdiction, boundaries are not part of it at all. It is simply a geographical area where various coastal or foreign states are actually involved in given activities. To that extent, in those areas the coastal states will be entitled to some degree of participation. This, incidentally, answers the question that Dr. Hey raised of whether it would involve exclusive coastal state rights. It would not. Unless everything failed -- and the only available option would be the coastal state's enaction of some regulation, exclusive jurisdiction would not be exercised. And on that point I agree with Tom. Although not a jurisdictional question, it may have jurisdictional implications, depending on the specific mechanisms that one might opt for. But that is a separate step that would depend on how things go.

Finally, let me turn to the crucial question that Bernie raised about the origin of the EEZ, which, in all truth, is very similar to what is going on with this question. In that case, European vessels were overexploiting fisheries, particularly the whale fishery, off the Chilean coast to the detriment of industries in Chile, which felt that they were being put at a disadvantage. Those industries put pressure on the government to enact jurisdiction over a given maritime area, which turned out to be 200 miles, although, incidentally, they were only claiming fifty miles.

The situation is indeed very similar, teaching us a most important lesson. At that time the concern voiced by Chile and other coastal countries was not taken into account at all, and as a result 200-mile claims began to arise and have reached the current stage. The lesson is that one should not ignore real problems. This is a real problem, and I think that there is an interest in solving it through negotiations and cooperation in the framework of the Convention of the Law of the Sea. If this concern is not ignored and solutions are found, things will be channeled in the right way. But if it is ignored, as some countries pretend to ignore it, then the outcome may not be as compatible with the Law of the Sea Convention as one would envisage it today. We must not simply try to forget an issue that is very much at hand.

jurisdiction beyond the 200-mile economic zone. This problem is a serious one because, however you define the ecosystem approach, the interest of the coastal state -- and here it is expressed as the presential sea -- will still be present. This interest can be present through cooperation, management, and even international institutions, which would be, as I mentioned, the ideal, but if those are not available, it will nonetheless be present directly, because the coastal state is the one most directly linked to most of the known ecosystems, including those that extend beyond the 200-mile economic zone. I agree with Tucker that the question is not to relate the LME to specific jurisdictional or legal issues; it's a broader concept, and that's precisely the interest one can have in it.

Let me turn to some specific questions. First, as to the status of the concept, it was proposed by the Commander-in-Chief of the Chilean navy, introduced in the Chilean fisheries law of 1991, approved unanimously by Congress, and supported by the government. So the concept is actually within the law. It does not specifically apply to any jurisdictional issue except very indirectly to the fact, for example, that Chilean fishing vessels, which operate within this area beyond the exclusive economic zone, will not be subject to fishing rights, to the payment of fees, and so on.

The second specific question was whether the meaning of participation is related to the same idea within marine scientific research: no, it's different. In marine scientific research, the idea is that the coastal state would have some participation in the results and in the conducting of marine scientific research by other countries. Here, the idea of participation is that since there is fishing going on in an area, the coastal state, with its own fishing vessels, will fish those areas directly, competing with those other foreign interests that may be there but not sharing in the catches of those foreign vessels. So participation is more competitive than some form of joint venture.

One other important aspect is Bernie Oxman's question on whether the presential sea applies to the seabed beyond the continental shelf. This has not been covered specifically under the concept, but within the early approaches to it and definitions. Continental shelf jurisdiction -- including the continental shelf jurisdiction of islands, and the particular situation of Easter Island, which has prompted some debate with the United States already in itself -- was mentioned and was taken into account. It is not a question of whether the seabed of the presential sea would be included in some jurisdictional way. I mention again, the concept is not related to jurisdiction. But it is certainly one of the expressions of coastal state interest within the broad area which, in this instance, has important islands scattered

On the contrary, the problem arises from the fact that the provisions of the Law of the Sea Convention in some cases are basic provisions that have not been expressed or detailed in any specific manner. I refer, in particular, to the case of Article 116 of the Convention, which relates high seas fisheries to the interests of the coastal states -- which have to be taken into account -- although it does so as a very abstract proposition. The question is how this abstract proposition is going to be translated into specific measures. So the framework, I think, is quite clear.

Here I refer, in particular, to Tom Clingan's and Professor Lagoni's comments. There is no question that the preferred option is certainly cooperation and negotiation, and if that fails, to have recourse to dispute settlement. The problem, not just today but always in the law of the sea, has been what happens when negotiation fails or dispute settlement is not available, which is usually the case. Then you have virtually two situations. In one, things will continue as they are; in this particular instance, high seas fisheries will be conducted in an entirely unregulated manner to the detriment of the interests of both the coastal state and the international community. The other option is for the coastal state to introduce some degree of regulation in those fisheries until this is settled.

I separate the question of enforcement that always has been hounding the problems of the sea and international law in general, but in any event the fundamental question is whether the coastal state would have any say in the matter. Here, of course, there are two views. There is the view that has been expressed by Professor Lagoni, for example, in the context of the work of the International Law Association to which he referred, that there would be no solution except for the coastal state and the international community to wait. To wait for what and for how long -- that is not answered. The alternative solution, voiced by Canada, is that while this is negotiated or settled, the coastal state has to intervene and introduce some degree of regulation in an unregulated situation. Those are the basic two options, and I don't think there is anything else for the time being.

How does all of this relate to the concept of the presential sea? We have here some important aspects to consider. First, the idea of the large marine ecosystem, is relevant from the point of management, of biological and geographical realities. It has been the subject of some contradictory views, particularly in the UNCED work, as we have just heard from Tucker. For example, some countries think that the LME concept will interfere with coastal state jurisdiction. Some other countries, on the contrary, feel that the LME concept will interfere with high seas rights and will mean an extension of coastal state

strong challenge to the initiative, nor to the way in which it has developed. The newcomers expressed their points of view but in the main they were quite supportive of the clarifications of the nine issues that have been achieved so far. We followed the general debate by taking four of the nine items: costs, the Enterprise, decision-making, and the Review Conference. It is anticipated that there will be another meeting quite shortly, perhaps in August, to consider the remaining five topics.

The strategy of the concept is not to postpone everything. This morning the ideas of freezing Part XI, of postponing it, and of having triggers for it were mentioned. I think we certainly would wish to see some of the more difficult provisions in Part XI adapted to the realities of the modern world. And we should try to find some golden principles which would take account of modern realities. The details should be left for the future, but it is not sufficient just to talk about freezing the whole of Part XI until mining starts. It is more complicated than that. The approach we are following in the consultations should allow for adaptation on these difficult points that can be dealt with now, such as decision making, whilst leaving some of the details on the economic issues to the future. And that balanced approach is better than the freeze and having the trigger mechanism.

Hermann da Fonseca Wollheim: I have just one innocent question to Professor Orrego. You suggested that this concept of the *mar presencial* could become a model for other countries. Now the question is: Could the same area of an ocean be subject only to one *mar presencial* or to several of several countries? Or would these countries have to negotiate boundaries between their respective zones?

Tullio Treves: We have now exhausted our list of speakers and I thank them for the interesting interventions and questions. All the members will be free to make short remarks, but I think we could give priority to Francisco Orrego who has been the more directly addressed by the audience. Please, Francisco.

Francisco Orrego Vicuna: I am very grateful for all the questions and issues that have been raised, and indeed I think that many of the problems are subject to some degree of verification. First, I should say that some of the concerns and panic that have been voiced could lie at ease because the whole approach has always been conceived within the framework of the UN Law of the Sea Convention. It has never been conceived as a separate framework or as an antagonistic concept at all.

high seas fisheries beyond coastal state jurisdiction. In light of that development, how does Professor Orrego propose to avoid the possibility that the idea of a presential sea will eventually become a spear in the heart of the 1982 Convention on the Law of the Sea?

Finally, Professor Orrego is correct that fisheries and other management regimes, as Mr. Scully pointed out, should respect the natural features of ecosystems, looking both seaward and along the coast. I note that the International Court of Justice flatly ignored this argument when made by the United States in the *Gulf of Maine* case, but the considerations there may have been somewhat different. But if Professor Orrego is correct, and I believe he is, on the management question, doesn't this imply foreign participation in management within the exclusive economic zone as much as it implies coastal state participation in management beyond the exclusive economic zone?

Giuseppe Cataldi: Referring to the interesting paper of Professor Orrego Vicuna, I would like to stress how different is the hypothesis of large marine ecosystems and the other situation of control of fisheries activities in high seas on the basis of bilateral and multilateral conventions with this concept of "presential sea." I can't imagine how this phenomenon of creeping jurisdiction will evolve in the future, but it seems to me the negation of the high sea principle as it still stands at present. And what is more, this "presential sea" concept perfectly fits with the geographical situation of Chile and some other countries like it, but for me it is difficult to apply to other situations. For this reason, I have some doubts that the rationale of the Chilean Law of 1991 can be applied consistently.

David Anderson: Mr. Chairman, there are here four people, of whom you are one, who took part in the discussions in New York last week, and perhaps something should be said, just to bring everyone up to date. The meetings last week had before them an excellent paper that drew on the Informal Consultations, which is attached to Ambassador Nandan's paper. Perhaps it wouldn't be out of place to pay tribute to Ambassador Nandan for the role he has played in shaping the Secretary General's initiative. My government is very strongly supportive of this initiative, and indeed we suggested seven of the nine topics that should be addressed. We have tried to strongly and actively participate in the discussions. The meeting was open-ended, so seventy-five countries were able to take part. The documentation has been made available now to all governments. The newcomers had a chance to give their views in a general debate, and I didn't hear any

concept in Article 249 of the Law of the Sea Convention with regard to participation in marine scientific research? Is that what is implied by this? If the concept is one that applies not only on the high seas in the area north of 60 degrees South latitude, but also south of the latitude, it would raise some very interesting questions with respect to obligations under the Antarctic Treaty.

Barbara Kwiatkowska: Ambassador Nandan, in view of your experience in the global oceans negotiations, what in your opinion are the chances for acceptance of Chile's claim to *mar presencial*?

Our chairman, Professor Treves, was the first to remark on the concept of *mar presencial* two years ago in his lectures in the Hague Academy of International Law. Although Professor Treves is one of the leading advocates of the high seas regime, he concluded that the change to be effected as a result of Chile's claim to *mar presencial* cannot be excluded. So I find it quite meaningful.

Bernard Oxman: While in negotiations it is frequently best not to address difficult or controversial questions, I assume that the purpose of academic gatherings such as this is to clear the air on some of those questions. I'm going to raise mine in that spirit. First, on suspending Part XI, what happens once mining does become a practical reality? On the issue of voting, which was addressed by both Professor Charney and Professor Clingan, do you believe that the United States Senate will accept a voting situation in which the United States must rely on other states to block measures significantly adverse to its own interests, particularly in light of voting developments at the UNCED Conference in Rio?

With respect to Professor Orrego's fascinating paper on the presential sea, first, it seems to me that there is no serious question of the coastal state right to participate in international and regional regulation of fisheries and other matters beyond its exclusive economic zone. I don't think it is a significant issue that requires a new concept in order to give breath to it. It is reflected in fisheries provisions; it is even reflected in deep seabed mining provisions to some extent. Second, does the concept of the presential sea apply to the seabed beyond the continental shelf? If so, how do you harmonize it with Chile's and other developing country views regarding the common heritage of mankind, and if you do not, why not? Third, as Professor Orrego knows and has indeed even written, what is now the exclusive economic zone began in some parts of the world, although not in his country, with assertions of a special coastal state interest in

community as you mentioned earlier? In answering that question, could you relate your answer to recent findings that, in the EEZ, the coastal state has not been such a good safeguarder of interests of the community of states. We are now finding that there is overexploitation of fisheries resources and that access to surplus is not being granted. In short, it seems that the interests of the international community in conservation and optimum utilization are not very well taken care of by coastal states.

Tucker Scully: First of all, a comment with regard to the discussions on high seas fisheries that took place at the Rio Conference at UNCED, where I had the misfortune to be in the middle of this issue. There are dangers in some approaches that are being articulated with respect to high seas fisheries, specifically straddling stocks and highly migratory species. I note, Francisco, that in your paper you outlined the concept of large marine ecosystems, which was discussed a great deal in Rio but was not specifically reflected in its results. The biological requirements for management are not satisfied necessarily by the jurisdictional arrangements that have been made in the LOS Convention or by an new jurisdictional arrangements sought by those who seek to change the LOS Convention. Jurisdiction does not guarantee management by any means. The concept of large marine ecosystems, which is beginning to emerge within the scientific community and with regard to the fisheries management, may have promise, since fish stocks don't recognize human-made jurisdictional boundaries. In Rio, however, the concept of large marine ecosystems was treated largely as a juridical concept and was seen as a threat to coastal state jurisdiction rather than a tool for effective management of fishery stocks that ignore jurisdictional boundaries. There is a danger in trying to articulate new jurisdictional concepts to deal with what were some of the unresolved management issues in LOS, fisheries which do not fit the normal EEZ configuration. The danger is that we will look for jurisdictional rather than biological solutions or solutions that are consistent with the population dynamics of fishery populations themselves. I note that you refer to the concept of LME not in terms of the requirements of management, but as a new jurisdictional assertion.

My question is also on the *mar presencial*. In the paper, you mentioned that it was put forward by a high-ranking naval officer, but I would like to know a little bit more as to the status of this concept. You also made the point in your paper with regard to participation by coastal states in activities on the high seas. Is that analogous to the

63, paragraph 2. Some coastal states apparently understand these interests as "special interests." In their view, the difference between interests and special interests is that, if there is no agreement between the fishing state and the coastal state, their special interests prevail. The Canadian proposal, to which Ambassador Arias referred, would give the coastal state a right to extend its rules and regulations beyond 200 miles. I consider this a case of creeping jurisdiction. We should remember that the jurisdiction to the exclusive economic zone is in itself not a case of territorial jurisdiction, but of functional jurisdiction. A state's extension of its laws beyond 200 miles is against the package deal which forms the basis of the Law of the Sea Convention. The fair question for the coastal state is: What can we do if there is no agreement on such fishing just outside our doors? A committee of the International Law Association chaired by Professor Alfred Soons just recently adopted a proposal at the Cairo meeting that the fishing states have to recognize the interests of the coastal states, and that the states concerned have an obligation to negotiate. This leads to an ongoing process of negotiation until the states concerned find a solution. If the negotiations fail, we are back to dispute settlement. Dispute settlement -- that means Part XV -- is in my view much more important than Part XI of the 1982 Convention. The aforementioned package deal was accepted because the states knew that they would have the possibility of resorting to binding dispute settlement. Excluding Part XI, most parts of the Law of the Sea Convention have become customary law, whereas the obligation to refer to binding dispute settlement, under Part XV, will not become customary law. Hence, one cannot simply state: "Forget about the Law of the Sea Convention, because its interesting parts become customary law." We should not forget the important Part XV on dispute settlement. To this end, the Convention should not only enter into force, it should enter into force for those states that have maritime interests.

Ellen Hey: Dr. Orrego Vicuna, you mentioned that part of the concept of the presential sea was surveillance activity by the coastal state for the purpose of safeguarding the regime of the high seas -- the coastal state as a safeguarder of the interests of the international community, one might say. You also mentioned, however, the increased economic interests of the coastal state in this presential sea. My question is, should this be regarded as a development of exclusive coastal states' rights to resources in areas beyond present coastal state jurisdiction? And if that is the case, how does that concur with the concept of the coastal state as a safeguarder of the interests of the international

guarding the vital economic interests of the inhabitants of the coastal regions, to establish the system of straight baselines...."

A pertinent commentary on claims of this kind had been made before the beginning of the UNCLOS III, and not by some Western delegate:

> A large majority of coastal states have, by elastic interpretations of article 4 (of the Geneva Convention), established their baselines in such a way as to give them the maximum area of territorial sea. Their actions have resulted in probably over one million square kilometers of what had been territorial waters and high seas in 1958 being claimed as internal waters.... It is to be foreseen the immediate enclosure, as internal waters, of some 15 per cent of the oceans, and the enclosure of a further 15-20 per cent of the oceans in the near future. Thus, some 30 or 35 per cent of ocean space will be already disposed of by the choice of appropriate baselines.[12]

The case that I have very briefly exposed is an example of a state practice that has in some instances distorted the rules for drawing straight baselines. The effect of such a practice is a claim that detracts from the international community's rights to use the oceans.

Is there any remedy? The Convention on the Law of the Sea is a perfectible instrument and according to its own provisions (Article 312 ff.) is subject to revision.[13] Perhaps Article 7 should be revised, owing to its excessive elasticity, which has been criticized by many authors.

Rainer Lagoni: My comment is on the topic of straddling stocks, which emerged recently even at the UNCED process in Rio. There is no doubt that the coastal states have an interest with regard to foreign fishing close to the outer boundary line of their exclusive economic zone, if this fishing affects their own conservation measures within the exclusive zone. The Law of the Sea Convention refers to the "interests of the coastal States" in Article 116, which relates to Article

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[12]A. Pardo, intervention in the Second Subcommittee of the Committee on the Ocean Floor, 8 August 1973, Doc. A/AC. 138/SC. II/SR.71, pp. 8-9.

[13]This should not prove an impossible task: for example, Paragraph 5 of the United Nations Resolution 46/78 dated 12 December 1991 on the Law of the Sea recognizes "the need to re-evaluate, in light of the issues of concern to some States, matters in the regime to be applied to the Area and its resources."

no justification in any article of the Convention, unless Burma wanted to declare the Gulf of Martaban as a historic bay. But this is not the case, because, in this hypothesis, the line would have been drawn in a different way, so as to close only the bay, whereas, as it is, it covers a much wider space. And indeed, correctly enough, the above mentioned *Atlas* inserts the Burma baselines under Part 2 (Coastlines deeply indented or fringed by islands) and not under Part 1 (Bays).

The articles, therefore, to be taken into consideration in examining the case are not the articles on bays (Article 7 of the Geneva Convention and Article 10 of the Montego Bay Convention), but the articles on straight baselines (respectively, Articles 4 and 7). Even taking into account the more liberal provisions of the 1982 Convention, no interpretation, however broad, can lead to such a result.

Another significant figure: the farthest point of this baseline from the shore in the Gulf of Martaban is 83 miles, a distance in conflict with paragraph 3 of Article 7: "The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters." As Prescott rightly observed, "The constant message of this paragraph is that the waters must be in fairly close proximity to the land represented by promontories or islands."[10]

Professor Reisman has also expressed deep doubts about the Burmese provision: "Even with the vexing elasticity of Article 4 of the 1958 Convention and Article 7 of the 1982 Convention, it is doubtful if many of the baselines used in the northerly section of the Burmese coast are consistent with the language of the Conventions."[11]

Officially there is nothing that can shed light on the reasons for such a provision. There are no preparatory works, no report of the executive to the legislative, no records of parliamentary debates. All that can be found is a sentence in the already mentioned Annex to Law No. 3: "Where by reason of the geographical conditions prevailing on the coasts of Burma or of the economic requirements of the coastal regions, straight baselines have been drawn...." The same concepts had been expressed in a declaration made by the Revolutionary Council in November 1968: "Where it is necessary ... for the purposes of safe-

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[10]Prescott, *Straight Baselines: Theory and Practice*, Cardiff, 1985.

[11]W. M. Reisman, in *Proceedings of the 82nd Annual Meeting of the American Society of International Law*, Washington, D.C., 1988, p. 268.

notification of agreements will not be a prerequisite for obtaining the exemption.

The Regulation empowers the Commission to issue regulations to declare certain consortia agreements exempted from Article 85(1); as such it gives the Commission far greater control over such agreements as compared to conference agreements.

Applying the Instruments

Regulation 4056/86

The main action of the EEC Commission under this Regulation concerns the EEC West and Central Africa trade. There have been two decisions relating to efforts by the Commission to collect information concerning alleged infringements of Articles 85 and 86. The first decision of 19 December 1990[46] was addressed to SECRETAMA, the Secretariat of the Shipowners Committee, which had infringed Article 16(4) of Regulation 4056/86 by supplying incorrect information in response to a Commission request. SECRETAMA was fined 5,000 ECUs. The second Commission Decision of 6 April 1992[47] concerned the United Kingdom West Africa Lines joint services (UKWAL). UKWAL had refused to submit to an investigation under Article 18(3) of Regulation 4056/86. It was also fined 5,000 ECUs.

The highlight of the Commission's action under this regulation is certainly its decision of 1 April 1992 applying Articles 85 and 86 to the French West African Shipowners' Committees.[48] In a twenty-six-page long decision complemented with six annexes, the Commission found that the enterprises that are members of the shipowners committees as listed in the Decision have infringed Article 85(1) of the Treaty. The Commission also found an infringement of Article 86 of the Treaty.

This is a very interesting decision dealing with two major issues. The first issue is the claim by the shipowners that the agreements were concluded on the behalf of the governments of the African States concerned. In actual fact, according to the Commission, the governmental measures referred to by the shipowners were enacted pursuant to pressure of the shipowners. Furthermore, the Commission found

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[46]OJ 1991 L 35/23.

[47]OJ 1992 L 121/45.

[48]OJ 1992 L 134/1.

that the bilateral agreements referred to did not impose obligations on shipowners to set up the Committees. It could be said that the Commission has been piercing the "governmental veil." A second issue concerns the extension of cargo-sharing agreements to the entire trade. It should be noted that the Code of Conduct only applies to liner conferences. The practice of the Shipowners Committees, however, was to shut out any competition by independent shipowners not approved by the Committee against members of the Committees. This led to a situation where redistribution of the 40 percent cargo share of the African members, which they were largely unable to carry, was only given to French conference members. Furthermore, the Shipowners' Committees effectively controlled the trade, thereby excluding from it all independent lines operating without approval of the Committee. The Shipowners' Committees also imposed fines in case vessels leaving European ports failed to meet requirements to submit their manifests for stamping by the secretariat of that Committee. Finally, the Commission found that members of the Shipowners' Committees evaded the application of Community law. Thus it prompted third countries to take action to impede the procedures initiated by the Commission.

As far as Article 86 is concerned, the Commission found that the Committees had abused their collective dominant position in the following manner:

* by participating in the application of a system of penalties to shipowner's members of shipowners committees in breach of the cargo-sharing rules established by the committees, or shipowners who without the authorization of the Committees nevertheless attempted to provide liner services on the bilateral shipping routes on which the committees operate;
* by applying a co-option mechanism which in practice amounted to excluding certain shipowners from the trade or reducing their involvement to an extent bearing no relation to their competitive strength.

The decision imposes fines on the participating enterprises. The main culprit, Delmas, was fined 11,628 million ECUs. The Commission imposed a mitigated fine on cross traders, who were confronted with the alternative of accepting the restrictions imposed by the Shipowners Committees or withdraw from an important trade. It pointed out, however, that these shipowners should have used the possibility of appealing to the Commission or national courts to request that such practices should be brought to an end. Finally, the

Commission concluded that there were grounds for exempting from fines shipping companies which, although members of the committees, contributed in drawing the attention of the Commission to the practices dealt with in the Decision; an example of plea bargaining.

In the case of the Eurocorde Agreement, the Commission has considered a substantial volume of submissions by several parties. It notes that as the relevant agreements are written at present, the services of the Commission are not satisfied that all four requirements of Article 85(3), which are cumulative, are fulfilled and that an individual exemption can be given, nor are the Commission's services convinced that conditions or obligations could be imposed that would make it appropriate to give an individual exemption from the Eurocorde Agreement. However, the Commission's services do not intend to take any further action in relation to this agreement as it is operated at present. This attitude to the agreement is provisional. The operation of the agreement will be kept under surveillance and the position will be reconsidered in 1995. If any significant change in the market situation occurs (for example, in the membership of the North Atlantic Conference or in the parties to the Eurocorde Agreement or in the market as a whole, or if any further restrictive arrangements are entered into, including the conclusion of a stabilization agreement limiting or reducing the capacity in the trade), then the position will be reconsidered. The parties are also required to keep the Commission fully informed of all significant developments in the market, whether resulting from the agreement or not. In the meantime, the parties continue to be protected against Commission fines by notification in accordance with Regulation 4056/86, but in other respects continue to act on the agreement at their own risk.[49]

Regulation 4057/86 on Unfair Pricing Practices[50]

As has been noted in the introduction, the Regulation has been applied in the case of Hyundai Merchant Marine Company. The complaint was lodged by the Comité des Associations d'Armateurs des Communautés Européennes (CAACE) on behalf of the Community liner shipping companies from several Member States. The main complaint was that Hyundai was enjoying non-commercial advantages

[49]Letter dated 30 January 1992, addressed to the lawyers of the independent parties to the Eurocorde Agreement, letter signed by the deputy director general for competition of the EEC Commission.

[50]OJ 1986 L 378/14.

granted directly and indirectly by the Korean government, such as financial support on favorable terms by the Korean Government Bank, and benefitted from the overt Korean cargo reservation scheme in trade to and from Korea. As a result of these advantages, Hyundai was able to charge very low freight rates in its service between the Community and Australia. According to the complainant, Hyundai was undercutting the rates of the European shipping companies by some 25 percent, thereby decreasing the capacity utilization of the Community lines by about 7 percent, and as a result the Community lines were suffering from major injuries.

Areas where the EEC has not yet formulated a Policy

Registration

Ever since the discussions on a EEC shipping policy started, the subject of registration has assumed major importance. In its communication, *Progress Towards a Common Transport Policy* (maritime transport), the Commission noted with concern the rapidly deteriorating competitive position of the Community merchant fleet.[51] High costs, largely crew costs and taxes, were the main causes for the loss of competitiveness. At the same time, UNCTAD held its conference on the drafting of a convention on the conditions for registration. The Convention on the Conditions for Registration of Ships was signed on 7 February 1986. On 29 September 1986 the Commission came with a proposal for a Council decision for a common position for Member States when acceding to the Convention.[52] The permissive character of the Convention spurred many countries into setting up a new register or restructuring their registration legislation in order to attract new tonnage under their flag. In Europe, Norway was the first country to set up a separate register: The Norwegian International Shipping Register.[53] Under the conditions of the new register, shipowners are basically free to engage crews without following the onerous national labor legislation. On the other hand, as far as safety requirements go, national requirements continued to apply. Following the successful Norwegian example, several Member States of the EEC, e.g., Germa-

[51]Com(85) 90 def.

[52]Com(86) 523 def.

[53]See Ready, N.P. *Ship Registration*, London 1991, page 33 et seq.

ny, Denmark, UK, France, and Belgium, have also set up a second register.

In response to this, the EEC Commission has put forward proposals to establish a European Register, EUROS.[54] Under these proposals, the shipowners registered in it would have only limited advantages, such as participation in the cabotage within the Community and easier transfer of ships from one country to another. The latter part of the proposal has been separated from it and formulated in a separate Council Regulation, which was adopted on 4 March 1991. The Regulation seeks to facilitate the transfer of ships within the Community. The gist of the Regulation is contained in Article 3, which requires Member States not to withhold registration for technical reasons for cargo ships registered in other Member States complying with the relevant international requirements.[55] It should be noted that the Commission has so far shied away from proposing a genuine EEC register with conditions that compete with other commercial registers, such as the Norwegian International Shipping Register. Discussions on this point continue.

In the meantime, there are a couple of interesting judgments by the European Court of Justice that are relevant for the registration issue. First of all, reference may be made to the quota-hopping cases.[56] The Court struck down as contrary to Article 52 of the Treaty provisions of the UK Merchant Shipping Act requiring that the vessel must be British-owned. The Court also struck down the condition that owners, directors, and shareholders as well as managers and operators of vessels must be residents in the UK. In its judgment *Lopez da Veiga*, the European Court of Justice ruled that workers permanently employed on board a ship flying the flag of a Member State may rely on the provisions of Regulation 1612/68 applying Article 48 of the

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[54]A Future for the Community Shipping Industry. Com(89) 266 def. of 3 August 1989, OJ 1989 C 263/11. Cf House of Lords, Select Committee on the European Communities, Community Shipping Measures, London, October 1990, Session 89-90, 28th Report (HL paper 90)

[55]Regulation 613/91, OJ 1991 L 68/1.

[56]Case C-221/89, *AR* v. *Secretary of State for Transport* ex parte factor pame; C-246/89, *Commission* v. *United Kingdom*; Case C-93/89, *Commission* v. *Ireland*, of 25 July 1991, and 4 October 1991 respectively, not yet reported. For a comment on these cases see Churchill, *CML Rev* 1992, page 405.

Treaty.[57] Finally, there are two very interesting cases pending that raise interesting questions concerning registration. In Case C-286-/90,[58] *Poulsen*, the question is asked whether the Community has jurisdiction to enforce fisheries conservation measures in case of ships registered in Panama, even though the ship is fully owned by Community interests and manned with Community nationals.

A second case, Case C-72/91 and C-73/91,[59] *Sloman*, concerns the question whether in instituting a second register the German Federal Republic has infringed the rules of the Treaty concerning state aids. The question is specified as whether Germany is allowed to disapply its national labor law in case of registration in the second register.

Safety and Other Measures

The development of a Community policy in the area of maritime safety has been very limited. There are two reasons for this. First and foremost, the promotion of maritime safety has always been within the domain of the International Maritime Organisation (IMO). The Member States of the EEC have actively participated in the development of such a policy in the context of IMO. They have been very reluctant to support initiatives of the European Commission in this area. The prevailing feeling is that IMO has done a very good job and that international maritime safety should be promoted at a world wide level rather than a regional level. There has also been a reluctance on the part of the Member States to have the EEC Commission participating in an IMO context. Member States of the EEC fear that participation by the Commission could lead other nations to advocate the group system as practised in UNCTAD.

Secondly, the EEC Treaty mandates the development of a common transport policy, taking the economic issues as its starting point. Even though it is not disputed any longer that the EEC has competence in this area, the number of measures enacted in this field has been limited. Two first measures concern Directives enacted on 21 December 1978. Directive 79/115[60] concerns pilotage of ships by deep

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[57]Case 9/88, Judgment of 21 September 1989, ECR 1989: 2989.

[58]So far only the Opinion of the Advocate General has been given.

[59]The Opinion of the Advocate General was given on 17 March 1992.

[60]OJ 1979 L 33/32.

sea pilots in the North Sea and the English Channel. Directive 79/116[61] lays down minimum requirements for certain tankers entering or leaving Community ports.

Efforts by the EEC Commission to incorporate the 1980 Paris Memorandum of Understanding on Port State Control into a Community Directive failed. Member States were unwilling to supplement wider European enforcement of maritime standards by Community action. The Community did adopt a decision establishing a Community information system for the control and the reduction of pollution caused by hydrocarbons discharged at sea.[62]

Recently the Council adopted a Directive 92/29[63] concerning the minimum safety and health requirements for improved medical treatment on board vessels. The Directive requires Member States to take the necessary measures that ships flying their flags carry a permanent and adequate medical supply.

State Aids

As part of the 1989 Commission's Memorandum on Positive Measures,[64] the Commission issued some guidelines on the application of the Treaty provisions on state aids in the field of maritime transport. The Commission indicated that aids that are intended to reduce social security costs of maritime transport are likely to be regarded favorably. Nevertheless, the usual criteria for exemptions under Article 92 have to be maintained. Apart from aid to maritime transport, the Community has long since adopted rules for aid to the ship building sector. The Community has adopted consecutive directives dealing with aids to ship building; the present Directive is number 87/167.[65]

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[61]OJ 1979 L 33/33.

[62]Council Decision 81/971, OJ 1981 L 355/52.

[63]OJ 1992 L 113/19.

[64]OJ 1989 C 263.

[65]OJ 1987 L 69/55.

External Relations

The greater part of maritime transport is carried out between the Member States of the EEC and third countries. As of old, there exists a extensive network of bilateral treaties to conduct maritime communications. Most Member States of the EEC have a great number of bilateral treaties with many countries in the world. However, most matters covered by the provisions of these national treaties and agreements will in the future be governed by Community agreements pursuant to Article 113 of the EEC Treaty. It should be noted that the specific subject matter of cargo sharing arrangements has been the subject of Regulation 4055/86.[66] Nevertheless, the Friendship, Trade, and Navigation treaties and similar agreements still contain a variety of matters concerning maritime transport. Moreover, Article 234(2) of the EEC Treaty requires Member States to take all appropriate steps to eliminate incompatibilities with the EEC Treaty which may exist in such treaties or agreements. For those matters that are presently not governed by Community agreements and that are not incompatible with the provisions of Community law, the Member States are authorized by the Council to renew or maintain the provisions governing matters contained in Friendship, Trade, and Navigation treaties and similar agreements listed in the Council Decision. The latest Council Decision 92/34[67] is of 28 April 1992.

Conclusion

The above summary of the EEC shipping policy shows that by now the policy is firmly established. The gist of this policy, especially in the future, will be the application of the principle of freedom to provide services to maritime transport as well as the application of the EEC competition policy. These have sometimes been referred to as negative measures, i.e., prescriptions to hinder the freedom to provide services and to interfere with a regime of undistorted competition. The summary also shows that the EEC has had great trouble in developing what is usually called a policy consisting of positive measures. This is partly due to the fact that measures promoting safety and protection of the environment have been developed in the context of IMO and do not need structured treatment within the EEC context.

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[66]Article 6 of this Regulation is discussed in the judgment of the European Court of Justice in Case 355/87, Council v. Commission, ECR 1989, 1517.

[67]OJ 1992 L 120/37.

At the same time, it is also clear that the EEC has not yet come up with an answer to the question of registration. So far the application of the EEC policy has mainly been in the area of competition policy. The most noticeable trend in this area is the Commission's policy to make sure that the group exemption provided for liner conferences will not be used or extended to set up restrictive agreements concerning the whole liner trade and including agreements with outsiders. It is also clear that the Commission is willing and capable to exercise jurisdiction in this area.

The other important Commission action has been the decision against the alleged unfair pricing practices by Hyundai. It shows that the Community is willing to act in cases where its maritime transport interests are clearly threatened. The above analysis of the EEC maritime policy also shows that the EEC Commission will challenge as much as possible actions by private enterprises rather than governmental actions. Thus the Commission chooses to take action on the basis of Regulation 4057/86 on unfair pricing practices rather than on Regulation 4058/86 concerning coordinated action to safeguard free access to cargoes in ocean trade, i.e., governmental measures in the case of Hyundai. Finally, it should be noted that the question of extraterritorial application of Community legislation has apparently not given rise to extensive international disputes. On the contrary, in September 1991 the EEC Commission concluded an executive agreement with the Department of Justice of the United States of America relating to the application of the anti-trust laws of the United States and the EEC competition provisions. In this agreement both authorities confirmed their willingness to cooperate in the application of their respective legislation.

THE EEC, SAFETY OF NAVIGATION, AND VESSEL SOURCE POLLUTION

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Introduction

On 16 March 1978, the supertanker *Amoco Cadiz* was wrecked off the Breton coast, spilling nearly 230,000 tonnes of crude oil into the sea. The ship had been in severe difficulties because of a failure in the steering gear system. The disaster did not find France totally unprepared. An emergency plan, the so-called "Plan Polmar," had already been worked out to cope with just such an eventuality, coordinating public and emergency services in France to do everything necessary to limit the enormous damage and to restore the coastal environment.

The *Amoco Cadiz* accident prompted the European Community to try to regulate the problems involving the safety of navigation and vessel source pollution at the Community level.[1] On 26 June 1978, an EC Council Resolution[2] set up an Action Programme for the control and reduction of pollution caused by hydrocarbons.[3] It is based on the following ambitious aims.

1. Computer processing of the existing data, or data still to be collected, on ways of dealing with marine pollution by hydrocarbons with a view to the immediate use of such data in the event of accidental pollution.
2. Study of the availability for the Member States of relevant data on tankers liable to pollute the waters around the Community and the coasts of the Member States and on offshore structures under the jurisdiction of the Member States.

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[1] For a deep analysis see H.G. Nagelmackers, "Aftermath of the Amoco Cadiz," *Marine Policy* 4, no. 1 (January 1980): 3-18.

[2] Resolution of 2 June 1978, *Official Journal of the European Communities* (hereinafter: *OJEC*) C 162 of 8 July 1978, p. 1.

[3] *OJEC* C 162 of 8 July 1978, p. 1.

3. Study of the need for measures to enhance the cooperation and effectiveness of the emergency teams that have been or that are to be set up in the Member States.
4. Study of a possible Community contribution to the design and development of clean-up vessels to which may be fitted the equipment needed for the effective treatment of discharged hydrocarbons.
5. Study of the amendments and improvements which may have to be made to the legal rules on insurance against the risks of accidental pollution from hydrocarbons.
6. Establishment of a proposal for a research programme on chemical and mechanical means of combatting pollution due to hydrocarbons discharged at sea, on the subsequent history of such hydrocarbons, and on their effect on marine flora and fauna.

At that time, the legal basis of the EC's competence on environmental protection had not yet been well defined. In the absence of explicit provisions on the matter in the Treaty establishing the European Economic Community (Rome, 25 March 1957), the Community based its competence on Arts. 100[4] and 235[5] of the Treaty. Shortly afterwards, the basis of the Community's competence was considerably strengthened. The Single European Act (Luxembourg, 17 February 1986 and The Hague, 28 February 1986[6]) introduced a set of rules (Title VII, Arts. 130R to 130T), which were explicitly devoted to the protection of the environment. According to these rules, the objectives of Community action relating to the environment consist in: (i) the preservation, protection, and improvement of the quality of the environment; (ii) the contribution towards

[4] "The Council shall, by an unanimous decision, on a proposal from the Commission, issue directives for the approximation of such provisions imposed by law, regulation and administrative action in Member States as directly affect the setting up or operation of the common market."

[5] According to this Article: "Where action by the Community appears necessary to achieve, in the course of operation of the Common market, one of the objectives of the community, and where this Treaty has not provided for the necessary powers of action, the Council shall, by unanimous decision, on a proposal from the Commission and after the Assembly has been consulted, take the appropriate steps."

[6] For the text of the Single European Act see *Int. Legal Materials* XXV, no. 3 (May 1986): 503.

protecting human health; (iii) the assurance of a prudent and rational utilization of natural resources[7].

The recent Treaty on European Union (Maastricht, 7 February 1992) confirms and improves the environmental provisions provided for by the Single European Act. Above all, it adds the promotion of measures at the international level to deal with regional or worldwide environmental problems.

Today, almost fifteen years after the *Amoco Cadiz* accident, it may be useful to have a look at what the Community has done with regard to the safety of navigation and vessel source pollution. A brief glance reveals that the production of regulations and directives has been modest, at least as far as quantity is concerned. This article intends to list and analyze these instruments and to try to answer some of the questions as to why Community action in this area has not lived up to its original intentions.

The EEC Legislation

At present, Community legislation in the field of safety of navigation and vessel source pollution[8] includes the following acts:

a) Council Directive No. 79/115 of 21 December 1978, which concerns pilotage of vessels by deep-sea pilots in the North Sea and in the English Channel;[9] and

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[7] Art. 130R para. 1 of the Single European Act.

[8] On the problem see: P.W. Birnie, "The European Community's Environmental Policy," E.D. Brown and Robin R. Churchill (Eds.), *The UN Convention on the Law of the Sea: Impact and Implementation* (Honolulu, 1987): 527-56 at p. 545 ff.; D. Le Morvan, "L'intégration de la dimension environnementale dans les politiques maritimes de la Communauté," Joël Lebullenger and Didier Le Morvan (eds.), *La Communauté Européenne et la mer* (Paris: Economica, 1990): 317-31; D. Le Morvan, "La pratique des Communautés Européennes au regard des dispositions "environmentales" de la Convention des Nations Unies sur le droit de la mer," Budislav Vukas (ed.), *Essays on the New Law of the Sea 2* (Zagreb, 1990): 143-170, at 161 ff. For an evaluation of the EC policy in the protection of the marine environment of particular areas, see: J.L. Pratt, "The Role and Activities of the European Communities in the Protection and the Preservation of the Marine Environment of the North Sea," *Int. Journal of Estuarine and Coastal Law* 5, no. 1, 2 and 3 (February 1990): 101-10; J.F. Kemp and A.F.M. De Bievre, "A Regional Vessel Traffic Service for the North Sea," *ibidem*: 167-179; Wolfgang Graf Vitzthum and Claude Imperiali (eds.), *La protection régionale de l'environnement marin* (Paris: Pedone, 1992).

[9] *OJEC* L 33 of 8 February 1979, p. 32. The Directive entered into force on 22 December 1978.

b) Council Directive No. 79/116 of 21 December 1978, which concerns minimum requirements for certain tankers entering or leaving Community ports.[10] These two directives are among the first concrete initiatives undertaken by the Community after the *Amoco Cadiz* accident. The former aims to ensure that in a particular area, the North Sea and the English Channel, vessels avail themselves of the services of adequately qualified deep-sea pilots. The latter requires oil, gas, and chemical tankers of 1600 gross registered tons and over to provide Member States with certain information before entering their ports or while traversing the territorial waters adjacent to the port of entry or departure.

c) Council Decision No. 80/686 of 25 June 1980, which establishes an Advisory Committee for the control and reduction of pollution caused by the discharge at sea of hydrocarbons;[11]

d) Council Decision No. 82/887, which adopts a concerted action project for the European Economic Community in the field of shore-based marine navigation aid systems;[12]

e) Council Decision No. 86/85 of 6 March 1986, which establishes a Community information system for the control and reduction of pollution caused by the spillage of hydrocarbons and other harmful substances at sea.[13] In recent years, the "Community information system" has provided the administrations of Member States with a very valuable service in dealing with major accidents involving sea pollution or threat of pollution.[14] An even better example of close co-

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[10] *OJEC* L 33 of 8 February 1979, p. 33. The Directive entered into force on 22 December 1978.

[11] *OJEC* L 188 of 22 July 1980. This Decision was amended by Decision No. 87/144 of 13 February 1987, *OJEC* L 57 of 27 February 1987.

[12] *OJEC* L 378 of 31 December 1982.

[13] *OJEC* L 77 of 22 March 1986. This Decision repeals Council Decision No. 81/971 of 3 December 1981 (*OJEC* L 355 of 10 December 1981, p. 52). It was recently amended by Council Decision No. 88/346 of 16 June 1988 (*OJEC* L 158 of 25 June 1988).

[14] In particular, the First Report on the implementation of Council Decision 86/85/EEC of 6 March 1986 (Communication from the Commission to the Council and the European Parliament), *COM(89) 1 final* of 15 March 1989 mentions, by way of example, the *Patmos* accident which occurred in the Strait of Messina in March 1985, the emergency situation of the tanker *Capo Emma* (Bantry Bay, 1986), the wrecking of the iron ore carrier *Kowloon Bridge* on Stag Rocks in West Cork, Ireland on 24 November 1986, and the grounding of the *Cason*, a 15,000-ton Panamanian registered vessel

operation is the Community "Task Force." It is an extension of the Community Information System, which is made up of experts with direct experience of emergencies. In an emergency the Task Force can be called upon to attend the scene of the incident to advise and to provide all possible assistence to the authorities concerned.[15]

f) Decision of the Commission No. 86/479 of 18 September 1986, which concerns the establishment of an Advisory Committee for the protection of the environment in particularly sensitive areas (Mediterranean basin);[16]

g) Council Regulation No. 613/91 of 4 March 1991 on the transfer of ships from one register to another within the Community.[17] This Regulation contains explicit references to the need to guarantee a high level of ship safety and environmental protection. It essentially relies on the assumption that the establishment and functioning of the internal market involve the elimination of technical barriers to the transfer of ships between Member States' national registers. To this aim, the Regulation provides for the mutual recognition of safety requirements assessed by national certificates.

h) Council Decision No. 92/143 of 25 February 1992 on radionavigation systems for Europe.[18] This Decision supports the establishment of a coherent and complete radionavigation system for the European maritime area in order to ensure the highest degree of safety

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carrying harmful chemicals, off the northwest coast of Spain on 5 December 1987.

[15] The Task Force, established at the initiative of the Commission, is activated by a simple telex which immediately activates the Commission's 24-hour operational section. The composition of the Task Force is determined case by case in consultation with the authorities making the request. In the *Cason* accident, for example: "The Task Force was called upon by the Spanish administration and the following action was taken:
1. German, Dutch, and Belgian administrations rapidly provided information on the dangerous cargo. 2. A Commission expert was sent on-scene within hours; a Dutch governmental expert and two private Dutch experts were seconded to the authorities the following day. 3. At a later stage, after these experts had left the scene, two British private advisors were seconded for about three months. A Commission official and a Belgian governmental expert also took part in an assessment meeting on-scene, and two other experts were seconded in order to offer advice during the final phase of the operation". First Report, *cit.*, Annex I, para. D.

[16] *OJEC* L 282 of 3 October 1986.

[17] *OJEC* L 68 of 15 March 1991, p. 1.

[18] *OJEC* L 59 of 4 March 1992.

of navigation and protection of the marine environment.[19] This Decision, however, does not prejudice the development of the general-purpose satellite systems that are expected to be available not before 1995[20].

The Community acts that have been adopted so far concern, above all, two aspects of vessels' pollution. The first aspect deals with the prevention of accidents by means of rules on the safety of navigation (see for instance instruments sub a), b), g) or h)). The second regards access to information so as to be able to respond to accidents causing pollution to the marine environment more effectively (instrument sub e) for example). These two aspects are by no means negligible, but they represent only a part of the comprehensive issue of safety of navigation and vessel source pollution.

In several resolutions, the European Parliament has urged a much wider Community maritime policy. For instance, in its Resolution of 17 March 1989, adopted after the disaster of the *Herald of Free Enterprise*, the Parliament noted that:

> ... the Community has not yet defined a framework within which a complex Community maritime policy could operate in the area of promoting safety at sea."[21]

The Resolution is also significant because it mentions several aspects that could be improved. For example, the Parliament calls for the

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[19] Incidentally, it should also be said that the decision to deal with this problem at the Community level was encouraged *inter alia* by the decision of the United States to terminate their Loran-C (a particular radio-navigation system) commitments outside their territory as from 1994 and to offer free of charge, in whole or in part, the Loran-C facilities to the relevant host countries.

[20] It should also be noted that certain proposals on other topics submitted by the Commission have not yet been adopted. See, for instance, the proposal of a Council Directive of 2 July 1980 on enforcement of international standards for shipping safety and pollution (*OJEC* C 192 of 30 July 1980); the proposal for a Council Directive on the drawing up of contingency plans to combat accidental oil spills at sea (COM(83) 520, *OJEC* C 273 of 12 October 1983, p. 3); and the proposal for a Council directive concerning minimum requirements for vessels entering or leaving Community ports carrying packages of dangerous or polluting goods (for the most recent text adopted on the argument see *OJEC* C 294 of 24 November 1990, p. 12). For a comment on this last draft directive see: Y. van der Mensbrugghe, "Le contrôle de certains navires entrant dans les ports maritimes de la Communauté ou en sortant: état de la question", *Droit de la mer. Etudes dédiées au Doyen Claude-Albert Colliard* (Paris: Pedone, 1992), 53-62.

[21] *OJEC* C 96 of 17 April 1989.

establishment of a stricter policy of control by the Community. As far as vessel pollution in strict terms is concerned, the establishment of appropriate infrastructures is encouraged, particularly in special regions of the Community, such as the Mediterranean and the North Sea. The construction of waste collection terminals and biological sea-cleansing stations is also encouraged.

In 1988 the European Parliament (Resolution of 18 January 1988[22]) strengthened the dose by declaring that the Commission had failed to carry on the proposals made in successive stages on the safety of navigation. The Parliament insisted that the next meeting of the Council of Ministers for the Environment should consider the problem of maritime safety and the means necessary to fill the legal gaps in this matter (responsibility, indemnity, problem of territorial waters, etc.).

The European Parliament's criticism was not altogether unfounded. Suffice here to say that despite the ambitious programs contained in the aforementioned 1978 Action Programme on the control and reduction of pollution caused by hydrocarbons, the topic of the safety of navigation and vessel source pollution really does seem to have been neglected by the recent draft of the Fifth Community Environmental Action Programme.[23]

The Principle of Subsidiarity

At this point it may be useful to examine the reasons behind the present state of affairs. Is the criticism that Community action has been scanty fully justified? Could and can the Community do something more and better?

An answer, which obviously cannot be given in absolute terms, inevitably involves a principle that is playing an ever-increasing role within Community law: the principle of subsidiarity.

Apparently this principle is rather frequent in the legal systems of federal States (and in this respect its appearance in Community law can be indicative of progress in European political integration). This principle has been expressed in the Single European Act, with regard to the environmental sector, in the following terms:

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[22] *OJEC* C 38 of 19 February 1988. The Resolution was occasioned by the accidents in which occurred two tankers, the *Kharg 5*" and the *Aragon*. Both accidents caused the spilling of crude oil off the coasts of Morocco.

[23] The Fifth Programme has not formally been adopted yet. The text is annexed to Doc. COM(92) 23 final of 30 March 1992.

> The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures."[24]

The same principle assumes a more general dimension, namely with reference to Community action as a whole, in Art. 3b of the Maastricht Treaty:

> ... In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effects of the proposed action, be better achieved by the Community....

The principle of subsidiarity is not a *deus ex machina* that resolves every problem, nor does it explain in any detail in which cases a certain objective can be better achieved by means of a Community action. This can give rise to complicated legal disputes. It is, however, evident that the principle of subsidiarity presumes the existence of (at least) two levels of legislation, the domestic level and the Community level. The existence of the former does not exclude the latter, and vice versa. Nevertheless, a choice must be made with regard to the specific cases and according to the teolological criterion of the best fulfilment of a certain objective. In our field, for example, the existence of Community legislation aimed at the coordination of emergency plans does not exclude the usefulness of national legislation such as the French "Plan Polmar."

Although Community law does not say this explicitly, it is important to point out that in our field the principle of subsidiarity operates in a threefold, not in a twofold dimension: domestic legislation, Community legislation, and international legislation. This is

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[24] Art. 130R, para. 4 of the Single European Act. According to para. 1 of this Article: "Action by the Community relating to the environment shall have the following objectives: (i) to preserve, protect and improve the quality of the environment; (ii) to contribute towards protecting human health; (iii) to ensure a prudent and rational utilization of natural resources."

because at present the European Community is something more than an association among States and something less than a federal State.

The small number of binding rules adopted by the Community on maritime safety and vessel source pollution so far can therefore be explained by the simple consideration that this matter can be better regulated at the international level. Of course, certain objectives can be better achieved by Community legislation that stands alongside the international agreements. However, the maritime spaces where navigation takes place are extensive and the legal status of these waters (internal waters, territorial sea, economic exclusive zone, high seas) varies. It is unreasonable, therefore, to think that these problems can be arranged and resolved within the ambit of the Community alone. Actually, the problem of so many good intentions expressed at Community level, but not yet put into effect, can be overcome if one considers that these intentions can be properly realized only by means of a worldwide action.

It is therefore necessary to consider the most recent developments in international law on the safety of navigation and the prevention of vessel source pollution. Above all, it is important to look at how the Community got involved in these developments.

The Community Action to Promote the Participation of its Member States in International Agreements

At the international level, the topic of the safety of navigation and vessel source pollution has developed in different sectors. Only some of these may be suitable for regulation at the regional level. The following are the principal aspects:

Aspects of prevailing world relevance

a) Prevention of operational pollution from ships, namely the pollution produced during the carrying out of navigational activities, by means of provisions regulating the design, construction, equipment, operation, and manning of vessels. This can be better regulated on the world scale through an appropriate multilateral convention (see, e.g., the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 related thereto (MARPOL 73/78)[25]).

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[25] For the text of the Convention see W. Burhenne (ed.), *Beiträge zur Umweltgestaltung, Multilateral Verträge* (hereinafter: *Beiträge*), (Berlin: 1974, loose-leaf), 973:84. All contracting States are bound by Annex I (containing regulations for the prevention of

b) Prevention of accidents and safety of navigation. This too should first be regulated at the international level through appropriate conventions. Nevertheless, the usefulness of regional rules suited to the sensitive character of certain maritime areas cannot be excluded (see, e.g., the 1974 International Convention for the Safety of Life at Sea (SOLAS);[26] the 1978 Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW),[27] the 1972 Convention on the International Regulation for Preventing Collisions at Sea (COLREG),[28] the 1966 International Convention on Load Lines (LL).[29]

It is significant that the Community has several times invited its Member States to ratify conventions falling within the two mentioned categories. This invitation can be seen as an implicit acknowledgment that the matters in question are first to be regulated at the international level.

Aspects of prevailing regional relevance

c) Measures for dealing with emergencies. Once an accident has happened the need for information, cooperation, and assistance among States that have been involved in the accident is particularly evident. The general requirements of the matter can be best regulated at the world level (see, e.g., the 1990 London Convention on Oil Pollution

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pollution by oil) and Annex II (containing regulations for the control of pollution by noxious liquid substances in bulk) are binding. Annexes III (Regulations for the prevention of pollution by harmful substances carried by sea in packaged forms, or in freight containers, portable tanks or road and rail tank wagons), IV (Regulations for the prevention of pollution by sewage from ships), and V (Regulations for the prevention of pollution by garbage from ships) are only optional. Belgium (with the exception of Annex IV), Denmark, France, Germany, Greece, Italy, Luxembourg, Netherlands (with the exception of Annex IV), Portugal, Spain and United Kingdom (with the exception of Annex IV) are the EC States at present are parties to MARPOL.

[26] *Beiträge*, 974:81. The Convention entered into force on 25 May 1980. SOLAS and its 1978 Protocol have been ratified by all maritime Community States.

[27] Text in *Beiträge*, 978:52. The Convention entered into force on 28 April 1984. All EC States except Luxembourg are parties to the STCW Convention.

[28] Text in *Beiträge*, 972:77. The Convention entered into force on 15 July 1977. All EC States except Luxembourg are parties to the Convention.

[29] Text in *UNTS*, 9159, p. 134. The Convention entered into force on 21 July 1968.

Preparedness, Response and Co-operation (OPRC)[30]). The specific requirements can be usefully regulated at the regional level (see, e.g., the 1976 Convention for the Protection of the Mediterranean Sea against Pollution[31] and its related Protocol Concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and other Harmful Substances in Cases of Emergency;[32] the 1983 Bonn Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil and other Harmful Substances of 13 September 1983;[33] the 1983 Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region;[34] the 1990 Lisbon Accord of Co-operation for the Protection of the Coasts and

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[30] Text in *Int. Legal Materials* XXX, n. 3 (May 1991): 735. The Commission of the European Community took part in the works of the Conference which adopted the OPRC Convention as observer.

[31] Text in *Int. Legal Materials* XV, no. 2 (March 1976): 290. The Convention entered into force on 12 February 1978. The Community signed the Convention on 13 September 1976 and approved it on 16 March 1978. The Convention entered into force on 15 April 1978. At present, the States parties are: Albania, Algeria, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Morocco, Spain, Syria, Tunisia, Turkey, Yugoslavia.

[32] Text in *Int. Legal Materials* XV, no. 2 (March 1976): 306. This Protocol entered into force on 12 February 1978. EC approved the Protocol on 12 August 1981. The Protocol entered into force on 11 September 1981. The States parties are at present: Albania, Algeria, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Morocco, Spain, Syria, Tunisia, Turkey, Yugoslavia.

[33] *Beiträge*, 983:68. The Convention entered into force on 1 September 1989. The EC approved the Convention on 24 September 1984 (Council Decision No. 84/358 of 28 June 1984, *OJEC* L 188 of 16 July 1984, p. 7). The Agreement replaces the Agreement for Co-operation in dealing with Pollution of the North Sea by Oil, done at Bonn on 9 June 1969 (Art. 19.2). At present, apart from the EC, Belgium, Denmark, France, Germany, Netherlands, Norway, Sweden and United Kingdom are parties to the agreement. The Community, which takes part in the meetings provided for by this agreement, has recently approved the amendments to the Convention adopted by the Second International Conference on the Protection of the North Sea (London 25 November 1987) with the aim, *inter alia*, of improving and extending cooperation among parties on surveillance (Decision of 22 September 1989, *OJEC* C 114 of 5 May 1992).

[34] For the text see *Beiträge*, 983:23. The Community signed the Convention on 24 March 1983.

Waters of the Northeast Atlantic against Pollution Due to Hydrocarbons or Other Harmful Substances[35]).

In the case of the Community, it is worth noting that the EC is a political, not a geographical, region. This is also true with respect to the seas surrounding the whole of the Community area. The first consequence is that the Community is called upon to become party to various regional conventions. The second is that also non-Community States are parties to these conventions. This is so, for example, for Norway and Sweden in the case of the North Sea and for the numerous non-Community coastal States in the case of the Mediterranean.

d) Cooperation in control. The adoption of more and more detailed legislation on vessel source pollution implies the need to strengthen the control system. The topic is particularly delicate because it involves the sovereignty of States with regard both to coastal zones on which they exercise sovereign rights, and to ships flying their flags. In principle, nothing prevents the conclusion of worldwide conventions on control. However, the control system requires international cooperation and therefore a degree of political homogeneity. So far, the level of the latter has allowed only the drafting of conventions on a political regional basis. For example, the Community promoted the adoption of the Memorandum of Understanding on Port State Control (Paris, 26 January 1982).[36] This is a precious instrument for the organization of regional cooperation in the matter of control. The implementation of the principal international agreements on the safety of navigation and the prevention of vessel source pollution can therefore be more effectively ensured.

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[35] *Int. Legal Materials* XXX, n. 5 (September 1991): 1227.

[36] The complete title of the agreement is: Memorandum of Understanding of Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment. The text is reproduced in Bernd Rüster and Bruno Simma (eds.), *International Protection of the Environment*, Second Series (New York: Dobbs Ferry, 1990), II/A/26-01-82. The Memorandum entered into force on 1 July 1982. All the EC Member States (except Luxembourg) and three Scandinavian States (Finland, Norway, and Sweden) are at present contracting parties to the Memorandum. The EC is not party to the Memorandum, but according to Art. 6 para. 1, a representative of the EC Commission participates in the proceedings of the Port State Control Committee established by the Memorandum. On the Memorandum and the EC position see: Y. van der Mensbrugghe, "Les navires inférieurs aux normes: le mémorandum d'entente de Paris du 26 Janvier 1982 sur le contrôle des navires par l'Etat du port", Joël Lebullenger and Didier Le Morvan (eds.), *La Communauté Européenne et la mer* (Paris: Economica, 1992): 463-474.

Conclusions

The Community has been much criticized for having done little to improve the safety of navigation and vessel source pollution. Some of this criticism may be attenuated by an examination of what the Community has done in order to promote the participation of its Member States in various agreements. Most of those treaties pursue objectives that can be better achieved at the world level. Art. 130R para. 5 of the Single European Act[37] and Art. 130R para. 4 of the Maastricht Treaty[38] clearly confirm that in this field the Community cannot take the place of its Member States. It can only work alongside them.

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[37] "Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the relevant international organizations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 228."

[38] "Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the relevant international organizations."

THE EEC AND FISHERIES: SOME RECENT DEVELOPMENTS

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Introduction

The subject of this paper regards some recent developments concerning the interpretation and application of the EEC Fisheries Policy that are of particular interest to experts in the international law of the sea.

The common denominator of these issues on which the EEC Court of Justice has passed some judgments is, in fact, the attempt by the Member State, accused of having violated Community Law, to affirm the legitimacy of its conduct in the light of the principles of international law of the sea, both customary and conventional, applicable in the specific case. This has once again induced the Court to take a position on the delicate relationships between the EEC Fisheries Policy and the law of the sea and, in more general terms, between EEC Law and international law. Moreover, the significance of the various issues examined will give us the opportunity to make some general observations on a few of the operational aspects of the EEC Fisheries Policy approximately ten years from the date of its entering into force -- on 25 January 1983, when the Council approved the basic regulations governing common policy in this field[1] -- and prior to the fast approaching realization of a Single European Market, scheduled to begin on 1 January 1993.

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[1] See Regulations 170/83 and 171/83 (E.C.O.J. 1983, L 24, 1 ff.), which institute, respectively, a Community system for the conservation and management of fisheries resources and technical measures for the conservation of such resources. For the regime in effect up until the issue of said regulations see R.R. Churchill, "Revision of the EEC's Common Fisheries Policy," *European Law Review*, (1980), 3-37 (Part I); 95-111 (Part II); G. Cataldi, "Sulla competenza CEE in materia di pesca," *Foro italiano* 107, (1982), IV, 260 ff. and authors cited therein. For subsequent developments see R.R. Churchill, "The EEC's Fisheries Management System: A Review of the First Five Years of its Operation," *Common Market Law Review* 25, (1988), 369 ff; Id., "EEC Fisheries Regime," 23 *L. Sea Inst. Proc.*, Noordwijk aan Zee, (1990), 344 ff. On the question, in general terms, of the relationships between the EEC and the international law of the sea, see J. Lebullenger, D. Le Morvan (ed.), *La Communaute europeenne et la mer*, Paris, 1990.

EEC Law and Ship Registration: The United Kingdom's Merchant Shipping Act of 1988 before the EEC Court of Justice

The new requirements for registration of fishing vessels in the United Kingdom as a reaction to the phenomenon of "quota hopping" by Spanish fishing vessels

The first issue to be examined is the relevance of EEC law on the competence of the Member States in matters of ship registration. This problem, a completely new one, has arisen as a consequence of the United Kingdom's issuing of the *Merchant Shipping Act* of 1988 which, after almost a century, reformed the subject of the registration of British ships which had heretofore been regulated by the analogous Act of 1894.[2] The Act of 1988 primarily provides for a general shipping register for the registration of vessels, conceived with the express purpose of granting foreign interests greater possibilities for registration, in order to expand the British fleet and to attract investments to this field. A separate register, however, has been instituted for the registration of fishing vessels, based on principles counter to those of the general register: in fact, to avoid the creation of fictitious British companies, Art. 14 of the Act imposes very strict requirements of nationality for the registration of a fishing vessel in the new register. First, the vessel must be British-owned. This means that the legal title to the vessel must be vested wholly in one or more British citizens resident and domiciled in the United Kingdom, or wholly in a company that is incorporated and has its principal place of business in the United Kingdom, and has at least 75 percent of its shares owned by, and at least 75 percent of its directors as, British citizens resident and domiciled in the United Kingdom. In the case of companies, beneficial ownership must meet the same requirements. In the case of individuals, only 75 percent of the vessel need be beneficially owned by British citizens resident and domiciled in the United Kingdom. Secondly, the vessel must be managed, and its operations directed and controlled, from within the United Kingdom. Finally, any charterer, manager, or operator of the vessel must be a British citizen resident and domiciled in the United Kingdom or a company fulfilling the requirements mentioned above.

The United Kingdom issued these restrictive measures in order to defend the fishing quotas allocated to its fishermen in accordance with

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[2] For detailed commentary on the provisions of the Act of 1988 see Gaskell, "The Merchant Shipping Act 1988," *Lloyd's Maritime and Commercial Law Quarterly*, (1989), 133 ff.

the system of periodic allocation of the Community's Total Allowable Catch among its Member States. In the past, numerous fishing vessels flying the Spanish flag have, in fact, been re-registered in the United Kingdom through the establishment, by the owners, of companies that then assumed ownership of the vessels. This was possible due to the particularly liberal conditions required for registration to the British shipping register as set forth by the previously cited *Merchant Shipping Act* of 1894, which simply required that the vessels be owned by a British citizen or by a company instituted and having its main place of business in the United Kingdom. Thanks to the process of re-registration, the above-mentioned vessels were allowed to fish in Community waters under a British flag and fishing license, even though they unloaded their catches in Spain. This practice, which originated as a reaction to the significant restrictions introduced by the 1980 agreement between EEC and Spain[3] that reduced the rights that Spanish fishermen had in Community waters up to 1 January 1979 (the date the interim Community fisheries regime went into force), continued even after Spain's accession to the EEC, as Spain and Portugal's Act of Accession institutes an interim fisheries regime limiting the number of fishing vessels flying a Spanish flag legally entitled to carry out their activity in waters subject to the jurisdiction of other Member States, until 31 December 2002.[4]

The practice of Spanish fishing vessels' re-registration in the British register did not at first cause any particular reaction in the United Kingdom. On the contrary, as we will see further on, it was in complete accordance with this country's policy in matters of ship registration. The situation changed radically when the Community fisheries policy was definitively established in 1983, as mentioned above. With the adoption of a system of periodic allocation -- by species -- of the Total Allowable Catch among Member States of the Community, all catches subject to quota restrictions made by fishing vessels sailing the flag of a Member State, or registered under a Member State, were from that moment counted against the quota as-

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[3] See E.C.O.J. 1980, L 322.

[4] See articles from 154 to 176 of the Act of Accession of the Kingdom of Spain and the Republic of Portugal, signed in Lisbon and Madrid on 12 June 1985 (E.C.O.J. 1985, L 302). For comments to the provisions concerning fishing contained in the Act of Accession, see G. Apollis, "La reglementation des activites halieutiques dans l'acte d'adhesion de l'Espagne et du Portugal au Traite C.E.E., *Annuaire Francais de Droit International* 31, (1985), 837 ff.; Id., "L'Europe bleue élargie," *Revue du Marché Commun* 17, (1986), 449 ff.

signed to the said State, regardless of where they were landed. Consequently, catches effected by Spanish vessels re-registered in the United Kingdom were in fact counted against the British quota, thus giving rise to the phenomenon which was henceforth defined as quota-hopping[5].

The problem was to preclude certain vessels from fishing in waters subject to the jurisdiction of the Member States of the Community of ten (excluding British waters), and unloading their catches in Spain, with their consequent attribution to the quota permitted to the United Kingdom. These vessels included both Spanish ships re-registered in the United Kingdom and British fishing vessels with licenses acquired by Spanish interests through companies established in the United Kingdom for that express purpose (the latter being the most widely followed practice after Spanish accession to the EEC). More restrictive normative measures were adopted by the United Kingdom authorities[6] resulting in its most radical measure, which was the reform of the system of registration for fishing vessels, introduced by the Act of 1988. This Act was analogous to previous measures in that it too was challenged before the courts of the United Kingdom by "Anglo-Spanish" companies that did not meet this country's requirements for registration. These companies objected to its incompatibility with Community law, in particular with the principles of the EEC Treaty forbidding discrimination based on nationality, and the issue was brought before the EEC Court of Justice in conformity with art. 177 of the EEC Treaty. Concurrently, this Act was also the subject of a proceeding ex art. 169 of the EEC Treaty instituted by the Commission against the United Kingdom.

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[5] For the motives leading to this practice, and the damage caused to the United Kingdom, see the observations made on this subject in the House of Lords, by the competent British Minister, whose salient points are reported in *British Yearbook of International Law* 54, (1983), 504 ff. Concerning the phenomenon in general, see R.R. Churchill, "Quota Hopping: The Common Fisheries Policy Wrongfooted?" *Common Market Law Review* 27, (1990), 209 ff. It should be pointed out that incidents of quota hopping have also been effected, though on a lesser scale, against Germany, by operators from the Netherlands. See U. Drobnig, "Billige Flaggen im Internationalen Privatrecht," in Drobnig, Basedow, and Wolfrum (eds.) *Recht der Flagge und "Billige Flaggen" – Neuere Entwicklungen im Internationalen Privatrecht und Volkerrecht*, Heidelberg, (1990), 36.

[6] For information concerning these measures, refer to R.R. Churchill, "Quota Hopping," cit., 212 ff.

International law and EEC law requirements for granting the nationality to a ship according to United Kingdom and to the EEC Court

According to the United Kingdom, international law devolves the issue of the requirements for granting of nationality to a ship to the exclusive competence of States, who, in the exercise of this competence, are obliged to respect only the limitations provided by international law. There could therefore be no question of inconsistency with Community law concerning the requirement for British nationality, a requirement which, as we have said, the Act of 1988 prescribes as mandatory both for the owners (legal or beneficial) and for the charterer, manager, or operator of fishing vessels to be registered in the United Kingdom shipping register. A discrimination based on nationality, and as such inconsistent with the EEC Treaty, would have been ascertained only if the measures under consideration had provided for different procedures for different nationalities. In other words, the Community principle of non-discrimination presupposes the existence of nationality as attributed, independently, by the individual States.

The significant principles of international law, according to the United Kingdom, are those codified under Art. 5 of the 1958 Geneva Convention on the High Seas and Art. 91 of the 1982 United Nations Convention on the Law of the Sea,[7] provisions requiring the existence of a "genuine link" between the State and the ship as the sole condition for granting the right to fly its flag.

Judgments passed by the EEC Court on 25 July 1991, case C-221/89, and on 4 October 1991, case C-246/89, affirmed, on the other hand, that, if it is true that each State is free to determine, in conformity with international law, the conditions for the registration of a vessel in its national register, the exercise of this competence does not

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[7] Art. 5 of the Geneva Convention states as follows:

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters, over ships flying its flag.
2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Article 91 of the 1982 Law of the Sea Convention is basically identical, except for the omission of the final part of the first sub-paragraph (from "in particular" on).

preclude the Member States' conforming to the pertinent rules of Community law as these do not conflict with provisions of international law on the matter, and as there is no question of inconsistency between the two sets of rules. As for the conditions of nationality, the Court considered it appropriate to note the difference between nationality of a ship and nationality of persons, and therefore the obligation of Member States to conform to Community principles banning discrimination against citizens of Member States by reason of nationality in determining the requirements for the granting of nationality to ships.

As we can see, the Court has reached these conclusions through little defined affirmations, especially with reference to the state of international law on the subject; in our opinion, however, it would have been convenient to have had a further developed justification. With this reservation, we must nevertheless admit that the affirmations are to be considered favorably, as we will attempt to demonstrate below.[8]

The question of the determination of a "genuine link" between the State and the ship and the EEC general principles against discriminations based on nationality

The opinion held by the United Kingdom that international law, in requiring the existence of a genuine link between the State of registration and the ship, excludes the application of Community rules against discrimination, would be sustainable only if it were proved that there actually existed a specific customary provision indicating with certainty how the above link is to be manifested and that it were inconsistent -- in the current phase of the Single European Market -- with the general principles of EEC law. We refer to "general principles of EEC law" since, had the Member States established specific rules concerning the registration of vessels, the problem would not exist, as these latter would prevail, as special law, over general international law.[9]

We may ask ourselves, in particular, whether possession of the nationality of the State of registration by the majority of owners is the

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[8] For a recent commentary on case C-221/89, see J. Juste Ruiz, "El contencioso pesquero hispano britanico ante el TJCE," *Revista de instituciones europeas* 18, (1991), 771 ff.

[9] On the relationship between customary and conventional law, and concerning the prevalence of the latter as special law, see B. Conforti, *Diritto Internazionale* [4], Napoli (1992), 179 f.

only criterion required for granting the right to fly a flag that would be considered legitimate by international law.

A rapid survey on the subject leads us to exclude the existence of any general rules regarding the "determination" of the genuine link. Apart from the data inferable from less recent international decisions,[10] it should be noted that neither the previously noted 1958 Convention on the High Seas, and the 1982 Convention on the Law of the Sea, nor, in particular, the United Nations Convention on Conditions for Registration of Ships, signed in Geneva on 7 February 1986,[11] offer any positive indications. Concerning the latter Convention, it is particularly important to point out that even thought it was promoted primarily to encourage the development of fleets of the poorer countries through strengthening on an international level of the "economic link" conditions between the State of registration and the ship, it gives the States a great deal of freedom in complying with this requirement. The registration requirements that the contracting States must include in their regulations are in fact not stringent.[12] To this

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[10] Two cases are frequently cited to support the theory of the inexistence, in general international law, of specific criteria regarding the determination of the genuine link. First, the judgement of the Permanent Court of Arbitration handed down on 8 August 1905 in the dispute between Great Britain and France on the *Dhows of Mascate* (see *United Nations Reports of International Arbitral Awards* XI, 92 ff.); the other case is the consultative opinion handed down on 18 June 1960 by the International Court of Justice, on request of the Intergovernmental Maritime Consultative Organization Assembly (International Court of Justice, *Reports of Judgments, Advisory Opinions nad Orders*, (1960), 150 ff.) On this subject see S.M. Carbone, *La disciplina giuridica del traffico marittimo internazionale*, Bologna, (1982), 72; Giuliano, Scovazzi, and Treves, *Diritto Internazionale*, II, Milano, (1983), 274; O'Connell, *The International Law of the Sea*, II, Oxford, (1984), 750.

[11] In *International Legal Materials* 26, (1987), 1229 ff. for comments on its provisions, see D. Momtaz, "La Convention des Nations Unies sur les conditions d'immatriculation des navires," *Annuaire francais de droit international* 32, (1986), 715 ff; H.W. Wefers Bettink, "Open Registry: The Genuine Link and the 1986 Convention on Registration Conditions for Ships," *Netherlands Yearbook of International Law* 18, (1987), 69 ff.

[12] See, in particular, Articles 7 to 10 of the Convention which, for example, contain no reference to the percentage of citizens of the State of registration necessary and sufficient to assure the latter control of the ship, nor the quota of crew which, similarly, should consist of citizens or permanent residents of the State of registration. On this point see, *amplius*, H.W. Wefers Bettink, cit., 118.

may be added the fact that, as is clear from Art. 2,[13] fishing vessels are not included in the area of applicability of the Convention, and thus no consideration has been given to reinforcing the requirement for a genuine link in this case.

Furthermore, the internal legislative practice on the subject of genuine link certainly cannot be considered unambiguous. Some countries require its existence, usually expressed through the requirement that the property and/or the crew be of a certain percentage of the nationality of the flag State. Other States, on the other hand, require far more negligible connections, or practically none.[14] Without taking into consideration the extreme of the so-called "flag of convenience" countries,[15] in which the property very rarely coincides with the nationality of the State of registration, it should be noted that it is precisely in the legislation of countries with a maritime tradition that we have noticed, for some time now, the tendency to disregard the traditional bond of ownership by substituting this with other types of links, such as that of mutual "economic convenience" between State and operator, regardless of the nationality of the latter, or the "link existing between the organization of the company and the State."[16] These tendencies are expressed by such measures as the Italian law of 1975, which modified the text of Art. 143 of the Navigation Code,[17]

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[13] Art. 2, in defining the concept of "vessel" as intended by the Convention, affirms that as such it means "any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both with the exception of vessels of less than 500 gross registered tons."

[14] On the differences in the various national legislations on the criteria for registering ships, see R.R. Churchill and A.V. Lowe, *The Law of the Sea*, Manchester, (1988), 206; D. Matlin, "Revaluating the Status of Flags of Convenience Under International Law," *Vanderbilt Journal of Transnational Law* 23, (1991), 1017 ff.

[15] On the question of flags of convenience, see works cit. *supra*, notes 10,11, and 14. See also, among more recent works, I. Seidl-Hohenveldern, *Flags of Conveniencey*, in B. Vukas (ed.), *Essays on the New Law of the Sea 2*, Zagreb, (1990), 299 ff.; R. Wolfrum, "Recht der Flagge und 'Billige Flaggen.' Neuere Entwicklungen im Volkerrecht," in Drobnig, Basedow, and Wolfrum (eds.), *Recht der Flaggen*, cit., 121 ff.

[16] On this point see S.M. Carbone, *La disciplina hiuridica*, cit., 78; W. d'Alessio, *Nazionalita della nave*, Napoli, (1984), 325.

[17] Law of 9 December 1975, No. 723. This reform basically reduced the minimum quota of shares that must belong to Italian citizens or concerns; furthermore, a sub paragraph to Art. 143 was inserted, stating that the provisions of Arts. 7 and 221 of the EEC Treaty remained unaffected.

and -- as we have already had occasion to point out -- the United Kingdom's Act of 1988, in the section not pertaining to fishing vessels. It is clear that the position taken by the United Kingdom in the matter under review concerning the general rule on "genuine link" between the State and the ship is in open contradiction to this country's traditional attitude on the subject. This is also inferable, with reference to more recent practice, from its firm opposition to the proposals of those States pressing for the introduction of specific and limited requirements (related to nationality, ownership, etc.), as necessary conditions for registration,[18] at the time of the UNCTAD Conference leading to the adoption of the 1986 Convention. Another significant issue was the reflagging of Kuwaiti ships under a British flag during the Iran-Iraq war.[19]

In conclusion, therefore, in the absence of a rule of general international law that strictly dictates how the link between the State of registration and ship is to be manifested, excluding as such the application of relevant EEC provisions by reason of inconsistency, the said link can and must be defined by a Member State in accordance with EEC law, and in particular, with the principles of non-discrimination by reason of nationality and the freedom of establishment of persons and corporations.

This conclusion does not vary even if, regardless of the state of customary law on the subject, we were to refer to Art. 5 of the 1958 Convention on the High Seas, attributing to this provision the meaning of imposing, on a conventional level (which is to be excluded, as we have said), a certain definition of the genuine link that is inconsistent with the requirements of EEC law. In other words, it could be said that, since the United Kingdom is bound by the Convention of 1958, and since it was so bound prior to its accession to the EEC, Art. 234 of the Treaty of Rome, which states

> The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more

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[18] On this point see the observations made by the representative of the United Kingdom in November 1983 before the Preparatory Commission, reported in *British Yearbook of International Law* 56, (1985), 498.

[19] On the issue of reflagging see R. Wolfrum, "Reflagging and Escort Operation in the Persian Gulf: An International Law Perspective," *Virginia Journal of International Law* 29, (1989), 387 ff.

Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty

would be applicable. However, this provision is to be interpreted, as frequently affirmed by the Court of Justice, as a means of leaving the rights of third States untouched,[20] given the possibility that Member States, in their mutual relations, can easily adopt a different regime from the one considered valid towards third States, even though they are all part of the same convention.[21]

EEC fishing rights and the modification of baselines of the territorial sea

The United Kingdom's Territorial Sea Act of 1987, the "low-tide elevations", and the EEC Regulation No. 170/83

The second issue to be reviewed concerns another legislative measure issued by the United Kingdom and defended by this State using arguments drawn from the international law of the Sea.

By the *Territorial Sea Act* of 1987 the United Kingdom, as we know, abandoned its traditionally strong position as a firm supporter of the legitimacy of a maximum three-mile limit for the territorial sea and brought this limit to twelve miles, a measure that has by now been adopted by almost all States.[22] Although this law does not establish anything on the subject of baselines, it has indirectly modified the baselines of British territorial waters, inasmuch as another provision, the 1964 *Territorial Waters Order in Council*[23], permits the consideration -- as a departure point for drawing the points and the baselines

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[20] See in particular the judgement handed down on 22 September 1988, case 286/86, E.C. *Reports*, (1988), 4907 ff.

[21] Following the same arguments see mainly the well-known judgement of 27 February 1962, case 10/61, E.C. *Reports*, (1962), 1 ff.

[22] The Act of 1987 is published in *Law of the Sea Bulletin* 10, (1987), 11; see also *British Yearbook of International Law* 58, (1987), 592. On the progressive expansion of the jurisdiction of coastal States, refer to G. Cataldi, *Il passaggio delle navi straniere nel mare territoriale*, Milano, (1990), 1, and authors cited therein.

[23] The text of this Order is reproduced in *United Nations Legislative Series, Ser.B/15*, 129. For the baselines introduced by this measure, see the map published in Scovazzi, Francalanci, Romano, and Mongardini (eds.), *Atlas of the Straight Baselines*[2], Milano, (1989), 229. On British practice on this matter refer to Gioia, *Titoli storici e linee di base del mare territoriale*, Padova, (1990), 151 ff.

from which are calculated the territorial waters and fishing zones -- of the so-called "low-tide elevations" found within the territorial waters, that is, of those natural land elevations that are surrounded by water at low tide and submerged during high tide.[24] Consequently, with the extension to twelve miles, new "elevations" have been included in the territorial waters and, in applying the Order of 1964, the baseline used to measure the territorial sea has been modified in some areas. This modification has resulted in significantly shifting towards the open sea the external limit of the territorial sea.

This action carried out by the United Kingdom is doubtless legitimate from the point of view of international law. The possibility of utilizing the low-tide elevations to draw the baseline of the territorial sea, already admitted by the International Court of Justice in its judgment of 18 December 1951 in the Fisheries Case between Great Britain and Norway,[25] is regulated both by the 1958 Convention on the Territorial Sea and Contiguous Zone, and by the 1982 United Nations Convention on the Law of the Sea,[26] and conforms to international practice.[27]

The problem that has arisen in the Community is due to the fact that Art. 6 of Regulation 170/83 cit., in allowing the Member States to extend derogation of the principle of equal access by fishermen of all the Member States to twelve miles from the coast, thus reserving fishing to the local fishermen, does not prejudice traditional fishing

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[24] For the definition of low-tide elevations refer to articles 11, No. 1, of the Geneva Convention of 1958 on Territorial Sea and Contiguous Zone, and 13, No. 1, of the United Nations Convention of 1982 on the Law of the Sea. On this point see G. Marston, "Low-tide Elevations and Straight Baselines," *British Yearbook of International Law* 46, 1972-73, 405ff.; T. Scovazzi, *Linee di base rette*, in Id., (ed.), *La linea di base del mare territoriale*, Milano, (1986), 140 ff.

[25] The judgement is published in International Court of Justice, *Reports*, cit., 1951, 115 ff.

[26] Art. 4, para. 3, of the 1985 Geneva Convention states as follows: "Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them." Art. 7, para. 4, of the Law of the Sea Convention is almost identical, except for the addition of a further exception, which admits the possibility of utilizing elevations even "in instances where the drawing of baselines to and from such elevations has received general international recognition."

[27] For references to legislation utilizing low-tide elevations, see T. Scovazzi, last work cited, 146 ff.

rights as defined in Annex 1 of said regulation, "fixing for each Member State the geographical zones within the coastal bands of other Member States where these activities are pursued and the species concerned." As for the coastal areas of the United Kingdom, Annex 1 refers to the area that extends between six and twelve miles from the coast, starting from the baselines of the territorial sea.

In notifying to the Commission and the other Member States the entering into force of the Act of 1987, the authorities of the United Kingdom maintained that the fishing zone included between six and twelve miles should have been measured according to the new baselines. The effect of this shift of other Member States' traditional fishing activities toward the open sea would have greatly affected these activities, as it would have meant their exclusion from zones particularly abounding in fish. In fact, it was not long before Belgium and France contested the issue.[28] These States, like the Commission, maintained that the zones mentioned in Annex 1 of Reg. 170/83 should be measured from the baselines existing on 25 January 1983, the date of adoption of the above regulation.

The Court of Justice, by its judgment of 9 July 1991, case C-146/89, condemned the United Kingdom for violation of EEC law, substantially upholding all the opinions maintained during the proceedings by the Commission and by France.

The Court rejected the principal argument of the United Kingdom. According to this State, the Act of 1987 could not be considered a unilateral modificatory act of Reg. 170/83 and therefore illegal, as it was in conformity with international law. The Court instead observed that the decision to utilize the faculties offered by international law to extend the effects of the new provisions to the delimitation of zones described in Annex I could be attributed only to British authorities, which consequently had unilaterally modified the scope of the provisions of Reg. 170/83.

The illegitimacy of the British position is evident both from the perspective of international law and of EEC law. It is especially beneficial to recall the principle expressed by the International Court of Justice in the already cited decision of 1951 on the Fisheries Case, where it is stated that

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[28]For Belgium's position on the issue see *Revue Belge de droit international* 22 (1989), 468. For information on French protests see A.V. Lowe, and C. Warbrick, "Current Legal Developments," *International and Comparative Law Quarterly* 37, (1988), 413 ff.

> 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 its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to the other States depends upon international law.[29]

Therefore the possibility granted by international law to extend a State's territorial sea must always be exercised in consideration of the interests of the other States. If this is true in general terms, it is even more so when there exists an agreement among EEC Member States on a common fisheries policy, as Reg. 170/83, unanimously adopted by the Council, may be defined. Applying the United Kingdom's new baselines would once more call into question the fishing rights established in the said regulation, denying this latter of a great part of its significance. This clearly cannot be permitted to any one individual State. To that end it would be necessary to have new negotiations with the participation of all the Member States. By this we certainly do not mean that the United Kingdom's twelve miles limit extension of its territorial sea is not valid, nor that new baselines cannot be drawn utilizing the partially emerging "elevations" existing within the twelve mile limit; but simply that this new regulation will not affect fishermen of other Member States by denying them the fishing rights granted by applicable EEC provisions. A different conclusion would also be in contrast with Art. 5 of the EEC Treaty, in the part stating that Member States "shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations ... resulting from actions taken by the institutions of the Community," and to the requirement that said States "shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty." Reference to the zone between six and twelve miles off the coast contained in Annex 1 to Reg. 170/83, in fact, can only be interpreted as attributing the fishing rights in question in a specifically delimited area.

Certainly, to avoid any possible challenge, it would have been preferable for the Council to have explicit reference, in these provisions, to the constant need to refer to the baselines in effect at the time of the adoption of Reg. 170/83. Nevertheless, as pointed out by the Court, this can be the sole interpretation, otherwise the regulation in question would not attain its objectives.

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[29] See International Court of Justice, *Reports*, 1951, 132.

The relevance of other Member States' practice in matter of modification of baselines

In order to affirm the legitimacy, in the light of the EEC law, of the modification proposed for the exercise of the traditional fishing rights of the other Member States in its waters, the United Kingdom also referred to precedents established by the variations in the layout of the baselines that occurred over the last few years due to the internal provisions of the Member States, provisions that have influenced the fisheries issue.

The argument is ineffectual due to the basic principle that execution of Community obligations cannot be conditioned by reciprocity, that is by these obligations being respected by other Member States.[30] The Court of Justice confirmed the said principle. Anyway, in order to oppose the British argument, the Court referred also to Belgium's *arreté royal* of 28 January 1988, in which the coastal waters of Belgium are defined as the maritime waters extending up to twelve miles from the baselines from which the territorial sea was measured "at the time the Community regime for the conservation and management of fishing resources was realized."[31] This scrupulous observance of EEC law by Belgian authorities should not, however, mislead us: the differences concerning access by fishermen of other EEC States are really of little account, whether adopting baselines existing in 1983 or those provided by the 1987 extension of the Belgian territorial sea to twelve miles.[32] This can be deduced also from reading Annex 1 to Reg. 170/83. The reality is that, as was pointed out by the authorities of the United Kingdom during the proceedings, the *arreté* in question was issued after the onset of the dispute between Belgium and the United Kingdom with regard to the British measures, and therefore its formulation is a direct consequence of the said dispute.

More convincing still, with regard to the arguments that the United Kingdom has drawn from the practice of Member States regarding modification of baselines, are the statements of the Court regarding

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[30] On this principle see European Court of Justice, 26 February 1976, case 52/75, E.C. *Reports*, (1976), 284.

[31] See *Revue Belge de droit international* 22, (1989), 474.

[32] The *Loi fixant la largeur de la mer territoriale belge*, in effect since 1 November 1987, is published as an appendix to the article by E. Franckx, "Belgium extends its Territorial Sea up to 12 Nautical Miles," *ibid.* 20, (1987), 41.

the discretionary powers of the Commission's decision to utilize the proceeding outlined in Art. 169 of the EEC Treaty. In other words, the Commission has the right to evaluate the consequences, regarding their conformity to EEC law, of the modification of the baselines of the territorial sea, and can therefore autonomously decide to go before the Court of Justice in a case considered as a violation of EEC law, or abstain from this procedure in another case if it considers the modification as lacking any appreciable consequences on the fishing activities guaranteed by the EEC law.[33]

It should finally be pointed out that the position of the United Kingdom in the issue in question can be considered contrary to the already recalled general principles, frequently affirmed by the Community institutions, on the basis of which the limitations of the Common Fisheries Policy are to be interpreted restrictively.

Conclusions

It is now necessary to draw some general conclusions from the recent developments we have reviewed of the EEC Fisheries Policy.

First of all, it must be pointed out that once more violations of fishing regulations are to be attributed to legal measures issued by the United Kingdom, thus consolidating a quite long-standing practice.[34] If this is so, it must, however, be recognized that in the cases under review the authorities of the United Kingdom can use an important argument as a partial justification of their attitude. The argument is that Spain's membership in the Community has led to the transcending of the derogations to the free access principle provided for the United Kingdom by the basic regulations of the Common Fisheries Policy issued in 1983, derogations thanks to which the British fishing vessels could enjoy particularly favorable conditions in the exercise of fishing off their own coastlines. In fact, as compensation for their exclusion from the entire North Sea until 2002, Spanish fishermen have been granted some fishing rights in the coastal regions of France, Southern England, and northwest Great Britain, simultaneously to the detriment

[33] For a decision relevant to the "objective" nature of the proceeding ex art. 169, see the judgement of 21 March 1991, case C-209/89, not yet published.

[34] See, for example, European Court of Justice, 16 December 1981, case 269/80, E.C. *Reports*, (1981), 3079ff.; 5th May 1981, case 804/79, *ibid.*, 1045 ff.; 10 July 1980, case 32/79, *ibid.* , (1980), 2403.

of the rights of the fishermen of these regions.[35] If to this we add the problems resulting from the practice of quota hopping by Spanish fishing vessels, the disagreeable situation in which the United Kingdom has found itself is even further clarified.

On the other hand Spain, the other Member State responsible for numerous violations of Community provisions on fishing, can justify its behavior as a consequence of the rules contained in the Act of Accession concerning fishing rights in the waters of other Member States, a regime which, due to its notable geographic and quantitative limitations, as well as the number of ships admitted under the system, approaches that which is normally attributed by the Community to third States.[36] In fact, as has already been noted, the rules are those approximately contained in the EEC-Spain agreement of 1980.

Of course, the Community provisions currently in effect have been approved by the EEC Council, and therefore with the agreement of competent authorities of all Member States. This means that the above-mentioned reasons do not negate the illegitimacy of the conduct of the United Kingdom and Spain as per the above cases; these justifications, however, do demonstrate the need to revise the Common Fisheries Policy, especially the rules for supervising compliance with regulations in force.

It is evident in fact that lack of control, or ineffective control, encourages fraud of the quota system, a significant example being the phenomenon of quota hopping.[37] But it is just as evident that often this lack of control, or ineffectual control, is not attributable to interpretative difficulties of EEC law nor to administrative negligence, but to the specific political will of national authorities. In other words, it is obvious that the very existence of such divergent national interests makes the success of a system of control to assure respect of Community policy in this sector entrusted not to Community institutions but to individual Member States, unrealistic.

However, the Member States do not for the moment seem willing to grant a direct power of surveillance to the Commission. The amendment -- made through Regulation No. 3483 of the Council of

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[35] On this point see G. Apollis, *L'Europe bleue élargie*, cit., 455.

[36] On this point see G. Apollis, *La reglementation des activities halieutiques*, cit., 845.

[37] For some recent considerations on the problems resulting from the inefficient operation of the quota system and controls see C. Goybet, "L'Europe bleu dans la tempête," *Revue du Marche Commun* 22, (1991), 165 ff.

7 November 1988[38] modifying Regulation No. 2241/87 -- against quota hopping, tends to try to remove controls from authorities of the landing States to the benefit of the flag State. The following has thus been established: the obligation of notifying, upon request of the interested Member State, the landings or transhipments effected in the ports or maritime waters of the State specified, by fishing vessels flying the flag of the requèsting State; the possibility of the flag State's instituting additional control measures towards those fishing vessels who have violated the pre-existing measures for control; the necessity of these latter fishing vessels to have specific documents certified by the flag State before being allowed to land or tranship catches subject to quotas in a Member State different from the State of registration; the penalty against State of landing or transhipment, consisting of counting the catches unloaded against the quota assigned to said State if it does not take penal or administrative action, nor transfer pursuit to the authorities of the flag State.[39]

The shortcomings of the above considered reforms, in our opinion, consist, however, in once again having to rely, for the effectiveness of the system installed, on a collaboration between the responsible authorities of the individual Member States, a collaboration which, as we can see even from the cases we have examined, does not seem very reliable. These difficulties seem to have been noted by the European Parliament, which, in the Resolution of 13 April 1989 "on monitoring the enforcement of the Common Fisheries Policy"[40] requested -- among other things -- that the Commission "amend Regulation (EEC) No. 2241/87 to make it possible for an inspection ship from one Member State to monitor its own fishermen in the zone of another Member State." At this time, more radical reforms do not seem possible; we do not believe that the Council will easily accept without significant modifications the proposals that the Commission will

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[38] See E.C.O.J. (1988), L 306, 2.

[39] The legitimacy of the restricting modifications to the system of control, modifications introduced with the adoption by the Council of Regulation 3483/88, has already been challenged before the EEC Court by Spain. The Court, by judgement passed on 27 March 1990, case C-9/89 (E.C. *Reports*, (1990), I, 1405 ff.), has nevertheless confirmed the validity of these provisions, emphasizing especially the "system of joint responsibility of the Member States" on the subject of control.

[40] See E.C.O.J. (1989), C 120, 239.

present in the next few months and that aim above all to strengthen the powers of the Community inspectors.[41]

In the area of fishing it would also undoubtedly be desirable to have more extensive initiatives dedicated to overcoming national particularities; even for fishing vessels, for example, we could consider the institution of an "EEC flag," currently the subject of a proposal by the Commission, with exclusive reference to merchant ships for maritime navigation.[42] The problem, however, as pointed out in a communication by the Commission on 19 July 1989,[43] is that the complete application of the principles of the Single European Market in the fishing sector would be perceived as an injustice by the coastal communities of fishermen, thus becoming the occasion for new tensions between Member States and the source of further violations of EEC law. In particular, a complete liberalization of the conduct of economic operators in the fishing sector, in accordance with the principles of the Treaty concerning the right of establishment and the free circulation of persons, goods, and services, does not seem to be consistent with the current and foreseeable state of the fishing resources in the Community and with the current level of restructuring of the fishing fleet.[44]

Thus, the conduct of the national authorities challenged by the Commission and condemned by the Court as being contrary to Community law is, for the most part, the result of contradictions inherent in the EEC law. Significantly, in the already noted Resolution of 1989, the European Parliament has invited the Commission

> to consider, with a view to 1992, whether the concept of national fisheries quota is compatible with the large internal European market,

emphasizing that

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[41] See "Report on monitoring implementation of the Common Fishery Policy," Doc. SEC. (92) 394 final, presented by the Commission, Brussels, 6 March 1992.

[42] See the modified proposal of EEC Regulation of the Council which institutes a community naval register and provides for the use of a community flag for ships in maritime navigation (E.C.O.J. 1992, C 19, 10).

[43] E.C.O.J. (1989), C 224, 3.

[44] *Ibid.*, 4.

fishermen are not the only ones who cheat and that in certain cases they are led into fraud because of inconsistencies between national fishing policies and the common fisheries policy and, at Community level, between structural policy and conservation policy."[45]

Only through significant financial effort, committed to the assumption, by the Community, of the economic burdens resulting from the different degrees of dependency on fishing activity of the coastal communities of the Member States, can we imagine the complete realization, in the short term, of the Common Fisheries Policy, and thus the elimination of the current contradictions with the principles of the Single European Market discussed.

No argument however, in our opinion, can justify the error made by the national authorities when, as happened in the cases examined, they use international law to support their non-compliance to the specific commitments -- which are likely to become even more cogent (refer to the Treaty on European Union signed in Maastricht on 7 February 1992) -- that Community membership implies, commitments that they themselves, obviously, have assumed. It would not be appropriate, in this paper, to dwell upon the instances of effective conflict between international law and EEC law, instances that, in fact, did not occur in the cases examined. What we want to highlight instead is that the reference to arguments drawn from international law by the Member States accused of violating EEC law recalls, in cases such as the ones discussed, an attitude that is often present in the sphere of State systems, when international law is used as an excuse by the national authorities for non-compliance with constitutionally sanctioned rights of individuals. This attitude, when carried over to the cases under review, and that is, to the internal commitments of the Community, implies little respect for Community law and scant consideration and maybe understanding of international law.

[45] E.C.O.J. C 120/89, cit., 241.

COMMENTARY

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I am concentrating on the papers of Dr. Fonseca Wollheim and Professor Cataldi, although I will also make some remarks concerning Dr. Pineschi's paper. I am interested in the conclusions that Dr. Fonseca Wollheim has been elaborating. I found his paper illuminating and at the same time slightly alarming. Yesterday Mr. Ferrari Bravo presented a paper on the future of the Law of the Sea Convention; he said that on the whole it was not really necessary for the member States of the Community to ratify the Convention, that it was all going to be implemented by state practice anyway and the problem of Part XI would be avoided in that particular manner. So perhaps a number of the points made by Dr. Wollheim are somewhat theoretical, at least in the short term. We simply do not know what the future is going to hold in this respect concerning the Community's participation in the Law of the Sea Convention.

Though I do not propose to go into the fine points of Community law or how the European Community might formally confirm its signature of the Convention, I am interested in Dr. Wollheim's brief reference to the procedure that would require Community members, or the majority of them, to ratify the Convention simultaneously, and to the complexities of that situation because it would be impossible for them to make reservations under Article 309. He did not explain clearly why he thought that was the situation or whether the views of Member States have been sought on this interpretation, which, as he says, was unimpeded. I would be interested to know his response and why he thinks, given the lack of definition of what constitutes a reservation under Article 309, a declaration under Article 310, the kind of declarations that have been made, and the possibilities for States to harmonize their laws with the Convention through the use of Article 310, that use of this alternative is completely ruled out for the Community States. This needs further discussion.

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*The views expressed are the personal views of the commentator and do not necessarily represent the views of the IMO or the IMO International Maritime Law Institute.

That said, I am somewhat concerned, as are states with broader interests than the purely "Communautaire," about the effect of what we have heard in Dr. Wollheim's paper on other parts of the Convention, i.e., other than Part XI on which not all member States had the same position. A number of obligations that the Convention lays down under other parts did reach consensus, and the signature of the Community to the Convention expresses support for those. There are obligations concerning fisheries: for example, that states maintain the maximum sustainable yield and even restore stocks to it, taking account of a wide variety of factors, and that they will promote optimum utilization, whatever "optimum" means in that context. In the case of pollution, a similar kind of commitment is required to preserve the marine environment, and now, in the context of UNCED, there is a need to ensure the "sustainable development" of the marine environment and of fisheries. We have not got much opportunity here, because the outcome of UNCED is so recent, to consider the impact of UNCED on future Community policies on the environment and fishing and so on, but undoubtedly, given the impact that the Stockholm Conference had on the Community, there must be a considerable feedback from the recent conference on these matters.

I will now turn to the fisheries issues and the cases to which Professor Cataldi has referred. I think we have here to consider why those two cases were brought by the United Kingdom, and I would point out that the Irish Republic also supported the United Kingdom in one of these cases (by intervention). The purpose of bringing these cases presumably was to illustrate and address certain real concerns of fishermen. Many, including some Community spokesmen, consider that the common fisheries policy has to some extent failed, particularly in meeting the kind of objectives I outlined earlier that the Law of the Sea Convention sets out. There has been overfishing; there has been failure of stocks; there have been particular acute problems in relation to herring, but not only with herring, and there is a concern amongst regional fishermen, not only in the United Kingdom but elsewhere, that their livelihood may be seriously affected. I shall come back to some of the problems about that later. I do not propose to enter into the argument concerning whether these cases were rightly or wrongly decided; there are others present more knowledgeable about the details of the judgments than I am. Rather, I want to point out that the result of those decisions is that the method of trying to resolve those problems unilaterally in one member State has been ruled out. But the decision does not remove the problem. The problem still has to be addressed. How does one have an effective Community

policy if the Community is not going to take effective action to prevent overfishing? There has to be some kind of new approach.

I have found a helpful paper by Daniel Vignes, in which he succinctly outlined the main elements of the Community's common fisheries policy. He drew attention to the fact that it consists of four aspects: technical measures; negotiations with Third States; monitoring; and structural and trade measures. Problems have arisen concerning all aspects. Technical measures are internal measures, mainly dealing with gear, areas of fishing, and so on. Recently, a problem that perhaps one might include under that aspect has arisen, namely the Community's new policy on discarding of fish that have been illegally caught. In the past, discarding of such fish has been required, in the interests of effective enforcement. It seems, however, that this requirement may soon be waived, and this has raised concern in some quarters.

Negotiation with third states is the external aspect of Community policy. We know from Dr. Wollheim's paper that the Community, in third party negotiations on fisheries, has full and exclusive power to represent its member States, but what are the respective rights of the Community and Third States in the border areas of national zones, i.e., fishing or exclusive economic zones, and the high seas? Recently there have been problems concerning these border areas in negotiating agreements; for example, Canadian fishermen from Northern Canada are currently very concerned about the alleged overfishing by the European Community, particularly by Spanish fishermen who have been driven out of distant water fishing grounds. The Community has to face the particular problem for Spain if the solution adopted is cessation of fishing on straddling stocks that traverse the border of the Canadian zone.

The third aspect of the Community fisheries policy is the monitoring of the effective operation of the policy. This has been done partly by national inspection within Community fishing zones and Community territorial waters, with a limited amount of international inspection, to which Dr. Cataldi referred at the end of his paper. He pointed out the difficulties that may arise if the Community tries to increase this form of inspection.

Another method that the Community has used, however, is to monitor landings in various landing ports. Up to now, the situation has been that fishing vessels operate from home ports and return with their catch there; catches can thus be monitored on a national basis. However, recent information suggests that because of the problems that Community fishermen are facing even in Community waters, they are having to fish further away from their home ports. The cost of fuel and other difficulties mean that they are not so anxious to return

to their home ports with the catch, and they are beginning to land their catch in ports closer to the fishing grounds. In the north of Scotland, for example, French fishermen are landing their catch in Kinloch-bervie and Invergordon. Perhaps a new Community approach is now required. There may have to be some kind of Community harmonization of monitoring of landings and harmonization of reportage. This seems to be the most effective method of implementation. In the future there may not be supervision by costly international inspection at sea as much as by checking landings throughout the Community. More thought will thus have to be given to how to take best advantage of this method.

Fourthly, the Community has structural policies and can take trade measures. Again, this seems to be the direction in which future Community policy will develop to prevent overfishing. All agree that there is overcapacity in Community fleets; this is what lies behind current problems and the legal arguments that have arisen. According to Daniel Vignes' paper, for example, obsolete equipment makes vessels uncompetitive. Fishing methods have changed; it is impossible to take advantage of technical progress without continuing to overfish unless the fleet catching capacity is reduced. As for trade, there is a common organization of the market in fish products, and there may thus be a possibility of controlling catches through development of EC policy on this. I am not going to discuss this because it is outside my scope as commentator on legal aspects. There appear to be various ways that trade control policies can be tinkered with to try to solve at least part of the problem, though basically the problem is more one of overcapacity of the fleets.

From 1992 the Community is required to produce a review of the Common Fisheries Policy. This will provide a major opportunity to deal with these kinds of problems. There is an obligation upon community member States to re-examine the policy and to try to solve the problem of the serious imbalance between resources of fish and capacity of the fleets. It is accepted generally that management and control have been poor. The Commission, fulfilling its obligation to review the policies, has produced a report, which it submitted at the end of December 1991 and which is now being examined within the Community. I have not yet had the opportunity to read this report, I regret to say, but such information as I have received suggests that the current thinking is that there should be better regulation of access to the resources through a stricter licensing system and a move away from the quota system that has caused these problems. The European Court, for example, in its decisions in the cases to which Professor Cataldi referred, did mention that one reason for the view they took

was that a carefully negotiated balance of interests was represented in the original regulations. This is something that now has to be achieved in other ways, namely a new negotiation of the balance of interests. The commission has also suggested that there may be more possibility of mechanically monitoring fishing vessels' activities rather than using coast guards, navies, or fishery commissioners to monitor fish catches; we might move to a system of "black boxes" as in trucks and airplanes. I am not sufficiently technologically knowledgeable in this field to know how that would work, but technical means of enforcement are certainly envisaged as well as various forms of Community sanctions and use of structural funds. What will be required if there is to be a licensing system that reduces the access of Community fleets to fishery resources is some kind of financial compensation to offset the losses caused by reduction in the numbers of vessels in the fishing fleets. Major policy changes will be required.

I would like to link what we have been discussing here today to an interesting session on fisheries that was held at the Law of the Sea Institute's Conference in Malmö last summer. There was much discussion of solutions that have been adopted elsewhere, of privatizing fishery allocation and enforcement by distributing back to fishermen the management of the licensing scheme. Maybe this is something that could be considered by the Community, in the context of the policy of subsidiarity that Professor Pineschi mentioned in relation to marine pollution. Subsidiarity requires that action be taken at the appropriate level -- that is, locally (or sometimes internationally) whenever possible, rather than being taken at the Community level. Community action is to be taken only when it is not appropriate to take action at the other levels. Perhaps this approach is one that can be envisaged in relation to fisheries also.

Lastly, I would like to mention two points that impinge on Dr. Pineschi's paper. There has been much concern that the effect of the adoption of common positions by the Community may undermine some of the aims of the 1982 UNCLOS with respect to pollution prevention from various sources, not just vessels. For example, studies have been conducted on the effect of the common position, or even the attempt at a common position, in pollution commissions such as, in the North Atlantic and North Sea region, the Paris Commission for land-based pollution. It is said by some commentators who have examined the records of this Commission that the European Commission's activities therein, i.e., its attempt to get a common position, is now made to the extent that, even if the Community is merely *trying* to get a common position in matters of mixed Community/Member

State competence, as in the case of pollution, though it has not actually achieved it, the member states cannot act unilaterally in these commissions. This is alleged to be inhibiting the Paris Commission's attempts to move forward. Whether this is correct or not I cannot say, not having conducted this research myself. I am merely reporting here the conclusions of some of those who have studied this Commission.

Interestingly also, and this is the last point I will make, linking the discussion to the other two papers, including Dr. Slot's, two years ago the UK House of Lords Select Committee on the European Communities examined Community shipping measures. They had occasion to look at the EUROS proposal and they made two remarks to which I would like to draw your attention. One was that international law requires a genuine link between a State and a ship flying its flag, as Dr. Cataldi has said; but the rule is not well observed in practice and flags of convenience have proliferated. The Community should not compound the mischief, in the view of this committee. It saw the proposed Community ship register as a new kind of flag of convenience based on financial attractions rather than legal responsibility for enforcing standards. It went on to say that it agreed with the European Commission's own recommendations, however, that member States should ratify international maritime conventions and should carry out the port state inspections required to implement them effectively. It recommended those ways of monitoring the Community's performance. We have seen the difficulties the Community had had in becoming itself a party to these kinds of arrangements, but nonetheless it has encouraged them. It is a matter of some concern, therefore, whether the Community, in developing this kind of register, would in fact be undermining the policy that it has adopted of encouraging ratification of international conventions and of better enforcement by Community Member States.

In conclusion, I would recall that some of the remarks I have made arise from remarks that Professor Cataldi himself made. I would in particular draw attention to his final remarks. He said that both the European Parliament and the Commission should consider, in relation to the changes to be brought about in the Community in 1992, whether the concept of national fish quotas was compatible with a large internal Community market. He also said that the justification for the UK-Spanish action did demonstrate the need to revise the Common Fisheries Policy, especially the rules for supervising compliance. On these questions we are in agreement, but we still have to consider where this takes the Community now.

COMMENTARY

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On the Paper of Piet Jan Slot

The paper by Professor Slot does much to clarify interpretation of regulation 4056 and other rules that go towards an EC shipping policy. There has been uncertainty in many areas about precisely how the commission interprets some aspects of these regulations.

This commentary will not focus on the legal aspects as such; it will deal with some of the matters raised from the points of view of equity and politics and will comment on how successful the measures detailed by Professor Slot have been in eliminating unfair competition and retaining ships under EC flags.

The author points out that the impetus to the development and implementation of an EC shipping policy has come about primarily during a period of marked decline in the numbers of ships flying EC Member State flags. The principle being applied in this EC policy is that of "free trade." This applies within the Community, including the phasing out of reservations of cabotage on the coasts of Member States, and particularly in relation to the freedom of seaborne trade and shipping services betweens the Community and other countries. The basic tenets of the policy include action against cargo reservation, freedom to provide services, action against predatory pricing, and application of EC competition rules.

At the start of policy formulation on the basis of market forces, the Community was faced with the existence of closed conferences, which, with the strict application of the EC pro-competition rules, would not have been tolerated. As the author shows, conferences have been exempted as a block from the application of these rules. This has been done on the basis that conference liner shipping is operating in a contestable market, and also in the spirit of the UN code of conduct for liner conferences, as modified by the Brussels package.

In the discussion of the competition aspects of EC shipping policy, the author makes the point that "the interests of shipowners and shippers are often closely connected." This has not always been the case. During the 1970s the legislation that was then being drafted to exempt conferences from the competition articles of the Treaty of Rome was dominated by the views of the Community shipowners. Shippers were much less active and organized at that time. What

emerged as a result was not a shipping policy as such but a shipping company policy. There are still different perceptions of the EC rules by some shippers as well as by overseas countries. What shipowners see as rules to curtail unfair pricing, shippers perceive as anti-competition. Many cargo shippers want a free choice of flag to obtain lowest freight rates. Some, of course, are willing to pay high rates for regularity of conference services in the liner trade, but others who are marketing certain types of commodities are more inclined towards lower rates rather than a high frequency of shipping and will favor non-conference vessels. The action by the Community against foreign shipping companies that engage in "unfair pricing" will, in the views of some EC shippers, result in these independents raising their rates to avoid prosecution and thus remove this choice and give the opportunity to the conferences to raise their rates if they can.

In many ways the shipping policy of the EC does not correspond to the reality of the situation in international shipping. It seems to be driven by the need simply to protect shipping and to bring vessels back to the national flags of the Community. These aims promote employment of seafarers and possibly safety at sea, but they may not be in the interest of EC shippers who consider shipping as the servant of trade.

Another concern related to the principles of the emerging EC shipping policy is the action against overseas countries based on an anti-protectionist, anti-subsidy, and pro-competitive stance. The Community will take action against governments and organizations that engage in "unfair competition." Many developing countries, in particular, find this attitude highly inconsistent when they compare it with the EC policy in matters other than shipping. The Community supports farmers with subsidies, and this reduces the prices of EC primary product exports in ways that damage producers overseas and burden EC taxpayers. The Community also protects some manufacturing industries by tariffs against the import of cheaper goods from overseas.

The result of sectoral EC policy is that, on the one hand, the EC has adopted punitive measures against protectionism and subsidies on the part of emerging shipping lines in developing countries on the basis of free trade arguments; and on the other it protects farmers and manufacturers in the EC, using the same devices that they are prepared to fight in shipping.

The EC shipping policy based on free trade is thus in conflict with the interests of some shippers, and it appears inconsistent and hypocritical to some of the developing countries in view of the highly protectionist nature of the EC in other respects.

The objectives of the EC are clear enough, but the methods are full of conflict and uncertainty. It is a desirable aim to retain EC merchant fleets that are able to operate competitively in an international market free of subsidies and cargo preferences. However, considering the varied overt and hidden ways by which national fleets are supported by governments, the methods adopted by the Community are not likely to be very effective. Furthermore, even within the EC various forms of subsidies are given, as well as fiscal support systems to national ships, and some bilateral and other cargo reservation methods are practiced.

Since the elimination of unfair competition seems unlikely through the retaliation measures of current EC shipping policy, and this policy appears hypocritical in the light of EC subsidization in other sectors, a new approach needs to be considered. The EUROS flag with its Community-wide tax support system and other measures is possibly the only real option to that of flagging out.

On the Paper of Laura Pineschi

This commentary on the paper of Laura Pineschi is to some extent a continuation of the previous topic. There are, of course, many forms of unfair competition and many methods of government support for shipping. For example, an "offshore registry" supported by the legislation of an EC country can allow seafarers freedom from income tax. This means that the shipowner can pay wages net of tax and pocket what would have otherwise gone to the treasury. This is a subsidy by government as tax income foregone. It can be very difficult to build cases on what are and are not subsidies.

A much more important area to be rigorously tackled is competition that reduces costs to shipowners through the use of substandard vessels and that gives ports extra trade where these vessels are tolerated. It is in this area that the thrust of unfair competition legislation should be strengthened. The offense is more transparent and action is more politically and ethically supportable. It would therefore be much more advantageous to put additional effort into curtailing unfair competition by penalizing vessels that do not conform to IMO and ILO conventions than to try and show that one way or another ships are subsidized and are thereby causing injury to EC shipping.

The author describes very well some of the difficulties in relation to Community action on unsafe ships and pollution. The general policy of the EC is to get Member States to support the international

measures at IMO. At the same time, there are provisions on safety that, it can be argued, are attained better at Community levels.

It is certainly important that all Community ships and ports act in a uniform way in relation to safety regulations; otherwise competitive advantages can be obtained by those member countries where there is less diligence. Port state control is a case in point. In northwestern Europe, Belgian ports have the highest record of detentions of sub-standard ships under this legislation. This can be explained only through the assumption that other ports are not applying, or cannot apply, the required standards. A marginally less seaworthy ship could therefore go to places other than Belgium, and really bad ships may avoid all northwestern European ports altogether and trade to Spain or the Mediterranean countries where there are fewer inspectors and lower penalties. There is a case for the application of port state jurisdiction over the whole of the EC and for the monitoring of national enforcement of port state control by an EC safety body.

The author is justified in contending that the EC as a whole has not in fact lived up to all intentions in ship safety. If, for example, the intention of Directive 79/115 referred to by the author was that certain vessels have to obtain deep sea pilots before passing through the Strait of Dover, then this certainly has not been implemented. The Strait of Dover is a high ship density area of very complex shipping mix and movements. There is little sea room for deep draughted vessels and a prevalence of fog; yet a ship inadequately manned, carrying a dangerous cargo, with a captain who has never been in the region before, can traverse the area with impunity regardless of the EC Directive. It is not clear either what qualifications and training a deep sea pilot should have under this provision. An EC Channel/North Sea pilotage qualification may also be a requirement.

A major problem in the EC in marine safety is clearly the appropriate divisions between national, regional (EC), and international (especially IMO) regulations and actions. The author in this respect concludes that in terms of world level provisions "the Community cannot take the place of its Member States." There is nevertheless some thinking toward an EC-wide safety body that can at least monitor the quality of national enforcement of EC and internationally agreed and accepted safety measures. It has also become apparent that the EC as a body is prepared to move ahead of IMO in time through the introduction of EC mandatory measures that are acceptable to the Maritime Safety Committee of IMO. The requirements for the improvements in the survivability of RoRo passenger ships is a case in point.

DISCUSSION

Alfred Soons: Now the floor is open for discussion. We will have comments and questions from five or six persons from the floor, and then the panelists will have an opportunity to react.

Rainer Lagoni: I have two short points and a question. The first point refers to the European Community and environmental matters. It seems to me that one should perhaps not give too much weight to the resolutions of the European Parliament in this respect, because we all know that the Parliament has no real powers. Instead, one should look more to the broad issue of pollution from land-based sources. There is a genuine competence of the European Council, and there are already a number of directives and regulations with regard to water quality, etc.

The second point refers to the EEC competence to regulate the freedom of services under Article 84 (2) of the EEC treaty. In 1986, the Council issued regulations 4055 to 4058. Under the heading of free access to cargo, some of these rules contain in fact rules of general international law. Regulation 4055 of 1986 guarantees access to cargo and consequently it also grants access to ports for ships. In addition, it guarantees equal treatment -- national treatment -- within ports for the ships concerned. These regional guarantees go beyond the standard of international law, because the 1923 Barcelona Convention and Statute of Ports grants only non-discrimination between foreign ships, whereas Regulation 4055 grants national treatment for ships of EEC Members.

My question relates to EUROS, the EEC shipping registry. The German secondary register is not a register in the proper sense, because it presupposes that the respective ship is already registered under the German flag before it may be registered in the secondary register. The purpose of this secondary register, as it has been said by Professor Slot, is to open the opportunity to employ foreign seafarers from outside the EEC under payment conditions of their home state. My question is directed to Dr. Fonseca Wollheim or to Professor Slot: What will be the relationship between the EUROS register and the existing registers? I have always assumed that EUROS is only an additional register and that the ships concerned have to remain in their national register. Accordingly, they will fly their national flag and additionally they may fly the blue flag with the golden stars of the EEC.

Friedrich Wieland: First of all, I want to say that I am not representing the Community in this forum; I'm here on a purely personal basis. I would like to make a few comments on the common fisheries policy issue. As has been pointed out correctly, the basic problem of the common fisheries policy is the discrepancy between overcapacity in the fleets and the available fishing possibilities. In that context, the quota system has been established as a temporary regime *faute de mieux*. The main problem lies in the fundamental principles of the treaty as enshrined, for instance, in Article 52, the right of establishment. It is out of the question that the fisheries sector be exempted from the scope of application of these provisions, because they apply directly in the territories forming the Community. That was the big problem of the Factortame case. The outcome was not astonishing because it clearly confirmed the direct applicability of these provisions. In terms of international law, the solution found by the Court seems to be correct because the provisions of the Treaty of Rome constitute *lex specialis* for the intercourse of the Member States with each other. Therefore, in the intercourse between Member States these provisions prevail. I am also grateful to Professor Cataldi for having pointed out the problem of control. That was one of the other issues in the Factortame issue. It was amazing to see a member state adopting a legislation that, as just has been confirmed, was not compatible with the fundamental principles of the treaty. The member state concerned enacted that legislation without trying to solve the problem by other means. It was astonishing to see, for instance, that although the so-called quota hoppers -- certainly a number of them -- failed to comply with EC fisheries rules, such as reporting catches on a regular basis, Member States did not take action against them and continued to grant licenses to these very vessels. That is the factual background of the Factortame litigation.

The Factortame case will affect the legislation of Member States concerning merchant ships. It may result in the abolition of national report requirements contained in these legislations, and it may also have repercussions on the legislation concerning airlines, which contains similar provisions.

The second comment relates to the so-called Baselines case. I want to call it that; it is a key word. The question at issue in that case was whether the reference in the regulation under examination was to baselines established according to international law. The Court ruled that, in that particular case where the regulation at issue established a special regime safeguarding certain historical rights for fishermen of other Member States, the reference was to historical baselines as they

were encountered at a certain period. It is interesting to note in that context that there are other Community regulations, for instance the regulation laying down technical measures for the conservation of fisheries, that contain a reference to baselines to define the scope of application of that legislation. There it is clear that the reference is to baselines established according to international law and to baselines which may shift in the course of time according to the principles of international law.

Thirdly, I would like to ask Mr. Cataldi a question on the problem of reflagging to flags of convenience, which is going to occupy us for a certain time and which has also been raised in the context of UNCED. There a possible solution has been contemplated in which the state of origin could take measures under its personal jurisdiction to prohibit, for instance, employment on these vessels of its own nationals. What would be the solution to an eventual conflict between the jurisdiction of the flag state, notably on the high seas, and a personal jurisdiction approach of that kind?

Giorgio Bosco: Dr. Fonseca, you speak of the profound misconception of the fundamental principles governing the decision-making procedures of the Community. In 1985 I was chairman of the Italian delegation at the Vienna Conference for the Protection of the Ozone Layer, which was concluded by the opening to signature of the Convention. I had to sign the Convention twice, for Italy and for the European Community, because at that time Italy had the chairmanship of the Community. But this was the final result; before arriving at it, we had to overcome serious difficulties. We had no problems among ourselves; we worked together with the representative of the Commission. The difficulties came from third states, especially the United States and the Soviet Union; we had to have several meetings with them to explain very patiently what our objectives and our positions were, and eventually we found a formula that permitted the Community to sign the Convention.

Since 1985, I have been studying other problems, so my question is this: in the last seven years, are the problems and the difficulties still the same, or has there been some improvement? In your paper, Dr. da Fonseca, you have put the accent more on the problems that arise among the EC Member States themselves than on the problems that arise vis-a-vis third states.

Louis Sohn: I want to speak about an issue that was raised in several papers, namely, rules relating to safety of ships and the attempt by

European states, not just Community but a much broader group including even the Scandinavian countries -- the Council of Europe, perhaps -- to adopt the Convention on Inspection in Ports. Mr. Couper mentioned the question of unfairness arising under the Convention. I would like to point out that there was also the question of discrimination among ships not coming from European countries. At least that was an allegation that was brought to UNCTAD, and UNCTAD appointed a commission to investigate it. The commission finally presented the report, in which it was not really proven that there was great discrimination, but perhaps there was some. At the same time the issue came out that some of the European ships were very old and therefore benefitted from the so-called 'grandfather' clause, while the ships in the developing countries were newer and therefore better and should not have been inspected as much as the others, which were much more dangerous. So here is raised a much broader issue, which only incidentally has been mentioned in our discussions here, namely, there is another layer of maritime regulations. In fact, the Registration Convention came out of UNCTAD, too. Like IMO, UNCTAD is a global institution, and its shipping commission is very active, especially on issues of ports. They have issued quite a number of reports -- not necessarily regulations; they don't have that power -- but at least guidelines and suggestions for improving the management of ports, etc. So we have to remember, and perhaps it might be a good subject for a future conference, that there is also the UNCTAD layer. We ought to know much more about UNCTAD and the law of the sea.

Barbara Kwiatkowska: I would like to ask Mr. da Fonseca Wollheim a question about the most controversial practice of the EEC in its external fisheries policy, that is, in the Northwest Atlantic Fisheries Organization (NAFO). As we all know, there would probably be no issue of straddling stocks, which is at the center of debates in the United Nations, UNCED, and wherever else, if there were no conflict between the EEC and Canada, in particular the EEC's notorious non-observance of quotas established by NAFO. It is also common knowledge that not many EEC states are involved and that it is mainly Spain, which apparently cannot get sufficient access internally to the EEC waters within the Common Fisheries Policy and therefore is seeking to accommodate its interests outside in the area regulated by NAFO. This is clearly the problem of Spain and also Portugal, because the issue first arose at the last meeting of NAFO in 1985, before their accession to the EEC, and has continued for almost seven years. Perhaps the solution to this urgent regional problem lies in reconsider-

ation of the EEC fisheries conditions. When these two countries acceded to the EEC, the Act of Accession of 1986 contained some fifty pages of fisheries provisions on how to accommodate Spain and Portugal within the EEC Common Fisheries Policy. Would there be any point in reconsidering the conditions on which Spain and Portugal have been accepted into the Community to resolve this question of external fishing rights? Off Namibia, the EEC is getting into a peculiar situation in which Spain is overfishing and causing trouble. What chance is there of solving these problems?

I would also like to ask Piet Jan Slot about the solution he mentioned relating to French shipping lines in West Africa. Is that solution acceptable to the Organization of African Unity and to the regional conference of West African states on maritime transport? In the context of the second part of the Review Conference on the Code of Conduct for Liner Conferences, what prospects exist for proper agreement between the Organization of African Unity and the EEC on the issues of revision of the Code of Conduct?

David Anderson: The discussion this morning has proceeded on different levels. I would like to comment on several of them. First of all, as regards the Community's position towards Part XI and the consultations, I agree very much with the comments of Herman da Fonseca Wollheim about the value of the discussions that we have had in Lisbon about the outstanding issues. It was noticeable last week in the consultations that the Member States, practically all of whom attended now that it is open-ended, were the source of most of the ideas that were put forward. We didn't agree on common positions, of course, because these are informal consultations and it wouldn't be appropriate, but we did exchange ideas and we enriched each other's thinking on the issues. I wish others, particularly the United States, would put forward some ideas to join the ideas that Europeans are making in that forum.

Another theme we have pursued has to do with the observance of the law of the sea by the Community and its Member States. In the first instance, matters are within Community competence, for example, in fisheries. How do we ensure that the Common Fisheries Policy is kept compatible with the law of the sea? Professor Birnie mentioned an interesting aspect related to conservation that has just been picked up. At another level there are the moves that Professor Pineschi mentioned towards regulating at the Community level questions to do with navigation. I very much agree with her conclusion, and I think Professor Slot does, that the idea of subsidiarity

should be introduced. We should remain within the scope of IMO conventions because the Community has to be outward looking, and we have to accept that what we do must be compatible with the obligations of the Member States vis-a-vis third states. IMO has done valuable work, and we should encourage all the Member States to ratify the relevant IMO conventions. In that way we ensure harmonization of national legislation and avoid the danger of putting the Member States in the position of not being able to defend themselves from complaints by non-Member States.

I come now to the paper by Professor Cataldi, and perhaps at this point I should declare an interest, because I was in the courtroom in Luxembourg both for the Factortame case and for the Baselines case. I'm sorry to see that he thinks that we used international law as an excuse. I hope that I'll persuade him that perhaps there was another side to the story. First of all, as regards the quota-hopping case, I agree with the comments of Professor Birnie and Professor Couper that one has to look at the broader picture and the effect that this practice was having upon our fishing industry. What do national quotas mean under the Common Fisheries Policy if vessels can come onto our register for the sole purpose of catching part of the British quota and taking it back to another country, unbeknownst to the British authorities because we never saw these vessels? The point has been made from the floor that this was an amazing piece of legislation because we didn't try other means. We tried endlessly other means. How many times did we press the Commission to try to propose a solution? I don't know. We tried many times. We introduced licensing conditions, which were then attacked in Jaderow and Agegate. We did the best we could. Part of the problem was that we had no idea what individual vessels were catching because they never came to a British port; they landed in a Spanish port. There were even occasions when infraction proceedings were brought against us for exceeding our quotas. And why were the quotas exceeded? Because the captures were landed in Spain and we had no record, we had no knowledge of what was going on. And so we had no means of stopping vessels from exceeding our quotas.

The Baselines case was a different affair. When the United Kingdom decided to extend its territorial sea in 1987, we did a review of the effect for Baselines. We are blessed with a large number of low-tide elevations between three and twelve miles of our coast. These are the remnants of the foregone age before the sea level rose when we were physically attached to the rest of the Community, a situation that is going to be restored by the Channel tunnel. Now, I found that many of these features affected our baselines in the area where there were

reserved rights under Regulation 170 of 1983. And I also found on examination that these base points based on low tide elevations had varied between 1983 and 1987, that these variations had been publically noted and had been accepted. Some changes had moved the six-to-twelve mile belt out and some had moved it in, and all these changes, advantageous or disadvantageous, had been accepted. The next thing I found from the Lexis was that there were no less than eighty-six Community regulations that referred to the baselines of a member state. Upon review, they were very good conservation measures. For example, beam trawling is prohibited within twelve miles of the baselines of Member States. And so we were faced with a dilemma. Should we choose the date of adoption of each of these eighty-six regulations, or should we use the date of entry into force of our territorial sea extension and thereby have just one set of baselines for all purposes? We decided that we would have the latter situation. But we didn't start to arrest foreign vessels; we gave them warnings. And as soon as they objected, we had talks with the French government, we had talks with the Commission, and we did another thing. We suspended the operation of our new regulations; we didn't arrest anyone. The talks with the Commission resulted in the infraction proceedings, which were really a disguised form of friendly chase. We were quite happy to go, we suspended the application of our law, and indeed at the end of the proceedings the Court found that, yes, in eighty-five regulations, the baselines were ambulatory and that in this one particular case, Regulation 170, they were not ambulatory. The Court concluded by saying that the conduct of the United Kingdom in this case had been exemplary. And it refused to award costs -- each side had to pay its own costs. We have loyally carried out the decision of the case. It was really an advisory opinion on a question where honest lawyers can take two views. I hope I have said enough to persuade Professor Cataldi that we are not using international law as an excuse.

As regards the genuine link, the United Kingdom has been consistent. We supported it in 1958; I myself put forward the proposal in the Second Committee in 1974 which led to the adoption of Articles 91 and 92 in the new Convention of 1982, which tried to reaffirm the genuine link and to specify the obligations. Don't forget, the flag state has obligations and they are now in Article 92. During the Gulf conflict, it was the American government that put the Kuwaiti tankers on their register; we did not reregister. So we have been consistent in trying to uphold the genuine link.

I'd like to conclude with this thought. Flags of convenience have been tolerated in the shipping, in the cargo, in the tanker trades. In

fishing there is a different factor -- international agreements about conservation. Flags of convenience are pernicious in this field, and we are seeing the results, as Professor Kwiatkowska has said. Conservation has to be taken into account, and we must all await the outcome of the Poulsen case, as Professor Cataldi mentioned.

Edgar Gold: Professor Cataldi, just a comment. Professor Birnie, Professor Kwiatkowska, and Mr. Anderson have already referred to the problem of straddling stocks, but flag of convenience registration of fishing vessels is also practiced for another reason. We talk about quota-hopping, but here we also have jurisdiction-hopping, because a number of EEC Member States, particularly Spain, and other states that are also members of NAFO, are in fact reregistering ships, particularly under the flag of Panama, to operate in high seas areas immediately outside the 200-mile zone, the straddling stocks area, and are decimating the straddling stocks. The Canadian position at UNCED was that this is environmental piracy, which has led to the serious problems between Canada and the EEC that have been referred to. Recently, the Spanish announced that they would be withdrawing some of their vessels from these areas, but there is now a real fear that these vessels simply will be reflagged under other flags that are not subject to EEC or NAFO controls. So these are the pernicious problems Mr. Anderson just referred to.

But there is another problem, Professor Cataldi. Apparently these Panamanian flag ships and some Spanish flag ships are also landing and transshipping catches in Spanish Atlantic island ports, particularly in the Canary Islands, which are apparently exempted from the customary EEC quota checks on fish landed in the EEC. So flags of convenience, which in the fishing industry today are called 'flags of necessity' or 'open registry,' are really quite different and certainly much more pernicious than they have been in the shipping industry where controls are exercised. This particular trend is a very serious one, and I would certainly agree with the remarks just made by Mr. Anderson.

Alfred Soons: I would now like to give the members of the panel an opportunity to react to the comments and to answer the questions.

Hermann da Fonseca Wollheim: First, Professor Birnie asked several questions, one concerning simultaneous ratification. The problem is not so much the necessity of simultaneous ratification but that the Convention obliges the Community to have a majority of Member

States ratify the Convention before the Community as such can ratify. This obligation creates a problem, making it more difficult for Member States to ratify or to adhere to the Convention, but this is a rather theoretical problem because none of our Member States intends to ratify for the moment. Once the problems concerning Part XI are overcome, all of them will want to ratify, and therefore none of them will have to wait for a long time before they can do so.

Another point Professor Birnie mentioned was that the Community asked Member States to abstain on matters of concurrent competences if a common position could not be reached. It is extremely disagreeable for Member States to be in such a position that they can vote neither for nor against an issue because, as there is no position of the Community, they have to abstain. This is just exactly the reason why it is now, since we have established this principle, much easier to agree on common positions. Therefore, I think this is just a kind of educational effect, which help the Member States to agree faster than they could before.

Professor Bosco asked whether there are still problems concerning the EEC clauses in international treaties and whether we still have problems with third countries. He referred, for instance, to the fact that, at the moment of the negotiation of the Ozone Layer Convention some years ago, the United States and the Soviet Union were particularly hesitant to accept such a clause. The problem has not completely changed. We had less problems with the Soviet Union in the last years of its existence. We have had no occasion to verify whether the same would apply to the independent former republics. We have had contacts with another large ally on this matter, and our legal service has provided a kind of briefing for all officials of this country who may participate in negotiations of international treaties. This briefing instructed on how to react if the matter of an EEC clause comes up and explained that this country has very friendly relations to the EEC, that (to reveal even a little bit more which country it is) there is an Atlantic Declaration dealing with the relations between the two, and so on. We hope that in the future this briefing, which had been agreed between the legal services of both countries, will help to ease the problems.

Dr. Kwiatkowska asked two questions concerning the EEC fishery policy, and with your permission I would ask my colleague, Mr. Wieland, who is from the Directorate General of Fisheries of the European Community, to respond because he is a much better expert than I on these questions.

Several interventions concerned the relation between the Community and the global convention and so on. I think it would be a

misunderstanding to represent this as a case between regional and global cooperation. The European Community is not just a group in which a limited number of states cooperate; it intends to become an actor in the international field and therefore in negotiations on a global level. Our decision to do something does not mean that we want to replace the possibility of a global solution with a narrower regional solution but that either we want to influence the development of the regional solution or we want to implement the global solution that has already been found.

Piet Jan Slot: Let me start by saying that I was happy with the comments made by Alastair Couper. I largely agree with the glosses, the critical comments he made, particularly his point that in the early stages of the development of Community policy it was very much the shipowners who were calling the tune, and now increasingly it is the shippers and industry in general, I would like to add. He also made a relevant point about the threat of the Comecon, which I haven't dealt with in the paper because I hope it is largely a thing of the past. There have, of course, been a number of decisions, which are called the so-called monitoring system of the perceived Comecon threat.

Thank you, Professor Lagoni, for calling our attention to the access to ports in the regulation on the implementation of the principle of freedom to provide services. As for your question on the relation between the future EUROS register and the national register, I couldn't possibly tell you, because I think this is an area where the Community has not really developed its thinking. The Community is presently balancing between two extremes; on the one hand there are thoughts of developing a fully-fledged Community register eventually to supersede national registers. On the other hand, the proposal that is presently before us is nothing more than a book in which you can enter your ships and which, if adopted, would entitle the shipowners to cabotage rights. As you can see in this port and several other Mediterranean ports, cabotage is by no means a minimal shipping activity, but clearly it is not really the mainstream of international shipping.

The second advantage that EUROS was going to give the shipowner was the easy transfer of ships. I have never understood that that was such an important thing, and I think it was merely window-dressing. What we are expecting of the Commission is its clear choice of where the Community will go. The development of second registers will be decisive there.

One remark on Professor Sohn's comment on the Memorandum of Understanding. It is not a full-fledged treaty. Ask our former colleague Meijers on that.

I don't think it is quite the case that the ships that are being subjected to inspection in the Community are the newer ships of the developing nations rather than the older ships of the Community. I have understood that the problem is normally the other way around. And that is part of the criticism.

As for Barbara's question on the position of the West African shipowners' states and the position in the revision conference of the Code of Conduct, if you read very carefully the long but interesting decision of the European Commission, you will note first of all that the fines are high. Second, the fines are a lot lower than what was originally intended. The French shipowner has been acquired by the Bolleré Group, which flatly told the Commission it couldn't pay the fine. Then it started negotiating with the Commission -- a very interesting episode, promising all sorts of good things from the point of view of competition policy -- and got the fine reduced by a tremendous amount. It hasn't been revealed to us what the intended fine was, but I understand it was something in the neighborhood of the largest fine ever -- 75 million ecus. I mention this because it was absolutely blatant behavior by the French shipowner, excluding virtually all carriage by other lines, with the help of the African governments. They pretended that they were forced by the African governments, but there is ample evidence that it was really the other way around. So this case is extremely interesting in its intermingling of private business conduct and official government conduct. The general position in EEC competition law is that enterprises have a duty to compete within the freedom left to them, even if government measures restrict their commercial freedom. So that was easily dealt with. The EEC's overall position is that it will stick to the rules of the code but will object to any extension beyond the principles of the Code and their strict application. If you read the decision carefully, that transpires very clearly. That is also consistent with the position that the EEC Member States are taking in the revision conference of the Code whereby they are objecting to any extension of its principles, for example, to the bulk trade.

Let me finally add one thought on the subject of fisheries and the use of flags of convenience. Several speakers remarked that the use of flags of convenience vessels in the fishing sector is far more pernicious than in the shipping sector in general. If you look at the history of the shipping sector in general, efforts to prop up the genuine link have been absolutely hopeless. Several centuries of experience -- some

would point to the British use of Dutch flags in the seventeenth century -- have taught us so. What has been successful, and I take issue there again with Louis Sohn, is the implementation of the Memorandum of Understanding. Couldn't there be something like a no-more-favorable clause in future fisheries treaties to enable those countries that are interested in enforcing international supervision of fisheries stocks to take enforcement measures?

Laura Pineschi: Thank you, Professor Lagoni, for your remark. This gives me the opportunity to clarify my position about the attitude of the European Parliament in the field of the prevention of marine pollution. I might have given the impression of overestimating the role of the European Parliament, but I am perfectly aware that it has no real decision-making powers. However, my intention was to stress the criticism that the European Parliament made towards other EEC institutions. The European Parliament is a political body elected by the citizens of the EEC Member States. In my opinion, it has been the sounding board for public opinion once a disaster has happened. Leaving aside any questions on competence, I concur with the positions taken by the European Parliament.

Giuseppe Cataldi: Beginning with the question of registration of ships, I think I have tried to tell both sides of this story, namely from the point of view of the EC and from the point of view of the two states involved. There is no doubt that the practice of quota-hopping by Spain is a practice quite illegitimate, and, what is more, it is supported by Spanish authorities, as is shown by the lack of any control on their part, and certainly this is not due to any difficulty in analyzing EC law. That's the reason why, in my speech, I made a reference to the judgement of 25 July 1991, in case C-258/89, which is not commented upon in my paper, a case in which Spain was condemned by the EC Court of Justice for lack of control of catches made beyond European waters. This case and the Factortame case are clearly connected; it is the same problem, of course. What I hope is that, as a consequence of these cases, the EEC institutions will finally accept the burden of solving these problems. As someone else has said, the question is the need to review the EEC fisheries policy, mainly through the financial accommodations to which Professor Birnie referred before.

On the question of flags of convenience, I'm aware of the particular problems that they raise in the field of fisheries, and I agree with what has been said on the subject. I only wanted to stress that against this practice the correct reaction in the relationship between

EC Member States is not a unilateral modification of legislation that is not in accordance with EC principles. Of course, in the case of Ireland and the United Kingdom, to a certain measure they were compelled to enact these provisions, due to the lack of intervention from EEC institutions in this issue.

Concerning the question of the implications of reflagging to flags of convenience on the problems of concurrence of jurisdiction, international practice now suggests without a doubt that states have to respect the law of the flag, whatever it is. Problems of research on the genuine link concern the field of private international law, from the point of view of trying to apply provisions that are more favorable to national workers on board, for example. I don't think that the question of reflagging can change, can complicate this research by national judges. Anyway, this is a very important problem, which is worthy of much more than the few words I can spend now.

On the Baselines case, we must not forget that the area from six to twelve miles was chosen in the specific case, namely in the 1983 Regulation, because of the richness of fish in the area. It is a specified area. The mistake made by the EEC Council was to fail to refer to this area through geographic coordinates. That's the problem, but I think that Member States acting bona fide can and have to know, they are supposed to know, that the area in question was chosen as a specified area. That's why I think that it was not possible to rely on the fact that many other regulations refer to the territorial sea and to baselines as fixed by each member state. That's all.

Patricia Birnie: One point for Louis Sohn on the Memorandum of Understanding on Port State Control. As I understand it, the developing countries, insofar as their flags are the subject of inspection, suffer from buying old ships rather than new ones. And the second point is that once your ship, if it passes inspection, has received clearance, it is not inspected again for another six months. There's some discussion at the moment about whether that period should be extended so that if you're cleared, you're cleared for perhaps a year, which perhaps will meet some of the difficulties.

The second factual point fits in with the points I was making about the conformity of European Community policy on fisheries with the 1982 UNCLOS, and that is to note that recently it was decided by the Commission and the ICES (the International Council on the Exploration of the Sea) that the ICES Fishery Commission, the AFTCM, would no longer be asked to provide advice on precise quotas or the range of quotas. They would provide the review of the stocks and

consider the implications of this, but it would be left entirely to the Commission to determine the range of quotas.

Friedrich Wieland: As to the problem concerning NAFO, Canada claims that the whole stock -- including the part of the stock that is found in the area adjacent to its exclusive zone -- has to be reserved for Canadian fishermen. Therefore Canada is trying to impose, in the context of NAFO, a moratorium in the area outside the exclusive zone while it continues to allocate fishing facilities inside its zone. That raises the problem of consistency between the measures applied inside and outside the exclusive zone.

Bernard Oxman: There have been references to problems that have arisen in connection with the negotiation of Community clauses in multilateral treaties. I was responsible in the United States delegation for the negotiation of the Community clause in the Convention on the Law of the Sea, which was not an easy process. I gather that analagous difficulties have arisen in connection with Community clauses in other treaties. I think it is useful here in a member state of the Community to make a comment on the question from the outside. There is little doubt that the Member States and the Commission and those concerned have to deal with complex questions of Community law in formulating their own position on Community clauses in treaties: where they are appropriate, what they should say, and so on. When the Community position is presented to the rest of the world, the rest of the world seems to encounter difficulties in dealing with the Community and the Member States that are different from those encountered in dealing with matters of substance. They seem to be worse.

In all negotiations you have to try and see the issue not only in terms of the internal but of the external complexities. For example, the United States felt very strongly at the time that no reservations should be permitted to the Convention on the Law of the Sea. The United States felt that the Community clause would in fact create a system in which one could become a party to part of the Convention and not the rest of it. That analysis may have been wrong, but it certainly raises a profound issue in the context of a negotiation of a treaty only some of whose provisions were within Community competence. That is an extremely difficult problem to deal with. The developing countries were concerned about the problem of voting. I don't know that I personally agree with them; if you are going to have a forum with 100 votes, I'm not sure it matters that you have 101 votes, but nevertheless they were concerned about that question as

well. In Community clauses, as in everything else in diplomacy, it is very important to step back and try to see the issue as others see it in terms of the effect on them.

Francisco Orrego Vicuna: Two short questions for Mr. Fonseca or Mr. Wieland. The first one relates to the policy of the EEC, which I understand is actively pursuing a policy of joint ventures in order to gain access to the exclusive economic zones of various developing countries. Is the intention of that policy to gain access to the surplus of those fisheries before the Convention enters into force sometime in the near future?

The second question is a follow-up to Dr. Birnie's: to what extent would the European Community be prepared to introduce privatization measures into its fisheries policy -- individual tranferable quotas or effort quotas or other mechanisms -- instead of the more highly interventionist policies that have been pursued until now and which, as we have heard, have not been entirely successful because of the problems this panel has mentioned?

Louis Sohn: Everyone knows that statistics are very dangerous; in the case of the Memorandum of Understanding, at the point the developing countries complained to UNCTAD that they were being discriminated against, the statistics were actually showing that proportionally more ships from the developing countries were being inspected than those coming from developed countries. From the point when the secretariat had looked at the statistics to the point the report was made, the statistics changed and were much more favorable to the developing countries. There was no longer such great discrimination. But my point was that, in such cases, it is very important to avoid discrimination. This is another factor that should be taken into account rather than simply to determine whether there is unfair state practice or not. As far as shipping is concerned, there are really two different problems. One is the character of the vessel itself, which is something that is being inspected in European ports, and the other one is the qualifications of the crew, especially the nationality of the crew, and so on. On that one, mostly it's a problem of labor unions. Companies run away from countries, including especially the United States, that have raised strong labor unions. As a result, many very good ships are being registered under flags of convenience. That again changes the statistics considerably. Maybe I overstated the problem in one way, but I think Mr. Slot probably overstated it the other way. It depends

on which part of the statistic you look at and what factors you consider.

Hermann da Fonseca Wollheim: As far as fisheries are concerned, I think Professor Orrego Vicuna has already guessed that I'd like to leave this answer to my colleague Mr. Wieland.

I would like to address a question to Professor Cataldi concerning the problem of vessels flying the flag of convenience of a state that was not party to a regional fisheries convention. Would it be possible to prohibit through national penal law the nationals of a member state from working on a vessel of a third state that did not respect the quota to which the Community has agreed? On the national level, we have cases of this type. For instance, as far as I know there is an Asian law that provides penal sanctions against Asian nationals working in companies of third states participating in the exploitation of the mineral resources of Antarctica. Or there is a German law not allowing its nationals in third countries to participate and work on mass destruction. So there are such cases, but here the situation is a little bit more difficult, because the sanction against the flag state or the link to the flag state would be more direct than in the case of, let's say, a company in the third state trying to exploit mineral resources in Antarctica.

Then to the remark of Professor Oxman. Of course, we understand that our position also has to be seen through the eyes of external observers, but we are a community on the way to something that is not yet clearly defined -- even less so after the Danish referendum -- but to a greater degree of unity than we have today. In the end, it will be clearer for those on the inside and on the outside to see where the different competences are, who is bound by what, and so on. But if you agree that such an entity is developing in the world, you must also agree that in the meantime one has to accept that the situation is sometimes unclear. I think the cases I have cited show that in the end there is no danger for third countries.

Friedrich Wieland: To answer Professor Orrego, joint ventures are considered as a possible means for concluding agreements with third states, agreements that eventually grant access to the waters of these countries.

On privatization in the fisheries policy -- I'm afraid I can't answer the question because the instruments are under consideration.

Piet Jan Slot: Just a very brief comment on the issue of the Memorandum of Understanding. There are clear indications that the ships of certain flags, countries like Cyprus, at a certain time were more prone to show substandard conditions, and that is what was taken into account by inspecting these ships under the Memorandum of Understanding. Mind you, the main objective of the Memorandum was to protect the environment rather than to secure equal conditions of competition, and in that I think it has been quite successful.

Giuseppe Cataldi: As far as I know, no general principles are raised on the issue of prohibiting nationals of a member state from working on vessels of a third state; the enforcement of this penal sanction is possible only as far as national legislation says something on point.

Alfred Soons: We have now come to the end of this session. I would like to thank the members of the audience who participated in the discussion, the four authors who paved the way for it with such excellent papers, and the two commentators.

BANQUET SPEECH

UNCLOS AND UNCED

Peter H. Sand
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Both UNCLOS (the Third United Nations Conference on the Law of the Sea, concluded at Montego Bay, Jamaica, in December 1982) and UNCED (The United Nations Conference on Environment and Development, concluded at Rio de Janeiro, Brazil, in June 1992) have set records in global conference diplomacy: UNCLOS as the longest, and UNCED as the largest UN conferences so far.

With more than 30,000 participants from 172 countries, including 103 Heads of State or Government, the Rio Conference may indeed be described as the "mother of all conferences" -- to paraphrase a contemporary strategist (who was not there). In terms of diplomatic history, the "Earth Summit" is comparable only to some major peace conferences in the past two centuries, the 1815 Vienna Congress and the 1919 Versailles Conference. That perspective -- the peace and security dimension -- is not so far-fetched; in his opening statement to the UNCED Preparatory Committee in March 1990, Maurice Strong pointed out that "in this case, the security of our planet and our species is at risk. Surely this must be seen as the ultimate security risk which calls for the ultimate security alliance." Or, as Lester Brown put it already fifteen years ago:

> The overwhelmingly military approach to national security is based on the assumption that the principal threat to security comes from other nations. But the threats to security may now arise less from the relationship of nation to nation and more from the relationship of man to nature.[1]

Environmental risks such as global warming and sea-level rise now threaten the survival of entire groups of countries with low coastlines. It was hardly surprising, therefore, to see the alliance of small island states emerge as a major lobbying group at UNCED and during the climate change negotiations. Ironically perhaps, ten years ago those very same countries were considered the major "winners" in the Law

[1]L. R. Brown, "Redefining National Security," Worldwatch Paper No. 14 (Worldwatch Institute, Washington, DC, 1977).

of the Sea negotiations, thanks to the expansion of their coastal jurisdiction. In a brutal reversal of fortunes, their national security and their very existence as States may now depend on collective action by the rest of the world to secure their survival, as illustrated by the dramatic appeals to the Earth Summit by the President of the Maldives and by the Heads of Government of several Pacific and Caribbean islands. To be sure, there are similar global threats to our future biological and chemical security, which the world community has only begun to address;[2] I have only singled out climatic security here because of its direct and indirect repercussions on the oceans regime.

In a very preliminary attempt at assessing the mutual impacts of UNCLOS and UNCED, I shall focus on three questions:

1. To what extent did UNCED benefit from the UNCLOS experience?
2. To what extent can UNCED be said to have learned from the drawbacks of UNCLOS? and
3. Is there a common denominator emerging from the UNCLOS and UNCED process in the field of international law and international relations?

I don't pretend to have definitive answers to these questions, and I am sure that each of you will have his own answers. But I hope that after listening to mine, you will at least agree that these questions were worth being asked.

To start with the benefits: how did the achievements and experience of UNCLOS contribute to UNCED? First of all, I must refer here to a personal factor that cannot be overestimated: the leadership of Ambassador Tommy Koh from Singapore, who served as chairman both during the conclusive part of the Law of the Sea Conference and throughout the sessions of the UNCED Preparatory Committee and the Main Committee at Rio de Janeiro. Those of you who came to know him at UNCLOS III won't need to be told about the UNCED negotiations -- Tommy repeated his masterly performance, and with his inimitable combination of good wits, personal charm, and determination of purpose once again gavelled his way through an impossible agenda until even the most obnoxious square brackets were eventually removed.

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[2]P. H. Sand, "International Law on the Agenda of the United Nations Conference on Environment and Development: Towards Global Environmental Security?", *Nordic Journal of International Law* vol. 60 (Copenhagen, 1991) pp. 5-18.

Without diminishing the merits of the last-minute ministerial sessions at Rio, where some of the final policy divergences had to be settled, it is no exaggeration to say that the success of the UNCED negotiations was to a very large extent due to the professional diplomatic skill of a unique chairman, who put his earlier UNCLOS experience to full advantage. In the course of the many accolades showered on him already at the final Preparatory Committee session in New York, one of his fellow diplomats said "Tommy, you have done us proud." I think all of us in the legal profession, and especially the distinguished club of maritime lawyers assembled here tonight, would join in that evaluation.

It is not surprising, therefore, to note close parallels in the procedural and structural aspects of UNCLOS and UNCED -- the methods of negotiation and drafting, moving from "non-papers" to "L. papers"; from "informal consultations" to "informal informals," resulting in heavily bracketed texts (at one point, I recall heated discussions over square brackets that contained nothing but a comma); and eventually evolving towards consensus texts and chairman's drafts that became the basis for final agreement.

Yet beyond these procedural parallels, I am not sure how comparable the *outcomes* really are. First of all, I don't think the package of instruments produced by the Rio de Janeiro Conference can be said to represent a new international "regime" in the sense in which the Montego Bay Conference, and the process leading up to it, produced a genuine global codification. The oceans regime that emerged from UNCLOS III may be defined as a self-contained new international order for the marine sector, allocating rights and responsibilities of States over the available ocean space and affirming a comprehensive resource-oriented approach that embraces all potential uses and users of the resource.

By contrast, UNCED clearly did not set out to codify, once and for all, a global regime for environment and development. Let us take the legal instruments emanating from Rio de Janeiro, one by one:

The United Nations Framework Convention on Climate Change (155 signatories at Rio) is not a "Convention on the Law of the Air", as some had pretended it should be, at least until the Ottawa meeting in 1989.[3] When you look at the 1992 text, you will note that (unlike UNCLOS) it does not even attempt to define or allocate sovereign rights over airspace -- a matter which has nourished endless legal

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[3]**Protection of the Atmosphere: Statement of the International Meeting of Legal and Policy Experts, Ottawa, February 1989.**

debates in the Outer Space committee of the United Nations, and which will continue to do so well into the twenty-first century. The mandate of the International Negotiating Committee was limited to the specific issue of global warming and to the specific uses and misuses of the atmosphere affecting this issue. The mandate did not extend to a global regime of the atmosphere.

Similarly, even a generous reading of the Convention on Biological Diversity (157 signatories) will not elevate it to a global regime for the Earth's living resources. The fundamental question of intellectual property rights (national or private) over fauna and flora was, at most, reserved for further negotiation; so was the responsibility for safety in biotechnology -- although even the prospect of international regulation in this field made at least one country hesitate to sign. The favorite compromise decision on this matter, as in a number of other areas at Rio, was postponement.

This is also true for the instrument on forests, which did not progress beyond the level of a "soft-law" statement of principles at this stage, in the face of solid resistance against a legally binding regime.

Last not least, there is the "Rio Declaration on Environment and Development," of which Maurice Strong said in his concluding statement:

> We have a profoundly important Declaration, but it must continue to evolve towards what many of us hope will be an Earth Charter that could be finally sanctioned on the 50th anniversary of the United Nations in 1995.

So did the Rio Conference come too early? Must we conclude that our time is simply not ripe for another great codification of international law -- echoing the verdict of 19th century jurists like Savigny who denied the "vocation of our age for legislation"[4]? In that case, the Law of the Sea Convention could have been the last major global regime emanating from our century, and we might have to await more auspicious times for law-making after the turn of the millennium.

I don't think there is reason to give up so easily. There are, however, good reasons to re-assess the merits of our methods of international law-making, or of "regime-building." It may well be that the technique of framework conventions supplemented by protocols

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[4]R. Pound, "Sources and Forms of Law," *Notre Dame Lawyer* vol. 22 (1946), p. 75, referring to F. K. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814).

is more appropriate to the field of environment and development than a rigid UNCLOS type of code. Admittedly, the process is open-ended (or rather loose-ended), with important parts of the decision-making postponed or delegated to the future. It does offer pragmatic advantages, though, which proved successful, e.g., in the ozone layer treaties; and it is worth remembering here that we first learned that technique from the law of the sea -- not UNCLOS, but the regional seas agreements starting with the Barcelona Convention and its protocols.

So much for institutional learning, and the strength of positive examples. Let me now turn to my other question: to what extent did UNCED learn from the weaknesses of UNCLOS?

The most obvious lesson, of course, concerns entry into force. We have had almost ten years' time to think about the slowness of the traditional process of treaty ratification to bring a global regime into effect; and while we are still waiting for the sixtieth shoe to drop and start UNCLOS, other international regimes have successfully bypassed this obstacle. Both the climate change convention and the biodiversity convention provide for interim activities (and more significantly, interim funding) starting immediately after signature, albeit on a voluntary basis; in the case of the climate convention, a whole "prompt start" program has been developed in order not to waste time where urgent action is needed and feasible prior to the formal entry into force of the treaty. It is no secret that in this instance the negative experience of the Law of the Sea Convention served as a warning light.

The second and most important lesson from the UNCLOS process was the need for a linkage between legal instruments and action programs to implement the agreed set of rules. The Law of the Sea Convention that was born at Montego Bay was an orphan unable to provide for its own subsistence until it would come of age and receive the income envisaged under Article 171. Under the circumstances, it was perhaps only logical that even the UN Secretariat unit in charge of UNCLOS follow-up all but lost its identity and in the new Secretary-General's first reorganization move in 1992 was absorbed by the UN Legal Office.

By contrast, the two conventions emerging from Rio de Janeiro come well-endowed with agreed action programs under UNCED's Agenda 21 and with interim funding ensured through the Global Environment Facility (GEF) jointly operated by the World Bank, UNDP, and UNEP. Once again, positive examples for this approach had already been set by the UNEP regional seas conventions, all of which are integral parts of regional action plans consisting of much

more than legal instruments, financed by special trust funds to ensure implementation. Not surprisingly, the debate over funding of Agenda 21 and over governance of the funding mechanism was one of the most difficult segments of the Rio Conference. Its successful outcome will make sure that the new infant treaties will not be relegated exclusively to the caring hands of lawyers.

Agenda 21 -- and especially the ocean-related part of the program, under chapter 17 -- should breathe new life into a number of UNCLOS chapters and articles. Take the problem of "straddling fish stocks" and highly migratory stocks under Articles 63 and 64: in a hard-fought last-minute agreement, the Rio Conference recommended to convene a UN-sponsored conference to promote effective implementation of the Law of the Sea Convention on this issue.

And there is a third feature where UNCED follow-up will differ from the UNCLOS mode. As you know, the Rio Conference reached agreement on the establishment of a new ECOSOC Commission on Sustainable Development, which will start operating in 1993. One of the functions of the new Commission will be to monitor the implementation of Agenda 21 as well as progress in the implementation of environmental conventions. Non-governmental organizations will have a major role to play in this context, especially the new "Earth Council" to be set up in Costa Rica. Chances are that this whole review mechanism will be more important in practice than the various judicial means and dispute settlement clauses found both in UNCLOS and in the two new conventions. This approach is also in line with the discussion on international legal instruments in Working Group III of the UNCED Preparatory Committee. The emphasis here clearly was on ways and means of making existing international law more effective,[5] including ways of improving the actual participation of developing countries both in the negotiation and in the governance of treaties.

Let me now turn to my last question: is there some kind of a common denominator in the UNCLOS and UNCED processes? Remember the two key concepts with which these two processes have widely been identified: the *common heritage* concept of UNCLOS, and the *sustainable development* concept of UNCED. "Sustainable development" actually was defined by the Brundtland Report as "development

[5]Summary report and background papers in P. H. Sand, ed., *The Effectiveness of International Environmental Agreements* (Cambridge: Grotius Publications, 1992).

that meets the needs of the present without compromising the ability of future generations to meet their own needs."[6]

Isn't it striking to see that both concepts focus on the relationship between generations? A relationship, I should add, that has largely been ignored by our existing body of international legal and international relations theory, but that seems to attract growing interest in the environmental context, where we have to deal with an intergenerational time-frame. You have all heard the quote, "We did not inherit the Earth from our parents; we have borrowed it from our children." The idea is variously cited as being either an African proverb or an Indian saying, and President Mitterand in his Rio Conference speech attributed it to Antoine de St. Exupéry. I can't tell who is right here, but I do know that the idea was first formulated in legal language more than one hundred years ago; there it reads as follows:

> Even society as a whole, a nation, or all existing societies put together, are not owners of the Earth. They are merely its occupants, its users; and like good caretakers, they must hand it down improved to subsequent generations.

Can you guess who the author was? Yes -- Karl Marx. Not a very popular author these days, I am afraid, but he did write this (*Das Kapital*, volume 3, chapter 46); and it reads surprisingly similar to the "public trust doctrine" developed by American environmental lawyers one hundred years later.

Perhaps our growing concern with future generations, in UNCLOS as well as in UNCED, has something to do with the fact that we are moving perilously close to the end of our century, to the end of our millennium, and that we are beginning to wonder what it is that *we* shall carry over to the next one. So let me finish with another quote, a more contemporary and more local one this time. When Italo Calvino, the Italian writer, was invited by Harvard University to give the Charles Elliot Norton Poetry Lectures in 1985, he decided to prepare what he called "six memos for the next millennium." The tragedy was that on the eve of his departure for America, Calvino died and the lectures were never given. They were, however, published posthumously in Italian, and my quote is from the first of his six

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[6]World Commission on Environment and Development, *Our Common Future* (Oxford and New York: Oxford University Press, 1987), p. 43.

memos, the one on *leggerezza* (lightness).[7] It is actually based on a mysterious short story by Franz Kafka, entitled "The Rider on the Bucket" (*Il Cavaliere del Secchio*; and the beauty of the Italian version has something to do with a play on words, a pun really, for in Italian the word for bucket (*secchio*) sounds almost like the word for century (*secolo*). In conclusion, therefore, allow me read just this one sentence from Italo Calvino:

> Così, a cavallo del nostro secchio, ci affacceremo al nuovo millenio, senza sperare di trovarvi nulla di più di quello che saremo capaci di portarvi.
>
> (And so, straddling our century, shall we face the new millennium without hoping to find there anything more than what we will be able to bring there.)

[7] I. Calvino, *Lezioni americane: sei proposte per il prossimo millennio* (E. Calvino, ed., Milano: Garzanti, 1988), p. 30.

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