### Oceans Law and Policy

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United States Responses to Excessive Maritime Claims

Second Edition

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and

ROBERT W. SMITH
CHAPTER 1

MAINTAINING FREEDOM OF THE SEAS

The oceans encompass more than 70 per cent of the surface of the globe. Prior to World War II, most of the oceans were free for use by all nations. Coastal states had sovereignty over only a narrow three mile\(^1\) territorial sea. However, since 1945 the trend has been clearly toward enclosing the oceans with ever broader coastal state claims of sovereignty or other competence to exclude other users of the oceans. This book chronicles the United States' continuing effort, principally in the years following adoption of the 1982 United Nations Convention on the Law of the Sea (LOS Convention),\(^2\) to maintain the freedom of the seas which is essential to its maritime commerce and national security.\(^3\)

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\(^1\) All miles in this study, unless otherwise noted, refer to nautical miles. One nautical mile equals 1,852 meters.

\(^2\) The LOS Convention, UN Doc. A/CONF.62/122 (1982), reprinted in 21 ILM 1261–1354 (1982), was concluded December 10, 1982, and entered into force on November 16, 1994 (one year following the deposit with the United Nations by Guyana of the 60th instrument of ratification on November 16, 1993) for those States that have ratified or acceded to it. See Appendix 8 for a list of States that have consented to be bound by the Convention as of December 1995.

\(^3\) The National Security Strategy of the United States, August 1991, at 19, states:

The United States has long supported international agreements designed to promote openness and freedom of navigation on the high seas. . . . As a maritime nation, with our dependence on the sea to preserve legitimate security and commercial ties, freedom of the seas is and will remain a vital interest. . . . Recent events in the Gulf, Liberia, Somalia and elsewhere show that American seapower, without arbitrary limits on its . . . operations, makes a strong contribution to global stability and mutual security.

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As a maritime nation, the United States' national security depends on a stable legal regime assuring freedom of navigation on, and overflight of, international waters.\textsuperscript{4} That regime is set out in the LOS Convention, reflecting a careful balance of coastal and maritime State interests. The LOS Convention was designed in part to halt the creeping jurisdictional claims of coastal nations, or ocean enclosure movement. While that effort appears to have met with some success, it is clear that many States presently purport to restrict navigational freedoms by a wide variety of means that are neither consistent with the LOS Convention nor with customary international law.\textsuperscript{5} The stability of that regime is undermined by claims to exercise jurisdiction, or to interfere with navigational rights and freedoms, that are inconsistent with the terms of the LOS Convention.

The historic trend is for the commonly shared rights of all users of the seas to be diminished by coastal State claims to exercise rights further from shore. The expansion of the territorial sea breadth from 3 to 12 miles, and the acceptance of the 200 mile exclusive economic zone (EEZ), are prime examples. While the 12 mile territorial sea and 200 mile EEZ have gained international legal acceptance, as reflected in the LOS Convention, many States have asserted claims that exceed the provisions

Convention to the Senate for advice and consent as one of the results of that strategy in producing tangible results with respect to U.S. security requirements, as follows:

In October 1994, President Clinton submitted the United Nations Convention on the Law of the Sea to the Senate for ratification. This was the culmination of years of negotiations to ensure an equitable balance between the rights of coastal States to control activities in adjacent offshore areas to protect their economic, security and environmental interests, and the rights of maritime states to free and unimpeded navigation and overflight of the oceans of the world. This included an acceptable regime to administer the mineral resources of the deep seabed, thereby protecting U.S. interests.

\textsuperscript{4} Under the LOS Convention, articles 58 and 87, the freedoms of navigation and overflight may be exercised in the high seas and exclusive economic zones.

of the Convention. Unless these excessive claims are actively opposed, the challenged rights will be effectively lost.

This book seeks to explain the United States Government's responses to excessive maritime claims through a program to preserve and enhance navigational freedoms worldwide. This program, named the U.S. Freedom of Navigation (FON) Program, was formally instituted during the Carter Administration in 1979 to highlight the navigation provisions of the LOS Convention to further the recognition of the vital national need to protect maritime rights throughout the world. The FON Program was continued by the Reagan, Bush and Clinton Administrations. It is intended to be a peaceful exercise of the rights and freedoms recognized by international law and is not intended to be provocative. As President Reagan stated on March 10, 1983, it has been U.S. policy to:

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

In addition, United States policy has been to:

exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 Law of the Sea] convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and

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6 1979 DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 997–98 [hereinafter, DIGEST].
freedoms of the international community in navigation and overflight and other related high seas uses.\(^8\)

The FON program operates on a triple track, involving not only diplomatic representations and operational assertions, but also bilateral and multilateral consultations with other Governments in an effort to promote maritime stability and consistency with international law, stressing the need for and obligation of all States to adhere to the customary international law rules and practices reflected in the LOS Convention.\(^9\) This study identifies those countries that have brought their offshore claims in line with accepted international standards. The FON program helps to promote this

\(^{8}\) Statement on United States Oceans Policy, March 10, 1983, 1 PUBLIC PAPERS OF PRESIDENT REAGAN 1983, at 378–79; 22 ILM 464; 77 Am. J. Int'l L. 619 (1983); DEPT ST. BULL., June 1983, at 70–71. See Appendix 1 for the full text of this statement. Upon signature of the LOS Convention, France expressed a similar view:

The provisions of the Convention relating to the status of the different maritime spaces and to the legal régime of the uses and protection of the marine environment confirm and consolidate the general rules of the law of the sea and thus entitle the French Republic not to recognize as enforceable against it any foreign laws or regulations that are not in conformity with those general rules.

UN, Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1994, UN Doc. ST/LEG/SER.E/13, at 858 (Sales No. E.95.V.5, 1995). On depositing its instrument of ratification Malta stated that it:

does not consider itself bound by any of the declarations which other States may have made, or will make upon signing or ratifying the Convention, reserving the right as necessary to determine its position with regard to each of them at the appropriate time. In particular, ratification of the Convention does not imply automatic recognition of maritime or territorial claims by any signatory or ratifying State.

\(^{9}\) On September 23, 1989, the United States and the former Soviet Union issued a joint statement in which they recognized "the need to encourage all States to harmonize their internal laws, regulations and practices" with the navigational articles of the 1982 LOS Convention. See Appendix 4 for the full text of this statement.
process, by lowering coastal State expectations that other States will accept their claims and reversing creeping jurisdiction which proceeded almost unchecked in the 1960's and 1970's.\textsuperscript{10}

When addressing other States' specific maritime claims that are inconsistent with international law,\textsuperscript{11} the United States uses, as appropriate, the various forms of diplomatic correspondence. These include first and third person diplomatic notes, and may take the form of formal protest notes, \textit{notes verbale} and \textit{aides mémoire}.\textsuperscript{12} Since 1948, the United States has filed more than 140 such notes, including more than 110 since the


\textsuperscript{11} See 1 \textsc{O'Connell}, \textit{The International Law of the Sea} 38–44 (1982) for a discussion of the significance of protest in the law of the sea. \textit{Compare} Colson, \textit{How Persistent Must the Persistent Objector Be?}, 61 Wash. L. Rev. 957, at 969 (1986):

First, States should not regard legal statements of position as provocative political acts. They are a necessary tool of the international lawyer's trade and they have a purpose beyond the political, since, occasionally, States do take their legal disputes to court.

Second, there is no requirement that a statement of position be made in a particular form or tone. A soft tone and moderate words may still effectively make the necessary legal statement.

Third, action by deed probably is not necessary to protect a State's legal position as a persistent objector when that State has otherwise clearly stated its legal position. Action by deed, however, promotes the formation of law consistent with the action and deeds may be necessary in some circumstances to slow erosion in customary legal practice.

Fourth, not every legal action needs an equal and opposite reaction to maintain one's place in the legal cosmos.

Fifth, the more isolated a State becomes in its legal perspective, the more active it must be in restating and making clear its position.

\textsuperscript{12} See 7 \textsc{Whiteman}, \textit{Digest of International Law} 502–04 (1965) [hereinafter, \textsc{Whiteman}].
FON Program began. Portions of these are excerpted or cited in this study.

The objective of the FON Program is not just to maintain the legal right to operate freely in and over international waters. The more important objectives are, first, to have other nations recognize and respect the legal right of all nations to operate, in conformity with the navigational provisions of the LOS Convention, in and over the territorial sea and international waters, and second, to minimize efforts by other States to reduce those rights by making excessive maritime claims. Diplomatic communications alone do not always achieve those objectives.

The United States requires maritime mobility. To the extent that mobility can be exercised consistent with international law as reflected in the LOS Convention and without political or military opposition, U.S. national security is enhanced. The United States believes it has a responsibility actively to promote compliance with the rules reflected in the navigational provisions of the LOS Convention. The United States has more to lose than any other nation if its maritime rights are undercut. Even though the United States may have the military power to operate where and in the manner it believes it has the right to, any exercise of that power is significantly less costly if it is generally accepted as being lawful. If the United States does not exercise its rights freely to navigate and overfly international waters, international straits and archipelagic waters, it will lose those rights and others, at least as a practical matter.

The necessity for diplomatic communications and operational assertions to maintain the balance of interests reflected in the LOS Convention as law is often not well understood. It is accepted international law and practice that, to prevent changes in or derogations from rules of law, States must persistently object to actions by other States that seek to change those rules. Protest "must, at the very least, be repeated" and "must be supported by conduct which opposes the presentations of the

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claimant State." Naturally, States are not required to adopt a course of conduct which virtually negates the rights reserved by protest. Consequently, States will not be permitted to acquiesce in emerging new rules of law and later claim exemption from them at will.\(^{14}\)

Acquiescence is the tacit acceptance of a certain legal position as a result of a failure to make a reservation of rights at the appropriate juncture. For acquiescence to arise, a claim must have been made and accepted. The claim must be made in a manner, and in such circumstances, that the other State has been placed on notice of that claim. The conduct that allegedly constitutes acquiescence, or tacit acceptance of that claim, likewise must be clear and unequivocal. The failure to make a timely protest in circumstances when it reasonably could have been expected to do so may constitute tacit acceptance of the claim.\(^{15}\)

Although one may question whether international law requires action by deed in order to preserve the legal position, "actions are an indication of national resolve and an affirmative effort to influence the formation of international law. . . . Action by deed . . . promotes the formation of law consistent with the action and deeds may be necessary in some circumstances to slow erosion in customary legal practice."\(^{16}\)


\(^{15}\) Gulf of Maine ICJ Case [Canada v. United States], U.S. Counter Memorial, paras. 235–40 [1983].

\(^{16}\) Colson, supra n. 11, at 964 & 969. "Passage does not cease to be innocent merely because its purpose is to test or assert a right disputed or wrongfully denied by the coastal State." Fitzmaurice, The Law and Procedure of the International Court of Justice, 27 Brit. Y.B. Int'l L. 28 (1950), commenting on the Corfu Channel Case in which the Court held that the United Kingdom was not bound to abstain from exercising its right of innocent passage which Albania had illegally denied. 1949 ICJ Rep. 4, 4 Whitteman 356.

The Special Working Committee on Maritime Claims of the American Society of International Law has advised that:
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Where the claim protested against has the effect of taking away a nation's right to use portions of the oceans, mere preservation of one's legal right to operate there is of little practical value when one chooses not to operate there except in extraordinary circumstances. Avoiding areas where a country needs to operate, or could be expected to operate, in the absence of the illegal claim gives both practical and legal effect to the excessive claim.

Operations by U.S. naval and air forces designed to emphasize internationally recognized navigational rights and freedoms thus complement U.S. diplomatic efforts. FON operations are conducted in a low-key and non-threatening manner but without attempt at concealment. The FON Program impartially rejects excessive maritime claims of allied, friendly, neutral, and unfriendly States alike. These assertions of rights and freedoms tangibly exhibit U.S. determination not to acquiesce in excessive claims to maritime jurisdiction by other States. Although some operations receive public scrutiny (such as those that have occurred in the Black Sea and the Gulf of Sidra), most do not. Since 1979, U.S. military ships and aircraft have exercised their rights and freedoms in all programs for the routine exercise of rights should be just that, "routine" rather than unnecessarily provocative. The sudden appearance of a warship for the first time in years in a disputed area at a time of high tension is unlikely to be regarded as a largely inoffensive exercise related solely to the preservation of an underlying legal position. Those responsible for relations with particular coastal states should recognize that, so long as a program of exercise of rights is deemed necessary to protect underlying legal positions, delay for the sake of immediate political concerns may invite a deeper dispute at a latter [sic] time.


17 In exercising its navigational rights and freedoms, the United States "will continue to act strictly in conformance with international law and we will expect nothing less from other countries." Schachte, The Black Sea Challenge, U.S. Naval Inst. Proc., June 1988, at 62. See also 1979 DIGEST 1066–69.

18 See infra Chapter 10.

19 See infra Chapter 3.
oceans against objectionable claims of more than 35 countries at the rate of some 30–40 per year.\footnote{20}

This study summarizes relevant portions of the law of the sea, as understood by the United States, and describes, in as much detail as security and foreign policy considerations permit, the actions undertaken and results achieved by the FON Program. It should be noted that most of the illegal claims were made prior to the adoption of the LOS Convention in December 1982, and many have not yet been revised to conform to the LOS Convention, even by some States which have ratified the instrument, notwithstanding the entry into force of the Convention on November 16, 1994.\footnote{21}

\footnote{20}{Department of State Statement, March 26, 1986, DEP'T ST. BULL., May 1986, at 79; Navigation Rights and the Gulf of Sidra, DEP'T ST. BULL., Feb. 1987, at 70. See Secretary of Defense, Annual Report to the President and the Congress 77–78 (1992) for a list of FON assertions conducted by DoD assets from October 1, 1990 to September 30, 1991; \textit{id.}, at 84–85 (1993) for a list of assertions by DoD assets between October 1, 1991 and September 30, 1992; \textit{id.}, at G–1 (1994) for a list of assertions by DoD assets between October 1, 1992 and September 30, 1993; \textit{id.}, at Appendix I (1995) for a list of assertions by DoD assets between October 1, 1993 and September 30, 1994; and \textit{id.}, at Appendix I (1996) for a list of assertions by DoD assets between October 1, 1994 and September 30, 1995.}

\footnote{21}{Some States with excessive maritime claims have since ceased to exist. The Yemens merged on May 22, 1990. The German Democratic Republic ceased to exist on October 3, 1990. The Soviet Union dissolved in 1991; Russia, Georgia, and the Ukraine are now the coastal States of the former Soviet Union. Estonia, Latvia, and Lithuania gained their independence from the Soviet Union on September 6, 1991 (although the United States never recognized Soviet sovereignty over these countries). On January 27, 1992, the Permanent Representative of Russia to the United Nations conveyed the text of the following note addressed to the heads of diplomatic missions in Moscow:

The Russian Federation continues to exercise its rights and honour its commitments deriving from international treaties concluded by the Union of Soviet Socialist Republics.

Accordingly, the Government of the Russian Federation will perform the functions formerly performed by the Government of the Soviet Union as depository for the corresponding multilateral treaties.

In this connection, the Ministry requests that the Russian Federation be considered a party to all international agreements in force,
Two caveats should be noted in regard to this study. First, it does not purport to discuss all coastal State maritime claims that may be inconsistent with the law of the sea, nor does it set out all actions taken by the United States (and other States) in response to these excessive claims. Thus, the failure to mention a particular claim should not be construed as acceptance of that claim by the United States.

Second, this analysis does not attempt to identify the practice of other States which conforms to the provisions of the LOS Convention, although basic zonal jurisdictional claims are identified. In fact, the United States believes that the general practice of States reflects acceptance as international law of the non-seabed parts of the LOS Convention.22

instead of the Soviet Union.

UN, LOS BULL., No. 20, March 1992, at 6 n. 9; Russian MFA circular note no. 11/UGP dated Jan. 13, 1992, American Embassy Moscow telegram 001654, Jan. 17, 1992, State Department File No. D92 0055–0637. On April 7, 1992, the United States recognized Bosnia–Herzegovina and Slovenia on the former territory of the Socialist Federal Republic of Yugoslavia. (On February 8, 1994, the United States recognized the Former Yugoslav Republic of Macedonia as an independent State. The F.Y.R.O.M. is a landlocked State.) Serbia and Montenegro have asserted the formation of a joint independent State, but this entity has not been recognized by the United States. Upon its independence from Ethiopia on April 27, 1993, Eritrea became a coastal State, while Ethiopia became a land-locked State. Information is not available on the maritime claims of Bosnia–Herzegovina, Eritrea, Georgia, Slovenia, and the Federal Republic of Yugoslavia (Serbia and Montenegro). See generally Walker, Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent, 6 The Transnat'l Lawyer 1 (1993).

22 In his report to the UN General Assembly occasioned by the tenth anniversary of the adoption of the LOS Convention, after reviewing the practice of States and international organizations, the Secretary-General concluded that:

there has been a striking convergence of practice towards accepting the concepts, principles and basic provisions embodied in the Convention. Such acceptance is notable, particularly in respect of the territorial sea, the regime of straits used for international navigation, the archipelagic waters, the exclusive economic zone, and the protection and preservation of the marine environment.
He acknowledged the existence, however, of:

some exceptional cases where state practice is not in conformity with, or clearly deviates from the relevant provisions of the Convention. These are particularly in the areas of the breadth of the territorial sea and the nature of the coastal State's jurisdiction in the contiguous zone and the exclusive economic zone with respect to security, fisheries, pollution control and marine scientific research.

CHAPTER 2

IDENTIFICATION OF
EXCESSIVE MARITIME CLAIMS

2.1. Introduction

Claims by coastal States to sovereignty, sovereign rights or jurisdiction over ocean areas that are inconsistent with the terms of the LOS Convention are, in this study, called "excessive maritime claims". They are illegal in international law. Since World War II, more than 80 coastal States have asserted various maritime claims that threaten the rights of other States to use the oceans. These excessive maritime claims include, but are not limited to claims inconsistent with the legal divisions of the ocean and related airspace reflected in the LOS Convention, such as:

- unrecognized historic waters claims;
- improperly drawn baselines for measuring the territorial sea and other maritime zones;
- territorial sea claims greater than 12 miles;
- other claims to jurisdiction over maritime areas in excess of 12 miles, such as security zones, that purport to restrict non-resource related high seas freedoms;
- contiguous zone claims at variance with Article 33 of the LOS Convention;
- exclusive economic zone (EEZ) claims inconsistent with Part V of the LOS Convention;
- continental shelf claims inconsistent with Part VI of the LOS Convention; and
- archipelagic claims inconsistent with Part IV of the LOS Convention.

Other categories of excessive maritime claims include claims to restrict navigation and overflight rights reflected in the LOS Convention, such as:
• territorial sea claims that impose impermissible restrictions on the
innocent passage of military and commercial vessels, of ships owned or
operated by a State and used only on government non-commercial service,
and of nuclear-powered warships (NPW) or warships and naval auxiliaries
carrying nuclear weapons or specific cargoes;
• claims requiring advance notification or authorization for
innocent passage of warships and naval auxiliaries through the territorial
sea or EEZ or applying discriminatory requirements to such vessels;
• territorial sea claims not exceeding 12 miles in breadth that
overlap straits used for international navigation and do not permit transit
passage in conformance with the customary international law reflected in
the LOS Convention, including submerged transit of submarines, overflight
of military aircraft, and surface transit of warships and naval auxiliaries
(including transit in a manner of deployment consistent with the security
of the forces involved), without prior notification or authorization; and
• archipelagic claims that do not permit archipelagic sea lanes
passage in conformance with international law as reflected in the LOS
Convention, including all normal passage routes used for international
navigation, submerged passage of submarines, overflight of military
aircraft, and surface transit of warships and naval auxiliaries (including
transit in a manner of deployment consistent with the security of the forces
involved), without prior notification or authorization.

2.2. Historic Bays

Bays meeting strict international legal standards contain internal waters,¹
navigation and overflight of which is subject to exclusive coastal State
control. Some countries claim to exclude ships and aircraft from other
bodies of water, containing territorial seas or high seas, that do not qualify
as juridical bays, based on their historic claim to do so. To meet the
international standard for establishing a claim to historic waters, a State
must demonstrate its open, effective, long term, and continuous exercise
of authority over the body of water, coupled with acquiescence by foreign
States in the exercise of that authority. The United States takes the

¹ LOS Convention, article 10.
position than an actual showing of acquiescence by foreign States in such a claim is required, as opposed to a mere absence of opposition. The United States believes few such claims meet that standard.

Eighteen countries claim historic bays. The United States has diplomatically protested 15 such claims that do not meet the international legal standard. Operational assertions have been conducted against seven of them:

- Soviet claims to Peter the Great Bay and three Arctic straits;
- Libya's claim to the Gulf of Sidra;
- India's claim to the Gulf of Mannar;
- Kenya's claim to Ungwana Bay;
- Dominican Republic's claim to Escocesa and Domingo Bays.²

2.3. Baselines

A State's maritime zones are measured from the baseline. The rules for drawing baselines are contained in articles 3 through 13 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (Territorial Sea Convention),³ to which the United States is a party, and in articles 5 through 11, 13 and 14 of the 1982 LOS Convention. These rules distinguish between normal baselines (following the low-water line along the coast) and straight baselines (which can be employed only in specified geographical situations).

Baseline claims can extend maritime jurisdiction significantly seaward in a manner that prejudices navigation, overflight and other interests. Objective application of baseline rules contained in these two treaties can help prevent excessive claims in the future and encourage governments to revise existing claims to conform to the relevant criteria.

The normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts

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² See infra Chapter 3.

officially recognized by the coastal State. The low-water line is the standard location of baselines, and is the method used by the United States.

Straight baselines may only be used in the two specific geographic circumstances provided for in the 1958 Territorial Sea Convention, and repeated in the LOS Convention, that is, (a) in localities where the coastline is deeply indented and cut into, or (b) if there is a fringe of islands along the coast in the immediate vicinity of the coast. The purpose of authorizing the use of straight baselines is to allow the coastal State, at its discretion, to enclose those waters which, as a result of their close interrelationship with the land, have the character of internal waters. By using straight baselines, a State may also eliminate complex patterns, including enclaves, in its territorial sea, that would otherwise result from the use of normal baselines. Properly drawn straight baselines do not result in extending the limits of the territorial sea significantly seaward from those that would result from the use of normal baselines.

More than 60 countries have delimited straight baselines along portions of their coast and approximately ten other countries have enacted enabling legislation but have yet to publish the coordinates or charts of their straight baselines. Many of these baselines have been drawn inconsistent with international law. The effect of an illegal straight baseline is a claim that detracts from the international community's right to use the oceans and superjacent airspace. One result has been that these straight baseline systems have created large areas of internal waters which legally remain either territorial seas or areas in which the freedoms of navigation and overflight may be exercised. Burma, for example, by drawing a 222-mile straight baseline across the Gulf of Martaban has claimed about 14,300 sq. miles (an area the size of Denmark) as internal waters which, absent the closing line, would be territorial sea or high seas. The United States has, so far, diplomatically protested 27 of those systems.

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4 1958 Territorial Sea Convention, article 3; LOS Convention, article 5.
5 1958 Territorial Sea Convention, article 4.
6 LOS Convention, article 7.
7 LOS Convention, article 7; 1958 Territorial Sea Convention, article 4(1).
8 See infra Chapter 4.
Operational assertions have been conducted against 18 of the claims: Burma, Cambodia, Colombia, Cuba, Djibouti, Dominican Republic, Ecuador, Ethiopia (before recognition of Eritrea), Guinea, Guinea-Bissau, Haiti, Iran, Mauritania, Oman, the former Soviet Union, and Thailand.\(^9\)

### 2.4. Territorial Sea Breadth

Despite many diplomatic protests in the decades through the 1970s,\(^{10}\) the United States failed to prevent international acceptance of the 12-mile territorial sea and in 1988 the United States extended its territorial sea to 12 miles.\(^{11}\) The broad consensus on a 12-mile territorial sea reflected in the LOS Convention\(^{12}\) has led more than half the countries claiming territorial seas broader than 12 miles to roll them back to the international standard reflected in the LOS Convention (see Table 5). The United States has either diplomatically protested or asserted its navigation rights against all 17 territorial sea claims that now exceed the 12-mile limit (see Table 6). Some claims have been protested more than once.

### 2.5. Contiguous Zones

The contiguous zone is an area seaward of the territorial a sea in which the coastal State may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea (but not for security purposes).\(^{13}\) The contiguous zone is comprised of international waters in and over which the ships and aircraft, including warships and

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\(^9\) See *infra* Chapter 4.

\(^{10}\) See 4 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 61, 91, 115–119 (1965) [hereinafter, WHITEMAN].

\(^{11}\) See *infra* Chapter 5 and Appendix 3.

\(^{12}\) LOS Convention, article 3.

\(^{13}\) LOS Convention, article 33; 1958 Territorial Sea Convention, article 24.
military aircraft, of all nations enjoy the high seas freedoms of navigation and overflight.\textsuperscript{14}

The maximum permissible breadth of the contiguous zone under international law is now 24 miles measured from the baseline from which the territorial sea is measured.\textsuperscript{15}

Some eighteen countries claim the right to expand the competence of the contiguous zone to include protection of national security interests, and thus restrict or exclude warships and military aircraft, including: Bangladesh, Burma, Haiti, Iran, Sri Lanka, Sudan, Syria, Venezuela, Vietnam and Yemen. Syria claims a 6 mile contiguous zone seaward of its excessive 35 mile territorial sea limit; between 1990 and 1991 Namibia claimed a 200 mile contiguous zone before rolling it back to 24 miles. North Korea claims a 50 mile military boundary. The United States has diplomatically protested 11 of those claims, and conducted operational assertions against the claims by Bangladesh, Burma, Cambodia, Haiti, North Korea, Nicaragua, Pakistan, Syria, Vietnam and Yemen.\textsuperscript{16}

2.6. Exclusive Economic Zones

The 200 mile EEZ, which gained recognition in the LOS Convention, gives coastal States increased rights over the resources off their coasts, while curtailing the trend of national claims to broader territorial seas and preserving as many high seas freedoms as possible. Over 85 countries claim an EEZ. By virtue of its islands, territories and possessions, and long coastlines, the United States claims the largest EEZ.\textsuperscript{17}

Most EEZ claims are generally consistent with the Convention's provisions relating to navigational freedoms. However, 20 States permit imprisonment for fisheries violations, contrary to the express provision of the LOS Convention.\textsuperscript{18} Further, India, Iran, Brazil and Uruguay do not

\textsuperscript{14} LOS Convention, articles 33, 58 & 87.
\textsuperscript{15} Id., article 33(2).
\textsuperscript{16} See infra Chapter 6.
\textsuperscript{17} See infra Chapter 7.
\textsuperscript{18} See infra text accompanying Chapter 7 n. 24.
permit foreign military exercises in their EEZs; and Colombia has claimed that foreign States do not have the right to conduct maritime counter-narcotics law enforcement operations in its EEZ, asserting exclusive jurisdiction in its EEZ to enforce its narcotics laws.\textsuperscript{19}

2.7. Continental Shelves

The LOS Convention defines the continental shelf of a coastal State as comprising:

the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.\textsuperscript{20}

Consequently, regardless of the seafloor features, a State may claim, at a minimum, a 200-mile continental shelf. Under other LOS Convention provisions, a State has the right to claim a 200-mile EEZ which includes jurisdictional rights over the living and nonliving resources of the seafloor and seabed. Thus, for those States whose physical continental margin does not extend farther than 200 miles from the territorial sea baseline, the concept of the continental shelf is of less importance than before.

Paragaphs 3–7 of article 76, which provide a rather complex formula for defining the "continental shelf", apply only to States that have physical continental margins extending more than 200 miles from the coast. It seems widely accepted that the principles of the continental shelf regime reflected in the 1982 LOS Convention, articles 76–81, were established as customary international law by the broad consensus achieved

\textsuperscript{19} See infra Chapter 14.
\textsuperscript{20} LOS Convention, article 76(1).
at the Third United Nations Conference on the Law of the Sea (UNCLOS III) and the practice of nations.

Since the mid-1970s, several countries have made general claims to the continental shelf that exceed the provisions of the LOS Convention. The Governments of Guyana, India, Mauritius, Pakistan and the Seychelles, for example, enacted statutes which purport to assert jurisdiction over any act in their continental shelves, contrary to international law. The United States has protested these claims, as well as those of Ecuador and Chile to continental shelves beyond 200 miles in the vicinity of the Galapagos, Easter and Sala Y Gomez Islands.\(^{21}\)

### 2.8. Archipelagos

The law of the sea first recognized a special regime for archipelagic states in the LOS Convention.\(^{22}\) By definition, an archipelagic State is a State "constituted wholly by one or more archipelagos and may include other islands". An archipelago is defined in the LOS Convention as:

> a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.\(^{23}\)

Until a State claims archipelagic status, the normal baseline is the low-water line around each island. Consequently, there may exist large areas of international waters between the islands of the archipelago. However, an archipelagic State is entitled to draw straight archipelagic baselines around the outermost islands of the archipelago, and to measure

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\(^{21}\) See *infra* Chapter 8.

\(^{22}\) See LOS Convention, Part IV.

\(^{23}\) *Id.*, article 46.
its territorial sea seaward of those baselines. Its sovereignty then extends to the archipelagic waters thereby enclosed.\textsuperscript{24}

Fifteen States have claimed archipelagic status: Antigua and Barbuda, Cape Verde, Comoros, Fiji, Indonesia, Kiribati, Marshall Islands, Papua New Guinea, Philippines, Saint Vincent and the Grenadines, Sao Tome and Principe, Solomon Islands, Trinidad and Tobago, Tuvalu, and Vanuatu. In addition, The Bahamas and Jamaica have legislation pending to make such a claim. The United States worked closely with a number of countries, including The Bahamas, Fiji and Indonesia during UNCLOS III to develop a set of reasonable parameters for the archipelagic regime. On the other hand, despite its public commitment to conform its claim to the provisions of the LOS Convention which it has ratified, the Philippines continues to claim as internal waters large areas of the Pacific to which it is not entitled under the LOS Convention.\textsuperscript{25}

While the Convention definition of archipelagic State was drafted to exclude continental States with offshore groups of islands, Canada, Denmark, Ecuador, Portugal and Sudan have sought to enclose their islands (Arctic, Faroes, Galapagos, Azores, and the Suakin Archipelago, respectively) with straight baselines in a manner simulating an archipelago. The United States has protested these efforts. Nevertheless, no independent island State has claimed archipelagic status to which it is not entitled under the LOS Convention.

2.9. Innocent Passage in the Territorial Sea

One of the fundamental tenets in the international law of the sea is the right enjoyed by all ships, including warships, regardless of cargo, armament or means of propulsion, to innocent passage through another State's territorial sea, in accordance with international law, for which neither prior notification nor authorization is required.

This right is not fully accepted by all coastal States. For example, over 30 States require either prior permission or prior notice. The United

\textsuperscript{24} Id., articles 46–48.
\textsuperscript{25} See generally infra Chapter 9.
States has diplomatically protested almost all of them, and conducted operational assertions against 28 of those countries (see Table 10). A number of States have rolled back these claims as a result of the FON program. In 1979, Turkey instituted a requirement for foreign warships to give it notice before exercising innocent passage in its territorial sea. The United States diplomatically protested in 1979, and in 1983 Turkey lifted that requirement. Between 1931 and 1983 the former Soviet Union required warships to obtain prior permission before entering the Soviet territorial sea. Between 1983 and 1989 the Soviet Union limited warships' right of innocent passage to five designated sea lanes. As a result of the LOS discussions following the Black Sea bumping incident in 1988, the Soviet Union conformed its claims to international law, and Russia has committed itself to continue that position. At the beginning of 1995, Sweden dropped its requirement for warships to give prior notification of their innocent passage through the Swedish territorial sea.

Five States apply special requirements not recognized by international law for the innocent passage of nuclear powered warships and naval auxiliaries carrying nuclear weapons: Djibouti, Egypt, Oman, Pakistan and Yemen. The United States had diplomatically protested all of these claims and conducted operational assertions against the claims of Oman, Pakistan and Yemen.26

2.10. International Straits

During the time when the international practice was to a territorial sea of three miles, over 100 straits connecting one part of the high seas with another part of the high seas contained a high seas route. Consequently, the ships and aircraft of all nations had the uncontested right to pass through such strategically important straits as Gibraltar, Hormuz, Bab el Mandeb, Lombok and Malacca, regardless of the political unpopularity of their mission. Consequently, there was no difficulty with the United States

26 See infra Chapter 10.
use of the Strait of Gibraltar to airlift support to Israel when it was attacked in October 1973.\textsuperscript{27}

These critical straits are, however, less than 24 miles wide at their narrowest point. To maintain maritime mobility, a condition for U.S. acceptance of a broader 12 mile territorial sea was a guaranteed legal right for U.S. ships and aircraft to continue to be able to transit, without coastal State interference, those straits.\textsuperscript{28} That right is codified in the LOS Convention as the right of transit passage.\textsuperscript{29} It was because of this right that U.S. aircraft were able again to fly through the Strait of Gibraltar without protest, when USAF aircraft flew from British bases for the April 1986 attack on Libya.\textsuperscript{30} In 1972 and in 1986, the littoral NATO nations refused to grant the U.S. permission to overfly their land for these missions.\textsuperscript{31}

Few States have explicitly accepted the transit passage regime of the LOS Convention as customary international law. Even the United Kingdom has been reluctant to do so before the Convention is universally accepted.\textsuperscript{32} Other States claim the right of transit passage is available only to the signatories of the LOS Convention, or otherwise seek to restrict the right by imposing conditions on its use not authorized by the terms of the


\textsuperscript{29} LOS Convention, article 38.


LOS Convention. The United States has diplomatically protested all of these claims, and conducted assertions of right against Iran, Oman, Spain, the USSR and Yemen. In 1988, when Indonesia closed Sunda and Lombok Straits for a brief period of time, the United States, United Kingdom and Australia made very strong demarches, and, so far, it has not been repeated.  

2.11. Overflight Restrictions

States with territorial sea claims greater than 12 miles, or with illegal straight baseline claims, frequently seek to prevent overflight by foreign aircraft of the international waters (i.e., waters beyond 12 miles from properly drawn baselines). In 1985, two Cuban MiG–21s intercepted a U.S. Coast Guard HU–25A aircraft. In August 1986, Ecuador interfered with the flight of a U.S. Air Force aircraft flying more than 175 miles seaward from the Ecuadorian coast. In 1973, Libya established a restricted area of airspace within 100 miles of Tripoli. In August 1986, Peru claimed that a USAF C–141, 80 miles off shore, did not receive permission to fly into Peruvian–claimed airspace. Several similar incidents involving USAF aircraft occurred in 1987, 1988, 1992 and 1995. Greece restricts the use of international airspace four miles seaward of its six mile territorial sea. Nicaragua requires clearance for overflight of its 200 mile territorial sea. The United States has protested all of these claims, and conducted assertions of right against them all.  

2.12. Archipelagic Sea Lanes Passage

A number of strategically important international navigation routes pass through Indonesian and Philippine archipelagic waters. A condition for U.S acceptance of the archipelago concept was a legal guarantee that freedoms of navigation and overflight be maintained in and over the waters

33 See infra Chapter 11, n. 115 and accompanying text.  
34 See infra Chapter 12.
between the islands of the archipelago. That right was documented in the LOS Convention as archipelagic sea lanes passage, which incorporates most of the essential elements of the transit passage regime of non-archipelagic international straits. All ships and aircraft, including warships and military aircraft, enjoy the right of archipelagic sea lanes passage while transiting through, under, or over the waters of archipelagos and adjacent territorial seas via archipelagic sea lanes. Those sea lanes include all routes normally used for international navigation and overflight, whether or not designated by the archipelagic State.

Indonesia was the first State to suggest it might seek to exercise its right to designate sea lanes suitable for the continuous and expeditious passage of foreign ships through its archipelagic waters, the Philippines has followed suit. Although such sea lanes are required to include all normal passage routes and all normal navigational channels, the Indonesian Navy is seeking to limit them to a mere three routes, all north-to-south and none east-west through the Banda and Java Seas. The Philippines continues to refuse to recognize the Convention's archipelagic regime notwithstanding its ratification of the LOS Convention and public international commitment to reverse its view that the Philippine archipelagic waters are akin to internal waters wherein foreign ships may not navigate, and aircraft may not overfly, without Philippine permission. The Philippines refused to repeat that commitment in the 1992 military bases negotiations, while continuing the long-standing permission for U.S. forces to operate freely in Philippine waters.

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36 LOS Convention, article 53(2).
37 Id., article 53(12).
39 LOS Convention, article 53(12).
41 This was one issue, among others, contributing to the U.S. decision to withdraw its military forces from the Philippines and to permit the Military Bases Agreement to expire in late 1992. See 3 U.S. Dep't of State Dispatch 824, Nov. 16, 1992 and Map 26.
expired, operational assertions of right are now necessary to maintain U.S. freedom of navigation and overflight there.

2.13. Marine Data Collection

The conduct of marine scientific research (MSR) is fully regulated by Part XIII of the LOS Convention, which does not apply to marine surveys. While the coastal State has the unqualified right to regulate, authorize and conduct MSR in its territorial sea and archipelagic waters, its right to control MSR in its EEZ is subject to the standards and qualifications set forth in the Convention. MSR on the high seas and on the seabed and ocean floor, and the seabed thereof, beyond the outer limit of the continental shelf is a high seas freedom. U.S. policy is to encourage freedom of MSR and not to claim jurisdiction over MSR in its EEZ.

The problems encountered by U.S. researchers in seeking to conduct MSR in foreign waters include delays or last minute denials of requests for ship clearance, requiring that all data be provided immediately prior to departure from the last port of call or to be held in confidence, requiring copies of data collected on the high seas or in waters under another country's jurisdiction, requiring reports to be submitted in other than English, requiring more than one observer to be on board the research vessel, and requiring the observer to be on board during non-research legs of a voyage.\textsuperscript{42}

Like MSR, marine survey activities in the territorial sea, and while in transit passage or archipelagic sea lanes passage, are subject to coastal State consent. Seaward of the territorial sea, all States remain free to conduct hydrographic and military surveys free of coastal State regulation or control.

United States responses to these claims are described in greater detail in the following chapters, which are organized along the lines of the foregoing listing. Responses of other States are included where they are known.

\textsuperscript{42} See infra Chapter 15.
Pages 27 & 28 intentionally omitted
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THE NEGOTIATING PROCESS OF THE THIRD
UNITED NATIONS CONFERENCE ON THE
LAW OF THE SEA

by
Tommy T.B. Koh and Shanmugam Jayakumar

CHAPTER ONE
AN OVERVIEW OF THE NEGOTIATING PROCESS OF
UNCLOS III

I. DID THE PROCEEDINGS OF UNCLOS III CONFORM TO THE
NEGOTIATING PROCESS AND PROCEDURES OF THE PRE-
CEDING CONFERENCES ON THE LAW OF THE SEA?

1. The first question is whether the negotiating process of the Third
United Nations Conference on the Law of the Sea (UNCLOS III)
and its procedures conformed to the pattern established in the previous
conferences on the Law of the Sea, such as the 1930 Hague Codification
Conference and the First (1958) and Second (1960) UN Conferences
on the Law of the Sea. Our conclusion is in the negative.

2. What was the pattern followed at the three previous Conferences?
The Hague Codification Conference of 1930 was held under the auspices
of the League of Nations. The Assembly of the League of Nations
had requested the Council to convene a Committee of Experts to
determine those subjects of international law which should be considered
for codification. In April 1925, the Council established the Committee
of Experts for the Progressive Codification of International Law. The
Committee selected 11 subjects for investigation and appointed a sub-
committee to look into each subject. One of the 11 subjects was the
territorial sea. The Committee of Experts reported to the Council that
seven of the 11 subjects were ripe for codification. The League then
decided to convene conferences to examine three of these subjects,
including the territorial sea. Beginning in 1929, a Preparatory Committee
was appointed to prepare detailed bases of discussion for the Conference.
Therefore, when The Hague Codification Conference convened in
March 1930, it had before it the draft texts on the territorial sea and
the contiguous zone proposed by the Preparatory Committee.

3. In the case of the First (1958) UN Conference on the Law of
the Sea, the preparatory work for the Conference was undertaken,
first by the International Law Commission (ILC) and later by a Group
of Experts.\(^1\) The ILC began its work in 1949 and chose 14 topics,

including the high seas and territorial waters. The Commission formulated draft treaty articles which were submitted to the UN General Assembly for comments by member States. By 1956, the Commission had succeeded in drawing up a draft Convention. Thus, when the First UN Conference on the Law of the Sea convened in Geneva in February 1958, it had before it the text of a draft Convention which had been prepared by the International Law Commission over the period 1949-1956.

4. The First UN Conference was unable to agree on the limits of the territorial sea and the extent of fishing rights. Before the Conference adjourned, it adopted a resolution requesting the General Assembly to study the possibility of calling a second Conference to consider the questions left unsettled. As a result, the General Assembly decided in 1958 to call a second Conference in 1960. Neither the International Law Commission nor any other body was requested to prepare new draft treaty articles on the unsettled questions for the second Conference. If no such request was made, it was probably because it was felt that the two questions (on the territorial sea and fishing rights) would have to be settled through negotiations, and it would not have been helpful to request an expert body to prepare new texts. There was, however, considerable diplomatic activity between the two conferences.

5. What are the main features of the pattern which we can identify from The Hague Codification Conference of 1930 and the First United Nations Conference on the Law of the Sea? First, there was a specialized or expert body, of limited size, entrusted with the task of preparing for the Conference. In the case of the 1930 Conference, the preparatory work was entrusted, in the first stage, to the Committee of Experts for the Progressive Codification of International Law, and, in the second stage, to a Preparatory Committee. In the case of the First UN Conference, the preparatory work was also entrusted to the International Law Commission and subsequently to the Group of Experts. Second, there was a single basic text, in the form of the draft treaty articles, available at the commencement of the Conference. Third, the Rules of Procedure, as was then normal, assumed that decisions by voting would take place, and the rules were so framed as to facilitate the process of decision-making through votes. In the 1930 Conference, the decision-making process of the Rules of Procedure was a major issue and it was not resolved until nearly the end of the Conference. Fourth, if groups or caucuses operated in the 1958 Conference, they were, in the main, groups and caucuses which had been well established in the UN, such as the regional groups. Fifth, the duration of the Conference was limited and fixed.

6. As will be shown below and elaborated in subsequent sections, the procedures of UNCLOS III did not fit into this general pattern. The task of preparing for the Conference was not entrusted either to the International Law Commission or to another expert or specialized group of limited size. Instead, UN General Assembly resolution 2750
C (XXV) entrusted the preparatory work to the enlarged UN Sea-Bed Committee, which had 86 members. The Sea-Bed Committee was further expanded to 91 members and was open to attendance, as observers, by other member States as well as by non-member States. When the Conference commenced, it did not have before it the text of a single preparatory document. The General Assembly had approved on 16 November 1973 a “Gentleman’s Agreement” covering the procedure by which it felt the Conference should take decisions on substantive matters. The decision-making provisions of the Rules of Procedure and the Gentleman’s Agreement of the Conference were deliberately framed to discourage the taking of votes. In addition to the traditional groups, a host of new interest groups emerged at the Conference. The Conference did not have a fixed and limited duration but began in December 1973 and concluded in December 1982.

The Negotiating Procedures and Process of UNCLOS III have certain unique features

7. In our view there are several unusual, if not unique, features about the negotiating procedures and process of UNCLOS III. We will list these features below, indicating briefly how they had affected the work of the Conference. The more important of these features will be amplified in subsequent sections of this chapter or in subsequent chapters.

II. THE WIDE SCOPE OF THE AGENDA AND THE THEORY OF INTERRELATIONSHIP BETWEEN THE AGENDA ITEMS

8. The extraordinarily wide and comprehensive scope of the agenda of the Conference was an important factor which contributed to the difficulties of the Conference. It will be recalled that originally the focus of the UN was limited to the sea-bed and ocean floor beyond the limits of national jurisdiction and to the concept of the common heritage of mankind. But this scope was radically widened in 1970 when the UN General Assembly decided to convene the Conference in 1973. GA resolution 2750 C (XXV) of 17 December 1970 now listed the following topics for the Conference:

- the establishment of an equitable international régime—including an international machinery—for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the régime of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question
of the preferential rights of coastal States, the preservation of the marine environment (including, inter alia, the prevention of pollution) and scientific research [Emphasis added] .

9. The list of subjects and issues, formulated by the Sea-Bed Committee after protracted negotiations, served as the basis of the Conference agenda. It listed no fewer than 25 different items:

1. International Régime for the Sea-Bed and the Ocean Floor Beyond National Jurisdiction
   1.1 Nature and Characteristics
   1.2 International Machinery: Structure, Functions, Powers
   1.3 Economic Implications
   1.4 Equitable Sharing of Benefits Bearing in Mind the Special Interests and Needs of the Developing Countries, whether Coastal or Land-Locked
   1.5 Definition and Limits of the Area [to be considered in the light of the procedural agreement as set out in paragraph 22 of the report of the Committee (26 GAOR, Supp. 21 (A/8421))]
   1.6 Use Exclusively for Peaceful Purposes

2. Territorial Sea
   2.1 Nature and Characteristics, Including the Question of the Unity or Plurality of Régimes in the Territorial Sea
   2.2 Historic Waters
   2.3 Limits
   2.3.1 Question of the Delimitation of the Territorial Sea; Various Aspects Involved
   2.3.2 Breadth of the Territorial Sea, Global or Regional Criteria. Open Seas and Oceans, Semi-Enclosed Seas and Enclosed Seas
   2.4 Innocent Passage in the Territorial Sea
   2.5 Freedom of Navigation and Overflight Resulting From the Question of Plurality of Régimes in the Territorial Sea

3. Contiguous Zone
   3.1 Nature and Characteristics
   3.2 Limits

3.3 Rights of Coastal States with Regard to National Security, Customs and Fiscal Control, Sanitation and Immigration Regulations

4. Straits Used for International Navigation
   4.1 Innocent Passage
   4.2 Other Related Matters Including the Question of the Right of Transit

5. Continental Shelf
   5.1 Nature and Scope of the Sovereign Rights of Coastal States Over the Continental Shelf. Duties of States
   5.2 Outer Limit of the Continental Shelf: Applicable Criteria
   5.3 Question of the Delimitation Between States; Various Aspects Involved
   5.4 Natural Resources of the Continental Shelf
   5.5 Régime for Waters Superjacent to the Continental Shelf
   5.6 Scientific Research

6. Exclusive Economic Zone Beyond the Territorial Sea
   6.1 Nature and Characteristics, Including Rights and Jurisdiction of Coastal States in Relation to Resources, Pollution Control and Scientific Research in the Zone. Duties of States
   6.2 Resources of the Zone
   6.3 Freedom of Navigation and Overflight
   6.4 Regional Arrangements
   6.5 Limits: Applicable Criteria
   6.6 Fisheries
   6.6.1 Exclusive Fishery Zone
   6.6.2 Preferential Rights of Coastal States
   6.6.3 Management and Conservation
   6.6.4 Protection of Coastal States' Fisheries in Enclosed and Semi-Enclosed Seas
   6.6.5 Régime of Islands Under Foreign Domination and Control in Relation to Zones of Exclusive Fishing Jurisdiction
   6.7 Sea-Bed Within National Jurisdiction
   6.7.1 Nature and Characteristics
   6.7.2 Delineation Between Adjacent and Opposite States
   6.7.3 Sovereign Rights Over Natural Resources
   6.7.4 Limits: Applicable Criteria
   6.8 Prevention and Control of Pollution and Other Hazards to the Marine Environment
   6.8.1 Rights and Responsibilities of Coastal States
   6.9 Scientific Research
7. Coastal State Preferential Rights or Other Non-Exclusive Jurisdiction Over Resources Beyond the Territorial Sea
   7.1 Nature, Scope and Characteristics
   7.2 Sea-Bed Resources
   7.3 Fisheries
   7.4 Prevention and Control of Pollution and Other Hazards to the Marine Environment
   7.5 International Co-operation in the Study and Rational Exploitation of Marine Resources
   7.6 Settlement of Disputes
   7.7 Other Rights and Obligations

8. High Seas
   8.1 Nature and Characteristics
   8.2 Rights and Duties of States
   8.3 Question of the Freedoms of the High Seas and Their Regulation
   8.4 Management and Conservation of Living Resources
   8.5 Slavery, Piracy, Drugs
   8.6 Hot Pursuit

9. Land-Locked Countries
   9.1 General Principles of the Law of the Sea Concerning the Land-Locked Countries
   9.2 Rights and Interests of Land-Locked Countries
   9.2.1 Free Access To and From the Sea: Freedom of Transit, Means and Facilities for Transport and Communications
   9.2.2 Equality of Treatment in the Ports of Transit States
   9.2.3 Free Access to the International Sea-Bed Area Beyond National Jurisdiction
   9.2.4 Participation in the International Régime, Including the Machinery and the Equitable Sharing in the Benefits of the Area
   9.3 Particular Interests and Needs of Developing Land-Locked Countries in the International Régime
   9.4 Rights and Interests of Land-Locked Countries in Regard to Living Resources of the Sea

10. Rights and Interests of Shelf-Locked States and States with Narrow Shelves or Short Coastlines
    10.1 International Régime
    10.2 Fisheries
    10.3 Special Interests and Needs of Developing Shelf-Locked States and States with Narrow Shelves or Short Coastlines
    10.4 Free Access To and From the High Seas
11. Rights and Interests of States with Broad Shelves

12. Preservation of the Marine Environment
   12.1 Sources of Pollution and Other Hazards and Measures to Combat Them
   12.2 Measures to Preserve the Ecological Balance of the Marine Environment
   12.3 Responsibility and Liability for Damage to the Marine Environment and to the Coastal State
   12.4 Rights and Duties of Coastal States
   12.5 International Co-operation

13. Scientific Research
   13.1 Nature, Characteristics and Objectives of Scientific Research of the Oceans
   13.2 Access to Scientific Information
   13.3 International Co-operation

14. Development and Transfer of Technology
   14.1 Development of Technological Capabilities of Developing Countries
   14.1.1 Sharing of Knowledge and Technology Between Developed and Developing Countries
   14.1.2 Training of Personnel from Developing Countries
   14.1.3 Transfer of Technology to Developing Countries

15. Regional Arrangements

16. Archipelagoes

17. Enclosed and Semi-Enclosed Seas

18. Artificial Islands and Installations

19. Régime of Islands:
   (A) Islands Under Colonial Dependence or Foreign Domination or Control
   (B) Other Related Matters

20. Responsibility and Liability for Damage Resulting From the Use of the Marine Environment

21. Settlement of Disputes

22. Peaceful Uses of the Ocean Space: Zones of Peace and Security
23. Archaeological and Historical Treasures on the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction

24. Transmission From the High Seas

25. Enhancing the Universal Participation of States in Multilateral Conventions Relating to the Law of the Sea

This list of subjects and issues relating to the law of the sea was prepared in accordance with General Assembly resolution 2750 C (XXV). Further, the Official Records of the General Assembly state that:

The list is not necessarily complete nor does it establish the order of priority for consideration of the various subjects and issues.

Since the list has been prepared following a comprehensive approach and attempts to embrace a wide range of possibilities, sponsorship or acceptance of the list does not prejudice the position of any State or commit any State with respect to the items on it or to the order, form, or classification according to which they are presented.

Consequently the list should serve as a framework for discussion and drafting of necessary articles. (27 GAOR, Supp. 21 (A/8721))

A. Why did the UN adopt such a broad and comprehensive agenda for the Conference?

10. If, in the beginning (1967), the focus of the UN was only on the international area, how was it that in 1970 the General Assembly decided to convene in 1973 a Conference to deal with such a broad agenda? UN General Assembly resolution 2750 C (XXV) of 17 December 1970, preambular paragraph 3, stated that the Secretary-General's consultations "indicate widespread support for the holding of a comprehensive conference on the law of the sea."3

11. Quite clearly, the broadening of the agenda represented a triumph for the strategy of the coastal States of Latin America, in alliance with coastal States from other regions, which had, for many years, been advocating the adoption of wider limits of coastal State jurisdiction. Once the door had been opened for the consideration of one aspect of oceans law, these coastal States, especially the Latin American coastal States, saw an opportunity to vindicate their long-felt dissat-

isfaction with the so-called "traditional law." This opportunity was acted upon.

(2) The proposals of the U.S.A. and the USSR
12. In 1965, the Soviet Union approached the United States and a few other countries on the idea of recognizing a 12-mile territorial sea, provided that the high seas corridor was preserved in international straits. In 1968 and 1969, the United States started sounding out the views of some NATO countries, the Soviet Union and others on the idea of conceding 12 miles as the maximum permissible breadth of the territorial sea in return for free navigation and overflight rights, especially for military vessels and aircraft, in straits used for international navigation. The two "superpowers," therefore, wanted a new Conference on the Law of the Sea to arrive at a universal consensus on these questions critical to their national security interests and to halt the creeping jurisdiction of coastal States. In the beginning, the United States wanted the conference to deal separately, in manageable packages, with the traditional Law of the Sea issues and with the sea-bed.

(3) Claim that different aspects of the law of the sea were interrelated
13. The argument that different aspects of the law of the sea were interrelated and should be considered as a whole was a formidable argument. Logically, and on objective merits, it was indefeasible. It was clear that the sea-bed beyond the limits of national jurisdiction could not be discussed without considering what indeed were the limits of national jurisdiction. This immediately opened the door to considering the limits of the continental shelf.
14. Once the door was further widened for linkage with the continental shelf, it was difficult to deny that there were other interrelationships. For example, the claim by some coastal States for a 200-mile territorial sea also had implications for the common heritage concept and for the continental shelf concept.
15. This theme of interrelatedness recurs often in the records of the Conference. For example, UN General Assembly resolution 2750 C (XXV) of 17 December 1970, preambular paragraph 4, stated:

Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole[.]

Further, UN General Assembly resolution 3067 (XXVIII) of 16 November 1973, after spelling out that the mandate of the Conference would be to adopt a convention dealing with all law of the sea matters,

taking into account the topics listed in UN General Assembly Resolution 2750 C (XXV) and the list of subjects and issues, added:

...and bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole[.]

(4) Claim that there was a need to update existing law

16. The argument that there was a need to update the existing law in order to take account of progress in science and technology and other developments relating to man's activities in ocean space was extremely persuasive. The definition of the outer limit of the continental shelf had to take account of the progress in offshore oil drilling technology. The controversial question of the right of coastal States, vis-à-vis the right of third States with respect to the living resources of the sea, was affected by developments in shipbuilding, fishing gear, electronics and other technology. The concern to preserve and protect the marine environment against pollution received a tremendous boost from the historic 1972 Stockholm Conference on the Human Environment.

(5) Claim that many newly independent States did not participate in the 1958 Conference and in the evolution of traditional law

17. Also influencing the decision to broaden the agenda was the political argument that many newly independent States had not participated in the 1958 Conference that adopted the Geneva Conventions on the Law of the Sea of 29 April 1958. The thrust of the argument was that much of the traditional law, with the emphasis on narrow national limits, served to promote only the interests of the major sea powers and the economic interests of distant-water fishing nations. These developing States wanted the opportunity to reshape the legal order of the oceans in order to protect their own perceived national security and economic interests. This element, i.e., that many new States had no say in the shaping of the then existing law of the sea,

3See, for example, remarks of the representative of Kenya, Mr. Njenga:
It is often forgotten that the majority of the developing countries were not represented in the 1958 and 1960 United Nations Conferences on the Law of the Sea, at which most of the issues of the law of the sea were settled. No doubt, those who were represented resolved the issues in what they considered to be the best interests of the international community as it then existed. But, just as 'it is the wearer who knows where the shoe pinches' it is only the developing countries which know what are their 'best interests' and the majority of them did not participate in those conferences. When a new conference is held, they will be entitled to put on its agenda all the issues on the law of the sea which they consider should be reconsidered and on which their interests were not adequately taken into account. 25 GAOR First Committee (1781st mtg.), para. 77.
is reflected in UN General Assembly Resolution 2750 C (XXV) of 17 December 1970, sixth preambular paragraph:

*Having regard* to the fact that many of the present States Members of the United Nations did not take part in the previous United Nations conferences on the law of the sea[.]

B. What were the effects of the wide scope of the agenda on the negotiating process and procedures?

18. The wide scope of the agenda affected the negotiating process in several ways.

1. *The sheer length of the list of the agenda made it difficult for the Conference to complete early consideration*

19. If we leave aside consideration of other factors, it is clear that the sheer length of the agenda (25 very broad issues) made it difficult, if not impossible, for the Conference, from a purely logistical viewpoint, to conclude its work at an early date. The Conference was not to be a mere exercise for States to record their views, such as a general debate in the UN General Assembly: it was a law-making Conference. As it turned out, the making of policy statements alone, the general debate, took up one entire substantive session (the second session, Caracas, 1974). These "general debates" were, in fact, statements of position by delegations in the Plenary and in each of the Main Committees on nearly all the items on the list. The Caracas general debates were apparently inadequate since many delegations continued to make general statements at subsequent sessions. Deferred general debates, on the Caracas style, were held in 1976 on items 21 (settlement of disputes) and 22 (peaceful uses of the ocean space). In 1978, another general debate was held on the final clauses and the preamble, which were not on the list of subjects and issues. From 1979 onwards, "mini" general debates on the results of the work done took place at the end of nearly every session or half session. These general debates were often the formal means to contribute a basis on which to revise the text before the Conference at the time.

2. *The difficulties of the agenda were compounded by the large number of States participating and the importance of the items for them*

20. The difficulty posed by a very lengthy agenda was complicated by two further factors. The *first* was the very large number of States participating in the Conference. A total of 164 States registered; and, although the actual number of delegations present varied, about 140 States were represented at most sessions. In addition, six non-independent States, eight national liberation movements, twelve specialized agencies and the International Atomic Energy Agency (IAEA), nineteen
intergovernmental organizations, a number of quasi-autonomous units of the UN as well as a host of non-governmental organizations (NGOs) attended the Conference. Given the different political, economic and other interests at stake, it was an extremely difficult task to harmonize the differences of so many States on such a long list of sensitive matters.

21. The second factor was that many of these items, e.g. straits, economic zone, continental shelf, etc., were either highly controversial or were novel concepts. States attached crucial importance to such subjects because of the consequences to their national interests and, therefore, quick agreement was not possible.

(3) The element of "interrelationship" between the various agenda items and the objective of one single Convention also complicated the negotiations

22. Reference has already been made to the position, incorporated in the General Assembly resolutions, that different aspects of the law of the sea were interrelated and had to be considered as a whole. The intention was for the present Conference to adopt a single Convention of wide acceptance promoting international stability. A disadvantage of adopting several Conventions is that States will choose to adhere only to those which seem advantageous and not to others, leaving the door open to disagreement and confrontations. The rationale for this approach was to avoid the situation that resulted from the 1958 Conference which concluded four Conventions from a single set of articles presented by the ILC.

23. However valid this theory of interrelatedness, the objective of concluding a single Convention on such a wide variety of matters definitely made the negotiations far more complicated and difficult, as well as time-consuming.

(a) Package deal and trade-offs

24. The Conference agreed to work on the basis of a "package deal." Implicit in this package deal concept was the assumption that the Convention should meet the minimum interests of the largest possible majority while accommodating the essential interests of the major powers and the dominant interest groups. Another assumption implicit in this package deal concept was that there would be trade-offs and reciprocal support between various claims: for example, support for navigation freedoms in straits and in the Exclusive Economic Zone (EEZ) in return for support for claims for sovereign rights over resources. Another example was the insistence by the coastal States that landlocked and geographically disadvantaged States (LL/GDS) endorse the sovereignty of the coastal States before the LL/GDS rights to share in the resources be considered.
25. Real or imagined linkages between many issues, within a Committee as well as across Committees, were vigorously asserted.

(b) Delaying tactics

26. Delegations or interest groups sometimes resorted to delaying tactics in the negotiations in one forum hoping to obtain concessions in negotiations in another forum on a related matter where things were not proceeding well for them. For example, certain Latin American coastal States would deliberately stall the negotiations in the First Committee to put pressure on their negotiating adversaries in the Second Committee.

(c) Objections to recognizing tentative agreements or compromise formulas

27. On other occasions, with tentative agreements actually reached on one issue, some delegations objected to any official or formal recognition thereof or objected to its incorporation in the basic Conference texts on the ground that certain allegedly closely related items were unresolved. The delegations which objected probably feared that their bargaining leverage on those unresolved items, which were vital for them, would be reduced or lost altogether. For example, at the close of the seventh session, both coastal States and LL/GDS gave broad support to the new compromise proposals of Ambassador Satya N. Nandan of Fiji, Chairman of Negotiating Group 4. The general feeling was that they could be incorporated in the ICNT. However, strong opposition came from the group of broad-shelf States who claimed that the LL/GDS question was linked to the continental shelf question discussed in Negotiating Group 6. Those States said that the LL/GDS must support the new formula on the continental shelf as a trade-off. The existence of this linkage was rejected by the LL/GDS and it was only at the eighth session (1979) that the Nandan text was accepted along with a compromise formula on the continental shelf, and these were incorporated in the ICNT.

(d) Effects on scheduling and allocation of time

28. The scheduling and allocation of time for various forums were also affected. Spirited debates took place on questions such as whether a specific item, group of items or the work of one committee should be given greater priority or should be allocated more time than others. Where certain committees or negotiating groups had achieved considerable progress in their work, there was objection either to their being reconvened or to their proceeding at the same pace on the ground
that other forums should be given the opportunity to bring their work to the same level of advancement. Illustrative of this was the explanation given by Ambassador Nandan, Chairman of Negotiating Group 4, for not having convened frequent meetings of his negotiating group at the seventh or eighth sessions. Ambassador Nandan felt that it would be fruitless for Negotiating Group 4 to meet because other negotiating groups (e.g., on the continental shelf) had yet to attain the same degree of progress and that more time should be given to those negotiating groups to advance their work to the same level. He felt that it would be counterproductive to hold meetings. He privately conveyed this view to delegations from both sides, and most of the LL/GDS deferred to his views. As a result, only two meetings of Negotiating Group 4 were held at the resumed seventh session.

III. THE NATURE OF THE AGENDA ITEMS: THEIR CRUCIAL IMPORTANCE FOR NATIONAL INTERESTS OF STATES; THEIR COMPLEXITY AND NOVEL NATURE

29. Quite apart from the wide scope of the interrelated agenda items, the nature of many of the agenda items also had an effect on the negotiating process.

A. Crucial importance of agenda items for national interests

30. While in many respects UNCLOS III was viewed by a number of States as an exercise in the codification and progressive development of international law, it should be borne in mind that some of the issues on its agenda were highly political and controversial. The reason was that vital national interests were perceived to be at stake. Nearly every issue at the Conference raised short-term or long-term implications for States and every proposal at the Conference had adverse or beneficial consequences for States.

31. Two obvious interests at stake were economic-resource interests and strategic and security interests. As regards the former, the issue of limits (such as the outer limits of the territorial sea, of the economic zone or of the continental shelf) had serious effects on States. Coastal States wanted limits and provisions which gave them exclusive rights over the greatest extent of living and non-living resources. On the other hand, the LL/GDS sought limits and provisions which permitted optimum sharing of resources and greater resources for the international area. In a world of dwindling resources, it is not surprising that States sought to promote their national interests as they perceived them.

32. Similarly, with regard to the latter interest (strategic and security interests), most nations had important concerns. The U.S.A., the USSR and the other major powers had global strategic and security interests. They were concerned that any new provisions on straits or
the economic zone not undermine or threaten these interests. Apart from the big powers, other States also had their own security interests in the context of their own region or subregion, and their approach to provisions on coastal States’ jurisdiction and control was often influenced by these interests.

33. Apart from these two interests, a long list of other interests can be drawn up, such as:

- environmental interests (prevention and control of pollution). Some coastal States wanted powers to take effective enforcement measures against offending ships. This posed implications for flag States;
- interest in free flow of navigation and communications. All countries, especially the major maritime powers and trading nations, had an important interest in ensuring maximum freedom of navigation and overflight to facilitate free flow of commerce and communications;
- interest in promoting safety of navigation; and
- interest in conservation and management of living resources.

34. The point need not be belabored. For most States, one or more of these interests were deemed crucial to their national well-being. The outcome of the Conference, therefore, would be important and, accordingly, States did their utmost to ensure that the emerging Conference trends would coincide with their national priorities.

35. The negotiations were affected since States would not make concessions easily or early on matters perceived as being important to their national interests.

36. One of the earliest and best indications of how strongly States regarded the issues was the drawing up of the list of subjects and issues for the Conference that was undertaken in the Sea-Bed Committee. Although this list was intended only to provide the basis for the draft articles which the Sea-Bed Committee was to prepare and not the Conference agenda, there was great difficulty in agreeing on the list or on the precise wording of the items (e.g. “international straits” versus “straits used for international navigation”). Why was this so? One view is because the inclusion or omission of a given item and its precise wording was regarded as prejudging or prejudicing the substantive discussions expected at the Conference. The sensitivity reflected the importance of the issues for States. If this were so for a mere listing, it is no surprise that the problems were greater when it came to the actual treaty articles.

37. Individual delegates could not help but be influenced by the importance of the subject matter for their countries. It was not always an easy responsibility for a representative to convey to his Government that its maximum negotiating position was not achievable and concessions would have to be made.

38. Many delegations came to the Conference, session after session,
adopting the same tough position which, by any objective analysis, was no longer realistic. What accounted for the reluctance to concede and shift to a more moderate position? The answer may lie in the seriousness of the issue for the country's interests. To concede or to be seen as conceding on a vital matter was, for many States, politically undesirable. It was undesirable either in the sense that this would create internal problems for the country or in the sense that it was perceived as being tactically bad to give in too early.

B. Complexity, novel nature, requirement of expertise and knowledge

39. Many of the agenda items were highly complicated and technical. This was true particularly with regard to First Committee matters where representatives, in order to participate effectively, had to be familiar with matters such as:

- technical aspects of deep sea-bed mining;
- commercial aspects of deep sea-bed mining (including effects on economies of land-based producers and a knowledge of the world metals market);
- scientific knowledge of the resources; and
- various possible financial and taxation arrangements, as well as royalties.

40. But complexity was not confined to Committee I matters. For example, in Committee II, a State which had a continental shelf required a great deal of scientific knowledge about its adjacent sea-bed before it could decide which proposal on delimitation best served its interests.

41. In short, a wide range of expertise was needed on a host of subjects, from mining to fisheries, and from military, strategic implications to financial and tax questions and environmental matters. Not all delegations were equally able to cope with the complex, technical demands of the Conference. Even if delegations did not require expertise, they certainly needed a minimum amount of scientific knowledge and data.

(1) Difficulty for States in formulating precise positions, and effect on negotiations

42. How did all this affect the negotiating process? In many instances, especially during the Sea-Bed Committee and the first three sessions of the Conference, delegations had considerable difficulty in formulating precise positions on specific questions. It was not difficult to make a statement on any law of the sea question in broad and general terms. But it was quite a different matter when a State had to indicate precisely which of the various texts of draft treaty articles it would support. It could do this only if it were able to decide what was in its best interests. In many cases this was impossible. How else could one explain the fact that the United States argued vigorously against an EEZ although,
under the Convention, it would acquire the largest in the world, and was the most active proponent of a deep sea-bed mining régime, although it would reject the entire Convention for that issue?

43. Therefore, during the period referred to, there were many delegations which had not yet formulated their positions on specific questions. They were forced to engage in political posturing or to rely on broad policy statements while they tried to calculate the pluses and minuses in terms of their national interests. In turn, this meant that these delegations were not willing or prepared to enter into serious substantive negotiations, so long as the detailed implications for them were not clear. Some of the delays and dilatory nature of the Sea-Bed Committee’s proceedings can be attributed to this factor.

44. The authors would like to illustrate the foregoing point by drawing on their own personal experience in the early stages of forming the LL/GDS group, during the period of the Sea-Bed Committee in 1971. It was clear then to those involved in this exercise that there were many States which would not benefit from a 200-mile exclusive economic zone (EEZ) limit. However, in the process of approaching these countries and urging them to join a common cause, two kinds of problems were encountered. One was the understandable apprehension over joining a new grouping which was alleged by some coastal States as being divisive of Group of 77 interests. The other problem, germane to our present discussion, was that several States which were approached on the ground that they were potentially geographically disadvantaged States simply did not realize the implications. Some of them did not have the factual data which was necessary. It was only when the study by the Office of the Geographer of the United States Department of State,\textsuperscript{6} showing the effects of a 200-mile limit, became generally available that these States were able to fully appreciate the implications.

45. At the eighth session (1979), the Sri Lanka delegation formally presented an amendment to the Irish proposal concerning delimitation of the continental shelf. The Sri Lanka delegation then intensively lobbied for support for its amendment. The immediate question which other delegations privately asked was why Sri Lanka had waited for so many years to present this proposal. The Sri Lanka delegates were candid in their explanations. They explained that, being a developing country without a full range of scientific expertise, they had not realized until then that the Irish formula would leave a significant part of the margin, to which they had a claim, outside their national jurisdiction. In addition, they indicated that UN maps produced in recent years also assisted Sri Lanka in assessing the various proposals.

\textsuperscript{6}U.S. Department of State, Bureau of Intelligence and Research; Office of the Geographer. \textit{International Boundary Study, Series A. Limits in the Seas No. 46. Theoretical Areal Allocations of Seabed to Coastal States Based on Certain UN Seabed Committee Proposals}, 12 August 1972.
(2) Difficulty for States in co-ordinating different national departments on law of the sea questions and harmonizing their views, and affect on negotiations

46. The factor of the complexity of the agenda items also posed a problem of a different nature for most delegations—an internal problem which, nonetheless, often had consequences such as delays in adopting positions or even shifting of negotiating stances. Because of the complexity of the agenda items, most delegations in formulating, implementing and reviewing their law of the sea policy did not merely have to refer to their foreign ministers or law ministries (or equivalent) but had to refer to numerous other departments or ministries, such as those dealing with defense and security, fisheries and other resources, environmental questions, sea, air and electronic communications. Indeed, for most delegations, all these departments and their views had to be co-ordinated.

47. This is true not only of bigger powers but also of most States, though the major powers with more complicated internal politics and lobbying probably had a greater problem in this regard. It was not merely a logistical question of co-ordination. More serious was harmonizing the positions of different departments with diverse responsibilities and outlooks. This was not easy, as various departments approached questions differently, and each department felt its priorities should be reflected in the national stand on the law of the sea.

48. This internal co-ordination factor also affected negotiations. Those States which had greater problems of diverse co-ordination at home were, naturally, less forthright and less flexible in the negotiations. It was not uncommon for delegations to tell other friendly delegations, even from rival interest groups, the problems they had at home. A considerable amount of Conference delay is attributable to this, perhaps, simple but “real world” feature.

IV. THE PREPARATORY WORK FOR UNCLOS III WAS NOT ASSIGNED TO THE INTERNATIONAL LAW COMMISSION OR OTHER SPECIALIZED EXPERT BODY

A. The International Law Commission was not utilized

49. According to the report of the Secretary-General on the review of the multilateral treaty-making process (A/35/312 of 27 August 1980), in the first 35 years of the United Nations’ existence, some 200 multilateral treaties have been concluded by United Nations organs or by diplomatic conferences convened by the United Nations. An examination of the various procedures employed within the United Nations to prepare these treaties discloses extensive diversity. The Secretary-General’s report stated that the only generalization possible is that multilateral treaty-making in the United Nations is almost always a multi-stage process. The first stages of the formulation of an instrument
are generally entrusted to some restricted body—a small committee of governmental representatives, an expert group or even the UN Secretariat. The final stages always involve a representative body whose membership generally coincides with the potential scope of participation in the proposed instrument.

50. A very important modality for the preparation of multilateral conventions has been to entrust the preparatory work to the International Law Commission. The International Law Commission would normally appoint a special rapporteur for the subject and, in due course, issue a set of draft treaty articles which would be submitted to Governments for comments and which would undergo a series of revisions. When the International Law Commission’s draft was considered to be ready, the General Assembly would normally decide on the convening of an international plenipotentiary conference for the adoption of a Convention. This was the procedure that preceded the adoption of conventions, such as the four 1958 Conventions on the Law of the Sea, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Vienna Convention on the Law of Treaties. Sometimes, instead of convening an international conference, the International Law Commission’s draft would be discussed within the General Assembly’s Sixth (Legal) Committee and a Convention would be adopted by the General Assembly itself. Whichever method was adopted, there was, first, preparatory work by a specialized body of a limited size and, second, a single basic text, the International Law Commission’s draft treaty articles, which served as the basis of negotiations.

51. In the case of UNCLOS III, the preparatory work was not assigned to the International Law Commission. Instead, UN General Assembly resolution 2750 C (XXV) of 17 December 1970, which decided on the convening of the Conference, effectively assigned the preparatory work to the United Nations Sea-Bed Committee when the resolution, in operative paragraph 6, requested the Sea-Bed Committee to prepare draft treaty articles on the agenda items. Operative paragraph 6, inter alia, requested the enlarged Sea-Bed Committee to hold sessions:

...in order to prepare for the conference on the law of the sea, draft treaty articles [embodied the international régime and machinery for the international area on the basis of the Declaration of Principles]...and a comprehensive list of subjects and issues relating to the law of the sea referred to in paragraph 2 above, which should be dealt with by the Conference, and draft articles on such subjects and issues[.]

B. Why was the preparatory work for UNCLOS III not entrusted to the International Law Commission?

52. A survey of (a) the various proposals made at the Twenty-fifth UN General Assembly (1970), (b) the debate at the Twenty-fifth UN
General Assembly, and (c) the views of member States submitted to the
UN Secretary-General on the desirability of convening the Conference
does not shed much light on this question.\(^7\) However, there was
no lack of awareness of the importance of preparatory work. Nearly
every delegation stressed the need for thorough preparatory work.

(1) Proposals, draft resolutions and amendments at the Twenty-fifth
UN General Assembly (1970)

53. None of the various proposals and amendments relating to the
Conference made any mention of the International Law Commission.
Most of the proposals assumed that the Sea-Bed Committee would
prepare for the Conference. An early United States draft resolution
(A/C.1/L.536) envisioned a preparatory committee of representatives
of States, but a later United States proposal assigned the preparatory
role to the enlarged Sea-Bed Committee. Brazil and Trinidad and
Tobago proposed (A/C.1/L.539) the establishment of an ad hoc com-
mittee, also of representatives of States, but this committee was to
make recommendations only on procedure and agenda.\(^8\)

(2) The debate in the First Committee, Twenty-fifth UN General
Assembly

54. The debate in the First Committee, Twenty-fifth UN General
Assembly, on the law of the sea question does not show that any
serious consideration was given to a possible International Law Com-
mmission role. The records\(^9\) show that many delegations spoke generally
about the need for thorough preparatory work and there was consider-
dable discussion on whether there should be one preparatory Committee or
two, i.e. the Sea-Bed Committee and another. China (Taiwan) stated
that it had originally informed the UN Secretary-General, in document
A/7925, that preparation should be entrusted in the first place to the
International Law Commission. But at the General Assembly session,
China (Taiwan) changed its position and agreed with the view that
the preparations be entrusted to a body other than the International
Law Commission (1785th meeting, paragraph 51). When delegations
did refer to the International Law Commission, it was usually to point
out that the 1958 Conventions had been preceded by arduous preparatory
work by the International Law Commission. Brazil pointed out that
normally conferences of this kind “in which legal texts are to be
approved, have been finally decided upon by the General Assembly
when the draft articles were already available and considered by the
Assembly to constitute an adequate basis of work” (1777th meeting,

\(^7\)See note 3.
\(^8\)25 GAOR, Annexes (Agenda Item 25).
\(^9\)25 GAOR, First Committee (1777th mtg., et seq.).
paraphrase 117). Iraq pointed out that "to succeed, a conference must be carefully prepared. As a basis for its discussion, it must have carefully worked out drafts. Let us recall that [the 1958 Conference] worked on the basis of drafts which the International Law Commission, in co-operation with States, worked out after several years of study," (1758th meeting, paragraph 105); and New Zealand pointed out that the present situation differed from 1958 where there were "original texts formulated in detail and in effect pre-negotiated over a long period, by the International Law Commission" (1786th meeting, paragraph 23).

(3) The views of member States submitted to the Secretary-General

55. The views of member States, likewise, did not contain any articulated reasons for the General Assembly’s decision to entrust the preparatory work to the Sea-Bed Committee, although many States generally stressed the need for thorough preparatory work. Indeed, only China (Taiwan) suggested a role for the International Law Commission.\(^{10}\) Malta, however, did concede that a UN organ should be entrusted with the preparation; but it felt that the International Law Commission did not appear to be able to deal with the matter expeditiously, as it was occupied with other urgent legal work.\(^{11}\)

(4) Possible explanations

56. The foregoing indicates that there was a stress on, and no lack of awareness of, the need for thorough preparatory work. Indeed, UN General Assembly resolution 2750 C (XXV), in preambular paragraph 10, provided that the General Assembly was

Convinced that a new Conference on the law of the sea would have to be carefully prepared to ensure its success and that the preparatory work ought to start as soon as possible...drawing on the experience already accumulated in the [Sea-Bed Committee]...[.]

57. We have also noted that it seemed to be assumed that the Sea-Bed Committee was the most suitable body to handle the preparatory work, and that reasons for the implied rejection or non-consideration of the International Law Commission were not articulated.

58. Based on observations from participation in the Sea-Bed Committee and discussions with other delegations, the following possible explanations are suggested.

59. First, the decision to convene a Conference was taken after the establishment of the Sea-Bed Committee which initially focused only on the deep sea-bed/common heritage question. Thus, when it was decided to convene a full-scale Conference, there was already a defined

\(^{10}\)A/7925 (see note 3), p. 11.
\(^{11}\)Ibid., p. 26.
administrative and organizational establishment, which had come into existence in order to serve the Sea-Bed Committee. It is possible that delegations considered it logical and convenient to entrust the preparatory work to an organ already seized of the subject, to enlarge its membership and to widen its terms of reference.

60. Second, delegations had different kinds of reservations about the International Law Commission. Some developing countries felt that the developing States were not adequately represented on the International Law Commission. Others regarded the International Law Commission as being too conservative. Yet others thought that the International Law Commission’s experience was mainly on the codification of international law and that it might not be suitable at making new law. Some, recalling that the International Law Commission took about nine years to prepare 73 draft articles for the 1958 Conference, feared that the International Law Commission would take too long to prepare for this Conference.

61. Third, and probably the most important explanation, is that it was generally recognized that the questions at UNCLOS III would not be purely legal. The issues involved political, economic, strategic, environmental and other considerations. It was also realized that the work of the conference would focus more on the progressive development rather than the codification of this branch of international law. Also, vital national interests were at stake not only on general principles and concepts but also on the details. States were simply unwilling to leave the promotion of their vital interests to the International Law Commission because they reasoned that only governmental representatives could effectively formulate solutions.

V. FAILURE OF THE UNITED NATIONS SEA-BED COMMITTEE TO PRODUCE A SINGLE PREPARATORY TEXT

62. At the end of 1973, the United Nations Sea-Bed Committee had not succeeded in producing a single preparatory document in the form of a set of draft treaty articles. Instead, the Sea-Bed Committee submitted to the Twenty-eighth Session of the General Assembly (1973) a report in six volumes consisting of literally hundreds of individual proposals and draft articles by member States or groups of States as well as a plethora of other documents and reports of the three main committees. Notwithstanding this fact, the General Assembly in resolution 3067

\[\text{\footnotesize \#See GA resolution 2750 C (XXV) 25 GAOR, Supp. No. 28 (A/8028), preambular paragraph 5, which noted that “political and economic realities, scientific development and rapid technological advances of the last decade have accentuated the need for early and progressive development of the law of the sea, in a framework of close international co-operation.”}\]
NEGOTIATING PROCESS OF UNCLOS III (XXVIII) of 16 November 1973 confirmed the convening of the Conference in that year.

63. Thus, when the Conference was convened, it had no single preparatory text as a basis for negotiations. Instead, it had inherited a voluminous mass of proposals, reports and documents from the Sea-Bed Committee. Resolution 3067 referred all these documents to the Conference and, furthermore, invited States to submit new proposals.

A. What was the effect of the absence of a single preparatory text?

64. The absence of a single preparatory text hindered negotiations, particularly for the Second Committee, which was the prime focus of the Conference in the early stages. The absence of a single text as a basis for discussions meant:

1) that it was extremely difficult for delegations to negotiate on the basis of countless different texts and proposals because States attached importance to their own proposals and felt that they were losing a tactical point if another State’s proposals were used as a basis; and

2) that, in effect, the Conference had to undertake the task of preparing such a neutral text which could be the basis of negotiations.

It was only after the end of the third session in 1975, when the Single Negotiating Text consisting of three effectively independent parts appeared, that the Conference had a single preparatory document which was comparable to the International Law Commission’s draft treaty articles which had been used for other Conferences. The Single Negotiating Text, however, did not have commentaries as did the material prepared by the International Law Commission. The Conference did have precedent to fall back on. The Second Committee relied heavily on the four Geneva Conventions of 1958. The First Committee was able to draw guidance and inspiration from the 1970 Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (Declaration of Principles). In formulating Annex V to the Convention, the Conference was able to rely upon the Annex to the Vienna Convention on the Law of Treaties; in formulating Annex VI, the Conference was able to draw upon the Statute of the International Court of Justice; and in drafting Part XII, the Conference could look to several earlier treaties on protection of the marine environment against pollution.

B. Would the International Law Commission have been more successful?

65. Having just made the observation that the United Nations Sea-Bed Committee had failed to produce a single preparatory text, the question may be asked whether the International Law Commission
would have been successful in producing such a single text if it had been charged with the preparatory work.

66. This is a speculative question, and the answer must, of necessity, be speculative. The United Nations Sea-Bed Committee apparently failed to produce a single text because of two main factors. The first was that the members of the Committee were themselves representatives of States having strong positions on the issues. The Sea-Bed Committee, although ostensibly engaged in preparatory work, was, in effect, a mini-Conference. For most participants, the Conference had begun and they had to safeguard their national interests. The second factor was the complexity of the agenda and the controversial nature of many items.

67. We believe that the International Law Commission, or any other specialized body of jurists or lawyers, might have approached the issues in a slightly more detached and more lawyer-like manner less motivated by nationalistic interests of any State or group of States. And with such a relatively more detached approach, it might have been possible for such an expert body to have produced a single text. But it is doubtful that such a text could have been produced within any period of time shorter than what was required to produce the Single Negotiating Text. It should not be forgotten that the International Law Commission had taken more than eight years to produce its draft articles for the 1958 Conference.

68. However, producing a single text is one thing. Its being considered an acceptable basis for negotiations by most Conference participants is a different question altogether. Given the controversial nature of many law of the sea issues, political representatives of States might well have viewed with considerable cynicism any text in the drafting of which they had no direct participation.

C. Why did the General Assembly convene UNCLOS III in 1973 as planned when the Sea-Bed Committee had failed to produce a single text?

69. There are several reasons that may explain why the General Assembly decided to convene UNCLOS III in 1973, even though the Sea-Bed Committee had failed to produce a single text:

(1) The General Assembly was of the view that no amount of work in the Sea-Bed Committee could produce such a basic text. It was felt that such a text could emerge only as a result of negotiations in the context of the Conference.

(2) Many delegations felt that the Conference had already commenced, de facto, with the 1970 General Assembly resolution and the enlargement of the Sea-Bed Committee. The actual convening of the Conference was more of a formality.

(3) The final report of the Sea-Bed Committee left it to the General
NEOTIATING PROCESS OF UNCLOS III

Assembly to assess the progress. In the final report, the Committee pointed out that:

various questions were considered by the Committee . . . including the question of the adequacy of the preparatory work. It was evident, however, that the questions were the subject of differing views and members of the Committee considered that assessment of the preparatory work should, in the circumstances, be left to the General Assembly.\(^{13}\)

(4) President Amerasinghe's own views were also influential. He told the Twenty-eighth Session of the General Assembly that, in his opinion, it was an impossible task to prepare agreed consolidated texts on all subjects. He felt that if the Committee sought to make this a prerequisite for the commencement of the conference, then the Conference would never be held.

(5) The prevailing view at that General Assembly was that the preparatory work had gone as far as was possible and that the Conference should not be delayed. The debate on this question was summarized thus by the 1973 UN Yearbook:

On the question as to whether the Sea-Bed Committee's work was sufficiently advanced to warrant the holding of the Conference, Members held different views. According to Members taking the position that the preparatory work was sufficiently advanced, the Committee had gone as far as possible in its preparatory work. The Committee, they stated, had done a most useful work in defining the extent and scope of the subjects, in clarifying issues and in setting out the areas of agreement and disagreement. The Committee did not resolve all the questions, but these could be examined by the Conference itself, where the basis of representation would be wider. Further, according to this view, the Committee's work had reached a stage requiring that negotiations be initiated. These negotiations, it was considered, could only take place in the framework of a conference of plenipotentiaries. The Conference also would inject into the international community a sense of urgency and create a momentum necessary for the conclusion of a treaty.

This view was held by Canada, China, Ghana, Guinea, Iceland, India, Iran, Kenya, the Libyan Arab Republic, Malta and Yugoslavia, among many others.

Other Members—among them Poland and the USSR—took the view that the preparatory work had not reached a satisfactory stage. Under those circumstances, they held,

the outcome of the Conference was uncertain and, therefore, more preparatory work should be undertaken. Brazil and Mexico were among those proposing that preparatory work could continue at the Conference itself.\textsuperscript{14}

VI. SPECIAL RULES OF PROCEDURE CONCERNING THE TAKING OF DECISIONS

70. Another unusual aspect of the Conference was the Rules of Procedure adopted. For most United Nations conferences, the rules of procedure, as regards decision-making, distinguish procedural questions from substantive questions. The traditional pattern is for decisions on procedural questions to be taken by a simple majority of members present and voting. A special majority, such as a two-thirds majority of those present and voting, may be required for decisions on substantive questions in the plenary. Substantive decisions in committees could be taken by simple majority. Whatever the majority which may be required, the rules would not themselves make it difficult to take a decision. It would be up to the participants to decide when the time was appropriate for the taking of decisions.

71. The UNCLOS III Rules of Procedure departed from the usual pattern however. They specifically discouraged or inhibited the taking of decisions by voting. Two devices were built into the rules to achieve this. First, there were special rules for the avoiding or delaying of decisions by voting on substantive matters, and second, there were special rules concerning the majority of votes required for the adoption of decisions.

72. The Rules of Procedure are discussed in Chapter Three (p. 86 below), as well as the effect such Rules had on the negotiations. At this stage, suffice it to indicate that the taking of decisions by consensus and not by voting explains, to some extent, the lengthy duration of the Conference.

VII. THE EMERGENCE AND FORMATION OF NEW INTEREST GROUPS AND INFORMAL PRIVATE NEGOTIATING GROUPS

73. The politics of UNCLOS III generated the emergence of new alliances and groupings. It is true that the traditional groups operating in the United Nations, such as the regional groups, also existed and operated in the Conference. But on substantive matters they were not the dominant groups at the Conference. Instead, interest groups emerged which were unique to the Conference and were very influential in the negotiations. They were unique because they cut across geographical

\textsuperscript{14}1973 Yearbook of the United Nations (Vol. 27), pp. 40-41.
ties, the traditional division of developed versus developing country, and even ideological ties.

74. Some of these new special interest groups which emerged were:

- the coastal States group
- the group of land-locked and geographically disadvantaged States (LL/GDS)
- the territorialist group
- the group of straits States
- the group of archipelagic States
- the broad-shelf States or margineers
- the Oceania group
- the group of EEC countries
- the group favoring median line or the equidistance principle as the method of delimitation of economic zones or continental shelves between States with opposite or adjacent coasts
- the group favoring the equitable principles method for delimitation of economic zones or continental shelves between States with opposite or adjacent coasts
- the group of land-based producers
- the group of five comprising the U.S.A., USSR, United Kingdom, France and Japan
- the co-ordinating group of five comprising the U.S.A., United Kingdom, France, Federal Republic of Germany and Japan

75. Apart from these special interest groups, there also emerged informal private negotiating groups whose membership cut across the various special interests. These informal groups attempted to contribute to the process of compromise-making.

76. Special interest groups are discussed in Chapter Two (p. 69), and informal private negotiating groups are discussed in Chapter Four (p. 104). In our opinion, both played prominent roles in the negotiation process of UNCLOS III. With regard to special interest groups, it will be noted that they had a positive as well as a negative impact.

VIII. AN UNPRECEDENTED DEGREE OF AUTHORITY WAS VESTED IN A FEW INDIVIDUALS

77. In any Conference of the magnitude and scope of UNCLOS III, one can expect certain individuals to play leadership roles, either because of their expertise, skills or personality, or because they were officially appointed to hold key offices in the Conference.

78. In UNCLOS III, however, an unprecedented degree of authority was vested in a handful of individuals. A general discussion of the role of individuals is contained in a subsequent section. But at this stage, specific reference is made to the President of the Conference and the Chairmen of the three Main Committees.
79. These four individuals, while holding these positions, were also representatives of their countries with known national positions on various issues. Yet the conference entrusted them with the task of preparing the basic texts.

80. Although numerous qualifications were attached to the tasks assigned to these officers (e.g. that these were negotiating and not negotiated texts, that they were personal efforts of the Chairmen and did not prejudice any other proposals), there is no doubt that from the moment the Single Negotiating Text appeared, it was regarded as the preliminary draft of the Convention. Subsequent revisions were regarded as improved drafts and, more importantly, as reflecting the trends in the Conference.

81. The power given to these four men to write texts which in practice were regarded as the unofficial draft Convention was unprecedented in UN practice. The power they held in their hands was enormous, especially considering that it was not easy for delegations to subsequently alter the texts. Indeed, whether the texts were to be revised or not was also largely left to the decision of the President and the Chairmen.

How did individual authority affect the negotiating process?

82. The decisions to entrust the President and the Chairmen to prepare texts on matters within the purview of their respective Committees, and subsequently to prepare, as a team, the ICNT and its descendants, definitely affected the negotiating process in the following ways.

83. First, the negotiating strategy of delegations and interest groups had to be modified. They felt that they had to influence the Chairman concerned, either to make changes or to resist suggestions for change.

84. Second, this influence was sought by numerous methods. Often, delegations sought to persuade as many States as possible to speak up to support their requests for a change. Those opposing the change would similarly muster a lineup of speakers. Many meetings were, therefore, no more than brief but countless expressions of support or opposition for particular proposals for change. Other delegations submitted to the Chairman letters and proposals. Many delegations felt it necessary to attempt to exert personal influence on the Chairman. The Chairman, in short, was cajoled and courted and was invited to endless dinners and lunchees by delegations representing nearly every interest group as well as by individual States.

85. Third, whenever the time arrived for revising the text, many delegations took seriously only those negotiations and meetings which were chaired personally by the Chairman or which were conducted with the blessing and approval of the Chairman. It was felt that it was a waste of time to participate in meetings, official or otherwise, if the results of the meeting were not likely to be seriously considered by the Chairman when he revised the text.
IX. THE UNUSUAL DURATION OF THE CONFERENCE: DEVELOPMENT OF STATE PRACTICE

86. The foregoing refers to numerous factors that contributed to the uniqueness of UNCLOS III negotiations and partly account for the long period of time which the Conference took to conclude its work. If we include the work of the Sea-Bed Committee, the negotiations spanned a period of 14 years.

87. This long period of time has itself caused problems for the negotiations. For instance, the long delay enabled delegations to have more time to rethink and reconsider positions in light of either national or international developments. Compromises and texts agreed upon at one session were unraveled in subsequent sessions by delegations which had not objected to the formulations agreed previously. When this happened, the process of arriving at an agreed text had to start anew.

88. The long duration also enabled unilateral actions of States to affect the negotiations. This too was a problem and this is discussed in Section X of this Chapter. The long duration also caused difficulties for the Conference because of changes in national governments, in the personnel of delegations, in the UN Secretariat and in the home task forces.

X. EVENTS AND ACTIVITIES OUTSIDE THE CONFERENCE

89. It would be misleading to view UNCLOS III negotiations as having been conducted exclusively during the sessions of the Conference and exclusively within the formal and informal Committees of the Conference. There were three categories of events and activities outside the Conference framework which have had profound effects on the Conference negotiations. These were:

A. Bilateral discussions, agreements and deals;
B. Conferences and other international meetings held outside the UNCLOS framework; and
C. Unilateral actions by States on law of the sea questions.

A. Bilateral diplomatic discussions, agreements and deals

90. Considerable diplomatic activity outside the Conference took place between sessions and sometimes even concurrent with a session. States with important interests at stake engaged in such diplomatic activity outside the Conference in order to persuade or dissuade other States on a given issue, or to plan strategy with like-minded States.

91. It is no secret, for example, that:

1. Canada and the United States had regular bilateral discussions on UNCLOS issues.
2. The Soviet Union and the United States had regular bilateral discussions.

3. The delegations of the United States, the USSR and Japan had a practice of making visits to various countries from time to time. These three delegations made visits to certain Asian and Southeast Asian countries and such visits were probably made also to other parts of the world. The purpose of such visits was clear. It was to inform the host State of the issues the delegation felt important and to solicit support and understanding for their position and proposals.

4. Apart from such general visits, some major powers made highly private visits to selected States, which had proved problematic on an issue, to reach an understanding on such an issue. For instance, the United States delegation made private visits to Indonesia before the third session to discuss the archipelagic concept.

5. Malaysia, Indonesia and Singapore periodically had meetings on the question of the safety of navigation in the Straits of Malacca and Singapore, and some aspects of their discussions were related to the questions before UNCLOS III.

92. Further examples could be offered but the above should suffice to demonstrate that the UNCLOS negotiations continued between the sessions. What precisely transpired during these bilateral or trilateral extra-conference discussions is not public. In some instances, deals were struck, formulas agreed upon or mutual understandings reached. All these were relevant to UNCLOS negotiations, as the delegations would then follow up to implement the agreements in the next session of the Conference. In this way, these bilateral activities made important contributions to the UNCLOS negotiation process.

B. Conferences and other international meetings held outside the UNCLOS framework

93. Over the many years which UNCLOS III had spanned, there was a plethora of conferences, meetings, workshops and seminars. Some of these were organized by governments, others by non-governmental organizations, academic institutions and individuals.

94. Some of these meetings had an impact on the negotiating process of UNCLOS III, particularly the following examples:

1. The meeting of representatives of Chile, Ecuador and Peru held at Santiago, Chile, 11 to 19 August 1952 which resulted in the adoption of the "Santiago Declaration" (UN Document ST/LEG./SER.B/6 at pp. 723-4);

2. The meeting attended by representatives of Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru and
Uruguay held in Montevideo, Uruguay, 4 to 8 May 1970 which resulted in the adoption of the "Montevideo Declaration on the Law of the Sea" (UN Document A/AC.138/34);

3. The meeting attended by representatives of Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela held in Lima, Peru, in August 1970 which resulted in the adoption of the "Declaration of Latin American States on the Law of the Sea" (UN Document A/AC.138/28);

4. The Meeting of Ministers of the Caribbean countries, 6 to 9 June 1972, held at Santo Domingo, the Dominican Republic, which resulted in the adoption of the "Declaration of Santo Domingo" [in GAOR Twenty-seventh Session, Supp. No.21, (A/8721), p. 70, originally issued as UN Document A/AC.138/80];


6. The Group of 77 meeting on the Law of the Sea issues, Nairobi, Kenya, 1974. This meeting failed to produce an agreed document or declaration partly due to a failure of the LL/GDS and the coastal States in the Group of 77 to agree on the text;


8. The Conference of the Developing Land-Locked and other Geographically Disadvantaged States, Kampala, Uganda 20 to 22 March 1974 which resulted in the adoption of "The Kampala Declaration" (Document A/CONF.62/23 in UNCLOS III, Off. Rec. III);


95. These meetings had a profound impact on the actual UNCLOS negotiations. For instance, the OAU Declaration and the Santo Domingo Declaration were the sources of various proposals and draft articles which were introduced in the subsequent Conference sessions. Even the 1974 Group of 77 meeting on the law of the sea, which was regarded as a failure, had an effect on Conference negotiations in a negative sense. At the UNCLOS session which immediately followed, it became
extremely difficult for coastal States and LL/GDS in the Group of 77 to agree on EEZ questions. Acrimonious debates between these two groups reached a new high and the climate for sober discussions was soured.

C. Unilateral actions by States on law of the sea questions

96. Unilateral actions or threat of unilateral actions by States also affected UNCLOS negotiations.

(1) Unilateral action or threatened unilateral actions in deep sea-bed mining

97. The intention of the United States Congress to enact legislation for unilateral deep sea-bed mining caused much concern to other States, especially the Group of 77 members. Whatever the merits or demerits of such unilateral action, the fact of its existence had an impact on the UNCLOS negotiating process.

98. First, a great amount of time and energy was consumed in debating this issue. This was especially so in the resumed seventh session (1978) and in the eighth session (1979) where the Group of 77 criticized the United States and the United States responded. The Group of 77 also established a highly qualified group of legal experts to prepare detailed arguments on the unlawfulness of the United States legislation.

99. Second, the possibility that the United States and certain technologically advanced States were on the brink of unilateral action had, in turn, affected the negotiating stands of some countries. It hardened the views of some Group of 77 States. The threat of unilateral action may have been intended by the United States Congress and others to increase their bargaining leverage in their negotiations and to make their negotiating adversary, i.e., the Group of 77, more flexible. But it is questionable whether it achieved the intended effect.

(2) Unilateral establishment of fisheries zones and EEZs

100. It is equally well known that numerous States had, ever since the Conference commenced, established fisheries zones or exclusive economic zones. Such unilateral actions profoundly affected the negotiations.

101. First, the coastal States appeared to draw psychological strength from their unilateral actions. Some argued that such unilateral actions amounted to State practice. Second, in the actual negotiations, those States which had taken unilateral actions restricted their negotiating flexibility. They could not negotiate on any basis which was inconsistent with their national position. Thus, as unilateral actions on EEZs increased in the aggregate, the positions of more States became more inflexible.
and, hence, it became more difficult to negotiate compromises. Third, the unilateral actions of some key countries, such as the U.S.A. and the EEC countries, increased the bargaining strength of the Group of Coastal States and weakened the negotiating position of the LL/GDS Group.

102. To best illustrate the point, an increasing number of States during the duration of the conference unilaterally declared exclusive economic zones or fisheries zones up to a maximum of 200 nautical miles. As an increasing number of States declared EEZs, the room for negotiations on questions related to the EEZ became progressively constricted. For the representatives of these States, their national legislation was, understandably, their minimum negotiating position in the Conference. Their flexibility in negotiating compromises became very limited.

103. During this period of time, the gradual increase in EEZ unilateral legislation affected the negotiations. For instance, consider the question of LL/GDS rights in the EEZ. In the early years of the Conference, e.g. the first to third sessions, the coastal States were receptive to the proposals of the LL/GDS Group and there appeared to be a genuine desire to reach an accommodation. Indeed, some of the formulas on LL/GDS rights worked out by the Evensen Group or by the Group of 77 during this period are, in retrospect, better for the LL/GDS position than are the provisions in the Convention.

104. However, in subsequent years a hardening of positions of certain coastal States occurred, largely by the States which had unilaterally declared EEZs. As the number of these States increased and their effect in the coastal States group was felt, the negotiations on the question became more intractable. Proposals and formulas which, in a previous session, were acceptable to these States, were no longer tenable propositions for them.

105. Apart from this effect of unilateral action which the passage of time exacerbated, States also began to refer to such unilateral actions as “State practice” or “emergent custom.” They urged the Conference to adopt provisions to recognize or endorse such emerging practice. Thus, not only did unilateral action affect the negotiations, but it also provided the unilateralist States with a self-serving, substantive argument.

XI. THE ROLE OF INDIVIDUALS

106. In any international conference, certain individuals play more important roles than others, perhaps because of their special talents and abilities, their personality and character, or their position in the Conference or in a particular delegation. The negotiations in UNCLOS III provided several individual delegates with a great capacity to influence
procedural and substantive developments. There were other individuals who, while not having quite the same influence, were nevertheless considered as very important personalities in shaping Conference events.

107. To understand how these individuals became influential, it is necessary to recall that first, the Conference procedures were designed to avoid the taking of votes. Instead, achieving consensus was stressed. By the nature of this process, the views of key groups had to be obtained and accommodated. In a large conference, certain individuals were bound to emerge as representatives of various groups. Second, the Conference’s decisions on the method for the preparation of the negotiating texts concentrated a great deal of power and responsibility upon a few individuals. Third, the emergence of private informal negotiating groups enabled the Chairmen and key actors of such groups to wield more personal influence. Fourth, the long duration of the Conference enabled the more effective and forceful individuals to be increasingly influential due to this experience and knowledge of issues and other players.

A. Who were these influential individuals?

108. The unusual influence of specific individual officials or categories of officials requires comment in order to understand the negotiating process of the Conference.

(1) The President, H.S. Amerasinghe and his successor, T.T.B. Koh

109. There is no doubt that the President of the Conference, H.S. Amerasinghe of Sri Lanka, as an individual had great influence in the negotiations. The battle fought at the seventh session (1978) over his continuation as President, after a change in the government of Sri Lanka left him excluded from his country’s delegation, showed clearly that even though he had ceased to be a representative of Sri Lanka, many States regarded his continuation as President to be essential. His success in the negotiations over the Rules of Procedure (second session, 1974) and the valuable work he did on the question of dispute settlement, the general provisions, the preamble and the final provisions were his main direct contributions to the Conference. Indeed, his firm chairmanship of General Committee meetings and his ability to pronounce that there was a consensus at meetings, without challenge from the floor, was greatly admired by his colleagues. Certain journalists who followed the proceedings of UNCLOS III called him the fastest gavel in Asia. The fact that he was so effective in promoting consensus is a tribute to his personal leadership.

110. President Amerasinghe died, unexpectedly, in December 1980. His successor, T.T.B. Koh of Singapore, had earlier chaired the Negotiating Group 2, on financial arrangements. At the request of the
Chairman of the First Committee, President Koh had also chaired the negotiations on decision-making in the Council of the International Sea-Bed Authority. After he assumed the presidency of the Conference, President Koh took personal charge of the negotiations on delimitation, participation in the Convention and Resolution II of the Conference on the Protection of Preparatory Investments.

(2) Chairmen of the three Main Committees

111. Apart from the President, the most influential role in the Conference was assigned to the Chairmen of the three Main Committees. Their greatest influence derived from the fact that the Conference entrusted them with the responsibility for preparing the Single Negotiating Text and with revising it.

112. The three Chairmen were not only influential as Chairmen of their respective Committees, each of them was also influential in the context of other groups. For example:

(a) The Chairman of Committee I, Paul Bamela Engo of Cameroon, was also influential in the Group of 77, in the African Group and sometimes in the LL/GDS Group, of which Cameroon was a member.

(b) The Chairman of Committee II, Andrés Aguilar of Venezuela, was influential in the Group of 77, in the Latin American Group, in the Group of Broad-Shelf States and in the Coastal States Group.

(c) The Chairman of Committee III, Alexander Yankov of Bulgaria, was influential in the Eastern European Group and in the LL/GDS Group.

(3) Chairman of the Drafting Committee

113. The Chairman of the Drafting Committee, J. Alan Beesley of Canada, was another Conference leader. As a member of the Collegium, he had a say in the revision of the negotiating text, as well as in the overall management of the Conference. He was an able leader of the Drafting Committee, which assumed great importance toward the closing stages of the Conference. Ambassador Beesley also played an active part in the work of the coastal States, broad margin States and the land-based producers groups.

(4) Chairmen of the negotiating groups

114. The Chairmen of various negotiating groups were also extremely influential. Here, reference is made to both the negotiating groups which were formally established by the Conference and to the private negotiating groups, such as the Evensen Group, the Nandan Group (also known as the Group of 21) and the Castañeda Group. The Chairmen
of such groups played an influential role in the Conference because they produced compromise texts which, depending on their acceptability, were subsequently reflected in the Conference negotiating text.

(5) Conference leaders

115. Apart from the officials and Chairmen referred to above, there were other individuals who were influential and who made an impact on the negotiations in the following ways:

(a) by being effective leaders of certain interest groups or regional groups. Their ability to persuade their group to accept or reject certain solutions was very important in the negotiating process. One or two able and effective individuals could successfully steer an interest group towards making or breaking a consensus.

(b) by being effective and active representatives of their own delegations. Indeed, the influence of certain delegations in the Conference depended on the skills and abilities of the individual representatives. It also depended on whether the representative regularly attended consecutive sessions of the Conference.

This point is important because, at UNCLOS III, profound relationships and rapport were established between delegates. This, in turn, meant that continuity was important because the Conference spanned such a long period of time. Certain delegations which had a rapid turnover of personnel found it difficult to gain admission to the informal "clubs" comprising the leadership of the Conference, such as the Castañeda Group.

B. Some Comments on the impact of the Chairmen of the Main Committees, Drafting Committee and negotiating groups

116. The following observations are offered on the role of the Chairmen of the three Main Committees, the Drafting Committee and the Chairmen of the various negotiating groups.

117. The role of the President and the three Chairmen of the Main Committees, in drafting the negotiating texts, had a positive impact in the negotiations in that it helped overcome the problem of the absence of a single text as the basis for negotiations. But there were also some negative aspects.

118. The discretion of the President and the Chairmen in making revisions to the negotiating text was unfettered until the seventh session (1978), when the Conference adopted clear criteria for the revision of the ICNT. No problem arose when a Chairman based his revision upon a text which emerged from negotiations. Problems did arise when
revisions were made which were not based upon the result of negotiations or where the Chairman tampered with a text which had emerged from the negotiations. A well-known example occurred during the sixth session (1977). Chairman Engo appointed Jens Evensen of Norway to chair an informal working group in the First Committee. As a result of the negotiations in the informal working group, Evensen prepared a compromise text which he submitted to Chairman Engo. The general expectation was that the Evensen text would be reflected in the ICNT. However, Chairman Engo made changes to the Evensen text without adequate consultations. The Chairman was charged with upsetting the balance in the Evensen text and the ICNT was declared to be fundamentally unacceptable to the United States and other industrialized countries.

119. The ability of the Chairmen of the three Main Committees, as well as the Chairmen of the negotiating groups, to produce texts which advanced controversial issues nearer to solution, often depended on the personal qualities and abilities of the Chairman as follows:

(a) whether he had a good perception of the problems and realities;
(b) whether he undertook adequate consultations with interested parties. When a Chairman produced a compromise text, without consultations with a key interested delegation or interest group, such delegation or group might try to wreck the compromise;
(c) whether he had conducted himself in such a manner that his integrity and objectivity were not doubted. In certain cases, some delegations felt that a particular Chairman had drafted a text solely to protect the national position of his country. Thereafter, the effectiveness of that Chairman was severely impaired not only with affected delegations but also with the Conference as a whole; and
(d) whether he was industrious. A Chairman who was trying to draft a compromise text on a controversial issue had to be very industrious and patient. Not only had he to consult extensively but he would also have to discuss the outlines of his proposed compromise with key participants.

Indeed, one Chairman of a negotiating group commented that he often felt he was in the position of a peddler hawking his goods (i.e. the compromise text) from one key delegation to another, all of whom had varied objections to the text, causing him to try a redraft and repeat the exercise all over. Nonetheless, it was due to the personal diligence and persistence of the Chairman who did such tedious groundwork that widespread acceptance was achieved for his drafts. Even those who could not agree felt obliged to tone down their objections since they appreciated the extensive work done by the Chairman.
Those Chairmen who merely chaired meetings and proceeded to draft their compromise texts without such ground-work often found their drafts being bitterly attacked from all sides.

XII. THE ROLE OF THE SECRETARIAT

120. The Conference was serviced by a Secretariat provided by the United Nations, and the Head of the Secretariat was the Special Representative of the UN Secretary-General. The Office of the Special Representative had highly trained professionals or lawyers. During each session of the Conference, the staff of the Office of the Special Representative was augmented by an approximately equal number of staff drawn from other departments and agencies of the United Nations, such as the Department of Political and Security Council Affairs, the Office of the Legal Counsel, the Department of International Economic and Social Affairs and the United Nations Conference on Trade and Development.

121. During the first and second sessions of the Conference, the Special Representative of the Secretary-General, Constantin A. Stavropoulos of Greece, was also the United Nations Legal Counsel. From the third session to the end of the Conference, the post of Special Representative was held by Bernardo Zuleta of Colombia.

122. What contributions did the Secretariat make to the work of the Conference? The Secretariat rendered invaluable assistance to the Collegium and the Conference in general in its work. The first contribution it made was to provide the Conference with adequate facilities to carry out its work. Second, Under-Secretary-General Zuleta assisted both President Amerasinghe and President Koh in the discharge of their responsibilities. President Koh entrusted the Under-Secretary-General on several occasions with the responsibility of undertaking consultations on his behalf on difficult procedural problems. Third, some of the Chairmen of the Main Committees, the Chairman of the Drafting Committee, and some of the Chairmen of the negotiating groups worked closely with the Secretariat officials assigned to their Committees and negotiating groups in the preparation and the revision of texts. It must be borne in mind that proposed texts must originate somewhere in draft form. In certain instances, Secretariat members were asked to prepare these drafts pursuant to instructions from, and under the supervision of, the Chairman or President.

XIII. THE ROLE OF THE COLLEGIUM

123. The Collegium of the Conference consisted of the President, the Chairmen of the three Main Committees, the Chairman of the Drafting Committee and the Rapporteur-General. Although the Collegium
came to play a pivotal role in the management of the Conference, this
came about gradually in response to a felt need which was not foreseen
at the start of the Conference. Hence, the Rules of Procedure of the
Conference contain no reference to the Collegium.15

124. Since the President, the Chairmen of the three Main Committees,
the Chairman of the Drafting Committee and the Rapporteur-General
were the six principal officers of the Conference, it was natural for
the Conference to look to them for leadership. The President of the
Conference was responsible for managing the negotiating process. In
doing so, the Conference expected him to consult and work closely
with the other principal officers of the Conference. Initially, when
negotiating texts had to be prepared, the Conference turned to the
President and the Chairmen of the three Main Committees to produce
such texts. At this point, the Chairman of the Drafting Committee
and the Rapporteur-General did not have an active role to play in
their institutional capacities. Typically, the President and the Chairmen
of the Main Committees worked on their own in producing the first
texts rather than as a team. The complexity of the negotiations may
have required this for details at this stage, although considerable informal
consultations were held in general and on key controversial matters.

125. The evolution of the Collegium and its consolidation as a team
began at the seventh session, with the adoption of document A/CONF.62/
62 which, inter alia, provided that the revision of the ICNT should
be the collective responsibility of the President and the Chairmen
of the Main Committees, acting together as a team headed by the President.
The document also stated that the Chairman of the Drafting Committee
and the Rapporteur-General should be fully aware of the considerations
that determined any revision of the text, and the latter should be kept
informed of the manner in which the Conference had proceeded at
all stages. The explanatory memorandum by the President to ICNT/
Rev.1 disclosed that the decisions on the revision were made by him
and his team on a joint basis.

126. From the seventh session onward, the Collegium developed
an increasing sense of unity and collegiality. No distinction was made
between the status of the President and the Chairmen of the three
Main Committees on the one hand and the Chairman of the Drafting
Committee and the Rapporteur-General on the other hand. All decisions
were made unanimously, whether with respect to revisions of the text,
the organization of the work or the timetable of the Conference. During
the last two years of the Conference, 1981 to 1982, President Koh
consciously set as one of his objectives the further consolidation of
the Collegium and the development of a sense of esprit de corps. The
Collegium met at least once every week to take stock of developments
in the Conference. The President would always discuss with his col-

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15On the Collegium, see para. 27 of the Final Act (p. 416 below).
leagues in the Collegium the proposals he intended to put forward to
the General Committee or to the plenary regarding the organization
of the work of the Conference and its timetable. The President did
not make any proposed modification to the text of the Draft Convention
and the Draft Resolutions without first discussing them with and obtaining
the consent of his colleagues in the Collegium. The ability of the six
principal officers of the Conference to work together as a team was
important to the success of the Conference because it provided leader-
ship, direction and management.

XIV. THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS

127. In his statement to the Conference at Montego Bay, Jamaica,
President Koh acknowledged the role played by the Non-Governmental
Organizations ("NGOs"). He said that the Non-Governmental Or-
ganizations provided the Conference with three valuable services.
They brought independent experts to meet with delegations, thus en-
abling delegates to have an independent source of information on
technical issues. They assisted representatives from developing countries
in narrowing the technical gap between them and their counterparts
from the developed countries. They also provided the Conference with
opportunities to meet, away from the Conference, in a relaxed and
informal atmosphere, to discuss some of the most difficult issues con-
fronted by the Conference. He might well have added that some NGOs
played an influential role in formulating the domestic position of nations
on LOS issues.

CHAPTER TWO

THE GROUP SYSTEM

1. The politics of UNCLOS III and the negotiating process produced
new alliances and groupings which played an important role in the
negotiating process. A discussion of these groups is essential.

2. It is true that some of the groups which traditionally operate in
UN diplomacy, such as the regional groups, also existed and operated
in UNCLOS III. However, they were not the dominant groups on
substantive matters.

3. Instead, new interest groups unique to this Conference emerged
and became very influential in the negotiations. They were unique
because many have no existence outside this Conference. They were
also unique because they cut across geographical groups and across
the traditional line dividing developed from developing country, as
well as across ideological lines. Some of these groups were formalized
into sub-groups, held regular meetings and established procedures.
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Others were less formal and met on an ad hoc basis. Some were active throughout the Conference while others were active only on certain occasions.

Homogeneous and heterogeneous groups

4. Most of the interest groups were homogeneous in that all members shared a common interest in or position on the law of the sea issue or issues discussed within the group. In this sense, the coastal States group and the LL/GDS Group were tightly-knit, homogeneous groups. However, an interest group could be highly heterogeneous. For example, the Group of 77's members, while often taking a united stand on Committee I matters, had divergent views on other matters. The regional groups were also heterogeneous in this respect.

A State could belong to more than one interest group

5. It was not unusual for a State to belong to more than one interest group because it could have more than one vital law of the sea interest and affiliation due to factors such as:

- the configuration of its coast;
- the length of its coastline and width of its continental shelf;
- its proximity to the coasts of neighboring countries;
- whether the sea or sea-bed adjacent to it were rich in living or non-living resources;
- the size of its commercial and military fleet;
- its relations with its neighbors; and
- its military alliances.

I. HOW DID THE NEW SPECIAL INTEREST GROUPS EMERGE?

6. Given such factors, most of the traditional UN groups, such as the regional groups, had diverse and often conflicting views on law of the sea issues between members of the group. It was difficult for members to forge a common position.

7. The Asian Group may serve as an illustration of this point. Within this group there were many coastal States, e.g., India, Sri Lanka, China and Malaysia, which strongly supported the EEZ concept. At the same time, there were also LL/GDS in the group, e.g., Nepal, Afghanistan and Singapore, whose objective initially was to oppose the EEZ concept and to advocate LL/GDS rights. Likewise on the straits issues, Malaysia, the Philippines and Oman supported the single régime of innocent passage for straits. States such as Singapore, Iraq and Kuwait advocated a distinct régime of passage for straits.

8. Because of the diversity of views existing on law of the sea issues within traditional UN groups, they were ill-equipped to be vehicles
for forging a common position. This led States which had a common stand to embark on a pattern of close consultations which, eventually, led to the formation of new groupings.

Some traditional groups were still effective

9. The impression ought not to be left that all the traditional UN groupings were completely ineffective with the arrival of new special interest groups. On Committee I matters, for instance, the Group of 77 was successful in forging a common developing countries’ position, though it never succeeded in reaching a common stand on Committee II or Committee III matters. At various times, on specific issues, some of the regional groups also took a united stand.

II. THE NEW SPECIAL INTEREST GROUPS

10. This section will survey the new groups which were established at the Conference. At the outset, we may note that the two largest and most active groups were the Coastal States Group and the LL/GDS Group.

A. The Coastal States Group

11. The Coastal States Group consisted of 76 coastal States, both developing and developed. They were:

1. Argentina
2. Australia
3. Bangladesh
4. Bahamas
5. Benin
6. Brazil
7. Burma
8. Canada
9. Cape Verde
10. Chile
11. Colombia
12. Congo
13. Costa Rica
14. Democratic Kampuchea
15. Democratic People’s Republic of Korea
16. Democratic Yemen
17. Dominican Republic
18. Ecuador
19. Egypt
20. El Salvador
21. Equatorial Guinea
22. Fiji
23. Gabon
24. Gambia
25. Ghana
26. Guatemala
27. Guinea
28. Guinea-Bissau
29. Guyana
30. Haiti
31. Honduras
32. Iceland
33. India
34. Indonesia
35. Iran
36. Ireland
37. Ivory Coast
38. Kenya
39. Libyan Arab Jamahiriya
NEGOTIATING PROCESS OF UNCLOS III

40. Madagascar
41. Mauritania
42. Mauritius
43. Mexico
44. Morocco
45. Mozambique
46. Nauru
47. New Zealand
48. Nicaragua
49. Nigeria
50. Norway
51. Oman
52. Pakistan
53. Panama
54. Papua New Guinea
55. Peru
56. Philippines
57. Portugal
58. Republic of Korea
59. Senegal
60. Sierra Leone
61. Somalia
62. Spain
63. Sri Lanka
64. Sudan
65. Suriname
66. Thailand
67. Togo
68. Tonga
69. Trinidad and Tobago
70. Tunisia
71. Uruguay
72. Venezuela
73. United Arab Emirates
74. Western Samoa
75. Yemen
76. Yugoslavia

Establishment

12. This group seems to have come into existence spontaneously during 1972 as a reaction to the organized efforts of the LL/GDS Group which succeeded in having the General Assembly adopt a resolution which requested the Secretary-General to make a study of the implications of the various limits proposals. At that time, there was already in existence a broad-shelf or margineers group and this was expanded into the Coastal States Group.

Common Interests of members

13. On the positive side, the common interest of members was to promote their cause for extended coastal States jurisdiction, particularly a strong EEZ, and to draft texts and map out strategies and tactics. On the negative side the common interest was to counter and oppose the proposals and tactics of other groups which were perceived as inimical to their interests, e.g., the LL/GDS claim for rights to living resources in the EEZs of other States, and for the position of the major powers and LL/GDS concerning the legal status of the EEZ.

Organization and procedures

14. The group met regularly during the sessions and usually in plenary. The leader of Mexico’s delegation, Ambassador Jorge Castañeda, was the Chairman of the group. It had a Coordinating Committee on the EEZ which consisted of the following ten members: Argentina,
Australia, Canada, Fiji, India, Kenya, Mexico, Norway, Peru and Senegal. The leader of the Peruvian delegation, Ambassador Alfonso Arias-Schreiber, was the spokesman of the group in its negotiations with the LL/GDS Group.

**Active and influential delegations**

15. The following were the more active and influential delegations in the Group:

- From Africa
  - Kenya, Madagascar, Senegal

- From Asia
  - Fiji, India, Pakistan

- From Latin America
  - Argentina, Brazil, Chile, Mexico, Peru, Uruguay

- From Western Europe and Others
  - Australia, Canada, Norway

**B. The Land-Locked and Geographically Disadvantaged States Group (LL/GDS)**

16. The LL/GDS Group consisted of 55 States, 29 of which were land-locked and 26 of which were in the geographically disadvantaged category. The 55 members were:

<table>
<thead>
<tr>
<th>Land-Locked States</th>
<th>Geographically Disadvantaged States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Afghanistan</td>
<td>1. Algeria</td>
</tr>
<tr>
<td>2. Austria</td>
<td>2. Bahrain</td>
</tr>
<tr>
<td>5. Botswana</td>
<td>5. Ethiopia</td>
</tr>
<tr>
<td>6. Burundi</td>
<td>6. Finland</td>
</tr>
<tr>
<td>9. Chad</td>
<td>9. Germany, Federal Republic of</td>
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<tr>
<td>10. Czechoslovakia</td>
<td>10. Greece</td>
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<tr>
<td>11. Hungary</td>
<td>11. Iraq</td>
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<tr>
<td>12. Lao People’s Democratic</td>
<td>12. Jamaica</td>
</tr>
<tr>
<td>Republic</td>
<td>13. Jordan</td>
</tr>
<tr>
<td>14. Liechtenstein</td>
<td>15. Netherlands</td>
</tr>
<tr>
<td>15. Luxembourg</td>
<td>16. Poland</td>
</tr>
<tr>
<td>16. Malawi</td>
<td>17. Qatar</td>
</tr>
</tbody>
</table>

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*This list is useful for interpretative purposes, but is not necessarily complete. (See, for example, Platzöder, Vol. IV, pp. 176-178.)*
Establishment

17. The organization of this group began in 1971 during the period of the Sea-Bed Committee. Several land-locked and geographically disadvantaged States, both developing and developed, were very concerned about the vigorous manner in which the EEZ concept and the 200-mile limit were being pushed. Apart from the U.S.A., the USSR and the major maritime nations who were concerned over their navigational and strategic interests, and the few distant-water fishing nations, there was very little, if any, resistance to the EEZ concept. Afghanistan, Austria, Nepal, Singapore and Zambia were the original founders of the group. They began to identify others with like interests and the LL/GDS Group grew.

Common interests of members

18. As one of the authors has stated:

The common denominator bringing these States together as a group was their realization that the proposals by geographically advantaged coastal States for extensions of limits of national jurisdiction, whether for living resources, non-living resources, or both, such as the "exclusive economic zone" (EEZ) proposal, would have serious adverse consequences for the LL/GDS. These adverse consequences would not only seriously curtail LL/GDS rights under existing law to fishing in certain areas of the present high seas, but, where such extensions of national limits affected the seabed, they would also diminish the extent of seabed resources available to the international community under the [common heritage concept]. . . .

The alliance between the land-locked States and the geographically disadvantaged States, may, upon first impression, seem strange since the latter States have a coast and, therefore, are
not as badly off as land-locked States who, undoubtedly, are the "most disadvantaged" in the UNCLOS negotiations. In the context of claims for extended national maritime jurisdiction, however, the geographically disadvantaged States can be considered to be in as bad a plight as the land-locked States. This is because, in the first place, they either cannot benefit from any new extensive limit that may be permitted (such as 200 nautical miles) or they are unable to extend their limits significantly or, if they can, then there are not substantial economic benefits in doing so. Secondly, the extensions by neighboring States to the new permitted limit would transform adjacent high seas into national zones, a prospect which is clearly unfavorable to the geographically disadvantaged States.

Consequently, in the negotiations in the Conference and earlier in the Sea-Bed Committee, the LL/GDS have been very active in articulating their interests and presenting their claims and proposals in Committee I, Committee II, and Committee III matters, as well as in the plenary discussions on dispute settlement. In the context of Committee II matters, the group has taken a very active role in the negotiations in (a) resources in the EEZ and rights of LL/GDS therein; (b) the status of the EEZ; (c) definition of the continental shelf; (d) revenue-sharing respecting nonliving resources; and (e) transit rights for land-locked States. 17

Organization/Procedures

19. The LL/GDS Group was well disciplined and had well-established structures and procedures. There was a plenary and there were also working groups. Austria was the chairman of the group as a whole. Czechoslovakia was the chairman of the working group on Committee I matters. Singapore was the chairman of the working group on Committee II matters. Iraq was the chairman of the working group on Committee III matters. Switzerland was the chairman of the working group on settlement of disputes. Upper Volta was the chairman of a special ad hoc group on the continental shelf.

20. As regards procedure, the group met often during each session and at least once a week. It sometimes also met between sessions. The plenary discussed the general strategy after receiving reports from the chairmen of the various working groups. Papers, proposals, draft articles, letters to the President of the Conference, etc., in the name of the group were often adopted. Lengthy and even heated debates

might precede decisions where there existed divergent views on positions of substance or procedural tactics which the group should adopt.

21. The Group also appointed its spokesmen or representatives to negotiate with other States or groups.

Active or influential delegations

22. The delegations which were the most active in this group were:

From Africa  
Algeria, Swaziland, Uganda,  
Upper Volta, Zambia

From Asia  
Bahrain, Iraq, Nepal, Singapore,  
United Arab Emirates

From Eastern Europe  
Czechoslovakia, German Democratic Republic, Poland

From Latin America  
Jamaica

From Western Europe and Others  
Austria, Federal Republic of Germany, Netherlands, Switzerland

The group of Developing LL/GDS

23. This group was formed after the 1974 Conference of Developing Land-Locked and other Geographically Disadvantaged States which met in Kampala, Uganda. It did not meet often and ceased to meet altogether in the latter stages of the Conference. The co-ordinator and chairman was Uganda. Other LL/GDS felt that too frequent meetings of this group might be interpreted as a split in the larger LL/GDS Group, and exhortations were privately made to developing LL/GDS to work within the larger body.

24. This smaller group was formed because some developing LL/GDS felt that certain drafts of the larger group on matters such as transit rights of land-locked States were unsatisfactory. They felt that the developed LL/GDS were unsympathetic to their concerns and that stronger formulations could emerge only from a group comprising developing LL/GDS. Some developing LL/GDS also thought that the coastal States might be more receptive to proposals presented by developing LL/GDS.

C. The Territorialist Group

25. This group may be considered as a sub-group of the Coastal States Group, although it operated as a separate group. Its members were:
1. Benin
2. Brazil
3. Cape Verde
4. Congo
5. Democratic Yemen
6. Ecuador
7. El Salvador
8. Equatorial Guinea
9. Gabon
10. Guinea
11. Guinea-Bissau
12. Libyan Arab Jamahiriya
13. Madagascar
14. Mauritania
15. Mozambique
16. Panama
17. Peru
18. Sao Tome and Principe
19. Senegal
20. Sierra Leone
21. Somalia
22. Togo
23. Uruguay

26. The members of this group were States whose national legislation provided for a territorial sea of more than 12 nautical miles and which wanted to retain such acquired rights under the new law of the sea treaty. Some of them had already proclaimed 200 nautical mile territorial seas and had national legislation to that effect. One of the group’s objectives was to ensure that the proposed 200-mile EEZ conformed as closely as possible to their territorialist concept. Often, this meant pushing for strong EEZ provisions to strengthen coastal States’ jurisdictional and regulatory powers.

D. The Margineers or Group of Broad-Shelf States

27. The group of broad-shelf States consisted of the following 13 members: Argentina, Australia, Brazil, Canada, Iceland, India, Ireland, Madagascar, New Zealand, Norway, Sri Lanka, the United Kingdom and Venezuela.

Common interest

28. Their common interest was to ensure that the new Convention would permit them to exercise continental shelf rights beyond 200 nautical miles. Specifically, they advocated the Irish formula for defining the outer edge of the continental shelf beyond 200 miles. They also had a common interest in opposing revenue sharing beyond 200 miles or in opposing what they considered to be unacceptable figures for revenue sharing.

29. All members of this group were very active though Australia’s Ambassador, Keith Brennan, often assumed the role of spokesman. This group became particularly active at the seventh resumed session and the eighth session in the context of the work of Negotiating Group 6 on the continental shelf.

\textsuperscript{18}For the Irish formula, see the commentary on article 76 (Volume II of this series).
E. The Straits States Group

30. This group, composed of States bordering straits, was very active when the articles on straits in the SNT and ICNT were being negotiated.

31. The members of the group of straits States were: Cyprus, Greece, Indonesia, Malaysia, Morocco, Oman, the Philippines, Spain and Yemen.

Common interest

32. Initially, the group's common interest was to ensure that the Convention had a single régime of innocent passage for passage through the territorial sea and through straits forming part of the territorial sea. Subsequently, when the SNT and the RSNT made a distinction between passage through the territorial sea (innocent passage) and passage through straits (transit passage), their common interest became twofold. First, to oppose the transit passage concept, and second, to seek amendments to the transit passage articles to accommodate their more immediate concerns over coastal States control, e.g., on prevention of pollution.

33. Those members in this group which were also archipelagic States, such as Indonesia and the Philippines, had another interest. They realized that the legal régime on passage through straits could well become the model for the régime of passage through archipelagic waters. The group became inactive after some of its leaders, such as Indonesia and Malaysia, were willing to accept the concept of transit passage.

F. Group of Archipelagic States

34. The members of this group were Fiji, Indonesia, Mauritius and the Philippines. Mauritius dropped out of the group in the latter stages of the Conference. Although the Bahamas was not formally a member of the group, it cooperated closely with its members. Although the group had only a few members, it was very effective in having its claims accepted and reflected in the Convention.

Common interest

35. Generally, their common interest was to ensure that the Convention would recognize the special method of drawing archipelagic straight baselines connecting the outermost points of the outermost islands so as to create a sense of political unity. The territorial sea would be measured seawards from such baselines. Waters landwards from these baselines would be archipelagic waters over which the archipelagic
State would exercise sovereignty analogous to internal waters. Specifically, their objective was to adopt a common position on passage through archipelagic waters, on claims by neighboring States for provisions on guaranteed access and communication, and on fishing rights.

G. The Delimitation Group supporting the Median Line or Equidistance Principle

36. The controversy over the method of delimitation of the EEZ and the continental shelf between countries opposite or adjacent to one another spawned two other interest groups. These two groups, in fact, represented splits on this issue among the coastal States, among big powers, among GDS and among some Arab States. These two groups became very active in the context of Negotiating Group 7 which was established at the seventh session (1978), and in subsequent sessions of the Conference.

37. Those in the group which favored the primacy of the median line or equidistance principle, as shown by their cosponsorship of the proposal contained in NG.7/2 of 20 April 1978, were:

1. Bahamas
2. Barbados
3. Canada
4. Cape Verde
5. Chile
6. Colombia
7. Cyprus
8. Democratic Yemen
9. Denmark
10. Gambia
11. Greece
12. Guinea-Bissau
13. Guyana
14. Italy
15. Japan
16. Kuwait
17. Malta
18. Norway
19. Portugal
20. Spain
21. Sweden
22. United Arab Emirates
23. United Kingdom
24. Yugoslavia

H. The Delimitation Group Supporting Equitable Principles

38. The other delimitation group was composed of States with a vested interest in according primacy to equitable principles as the method for delimitation of opposite and adjacent areas of ocean space. These States, as reflected by the cosponsorship of the proposal contained in NG.7/10 of 1 May 1978, were:

1. Algeria
2. Argentina
3. Bangladesh
4. Benin
5. Bhutan
6. Congo
7. France
8. Gabon
9. Iraq
10. Ireland
11. Ivory Coast
12. Kenya
13. Liberia
14. Libyan Arab Jamahiriya
15. Madagascar
16. Mali
17. Mauritania
18. Morocco
19. Nicaragua
20. Nigeria
21. Pakistan
22. Papua New Guinea
23. Poland
24. Romania
25. Senegal
26. Syrian Arab Republic
27. Somalia
28. Turkey
29. Venezuela

I. The Oceania Group

39. The members of the Oceania Group were: Australia, Fiji, New Zealand, Papua New Guinea, Samoa, Tonga, and the Trust Territories of the Pacific. This group represented the interests of the island States in the South Pacific. Its position was often shared by other States which possessed islands. The common interest of the group was to ensure that islands were not precluded from establishing EEZs and continental shelves.

J. The Group of Maritime States

40. A group of maritime States was apparently formed during the Sea-Bed Committee’s meetings and was active, both prior to the convening of the Conference and also at the second and third sessions of the Conference. It was a coalition of States having interests in shipping and navigation and developed from a vessel-source pollution group that met to deal with the Canadian claim to regulate navigation on the ground of the prevention of marine pollution.

41. The members of the group were:

1. France
2. Germany, Federal Republic of
3. Greece
4. Japan
5. Liberia
6. Norway
7. Panama
8. USSR
9. United Kingdom
10. U.S.A.

K. The Great Maritime Powers

42. Apart from the groups already described, there were two other groups of very great importance. First, there was a group of five consisting of France, Japan, United Kingdom, the U.S.A. and the
USSR. The members of this group held regular consultations during much of the Conference, often meeting daily during sessions of the Conference and at least once between sessions. Second, there was another group of five formed in the final years of the Conference called the Co-ordinating Group of Five. This consisted of the following members: the Federal Republic of Germany, France, Japan, United Kingdom and the U.S.A. The members of this Group also met regularly, both during sessions of the Conference and intersessionally.

L. The Group of 12

43. A remarkable group of delegations, sometimes called the Group of 12 and sometimes the Group of 11, emerged at the eleventh session of the Conference (March to April 1982). At the commencement of the eleventh session, the United States had submitted 68 pages of suggested amendments to the sea-bed mining part of the Convention. The amendments were circulated to delegations in the form of a loose-leaf volume with green covers, and immediately came to be known as the “Green Book.” The amendments contained in the Green Book proposed many extensive changes to Part XI of the Convention. After considering the amendments for two days, the Group of 77 rejected the Green Book, even as a basis for negotiations. The Conference was, therefore, in a deadlock.

44. The leader of the Canadian delegation, J. Alan Beesley, convened a meeting of the leaders of the following eleven delegations: Australia, Austria, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden and Switzerland. The Netherlands subsequently joined the group as its twelfth member. The Group of 12 tried to bridge the gap between the United States and the developing countries. They tried to draft amendments to Part XI of the Convention which would satisfy the six objectives contained in [United States] President [Ronald] Reagan’s statement (29 January 1982). The Group of 12 presented its proposal to the Conference two days after the Group of 77 had rejected the Green Book. Although the proposal of the Group of 12 would not have given the United States everything that it had asked for, it proposed substantial concessions on the part of the developing countries on such important and controversial issues as: (1) a guaranteed seat for the United States in the Council of the International Sea-Bed Authority; (2) a simplified procedure for obtaining mining contracts; (3) dilution of the obligatory transfer of technology; and (4) changes to the provisions on amendments to part XI of the Convention. The President and the Chairman of the First Committee tried very hard to convince the United States delegation to accept the proposal of the Group of 12. They were convinced that if the United States had found it possible to accept the proposal, they would have been able
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to persuade the Group of 77 and the Eastern European Group to accept it as well. However, in spite of repeated entreaties, the Chairman of the United States delegation, Ambassador James L. Malone, indicated that the proposal of the Group of 12 was not acceptable as a basis of negotiations. Nevertheless, after the United States had voted against the Convention, it said, in the course of its explanation of its vote, that if the proposal submitted by the Group of 12 had been incorporated in the Convention, the United States might have taken a different attitude.

III. THE TRADITIONAL GROUPS

45. As indicated in Section I of this Chapter, the interest groups also included the established groups operating in UN diplomacy. Accordingly, it is appropriate to survey these groups with respect to the Conference.

A. The Group of 77

46. This group of developing countries, numbering approximately 120, is a well-known group which operates in forums other than UNCLOS III. The Group of 77 which met in UNCLOS was distinct from the Group of 77 of the UN General Assembly. The Group of 77 of UNCLOS III had its own officials and working methods.

Common interests

47. On many law of the sea matters, especially Committee II issues, such as EEZ, straits, and transit rights, the Group of 77's members did not share common interests. As views of developing countries often conflicted on these issues, the Group of 77 was not very effective in taking a united stand on Committee II matters. It was only moderately effective on Committee III and dispute settlement matters. The Group of 77 did make two major attempts at forging a common stand on overall issues, including Committee II matters: first, at the 1974 Group of 77 meeting in Nairobi, Kenya, which was a failure; and second, in preparing a Group of 77 working paper on the EEZ which was submitted to the Chairman of Committee II at the third session (1975).

48. On Committee I matters, however, the group worked effectively. This was so because the interests of industrialized countries with technology for deep sea-bed mining were distinguishable from the interests of developing countries which did not have such technology. Consequently, the Group of 77 was very active in Committee I matters, taking group positions on different questions before the Committee.
The group also took a unified position, critical of the United States and other States, promoting unilateral national legislation of deep seabed mining.

49. The Group of 77, therefore, was partly homogeneous and partly heterogeneous.

Organization and procedure

50. The Group of 77 had a President which rotated from session to session amongst the African, Asian and Latin American Groups. Separate working or contact groups were established as follows:

First Committee: Co-ordinator, Peru (Latin America)
Second Committee: Co-ordinator, Senegal (Africa)
Third Committee: Co-ordinator, Iraq (Asia)
Plenary: Co-ordinator, Tunisia (Africa)

51. The frequency with which the Plenary or contact groups met varied depending on the chairmen or co-ordinators, on whether there were matters calling for Group of 77 discussion, or on whether there were requests for meetings. It should be noted that certain skillful delegations turned to the Group of 77 to secure a position which coincided with and, therefore, buttressed their national positions.

52. Decisions in the Group of 77 were taken by consensus with the Chairman assessing the existence of consensus.

Active and influential delegations

53. Some of the more active and influential delegations in the Group of 77 were:

Africa: Algeria, Ghana, Kenya, Nigeria, Senegal, United Republic of Tanzania, Tunisia
Asia: Fiji, India, Indonesia, Iraq, Nepal, Pakistan, Singapore, Sri Lanka
Latin America: Argentina, Brazil, Chile, Jamaica, Mexico, Peru, Trinidad and Tobago

Some delegations were more active in one Committee than in others.

B. The Regional Groups

54. The regional groups that are a well-known feature of UN diplomacy also operated in the context of the Conference, namely:
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The African Group
The Asian Group
The Arab Group
The Latin American Group
The Eastern European Group
The West European and Others Group (WEO)

55. Of all these Groups, perhaps the Latin American Group was the most united and effective in coming to a homogeneous position on the law of the sea issues. A partial explanation could be that except for two land-locked States, Bolivia and Paraguay, and two GDS States, Jamaica and Trinidad and Tobago, the rest of the Latin American Group was in favor of extended coastal State jurisdiction.

56. The Eastern European Group was, by and large, dominated by the Soviet Union. On occasions, some members of the group did exhibit their independence from the Soviet Union. For example, Romania took a very strong position on the question of the passage of warships through the territorial sea, which was at variance with the position of the Soviet Union.

57. The Africans, Asians and West Europeans, by comparison with the Latin Americans, had too many divergent views within their groups to forge a common position on substantive matters. The African Group came close to achieving a united position with the 1973 OAU Declaration. However, in the later stages of the Conference, the significance of the OAU Declaration was downplayed by several African delegations. The African Group did, however, succeed in taking common positions on matters relating to the First Committee.

58. On a few occasions, efforts were made in the Asian Group to discuss substantive questions, but this did not lead to any results. For example, at the seventh session (1978) Thailand and Malaysia proposed that members of the Asian Group sort out their differences internally within the Group. The West European and Others Group also concentrated its work on candidatures, procedure and organizational matters. Although the United States did not participate in the WEO Group, it was always invited, as an observer, by the President of the Conference to meetings of the representatives of the regional groups. These observers were always asked to speak on the topic under discussion.

Were these regional groups effective?

59. For the reasons already given, the regional groups were not dominant on substantive and contentious matters. Their main and immediate role was with regard to candidatures, distribution of offices in the Conference Bureau, etc., and this was largely settled at the first session of the Conference. The regional groups also met periodically
on questions of organization of work referred to them by the President. The only exception to this generalization was that the African Group was able to operate as a group in the First Committee.

*One contentious issue in which geographical groups played an important role*

60. At the seventh session (1978), in the debate over the question of whether Ambassador Amerasinghe should and could continue to be President, regional groups were intensely active. This was particularly so with the African Group and the Asian Group which formed a united front against the Latin American Group's attempt to oust Amerasinghe.

61. Why was it that on this highly controversial issue different regional groups were able to take united positions? *First*, perhaps the Asian Group felt that it was necessary to defend Amerasinghe, as he had been nominated by the Asian Group for the Presidency. *Second*, both the African Group and the Asian Group were annoyed with the Latin American Group for insisting on their views when there was no doubt that the majority clearly favored retaining Amerasinghe as the President.

C. The Group of EEC Countries

62. Although the member States of the EEC held regular consultations, they were usually not successful in evolving a common position on law of the sea issues. For example, the EEC was not able to assume a common position in the First Committee. In the Second Committee, some EEC countries were members of the group of coastal States, while others belonged to the LL/GDS group. The only issue on which the group was united was in advocating the right of the EEC to become a party to the Convention.

D. The Arab Group

63. The Arab Group was not truly homogeneous on law of the sea issues, as some were GDS while others could claim extensive EEZs. In general, the Arab States were not especially active on LOS issues.

64. The members were:

1. Algeria  
2. Bahrain  
3. Democratic Yemen  
4. Djibouti  
5. Iraq  
6. Jordan  
7. Kuwait  
8. Lebanon  
9. Libyan Arab Jamahiriya  
10. Mauritania
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11. Morocco
12. Oman
13. Qatar
14. Saudi Arabia
15. Somalia
16. Sudan
17. Syrian Arab Republic
18. Tunisia
19. United Arab Emirates
20. Yemen
21. Palestine Liberation Organization [participating in the Conference as an observer]

Common interest

65. The Arab Group's main common interest was to oppose continental shelf rights beyond 200 miles. Geography dictated their position, as nearly all of them have narrow shelves. They adopted a firm common position that 200 miles should be the cutoff line for national jurisdiction and for continental shelf delimitation. It is possible that this position was reinforced because many of them are also oil-producing countries. Arguably, it would be in their interests for any oil resources beyond 200 miles to be within the common heritage concept rather than be appropriated by broad-shelf States.

66. The Arab Group was also able to adopt a common position in a few other instances. First, the Arab Group tabled a proposal on the dispute over Amerasinghe's right to stay as the President of the Conference. Second, the Group strongly advocated the right of national liberation movements to become a party to the Convention.

IV. USEFULNESS OF THE INTEREST GROUPS IN THE NEGOTIATING PROCESS

67. These special interest groups, especially the new groups which were created at the Conference, had a profound impact in UNCLOS III negotiations. Some of them, like the Coastal States Group on the EEZ or the LL/GDS Group, tabled proposals and texts on behalf of their groups and even appointed representatives to negotiating groups.

68. The Conference took cognizance of the existence and importance of these groups, and the schedule of meetings of these groups was announced on the Conference notice boards. Conference room facilities, interpretation facilities, etc., were made available for their meetings.

69. The special interest groups had both beneficial and adverse effects on the negotiations.

70. On the positive side, it can be said that these groups greatly assisted in the identification of issues and in promoting sharper clarification of basic positions. Insofar as some of these groups adopted common group positions or texts, they assisted in reducing the number of separate proposals before the Conference. It is probable also that,
by the composition of their membership, the groups helped to indicate the relative degrees of support for various proposals, or at least to indicate which interests had to be accommodated if the Convention was to have widespread acceptance.

71. On the negative side, it should be noted that the entire process of emergence and operation of these groups—their commencement and formation, process of coalition building, resolving internal differences, agreeing on their common stands, etc.—consumed a great deal of the Conference’s time. The second to fifth sessions were marked by a high frequency of meetings of these groups, and the complaint was often made that interest groups were talking among themselves rather than to each other. President Amerasinghe appealed to the groups to have fewer of their intra-group meetings and more inter-group meetings. Another adverse effect of these special interest groups was that some of them tended to couch their group positions in an extreme, maximum or rigid fashion. In this respect, the interest groups were not too helpful in the formulation of compromise formulas, a task which had to be left to other means such as the private informal negotiating groups, which brought together key delegations from various interest groups.

CHAPTER THREE

THE OFFICIAL NEGOTIATING PROCESS

I. EXISTENCE OF TWO PARALLEL STRUCTURES OF NEGOTIATIONS

1. There were two parallel systems of negotiations. First, there was the official negotiating structure of the Conference with its plenary, its three Main Committees and subsidiary groups. Second, there were the unofficial meetings of the special interest groups (Chapter Two), the meetings of the informal private negotiating groups (Chapter Four), as well as the events taking place outside the Conference (Chapter One).

2. The two systems were clearly related. The official structure of negotiations became more productive after the seventh session when negotiating groups of limited size were established on seven hard core issues. Prior to that, most of the official negotiating forums consisted of all delegations. So long as this continued, the unofficial structures—especially the informal private negotiating groups—had greater potential for reaching results, because while most of the new negotiating groups were open-ended, they were, in fact, operating with a nucleus of those delegations most directly concerned.
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3. This was recognized by the Conference which, as noted earlier, made it a point to provide facilities to enable these informal private negotiating groups and special interest groups to meet, and their meetings were taken into account when arranging the schedules of the Conference.

II. THE FORMAL NEGOTIATING STRUCTURE: SOME OBSERVATIONS

4. The Conference was organized along the following lines. First, there was the Plenary in which all delegations were represented. The following agenda items were allocated to the Plenary:

   Item 22  *Peaceful uses of the ocean space; zones of peace and security*

   Item 25  *Enhancing the universal participation of States in multilateral conventions relating to the law of the sea*

5. Although the settlement of disputes (Item 21) was to be dealt with by each Main Committee, insofar as it was relevant to their mandates, in practice, the question was discussed and negotiated in the Plenary. The preamble to the Convention and its final clauses were also discussed and negotiated in the Plenary. Other items to be dealt with by each Main Committee, insofar as was relevant to their mandates, were: Item 15—Regional arrangements; Item 20—Responsibility and liability for damage resulting from the use of the marine environment; and Item 22—Peaceful uses of the ocean space, zones of peace and security.

6. Second, the Conference had three Main Committees. The agenda of the First Committee consisted of the following items:

   Item 1  *International régime for the sea-bed and ocean floor beyond national jurisdiction*

   1.1 Nature and characteristics
   1.2 International machinery: structure, functions, powers
   1.3 Economic implications
   1.4 Equitable sharing of benefits bearing in mind the special interests and needs of the developing countries, whether coastal or land-locked
   1.5 Definition and limits of the Area
   1.6 Use exclusively for peaceful purposes

   Item 23  *Archaeological and historical treasures on the sea-bed and ocean floor beyond the limits of national jurisdiction*

7. The agenda of the Second Committee consisted of the following items:
Item 2  *Territorial sea*

2.1 Nature and characteristics, including the question of the unity or plurality of régimes in the territorial sea
2.2 Historic waters
2.3 Limits
2.3.1 Question of the delimitation of the territorial sea; various aspects involved
2.3.2 Breadth of the territorial sea, Global or regional criteria. Open seas and oceans, semi-enclosed seas and enclosed seas
2.4 Innocent passage in the territorial sea
2.5 Freedom of navigation and overflight resulting from the question of plurality of régimes in the territorial sea

Item 3  *Contiguous zone*

3.1 Nature and characteristics
3.2 Limits
3.3 Rights of coastal States with regard to national security, customs and fiscal control, sanitation and immigration regulations

Item 4  *Strait used for international navigation*

4.1 Innocent passage
4.2 Other related matters including the question of the right of transit

Item 5  *Continental Shelf*

5.1 Nature and scope of the sovereign rights of coastal States over the continental shelf. Duties of States
5.2 Outer limit of the continental shelf: applicable criteria
5.3 Question of the delimitation between States; various aspects involved
5.4 Natural resources of the continental shelf
5.5 Régime for waters superjacent to the continental shelf
5.6 Scientific research

Item 6  *Exclusive economic zone beyond the territorial sea*

6.1 Nature and characteristics, including rights and jurisdiction of coastal States in relation to resources, pollution control and scientific research in the zone. Duties of States
6.2 Resources of the zone
6.3 Freedom of navigation and overflight
6.4 Regional arrangements
6.5 Limits: applicable criteria
6.6 Fisheries
6.6.1 Exclusive fishery zone
6.6.2 Preferential rights of coastal States
6.6.3 Management and conservation
6.6.4 Protection of coastal States' fisheries in enclosed and semi-enclosed seas
6.6.5 Régime of islands under foreign domination and control in relation to zones of exclusive fishing jurisdiction
6.7 Sea-bed within national jurisdiction
6.7.1 Nature and characteristics
6.7.2 Delineation between adjacent and opposite States
6.7.3 Sovereign rights over natural resources
6.7.4 Limits: applicable criteria
6.8 Prevention and control of pollution and other hazards to the marine environment
6.8.1 Rights and responsibilities of coastal States
6.9 Scientific research

Item 7 Coastal State preferential rights or other non-exclusive jurisdiction over resources beyond the territorial sea
7.1 Nature, scope and characteristics
7.2 Sea-bed resources
7.3 Fisheries
7.4 Prevention and control of pollution and other hazards to the marine environment
7.5 International cooperation in the study and rational exploitation of marine resources
7.6 Settlement of disputes
7.7 Other rights and obligations

Item 8 High Seas
8.1 Nature and characteristics
8.2 Rights and duties of States
8.3 Question of the freedoms of the high seas and their regulation
8.4 Management and conservation of living resources
8.5 Slavery, piracy and drugs
8.6 Hot pursuit

Item 9 Land-locked countries
9.1 General principles of the law of the sea concerning the land-locked countries
9.2 Rights and interests of land-locked countries
9.2.1 Free access to and from the sea: freedom of transit, means and facilities for transport and communications
9.2.2 Equality of treatment in the ports of transit States
9.2.3 Free access to the international sea-bed area beyond national jurisdiction
9.2.4 Participation in the international régime, including the
machinery and the equitable sharing in the benefits of the area

9.3 Particular interests and needs of developing land-locked countries in the international régime

9.4 Rights and interests of land-locked countries in regard to living resources of the sea

Item 10 Rights and interests of shelf-locked States and States with narrow shelves or short coastlines

10.1 International régime

10.2 Fisheries

10.3 Special interests and needs of developing shelf-locked States and States with narrow shelves or short coastlines

10.4 Free access to and from the high seas

Item 11 Rights and interests of States with broad shelves

Item 16 Archipelagos

Item 17 Enclosed and semi-enclosed seas

Item 18 Artificial islands and installations

Item 19 Régime of islands

(a) Islands under colonial dependence of foreign domination or control

(b) Other related matters

Item 24 Transmission from the high seas

8. The agenda of the Third Committee consisted of the following items:

Item 12 Preservation of the marine environment

12.1 Sources of pollution and other hazards and measures to combat them

12.2 Measures to preserve the ecological balance of the marine environment

12.3 Responsibility and liability for damage to the marine environment and to the coastal State

12.4 Rights and duties of coastal States

12.5 International co-operation

Item 13 Scientific research

13.1 Nature, characteristics and objectives of scientific research of the oceans

13.2 Access to scientific information

13.3 International co-operation

Item 14 Development and transfer of technology

14.1 Development of technological capabilities of developing countries
14.1.1 Sharing of knowledge and technology between developed and developing countries
14.1.2 Training of personnel from developing countries
14.1.3 Transfer of technology to developing countries

The list is not complete nor does it establish the order of priority for consideration of the various subjects and issues.

Since the list has been prepared following a comprehensive approach and attempts to embrace a wide range of possibilities, sponsorship or acceptance of the list does not prejudice the position of any State or commit any State with respect to the items on it or to the order, form or classification according to which they are presented.

Consequently the list should serve as a framework for discussion and drafting of necessary articles . . . (A/CONF.62/28, Off. Rec. III)

9. In addition to the plenary and the three Main Committees, the Conference also had a General Committee which acted as its bureau, a Drafting Committee and a Credentials Committee.

10. The plenary operated on two distinct levels. In its formal meetings it dealt with matters concerning the organization of the Conference, the election of its officers, the allocation of agenda items and the adoption of the Rules of Procedure, and it held a series of general debates in the initial stages of the Conference, especially at the second (Caracas, 1974), fourth (New York, 1976) and eighth (Geneva, 1978) sessions, and as the results of work in the organs became available, it held a series of general debates on their reports. After the Conference had decided that the revised draft of the Convention (A/CONF.62/L.78) was the official draft Covention, the plenary also dealt with amendments thereto and the procedures connected with its adoption, in light of the special provisions on decision-making contained in Chapter VI of the Rules of Procedure.

Parallel to this, the plenary met in informal meetings under the title of the Informal Plenary. This was institutionalized relatively early in the Conference and functioned as a Main Committee. The principal items allocated to the Informal Plenary consisted of the preamble, the institutional aspects of the settlement of disputes, the general provisions, the final provisions and the Final Act. The Informal Plenary also received the reports of the seven negotiating groups set up at the tenth session (whether or not they had previously been examined in an appropriate Main Committee), and of the Drafting Committee, and transmitted the results of the informal deliberations to the formal meetings of the Conference itself, otherwise known as the Plenary. In the capacity of Informal Plenary acting as a Main Committee,
subsidiary groups could be established—the most significant was the Group of Legal Experts on the Final Clauses under the chairmanship of Mr. Jens Evensen (Norway). Most importantly, when an issue was ripe for negotiations, the President would convene a small number of delegations representing those countries which had strong interests on the matter, as well as the various points of view in the Conference, to participate in a small and closed negotiating group. On the question of participation in the Convention, for example, President Koh invited approximately 15 delegations to such negotiations. It was this group that eventually succeeded in arriving at generally acceptable compromises.

In general, the Conference, at all levels, showed a marked preference to work in informal meetings, without records and closed to the public. It was thought that the informal atmosphere and the absence of records would enable delegations to take a more flexible stand than in formal meetings.

11. In the case of the First Committee, various forums and methods of negotiation were attempted. At the second session of the Conference (Caracas, 1974), the First Committee initially established a working group which was later converted into a negotiating group consisting of 50 delegations. Christopher W. Pinto of Sri Lanka proved to be remarkably able as the chairman of both the working group and the negotiating group. At the fourth session of the Conference (New York, 1976), the First Committee created an open-ended working group which came to be known as the workshop. The workshop was chaired by two cochairmen: S.P. Jagota of India and H.H.M. Sondaal of the Netherlands. The two cochairmen presided over alternative meetings and when one cochairman presided, the other would sit on his right. With the help of the Secretariat, they prepared joint reports which were submitted at regular intervals to the formal meetings of the Committee.

12. At the sixth session of the Conference (New York, 1977), the First Committee established an informal working group of the whole on the system of exploitation. Jens Evensen of Norway was appointed the Special Co-ordinator of the Working Group.

13. At the seventh session of the Conference (Geneva, 1978), the Conference established seven negotiating groups to deal respectively with the seven outstanding hard-core issues. Three of these hard core issues related to the agenda of the First Committee. Negotiating Group 1, chaired by Francis X. Nijenga of Kenya, dealt with the system of exploration and exploitation and resource policy. Negotiating Group 2, chaired by T.T.B. Koh of Singapore, dealt with financial arrangements. Negotiating Group 3, chaired by Paul Bamela Engo of Cameroon (Chairman of the First Committee), dealt with the organs of the International Sea-Bed Authority, their composition, powers and functions. These negotiating groups were described as “negotiating groups of
limited size"; however the attempt to limit their size was to some extent negated by the requirement that they be open-ended, i.e., any delegation could participate if it wished.

14. At the eighth session of the Conference (Geneva, 1979), an informal group on the question of production policies was established under the auspices of Negotiating Group 1. Satya Nandan of Fiji was appointed as Chairman of the informal group. Harry Wünsche of the German Democratic Republic was appointed to chair a group of legal experts on the question of the settlement of disputes relating to Part XI of the Convention.

15. Also at the eighth session, on the proposal of the Group of 77, the Conference established a negotiating group of limited size to resolve all the outstanding issues relating to the agenda of the First Committee. The negotiating group was called the Working Group of 21 (WG.21) and was chaired by the Chairmen of Negotiating Groups 1, 2 and 3. WG.21 consisted of ten members nominated by the Group of 77, seven members representing Western industrialized countries, three members representing the Eastern European group and one seat for China. Since WG.21 was established by the General Committee and not by the First Committee, it should have, by right, reported directly to the plenary. However, the Chairman of the First Committee insisted that WG.21 first report to the First Committee. The Chairman of the First Committee then reported on behalf of WG.21 to the plenary.

16. The Second Committee set up informal groups, at different stages, to deal with specific subjects or issues on the Committee's agenda. At the third session of the the Conference (1975) 12 informal consultative groups, open to all delegations, were established. They were chaired by the Chairman, one of the three Vice-Chairmen (the representatives of Czechoslovakia, Kenya and Turkey) or by the Rapporteur of the Committee, Satya Nandan (Fiji). They dealt with the following subjects: baselines; historic bays and historic waters; contiguous zone; innocent passage; high seas; question of transit (land-locked States); continental shelf; exclusive economic zone; straits; enclosed and semi-enclosed seas; islands; and delimitation. At the fifth session of the Conference (1976) the Committee established five negotiating groups dealing with the following questions:

Negotiating Group 1: The legal status of the exclusive economic zone. Rights and duties of the coastal State and of other States in the exclusive zone.

Negotiating Group 2: Rights of access of land-locked States to and from the sea and freedom of transit.

Negotiating Group 3: Payments and contributions in respect of the exploitation of the continental shelf beyond 200 miles, and the definition of the outer edge of the continental margin.
Negotiating Group 4: Straits used for international navigation.
Negotiating Group 5: Delimitation of the territorial sea, the exclusive economic zone and the continental shelf between adjacent or opposite States.

In some of these groups, smaller consultative groups were set up with limited membership as decided by the Chairman. At the sixth session of the Conference (1977) the Committee created three open-ended negotiating groups to deal with the following questions:

Negotiating Group 1: Legal status of the exclusive economic zone. Rights and duties of the coastal State and of other States in the exclusive economic zone.

Negotiating Group 2: Definition of the outer edge of the continental margin and payments and contributions with respect to the exploitation of the continental shelf beyond 200 miles.

Negotiating Group 3: Delimitation of the territorial sea, the exclusive economic zone and continental shelf between States with opposite or adjacent coasts.

Within each group informal consultative groups with limited membership were created to report to the negotiating groups.

17. Four of the seven negotiating groups established by the Conference at its seventh session (Geneva, 1978) dealt with issues on the agenda of the Second Committee. Negotiating Group 4, chaired by Satya Nandan (Fiji), dealt with the following two questions:

(1) Right of access of land-locked States and certain developing coastal States in a sub-region or region to the living resources of the EEZ; and

(2) Right of access of land-locked and geographically disadvantaged States to the living resources of the economic zone.

18. Negotiating Group 5, chaired by Constantin Stavropoulos (Greece), dealt with the question of settlement of disputes relating to the exercise of the sovereign rights of coastal States in the exclusive economic zone.

19. Negotiating Group 6, chaired by Andrés Aguilar (Venezuela, and Chairman of the Second Committee), dealt with the question of the definition of the outer limits of the continental shelf and the question of revenue sharing.

20. Negotiating Group 7, chaired by E.J. Manner (Finland), dealt with delimitation of maritime boundaries between adjacent and opposite States and settlement of disputes thereon.

21. In the Third Committee, negotiations took place directly under its chairman, Alexander Yankov (Bulgaria), as well as in the two
informal working groups created by the Committee. The first working group on the protection and preservation of the marine environment was chaired by José Luis Vallarta (Mexico). The second informal working group dealt with scientific research and the development and transfer of technology and was chaired by Cornel A. Metternich (F.R.G.).

A. Futility of meetings of the entire Conference membership

22. For far too long, the Conference's official structure indulged in meetings of the whole, that is, meetings involving all the participants. Although styled “negotiations” they were more in the nature of general debates. While debates serve useful purposes, stages are reached where general debate must be transformed into specific action.

23. In the early stages of the Conference, e.g., at the second session in Caracas in 1974, the general debate was helpful in laying out the positions of various countries. Thereafter, however, there was no need to prolong the general debate. Nonetheless, these large meetings of the whole were allowed to continue. Perhaps the only useful function they performed was that they enabled delegations to report home that they had done their best and could get no further on a given topic.

Designating meetings of the whole as informal, closed-door and without records.

24. The Conference seemed to realize that these large meeting were unproductive. In an attempt to promote serious negotiations on specific texts and on details, the procedure was established that most of the meetings would be closed (in the sense that only delegations could attend) and that no formal records would be kept. This did not, however, reduce sufficiently the sterile and polemical debating. The atmosphere and setting still did not encourage delegates to feel they could modify their rigid first-line negotiating positions. Even if there were no formal records, many delegates were still obliged to their Governments and interest groups to take a hard-line position in public.

B. Why was it difficult for the Conference to establish groups of limited size?

25. It was difficult for the Conference to officially establish small negotiating groups for three main reasons.

26. First, few sovereign nations will allow other countries to represent
their interests. All delegations were attending the Conference on the basis of sovereign equality and all were answerable to their Governments. Too many vital interests were at stake and delegations could not easily agree to allow others to represent their points of view. As late as the fifth session (1976), when it was proposed to establish three small negotiating groups on LL/GDS, EEZ and transit rights, there was opposition for a variety of reasons, some of which were substantive. In any event, negotiating groups of the whole were established.

27. Second, the official establishment of small negotiating groups almost always led to two problems which caused delay and infighting. One was the problem of determining the allocation of the limited seats to the various interest groups or regional groups. The second problem was that each group invariably had problems within itself in determining which delegations should occupy the seats allotted to the group (this was more of a problem with the heterogeneous regional groups than with the homogeneous groups like LL/GDS or the coastal States).

28. Third, even if the Conference envisioned groups of limited size, there was the question as to whether they would be open-ended. In the official Conference structure, there was generally opposition to any move to make meetings of small groups closed. Delegations wanted meetings of the smaller negotiating groups to be open-ended so that other delegations could attend and observe. But this defeated the very objective of having small groups, which was to reduce the gallery atmosphere and to generate candor and frankness in the negotiations.

C. Informal private negotiating groups had to fill the vacuum

29. In view of all these problems, it is not surprising that the informal, private negotiating groups were created to fill a definite gap.

30. Why was it possible to create these informal private negotiating groups when similar attempts by the Conference to establish negotiating groups of limited size were unsuccessful? The explanation is largely that they were privately convened. Being private and unofficial, those delegations which were excluded were less resentful and had fewer reasons to object since these groups were not part of the official Conference structure. The conveners of the informal groups were acting in their personal capacity and, therefore, they could decide whom they wished to invite.

D. Failure of the Conference's only attempt to close meetings of WG.21

31. The difficulties of the official negotiating structure may be illustrated by referring to a decision taken by the Conference at the eighth session to establish a negotiating group on Committee I matters
which would not only be of limited size but also would be closed to other delegations.

32. The decision originated from a proposal of the Group of 77 which had been agreed upon at an inter-sessional meeting of that Group, just before the eighth session (1979). After appropriate consultations, it was adopted by the General Committee. The negotiating group would have 21 members and its meetings would be closed to non-members. The rule was enforced and non-members were turned away. Very strong resentment was aroused and the Group of 77 had to meet in an emergency session and reverse its own proposal to bar non-members from attending meetings of WG.21. After only two days, the doors of WG.21 were again opened to all delegations.

33. Why was there such a strong reaction? First, delegations, while agreeable to the establishment of a small group, felt that there was no good reason to bar other delegations from observing. Second, there was also some bitterness among delegations over the procedure by which the decision had been taken. The General Committee, for the first time, had not submitted its recommendation to the plenary. The point was raised in the General Committee but the President replied that the General Committee was not changing procedure but only implementing it. This was not a good answer since every report of the General Committee had previously been submitted to the plenary for its approval. Had the recommendation of the General Committee been submitted to the plenary and had the Conference, as a whole, agreed to this procedure, it is possible that there might not have been such a strong reaction. Third, at that time there were very few other meetings to keep delegations occupied. Often, having the right to attend meetings is more important than attending them.

E. Establishment of small, official negotiating groups at the seventh session (1978)

34. A breakthrough was, in a sense, achieved at the seventh session (1978) when the Conference decided to establish seven small negotiating groups on the seven hard-core unresolved issues. The understanding was that each negotiating group would have "a nucleus of those countries principally concerned." Thus, Negotiating Group 1 had a nucleus of 50 States, Negotiating Group 4 had a nucleus of 39 States and Negotiating Group 5 had a nucleus of 36 States.

35. Even here, the Conference could not avoid that open-ended element. It was stressed that, while each negotiating group had a

9The decisions concerning these negotiating groups are set out in A/CONF.62/62 (1978), Off. Rec. X. See also A/CONF.62/63 (1978), Off. Rec. IX.
nucleus, it was on the "clear understanding that they would be open-ended in the sense that any participant not included in the original nucleus would be free to join the groups with the same status as the original members." (A/CONF.62/62, para. 3).

F. Examples of how the negotiations were actually conducted

36. Initially, all the meetings of Negotiating Group 2 on financial arrangements were meetings of the whole. This stage helped to inform interested delegations on complex issues relating to financial arrangements, the different positions held by delegations on these issues, the merits and demerits of the various proposals and the concepts and terminologies contained in the technical papers relating to the subject. This stage was also necessary in order to give all delegations a sense of participation in the negotiating process. Once the objectives of stage one were achieved the Chairman started to call meetings of "financial experts." The meetings were deliberately held in small rooms which could accommodate not more than 30 persons. Although these meetings were open to all, by saying that these meetings were meetings of experts, and by holding them in small conference rooms, the Chairman succeeded in reducing the size of his negotiating group from 140 to 30. The group of financial experts was thus able to go into the issues in much greater depth and to sharpen the focus of the issues in contention. By regular reporting to the group in plenary, those delegations which were not attending meetings of the smaller group were kept informed of the group's progress.

37. At a certain point, the Chairman came to the conclusion that stage two had been completed and it was time to move into the third and final stage of the negotiations. At this point, he further reduced the size of the negotiating group. He invited the representatives of Argentina, Mauritius and Pakistan to represent the Group of 77. He invited the representative of the United States to represent the Western industrialized countries. He chaired the negotiation between the three representatives of the Group of 77 and the representative of the United States for two consecutive days and succeeded in arriving at an agreement. Similarly, the Chairman himself negotiated an agreement with the representative of the Soviet Union.

38. The technique of gradually miniaturizing the negotiating process just described was not unique to Negotiating Group 2. The Chairman of Negotiating Group 2 also chaired the negotiations on decision-making in the Council of the International Sea-Bed Authority, on participation in the Convention, on delimitation, and on the protection of preparatory investments. In each case, the same technique was
used of first holding meetings of the plenary, then moving to an intermediate stage, and finally to the real negotiations when the number of persons involved could be comfortably seated around a small conference table. The technique of miniaturizing a negotiating group requires good timing and some luck. It requires obtaining the trust of the interested groups and good feedback from the negotiators to their interest groups. But without this process, in the cases described above and elsewhere, the Conference might never have resolved its most controversial issues.

III. THE UNIQUE NATURE OF THE RULES OF PROCEDURE AND THEIR EFFECT ON THE NEGOTIATIONS

A. The unique nature of the Rules of Procedure

39. As noted, the Conference's Rules of Procedure departed from the pattern normally applicable for UN conferences for the taking of decisions. The UNCLOS Rules of Procedure were unique, first, in having built-in devices for avoiding or delaying the taking of decisions by voting and, second, in providing for special rules concerning the majority of votes required for the taking of decisions.

Special rules on avoiding or delaying the taking of decisions on substantive matters by vote

40. The following features of the Rules of Procedure of the Conference (A/CONF.62/30/Rev.3) sought to avoid or delay the taking of decisions on substantive matters by vote:

(a) Before any substantive matter could be put to a vote, the Conference should have decided that all efforts at reaching agreement had been exhausted. This determination should be by a two-thirds majority of representatives present and voting, providing that such majority also included a majority of the States participating in that session of the Conference [Rules 37(1) and 39(1)].

(b) Before making such a determination, several other procedures could be invoked:

(i) When the substantive matter comes up for voting for the first time, the President may, and shall if requested by at least 15 representatives, defer the taking of a vote by a period not exceeding 10 days. Such procedure can be applied only once on any matter [Rule 37(2)(a)].
(ii) At any time the Conference, on the President’s proposal or on a motion by one representative, may decide to defer the taking of a decision on any substantive matter for a specified period of time [Rule 37(2)(b)].

(iii) During the period of deferment, the President shall make every effort, with the assistance as appropriate of the General Committee, “to facilitate the achievement of general agreement, having regard to the overall progress made on all matters of substance which are closely related,” and the President will make a report to the Conference prior to the end of the deferment period [Rule 37(2)(c)].

(iv) If, at the end of the deferment period, agreement is still not reached, then the Conference shall make the determination that all efforts at reaching agreement have been exhausted [Rule 37(2)(d)].

(v) If the Conference does not make such a determination, the President or any representative may propose, after a period of no less than five days from the last vote on such determination, that such a determination be made. The five days’ delay is not applicable in the last two weeks of the session [Rule 37(2)(e)].

(vi) No vote is to be taken on any substantive matter less than two working days after an announcement is made that the Conference is going to vote on the matter [Rule 37(3)].

(vii) All these special procedures and Rule 37 do not apply to the adoption of the text of the Convention as a whole. But the Convention, as a whole, shall not be put to vote less than four working days after the adoption of its last article [Rule 39(2)].

Special Rules concerning the majority of votes required for the taking of decisions (Rule 39)

41. The Rules of Procedure (A/CONF.62/30/Rev.3) provided that:

(a) On all matters of substance, including the adoption of the text of the Convention as a whole, decisions are to be taken by a two-thirds majority of the representatives present and voting, provided that such a majority shall include a majority of States participating in that session (such a proviso is not found in the UN General Assembly’s Rules of Procedure).

(b) The same majority is required for any determination that all efforts at reaching agreement have been exhausted.
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(c) On all matters of procedure, decisions shall be taken by a majority of representatives present and voting. (This is similar to UN General Assembly practice.)

(d) If a dispute arises as to whether a matter is procedural or substantive, the President shall rule on the question. Any appeal against the ruling shall be immediately put to the vote and the President’s ruling shall stand unless the appeal is approved by a majority of representatives present and voting. This, again, is similar to normal UN practice.

B. Background to these special Rules of Procedure

42. What is the explanation for the decision to incorporate these unusual features in the Rules of Procedure? The underlying philosophy appears to have been the achievement of a Convention commanding the widest possible support. Hence, it was felt that it was necessary to work into the Rules safeguards against hasty voting, for cooling-off periods and to provide for special majorities. Another underlying rationale was that important interest groups, e.g., the major powers, who were numerically in the minority, did not want to be railroaded into voting where they might not have the votes to win.

Sea-Bed Committee procedures

43. It should be recalled that the UN Sea-Bed Committee, from 1971 to 1973, avoided the taking of votes on substantive matters and operated on the consensus method. This Sea-Bed Committee practice and procedure influenced the development of the Conference’s Rules of Procedure.

The Gentlemen’s Agreement approved by UN General Assembly, 16 November 1973

44. Another factor which influenced the Rules of Procedure was clearly the “Gentlemen’s Agreement” adopted by the UN General Assembly on 16 November 1973. The operative paragraph of this Gentlemen’s Agreement states that “the Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.”

45. Many States, but especially the two superpowers, attached importance to this Agreement. The basic principle was not objected to by others but the problem was the implementation of this Agreement in the Rules of Procedure. The first session (1973) failed to reach
agreement on the Rules of Procedure and agreement was secured only in the second session (1974).

C. Were the Rules of Procedure observed?

46. The letter and spirit of the Rules were observed by the Conference. On procedural questions, where the normal requirement was for a simple majority vote, there were only six instances where decisions were taken by voting. These instances were:

— First, on a motion by Guyana (30 July 1974, 19th meeting of Committee II), on the closure of debate on the continental shelf, which was rejected by a vote of 61 against, 24 in favor and 22 abstentions. (Curiously, although this seems to be a procedural matter, the Official Records (Vol. II) states that "The motion was not adopted, having failed to obtain the required two-thirds majority." (Off. Rec. II.))

— Second, the President's ruling to allow the Canadian representative to introduce working paper A/CONF.62/L.4 in the plenary was challenged by Tunisia (46th plenary meeting, 29 July 1974). The President put his ruling to the vote. The Tunisian appeal was rejected by 50 votes to 38, with 39 abstentions. (Off. Rec. I.)

— Third, the decision of the Conference at the sixth session (81st plenary meeting, 15 July 1977) on the venue of the seventh session. A secret ballot was taken on three alternative sites: Geneva, Jamaica and Malta. (Off. Rec. VII.)

— Fourth, the decision of the Conference (first part of the resumed seventh session, Geneva, 1978), that Amerasinghe could continue to be the President of the Conference. The Conference voted on several draft resolutions. (Off. Rec. IX; Final Act, para. 13.)

— Fifth, the decision of the Conference (at the seventh session, 106th plenary meeting, 19 May 1978) on the proposal to have a resumed seventh session. The vote was taken by secret ballot. (Off. Rec. IX.)

— Sixth, the decision taken at the 120th plenary meeting, 24 August 1979, to adjourn the meeting, which was a decision taken by a vote. (A/CONF.62/SR.120, Off. Rec. XII.)

In addition to these above instances, there is also one instance of an indicative vote having been taken (A/CONF.62/SR.119) at the 119th plenary meeting on the question of the venues of the two parts of the ninth session. Singapore proposed that the debate be closed and the question be decided by an indicative vote.
47. Turning to substantive matters, how have the Rules of Procedure been applied? The Rules of Procedure were correctly applied throughout the Conference. The first instance on which a matter of substance was decided by vote occurred at the resumed tenth session (Geneva, 1981). The first question concerned the venue of the International Sea-Bed Authority. Three countries were in contention: Fiji, Jamaica and Malta. The second question was the venue of the International Tribunal for the Law of the Sea. The Conference decided to resolve these two questions by a secret ballot vote conducted in an informal meeting of the Plenary. Following the voting, which chose Jamaica as the venue of the International Sea-Bed Authority and Hamburg as the venue of the International Tribunal for the Law of the Sea, the Conference decided that these decisions should be incorporated in the revision of the draft Convention and that the introductory note to that revision should record the requirements agreed upon when the decisions concerning the two seats were taken (A/CONF.62/L.78).

48. When the gate was opened for the submission of amendments to the Convention at the eleventh session (New York, 1982), 31 sets of amendments were submitted. The President invoked Rule 37 and declared a cooling-off period of 10 days. During this period the Collegium members, at the behest of the President, contacted the cosponsors of all the amendments in order to do two things. First, they tried to see whether any of the amendments enjoyed widespread and substantial support and would, if accepted, enhance the prospects of achieving general agreement. Of all the amendments, only four fell into this category. These were accepted by the Conference. Second, after the President had ascertained that the other amendments did not satisfy the two criteria stated above, he tried to persuade the cosponsors to withdraw, or at least not to insist on putting them to the vote. After much persuasion, this was successful in respect of all the amendments, except three. Spain insisted on putting its amendments to article 39 and article 42 to the vote, and subsequently these two amendments were not adopted. The second Spanish amendment obtained the required two-thirds majority but not the second requirement of a majority of the delegations attending that session of the Conference. Turkey also insisted on putting its amendment to article 309 to the vote. Turkey’s amendment was also rejected. The rejection of these amendments, especially of Spain’s amendment to article 42, confirmed the Conference’s commitment to the consensus procedure.

49. After the amendments had been disposed of, the delegations of Israel and the Soviet Union asked for separate votes. Israel wanted a separate vote on resolution IV. The USSR asked for a separate vote on resolution II. The President ruled that the Convention, its annexes and the four resolutions formed an integral whole and must be voted upon as a package. Israel appealed against the President’s ruling which
was, however, upheld by the Conference. Since the Soviet Union’s request involved the same issue, it was therefore not acted upon. The United States then requested a recorded vote on the draft Convention and the four related resolutions. The Convention package was adopted by a vote of 130 in favor and 4 against, with 17 abstentions.

D. How did the Rules of Procedure affect the Negotiations?

50. The Rules of Procedure on decision-making were scrupulously observed until the very end of the Conference. The resort to voting was rare, in accordance with the letter and spirit of the Gentlemen’s Agreement.

51. While the Rules and their observance may be remarkable, there is no doubt that the observance of the letter and spirit of the Rules inevitably (insofar as they discouraged the taking of votes) meant a longer conference. The delegates had to keep the discussions and negotiations going, session after session, in the hope that a compromise would eventually emerge.

52. The Rules, in other words, partly accounted for the very long duration of the Conference. If not for the unique features of the Rules, voting on numerous issues could easily have been taken. However, to have done so would have put in jeopardy the collective goal of the Conference, which was to adopt a Convention which would enjoy the widest possible support. Therefore, in retrospect, the Conference was wise to have stuck faithfully to the objective of trying to achieve consensus.

CHAPTER FOUR

THE UNOFFICIAL NEGOTIATING PROCESS

1. As mentioned earlier, apart from the official negotiating process, the Conference also had an unofficial negotiating process. The latter consisted of the meetings of the interest groups, the events which were taking place outside the Conference and the meetings of the informal private negotiating groups (hereinafter called the private groups). These groups are called “informal” because they were convened unofficially, outside the formal framework of the Conference and its Committees. The private groups were convened at the initiative of certain individuals. They were private in the sense that only those invited could participate. They were distinct from the special interest groups because the private groups cut across the special interest groups.
Indeed, the main objective of the private groups was to bring together informally the leading actors from the various special interest groups.

I. WHAT WAS THE OBJECTIVE OF THE PRIVATE GROUPS?

2. The main objective was to bring together, informally, the leading and important delegations to discuss an issue or group of issues, in a small group. The hope was that such small groups, being informal, private and without official status, would be more conducive to negotiations.

II. WHAT WAS THE PROCESS BY WHICH THESE GROUPS EMERGED?

3. The manner whereby these private groups emerged varied. Sometimes, it was the exclusive initiative of a leading personality in the Conference who felt motivated to undertake such an initiative. This was the case of the Evensen Group, named after the leader of the Norwegian delegation, Jens Evensen, and the Castañeda Group, named after the leader of the Mexican delegation, Jorge Castañeda.

4. Sometimes, two opposing sides on a controversial issue, equally exasperated with the lack of progress in the official Conference forums, themselves approached a respected individual and urged him to convene and chair a private group to attempt breaking the impasse. This was how the Group of 21 (also known as the Nandan Group) was established.

5. Those responsible for the initiation and organization of these groups made it a point to consult the President and the respective Chairmen of the Main Committees handling the issues concerned. This was necessary not only to avoid misunderstandings with the Conference officers but also because the President and the Chairmen needed to be apprised of the progress of the talks within such private groups in order to properly co-ordinate the formal work of the conference. For example, the work of these private groups had to be taken into account in arranging the schedules of meetings of the Conference. Where these private groups were making progress, it was not uncommon for the official meetings of the conference to be deferred in order to give extra time to the private groups.

III. EXAMPLES OF PRIVATE GROUPS

6. We shall now refer to some of the more well-known private groups.
A. The Evensen Group of Juridical Experts

7. The best known of the private groups was the Evensen Group, named after the convener, Jens Evensen, the leader of the Norwegian delegation, who chaired the meetings of the Group.

8. The Evensen Group reportedly began in 1973. Its composition varied from time to time depending upon the subjects under consideration. During the course of the Conference, the Evensen Group dealt with numerous subjects, including the exclusive economic zone, the protection and preservation of the marine environment, marine scientific research, and the continental shelf, as well as the rights of LL/GDS.

9. Participants were invited by the Chairman, and in this sense the Group was a closed Group. In the course of time, however, non-member delegations were permitted to attend in order to observe the proceedings. The procedure in the Evensen Group was to regard the delegates as participating in their personal capacity. They were called upon to speak by their names and not by the country they represented. In practice most participants spoke in line with the position of his or her delegation. The tendency was to speak more to the point, however, than was the case in the formal sessions.

10. At the end of the initial discussion of a topic, the Chairman would produce a text (often referred to as the Evensen text) which, in his view, represented a workable compromise. This text was then discussed and, taking comments into account, the Chairman would produce a revision of the text. This process would be continued until Evensen was satisfied that he had gone as far as he could in producing a generally acceptable text. Several of these Evensen texts were submitted to the Chairmen preparing the SNT and the RSNT.

11. The Evensen Group was the first private group which cut across special interest groups and provided delegates with an opportunity to discuss in detail the various proposals on different issues. The Evensen Group was well organized and it had an added advantage in that it also met between sessions.

12. Although many delegations had reservations regarding the composition of the Evensen Group and the contents of some of the texts produced by the Group, there is no doubt that the Evensen Group played an important role in the negotiating process, especially during the period when the SNT was being drafted. At a time when there

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20The LL/GDS felt that the Evensen Group was too coastal in orientation and unsympathetic to LL/GDS concerns. When Evensen’s text on the EEZ (which purported to reflect all “main trends and tendencies”) was issued, the four LL/GDS States which had participated in the Evensen Group immediately wrote a joint letter to the Chairman of the Second Committee dissociating themselves from the Text and stressing the domination of the Group by coastal States. See Jayakumar, op. cit., p. 101, fn. 107.
was an urgent need for delegations to meet informally to iron out differences, the Evensen Group filled this need.

B. The Private Group on Straits cochaired by Fiji and U.K.

13. This private group was convened at the third session (Geneva, 1975) at the joint initiative of Fiji and the U.K., who were the cochairmen. Their objective was to prepare a set of draft articles on passage through straits used for international navigation which would be an acceptable compromise. The position of the major maritime powers favoring free transit and the position of the group of straits States—favoring innocent passage for straits used for international navigation—dictated that a compromise had to be worked out. The compromise would have to meet the essential interests of the straits States on the one hand, and of the U.S., USSR and other major maritime powers on the other hand. The bases of the negotiations were the separate proposals submitted to the Conference by the U.K.\textsuperscript{21} and Fiji.\textsuperscript{22}

14. The cochairmen invited the following 13 delegations to participate in the Group:

1. Argentina  
2. Australia  
3. Bahrain  
4. Bulgaria  
5. Denmark  
6. Iceland  
7. India  
8. Italy  
9. Kenya  
10. Nigeria  
11. Singapore  
12. United Arab Emirates  
13. Venezuela

15. The composition of the Group was interesting and the intention of the cochairmen seemed to have been to exclude the extreme viewpoints, such as the radical straits States (Indonesia, Malaysia and Spain) and the two superpowers, the U.S. and the USSR. The two cochairmen explained at the time that their intention was to bring together a moderate group. However, the Group of Straits States was not satisfied with the explanation and criticized the Group's composition on the ground that the U.K.'s interests in straits were identical to those of the U.S.A. and USSR.

16. This private group on straits produced a consensus text on straits which was submitted to the Chairman of the Second Committee at the third session, Reynaldo Galindo Pohl of El Salvador. Most of the provisions of this consensus text were incorporated in the SNT.


C. Castañeda Group on legal status of the EEZ and related matters

17. At the sixth session (New York, 1977), prior to the revision of the RSNT, the Chairman of the Mexican delegation, Jorge Castañeda, convened a private group to break the deadlock on the issue of the legal status of the EEZ.

18. The 17 delegations that were members of the Castañeda Group were:

1. Australia
2. Brazil
3. Bulgaria
4. Canada
5. Egypt
6. India
7. Kenya
8. Mexico
9. Nigeria
10. Norway
11. Peru
12. Singapore
13. United Kingdom
14. United Republic of Tanzania
15. U.S.A.
16. USSR
17. Venezuela

19. The Group was formed following a dinner hosted by Castañeda on the evening of 25 June 1977, and its first meeting was held that night. Between 25 June and 12 July 1977, the Group held 13 meetings, all of which were in the evening and some of which ended in the early hours of the morning. Castañeda and Evensen’s deputy, Helge Vindenes, acted as the corapporteurs and draftsmen of the Group. The Group negotiated on the following four issues:

(a) Defining the status of the EEZ;
(b) Revising the Second Committee’s text dealing with the rights and duties of the coastal States and of other States in the EEZ (articles 44 to 47 of the RSNT);
(c) Revising the Third Committee’s text which had a bearing on the legal status of the EEZ (articles 59, 60, 61, 62, 64, 65, 66, 67, 76, and 77 of the RSNT); and
(d) Settling the general outline for the settlement of disputes on fisheries matters and scientific research in the EEZ (afterwards dealt with in detail by NG5).

20. In subsequent sessions of the Conference, the Castañeda Group evolved to play a different but equally important role in the Conference. The composition of the group was slightly enlarged in order to include all the Conference leaders. The Group met approximately once a week, either under the chairmanship of Castañeda or, after Castañeda became the Foreign Minister of Mexico, under the chairmanship of Keith Brennan of Australia. The Group would discuss the current status of the negotiations and the program of work of the Conference. Because the leaders of the Conference were all represented in the Castañeda Group, the discussions in the Group were extremely important. The
results of the discussions were reported to the President of the Conference who benefited greatly from the guidance and advice given by the Castañeda Group. In a sense, the Castañeda Group rather than the General Committee became the real bureau or steering committee of the Conference.

D. The Nandan Group or Group of 21 on rights of LL/GDS in the EEZ

21. The Nandan Group was set up at the fifth session (New York, 1976). The Group’s formation was the result of the desire of moderate delegations in the Coastal States and LL/GDS Groups for an early resolution of the issue of LL/GDS rights. These delegations felt that existing Conference procedures were unproductive and only served to strengthen the hands of radicals in both Groups who were not fostering a compromise. They felt that it was necessary to get away from the futile, large-scale parliamentary debates and to establish a small group wherein both sides could negotiate in earnest. With this motivation, the two Groups approached the Rapporteur of the Second Committee, Satya Nandan of Fiji, to be the Chairman of the Group.

22. The composition of the Nandan Group/Group of 21 was as follows:

<table>
<thead>
<tr>
<th>LL/GDS</th>
<th>Coastal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Austria</td>
<td>1. Canada</td>
</tr>
<tr>
<td>2. Czechoslovakia</td>
<td>2. Chile</td>
</tr>
<tr>
<td>3. Iraq</td>
<td>3. Fiji</td>
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<tr>
<td>4. Jamaica</td>
<td>4. Iceland</td>
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<tr>
<td>5. Nepal</td>
<td>5. Iran</td>
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<tr>
<td>7. Poland</td>
<td>7. Pakistan</td>
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<tr>
<td>8. Singapore</td>
<td>8. Peru</td>
</tr>
<tr>
<td>10. Uganda</td>
<td>10. Spain</td>
</tr>
<tr>
<td>11. United Republic of Tanzania</td>
<td></td>
</tr>
</tbody>
</table>

23. The basis of discussions of this Group was the RSNT articles on LL/GDS rights to living resources in the EEZ. While formed privately, it had a clear link to Committee II which did not establish a negotiating group on this matter for the specific reason that the Group of 21 was already in existence.

24. At the end of the fifth session, Chairman Nandan produced drafts (Nandan text) of certain articles which, in his view, were a possible basis for compromise. This text was discussed in the next session (sixth) but discussions were unproductive in the Group.

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23A detailed description of the establishment of this group as well as of its work is given in the article by Jayakumar cited in note 17.
25. At the sixth session (New York, 1977), when negotiations were very difficult, Chairman Nandan sometimes convened a smaller group or sub-group and consulted with them either on texts he was drafting or on future steps to take. For instance, he consulted:

a group of eight States: Brazil, India, Kenya and Mexico (coastal States); Jamaica, Nepal, Swaziland and Singapore (LL/GDS)

and

a group of four States: Mexico and Peru (coastal States); Austria and Singapore (LL/GDS)

26. At the seventh session (Geneva, 1978), the Nandan Group was absorbed into the scheme of negotiating groups officially established by the Conference. Satya Nandan was assigned to chair Negotiating Group 4 on LL/GDS rights. Negotiating Group 4 was generally regarded as an enlarged version of the Group of 21.

27. Discussions in the Group of 21 were often extremely difficult. However, only after the Group of 21 was established were the specific problems pinpointed and discussed seriously. Prior to that, discussions in the larger forums had been very amorphous, polemical or philosophical. In this sense, the Group of 21 served a useful purpose in facilitating the negotiating process.

E. The Private Group on Settlement of Disputes

28. At the second session of the Conference (Caracas, 1974), Louis B. Sohn, a law professor from the United States, was asked by several delegations to informally convene a private group to hold discussions on the settlement of disputes. About 30 delegations from all regions of the world were invited, and agreed to meet on a regular basis to exchange ideas and provisions for a chapter of the Convention on dispute settlement. The Group was initially chaired by two cochairs: Galindo Pohl of El Salvador and Ralph Harry of Australia. From the third session, A.O. Adede of Kenya joined as the third cochairman of the Group. Louis Sohn acted as the rapporteur of the Group. Nine members of the group—Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, the Netherlands, Singapore and the U.S.A.—submitted a working paper to the Conference containing alternative texts on the basic provisions of a chapter of the Convention on dispute settlement (A/CONF.62/L.7). At the third session of the Conference (Geneva, 1975), the Group held a weekend meeting at Montreux, Switzerland, which proved to be most productive. At that meeting, Willem Riphagen of the Netherlands outlined an approach to dispute settlement which found general favor in the group and which later was embodied in the Convention.
F. Secret Groups

29. The private groups mentioned so far, while being private and unofficial, did not try to hide their own existence. Nor did they seek to deny their involvement in, and authorship of, the texts which emanated from such groups.

30. Sometimes, however, delegations wanted to meet very privately and even secretly to attempt to draft new texts which might be workable compromises. For instance, the key delegates desiring to work together to solve an impasse might not want to place themselves in an embarrassing position within their own regional or interest group. Another reason was that it was felt that a given compromise formula might have a better chance of success if the identity of the real authors was not known.

31. The key negotiators in Committee I resorted, on several occasions, and with the knowledge and blessings of the Chairman, to the practice of establishing private negotiating groups in secrecy. One such group met each morning from 7 a.m. to 10 a.m. in one of the missions to the United Nations. There were, therefore, two parallel negotiations going on at the same time. The first was in the secret negotiating group and the second was in the First Committee of the Conference. Although the members of the secret negotiating group worked extremely hard and managed to produce compromise texts on various contentious issues, the texts were rejected by the First Committee when it was revealed that they had been produced by a small negotiating group working in secrecy. The majority of the members of the Conference resented the fact that the existence of the negotiating group had not been revealed. This added to the resentment many felt for not having been included in the negotiating group. The lesson learned was that when a private negotiating group had to be formed, it was better not to hide the fact of its existence from the Conference.

IV. USEFULNESS OF SUCH PRIVATE GROUPS

32. How should we assess the role of such private groups in the negotiating process? Quite apart from the content of the texts emerging from such groups, these groups played a vital role in the negotiating process. Indeed, were it not for the work of such groups, the Conference's official machinery would have taken a much longer time to reach agreement on texts on such crucial issues as straits and the legal status of EEZs. Indeed, some of the compromises negotiated could not have been achieved without these private groups.

33. The value of the private groups was not only in providing a forum for serious negotiations. They or their chairmen also produced compromise texts. These texts were extremely useful to the chairmen of the Main Committees who were drafting the SNT and RSNT. It
made their task easier as they could not be criticized for incorporating texts arbitrarily. Moreover, the texts presented were quite often the product of hard bargaining by opposing interest groups.

V. WHY WERE MORE PRIVATE GROUPS NOT FORMED?

34. If these groups were useful, the question may be asked why more of such groups did not emerge on other topics. The following explanations are offered.

35. First, many delegations or interest groups were unprepared for such detailed negotiations until the later stages of the Conference. Many had to finalize their own positions and to reconcile internal differences. It was not difficult to adopt a general position in the official, large Committees. However, participation in a small negotiating group implied that participants were ready to state positions on specific aspects of the issue and to comment on the wording of drafts in detail. Where delegates were not ready to do so, they did not favor the establishment of such smaller groups.

36. Second, there was a tactical reason explaining the reluctance to support the establishment of more private groups. Delegations wanted to await the outcome on other issues deemed to be related. Some delegations felt that embarking on serious negotiations too early in one area might prematurely restrict their negotiating positions on other issues.

37. Third, there were inherent problems in convening small groups. As stated, sovereign States were reluctant to delegate to others the authority to negotiate for them. Delegates who were not invited to participate in a private negotiating group were naturally apprehensive and resentful. In addition, not having participated in the negotiations, they may not have fully understood or appreciated the value of the compromise text.

38. Fourth, it should be remembered that in all cases of private groups, the reputation of the chairman and his delegation were at stake. Sometimes the chairman would produce compromise texts and formula with the best of intentions only to find that delegations from both sides were critical of the text. In a few cases, some delegations which found the text very damaging to their interests would go so far as to criticize the chairman. In these circumstances, it is not surprising that few in the Conference were willing to undertake such an onerous responsibility.
CHAPTER FIVE

THE EVOLUTION OF THE CONVENTION

1. In Chapter One, it was noted that one unusual feature of this Conference was that it commenced without a preparatory text. This resulted in the Conference itself having to prepare such a text. The manner by which the Conference prepared these negotiating texts and its decision to empower a few officials—namely the President and the Chairmen of the main Committees—with the task of drafting the text were remarkable features of the Conference's negotiating process.

2. We shall now discuss the process by which the text, i.e., the informal Single Negotiating Text (SNT), was prepared and how this, through subsequent revisions, gradually evolved as the Revised Single Negotiating Text (RSNT), the Informal Composite Negotiating Text (ICNT), the Revised Informal Composite Negotiating Text (ICNT/Rev.1) and the second revision of the ICNT (ICNT/Rev.2), the Draft Convention (Informal Text), the Draft Convention (Official Text) and finally the Convention itself. 24

I. THE NEGOTIATING PROCESS LEADING TO THE PREPARATION OF THE SINGLE NEGOTIATING TEXT (SNT)

3. When the Conference began, it had inherited a plethora of proposals made in the UN Sea-Bed Committee. According to the relevant UN General Assembly resolutions, such proposals need not be resubmitted to the Conference. In addition, when the Conference began to discuss substantive matters at the second session in Caracas in 1974, a very large number of proposals and documents emerged. Given the fact that the Conference did not have a single preparatory text as the basis for negotiations, it became clear that the proliferation of proposals would not enable the Conference to move forward in an efficient manner.

4. Some preliminary attempts were made to rectify the situation. For example, at the end of the second session the First Committee attempted to produce a consolidated text containing four alternative texts on selected articles. The Bureau of the Second Committee produced a document entitled "main trends" 25 "in order to reflect in generally acceptable formulations the trends which had emerged." This document also set out alternative texts on various issues before the Second Committee.

24 A list of the sessions of UNCLOS III is given in para. 7 of the Final Act (see p. 406 below). A "Chronology of Significant Law of the Sea Events" appears as an Appendix to the Introduction of this volume (see p. xxx above).
5. At the end of the second session, delegations were concerned at this state of affairs. The formulation of alternative texts was probably the most progress that was achievable in the circumstances but it was not satisfactory. Furthermore, delegations were still introducing numerous new proposals, documents and draft articles.

Third Session (Geneva, 1975)

6. Against this background, when the third session met, there was some concern over the procedures which should be employed. Several concerned delegations held private consultations and the view emerged from these consultations that it was necessary for the Conference to prepare a single preparatory document. These delegations felt that this was the only way for the Conference to extricate itself from the proliferation of individual proposals.

7. It was the delegation of Singapore which first made the proposal in the General Committee, on 7 April 1975, that:

... the General Committee might ask the other three Committees to make a rapid survey of the methods of work they were using and to report back in a few days, indicating what improvements or new methods they recommended for speeding up the work. The Chairman of the working group of the First Committee had proposed that he should submit to the Group a text which would serve as a basis for negotiations. In the Second Committee, the method used had been that of small special-interest groups, dealing with such subjects as baselines and historic waters. However, within that Committee the large number of variants constituted an obstacle to the rapid progress of the work. The Chairman of the Second Committee might therefore consider drawing up a text on the basis of which negotiations could be conducted.26

8. The proposal of the delegation of Singapore was supported by the delegation of Chile which stated that:

... it did not seem possible to work on the basis of a whole series of variants; the Conference should have a single text before it. The Second Committee, for example, in spite of the efforts of its Chairman and unlike the First and Third Committees, had no basic text. He therefore fully supported the proposal of [Singapore] which went to the heart of the problem.27

9. There were, however, some reservations and doubts expressed by certain delegations. For example, China thought that the "time

26General Committee (10th mtg.), para. 39, Off. Rec. IV.
27Ibid., para. 49.
had not yet come" for preparation of this text because certain Second Committee questions had not yet been seriously discussed and no consensus had been reached on them. 28 Likewise, Poland thought that "it would be dangerous and premature" to begin drafting such a text when the results of the various informal meetings were not known. 29

Decision by the Conference

10. The President embraced the proposal by Singapore and pushed it energetically in the consultations. The idea gained support in subsequent General Committee meetings and was accepted by the Plenary at the 55th meeting on 18 April 1975. 30

What was the SNT intended to be?

11. The SNT was originally intended to be merely a basis for negotiation. As summarized by the President:

\[\text{\ldots} \text{the Chairmen of the three Committees should each prepare a single negotiating text covering the subjects entrusted to his Committee, to take account of all the formal and informal discussions held so far. The texts would not prejudice the position of any delegation, and would not represent any negotiated text or accepted compromise. They would be a basis for negotiations. The Chairmen would be helped by the Secretariat in the preparation of their texts, but would not consult the Secretariat \ldots. The Chairmen themselves would decide whom to consult and how. In the negotiations, any representative would be free to move amendments. In the preparation of the single texts, account must be taken of the results achieved in formal and informal groups. The drafting of single texts would not provide a pretext for ignoring any existing text, nor would it mean that no work could be done in working groups, or that other negotiations \ldots would cease. On the contrary, it should stimulate discussion and facilitate progress in the negotiations \ldots. }\]

Why did the Conference confer so much power on three individuals?

12. An intriguing question is: what is the rationale underlying the willingness of the majority of the delegations to confer such an important

28 General Committee (11th mtg.), para. 27, Off. Rec. IV.
29 Ibid., para. 22.
30 Plenary (55th mtg.), para. 92, Off. Rec. IV.
31 Ibid., paras. 92-93.
task on three individuals? We consider this to be an intriguing question because the three Chairmen were representatives of States each having its own national interests. Furthermore, despite the caveat that the text would be informal and that it would be a negotiating and not a negotiated text, most delegations anticipated that the text would have a special significance.

13. Perhaps the main explanation was the sheer frustration of most delegations over the cumbersome and unproductive procedures then operating. There was a prevailing view that the three Chairmen, even if they were representatives of their own States, could act responsibly and produce a single text.

*How did each Chairman prepare his portion of the Text?*

14. Each of the Chairmen followed a different method in preparing the SNT. In the case of the First Committee, Chairman Engo had requested Christopher W. Pinto, the Chairman of the Informal Negotiating Group, to prepare the text and had given Pinto a deadline for the submission of his text. Although Pinto did prepare such a text, he failed to reach Chairman Engo by the prescribed deadline. As a result, the Pinto text, which was widely circulated at the Conference, was not incorporated by Engo in the SNT. Instead, the First Committee’s portion of the SNT was drafted by Engo and a small number of his close friends, all of whom were from the Group of 77. However, Annex 1 of the SNT, containing the basic conditions of exploration and exploitation, was drafted by Pinto.

15. In the case of the Second Committee, Chairman Reynaldo Galindo Pohl (El Salvador) entrusted the preparation of the SNT to his rapporteur, Satya Nandan (Fiji). Nandan enlisted the help of two members of the Secretariat, Hugo Caminos and Gudmundur Eiriksson. In drafting the SNT, Nandan and his two collaborators took careful account of the texts on the EEZ prepared by the Evensen Group and the Group of 77, the text prepared by the informal groups established by the Second Committee on such issues as the territorial sea and high seas, and on the draft articles on straits used for international navigation prepared by the private group on straits.

16. In the case of the Third Committee, the SNT was prepared by the Chairman, Alexander Yankov (Bulgaria), in close collaboration with the Chairman of the Working Group on the Protection and Preservation of the Marine Environment, José Luis Vallarta (Mexico), the Chairman of the Working Group on the Development and Transfer of Technology, Cornel A. Metternich (F.R.G.), and with the Secretariat officials assigned to the Third Committee. The Third Committee's portion of the SNT reflected the results achieved in the negotiations in the two working groups.
II. PREPARATION OF THE REVISED SINGLE NEGOTIATING TEXT (RSNT)

17. The informal single negotiating text (SNT) appeared on the last day of the third session in 1975. There was therefore no time at that session for delegations to study and comment on its content. The SNT pleased some delegations and upset others. On the whole, however, there was no violent reaction on the part of the overwhelming majority of the delegations against the result. The absence of any significant objections, in a sense, proved the correctness of the decision to request the three Chairmen to prepare such a text. The procedure worked and the results were better than might have been predicted. The favorable reaction was reflected in the decision of the Conference, at its 56th meeting, when it decided that the general debate had been completed.

18. It was largely because the procedure had proved workable in preparing the initial text that the decision to request the Chairmen to revise the text was less controversial. The Conference had confidence in this process and in the genuine effort of the respective Chairmen to faithfully discharge their roles as even-handed officers of the Conference.

Fourth session’s decision to revise the SNT

19. The decision at the fourth session (New York, 1976) that the Chairmen should revise the SNT seemed to have been easily secured. At the first meeting of the General Committee at that session, President Amerasinghe, after consulting the three Chairmen and others, proposed, inter alia, that if after the period of negotiations any Chairman “felt that there was a set of amendments commanding such widespread support as to justify the revision of the original text, he should be free to effect such a revised version of the relevant portion of the (SNT) while retaining the informal character of the document.”\(^3\) This was not opposed either in the General Committee or in the plenary.

Preparation by the President of the first text on the settlement of disputes

20. The SNT, dealing basically with matters before the three main Committees, did not contain any comprehensive provisions on the settlement of disputes. President Amerasinghe took the initiative of producing the SNT on dispute settlement.\(^3\) He stated that although he had not been expressly requested by the Conference to prepare

\(^3\)General Committee (14th mtg.), para. 6, Off. Rec. V.

\(^3\)A/CONF.62/WP.9 (1975), ibid.
such a text, this was implied in the Conference's decision to prepare the SNT since the question of settlement of disputes had not been allocated to any one of the three Main Committees. His text was released before the commencement of the fourth session.

21. In preparing the first text on dispute settlement, President Amerasinghe enlisted the help of Professor Louis Sohn and two Secretariat officials, Hugo Caminos and Gitakumar Chitty. The President's team relied heavily on a paper that had been prepared by the private group on dispute settlement.34

22. The President's initiative in preparing a text on dispute settlement was welcomed by some delegations and criticized by others. In response to the criticism that the Conference had not mandated him to prepare such a text, he had to admit that:

... given the genesis of the other informal single negotiating texts, the one which he had prepared could not claim the same status, since there had been no general discussion on the question of settlement of disputes ... 35

23. The President's text was embraced in the general debate on the settlement of disputes which took place in the plenary in the fourth session (New York, 1976). After the debate, the Plenary authorized the President to prepare a revised SNT on the settlement of disputes which would have the same status and character as the other parts of the SNT. The President did so, and a new text contained in A/CONF.62/WP.8/Rev.1 appeared on 6 May 1976.

How did the various Chairmen revise the SNT?

24. With the appearance of the SNT, there was agreement that further general debates should be avoided and that informal negotiations should focus on specific aspects of the SNT. There was some uncertainty as to whether informal amendments would be entertained. President Amerasinghe suggested in the Plenary and in the General Committee that this should be possible, but no decision was taken.

25. The general procedure was to have the SNT discussed in informal negotiations in the three Main Committees. Thereafter, the three Chairmen would revise those parts of the SNT falling within their Committee's purview.


35General Committee (14th mtg.), para. 12, Off. Rec. V.
First Committee

26. The Chairman of the First Committee, Paul Bamela Engo, stated that the First Committee had conducted its informal negotiations at:

... various informal levels, including the formal meetings of the Committee as a whole, and a multiplicity of smaller groups of experts and interested individuals under my personal supervision. These delegations were also encouraged to meet bilaterally and multilaterally, as well as in groups of interests. The results of all of these were fed in to me and in appropriate cases thrown open for further review in larger meetings.\textsuperscript{36}

Second Committee

27. By the fourth session, the Chairman of the Second Committee, Reynaldo Galindo Pohl of El Salvador, had resigned and the Latin American group had nominated Andrés Aguilar of Venezuela to replace him.

28. In the informal discussions of the SNT, Chairman Aguilar introduced in the Second Committee the procedure of "silence-means-agreement-with-the-SNT." As explained by him, in his introduction to the RSNT:

Early in its work the Committee agreed to follow "a rule of silence," whereby delegations would refrain from speaking on an article if they were essentially in agreement with the single text. Silence on amendments would be interpreted as lack of support for such amendments. The rule was to be applied flexibly and was not intended to result in any arithmetic calculations or to be taken as a form of indicative vote. In my interpretation of the effect of this rule, I took into account the fact that with regard to certain issues, only those delegations most directly involved would normally participate in the discussion. Nevertheless, the rule allowed a general classification of the issues before the Committee.\textsuperscript{37}

According to the Chairman, "very few of the over one thousand amendments proposed during the session would achieve the purpose of making the text a more adequate instrument . . . ."

29. The rule that silence on a provision implied agreement created a presumption in favor of the text and was advantageous for those who were satisfied with a given provision. It was disadvantageous for those who wanted certain provisions changed. These States had to

\textsuperscript{36}A/CONF.62/WP.8/Rev.1/Part II (1976), para. 4, ibid.

\textsuperscript{37}A/CONF.62/WP.8/Rev.1/Part II (1976), para. 6, ibid.
muster as many other like-minded delegations as they could and orchestrate a chorus of criticism of the provision in the hope that the Chairman would alter the text.

30. There was considerable concern by some delegations when Chairman Aguilar left for Venezuela for a short period leaving the Vice-Chairman, Francis X. Njenga (Kenya), to chair meetings of the Committee. Some delegations feared that the Chairman, being absent for part of the discussions of the SNT, might not take into account some of the views expressed. However, this concern appeared unfounded as Chairman Aguilar was quickly brought up to date on what had transpired in his absence.

Third Committee

31. The Chairman of the Third Committee, Alexander Yankov, like the other two Chairmen, revised the text on Third Committee matters after the conclusion of all informal discussions and negotiations on the text. According to him "... account was taken of all proposals, amendments and suggestions made during the informal meetings of the Committee ... the results of informal inter-sessional negotiations as well as other documents before the Conference."38 Where the Committee met informally under the chairmanship of others, the results of such meetings, he said, were conveyed to him.

The appearance of the RSNT

32. The RSNT appeared at the end of the fourth session. Unlike the SNT, which contained only a brief introductory note by the President and a brief note by the Chairman of the Second Committee, the RSNT had an extensive introductory general note by the President as well as introductory notes by the Chairmen of the three Main Committees. The notes by the Chairmen of the First and Second Committees were extensive and explained the changes they made in the text.

33. The President's note continued to stress that the RSNTs:

... have been prepared entirely on their own [the three Chairmen's] responsibility and will have no other status than that of serving as a basis for continued negotiation without prejudice to the right of any delegation to move any amendments or to introduce any new proposals. The texts must not be regarded as committing any delegation or delegations to any of their provisions. In accordance with the procedure already established, there will be no general discussion of the texts.39

III. THE PREPARATION OF THE INFORMAL COMPOSITE NEGOTIATING TEXT (ICNT)

Fifth session

34. At the fifth session (New York, 1976) the RSNT was subjected to detailed discussion. Although styled as “informal negotiations,” these were actually debates between those who preferred to retain the text on a given topic and those who sought changes. Many felt that the convening of this session, in retrospect, had been a mistake.

35. Toward the end of the fifth session, delegations began to confer on methods which could unify the different parts of the text into a coherent whole and, at the same time, possibly elevate the text to a higher status.

36. Against this background, one of the General Committee’s recommendations on the organization of the sixth session (recommendation ix) was that at the end of the sixth week of the sixth session, the President, with the Chairmen of the three Main Committees “adopting the collegiate method, would prepare an informal single composite text. On the basis of that text, the Conference should in the last week prepare a draft Convention on which it should act, if possible, by consensus and without resorting to a vote.”¹⁴⁰

Sixth session (New York, 1977)—Debate over how the ICNT should be prepared

37. An interesting debate over how the ICNT should be prepared took place at the sixth session. Much of the problem stemmed from the term “collegiate.” Different meanings were assigned to the term by different delegations. In the end, the debate became moot.

President Amerasinghe’s omission of the term “collegiate”

38. At the 29th meeting of the General Committee, the President proposed the procedure for preparing the ICNT.¹⁴¹ Significantly, he made no mention of the collegiate system but proposed that he should be authorized to prepare the ICNT “in consultation with” the Chairmen of the three Committees, the Chairman of the Drafting Committee and the Rapporteur-General. This omission immediately attracted comment. Chile reminded him that at the previous session “it had also been agreed . . . that the President with the Chairmen of the Committees,

¹⁴⁰Plenary (76th mtg.), para. 33, Off. Rec. VI.
adopting the collegiate method, would prepare an informal single composite text.\footnote{\textsuperscript{42} Brazil, to cite another example,}

firmly believed that the single composite negotiating text should be prepared jointly by the President and Chairmen of the three Committees rather than by the President in consultation with the Chairmen of those Committees. [The Brazilian delegation] therefore preferred the language of the General Committee's recommendation (ix) which had used the term 'the collegiate method', to that in document A/CONF.62/BUR.5.\footnote{\textsuperscript{43}}

\textit{Two views on the collegiate system}

39. Intense behind-the-scenes lobbying led to two schools of thought. The first school represented the views of those who wanted each Chairman to have a veto. They did not favor vesting the final decision with the President. These States, mostly Latin American and most coastal States, insisted on the collegiate system and interpreted that term to mean joint preparation, implying a veto for each Chairman. The second school represented those who felt that, while it should be a team, the President must have the final say and the power to suggest solutions in case of a deadlock. Those belonging to this school were mostly LL/GDS, the Asian Group and some African coastal States, such as Kenya.

\textit{What were the concerns and fears accounting for this dispute?}

\textit{First School (favoring joint preparation)}

40. The articulated reason for the joint preparation school was that each Chairman knew best the trends in his Committee and, therefore, was the best judge of what solutions were feasible. Perhaps their inarticulated reason was the fear or suspicion that the President, if given a final say, might succumb to pressures from various groups to make changes over the objections of the three Chairmen. It may have been that the members of this school thought they could be better protected with their influence on individual chairmen than they could with the independent-minded President of the Conference. It was also said by Mexico, at the 78th plenary meeting, that several States had adopted legislation based on the RSNT and these States could not accept the idea that the texts could be changed "lightly or by any one person."
Second School (giving the President the final say)

41. The articulated reason for giving the President the control was that it might be impossible to prepare the ICNT if each Chairman were to have a veto. If the Conference was prepared to put its trust in each of the three Chairmen, it was argued that the same trust should be given to the President. Perhaps the inarticulated reason was fear by some delegations that certain Chairmen would not allow any changes to their parts of the RSNT and that the only way of making changes was to give the final say to the President.

New proposal by the President

42. President Amerasinghe subsequently presented to the General Committee a new proposal for preparing the ICNT.44

43. This document now referred to the collegiate system. He clarified his proposal to mean that he would undertake the preparation of the ICNT “jointly with the Chairmen of the three Committees. It will be a team under the President’s leadership.”45 At the 32d meeting of the General Committee, in presenting A/CONF.62/L.20, he added the observations that “in the event of a disagreement with the Chairmen over any suggestion that he might make during the preparation of the composite text, their views would prevail.”46

44. This “Chairmen’s view will prevail” idea was opposed by several in the General Committee. For example, Singapore was the first to object and said “that seemed to imply that a veto could be exercised by one member of the team . . . .”47

Plenary discussion

45. When the matter went to the plenary, the President, when presenting A/CONF.62/L.20, did not repeat the observation that the Chairmen’s view would prevail when there was disagreement. Jorge Castañeda of Mexico immediately referred to the President’s comment in the General Committee about the Chairmen’s view prevailing. He said this did not amount to a veto but that texts should not be changed lightly or by one single person.

46. The delegation of Singapore disagreed with Mexico and said that matters of procedure should be left to the President and the three Chairmen to work out. He pointed out that there was no reason why

45Ibid., 8th paragraph.
46General Committee (32d mtg.), para. 2 (1977), Off. Rec. VII.
the President should "be trusted less" than the three Chairmen. If any difficulties arose and persisted, the President should be free to take such initiatives as he saw fit.48

Was the ICNT prepared on a collegiate basis?

47. In retrospect, all the heated debates over the collegiate system seem to have been in vain. This is because, in the ultimate analysis, when the team got together, the President seemed to have given in and the procedure adopted was that each Chairman would be responsible for the provisions of the ICNT concerning his Committee.

48. In other words, it was really not a joint or team effort at all. This is very clear in the President's Memorandum accompanying the ICNT.49 This Memorandum states, inter alia:

It was understood that while the President would be free to proffer his own suggestions on the proposed provisions of any part of the composite text, in regard to any matter which fell within the exclusive domain of a particular chairman, that chairman's judgement as to the precise formulation to be incorporated in the text should prevail. The adoption of this procedure was a recognition of the fact that each chairman was in the best position to determine, having regard to the negotiations that had taken place, the extent to which changes in his revised single negotiating text should be made in order to reflect the progress achieved in the course of negotiations where, in the chairman's opinion, such progress justified changes in the revised single negotiating text and also to decide, even where the negotiations had not resulted in substantial agreement, whether such progress as had been achieved warranted changes which would be conducive to the ultimate attainment of general agreement. It was also understood that, so far as issues on which negotiations had not taken place were concerned, there should be no departure from the revised single negotiating text unless it was of a consequential character. This understanding was scrupulously observed in the course of the preparation of the informal composite negotiating text. There is no question, therefore, of joint responsibility being assumed for the provisions of the text by the President and the chairmen of the three Committees. The chairman of each Committee bears the full responsibility for those provisions of the informal composite negotiating text which are the exclusive and special concern of his Committee. This is not an enunciation of a new doctrine of collective irresponsibility. [Emphasis added.]

48Plenary (78th mtg.), para. 10, Off. Rec. VII.
IV. THE PROCESS LEADING TO ICNT REVISION 1

Inter sessional meeting before the seventh session
(Geneva, 1978)

49. Before the convening of the seventh session, an inter sessional
meeting was held in New York from 6 to 17 February 1978. This
inter sessional meeting came about as a result of two days of informal
consultations which the President conducted on 13 and 14 December
1977. The President had presented a list of outstanding issues for
consideration at the inter sessional meeting. This inter sessional meeting
was significant in that it was the first time that the President of the
Conference had taken the initiative to convene such a session. The
session served a useful purpose in that hard core outstanding issues
were identified. A group of 21, chaired by Satya Nandan of Fiji, was
created to deal with the question of LL/GDS rights to living resources
in the EEZ. There was also a discussion on First Committee matters.

The seventh session and controversy over the Presidency

50. The first part of the seventh session was taken up by the con-
troversy over the Presidency. As noted earlier, the problem arose
because the new Government of Sri Lanka replaced Amerasinghe as
its Permanent Representative to the UN and also did not include him
in its delegation to UNCLOS III. The question, therefore, was whether
an individual who was no longer a representative of any Government
could serve as President of the Conference. Detailed comment on this
controversy is not warranted. Suffice it to mention that, first, this
controversy held up negotiations; second, it underscored the important
role of individuals; third, it saw the phenomenon of Afro-Asian unity
against the Latin Americans; and fourth, when the matter could not
be resolved through negotiations, the Conference had to decide by a
roll call vote that Amerasinghe could continue as President. All these
discussions took place in formal closed meetings of the plenary,
of which the records have not been made public and the documentation
is "restricted."

51. The "Presidential crisis" did not have serious adverse effects
on the subsequent negotiations concerning substance. However, many
felt that the Conference deliberations were prolonged by perhaps as
much as one year because of the time consumed in resolving this
delicate issue.

Seventh session—Negotiations on substantive matters

52. With the presidency crisis over, the seventh session began its
negotiations on substantive items. As noted earlier, the agreed procedure
was set out in A/CONF.62/62\textsuperscript{30} which, inter alia, identified seven hard-core, outstanding issues and established negotiating groups of limited size on each of the issues.

53. Some interesting aspects of this procedure were as follows. First, it was an effort to bring some of the negotiations away from under the umbrella of the Committees. Therefore, it was envisioned that the negotiating groups would be negotiating groups of the Conference.

This scheme did not completely succeed because Document 62/62 also provided that when a negotiating group reported to the chairman of a Committee and to the President, the latter was to consult the chairman as to whether the results should go straight to the plenary or be discussed in the Committee. Second, as regards the composition of the negotiating groups, each hard-core negotiating group would be constituted by a nucleus of countries principally concerned but with the understanding that the group was open-ended.

\textit{Criteria for revising the ICNT}

54. Document A/CONF.62/62 also set out the criteria for revising the ICNT. It stated, inter alia, that

Any modifications or revisions \ldots should emerge from the negotiations themselves and should not be introduced on the initiative of any single person, whether it be the President or a Chairman of a Committee, unless presented to the Plenary and found, from the widespread and substantial support prevailing in Plenary, to offer a substantially improved prospect of a consensus.

The revision of the ICNT should be the collective responsibility of the President and the Chairmen of the main committees, acting together as a team headed by the President. The Chairman of the Drafting Committee and the Rapporteur-General should be associated with the team as the former should be fully aware of the considerations that determined any revision and the latter should, \textit{ex officio}, be kept informed of the manner in which the Conference has proceeded at all stages.\textsuperscript{31}

\textit{Why was the ICNT not revised at the end of the seventh session?}

55. Although the assumption in Document A/CONF.62/62 was that the ICNT would be revised at the seventh session, such revision did not take place. The various negotiating groups had reached different levels of progress. The First Committee had serious problems as did


\textsuperscript{31}Ibid., paras. 10 and 11.
Negotiating Group 7 on delimitation. Negotiating Group 4, chaired by Satya Nandan, achieved the most progress and the Chairman issued a text, known as the Nandan text, in 1978. Negotiating Group 5 also attained commendable progress. However, due to this uneven pattern of progress, there were strong objections by several delegations to revising one part of the ICNT while other parts were being negotiated. It was asserted that several matters were linked to each other and that successful compromises in one negotiating group could not be incorporated in a revised text when other negotiating groups had not resolved their problems.

56. Finally, therefore, what emerged from the seventh session was the collation of all the reports of the negotiating groups into one document, of about 200 pages, which was entitled “Reports of the Committees and Negotiating Groups on Negotiations at the seventh session contained in a single document both for the purposes of record and for the convenience of delegations.”

**Negotiations at the resumed seventh session (New York, 1978)**

57. The ICNT was not revised at the resumed seventh session for the same reasons given above. An important feature of the resumed seventh session was that it began without any General Committee meetings on the organization of work. This was a departure from previous practice and this session saw the President and the Collegium exerting a stronger hand in the control of proceedings. Indeed, very few General Committee meetings were held and this led to private criticism over the non-convening of General Committee meetings. The unofficial explanation given was that this was a resumed session and, therefore, all that was needed was for the different negotiating groups to resume where they had left off at the previous part of the session. This practical effect of the procedure was to avoid lengthy debates on organization of work and to enable the negotiating groups to get an early start.

58. At the resumed seventh session, the focus was on the negotiating groups which had not attained the same levels of progress as Negotiating Group 4 and Negotiating Group 5. As regards Negotiating Group 4, several delegations from the LL/GDS Group which were dissatisfied with the 1978 Nandan text urged the Chairman to convene meetings. He resisted this and called only a few token meetings on the ground that more meetings would be counter-productive. Chairman Nandan’s view was that no further progress could be made in Negotiating Group 4 until other negotiating groups had reached a similar level of progress.

**ICNT revised at the eighth session**

59. The revision of the ICNT, which was to have taken place at the seventh session, was finally effected at the eighth session (Geneva,
1979). To be precise, the revision was undertaken by the President and the members of the Collegium only after the session had concluded.

60. The Plenary debates on the reports of the Chairmen of the various Committees and of the negotiating groups consumed a great deal of time. One of the topics which generated much controversy was the continental shelf. The Chairman of the Second Committee, who also chaired Negotiating Group 6, tabled a compromise proposal\(^2\) which was opposed by many LL/GDS and Arab States. Some felt the proposal, based on the Irish formula, might be a step forward, but objected to its being presented to delegates at the very last minute in the Plenary without prior discussion in Negotiating Group 6.

61. Many delegations had thought that upon the conclusion of these debates, the President would confer with the three Chairmen and announce which changes would be effected. However, this was not to be the case. The President adjourned the eighth session and informed delegates that he would meet his colleagues in the Collegium "to consider a revision of the ICNT." Apparently, the team worked through the night following the adjournment of the session and concluded its work in the early hours of the morning.

62. The Explanatory Memorandum by the President to the ICNT/Rev.1 contains significant insight into the manner whereby the President and the three Chairmen approached the task of revising the text. For example, the Memorandum discloses that:

- the team decided to describe the revised text as "Informal Composite Negotiating Text/Rev.1" since the Conference had been assured that the revision would remain a negotiating text and not a negotiated text;
- the team did not feel empowered to consider any proposals not covered by the reports of the Committees or negotiating groups;
- the team seemed to have had some difficulty in deciding whether Negotiating Group 6 Chairman's text on the continental shelf should be included. It noted that several reservations had been expressed but, on the other hand, support for inclusion of the text had been expressed by countries from all regional groups, among whom were included a number of land-locked and geographically disadvantaged States. Its decision was, therefore, in favor of inclusion.

63. The Explanatory Memorandum also discloses that the President and his team made decisions on the revision on a joint basis. The Memorandum states: "The discussions in the team on all points were characterized by a remarkable degree of agreement and understanding which enabled it to arrive at unanimous decisions on all the other texts and revisions . . . ." In this sense, it can be said that the collegiate

\(^2\)A/CONF.62/L.37 (1979), Off. Rec. XI.
system seemed to have worked with regard to the process of revising the ICNT, while it did not work in preparing the ICNT itself.

V. THE PROCESS LEADING TO ICNT REVISION 2

Resumed eighth session (New York, 1979)

64. The objective of effecting a second revision of the ICNT at the resumed eighth session did not materialize. The second revision was deferred to the ninth session.

65. Although the resumed eighth session did not effect a second revision, it took certain important decisions in planning a four-stage program during which the status of the ICNT would be formally altered to that of a Draft Convention. The four-stage program set out in A/CONF.62/88 [Off. Rec. XII] dated 24 August 1979 envisioned the following.

First Stage

In the first three weeks of the ninth session, work on the final clauses would be completed. The Chairmen of the three Committees should seek to reach compromise solutions on outstanding issues. The Drafting Committee was also to complete its work on recommendations for incorporation in the final version of the ICNT.

Second Stage

In the fourth week of the ninth session, there would be a formal meeting of the Plenary to enable delegations to express their views on the revised ICNT and on the overall package. Delegations could also submit written statements for the record.

At the end of this period, the President and the three Chairmen would revise the ICNT.

Third Stage

In the fifth week of the ninth session, the Plenary would meet to decide on altering the status of the ICNT to that of "a Formal Conference document that would serve as a Draft Convention." All formal proposals would thereafter be considered lapsed while States could move fresh amendments to the formal Draft Convention.

Fourth Stage

In the first ten days of the resumed ninth session, the Main Committees would examine the Draft Convention and the Committees would take a decision on all pending amendments. It was envisioned that the Convention could possibly be adopted before the end of the fifth week of the resumed ninth session.
Ninth Session (First Part), March to April 1980

66. The program of work adopted at the resumed eighth session had to be modified because the various Committees and negotiating groups could not complete their work within the first three weeks of the ninth session. Accordingly, the period of the first stage was extended by one week until the end of the fourth week. The reports of the Chairmen of the different Committees and negotiating groups were ready only at the beginning of the fifth and final week of the session. This meant that there were only a few days left for the plenary debate. In view of this, the plenary modified its plan of work by deciding that the debate would be confined only to the proposed changes to the ICNT. The formal debate on the overall package was deferred until the resumed ninth session.

67. After the formal debate in the Plenary, the Collegium found itself in a position to undertake the second revision to the ICNT. The Collegium agreed that all the proposals submitted by the Chairmen of the First, Second and Third Committees, as well as the text suggested in the report of the Chairman of Negotiating Group 7 and the text of the preamble and the settlement of disputes proposed by the President, should be incorporated in the revision. ICNT/Revision 2 appeared on 11 April 1980, a week after the adjournment of the first part of the ninth session.

VI. THE PROCESS LEADING TO THE DRAFT CONVENTION (INFORMAL TEXT)

Resumed Ninth Session (Geneva, July to August 1980)

68. During the resumed ninth session, the negotiations on the outstanding issues in the Main Committees and in the Informal Plenary, acting as a Main Committee for this purpose, were concluded on 23 August 1980. The results of those negotiations were discussed during the general debate which took place on 25, 26 and 27 August 1980. Following the general debate, the Collegium took note of the results of the negotiations during the resumed session and the statements made in the course of the general debate. The conclusions reached by the Collegium were reflected in the revision of ICNT/Rev.2 which appeared on 22 September 1980 under the title “Draft Convention on the Law of the Sea (Informal Text).” The Draft Convention (Informal Text) incorporated the results of the negotiations contained in the report of the Co-ordinators of the Working Group of 21, the results of the negotiations conducted by the Third Committee, the results of the negotiations in the Informal Plenary on the settlement of disputes and the final clauses (except for the issue of participation).

69. In his Explanatory Memorandum, the President explained that although the title of the text had been changed from the Informal Composite Negotiating Text (Revision 2) to the Draft Convention (Informal Text), the text remained informal in character. He emphasized that it was a still negotiating text and not a negotiated text, and that its title did not prejudice the status of the text which would be determined at the tenth session.

VII. THE PROCESS LEADING TO THE DRAFT CONVENTION (OFFICIAL TEXT)

70. At the resumed tenth session (Geneva, 3 to 28 August 1981) the conference decided, at its 153rd plenary meeting, to revise the Draft Convention (Informal Text). The Conference specified that, in accordance with A/CONF.62/62, the revision would incorporate the recommendations of the Drafting Committee, approved by the formal plenary, and the decisions taken by the Informal Plenary on the sites of the International Sea-Bed Authority and the International Tribunal for the Law of the Sea. It also specified that the revision would take into account the results of the consultations and negotiations conducted during that session and which, when presented to the plenary, satisfied the criteria in A/CONF.62/62. The Conference also decided that the text when so revised would no longer be an informal text. It would be the official Draft Convention, subject to the following three conditions:

Firstly, the door would be kept open for the continuation of consultations and negotiations on certain outstanding issues. The results of these consultations and negotiations, if they satisfy the criteria in A/CONF.62/62, will be incorporated in the draft convention by the Collegium without the need for formal amendments. Secondly, the Drafting Committee will complete its work and its further recommendations, approved by the informal plenary, will be incorporated in the text. Thirdly, in view of the fact that the process of consultations and negotiations on certain outstanding issues will continue, the time has, therefore, not arrived for the application of rule 33 of the rules of procedure of the Conference. At this stage, delegations will not be permitted to submit amendments. Formal amendments may only be submitted after the termination of all negotiations (A/CONF.62/114, para.2, Off. Rec. XV).

71. The Draft Convention on the Law of the Sea appeared on 28 August 1981.\(^{34}\) In addition to the drafting changes and the venues of the International Sea-Bed Authority and the International Tribunal for the Law of the Sea, the new text also incorporated a proposal of the President

\(^{34}\)A/CONF.62/L.78 (1978), Off. Rec. XV.
on delimitation contained in A/CONF.62/WP.11. The proposal of the
President was presented to the plenary at its 154th meeting on 28
August 1981. The Collegium was of the unanimous view that the
proposal satisfied the criteria in A/CONF.62/62 and should, therefore,
be incorporated in the revision.

VIII. THE PROCESS LEADING TO THE ADOPTION OF THE
CONVENTION

72. At the eleventh and final session of the Conference, the negotiations
were focused on the following:

(a) Changes to Part XI of the Draft Convention and its related
annexes in order to accommodate the objections of the United
States.

(b) A scheme to protect preparatory investments by pioneers in
sea-bed mining.

(c) A resolution of the Conference to establish the Preparatory
Commission for the International Sea-Bed Authority and the
International Tribunal for the Law of the Sea.

(d) Provisions of the final clauses concerning the participation
in the Convention of entities other than States.

(e) The drafting changes recommended by the Drafting Committee.

73. Following intensive negotiations and consultations, the President
succeeded in arriving at an agreement on the question of participation
by entities, other than States, in the Convention. The report of the
President is contained in A/CONF.62/L.86 dated 26 March 1982. On
29 March, the President and the Chairman of the First Committee
issued a joint report in their capacity as co-ordinators of WG.21. The
of a draft resolution establishing the Preparatory Commission and the
text of a draft resolution governing preparatory investments in pioneer
activities relating to polymetallic nodules. The Chairman of the Second
Committee submitted a report to the plenary contained in A/CONF.62/
L.87 and the Chairman of the Third Committee submitted a report to
the plenary contained in A/CONF.62/L.88. These reports were presented
to the plenary and were the subject of the debate which began on 30
March and concluded 1 April 1982. Following the debate in the plenary,
the Collegium determined that the various proposals contained in the
reports satisfied the criteria in A/CONF.62/62 and should be incorpo-
rated in the Draft Convention. The Collegium issued a Memorandum
(A/CONF.62/L.93 and Corr.1) containing the changes that would be incor-
porated in the Draft Convention and document A/CONF.62/L.94
containing the draft resolutions and draft decision, which would form
part of the Final Act.
74. On 7 April 1982, the plenary met and accepted the President's proposal that Rule 33, for the submission of amendments, should become operative on 8 April. Amendments would have to be submitted by 13 April at 6 p.m. By the deadline, 31 sets of amendments, viz. A/CONF.62/L.96 to A/CONF.62/L.126, were duly received. In accordance with Rule 37, paragraph 2(a), of the Rules of Procedure, the President informed the Conference of his decision to defer the taking of a vote on the amendments for a period of eight calendar days, commencing 14 April and terminating on 21 April 1982. The Plenary met on 15, 16 and 17 April to enable delegations to make statements on the amendments. Rule 37, paragraph 2(c), required the President, during the period of deferment, to make every effort to facilitate the achievement of general agreement. Under the same rule, the President had a duty to report to the Conference, prior to the end of the period of deferment, on the results of his efforts to facilitate the achievement of general agreement. The President submitted a report to the plenary (A/CONF.62/L.132) on 22 April 1982. In his report, the President recommended the acceptance of some of the amendments on the ground that they offered a better prospect to achieve general agreement. The President also proposed certain modifications to the Draft Convention. The proposals of the President are contained in A/CONF.62/L.132/Add.1. The results of the consultations carried out by Satya Nandan are contained in A/CONF.62/L.141 and Add.1. After due consideration and debate, the plenary accepted all the proposals and recommendations of the President.

75. An account appears elsewhere of what happened to the amendments which were submitted and we will not repeat that account here. In spite of the many changes which were made at the eleventh session to accommodate the United States, the United States did not feel able to support the adoption of the Convention, either by consensus or without a vote. The United States requested a recorded vote on the Convention. The Convention and its related resolutions and decision, forming a package, were adopted by a recorded vote of 130 in favor and 4 against, with 17 abstentions. The positions of the Conference delegations were as follows:

In favor:
Afghanistan, Algeria, Angola, Argentina, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Benin, Bhutan, Bolivia, Botswana, Brazil, Burma, Burundi, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Cuba, Cyprus, Democratic Kampuchea, Democratic People's Republic of Korea, Democratic Yemen, Denmark, Djibouti, Dominican Republic, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Gabon, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Ivory Coast, Jamaica,
Japan, Jordan, Kenya, Kuwait, Lao People’s Democratic Republic, Lebanon, Lesotho, Libyan Arab Jamahiriya, Liechtenstein, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Morocco, Mozambique, Namibia, Nepal, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Qatar, Republic of Korea, Romania, Rwanda, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Togo, Trinidad and Tobago, Tunisia, Uganda, United Arab Emirates, United Republic of Cameroon, United Republic of Tanzania, Upper Volta, Uruguay, Viet Nam, Yemen, Yugoslavia, Zaire, Zambia, Zimbabwe.

Against:
Israel, Turkey, United States of America, Venezuela.

Abstaining:
Belgium, Bulgaria, Byelorussian SSR, Czechoslovakia, German Democratic Republic, Germany—Federal Republic of, Hungary, Italy, Luxembourg, Mongolia, Netherlands, Poland, Spain, Thailand, Ukrainian SSR, USSR, United Kingdom of Great Britain and Northern Ireland.

Absent:
Albania, Antigua and Barbuda, Belize, Comoros, Dominica, Ecuador, Equatorial Guinea, Gambia, Holy See, Kiribati, Liberia, Maldives, Nauru, Solomon Islands, Tonga, Tuvalu, Vanuatu.
TABLE OF COMPARABLE PROVISIONS:

1982 LAW OF THE SEA CONVENTION WITH THE 1958 GENEVA CONVENTIONS ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE (TSC), CONTINENTAL SHELF (CSC), HIGH SEAS CONVENTION (HSC), FISHING AND CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS (Fishing) AND OPTIONAL PROTOCOL ON DISPUTE SETTLEMENT

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**Section 3. Innocent Passage in the Territorial Sea**

**Subsection A. Rules Applicable to All Ships**

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Part VII. High Seas

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FLOW CHART

The flow chart which follows is designed to assist the reader in a systematic identification of the type of baselines that are to be established in different coastal situations.

The first decision to be taken is whether or not a country is a "mainland" or an "archipelago". The latter is defined in article 46 of the Convention dealing with archipelagos. If article 46 applies, then the reader should go to step 14. Otherwise, he should proceed sequentially from step 1 to 2 and on.

Each diamond shape poses a question requiring a "yes" or "no" answer. Whichever it is, follow the appropriately labelled line to the next step. Each rectangle gives an instruction for action to be taken. Each circle contains an instruction to skip some steps and proceed to the numbered step as indicated and continue the sequence from there.

No matter which paths are followed, the reader should eventually arrive at one of the two concluding steps 13 or 26, which give instructions for completing the process in accordance with the Convention.

The legislative procedures for giving effect to the baselines will be based on the constitutional and administrative requirements of each State.

Schematic for determining baselines (continued)

8. Can the rivers and/or bays and/or ports be closed? [Apply arts. 9, 10 and 11]
   - NO GO TO 10.
   - YES

9. Determine base points and mark on charts and/or prepare a list of co-ordinates

10. Apply the rules for normal baselines for sections of the coast where neither straight baselines nor closing lines have been drawn [Arts. 6, 8, 11 and 13]

11. Do you possess any roadsteads lying wholly or partly outside your territorial sea that you wish to include within it? [Art. 12]
   - NO GO TO 13.
   - YES

12. Include your roadsteads within your territorial sea [Art. 12]

13. Publicize your charts and/or list of co-ordinates and send a copy of the charts or list to the Secretary-General of the United Nations in accordance with article 16

Schematic for determining baselines (continued)

ARCHIPELAGO

14. Obtain charts of the archipelago at a suitable scale and a list of the areas of the islands

15. Measure distances from appropriate baselines [Arts. 6, 8, 9, 10, 11 and 13] between adjacent islands and/or low tide elevations

16. Are any of the distances greater than 125 nautical miles? [Art. 47(2)]
   - NO GO TO 16.
   - YES

17. It will not be possible to surround the entire archipelago with a baseline system. However, it may be possible to surround part of the archipelago with a set of baselines or the entire archipelago with more than one set of baselines

18. To discover whether one or more sets of baselines can be drawn, apply the following tests

19. Draw baselines around the outer edge of the whole or part of the archipelago so that the general configuration of the archipelago is preserved [Art. 47(3)], and so that not more than 3 per cent of baseline segments measure between 100-125 nautical miles [Art. 47(2)]

20. Calculate the area of water within the baselines and compare it to the area of land
Schematic for determining baselines (continued)

21. Is the ratio within the range of [water to land] 1:1 and 5:11 [Art. 4(10)]
   NO
   YES

22. Determine turning points of baselines: record on charts and/or provide a list of geographical coordinates specifying the geodetic datum [Art. 4(12)]
   NO
   YES

23. Can you redesign the baselines to increase the area of sea enclosed or reduce the area of land?
   NO
   YES

24. Do you wish to draw closing lines to define internal waters?
   NO
   YES

25. Apply Articles 5, 10, and 11, which deal with the closing lines of rivers, bays and ports.
   NO
   YES

26. Publish such charts or lists of co-ordinates and send a copy of the charts or lists to the Secretary-General of the United Nations [Art. 19]
   NO
   YES

Schematic for determining baselines (continued)

27. Is the ratio [water to land] less than 1:1?
   NO
   YES

28. Is the ratio [water to land] more than 5:11?
   NO
   YES

29. Do some of the islands or states include waters within elongated reefs or islands over an oceanic plateau which is enclosed or nearly enclosed by limestone islands and low-lying reefs on the plateau's perimeter [Art. 4(17)]
   NO
   YES

30. Measure such waters and add their area to the land area; then recalculate the ratio.
   NO
   YES

31. Is the ratio within the range of [water to land] 1:1 and 5:11?
   NO
   YES

32. Can you redesign the baselines to increase the area of sea enclosed or reduce the area of land?
   NO
   YES
STRAITS USED FOR INTERNATIONAL NAVIGATION: A COMMENTARY ON PART III OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982*

By S. N. NANDAN and D. H. ANDERSON†

I. INTRODUCTION

The UN Convention on the Law of the Sea was the product of a detailed re-examination of all issues relating to the law of the sea extending over a period of more than twelve years. In the words of its preamble, the Convention was seen as 'an important contribution to the maintenance of peace, justice and progress for all peoples of the world'. The Convention contains numerous significant provisions, amongst which must be included Part III concerning straits used for international navigation. The formulation of the articles in Part III was an important element in the overall solution, reached at the conference, to the question of maritime limits, since establishing 12 nm as the maximum breadth of the territorial sea was acceptable to many delegations only on the basis of a satisfactory regime for passage through straits used for international navigation. At the same time, Part III represents a balance between the interests of States bordering busy straits in such matters as security, safety and protection of the environment, and the interests of other States in the freedom of communications. The purpose of this article is to provide insights into the terms of Part III as a whole, as well as a detailed commentary on the individual articles.


Unlike several parts of the Convention (including Part II concerning the territorial sea and contiguous zone and Part VII concerning the high seas), the wording of Part III was not based on any of the Conventions on the Law of the Sea adopted by the First UN Conference on the Law of the Sea of 1958. This is not to say that Part III did not have antecedents: Part III is

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The latest of several attempts by international lawyers and governmental conferences to set down in the form of articles the rules of law applicable to straits. The first attempts were made by the Institut de Droit International and the International Law Association (ILA) between 1894 and 1906 in their 'Rules relating to territorial Waters'. In the form adopted by the ILA in 1906 the Rules contained the following about straits:

ART. 10.—Les dispositions des articles précédents s'appliquent aux détroits dont l'écart n'excède pas douze milles, sauf les modifications et distinctions suivantes:

1° Les détroits dont les côtes appartiennent à des États différents font partie de la mer territoriale des États riverains, qui y exerceront leur souveraineté jusqu'à la ligne médiane.

2° Les détroits dont les côtes appartiennent au même État et qui sont indispensables aux communications maritimes entre deux ou plusieurs États riverains que l'État riverain font toujours partie de la mer territoriale du rivage, quel que soit le rapprochement des côtes. Ils ne peuvent jamais être barrés.

3° Dans les détroits dont les côtes appartiennent au même État, la mer est territoriale bien que l'écartement des côtes dépasse douze milles, si à chaque entrée du détroit cette distance n'est pas dépassée.

4° Les détroits qui servent de passage d'une mer libre à une autre mer libre ne peuvent jamais être barrés.

ART. 11.—Le régime des détroits actuellement soumis à des conventions ou usages spéciaux demeure réservé.

(The words in italics were the modifications made by the ILA to the Rules adopted by the Institut in 1894.)

The League of Nations Conference of 1930 marked another attempt to formulate articles: the Hague Conference considered the question of the territorial sea in its Second Committee. The report of Sub-Committee No. II discussed the question of straits and included the following:

PASSAGE OF WARSHIPS THROUGH STRAITS

Under no pretext whatever may the passage even of warships through straits used for international navigation between two parts of the high sea be interfered with. According to the previous Article the waters of straits which do not form part of the high sea constitute territorial sea. It is essential to ensure in all circumstances the passage of merchant vessels and warships through straits between two parts of the high sea and forming ordinary routes of international navigation.

The question of the law of international straits was reviewed fully in a learned treatise by Brüel, written in the late 1930s and published in English in 1947. His conclusion was that such straits had a legal position which was sui juris, i.e. separate from the law of innocent passage through the territorial sea.

The law was clarified in 1949 by the International Court of Justice: in its judgment in the Corfu Channel case, the Court held that:

... States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

The Court thus stated some basic rules of customary law about passage through straits used for international navigation, rules which applied to all ships and which did not depend upon the precise legal status of the waters forming such a strait.

The wide significance of this decision was not fully reflected in the draft articles of the International Law Commission which formed the basic proposal at the Geneva Conference on the Law of the Sea. As a result, the question of passage through straits was treated in the Convention on the Territorial Sea and the Contiguous Zone of 1958 as an incidental aspect of the right of innocent passage through the territorial sea. Thus Article 16(4) provided that:

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

This paragraph was described by a participant in the Conference as 'a universally recognised rule of general international law'; but the question of straits was not dealt with generally and even less as a separate topic.

(b) The UN Committee on the Peaceful Uses of the Sea-Bed ('the Sea-Bed Committee')

The change in approach adopted at the Third Conference was prompted by the wider acceptance of the twelve-mile limit for the territorial sea which had become apparent in the 1970s. The change first found expression in the draft articles on the breadth of the territorial sea and straits submitted to the UN Sea-Bed Committee in 1971 by the United States. Draft Article II provided that:

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In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through or over such straits, as they have on the high seas. In 1972, the Soviet Union made a similar proposal (but confined to straits linking two parts of the high seas) which went on to elaborate more detailed rules for the exercise of the freedoms of navigation and of overflight through straits. Later that year, the 'List of Subjects and Issues relating to the Law of the Sea' adopted by the Sea-Bed Committee included item 4:

Strait used for International Navigation

4.1 Innocent Passage
4.2 Other Related Matters Including the Question of the Right of Transit.

The List of Subjects and Issues was, in effect, the substantive agenda for the Third Conference and the inclusion of a separate item about straits marked a significant development. In the Sea-Bed Committee (and indeed during much of the Conference), the views were pressed that there was no separate body of law about straits and that the rules about innocent passage through the territorial sea applied to them (subject to some qualifications). However, those views did not prevail: the predominant opinion was that the question of passage through straits used for international navigation should be treated separately from that of passage through the territorial sea. It is that opinion, based on customary law and the needs of the contemporary situation, which finds expression in Part III.

(c) The Work of the Fiji/UK Group

At the Conference, rival proposals were tabled which would have given expression to these two different approaches. Supporting the approach of separate treatment for straits, the UK put forward a set of draft articles in two parts, one on territorial sea and the other on straits; and separate proposals on straits were tabled by Bulgaria and certain other States. The UK's proposals on straits put forward the concept of the right of transit passage, which, though an extensive right in content, was not the same as freedom of navigation and overflight, as had been proposed by the US in 1971 and the Soviet Union in 1972. Supporting the other approach, a group of delegations led by Malaysia proposed to deal with straits in the context of the territorial sea, applying to straits the regime of innocent passage with modifications. The proposals by Fiji were stated to be without prejudice to the Conference's decision on the issue of the approach; but, significantly, the point of departure in the Fiji paper was that submarines might pass in straits under water, thereby accepting a distinction between the territorial sea in general and straits—a distinction which formed the basis for the later compromise between the Fijian and British proposals. The Fijian proposals also dealt in detail with the question of the legislative powers of straits States. The two different approaches, as well as the Fijian proposals, were reflected in the document entitled 'Main Trends', produced by the Second Committee in 1974.

Informal consultations had been held in 1974 between the British and Fijian delegations about questions of navigation and, in particular, the formulations of the rules on innocent passage in their respective sets of draft articles. In 1975 it was decided after further consultation to create a group of delegations from the different regional groups under the joint chairmanship of Mr Nandan (Fiji) and Mr Dudgeon (UK), the so-called 'Private Working Group on Straits used for International Navigation' or the 'Fiji/UK Group'. Attendance was by joint invitation of the Co-Chairmen who sought a cross-section of moderate opinion, drawn from all regional groups and including straits States and delegations with a particular interest in sea-borne trade or questions of limits of the territorial sea and EEZ. The first meeting on 25 March 1975 was attended by 14 delegations: Argentina, Bahrain, Denmark, Ethiopia, Fiji, Iceland, Italy, Kenya, Lebanon, Nigeria, Singapore, the UK, United Arab Emirates and Venezuela. (Subsequent meetings were attended also by Australia, Bulgaria and India.) The objective was explained as being to continue to seek accommodation between the proposals of Fiji and the UK on straits, in order to achieve a sound balance between the interests of States bordering straits and maritime nations.

In the discussion, it was noted that unimpeded passage of straits was one

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12 Report to the General Assembly, A/8721, p. 5. (Item 2 concerned the territorial sea and Item 3 the contiguous zone.)
13 A/CONF. 62/C.2/L. 3. Some amendments were proposed by Denmark and Finland (ibid., L. 15).
14 Ibid., L. 11. Bulgaria et al. put forward proposals about passage through the territorial sea in ibid., L. 26. Algeria proposed 'freedom transit' in straits for ships other than warships which were to enjoy the right of innocent passage (ibid., L. 20). Iraq proposed 'freedom of navigation' in straits customarily used for navigation (ibid., L. 71).
of three major issues, the others being the twelve-mile territorial sea and the 200-mile EEZ. Whilst passage should be unimpeded, it was pointed out that the cases of merchant ships, surface warships, submarines and nuclear-powered vessels (civil or military) would have to be considered, as well as oversight. The distinction was brought out between the regime of navigation and oversight, on the one hand, and the nature of the waters, on the other. Another distinction drawn was between straits linking two parts of the high seas/EEZ and those linking the high seas/EEZ to the territorial sea, on the grounds that the balance of interests differed between the two situations. The view was expressed that even in the first type of situation, complete freedom of navigation could not be accepted although freedom in the sense of non-discrimination should be granted. Concern for the interests of developing States was voiced. Responding to these points, the Co-Chairmen pointed out that the UK and Fiji draft articles had not proposed complete freedom of navigation such as existed on the high seas since passage had to be, for example, expeditious, without threat to the straits States and in compliance with international regulations. All types of vessels required to make passage; but passage must be effected in a way which did not prejudice the interests of coastal States in the narrow stretches of water forming straits. The question of nuclear vessels was being considered elsewhere in the conference. The need for submerged passage had to be considered in the context of its powerful backing and the safeguards offered to straits States.

After discussing the issues, the members of the Group agreed at the end of the first meeting to continue work on the basis that there should be a regime for straits which was separate from the regime of innocent passage applicable to the territorial sea in general. The members of the Group then proceeded to discuss the nature of the regime for straits during seven subsequent meetings ending on 18 April 1975. Between meetings, individual members of the Group held detailed informal discussions with many interested delegations outside the Group. In particular, in view of the link with the question of archipelagic States, close contacts were maintained with Indonesia and Malaysia; at the same time, major maritime powers such as the Soviet Union, the United States, France, Japan and the FRG were consulted, as well as straits States such as Morocco. The Co-Chairmen were especially active in those discussions.

On 30 April 1975, the Co-Chairmen circulated to all delegations the set of draft articles which resulted from the Group's work and which represented what they described as a 'broad consensus' of the members. They explained that the 'principal basis of our work' had been 'the straits chapter of document A/CONF. 62/C.2/L. 3'; but several substantive changes were made by the Group, notably those concerning the definition of transit passage, the legislative powers of States bordering straits, the designation of

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**INTERNATIONAL NAVIGATION**

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sea lanes and the status of the waters forming straits, as well as minor changes of wording.

The Chairman of the Second Committee took account of the Group's work in preparing his informal single negotiating text.77 His main changes affected the structure of the draft articles, including the introduction of three sections (general provisions, transit passage and innocent passage) which brought greater clarity to the text. Whilst this part of the ISNT remained controversial, the subsequent changes to the text were minor and the Conference accepted what became Part III as part of the overall solution to the issue of limits.18

(d) The Categorization of Straits in Part III

The Conference attempted to make provision for navigation in all straits. However, circumstances of history and geography vary greatly from one strait to another, and so it was found appropriate to make different provision for different situations. For these reasons, the Convention in effect divided straits into several categories, with rules which may be summarized as follows:

(a) Straits not used for international navigation;

(b) 'Broad straits' which have a high seas/EEZ route through them; and

(c) Straits subject to their own long-standing regimes;

(d) Straits not covered by (b) or (c) and used for international navigation:

(i) Straits between two parts of the high seas/EEZ, apart from those subject to the exception in Article 38(1);

(ii) Straits between the high seas/EEZ and the territorial sea of a foreign State, and

(iii) Straits excluded from Article 38(1).

Two further points may be noted: first, those straits which are situated

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77 A/CONF. 62/ WP. B/Part II, Articles 34 to 44.

18 Statements were made about different aspects of Part III upon signature of the Convention by Finland, Greece, Iran, Iraq, Oman, Spain and Sweden.
within an archipelagic State are subject to Part IV; and, secondly, there is no reference in Part III to the idea of ‘historic straits’ to parallel the reference to historic bays in Part II.

e) The Interpretation and Application of Part III as a Whole

In construing and applying Part III, the normal rules of international law on the interpretation of treaties, as set out in the Vienna Convention on the Law of Treaties, are applicable. At the same time, there are some general points which may be noted:

1. The way in which geographical factors should be approached;
2. The question of what is meant by the expression ‘a strait used for international navigation’;
3. The differences between transit passage, archipelagic sea lanes passage and innocent passage.

1. Geographical factors

Part III contains several important geographical references, such as those to straits ‘formed by an island’ and ‘mainland’, as well as to straits ‘between one part of the high seas’ and another. In putting forward their proposals at Caracas, the UK delegation had available a set of chartlets illustrating such features as the wide strait (with or without a suitable route beyond twelve-mile limits throughout its length), the strait giving access to the territorial sea of a foreign State, the strait lying between the mainland and an island of the coastal State, and so on. Geographical factors are of crucial importance in construing the provisions of Part III and, indeed, in deciding what constitutes ‘a strait’, since the term was not accompanied by a formal definition. The Concise Oxford Dictionary defines the word to mean a ‘narrow passage of water connecting two seas or larger bodies of water’; it comes from the Latin root ‘strictus’. The definition’s use of the word ‘passage’ is worthy of special note.

How, then, should geographical factors be approached? The best approach is to take into account the terms of the articles as well as all the relevant geographical and other factors, i.e. to adopt something of a ‘common-sense’ interpretation. A strictly literal (or ‘mechanical’) interpretation could well be found to be inappropriate in certain settings. Each geographical situation is unique and many published maps are drawn to a small scale which does not permit the inclusion of every natural feature. At the same time, some features may not be relevant to the question of how to apply Part III. It may be the case, to take the last example, that a strait is formed by a mainland and two islands of a coastal State, with the mainland on one side and the two islands on the other. In such a case, the fact that there are two islands rather than one is hardly a material factor for the purposes of Article 38(1). To take another example, if a mainland is masked by an elongated island close to the coast so that a straight is formed between that island and another belonging to the same State, it would be consonant with the intention behind Part III to assimilate the elongated island to the mainland for the purpose of applying Part III. An overly mathematical approach to straits would appear to be out of harmony with the principles of Part III. Its terms have to be construed in their context, which has to do with questions of passage—something reflected in the dictionary definition of the word ‘strait’. This approach is also consistent with that of the ICJ in the Fisheries case (UK v. Norway), as well as more recently in the Libyan Malta case.

2. The question of ‘use’

The second issue—that of a strait’s use for international navigation—is also crucial: it was a source of much discussion and even controversy at the Conference. The test of ‘use’ comes from the ICJ’s decision in the Corfu Channel case and the Court’s analysis of the idea retains its value. It will be recalled that after appraising certain evidence, the Court continued:

The Albanian Government does not dispute that the North Corfu Channel is a strait in the geographical sense; but it denies that this Channel belongs to the class of international highways through which a right of passage exists, on the ground that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda.

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

The Court concluded that ‘the North Corfu Channel should be considered

**Articles 32 to 35 set out rules of international law.

**Notably, at the time when the Second Committee considered Agenda Item 4; see the statement by Mr Dudgeon (UK) on 21 July 1974 (Official Records, vol. 2, pp. 125-6). A set of chartlets is appended to this article.
as belonging to the class of international highways through which passage cannot be prohibited by a coastal state in time of peace.

There exists a temporal problem with the word 'used'. In French, the equivalent is 'servant', a present participle, or 'serving', which suggests that use at the time when the question arises is what really matters. If so, evidence of past use, whilst relevant in showing a pattern, is of lesser significance. In the normal case, very slight or short-lived use would be insufficient; but in certain circumstances limited use brought about by, say, an oil discovery may quickly put a strait into the category of those used for international navigation. Purely potential use would not appear to be sufficient: there should be actual use when the question falls to be decided. Taking the English and French texts together, 'used' and 'servant' can be said to be in the present continuous.

Finally on 'use', it has to be remembered that proposals at different times to insert an adverb such as 'normally', 'customarily' or 'traditionally' before 'used' have been rejected. The ILC expressed the opinion that it would be in conformity with the Court's decision [in the Corfu Channel case] to insert the word 'normally', but this formulation was not accepted by the First UN Conference on the Law of the Sea. Proposals were put forward at the Third Conference by Algeria and others and by Iraq employing the term 'customarily used'. Canada proposed a definition of 'international strait' which included the qualification that it 'has traditionally been used for international navigation'. Chile spoke in favour of 'traditional use' in the Second Committee on 23 July 1974 and a similar proposal was advanced by Canada, Chile and Norway in an aide-mémoire dated 30 April 1975, commenting upon the FIJI/UK Group's draft articles. However, the Chairman of the Second Committee did not include 'customarily', 'traditionally', or any similar qualification upon the word 'used' in framing his ISNT. In contrast, Article 53 ('Right of Archipelagic Sea Lanes Passage') provides for that right to apply to 'all normal passage routes used as routes for international navigation or overflight' (paragraph 4): if an archipelagic State does not designate sea lanes or air routes, the right may be exercised through routes normally used for international navigation (paragraph 12) (emphasis added). This contrast is significant since in many other respects

the Corfu Channel as a typical 'détroit latéral' or water dividing an island from a mainland 'the importance of which can never be sufficient to qualify them as "international"' (Festschrift für R. Laut (1953)). This distinction has now been recognized in Articles 38(1) and 45 of the Convention, but the application of those Articles to the particular case of the Corfu Channel is not entirely clear.

3. Differences between the regimes of passage

Turning to the differences between the regimes of transit passage, archipelagic sea lanes passage and innocent passage, these emerge from detailed comparisons of the texts of Parts III, IV and II. On the broader level, the differences between the right of transit passage and the right of innocent passage are of great significance, especially in their strategic aspect. Both are regimes of passage: in other words, under either regime ships may in principle pass. However, the right of innocent passage may be suspended in certain circumstances; it is not available to aircraft, and submarines are required to pass on the surface. Transit passage may not be suspended; it is available to aircraft, and may be exercised by submarines submerged. The distinctions are justified by the consideration that transit passage exists where there is no alternative route or none of equal convenience. The differences between the right of transit passage and that of archipelagic sea lane passage are not so marked: indeed, much of the wording of Article 53 was taken verbatim from what became Part III. Article 53 contemplates the possibility of there being designated sea lanes and air routes which traverse the whole of an area of archipelagic waters, whereas Part III makes no provision for the designation of air routes in straits and sea lanes need not run for the entire length of a strait. The distinction arises from the geographical circumstances in the two cases. Whereas a strait is a relatively narrow strip of water, an archipelago often has islands more than 24 nm apart between which international sea routes pass. It was necessary, therefore, to devise a system which would confine the exercise of archipelagic sea lanes passage within certain limits. In practice, however, the differences between these two regimes of passage may be insignificant since ships and aircraft in
transit can be expected to remain within the bounds of routes normally used for international navigation.

(I) Part III and Customary Law

Part III represents both codification and progressive development of customary law. The fundamental principles laid down by the ICJ in the Corfu Channel case have been retained and elaborated: this was achieved in the context of a consensus that 12 nm should be accepted as the maximum breadth of the territorial sea. Many of the detailed rules take account of modern developments such as sea lanes and traffic schemes, and these rules too contain elements of codification and development of the law. The article attempted to strike a balance between the interests of coastal States and other States; between the security and other interests of the former and the general interest in freedom of commerce and communication; between self-protection and self-defence, on the one hand, and freedom of the seas and the freedom of communications on the other. The coastal State on a strait would not be justified in seeking to take advantage of its geographical situation in order to interfere with international communications; but, at the same time, its legitimate interests are safeguarded in relation to its coasts and waters within the strait. Although the precise balance proposed during the first part of the Conference was resisted by several States bordering straits, the terms of Part III—which resulted from long debates—eventually achieved consensus and so represent negotiated solutions in the overall context. It is likely, therefore, that Part III will influence the practice of States even before the entry into force of the Convention.

A good number of straits used for international navigation are less than 24 nm wide. Of the 33 examples in the study prepared for the First UN Conference on the Law of the Sea in 1968, 32 are less than 24 nm wide and so are made up of territorial sea if the maximum permissible breadth of the territorial sea is taken by the coastal State concerned (A/CONF. 13, Official Records, vol. I, pp. 114 f.). In the State Department's table of 'Widths of Selected Straits and Channels', only 18 out of 136 straits are less than 24 nm wide (Geographic Bulletin, No. 3, 1965).

Although votes were taken on proposals by Spain to amend Articles 39 and 42 (Official Records, vol. 16, pp. 195–196, 175th plenary meeting).

The following is a recent example:

JOINT DECLARATION BY THE GOVERNMENT OF THE UNITED KINGDOM AND THE GOVERNMENT OF THE FRENCH REPUBLIC

On the occasion of the signature of the Agreement relating to the Delimitation of the Territorial Sea in the Straits of Dover, the two Governments agreed on the following declaration:

The existence of a specific regime of navigation in the straits is generally accepted in the current state of international law. The present regime is particulary suited in straits, such as the Straits of Dover, used for international navigation and linking two parts of the high seas or economic zones in the absence of any other route of similar convenience with respect to navigation.

In consequence, the two Governments recognise rights of unimpeded transit passage for merchant vessels, state vessels and, in particular, warships following their normal mode of navigation, as well as the right of overflight for aircraft, in the Straits of Dover. It is understood that, in accordance with the principles governing this regime under the rules of international law, such passage will be exercised in a continuous and expeditious manner.

The two Governments will continue to cooperate closely, both bilaterally and through the International Maritime Organisation, in the interests of ensuring the safety of navigation in the Straits of Dover, as well as in the southern North Sea and the Channel. In particular, the traffic separation scheme in the Straits of Dover will not be affected by the entry into force of the Agreement.

With due regard to the interests of the coastal States the two Governments will also take, in accordance with international agreements in force and generally accepted rules and regulations, measures necessary in order to prevent, reduce and control pollution of the marine environment by vessels.

November 1988

33 A/CONF. 65/C.3/L. 3 (UK) and amendments in L. 15 (Denmark and Finland), L. 6 (Spain), L. 11 (Bulgaria) et al., L. 16 (Malaysia et al.), L. 19 (Fiji), L. 20 (Algeria), L. 71 (Iraq) and L. 72 (Iran), as well as definitions in L. 44 (Algeria et al.) and L. 83 (Canada).

34 A/CONF. 65/WP.8/Part II, Article 39(1) and (3).

35 Despite some criticism (e.g. Spain, A/CONF. 65/WS/13) and some informal amendments (CA/Informal Meeting 4 (Spain), 17 (Greece) and 22 (Morocco), none of which were accepted).
passage through straits used for international navigation. It does not apply to such questions as whether the waters within such a strait are territorial sea, or high seas, or internal or archipelagic waters, nor to any questions of fishing, baselines, delimitation and the like. In other words, although it is entitled 'strait used for international navigation', Part III does not in fact apply to all aspects of such straits: it is confined to the question of passage in such straits. Article 34(1) speaks about 'the regime of passage ... established in this Part': this is a reference to the right of transit passage (Section 2) and the right of innocent passage (Section 3) in the different types of straits used for international navigation. The regime of passage affects 'the legal status of the waters forming' strait used for international navigation to the extent that the waters are subject to that regime in accordance with Part III. But in all other respects, the legal status of the waters is not affected. Equally unaffected is the exercise by the States bordering straits of their sovereignty or jurisdiction over the waters (including the sea-bed and subsoil and the air space) forming the straits.

Article 34(2) provides that (i) the sovereignty of a State bordering a strait over its internal waters and territorial sea within a strait, and (ii) its jurisdiction over any areas of its EEZ or continental shelf within a strait, have both to be exercised subject to (a) Part III as regards passage through the strait, and (b) other rules of international law, e.g. those on the non-use of force or delimitation. In other words, in so far as non-navigational questions may arise, other rules of international law, including other Parts of the Convention, apply. Amongst other provisions in the Convention, Article 233 (safeguards with respect to straits used for international navigation) may be noted: this permits a State bordering such a strait to take appropriate enforcement measures in the case where a merchant ship has violated the State's laws and regulations, thereby causing or threatening major damage to the marine environment of the straits.

Article 35
Scope of this Part

Nothing in this Part affects:
(a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;
(b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or
(c) 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.

Article 35 sets out three separate saving provisions for cases not intended to be affected by Part III: in brief, they are (a) internal waters, (b) the status of waters beyond the territorial sea and (c) straits in which passage is regulated by existing treaties.

Case (a)

The origins of sub-paragraph (a), which concerns certain areas of water which are excluded, can be traced to proposals describing which straits were included. Thus, Article 1(5) of the UK's proposal39 was that transit passage should apply 'to any strait or other stretch of water, whatever its geographical name which (a) is used for international navigation and (b) connects two parts of the high seas'. A Canadian definition40 of straits required that they should be 'naturally formed', should lie within the territorial sea and should have been 'traditionally used for international navigation'. In 1975, the Fiji/UK Group considered the definition: the resulting text applied to '... any strait (which term includes any naturally-formed stretch of water whatever its geographical name) ...'.41 In an aide-mémoire42 dated 30 April 1975, Canada, Chile and Norway pointed out that on the basis of the Corfu Channel case and Article 16(4) of the Convention on the Territorial Sea and the Contiguous Zone of 1958 (hereinafter the CTSCZ), the law on straits applied to 'only those that lie within the territorial sea of one or more States' and that the proposed wording would negate the regime of internal waters behind straight baselines drawn by many States. In his ISNT, the Chairman of the Second Committee tried to take account of the three delegations' concerns43 by excluding from the application of Part III 'any areas of internal waters which had been considered as part of the high seas or territorial sea prior to the drawing of straight baselines'. Subject to drafting changes, this approach was accepted by the Conference in Article 35(a).

In the result, sub-paragraph (a) means that the rules about passage in Part III do not affect any areas of internal waters within a strait, unless those areas become internal waters as a result of the drawing of straight baselines in accordance with the method set forth in Article 7. Internal waters are defined by Article 8(1), i.e. waters on the landward side of the baseline of the territorial sea, and in the normal case there are no rights of passage, whether innocent or transit passage, through such waters. The exception implies that straight baselines may be drawn within or across

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39 In Article 49(4), the comparable provision in Part IV (Archipelagic States), there appears additionally a reference to the resources contained in the sea-bed, etc.: there can be no doubt that Article 34(1) also applies to any resources in the subsoil etc.
40 Similar provisions are contained in Articles 2(2) concerning the territorial sea and 49(3) concerning archipelagic waters. The precise meaning of the reference to 'other rules of international law' may not always be entirely clear in practice.
43 Plummer, op. cit. above (n. 16), p. 194. The rest of the definition followed the language of L. 3.
44 Ibid., p. 283.
45 A/CONF. 65/WP.8/Part II, Article 35(a).
46 In accordance with the rules in Article 7.
Straits so long as the criteria set out in Article 7 are satisfied. The exception is consistent with the rule in Article 8(a) concerning the maintenance of the right of innocent passage. Articles 8(a) and 35(a) both use the formula 'in accordance with the method set forth in Article 7': this wording was intended to be capable of applying to baselines drawn in the past, as well as to ones to be drawn in the future, so long as the method set out in Article 7 was followed.

Case (b)

This sub-paragraph was intended to clarify the position with regard to areas of water lying within a strait and beyond but surrounded by the territorial sea of the coastal State(s), the so-called 'pockets' of high seas or EEZ. This situation is found in longer, broader straits such as the Straits of Malacca, and it provoked questions from Malaysia in particular. The wording originated in Article 9 of the UK's proposals49 to the effect that 'pockets' of high seas within a strait were not affected by the other provisions about passage in the strait. The Chairman of the Second Committee included in his ISNT similar wording as Article 36(b);47 but he also made clear that 'pockets' of EEZ were equally not affected by the provisions about straits. Subject to changes made in the Drafting Committee (notably the insertion of the word 'legal' before 'status' in the interests of consistency), his approach was accepted.

Sub-paragraph (b) makes clear that the provisions of Part II do not affect the legal status of any areas of water within a strait lying beyond the outer limit of the territorial sea of the State or States bordering a strait; these 'pockets' may be EEZ, or high seas if the States concerned have not claimed EEZs (whether generally or in the strait). As such, they would be subject to the regime of freedom of navigation and overflight in accordance with Parts V and VII.48 Sub-paragraph (b) is to similar effect as Article 34(1).

Case (c)

This sub-paragraph excludes from the application of Part III a small number of straits in regard to which there exists in each case a regime of passage specifically related to that strait.

By way of background, it may be recalled that Article 25 of the CTSCZ stated:

The provisions of this Convention shall not affect conventions or other international agreements already in force, as between Parties to them.

This approach was followed in the UK's proposals about straits49 which included the following Article 10:

The provisions of this Chapter shall not affect obligations under the Charter of

46 A/CONF. 65/C.2/L. 31: 'Nothing in this Chapter shall affect any areas of high seas within a strait.'
47 A/CONF. 65/WP.8/Part II, Article 36(b).
48 Especially relevant are Articles 58 and 87.
49 Ioc. cit. above, n. 40.

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the United Nations or under conventions or other international agreements already in force relating to a particular strait.

A slightly different approach was put forward by Bulgaria and other States; thus Article 1(3)(c) of their proposals read:

The provisions . . . (c) shall not affect the legal regime of straits through which transit is regulated by international agreements specifically relating to such straits.50

A clear example under both approaches was the Montreux Convention relating to the Bosphorus and Dardanelles. Denmark and Finland submitted a proposal52 (in the form of an amendment to the UK's draft articles) advocating the maintenance of the regime of non-suspendable innocent passage in straits having a width of less than 6 nm, i.e. twice 3 nm. Sweden supported this approach on the grounds that 'it was not fair to ask coastal States to give up the control over passage through narrow straits that they had exercised for hundreds of years in accordance with the rules of international law'.53

Whilst the idea of excluding some particular cases found a positive response in the Fiji/UK Group, concern was expressed about the imprecise effects of the formulation which had been proposed by the UK. Denmark was especially concerned with this question in view of the regime in the Baltic Straits. As a result of discussions, some revised wording, derived largely from that of the Bulgarian proposal, was produced, as follows:

The provisions of this Chapter shall 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.53

In preparing his ISNT, the Chairman of the Second Committee accepted the results of the discussions in the Group; but, instead of making a separate article, he incorporated the formula into his Article 3554 and he changed the term 'legal regime' to 'legal status'. The Chairman's approach in the ISNT was eventually accepted by the Conference as Article 35(c) of the Convention, but the term 'legal regime' was reinstated.

Sub-paragraph (c) means that Part III does not affect the legal regime in certain straits. This regime may be made up of the terms of the relevant convention and the practice of States (including of course that of the coastal State) and would include the regime of passage. The straits concerned are those in which passage is regulated by long-standing conventions relating specifically to those straits. The conventions may be bilateral or multilateral

50 Ioc. cit., L. 11.
51 Ioc. cit., L. 15.
52 Official Records, vol. 2, p. 129 (15th meeting, 23 July 1974). Similar statements had been made by Denmark and Finland in introducing their amendment (L. 15) at the 15th meeting earlier that day (ibid., pp. 124-5).
53 Article 30 of the draft articles produced by the Group, in Platzoder, op. cit. above (n. 16), p. 194.
54 Ioc. cit. above (n. 44).
and may be any kind of treaty. The regulation may be extensive, as in the case of the Montreux Convention of 1936 about the Turkish straits, or may be partial, as in the cases of the Treaty of Copenhagen of 1857 about the Danish Straits and the Treaty of 1881 between Argentina and Chile about the Straits of Magellan. The term 'long-standing international conventions in force' was chosen with those examples in mind: a brand new convention about another strait somewhere in the world was not intended to count. In those straits to which Part III does not apply by virtue of Article 35(c), the local, existing regime was expected by the Conference to persist.

Article 36

High seas routes or routes through exclusive economic zones through straits used for international navigation

This Part does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone 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.

Article 36 was derived from Article 1(4) of the UK proposals, which read:

Transit passage shall apply in a strait only to the extent that:
(a) an equally suitable high seas route does not exist through the strait;

The intention was that the right of transit passage should not exist through

... what might be described as a broad strait: if the strait was rather more than 24 miles wide, and had a good and wide enough high-seas route down the middle, it was unnecessary to provide a special right of transit passage since ships and aircraft could navigate on the high seas through the strait.

The Fiji/UK Group modified the wording of the proposal and referred to the absence of a high seas route of similar convenience through the strait. 'Similar convenience' was considered a better test than 'equal suitability' in the original proposal since exact equality may never be found at sea.

The Chairman of the Second Committee accepted the gist of the Group's proposal, but recast it as a separate article of general application. Thus, his Article 36 read:

The provisions of this Part shall not apply to a strait used for international navigation if a high seas route or a route through an exclusive economic zone of similar convenience exists through the strait.

As will be seen, the Chairman introduced two new elements: first, the article referred not solely to the right of transit passage but rather to Part III as a whole; and, secondly, the article applied also to a route through waters having the status of EEZ as well as to high seas routes.

In informal discussion in 1975, it was pointed out that the word 'convenience' was too broad a test by itself and needed qualification by reference to conditions of navigation and hydrography, i.e. objective criteria. Thus the questions were posed: similar to what? and convenient for whom? The similarly convenient route was intended to be the one through the territorial sea in the strait and the convenience was that of the user, not the coastal State. In revising the ISNT, the Chairman of the Second Committee accepted the need to clarify the scope of the words 'similar convenience' by adding the words 'with respect to navigational or hydrographic characteristics'. In interpreting the phrase as a whole, regard may be had to factors such as distance, safety, the state of the sea, visibility, depth of water (including the presence of shallows or shoals) and ease of fixing a ship's position. The balance may vary between, say, a very large crude carrier and smaller coasters.

In further informal discussion in 1978, Yugoslavia suggested the addition to the end of the words: 'in such routes freedom of navigation and overflight shall be maintained unimpeded'. A modified formula was circulated in 1980, but there were doubts as to the need for it since Parts V and VII would apply to the waters in question by virtue of their own terms. None the less, the Chairman of the Second Committee endorsed a further modified version of the concluding phrase at the end of Article 36 and this secured consensus at the Conference.

As a result, Article 36 excludes from the application of this Part every strait where there is a similarly convenient route through the strait in the high seas or an EEZ. The justification for transit passage or non-suspendable innocent passage does not exist if there is a route through the strait where ships of other States can remain outside the territorial sea and can exercise rights of navigation under the regime of the high seas or of the EEZ. But this route must be similarly convenient both in terms of navigation (e.g. overall distances, position-fixing, and the route's breadth and straightness) and in terms of hydrography (e.g. depth and lack of natural obstructions). A similar proposition is contained in Article 38(1).

In extending its territorial sea to twelve nm, Japan has, by special

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59 A/CONF. 65/WP.8/Part II.
60 A/CONF. 65/WP.8/REV. I/Part II, Article 35.
61 Amendment C/Informal Meeting 2.
62 Ibid., Rev. 2: 'Parts VII and V respectively, including the provisions on freedom of navigation and overflight, apply.'
provisions, not extended it in certain straits, so as to leave a route through the straits which can be used without entering the territorial sea. Sweden has also made similar arrangements for certain areas in waters lying between Sweden and Denmark but outside the traditional Danish straits regulated by the Treaty of Copenhagen of 1857.

SECTION 2. TRANSIT PASSAGE

Article 37
Scope of this section
This section applies to straits which 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.

Section 2, which consists of nine articles, sets out the regime of transit passage.

Article 37, which defines the scope of Section 2, was put forward by the Chairman of the Second Committee in his ISNT when the Part of the draft Convention about straits was first sub-divided into three sections. The Chairman followed the general approach to the question adopted by the Fiji/UK Group whose Article 1(x) had applied the right of transit passage to 'any strait (which term includes any naturally formed stretch of water whatever its geographical name) which: (a) is used for international navigation and (b) connects two parts of the high seas'. The Chairman omitted the references to straits being 'naturally-formed' and to the irrelevance of a strait's name, no doubt because both points were considered self-evident. He inserted references to the EEZ in line with the remainder of his proposed ISNT. Subject to minor drafting changes, the Chairman's text was accepted by the Conference.

As a result, the regime of transit passage applies only in straits which (i) are used for international navigation and (ii) connect areas of sea which have the status of high seas or EEZ. If a strait leads only to territorial sea or internal waters, then Section 2 does not apply: Section 3 (providing for non-suspendable innocent passage under Article 45) applies instead.

Article 37 must, of course, be read together with Section 1 which contains several exclusion clauses, as well as with Article 36(x) which creates a second exceptional type of strait to which Section 3 applies.

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Article 37 employs the two key criteria—a strait must be 'used for international navigation' and must connect two parts of the high seas/EEZ—laid down in the judgment of the International Court of Justice in the Corfu Channel case. The wording of Article 37 must be interpreted in the light of that judgment. The meaning of the term 'used for international navigation' has been analysed above. In deciding whether a strait 'connects two parts' of the high seas/EEZ, there may be difficulty where one part is very small in extent. Here again, a 'common-sense' rather than a mechanical or mathematical interpretation is called for. If such a 'pocket' of high seas is surrounded by territorial sea and is not used as part of a route, there is insufficient justification for applying Section 2: instead, Section 3 would apply.

Article 38
Right of transit passage
1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, 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.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Article 38 is a key provision in the Convention. Against the background of acceptance of 12 nm as the maximum breadth of the territorial sea, Article 38 provides for a regime of transit passage in certain straits used for international navigation. This link was described in the following terms:

Acceptance of a territorial sea of 12 miles would result in a large number of straits forming essential links for international navigation, both by sea and air, ceasing to have a strip of high seas down the middle. Hence the need to ensure that unrestricted navigation through those vital links in the world network of communications should remain available for use by the international community.

The origins of Article 38 can be found in the separate proposals of the UK (which, as indicated above, formed one starting point for the work of
the Fiji/UK Group\textsuperscript{71} and of Bulgaria \textit{et al.}\textsuperscript{72} as well as in those of the Chairman of the Second Committee.\textsuperscript{73} In introducing its proposals, the UK delegation put forward this explanation of the concept of transit passage:

Article 1 sets out the concept of transit passage through straits connecting two parts of the high seas. The concept his delegation had tried to describe corresponded to what it believed to be the best international practice at that time. It proposed that ships and aircraft exercising the right of transit passage should not be impeded or hampered during their passage. At the same time the right was given 'solely for the purpose of continuous and expeditious transit of the strait'.\textsuperscript{74}

No doubt, the practice which the delegation had in mind was that whereby passage had been exercised in certain straits on the basis of freedom of navigation and overflight, rather than on the basis of the right of innocent passage as defined in the CTSCC\textsuperscript{75} and irrespective of whether the coastal States' claims had left central 'corridor' of high seas/EEZ in the strait. The proposals attracted much interest and some opposition, especially from States which supported the application of the regime of innocent passage to all straits.\textsuperscript{76}

Paragraph 1 makes clear that all ships and aircraft, including therefore warships and military aircraft, enjoy the right of transit passage. The references to aircraft (which were included in both the UK's proposal\textsuperscript{77} and, as regards straits 'traditionally used' for overflights, that by Bulgaria \textit{et al.}\textsuperscript{78}) proved controversial; objections were advanced to the effect that these proposals were inconsistent with the Chicago Convention. An amendment by Spain\textsuperscript{79} to remove all reference to aircraft was, however, not accepted by the Conference. It is a right the exercise of which may not be impeded by any agency, whether the coastal State (the duties of which are stated also in Article 44) or the ships or aircraft of third States. The right applies in principle in all straits used for international navigation between two parts of the high seas/EEZ (Article 37). At the same time, the right is subject to (i) the qualifications in Section 1 of Part III, and (ii) the exception in paragraph 1 of the present article.

The exception excludes from the ambit of Section 2 the strait which runs

\begin{itemize}
\item \textsuperscript{71} Draft Articles of 30 April 1975, in Plattsch, op. cit. above (n. 16), p. 194.
\item \textsuperscript{72} A/CONF. 63/C.1/L. 11.
\item \textsuperscript{73} A/CONF. 63/WP.8/Part II, Article 38.
\item \textsuperscript{74} Official Records, vol. a, p. 125 (para. 18).
\item \textsuperscript{75} Special provisions about straits are to be found in the legislation of several States bordering straits used for international navigation, notably France (24 December 1971, Article 2: ST/LEG/2/6, p. 17); Japan (1 July 1977); ST/LEG/2/19, p. 56); Morocco (3 March 1973, Article 3; ST/LEG/2/8, p. 29); Oman (10 February 1981); and Sweden (1 January 1980). As regards the Straits of Gibraltar, see Colombas, \textit{International Law of the Sea} (1967), p. 320; O'Connell, \textit{International Law} (1970), vol. I, p. 357; and Trouver, \textit{The Straits of Gibraltar and the Mediterranean Sea} (1981), chap. 5.
\item \textsuperscript{76} Spain, China, Egypt, Albania, Iran, Greece and PDR Yemen were notable in this regard, making particular reference to the Chicago Convention of 1944.
\item \textsuperscript{77} Loc. cit. above, n. 70.
\item \textsuperscript{78} Loc. cit. above, n. 72.
\item \textsuperscript{79} Amendment Ca/4 of 1978 (Spain).
\end{itemize}

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\begin{itemize}
\item between an island of the coastal State and its mainland\textsuperscript{80} if there exists a route seaward of the island through the high seas or EEZ which is of 'similar convenience with respect to navigational and hydrographical characteristics'. That expression bears the same meaning as in Article 36 and the commentary on that article need not be repeated here. An example of such a strait is the Pemba Channel off Tanzania. The Corfu Channel\textsuperscript{81} is a less clear case since part of the strait lies between Corfu and Albania. The application of the exception in particular geographical situations (e.g. where there is an archipelago as in the Aegean or where there are several islands lying together, or where it is not clear what is a State's 'mainland') may not be free from difficulty; but the words should not be interpreted too mechanically. Instead, all the relevant geographical and other circumstances\textsuperscript{82} should be taken into account and a 'commonsense' interpretation given, as described above.

The underlying rationale of the exception is clear: in a place where there exists an alternative route to seaward of the island of similar convenience, the interest of the international community in freedom of navigation is not as strong as in the place where there is no such alternative route, and a different balance was struck between that interest and the interest of the coastal State. In those instances where a strait is excluded by Article 38(1) from the regime of transit passage, the strait is subject to that of innocent passage by virtue of Article 45.

Paragraph 2 defines the concept of 'transit passage'. It is the exercise of 'the freedom of navigation and overflight', freedoms to be found also in Article 87 (Freedom of the High Seas). However, whilst in principle the freedoms in paragraph 2 are of the same order as those in Article 87, paragraph a contains significant qualifications. First, the right of transit passage must be exercised in accordance with Part III, not Part VII. Secondly, the right must be exercised for a single purpose, namely transit from one part of the high seas/EEZ to another part of the high seas/EEZ. Thirdly, the purpose of the navigator (vessel or aircraft) must be that of 'continuous and expeditious transit' of the strait. This means that hovering, loitering or conducting manoeuvres (all of which are part of the freedom of navigation on the high seas) are not allowed when exercising the right of transit passage. There are at least two parallels between Article 38(2) and Article 18: the latter defines the meaning of (innocent) 'passage' in terms of specified purposes and also calls for passage to be 'continuous and expeditious' (subject to safety requirements, \textit{force majeure}, distress or humanitarian duty\textsuperscript{83}).

To the requirement of continuous and expeditious transit of the entire
length of a strait, there is a qualification for the case of transiting part of a strait, passing the coasts, say, of States A and C in order to enter, leave or return from the port or airport of State B which also borders the strait. A vessel or aircraft entering, etc., State B remains subject to its conditions of entry. An example of a State in the position of State B is Singapore. In introducing this part of its proposal, the UK representative in the Second Committee spoke as follows:

His delegation also had in mind the situation of the long strait which had more than one country bordering one side of the strait. Assuming a strait which had two countries on the western side, States A and B, and one country on the eastern side, State C, the United Kingdom draft proposed first, a right of transit should the ship or aircraft be going all the way northwards or southwards through the strait; secondly, a right of transit if the ship or aircraft was proceeding down the first part of the strait between States A and C with a view to calling at a port or airport of State B.\(^4\)

The substance of the proposal was accepted in the second sentence of Article 38(a). The wording was refined during the course of the Conference and cast as an exception to the rule of 'continuous and expeditious' passage.

Paragraph 2 first appeared in the draft articles prepared by the Fiji/UK Group on Straits, dated 18 April 1975.\(^5\) It was intended to make clear that any activity, including navigation in or over straits, which does not amount to an exercise of the right of transit passage as defined in Article 38 remains subject to the other provisions of the Convention. These include Article 34 (legal status of waters forming straits used for international navigation) and other articles in Part III, as well as Article 2 (legal status of the territorial sea, etc). In other words, if a vessel or aircraft is present in a strait used for international navigation but is not exercising the right of transit passage, then the vessel or aircraft is subject to provisions in the Convention other than those in Part III which regulate transit passage.

Proposals by Spain and Morocco\(^6\) to add to the end of the paragraph the words 'and to other rules of international law' were not accepted. The proposals were advanced at a time when there remained controversy about overflight, it being argued by the proposers that it was contrary to rules of general international law contained in the Chicago Convention of 1944 on International Civil Aviation. The opposition to the proposals had a tactical element. Notwithstanding the rejection of the proposals, those rules of international law which are not excluded by the terms of the Convention (either expressly or implicitly—as are the rules in the Chicago Convention) would continue to be applicable. Reference to 'other rules of international law' was included in Article 34(2) concerning qualifications upon the sovereignty or jurisdiction of States bordering straits.

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5. Flatscher, op. cit. above (n. 16), p. 194.
6. Amendment C/4 of 1978 (Spain) and Amendment C/32 of 1978 (Morocco).
represent a threat of force by reason only of its presence in or over a strait.

Thirdly, and in many ways most importantly, ships and aircraft in transit are to 'refrain from any activities other than those incident to their normal modes of . . . transit'. In other words, ships and aircraft are to behave in their ordinary manner and do what is usual to effect their passage, and nothing else. In putting forward this approach, the intention was to avoid the need for a long list of prohibited activities such as the list of 'non-innocent' activities appearing in Article 19(2). Anything which is not incidental to transit in the normal mode is impermissible: clearly, most if not all the activities listed in Article 19(2) are not incidental. The term 'normal mode' was intended to mean, for example, that submarines could make their transits submerged, aircraft would fly at their normal altitudes, and surface vessels would follow their normal operating procedures whilst in transit. Regard would be had to all relevant circumstances, including in the case of submarines the depth of the water. The reference to 'the normal mode' avoided the need for a formula such as 'submarines may pass under water', which would have raised questions in the case of submersibles and other underwater vehicles which may come along in the future. This possibility of submerged transit took account of the fact that it is often much safer for a modern submarine to proceed dived. This approach was accepted in the Fiji/UK Group and by the Chairman of the Second Committee. It was challenged in the Second Committee's Working Group by certain delegations, notably Spain and Morocco who tabled amendments; however, these were not accepted by the Conference. Others questioned the discretion which they understood was given to navigators in the phrase 'normal mode', for example in the case of an aircraft carrier or a flotilla, but they did not press their point and the term 'normal mode' was accepted. It may be noted that the term appears also in Article 53(3) concerning the rights of archipelagic sea lanes passage: the term carries the same meaning in both articles.

There is an exception to the obligation to refrain from non-incidental activity: Article 39(1)(c) accepts that a ship or aircraft in transit may have to slow or stop or take special action if this is made necessary by 'force majeure' (e.g. collision or hurricane) or distress.

Finally, paragraph 1(d) obliges ships and aircraft to comply with the other relevant provisions of Part III: these include the obligations to respect sea lanes and traffic schemes in Article 41(7) and to observe applicable laws and regulations in Article 42(4), as well as obligations in the other provisions of Article 39. Paragraph 1(d), which originated in the Fiji/UK Group, makes explicit a point which was left unstated in the UK's initial proposals.

Paragraph 2 specifies certain duties for ships in transit passage, arising

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**INTERNATIONAL NAVIGATION**

from 'generally accepted international regulations, procedures and practices'. That expression was cast in deliberately wide terms and was intended to connote, in the first place, international conventions adopted for example under the auspices of the International Maritime Organization (IMO) which have secured wide acceptance within the world community, as well as subsidiary or related instruments and decisions. To such 'international regulations' must be added generally accepted 'procedures and practices', which include those normally followed by mariners. The duties specified are in two fields: safety and pollution. Ships in transit are to comply with international safety rules, including the International Regulations for Preventing Collisions at Sea. The current version of these Regulations is annexed to the Convention on the International Regulations for Preventing Collisions at Sea of 1972. In particular, the regulations take account of sea lanes and traffic schemes, many of which relate to straits. Ships in transit are also to comply with international rules for the prevention, reduction and control of pollution: again, the IMO has adopted several conventions about marine pollution, notably the MARPOL Convention of 1973.

Paragraph 3 specifies similar duties for aircraft, designed to ensure safety. Aircraft in transit are to observe the Rules of the Air established by the International Civil Aviation Organization for civil aircraft: this means that military aircraft are to observe those Rules whilst in transit. The concept arose in the context of negotiations on an archipelagic regime. The US insisted on freedom of overflight for all aircraft. The Indonesians objected to this, stating that there was no place for such provision in the law of the sea and that it was a matter for ICAO. However, if such a provision was to be introduced then Indonesia wanted all aircraft, including military aircraft, to be subject to ICAO rules. This the US would not agree to. Eventually Fiji proposed the compromise whereby civil aviation would be subject to ICAO rules and military aircraft would normally comply with those rules. For strategic reasons the US did not want military aircraft to be subject to reporting requirements at all times. The normal practice is for military aircraft to observe and comply with ICAO rules, even though strictly they apply only to civil aircraft. The rules are applied worldwide. The relevant part of the Rules, according to a statement made by the UK delegation during discussions in the Second Committee's Working Group, is that relating to the high seas. In a study dated 20 January 1984, the Secretariat of ICAO noted that Article 39(3) would extend the legislative jurisdiction of the ICAO Council from the high seas to the air space above straits used for international navigation. Sub-paragraph (b) supplements the foregoing duties. Aircraft in transit are obliged to monitor either the radio frequency assigned by the air traffic

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84 Draft Articles of 30 April 1955 in Platsoder, op. cit. above (n. 16), p. 194.
85 A/CONF. 6/Add.8, Part II, Article 39.
86 Amendment C/4 (Spain, 1978) and C/22 (Morocco, 1978).
87 Platsoder, op. cit. above (n. 16), p. 194 (Article 39(1)(d)).
88 In force 15 July 1977: IMO Publication 904, 85, OIE.
90 See also Article 31(1).
control authority designated for the area concerned by ICAO (i.e. the authority listed in the local Regional Air Navigation Plan, as approved by the Council of ICAO), or the international distress radio frequency. This radio frequency is the one referred to in Annex 10 to the Chicago Convention, Aeronautical Communications, i.e. 121.5 MHz. It has been argued by the ICAO Secretariat that aircraft are under a duty 'according to firmly established practice and international standards adopted by the ICAO Council' to monitor both the frequency assigned by the ATC authority and the distress frequency; that Article 39(3) contains an error in allowing alternatives; and that the relevant standards are lex specialis which will be complied with in practice.\(^7\) It may well be true that those standards will always be complied with in practice: however, Article 39(3) is also a lex specialis for the oversight of straits by aircraft of all types and it should not be thought to contain errors. Aircraft in transit are to operate at all times with reasonable regard for the safety of navigation and so should be capable of knowing about other aircraft in the vicinity. In the case of State aircraft, the obligation to maintain continuous listening watch of the local air traffic control arises from requirements of safety and paragraph 3, rather than from the Rules of the Air. Standard 3.6.5.1 requires continuous listening watch in the case of a controlled flight and similar requirements exist in the visual flight rules (Standard 4.7, Annex 2) and in the instrument flight rules (Standard 5.3.2, Annex 2). Proposals by Morocco\(^8\) to impose more specific restrictions and duties on aircraft in transit were not accepted by the Conference.

**Article 40**

**Research and Survey activities**

During transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.

The idea of this article was first put forward in the proposals of Fiji\(^9\) in the twin contexts of innocent passage and passage through straits. The present wording first appeared in the Informal Composite Negotiating Text.\(^10\) In the light of informal discussions. In effect, it supplements the general rules in Article 39 by adding specific rules about research and survey activities on the part of ships exercising the right of transit passage. The prior authorization of the State(s) bordering a strait is required for such activities. Where an agreed maritime boundary exists in a strait, the consent of the appropriate coastal State is needed for activities in that part of the strait under its sovereignty or jurisdiction. The relevant activities are marine scientific research (a subject regulated by Part X of the Convention) and hydrographic surveying. Both activities are mentioned in Article 19(1)(j) concerning the meaning of innocent passage; and Article 40 (like Article 39) applies by virtue of Article 54 to ships exercising the right of archipelagic sea lanes passage.

Article 40 adds little to what is implicit in Article 39: it appears to have been included largely for the avoidance of doubt. It may have particular relevance in long straits, for example those of Malacca, and archipelagic waters.

**Article 41**

**Sea lanes and traffic separation schemes in straits used for international navigation**

1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.

2. Such States may, when circumstances require, and after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by them.

3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.

4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the strait, after which the States may designate, prescribe or substitute them.

5. In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall co-operate in formulating proposals in consultation with the competent international organization.

6. States bordering straits shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by them on charts to which due publicity shall be given.

7. Ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

Article 41 gives further recognition in international law to the institution in recent times of traffic schemes for promoting the safety of shipping.\(^10\) The article is based upon proposals made by the UK\(^11\) and Fiji\(^12\) and incorporates modifications and additions suggested by other delegations during informal discussions. In introducing the proposals, the UK

\(^7\) Ibid., paragraph 9.12.

\(^8\) Amendment C/42 of 1978. Restrictions proposed were no exercises, use of weapons, photography, refuelling in flight, dive-bombing and interference with the coastal State's telecommunications—many of which are excluded by virtue of paragraph 1 of Article 39. Greece proposed (in amendment C/17 of 1978) to make the duty 'to comply' with the ICAO Rules, but this was not accepted.


\(^10\) A/CONF. 62/WP.10; Official Records, vol. 8, Article 40. The ICNT's draft article began with the words 'in their', words then changed to 'During transit' by the Drafting Committee.

\(^11\) Traffic schemes are also dealt with in Articles 42 (territorial sea) and 53 (archipelagic waters), as well as in the Collision Regulations and the Convention for the Safety of Life at Sea.

\(^12\) A/CONF. 62/G.1/L. 3, Article 3.
representative noted there was often a concentration of shipping in straits and continued: 'In view of the general interest of the international community in navigation through straits, we propose that traffic separation schemes should be fully considered before their promulgation.'

The article has two parts: first, paragraphs 1 to 6 specify the rights and duties of States bordering straits in the matter of traffic schemes; and, secondly, paragraph 7 imposes a corresponding duty upon ships exercising the right of transit passage to respect such schemes.

Paragraph 1 confirms that States bordering straits are competent to designate sea lanes and to prescribe traffic separation schemes, including the making of laws and regulations, where this is necessary to promote the safe passage of ships in straits. The necessity will often arise in straits used for international navigation and many traffic schemes already exist in such straits. The schemes take account both of ships in transit and local traffic, including traffic across a strait. There are also schemes which take account of the existence of shallows or shoals in a strait by defining 'deep draught routes'. Although the express reference to 'depth separation schemes' in the proposals by Fiji was not incorporated in Article 41, they are covered as a type of traffic separation scheme. On 28 April 1982, a letter and statement were circulated to the Conference about the Straits of Malacca and Singapore by the delegations of Malaysia, Indonesia and Singapore; this statement, although made with particular reference to Article 233 (safeguards with respect to straits used for international navigation), contained the point that traffic separation schemes could include the determination of under keel clearance for the Straits provided in Article 41. The statement met with wide support. Since then an agreement about under keel clearance has been drawn up by Indonesia, Malaysia, Singapore and Japan, making provision for the special characteristics of the Straits of Malacca.

Paragraph 2 recognizes that circumstances in a strait may change (e.g. natural changes such as silting may take place, or changes in traffic such as the introduction of large tankers following an oil discovery). Where the new circumstances require a change in the traffic scheme, a substituted scheme may be prescribed or designated. However, the coastal State has to respect the terms of the article and in particular give appropriate publicity to the change.

Paragraphs 3 and 4 take account of the worldwide interest in the safety of navigation in straits by requiring that traffic schemes conform to generally accepted international regulations, notably the Collision Regulations and the Safety of Life at Sea Convention. Whereas Article 22 gives wide discretion to the coastal State with regard to traffic schemes in the territorial sea generally, Article 41(3) contains a safeguard for the international community in the particular case of traffic schemes in straits. Paragraphs 3 and 4 were the products of the Fiji/UK Group which sought to find a balance between the interests of States bordering on straits and other States.

In the initial proposals of the UK, a State bordering a strait would have been in a position to designate or prescribe a traffic scheme 'only as approved by' the competent international organization (i.e. the IMO). This went too far for delegations such as Singapore and Fiji, which wished the role of the IMO to be purely advisory. Paragraph 4 represents a compromise between these approaches (which was worked out in the Fiji/UK Group). The procedure is as follows: first, the State(s) bordering a strait has to submit its proposals to the IMO; the latter may, secondly, adopt a scheme only in agreement with that State(s) (i.e. modifications have to be agreed); finally, the State bordering a strait may then proceed to designate or prescribe the traffic scheme. The same procedure applies to substitutions.

Paragraph 5 was first proposed in the Fiji/UK Group. It makes explicit provision for cases where there exist two or more States bordering the same strait and requires the States concerned to co-operate in formulating proposals in consultation with the IMO (i.e. the procedures indicated in paragraph 4).

Paragraph 6 requires a State bordering a strait to mark on charts the traffic schemes which it has prescribed in the strait and to give appropriate publicity to the charts. It is similar to Article 53(10) concerning traffic schemes in archipelagic waters and Article 22(4) concerning sea lanes and traffic schemes in the territorial sea. Unlike Article 16 concerning charts depicting baselines, there is no obligation to deposit a copy of each chart with the Secretary-General of the United Nations.

Paragraph 7 requires ships to 'respect' sea lanes and traffic schemes. For example, they must not sail along a sea lane in the wrong direction. Whilst the paragraph does not in terms confine the exercise of the right of transit passage to sea lanes, in practice ships in transit can be expected to follow them. To 'respect' a scheme includes respecting its operating rules as well as the lines on the chart, although the obligation is less precise than one to 'comply with' a scheme.

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**Notes:**

2. See Article 41(1)(a).
5. A/CONF. 63/L. 145, Add. 1 to 8 (Indonesia, Singapore, France, UK, USA, Japan, Australia and FRG).
6. Convention on the International Regulations for Preventing Collisions at Sea, 1972 (referred to in Article 39(1)(a)).
8. Amendment 26 (1976) by Spain would have added a sentence requiring the agreement of all the States bordering the strait in the IMO before the scheme could be prescribed. However, this amendment was not adopted.
to meet the legitimate concerns of States bordering straits. It was pointed out that a ship in transit might commit a pollution offence, or engage in fishing or smuggling, thereby giving rise to a need for the State to protect its interests. Waiting for a suspected ship to enter port would not be enough. It was also pointed out that a navigation offence might be committed which was not to do with sea lanes or traffic schemes, or a pollution offence which did not lead to damage so much as expense on the part of the State concerned. After detailed discussions, the list in the UK proposal was expanded and wording similar to Article 42(1) was accepted by the Group.115

The Group's text struck a balance between (i) the wish of States bordering straits to have specific regulatory powers (broadly the same as those in Article 21) so as to ensure safety and to protect their coastal interests along the shores of the strait, and (ii) the wish of flag States to see their ships pass through straits without interference from or the imposition of special rules by the bordering States. The Group's text on this issue formed the main basis for Article 41 of the ISNT proposed by the Chairman of the Second Committee;116 and this text, with minor modifications made in the light of subsequent discussions, eventually became Article 42 of the Convention. Several amendments, the general effect of which was to broaden the powers of States bordering straits, were tabled in 1978,117 but these amendments were not accepted by the Conference.

Paragraph 1 specifies under four headings the content of the legislation which States bordering straits may adopt about transit passage. First is the safety of navigation and the regulation of traffic, in the terms set out in Article 41. In concrete terms, such a State may give effect within its legal order to a scheme for sea lanes or traffic regulation which satisfies Article 41's requirements. It may do so for all foreign ships exercising the right of transit passage, so that in effect internationally adopted schemes for a strait may be made applicable to all ships in transit passage there regardless of their flags, i.e. even if the flag State has not enacted legislation for ships flying its flag. Secondly, in order to prevent, reduce and control pollution, legislation may be adopted giving effect to those applicable international regulations (such as the Convention on Marine Pollution, 1973) which prohibit the discharge of oil, oily wastes and other noxious substances close to shore and therefore in straits. Similarly, this legislation can be applied to ships flying the flag of States which have not ratified the relevant

118 Pittsod, op. cit. above (n. 16), p. 194.
119 A/CONF. 60/WP.8/Part II, Article 41.
120 Antemend C/4 (Spain) would have broadened powers in regard to pollution and protection of facilities etc., and imposed requirements concerning liability. Amendment C/17 (Greece) would have extended paragraph 1(2) to encompass laws about air traffic. Amendment C/21 (Morocco) would have included in the list of legislative powers the protection of navigational aids, other installations, cables and pipelines; the conservation of living resources; and research and hydrographic surveys.
121 Annex I to the Convention of 1973 concerns the discharge of oil and oily wastes, whilst Annex II deals with other noxious substances. Proposals in the Drafting Committee to replace 'applicable' by 'generally accepted' and to delete 'oily' before 'wastes' were not reflected in the text as adopted.
Paragraph 5 recognizes that whilst such legislation cannot be enforced through the courts against a warship (or other vessel or aircraft entitled to sovereign immunity), the coastal State should not be left without a remedy. The paragraph confirms that international responsibility is borne by the flag State for any loss or damage resulting from acts contrary to such legislation and incurred by States bordering straits. The same rule applies to acts contrary to Part III, including therefore Article 39, which result in loss or damage. The proposal of the Fiji/UK Group to refer also to damage incurred by other States in the vicinity of the strait was not included in Article 42 on account of its vagueness: in such a case, the general rules on State responsibility would apply.

**Article 43**

Navigational and safety aids and other improvements and the prevention, reduction and control of pollution

User States and States bordering a strait should by agreement co-operate:
(a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
(b) for the prevention, reduction and control of pollution from ships.

This article, which seeks to promote co-operation between States bordering straits and the flag States of vessels and aircraft using straits, is based on a proposal by the UK. The proposal recognized that the international interest in navigation through straits used for international navigation imposed certain restrictions on the rights of States bordering straits and therefore sought to foster co-operation as far as appropriate between those States and the flag States of vessels and aircraft using the strait over such matters as safety aids and the avoidance of pollution from ships. The article, which was put forward with the case of shipping passing through straits such as Malacca particularly in mind, aroused little comment and no controversy. In informal discussions in the Fiji/UK Group and later in the Second Committee Working Group when it was discussing the ISNT, it was noted that the article was cast in conditional, non-mandatory terms: informal suggestions (a) to make it obligatory for user States to co-operate and (b) to make it clear that decisions about safety aids were for the straits State to make, were not pressed. In 1978, Morocco put forward an amendment designed to make the article obligatory and to extend its scope to

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120 In their Article 43(5). Similarly, their Article 43(6), concerning the responsibility of a State bordering a strait for loss or damage to foreign ships or aircraft resulting from actions contrary to Part III, was not included in the Convention. The matter is governed by the general rules of international law.
122 A/CONF. 62/C.2/8/Part II, Article 42.
123 Amendment C(3), reading: ‘User States and States bordering a strait shall co-operate, by agreement, in the establishment and maintenance in the strait of necessary safety and environmental protection installations and navigation aids, as well as any other device calculated to safeguard the exercise of the right of transit passage in accordance with the provisions of this Part and of other rules of international law.’
cover safety installations and other devices; but this amendment was not accepted by the conference.

Sub-paragraph (a) would form a basis for international co-operation to defray the cost of such things as new lighting or buoying schemes, as well as the dredging of new channels for deep draught vessels, particularly if the new facilities were intended to benefit the ships of third States rather than those of the State(s) bordering the strait. \(^{114}\) Sub-paragraph (b) would form a basis for co-operation in the provision of navigational aids in order to prevent the grounding or collision of vessels. That course would reduce the risks of pollution. As a whole, the article should encourage co-operation, whether on a bilateral or a wider basis, between States bordering straits and flag States.

**Article 44**

**Duties of States bordering straits**

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

This article, which specifies three important duties on the part of States bordering straits, follows closely the wording of a proposal by the UK. \(^{115}\) That proposal was similar in certain respects to Article 1(2)(c) and (f) of the proposals by Bulgaria and other States, to the effect that:

(c) No state shall be entitled to interrupt or suspend the transit of ships through the straits, or engage therein in any acts which interfere with the transit of ships, or require ships in transit to stop or communicate information of any kind.

(f) The coastal state shall not place in the straits any installations which could interfere with or hinder the transit of ships. \(^{116}\)

The UK proposal was put forward with the decision of the ICJ in the *Corfu Channel* case \(^{117}\) in mind: the Court found that States were obliged to give notice of dangers to navigation in waters under their sovereignty. This duty was codified in Article 15 of the CTSCZ and is repeated in Article 24 of the present Convention. Those articles also contain the concept of not hampering passage, whilst Article 16(4) of the CTSCZ contained a prohibition against the suspension of passage through straits used for international navigation between two parts of the high seas.

In discussions in the Second Committee in 1974, Denmark pointed out, with reference to paragraph (f) of the proposals by Bulgaria and its co-

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\(^{114}\) Some suggestions were voiced during the Conference that lighting, buoying and dredging should be paid for by the imposition of tolls. However, these suggestions were rejected. Japan has agreed to defray the cost of certain dredging work in the Straits of Malacca.

\(^{115}\) A/CONF. 66/C.2/L. 3, Article 6. It appeared as Article 6 of the Fiji/UK Group’s proposed text and as Article 43 of the ISNT.

\(^{116}\) A/CONF. 66/C.2/L. 11, Article 1(3)(e). A similar proposal was contained in Article 3(a)(d) about overflight.

\(^{117}\) *ICJ Reports*, 1949, p. 3.
STRAITS USED FOR
SECTION 3. INNOCENT PASSAGE

Article 45
Innocent passage

1. The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation:
   (a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or
   (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

2. There shall be no suspension of innocent passage through such straits.

Section 3, which contains a single article, deals with those types of straits used for international navigation in which the basic regime of passage is not transit passage but rather innocent passage.

Article 45 was derived from proposals by the UK and Bulgaria and others. Both sets of draft articles proposed the regime of non-suspendable innocent passage in the case of a strait used for international navigation between the high seas and the territorial sea of a foreign State. This was the rule in Article 16(4) of the CTCSZ. The UK also proposed the same regime of non-suspendable innocent passage for certain types of straits connecting two parts of the high seas which were excluded from its proposals concerning transit passage, i.e. 'broad' straits through which a good high seas route existed and straits formed by an island of the coastal State to seaward of which a good high seas passage existed. In addition, the rules about traffic schemes in straits (now Article 41) were to apply in such straits. These proposals were accepted by the Fiji/UK Group on Straits. In his ISNT, the Chairman of the Second Committee followed those proposals for the part. He accepted the main elements, but added references to the EEZ and altered the structure, no doubt in order to give the article greater clarity. This ISNT made two other changes. It removed completely the 'broad' strait from the application of Part III, by means of the new Article 36 (high seas routes, etc.) and, secondly, it did not apply the proposed rules about traffic schemes in other straits (now Article 41) to the straits covered by section 3.

In discussion of the ISNT, the proposal attracted criticism on various grounds, as well as much support. The article was criticized because it divided straits into different categories and did not treat them equally: against this, it was pointed out that different considerations applied to straits connecting two parts of the high seas from those connecting the high seas to the territorial sea of a foreign State. The prohibition against suspension was criticized; but this position attracted little support, probably because it ran counter to Article 16(4) of the CTCSZ. The proposals of Malaysia and its co-sponsors, to the effect that non-suspendable innocent passage should be the regime in all straits used for international navigation, were recalled; but this was in effect a criticism of the whole of section 2 and did not attract much support. The UK again put forward its proposal that the special rules about traffic schemes in other straits should apply also to section 3: although some support was voiced, this proposal was not accepted, with the result that the rules in Article 22 about sea lanes and so forth in the territorial sea apply as part of the regime of innocent passage to straits covered by Article 45. A UK drafting suggestion to make paragraph 1(a) of the article into a simple cross-reference to Article 38(1) was, however, accepted in the ISNT and now appears as Article 45(1)(a). Three informal proposals to the effect that in straits to which Article 45 applies the coastal State could (a) require prior notification or authorization for the passage of foreign warships, (b) confine the passage of research or survey ships, tankers and ships carrying nuclear materials to designated traffic lanes, and (c) require prior notification of the passage of foreign nuclear powered ships, were not accepted by the Conference. Finally, attention was drawn to the need to adopt similar methods for establishing baselines in straits where two States were adjacent or opposite each other before tackling the issue of delimitation; however, this subject is regulated by Part II (Territorial Sea), not by Part III (Straits).

Article 45 applies to two types of strait used for international navigation:
(a) a strait which is formed by an island of the State bordering the strait and its mainland and which is situated in a place where there exists seaward of the island a route through the high seas or EEZ of similar convenience; such a strait is excluded from the transit passage regime by Article 38(1);
(b) a strait connecting the high seas or EEZ and the territorial sea of a foreign State; 'foreign' means the same as in Article 16(4) of the CTCSZ, i.e. a State located beyond the coastal State(s) bordering the strait. The French text uses the formulation 'd'un autre état', consistent with that meaning, as is the Spanish 'de otro Estado'.

In those types of strait, the regime of innocent passage as it is defined in...
Part II applies in all its respects, subject to the exception that the right of innocent passage through such straits may not be suspended.¹³⁹

**APPENDIX**

Set of chartlets derived from those made available in the Second Committee by the UK Delegation in 1974. (The numbers of the articles correspond with those in the Convention.)

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¹³⁹ Article 35(3) permits temporary suspension of the right of innocent passage in specified areas of the territorial sea. Article 45(a) prohibits suspension in straits where it would prevent passage through them.
THE REGIME OF STRAITS AND NATIONAL SECURITY:
AN APPRAISAL OF INTERNATIONAL LAWMAKING

By W. Michael Reisman *

The United States military potential may be viewed in two interlocking dimensions. The first is nuclear deterrence: the maintenance of a posture designed to deter other states with nuclear military potential from nuclear adventures. The second is comprised of nuclear and more conventional capabilities, designed to communicate to the widest spectrum of adversaries a capacity and willingness to exercise coercion in different settings in order to protect vital national interests.

The importance of the oceans to the use of the military instrument is obvious: the oceans, their airspace, and submerged areas are some five-sevenths of the world arena. Both of the dimensions of military potential currently include use of the oceans, their airspace, and, in particular, their straits; both require an international normative regime which facilitates that use.1 Possible future uses, particularly with regard to superjacent airspace, must also be considered in determining what constitutes a minimally acceptable normative regime. It is clear, for example, that greater use of airspace for military and commercial purposes and the routinization of shuttles with satellites may make the airspace over these five-sevenths of the globe even more critical.2

In many ways, U.S. national interests in these dimensions of the maritime regime resonate positively with the common interests of the world in a system of minimum order. An effective system of mutual deterrence between the superpowers is not only in their own interests; it is a prerequisite to general survival. In any community, common interests must

* Of the Board of Editors.

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2 Some perspectives are offered in Pickett, Airlift and Military Intervention, in THE LIMITS OF MILITARY INTERVENTION 137 (Stern ed. 1977).
predominate; this has been an enduring postulate of international maritime law. "Navigation and shipping," Ambassador Pardo has said, "... are fields where because of the requirements of international trade and intercourse... the international interest... must prevail." Deterrence is an uncompromisable security necessity for all members of the world community. Where national claims are inconsistent with the regime that provides effective deterrence, they must yield to the inclusive interest, for minimum order is inescapably the preeminent common interest.4

The United States system of deterrence 5 is based on a nuclear triad: warheads delivered by land-based ballistic missiles, by aircraft, and by ballistic missiles carried by submarines (SLBM's). 6 Prelaunch location,

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4 Statement delivered before the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond Limits of National Jurisdiction on March 23, 1971, quoted in Lapidoth, Freedom of Navigation—Its Legal History and its Normative Basis, 6 J. MAR. L. & COM. 259-72 (1975). Where goals are stated in functional terms, it is important to test the institutional arrangements for their realization functionally, for in conventional terms, there may appear to be inequalities. Functional goals may be fulfilled when one state exercises virtual plenary jurisdiction in waters within 12 miles of its coast, while another, whose coasts front on a strait, may enjoy considerably less jurisdiction. The test here is not formal equality but whether the goal is approximated.

5 I do not minimize the substantial interests of coastal states in establishing regimes to deal effectively with the increasingly intensive and potentially noxious uses of their coastal waters. Young writes, "No underinsured, ill-equipped, ill-navigated, chartless, flag-of-convenience-registered 250,000 ton tanker can ever be 'innocent' in the English Channel or the Malacca Strait, or, should it find itself there, in the Canadian Arctic." Young, New Laws for Old Navies: Military Implications of the Law of the Sea, 16 Survival 262, 265 (1974). Obviously, an acceptable regime must protect those interests, but unless it is compatible with minimum order requirements, no interests will survive. In many circumstances, it should be plain that coastal interests may be enhanced by not enlarging coastal competence: see note 45 infra. In other circumstances, organizational and normative design may accommodate freedom of navigation and coastal interest, e.g., in absolute liability standards, insurance schemes, and punitive damages. See, e.g., the statement of John R. Stevenson before Subcommittee II of the Seabed Committee, July 28, 1972, UN Doc. A/AC.138/SC.II/8/R.37, at 2 (1972), cited in Knight, Issues before the Third UN Conference, 34 LA. L. Rev. 135, 194 (1974). For an earlier discussion, see E. Lauterpacht, Freedom of Transit in International Law, 44 Grotius Society Transactions 313, esp. 319-30 (1958-59).


7 On submarine warfare, see Rathjen & Ruina, Trident, in The Future of the Sea-Based Deterrent 66 (Tispis, Cahn, & Feld, eds., 1973); Hill, Maritime Power and the Law of the Sea, 17 Survival 70 (1975); Garvin, Anti-Submarine Warfare and National Security, in Progress in Arms Control? Readings from Scientific American 82-94 (Russett & Blair, eds. 1979), and see the editors' Introduction, id. at 30-31; R. H. Smith, ASW—The Crucial Naval Challenge, 96 U.S. NAVAL INSTITUTE PROCEEDINGS 126-41 (1972); Scoville, Missile Submarines and National Security, 226
storage, relative mobility, method of delivery, targeting accuracy, and vulnerability introduce significantly different strategic, deterrent, and political factors for each.

Land-based missiles, from fixed bases and, to a lesser degree, from aircraft, exercise an inherent attraction for preemption or first strike, whereas submarine missiles, by virtue of their mobility and comparative invisibility, do not. Many students of this area believe that for the foreseeable future antisubmarine warfare techniques pose no serious threat to U.S. submarines—assuming the subs are submerged. The differences between land basing and submarine delivering are more than marginal. A former Secretary of State contends that “by some time in the early 1980s the Soviet Union will have the capability to destroy with a reasonable degree of confidence most of our land-based ICBMs. In the same period of time we will not be able to destroy the Soviet ICBM force.” Even if this prognosis proves wrong, other significant factors must be taken into account. For one, submarine missiles are more stable politically. Precisely because land-based missiles exercise a preemption and first-strike attraction for adversaries, democratic allies hosting them will be vulnerable to domestic political pressure for their removal. The more democratic a host becomes, the more it becomes susceptible to domestic pressure to expel the very missiles protecting the alliance; national defense planners encounter this phenomenon in domestic politics about siting land-based missiles. Even where the foreign host is undemocratic, land-based missiles may make it subject to extraordinary political pressures or blandishments by the adversary. Without addressing relative military utility, it seems clear, for these and other reasons, that submarine missiles offer a more reliable deterrent.6

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6The major vulnerability of airpower is that it must get off the ground. Land-based missiles may become unacceptably vulnerable in the next decade as the USSR’s throw-weight increases. To counter this development, defense specialists seek to increase the number of launch points, which, in turn, incites public resistance in the neighborhoods where siting is projected. SLBM’s do not present these problems; moreover, they often traverse shorter distances, making them more effective and advantageous.

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6Kissing’s Critique, The Economist (London), February 3, 1979, at 17, 18. The development was anticipated almost 20 years ago by Dr. Oskar Morgenstern:

The United States can make its force invulnerable by hardening... But this has the simple consequence that these sites will come under correspondingly heavier attack. Their locations in the United States... are perfectly known to the enemy. With modern missile technology it is easy to nullify any degree of hardening by the dispatch of more missiles with more and more powerful nuclear warheads. Hardened bases draw heavier fire, mostly ground bursts producing deadly fall-out that spreads throughout the continent...
Terms such as "gunboat diplomacy" and "showing the flag" are rather anachronistic ways of expressing the fact that an integral part of political power at any level of social organization is the general expectation that an actor has the capacity and will to use force to conserve or extend vital interests. Stability is increased when capacity, will, and vital interest are correctly appraised by others; it is decreased when they are misperceived. This process proceeds even when troops rest in their barracks and ships bunker at home ports, for it is an ongoing assessment of possibility. As Lasswell put it:

Demands for colonies, ships, and treaty revisions are continually modified in the light of estimated changes in the relative fighting position of groups; estimates of fighting effectiveness are differentially modified by actual changes in the natural resources and technology; and identifications with this or that collective symbol are partially controlled by the supposed prospects of success of that symbol in the struggle for status.9

One of the key and often misunderstood functions of the military instrument is not during war, but before war, and hopefully in preventing war. The military instrument is an unwelcome and yet ubiquitous feature of politics at all times and its relative utility at any particular time depends on comparative quanta as well as locations.10 Hence the continuing im-

Thus, Morgenstern, with extraordinary prescience, argued:

Indeed, we must go further and place the major part of the retaliatory force outside our country... on the vast expanses of the world’s oceans, in fact under the waters. We then combine through the use of nuclear-powered, missile-firing Polaris submarines the tremendous advantages of mobility with invisibility; and we can distribute individual units randomly, thereby making surprise attack on any even remotely substantial part of that force impossible. I call this the Oceanic System of Defense.

Morgenstern, supra note 7, at 107.

9 H. LASWELL, WORLD POLITICS AND PERSONAL INSECURITY 40 (1935, Free Press Paperback, 1965). See also E. LUTTWAK, THE POLITICAL USES OF SEAPower 1-38 (1974). Young, supra note 4, argues at 266 that "probably no naval vessel can now count on being freely allowed passage through straits in time of trouble, whatever the small print of the relevant convention might say." The comparativecertainty of that statement will be affected by the normative regime that results; the latter will certainly influence the degree of freedom of passage in noncrisis periods, when the military instrument continues to be important.

10 See generally, E. LUTTWAK, note 9 supra; McGwire, Changing Naval Operations and Military Intervention, in Stern ed., supra note 2, at 151; Feld, Military Demonstrations: Intervention and the Flag, id. at 197; J. CABLE, GUNBOAT DIPLOMACY (1971). In this respect, Pirrie's comments would appear to miss the point. Obviously, the depth and breadth of straits make them susceptible to blockage or mining during intense belligerency: Patterson, Mining: A Naval Strategy, 23 NAVAL WAR C. REV. 52 (1971). This vulnerability must be factored into calculations by all parties who may even discover a common interest in keeping the straits open in those periods. But a key concern of an appropriate maritime regime is to keep the straits maximally open in non- and prebelligerent situations: Pirrie, Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate" Revisited, 5 OCEAN DEV. & INT’L L.J. 492 (1978). In his emphasis on power alone, Pirrie, like Young (note 9 supra), would appear to misunderstand the general function of law in the power arena.
portance of communicating strategic and tactical capabilities. In the contemporary arena, strategic and tactical capabilities employ submarine as well as surface and aerial elements, all of which may require relatively easy access to large parts of the oceans and, in particular, transit through straits. Indeed, the expectation of accessibility is, itself, a key component of the military effectiveness of the weapons system.11

In a deterrence system, the normative regime must fulfill these requirements for all parties and must not be run aground to serve the apparent short-term advantages of one party in the ceaseless zigs and zags of competitive technological and weapons development. Thus, the fact that the USSR may benefit from making the United States “strait-bound” with regard to submerged or surface passage in a particular part of the world or that the United States may benefit from having the USSR “strait-bound” in the interim when the range and accuracy of U.S. SLBM’s do not require the proximity afforded by straits passage, does not, in terms of long-range interests, justify either in establishing a regime which diminishes the deterrent capacities of the other. In the logic of a deterrence system, each party must remain assured of its deterrent competence; as assurance erodes, the inclination to preempt increases.

Among other things, the effectiveness of both the SLBM component of the deterrence system and the surface and aerial components of the strategic and tactical system requires unrestricted access to large parts of the oceans. In the case of SLBM submarines, access must include the right to remain submerged in order to avoid detection, a consideration at best only partially satisfied by the increasing range and accuracy of SLBM’s. As a recent Stockholm International Peace Research Institute study puts it:

Unlike torpedo or cruise missile-carrying counter-shipping submarines, the ballistic missile submarine has a strategic rather than a tactical role. Its operations are therefore not confined to the vicinity of a convoy or a task force; rather it roams submerged in the millions of cubic kilometres of ocean from where it can be within range of its strategic inland targets. It does not seek to approach but rather avoids, surface ships, since its main operational requirement is to remain undetected and thereby ensure the availability of its ballistic missiles at any instant.12

In deterrence theory, detection of the submarine is as systemically dangerous as would be an antiballistic missile system to protect cities:

The deployment of ABM (anti-ballistic missile) systems to protect urban areas was prohibited by the SALT I agreements, the reason being that such systems impede the ability of ballistic missiles to attack urban areas and hence erode the counter-value role of these missiles. Similarly, an ASW [antisubmarine warfare] system designed to attack missile-carrying submarines could threaten the sec-


ond-strike capability of these submarines, and would thus be as undesirable as an urban ABM system: both ABM and ASW systems undermine the credibility of deterrence as a viable strategic posture. The institutionalization of deterrence as the mutual strategic posture of the Soviet Union and the United States (and presumably also France, Britain and China) appears to proscribe any military operation that could threaten the stability of strategic weapon systems on which the credibility of deterrence is based.13

An acceptable public order of the oceans as it pertains to security should provide for wide surface and aerial access and rights of submerged passage as unconditionally as possible.14

13 Id. at 304. These conclusions will not be accepted by American or Soviet strategists who view strategic forces as being not only deterrent, but also as war fighting; they will obviously desire to threaten the second-strike capabilities of the adversary, a sequence with which this article will not deal.

14 Professor Burke has argued that "[i]t appears to be a very insubstantial basis for concluding that the security position of the powers employing nuclear or other submarines would be materially prejudiced by requiring these craft to travel on the surface through straits or other parts of the territorial sea." W. BURKE, CONTEMPORARY LAW OF THE SEA: TRANSPORTATION, COMMUNICATION AND FLIGHT 12 (Law of the Sea Institute Occasional Paper No. 28, Univ. of B.L., 1975). Burke implies in a footnote that the development of underwater surveillance systems makes undetected passage through straits improbable: if this is the case, there is cogency to his argument. But the works he cites to support his contention are at best ambivalent on this point and at worst directly contrary to it. After a discussion of all the surveillance systems designed to locate submarines, one of the cited works observes:

Acoustic countermeasures designed to confuse the sonar devices of an opponent seem to offer considerable opportunity for effective innovation. Torpedoes carrying recorded submarine sounds, which are now employed to test and practice the use of acoustic homing torpedoes, can be easily modified to spoof the sounds of a submarine in order to confuse even the most sophisticated passive sonar. Jamming of the large passive arrays with noise makers is relatively easy since, unlike the case of electromagnetic radiation, the relevant frequency band is rather limited and can be easily covered. Other counter-ASW measures include the reduction of the acoustic cross-section of submarines by using smaller hulls made of reinforced plastics and titanium, or using fuel cells (developed for space use) that will replace the cumbersome and relatively noisy reactor with a much quieter power crew; such power plants can give future hunter-killer submarines the speed and depth characteristics of the considerably larger and noisier nuclear-power craft.


But the piece continues, "In several countries work is going on to develop torpedo-countermeasure resistance (counter-countermeasures) and achieve sonar improvements that aim at neutralizing acoustic countermeasure efforts." Once perfected, if not sooner, such efforts will probably result in still another round of countermeasures. To the same effect Pirrie contends that the operationalization of the Trident system, with its increased range and accuracy, will minimize the importance of straits passage for submarines. Pirrie, supra note 10, at 488. Like Burke, Pirrie does not address some of the considerations raised in the cited SIPRI studies. Neither considers that the common interests in the global deterrence system may require that both the United States and the USSR enjoy plenary navigation rights through straits.

Nor should changes in technology alone be invoked to devalue straits for U.S. security. Adversaries may have or may acquire means for detecting submerged passage of U.S. vessels through straits, but that does not terminate the utility of a right of submerged passage. There are many actors who will not have that means of detection, and secrecy of passage may still have strategic value with regard to interactions with them.
In the nature of things, normative regimes indulge some and deprive others and hence are always under stress. Particular components are always undergoing long-term erosion or reinforcement. But at about the time that the sea-based deterrent became increasingly refined and began to loom as one of the major bases of national security, the international legal regime of the oceans supplied many of the user access requirements through four venerable though not equally stable principles: (1) a complex of user rights traditionally referred to as the freedom of navigation on the high seas; (2) a 3-mile territorial sea, which left most of the oceans as high seas and among other things resulted in (3) a belt of international waters in most of the critical geographical straits of the world; (4) a right of innocent passage in the territorial sea which, as we shall see, was relatively broad in terms of the user and narrow in terms of the discretion afforded to the coastal state to characterize passage as noninnocent.

It was the concatenation of these legal principles that made the sea-based components of the security system possible. The U.S. interest in the maintenance of this concatenation was expressed, with few exceptions, and sometimes despite the U.S. delegation, in the products of the 1958 Law of the Sea Conference.\(^{15}\) The pertinent conventions emerging from that conference took account of those interests and, in many though not all key sectors succeeded in preserving the legal environment indispensable for the deterrence system. Ironically, these norms were prescribed when the United States was so strong that the norms themselves may not have been exigent; nuclear predominance was so great that the abiding importance of the ocean and straits dimension may have been underestimated. But as the constellation of political, military, technological, and resource factors changes and U.S. power potentials vis-à-vis other actors at least equalize, an appropriate normative system becomes more urgent.

The purpose of this article is to compare the concatenation of norms of what may be called the 1958 system\(^ {16}\) with the concatenation that is emerging in the Third United Nations Conference on the Law of the Sea (UNCLOS)\(^ {17}\) and to assess whether the newer regime as it pertains to

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\(^{15}\) See generally Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AJIL 607 (1958). See also Slonim, *The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea*, 5 COLUM. J. TRANSNAT’L L. 96 (1966). Oddly enough, the U.S. delegation espoused a number of positions actually contrary to its interests. For example, it supported a subjective conception of innocent passage, and when it undertook its unsuccessful démarche for a 6-mile territorial sea, it did not insist on a straits exception. One can only speculate as to whether these were blunders or the result of an appraisal of the then political dependency of key straits states.


straits meets the requirements, in a new context, of both an international
deterrence system and a U.S. sea-based security system. Key questions
are whether the new regime provides as much mobility to submarines as
does the extant regime and whether it permits surface and aerial com-
ponents to be shifted as security interests require.

Given the importance of the SLBM component of the defense system, a
rather rigorous examination would appear called for. Since UNCLOS
will produce a complex convention, an essentially textual approach to
construction, as conceived by the Vienna Convention on the Law of Treaties,
would appear required because of the Vienna Convention's directives,19

on the Informal Composite Negotiating Text (ICNT) of 1977, but the provisions con-
cerned are cited from the more recent ICNT/Rev.1, where only minor changes were
made in them.

18 This article does not address the related issues of the adequacy to security con-
cerns of the regimes for the exclusive economic zone and for archipelagos; some of the
problems treated here arise in those regimes as well. For example, Articles 56 to 58
transform certainties about many inclusive high seas rights into grave questions with
only the most general guidelines for decision (see, e.g., Article 59). Treatment of
these matters must await an additional article.

19 On the unfortunate predilection for textualism in international legal interpretation,
see, e.g., U.S. Nationals in Morocco case, [1952] ICJ Rep. 196, 199, and, most recently,
Aegean Sea Continental Shelf case, [1978] ICJ Rev. 20 ff. The Vienna Convention's
codification in Articles 31 and 32 provides:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary
meaning to be given to the terms of the treaty in their context and in the light
of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise,
in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the
parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with
the conclusion of the treaty and accepted by the other parties as an instrument
related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpreta-
tion of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes
the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between
the parties.

4. A special meaning shall be given to a term if it is established that the
parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the
preparatory work of the treaty and the circumstances of its conclusion, in order
to confirm the meaning resulting from the application of article 31, or to determine
the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.
and ineluctable owing to the absence of a formal record of the *travaux*. The alternative hardly recommends itself. *Travaux* should be used to supplement incomplete texts, but there is something inherently implausible, in a period immediately after a text’s redaction, in using extraneous material, even if it were not ambiguous and contradictory, against the manifest purport of the text. It is even more curious to suggest that use before the treaty has been accepted.

Given the very special political and legal problems dealt with here, it would appear equally problematic to use certain practices, as evidence of alleged custom, to illuminate the text. The Vienna Convention seems to rule out prior practice for interpreting the text, permitting in Article


It would be a misnomer to refer to these pages as evidence of a "discussion"; they appear, rather, as a series of prepared and read statements, with no interaction between the speakers evident. To cite one example, at the 26th meeting of the Plenary on July 2, 1974, Mongolia, Yugoslavia, Tanzania, Mauritania, and India spoke in succession. Mongolia called for free passage through all international straits. Yugoslavia affirmed coastal jurisdiction "to effectively guarantee their security and to safeguard their legitimate interests"; "commercial navigation" for "permissible and legitimate purposes" should also be guaranteed. Tanzania then contended that the entire notion of freedom of the seas was outmoded, and Mauritania followed by calling for innocent passage through straits. The circle was closed by India which called for free passage. 1 *Official Records* 91-93 (1975).

Professor Burke, who has criticized commentators for construing the ICNT textually, concedes that there are no adequate legislative histories, and the records of different groups meeting in closed or secret meetings are not available. Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 Wash. L. Rev. 193, 202-03 (1977). The artful interpreter may, of course, pick and choose and cut and trim speeches from the meetings, but it is really quite difficult to see how this sort of record can help to illuminate a text. Off-the-record and secret meetings, in which transcripts may have been made, might indicate the actual line of consensus (if any), but the probative value of such records against the text and against the official record is a matter of question. As yet there is no systematic study of the theory and practice of the use of *travaux* in international interpretation. Thus, both *lex lata* and the otiose but actually meager record of this draft impel the interpreter to the text. Even with adequate *travaux*, a construction contra legem rather than praeter legem is most difficult to sustain, especially during periods shortly after the text was accepted. For the special problems involved in construing statements in interest by the United States and inferring acquiescence by others, see note 63 *infra*.
31(3)(b) reference to "subsequent practice in the application of the treaty." As for prior practice, it would be as difficult to construe submerged passage through straits now less than 6 miles in width as generative of a customary right of submerged passage through straits in general as it would be to construe such passage through territorial waters as generative of a right of submerged passage there. By its nature, submerged passage is not the sort of practice that generates customary rights. The notoriety and opportunity for protest by parties thereafter subordinated—requisite components of formation of prescriptive rights—can hardly be fulfilled when the strait state does not or cannot know of the passage or lacks the means of stopping it. And even if such practices were deemed to have generated customary rights in one strait, they could not eo ipso be applied to all straits, nor would they be probative of features of surface or aerial passage.

Both the Vienna Convention and the special features of this problem thus impel us to textual construction.

I. Freedom of Navigation

One of the freedoms of the high seas mentioned in Article 2 of the 1958 Convention on the High Seas is "the freedom of navigation," a term comprehensive in intention including movement, observation, inspection, maneuvers, tests, and so forth, carried out above, on, and below the surface. The design of Article 2 is noteworthy. The freedoms or protected uses of the high seas are to be exercised "with reasonable regard to the interests of other states," but cannot be subjected to state sovereignty: "no state may validly purport to subject any part of them to its sovereignty." The "freedoms" can be regulated only by the treaty or by international law: "Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law." Thus, these freedoms may be deemed to be absolute in the sense that, absent a treaty or other norm, improper use may give rise to protest or stronger action on another plane, but will not permit an aggrieved state to interfere with the allegedly abusive use on the same plane.

While the general freedom of navigation is potentially subject to some regulations, expressed either in the convention itself or in another treaty, no regulations may be applied to warships; they are immune from other than flag jurisdiction. Article 8 states that they "have complete immunity


from jurisdiction of any State other than the flag State.” Hence, freedom of navigation for warships may be deemed to be the most comprehensive of the protected uses of the high seas. The “high seas” are defined in Article 1 of the 1958 Convention on the High Seas as “all parts of the sea that are not included in the territorial sea or in the internal waters of a state.” Given the historic uses of the ocean, “all parts” has both a vertical and horizontal extension.

Whatever the vertical definition of high seas, the term “freedom of navigation” appears only to be used with regard to the high seas. Navigation through territorial waters in the Convention on the Territorial Sea and the Contiguous Zone of 1958 is characterized in Article 14 as “innocent passage” or “navigation.” The words “freedom of navigation” are not used in this connection. In Article 16(4) of the Territorial Sea Convention relating to straits all of whose waters are territorial at some point, the reference is to “innocent passage” and not “freedom of navigation”: “There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.” The International Court of Justice used similar language in the Corfu Channel judgment. Insofar as a body of water connecting two parts of the high seas or the high seas and the territorial waters of a state was less than 6 miles in breadth, no special straits regime in favor of users existed. The waters were territorial and the principle of innocent passage applied with the ambiguous proviso that passage not be suspended so long as it was innocent.

On the high seas, “freedom of navigation” includes the right of submerged movement of submarines. However, this freedom does not extend under existing treaties to the “innocent passage” rights of foreign ships through territorial waters in general or through territorial waters in straits. Article 14(6) of the Territorial Sea Convention states: “Submarines are required to navigate on the surface and to show their flag.” Hence a strict interpretation, in line with the principles of construction of the Vienna Convention on the Law of Treaties, would induce the interpreter to conclude that “freedom of navigation” has not included freedom of submerged transit through territorial waters in straits, under treaties now in force, a point of some importance insofar as ambiguities in proposed texts are to be clarified in the light of the lex lata. More generally, the principles of innocent passage rather than freedom of navigation govern transit by any foreign vessel through territorial waters. In this respect the key difference between freedom of navigation and innocent passage is competence. In freedom of navigation, competence about the character of the user is the flag state’s; in innocent passage it is the coastal state’s. As for the cavil that an international tribunal will vindicate the user, it is plain fantasy. If there is an international tribunal, how does one compel the coastal state to appear there? In the unlikely event that it should appear, how

can one expect the tribunal to apply norms of such exquisite vagueness in ways favorable to the user?

As long as the major maritime powers insisted on a 3-mile territorial sea, a belt of international waters between some of the more strategically critical straits was maintained. Merchantmen as well as warships benefited from passage rights which became increasingly more protected in international law from the late 19th century on. UNCLOS has, however, produced a new regime. Article 3 of the Informal Composite Negotiating Text (ICNT) provides: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." The rather alarming tendency, enunciated most authoritatively by the International Court in the Iceland Fisheries case, to view select provisions in international drafts as indicators of consensus and hence evidence of innovative customary law, despite their failure to win the formal support necessary for adoption in conformity with constitutive processes, virtually transforms Article 3 into custom. The prophecy becomes self-fulfilling when many states, acting on the purported authority of draft Article 3, proceed to exercise their putative right, thereby providing the evidence of state practice that confirms the consolidation of the custom. Factors such as quantitative simplicity make provisions on the order of Article 3 more likely candidates for accelerated customization than more complex provisions which, in the dynamics of conference bargaining, may have been parts of packages or trades for support in return for inclusion of Article 3 in the draft. Be that as it may, the continuing erosion of the U.S. commitment to a 3-mile limit means that formerly high seas belts for passage through critical straits may become territorial waters. With a 12-mile territorial sea available to coastal states on demand, as many as 116 straits that currently include a high seas belt and hence are open to passage under the "freedom of navigation" may lawfully be territorialized and henceforth, in the absence of a special and clearly prescribed regime, available to ships only under the much more limited right of innocent passage. Only some of those straits may be currently vital, but a draft long-term treaty must be weighed against long-term interests, under which straits of only

25 For discussion of the waxing and then waning of the 3-mile rule, see S. Swartz-trauber, The Three-Mile Limit of Territorial Seas (1972).
28 "It no longer seems to be seriously doubted that a 12-mile territorial sea has been established by customary international law, or soon will be unless a trend develops toward even wider limits." Burke, Submerged Passage, supra note 20, at 194 n.6.
marginal utility now may acquire the greatest and most urgent importance. Does the doctrine of "innocent passage" in its 1958 form or in its UNCLOS transformation meet the security requirements of the United States? 20

II. RIGHT OF INNOCENT PASSAGE

Articles 14 to 17 of the 1958 Convention on the Territorial Sea and the Contiguous Zone deal with "the right of innocent passage." 20 The comparable provisions in the ICNT are Articles 17 to 26. Both references are to surface passage and not to overflight. In both texts, there is substantial congruence with regard to the referents of passage, but marked differences with regard to the meaning of "innocence." 21 Article 14(4) of the 1958 text states: "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 these articles and with other rules of international law." For our purposes, it is the first sentence of Article 14(4), dealing with the notion of innocence, which is important; the

20 One of the more alarming aspects of the straits debate has been the identification of those straits that are currently indispensable as the maximum number of straits likely to be indispensable in the future. Pirtle, for example, writes that "[a]lthough all straits serve the same navigation function, straits unrelated to "lifelines" or military objectives can be factored out of the national security equation." Supra note 10, at 487. This type of extrapolation represents the most primitive form of policy analysis and should be eschewed. The relative importance of different avenues of the oceans in the future will depend on technics, contexts, and needs which cannot be envisaged now. It should be clear that the prudent course is not to surrender any of these maritime highways if it can be avoided. Where they must be sacrificed, it is foolish to persuade ourselves of their triviality, since it induces us to concede them for less and less. For a persuasive statement, see Grandison & Myer, International Straits, Global Communications and The Ecoling Law of the Sea, 8 Vand. J. Transnat'L L. 393, 414-15 (1975). But see U.S. Dep't of State, Office of the Geographer, Maps Relating to the Law of the Sea, No. 6, World Straits Affected by a Twelve-Mile Territorial Sea. See also Knight, The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits, 51 Ore. L. Rev. 759, 772 (1972).


20 There is, unfortunately, no concise term to denote a passage that is "not innocent." "Noxious" passage seems too strong in connotation, especially in the light of the criteria proposed by the ICNT. The interest in precision would appear to outweigh the interest in elegance. I will use the term "noninnocent" passage to designate passage that fails one of the tests of the 1958 convention or the ICNT.
second sentence would appear to refer to the more technical aspects of passage. Article 19(1) of the ICNT replicates the first part of the 1958 provision but then illuminates it in paragraph 2:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:

(a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(b) Any exercise or practice with weapons of any kind;
(c) Any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
(d) Any act of propaganda aimed at affecting the defence or security of the coastal State;
(e) The launching, landing or taking on board of any aircraft;
(f) The launching, landing or taking on board of any military device;
(g) The embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal State;
(h) Any act of wilful and serious pollution, contrary to this Convention;
(i) Any fishing activities;
(j) The carrying out of research or survey activities;
(k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
(l) Any other activity not having a direct bearing on passage.

The intention may have been no more than to illuminate Article 14, but the change in language here is substantive in result. Article 14 of the 1958 convention permitted the coastal state to characterize passage as non-innocent if it was, in its view, “prejudicial to the peace, good order or security of the coastal state.” This formula requires the coastal state to demonstrate that effects deriving from the projected passage will be prejudicial to the coastal state itself. The category of effects may have been too ambiguous and open-ended for the prudent international user and could have been made “more precise and less susceptible to the discriminatory appreciation of the coastal state,” but it was, at least, limited to effects on the coastal state. In contrast, the ICNT, introducing the Charter formula, both severs the link to effects on the coastal state and extends the range of effects of a projected passage that the coastal state may take account of in assessing the purported innocence of a passage. Possible effects on other states may apparently be taken into account, if they are illicit under the Charter. Article 51 of the Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary...” Many scholars consider the Charter’s post hoc requirement for activation of the right

Burke, Contemporary Law of the Sea, supra note 14, at 11.
of self-defense quite obsolete and contend that the Charter must now be interpreted to permit an anticipatory self-defense. If that interpretation is accepted, the discretionary judgment given the coastal state under ICNT Article 19 is even broader than would appear on its face. Professor Burke remarks pertinently:

It is one thing to base this judgment only on the activities of particular ship [sic] in transit (even in light of the general context of contemporary relations between the coastal state and others) and quite another to reach conclusions derived from a much broader state of affairs such as the nature of the cargo aboard, its ports of call, destination, previous history in transit, and so forth. To permit coastal officials to take into account the latter range of factors, and to link them with prevailing political relations with or between other states, broadens coastal discretion very considerably and extends it to substantial license. Concern for the broad community interest (including the coastal interest as a flag state in other contexts) justifies establishing limits on coastal discretion by providing that the innocence, or lack thereof, of passage must be determined only by specific acts occurring during passage in the territorial sea itself.\(^3\)

The ICNT formula is not limited to principles expressed in the Charter; it refers to principles of international law “embodied” in the Charter (“incorporé” in the French version, “incorporado” in the Spanish). Whatever “embodied” means, it would not appear to require an explicit provision. Hence, it will be for the coastal state initially, and often primarily and effectively, to determine whether a principle of international law it alleges is “embodied” in the Charter.

Consider also the second part of paragraph 2(a). If the intention of the drafters was to limit the discretion of the coastal state by adding a qualification to the permissible impacts of the transiting ship on the sovereignty, territorial integrity, or political independence of the coastal state,\(^4\) then it may have failed. Syntactically, the second part of Article 19(2)(a) can be read as qualifying “threat or use of force.” Consequently, the text may authorize the coastal state to characterize as noninnocent, and hence suspendable passage, activities in violation of the principles of international law embodied in the Charter of the United Nations, which are not necessarily a threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal state. The impression of the French text is even more spacious, requiring that ships and planes “s’abstiennent . . . de toute autre action en violation des principes du droit international.”

Some proponents of the draft contend that a practical restraint on the discretion of the coastal state may be derived from the words, “in the ter-

\(^3\) Id. at 12.

\(^4\) This assumption, which would predispose the interpreter to construe restrictively coastal state competences to limit innocent passage, would appear to be unwarranted if the innocent passage provisions of the ICNT are compared with those of the 1958 convention. ICNT Article 19 introduces so many new limitations on innocent passage that the counter-assumption that the text intends to increase coastal state competence would appear to be the better working hypothesis.
ritorial sea." In other words, they argue, the discretion of the coastal state to characterize a passage as noninnocent requires that the threat of violation of international law occur while the ship is in passage. There is, in short, an alleged locational requirement. But the requirement is an ineffective limitation on coastal state discretion for two reasons. First, innocence is no longer causally related to impacts on the coastal state. Second, in the environment of modern technology, the symbolic or "flag-showing" functions of surface vessels cannot be suspended during strait transit or become operative only when the ships have assumed their stations; the symbolic function commences the moment that course changes are noted and increases in intensity as the ships continue on the new course. Consider a scenario of a war in the Middle East: As a symbol of U.S. commitment and a signal of deterrence, the President orders ships in the North Atlantic to make for the eastern Mediterranean and ships in the Pacific to make for the Arabian Sea. The moment Soviet satellites note the new course, the communication of intention has been made; it is increased in intensity as the ships remain on course and move closer to the designated theater. If a state believes that the U.S. action is an unlawful intervention, in violation of international law, will it deem that communication temporarily suspended as the ships move through straits and/or territorial waters?

In belligerent situations, a state cannot be expected to tolerate enemy activity in its coastal waters. Both the 1958 and 1977 versions recognize a self-defense exception with regard to the passage of vessels of other states in innocent passage and through straits. But the 1977 conception of innocent passage goes further, for it may authorize the coastal state to characterize proposed passage by maritime users as noninnocent if the passage is related to activities in violation of international law and the Charter, even though those activities do not threaten the coastal state to the extent of activating a right of self-defense. In this respect the 1977 version transforms the UN Charter and the general reference to international law into a type of neutrality law to be specified by the coastal state on a case-by-case basis. It is an interesting idea, to be sure, but one that has been rejected in the past. In the S.S. Wimledon,38 for example, Germany sought to suspend French transit rights in the Kiel Canal, not for reasons of self-defense but on grounds of neutrality. The Permanent Court of International Justice rejected the claim, essentially for conventional law reasons, and then enunciated a more general principle:

... [W]hen an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.39

39 Id. at 28.
Presumably, the dictum would apply equally to a coastal state’s inclination to prohibit passage, lest it contribute otherwise to a violation of international law. The obligations of third states in such matters have probably been extended in the International Court’s Namibia opinion. The Wimbledon subordinates such obligations to rights of user in international waterways. The ICNT, in turn, may be viewed as a legislative overruling of the Wimbledon principle, both for straits passage and for innocent passage. Given the absence of centralized international decision in security matters such as these, the net result could be a significant extension of coastal state jurisdiction over the characterization of the innocence of a proposed passage.

It is not difficult to imagine situations in which these new doctrines may operate to the detriment of U.S.-perceived security interests. Wimbledon-type situations are quite likely to occur, when the U.S. function in a foreign conflict is to provide an ally with food, oil, or matériel, all of which, under doctrines of modern warfare, can be considered vital to the prosecution of the belligerency.

Even symbolic participation may be circumscribed. In January 1979, the United States elected to send a force of jet fighters to visit Saudi Arabia. Ostensible purposes included affirming support for the Saudi Government, emphasizing U.S. concern to the Soviet Union, and communicating, by deed, messages to multiple audiences in Iran. It was, in short, a type of “showing the flag” operation, using the medium of planes rather than ships; indeed, the prospect of sending an aircraft carrier from the South China Sea, the more conventional modality of communication, had been considered and then rejected. Spain refused to allow the jets to refuel in U.S. bases in Spanish territory. Though its action was apparently based on treaty interpretation, it is clear that Spain could have made a not implausible argument in terms of Article 2 of the United Nations Charter with regard to use of airspace superjacent to land territory and waters. That argument can be made with much greater ease with regard to innocent passage than to freedom of navigation. The remarks of Pirtle with regard to straits apply with equal force to innocent passage: “The implications of discretionary power to determine subjectively the innocence of passage through straits and to unilaterally determine limitations on such passage are far-reaching.”

The point is not that Charter principles should not be more widely applied; they should. But an aspect of determining the utility of a norm and,

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88 On this, see Grandison & Meyer, supra note 29, at 419.
89 Burt, Madrid Bans Refueling for F-15’s on Visit to Saudis, N.Y. Times, Jan. 13, 1979, §1, at 3, (city ed.).
91 Pirtle, supra note 10, at 481.
in particular, fixing its level of generality or specificity, is the decision structure that will be applying it. Many Charter principles were designed to be applied by UN organs in accord with Charter procedures; the level of generality and accordingly the amount of discretion passed on to the applicant took this into account. As a general jurisprudential matter, an open-textured normative formulation in a decision process appropriately structured to the situation may be desirable because it gives discretion to the applicant; the same formula may be undesirable and invite abuse if the application is unilateral. When norms whose application threatens severe deprivations to others are to be applied unilaterally, prudent requires that these norms be framed at lower levels of generality, lest the application itself threaten public order. As Burke remarked of the alternative, "The substitution of a wholly decentralized authority, fragmented amongst over 100 coastal nations, does not represent an improvement, and could lead to serious impediments to continued efficiency in transport of commodities around the globe." 42

Obviously, "innocent passage," under its most generous interpretation, is a much narrower doctrine than "freedom of navigation." Freedom of navigation is navigation on the high seas. It requires no characterization, for it self-actualizes; it is what is done. Innocent passage, however, requires the coastal state to characterize the passage as appropriately innocent. Only when it has affirmatively done so is the passage insulated from lawful suspension by the coastal state. Moreover, the 1958 convention imposes the regime of innocent passage of ships through straits whose waters are territorialized (Article 16(4)), and a submarine's would-be innocence, both under the 1958 and 1977 texts, requires it to surface and to show its flag. In short, a transposition of these parts of the 1958 regime to a context in which territorial seas may be extended to 12 miles, territorializing heretofore international waters in the straits, would not appear to meet the security requirements of the United States or the Soviet Union. Since the conception of innocent passage in the ICNT is even more laden with conditions whose fulfillment must be judged by the coastal state, the emerging trend in this area of the law must be viewed, from a national security perspective, as increasingly melancholy.

III. Straits

The ICNT establishes two categories of straits. The first, set out in Article 37 and illuminated and qualified in Article 38, includes straits "used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone." For these straits, the neologistic "right of transit passage" avails; we will consider it in detail below. The second category, set out in Article 45, includes two types of straits: those straits linking high seas or exclusive economic zones with waters subject to national jurisdic-

tion and those straits not included in ICNT Article 38. For Article 45 straits, only the more restricted right of innocent passage avails.

Article 38 straits and Article 45 straits are not mutually exclusive categories. There is, if one may be permitted to use the metaphor, an undertow running toward Article 45, for two reasons: the structure of Article 38 and the impact of Article 3 of the LOS draft.

Like its predecessor in the 1958 convention, Article 38's definition mixes geographical and use factors. In order for a part of the maritime environment to be characterized as a strait under Article 38 and hence entitled to the somewhat more extended rights of passage than those afforded by innocent passage, it must fulfill two cumulative requirements. It must be a bridge between high seas and/or exclusive economic zones and it must in fact be "used for international navigation." ICNT Article 36 further subjects the geographical component to a special requirement when the strait is formed by an island of the strait state; then there must be no "high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics." Though the category is limited, this is a qualification whose potential for future constriction is great. It does not permit would-be users to invoke political convenience or necessity as a justification for using such a strait, despite the fact that a high seas or exclusive economic zone route manifests similar navigational and hydrographical characteristics.

From its inception, the use criterion has been unclear. Can the use requirement be fulfilled by the potential utility of a strait for international navigation without regard to the intensity of use, as the International Court suggested in the Corfu Channel case,\textsuperscript{42} or is some level of use actually required to fulfill this condition? The words "used for" in both the 1958 and 1977 versions would suggest a legislative overruling of the Corfu judgment. If that is the case, then future decision may establish some threshold of use higher than episodic transit in order for straits to retain their Article 37 character. The result may well be that many "international straits" will be transformed into the second category envisaged under Article 45(1), and users thereafter will not fall under transit passage but will be required to fulfill the even more stringent requirements of "innocent passage." This aspect of the formulation of the ICNT must be viewed as unfortunate from the standpoint of world order, for it is the sort of ambiguity that is likely to excite mischief.\textsuperscript{44}

\textsuperscript{42} [1949] ICJ Rep. 4.

\textsuperscript{44} Geography outweighs use in this formula. Ironically, a tribunal could not compute the quantum of use of a strait which might have been intended to fulfill the use requirement so that it could internationalize the strait. Compare The Case of the Edisto and Eastwind, 57 Opin. State Bull. 362 (1967); Farand, Soviet Union Warns United States Against Use of Northeast Passage, 62 AJIL 927 (1968). The controversy, by no means settled, of the "innocence" of warships for passage purposes, will thus be transferred to many straits situations. See, in this regard, Przetacznik, supra note 30, at 302–15.
Article 45 will absorb other straits because of the flow of territorial waters seaward. Prior to the UNCLOS policy allowing extension of territorial waters to 12 miles' breadth, any body of water beyond a strait which body was more than 6 miles wide contained, perforce, a water and air column whose breadth was equivalent to the surplus over those 6 miles, and that water and air column was legally international, rendering the strait "international" in the sense in which Article 38 of the ICNT uses the term. Subsequent to ICNT Article 3, however, the body of water in the strait must be more than 24 miles wide in order to allow for a column of "international waters." The result is that more of the geographical straits of the world become legal straits for which passage must qualify under Article 38 and Article 45. A side benefit, however, is that now even straits less than 6 miles in width may qualify, *ceteris paribus*, for transit passage.

I do not propose to inquire whether straits currently falling in the Article 45 category are deemed vital for U.S. security. UNCLOS is creating a long-term treaty and in the course of its life, conceptions of security and security needs may be expected to change many times.\(^4\) I take it as given that, over the long haul, some and perhaps many of the straits in this category will become vital. The regime the ICNT provides for straits in the categories established by Article 45 would appear to be insufficient for the security needs of the United States. The passage must be prospectively "innocent," as determined by the coastal state; even if it fulfills the many conditions of innocence, submarines will still be required to effect their passage on the surface. Hence, even if the ICNT regime for straits governed by Article 38 were satisfactory from a security standpoint, the number of international straits falling under Article 45 as well as the "undertow" toward that provision would still stir substantial doubt about the acceptability of the ICNT in this regard.

IV. Transit Passage

The ICNT's regime for straits governed by Article 38 poses its own disturbing questions. Article 38 of the ICNT provides:

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded, except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island.

2. Transit passage is the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through

\(^4\) See, in this regard, the pertinent remarks of Knight, *supra* note 29, at 772.
the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Earlier drafts submitted by the United States and the Soviet Union may provide a foil. In 1971, the United States proposed the following provision for straits:

In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.46

An early Soviet draft provided that “[n]o State shall be entitled to interrupt or suspend the transit of ships through straits, or engage therein in any acts which interfere with the transit of ships, or require ships in transit to stop or communicate information of any kind.”47 There are some striking additions, deletions, and arrangements in the ICNT product, in particular, the introduction of the concept of “transit passage.”

“Transit passage” is a neologism; it lies somewhere between “freedom of navigation” on the one hand, and “innocent passage” on the other. It is a compromise, a concession or a second-best solution48 when contrasted with

46 65 Dep't State Bull., 266 (1971). Thus, John Stevenson in a statement to Subcommittee II of the Seabed Committee, July 28, 1972: “The United States and others have also made it clear that their vital interests require that agreement on twelve mile territorial sea be coupled with agreement on free transit of straits used for international navigation and these remain basic elements of our national policy which we will not sacrifice.” Supra note 4.

For an early review, see Ratner, United States Ocean Policy: An Analysis, 2 J. Mar. L. & Com. 225, 263-64 (1971); Knight, supra note 29, at 773. See also Cundick, International Straits: The Right of Access, 5 Ga. J. Int'l & Comp. L. 107 (1975). Five years after the 1971 proposal, an official explained U.S. objectives as follows: “... what we seek is freedom of navigation (i.e., submerged transit) and overflight for the purpose of transit in straits connecting high seas to high seas. We oppose the restrictions of innocent passage in such straits. ...” Letter of Stuart French, U.S. Department of Defense, to Senator John C. Stennis (Aug. 11, 1976), quoted in Burke, Submerged Passage, supra note 20, at 218-19.


48 Much has been made of the coastal state's interest in having submarines pass on the surface through straits. While concern for navigation and for rules of the road may be valid, there would appear to be no increment of coastal security in having submarines surface when proximate to the coastal state. Indeed, these arguments seem to be based on a misperception of the distinctive nature of the submarine's function and a confusion of the submarine with surface vessels. Even if the transiting submarine were targeting sites within the coastal state, it would not have to
with the earlier maritime power drafts. The key question is whether, on its face or as construed by international law’s methods of interpretation, the new doctrine of transit passage gives rights, in a quantity and with certainty sufficient to make the regime acceptable from a security standpoint. Some commentators are convinced that it does. Pirtle, for example, writes that “[t]he ICNT provisions on transit passage and archipelagic sea-lanes passage constitute a treaty weighted in favor of the navigation and security interests of the United States.”49 U.S. negotiators apparently agree and believe that transit passage is very, very close to the freedom of navigation available on the high seas and, moreover, that the text provides a right of submerged passage by submarines which would unquestionably be deemed to be an exercise of the freedom of navigation.50 In support of this interpretation one may note that the ICNT’s definition of “transit passage” does, indeed, include a reference to the “freedom of navigation” and does not include a requirement of surface passage by submarines. Furthermore, insertion of “transit passage” seems to exclude “innocent passage.” But the text is not explicit and an interpretation based ultimately on an intersection of inclusio and exclusio is not the sort of case a lawyer happily sends to trial.

The more optimistic interpretation of Article 38 encounters a number of obstacles. When a legal document speaks of duties, it may be presumed to mean legal duties and not moral or ethical duties whose content or compliance depends only upon the duty-bound party. The correlative of a duty is a right. Though Article 39 speaks of user duties, it necessarily imports coastal rights. It must be construed as allowing the coastal states a broad prescriptive and applicative competence with regard to transit passage unless we are to assume that the “duties” are no more than moral imprecations. There is no correlative here to Article 236, the sovereign immunity clause, with regard to coastal regulations under Article 42. Of most concern are some of the duties imposed on users by the relevant terms of Article 39(1):

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

   (a) Proceed without delay through or over the strait;
   (b) Refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering

approach the state, since the range of its missiles would permit it to stand off beyond territorial or straits waters. As for showing the flag, that traditional naval function can only be accomplished when the sub has surfaced. The likelihood that the submarine will become a target for nuclear or conventional attack and set off, theoretically, secondary nuclear explosions or radiation contamination increases with increased visibility to adversaries. From a security standpoint, the coastal state’s safety increases the less others know of the transiting submarine’s whereabouts. It is thus more likely that the coastal state’s demand for surface transit is based either on misunderstanding of the situation or the desire to increase its competence in order to augment power vis-à-vis the transiting state.

49 Pirtle, supra note 10, at 486.
straits, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(c) Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;
(d) Comply with other relevant provisions of this Part.

In order for passage to be "transit passage," it must be effected without delay, not be a "threat or use of force against the sovereignty, territorial integrity or political independence of States bordering straits" (note the plural usage here), and not "in any other manner in violation of the principles of international law embodied in the Charter of the United Nations." Because these are legal duties and hence require characteristics that the coastal state must assess, "transit passage" takes on many of the features of innocent passage. In comparison, high seas "freedom of navigation" has virtually no limitations or qualifications other than the duty of reasonableness which attends virtually every right. And insofar as international norms do apply, the danger of provocative unilateral application is minimized by other norms and by the spatial context.

Since the major differences between innocent passage and freedom of navigation are the conditions and right of qualification of the coastal state with regard to the former, "transit passage" seems more a species of innocent passage than a high seas freedom. Though ICNT Article 44 does conclude that "[t]here shall be no suspension of transit passage," that is not the same as saying "[t]here shall be no suspension of passage." In other words, a state bordering a strait might unilaterally determine that a particular transit, in given circumstances, violates ICNT Article 39(1)(b), hence is not a "transit passage" in the meaning of the convention and may either be prohibited entirely or permitted only upon the fulfillment of conditions imposed by the coastal state, for example, upon surfacing.

Moreover, transit passage, as defined in ICNT Articles 37 to 39, requires characteristics that are incompatible with the high seas notion of freedom of navigation. In particular, the word "solely" in Article 38(2), the broad right of characterization necessarily given to the coastal state in Article 39(1)(b), and the ambiguous scope of Article 39(1)(d) add conditions that never burdened "freedom of navigation." Though not without ambiguity, Article 41(1) may constitute possible authorization to the strait state to insist on surface transit of submarines through busy straits as a safety regulation, particularly when contrasted with Articles 42 and 236. The equivocality of these provisions would excite no concern were there an explicit provision stating that submarines may always traverse international straits submerged.

The net result of the ICNT in this regard is that the extension of territorial waters from a 3-mile limit territorializes formerly high seas belts in strategically critical international straits; in return, the ICNT does not unequivocally guarantee a functional equivalent to the virtually unconditional "freedom of navigation" that other maritime states used to enjoy in the belt of international waters through international straits. Instead,
it offers a right of "transit passage," burdened with qualifications unknown to the "freedom of navigation." The situation could begin to approach Jared Carter's nightmare of "ten, fifteen, twenty Berlin corridors." 51

V. THE PROBLEM OF SUBMERGED PASSAGE

Even if "transit passage" affords users significantly more rights than does innocent passage as far as surface passage is concerned, a key question for U.S. security is whether "transit rights" permit submarines, while submerged, to traverse straits. Innocent passage does not accord submarines this right; hence, submarines traversing straits under Article 45 of the ICNT must surface in order for their passage to be deemed innocent.

The section dealing with transit rights does not explicitly require submarines to surface, as does ICNT Article 20 and Article 14(6) of the 1958 convention. It is possible to infer a permission from the absence of a prohibition, a possibility whose reasonableness is enhanced by the fact that the parallel innocent passage provisions do contain an express prohibition. It is, alas, equally possible not to infer a permission which is not explicit, especially when international jurisprudence interprets derogations from sovereignty strictly and textually. U.S. negotiators have apparently told members of the Senate that Article 39(1)(c) of the ICNT does accord submarines the right of submerged passage and, perhaps because of some disquiet about the ambiguity of the text, refer to an "understanding" on this point. 52 In my view, neither textual interpretation nor private understanding succeeds in removing clouds from title.

Do the words, "normal modes of continuous and expeditious transit," in Article 39(1)(c) amount to a nonsuspendable license to traverse straits submerged? In order to reach this result, "normal mode" must be construed as noncontextual, nonnormative, and permanently vessel-specific. But in the text and in general, this interpretation is forced and unreal. Mode of transit of different vessels is, in part, a factual question, but it also has normative and contextual components, for what is "normal" will depend on context, including the legal environment. It is neither implausible nor inconsistent with other ICNT provisions to assume that both the coastal and the flag state will participate in determining "normality" for vessels transiting coastal waters.

As for the vessels themselves, a layman is not equipped to characterize the normal mode of transit of submarines but would assume that mode would vary according to such factors as type of channel, density of traffic, safety factors, nature of mission, rules of the road, and so on. What may be "normal" in internal or territorial waters would be "abnormal" on the high seas, and so on. Knauss, for example, writes that ballistic missile submarines now run submerged through their entire patrol, including


52 Ibid.
international straits, but notes that "it would certainly be easier and safer to go through those narrow and busy straits on the surface." It is quite likely that a modern submarine moves efficiently and safely submerged, but one could not infer from this datum (which might itself be controverted in some contexts) that submerged passage was "normal" for all circumstances. Nor would Article 39(1)(c) appear to override the state's regulatory competence for matters such as navigation and safety. In other words, the user would be hard pressed to justify evading such regulations on grounds that they required departure from its normal mode of transit.

From a textual standpoint, the "normal modes" aspect of ICNT Article 39(1)(c) raises problems not easily resolved, especially in view of the textual orientation of international treaty construction. The "freedom of navigation" for passage through straits established in Article 38(2) is not freedom of navigation in the high seas sense: it is "freedom of navigation and oversight solely for the purpose of continuous and expeditious transit." That qualification was apparently introduced in order to deny ships transiting straits all the other components of freedom of navigation, such as overt military exercises and weapons testing, surveillance and intelligence gathering, and refueling. The purport of the provision is negative, i.e., vessels should refrain from activities other than those incident to transit. The "normal modes" qualification appears in the following context: "Ships and aircraft while exercising the right of transit passage, shall . . . (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress . . . ." The plain and natural meaning of that provision would appear to emphasize the notion of expeditious transit. As two U.S. negotiators commented 1975, "The 'security' problem with submarine and military aircraft transit of straits is in fact one of limiting the right to transit to its normal incidents." In other words, you may do


54 Thus Professor Burke, writing in 1975, observed:

Another contention is that safety requires submerged transit. It seems rather late in the date to urge this seriously in view of the previously wide acceptance of a requirement for surface transit in the territorial sea, including acceptance by the major powers operating nuclear submarines. There may be substance to this point, but concern for safety can be satisfied in other ways more consonant with coastal interests than simply providing for unannounced submerged passage by large nuclear-powered vessels carrying nuclear weapons.

Contemporary Law of the Sea, supra note 14, at 12.

56 Burke argues on the basis of textual analysis that "Article 38 does not authorize the coastal state to determine what is a 'normal' mode of transit each time a vehicle approaches a strait." Submerged Passage, supra note 20, at 214. That may be so, but the ICNT would appear to permit the coastal state to determine or participate in determining "normal mode" for classes of vessels and/or for specific time periods, e.g., periods of crisis.

things normally associated with modes of continuous and expeditious transit, even though such activities would otherwise be forbidden in transit passage. Sonar, for example, may yield information of intelligence value, and one of the ancillary functions of the use of sonar on the high seas may be the intelligence dividend. Even though you may not gather intelligence in transit passage, you need not suspend sonar when you transit straits if you ordinarily use sonar in your continuous and expeditious transit. Thus, the simplest or most natural interpretation of Article 39(1)(c) is one that does not focus on normal mode, whatever that may be, but rather on the activities ancillary to transit, which, absent this provision, would be prohibited by Article 38.

Alternative interpretations of Article 39 encounter other problems. There are, for example, internal contradictions if Article 39(1)(c) is read to permit submerged transit of straits. The subsection immediately preceding subparagraph (c) recognizes the coastal state's competence to appraise the contemplated passage, inter alia, for its conformity to the principles of international law embodied in the UN Charter. If submerged passage is secret passage, then how can the coastal state perform that function under subsection (b)? How can it control unauthorized research and survey activities which may be undertaken by the submerged vessel under Article 40? How can it implement its safety and sea lanes regulations (Articles 41 and 42), and so on? If anything, the structure of the entire section dealing with transit passage emerges as a more coherent drafting complex if no right of submerged passage is hypothesized.

The provisions regarding innocent passage, including the requirement that submarines traverse territorial waters on the surface, appear in part II of the ICNT, while the issue of transit passage occurs in part III. Could an authoritative interpreter infer from this an implied bar of the rules of innocent passage to all of part III? Such a construction seems forced and, for such a grave matter, unsatisfactory. It is far more reasonable to assume that provisions will be interpreted by reference to the entire instrument, a point confirmed by the Vienna Convention and the recent Beagle.

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67 One would, in this regard, take exception to Professor O'Connell's view that free transit would permit one to go through using your sonar, with helicopters engaged in dunking sonar operations, with missiles unhoused, etc., etc., and doing a zig-zag pattern and the like, all of which one would assume you could do in the high seas but not in the territorial seas engaged in innocent passage.

BRITAIN AND THE SEA (Papers and Records of a Conference at the Royal Naval College, Greenwich, 1973), cited in Young, supra note 4. To the contrary, it would appear that the words "normal mode," reasonably construed, would limit many of the operations in Professor O'Connell's reductio. Compare Knight, supra note 29, at 773, especially the reference to "on-board activities."

68 Despite Professor Burke's assertion (Submerged Passage, supra note 20, at 208), it is difficult to see how the qualifications of ICNT Articles 38 and 39 could be as easily fulfilled by a submarine as a surface vessel. With regard to Article 38(1)(c), for example, how can one tell if a passing submerged vessel is or is not preparing to cause injury?

Channel arbitration. In any case, part III does make incorporations by reference to the rules of innocent passage, for example in Article 45, and refers generally to other provisions in Article 38(3).

The presence of conditions whose fulfillment must be certified by the host state in order for passage to be innocent and hence nonsuspendable would probably lead an international tribunal, were it seized of the case, to conclude that passage is not a right at all, but a type of license. This is not the place to enter into extensive discussion of international servitudes, but it is worth recalling the International Court's judgment in the Right of Passage case. There the Court distinguished between passage not subject to conditions by the host, a virtual servitude whose suspension by the host would be delictual, and passage subject to conditions, for which suspension by the host could be lawful. It is apparent with regard to straits that nothing akin to a servitude is being created in the ICNT. Hence, anticipation of extensive construction of the rights granted would appear unwarranted.

Allegations by U.S. negotiators to members of the Senate of an "understanding" on the right of submerged passage through straits are puzzling.

Controversy concerning the Beagle Channel Region [Chile v. Argentina] (Santiago 1977).


Goldwater letter, supra note 50. Professor Burke develops another conception of "understanding." He sifts "comments, questions and proposals" about submerged passage and finds that these confirm, in his judgment, an understanding shared by participants that submarines would have a right of submerged transit through straits. Submerged Passage, supra note 20, at 205. "There are many serious problems with this approach. The first, as mentioned, is that there is no record to speak of, but only fragments; how probative such a record would be is open to grave question. The second is that many of the statements that are available can be disqualified for interest. The fact that the United States, for example, continued to insist on its understanding of an equivocal text (see id. at 206) neither banishes the obvious equivocality of the text nor proves that others accepted the interpretation pressed by the United States. It simply proves that the text is equivocal and that the United States, unable to secure a text that clearly expressed its interest, had no choice but to say petulantly, "Well, this is what we mean." Alas, the objective in this game is not to make statements, off the board, but to win the text that you need. Third, the acquiescence by others is derived essentially from the absence of evidence in the "record" that others did not object. Whatever the chairmen of individual committees may have thought, recent diplomatic history should demonstrate the peril of this course. In negotiations with the People's Republic of China over Taiwan, the United States apparently satisfied itself with an understanding based on its own statement, which was not challenged by China. At a later stage, China "clarified" its position and the U.S. "understanding" dissolved. Despite all of the alleged "understanding" he tries to reconstruct, Professor Burke is still somewhat cautious about conclusions; in a single page, he shifts from an "unmistakable" right of submerged passage, to "little room for question," and then "strongly suggests" (id. at 207). The ambivalence is important. The point of the
If it is a conference-wide understanding that is documented and/or incorporated by reference through a general provision, then this is a telling point. There are, of course, conventional requirements for such an understanding. There is a possibility that the Vienna Convention in Article 31 may require that such an agreement be between all the parties or be accepted by the other parties.

Unfortunately, there is no record of such an understanding and no way of establishing that all parties to the treaty share or accept this ancillary agreement. If our negotiators are referring to a suppressed document, presumably concluded with a much smaller number of states, its power to counter the plain and natural meaning of the convention would appear doubtful, to say the least. Whether an agreement that has not been registered under Article 102 of the United Nations Charter can be invoked against a multilateral treaty, which presumably will have been, is also doubtful.

"An oral agreement," Samuel Goldwyn quipped, "isn't worth the paper it's written on." The idea of an undocumented "understanding" among all or even most of the more than 150 delegations at the LOS conference is preposterous, and the lawyer who would believe it, advise reliance on it, or invoke it before a tribunal would be very naïve indeed. If our negotiators are referring to "secret" understandings with key strait states about a U.S. right of submerged transit through their straits, then one can only remark on the peril and shortsightedness of such a course. If the plain and natural meaning of the ICNT is against these understandings, then they are unlikely to survive changes of government in the strait states, if that long. Why there should be an understanding on something so important at a meeting whose manifest function is to articulate norms on the subject is also puzzling. The asymmetry in our willingness to accept understandings in matters vital to us but to concede explicit provisions in matters vital to others is more than disquieting.

VI. APPRAISAL AND CONCLUSION

The straits regime of the ICNT poses two problems: the absence of an express right of submerged passage in a context of other provisions, many of which could be inconsistent with an allegedly implied right, and, second, the more general problem, common to the innocent passage regime, of the present inquiry is not that submerged passage is excluded, but that it is not certain in the text, and, in the absence of express confirmation, is unlikely to defeat coastal competences which are explicit and could be used to require surface passage and, in some circumstances, ban passage and overflight.

44 This hypothetical strategy is reminiscent of Boss Hughe's apodigm that an honest politician is one who stays bought. The notion that bilateral agreements with particular states are sound strategy for matters of the sort discussed here rests on the assumption that association of a state with one alliance or another is stable. Recent experience in Iran, Ethiopia, Afghanistan, Somalia, Vietnam, and China, to mention only a few, should demonstrate to both superpowers the advantages of a system of real rather than personal rights, for uses deemed to be of inclusive security concern.
enhanced primary competence of the coastal state to characterize any passage below, on, or above the surface as violating "transit" requisites and hence not "transit passage."

The language of the Camp David agreement of 1978 dealing with straits passage may be contrasted with that of the UNCLOS text. It is particularly instructive for, though bilateral, it purports to enunciate many general norms and is the first major diplomatic statement on the subject since the ICNT draft. Moreover, the United States played a significant role in its formulation. Rather than adopting or even intimating any relation with the UNCLOS formula, the Camp David formula states in part: "[T]he Strait of Tiran and the Gulf of Aqaba are international waterways to be open to all nations for unimpeded and nonsuspendable freedom of navigation and overflight."65 With this sort of formula, tortured, casuistic interpretations are not necessary. Indeed, Camp David is redundant in emphasizing precisely what the ICNT overlooks. The waterways are characterized as "international" and any hint of a territorial competence with regard to passage is repeatedly excluded; there is no "right of transit" characterizable by the coastal state, but instead and only the traditional freedom of navigation, and that right may not be impeded or suspended. Interpreted logically or teleologically, Camp David produces freedom of navigation and, were it necessary, even a right of submerged transit. The ICNT achieves nothing approaching that clarity.

Empson analyzed seven types of ambiguity in our culture,66 but a wise old country lawyer was wont to remark that there are only two kinds that matter: your ambiguities and the other fellow's. It is as unwarranted to contend that UNCLOS rejects outright the types of straits passage needed for U.S. security as it is to contend that UNCLOS grants them outright. The problem is the ambiguity. It would be imprudent to ignore the erosion in the UNCLOS draft of key aspects of a maritime regime that will continue to be important to the United States and irresponsible to deny the transformation of certainties into ambiguities. In the changing world power process, these may prove to be the other fellow's ambiguities. Fortunately, there are yet opportunities, at the international and national levels, for dispelling any possible misunderstandings about the regime of straits and national security and for assuring a regime that will serve the common interests of the world community.

66 W. EMPSON, SEVEN TYPES OF AMBIGUITY (1930).
THE REGIME OF STRAITS AND THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

By John Norton Moore *

I. INTRODUCTION

The negotiations at the Third United Nations Conference on the Law of the Sea have been the most important catalyst of this century for a new legal and political order for the oceans. The conference, together with its preparatory work within the "Seabeds Committee," has indelibly stamped ocean perspectives. Even without a widely acceptable, comprehensive treaty the influence of these perspectives on state practice will be profound—indeed, it already has been, for example, in legitimizing 200-mile coastal fisheries jurisdiction. If the conference is able to clear the remaining hurdles, particularly that of deep seabed mining, the new treaty is likely to govern oceans law for the foreseeable future.

One area of the negotiations that is generally regarded as concluded is that of the regime for transit of straits. The revised Informal Composite Negotiating Text (ICNT/Rev.1), which embodies the conference's work product, includes a chapter on straits used for international navigation and a related chapter on archipelagic states. These chapters are not among the remaining unresolved issues. Within the conference resolution of these issues has been welcomed, as it has been widely understood that their satisfactory resolution was a sine qua non for a successful treaty.

Recently, there have been two serious and opposing challenges con-

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cerning straits from some members of the oceans and international legal communities within the United States. On the one hand, some such as Richard G. Darman, writing in a recent issue of Foreign Affairs, have challenged the importance of straits transit and have sought in a revisionist mode to "rethink United States oceans interests." On the other hand, some such as Professor W. Michael Reisman, writing in this issue of the Journal, while reaffirming the importance of straits transit, have challenged the adequacy of the negotiated straits regime for national security needs. Either of these virtually opposing challenges, if widely accepted, could influence the outcome of Senate debate on advice and consent to a new law of the sea treaty, and more broadly and importantly could sow confusion as to the future regime of straits transit in international law and U.S. policy toward it.

In making this statement, I do not challenge the legitimacy of expression of these strongly held views. Richard Darman and Michael Reisman are among our most sophisticated theorists, and their articulate surfacing of both points of view, which for some time have been undercurrents in the oceans community, should lead to a more complete understanding of the issues.

II. THE IMPORTANCE OF A STRAITS REGIME

A straits regime that recognizes the community interest in transit through straits, and provides freedom of navigation through, over, and under


A central theme of the Darman challenge, echoing a view of some members of the seabed industry, is that navigational rights in the treaty may not be worth the costs that they project will be associated with acceptance of the treaty, and particularly with what they feel is likely to be an ambiguous regime for seabed mining. Professor Reisman does not raise the seabed mining issue and is concerned with the merits of the national security issues associated with straits transit. The interpretational challenge he espouses, however, seems first to have been publicly triggered by a letter of July 23, 1976, from Senator Barry Goldwater to a number of international lawyers inquiring in less than neutral terms whether the conference text would "guarantee" submerged transit through straits. It is said by some in Washington that the Goldwater letter may have been inspired by one segment of the seabed mining industry, a speculation perhaps fostered by a negative response from a former partner of a prominent Washington firm representing one of the seabed industries that conceded that the author was "not an international law scholar." This, of course, is in any event not a responsibility of Professors Darman or Reisman whose challenges must be fairly dealt with on their merits and on their merits alone.

The United States should not and will not adhere to a law of the sea treaty unless it unambiguously protects assured access to seabed minerals. This is a pledge repeated by every administration that has dealt with the issue and is an article of faith on Capitol Hill. If seabed mining is dealt with adequately in the negotiation, the hypothetical trade-off that concerns Darman, of course, will be only an imaginary "horrible."
strait used for international navigation while meeting legitimate safety and environmental concerns of straits states, is of fundamental importance in ocean law. Although there has been repeated focus on straits transit as a requirement of maritime states, and particularly as a requirement for acceptance of a comprehensive treaty by the United States and the Soviet Union, the principal reason for such transit rights is that they are strongly in the interest of the entire community of nations. Straits such as Bab el Mandeb, Gibraltar, Hormuz, Dover, Lombok, Malacca-Singapore, and over a hundred others serve as routes for the bulk of the world's shipping trade. To permit extending coastal states' jurisdiction to enable them unilaterally to control or impose conditions on such an important community freedom would be inequitable, inefficient, and conducive to conflict. Transit through such chokepoints is fundamentally different from transit through the territorial sea in general, and in the common interest must be recognized as such.

As with many important interests, the costs associated with any failure to recognize freedom of navigation through straits will not necessarily be immediately manifest. Initial challenges may be subtle, plausible, and limited. Through time, however, the common interest will be eroded by unwarranted restrictions on transit, discrimination among users, uncertainty of transit rights, inefficient and inconsistent regulations, efforts at political or economic gain in return for passage, increased political tensions, and perhaps even an occasional military confrontation as in the Corfu Channel case.4

Similarly, any straits regime, to be lasting, must fairly meet the real concerns of strait states concerning safety of navigation through straits and protection of the marine environment. Failure to establish an adequate international framework for such protection in the short run will detract from the effort to protect the oceans environment and in the long run may seriously threaten navigational freedom as strait states react through unilateral claims.

The issue, in short, is not any one strait, any one country, any one period of time, or any one commercial or strategic need, but rather protection of the common interest in straits transit and a lasting and appropriate balance between it and the safety and environmental concerns of strait states. Had this situation not been broadly understood at the Third United Nations Conference on the Law of the Sea (UNCLOS), no amount of insistence by the maritime nations would have sufficed for agreement.

In addition to this fundamental basis for protecting freedom of navigation through straits, there are a variety of significant commercial, strategic, and conflict management factors of concern to all nations but reflected most immediately in their impact on the interests of the United States, the

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4 For a broader frame of reference concerning these straits, seabed mining, and other oceans policy issues in the context of overall U.S. foreign policy interests, see J. N. Moore, A FOREIGN POLICY FOR THE OCEANS 1 (Oceans Policy Study 1:4, 1978).

Soviet Union, and other maritime nations. These include:

- Efforts to increase the stability of the strategic balance between the United States and the Soviet Union (an issue that rationally should be a matter of great concern for all nations) benefit from actions that increase the relative invulnerability of the strategic missile (SSBN) submarines of both sides. The oceans are ideal for dispersing targets and therefore deter any destabilizing temptation toward first strike. Similarly, the number of SSBN submarines of both sides is more easily verifiable and, at least at current technologies, oceans strategic forces are less vulnerable and less accurate than land-based missiles, which doubly deters counterforce first-strike temptations and increases stability through verifiability. Given these stabilizing tendencies of ocean strategic forces, it is in the common interest that an oceans regime protect the secrecy of SSBN forces and not, for example, require that they surface in straits or provide notification to strait states of transit (with associated intelligence targeting of such notice). Arguments made by some American scholars that the Trident and associated missile systems, because of greater range, would not need to transit straits miss the point, as all such arguments accept a lessening of the ocean area available for SSBN forces and thus in some degree decrease the relative invulnerability of seaborne forces. Moreover, to the extent that legal restraints on SSBN forces appear to fall more heavily on Soviet forces, they may encourage further Soviet reliance on the more destabilizing land-based missiles. As technology for detection of strategic submarines develops and as the number of such submarines decreases with deployment of the Trident system, it will be even more important for the oceans regime not to introduce factors further pressuring the relative invulnerability of sea-based deterrent forces.

- As an open society with strong traditions for following a rule of law, the United States would not be unreasonable in being concerned about possible lack of reciprocity in straits transit if its SSBN submarines, for example, were legally required routinely to surface in straits. Would the restraint of law operate equally on other nations, or would there be a temptation to take advantage of the greater secrecy afforded by a less open society? Whether or not this would be the case, as a legal norm with arms control implications, any restrictive requirements for SSBN submarines would have some of the same dangers for all parties as an unverifiable arms limitation agreement.

- It is important to preserve transit rights of aircraft, both civil and military. Moreover, such transit rights are most needed precisely

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1 See, e.g., Osgood, U.S. Security Interests and the Law of the Sea (paper prepared for the Conference on the Law of Sea: U.S. Interests and Alternatives, the American Enterprise Institute, Washington, D.C., Feb. 14, 1975). Darman also emphasizes "the increased range and sophistication of U.S. missiles and missile-launching submarines" as an argument against the need for straits transit rights. See Darman, supra note 3, at 375, 376. Charles E. Pirtle also sounds the Osgood-Darman trumpet. In a recent paper he says, "The purpose of this paper is to challenge the validity of U.S. claims that national security is inexorably bound to a right of unimpeded transit through straits." Pirtle, Transit Rights and U.S. Security Interests: "Straits Debate," 5 OCEANS DEV. & INT’L L.J. 477, 479 (1978). One can only marvel at the rigidity of the straw man constructed by Pirtle in this phrase.
in those settings where political pressure would make them difficult if not impossible to protect if they were ceded to others. United States overflight of the Strait of Gibraltar during the Yom Kippur War is a case in point: overflight of land territory had been denied even by our NATO allies, and negotiation of such a right would have been impractical if not impossible. This concern for freedom of overflight is strongly shared by those charged with protection of commercial aviation interests around the world; it would be a mistake to conceptualize it as a need only for military aircraft or only in a particular area.

- Unimpeded access through straits for commercial ships on a global basis may be as important as preservation of military transit rights. For example, the United States, Japan, the nations of the European Economic Community, and many developing countries are critically dependent on supplies of oil that must initially move through one or more straits. Yet it is precisely large tankers, liquefied natural gas (LNG) ships, and other “controversial” vessels such as nuclear-powered ships that present the greatest potential problem of multiple and inconsistent coastal state regulations or other inefficient restrictions. Moreover, because unnecessary increased costs resulting from an inefficient or restrictive straits regime ultimately will be borne by all, this commercial interest is substantial even for nations with a small merchant marine who rely on flag vessels of other nations.

- Modern nuclear submarines run safest “in their normal mode,” that is, submerged, and it is a mode for which they are designed. On the surface they are less maneuverable, their systems for avoiding collision work less well, they are difficult to see even with good visibility, they present only a small and possibly misleading radar target for other shipping seeking to avoid them, and they must travel in an area of higher density of shipping with consequent increased risk of collision. For these reasons, as well as for the inconsistency with their primary mission, SSBN submarines do not transit straits unless the depth and other hydrographic characteristics permit safe submerged navigation. To require them to transit on the surface would be to increase the collision risk significantly, despite the occasional “intuitive” argument to the contrary one sometimes hears based on assumptions about shallow straits these submarines are unlikely to transit in any mode.

- To permit strait states discretion to control shipping or aircraft could lead to expanded conflict. Transit rights through important international canals such as Suez are frequently guaranteed even for belligerents (provided the canal state itself is not involved). The rationale for these provisions is to avoid drawing the canal state into the conflict. Under the laws of neutrality, any differential favoring of one belligerent could occasion loss of neutral rights and broaden the conflict to include the strait state. And in the nuclear age any effort to identify when an SSBN submarine might be in a strait could, if successful, risk routine targeting of the strait, just as home ports of SSBN’s may be routinely targeted.

- To permit strait states control of warships or commercial navigation or overflight could spill over into other areas of coastal state functional jurisdiction, such as any potential economic zone, and occasion increased restrictions in those areas. This spillover threat and the long-run relation between transit rights and other oceanic free-
doms are usually ignored by those focusing narrowly on military straits transit rights. There is also a similar spillover effect at work between ship transit rights and overflight rights and between military and commercial rights.

- Military and commercial activities may be as effectively discouraged when rights are uncertain and ambiguous as when there are no legal rights. As Ambassador Elliot Richardson has observed, for adequate protection it is necessary that transit rights be clear and widely accepted. If an exercise of a right is to be accompanied by a severe political dispute about the existence of that right, then the value of the right itself is impaired. *

Reisman and I are in agreement that freedom of navigation through straits is important, and I believe that his article makes an original and substantial contribution to an understanding of that importance. Darman, however, in his revisionist effort at "rethinking U.S. interests," succeeds only in rethinking them poorly when he questions the importance of straits transit rights. Difficulties with the Darman analysis include, among others, the following.

First, the argument "that an increasingly territorialist regime could be of net advantage to the United States" * is seriously in error for analyzing the U.S. interest in straits transit and navigational freedom as a zero-sum game against the Soviet Union. The most important issue, as discussed above, is fundamentally to preserve through time the common interest in straits transit. Darman's argument is also simplistic in failing to take account of a variety of important factors that cut the other way in his own analysis. These include the mutual interest in stable sea-based strategic forces, the risk of asymmetrical noncompliance with nonverifiable arms-affecting measures, the greater dependence of the United States on imported raw materials, particularly oil, and indeed the fundamental asymmetry in the strategic geopolitical equation: the Soviet Union is a land power bordering on its most important allies, while the United States must be more concerned with allies across the sea in Europe, Asia, and elsewhere. Because U.S. naval roles are predominantly sea control and Soviet ones predominantly sea denial, even if we were to assume solely a zero-sum analysis against the Soviet Union and that a loss of straits transit

*a See, e.g., Richardson, "National Security and the Law of the Sea" (July 13, 1974) (Remarks by Ambassador-at-Large Elliot L. Richardson, Special Representative of the President for the Law of the Sea Conference, at the Launching of the U.S.S. Samuel E. Morison, Bath, Maine, on file at Center for Oceans Law and Policy, University of Virginia). In this statement Ambassador Richardson points out:

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

Id. at 8.

* Darman, supra note 3, at 377, and generally at 376-78.
rights or navigational freedoms would have a heavier impact on the Soviet Navy than on the United States Navy, such a loss still would not necessarily create a security gain for the United States.\textsuperscript{10} That is, measures that inhibit use of the oceans, because of the asymmetrical need for oceans use, may affect U.S. security needs even more. Put another way, a hypothetical legal constraint that inhibits U.S. naval forces by 10 percent in ability to carry out a particular mission and simultaneously inhibits Soviet counterforces by 15 percent may still be a net loss to the United States because the inhibition on Soviet naval forces may be only partially passed through in effective sea denial, and thus may be more than offset by the decline in U.S. ability to perform a vital mission. Another way to conceptualize the same effect is that the Soviet role, largely sea denial, may now be partly performed by the across-the-board 10 percent inhibiting factor more efficiently than by Soviet counterforces. By definition, a 10 percent inhibiting restraint is 100 percent effective in achieving a 10 percent reduction, yet it would not be reasonable to assume equivalent 100 percent effectiveness for any counterforce sea denial effort. The net effect, then, could be a reduction in the ability of the United States to perform a vital defense mission. Nevertheless, because the issue is not merely zero sum against the United States and because it involves stability of strategic forces, it would still be in the Soviet interest to support freedom of navigation in general and through straits in particular.

Second, Darman's statement that "[f]or the past decade . . . 'national security' interests—particularly interests associated with military functions—have been predominant in the development of U.S. policy toward a comprehensive treaty on the Law of the Sea"\textsuperscript{11} is simplistic. It merely repeats a popular (and no doubt deeply felt and honestly held) belief, particularly of seabed mining groups, that their interest was being neglected—or was about to be traded off—for something else. During the period of over 3 years in which I chaired the process of preparing instructions for the U.S. delegation, it was repeatedly made clear that the United States had a variety of objectives that could not be sacrificed, notably including assured access to seabed minerals as well as freedom of transit through, over, and under straits.\textsuperscript{12} The National Security Council Interagency Task Force spent more time by far on nonmilitary issues than on military ones, and if any single issue received more attention than others, it was seabed mining. It is time that analysis of U.S. policy move from this myth about overemphasis on military concerns and understand that just because national security interests are important does not mean that they are the only interests understood to be important or that other interests are being traded off.

\textsuperscript{10} See generally for background on naval defense issues, J. NATHAN & J. OLIVER, THE FUTURE OF UNITED STATES NAVAL POWER (1979).

\textsuperscript{11} Darman, supra note 3, at 375.

\textsuperscript{12} Ambassador Richardson has reaffirmed this point that we will not trade off basic interests to gain protection for navigation. See Richardson, supra note 8, at 12. No U.S. representative to the conference has stated a different view.
The most bizarre of the Darman arguments is his urging the weak pattern of executive and congressional response to “creeping jurisdiction” as persuasive evidence that straits transit and other navigational freedoms are unimportant to the United States, despite the repeated assertions of official U.S. spokesmen to the contrary. But if an on-the-merits analysis suggests that such freedoms are important, that importance is altered not at all by a recitation of instances in which the interest was not adequately protected. Rather, the argument is a classic error in logic, asserting that the "is" demonstrates the "ought."

In addition, it simply is not true that core strait transit rights and navigational freedoms have been acquiesced away by the United States. The exercises in low-level pragmatism that have occurred at the expense of ocean interests have generally been only at the periphery of such rights and usually have not directly involved navigational freedoms. Indeed, the United States did reaffirm its continuing position of overhaul rights through Gibraltar when challenged by Spain in the Yom Kippur War, and more recently has reaffirmed its longstanding policies on navigational freedom and has initiated a systematic program for assuring its ocean freedoms. The pattern of U.S. response is also complicated by the difficulty of proving in advance the effect of unilateral assertions of one form of jurisdiction on another. In passing the 200-mile Fishery Conservation and Management Act, for example, Congress was not saying that the encroachment of creeping jurisdiction on navigational freedoms was unimportant. Rather, it was not persuaded that an extension of fishery jurisdiction would result in encroachments on navigation, and throughout the debate proponents of the act insisted that these were separate issues.

Finally, the Darman argument fails to take account of the fact that the executive branch has been pursuing a multilateral strategy for resisting "creeping jurisdiction" and in that context unambiguously insisted on straits transit rights and other navigational freedoms. Darman ignores this pattern of practices in concluding that these interests have been left to atrophy. In this connection, it should be remembered that the multilateral forum in which navigational interests were vigorously espoused has been regarded as the most important arena for the development of oceans law and thus for protecting freedom of navigation. Finally, although I believe that the pattern of protection of all ocean interests, not just navigational rights, has been weaker than it should have been, the reason is rooted more in failure to conceptualize and systematize a foreign policy for the oceans than in any assessment that a particular interest was unimportant.

The principal problem with the Darman analysis is less these and other particular failings of his own point of reference than the narrowness of that reference. The importance of straits transit goes far beyond the

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13 Darman, supra note 3, at 378-79.
14 Like many other contemporary international relations theorists, Darman seems seriously to underestimate the role of authority in international relations. See Darman, supra note 3, at 362. See generally on the point, Moore, The Legal Tradition and
military needs of any particular country at any point in time. The real issue is whether we will have a lasting oceans regime that protects the navigational heritage of all nations while meeting the legitimate concerns of coastal states. In what may be its principal achievement, UNCLOS has developed such a regime for straits.

III. BACKGROUND TO INTERPRETING THE UNCLOS STRAITS REGIME

A Point of Comparison: Ambiguities and Inadequacies of Straits Transit Prior to the UNCLOS Consensus

Both interpretation and evaluation of the straits regime of the Third United Nations Conference on the Law of the Sea presuppose a point of reference. What is the pre-UNCLOS straits transit regime and how does it compare with the UNCLOS regime? Reisman’s analysis suggests that the pre-UNCLOS regime is simply one of freedom of navigation through areas of straits beyond 3 nautical miles and that this is the appropriate point of comparison with the UNCLOS regime. Existing international law, unfortunately, is less clear.

The United States is a party to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone which establishes a general regime of “innocent passage” for transit through the territorial sea. Article 16(4) of that convention seems to envisage the regime of innocent passage for straits used for international navigation subject only to the proviso that “[t]here shall be no suspension” of such innocent passage rights. Under the Geneva Convention, then, whatever ambiguities and inadequacies there are in the regime of “innocent passage” in general will apply in areas within straits overlapped by the territorial sea, except as the doctrine of changed circumstances (increase in breadth of the territorial sea) or a pattern of customary law/historic rights for straits transit has altered that regime.

The current regime of “innocent passage” unfortunately is replete with ambiguities and inadequacies if applied generally to straits transit. These include:

- failure to recognize the essential separateness from the standpoint of community policies of a regime for passage through the territorial sea in general and for transit of straits used for international navigation;
- no right of overflight as a matter of independent oceans law;
- a requirement that submarines in innocent passage must “navigate on the surface and . . . show their flag”;
- the subjectivity inherent in the definition of “innocent passage.”


coupled with the right of coastal states to "take the necessary steps in . . . [their] territorial sea to prevent passage which is not innocent";

- uncertain and imbalanced coastal state regulatory competence over vessels in innocent passage, particularly uncertain prescriptive and enforcement competence for dealing with vessel-source pollution;

- uncertainties concerning the protected category of "strait used for international navigation"; and

- the failure of some strait states to adhere to the 1958 Geneva Convention with its definition of "innocent passage" and their consequent assertion of even more restrictive norms such as requirements for prior notification for transit of warships, and ambiguous or highly restrictive concepts of passage through "archipelagic waters" or broadly defined "historic waters."

Equally unfortunate in light of these ambiguities and inadequacies of the innocent passage regime, the Second United Nations Conference on the Law of the Sea in 1960 failed to reach agreement on the breadth of the territorial sea. While one may reasonably infer from its voting records, plus the limitation of the contiguous zone to 12 miles in the 1958 convention, that at maximum the territorial sea may not exceed 12 nautical miles, that is slight comfort for strait transit rights in straits from 6 to 24 nautical miles' width. Even prior to the UNCLOS consensus that combined a 12-mile maximum breadth for the territorial sea with new provisions on "strait used for international navigation" and "archipelagic states," considerably more states recognized a territorial sea of up to 12 miles than supported the U.S. position of only 3 miles. In current state practice, as of November 2, 1979, 23 states, including the United States, recognized 3 miles; 7 recognized limits beyond 3 but less than 12; 76 claimed or accepted 12 miles, including the Soviet Union, the People's Republic of China, Canada, Mexico, Italy, France, India, and Indonesia; and 25 recognized limits beyond 12 miles, ranging from 15 to 200. This pattern of state practice makes it increasingly difficult to urge that any territorial sea beyond 3 nautical miles and up to 12 is unlawful. Certainly as a basis for future protection of strait transit, breadth alone is a frail reed indeed.

There is a sound alternative legal basis in the event of a breakdown in UNCLOS negotiations, but it does not offer the certainty of Reisman's hypothetical point of comparison. Thus, although the Soviet Union has long maintained a 12-mile limit, it asserts historic rights for freedom of navigation through straits used for international navigation, even if such straits are overlapped by the territorial sea. The United States, I believe, would be on even stronger grounds in asserting customary law rights in straits broader than 6 miles as state practice moves toward a 12-mile limit. Certainly, U.S. acceptance of the 1958 Territorial Sea Convention did not contemplate a territorial sea of 12 nautical miles completely overlapping more than 116 straits used for international navigation. This right of free or unimpeded transit through straits in the 3- to 12-mile range (i.e., in straits broader than 6 miles and narrower than 24) is reinforced by the Japanese decision to recognize a territorial sea of 12 miles except in five
straits where a 3-mile maximum breadth is maintained. It is also power-
fully reinforced by the UNCLOS straits model recognizing transit passage
rights through straits used for international navigation. Indeed, because
of the potential power and influence of the UNCLOS straits model in
interpreting rights of straits transit, it would be difficult to separate the
UNCLOS regime from an evolving customary international law of straits
transit. Under such an evolving customary law, strait state competence
simply does not extend to transit.

Although I believe for these reasons the United States is on sound legal
ground in insisting on freedom of navigation through straits used for inter-
national navigation with or without a comprehensive law of the sea treaty,
the contemporary law is a great deal messier and more uncertain than
is implied in Reisman’s model. Moreover, at least some important straits,
such as Malacca-Singapore, are not protected by Reisman’s “high seas”
model since they are less than 6 miles wide. Finally, the “high seas”
model does not accurately reflect many other ocean claims which, though
not recognized by customary international law, do reflect insistent pressures
for expanded coastal state jurisdiction in the contemporary oceans political
arena. Most importantly, these include claims by “archipelagic states” to
enclose important straits with “archipelagic baseline systems” and claims
by coastal states to regulate vessel-source pollution and thus, fairly di-
rectly, shipping. In the real world, accommodation of these interests in
ways that meet coastal and archipelagic states’ concerns while protecting
navigational freedoms can be achieved far better through broad-based
negotiation than through a pattern of response to unilateral claims.

Applicable Principles of Interpretation

Reisman indicates as a starting point for interpretation of the UNCLOS
text that “[s]ince UNCLOS will produce a complex convention, an essen-
tially textual approach to construction, as conceived by the Vienna Con-
vention on the Law of Treaties, would appear required because of the
Vienna Convention’s directives, and ineluctable owing to the absence of
a formal record of the travaux.”10 I believe, as will be seen, that even a
strict textualist approach to the UNCLOS regime strongly supports a right
of submerged transit and other essential elements of a viable straits transit
regime. Nevertheless, if a strictly textualist analysis left any ambiguity,
as Reisman feels is the case, it would appear that under the “Vienna
Convention directives” recourse may be had to supplementary means of
interpretation. Thus, Article 32 provides:

Recourse may be had to supplementary means of interpretation, in-
cluding the preparatory work of the treaty and the circumstances of
its conclusion, in order to confirm the meaning resulting from the
application of Article 31, or to determine the meaning when the in-
terpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

10 Reisman, supra note 4, text at notes 19 and 20.
(b) leads to a result which is manifestly absurd or unreasonable.\textsuperscript{17} Moreover, even Article 31, the "[g]eneral rule of interpretation," requires that "[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";\textsuperscript{18} thus, overall textual context and object and purpose should be considered even in threshold determinations. Paragraph 4 of Article 31 also provides, "[a] special meaning shall be given to a term if it is established that the parties so intended,"\textsuperscript{19} and thus makes clear that full context concerning special meanings of terms should also be considered in threshold determinations. Presumably, Reisman's principal substantive thesis is that the UNCLOS regime is ambiguous (and thus squarely triggers Article 32) rather than that it is unambiguously opposed to the United States interpretations. Indeed, in concluding he writes: "It is as unwarranted to contend that UNCLOS rejects outright the types of straits passage needed for U.S. security as it is to contend that UNCLOS grants them outright. The problem is the ambiguity."\textsuperscript{20} Any interpretation asserting that the text clearly prohibits submerged transit, for example, would be manifest nonsense, and to my knowledge no one has made such an assertion.

This somewhat broader interpretive ambit of the Vienna Convention, at least for settings of asserted ambiguity, more nearly reflects the descriptive and prescriptive conclusions of the most sophisticated analysis of the law of interpretation of international agreements to date, that of McDougal, Lasswell, and Miller in The Interpretation of Agreements and World Public Order.\textsuperscript{21} In summarizing the practice of examining preliminary events prior to the outcome of an agreement, the authors say: "Thus today it is fair to say that the majority of writers and decision-makers reject the restrictions of earlier years—even if in somewhat indirect ways—and favor instead a thorough contextual analysis within the limitations of time and resources available in any given case" (and by "contextual" the authors refer to full context and not just to full textual context).\textsuperscript{22}

Reisman implies as a second reason for his virtually exclusively textual analysis that it is "ineluctable owing to the absence of a formal record of


\textsuperscript{18} The Vienna Convention on the Law of Treaties, supra note 17.

\textsuperscript{19} Ibid.

\textsuperscript{20} Reisman, supra note 4, text at note 66.

\textsuperscript{21} M. McDougal, H. Lasswell & J. C. Miller, The Interpretation of Agreements and World Public Order (1967).

\textsuperscript{22} Id. at 123. The background of the Vienna Convention, of course, suggests a more rigid textualist emphasis than this quotation. As the legal realists have reminded us, however, doctrine and reality are not necessarily coincident, and in practice interpretation under the convention may well approximate the quoted McDougal, Lasswell, & Miller summary despite the syntax used to achieve such a result under the convention.
the travaux." It is an overstatement to say there are no formal travaux, since official conference records are kept as well as certain notes and records of the Secretariat. Nevertheless, Reisman is essentially correct that the formal record is sketchy and incomplete. As has been seen, however, it is not merely formal travaux that the Vienna Convention contemplates as a supplementary means of interpretation but also more generally "the preparatory work of the treaty and the circumstances of its conclusion." In its analysis of Article 32 of the Vienna Convention, the International Law Commission clearly refused to limit applicable travaux in any way, for example, by whether the materials were published or unpublished. Instead, it said, in an unmistakably broad concept of travaux, that "trying to define travaux préparatoires . . . might only lead to the possible exclusion of relevant evidence"; and "object and purpose" and "special meanings" of terms are to be taken into account even in the initial determination under Article 31.25

When the permissible context is thus broadened as it should be, there is a great deal of relevant evidence that must be considered and that strongly supports the interpretations Reisman questions. This evidence includes repeated statements by the United States, the Soviet Union, and other maritime states concerning the essentiality of transit passage (including submerged transit and other incidents), followed by absence of objections to the ICNT text by these parties; efforts by extreme strait states to reopen the text and prohibit submerged transit or overflight of straits; common and uncontradicted use of special terms during negotiations such as "freedom of navigation" and "in the normal mode" to include subinerged transit; and an on-the-record exchange indicating that the United Kingdom's transit passage text contemplated overflight and submerged transit. It is the widespread understanding of these and other background circumstances that is loosely referred to by some as an "understanding" supportive of textual interpretations advanced by maritime states, not some mysterious or secret off-the-record document or agreement.

In this regard I agree with Professor William Burke's general criticism of restrictive interpretation of the UNCLOS straits regime: "One difficulty with this . . . [and] other criticisms of the Revised Text is that they rest almost completely on textual exegesis and manipulation of words without regard for, and with virtually no reference to, the negotiating context." 26

23 Reisman, supra note 4, text at note 20.
25 Apparently, the proponent has the burden of showing "special meanings" of terms under the Vienna Convention, but the point is that such special meanings may be shown and are not excluded by an initial textual focus.
26 Burke, Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text, 52 Wash. L. Rev. 193, 193 (1977). This article is the definitive work to date on the interpretation of the straits chapter of the ICNT.
In short, although I believe that a purely textualist approach amply supports the generally accepted interpretation of the UNCLOS straits regime, even if it did not, the "circumstances of its conclusion" or "negotiating context" would provide such support. The Reisman analysis is seriously flawed in not taking account of these contextual features.

IV. THE UNCLOS CONSENSUS AND THE REGIME OF STRAITS TRANSIT

This section will analyze the text of the UNCLOS straits regime, discuss counter-textual assertions advanced by Reisman and others, and examine the preparatory work and circumstances of its conclusion (negotiating context). It will proceed individually by major issue, taking in order recognition of the separateness of passage through the territorial sea in general and straits transit, overflight rights, rights of submerged transit, certainty of transit rights, scope of strait state regulatory competence, transit rights for warships, archipelagic sea lanes passage, and categories of straits.

Recognition of the Separateness of Straits Transit

Text. One of the greatest shortcomings of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone is that with the exception of a single clause providing for "no suspension" of innocent passage in straits, it fails to differentiate meaningfully between passage through the territorial sea in general and transit of straits. In the UNCLOS text this crucial distinction is recognized for the first time in the history of oceans law. Thus, "Innocent Passage in the Territorial Sea" and "Straits Used for International Navigation" are separate parts of the text, each clearly with its own regime. Indeed, "Innocent Passage in the Territorial Sea" is a section of part II, the chapter on the territorial sea and the contiguous zone. "Transit Passage," however, is a section of a separate part III, the chapter on straits used for international navigation. Passage through the territorial sea in general is dealt with by the term "innocent passage" and transit of the broadest category of straits is dealt with by the term "transit passage." Similarly, the analogous right of passage through archipelagic sea lanes is termed "archipelagic sea lanes passage."

Lest there be any mistake, part III on straits repeatedly makes it clear that straits are governed by "this Part," that is, by the straits part. Thus, Article 34(1) speaks of "[t]he régime of passage through straits used for international navigation established in this Part." Article 34(2) provides that "[t]he sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part." Article 35, entitled "Scope of this Part,"

Burke goes on to say:

There is a loss of plausibility when the interpreter makes no attempt to take into account the issues being negotiated, their origin, the contrasting views and proposals of the principal participants, contemporary interpretations of these proposals, and the formulation of the outcome in relation to these communications among the parties in the negotiations.

Ibid.
enumerates three categories not affected by "this Part," and Article 36 enumerates another for which "[t]his Part does not apply." By Article 37 "[t]his section applies" to all other categories of straits, except as part III itself specifically applies the innocent passage regime to certain categories of straits in Article 45. In addition, Article 37, which leads off a section of the straits part entitled "Transit Passage," is entitled "Scope of this section" and says, "[t]his section applies to straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone." Article 38(1) provides that "[i]n straits referred to in article 37, all ships and aircraft enjoy the right of transit passage." Article 38(2) says that "[t]ransit passage is the exercise in accordance with this Part." Establishment of sea lanes and traffic separation schemes pursuant to Article 41 is explicitly required to be "[i]n conformity with this Part." And coastal state regulatory competence affecting transit passage is by Article 42 explicitly made "[s]ubject to the provisions of this section."

Similarly, Article 38(3) provides that "[a]ny activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention," and thus clearly implies that activities which are an exercise of the right of transit passage are not subject to the other provisions of the convention. Even more importantly, Article 39(1), which sets out the duties of ships and aircraft during passage, by ending its enumeration with the flag state obligation to "[c]omply with other relevant provisions of this Part," thus completing an inclusive list, excludes duties that might be implied from other parts of the convention, for example the part dealing with innocent passage. In contrast to Section 2, "Transit Passage," Section 3, "Innocent Passage," makes clear that "[t]he régime of innocent passage, in accordance with section 3 of Part II [the innocent passage section of the territorial sea chapter], shall apply" in the categories of straits enumerated. The analogous "archipelagic sea lanes passage" established in Article 53 contrasts clearly with innocent passage applicable outside of designated sea lanes and air routes (or if none are designated, "through the routes normally used for international navigation"). Similarly, Article 25 of the innocent passage section, which is derived from Article 16 of the Territorial Sea Convention, does not include paragraph 4 of Article 16 which deals with straits, and thus confirms that the UNCLOS text deals with straits transit in a separate chapter, unlike the Territorial Sea Convention which treats the issues together. As an added precaution, Article 233 plainly states that the regime for coastal state regulatory and enforcement competence for pollution from vessels in innocent passage in the territorial sea in general shall not "affect the legal régime of straits used for international navigation," except for a specifically enumerated enforcement right against vessels not entitled to sovereign immunity with respect to violations of major, internationally approved traffic separation or discharge regulations, which is rooted in Article 42 of the straits chapter.

This textual record leaves no reasonable doubt that the régime of transit
passage of those straits used for international navigation enumerated by Article 37 (and not excluded by Articles 35, 36, or 38(1)) is established exclusively by the straits chapter and is not governed by provisions elsewhere in the text concerning innocent passage in the territorial sea in general.

Counter-textual Arguments. Those who charge the straits regime with "textual ambiguity" generally fail to note the important advance in oceans law made by UNCLOS in providing that innocent passage in the territorial sea in general, on the one hand, and "transit passage" and "archipelagic sea lanes passage" through straits and sea lanes, on the other, are fundamentally different and require different regimes.

In a letter to Senator Barry Goldwater of July 29, 1976, Professor Gary Knight argues that Article 34(1) of the straits chapter might be interpreted to apply Article 20 from the general innocent passage regime stipulating that submarines "are required to navigate on the surface and to show their flag." Article 34(1) provides: "The régime of passage through straits used for international navigation established in this Part shall not in other respects affect the status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil."

To prevail in this interpretation, Knight must establish that "other respects" means "other respects of passage not dealt with in this part" (as

Letter from H. Gary Knight to Senator Barry Goldwater, at 11–13 (July 29, 1976) (the letters referred to in this note are on file at the Center for Oceans Law and Policy, University of Virginia). Knight does not assert that this interpretation is a necessary interpretation, merely that it is "arguable." He concludes his discussion on this point by saying, "an honest case can be made both for and against the proposition that Article 19 [Article 20 of the ICNT] is applicable to 'transit passage.'" Id. at 13.

The letter from Senator Goldwater of July 23, 1976, to a number of international lawyers on the issue of interpretation of the straits chapter asks several questions that may confuse fair interpretation such as: does the term "freedom of navigation," as used in international law, include freedom of submerged transit through territorial waters in straits? This confuses the doctrines of high seas freedoms and innocent passage and distracts attention from the major rationale of the straits chapter, that as high seas freedoms are lost in straits by an expansion of the territorial sea it becomes imperative to create a new regime protecting freedom of navigation through territorial waters in straits.

Despite the less than neutral terms of the letter, Professors Richard B. Bilder, William T. Burke, Louis Henkin, Brunson MacChesney, Ved P. Nanda, and Stefan A. Riesenfeld interpreted the text as clearly including a right of submerged transit. In contrast, Professors Gary Knight, Jerome C. Muys, Michael Reisman, and Alfred Rubin did not assert that the text prohibited submerged transit but merely that it did not unambiguously include it. The responses of Professors Richard Falk, Edward Gordon, and Woodfin L. Butte do not as easily fit into either category. The counter-textual arguments indicated in these letters are, I believe, fully dealt with in this article.

Of particular relevance to the inapplicability of the Article 20 requirement concerning surface transit of submarines is Burke's statement in his reply that "[i]t is my opinion that Article 19 [Article 20 of the ICNT] is inapplicable to transit passage and that the RSNT makes this clear beyond reasonable doubt." Letter from Professor William T. Burke to Senator Barry Goldwater, at 1 (July 29, 1976).
well as establish that submerged transit is not dealt with in this part), rather than the more straightforward "respects other than the regime of passage." Were it not that the overall textual structure of the straits chapter and transit passage section repeatedly limits the scope of transit passage to that enumerated in "this Part," and that submerged transit is provided for by the straits chapter, this interpretation might be arguable, though strained. Even if taken alone, it would not be the most reasonable textual construction, in view particularly of its operative focus on status of waters and exercise of jurisdiction without mention of residual applicability of a regime of innocent passage or duties of transiting vessels. Nor is it consistent with the omission in Article 25 of paragraph 4 of the parent Article 16 of the Territorial Sea Convention, an omission confirming the repeated textual indication that straits transit issues are governed by the straits chapter, or with the use of a specific cross-reference to straits in Article 233: that is, where straits used for international navigation were meant to be affected outside the straits chapter, a specific cross-reference was used.

In fact, the draft convention consistently achieves such cross-chapter effect either through specific cross-reference or by use of the term "this Convention" rather than "this Part." No such reference appears in conjunction with Article 20. In short, the straits chapter deals with all aspects of the regime of passage (either by inclusion or exclusion) and cannot be said to leave any of those aspects to part II by implication.

If the text is taken as a whole, then, as the Vienna Convention requires, the interpretation espoused by Knight is not credible. Rather, in overall context Article 34(1) is unmistakably intended to preserve coastal state resource rights and regulatory competence over scientific research and activities other than "passage." To argue that Article 34(1) prohibits submerged transit in the face of the overwhelming textual evidence to the contrary is logic chopping at its worst!

Negotiating Context. Nothing could be clearer in the overall negotiating context than the attempts by the strait states to have innocent passage through the territorial sea in general and straits transit treated as synonymous. Thus, the eight-nation strait state working paper introduced in the Seabeds Committee on March 27, 1973, recited as a first "basic consideration" that "navigation through the territorial sea and through straits used for international navigation should be dealt with as an entity since the straits in question are or form part of territorial seas." 28 And a representative of Spain said during debate on the straits article:

Straits used for international navigation were an integral part of the territorial sea in so far as they lay within territorial waters. Any attempt to set up separate regimes for the territorial sea and for straits would clearly violate the fundamental principle of the sovereignty of the coastal State over its territorial sea. . . . 29

28 Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen: Draft articles on navigation through the territorial sea including straits used for international navigation, UN Doc. A/AC.138/SC.II/L.18 (March 27, 1973).

29 Statement of Mr. Ruiz Morales of Spain, UN Doc. A/AC.138/SC.II/SR.80 at 188
Similarly, nothing could be clearer than that the United States, the Soviet Union, and other maritime states sought to have this difference recognized as a fundamental distinction in oceans law. For example, the United States representative said in Committee II of the Seabeds Committee on April 2, 1973:

We should be clear, Mr. Chairman, that the community interest at stake in international straits is far more vital than simply the right of innocent passage in the territorial sea. The issue is no less than whether the freedoms of the high seas enjoyed by all nations are to remain meaningful.

A principal goal of the Law of the Sea Conference must be to agree on a regime which will minimize the possibilities of conflict among nations, conflicts which may arise because of uncertainties as to legal rights and responsibilities. In view of the importance of straits used for international navigation, any regime for such straits which depended upon a set of criteria that could be subjectively interpreted by straits states would sow the seeds of future conflict and undercut a major goal of the Conference. For these reasons, Mr. Chairman, it is completely inappropriate to approach the problem of transit through straits as though it were simply a problem of passage through the territorial sea which could be dealt with by the doctrine of innocent passage.60

Again, at the Caracas session of the conference on July 22, 1974, it was said:

The U.S. delegation has stated on numerous occasions the central importance that we attach to a satisfactory treaty regime of unimpeded transit through and over straits used for international navigation. Indeed, for states bordering as well as states whose ships and aircraft transit such straits, there could not be a successful Law of the Sea Conference unless this question is satisfactorily resolved. The inadequacies of the traditional doctrine of innocent passage—a concept developed not for transit through straits but for passage through a narrow belt of territorial sea—are well known.61

To my knowledge, since the initial appearance of the straits chapter in the Single Negotiating Text (SNT), which clearly made this distinction, no nation has questioned that this separate regime is established in the text and that the straits chapter, and not the innocent passage articles, governs all aspects of transit through Article 37 straits used for international navigation. Based on my experience in the negotiations, I am cer-

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tain that any other interpretation would have produced an instant rejection from the United States, the Soviet Union, and other maritime states.

The Knight argument that Article 34(1) incorporates Article 20 by implication is further contravened by the circumstance that Article 34 was originally presented and explained by the United Kingdom in April 1975 in the Straits Working Group of the conference. An interpretation of this article as denying submerged transit rights hardly seems credible in view of the commitment of the United Kingdom to those rights. Rather, it was intended to protect resource and other nontransit interests.

Overflight Rights

Text. The UNCLOS text states unmistakably that transit passage includes overflight rights as a matter of general oceans law. Article 38(1) speaks of “all ships and aircraft,” 38(2) provides for “freedom of navigation and overflight,” 39(1) says “ships and aircraft,” 39(3) sets out specific duties of “[a]ircraft in transit,” 42(5) speaks of “a ship or aircraft,” and 44 uses “navigation or overflight.” Similarly, the analogous right of archipelagic sea lanes passage established by Article 53 speaks of “navigation and overflight” and “ships and aircraft.”

Counter-textual Arguments. To my knowledge, no arguments have been made that the UNCLOS text fails to provide overflight rights. In general, however, those criticizing the straits chapter have failed to point out that in contrast to the Geneva Convention’s “innocent passage” regime, the UNCLOS text fully protects overflight rights.

Negotiating Context. From the beginning of the negotiation the United States, among others, insisted that there be full overflight rights through straits for all categories of aircraft. Certain strait states opposed this position. Indeed, the continued efforts by Spain and Greece to remove overflight rights from the text only resulted in enhancing its clarity, and the amendments they recently introduced to that effect were not adopted by the conference.\(^2\)

Submerged Transit

Text. An analysis of the full text makes clear that transit passage includes rights of submerged transit through straits for those straits covered by the transit passage regime. The innocent passage section includes a specific article requiring submarines “to navigate on the surface and to show their flag”; by contrast, there is no such requirement in either the transit passage section or the archipelagic states chapter dealing with the

analogous archipelagic sea lanes passage, even though the transit passage section expressly enumerates the duties of ships during passage. That list of duties is clearly exhaustive since it ends with a catch-all obligation to "comply with the other relevant provisions of this Part." Moreover, both the Territorial Sea Convention and the innocent passage section of UNCLOS establish a pattern that if submerged transit is to be prohibited, it will explicitly be so stated. In contrast, there is nowhere in the straits and archipelago chapters a duty to navigate on the surface through straits or "archipelagic sea lanes." In my judgment, these textual provisions, taken together, undeniably establish the right of submerged transit in straits, and nothing else, text or travaux, is needed. Nevertheless, the existence of the right of submerged passage is further attested to by a wide variety of other textual indications.

- Not even the high seas chapter provides explicitly for submerged transit. The reason is that the phrase "freedom of navigation" in Article 87 includes submerged operations, just as it did in Article 2 of the 1958 Geneva Convention on the High Seas. Given this background, no provision other than "freedom of navigation" is needed to include a right of submerged transit. In contrast, the innocent passage chapter requiring surface transit does not use this terminology.

- The term "freedom of navigation" is used in defining transit passage in Article 38(2). Given the high seas background of this term, it surely includes rights of submerged transit, and the text cannot reasonably be read to exclude those rights from the "freedom" granted. Indeed, the use of the term establishes that any requirement in derogation of such "freedom of navigation" must be spelled out in the text. Given the important and consistent use of the term to refer to high seas rights, it would have little meaning in the article unless it was intended to reserve rights of submerged transit and other freedoms of transit. That is, it preserves "freedoms" associated with transit.

- The provision in Article 39(1)(c) that ships shall "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit" establishes, since it appears in a list of duties, that transit passage includes a right of transit in the "normal mode of continuous and expeditious transit." Because the "normal mode of continuous and expeditious transit" of modern submarines is submerged, a right of submerged transit is comprehended. It should be noted that normal mode in this regard is modified only by "of continuous and expeditious transit," not some other standard.

- Article 53(3) concerning the analogous right of archipelagic sea lanes passage provides that it is a right "of navigation and overflight in the normal mode." Even more importantly, the archipelagic sea lanes passage regime employs a specific cross-reference to and only to Articles 39, 40, 42, and 44 (not to Article 20 requiring navigation on the surface) in enumerating duties of ships and aircraft. It simply is not credible in light of the overall object and purpose of the text that archipelagic states have accepted a right of submerged transit in sea lanes through archipelagic waters if no such right is provided through straits used for international navigation outside of such waters.
In any event, the similar terminology and repeated cross-references in the archipelagic states chapter indicate that transit passage and archipelagic sea lanes passage are equivalent rights. There seems no difference in any other important respect, and in the absence of a clear intention otherwise, it would not seem reasonable to assume that they differ on the right of submerged transit.

- The existence of Article 45 makes it clear that when a cross-reference is intended to the innocent passage section from the transit passage section, it is made explicitly. Similarly, Articles 29, 31, and 32 in the innocent passage chapter make it clear that when a provision of that part is intended to have effect beyond that part or to be affected by another part, it is so stated. This specific cross-reference practice is also followed in the environmental chapter on issues concerning navigational rights as spelled out in Articles 211(4), 220(2), and most importantly, 233 and 236, which also apply in straits. Articles 233 and 236 particularly show that whenever an article outside of the straits part is intended to have an effect on the straits part, it is specifically stated to so apply or to apply to the entire convention. In short, the overall textual scheme of the convention is that in the absence of a specific cross-reference in at least one of the parts to be affected, nothing in the convention outside the straits chapter affects transit rights through straits used for international navigation.

- The innocent passage and straits transit sections are not even parts of the same chapter. Rather, innocent passage appears in a general part on the territorial sea and contiguous zone, and straits transit appears in a separate chapter on straits used for international navigation. Similarly, paragraph 4 of Article 16 of the Territorial Sea Convention, the only paragraph in the Territorial Sea Convention dealing explicitly with straits, is omitted from the comparable Article 25 in the innocent passage section of UNCLOS, and the issue is dealt with instead in the separate straits chapter of UNCLOS.

- Finally, of some peripheral support are the Article 39 duty to "proceed without delay," which is most consistent with transit rights in a normal mode, that is submerged, for a modern submarine, and the articles making reference to nuclear-powered vessels in the innocent passage section, Articles 22(2) and 23, which, like Article 20, are omitted from the transit passage section of the text.

Under the Vienna Convention requirements, these provisions must be read together in their overall context. In that context, for all the reasons just mentioned, as well as the omission of a duty to navigate on the surface from the exhaustive list of transit duties in Article 39 and the repeatedly expressed assertion mentioned earlier that transit passage is governed by "this Part," that is, by the transit passage section of the straits chapter, there can be no reasonable doubt that even solely on a textual analysis the UNCLOS text provides a right of submerged transit.

Counter-textual Arguments. A number of textual arguments have been advanced by Knight and Reisman to demonstrate that the existence of a right of submerged transit is ambiguous under the UNCLOS text.

Knight seems to ask why, if submerged transit is so important and is included, it was not spelled out in the text as such.\(^{22}\) The answer is quite

\(^{22}\) See the letter to Senator Barry Goldwater from H. Gary Knight, supra note 27, at 11.
clear. The existing 1958 Geneva Convention on the High Seas and the high seas chapter of the ICNT both speak only of “freedom of navigation.” They do not spell out a right of submerged transit beyond use of that phrase. Yet such rights on the high seas are understood by all to include the right of submerged transit. Moreover, altering the UNCLOS straits text to spell out that submerged transit is included in “freedom of navigation” could without such alterations elsewhere have negative implications not only for Article 87 (high seas) of the UNCLOS text—which presumably might be altered—but also for Article 2 of the 1958 Geneva Convention—which cannot be without a new conference of its own. Because of the clarity of meaning of the term “freedom of navigation,” none of the straits proposals advanced by the United States, the Soviet Union, and the United Kingdom, which were well known as intended to include submerged transit, explicitly used language providing for that right. Rather they relied on the clearly understood phrase, “freedom of navigation.”

There can be no doubt, then, that the absence of such an explicit provision is not a persuasive argument for an interpretation negating the right of submerged transit when neither the paradigm straits articles for submerged transit nor the high seas articles themselves include such an explicit provision.

Knight also argues that Article 20 might be applicable to the transit passage section through Article 34(1). For the reasons previously discussed in connection with the separation of the innocent passage regime and the transit passage regime, this argument is but logic chopping. It does not fairly take account of the overwhelming range of textual indications running counter to this interpretation, but rather relies on a vague argument to the exclusion of all such indications.

Reisman argues that the language, “in the normal mode,” does not clearly establish a right of submerged transit, although he seems to concede that some submerged transit may be “in the normal mode.” Thus, he implicitly disagrees with Knight’s argument that Article 34(1) by incorporation of Article 20 provides for an obligation to transit on the surface. Taken alone as a textual issue without benefit of the broader textual setting or the negotiating context, this provision, “in the normal mode,” would seem an unsatisfactory basis on which to rely for a right of submerged transit. The most important textual bases for such a right, however, are not rooted in this provision, which is only an incidental indication of its existence. Moreover, if the phrase “normal mode” is ambiguous, as Reisman seems to argue, then recourse may be had to the negotiating context, which I be-

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84 The United Kingdom draft articles, for example, provided that

’t’s transit passage is the exercise in accordance with the provisions of this chapter of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas and another part of the high seas or a State bordering the strait.


85 Reisman, supra note 4, text at notes 53 and 54.
lieve makes abundantly clear that this phrase includes submerged transit. Indeed, paragraph 4 of Article 31 of the Vienna Convention provides that the intention of the parties is the guide to special meanings of terms, so that negotiating context must be examined on the meaning of such terms even if no ambiguity is alleged.

Reisman also argues that “normal mode” may be determined by the strait states acting pursuant to their competence under Articles 39 to 42. For example, implementation of certain sea lanes by strait states may be inconsistent with a right of submerged passage. This argument is premised on what I believe to be a serious misinterpretation of the UNCLOS text. That is, Articles 39 and 40 are intended solely to establish flag state obligations and not to create rights unilaterally enforceable by a coastal state. Similarly, Articles 41 and 42 are carefully drafted to require international approval for any sea lanes or traffic separation schemes, and there is nothing inconsistent between such internationally agreed lanes and a general right of submerged transit. In fact, the initial U.S. straits article, which clearly contemplated submerged transit, would have permitted even the unilateral imposition of such lanes by strait states without assuming any inconsistency with a right of submerged transit. To the same effect, the areas of regulatory competence granted the strait state under Article 42 are carefully drafted so as not to create problems for submerged transit. (Both these issues of “flag state obligations” and coastal state regulatory competence will be discussed in some detail in the next few sections of this article.) Even if these articles did grant significant regulatory competence to the strait states, which they do not, Article 44 requires that “[s]tates bordering straits shall not hamper transit passage” and Articles 32, 42(5), and 233 taken together establish immunity for warships transiting straits. In light of the abundant textual evidence that submerged transit is contemplated and is not subject to strait state interference, it is difficult to understand how the inconsistency that Reisman sees would be a reasonable interpretation of the straits chapter.

Finally, in a letter to Senator Goldwater, Reisman argues:

It is true, as our negotiators aver . . . that Article 19 [Article 20 of the ICNT] appears in Chapter I rather than in Chapter II of the Text [Parts II and III of the ICNT]. On the other hand, innocent passage is reexplained in Section 3 of Chapter II [section 3 of part III of the ICNT] (dealing with a second species of straits—“straits used for international navigation”) and Article 38(1)(d) [39(1)(d) of the ICNT] obliges transit passage ships to “comply with other relevant provisions of this chapter.” If, to argue in the manner of our negotiators, Article 19 is part of the regime of innocent passage and if innocent passage is a relevant provision of Chapter II, then the duty of surface transit may be “understood” to apply.27

Reisman’s effort to demonstrate ambiguity in the UNCLOS text is particularly strained by this argument, for it completely ignores the purpose

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26 Reisman, supra note 4, text at note 58.
of Article 45, which is to establish the innocent passage regime in certain straits not covered by transit passage. By its terms, Article 45 does not apply to transit passage straits; thus, it is not "relevant" under Article 39(1)(d) to such straits and is not included within the list of duties comprehended for transit passage. If anything, the specific reference in the transit passage section to the Article 45 category of straits, in which the regime of "non-suspendable innocent passage" is to be applied, lends clarity to the separateness with which the regimes of innocent passage and transit passage are regarded.

In summary, none of the arguments made to demonstrate that the UNCLOS text is ambiguous on submerged transit are persuasive, even on their individual merits, and the greatest failing of them all is that they do not fairly deal with the abundant evidence from the text as a whole supporting a right of submerged transit.

Negotiating Context. Even if there were any ambiguities concerning the right of submerged transit in the UNCLOS text, they would be overwhelmingly dispelled by the negotiating context.

First, the United States and the Soviet Union repeatedly made clear that they could not accept a law of the sea treaty that did not provide for freedom of navigation through straits, including submerged transit. In fact, on no other issue in the negotiation did the major participants express themselves so unmistakably on and off the record and make their views so well known. That they accepted the ICNT straits chapter during Committee II's article-by-article reading of the text strongly suggests that they believed the right of submerged transit was included. There can be no doubt that this is the U.S. interpretation. On July 14, 1979, Ambassador Richardson said in a major speech, "National Security and the Law of the Sea": "Under the text [ICNT/Rev.1] we would enjoy free and unimpeded passage, through, under, and over straits and archipelagic waters."**

In marked contrast to these views of the principal proponents of submerged transit, its principal opponents have continued their efforts to alter the text to prohibit it. Thus, in 1976 Spain introduced an amendment to the SNT straits chapter that provided: "Submarines and other underwater vehicles are required to navigate on the surface and to show their flag, unless otherwise authorized by the coastal State."*** And in 1976

** See the remarks by Ambassador Richardson, supra note 8, at 11.

*** See also the letter of August 11, 1976, from Stuart P. French, Secretary of Defense Representative for the Law of the Sea Conference, to Senator John C. Stennis, Chairman of the Senate Committee on Armed Services (on file at Center for Oceans Law and Policy, University of Virginia). French writes, after a careful analysis of the issues raised in the replies to the Coldwater letter:

I want to assure you personally that our national security interests in free transit of straits (both submerged transit of submarines and overflight of aircraft without notification or authorization) connecting high seas to high seas are fully protected in the Law of the Sea negotiations as reflected in the Revised Single Negotiating Text. This letter also details the negotiating history of the phrase, "in the normal mode," fully supporting that it includes, indeed primarily refers to, submerged transit.

*** Amendments to the Informal Single Negotiating Text (submitted to Committee II by Spain), in Platzöder, supra note 32, at 522.
Greece introduced virtually the same amendment to be included in Article 39, "Duties of ships and aircraft during their passage" (exactly the article where such a duty would be expected if intended). Neither of these amendments was adopted by the conference, as it was well known that to do so would end any chances for agreement. In summarizing the work of the 1977 New York session, Professor Bernard Oxman writes of the attempted amendments: "Earlier attempts to impose a requirement that submarines navigate on the surface failed and were not revived." 

In addition, the United Kingdom, whose draft articles formed the basis for the ICNT straits articles and who served as cochairman, with Fiji, of the straits negotiating group, obviously intended that the new concept of "transit passage" include the right of submerged transit. Among other contemporary indications of this interpretation, during discussion in the House of Lords on March 9, 1976, Lord Campbell said:

Britain, I understand, has taken a leading part in putting forward the concept of transit passage. . . .

On the question of strategic considerations, we want the Conference to accept that warships and even submerged submarines have the right to go through international straits, even though the territorial seas are to be expanded to 12 miles.

And similarly Lord Coronwyl-Roberts in the same forum on May 19, 1976: "We also advocated the creation of a special regime for passage through international straits . . . so as to ensure . . . a right of submerged transit."

Burke, in the best analysis of the straits chapter to date, concludes from statements in the formal conference records that submerged transit is provided by the straits text:

Statements by Sri Lanka, Egypt, Peru and Spain, in commenting both on the United Kingdom proposal and on a United States intervention

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48 Proposed amendments by Greece, supra note 32, at 530.

It should also be noted that both the innocent passage and transit passage provisions of the SNT built heavily on the UK dual proposal, and that proposal, which was understood by all to permit submerged transit, specifically included in the innocent passage part a general requirement like that in Article 20 of the ICNT that submarines must surface and show their flag. But since in the UK text the article requiring surfacing clearly applied only to innocent passage and not to straits transit, there seems no justification for alleging that in the ICNT, deriving from the SNT patterned on the UK text, Article 20 applies to transit passage.

The Article 34 phrase about the passage regime "not in other respects" affecting the status of the waters was drafted to meet concerns in the UK-Fiji straits negotiating group that a state would not be able to exercise territorial sea rights other than passage, e.g., resource rights. It was not intended to and does not reintroduce innocent passage in any way.
on the subject, are especially revealing of the contemporary understanding of freedom of navigation in this context. Each of these delegations questioned the need for, and desirability of, submerged passage for submarines. The comments, questions, and proposals advanced by these delegations are virtually impossible to explain unless they understood that submerged passage was intended to be included in the concept of “freedom of navigation” in straits.44

The record of discussions, proposals, and proposed amendments also shows clearly that those states who sought right of submerged transit supported the language, “freedom of navigation” or “in the normal mode,” for this purpose, while those who opposed that right consistently tried to delete these phrases. To my knowledge, no participant in the negotiations has doubted that the ICNT includes a right of submerged transit, nor has it ever been questioned that the phrases, “freedom of navigation” and “normal mode,” used interchangeably in that text, include submerged transit.

From my own experience as a United States negotiator of the straits and archipelago chapters I can say unequivocally that at no time did the United States, or to my knowledge any other maritime power, including the Soviet Union and the United Kingdom, or any other participant in the straits and archipelago negotiations, have any doubt that the text fully provides a right of submerged transit through covered straits and archipelagic sea lanes. This issue was made abundantly clear throughout the negotiation and there are absolutely no travaux of any kind, on or off the formal record, supporting a contrary interpretation. It should be kept in mind that no one questions that the United States has made it clear that it cannot accept a law of the sea treaty that does not provide freedom of navigation through straits, including submerged transit. Yet not even the U.S. draft articles included a specific phrase referring to submerged transit, as the phrase “freedom of navigation” through a strait was felt to be abundantly clear on this point.

**Certainty of Transit Rights**

*Text.* The chapter on innocent passage through the territorial sea provides for a right of “innocent passage.” This right is qualified by Article 19, which defines passage as innocent “so long as it is not prejudicial to the peace, good order or security of the coastal State,” a test subsequently defined in paragraph 2. Most indicative of an intent to give coastal states certain rights to take unilateral action to prevent noninnocent passage is Article 25, which provides that “[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.” Similarly, Article 30 provides: “If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require it to leave the territorial sea immediately.”

44 Burke, supra note 26, at 205.
In marked contrast, "transit passage" in the straits chapter is defined as the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone.

Even more importantly, Article 39 setting out the duties of ships and aircraft during their passage does not say, as does Article 19, that passage "shall be considered to be prejudicial . . . if"; rather, it says, "ships and aircraft, while exercising the right of transit passage, shall," and thus differentiates flag state duties from the definition of transit passage rights. Articles similar to 25 and 30, which permit coastal states to interfere with passage under certain circumstances, are notably absent. Finally, under Articles 31, 32, 42(4) and (5), 233, and 236, coastal states shall not interfere with or take enforcement action against warships or other vessels entitled to sovereign immunity. Rather, as expressed in 42(5): "The flag State of a ship or 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 to States bordering straits."

Counter-textual Arguments. Reisman is concerned that, similarly to the innocent passage provisions in general, a state might be able to characterize passage as "nontransit"—particularly by reference to Article 39(1)(b), which creates a duty for ships and aircraft in transit passage to refrain from use of force in violation of the United Nations Charter—and subsequently to deny passage unilaterally. He points out in this connection that Article 44 merely creates a duty not to hamper "transit passage," not one not to hamper "passage" in general. This argument, however, does not deal with the principal point that, in contrast with the innocent passage section, Article 39 delinks duties of ships and aircraft during passage from the definition of transit passage rights. Rather, these duties are flag state obligations "while exercising the right of transit passage." His argument also does not deal with the previously mentioned structural difference between the two sections, that strait states are not given a unilateral claim to prevent passage, nor with the clear design throughout the convention for warship immunity.

It does not follow as a matter of logic that the existence of flag state duties in Article 39 gives strait states a right to determine violations of such duties unilaterally and to seek to enforce them by denial of passage. Rather, it is entirely consistent with that text and clearly within the specific language of Articles 31 and 42(5) that the flag state shall bear "international responsibility" for such violations, and that enforcement shall be solely through the normal diplomatic (and, if available, judicial) channels. In fact, these provisions, as well as the second sentence of Article 233, would make little sense if strait states could prohibit transit passage.

45 Reisman, supra note 4, at 70.
46 Ibid.
for violation of Article 39 duties, and they confirm for vessels entitled to
sovereign immunity the other textual evidence of Article 39 itself and the
absence of articles comparable to 25 and 30 from the innocent passage
chapter. Moreover, Part XII, "Protection and Preservation of the Marine
Environment," makes abundantly clear that broad international obligations
concerning vessels in navigation do not necessarily result in coastal state
rights enforceable by unilateral action, and when they do the text is spe-
cific in so stating and providing safeguards.

Finally, even if Reisman's interpretation were accepted, and transit
passage rights and flag state duties were linked, it would not follow that
a unilateral determination by a coastal state of violation of an Article 39
duty or other straits chapter obligation would terminate the right of transit
passage. Rather, the duty would in fact and in law have to be violated,
and the transiting state would be on firm ground in protecting its transit
rights if there were no such violation. It is precisely this need to avoid
confrontation caused by differing interpretations on so important a right
that led to the delinkage in the straits chapter between rights of transit
passage and duties of transiting ships and aircraft.

Negotiating Context. From the beginning of the negotiation, maritime
nations were aware of the problem of linkage of transit rights with vague
duties or restrictions that could lead to confrontation over straits transit
rights. This defect in the innocent passage regime had been all too evi-
dent. For this reason, early Soviet draft straits articles, in stipulating
duties of transiting ships and aircraft, provided them as flag state obliga-
tions not directly enforceable by the strait state. This approach was car-
ried over into the United Kingdom text and the work of the Straits Work-
ning Group. Moreover, it was hardly novel: the same distinction between
what was commonly referred to as a "flag state obligation" and coastal
state authority to take unilateral enforcement action underlay the initial
U.S. marine scientific research articles. For that chapter, however, this
approach was set aside in favor of a modified consent regime requiring the
coastal state's consent. This distinction between a "flag state obligation"
approach and broader coastal state authority to take unilateral enforcement
action was also fully understood in the vessel-source pollution negotiations
over part XII of the text. Although that chapter creates broad flag state
obligations to comply with international standards, they are enforceable
by coastal states only as specifically set out in the text. Article 233 makes
a clear link between that part and the straits chapter, which fully pre-
serves this distinction. Indeed, a "flag state obligation" approach, which
creates obligations but not direct rights of enforcement in other states, is
Not surprisingly, this result is again consistent with the use of the phrase
"freedom of navigation" in the straits chapter taken from that convention.
The seriousness with which the United States viewed the question of
certainty of transit rights is indicated by the statement of Secretary of
State Henry Kissinger in August 1975, that "[w]e will not join in an agree-
ment which leaves any uncertainty about the right to use world communi-
cation routes without interference.” Many such statements on transit rights were made by conference participants.

Strait State Regulatory Competence

Text. Unlike the broader regulatory competence provided coastal states under Articles 21 and 22 for ships in innocent passage, the unilateral regulatory competence accorded strait states under the straits chapter is carefully circumscribed. The only provision that creates any such right is Article 42. Article 41, which deals with sea lanes and traffic separation schemes, in marked contrast with Article 22 on the same subject in the innocent passage chapter, provides in paragraph 4:

Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization [IMCO] with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.

Thus, Article 41 requires that sea lanes or traffic separation schemes be internationally adopted before permitting their designation by a strait state. The only unilateral competence in this article is to prevent the international organization from imposing a scheme without the consent of the strait state.

Only Article 42 is entitled “Laws and regulations of States bordering straits relating to transit passage.” No other article in the straits chapter gives any regulatory competence to strait states. Substantively, Article 42 provides for four instances, and four instances only, where coastal states “may make laws and regulations relating to transit passage.” The first category is for laws and regulations implementing Article 41, and thus does not provide a basis for regulation except to effectuate sea lanes or traffic separation schemes as internationally adopted. The second category permits pollution control laws and regulations “giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.” Again, this authority is limited to effectuating international regulations previously adopted and relating only to discharge standards and not, for example, to design, construction, manning, or equipment. The third basis of authority concerns fishing vessels and permits laws for “the prevention of fishing, including the stowage of fishing gear.” The fourth and final basis permits strait states to make laws and regulations concerning loading and unloading for effectuating their “customs, fiscal, immigration or sanitary regulations.” Article 233 demonstrates that nothing in the marine environment chapter, which deals with the sensitive vessel-source pollution problem, adds to this prescriptive

competence of strait states with respect to transit passage, and it clarifies
the circumstances in which violation of internationally established dis-
charge standards or traffic separation schemes, including associated regu-
lations on under-keel clearance, may entail enforcement measures against
vessels in transit passage.

This narrowly drawn regulatory competence is then subjected to four
important sets of safeguards. First, Article 42(2) provides: “Such laws
and regulations shall not discriminate in form or in fact amongst foreign
ships or in their application have the practical effect of denying, hamper-
ing or impairing the right of transit passage as defined in this section.”
Second, Article 44 provides: “States bordering straits shall not hamper
transit passage and shall give appropriate publicity to any danger to navi-
gation or overflight within or over the strait of which it has knowledge.
There shall be no suspension of transit passage.” Third, Articles 31, 32,
42(4) and (5), 233, and 236 taken together establish that such laws and
regulations may not be directly applied to warships or other vessels or
aircraft entitled to sovereign immunity. And finally, Article 233 incorpo-
rates by reference certain additional safeguards into its enforcement
authority.

As a result of both the narrowness of coastal state regulatory com-
petence and the strong safeguard provisions of the UNCLOS text, coastal
states are not given authority to suspend or hamper submerged transit,
overflight, or other essential components of the transit passage regime.

Counter-textual Arguments. Reisman assumes broad strait state pre-
scriptive and applicative competence stemming from Articles 39, 40, 41,
and 42. He writes: “Though Article 39 speaks of user duties, it necessarily
imports coastal rights. It must be construed as allowing the coastal states
a broad prescriptive and applicative competence with regard to transit
passage unless we are to assume that the ‘duties’ are no more than moral
imprecations.”

Reisman is correct in his premise that Article 39 establishes user duties
and “necessarily imports coastal rights”; a duty, of course, implies a cor-
relative right. Wesley Hohfeld has at least taught us that. But his con-
clusion that “it must be construed as allowing the coastal state a broad
prescriptive and applicative competence” is not required as a matter of
logic and is inconsistent with the overall context of the UNCLOS text.
That the coastal state has rights correlative to the Article 39 flag state
duties does not mean that they are unilateral rights to suspend transit
passage, and much less that they are of prescriptive and applicative com-
petence. To use a homely property analogy, that I have a right as landlord
to receive rent from the tenant does not mean that I necessarily have a
right unilaterally to evict him by force when the rent is not paid, much
less to prescribe new regulations for payment of rent not spelled out in
the lease.

Reisman, supra note 4, at 69.

See generally, W. Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS (1923) (see
particularly the Introduction by Walter Wheeler Cook).
Counter to the Reisman theory, the whole structure of UNCLOS serves to decouple transit passage rights from flag state obligations, as was discussed in the preceding section. That is, they are rights (not merely "moral imprecations") to be pursued through diplomatic channels or, where applicable, third-party dispute settlement, but certainly not unilateral action by the strait state. More important than a larger than permissible logical leap, Reisman's argument on this point ignores the fact that coastal state prescriptive and applicative competences under the straits chapter are narrowly limited to those enumerated in Article 42 (and the safeguards that go along with them). It is no accident that only Article 42 speaks of "[l]aws and regulations of States bordering straits relating to transit passage." No other article in the straits chapter, including Article 39, uses such terminology. And if such competence was intended to be granted under Article 39, why was it not included in the Article 42 listing? The inclusion of a specific cross-reference to implementation of Article 41 shows that where some other article was intended to be implemented unilaterally by strait states, it was included in the Article 42 list. Furthermore, Reisman's interpretation does not seem to square with the clear purport of Articles 233 and 236.

Reisman also uses his assumption of broad coastal state regulatory competence to cast doubt on a right of submerged transit. Thus, he argues, "Article 39(1)(c) [would not] appear to override the state's regulatory competence for matters such as navigation and safety. In other words, the user would be hard pressed to justify evading such regulations on grounds that they required departure from its normal mode of transit." And:

There are . . . internal contradictions if Article 39(1)(c) is read to permit submerged transit of straits. The subsection immediately preceding subparagraph (c) recognizes the coastal state's competence to appraise the contemplated passage, inter alia, for its conformity to the principles of international law embodied in the UN Charter. If submerged passage is secret passage, then how can the coastal state perform that function under subsection (b)? How can it control unauthorized research and survey activities which may be undertaken by the submerged vessel under Article 40? How can it implement its safety and sea lanes regulations (Articles 41 and 42), and so on? If anything, the structure of the entire section dealing with transit passage emerges as a more coherent drafting complex if no right of submerged passage is hypothesized.51

This line of argument fails completely if, as has been demonstrated in this and the immediately preceding sections, states bordering straits have no right of unilateral action to inhibit passage based on the flag state duties under Articles 39 and 40, and no right of regulatory competence except as is narrowly provided in Article 42 and subject to the safeguards applicable to that provision. In fact, under Article 42 any sea lanes or pollution discharge regulations would need to be rooted in previously adopted international regulations. Even then, they could not "have the practical effect

50 Reisman, supra note 4, at note 55.
51 Id., at note 58.
of denying, hampering or impairing the right of transit passage [including submerged transit]" and could not be applied against warships such as an SSBN submarine. If anything, Reisman's argument is yet another good reason why the UNCLOS text is constructed as it is, as not providing unilateral strait state competence to prohibit transit pursuant to Article 39 duties or broad coastal state regulatory competence, both of which would indeed be inconsistent with a meaningful right of submerged transit.

**Negotiating Context.** Again, as with certainty of transit rights, it was fully understood in the negotiation that one of the defects of the innocent passage regime, if applied to straits, was a vague and overly broad coastal state regulatory competence that could be productive of conflict and seriously impair freedom of navigation through straits. Maritime states, including the United States, asserted repeatedly that any such competence concerning safety and pollution matters would need to be narrowly circumscribed and could not be applied against warships or other vessels or aircraft entitled to sovereign immunity. Extreme strait states espoused contrary views. The United Kingdom articles reflected the former view, and by way of the SNT became the ICNT straits text. Subsequently, the United States, the Soviet Union, and other maritime powers accepted this text by not objecting during the article-by-article reading of the SNT in the Second Committee at the 1976 New York meeting. Spain, however, among other extreme strait states, continued to press its views and in 1976 offered a set of amendments that among other things would have permitted strait states to establish sea lanes and traffic separation schemes unilaterally, except those established "through the waters of two or more States." 53

In April 1978, Spain again introduced amendments that not only reiterated the previously espoused sea lanes provision but also included specific provisions broadening the limited pollution control authority of Article 42(1)(b) and requiring under Article 39 that ships comply with safety and pollution control standards "established by the coastal State, in accordance with the provisions of Article 42." 54 Also in April 1978, Morocco introduced a set of amendments to the straits chapter that would have substantially broadened strait state regulatory competence under Article 42, including a new provision concerning "marine scientific research and

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53 Most recently, Ambassador Richardson confirmed:

The provisions on these subjects [transit passage and archipelagic sea lanes passage] emphasize the obligations of transiting states rather than the right of coastal States to control transit. This approach is designed to protect legitimate coastal State interests without permitting coastal State interference with transit. As you might expect, the only significant exceptions pertain to enforcement of internationally approved maritime safety and pollution measures.

Remarks by Ambassador Richardson, supra note 8, at 11. The "exceptions" refer to Article 333 in conjunction with Article 42.

58 See Amendments . . . Proposed By the Spanish Delegation, supra note 39, at Art. 42(4).

54 See the Informal Suggestion by Spain, supra note 32, at Arts. 39(2)(a), 41(5), and 42(b) and (e).
hydrographic surveys." These and similar amendments were not adopted by the conference. But if Reisman’s interpretation were correct, there would have been no need for Spain or Morocco to introduce them. Also contrary to Reisman’s view, these amendments recognize that strait state regulatory competence is established under the straits chapter only by Article 42.

Finally, the current version of Article 233, which cross-references Article 42 and clarifies the circumstances in which laws and regulations would be directly applicable to ships in transit passage, was worked out in 1977 after the adoption of the straits chapter as part of a concession on commercial vessels made to Malaysia. This article, with its carefully limited enforcement right, strongly confirms the basic structure of the UNCLOS text described in this section and is inconsistent with the Reisman argument of a threat to submerged passage from inferred broad strait state prescriptive and applicative competence.

Transit Rights for Warships

Text. The Corfu Channel case made clear that warships as well as commercial vessels have a right of transit through straits used for international navigation. The preparatory work for the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, however, reveals that there was a debate about requiring warships to provide notice to coastal states for innocent passage through the territorial sea, or even to obtain coastal state consent for passage. The issue was resolved in that convention, in conformity with the Corfu decision, by not requiring any such notification or consent, even for passage through the territorial sea in general. Nevertheless, in the intervening years such conditions have sporadically been raised.

Both the innocent passage and straits sections (and the archipelagic states chapter as well) of the UNCLOS text continue the Geneva Convention practice that no such notification or consent is required. No article in either part establishes any such requirement, and the references in Articles 19(2)(b) and (f), 29, 30, 31, 32, 39(1)(b) and (c), 39(3)(a), 42(5), 54, 233, and 236 clearly establish that transit by warships and military aircraft in straits (as well as other categories of vessels and aircraft in straits) was contemplated. Similarly, Articles 37 and 53 in the straits and archipelagic sea lanes passage chapters use the phrase, “all ships

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56 See generally McDougal & Burke, supra note 15, at 216–21. They conclude on the merits of this issue:

Denial of a right of innocent passage would . . . constitute a greater burden on passage than in the past when lesser breadths were claimed, yet because of progress in weapons technology, would offer much less protection against actual harm to coastal interests. For these reasons it appears desirable from a community policy perspective that there should be no special, discriminatory rule established in regard to access of warships.

Id. at 194.
and aircraft enjoy the right of transit [archipelagic sea lanes] passage," a phrase wholly inconsistent with any differentiation on the basis of the military or commercial nature of the vessel or aircraft. Indeed, the security concerns of the "archipelagic states" are creatively dealt with by providing for archipelagic sea lanes and for the regime of innocent passage outside such sea lanes, and by permitting temporary suspension of innocent passage pursuant to Article 52(2) for specified areas outside such sea lanes.

Counter-textual Arguments. To my knowledge, there have been no arguments advanced that the UNCLLOS straits regime (or any other provision of the ICNT) in any way requires notification or consent for warship passage.

Negotiating Context. On this issue, as well as on other vital transit rights, the United States and other maritime nations have repeatedly stated that they could not accept requirements for either notification or consent for warship transit. Contrary views were initially advanced by certain extreme strait states in discussion and draft articles, although the issue did not become as significant as it had at Geneva in 1958. The SNT maintained the freedom in this respect provided by the Territorial Sea Convention, both for vessels in innocent passage in general and for transit passage of straits in particular. In 1976 Yemen introduced an amendment to the RSNT straits chapter that stated: "The coastal State may require prior authorization or notification for the passage through its strait in its territorial sea of foreign warships or nuclear-powered ships or ships carrying dangerous substances." 57

This amendment, which would have reversed the decision of the International Court of Justice in the Corfu Channel case and rolled back more than 20 years of state practice to the contrary, was not adopted by the conference.

Archipelagic Sea Lanes Passage

Text. Part IV of the ICNT, "Archipelagic States," establishes a right of "archipelagic sea lanes passage" through archipelagic waters and adjacent territorial sea seaward of archipelagic baselines. This right is in all major respects the equivalent of the right of transit passage through straits. In fact, Article 54 expressly incorporates by reference Articles 39, 40, 42, and 44 of the straits chapter. Comparison of Article 53(3) with Article 38(2) illustrates the interchangeability in the text of the phrases "freedom of navigation and overflight" and "navigation and overflight in the normal mode."

Counter-textual Arguments. To my knowledge, no arguments have been advanced that interpret the right of archipelagic sea lanes passage counter to its clear textual intent.

Negotiating Context. "Archipelagic States," part IV of the ICNT, was a product of informal consultations between maritime and archipelagic

57 Amendments to Informal Single Negotiating Text (September 8, 1976) (submitted to Committee II by Yemen), in Flatzöder, supra note 32, vol. 3 at 678.
states and a balanced Archipelago Working Group composed of both groups. If a convention is ultimately accepted, it will recognize the concept of mid-ocean archipelagic states for the first time in the history of oceans law, and thus will meet important political objectives of those states. As may be recalled, this recognition was not accorded by the First United Nations Conference on the Law of the Sea in 1958. At the same time, the convention would establish a right of archipelagic sea lanes passage in broad sea lanes through archipelagic waters and adjacent territorial seas. The text reflects the understanding—without which the conference would not have accepted the mid-ocean archipelagic concept—that in all major respects the underlying concepts of "transit passage" of straits and "archipelagic sea lanes passage" are identical, including rights of overflight and submerged transit. 88

Categories of Straits

Text. The ICNT recognizes the following four categories of straits used for international navigation.

(1) Those governed by Article 35(c), "in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits." This category includes the Turkish Straits, the Danish Straits, and the Strait of Magellan. In those straits all concerned felt that it would be better to continue existing special legal regimes which provide for freedom of navigation. Part III of the text does not affect the special legal regimes in these straits.

(2) Those governed by Article 36, in which "a high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists through the strait." By definition, these straits contain an equally usable corridor with high seas freedoms of navigation and overflight. Thus, there was no need to apply the straits chapter to them.

(3) Those governed by Articles 37 and 38(1), "between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone . . ., except . . . if the strait is formed by an island of a State bordering the strait and its mainland . . . [and] a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island." This general category includes the great bulk of straits used for international navigation and would be governed by the regime of transit passage established in the straits chapter. Similarly, straits in archipelagic waters would be governed by the equivalent regime of archipelagic sea lanes passage.

(4) Those governed by Article 45 that either fall within the "island exception" of the preceding category (Article 38(1)) or that lie between one area of the high seas or an exclusive economic zone and the territorial sea of a foreign State." In these straits the regime of nonsuspendable innocent passage in accordance with Article 45

88 See also Oxman, supra note 41, at 66.
and section 3 of part II of the text applies. If an equally convenient route exists seaward of an island, it was felt that there was no need to preserve more than a right of nonsuspendable innocent passage through such a strait. This “island exception” applies to straits such as Pemba (between Pemba Island and the Tanzanian mainland) and Messina (between the Italian mainland and Sicily). The category of high seas to the territorial sea of a foreign state includes the Strait of Tiran, Head Harbor Passage, the Strait of Georgia, and the Gulf of Honduras, all of which are overlapped by a 3-mile territorial sea. The existing 1958 Geneva Convention provides for nonsuspendable innocent passage in this category of straits connecting high seas to the territorial sea of a foreign state. No changes from existing law, except with respect to clarification of the innocent passage regime, apply to this high-seas-to-territorial-sea category by virtue of Article 45.

It should also be noted that the overall qualification applying to all these categories, “strait used for international navigation,” reflects customary international law as evidenced by the Corfu Channel case, as well as by Article 16(4) of the 1958 Territorial Sea Convention. Therefore, this threshold test will not create additional restrictions on strait transit. Indeed, any category of “strait not used for international navigation” is extremely small. Presumably, the regime of innocent passage would apply pursuant to ICNT/Rev. 1 Article 17 in any such straits overlapped by the territorial sea, and if broader than 24 nautical miles, full freedom of navigation and overflight would apply pursuant to Articles 58 and 87.

UNCLOS has not altered or clarified the existing uncertainty in customary international law over the definition of “strait used for international navigation.” Still, the Arctic strait controversy (including the Northwest Passage question) may be defused by the “[i]ce-covered areas” understanding embodied in Articles 234, 236, and 296, which would apply “within the limits of the exclusive economic zone.”

Counter-textual Arguments. Reisman indicates that UNCLOS “establishes two categories of straits.” 30 Actually, it recognizes four categories of strait used for international navigation with four different regimes, as enumerated above, and only the regime of transit passage (with its counterpart archipelagic sea lanes passage) is new (although the other regimes may be varied for some straits falling under the “island exception” of Article 38(1)).

Of greater importance, Reisman suggests that there is an “undertow” running toward Article 45 that over the long haul could subject vital straits to the less protective regime of innocent passage. 31 He seems to overstate the importance of the Article 45 exception to the transit passage regime and to understake the extent to which innocent passage already applies in the high-seas-to-territorial-sea category of straits.

First, Reisman misinterprets Article 45 when he says that it includes “those straits not included in ICNT Article 38.” 32 Article 45 includes instead those “[e]xcluded under article 38, paragraph 1, from the application of the régime of transit passage.” The difference, though subtle, is sub-
stantial. It means, for example, that the Article 35(c) and Article 36 straits are not included within the Article 45 nonsuspendable innocent passage regime.

Second, the "island exception" from the transit passage regime by definition is operative only "if a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island," and then only "if the strait is formed by an island of a State bordering the strait and its mainland." To argue that the straits within the "island exception," such as Pemba, are "vital" in requiring transit passage as opposed to nonsuspendable innocent passage, when such an alternative route is available, may be to overwork the term. In Reisman's own frame of reference, one would also need to ask how many of the straits in this category are less than 6 miles wide and, as a result, already governed by a regime of nonsuspendable innocent passage.

Third, in connection with the high-seas-to-territorial-seas category, Reisman is theoretically correct that a shift from a 3- to a 12-mile territorial sea would increase the number of straits connecting to "the territorial sea of a foreign State," and thus those in which innocent passage would be applied. In the real world, however, no strait would be so affected because those in this category are all less than 6 miles wide. Thus, under the assumptions of Reisman, Tiran would already fall under the nonsuspendable innocent passage regime of Article 16(4) of the 1958 Territorial Sea Convention (at least for parties to the convention), were it not for applicable UN Security Council decisions. Indeed, the addition of the high-seas-to-territorial-sea provision was regarded at Geneva in 1958 as designed expressly for Tiran. But the Security Council has dealt specifically with the issue in Resolutions 242 and 338 as part of the overall effort at achieving a durable Middle East peace. These actions, which affirm "the necessity . . . [f]or guaranteeing freedom of navigation through international waterways in the area," are binding on all members of the United Nations, and thus override both the Territorial Sea Convention and UNCLOS Article 45(1) (b) for the Strait of Tiran (as would any agreements concluded between the parties pursuant to the Security Council requirements, e.g., the recent Egyptian-Israeli agreement cited by Reisman).

Finally, the suggestion that the use of the term, "strait used for international navigation," in the straits chapter is "a legislative overruling of the Corfu judgment," narrowing the customary international law right of passage, is wrong. The International Court of Justice specifically said in that case:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international

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62 Id., text at note 45.
63 Id. at 67.
66 Reisman, supra note 4, text at note 43.
navigation between two parts of the high seas without the previous authorization of a coastal State. 

And again:

It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.\textsuperscript{68}

The UNCLOS text tracks the Corfu decision closely and, if anything, broadens the category of straits in which passage is protected. In any event, as Reisman points out, "used for international navigation" is found in the 1958 Territorial Sea Convention, to which the United States is party. Reisman might also have pointed out, however, that both the 1958 convention and the UNCLOS text broaden the Corfu decision by extending non-suspendable innocent passage to straits connecting to "the territorial sea of a foreign State." Furthermore, since the qualification, "used for international navigation," appears not only in Article 37 (incorporated by reference in Article 38) but also in the title of the straits chapter, as well as in Article 45 itself (as a qualifying criterion), Reisman's argument would not seem to demonstrate much of an "undertow" toward Article 45.

It should be mentioned that Article 45 creates a regime of non-suspendable innocent passage rather than mere "innocent passage," as Reisman labels it.\textsuperscript{69} This distinction is not inconsequential because the non-suspendable regime is the only recognition of the separateness of straits in the Territorial Sea Convention and is an essential protection for passage.

Had Reisman made the point that previous uncertainties over whether a strait is "used for international navigation" have continued under the UNCLOS text, he would be correct. But to say that UNCLOS has not resolved all straits problems is quite different from implying that it has resolved them so as to give less protection to navigation.

\textit{Negotiating Context.} Article 35(c) on straits with "long-standing international conventions in force" was carefully worded, after lengthy negotiations with the concerned states, to preserve the special legal regimes within the Danish Straits, the Turkish Straits (the Bosporus), and the Strait of Magellan, without affecting the normal straits chapter coverage of other straits. In all three cases, freedom of navigation is preserved pursuant to the special convention regime.\textsuperscript{70}

\textsuperscript{67} The Corfu Channel case, [1949] ICJ Rep. 4, 28 (emphasis added).

\textsuperscript{68} Ibid. (emphasis added).

\textsuperscript{69} Reisman, supra note 4, at section III, "Straits."

\textsuperscript{70} With respect to the special convention regimes in each of these three straits, see generally E. Brûlé, 1 INTERNATIONAL STRAITS 195-200 (1947) (Montreux Convention of 1936 and Danish-Swedish Declaration of 1932), and E. Brûlé, 2 INTERNATIONAL STRAITS 11-115, 200-51, 252-424 (1947) (the Danish Straits, the Strait of Magellan, and the Turkish Straits). Passage through the Strait of Gibraltar is not subject to special international treaty provisions within the meaning of Article 35(c) of the revised ICNT. See id. at 165. This was well understood in the negotiations.
Article 36 was intended, and was so understood by those participating in the straits negotiations, as an "exception" to the transit passage regime only because straits more than 24 nautical miles wide would contain a high seas or economic zone route of equal convenience that would make it unnecessary to traverse even a 12-mile territorial sea. It has never been controverted that high seas freedoms of navigation apply and will continue to apply in such straits.

The regime of nonsuspendable innocent passage under Article 45 was intended to apply to "island exception" straits and to those connecting to "the territorial sea of a foreign State." The first is a narrowly drawn exception made in deference to the availability of a route "of similar convenience." The paradigm straits of applicability for this exception are the Pemba Channel and the Strait of Messina. The second exception continues the broadening of the Corfu decision described in the previous section.

V. THE UNCLOS CONSENSUS AND THE REGIME OF THE TERRITORIAL SEA

Breadth of the Territorial Sea

Reisman writes that UNCLOS "has . . . produced a new regime" 71 broadening the territorial sea and that

[1]he rather alarming tendency, enunciated most authoritatively by the International Court in the Iceland Fisheries case, to view select provisions in international drafts as indicators of consensus and hence evidence of innovative customary law, despite their failure to win the formal support necessary for adoption in conformity with constitutive processes, virtually transforms Article 3 [establishing a maximum permissible breadth of 12 nautical miles for the territorial sea] into custom. 72

I would agree that the existence of the law of the sea negotiations, with the consequent political focus on oceans jurisdictional limits, has probably accelerated the trend toward a 12-mile territorial sea. Nevertheless, Reisman does not fully treat this issue in context. First, prior to the UNCLOS negotiations, the trend toward a territorial sea of 12 miles (or even more) was unmistakable. Indeed, it was one of the reasons the United States joined with the Soviet Union and other states in seeking a new straits transit regime to be coupled with a limit on the maximum territorial sea to 12 nautical miles. Through time the 12-mile trend would likely have made itself felt as clearly as it is today anyway, particularly since the Soviet Union had itself taken the step long before UNCLOS. Second, any effort to contain the overall trend of unilateral extensions of coastal state jurisdiction through international negotiation would inevitably have stimulated appetites as well.

If the UNCLOS text is creating instant custom in this area, it should be remembered that this custom also acts against a territorial sea broader than 12 miles, a not inconsiderable issue today when more nations claim beyond 12 than a 3-mile or narrower limit. Additionally, if UNCLOS is creating

71 Reisman, supra note 4, at 59. 72 Ibid. (footnote omitted).
custom concerning a 12-mile limit, it is simultaneously creating custom for
transit passage of straits, as these issues have been linked at every stage of
the negotiation. Finally, if Reisman is correct that Article 3 has virtually
been transformed into custom, a proposition that does not at this time re-
fect the U.S. view, then it would no longer seem appropriate to use the
3-mile limit and high seas freedom as the point of comparison for approval
of UNCLOS—unless one were to spell out, as I believe is fully sustainable,
an equivalent customary-historic right to freedom of navigation through,
over, and under straits used for international navigation.

Innocent Passage

In addition to establishing a separate regime for straits transit, the
UNCLOS text updates and strengthens the regime for innocent passage
through the territorial sea. This "Innocent Passage" section of the territorial
sea chapter is rooted in the provisions of the 1958 Geneva Territorial Sea
Convention but in important respects modernizes and improves it. These
improvements include:

- The vague regulatory competence of the coastal state, reflected in
  Article 17 of the 1958 Geneva Convention, has been clarified in Article
  21 of the ICNT in a balanced fashion and reasonably accommodates
  both coastal state concerns and navigational rights.

- Coastal state regulatory competence over pollution from vessels in
  innocent passage has been clarified to balance environmental concerns
  and protection of navigational rights. In particular, Article 21(2)
  makes it clear that no "[s]uch laws and regulations shall . . . apply to
  the design, construction, manning or equipment of foreign ships unless
  they are giving effect to generally accepted international rules or
  standards."

- Coastal state duties not to hamper innocent passage have been
  strengthened in Article 24. Most importantly, the article includes new
  obligations not to "[i]mpose requirements on foreign ships which have
  the practical effect of denying or impairing the right of innocent pas-
  sage" and not to "[d]iscriminate in form or in fact against the ships of
  any State or against ships carrying cargoes to, from or on behalf of
  any State."

- Balanced provision for sea lanes, traffic separation schemes, and
  nuclear-powered ships is made in Articles 22 and 23.

- The ambiguity associated with the concept of "innocent passage"
  has been somewhat reduced by limiting it in Article 19(2) to activities
  engaged in "in the territorial sea" and by defining it in the same
  article in terms of a specified list of 12 noninnocent forms of activity.

- Provision has been made in Article 296 for compulsory third-party
  settlement of innocent passage disputes, at least those concerning com-
  mercial vessels.

One of the major defects of the 1958 Territorial Sea Convention is that it
did not deal with the environmental issues associated with innocent passage.
As a result, it left doubts about competence genuinely needed by coastal
states, such as authority to establish traffic separation schemes (outside of straits), and risked their overreacting to environmental threats by trying to limit navigational rights as, for example, by establishing design or construction standards for vessels in transit. This issue was debated at length at UNCLOS and, in association with its treatment in the chapter on marine pollution, was resolved in a creative and balanced manner.

Failure to provide for assured recourse to third-party compulsory dispute settlement was also a significant weakness of the Territorial Sea Convention. Without it there was only halting opportunity to develop a reasonable jurisprudence of “innocent passage” based on the treaty. Provision for compulsory settlement of disputes, even if confined to commercial vessels, would be a significant strengthening of oceans law in this area.

Without mentioning the several important respects in which the UNCLOS innocent passage regime has been strengthened over the 1958 Geneva Convention currently binding on the United States, Reisman offers several criticisms of the updated regime that center on the definition of innocent passage. He is particularly concerned by what he interprets as both a removal of the Geneva limitation that the peace, good order, or security of the coastal state must be prejudiced and a broadening of the range of effects that can be determined to be noninnocent.13 This interpretation is based exclusively on Article 19, paragraph 2 through 2(a), a portion of the article entitled “Meaning of Innocent Passage” that attempts an objective definition. That portion provides:

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:

   (a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations. . . .

While agreeing with Reisman that it is important to increase specificity and objectivity in an article so importantly relating to community navigational rights, I believe his concern is overstated and that the UNCLOS text makes some progress in defining innocent passage objectively.

First, while Reisman’s argument that Article 19(2) abandons the Geneva limitation that prejudice must be to the coastal state for passage to be noninnocent is a possible interpretation, I believe that a better one and the conference’s intention is that it does not change the Geneva Convention in this respect. Article 19(1) and the first paragraph of 19(2) specifically retain the requirement, “of the coastal State,” which seems inconsistent with the interpretation that it has been eliminated. Moreover, 19(2)(a) itself retains the phrase, “of the coastal State,” which can be read as easily, if not more easily, as modifying the “in any other manner” clause, just as this clause is modified by “threat or use of force” in the first half of 19(2)(a). That is, the “in any other manner” clause refers to and requires a threat

13 Id., text at notes 31–35.
or use of force against the coastal state. As a textual matter this interpretation is reinforced by the repeated use of "the coastal State" in limiting the noninnocent activities enumerated in Article 19(2). The phrase appears five times in the list of activities, whenever drafting suggests the need for a limiting factor. Most importantly, Article 19(2)(a) was taken from Article 2(4) of the UN Charter, and the phrase "any other manner" clearly refers back in that context to threat or use of force. The "coastal State" phrase is merely substituted for the "of any State" phrase in Article 2(4), and thus is intended in an obvious way to limit the broader applicability of the Charter usage to threats against the "coastal State" only. Moreover, why should a more serious threat against territorial integrity be limited to threats against the coastal state if lesser violations of Charter principles in the Article 19 enumeration were not so limited? As one who helped negotiate this provision, I certainly understood that it was modeled on the Charter prohibition against use of force in the manner I have just described. As Never was there any sign during the negotiations that Article 19(2) was to make the major change in the Geneva Convention framework that Reisman finds in it.

Second, Reisman understates the importance of the new Article 19(2) phrase requiring that activities to be noninnocent must be engaged in "in the territorial sea." Given the long background of this provision in oceans law, it seems more reasonable to interpret it as a limitation intended to avoid the expansive interpretations that Reisman rightly fears. McDougal and Burke point out in their encyclopedic study of oceans law that the failure of the 1958 Geneva Conference to include a weaker but similar phrase meant that it was "now open to the coastal state to take other factors into account, including, for example, the purpose of the projected passage, the cargo carried and destination in a third state." In this respect a change from Geneva is intended by the ICNT.

Third, Reisman fails to take account of the explicit new duty in Article 24 that "in the application of this Convention . . . the coastal State shall not . . . discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State." Such an obligation would seem to point against an expansive interpretation of 19(2) that sees it as permitting discrimination against third states, based on their alleged violation of Charter norms.

Fourth, under the overriding norms of the Charter any state, coastal or not, is free pursuant to Article 51 collectively to assist a state unlawfully attacked in violation of Article 2(4). But if such a determination is made

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14 A statement of the U.S. representative in the Second Committee at Caracas on July 22, 1974, lends some support to this interpretation of the limitation to forceful threats against the coastal state. Thus, it was said: "The convention should require that ships and aircraft in transit refrain from any threat or use of force, in violation of the Charter of the United Nations, against the territorial integrity or political independence of a State bordering the strait." Record of the 12th meeting of the Second Committee (July 22, 1974), 2 OFFICIAL RECORDS: THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 128 (1974).

15 McDougal & Burke, supra note 15, at 258.
by a coastal state, it loses its neutral status and under the law of neutrality could itself be treated as a belligerent. This potential loss of neutral status should be a deterrent to such coastal state interventions against passage.

Fifth, Reisman may somewhat overstate the certainty of the linkage between prejudice and strait state interests in the Territorial Sea Convention. McDougal and Burke suggest this linkage was the principal reason for the separation between the first and second sentences in Article 14(4), but that “this supposed dichotomy between innocence of passage and conformity with international law cannot be taken as an absolute separation.” And with particular relevance to Reisman’s concern about a possible new linkage to Charter norms, McDougal and Burke go on to say, “infringement of more fundamental prescriptions, such as those of the United Nations Charter, would clearly justify prohibition of passage as non-innocent.” Whether or not one accepts this interpretation if applied to a breach other than toward the coastal state, it points out yet again that the 1958 innocent passage regime was no model of clarity. By contrast, the textual thrust of the ICNT is to limit the determination of noninnocence to threats or use of force against the coastal state in violation of the Charter.

Finally, it is not true that “only when [the coastal state] has affirmatively characterized a passage as appropriately innocent is the passage insulated from lawful suspension by the coastal state,” as Reisman suggests. The provisions of the innocent passage regime do not in this respect either require affirmative action by the coastal state or assign complete discretion to it. Rather, they establish an objective normative standard that is binding on coastal and transiting states alike. Under Article 25 the coastal state may take steps to prevent passage “which is not innocent” (emphasis added), not which it deems not to be innocent. If passage is innocent, then the coastal state has no right under UNCLOS to prevent it, and transiting states presumably can be expected to defend their rights of passage. It should also be remembered that in a major improvement over the 1958 Geneva regime, third-party compulsory adjudication is available for determining noninnocence, at least with respect to disputes involving commercial vessels.

VI. Conclusion

Despite the contemporary development of new uses of the oceans, their use as a global highway for trade and commerce remains economically the most important. Oceans commerce is an indispensable part of the highly interdependent global economy. If to this economic dependency is added the vital, and often interdependent, interests of many nations in the use of ocean space for strategic deterrence and defense, the protection of the community interest in navigational freedom throughout the world’s oceans becomes of first-rank importance.

Fortunately, there is no necessary conflict between the extension of

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76 Id. at 257-58.
77 Id. at 258.
78 Reisman, supra note 4, at 65.
coastal state jurisdiction over resources and the full protection of community navigational freedoms. Navigational use can be repeated without depletion and most efficiently remains a shared freedom. In reaffirming that basic truth for the present era in oceans law, it is essential that it be clearly expressed in a functional separation of expanded forms of coastal state resource jurisdiction and full protection of navigational freedom. Dysfunctional claims to ocean space are not most usefully avoided by futile efforts to prevent all claims, but rather by allowing specialized resource competence and limited functional jurisdiction when in the common interest and simultaneously protecting navigational and other community freedoms fully and effectively in areas of expanded coastal state jurisdiction. For example, modern oceans law must provide for effective protection from vessel-source pollution. Any construct that fails to address itself to this environmental issue or the major trend toward expanding the resource jurisdiction of coastal states invites overreaction from those states, which would threaten the environment or navigational freedom, or even both. It is in establishing this careful functional division in the straits regime, which respects both legitimate coastal state needs and protection for navigational freedom, that UNCLOS has made a lasting contribution. That contribution is likely to be more enduring if UNCLOS succeeds in concluding a comprehensive treaty, but in any event it seems likely to have substantial influence on the development of oceans law.

Criticisms of the UNCLOS straits regime rooted in misperceptions of purported trade-offs or narrow analyses of national needs view the issues through a peephole on the world. Richard Darman's Foreign Affairs article denigrating the importance of straits transit misses the point. The real stake is not the strategic interests and national needs of any one nation, however important. Rather, it is no less than maintenance, indeed strengthening, of the common interest in navigational freedom in an age of increasingly complex oceans use and oceans politics. The regime of straits transit is the most essential element in that freedom. And in the real world of oceans politics, it is nonsense to believe that either the United States or the Soviet Union would accept a law of the sea treaty that did not fully protect freedom of navigation through straits.

Similarly, criticisms that do recognize the importance of straits transit but assert narrow interpretations of the work at UNCLOS, though correctly cautious in dealing with so important a community interest, overstate both the certainty of the existing international law of straits transit and the uncertainty alleged to be associated with the new UNCLOS regime. In my judgment, there is no reasonable doubt, based on either a purely textualist or a broader contextual interpretation of the UNCLOS text, that the straits regime protects freedom of navigation through, over, and under straits used for international navigation. Specifically for covered straits this protection includes:

- a right of overflight as a general right of oceans law;
- recognition of the separate needs of straits transit as opposed to passage through the territorial sea in general;
• a right of submerged transit;
• clear transit rights not subject to coastal state characterization of "innocence" or some other restrictive threshold standard;
• limited and balanced coastal state regulatory competence providing protection both for coastal states' environmental concerns and the community's navigational freedoms;
• no discrimination against military vessels or aircraft; and
• freedom of navigation through, over, and under archipelagic sea lanes.

These conclusions as to the UNCLOS straits regime are consistent with the excellent analysis by Burke 79 and, I believe, reflect a common interpretation at UNCLOS, including that of the United Kingdom as principal draftsman of the background text as well as those of the United States and the Soviet Union as principal affected nations. Indeed, I know of no interpretation to the contrary that has been advanced by any nation participating at UNCLOS.80

It is to be hoped that the major effort of over 10 years that has gone into UNCLOS by nations and leaders from all regional groups will result in a widely accepted "Caracas Convention on the Law of the Sea." For that to happen, the conference must still clear formidable hurdles such as deep seabed mining, continental margin delimitation, principles for resolution of continental margin boundary disputes, protection for marine scientific research, protection for cetaceans, final articles, and procedures for completing and adopting a package text.81 With or without a new convention, however, the UNCLOS straits regime seems destined to serve as a powerful model for the development of a new customary law of straits transit.


80 On a topic as important as UNCLOS straits transit, the appearance of articles interpreting the text during the continuation of the conference may, of course, tempt disgruntled participants to attempt to reinforce revisionist interpretations.

81 Acceptance—as a reasonable accommodation—of the UNCLOS straits regime reflected in the ICNT should not be assumed to extend to all other aspects of the ICNT, or even to all other navigational and security aspects of that text. In my judgment, the text remains seriously deficient on seabed mining, the "status of the economic zone," protection of cetaceans, delimitation of the outer edge of the continental margin, and marine scientific research. In its present form it could not obtain Senate advice and consent.

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PANEL III

The Commission on the Limits of the Continental Shelf
Thank you. I first want to thank John Moore, Myron Nordquist, and the Center staff for inviting me to be a part of this meeting. This morning we are going to address the Commission on the Continental Shelf. Some of you in the audience were indeed participants in the negotiation of the Continental Shelf Article. Others of you perhaps have not really addressed this part of the Convention that thoroughly so this may be relatively new to some of you. We have an interesting panel in that we have representatives from two non-parties of the Law of the Sea sandwiching in one Commissioner of the Continental Shelf Commission today. We should get some different perspectives in our presentations today. I suspect you all will have comments and questions following our three talks. Primarily I will be the moderator of this group. I will spend the first five to ten minutes basically introducing the Continental Shelf concept, and then we shall hear a presentation from Mr. Francis on the Commission. Then Mr. Haworth will give a presentation on Article 76 and exactly what is going to be entailed in an application by a coastal State to the Continental Shelf Commission.

The Continental Shelf Commission is interesting because the majority of the States in the world will not have a direct impact on or need for the Continental Shelf Commission. However, the entire international community will be impacted by the decisions and recommendations that come out of the Commission. The provisions relating to the Continental Shelf are contained in Articles 76 and 85, Annex 2 which established the Commission on the Continental Shelf, and Annex 2 of the Final Act which is a

*United States Department of State.
Robert Smith

statement of understanding concerning the specific method to be used in determining the outer edge of the continental margin. The Article elaborates on the parameters of a regime in an area in which the coastal State may exercise sovereign rights for the purpose of exploring and exploiting the natural resources of the seabed and sea floor.

The first Article in Part 6, Article 76, defines the Continental Shelf in a manner which is scientifically based, legally defensible and politically acceptable. The formula to define the outer limit for the coastal State’s Continental Shelf is complex but workable. At a minimum, the coastal State has the right to a Continental Shelf out 200 miles from a base line whether or not the physical Continental Shelf extends to that limit. According to Article 77, these exclusive rights over the Continental Shelf do not depend on the occupation, effective or notional or any expressed proclamation. Where the physical conditions are met, Article 76 seeks to maximize the State’s jurisdiction over the Continental Shelf where that Shelf extends beyond 200 miles from the baseline from which the territorial sea is measured.

In comparing the 1982 Convention with the 1958 Convention on the Continental Shelf, with the exception of the definition of the outer limit of the Continental Shelf, most of what is contained in the fifteen Articles of the 1958 Convention have been preserved in Part 6 of the 1982 Convention, either verbatim or in principle. The sovereign rights expressed in Articles 2 and 3 of the 1958 Convention, remain the same as those cited in Article 77 of the LOS Convention. In both Conventions, the right of the coastal State over the Continental Shelf shall not affect the legal status of the superjacent waters as high sea or that of air space above.

In addition, the Los Convention in Article 78, paragraph 2 emphasizes this point by the following: “The exercise of the right of the coastal State over the Continental Shelf must not infringe or result in any unjustifiable interference with navigation and other

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rights of freedom of other States as provided for in the Convention.” In the 1958 Convention, the Continental Shelf was defined as “The seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to a depth of 200 meters or beyond that limit to where the depth of the superjacent waters admit of the exploitation of the natural resources of said areas.” The concepts of adjacency and exploitability are imprecise and ambiguous. This creates a complicated and virtually unworkable definition of the outer limit of the Continental Shelf. Greater certainty was required in the LOS Convention and the definitions established a boundary between the coastal State Continental Shelf and the deep seabed area subject to the resource jurisdiction of the International Seabed Authority. In addition, companies wanting or able to drill in deeper waters need a clear definition of the Continental Shelf limit. So the LOS Convention did preserve the concept contained in the 1958 Convention, that the Continental Shelf begins at the outer limit of the territorial sea.

However at Third United Nations Conference on the Law of the Sea which produced the LOS Convention, there was a division of views regarding what the outer limits definition should be. Many countries favored a Continental Shelf limit which coincided in all situations, with a 200 mile (EEZ) drawn from the baseline from which the State measured its territorial sea. This condition follows from the fact that from a physical perspective, most States do not have any possibility of extending the Continental Shelf beyond 200 miles. However, a relatively small but influential member of broad margin States favored a Continental Shelf definition which under certain circumstances went beyond the 200 mile limit.

The Continental Shelf is only one part in the submerged prolongation of land territory off the shore. It is the innermost of three geomorphological areas; the Continental Slope and the Continental Rise being the other two. The Shelf, Slope and Rise taken

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together are geologically known as the Continental Margin. World-wide, there is a wide variation in the profile of the Continental Shelf, Slope and Rise. And from the time of the 1958 Convention, the term given to the submerged area being placed under national jurisdiction has been known as Continental Shelf. I should note that during certain stages of the Third Law of the Sea negotiation, there were attempts to clarify this from a physical standpoint, but the term Continental Shelf was such a known concept that it remains the concept that prevailed. And so the resulting compromise in the definition of the Continental Shelf's outer limits is legal in nature, but it is scientifically based.

New to the LOS Convention are provisions addressed in Article 82 pertaining to revenue sharing, with respect to exploiting the natural resources on the Continental Shelf beyond 200 miles. The coastal State shall be obligated to make a payment or contributions in time on the resources exploited after the first five years of production at that site. And as stated in Article 82, paragraph 2, "For the sixth year, the rate of payment or contribution shall be one percent of the value or volume of production at the site. The rate shall increase by one percent for each subsequent year until the fifth year and shall remain at seven percent thereafter." And these payments or contributions will be made through the Seabed Authority, which shall distribute them to the State's party on the basis of an equitable sharing criteria taken into account the interests and need of the developing States, particularly the least developed and land-locked nations.

In paragraph 8 of Article 76, it states that the information on the limits of the Continental Shelf beyond 200 miles shall be submitted by the coastal State to the Commission on the limits of the Continental Shelf which, again, is established according to Annex 2. After reviewing the evidence submitted, the Commission shall make recommendations to the coastal State on the outer limits, and then based on the limits established by the coastal
States based on those recommendations, the decision shall be final and binding.

But in recognizing the complexity of Article 76, we need to get a sense of the final revisions, and the sensitivity of coastal States related to sovereign rights. The Conference negotiators opted to create a Commission which “recommends” and to exclude delimitation and outer limits of the Continental Shelf, from compulsory or binding, third party dispute settlements. This was a common feature in the LOS Convention. Thus, the process by which the Commission includes review, advice and recommendations acceptable to the international community.

The Commission itself does not establish the outer limit of the Continental Shelf. That remains a function of the coastal States, following the submission of information pertaining to the definition of the outer limits and the recommendation of the Commission. If the coastal State makes the submission and if the Commission’s recommendations are acceptable to the coastal State, then the State may establish the outer limit. If the views of the Commission are not acceptable to the submitting State, then the State must make another submission. Theoretically, this process could go on and on indefinitely.

Paragraph 10 of Article 77 notes that the recommendation of the Commission is without prejudice to the question of delimitation in the Continental Shelf between States, that is opposite or adjacent States. This is a very ticklish question, one that is still being discussed and will be noted further in terms of the rules and procedures of the Convention.

At this time, I would like to introduce our first panelist, Mr. Noel Francis, from our host country here in Jamaica, who is a surveyor. He presently is a Deputy Director of Surveys in the Survey Department of Jamaica. He received a Bachelor’s degree in Natural Sciences at the University of the West Indies. He got a post-graduate diploma in Surveying in the University College in
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London, has taken survey courses with the Canadian Hydrographics Service, received a Certificate of Maritime Boundary Delimitation at the University of Toronto, and has an M.B.A. from Nova University in the United States. From his resume, he has been extremely busy, in the context of Jamaica's delimitation of its own maritime boundaries with its neighboring States. Perhaps most important for this group, just last year he was one of the first group of 21 Commissioners elected to the Continental Shelf Commission. So I would like to turn the podium over to Noel right now to give you some first hand thoughts on the Commission.
Thank you very much, Mr. Chairman. Ladies and gentlemen, first I must take this opportunity to welcome you all to Jamaica, our home. We would like to know that you have made it your home for the last few days that you have been here, and for the days to follow that you will be here. Enjoy the rest of your stay.

I will be talking to you for the next few minutes about setting up the Commission, and I must emphasize setting up the Commission, because I will try to steer clear from Commission issues. The main reason is because the Commission is still in its embryonic stages. Yes, there are physical bodies in place. The members of the Commission are there. However, we have yet to decide on things like the rules of procedure, modus operandi, and what have you, so we are still in our embryonic stages.

Ladies and gentlemen, the United Nations Convention on the Law of the Sea has given rise to the creation of three distinct bodies. One is the International Tribunal for the Law of the Sea, located in Hamburg. Then there is the International Seabed Authority with its headquarters here in Kingston, Jamaica. Then, there is the Commission on the Outer Limits of the Continental Shelf, with its headquarters in New York, of which I am a member.

Maybe one of the foremost questions on your mind is what is the purpose of this Commission? Well, to answer this, I would like to refer you to Article 3 of Annex II, which lists the function of the Commission as follows: 1) To consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200

*Member of the Commission, Jamaica.
nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea. (The latter relates to the situation in the Bay of Bengal.) Secondly, to provide scientific and technical advice, if requested by the coastal State concerned, during the preparation of the data referred to in the previous paragraph.

This is a very key section of the work of the Commission, and a most practical example is here in the Caribbean. There might be Caribbean States that can take advantage of this special situation, and I would like to refer to maybe Trinidad and Tobago, as well as Barbados. However, these countries will quite likely need technical advice from the Commission. Right now we are in the process of trying to sensitize all of the various Caribbean nations to this organization.

The Composition of the Commission

Now, this Commission is comprised of individuals and, I will stress individuals, with knowledge in geology, geophysics and hydrography. It is in the general feeling that these diverse professionals should be adequate to comprehend and evaluate the complicated issues that are to be dealt with in Article 76 of the Convention that provides the definition of the Continental Shelf in accordance with the specific technical criteria. I want to stress that the Commission is really comprised of individuals, and not States or representatives of States, but rather of individuals.

How are the Commission members elected? Again, I would like to refer you to Article 2 of Annex II. This Article states that the Commission shall comprise 21 members. These members should be expert in the field of geology, geophysics, or hydrography. Most importantly, it stresses a need for equitable geographic representation on the Commission. We can all see the
need for equitable geographic representation. If there were no Caribbean representative, then maybe nobody would be talking about sensitizing Caribbean nations to the issues that are involved here.

The process of election, as specified in this Article, consists of the Secretary-General inviting submissions from State’s parties to form a list of all the candidates along with their curriculum vitae which is circulated among the State’s parties. Election of the members is then held at the U.N. headquarters, at a meeting as specified in this Annex. Each Commission member is elected for a period of five years, and then assuming that everything goes well, at the end of five years you can seek reelection.

Now, to date, the existing Commission has had two sittings. On the first sitting, each member made the solemn declaration with regards to the performance of his duties in accordance with the rules of procedure. The officers of the commission, which included a Chairman, three Vice-Chairmen and one Rapporteur, have all been elected and are in place. However, I must stress that this Commission is still going through the seeding stage. We are still trying to finalize the rules of procedure, the modus operandi, and the manner in which technical data should be presented with the submission. In other words, the manner in which the submission is made to the Commission. What we want is a stated situation where there will be a more or less unique way in presenting a State’s idea so that the Commission work will be made much easier.

The Commission has agreed to have regular meetings twice per year. However, if the need arises, then this Commission will be willing to sit outside of the regular meetings to consider a submission. Our first meeting lasted for a week, and then we found out that for the Commission, this time was not adequate. Thus, we have actually extended the period of our meeting to two
weeks. The next meeting should be in June, 1998 and it will again last for a period of two weeks.

Now, although there are still outstanding issues concerning the rules of procedure and the modus operandi, there is general agreement on the procedure to be followed in making a submission to the Commission. In general terms, the coastal States inform the Secretary-General of their intention, and then submit the relevant information to support their claim. It is passed over to the Commission and we consider the submission.

I wish to comment that the concept of the independence of each Commission member is a most desirable one. However, one has to ask the question as to the extent to which this Commission can be truly independent when all expenses of the Commission member is borne by the State party which proposed the member. It is my opinion that the expenses of each Commission member should be borne by the United Nations to make it a real independent Commission. I wish to refer you to the old saying that the one who pays the piper calls the tune. To make this Commission truly independent, again I must say that it is my opinion that all of the expenses of the Commission should really be borne by the United Nations.

The Commission members will have to be very vigilant to maintain their independence. They must avoid political considerations in enforcing their decision as this Commission will play a very important role in maintaining stability in international relations.

In the election of Commission members, the concept of equitable geographic representation is used. I would consider this a most desirable situation as this allows for wider participation. Not just wider participation but it allows people from developing States, such as Jamaica, to participate in this very important Commission. Ladies and gentlemen, I am willing to take whatever questions you may wish to ask. I must however, specify that there
is not a lot that I can say about the work of the Commission at this point, because of the fact that we are at our embryonic stages.
The Continental Shelf Commission

Richard Haworth*

Over the last five years, I have had at least something to do with trying to identify the problems that the Commission was going to face. I am somewhat in awe of the development of the work of the Commission. About three years ago, I took part in a meeting in Fredericton, New Brunswick which was attended by about 50 percent scientists, 50 percent lawyers, to talk about the problems of Article 76. It was a very interesting discussion between two distinct cultures. That meeting gave me some insight into the way in which the lawyers were perhaps looking at Article 76. From the lawyers point of view, this is a very simple thing that the scientists should be able to sort out very quickly. I spent most of my time during that particular meeting pointing out to them that it was a little more difficult than that. When I gave a similar talk to the Division of Ocean Affairs and Law of the Sea at the U.N., I took about two to three hours. To do it in 20 to 25 minutes is going to be a little bit difficult, but I hope to at least instill in your minds that this is not very, very simple at all. You have heard most of the information that is contained here as it says on slide 1. The only clarification is that November 16, 1994 was the date at which the UNCLOS came into force for those countries that had ratified. But the Commission responsible for developing procedures by which the limits of the Continental Shelf proposed by a coastal State may be accessed for compliance with Article 76 really just got underway on March 13, 1997.

There are two sets of definitions for Article 76 (see slides 2 and 3). The definition of the Continental Shelf is not just the geological or hydrographic definition. It consists of the seabed and

*Director General, Natural Resources Canada.
subsoil of the Shelf, the Slope and the Rise, which makes up the Continental Margin (76.3). It is the entire Continental Margin and that is the way that we have to look at it.

The principle behind Article 76 appears to have been that it includes those resources associated with the geology of the coastal State. It includes out to 200 nautical miles at least, or out to 60 nautical miles beyond the foot of the slope. Thus, coastal States may claim most of the sedimentary wedge that is associated with the Continental Margin. But unfortunately, when the definition is applied to the real world the results are not clear. Not clear is the gentlest of phrases that I can use.

Just to give you an indication of what this means, from the baseline one can go out 200 nautical miles if you have a very narrow Continental Margin, and that is the simplest expression of what the limits of the Continental Shelf can be. When one has a wide Continental Margin, there are these two formulae: out to the foot of the slope and then 60 nautical miles farther seaward. There are additional limits as to how far out one can go, but the foot of the slope or 60 nautical miles where I shall leave it for the moment.

The sediment thickness formula—a sedimentary wedge normally underlies a Continental Margin—goes out from the foot of the slope to a distance where the thickness of sediment is one percent of the distance from the foot of the slope—the so-called "Gardiner" limit, named after the Irish author of this part of the formula. That is again a definition based upon one's knowledge of the thickness of the sedimentary wedge. In both of these cases, the formula for a wide margin should give the coastal States most of the resources that exist within the Continental Margin. Most of those will be hydrocarbons within the sedimentary wedge. If one goes out to one percent of that distance, most of the sedimentary wedge is incorporated.
Now this slide (slide 3) can always get a rise out of Bob. It also will give an example of Canada, where the 200 nautical mile limit is where this red line is, all on the three oceans which we border. The preliminary outer limits that would be determined by Article 76, is the white line. It extends considerably beyond the 200 nautical mile limit around the Grand Banks and also in the Arctic Ocean, and extends well beyond the Continental Shelf. This is essentially this light-colored area which is the Continental Shelf as a geologist would understand it. In our case, it probably extends the zone over which we would claim sovereignty by an additional 50 percent in terms of area.

Now I just want to go through each example of the kinds of problems that we have.

Baselines (slide 4). When I first started working on Article 76, I recognized that the baselines were essentially those that had been deposited with the United Nations (16.2). I thought this was somebody else’s problem. But these types of things tend to come back to you. Two years later, I realized what a potential problem baselines are. The point is that the Commission is using information that should have been submitted by the coastal State. Therefore, the responsibilities of the Commission with respect to baseline are by no means clear. The relevant Articles of the Convention are identified there, but this is something that is already supposed to be in existence by the time the Commission does its work.

The first thing that they really have to look at is the foot of the slope. The foot of the slope, it says in Article 76, 4(b), shall be determined as the point of maximum change in the gradient at its base. Two little problems. How does one define “the maximum change?” How do you define “at its base?” I shall show you a couple of examples and then come back to that slide again.

For example, in this particular case, if one considers a Continental Margin, does one take a local bump in the edge? Or
do we define the maximum range of slope over a region? There is no definition. The Commission will have to decide which of those to use. It will also have to decide how these profiles are to be presented because scale is all important. The is a margin, and this is a very shrunk scale that one could argue is the foot of the slope. If one expands that section, then perhaps really that is where the foot of the slope is. Is that the base of the slope? Is that where one might indicate where the slope is? Or if I stretch it out to the scale to which we would normally look at these things, that is where I showed you the first one (slide 5)—that is where I showed you the second one. (Slide 6)—Maybe that is where the foot of the slope really is. One can see that in this case, that is a difference of 250 kilometers between those two points. And if that's not bad enough, this particular Article starts with the phrase "In the absence of evidence for the contrary, the foot of the slope..." So what is the kind of evidence that might be accepted as other evidence for the foot of the slope?

The outer limits (slide 6) will have to be identified by a series of straight lines not exceeding 60 nautical miles. These are connected fixed points defined by coordinates of latitude and longitude. Again, this is paragraph 7 of Article 76.

What are straight lines? Straight lines on a map? Or straight lines on the Earth? They are two very different things. How do you choose the points? Is it at the discretion of the state? How well must the points be justified? If you have a single profile across the Margin, is that sufficient? Must you have a series of profiles which show that the points that chosen are well justified? Can one choose those most beneficial to the coastal State or does one have to have a line which in generalities agrees with the definitions within Article 76, over a larger area?

The Gardiner Rule (slide 7) is looking at the thickness of sedimentary rocks. Again, we define fixed points. Again, maximum separation—60 nautical miles at which the thickness is
one percent of the shortest distance from the foot of the slope. This, in itself, has always seemed to be, for most of the geologists and geophysicists, somewhat of a difficult thing to define. We have to look at the thickness of the sediment which is one percent of the distance from the foot of the slope. If one has a sedimentary wedge that behaves like that, everything is fine. No problem at all. And I defy you to find a geophysicist and geologist who has ever seen an ideal profile.

The first problem here is basement with sediment lying on top of it. One must define where that particular line is, because it is not easy unless you have drill samples to identify where that particular basement is. You generally look at it with differences in velocities within a particular section. So first of all, where is the basement? How deep is it? Where is it? Wherever it is, it normally has somewhat of a rough topography. So if one is looking for this one percent point, for example, one might have eight solutions. Which is the appropriate one to choose?

That also automatically assumes that one knows the thickness of the sediment. Again, we do not know the velocity of sediments very well. Thus, we have a problem in finding the base of the sedimentary rocks. What is their absolute thickness? Because one needs to know absolute thickness, which solution of the many possible is acceptable?

So that's the summary of the technical challenges (slide 8). Both the fundamental reference points, the baselines and the foot of the slope are subject to interpretation. The baselines have been defined by the coastal State, but for the foot of the slope there are the technical difficulties in defining where they are. And then the means by which extensions from the foot of the slope are determined are subject to technical problems of measurement and to interpretation, as shown with the Gardiner rule.

This is why Mr. Francis and his colleagues need technical expertise to go through this interpretation of the technical
elements of Article 76. As Mr. Francis said, the functions of the Commission are to consider the data and other materials submitted by the coastal State, and make recommendations (Annex II, article 3.1a)(slide 9). The second function, which again was mentioned, was to provide scientific and technical advice if requested by a coastal State during the preparation of the data (II 3.1b). So, one of the functions of the members of the Commission is to provide advice (at/and) the cost of the coastal State if requested to help it in the preparation of its submission. One of the questions is what data are to be submitted (slide 10). Article 76 specifies, relatively briefly, information on the limits of the Shelf should be submitted by the coastal State to the Commission. As Mr. Francis said, the Commission is still trying to decide what data shall be submitted. Annex 2, Article 4 specifies that coastal States shall submit particulars of such limits along with supporting scientific and technical data. This is very important because we need to know the amount of information that is need in support of a claim.

Some potential problems that the Commission will face (slide 11) is this conflict between providing advice and assessing the submission (II Art 5). As both of the previous speakers said, this is essentially dealt with. If one provides information to a coastal State, one cannot be a member of the sub-Commission which is assessing the submission. However, that particular person will be a member of the Commission, and have voting rights as a member of the Commission in accepting the recommendations of the sub-Commission.

Too much data may be overwhelming—too little data may be inconclusive. I mentioned earlier how little information one needs to justify points that 60 nautical miles apart. To give you an example, if we in Canada were to submit all of the information about our Margin, that would be the extent of the information that we would have to submit (slide 12). I am not quite sure how many box cars we would need if we put it in paper form, to assess
the outer limits would be a major task. It certainly has been a major task of ours to assemble all the information. It is not a task that I would expect the Secretariat looking after the Commission to deal with.

In the case of the Gardner rule, this is the kind of information upon which the thickness of sedimentary rocks is obtained. This brings up the second problem of the kind of information that is made available and the confidentiality of that information. Most of the information in heavily populated areas is collected by oil companies. It is confidential information. It is very marketable. As government scientists, we have access to that information and would use that information in trying to identify the limits of our Margin. It goes without saying that the companies that have collected this information would not be willing to see that information put into the public domain.

Therefore, there is a question as to how much information shall be available to Commissioners, to members of the Commission, and to members of the Commission from an adjacent State, for example. It is a question that I know the Commission is already dealing with. But this confidentiality of information is a very important one. The question that I raise is for the Commission to think about. Does the Commission really wish to have the information stored at the United Nations? Or would it be willing to say that it is stored at the coastal State, and therefore just accessible to the Commission when the Commission is making its assessment of the submission.

The submission must be within ten years of the entry into force of the Convention for that State (II Art 4), and the sub-Commission then submits its recommendations (II Art 6). When the coastal State disagrees, the coastal State shall, within a reasonable time, make a revised or new submission (II Art 8). Again, there are no limits on the number or the timing of that resubmission. It potentially could go on without end. Therefore,
Richard Haworth

the Commission and the United Nations in general has to try to decide what that reasonable time is, and what will be the termination of that particular action.

The final item is on neighborliness (slide 13). That is the "delimitation of the Continental Shelf between States with opposite or adjacent coasts" (Art 83). There are comments on this that this shall be done by agreement on the basis of international law. If no agreement, then one shall settle the dispute using the mechanisms that we talked about yesterday. And meanwhile, while it is underway, we will try for a provisional arrangement between the two States. And again, there has to be some discussion that if one State has not ratified, what are the implications for the State that has, in terms of the time limit that is given for making a submission of the limits of its Continental Shelf?

As to whether Article 76 can actually be enforced, all that I am trying to point out is that the technical definitions do not translate well to the real world. There are innumerable problems that have to be dealt with. I am sure that the Commission will decide how these can be interpreted and the way in which they may be implemented. All I tried to do is to identify the problems, when combined with politically inspired imprecision. I do recognize that getting through and having an agreement as we do with UNCLOS, was a major political achievement. And I recognize that much of the imprecision is there for a purpose. But that does leave the Commission members with a major interpretational challenge (slide 14). The Commission has begun to address some of its issues but the big test will be its response to its first submission.

I have left an overhead (slide 15) suggestions for further reading. These are sources of information that some of you may wish to follow up afterwards. Thank you very much indeed.
UNCLOS

- Signed: December 10, 1982
- 60 countries ratified: November 16, 1994
- Commission (on the Limits of the Continental Shelf)
  - elected March 13, 1997
  - responsible for developing procedures by which the limits of the continental shelf proposed by a coastal State may be assessed for compliance with Article 76
Article 76

- Definition of the Continental Shelf
  - seabed and subsoil of the submarine areas that extend ... throughout the natural prolongation of its land territory to the outer edge of the continental margin (76.1)
  - consists of the seabed and subsoil of the shelf, the slope and the rise (76.3)
  - so, not the geological/hydrographic definition
Article 76

- Principle appears to have been to include those resources associated with the geology of the coastal State
  - includes 200 nm at least
  - goes out at least 60 nm beyond foot of slope
  - can claim most of sedimentary wedge

- Unfortunately, in each case the definitions when applied to the real world are not clear
Baselines

- Use those from which the breadth of the territorial sea is measured
- To be shown on charts of a scale adequate for ascertaining their position, or
- As a list of geographic co-ordinates of points, specifying the geodetic datum (16.1)
- Publicize and deposit copy with the Secretary General of the UN (16.2)
Foot of the Slope

- ... the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base (76.4b)
  - define “maximum change”
  - define “at its base”
- In the absence of evidence to the contrary..
  - what evidence might be accepted?
Outer Limits

- Delineate by straight lines not exceeding 60 nautical miles in length connecting fixed points defined by coordinates of latitude and longitude (76.7)
  - straight lines on a map or spheroidal earth?
  - how are the points to be chosen?
  - how well must the points be justified (single lines or areal survey)?
Gardiner Rule

- Define fixed points (maximum separation 60 nm) at each of which the thickness of sedimentary rocks is at least 1% of the shortest distance from such point to the foot of the continental slope
  - where is the base of the sedimentary rocks?
  - what is their absolute thickness?
  - which solution of many possible is acceptable?
Summary of Technical Challenges

- Both fundamental reference points (baselines and foot of slope) are subject to interpretation
- The means by which extensions from the foot of the slope are determined are subject to technical problems (measurement) and to interpretation
- So, Commission needs technical expertise
Functions of the Commission
(Annex II Article 3)

- Consider data and other material submitted by coastal States (II 3.1a)
- Make recommendations in accordance with article 76 and the Statement of Understanding (II 3.1a)
- Provide scientific and technical advice if requested by a coastal State during preparation of the data (II 3.1b)
What Data to be Submitted?

• Article 76 specifies only:
  – "information on the limits of the continental shelf ... shall be submitted by the coastal State to the Commission"

• Annex II Article 4 specifies:
  – "a coastal state ... shall submit particulars of such limits ... along with supporting scientific and technical data"
Potential Problems

- Conflict between providing advice and assessing submission - dealt with (II Art 5)
- Too much data may be overwhelming; too little data may be inconclusive
- Stored at UN or in coastal State?
- Confidential data likely used to support "Gardiner" limits - access to whom?
Submission (and Resubmission?)
(Annex II)

- Submission … within 10 years of the entry into force … for that State (II Article 4)
- Subcommission submits recommendations for approval by majority of the Commission (II Article 6)
- When coastal State disagrees, the coastal State shall “within a reasonable time” make a revised or new submission (II Article 8)
Neighbourliness

- "Delimitation of the continental shelf between States with opposite or adjacent coasts" (Article 83)
  - by agreement on basis of international law
  - if no agreement, settle dispute under Part XV
  - meanwhile, try for provisional arrangement
- If one State has not ratified, what are the implications for the State that has?
Summary

- The technical definitions of Article 76 do not translate well to the real world
- When combined with politically inspired imprecision, Commission members face a major interpretational challenge
- The Commission has begun to address some issues (confidentiality, data) but the big test will be its response to the first submission
Further Reading Material

- The Law of the Sea - Definition of the Continental Shelf
  - UN 1993 (ISBN 92-1-133454-3)
- Commission on the Limits of the Continental Shelf: Its functions and scientific and technical needs in assessing the submission of a coastal state
  - States Parties (SPLOS/CLCS/INF/1 May 1996)
DEFINING SCIENTIFIC RESEARCH: MARINE DATA COLLECTION

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Panel VI: Marine Science and Law
Law, Science and Ocean Management
30th Virginia Law of the Sea Conference
Dublin Castle, Ireland
14 July 2005
Defining Scientific Research: Marine Data Collection

by

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In the context of this panel on marine science and law, why is there a need to try to define "scientific research"? One answer is suggested by the theme of this conference, "Law, Science and Ocean Management". What is done in the interest of gaining knowledge of the oceans is -- supposedly -- governed by the law, and thus the question, what is the relevant law?

Another answer, at a more specific level of detail, is posed by the question whether all means and methods of, and purposes for, gathering information about the oceans is governed by a single set of rules of law, or whether there are separate rules of law depending on the means, methods and purposes for these activities?

These questions are timely because some assert that all research in the marine environment is marine scientific research (MSR) regulated by Part XIII of the Law of the Sea Convention. This author disagrees. He believes that the law of the sea gives coastal States regulatory authority over some but by no means all forms of data collection in the marine environment; the flag State has exclusive regulatory authority over other such activity at sea. Put another way, what the activity is factually determines the legal regime governing the activity—whose permission is required to conduct and report on the activity.

Thus, the thesis of this paper is that there is no single set of rules of law that governs the collection of information about the oceans. Rather, the applicable rules of law depend on the means, methods, locations and purposes for the collection of that information.

* * * *

For the analysis that follows I have found it useful to use the generic term "marine data collection", a term without legal content, as the umbrella under which to consider the various activities for which the law of the sea does provide varying regimes depending on the maritime zone involved.

Under “marine data collection” I list the following four categories, with seven subcategories:

- Marine scientific research (MSR)
- Surveys

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1 Office of the Legal Adviser (L/OES), U.S. Department of State. The author has been a member of the U.S. delegation to the UNESCO/IOC Advisory Body of Experts on the Law of the Sea (ABE-LOS) since its first meeting in 2001. ABE-LOS continues to grapple with the issues raised in this paper. See http://ioc3.unesco.org/abelos/. The author would like to thank Dr. Stephen Pietrowicz, Mrs. Margaret Hayes and Ms. Elizabeth Tirpak for their very constructive suggestions. Dr. Pietrowicz and Ms. Tirpak were particularly helpful in clarifying the section on operational oceanography. Any errors remain the responsibility of the author.
- Hydrographic surveys
- Military surveys
- Operational oceanography
  - Ocean state estimation
  - Short-term warnings and forecasts
  - Climate prediction
- Exploration and exploitation\(^2\) of
  - Natural resources
  - Underwater cultural heritage (shipwrecks).

The relevant maritime zones where these activities take place are the territorial sea, contiguous zone, exclusive economic zone (EEZ), continental shelf, deep seabed beyond the limits of national jurisdiction (the Area), straits used for international navigation, and archipelagic sea lanes.

This paper examines what is involved in each of these activities, reviews the applicable legal regimes, and demonstrates that neither surveys, operational oceanography, or exploration and exploitation are marine scientific research regulated by Part XIII of the Law of the Sea Convention,\(^3\) rather they are subject to separate legal regimes.

**Definitions and Distinctions**

Even though none of these four categories and seven subcategories is defined in the law of the sea, including the Law of the Sea Convention, it is necessary to understand what they each factually entail if we are to appreciate the legal regime applicable to each.

The most heavily regulated is the first category, *marine scientific research* (MSR). The Law of the Sea Convention devotes a whole part, Part XIII, containing 28 articles, to the subject of MSR. Although not defined in the Convention, marine scientific research is the general term most often used to describe those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment and its processes.\(^4\) In this

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\(^2\) The term “exploitation” is used in the sense of resource development and management.

\(^3\) The resolution of advice and consent, approved by the Senate Foreign Relations Committee in unanimously recommending United States accession to the Law of the Sea Convention, includes the following understanding:

(5) The United States understands that “marine scientific research” does not include, inter alia,-

- (A) prospecting and exploration of natural resources;
- (B) hydrographic surveys;
- (C) military activities, including military surveys;
- (D) environmental monitoring and assessment pursuant to section 4 of Part XII; or
- (E) activities related to submerged wrecks or objects of an archaeological and historic nature.


\(^4\) Compare LOS Convention articles 243 (“scientists … studying the essence of phenomena and processes occurring in the marine environment and the interrelations between them” and 246(3) “to increase scientific knowledge of the marine environment for the benefit of all mankind”). *Accord,* Alfred H.A. Soons, Marine Scientific Research and the Law of the Sea 124 (1982).
paper, the term "marine scientific research" applies only to that form of marine data collection regulated by Part XIII of the Law of the Sea Convention.

For the purposes of this analysis, there are two forms of surveys, hydrographic surveys and military surveys.

*Hydrographic surveys* are activities undertaken to obtain information for the making of navigational charts and for the safety of navigation. Hydrographic surveys include the determination of the depth of water, the configuration and nature of the natural bottom, the direction and force of currents, heights and times of tides and water stages, and hazards to navigation. This information is used for the production of nautical charts and similar products to support the safety of navigation, such as Sailing Directions, Light Lists and Tide Manuals for both civil and military use.\(^5\)

*Military surveys* involve the collection of marine data for military—not scientific—purposes. The data collected may include oceanographic, hydrographic, marine geological/geophysical, chemical, acoustic, biological and related data. The data collected may be in classified or unclassified form. The data is not normally available to the public or the scientific community unless it is unclassified and was collected on the high seas.

My third category of marine data collection is *operational oceanography*. Operational oceanography is the routine collection of standard data sets, such as temperature, pressure, current, salinity and wind. It may be conducted in the oceans, at the air-sea interface, and in the atmosphere. This data is used for monitoring and forecasting of weather (meteorology), climate prediction, and ocean state estimation (e.g., surface currents and waves). The data is transmitted from sensor to shore in near real time and is made available to the public in near real time. The components of operational oceanography are described in some detail below.

The fourth category of marine data collection is *exploration and exploitation of natural resources and underwater cultural heritage*.

Exploration and exploitation of *natural resources* involves the searching for and removal of living or non-living natural resources found in the oceans or beneath the seabed. The term “natural resources” has four separate meanings in the law of the sea, depending on the maritime zone. The natural resources governed by the EEZ regime are the living and non-living natural resources (not further expressly defined) located within the EEZ.\(^6\) The natural resources governed by the continental shelf regime are the mineral and other non-living resources of the seabed and subsoil, together with the living organisms belonging to sedentary species.\(^7\) The natural resources of the deep seabed beyond the limits of national jurisdiction

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\(^6\) LOS Convention, article 56(1)(a).

\(^7\) LOS Convention, article 77(4). Sedentary species are those organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant contact with the seabed or subsoil. Id.
(the Area) are all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules; this definition does not include living marine resources. The natural resources of the high seas regime are referred to as “the living resources of the high seas” and include fish and marine mammals.

Exploration and exploitation of underwater cultural heritage involves the search for, recording of, and removal of items of cultural heritage, such as shipwrecks. These items are, of course, not natural but are man-made resources.

As will become evident from the following discussion of what is the legal regime applicable to each category and subcategory, and what is involved in each, neither form of survey or exploration and exploitation nor operational oceanography is MSR.

Legal Regimes

Marine Scientific Research (MSR)

Marine scientific research is regulated by Part XIII of the Law of the Sea Convention. MSR may not be conducted in the territorial sea, the exclusive economic zone, or on the continental shelf without the permission of the coastal State. MSR may not be conducted while in transit passage through a strait used for international navigation without the prior authorization of the States bordering the strait. Similarly, MSR may not be conducted while in archipelagic sea lanes passage without the prior authorization of the archipelagic State.

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8 LOS Convention, article 133. When recovered from the Area, these resources are referred to in the Convention as “minerals”.

9 LOS Convention, Part VII, section 2, articles 116-120.

10 LOS Convention, article 245, requires the express consent of and under the conditions set by the coastal State for the conduct of MSR in its territorial sea.

11 LOS Convention, articles 246, 248, 252-253 set the conditions for the conduct of MSR in the EEZ. In particular six months advance request is required and the results of the research cannot be distributed publicly until the results of the research are compiled and shared with the coastal State. Further, the coastal State may, in its discretion, withhold consent to the conduct of a MSR project of another State in its EEZ or on its continental shelf if the project, inter alia, is of direct significance for the exploration or exploitation of its natural resources, whether living or non-living, within its EEZ. LOS Convention, article 246(5)(a). The United States does not require its permission to conduct MSR in the U.S. EEZ unless it involves marine mammal research (16 U.S. Code § 1374(c)), fisheries research involving commercial gear (16 U.S. Code § 1857(4)), the taking of commercial quantities of fish (16 U.S. Code § 1857(2)), or exploration of the U.S. Outer Continental Shelf (43 U.S. Code § 1340). For further information see http://www.state.gov/g/oes/ocsns/rvc (MSR authorizations); http://www.state.gov/g/oes/ocsns/rvc/2504.htm (authorizations to conduct MSR in foreign EEZs); http://www.state.gov/g/oes/ocsns/rvc/2503.htm (authorization to conduct MSR in US EEZ); and imbeded links. The requirements of other countries may be viewed at http://www.state.gov/www/global/oes/oceans/notices.html (notices to research vessel operators) and http://www/state/ogv/g/oes/ocsns/rvc/24243.htm (country specific requirements).

12 LOS Convention, article 252 sets similar conditions for the conduct of MSR on the continental shelf.

13 LOS Convention, article 40.

14 LOS Convention, article 54 incorporating article 40.
On the other hand, all States have the right to conduct MSR in the Area in conformity with Part XIII, articles 143 and 155, and the Annex to the Implementing Agreement, sections 1(5)(h) and 2(1)(b). The conduct of MSR in the high seas (i.e., the water column seaward of the outer limit of the EEZ, and the water column above the continental shelf beyond 200 nm) is a high seas freedom guaranteed by articles 78(1), 87(1)(f) and 257 of the LOS Convention.

**Surveys**

Like the other five forms of marine data collection, *hydrographic surveys* are not mentioned in Part XIII of the LOS Convention. However, the Convention places some restrictions on the conduct of hydrographic surveys in close-in waters. Prior authorization is required from the coastal State to conduct hydrographic surveys in its territorial sea, from the States bordering straits used for international navigation to conduct surveys while in transit passage through the straits and from the archipelagic State to conduct surveys while in archipelagic sea lanes passage.

Hydrographic surveys are not mentioned in the parts of the LOS Convention governing the EEZ, continental shelf, high seas or the Area. Therefore the conduct of hydrographic surveys in these areas is a high seas freedom associated with the operation of ships and aircraft. Hydrographic surveys are not MSR.

*Military surveys, per se, are not mentioned at all in the LOS Convention. Because they are “surveys”, the collection of marine data for military purposes in the territorial sea, and on the continental shelf when they involve exploration or exploitation of natural resources of the continental shelf, requires coastal State permission. Seaward of the territorial sea, the*

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15 LOS Convention, article 256.
17 LOS Convention, articles 19(2)(j) and 21(1)(g). The same rule applies to ships in innocent passage in archipelagic waters. LOS Convention, article 52(1).
18 LOS Convention, article 40.
19 LOS Convention, article 54 incorporating article 40.
20 LOS Convention, articles 58(1) and 87.
22 LOS Convention, article 19(2)(j). The sovereignty of a coastal State extends, beyond its land territory and internal waters, *inter alia*, to the adjacent territorial sea as well as to its bed and subsoil. LOS Convention, article 2. The sovereignty of an archipelagic State extends, beyond its land territory and internal waters, *inter alia*, to its archipelagic waters and the adjacent territorial sea. LOS Convention, articles 48 and 49(1).
23 LOS Convention, article 77(2), which provides that the coastal State’s rights are exclusive and no one may undertake exploration or exploitation of its natural resources without the express consent of the coastal State.
conduct of military surveys is a high seas freedom, as they too are associated with the operation of ships and aircraft.\textsuperscript{24} Military surveys are not MSR.\textsuperscript{25}

**Operational Oceanography**

Likewise, *operational oceanography* is also not mentioned in the LOS Convention.

It should be recalled that the Third UN Conference on the Law of the Sea decided that the collection of marine meteorological data is not marine scientific research regulated by Part XIII of UNCLOS.\textsuperscript{26} Clearly analogous to the collection of marine meteorological data is the routine collection of ocean observations that are distributed freely and openly and are used for monitoring and forecasting of ocean state, short-term warnings and weather forecasts (meteorology), and climate prediction.

The various operational oceanography programs and data collection instruments are next described to facilitate a better understanding why they are, for the most part, conducted in the exercise of the high sea freedoms of navigation and overflight. Nevertheless, some coastal States remain concerned that some or all of this data collected within their EEZs may be of direct significance for the exploration and exploitation of natural resources, whether living or non-living, within their EEZs\textsuperscript{27} and thus wish to have some say as to the collection and use of that data.

**Operational Oceanography Programs**

Operational oceanographic programs have the same characteristics: sustained, systematic, reliable, and robust mission activities with an institutional commitment to deliver appropriate, cost-effective products and services.

One example of an operational oceanographic program is the TAO/TRITON array of approximately 70 moorings in the Tropical Pacific and Indian Oceans, telemetering oceanographic and meteorological data to shore in real-time. Development of this array was motivated by the 1982-1983 El Niño event, the strongest of the century up to that time, which was neither predicted nor detected until nearly at its peak. The event highlighted the need for real-time data from the tropical Pacific for both monitoring, prediction, and improved understanding of El Niño. The operationally supported measurements of the TAO/TRITON array consist of winds, sea surface temperature, relative humidity, air temperature, and


\textsuperscript{26} See attachment 2.

\textsuperscript{27} Cf. LOS Convention, articles 56(1)(a) and 246(5)(a). See note 11 above.
subsurface temperature at 10 depths in the upper 500 meters. Additional moorings and/or enhancements to the basic measurement suite are often incorporated to the operational array in support of research studies to understand specific physical processes not well measured by the existing network.28

Another example is the global array of approximately 1,250 surface drifting buoys. Surface drifting buoys were originally developed to observe surface currents of the world's oceans. The most important observations collected today are (1) sea level pressure observations and (2) sea surface temperature observations collected over vast stretches of the globe where no other sources for these data exist. Both are transmitted in near real-time for incorporation into numerical weather prediction models.29

The global array of over 2,500 lagrangian floats (Argo) is providing over 7,000 vertical profiles of temperature and salinity a month throughout the world's oceans. When complete, the array of 3,000 floats is operational in late 2006 or early 2007, approximately 9,000 profiles a month will be available to operational centers world-wide in real-time via the Global Telecommunications System (GTS). Data from the Argo array is free and open to anyone either via the GTS or via two Global Data Assembly Centers (GDACs) in France and the United States. Argo has revolutionized the ability to observe the oceans providing, for the first time, global, synoptic pictures of the thermodynamic structure of the open ocean and some understanding of circulation; together with remotely-sensed data, model ocean circulation and ocean climate; and allowed scientists to dramatically improve their understanding of the coupled ocean-atmosphere system for weather and climate prediction.30

The world's oceans exhibit wide variability on both spatial and temporal scales. While designated by basins (e.g., Atlantic, Pacific, Indian, Southern), boundaries used to delineate them are geographical and somewhat artificial as the oceans interact on global as well as regional scales. For example, changes in overturning circulations (North Atlantic, Southern Ocean) eventually will impact all of the ocean basins thereby manifesting changes regionally. Like the atmosphere, the oceans do not recognize geopolitical boundaries. Similarly, the oceans' interactions with the atmosphere often manifested through changes in weather and storm patterns are global processes, reflected regionally. Understanding of the global ocean provides the context for understanding and predicting regional and coastal variability. The key to understanding is observations, observations of the oceans globally, regionally and locally. The operational ocean observing system will allow nations to:

- Monitor, understand and predict weather and climate;
- Describe and forecast the state of the ocean, including living resources;
- Improve management of marine and coastal ecosystems and resources;
- Mitigate damage from natural hazards and pollution;
- Protect life and property on coasts and at sea;

28 See http://www.pmel.noaa.gov/tao/.
29 See note 52 below.
30 See notes 53 and 54 below.
• Enable scientific research.  

The Intergovernmental Oceanographic Commission (IOC) of UNESCO and the World Meteorological Organization jointly coordinate implementation of operational oceanographic programs through the Joint WMO-IOC Technical Commission for Oceanography and Marine Meteorology (JCOMM), as the scope and effort of global oceanographic observations exceeds the budget and mandate of the individual intergovernmental organizations and individual Member Countries.

JCOMM coordinates, regulates and manages a fully integrated marine observing, data management and services system that uses state-of-the-art technologies and capabilities, is responsive to the evolving needs of all users of marine data and products, and includes an outreach program to enhance the national capacity of all maritime countries.

JCOMM encourages real-time or near real-time reporting of data, and the full and open exchange of data through oceanographic data centers. Such collaboration occurs because observational data contribute to the prediction of meteorological conditions and other natural events. The global scale of observations necessary to establish accurate predictions of natural events is necessarily beyond the capability of any coastal nation. Thus international cooperation is essential if individual nations are to benefit from the data collected.

The Global Ocean Observation System (GOOS) is a permanent global system for observations, modeling and analysis of marine and ocean variables to support operational ocean services worldwide. GOOS provides accurate descriptions of the present state of the oceans, including living resources; continuous forecasts of the future conditions of the sea for as far ahead as possible; and the basis for forecasts of climate change. GOOS forms the ocean component of the Global Climate Observing System (GCOS) and the marine coastal component of the Global Terrestrial Observing System (GTOS). A fundamental principle of GOOS is that all data acquired by the operational systems are freely and openly available in real time to any potential user through distribution via the Global Telecommunication System (GTS) and/or Data Distribution Centers (DACs) such as the two DACs supporting the global array of profiling floats known as Argo.

One operational component of GOOS is the Global Sea Level Observing System (GLOSS). GLOSS is an international component of GOOS, a network of high quality

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31 These six bullets are what GOOS is designed to do. See http://www.ioc-goos.org/content/view/12/26/. "Enable" means observe from which hypotheses are developed and tested, not conduct scientific research.
32 See http://www.ioc.unesco.org/jcomm/.
33 See http://www.ioc.unesco.org/goos/.
34 See http://www.ioc-goos.org/.
36 See http://www.fao.org/gtos/.
38 See http://www.argo.ucsd.edu/ and http://w3.jcommops.org/cgi-bin/WebObjects/Argo.
39 See http://www.jcommweb.net.
global and regional sea level stations for application to climate, oceanographic, and understanding coastal sea level processes. The main component is a “Global Core Network” (GCN) of 290 sea level stations around the world for long-term climate change and oceanographic sea level monitoring. Applications of such data include prediction and detection of storm surge inundation and tsunami.

JCOMM also coordinates contributions to the Data Buoy Cooperation Panel (DBCP). Principal objectives of the DBCP are:

(i) review and analysis of requirements for buoy data,

(ii) co-ordination and facilitation of deployment programs to meet requirements,

(iii) initiation and support of action groups,

(iv) improving the quantity and quality of buoy data distributed onto the Global Telecommunication System (GTS),

(v) information exchange and technology development, and

(vi) liaise with relevant international and national bodies and programs.\(^{40}\)

The primary goal of the Ship-of-Opportunity Program (SOOP) is to fulfill the requirements for collection of upper ocean data which have been established by GOOS and GCOS, and which can be met at present by measurements from ships of opportunity (SOO). SOOP is establishing itself as an operational program and is therefore participating in JCOMM and particularly in its Ship Observations Team.\(^{41}\) Data management is taken care of through the Global Temperature Salinity Profile Program. The SOOP is directed primarily towards the continued operational maintenance and co-ordination of the XBT ship of opportunity network. As described in greater detail below, an XBT is an expendable temperature and depth profiling system that collects upper ocean thermal data in support of weather and climate prediction and ocean state estimation systems that are communicated in real time to oceanographic and meteorological services primarily via the GTS under JCOMM.

Other types of measurements are being made (e.g., conductivity, current profiles; pCO2; chlorophyll concentration). This network in itself supports many other operational needs (such as for fisheries, shipping and defense) through the provision of upper ocean data for data assimilation in models and for various other ocean analysis schemes. One of the continuing challenges is to optimally combine upper ocean thermal data collected by XBTs from Ships of Opportunity with data collected from other sources such as the TAO array, Argo and satellites. However, it is considered most important to have the SOOP focused on


\(^{41}\) The SOT includes the implementation panels for SOOP, VOS, and a program with the acronym ASAPP which launches radiosondes (weather balloons) from ships.
supporting climate prediction in order to ensure the continued operation of the present network.\footnote{See \url{http://www.brest.ird.fr/soopip/} and the JCOMMOPS website \url{www.infremer.fr/ird/soopip/}. See also the “Best Guide and Principles Manual for the Ships of Opportunity Program (SOOP) and Expendable Bathythermograph (XBT) Operations,” by Steven Cook and Alexander Sy, March 2001, at \url{www.brest.ird.fr/soopip/doc/manuals/best_guide/SOOP_best_guide.pdf}.}

**Data Collection Platforms and Instruments\footnote{The information in this section is taken from \url{http://www.aoml.noaa.gov/goos/goos-operational.php}.}**

Data about the lower atmosphere and sea surface is collected from ships, balloons, visual observations, aircraft and satellites, while data about the water column is obtained from satellites, moored buoys, drifting buoys, profiling floats and expendable bathythermographs (XBTs).\footnote{See \url{http://www.aoml.noaa.gov/goos/goos-operational.php}.}

The U.S. National Oceanic and Atmospheric Administration (NOAA) is involved in the collection of marine data through programs involving five different types of data collection instruments or platforms: global drifters, Voluntary Observing Ships (VOS), expendable bathythermographs (XBTs), high density expendable bathythermographs (XBTs), and Argo profiling floats.

**Global Drifters**

NOAA, at its Atlantic Oceanographic and Meteorological Laboratory (AOML) operates a global Drifting Buoy Center that annually deploys, via Voluntary Observing Ships (VOS), research vessels and U.S. Navy aircraft, over 400 Drifters\footnote{For a detailed description of these drifters, see \url{http://www.aoml.noaa.gov/phod/dac/gdp_drifter.html}.} in all three ocean basins. These drifters are tracked daily via the ARGOS satellite system through which their positions and sea surface temperatures (and sometimes other parameters) are processed and inserted on to the Global Telecommunications System (GTS) for global distribution.\footnote{See \url{http://www.aoml.noaa.gov/phod/dac/gdp.html} for the location of these drifters.} Approximately 630,000 sea surface temperatures are collected annually via this program. Additionally, the Center performs the added function of a Data Acquisition Center (DAC) for the Global Drifter Program (GDP). When the deployed Drifters are verified as operational they are reported to the DAC. This effort insures that research quality Drifter data is available from other organizations and countries programs. The Global Drifter Program is a participating member of the IOC - WMO Data Buoy Co-operation Panel (DBC P) and, as such, represents NOAA in this international forum.

**Voluntary Observing Ships (VOS)**

Meteorological information has been gathered by ships at sea for over 150 years. The International Convention for the Safety of Life at Sea, 1929, and it successor adopted in 1974 and subsequently amended, have encouraged the collection of meteorological data by ships at
sea. The data is collected by Voluntary Observing Ships (VOS) coordinated by the WMO. The data gathered pertains to the atmosphere above the sea (temperature, dew point, cloud, weather, visibility and pressure) and to the surface of the sea (temperature, waves, currents and ice). The data is collected for the preparation of forecasts and warnings to help route ships and avoid severe weather conditions, for the preparation of forecasts and warnings for offshore industries, for global models of the future state of the atmosphere, to monitor the state of the oceans, for climatological data banks serving many purposes, and to build long-term records to monitor changes in the climate of the earth. The IMO has noted the critical importance of VOS meteorological reports to the provision of meteorological services to the mariner and encouraged increased participation in the scheme.

NOAA GOOS Center operates a global fleet of about 400 domestic and foreign commercial vessels. The GOOS global fleet mostly represents a subset of the larger National Weather Service VOS fleet consisting of over 1500 vessels. These vessels voluntarily collect sea surface meteorological, sub-surface expendable bathythermograph, shipboard thermosalinograph or atmospheric observations. They deploy drifting buoys and highly instrumented Argo and Argo-type floats and sometimes tow continuous plankton recorders. The GOOS global VOS fleet is the mechanism used to collect observations and deploy instrumentation that transmit, in real-time, data to U.S. National Centers such as the National Center for Environmental Prediction. In any given year this network provides the following approximate number of observations:

630,000 Sea Surface Temperature Observations from Drifting Buoys
110,000 Meteorological Observations
30,000 Thermosalinograph Observations
15,000 Expendable Bathythermograph Observations.

Expendable Bathythermographs (XB Ts)

While many nations deploy XBTs locally or regionally, NOAA/AOML operates a global XBT program that utilizes approximately 70 Voluntary Observing Ships (VOS) to monitor, on a monthly basis, 26 transects in all three ocean basins. Participating vessels utilize a Shipboard Environmental Data Acquisition System (SEAS) hardware/software installation to collect, quality control and transmit in real-time subsurface oceanographic observations (about 15,000 per year) and sea surface meteorological observations (about 110,000 per year). The XBT is an expendable temperature probe that is manually launched

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47 The current provision appears in regulation 5, Meteorological services and warnings, of chapter V of SOLAS, 1974, the text of which appears in attachment 3.
50 See http://www.ncep.noaa.gov.
51 See http://www.aoml.noaa.gov/goos/iot/.
from vessels approximately 4 times per day, along certain scientifically selected shipping lanes. The data transmitted via the wire link from the XBT probe is stored on the SEAS computer where it is processed and formatted for satellite message transmission. The transmitted data is routed to the GOOS Center where it is further quality controlled and then inserted on to the Global Telecommunication System (GTS) for global distribution. The National Centers for Environmental Prediction (NCEP) use these data for weather and climate forecasting as well as for seasonal, interannual and decadal climate research. The XBT program is a participating member of the IOC - WMO Ship of Opportunity Program Implementation Panel (SOOPIP) and, as such, represents NOAA in this international forum.

**High Density Expendable Bathythermographs (XBMs)**

Certain regions of the oceans require more observations than a volunteer ship’s crew can adequately supply. Along these routes, scientific crew ride the VOS and sample the ocean with much higher spatial resolution. These high density lines (HDX) resolve ocean features with more detail than the standard low density (LDX) sampling scheme.\(^{53}\) NOAA’s Atlantic Oceanographic and Meteorological Laboratory (AOML) runs five HDX lines with the following three objectives:

- to measure the upper ocean thermal structure in the center of the subtropical gyre in the North Atlantic and the South Atlantic,
- to investigate the meridional structure at the subtropical gyre and Gulf Stream in the North Atlantic, and
- to characterize both the mean and the time-dependent upper ocean properties of the tropical portion of the Meridional Overturning Circulation and of the shallow Subtropical Cell in the Tropical Atlantic.

**Argo Profiling Floats\(^{54}\)**

Argo is to be a global array of 3,000 free-drifting profiling floats that measures the temperature and salinity of the upper 2000 meters of the ocean. This allows, for the first time, continuous monitoring of the temperature, salinity, and velocity of the upper ocean, with all data being relayed and made publicly available within hours after collection. This program was started in 1999 to meet the challenge posed by the lack of sustained observations of the atmosphere, oceans and land that hindered the development and validation of climate models.

There is increasing concern about global change and its regional impacts. Sea level is rising at an accelerating rate of 3 mm/year, Arctic sea ice cover is shrinking and high latitude areas are warming rapidly. Extreme weather events cause loss of life and enormous burdens

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\(^{53}\) See [http://www.ncep.noaa.gov/phod/hdenvbt](http://www.ncep.noaa.gov/phod/hdenvbt).

\(^{54}\) The factual information contained in this section is derived from the Argo home page, [http://www.argo.ucsd.edu/](http://www.argo.ucsd.edu/). For information on how Argo floats work, see [http://www.argo.ucsd.edu/FrHow_Argo_floats.html](http://www.argo.ucsd.edu/FrHow_Argo_floats.html).
on the insurance industry. Globally, 8 of the 10 warmest years since 1860, when instrumental records began, have been in the past decade.

These effects are caused by a mixture of long-term climate change and natural variability. Their impacts are in some cases beneficial (lengthened growing seasons, opening of Arctic shipping routes) and in others adverse (increased coastal flooding, severe droughts, more extreme and frequent heat waves and weather events, such as severe tropical cyclones).

Understanding (and eventually predicting) changes in both the atmosphere and ocean are needed to guide international actions, to optimize governments’ policies, and to shape industrial strategies. To make those predictions Argo was created to provide the information to develop improved models of climate and of the entire earth system (including socio-economic factors).

Argo deployments began in 2000; by the end of 2005 the array was over 75% complete. A total of 2531 Argo floats were in place on September 9, 2006. The Argo array should approach 3000 floats by the end of 2006, and can be maintained at that level as long as national commitments provide about 800 floats per year. The need for global Argo observations will continue indefinitely into the future, though the technologies and design of the array will evolve as better instruments are built, models are improved, and more is learned about ocean variability.

The final array of 3000 floats will provide 100,000 temperature/salinity profiles and velocity measurements per year distributed over the global oceans at an average 3-degree spacing. Floats will cycle to 2000m depth every 10 days, with 4-5 year lifetimes for individual instruments. All Argo data are publicly available in near real-time via the GTS and Global Data Assembly Centers (GDACs) in Brest, France\textsuperscript{55} and Monterey, California\textsuperscript{56} after an automated quality control (QC), and in scientifically quality controlled form, delayed mode data, via the GDACs within six months of collection.

NOAA/AOML’s Physical Oceanography Division provides the data management and real time quality control of profiling float data from the global Argo program.\textsuperscript{57}

In view of the United States, operational oceanography is not MSR.\textsuperscript{58} This author submits that the large-scale programs of oceanographic data collection, described above, that operate independently from the users of the data distinguish operational oceanography from MSR. The IOC/ABE-LOS is considering the implications for the conduct of this form of marine data collection in the EEZ.\textsuperscript{59}

\textsuperscript{55} http://www.coriolis.eu.org/.
\textsuperscript{56} http://www.usgodae.org/argo/argo.html.
\textsuperscript{57} For addition information on Argo, see http://www.argo.net, http://www.aoml.noaa.gov/phod/ARGO/HomePage, and the Argo Information Center http://www.argo.jcponmop.org/.
\textsuperscript{58} Senate Committee on Foreign Relations, United Nations Convention on the Law of the Sea, Executive Report 108-10, at 10 (2004) ("there are other activities, such as operational oceanography, that are also not considered marine scientific research").
\textsuperscript{59} See the report of the sixth meeting of ABE-LOS through the link at http://ioc3.unesco.org/abelos/, at pages 5-6 and Annex III.
Exploration and Exploitation

The Law of the Sea Convention contains separate regimes for exploration and exploitation of natural resources and of underwater cultural heritage.

As noted above, the term “natural resources” has four separate meanings in the law of the sea, depending on the maritime zone.

Part V of the LOS Convention regulates exploration for and exploitation of the living and non-living natural resources located within the EEZ separately from the conduct of MSR within the EEZ. Part VI of the Convention governs exploration for and exploitation of the mineral and other non-living resources of the seabed and subsoil, i.e., the continental shelf, together with living organisms belonging to sedentary species. Part VI does not address MSR at all. Thus it follows that, even though exploration and exploitation in both maritime zones are subject exclusive coastal State control, those activities are not MSR.

Part XIII of the Convention and its Implementing Agreement regulate exploration for and exploitation of all solid, liquid or gaseous mineral resources in situ in the deep seabed beyond the limits of national jurisdiction at or beneath the seabed, including polymetallic nodules. Exploration and exploitation in the Area are subject to regulation by the International Seabed Authority. Article 256 provides that MSR in the Area is to be conducted in conformity with Part XI, particularly article 143. Hence, exploration and exploitation of mineral resources in the Area is not MSR.

Part VII, Section 2, governs the conservation and management of the living resources of the high seas.

Exploration for and exploitation of all forms of natural resources is not MSR.

On the other hand, underwater cultural heritage (UCH), principally shipwrecks, are not natural resources as that term is variously defined in the LOS Convention. UCH is addressed in only two articles of the LOS Convention, article 303 with regard to the contiguous zone, and article 149 with regard to archaeological and historical objects found in the Area. UNESCO has sought to provide a regulatory scheme for UCH found at sea. However, the UNESCO Convention sought to provide coastal States authority to regulate

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60 Compare LOS Convention articles 56(1)(a) and 56(1)(b)(ii).

61 LOS Convention, article 77.

62 MSR in the EEZ and on the continental shelf is regulated by Part XIII, article 246 of the Convention.

63 Because they directly implicate exploration or exploitation of the natural resources of the continental shelf, article 246(5) permits a coastal State to withhold its consent to the conduct of a MSR project on its continental shelf, inter alia, if (a) it is of direct significance for the exploration and exploitation of natural resources, whether living or non-living, (b) involves drilling into the continental shelf, or (c) involves the construction, operation or use of artificial islands, installations and structures.


Summary

This paper has demonstrated that not all methods of collection of data about the oceans is marine scientific research regulated by Part XIII of the Law of the Sea Convention. While the lack of agreed definitions of the various methods for marine data collection has resulted in differences of views on the legal regimes governing them, this paper seeks to provide clarification and further understanding. Attachment 1 summarizes the regulatory authority for each of these activities in the various maritime zones.

In particular, the paper has sought to demonstrate that the collection of data by operational oceanographic instruments and programs is not MSR because:

- the data is immediately available to all nations for their benefit,
- the sum of the systems is greater than its parts and therefore nations must facilitate access and data sharing if each country is to benefit from conclusions that can be drawn from the large scale data sets (both in terms of size and time), and
- whether or not one agrees that operational oceanography is or is not MSR, Part XIII still encourages countries to collaborate and facilitate access to EEZs for such large-scale initiatives.

Since most coastal States are members of IOC, which sponsors these programs, they should consistently support them in their national policy.
## ATTACHMENT 1

### Regulatory Authority

<table>
<thead>
<tr>
<th>Activity</th>
<th>Territorial sea</th>
<th>EEZ/Continental Shelf</th>
<th>High Seas</th>
<th>The Area</th>
<th>Straits/ASL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marine scientific research</td>
<td>Coastal State</td>
<td>Coastal State</td>
<td>Flag State</td>
<td>Flag State/ISBA</td>
<td>Strait State/Archipelagic State</td>
</tr>
<tr>
<td>Hydrographic survey</td>
<td>Coastal State</td>
<td>Flag State</td>
<td>Flag State</td>
<td>Flag State</td>
<td>Strait State/Archipelagic State</td>
</tr>
<tr>
<td>Military survey</td>
<td>Coastal State</td>
<td>EEZ: Flag State; Shelf: coastal State</td>
<td>Flag State</td>
<td>Flag State</td>
<td>Flag State</td>
</tr>
<tr>
<td>Operational oceanography</td>
<td>Flag State/Coastal State</td>
<td>Flag State</td>
<td>Flag State</td>
<td>Flag State</td>
<td>Flag State</td>
</tr>
<tr>
<td>Explore/exploit natural resources</td>
<td>Coastal State</td>
<td>Coastal State</td>
<td>Flag State</td>
<td>ISBA</td>
<td>Strait State/Archipelagic State</td>
</tr>
<tr>
<td>Explore/exploit UCH</td>
<td>Coastal State</td>
<td>Flag State</td>
<td>Flag State</td>
<td>Flag State</td>
<td>Strait State/Archipelagic State</td>
</tr>
</tbody>
</table>

ISBA = International Seabed Authority.
ATTACHMENT 2

Resolution 16 (Cg-VIII) adopted by the World Meteorological Organization at its eighth congress in Geneva in April/May 1979
UN document A/CONF.62/80, 9 August 1979

The Congress,
Noting
(2) The informal composite negotiating text prepared by the Conference, in particular part XIII, entitled “Marine scientific research”,
(3) Action taken by the Executive Committee and the Secretary-General to ensure that the meteorological interests are adequately safeguarded during the consideration of relevant articles of the negotiating text,
Recalling that activities of the members of the World Meteorological Organization in the oceans fall under the following two major categories:
(1) Operational activities such as the collection of meteorological information from voluntary observing ships, buoys, other ocean platforms, aircraft and meteorological satellites,
(2) Research activities, both meteorological and oceanographic, such as those carried out during the Global Weather Experiment,
Considering
(1) That an adequate marine meteorological data coverage from ocean areas, in particular from those areas in the so-called “exclusive economic zone”, is indispensable for the issue of timely and accurate storm warnings for the safety of life at sea and the protection of life and property in coastal and off-shore areas,
(2) That the International Convention for the Safety of Life at Sea, of 1960 specifies that the contracting Governments undertake, inter alia, to issue warnings of gales, storms and tropical storms and to arrange for selected ships to take meteorological observations,
(3) That members of the World Meteorological Organization have undertaken the responsibility of issuing warnings for the high seas and coastal waters according to internationally agreed procedures,
Expresses the hope that the legal provisions specified in the informal composite negotiating text which govern marine scientific research will not result in restrictions to operational meteorological and related oceanographic observational activities carried out in accordance with international programmes such as World Weather and the integrated Global Ocean Station System;
Appeals to members to ensure that their delegations to the United Nations Conference on the Law of the Sea are made aware of the vital need for observational data from sea areas for the timely issue of weather forecasts and storm warnings,
Requests the Secretary-General to follow closely the developments in the Conference, in particular by ensuring representation at sessions of the Conference, as appropriate.
Extract from the Oral Report of the Chairman of the Third Committee to the Third Committee at its 46th meeting, 20 August 1980

The Chairman, Mr. A. Yankov (Bulgaria)

4. [] announced that he had received from the World Meteorological Organization a letter in which it referred in particular to the work of the Eighth World Meteorological Organization held in Geneva. On that occasion, the organization had expressed its interest in research activities conducted in the oceans and, in particular, in the "exclusive economic zone". In a resolution which had been adopted by the Congress and had been distributed to the participants in the Conference (A/CONF.62/80), the organization had referred to some of its activities, including the collection of meteorological information from voluntary observing ships, and meteorological and oceanographic observational activities carried out in accordance with international programmes such as the World Weather Watch and Integrated Global Ocean Station System. Now that the Third Committee had completed the negotiation on the substantive questions before it, it was in a position to reply to the Secretary-General of the World Meteorological organization.

5. Since the formulation of draft articles on the legal regime for the conduct of marine scientific research came under his mandate as Chairman of the Third Committee, he was able to share the view of the Eighth Meteorological Congress that adequate marine meteorological data coverage, including that from areas within the exclusive economic zone, was indispensable for timely and accurate storm warnings for the safety of navigation and for the protection of lives and property in coastal and offshore areas. In his opinion, the provisions on marine scientific research would not create any difficulties and obstacles hindering adequate meteorological coverage from ocean areas, including areas within the exclusive economic zone, carried out both within the framework of existing international programmes and by all vessels, since such activities had already been recognized as routine observations and data collecting which were not covered by Part XIII of the negotiating text. Furthermore, they were in the common interest of all countries and had undoubted universal significance. He informed the Committee that he intended to send a letter to the Secretary-General of the World Meteorological Organization along these lines. (Emphasis added.)

* * * *

Extract from the Report of the Chairman of the Third Committee

8. At the end of the 46th meeting of the Committee on 20 August, I referred to a letter addressed to me by the Secretary-General of the World Meteorological Organization (A/CONF.62/80) in which was expressed the concern that some provisions on marine scientific research might have direct consequences on operational and research activities of the World Meteorological Organization over the oceans, particularly in areas off the coast of the coastal States, including the exclusive economic zone. The World Meteorological Organization had specifically in mind activities carried out under its Voluntary Observation Ships' Scheme which is an important element of the World Weather Watch and activities carried out under the projects and programmes of organizations such as the Marine Meteorological Services, the Tropical Cyclone Project and the Integrated Global Ocean Station System. The letter expressed concern that some provisions on marine scientific research might have a restricting effect on those activities of the World Meteorological Organization. I informed the Committee that in my reply to the Secretary-General of the World Meteorological Organization I will state that in my view the pertinent provisions of the second revision of the text on marine scientific research would not create any difficulties or obstacles hindering adequate meteorological coverage from the ocean areas, including areas within the exclusive economic zone since such operational and research activities have already been recognized as routine activities within the terms of reference of the World Meteorological Organization and are of common interest to all countries with an undoubted universal significance. (Emphasis added.)

* * * *
43. At the end of the 46th meeting of the Committee, he had referred to a letter which he had received from the Secretary-General of the World Meteorological Organization (A/CONF.62/80) expressing concern that some provisions in the negotiating text on marine scientific research might have a restricting effect upon certain operational and research activities of the Organization. He informed the Committee that, in his reply to the Secretary-General of the Organization, he would that in his view the provisions of the second revision of the negotiating text on marine scientific research would not hinder adequate meteorological coverage from ocean areas, including areas within the exclusive economic zone, since such operational and research activities had already been recognized as routine activities within the Organization's terms of reference and were of common interest to all countries. (Emphasis added.)
ATTACHMENT 3

SOLAS REGULATION V/5 (2002)
Meteorological services and warnings

1 Contracting Governments undertake to encourage the collection of meteorological data by ships at sea and to arrange for their examination, dissemination and exchange in the manner most suitable for the purpose of aiding navigation.* Administrations shall encourage the use of meteorological instruments of a high degree of accuracy, and shall facilitate the checking of such instruments upon request. Arrangements may be made by appropriate national meteorological services for this checking to be undertaken, free of charge to the ship.

2 In particular, Contracting Governments undertake to carry out, in co-operation, the following meteorological arrangements:

.1 to warn ships of gales, storms and tropical cyclones by the issue of information in text and, as far as practicable graphic form, using the appropriate shore-based facilities for terrestrial and space radiocommunications services.

.2 to issue, at least twice daily, by terrestrial and space radiocommunication services**, as appropriate, weather information suitable for shipping containing data, analyses, warnings and forecasts of weather, waves and ice. Such information shall be transmitted in text and, as far as practicable, graphic form including meteorological analysis and prognosis charts transmitted by facsimile or in digital form for reconstitution on board the ship's data processing system.

.3 to prepare and issue such publications as may be necessary for the efficient conduct of meteorological work at sea and to arrange, if practicable, for the publication and making available of daily weather charts for the information of departing ships.

.4 to arrange for a selection of ships to be equipped with tested marine meteorological instruments (such as a barometer, a barograph, a psychrometer, and suitable apparatus for measuring sea temperature) for use in this service, and to take, record and transmit meteorological observations at the main standard times for surface synoptic observations (i.e. at least four times daily, whenever circumstances permit) and to encourage other ships to take, record and transmit observations in a modified form, particularly when in areas where shipping is sparse.

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* Refer to the Recommendation on weather routeing adopted by the Organization by resolution A.528(13).
** Refer to regulations IV/7.1.4 and IV/7/1.5.
to encourage companies to involve as many of their ships as practicable in the making and recording of weather observations; these observations to be transmitted using the ship's terrestrial or space radiocommunications facilities for the benefit of the various national meteorological services.

the transmission of these weather observations is free of charge to the ships concerned.

when in the vicinity of a tropical cyclone, or of a suspected tropical cyclone, ships should be encouraged to take and transmit their observations at more frequent intervals whenever practicable, bearing in mind navigational preoccupations of ships' officers during storm conditions.

arrange for the reception and transmission of weather messages from and to ships, using the appropriate shore-based facilities for terrestrial and space radiocommunications services.

to encourage masters to inform ships in the vicinity and also shore stations whenever they experience a wind speed of 50 knots or more (force 10 on the Beaufort scale).

to endeavour to obtain a uniform procedure in regard to the international meteorological services already specified, and as far as practicable, to conform to the technical regulations and recommendations made by the World Meteorological Organization, to which Contracting Governments may refer, for study and advice, any meteorological question which may arise in carrying out the present Convention.

The information provided for in this regulation shall be furnished in a form for transmission and be transmitted in the order of priority prescribed by the Radio Regulations. During transmission "to all stations" of meteorological information, forecasts and warnings, all ship stations must conform to the provisions of the Radio Regulations.

Forecasts, warnings, synoptic and other meteorological data intended for ships shall be issued and disseminated by the national meteorological service in the best position to serve various coastal and high seas areas, in accordance with mutual arrangements made by Contracting Governments, in particular as defined by the World Meteorological Organization’s System for the Preparation and Dissemination of Meteorological Forecasts and Warnings for the High Seas under the Global Maritime Distress and Safety System (GMDSS).
CENTER FOR
OCEANS LAW AND POLICY
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Twentieth Annual Seminar:
Implementing the 1982 Law of the Sea Convention

Myron H. Nordquist
Editor

March 15-16, 1996
Annapolis, MD
Research and Surveys in Coastal Waters

J. Ashley Roach*

Admiral Doyle, thank you for that kind introduction. May I join the other panelists in extending my thanks to the Center for Oceans Law and Policy and the Naval War College for organizing such a timely and useful program, and for extending me the privilege of making a small contribution to its success.

I have been asked to address the issue of research and surveys in coastal waters in the context of the legal regime established by the LOS Convention. As there are significant differences between research and surveys, so are there differences in the legal regimes between these various forms of marine data collection. I view my assignment thus to identify those differences. In doing so, I propose to proceed in the following way. After a few preliminary matters, including the all-important requirement of definitions, I will first review the various legal regimes for MSR [marine scientific research]—in the territorial sea, in the EEZ [exclusive economic zone] and on the continental shelf, and in international straits. Then, after a brief description of U.S. MSR policy, I will describe our experiences with that regime, and propose a program to reduce the few, but significant, difficulties our researchers have experienced. Then I will close with an examination of the legal regimes governing the various types of surveys. The paper will demonstrate that, while the Convention limits survey activities during passage in the territorial sea,

* Captain, JAGC, U.S. Navy (retired); Office of the Legal Adviser, U.S. Department of State
international straits, and archipelagic sea lanes, the coastal State is not authorized by the Convention to limit the activities of foreign survey ships in its EEZ as the conduct of surveys in the EEZ is an exercise of the freedom of navigation and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operations of ships. Finally, the paper concludes by establishing that military activities, including military surveys, conducted outside foreign territorial seas are also not subject to coastal State regulation, as there is no general competence of the coastal State over military activities in its EEZ or on the high seas.

I. Definitions

The first point to make, as a general introduction, is to remind you that the extent of coastal State jurisdiction over foreign marine data collection activities depends on which type of activity is involved and on the maritime zone in which it is conducted.

Thus, I believe it is essential to clarify what is meant by “research” and “surveys”. The LOS Convention does not define these terms, or their subsets, “marine scientific research”, “hydrographic survey”, or “survey activities”, and does not mention “military surveys” or “military activities”. However, the concepts are distinct, and with significantly different legal regimes:

- “Marine scientific research” (MSR) is the general term most often used to describe those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment and its processes.¹ The United States accepts this definition. MSR
includes physical oceanography, marine chemistry, marine biology, scientific ocean drilling and coring, geological/geophysical research, as well as other activities with a scientific purpose. It is to be distinguished from hydrographic survey, from military activities, including military surveys, and from prospecting and exploration.²

- The generally accepted modern international definition of “hydrographic survey”, which is shared by the United States, is the obtaining of information for the making of navigational charts and for safety of navigation. It includes determination of one or more of several classes of data in coastal or relatively shallow areas—depth of water, configuration and nature of the natural bottom, directions and force of currents, heights and times of tides and water stages, and hazards for navigation—for the production of nautical charts and similar products to support safety of navigation, such as Sailing Directions, Light Lists, and Tide Manuals for both civil and military use.³ Nautical charts of U.S. waters are prepared by the National Oceans Service, National Oceanic and Atmospheric Administration, Department of Commerce.⁴ Coastal, harbor, and harbor approach charts of non-U.S. waters and other products are published by the U.S. Defense Mapping Agency and made available to mariners of all nations.⁵

- The United States considers that “military surveys” refer to activities undertaken in the ocean and coastal waters involving marine data collection (whether or not classified) for military purposes. Military surveys can include oceanographic, marine geological, geophysical, chemical, biological, and acoustic data. Equipment used
can include temperature/conductivity/sound velocity sounders, swath bottom mappers, side scan sonars, bottom grab and coring systems, current meters, and profilers. While the means of data collection used in military surveys is often the same as or similar to that used in MSR, information from such activities, regardless of security classification, is intended for use by the military.

- "Survey activities" is the term used to include both hydrographic surveys and military surveys.
- "Military activities" include, *inter alia*, normal ship operations, task force maneuvers, launching and landing of aircraft, military exercises, operating military devices, intelligence collection, weapons exercises, ordnance testing, and military surveys.

II. Legal Regimes for Marine Scientific Research

Prior to the Third UN Law of the Sea Conference, each coastal State possessed sovereignty over a narrow territorial sea and sovereign rights over its continental shelf for the purpose of exploring and exploiting its natural resources. High seas freedoms, including the freedom to conduct MSR and surveys, appertained in the water column seaward of the territorial sea, and on the seabed seaward of the outer limits of the continental shelf.

The 1982 LOS Convention significantly reduced the oceanic areas in which there was freedom of MSR, by expanding the maximum breadth of the territorial sea to 12 nautical miles and by establishing a consent regime for MSR in the EEZ and on the subjacent continental shelf, while largelyunchanging the freedom to conduct marine
surveys in those areas. In 1983, President Reagan decided that, Part XI aside, the rest of the LOS Convention supported U.S. interests, including that of encouraging freedom of MSR.

The conduct of MSR is fully regulated by Part XIII of the LOS Convention which does not address or apply to marine surveys of any sort. The Convention confirms the right of all States and competent international organizations to conduct MSR and the duty to facilitate the conduct of MSR in accordance with the terms of the Convention. The Convention sets forth the rights and obligations of States and competent international organizations with respect to the conduct of MSR in different areas.

Within the territorial sea, the coastal State exercises complete sovereignty, and MSR is now clearly under its exclusive control. The LOS Convention explicitly provides that the coastal State has "the exclusive right to regulate, authorize and conduct" MSR in its territorial sea, which may be "conducted only with the express consent of and under the conditions set forth by the coastal State." Further, the LOS Convention expressly states that the "carrying out of research or survey activities" makes passage through the territorial sea not innocent and expressly authorizes the coastal State to enact laws and regulations relating to innocent passage through the territorial sea in respect of "marine scientific research" as well as "hydrographic surveys." The same rules apply in archipelagic waters which are under the sovereignty of the archipelagic State.

Under the LOS Convention, the regime of passage through international straits does not in other respects affect the legal status of the waters forming such straits or
the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters.\textsuperscript{15} Accordingly, article 40 provides that during transit passage through such straits, foreign ships, "including marine scientific research and hydrographic survey ships," may not carry out "any research or survey activities" without the prior authorization of the States bordering straits. The same rules apply to archipelagic sea lanes passage.\textsuperscript{16}

International law now recognizes the right of all coastal States to claim EEZs that may extend seaward 200 miles from their territorial sea baselines. Indeed, some 90 coastal States have done so. International law further recognizes that within its EEZ a coastal State may exercise jurisdiction over MSR.\textsuperscript{17} International law also now recognizes the sovereign right of the coastal State to explore (and exploit) the natural resources of its continental shelf, which may—as in the case of the United States—extend beyond 200 miles, but in most cases no more than 350 miles from the territorial sea baseline.\textsuperscript{18} The Convention provides the legal framework for the exercise of MSR jurisdiction in the EEZ and on the continental shelf.\textsuperscript{19}

Seaward of the EEZ lie the high seas, and seaward of the continental shelf lies the seabed beyond the limits of national jurisdiction. Here the LOS Convention clearly advances the rights of the scientific community by expressly recognizing, for the first time, that MSR is a freedom of the high seas that may be exercised by all States.\textsuperscript{20} Further, all States, as well as the International Seabed Authority, are permitted to carry out MSR on the seabed beyond national jurisdiction.\textsuperscript{21} On the other hand, the LOS Convention is silent regarding survey activities seaward of the territorial sea.
III. Marine Scientific Research in EEZ and on Continental Shelf

Under article 246, coastal States have the right to regulate, authorize, and conduct MSR in the EEZ and on the continental shelf. Access by other States or competent international organizations to the EEZ or continental shelf for a MSR project is subject to the consent of the coastal State. The consent requirement, however, is to be exercised in accordance with certain standards and qualifications.

In normal circumstances, the coastal State is under the obligation to grant its consent to requests to conduct MSR in its EEZ or on its continental shelf. (It is explicitly provided that circumstances may be normal despite the absence of diplomatic relations.) The coastal State, nevertheless, has the discretion to withhold its consent if the research project is of direct significance for the exploration and exploitation of living or non-living resources; if it involves drilling, the use of explosives, or introduction of harmful substances into the marine environment; or if it involves the construction, operation, and use of artificial islands, installations, or structures. (The first of these grounds for withholding consent may be used on the continental shelf beyond 200 miles only in areas specially designated as under development.)

The coastal State may also withhold consent if the sponsor of the research has not provided accurate information about the project or has outstanding obligations in respect of past projects. If requested, the coastal State must state the reasons for denying consent; otherwise, the researching State will not be in a position to determine
what adjustments would be required to enable the project to proceed.

The consent of a coastal State for a research project may be granted either explicitly or implicitly. Article 248 requires States or organizations sponsoring projects to provide to the coastal State, at least six months in advance of the expected starting date of the research activities, a full description of the project. The research activities may be initiated six months after the request for consent, unless the coastal State, within four months, has informed the State or organization sponsoring the research that it is denying consent for one of the reasons set forth in article 246 or that it requires more information about the project. If the coastal State fails to respond to the request for consent within four months following notification, consent may be presumed to have been granted.27 This provision is designed to encourage timely responses from coastal States to requests for consent.

Consent may also be presumed under article 247 to have been granted by a coastal State for a research project in its EEZ or on its continental shelf undertaken by a competent international organization of which it is a member, if it approved the project at the time that the organization decided to undertake the project and it has not expressed any objection within four months of the notification of the project by the organization to the coastal State.

Article 249 sets forth specific conditions with which a State or competent international organization sponsoring research in the EEZ or on the continental shelf of a coastal State must comply. These include the right of the coastal State to participate in the project, in particular through
inclusion of scientists on board research vessels; provision to the coastal State of reports and access to data and samples; assistance to the coastal State, if requested, in assessing and interpreting data and results; and ensuring that results are made internationally available as soon as practicable. Additional conditions may be established by the coastal State with respect to a project falling into a category of research activities over which the coastal State has discretion to withhold consent pursuant to article 246.

If a State or competent international organization sponsoring research in the EEZ or on the continental shelf of a coastal State fails to comply with such conditions, or if the research is not being conducted in accordance with the information initially supplied to the coastal State, article 253 authorizes the coastal State to require suspension of the research activities. If those carrying out the research do not comply within a reasonable period of time, or if the non-compliance constitutes a major change in the research, the coastal State may require its cessation.

IV. U.S. Marine Scientific Research Policy

The LOS Convention solidifies coastal State control over MSR in waters subject to their jurisdiction, waters which now encompass considerably more of the globe than in 1958. Nevertheless, U.S. policy is to encourage freedom of MSR. That policy was fostered by the U.S. decision, first stated in the President’s Oceans Policy Statement of March 10, 1983, and reaffirmed in October 1994 in the documents transmitting the LOS Convention to the Senate, not to claim jurisdiction over MSR in its EEZ. The United States declined to assert jurisdiction in its EEZ over MSR because
of its interest in encouraging MSR and promoting its maximum freedom while avoiding unnecessary burdens. The Department of State is charged with facilitating access by U.S. scientists to foreign EEZs under reasonable conditions. Consequently, since 1983, the United States has requested permission through diplomatic channels for U.S. research vessels to conduct MSR within 200 miles of a State asserting such jurisdiction. 31

The United States does not claim jurisdiction over fisheries research except when it involves commercial gear or commercial quantities of fish, and even then it may qualify as scientific research. The United States does, however, claim jurisdiction over marine mammal research. 32

V. Role of the U.S. State Department in Marine Scientific Research

Within the State Department's Bureau of Oceans and International Environmental and Scientific Affairs (OES) is the Office of Ocean Affairs (OA), a division of which is the Marine Science and Technology Affairs Division (OA/-MST). The Marine Science Division is responsible for assuring that U.S. MSR policy is adhered to in acquiring permission from the coastal State, when required for such research, 33 and for coordinating and processing of the requests, as well as in processing requests from foreign researchers to conduct MSR in the U.S. territorial sea. Between 1983 and 1995, the U.S. Department of State processed over 1,600 requests for U.S. research vessels to conduct MSR in territorial seas and EEZs of 140 States. Only 43 were denied, and 148 were cancelled, principally
because of the researchers' non-compliance with the MSR regime. Thus, it seems clear that U.S. marine scientists have not escaped compliance with the Convention's MSR regime, whether or not the United States accedes to the Convention.

VI. Coastal State Practice Regarding Marine Scientific Research Under the LOS Convention

As just noted, most coastal States seem to be complying with the MSR regime of the LOS Convention, perhaps in no small part with the assistance of a practical guide to the implementation of the MSR provisions published in 1991 by the UN's Office for Ocean Affairs and the Law of the Sea. Now that the Convention has entered into force, this booklet takes on increased importance in influencing States and researchers to comply with their particular duties.

There are, however, a few States that are not complying with the Convention's MSR provisions. Some of them are party to the Convention (e.g., Brazil, Indonesia, Mexico); others are not (e.g., Chile, Colombia, Russia). The problems the United States has encountered include the following:

- delays in responding to requests for ship clearances;
- last minute denial of permission to conduct the research;
- requiring that all data, regardless of format, be provided immediately prior to departure from last port of call;
- requiring the data to be provided within a fixed time after leaving the coastal State's waters, rather than after completion of the cruise;
• requiring copies of data collected in international waters, or in waters under another country’s jurisdiction;

• requiring data to be held in confidence and not placed into the public domain;

• requiring the cruise reports to be submitted in other than English;

• requiring more than one observer to be on board;

• requiring the observer to be on board during non-research legs of a voyage;

• requiring research and port call requests to be submitted other than through the Foreign Ministry;

• Foreign Ministry’s failing to forward cruise reports to cognizant organization; and finally

• slow or incomplete staffing and coordination among interested coastal State bureaucracies.

VII. Value of the LOS Convention Today for Marine Scientific Research

One could take the foregoing assessment to cast doubt on the value today of the LOS Convention to the marine scientific community. That need not be the case because the Convention is approaching universal acceptance.

The Convention entered into force November 16, 1994, for more than 60 States, and is now in force for at least 90 States, including Brazil, India, Indonesia, Mexico, Germany, Greece, Italy, and Australia. Almost 20 other States have taken the political decision to adhere to the Convention. Finally, as should be well known, the President has submitted the Convention to the Senate for advice and consent.
Regarding MSR, the President’s Letter of Transmittal stated: “In light of the essential role of marine scientific research in understanding and managing the oceans, the Convention sets forth criteria and procedures to promote access to marine areas, including coastal waters, for research activities.” The Secretary of State’s Report expanded on the importance of the Convention to MSR:

The essential role of marine scientific research in understanding and managing the oceans is also secured. The Convention affirms the right of all States to conduct marine scientific research and sets forth obligations to promote and cooperate in such research. It confirms the rights of coastal States to require consent for such research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that coastal States exercise the consent authority in a predictable and reasonable fashion to promote maximum access for research activities.

So how can those recalcitrant coastal States be convinced to accept and carry out their new duties? More than a decade’s experience before the Convention entered into force suggests little hope for doing so outside the Convention regime. However, in my view, there are at least three ways in which the Convention helps make the balance reflected in the Convention’s terms become a matter of fact.

First, States party to the Convention are legally bound by their treaty relationships to comply with the Convention’s provisions, which by their nature are more explicit than customary law.
Second, U.S. accession to the Convention would finally place the U.S. Government and its researchers on a level playing field with other countries. Coastal States would no longer have the excuse for not complying with the Convention that the United States was not bound by the Convention—a significant diplomatic improvement.

Third, the Convention provides a scheme for resolving MSR disputes with coastal States. This, in and of itself, is an improvement over the present situation. Further, the dispute settlement regime is a major accomplishment. Indeed, it may provide the only way to restrain—and roll back—excessive coastal State constraints on the conduct of MSR.

**Marine Scientific Research Dispute Settlement Regime**

Article 264 provides that “disputes concerning the interpretation or application of the provisions of [the LOS] Convention with regard to marine scientific research shall be settled” in accordance with the sections on “compulsory procedures entailing binding decisions” and the limitations and exceptions thereon, set out in Part XV, “Settlement of Disputes”, Parts 2 and 3, respectively. Let me briefly describe the elements of that regime.

**Fora**

The Convention permits a State to choose one or more fora for the settlement of disputes concerning the interpretation or application of the Convention:
- the International Tribunal for the Law of the Sea, to be situated in Hamburg, Germany;
- the International Court of Justice, at the Hague;
- arbitration; or
special arbitration.\textsuperscript{50}

The President has indicated that the United States intends to elect arbitration and special arbitration where permitted by the Convention, and to exempt from compulsory dispute settlement (CDS) those activities permitted by article 298, including military activities, such as military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities, in regard to the exercise of sovereign rights or jurisdiction over MSR.\textsuperscript{51}

\textit{CDS Regime for Marine Scientific Research}

With regard specifically to MSR, as I just said, the Convention provides that "disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled" by the compulsory dispute procedures.\textsuperscript{52}

Unfortunately, article 272(2)(a) carves out two substantial exceptions:

\begin{itemize}
  \item the exercise by the coastal State of a right or discretion under article 246 concerning MSR in the EEZ and on the continental shelf; and
  \item a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253, because the research activities are not being conducted in accordance with the information communicated to the coastal State under which the consent was based; or the researching State fails to comply with the conditions established by the coastal State under article 249 regarding: participation, receipt of preliminary
results, access to all the data and samples derived from the research, assessment of that data when requested by the coastal State, ensuring international availability of the research results, informing the coastal State immediately of any major changes in the research program, or removal of the scientific research installations or equipment once the research is completed.

MSR exempted from CDS thus includes the following:

- the general right to regulate, authorize, and conduct MSR in the EEZ or on the continental shelf, and
- the discretion to withhold consent for MSR in its EEZ or on the continental shelf if that project:
  - is of direct significance for the exploration and exploitation of natural resources, whether living or non-living. However, article 246(6) precludes a coastal State from exercising its discretion to withhold consent if the project is to be undertaken on the continental shelf beyond 200 miles, and outside specific areas the coastal State has at any time publicly designated as “areas in which exploitation or detailed exploratory operations focused on those areas” are occurring or will occur within a reasonable period of time;
  - involves drilling into the continental shelf, the use of explosives, or the introduction of harmful substances into the marine environment;
  - involves the construction, operation, or use of artificial islands, installations, and structures for economic purposes, and installations and structures which may
interfere with the exercise of the rights of the coastal State in the EEZ or on the continental shelf; or
- contains inaccurate information communicated to the coastal State, or if the researching State has outstanding obligations to the coastal State from a prior research project.

**Interim Measures**

Two other provisions favor the coastal State:

- Article 265, Interim Measures, provides that pending settlement of a dispute, authorized MSR will not begin or continue “without the express consent of the coastal State concerned.”
- Further, the provisions of article 292 authorizing a tribunal or court to order the prompt release of vessels and crews applies by its terms only to detentions for fishing and pollution violations. Thus, there is no guaranteed right of prompt release if a foreign research vessel were detained by the coastal State for violating its MSR laws and regulations, or indeed if the vessel exercised the implied consent regime.

**Remedies for Improper Exercise of Discretion**

What aspects of MSR then are subject to dispute resolution? Two important coastal State duties come to mind: (1) the duty of the coastal State to grant consent, in normal circumstances, for MSR projects in the EEZ or on the continental shelf; and (2) the duty to establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably. Although these may not appear to be that significant, it seems that the very existence of these
areas provides the researching State leverage over the coastal State that is not implementing the MSR regime consistent with the terms of the Convention.

In a situation where the United States now has very little leverage over recalcitrant coastal States, and there is little incentive for those States to change their laws, regulations, or procedures, the mere fact that their non-compliance can be brought before third parties can only be an improvement in the present situation, and should lead to greater conformity with the MSR regime in the Convention.

Further, U.S. accession to the LOS Convention would provide the opportunity to try, an opportunity not available while the United States remains outside the treaty regime.

Finally, U.S. accession to the Convention would give reason for the United States to consider establishing a Freedom of MSR Program analogous to the NSC-directed State-Defense Freedom of Navigation Program that since 1979 has helped conform state practice with the navigational provisions of the Convention. Similar results should be sought for MSR. U.S. researchers and MSR generally can only benefit from such a sustained effort.

VIII. Survey Activities Under the LOS Convention

Survey activities are not MSR. The LOS Convention distinguishes clearly between the concepts of “research” and “MSR” on the one hand, and “hydrographic surveys” and “survey activities” on the other hand. Article 19(2)(j) of the LOS Convention includes “research or survey activities” among those activities that are inconsistent with innocent passage in the territorial sea. Article 21(1)(g)
authorizes the coastal State to adopt laws and regulations, in conformity with the provisions of the Convention and other rules of international law, relating to innocent passage through the territorial sea in respect of "marine scientific research and hydrographic surveys." Article 40, entitled "research and survey activities," provides that in transit passage through straits used for international navigation, foreign ships, including "marine scientific research and hydrographic survey ships," may not carry out "any research or survey activities" without the prior authorization of the States bordering straits. The same rule applies to ships engaged in archipelagic sea lanes passage (article 54). While Part XIII of the LOS Convention fully regulates MSR, it does not refer to survey activities at all.

This conclusion, that MSR is distinct from survey activities, is supported by other respected publications on this subject.56

The Convention therefore limits survey activities during passage in the territorial sea, international straits, and archipelagic sea lanes, but does not limit the activities of survey ships in the EEZ.

Like MSR, survey activities in the territorial sea are expressly subject to coastal State consent.57

Again, like MSR, survey activities while in transit passage or archipelagic sea lanes passage are expressly subject to prior authorization of the States bordering straits or the archipelagic State.58

Seaward of the territorial sea, all States remain free to conduct surveys free of coastal State regulation or control.59

International law, as reflected in the LOS Convention, authorizes coastal States to claim limited rights and jurisdiction in an EEZ. The jurisdictional rights relate
primarily to the exploration, exploitation, and conservation of natural resources, MSR, and the marine environment. Beyond the territorial sea, all States enjoy the freedoms of navigation and overflight and other related uses of the sea within the EEZ, provided that they do so with due regard to the rights of the coastal State and other States. The conduct of surveys in the EEZ is an exercise of the freedoms of navigation and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operations of ships, which article 58 of the LOS Convention guarantees to all States.

IX. Military Activities, Including Military Surveys

The LOS Convention recognizes that all States have, within the EEZ in contrast to the territorial sea, the right to conduct military activities, provided that they do so with due regard to the rights of the coastal State and other States. Appropriate activities include normal ship operations, task force maneuvering, launching and landing of aircraft, operating military devices, military exercises, intelligence collection, weapons exercises, ordnance testing, and military surveys. There is no general competence of the coastal State over military activities in the EEZ. Therefore, military activities, including military surveys, conducted outside foreign territorial seas are not subject to coastal State regulation.

Military surveys are not specifically addressed in the LOS Convention and there is no language stating or implying that military surveys may be regulated in any manner by coastal States outside their territorial sea or archipelagic waters. The United States therefore considers
it to be fully consistent with the LOS Convention that the
conduct of such surveys is a high seas freedom and the
United States reserves the right to engage in military
surveys anywhere outside foreign territorial seas and
archipelagic waters. To provide prior notice or request
permission would create an adverse precedent for restric-
tions on mobility and flexibility of military survey opera-
tions.

These definitions thus clearly distinguish between MSR,
which the coastal State can regulate, and hydrographic
survey and military survey activities, which are freedoms
the coastal State cannot regulate outside its territorial sea.

X. Conclusion

Let me conclude at this point with the observation that
the LOS Convention provides the only agreed legal regime
governing the conduct of marine data collection, whether
it be marine scientific research, hydrographic surveying, or
military activities, including military surveys. Universal
adherence to that regime can only redound to the benefit of
the research community and thus to that of the world
generally.

Thank you very much.

NOTES

1. Accord, Soons, Marine Scientific Research and the Law of the Sea 124
   (1982) [hereinafter, Soons].

   80; 6 State Dept. Dispatch Supplement No. 1, Feb. 1995, at 44; 34 ILM
1439 (1995); Soons 125 (MSR differs from hydrographic surveys and resource exploration). In discussing MSR for military purposes, Soons (at 135) does not mention military surveys or other military activities.


5. 10 U.S.C. § 2791 et seq. In many areas of the world, the production of up-to-date charts has had a positive impact on economic development in coastal areas, stimulating trade and commerce and the construction or modernization of harbor and port facilities. By helping safety of navigation for ships in transit, up-to-date charts also play a role in protecting coastal areas from the environmental pollution which results from wrecks of tankers carrying hazardous cargoes and freighters. Data collected during hydrographic surveys may also be of value in coastal zone management and coastal science engineering.


7. de Marffy, Marine Scientific Research, in 2 A Handbook on The New Law of the Sea 1140 (Dupuy & Vignes eds., 1991) ("the balance is tipped much more in favour of coastal States than in favour of researching States, and this is perhaps harmful to scientific research in general").


9. Id., article 238.

10. Id., article 239.

11. LOS Convention, article 245. There is no appeal if consent is refused or unreasonable conditions imposed. 56 Brit. Y.B. Int'l L. 1985, at 501.

12. Id., article 19(2)(j).

13. Id., article 21(1)(g).
15. Id., article 34(1).
16. Id., article 54.
17. Id., article 56(1)(b)(ii).
18. Id., article 76.
19. Id., article 246
20. Id., articles 87(1)(f) & 257.
21. Id., articles 143 & 256. Under article 143, research in the Area is to be carried out exclusively for peaceful purposes.
22. Id., article 246(3)-(4).
23. Id., article 246(5)(a-c).
24. Id., article 246(6).
25. Id., article 246(5)(d).
27. LOS Convention, article 252.
28. Accompanying Germany’s instrument of accession to the LOS Convention was a declaration concerning MSR, which reads as follows:

Although the traditional freedom of research suffered a considerable erosion by the Convention, this freedom will remain in force for States, international organizations and private entities in some maritime areas, e.g., the sea-bed beyond the continental shelf and the high seas. However, the exclusive economic zone and the continental shelf, which are of particular interest to marine scientific research, will be subject to a consent regime, a basic element of which is the obligation of the coastal State under article 246, paragraph 3, to grant its consent in normal circumstances. In this regard, promotion and creation of favorable conditions for scientific research, as postulated in the Convention, are general principles governing the application and interpretation of all relevant provisions of the Convention.
The marine scientific research regime on the continental shelf beyond 200 nautical miles denies the coastal State the discretion to withhold consent under article 246, paragraph 5(a), outside areas it has publicly designated in accordance with the prerequisites stipulated in paragraph 6. Relating to the obligation, to disclose information about exploitation or exploratory operations in the process of designation is taken into account in article 246, paragraph 6, which explicitly excluded details from the information to be provided.

Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1994, UN Doc. ST/LEG/SER/13, at 859 (UN Sales No. E.95.V.5, 1995).

29. When claiming its EEZ in 1983, the United States chose not to assert the right of jurisdiction over MSR within the zone. President Reagan explained the rationale for not doing so, as follows:

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognize the right of other coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised in a manner consistent with international law.


31. The United Kingdom similarly acts on behalf of British scientists seeking authorization to conduct MSR in foreign waters. 56 Brit. Y.B. Int’l L. 1985, at 500. The United States would similarly request permission to conduct MSR on a continental shelf seaward of the 200 limit.

32. 16 U.S.C. § 1374(c).


35. The last sentence of article 246(3) requires coastal States to establish rules and procedures ensuring that consent will not be delayed or denied unreasonably. The UN MSR Guide states the coastal State “should therefore respond as quickly as can reasonably be expected to requests for consent.” UN, MSR Guide 11, at para. 52.


37. Article 249(1)(b) sets no fixed time-limits for providing the preliminary reports, final results, and conclusions of the research to the coastal State. Providing even a preliminary report prior to the ship’s departure is not practicable. Soons 190. Common practice is to provide the preliminary report 30 days after completion of the field portion of the research.

38. The UN MSR Guide states that “[a]ll efforts should be made to supply the final results and conclusions within a reasonable period of time” noting that the “time span between the end of the cruise and the availability of the final results can vary substantially depending upon the nature of the research.” UN, MSR Guide 19, para. 92. Final reports usually take a year or longer to prepare.
39. The coastal State has no right under the Convention to receive such data, until it is made public.

40. Article 249(1)(e) requires the data be made internationally available, unless it is of direct significance for the exploration and exploitation of natural resources. U.S. law requires that U.S. government-funded data must become part of the public domain unless classified or restricted for national security reasons. 44 U.S. Code §§ 3501(2) & 3506(d)(1), as amended by the Paperwork Reduction Act of 1995, Pub. L. 104-13.

41. The Convention is silent on this question. The UN MSR Guide recommends that consideration be given to providing the coastal State with reports “written in a language which can be read by scientists of the coastal State.” UN, MSR Guide 19, para. 93.

42. The right to participate under article 249(1)(a) is qualified to the extent that it must be “practicable”. The UN MSR Guide notes that, if the right to participate is to be meaningful at all, the researching State “must always reserve space for at least one coastal State scientist on board,” while recognizing that only in extreme situations would that be impracticable, such as on a two- or three-man submersible. The Guide also cautions that “excessive demands should not be made.” UN, MSR Guide 16, para. 78. Consistent with the UN MSR Guide’s conclusion that “[t]he coastal State may be able to claim more than one participant only if, and to the extent that, there is space available,” two scientific participants are generally permitted on board U.S. research vessels when space allows. However, there may be occasions when participation is not practical, or, conversely, when more than two may participate. Accord, Soons 189.

43. This is not authorized by article 249.

44. Under article 250, all communications concerning MSR projects “shall be made through appropriate official channels, unless otherwise agreed.” Soons states that it is always most safe to use diplomatic channels. Soons 193.

45. To avoid problems, the UN MSR Guide recommends also sending a copy directly to the coastal State scientists involved. UN, MSR Guide 19, para. 90. The Guide also recommends the researching State expressly inform the coastal State involved, after final results and conclusions of
a research project have been provided to it, that all obligations related to a specific research project have in its opinion been fulfilled, to avoid invocation of article 246(5) by the coastal State to withhold consent to future projects because of outstanding obligations to it from a prior research project. UN, MSR Guide 20, para. 99.

46. The UN MSR Guide points out the need for the coastal State to have a single office to process applications for consent and be able to coordinate the request among the relevant government agencies. UN, MSR Guide 9, paras. 42, 43, 46.

47. The following States have indicated their intention to become party to the Convention once their internal procedures are completed: Belgium, Canada, Chile, China, Denmark, Finland, France, Ireland, Japan, Luxembourg, the Netherlands, New Zealand, Panama, Portugal, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. Further, Israel, Russia, and the Ukraine have stated that they are giving serious consideration to becoming Party to the Convention.


50. In addition, the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea is available for disputes under its jurisdiction, including disputes between States Parties concerning the interpretation or application of article 143 relating to MSR concerning the Area and its resources.


52. LOS Convention, article 297(2).

53. Id., article 246(1).

54. See id., articles 73(2), 220(7) and 226(1)(b); cf. article 27(3).

56. For example, the UN MSR Guide, at 1, notes that "‘survey activities’...are primarily dealt with in other parts...of the Convention rather than in Part XIII. This could indicate that these activities do not fall under the regime of Part XIII.” Professor Alfred H.A. Soons, Director of the Netherlands Institute for the Law of the Sea has written: “From articles 19, 21 and 40, which use the term ‘hydrographic surveying’ separately from ‘research’, it follows that the term ‘marine scientific research’, for the purposes of the Draft Convention, does not cover hydrographic surveying activities.” (Soons 125) Later in the same book, Professor Soons wrote: “With respect to hydrographic surveying (an activity which is not to be considered marine scientific research, although it is somewhat similar to it...), it is submitted that this activity, when it is conducted for the purpose of enhancing the safety of navigation..., must be regarded as an internationally lawful use of the sea associated with the operations of ships...in accordance with article 58, and can therefore be conducted freely in the exclusive economic zone....” (Soons 157).

57. LOS Convention, articles 19(2)(j) & 21(1)(g).

58. Id., articles 40 & 54.

59. Id., articles 56(1)(b)(ii), 78 & 87(1)(f).

60. Id., article 58.

OCEAN RESEARCH INTERESTS IN THE 1990S

Barbara S. Moore

Introduction

In the early 1970s, as negotiations for the Third United Nations Conference on the Law of the Sea were building steam, an extensive interagency process was undertaken to define the interests of the United States. These interests were used to set policy direction for the United States in negotiating the treaty. The ocean research interests that defined the U.S. position at that time were largely influenced by the report of the Stratton Commission, which had just been released in 1969, as well as the interests of the U.S. Navy that had become a major player in oceanographic science in support of its defense mission. The Stratton Commission Report voiced great hopes for wealth from the oceans in the form of minerals and fishery resources along with the technology development to support their exploitation. The Navy understood the important role of the oceans in military defense and the significance of the oceans in masking as well as tracking the movements of submarines and other underwater technology assets. Thus, they had great interests in the physical characteristics and behavior of the oceans as well as the atmospheric sciences to support weather forecasting.

*Acting Director, National Undersea Research Program, National Oceanic and Atmospheric Administration, U.S. Department of Commerce. Please note special acknowledgement to NOAA Corps officer Captain Robert Smart, whose research and work on dual use technologies for oceanographic applications was the reference for much of the information provided here.
Around the same time, several major oil spills occurred at sea, the *Torry Canyon* in 1969, followed by the *Argo Merchant* off the coast of the United States in 1976 and the *Amoco Cadiz* off the coast of France in 1978. These disasters influenced the channeling of significant research resources into the effects of pollution on the marine environment and shaped a major portion of the treaty in an attempt to prevent similar accidents.

As the 1990s draw to a close, some of these research interests remain; however, many have changed as the reality of great wealth from the oceans has been challenged and international priorities have shifted. What follows in this paper is a brief discussion of some of the principal research concerns that existed at the time the treaty was being shaped, and a look at the ocean interests as they exist today, some 25 years later. I have also noted several interesting trends over the past 25 years as well as observations about technology that has become available to assist in the pursuit of our current ocean research interests.

In the early 1970s, ocean research interests, if not always resources, were focused on mineral resources such as oil and gas located on the continental shelves and margins, manganese nodules located in the deepest parts of the oceans, and the technology development to support these lines of inquiry. Fishery resources were of considerable interest, although it was recognized that most highly valued stocks existed within the 200-mile economic zones. Oceanographic research was centered in the blue water of the open oceans and was focused on furthering our generalized understanding of ocean dynamics—circulation patterns, temperature distributions, and water mass movements as well as ocean chemistry and the physics of
sound propagation in the ocean. The principal players in ocean research in the early 1970s were the United States, the Soviet Union, and France.

It is not surprising to find that 25 years later our research interests have changed. In the field of geology, the interest in mineral resources has been replaced by a whole new thrust to understand seafloor spreading and underwater tectonics. Barely acknowledged 25 years ago, seafloor spreading studies, along with their revelations of related mineral deposits and new life forms, have become a topic of considerable interest.

Although blue water oceanographers are still interested in ocean dynamics, including water mass movements and temperature distributions, their studies are aimed at understanding the coupled system composed of the oceans and atmosphere toward the aim of gaining a better understanding of global climate change. A principal research thrust today is improved understanding of the relationship between two massive fluid systems—ocean and atmosphere—that distribute heat and energy throughout the globe. The understanding of this coupling is an essential element in being able to predict future changes in climate and their impact on the globe, whether natural or induced by man. The understanding of this coupling is also an important element in improving weather forecasting capabilities.

While blue water oceanography is still a topic of interest, primarily for its role in climate studies, considerable effort has shifted to “brown” water or “green” water oceanography. Coastal oceanography is gaining prominence because of its more direct relationship to topics of greater public policy concern—coastal development,
fisheries sustainability, and defense in a post-cold war era. The Navy currently believes that battles of the future are more likely to require understanding of complex processes in coastal areas than in the blue waters of the deep oceans.

Marine pollution, while still of concern, is a topic that receives little research attention today. The research that does take place is incorporated into studies of larger ecosystems, and builds on the results of what has been learned from earlier studies.

Fisheries research is still a topic of great concern; however, current focus is on stock assessment, and is aimed at predicting the amount of fish that can safely be harvested. Of particular note is that in the early 1970s, during the initial stages of the treaty negotiations, world-wide fish catch was estimated to be approximately 65 million metric tons per year. In the late 1990s, world-wide catch is estimated at over 100 million metric tons per year, an amount thought by some to be close to the total sustainable yield of the world’s oceans for many, if not most, traditionally harvested species.

A more recent line of research on living marine resources is that focused on protection of endangered species. During the early 1970s, endangered species were first identified as a topic of concern. Today a significant portion of our limited fisheries research is channeled toward gaining a better understanding of these organisms.

In the second half of the decade of the 1990s, not only have ocean research interests shifted, so have the players. No longer is large-scale global research in the oceans being undertaken by a few world-class, ocean-going nations on their own. The enormous costs and huge oceans expanses to be covered, require the cooperation of many nations as
well as international organizations to both share the costs involved and to gain access to the geographic areas under their jurisdiction within exclusive economic zones. Today, ocean research participation has become much more international. Principal players still include the United States, Russia, and France. They have been joined by a host of other nations, including Japan, China, Taiwan, and Korea, in carrying out the global ocean research that is now underway.

In the early 1970s, NOAA had a fleet of 24 ships whose average age was 7 years. Today, NOAA’s fleet numbers 16 with an average age of 32 years. (Keep in mind that the design life of a research ship is about 25 years, and while this can and has been extended, NOAA has a dwindling and aging fleet with plans for acquiring only two new ships in the next few years, while retiring more.) The longer term plan is for NOAA to turn to the university research fleet for most of its research needs.

The Navy, on the other hand, has recognized the importance of continuing ocean research and has recently restated its policy commitment to maintain a "robust competency in oceanography" as a core requirement and responsibility of the U.S. Navy. In a statement on Naval oceanography policy, Admiral J.M. Boorda, Chief of Naval Operations, maintains, "It is so vital to the success of naval operations that the Navy must lead in focusing national attention on ocean policy and programs."

Tools and Techniques for Research

I have mentioned a number of research themes that are prominent today in the oceanographic community. In the
next few minutes, I would like to give you some specific examples of some of the many very interesting tools and technological innovations that now enabling us to pursue these research themes.

A principal goal of our research is to improve our ability to forecast weather, particularly severe events, as well as the prediction of climate variability. As a result of studies over the past ten years, we are close to being able to forecast reliably El Niño events and the long term weather trends associated with these occurrences. One of the tools that is enabling us to work in this area is an instrumented array of buoys stretched across the middle of the tropical Pacific Ocean. Called the TAO array (Tropical Atmosphere Ocean), the system consists of a series of 69 deep-moored buoys which support measurements of key oceanographic and meteorological parameters. This instrumented array spans one-third of the earth's circumference, across the tropical Pacific from 95 degrees west to 137 degrees east. The United States, through NOAA, is leading the project to maintain the TAO monitoring array, with participation by Japan, Korea, Taiwan, and France. Data from the TAO array have enabled us to improve weather forecasts for the United States, and to detect El Niño events. A major line of research is using information from this monitoring system to develop mathematical models that will lead to seasonal forecasts of El Niño/southern oscillation effects.

A number of new tools have become available to the civilian oceanographic community since the end of the Cold War. These include hardware systems once used by the defense and intelligence communities, along with environmental data acquired for defense purposes. Many
of these system and data sets are unique because civilian agencies could never duplicate them on their own. Let me describe just a few.

Almost 50 years ago, a Woods Hole research vessel left Woods Hole Harbor and dropped depth charges that were recorded up to 1,000 miles away. This was the discovery by Maurice Ewing and Joe Worzel of the Ocean Sound Channel. Following this discovery, very rapid development led to the emplacement of sea floor listening arrays for submarine detection and tracking at a cost of tens of billions of dollars. The development of the SOSUS (Sound Surveillance System) system is one of the proud technological achievements of this generation. Soviet submarines were routinely detected, identified and followed at 1,000 mile ranges, and this capability was a major contribution to U.S. security over many decades. The era came to an abrupt end when the Walker family leaked this information to the Soviets who then withdrew their submarines into areas in the Barrents Sea and Sea of Okhoks where SOSUS capabilities were limited, and began a highly effective submarine quieting program. By the beginning of this decade, standard SOSUS stations were no longer effective in detecting Soviet submarines. The U.S. Navy initiated development of improvements and other techniques for listening to quiet submarines. Recent experiments have demonstrated that these improved systems, as well as some of the earlier standard systems, are capable of detecting noises of interest for non-defense purposes. The SOSUS arrays are capable of monitoring whale vocalizations, detecting natural underwater seismic noises such as underwater volcanoes and earthquakes, assisting in fisheries enforcement in international waters, and in
conducting long-path ocean temperature measurements that will be a key indicator of climate change. At the present time, scientists with proper security clearances are accessing SOSUS data from arrays that the Navy continues to operate in support of its mission. Signals that the Navy had been discarding as noise, have turned out to be of great significance to scientists studying whales, sea floor venting, underwater volcanoes, sea-floorspreading, and earthquake activity. Unfortunately, many of these systems are likely to be short-lived opportunities for the scientific community since the civilian sector is not likely to have the financial resources to continue operation of these costly hardware systems once the Navy determines they are no longer necessary for their purposes.

Acoustic Thermometry of Ocean Climate (ATOC)

A principal thrust of today’s climate research programs is that of modeling. Accurate models that couple the behavior of atmosphere and ocean are needed to predict future climate changes. Models are built and tested using observations collected over broad ranges of time and space, and one of the most important parameters in the models is ocean temperature. Because of the huge thermal inertia caused by the large water masses of the oceans, ocean temperature is of key importance. Ocean temperature is not uniform. It varies greatly with time, geographic location, and depth. Traditional techniques for measurement of ocean temperature provide information at discrete locations, widely dispersed. Typically, temperatures are acquired by hanging thermometers or thermistors over the side of a ship, spaced along a wire to provide temperature readings at various depths along the line. Spot measure-
ments such as these, even a great number of them, are vulnerable to local variability. The oceans are dynamically very active, with spacial structures on the scale of millimeters to thousands of kilometers. Temporal scales range from less than a second to at least several years. This wide range of variability makes it extremely difficult to make accurate observations of large-scale underlying trends such as global warming. Currently, the only methods with sufficient coverage and resolution come from satellite observations of the sea surface and Arctic ice cover. Sea surface temperature data from satellites are just that, however: the temperature of the top few centimeters of the ocean. Since the oceans are often several thousands of meters deep, this is hardly sufficient information for inferring heat content below the surface.

A promising new technique called Acoustic Thermometry of Ocean Climate (ATOC), has been proposed and tested. Sound can be made to travel in a bounded region some 2,000 meters deep centered at 1,000 meters or more below the sea surface in the naturally occurring sound channel. Sound energy can propagate over great distances inside the sound channel with little loss of energy. The speed at which the sound travels is a function of water characteristics including temperature, and has been well studied by those traditionally interested in underwater sound. Thus, by transmitting a series of sound pulses in the sound channel and determining the time it takes those pulses to travel fixed distances, the average heat content of the water through which the sound travelled can be inferred.

From this concept, the ATOC project was born. It was the brain-child of Professor Walter Munk of the Scripps
Institute of Oceanography. Initially, the plan called for placement of two transmitters at key locations in the Pacific and listening stations at many sites near the ocean margins. Many of the listening posts are to be provided by the U.S. Navy, which has already installed suitable sensors at great cost for its own purposes. ATOC involves the collaboration of over 12 universities and research laboratories in 8 countries. By measuring the average temperature profile along many intersecting transects in the Pacific, the ATOC project is intended to provide a prototype measurement of reliable ocean temperature data that the modelers so badly require.

**Over-the-Horizon Backscatter (OTH-B) Radars**

Following the cold war, the U.S. Air Force had no mission requirement for two multi-billion dollar over-the-horizon Backscatter (OTH-B) radars, located in California and Maine. These powerful radars achieve great detection ranges by bouncing high-frequency radio waves off the ionosphere. For example, the east coast radar can look across the Atlantic ocean to Europe, North Africa and northern South America. The west coast radar can look over the entire Aleutian Island chain and past Hawaii. Designed to detect aircraft, the radars can also detect sea-surface conditions and information related to surface currents. From sea surface conditions, wind field patterns over the entire North Atlantic and North Pacific Oceans can be derived. Information from this system has been shown to be useful in supplementing satellite data for improving hurricane forecasts. Both the east and west coast radars have now been shut down. However, the Navy still operates smaller ionic Backscatter radars in support of the
counter-drug mission for the Caribbean and Gulf of Mexico region. Called Relocatable Over-the-Horizon Radars (ROTHR), these radars do not possess the immense range and area overage of the Air Force OTH-B radars, but they do offer other possibilities for scientific application.

**Submarine Arctic Science Cruises**

The Navy wants to retain an operational capability in the Arctic, and to increase its scientific understanding of the environment in which it must operate. Toward this end, the Navy invited civilian scientists to work with scientists at the Navy Arctic Research Laboratory and has made available nuclear submarines to carry out under-the-ice research in cooperation with civilian scientists. Two cruises have taken place so far, with the promise of more this year. All scientific data was declassified shortly after completion of the cruises, making it available to the scientific community at large. Already significant new findings have been made that influence scientific thinking about the Arctic region.

**Navy Underwater Technology**

The Navy also needs to maintain a deep submergence rescue capability and for this mission has developed a number of advanced technological devices. These assets, unique manned and unmanned submersibles and remotely operated vehicles, are being made available for civilian scientific use at relatively low cost, and are being coordinated through NOAA.
Geosat Data

In 1985, the Navy carried out an 18-month, $80 million project (the GEOSAT Mission) to measure gravity from space as a means of improving the accuracy of submarine-launched ballistic missiles. A resulting discovery was that perturbations in the gravity field over the oceans could reveal sea-floor topographic features. The gravitational influence of these masses also produces variations in local sea level that can be measured by satellite-borne radar altimeters. The Navy recently released worldwide GEOSAT data and scientists have combined it with other data to produce a map showing geologic features previously unknown on the floors of the oceans. The map is a major advance in our understanding of the oceans and may force revision of plate tectonic theory, because plates making up the earth’s crust do not appear to be as rigid as previously thought.

In concluding, let me note several points. Advances in technology are shaping the way ocean scientists go about their business of understanding the environment in which we live. These advances are responsible for the rapid pace at which our rate of both discovery and understanding is taking place. Much of what was accepted as truisms in understanding the oceans only 20 years ago has long since been disproved and replaced with more sophisticated concepts about how the natural environment works; this includes the discovery of new creatures and phenomena previously unknown. Exploration and understanding of the oceans will continue to evolve as new techniques for exploration are developed. The vast scope of the geographic areas to be studied as well as their complexity will continue to require cooperation and support among
Implementing the 1982 Law of the Sea Convention

international partners. The regime set forth in the 1982 Law of the Sea Convention, while not fully satisfactory as far as the inquisitive ocean scientist is concerned, has been largely accepted by coastal States and ocean scientists alike that are learning to accommodate long lead time clearance provisions.
A U.S. Perspective on
Global Developments in Marine Science

Barbara Moore*

The year 2005 finds the field of marine science at the forefront of a number of important priorities. A series of broad global challenges are driving marine science today in directions that will shape the science and understanding of the future. In this presentation I would like to address this from two perspectives – the broad vision as it is being laid out by the international ocean community today, and a somewhat more specific discussion of some of the more interesting issues that contribute to this vision.

The National Oceanic and Atmospheric Administration (NOAA), is the principal ocean agency in the United States. We have identified three significant challenges facing the global marine science community today. They arise from the need to understand global climate variability, the need to conserve and manage living marine resources and the desire to provide operational oceanographic products to a range of users. Many of these challenges, such as the need to understand climate variability and its more immediate shorter-range component, weather forecasting, are shared by all nations. These challenges lead to important priorities for the marine science community in the coming decades. They fall into three broad categories – earth observations, ocean exploration and ecosystem approaches. Let me comment briefly on each of these.

EARTH OBSERVATIONS

Earth observations, both satellite and in situ – have been at the heart of NOAA’s mission for more than 30 years. In fact, environmental information is our primary reason for existence. NOAA depends on

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observing systems for virtually every activity it does, from fundamental research to long range operational forecasting and day-to-day regulatory decisions. It is estimated that more than 30 percent of the United States Gross Domestic product depends on weather and climate products and services, so it goes without saying that we, as a country, are big believers in earth observations.

The premise behind the global earth observation system is simple – even if not necessarily easy to implement. There are currently thousands, if not millions, of observation points collecting data around the world. Unfortunately, they operate, for the most part, independently of one another. By establishing an integrated global system, participants seek to improve coordination of strategies and systems for observations of the earth – from in situ, aircraft, and satellite networks. Participants also hope to identify measures to minimize data gaps – all with a goal of moving toward comprehensive, coordinated, and sustained earth observation system or systems.

![Argo Network, as of October 2004](image)

*Earth Observations – Linking together many data collection systems.*
If successful, by fully networking the systems that exist and filling in gaps where they do not now exist, we will advance our understanding of the earth's environment and improve our ability to address pressing policy issues. Let me describe several of the global systems already in place and under development.

**OCEAN EXPLORATION**

We are increasingly aware of our dependence on the oceans for healthy fisheries and clean beaches. Less well developed is our appreciation of the role of the oceans in climate, its potential for yielding the keys to new medicines and the ability to sustainably use its resources, including maritime heritage. Most of the oceans remain unexplored. Ocean exploration, as a general matter, is an area we must identify as a priority. The United States now has a dedicated program in ocean exploration.

**MARINE ECOSYSTEMS APPROACH TO MANAGEMENT**

Management of marine resources is in the midst of a major transformation globally. In the United States and in many other countries and international bodies, we are moving toward an ecosystem approach to management. While ecosystem based management has been an academic concept for many years, the application of this concept to management presents some very significant challenges. In other words, theoretically, we may understand what ecosystem based management means, practically; we really don't know how to implement this complex concept. Ecosystem-based management is an emerging theme shared by the United States and many in the international community as we recognize the need to address marine resource management from a more holistic perspective. In NOAA we have defined the ecosystem approach to marine resource management as:

1. adaptive,
2. geographically specific,
3. takes into account ecosystem knowledge and uncertainties,
4. considers multiple external influences, and
5. strives to balance diverse social objectives.

Having defined the terminology, our task now is to learn how to carry it out.

Marine ecosystems are complex. They are affected by atmospheric, oceanographic and land-based processes as well as anthropogenic activities such as fishing, habitat alteration and pollution. Many of these processes and their effects are poorly understood and difficult to predict. Improving our understanding of those processes and how they interact...
with human uses of the oceans, will be a major challenge in the coming decades.

A critical point here is that human communities are part of the ecosystem, and their values and motivations must be considered when designing an ecosystem-based approach to management.

Our current approach to ecosystem management is both "bottom-up" and "top-down." We are building upon traditional approaches to management, for example in fisheries, we are progressing from single species management to multi-species management, taking into account other factors such as bycatch and impacts of fishing on habitat. Top-down – at the other end of the spectrum, we are continuing to expand our ocean observations in order to understand ecosystems to be better equipped to consider fisheries within this larger context.

Having presented a broad overview of the big picture developments in marine science, I turn at this point to a discussion of some of the most interesting and compelling issues that have captured the attention of the global marine science community today.

This paper is written from a very privileged perspective. As director of a national research program that specializes in undersea research, I have been, for a number of years, in the midst of new and emerging ocean issues as they unfold. I work with those involved in attempting to understand their significance, both the scientists and the policymakers. The thoughts that follow are personal views that come to me as a result of this experience.

In the 1970s, most ocean scientists believed that much of the seafloor was largely a featureless desert, punctuated with occasional underwater volcanoes, seamounts and a range of underwater mountains in the mid-Atlantic ocean that terminated in Iceland.

Today we know that this mountain range that bisects the Atlantic Ocean is only part of a continuous geologic feature that encircles the globe and is but one of the many manifestations of the plate tectonics that form the basis of the geological underpinnings of the earth itself. The largest single geographic feature on the surface of the planet, this 56,000 mile continuous underwater mountain range, remained undetected from the beginnings of human history until barely 30 years ago. What else lies
hidden within the vast expanses of the ocean and remains to be discovered?
This paper discusses five topics that have captured our attention:

(1) Methane hydrates,
(2) Hydrothermal vents, seafloor spreading centers, seamounts and the other consequences of tectonic processes,
(3) Deep water corals,
(4) Ecosystems in extreme environments, and
(5) The genetic resources of extremophiles.

**Methane Hydrates**

Methane hydrates are naturally occurring substances likely found throughout the world. At standard temperatures and pressures, methane is a gaseous hydrocarbon, the main component of natural gas. However, under conditions of relatively high pressure and low temperature, methane can be found as a solid frozen within a crystalline structure of water molecules. The structure is known geologically as a clathrate.

Gas hydrates occur at many sites along continental margins and in the Arctic - wherever the temperature and pressure conditions permit. The temperature and pressure conditions that lead to hydrate formation are found typically in areas of permafrost (on land), and on the continental shelf and slope, under the sea in water depths to 5,000 meters. Hydrates are found buried beneath the sediment of the sea floor at depths varying from hundreds of meters to centimeters. Some hydrate deposits are exposed and sit like mounds of ice protruding from the sea floor.

The issues surrounding hydrates are many and complex. Unfortunately, no single scientific discipline or government organization seems to deal with all aspects of hydrates, and most discussions tend to focus on one or two dimensions. In this discussion, I will attempt to provide a brief but broad overview of the many issues involved.
Methane Hydrates are Important Because of the Immense Quantities Thought to Exist

Hydrates store large amounts of methane, with major implications for energy resources and climate. Estimates of global resources of natural gas hydrate range from 100,000 to almost 300,000,000 trillion cubic feet (TCF). To put these quantities into context, estimates of the total global reserves and undiscovered resources of conventional natural gas total about 13,000 TCF. The amount of methane stored in hydrates is estimated at perhaps 3,000 times the amount in the atmosphere.
Exposed Methane Hydrate Deposit on Sea Floor.
Photo Credit: Ian R. MacDonald, Texas A & M University, Corpus Christi, Texas

Hydrates in Marine Sediments Influence the Physical Properties of the Sediment, Particularly Sediment Strength

This has implications for sediment stability particularly as it relates to oil and gas drilling operations. Natural temperature increases or pressure decreases can cause hydrates to dissociate, converting a strong sediment into a weak, watery sediment. Such changes cause slides and seafloor collapse.

Methane is a Greenhouse Gas Ten Times More Effective than Carbon Dioxide

The release and absorption of large volumes of methane from seafloor hydrates may have major impacts in modifying the earth’s climate. When released from its condensed structure, the volume of methane gas is 160 times greater than that in the hydrate form. The volume of carbon contained in methane hydrates worldwide is estimated to be twice the amount contained in all fossil fuels on Earth, including coal. Thus, large-scale releases of methane to the atmosphere, could have dramatic effects on climate.
Unique Biological Communities are Found in Connection with Hydrate Deposits

As the hydrates dissociate, methane seeps through the sediments onto the sea floor. This provides a rich environment for highly diverse communities that make their energy chemosynthetically from the materials seeping from the sea floor. Organisms in hydrocarbon seep habitats rely on reduced carbon in the form of methane gas and crude oil in migrating seep fluids. Some of the seep organisms may be related to those occurring near hydrothermal vents. Chemosynthetic communities associated with seep habitats derive sulfide from microbes that reduce the sulfate to forms from which they take their energy.

*Life Forms Existing at Methane Seep.*

The Gulf of Mexico hydrocarbon seep and methane hydrate habitats which are the most studied till this time, are colonized by dense mats of bacteria, vestimentiferan tubeworms, methanotrophic mussels, bivalves and methane-dwelling worms. These communities thrive in environments
that would be highly toxic to most known organisms and function through chemosynthetic processes and interactions that we are only beginning to identify and understand.

Until the 1960s, methane hydrate was considered an unusual and unnatural substance that occurred only in the laboratory or in natural gas pipelines. Discoveries, first in Polar regions, and then throughout the deep-water shelves of every continent, have shown that natural methane hydrate occurs on a truly staggering scale. In many areas the existence of natural methane hydrate is inferred only from indirect evidence from geophysical surveys or geochemical analyses of sediment samples. The immense volume of methane hydrates worldwide may be a potential resource of extraordinary richness. Our understanding of these resources is rudimentary.

HYDROTHERMAL VENTS, SEAFLOOR SPREADING CENTERS, SEAMOUNTS AND OTHER CONSEQUENCES OF TECTONIC PROCESSES

What are they? Mid-ocean ridges, back arc spreading centers, vents and seamounts are expressions on the earth’s surface of planetary-scale processes of ocean crust formation, plate separation, and global heat loss. These tectonic processes are responsible for a variety of phenomena that may one day lead to recoverable resources in the sea. In a very simplistic fashion, one could envision the surface of the earth broken into rigid plates. Twelve major plates plus a number of minor plates, 100 to 120 km thick, cover the earth’s surface. The plates sit on top of a softer, more plastic layer of mantle. They are all in constant motion, some moving faster than others. They move in different directions. Most of the earthquakes and volcanoes worldwide occur along narrow bands that correspond with the boundaries of plates. The most recent and dramatic evidence of just such motion was the December 26, 2004 Indian ocean tsunami which was generated by the massive water displacement caused by the shifting of two plates. A 1,320 km stretch of one plate off the coast of Sumatra, dropped 50 meters, displacing the tremendous amount of water that resulted in the devastating tsunami that occurred on December 26, 2004.
Where plate boundaries occur beneath the sea, water seeps through cracks in the seafloor caused by the moving plates, and is heated by molten rock deep below the ocean crust to as high as 400 degrees C. The hot fluid rises to the seafloor surface and carries with it dissolved metals (including Fe, Cu, Zn and it picks up H₂S) and other chemicals from deep beneath the ocean floor. These hydrothermal fluids exit the seafloor, at many locations through vents that form chimneys. Vents have been found at almost every type of seafloor spreading boundary (slow, intermediate, fast); they have been found at hot spots and back-arc basins. Seemingly, everywhere that some type of mantle-driven activity occurs, scientists have found vents. Although less than 1 percent of the sea floor where hydrothermal vents are suspected has been investigated, hundreds of hydrothermal vent fields have been identified globally in the past few decades.

Vents

Vents occur whenever hot fluids carrying dissolved materials combine with Sulfur to form sulfides which, in turn, precipitate out when the super-hot vent water meets surrounding deep ocean water, which is only a few degrees above freezing. Formation of a simple black-smoker begins as
metal (e.g. iron, copper and zinc) and sulfide-rich, high temperature, acidic fluids mix with the surrounding cold, alkaline seawater, causing the metal sulfides to precipitate and form particle-rich “black-smoker” plumes. Columnar chimneys grow to heights of 10-20 meters, often with multiple high temperature openings at the top.

White smokers are those chimneys from which fluids at intermediate temperatures (100-300 degrees C) are emitted. At these lower temperatures, silica, anhydrite, and barite (BaSO₄) precipitate as white particles. Black smokers are the hottest of the vents. They are composed primarily of iron and sulfide. Vents can occur at any depth. Some are as
deep as 3,600 meters, others are found at barely 30 meters off the coast of New Zealand. Underwater vent chimneys can form very rapidly. Nine meters in 18 months is not unusual.

**Mid-Ocean Ridges**

Mid-ocean ridges are underwater mountain ranges; that encircle the globe like seams on a baseball. They total more than 56,000 km. Mid-ocean ridges are located at the boundaries between tectonic plates where sea floor spreading takes place. As plates are pulled apart by tectonic forces, hot, soft rock from deep in the earth rises to fill the gap between them. As it rises, the soft rock partially melts, feeding volcanoes that construct the ocean crust. This zone of crustal accretion is narrow, only a few kilometers wide at most, with an axial valley or trough that marks the spreading axis.

The average rate at which the seafloor spreads apart at mid-ocean ridges is not uniform throughout the entire ridge system. Spreading rates can be characterized as slow (10-50 mm/yr), medium (50-90 mm/yr) and fast (more than 90 mm/yr). Almost 50 percent of the presently active ridges are slow spreading, including the Mid-Atlantic Ridge. The East Pacific Rise is the only presently active fast-to-superfast spreading-center.

**Back-arc Spreading Centers**

These form behind island arcs along active margins where thick, old ocean crust is undergoing subduction beneath a continental plate moving in the same direction. Where there is sufficient heat, crustal accretion takes place by upwelling of magmas. This mechanism of crust formation is very different from open ocean seafloor spreading and takes place periodically over a period of millions of years, rather than continuously as at mid-ocean ridges.

**Seamounts**

Seamounts form from hot springs on the sea floor that are not restricted to spreading centers along the mid-ocean ridges and island-arc
Barbara Moore

systems. They occur wherever there is sufficient heat and porosity to drive hydrothermal convection producing active submarine volcanoes in the centers of plates. Thousands of seamounts rise from the sea floor, primarily in the Pacific. Some reach the ocean surface, like the islands of Hawaii. Others are hundreds of meters below the sea surface. Many, if not most, are uncharted. To underscore that point, recall the recent encounter (January 8, 2005) between an uncharted seamount and a U.S. submarine. The USS San Francisco was traveling at top speed in waters 350 miles south of Guam at a depth of about 1,500 meters, when it struck an uncharted seamount. The resulting collision killed one crewman and injured 23 others. Fortunately, the submarine was able to return to Guam where it is now undergoing repair.

Because of the process by which they are formed, these features are the sites of rich deposits of minerals. They also support communities of living organisms that have evolved over time in the extreme environments surrounding them. The hydrothermal processes had been predicted. What was unexpected, however, was the existence of thriving communities at these sites.

Active vents are transitory as are the ecosystems they support. When hot fluids ultimately cease to flow through a chimney, the metal sulfides slowly begin to oxidize, turning to iron oxyhydroxides, and the chimney’s matrix becomes soft and unstable. Dense hydrothermal communities on the chimneys die off and are often replaced by a few suspension feeding organisms which take advantage of the richer food supply delivered by currents strengthened by the resulting changes to local topography.

Mining the mineral deposits resulting from hydrothermal processes may become a reality in the future.

DEEP-SEA CORALS/COLD WATER CORALS

Most are familiar with corals as they are commonly described in connection with coral reef systems that occur throughout the tropics. Few are aware, however, that a variety of corals also inhabit cold waters in the deep sea off all U.S. coasts, off the coasts of northern Europe and Australia, and most likely off all coasts globally. Deep-sea corals/cold water corals are members of the Class of animals called Anthozoa that
includes sea anemones, stony corals, soft corals and sea pens. Deep-sea corals inhabit the colder, deeper waters of the continental shelves and offshore canyons in waters ranging from 50-1,000 meter depth. They may occur as small growths of individual organisms, or where current and

*Deep Sea Corals.*
Photo Credit: Stephen Cairns

substrates are suitable, they may form highly complex thickets or groves. They are slow growing and can reach ages of hundreds of years. The tropical corals that make up the familiar coral reefs contain a symbiotic algae (zooxanthellae) that relies upon sunlight for photosynthesis to supply the corals energy needs. Deep-sea corals do not contain these symbionts, and therefore do not rely upon sunlight for their energy. They can live at much greater depths, where light does not penetrate. They actively feed upon material suspended in the water. They may live on the deeper flanks of tropical coral reefs, or they may live far distant from reef structures in the cold waters of Alaska or the North Sea. Deep-sea corals may build reefs, or they may occur as solitary organisms.
They are important for a number of reasons.

**Fish Habitat**

Just as tropical corals are essential habitat for tropical fish and important ecosystems, deep-water corals are habitat for deep-sea fish. The strong water current that deep-sea corals prefer is important for marine life because they increase water and nutrient flow. These strong currents also make survival more difficult, particularly for smaller life, such as juvenile fish. Coral outcrops and “forests” are important habitat for many fish and crustacean species and also for other marine life because they provide protection from these currents and predators. Fish rely on coral areas for food, protection, and a place to lay their eggs. We have yet to determine, however, if these areas are “essential” fish habitats.

**Records of Climate Change**

More recently we have begun to recognize that through their relatively slow growth rates and intermediate-to abyssal-depth habitats, these
species can record deep-ocean changes in chemistry and circulation at the sub-decadal time scale. For example, the species Desmophyllum cristagalli is a solitary coral that can be used to calibrate paleoceanographic tracers. Because corals live so long, and because some species grow in concentric rings, similar to tree rings, we are beginning to look to deep-sea corals for information about changes in ocean temperature and nutrient levels over the past several centuries - information important to understanding climate change.

![Deep Sea Corals as Climate Records.](image)

Deep-sea corals exist around the world. Different types of deep-sea corals have been documented in the Atlantic and the Pacific oceans, and there is no reason to believe they do not exist in all oceans. They live at depths unaffected by storms and other large-scale natural disturbances.

Little is known about the distribution of deep-sea corals, their ecological role and conservation status. Recent evidence suggests that fishing practices have had substantial impacts on these communities in both the North Atlantic and Pacific Oceans. Protected areas such as coral conservation areas have been established by a number of states in order to restrict destructive fishing practices and provide study areas.
ECOSYSTEMS IN EXTREME ENVIRONMENTS

Discoveries over the past 20 years have led to the realization that many organisms are capable of thriving in environments that are uninhabitable to not only humans, but also most of the living organisms with which we are familiar. These environments of extreme temperature or pressure or chemicals toxic to much life — or combinations of these factors, are known as extreme environments. I would like to describe a few.

Hydrothermal Vents

As noted earlier, the scientific community had predicted hydrothermal processes. What was unpredicted was the existence of thriving communities of lifeforms at these sites. An amazing group of organisms has evolved around hydrothermal vents. They range from tiny bacteria that feed off the chemicals spewing from the vents, to tube worms, giant clams and ghostly white crabs.

Tubeworms (left) and Crabs (right) from Vent Ecosystem.
Compared to the surrounding sea floor, hydrothermal vents boast a community of organisms that is 10,000 to 100,000 times denser. The reason for this is the sulfur-oxidizing bacteria as a food source either directly or through a cooperative arrangement between bacteria and some vent organisms.

Sulfur-oxidizing bacteria and other forms of bacteria that gain energy from the metabolism of inorganic compounds are called chemoautotrophs. These bacteria are able to oxidize compounds such as hydrogen sulfide and store energy in the form of ATP (adenosine triphosphate) that is the universal energy molecule in all organisms. These bacteria use this energy to transform carbon dioxide into simple sugars and other molecules, just like plants, creating organic matter at the base of the food web for other organisms to use. While some hydrothermal vent organisms are adapted to high temperatures, it is the chemistry of hydrothermal fluids - not the heat - that sustains the chemosynthetic basis of life at vent ecosystems.

**Brine Seeps**

Brine seeps are another type of extreme environment. They occur along the base of the Florida Escarpment in the Gulf of Mexico and other ocean sites where pore waters are squeezed out of sediments by tectonic
plate movement. Many of the invertebrates in these communities are taxonomically similar to those in hydrothermal vent communities. They are also chemoautotrophic. And, of the 211 seep species inventoried so far, 64 are symbiont-bearing species.

When methane-rich seeps were first discovered, bacteria that acted as symbionts were presumed to be methanotrophic, but sulfide-oxidizing chemoautotrophs are often most prevalent. New seep sites are constantly being discovered (e.g. at mud diapirs along passive margins and at active convergent margins off New Zealand, Costa Rica, Japan and Alaska), adding to the geographic distribution of known seep communities and to the diversity of fauna.

Seep communities are estimated to have longevity far surpassing that of most hydrothermal systems. Apart from chemoautotrophic symbioses at diffusion sites, the most surprising organism discovered must be the ice worm, Hesiocacca methanicola, a 2 cm long polychaete that lives in high densities in icelike methane hydrates.

**GENETIC RESOURCES OF EXTREMOPHILES**

Extremophiles are the rule breakers in biology. These organisms live in the harshest environments on earth - boiling water holes in Italy, the ice of Antarctic seas, and hydrothermal vents at the bottom of the ocean. They not only survive, but also thrive under conditions previously thought to prohibit all forms of life. In recent years, scientists have begun to mine the genomes of extremophiles for information that might lead to new technologies, such as heat resistant molecules for commercial uses, and to breakthroughs in medicine and the environmental sciences.
A U.S. Perspective on Global Developments in Marine Science

*Tubeworms Surround Exposed Methane Hydrate Deposit.*
Photo Credit: Ian R. MacDonald, Texas A & M University, Corpus Christi, Texas

*Ice Worms Live in Methane Hydrate Deposits.*
Photo Credit: Charles Fisher, Penn State University

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The first extremophile to be sequenced was Methanoccus jannaschii, an organism straight out of science fiction. The single-celled microbe lives near hydrothermal vents 2,600 meters below sea level, where temperatures approach the boiling point of water and pressure is sufficient to crush an ordinary submarine. There, Methanoccus jannaschii survives on carbon dioxide, hydrogen and a few mineral salts. It cannot tolerate oxygen and takes care of its energy needs by producing methane.

The potential for biotechnological utilization of microbial species isolated from hydrothermal vents and other extreme environments is considerable. Bacterial bioremediation of waste sulfides from industrial processes has already been demonstrated on a laboratory scale. Hyperthermophilic (heat-loving) bacteria offer the prospect of a broad range of thermostable enzymes. The search for Archaea and bacteria with novel biochemical attributes is an entire field of marine research.

I would like to conclude with two final points about genetic resources. First, marine organisms are much more productive than terrestrial organisms. In the search for new medicines and bioactive compounds, marine samples have a greater bioactivity, in comparison to terrestrial samples, most likely due to their higher chemical diversity. In general, for terrestrial samples, 1 out of 10,000 samples is a significant biomedical hit (i.e. forwarded for clinical trials). For marine samples, 1 in 5,000 samples is a significant hit. Our own recent experience with organisms from coral ecosystems shows even higher success rates. Second, when we discuss bio-prospecting – or the search for genetic resources, we are not talking about harvesting large quantities of organisms. We are talking about taking small quantities for laboratory analysis. In most cases, the information that results will be used to reproduce the bioactive components in shore based laboratories or factories. It is information that is being “harvested”, not the organisms themselves.

END NOTE

We are regularly reminded of our arrogance in believing how much we know and understand about the oceans. Thirty years ago we were taught that life on earth is not possible without light or oxygen. The life forms we found living around ocean vents proved this is not so. Forty
years ago we believed the only resource of value on the seafloor were manganese nodules. The discoveries of ocean ridges and sulfide rich deposits have proven otherwise. Twenty years ago we thought the seafloor was a colorless, barren desert. Today we know it is dotted with oases rich with life - composed of ecosystems never envisioned before. Modern technologies revealed they existed. The point -- there is much we do not know about the ocean - what new resources and assets will we encounter as our means for getting out there and down there advance? I will admit that I don’t know, and I look forward to the surprises that await discovery. Whatever we find, however, I will wager, will not be what we are able to predict today.

Aquarius – an Underwater Laboratory.

Photo Credit: NOAA
Introduction

JONATHAN I. CHARNEY

I CONTEXT OF THE PROJECT

Historically, states rarely delimited their maritime boundaries with other states. This situation has changed in recent years. Ocean resource development has led states to define their maritime boundaries more exactly. Perhaps the primary force behind the move to establish these boundaries has been the development of technology to recover highly valuable hydrocarbons and other non-living resources of the seabed and subsoil. The commercial exploitation of these resources often requires that defined areas be allocated among operators. This has provided states with strong incentives to claim new zones of maritime jurisdiction seaward from the traditional territorial sea and to assert boundaries with other states that maximize the areas over which they have exclusive authority to exploit and manage these resources. As a result, efforts to delimit maritime boundaries among neighboring states have intensified.

The pace at which states will negotiate, litigate, and resolve their maritime boundaries is likely to increase in the future. This should result from expanded use and management of the oceans by states, and from the expected entry into force of the 1982 Convention on the Law of the Sea in the not too distant future.¹

This latter development may have a profound impact on all oceans related matters. During the negotiations that led to the conclusion of that Convention oceans law and practice changed substantially. For example, in the beginning of that period 200 nautical mile national resource zones were rare and 12 nautical mile territorial seas were controversial. By the end, these 200 and 12 mile zones were accepted in the Convention, in law, and in very substantial state practice.² The worldwide attention given to the law of the sea by the ongoing negotiations contributed substantially to these developments.

After the negotiations concluded, attention to ocean law declined and so did developments in the field. The period subsequent to 1982 has been marked by efforts to encourage states to sign and ratify the Convention and to bring recalcitrant states back into the processes. The work of the Convention’s Preparatory Commission has been limited, and the community of international lawyers, diplomats and technical experts entered a period of relative quiescence.

Nevertheless, states have proceeded at a steady pace to settle their maritime boundaries through treaties and third party processes. During the last ten years, there have been, on average, four or five settlements each year, with many others under active negotiation or study. If there is no change in the status quo regarding the general law of the sea, maritime boundary settlements will continue at roughly the same pace for years.

With 51 of the 60 necessary ratifications in place (as of October 1991) the likelihood that the LOS Convention will enter into force in the foreseeable future has increased dramatically. Special efforts by the United Nations Secretary General in 1990 and 1991 have stimulated renewed interest in the Convention and the law of the sea. In addition, some evidence suggests that the principal objecting state – the United States – may be willing to reenter the process in response to positive movements from members of the Group of 77. If a rapprochement were achieved and the Convention were to enter

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6 See Statement Mr. Pickering of the United States, United Nations General Assembly, 46th Sess, Provisional Verbatim Record of the 70th (sic) Meeting, UN Doc. A/46/PV.70 (30 Dec. 1991); Concluding Remarks of the Secretary-General, supra note 5; Provisional Verbatim Record of the 70th (sic) Meeting, supra note 5; Provisional Verbatim Record of the 71st Meeting, supra note 5; the Law of the Sea Resolution of December 1991, supra note 5; Speech by Satya N. Nandan, United Nations Under-Secretary General for the Law of the Sea, Office for Ocean Affairs and the Law of the Sea, at the 23rd Annual Conference of the Law of the Sea Institute (Noordwijk aan Zee, Netherlands 12 June 1989) IMPLEMENTATION OF THE LAW OF THE SEA CONVENTION THROUGH INTERNATIONAL INSTITUTIONS 179 (T. Clingan, Jr. & A.H.A. Soons eds.); Statement Made on the Completion of the Work of the Preparatory Commission and the
into force, the entire field would again become highly active. The many organs of the Convention including, for the instant purposes, the dispute settlement systems and the Commission on the Limits of the Continental Shelf, would encourage states to address their maritime boundary problems, among other oceans matters.\footnote{7}

States will begin in earnest to define the seaward limits of their continental shelves under Article 76 of the Convention. The Commission on the Limits of the Continental Shelf will examine those limits and engage states in the processes called for by the Convention. It is inevitable that other maritime boundaries between states would become directly and indirectly relevant to this process and greater numbers of boundary delimitations would be attempted.

Third party dispute settlement conducted under the Convention before experts in the field may facilitate the use of these forums for maritime boundary purposes. Thus, the compulsory dispute settlement system established by the Convention may contribute to increased adjudication and settlement. This will augment the more general focus on oceans issues which will lead to increased activity in the oceans community.

Equally relevant to maritime boundary issues is the increased focus of the world community on the global environment. This subject is drawing greater attention to the marine environment, its resources, and its role in weather and climate change. The behavior of the international community in response to this development cannot easily be predicted, but it is likely that many states will seek to perfect their control over nearby ocean areas. This will, in turn, require that boundary questions be resolved. To the extent that resource scarcity and competition for valuable resources continue to drive state behavior, established maritime boundaries will serve to allocate ocean resources of the continental shelf and exclusive economic zone. Unsettled maritime boundaries can lead to discord, conflict, and poor resource and environmental management. Furthermore, the attention given to the environment may encourage states to better address these concerns in their maritime boundary settlements.

There is a school of thought that argues against the establishment of maritime boundaries, favoring more functional regimes for managing the oceans resources and environment.\footnote{8} While there are cogent arguments to

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\textit{Universality of the Convention Made by Ambassador José Luis Jesus, of Cape Verde on the Occasion of the 24th Annual Meeting of the Law of the Sea Institute,} (Tokyo 23–27 July 1990) (Jesus was the Chairman of the Preparatory Commission); and \textit{Reflections on Institutional Aspects and How to Facilitate Universal Acceptance of the Convention,} by Mumba S. Kampuma, Chairman of the Delegation of Zambia to the Preparatory Commission for the International Seabed Authority, \textit{24th AM\-\textsc{N}UAL MEETING OF THE LAW OF THE SEA INSTITUTE} (Tokyo 23–27 July 1990) (Kampuma served as Chairman of the Group of 77 at the meeting of the Preparatory Commission in the fall of 1989).

\footnote{7} LOS Convention, \textit{ supra} note 1, arts. 76.8, 279–99, Annexes II, V, VI, VII, VIII.

support that view, the evidence of state behavior suggests that boundary
settlements will precede the establishment of more functional transboundary
regimes. Common zones created in the absence of boundaries are rare and
limited to discrete areas that are themselves bounded.

The increased attention to maritime boundary delimitations that is foreseen
will require states to obtain the expertise necessary to develop their boundary
claims, to negotiate with their neighbors, and to utilize third party settlement
procedures, as necessary. As is well known, the positive international law of
maritime boundaries cannot be presented in an easily understood and applied
written rule. Many writers have made contributions to the literature on the
subject that are worthy of attention. Some of the leading experts and practi-
tioners in the field have, in fact, participated in the instant study. When faced
with a maritime boundary question, however, the diplomat, judge, and scholar
will have to resort to the prior practice to understand the options and tech-
niques available if one is to define a state's maritime boundaries. This study
systematically provides that data, as well as analyses based upon that data. It
provides both practical and theoretical information that may be utilized by
persons working in this field at a variety of levels.

While states have delimited their maritime boundaries for centuries, so
much has changed in recent years that the most relevant data postdates 1940.
The first such boundary delimitation during this period was the 1942 agree-
ment between Trinidad and Tobago and Venezuela in the Gulf of Paria (No.
2–13(1)). It was stimulated by resource development interests in that area.
Pressure to delimit other maritime boundaries increased as states made
extended continental shelf and exclusive fishery zone claims. The Truman
Proclamations of 1945 certainly mark a significant turning point in this new
era.9

In the fifty-two years subsequent to 1940 the three United Nations
Conferences on the Law of the Sea have codified and progressively devel-
oped the law of the sea.10 The regimes of the contiguous zone, the continental
shelf, the 200-mile exclusive economic zone, and the 12 mile territorial sea
have become established as law. There has been hydrocarbon development off
many nations' shores. These activities have provided substantial economic,

9 Proclamation No 2667, Policy of the United States with Respect to the Natural Resources
of the Subsoil and Sea Bed of the Continental Shelf, 28 September 1945, 10 Fed. Reg. 12303
(2 October 1945). Its seeds, however, can be found as early as the late 1930's. It was during
this period that pressure from distant water Japanese fishermen motivated President Roosevelt
of the United States to consider actions that led to the Truman Proclamations of 1945. See
carbon development began at that time and states started in earnest to seek expanded offshore
jurisdiction and to fix maritime boundaries with neighboring states.

10 These were the First United Nations Conference on the Law of the Sea of 1958, the
Conference on the Law of the Sea 1973–82. The First Conference produced four law of the sea
conventions: the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 2606,
industrial, and technological benefits to coastal states worldwide. Nations have, in addition, increased their management of living resources found in their adjacent maritime areas and have taken steps to protect the marine environment from damage resulting from exploitation activities.

As a part of these developments, states have established many maritime boundaries. Since 1940 coastal states have managed to settle more than 130 of those boundaries, although many more remain unresolved. Nearly twenty disputes relating to maritime boundaries have been submitted for resolution to international courts, conciliators and arbitrators. In fact, during this period there has been more litigation before the International Court of Justice (ICJ) on maritime boundaries than any other single subject. Disputes over the location of maritime boundaries have been common. Some of them have been central to significant international controversies. As a result, violence has


Four maritime boundary disputes are pending before the International Court of Justice as of February 1992: Land, Island and Maritime Frontier Dispute (El Salvador/Honduras); Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway); Maritime Delimitation between Guinea-Bissau and Senegal; and Maritime Delimitation between Qatar and Bahrain. One dispute is currently under submission to an ad hoc panel of arbitration. See Agreement Establishing a Court of Arbitration for the Purpose of Carrying Out the Delimitation of Maritime Areas between France and Canada (St. Pierre and Miquelon), March 30, 1989, reprinted in 29 INT’L. LEG. MAT. 1 (1990).
flared, international relations have been damaged, sound management and environmental protection measures thwarted, and economic development delayed.

With so much history, one might have expected that a clear rule of law that would fix these boundaries might have evolved. The formulation of such a norm was the subject of discussion at the preparatory work for the First United Nations Conference on the Law of the Sea. The International Law Commission (ILC) did organize a group of experts to consider the matter. The results of their deliberations were in turn discussed by the ILC and the Law of the Sea Conference of 1958. The product of this effort was the relatively indeterminate equidistance-special circumstances rule contained within the Convention on the Territorial Sea and the Contiguous Zone, and the Convention on the Continental Shelf. The matter was subsequently taken up by the International Court of Justice in the *North Sea Continental Shelf* cases. The Court did provide some guidance to the parties, but pronounced a multifactored rule that may have made the law more indeterminate. The matter was not addressed at the Second Conference on the Law of the Sea, but it became a matter of substantial concern at the Third Conference.

The 1982 Convention on the Law of the Sea, which was the product of the Third United Nations Conference on the Law of the Sea, retained the less than determinate equidistance-special circumstances language for maritime boundaries in the territorial sea, but jettisoned that language for boundaries in the continental shelf and the exclusive economic zone. This new language spoke in terms of ‘equitable solutions,’ dropping all references to equidistance and special circumstances. A reference to international law provides an ambiguous connection to the old language and customary international law.

Litigation and arbitration produced equally indeterminate results with respect to the operative norm. The ICJ has given prominence to the language of equity that found its way into the 1982 LOS Convention. The Court now speaks of considerations of equity in order to produce equitable results. These judgments have stimulated heated dissenting opinions and other writings critical of the Court’s alleged result oriented approach to the subject and its potentially disingenuous use of equity as the rule. Others have defended this

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13 *Supra* note 10, art. 12.1.
14 *Supra* note 10, art. 6.
16 LOS Convention, *supra* note 1, Arts. 15, 74, 83.
17 Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. REPORTS 18, 59; Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/ Malta), 1985 I.C.J. REPORTS 13, 39.
development as reflecting the most realistic and practical approach to the subject that is possible.\textsuperscript{18}

From the very beginning the codified law and third party decisions have stressed the primary objective that states should settle their maritime boundaries by agreement. Only in the absence of agreement would positive law dictate the result in any particular case. This preference for resolution by agreement is unexceptional in international law. Outside of matters governed by peremptory norms of international law, states are free to settle their disputes by agreement, notwithstanding otherwise applicable rules of law.

It is also true that such settlements may contribute to the evolution of the relevant positive norm of international law. In the premiere modern judgment on the subject, the North Sea Continental Shelf cases, the Court provided now classic views on the evolution of customary law. It considered whether the use of the equidistant line was required by customary law. The Court found that it was not. In the course of its analysis, the Court considered the evidence of state practice found in the existing maritime boundary agreements. It discovered that the practice was not sufficiently extensive or uniform and that the necessary \textit{opinio juris} was absent.\textsuperscript{19}

In the twenty-three years that have passed since that judgment, the number of maritime boundary agreements has increased dramatically. As reported above, there are now over 130 such agreements and new agreements continue to be concluded. The international community also has sought to identify the norms applicable to maritime boundary delimitations. Courts and tribunals charged with addressing specific disputes, however, have not given much attention to the state practice. This is true despite the fact that litigants have presented the ICJ with annexes to their memorials containing the texts of many agreements and illustrative maps.\textsuperscript{20} Arguments have been fashioned on the basis of these submissions without apparent success.

Due to the volume of this material as well as the effort required to organize


\textsuperscript{19} North Sea Continental Shelf Cases, 1969 I.C.J. REPORTS 3, 44–45.

\textsuperscript{20} International Court of Justice, Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine(Canada/United States), Annexes to the Reply Submitted by Canada, Volume I, State Practice, 12 December 1983; International Court of Justice, Continental Shelf (Libyan Arab Jamahiriya/Malta), Annex of Delimitation Agreements Submitted by the Socialist Peoples Libyan Arab Jamahiriya, Counter-Memorial, Volume II, Parts 1 and 2 (26 October 1983).

and analyze the relevant information, no previous independent study has attempted to systematically scrutinize this material for legal and practical developments. It was the purpose of this project to study these agreements to discover what light they might shed on the rules and practices relevant to the resolution of maritime boundary disputes. The project was designed to study each of the known boundaries in a systematic way in order to compare the approaches used to resolve these disputes.

One hypothesis held that such a study would be able to synthesize the state practice and show that there are common patterns of behavior suggesting the development of more determinative maritime boundary law. This study was designed to ferret out this information to ascertain whether patterns could be discerned. Another hypothesis held that no such patterns that might lead to normative developments have evolved; the evidence would demonstrate that it is not reasonable to expect the practice to lead to the evolution of new and more determinative norms. The project was designed to explore this hypothesis. A third view held that regardless of whether the agreements have provided a foundation for new normative developments, knowledge of techniques used by states to solve their maritime boundary disputes could contribute to the resolution of the remaining disputes. This project was designed to identify those technical solutions that might aid efforts to settle unresolved maritime boundary disputes.

II DESIGN, EXECUTION AND SUMMARY

In order to accomplish the objectives described above the project was designed to gather and analyze data on the settled maritime boundaries. At the first stage, the world was divided into ten regions. Experts on each of those regions were commissioned to study the maritime boundaries of the regions in which they had expertise. They prepared individual reports on each boundary which identify those considerations that entered into the boundary settlements.21 The regional experts who participated in the first stage of the project are:

1. North America – Lewis M. Alexander22
2. Middle America and Caribbean – Kaldone Nweihed
3. South America – Eduardo Jiménez de Aréchaga
4. Africa – Andronico O. Adede
5. Central Pacific/East Asia – Choon-Ho Park23
6. Indian Ocean and South East Asia – J.R. Victor Prescott

21 Each boundary report is numbered and listed in Table *
22 With assistance from David Colson, Robert W. Smith, and Elizabeth Verville.
23 With assistance from J.R. Victor Prescott, Robert Smith, and David Anderson.
24 With assistance from David Colson.
8. Mediterranean and Black Seas – Tullio Scovazzi
9. Northern and Western Europe – David Anderson
10. Baltic Sea – Erik Franckx

Individual reports on each of the maritime boundary agreements reached or subject to third party dispute settlement were prepared by these experts. The reports from each region are published together and identified by the number of the region as listed above. Within each region the reports are numbered consecutively. Since new agreements continue to be made and the publication process took some time, the most recent maritime boundary settlements could not be included in these volumes. We hope to update this study in the future.

The vast preponderance of the maritime boundary settlements reported in this study are in force. Some are not and the status of others is not clear. These facts are reported when known. We have included in this study all known international maritime boundary agreements reached even if they have not entered into force or have been terminated. Some of these agreements have been signed but not ratified as of the date that this study went to press. Others were entered into by states directly or on behalf of territorial entities under their control. Subsequently, some of those territories have disappeared as separate units through merger with other territories. These developments have made those maritime boundary agreements irrelevant to modern events. State succession may have an impact on the legal validity of some maritime boundary agreements. The break up of the Soviet Union is, perhaps, the most recent and dramatic of these developments. That change, in particular, came too late to be incorporated into this study.

As structured, however, this study makes those changes largely irrelevant. We have reported all international maritime boundary settlements reached, regardless of their current legal status. The study, thus presents the state practice as evidenced by the behavior of representatives of states to maritime boundary negotiations when such actions have received the approval of state organs at the conclusion of negotiations as evidenced by signature or entry into force. Entry into force of the agreement subsequent to signature provides additional validation of the arrangement reached. Later termination, especially when it is due to unrelated political events, may only be marginally relevant to an assessment of the contribution to the record of state practice derived from such agreements.

The regional experts were particularly asked to explore nine categories of considerations that might have played a role in the delimitations. Those considerations are identified below, followed by a short statement describing the questions to be explored within each category.

25 Thus, the identification of Report Number 8–10(3) means that the boundary is in the Mediterranean and Black Sea Region (“8”). It is the tenth (“10”) report in that region and addresses the third (“(3)”) supplemental or subsidiary agreement regarding that boundary.
1 Political, Strategic, and Historical Considerations

If and how political factors, security interests, historical considerations, contemporary usages, or perceived legal constraints affected the negotiation or location of the boundary, e.g., geopolitical power, military power, strategic considerations, contemporary relations between the parties, conflict avoidance, other maritime boundaries or disputes, navigation and overflight interests, historical claims, established resource exploitation activities, and contemporaneous accommodation of related or unrelated interests of the parties.

2 Legal Regime Considerations

What is the juridical character of the areas delimited by the boundary agreement? Are there provisions for dispute settlement and cooperation? If and how the movement from a continental shelf to an exclusive economic or fisheries zone boundary, (including gray zones) affected the location of the maritime boundary.

3 Economic and Environmental Considerations

If and how economic considerations, biological, ecological or scientific facts affected the location of the boundary, e.g., biological provinces, currents, environmental protection, economic power, economic need, unity of deposits, division of mineral and living resources, and joint development zones.

4 Geographic Considerations

If and how geographic factors affected the location of the boundary, e.g., coastal configurations, concavities, convexities, general direction of the coasts, and location and direction of the land boundary.

5 Islands, Rocks, Reefs, and Low-Tide Elevations Considerations

If and how islands, rocks, reefs, and low-tide elevations affected the location of the boundary in regard to such matters as: the entitlement of such features to maritime zones; the use of such features as base-points for the delimitation of maritime areas attaching to larger land formations; and the significance of factors such as location (e.g., proximate, distant, mid-ocean, etc.), size, population, economic status, political status, or disputed status.

6 Baseline Considerations

If and how the baseline from which the territorial sea is measured (such as bay and river closing lines, systems of straight lines, and lines delimiting historic or archipelagic waters) or other similar lines, affected the location of the boundary.
7 Geological and Geomorphological Considerations

If and how factors of geology and geomorphology, including the concept of "natural prolongation," may have affected the location and extent of the boundary.

8 Method of Delimitation Considerations

What were the methods used to delimit the boundary line? If and how oppositeness, or adjacency and proportionality affected the delimitation.

9 Technical Considerations

If and how technical issues of delimitation affected the location of the boundary, *e.g.*, questions relating to map projections, simplifications, measurements of areas, distances, water datums, whether the boundary or part of it is ambulatory, and whether the coordinates of the boundary were computed or determined by geographical means.

The regional experts have organized their reports on the existing maritime boundary settlements in conformity with these nine considerations. They have also included technical information relating to the boundaries, the text of the delimitations, and illustrative maps showing the boundary lines. Those reports and supporting materials are and represent perhaps the most important product of this project. This process is not yet complete. As additional boundaries are established, the project hopes to be able to publish reports on the new boundaries. The new reports will follow the format already in use.

The existing and future reports should provide valuable information about the methods used by states to resolve their maritime boundary disputes. The materials already included in this study contain a wealth of important information that heretofore has not been comprehensively accessible to those working in the field. The data should facilitate the settlement of the remaining maritime boundary situations, aid government officials called upon to negotiate or litigate maritime boundary disputes, and provide a trove of information to be analyzed by interested experts.

The boundary reports have already provided the foundation for the analytical papers that were commissioned by the project. These analytical papers are of two kinds. First, the regional experts were invited to prepare papers synthesizing the results of their study of the maritime boundaries in their regions and related areas. Regional papers covering all of the ten regions are included in this book. Second, other experts, designated subject experts, were invited to analyze the boundary reports from a global perspective. Experts were assigned to examine each of the nine considerations identified above. Those experts are as follows:

1. Political, Strategic, and Historical Considerations – Bernard H. Oxman
2. Legal Regime Considerations – David Colson
3. Economic and Environmental Considerations – Barbara Kwiatkowska
4. Geographic Considerations – Prosper Weil
5. Islands, Rocks, Reefs, and Low-Tide Elevations Considerations – Derek Bowett
6. Baseline Considerations – Louis Sohn
7. Geological and Geomorphological Considerations – Keith Higeth
8. Method of Delimitation Considerations – Leonard Legault and Blair Hankey
9. Technical Considerations – Peter Beazley

The primary source of data used in the preparation of these papers was the set of boundary reports prepared by the egional experts. These global analytical papers examined the practice in order to determine which, if any, of the original hypotheses appear to be correct.

Both the regional and subject maritime experts had difficult assignments. Although there are many settled maritime boundaries, these agreements often do not identify the considerations that led the parties to adopt the specific line or arrangement contained in the agreement, or even the specific methods used to position the boundary. The regional experts were asked to seek both public and nonpublic information that would bear on the issues. Unfortunately, their sources often were unwilling to provide the desired information or unable to do so because the bases for the agreements were never clarified, even among the negotiators. One surmises that it is often desirable to avoid clarity in order to allow a practical settlement to be reached. Nevertheless, this study has endeavored to report on the considerations that have contributed to the various boundary settlements and the common forms of behavior that could be identified. When hard information was unavailable the authors of the boundary reports were invited to provide their own expert judgment on the considerations that entered into the settlements.

The regional analytical reports prepared by the regional experts consider the practice in particular regions as a whole. These papers identify certain facts that have influenced the delimitations in the individual regions. The regional analyses are important to a full understanding of the context and meaning of the information found in the individual boundary reports. They provide information on the historical and contemporary circumstances that may have influenced the delimitations. They also identify regional practices, if any, and the maritime boundaries remaining to be delimited. Thus, Kaldone Nweihe’s regional analysis of the Middle America and Caribbean areas provides substantial information regarding the important historical and other linkages among the boundary delimitations in his area.26 Erik Franckx’s regional analysis of the Baltic Sea thoroughly examines all the considerations that contributed to this unique area of settled maritime boundaries.27

26 Nweihe, Middle America and the Caribbean Maritime Boundaries, infra.
27 Franckx, Baltic Sea Maritime Boundaries, infra.
state of Baltic maritime boundaries contrasts with that in the Mediterranean and Black Seas, examined by Tullio Scovazzi, which has been marked by continuing controversies and international litigation.\textsuperscript{28} Eduardo Jiménez de Aréchaga, presents a regional paper which explains the context within which the South American maritime boundaries arose and the policies which gave rise to these delimitations, some of which are rather unique.\textsuperscript{29} Similar presentations are made for the regions of Africa,\textsuperscript{30} Central Pacific and East Asia,\textsuperscript{31} Indian Ocean and South East Asia,\textsuperscript{32} North America,\textsuperscript{33} Northern and Western Europe,\textsuperscript{34} and the Persian Gulf.\textsuperscript{35}

Using as a base the important data made available in the boundary reports, regional analyses, and other information to which they had access, the subject experts prepared papers analyzing each of the nine considerations examined in the boundary reports. These papers represent a first attempt to analyze and synthesize the boundary practice information generated by this study. Hopefully, the data and views presented herein will stimulate others to make further progress towards a better understanding of the field.

The first paper that analyzes the individual considerations from a global perspective is Bernard Oxman’s paper on the political, strategic, and historical considerations that may have influenced the delimitations.\textsuperscript{36} His was a rather difficult assignment because these are particularly broad, undefined, and cross-cutting subjects. In addition, states are not likely to admit that such factors independently influenced the delimitation and/or the related management regime. Circumstantial evidence, however, supports their relevance in stimulating initiatives to delimit these boundaries, in reaching accommodations, in positioning the lines, and in performing the resulting obligations. Oxman reports that these considerations have encouraged delimitation efforts even in the absence of active disputes or current uses of the areas for a variety of reasons. These have included interests in merely marking boundaries, avoiding the risks of future conflict, building relationships, establishing principles (related and unrelated to the instant boundary), and eliminating uncertainties that deter development. Security concerns, often tied to proximity, navigation and overflight, can lead states to favor equidistant lines, historical patterns, and traditional navigation routes. He suggests that some of the more intractable problems in this area arise in the case of localized or traditional fisheries which have both political and economic significance. These problems may be particularly amenable to solutions decoupled from the

\textsuperscript{28} Scovazzi, Mediterranean and Black Sea Maritime Boundaries, infra.
\textsuperscript{29} Jiménez de Aréchaga, South American Maritime Boundaries, infra.
\textsuperscript{30} Adebe, African Maritime Boundaries, infra.
\textsuperscript{31} Park, Central Pacific and East Asian Maritime Boundaries, infra.
\textsuperscript{32} Prescott, Indian Ocean and South East Asian Maritime Boundaries, infra.
\textsuperscript{33} Alexander, North American Maritime Boundaries, infra.
\textsuperscript{34} Anderson, Northern and Western Europe Maritime Boundaries, infra.
\textsuperscript{35} Alexander, Persian Gulf Maritime Boundaries, infra.
\textsuperscript{36} Oxman, Political, Strategic and Historical Considerations, infra.
boundary delimitation. Oxman observes that it is the rare case, however, in which particular interests relating to maritime boundaries reach high levels of national or international importance. Thus, states will seek negotiated settlements and are often willing to utilize third party settlement procedures in order to avoid an escalation of these conflicts and the disruption of other bilateral or regional relationships.

While the boundaries studied involve a variety of legal regimes, it appears from the available information considered by David Colson that states rarely, if ever, are influenced by legal regime considerations. This is best illustrated in those cases where maritime boundary lines that were established for the purpose of one type of maritime jurisdiction have been applied to others without changing the location of the boundary lines. Neither have states faced particular difficulties negotiating their maritime boundaries when their maritime claims have differed in extent or scope. The solutions contained in the boundary agreements are most often simple and definitive. Thus, these settlements never provide procedures for termination or revision. Provisions requiring compulsory dispute settlement procedures are rare and appear to have played minor roles in the resolution of these boundaries. Cooperative arrangements that have some real substance appear in less than one fifth of the boundary settlements. While they do not predominate, in the proper circumstances such arrangements can be critical to the settlement of the boundary. There are a wide variety of such arrangements which reflect the diverse conditions that motivated these solutions.

Colson points out that while maritime boundary delimitations are primarily a bilateral affair, the claims and rights of third states are often relevant to a boundary delimitation. Although these interests add some complications to a complete resolution of the delimitations, they are often ignored. When they are considered, any one of a number of solutions has been used to address those interests.

Adjudications and arbitrations of maritime boundary disputes appear to place decreasing emphasis upon economic and environmental considerations. It is not clear that the maritime boundary agreements reflect the same trends. Barbara Kwiatkowska’s study of these factors suggests that economic considerations may play important roles in such settlements. Economic interests in regard to current and historic fisheries, current and potential mineral resource development, and navigation certainly provide a leitmotif for the negotiation and conclusion of such agreements. In many situations in which such interests are present, the boundary agreements or related agreements establish special regimes for particular economic activities. These arrangements appear to permit the boundary line to be delimited without regard to economic considerations.

37 Colson, The Legal Regime of Maritime Boundary Agreements, infra.
38 Kwiatkowska, Economic and Environmental Considerations in Maritime Boundary Delimitations, infra.
Evidence suggests that in a small minority of the agreements (particularly situations in which there have been ongoing mineral resource activities) these considerations have directly influenced the location of the boundary line. Even less of a role has been given to environmental and navigational considerations. In the majority of settlements it appears that these considerations had no influence. But the fact that in nearly one quarter of the cases these considerations may have been taken into account suggests that the minimal consideration these facts have received in third party proceedings may not be consistent with state practice. This divergence, however, may reflect differences between the law applicable to third party procedures and the law applicable to direct negotiations. Kwiatkowska argues that these differences should not continue and that the law applicable to third party settlements should give greater attention to considerations relating to economics, navigation, and the environment.

Prosper Weil draws a stronger distinction between the law binding on courts and arbitral tribunals charged with establishing a maritime boundary on the one hand, and interstate negotiations to settle such boundaries on the other hand. While third party forums are required to apply the law, states are free to negotiate solutions on the basis of any considerations they wish. Nevertheless, those two modes of establishing maritime boundaries are closely linked in fact. The law applicable to third party settlements will influence the negotiators, just as trends in boundary settlements will influence the tribunals. In virtually all situations coastal geography is primary. Thus, the landmass, seabed, and human geography have limited relevance, if any, to such boundary delimitations. They may, however, be influential in particular cases. The only geographic fact that appears to have almost universal importance is the point at which the land boundary meets the sea. Even in the case of coastal geography its influence on the maritime boundary is not clear. It is difficult to determine how particular geographic facts influenced the location of a specific delimitation line. While the coastal geography is an objective fact, its importance to any particular delimitation is the result of subjective, not objective, reasoning.

Finally, based upon the available evidence Weil reports that there are no definite patterns of state practice, at most there are trends. Any analysis of the role of geography in these delimitations demonstrates that conflicting examples involving apparently similar geographic circumstances abound. As a consequence, the settlements are so varied that Weil dismisses the idea that the practice supports any normative rule. Although the agreements do not appear to be guided by a substantive rule of law, he concludes that international courts and tribunals do not have the luxury to be free of normative obligations derived from other sources.

Perhaps the most interesting boundary settlements involve islands, rocks, reefs, and low-tide elevations. As Derek Bowett reports, the practice varies

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39 Weil, Geographical Considerations in Maritime Delimitation, infra.
Rocks, reefs, and low-tide elevations do not serve as a basis for entitlements to economic zone or continental shelf areas. They may, however, influence maritime boundary delimitations as appendages to larger territorial units. On the other hand, an island may serve as a basis for an entitlement to such zones. The treatment of islands in maritime boundary delimitations varies substantially, mostly due to the variety of circumstances in which they are found. These differences turn primarily upon the geographical context. It is clear, nevertheless, that in many situations islands, even the smallest of them, have had substantial impacts on the location of maritime boundary lines. Bowett classifies the circumstances in which islands are relevant to these delimitations on the basis of their entitlements to maritime zones and the effects which islands have had on the locations of the boundary lines. While these effects vary substantially, some patterns can be discerned from the practice that are worthy of consideration. These patterns are influenced by such factors as the distances separating the features, comparisons of coastal lengths, questions of political status, population, and economic self-sufficiency.

While certain islands, as well as rocks, reefs, and low-tide elevations close to the mainland shore might not be considered as entitled to offshore zones themselves, they may serve as basepoints for the boundary line. Thus, they may serve as a substitute for the mainland coastline or the basepoints from which a system of straight baselines may be generated. Such coastlines and baselines may be used to generate the maritime boundary line. Bowett finds that minor features play influential roles in these boundary delimitations more often than other islands that are a greater distance from the mainland coast.

The law of the sea has developed elaborate rules for the location of the baseline used for the delimitation of the territorial sea. Louis Sohn has studied the relationship of that baseline to maritime boundary delimitations. He has found that most boundary agreements do not specify what basepoints or portions of the baseline were used to generate the boundary line. Modern boundary agreements simply describe a line in the sea by lines connecting points that are described by latitude and longitude. Unless the line is clearly an equidistant line, the connection between the baseline and the delimitation is not easy to ascertain. By definition, a true equidistant line is mathematically derived from the legal baseline used to delimit the coastal state's territorial sea. Normally, this baseline will be the mean low water line along the shore and closing lines at river mouths and juridical bays. But it is not clear from the agreements what baseline is used. Is it the actual line of mean low water on the shore or the low water line shown on charts published by the boundary state or foreign authorities? The agreements fail to make this clear.

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41 Sohn, *Baseline Considerations*, infra.
The reports also show that equidistant lines have been generated by use of other points and lines that are clearly not part of the coastal states’ coastline. Such a situation may arise, for example, when one boundary state has drawn a system of straight baselines and the other has not. In those circumstances, the imbalance created by that fact has often led to compensatory calculations. Sohn identifies cases in which all straight baselines have been disregarded and the shoreline has been used, others in which systems of straight lines have been constructed for the sole purpose of generating the maritime boundary lines on the coasts of states that do not have such a system, and still others where unique construction lines have been used to generate the maritime boundary lines. Closing lines of bays and river mouths also have been variously treated. This is particularly true in the case of disputed historic waters.

When a boundary line is delimited on the basis of baselines that do not conform to international law or are rejected by third states Sohn points out that the rights and interests of non-party states may be affected. This may arise in connection with systems of straight baselines, closing lines of bays and river mouths, and historic waters. Boundaries delimited on the basis of such disputed baselines might run through maritime areas beyond the jurisdiction of the coastal states. The exercise of jurisdiction in such areas may also interfere with freedoms of the seas held by third states.

A similar third state question arises in the, so-called “gray zone.” A boundary line that departs from the true equidistant line at its seaward limit may allocate to one coastal state an area that could not otherwise be placed within that state’s jurisdiction because the area will be located beyond the distance from its coastline permitted by international law. Apparently, in this gray zone the receiving state exercises the maritime jurisdiction which the granting state is permitted to hold under international law. As Sohn and Colson point out, few maritime boundary agreements make this clear and it is not settled that the transfer of authority is permitted by international law. The recent agreement between the United States and the Soviet Union ((1990), No. 1–6) presents the most express treatment of this issue to date.

All these variations and the lack of clarity found in the agreements have led to boundary lines that are not easily located by navigators and others whose activities must be guided by the boundary lines. Sohn suggests that states should take better account of these users in order to develop boundaries that are more easily located. Greater use of salient basepoints and simple formulae for generating the lines would be preferable to many complicated zigzag lines now in use. Keith Higget examines the use of geophysical factors in maritime boundary delimitations (e.g., geology and geomorphology). In the 1969 North Sea Continental Shelf cases the Court vaguely suggested that geophysical factors were relevant to such delimitations. In the following years

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42 Higget, The Use of Geophysical Factors in the Delimitation of Maritime Boundaries, infra.
considerable attention was given to these factors in international litigation and in the literature. Despite this attention only a small proportion of the agreed maritime boundary delimitations took account of such factors to any degree whatsoever, although in a very few unusual cases these factors were significant. No judgment of the ICJ or award of any other international tribunal has established a maritime boundary on the basis of geophysical factors. By 1985 the Court in the Libya/Malta case disposed of geophysical factors, at least in regard to areas where the distance separating the boundary states, coasts do not exceed 400 nautical miles. It relied heavily upon the developments at the Third Law of the Sea Conference which led to the establishment of the 200 nautical mile exclusive economic zone in international law.

The role of geophysical factors, Hight finds, reached its apex in the years following the North Sea judgment. The period subsequent to the Third Law of the Sea Conference and the Libya/Malta judgment has shown a decline in attention given to geophysical factors in maritime boundary delimitations. At the same time, attention is continuing to be given to the role of geography. He expects this practice to continue in the future. In some contrast to Weil, Hight maintains that states negotiating maritime boundary agreements are substantially constrained by the law that is enunciated by the Court. Unlike other areas of international law, maritime boundary disputes often lead to international adjudication. States are reluctant, he maintains, to put forward negotiating positions that they could not credibly maintain before the Court.

Once the appropriate considerations are identified, states are called upon to use a method to locate the particular boundary line. Leonard Legault and Blair Hankey jointly explored the methods used to delimit maritime boundaries.43 While some maritime boundaries are delimited by unique methods, many make use of standard methods and their variants. Legault and Hankey describe these common methods beginning with equidistance, and proceeding to parallels and meridians, enclosing, perpendiculars, and parallel lines. In the maritime boundary jurisprudence there is a tension between legal principles and practical methods. This has produced substantial indeterminacy. However, recent focus on geography, the predominant use of geographical methods, and the decline of other elements have, in the authors’ opinion, given more substance to maritime boundary law. Legault and Hankey explore whether there exists any correlation between the methods used in the delimitations studied and the coastal relationships of oppositeness and adjacency. They find substantial use of the equidistance method throughout. This is particularly striking in the case of opposite coasts and less so in adjacent situations. Even in the latter up to one-third of the boundaries are based upon equidistance. But these statistics may be misleading if changes in the jurisprudence over time and the geographical circumstances presented are not factored in. These considerations suggest a decline in equidistance as the International Court of Justice

43 Legault and Hankey, Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation, infra.
relegated it to a subsidiary role and as the 1958 Law of the Sea Conventions became less salient. Furthermore, early delimitations may reflect easy cases that were more amenable to solutions based upon the equidistance method and its variants. The role of proportionality in maritime boundary negotiations was less easy to ferret out. Proportionality has played a significant qualitative role in the maritime boundary cases. Evidence exists to establish both a qualitative and quantitative use of proportionality in agreed delimitations, but due to methodological questions its role is more amenable to the former and will remain important so long as third party procedures rely upon this factor.

It should be apparent that the delimitation of maritime boundaries requires the consideration of many geographic, geodetic, hydrographic, and cartographic facts. Peter Beazley studied the treatment given to certain of these technical matters in the settlement of maritime boundaries. He focused on the sources of data used to locate the baselines and basepoints, the differences in vertical and horizontal datums used, the methods used to produce the boundaries, the nature of the lines used to join boundary turning points, the methods by which the terminal points of the boundaries were defined, and the accuracy attained by the delimitation methods. His paper argues that inattention to such matters may lead to serious problems, especially where precise locations are necessary for certain maritime activities.

In the early days inaccuracies produced by differences in the datum used to locate the coastlines of the boundary states might have been difficult to avoid; inaccurate graphical plotting of boundaries was the only method available, and unscientific descriptions of lines ('straight line') may have been sufficient. This situation may have been tolerable when accuracy may not have been required for contemporary maritime activities and one could not measure and calculate precisely in the maritime environment. Today, the lack of attention to these technical matters is not as understandable. Modern satellite generated data and computer systems permit states to locate their coastlines with considerable accuracy and to calculate precisely the lines they wish to utilize for their maritime boundaries. Modern maritime boundary delimitations need not be constrained by the limitations inherent in published nautical charts that often are unfit for boundary delimitation purposes. Many contemporary maritime activities require accurate maritime boundaries. Beazley suggests that serious difficulties could be avoided if the negotiators and international tribunals would resolve these technical matters as they develop the boundary line. Failure to do so may result in unnecessary uncertainties that could lead to international disputes.

While states may not have taken full advantage of modern technological developments to delimit maritime boundary lines, they have shown considerable creativity in regard to other delimitation questions. Attention has been given to the description of boundary terminal points. On the landward side states have had to link ambulatory land boundaries to fixed maritime bound-

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44 Beazley, Technical Considerations in Maritime Boundary Delimitations, infra.
aries. On the seaward side, the indeterminacy of the seaward extent of the continental shelf and potential boundary junctions with third states have called for a variety of solutions that are examined in Beazley's paper.

III CONCLUSIONS

In my opinion these global and regional papers and the individual boundary reports support the conclusion that no normative principle of international law has developed that would mandate the specific location of any maritime boundary line. The state practice varies substantially. Due to the unlimited geographic and other circumstances that influence the settlements, no binding rule that would be sufficiently determinative to enable one to predict the location of a maritime boundary with any degree of precision is likely to evolve in the near future.

It is estimated that there are several hundred maritime boundaries that remain to be fixed. The settlement of approximately 130 boundaries represents an important start. Many of the remaining boundaries will be settled in the next few decades. Perhaps, as additional settlements are reached and reported more definitive patterns of practice will emerge. At present, the practice does not suggest the evolution of rules dictating the exact location of maritime boundaries. Furthermore, an opinio juris supporting a definitive norm certainly is absent.

There are, however, trends and practices that are substantial. Surprisingly, it appears from the practice that the equidistant line has played a major role in boundary delimitation agreements, regardless of whether they concern boundaries between opposite or adjacent states. In the vast preponderance of the boundary agreements studied, equidistance had some role in the development of the line and/or the location of the line that was established. Indications in some literature that suggest the demise of equidistance would appear to be incorrect. If state practice has any influence on the positive law for maritime boundary delimitations, equidistance must have a place.

Clearly, even today the focus upon coastal geography has had the effect of limiting the geographical range in which those boundaries may be found. States appear to be concentrating upon the division of water areas. Techniques of equidistance (with minor features disregarded or discounted) and other areal divisions suggest a narrow range of acceptable solutions to many maritime boundaries.

Geography, however, does not fully explain why many of the maritime boundary lines were drawn as they were. Prosper Weil points out this inadequacy in his argument that boundary situations having similar geographical characteristics have resulted in substantially different boundary solutions.\footnote{Weil, supra note 39.} In the absence of an analysis that can explain these variations based upon
subtle geographical differences, one must conclude that other considerations are in play. The available evidence suggests that geological, geomorphological, environmental, and strategic considerations have little role in these matters. Political, historical, and economic considerations may be more salient.

Often economic considerations are removed through arrangements that focus separately on those specific interests. But economic interests founded upon historic rights and usage remain as important elements in these negotiations. Continuing historical activities are, however, based upon facts that may be objectively determined. Those elements combined with geography could lead to a relatively clear norm. The studies suggest, however, that historical practices explain only a few of the results. Political considerations may explain some of the otherwise inexplicable results. This conclusion must be reached primarily on the basis of deduction since evidence in this regard was nearly impossible to garner. While politics appears to play a role, it should be clear, however, that its impact is limited. This is a result of the fact that the products of these negotiations are depicted as lines on maps which primarily represent the geographical context.

Even this limited flexibility may not readily be available to courts and arbitral tribunals. They may not decide boundary matters on the basis of politics. They must provide reasons for their determinations. Geography and historical practices will increasingly direct their attention to the narrow range of alternative results that can be justified to the international community. Increased clarity on their part may, in turn, influence the negotiated solutions reached by states.

Binding customary international law is the product of state practice and *opinio juris*. That state practice may be found in unilateral actions of states, and those taken pursuant to bilateral and multilateral agreements. *opinio juris* also may be derived from such agreements, as well as resolutions of international organizations and public pronouncements of states. In theory, there is a considerable trove of evidence that could establish customary law for maritime boundaries. The more than 130 boundary agreements, three multilateral conventions, nearly twenty international judgments and awards, and numerous scholarly analyses exceed the quantity of relevant evidence used to establish most rules of customary international law. Due to the number of disputes that continue to abound, a normative rule of some determinacy may be desirable. While there is no lack of normative solutions, there is also no evidence of significant normative development. Perhaps, this is due to the fact that negotiators have acted without knowledge of the practice throughout the world. If so, this study will begin to provide that information. More likely, states have not been satisfied that any particular relatively determinative norm would be satisfactory in all or the vast majority of cases. If such a rule could be designed, it might be embraced by the international community.

Unfortunately, the factual variations among boundary situations make it

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46 See Oxman, *supra* note 36.
impossible to imagine that a relatively concise and precise norm could be found. This study suggests, however, that the range of options available to states is relatively limited. If this conclusion is correct, the scope of disputes will narrow. Festering disputes will become less likely as states recognize that the alternative permissible lines make little practical or political difference. While a positive norm may not develop, a negative one that limits the options could have salutary results. The results of this project may help to facilitate the resolution of maritime boundary disputes and the evolution of some desirable improvements in the relevant maritime boundary law.

Patterns of practice and trends have been discovered in the course of this study that may influence negotiators and tribunals in varying degrees. With few exceptions, variables such as the nature of the zones to be delimited and the seaward extent of coastal state claims, do not appear to be important for states to consider when developing their negotiating strategies. Certain potential areas of conflict, such as those regarding resource development, are often resolved through special agreements independent of the maritime boundary line. Finally, since termination clauses and compulsory dispute settlement provisions are rarely included, the maritime boundary agreements are treated as permanent and definitive.

Some of the patterns of practice may impose unnecessary risks for the stability of the boundary agreements. While these boundaries are considered definitive, the common failure of negotiators to address technical issues when describing the lines may increase the risk that controversies over the location of the lines may arise. The absence of compulsory dispute settlement mechanisms may increase the risk that technical questions might cause agreements to unravel. Technical experts are available to assist governments interested in accurately describing lines that are identified as a result of diplomatic negotiations. A clause in these agreements requiring the settlement of potential technical disputes through a third party process could permit the resolution of such disputes and avoid risks to the stability of these agreements. Certainly, such dispute settlement provisions should be easy to include in these agreements.

Despite the normative and theoretical uncertainties present in this area, the evidence brought out in this study suggests to me that states seeking to delimit their maritime boundaries ought to consider certain facts and options as they develop their positions and resolve them through negotiation and third party processes.

First, it is clear that primary attention will be placed upon the geography of the coastline.

Second, the equidistant line will be considered in most circumstances as a basis for analyzing the boundary situation. It may very well be used in some form or variant to generate the boundary line itself.

Third, the delimitation of a definitive maritime boundary is not the only option available to states. While different boundaries for different regimes or uses are rare, creative settlements that take certain matters out of contention
for boundary delimitation purposes are possible. Thus, joint development or management zones that cross boundaries, revenue sharing, and management cooperation are all possible options which, in the appropriate cases, can facilitate settlement or even make settlement of the maritime boundary irrelevant.

Fourth, even if a definitive boundary cannot be established interim arrangements may be possible. States need to be careful to assure that such arrangements are, in fact and law, not unwittingly prejudicial to the ultimate settlement.

Fifth, a precise definition of the boundary line may be necessary at some point in the future. The boundary states would be well advised to memorialize their settlement in a technically precise form that would be unchallengeable in the future. The association of technical experts at the appropriate stages is strongly advised.

Sixth, the investment of substantial resources to study obscure geological and geomorphological facts may not be rewarding in either international litigation or negotiation. Knowledge of ongoing exploitation of living and nonliving resources by the boundary states in the boundary area, however, is likely to contribute to the development of a successful solution.

Seventh, the state representatives should bring to negotiations and litigation knowledge of the boundary states' international agreements that may bear on the location of the boundary line. This would include information on agreements relating to the terminus of the land boundary, and on the rights of the parties in the areas in question.

Eighth, maritime boundary delimitations cannot be divorced from the status of the general relations between the boundary states. Actively hostile relations will doom boundary settlement negotiations; less than friendly relations will make cooperative arrangements impossible to negotiate and implement.

Ninth, despite the relative indeterminacy of the maritime boundary law there are in state practice and in judicial decisions real limits to the geographical range in which a maritime boundary between two states will be located. These limits are primarily a function of the coastal geography, the size and location of islands, and the waters of the areas in question. What is ultimately considered to be fair or equitable will be largely dictated by a visual conception by the decision-makers of the maps and charts examined for this purpose. As a consequence, focus will be on the division of the water areas in question relative to the coastal states.

Finally, within the above considerations the law and practice permits states and tribunals a range of discretion that allows for the resolution of maritime boundaries in ways that no state need be characterized as a winner or a loser, unless a state were itself to stake out an unswervingly doctrinal position. Viewed in isolation, boundary making is a zero sum game. However, the options available to vary the line over extended distances and to resolve related issues on the basis of non-boundary solutions allows for the resolution of maritime boundaries to the maximum advantage of all the participants.
The written product of this project is not the definitive analysis of maritime boundary law and practice. Much is left to be done by states and scholars. While more than 130 maritime boundaries have been established since 1940 many more, perhaps the most difficult of them, remain to be settled. It is hoped that the instant work will make a substantial contribution to an understanding of the field, lead to further scholarly work, and facilitate the just resolution of the remaining maritime boundaries.

47 E.g., the maritime boundary in the Aegean Sea between Greece and Turkey. For a recently published collection of papers on this dispute, see FOREIGN POLICY INSTITUTE, THE AEGEAN ISSUES: PROBLEMS AND PROSPECTS (1989).
Pages 386-388 intentionally omitted

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Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes

Robert W. Smith
Bradford Thomas

Introduction

"Islands, within the law of the sea context, often have caused problems in the delimitation of boundaries and the extent of national sovereignty and jurisdiction." This was the opening sentence in the preface to a study written on the islands in 1973 by Bob Hodgson, The Geographer of the Department of State. Dr. Hodgson, a man known to many in this room, knew even then what the potential problems would be in implementing any law of the sea regime. The title of his work was rather prophetic: "Islands: Normal and Special Circumstances." The use, or non-use, of islands in establishing national jurisdiction over ocean space has been somewhat inconsistent and troublesome on a global scale over the years. While on the one hand, islands are to be treated in the same manner as any mainland territory (such as being an integral part of a coastal State’s baseline and having a territorial sea of its own), the extent of this “equal” treatment often is disputed. Consideration of islands in the law of the sea often is influenced by their size, their location (particularly in

*Office of Ocean Affairs, U.S. Department of State. The views expressed in this paper are those of the author, and not necessarily those representing the U.S. Government.

**Until his recent retirement, Mr. Thomas was Chief of the Cartography Support Staff in the Office of The Geographer and Global Issues, in the U.S. Department of State.
relation to neighboring States), its political status, and the nature of the island itself (i.e., what's on it, or not on it).

My first day on the job at the State Department in May 1975 coincided with the day the Informal Single Negotiating Text (ISNT) was issued, following the third session of the Third United Nations Law of the Sea Conference. One of the first things Dr. Hodgson asked me to do as I began work in the Office of The Geographer was to assist him in analyzing the ISNT from a geographical perspective. The question of islands garnered a good portion of our attention in that study. Many of our concerns about how islands were addressed in the draft articles were not rectified. Some of the issues, such as how to draw closing lines in certain atolls, perhaps will have minimal impact as States implement the Law of the Sea (LOS) Convention; other situations, such as the application of Article 121 (3) on rocks, may be of some significance. Our presentation this morning will seek to give an overview of islands and the law of the sea, highlighting the major types of disputes involving islands.

It seems to us that disputes involving islands fall under two major categories: (1) a dispute over the sovereignty of the island(s) itself, and (2) a dispute over the affect the island(s) may have on the delimitation of adjacent maritime space. There are important distinctions to be made between these two categories in relationship between the particular type of dispute and the role that the LOS Convention may, or may not, have on affecting resolution. In our role in presenting the opening paper in this seminar, we hope to accomplish two things—first, to present a clear distinction of the types of disputes involving islands. And second, to give a global overview of where these disputes exist today. Out of necessity of time, Brad and I will give only a broad brush review of the disputes themselves. We
leave it to the other panels to address the particulars of these disputes, or to provide thoughts on the potential mechanisms available for their resolution.

While we hope to be accurate and up-to-date with our information, we do have to caveat our presentation with the notion that there may be additional disputes of which we are not presently aware. We welcome correction to any lists or assertions we make today. Brad Thomas, who just recently retired after a distinguished career with the U.S. Government—and the last ten years with the Office of The Geographer, and I have shared responsibility in preparing this presentation. Brad will address disputes over island sovereignty, and I will then speak to the delimitation issues involving islands. And, I must caveat my statements by saying that the views are my own, and do not necessarily represent those of the U.S. Government.

Island Sovereignty Disputes

In the last few years, disputes over island and rocks, many hitherto unknown, have surfaced and gained worldwide attention, sometimes putting severe strain on public knowledge of world geography as people rush to charts, maps, and atlases with magnifying glasses to find these nuggets of the oceans. In several instances, bilateral relations have been strained as increased public posturing has created, in some cases, an unwanted public awareness of what had been "back burner" issues. In virtually all cases, the sovereignty disputes themselves are not new. The respective claims have been around for decades, and, if you read all the public statements and "white" papers of some of the claimant States, probably for centuries.
Robert W. Smith & Bradford Thomas

Nationalism, and the sentiments associated with it, plays a large role in the process of managing a dispute over a piece of territory. Regardless of the strength of the legal arguments behind a State’s position regarding sovereignty, once the people become aware of the dispute, it is very difficult for the negotiators to do anything but maintain the full claim. Virtually all disputes can be resolved if the political will is present, but that certainly is easier said than done.

Table 1 lists the known disputes over island sovereignty around the world. East Asia has a particular concentration of those making headlines of late, with others in the Middle East and the Aegean Sea contributing further to current news. These disputes all are tied ostensibly to concerns over maritime interests of one kind or another. Three of the East Asian island disputes involved Japan which have come more visible as Japan has ratified the LOS Convention and passed new maritime legislation (see map 1). Below we briefly describe the more prominent disputes over island sovereignty capturing today’s headlines and some of their implications for maritime interests.

Senkaku (Diaoyu) Islands: In the southern part of the East China Sea, Japan and China dispute the Senkaku (Diaoyu) Islands in the East China Sea (see map 2). Here China (Taiwan) and Japan vie for sovereignty over a group of tiny islands that possibly could have a pronounced effect on the drawing of maritime boundaries in favor of whomever owns them. China claimed the islands in its 1992 domestic legislation and a China vessel has conducted geological research near these islands in the last several years. Unofficial activist groups, however, have taken the lead in asserting their respective countries’ claims. Trouble resurfaced when a Japanese youth group went to the islands and erected an unofficial navigational beacon. In this dispute, as in the Spratly Islands, China and Taiwan share the
same claim. Activist groups from Taiwan and Hong Kong spearheaded protest voyages to the islands and landings on them, though the PRC Government remained cautiously reserved.  

Other Japanese Island Disputes: A similar dispute resurfaced in 1996 between Japan and South Korea over tiny islets, the Liancourt Rocks, in the south-central section of the Sea of Japan when Japan protested the construction of harbor facilities by South Korea. These 250-square meter rocks, again, could have a profound effect on the delimitation of maritime boundaries (see maps 1 and 3).  

Northeast of Japan, a long-standing sovereignty dispute between Japan and Russia over a group of islands northeast of Japan (known in Japan as the “Northern Territories”) originally involved Soviet takeover in 1945 and displacement of resident Japanese. In the last several years, the dispute has plagued the activities of Japanese fishermen, which have repeated run-ins with Russian border guard units off these islands (see map 1). Recently, talks have occurred between these two States seeking resolution to this long-standing problem in their bilateral relations.  

Spratly Islands: One of the most complex disputes in East Asia, if not in the world, is that in the South China Sea, where five claimants dispute all, or some, of the islands collectively known as the Spratly Islands (see map 4). China (and Taiwan) and Vietnam have laid claim to all of the islands in the South China Sea, while the Philippines and Malaysia have each claimed overlapping portions of the Spratly Island group. Chinese (PRC) forces occupy the Paracel Islands, also claimed by Vietnam, and Taiwan forces occupy Pratas Reef, but each of the claimants has established other military outposts in the Spratly Islands. Malaysia has established a resort on Swallow
Robert W. Smith & Bradford Thomas

Reef (map 4). Given that China and Taiwan share the same claim, that still leaves four claimants for some of the islands. No other island dispute has as many.

The Spratly Island claims are especially critical for China and Taiwan, since, without sovereignty over these islands, they would have no credible basis for claiming jurisdiction over offshore resources in the southern part of the South China Sea. Recent Chinese foreign ministry statements about China’s claim to the islands have consistently included reference to their “adjacent waters.” Vietnam, in turn, refutes Chinese claims to potential hydrocarbon areas southwest of the Spratly Islands by insisting that they are on Vietnam’s continental shelf. Some Vietnamese statements even argue that the Spratly Islands deserve no extended maritime jurisdiction at all.

Mischief Reef: In the Spring of 1995 tensions flared between the Philippines and China over Mischief Reef, a small, uninhabited reef located in the eastern part of the Spratly Island group (map 4). The reef is claimed by both States. Following occupation of the reef by China, the Philippines sponsored a media trip to the reef and later arrested sixty-two Chinese fishermen for alleged illegal fishing in the area.

Malaysia’s Island Dispute: To the south, Malaysia finds itself disputing island sovereignty with two of its neighbors. With Singapore it disputes Pulau Pisang and Pulau Batu Puteh. To the east, Malaysia disputes with Indonesia the sovereignty of the islands of Sipadan and Ligitan, off the coast of Borneo at the land boundary terminus between Malaysia’s Sabah state and Indonesia’s Kalimantan province (see map 5). In both sovereignty disputes the countries have agreed to take the matter to third party arbitration. Again, each of these disputes has some implications for the location of maritime boundaries.
Red Sea: Following hostilities which erupted in December 1995 between Eritrea and Yemen, the two States have recently agreed to take their sovereignty dispute over the Hanish Islands to arbitration (see map 6). Both sides have cited history to support its respective claim. Yemen has demanded that the maritime centerline of the Red Sea be determined as part of the dispute resolution. Yemen's position that the delimitation of the maritime boundary with Eritrea "in line with international laws and charters" be part of the final determination of the status of the Hanish Islands was well publicized near the end of 1995. The international community has a special interest in this dispute as the disputed islands are situated in the Red Sea just north of the important Strait of Bab el Mandeb.

Aegean Sea: The dispute between Greece and Turkey over the uninhabited Imia (Greek name) / Kardak (Turkish name) rocks in the Aegean, hemmed in all around by nearby Greek and Turkish islands, or mainland (see map 7), has almost no relation to jurisdiction over maritime resources. Other than a question of national pride, it is probably more related to apprehensions over the extent of claimed territorial seas and their implications for unhindered navigation.

Greek claims to this particular island derive from Italian claims which passed to Greece under the 1947 Treaty of Paris following World War II. The Italian claims began with military occupation of the Dodecanese Islands prior to World War I. In the 1923 Treaty of Lausanne, Turkey renounced, in favor of Italy, all rights and title to the Dodecanese Islands, and the adjacent islands "dependent" on them. Greece also points to a 1932 Protocol and argues these islands are "dependent on" or "adjacent to" islands ceded to Italy in 1923, and subsequently passed to Greece in the 1947 Treaty.
Yet, perhaps more importantly, this dispute is taking place against the broader backdrop of the extent of maritime and airspace jurisdiction by both sides. This part of dispute will be discussed later in this presentation.

**Abu Musa and the Tunbs Islands:** Iran presently occupies a strategic cluster of islands that lie along the major shipping lanes in the western approaches to the Strait of Hormuz in the Persian Gulf (see map 8). Nearly all vessels entering or leaving the Persian Gulf use the shipping lanes that pass near these islands. While Iranian sovereignty over Sirri, Forur, and Bani Forur is uncontested, control over Abu Musa and the Tunbs has been the subject of a long-standing dispute between Iran and the United Arab Emirates, specifically Sharjah and Ras al-Khaimah. Iran and Sharjah have jointly administered Abu Musa since a Memorandum of Understanding was signed in 1971. Tensions arose in 1992 when Iran tightened its control over Abu Musa. While Iran and Sharjah have shared in the revenue of an offshore oil concession, the dispute over this and the other islands is essentially a sovereignty issue rather than a maritime resource issue. Similar to the Red Sea Island dispute, the international community is keenly interested in the state of play in this area because of vital shipping interests in the region.

**Falkland Islands/Isla Malvinas:** This dispute has been a source of contention between Argentina and the United Kingdom since Britain occupied the islands in 1833 (see map 9). After years of ineffectual UN resolutions and unsuccessful negotiations between the two countries, the dispute erupted into a short war in 1982. Argentina invaded and briefly occupied the islands, before being expelled by the British at the cost of several hundred lives on both sides. Sovereignty remains unresolved, but it has become more a maritime resource issue. In 1986, the United Kingdom formed a 150-mile fisheries
protection zone, with an announcement of the “entitlement of the Falklands under international law, to a fisheries limit of 200 miles.” Then, in 1990, after Argentina and the United Kingdom agreed to cooperate over fisheries conservation in the South Atlantic, the United Kingdom proclaimed a joint “Outer Fishery Conservation Zone” between 150 miles and 200 miles around the islands. The two countries have since signed an agreement on the framework for joint oil exploration in a “Special Cooperation Area” southwest of the Falklands/Malvinas, and oil exploration is proceeding to the north of the islands, with participation by an Argentine company in the consortium and Argentina slated to share in royalties from the development.¹⁰

United States–Canada: In the northern section of the Gulf of Maine, the United States and Canada have a two-century old dispute over Machias Seal Island and adjacent North Rock. It is the view of the United States that these territories have been part of the United States since the founding of the Republic. U.S. sovereignty over these islands was recognized in 1783, when Article II of the Definitive Treaty of Peace between the United States and Great Britain assigned to the United States “all islands within twenty leagues of any part of the shores of the United States . . . excepting such islands as now are, or heretofore have been within the limits of the said province of Nova Scotia.”¹¹

And, to further its argument, the United States notes that the Arbitration between the United States and Great Britain undertaken pursuant to the 1814 Treaty of Ghent confirmed that the grant of Nova Scotia by the British Crown under the terms of a 1621 Charter to Sir William Alexander did not include either island. Canada, however, maintains a different interpretation of these historical treaties. Both States acknowledge the disputed status of the islands. Because of the complexity of the dispute, and the fact that the claims are based on treaties not associated
with the law of the sea, the United States and Canada agreed, in
the early 1980s, not to include this sovereignty dispute in the
ICJ Arbitration that settled the maritime boundary to the south,
in the Gulf of Maine.

Island Sovereignty Disputes and
the Law of the Sea Convention

So, why are these islands, many of which are only tiny
pieces of territories, receiving all this recent attention? Some
point to the UN Convention on the Law of the Sea (LOS
Convention) and its coming into force in late 1994. The LOS
Convention provides for a territorial sea of up to 12 miles
around any land feature that projects above high tide, and it
allows for exclusive jurisdiction over maritime resources out to
200 miles provided that feature is not an Article 121(3) “rock.”12
A zone of 200 miles around a small island can generate about
125,660 square nautical miles of ocean space. Within this zone,
a State may enjoy, inter alia, “the living and non-living re-
sources [such as fisheries and hydrocarbon deposits], the waters
superjacent to the seabed and of the seabed and its subsoil.13
Similarly, a State could claim the continental shelf from an
island.14 A recent Wall Street Journal article has stated that the
dispute between China and Japan over the Diaoyu (Senkaku)
islands is a result of the “claim-staking mania inspired by the

The LOS Convention did enter into force on November 16,
1994, for those States party to the Convention.16 While this
event placed a capping stone on a construction many years in the
making, many of the building blocks of the structure itself (i.e.,
the LOS Convention) were not entirely new to the international
community. The right of States to make claims to the extended maritime zones included in the Convention, it can be argued, has been around for many years. The concept of the continental shelf entered the realm of international law with the proclamation by President Truman of the U.S. continental shelf in 1945 and was codified in the 1958 Geneva Convention on the Continental Shelf. It was rapidly instituted around the world, with 52 such claims issued by 1971 (before the first negotiating text of the Third LOS Convention) along with 35 claims to fishing zones. A similarly extensive state practice of claiming the more comprehensive exclusive economic zone (EEZ), following adoption of the concept by the Third United Nations Law of the Sea Conference in the mid-1970s, suggests the growing acceptance in international law for extended maritime zones. By 1990, there were 80 EEZ claims. However, though the LOS Convention has now entered into force and 100 States claim EEZs, there has not been agreement in the international community about the kinds of insular features that can generate EEZs or continental shelves in light of Article 121(3) of the LOS Convention. This is an issue that needs to be addressed.

It would be safe to assume, however, that some States have held off claiming an EEZ until such time that they have completed their domestic process of ratifying the LOS Convention and the Convention had entered into force for them. To this extent, then, the LOS Convention could be viewed as a catalyst for a State to review its offshore situation. In those situations where disputes have involved islands in some fashion, it appears that those islands have gained renewed attention.

It is fair to say that maritime resource jurisdiction is at least an implicit issue in almost all island disputes, regardless of when and over what issue the dispute originated. This aspect of island disputes is clearly more pronounced than it was three or
four decades ago. It is obviously related to the awakening interest by the world’s States in developing offshore food and energy resources to meet the demands of burgeoning populations and their economies as land-based resources dwindle or fall short of needs. The development of the LOS Convention as a response to this rising interest in the oceans, represented an attempt to set rules and standards for the exploitation of those offshore resources.

It is just not correct to place the blame for the recent flurry of activity over these disputed islands to the LOS Convention, or to pronounce the Law of the Sea Convention the cause of the sovereignty disputes themselves. First, it would be well to remember that almost all of the island disputes that now interfere with certain bilateral relations predate the development of many, if not most, of the LOS concepts, and the conventions that have attempted to codify them. China indicates that its claims in the South China Sea date back to the second century B.C. Many of the world’s disputed islands actually may have had some intrinsic value in earlier times. Some islands were used as transitory bases for fishermen. Other islands were sought for sitting navigational aids, for refueling and provisioning stations, for strategic control of shipping lanes, or for the resources found on the islands themselves, such as mineral deposits or bird droppings (guano).

Since I am speaking to the sovereignty disputes over islands, let me be quite clear in stating that the Law of the Sea Convention DOES NOT contain any provisions in any of its articles that discuss the resolution of disputes over any territory, islands, or other types of territory. While the LOS Convention provides for several bodies for adjudicating disputes, or for a Commission to oversee claims to continental shelves beyond 200 miles, there is nothing in the body of the LOS Convention that deals with
sovereignty issues. The LOS Convention addresses the establishment of maritime jurisdiction zones. In fact, the application of the LOS Convention is premised on the assumption that a particular State has undisputed title over the territory from which the maritime zone is claimed.

There have been cases where countries have used declaration of maritime jurisdiction to assert claims on islands, even though the LOS Convention has no provision for such practice. Malaysia, for example, publicly has based its claim to certain Spratly Islands on the fact that they fall within the continental shelf limits that it proclaimed in 1979.\textsuperscript{22} Periodically, China has implied that the Senkaku (Diaoyu Islands) are part of the "natural prolongation" of the Chinese mainland (i.e., its continental shelf claim).

There is no rule in international law that prescribes sovereignty over islands on the basis of making a maritime claim. To make such a claim to an island by citing the LOS Convention as a source of law is not correct and distorts the provisions and intent of the LOS Convention.

**Resolution of Island Sovereignty Disputes**

If the LOS Convention does not provide a basis for settling island sovereignty disputes, then what mechanisms do States have? While this issue will be more fully addressed by the legal scholars here, a few observations may be in order. The first attempt to resolve sovereignty disputes should be by bilateral negotiation. Failing this, several types of third party arbitration are available. Usually, resolution of sovereignty disputes does impact marine space allocation. Often the compromise will
consist of questions relating to both sovereignty and marine jurisdiction.

The 1992 ICJ decision on the El-Salvador-Honduras boundary dispute also decided the sovereignty of territory on the mainland as well as some of the islands in the Gulf of Fonseca. The decision had major implications for the location of the maritime limits in that Gulf, as well as for Honduras' access to the Pacific Ocean.  

An earlier dispute between Argentina and Chile over islands in the Beagle Channel, off Tierra del Fuego, held major ramifications for Chilean access to the Atlantic Ocean. After rejection by Argentina in 1978 of a decision rendered through arbitration by a panel of former ICJ judges selected by the United Kingdom, this dispute was submitted to the Vatican for arbitration. In 1984, the Vatican ruled in favor of Chilean sovereignty over the islands, but limited Chile's exclusive economic zone in the area.

At least four prominent island disputes appear to be heading to arbitration or adjudication. In East Asia, Malaysia has agreed with both Singapore and Indonesia to submit their respective island disputes to the ICJ. Bahrain and Qatar may be settling their dispute over the Hawar Islands in the ICJ. Lastly, Eritrea and Yemen have agreed to take their dispute over the Hanish Islands to arbitration by an international panel.

Another method to address sovereignty issues is to place the dispute on hold and to devise other means to utilize the maritime area around the island. Again, this suggests that the interest of the parties is less on the piece of territory itself and more on the potential marine area to be generated by it. To finesse the sovereignty question by seeking a solution based on resource considerations, for example, is usually driven by commercial interests in the marine area--be it fisheries or, more likely, oil
Setting the Stage

and gas development. Oil companies, for example, are reluctant to invest money in an area in which there is no clear title. If a workable scheme can be devised whereby resource development can occur which benefits both countries, then the sovereignty issue is minimized.

Such solutions based on possible joint development schemes make a link between sovereignty disputes and the influence that islands have over maritime delimitation.

Islands and the Law of the Sea Convention

I would like to take the next step and address islands and maritime delimitation issues. As Brad has noted, resolution of island sovereignty disputes normally do not settle only the question of title over that particular piece of territory. Sovereignty disputes submitted to third party arbitration often include a request to delimit the maritime area adjacent to the island in question. It is in this context of maritime delimitation that the LOS Convention may properly be used as one source for guidance.

Delimitation takes on two related meanings. In the first instance, delimitation pertains to the establishment and definition (and depiction on charts) of maritime zones to which States are entitled under the provisions of the LOS Convention. A second meaning pertains to the delimitation of maritime space between two neighbors in areas where jurisdictions overlap.

As this audience knows, delimitation, in the first meaning of the term would include the territorial sea, contiguous zone, exclusive economic zone, and the continental shelf. The LOS Convention clearly leads a State to think that islands are to be
accorded the same maritime zones as mainland areas. In fact, Article 121 (2) states,

Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory. (Emphasis added).

In this regard, many States have held fast to their sovereign claims to these often very small pieces of territory, sometimes far from the mainland, with the prospect that a large maritime area could possibly be claimed as an extension of this ownership. Brad has identified where some of the more publicized sovereignty disputes are in the world. Once States get serious in their desire to resolve the sovereignty dispute, it is quite likely the question of maritime area allocated to that territory will be significant. Often, it is the desire to develop the marine resources (usually fish or hydrocarbons) in the vicinity of the disputed island that is the driving force behind the States’ desire to seek resolution. This idea gets back to the point that in many of the islands sovereignty disputes the value of the land is less than the maritime zone that, under the provisions of the LOS Convention, possibly could be claimed from that island.

Thus, as a starting point, it should be recognized that the drafters of the Convention viewed islands in the same light as any other part of a State’s territory. Maritime sovereign rights and jurisdiction flow from sovereignty over the land domain, be it from mainland territory, or from insular territory. The one exception to this entitlement was rocks, however they were to be defined, which cannot sustain human habitation or economic
life of their own, whatever these concepts may mean, shall have no exclusive economic zone or continental shelf.²⁷

Bowett provides a general categorization for islands under the broad heading of “Islands enjoying separate entitlement:

(a) as the sole unit of entitlement; or
(b) in conjunction with the entitlement of a large territorial unit,
   (i) lying proximate to a mainland coast under the same sovereignty;
   (ii) straddling a median or equidistant line between ‘mainland’ coasts; or
   (iii) proximate to a mainland coast under a different sovereignty.”²⁸

While the above categorization strongly emphasizes the geographical location as fundamental in how an island is to be treated in its legal maritime entitlement, Bowett does agree with my earlier statement that consideration of islands must also look to the island’s size, political status, and the nature of the island itself.

Most islands in the world have no disputes associated with them, either with the legal title over the islands themselves, or with the maritime zones generated from them. States which essentially are dominated by a main island or two—such as Cuba, Iceland, and Nauru—where because of their size, political status (independent countries), and relative location, there is no question of their entitlement to the various LOS zones.

The numerous islands found along mainland coastal areas of many States, that are an integral part of that mainland State, would be a part of the mainland’s baseline (either as a part of straight baseline system or using the low-water mark of the
islands). The relevant maritime zones would be generated from these islands. Virtually every State has nearby adjacent islands—obvious examples would be the islands off the Maine, Louisiana, Florida, and Alaskan coasts for the United States, the many Norwegian or Chilean islands, etc.

There are situations, however, where, due to the location of particular islands, extension of maritime jurisdiction from islands pose potential problems that have both international and domestic ramifications. In several instances around the world islands lie astride key international straits and vital routes used for international navigation. Full territorial sea claims made from these islands (and often from the opposing mainland) would impact the navigation regime through these international straits.

As this audience well knows, the LOS Convention provides for transit passage through international straits which allows for the "freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait." Thus, aircraft can fly over the international strait, and submarines can navigate submerged. There are several instances where, for various reasons, the coastal State has opted, in certain areas off its coasts—particularly the coasts of some of its islands, not to claim the full 12-mile territorial sea allowed under international law. A few examples will illustrate this point.

Japan, for example, extended its territorial sea limit to 12 miles in 1977. Such extension would have created a territorial sea overlap between its islands in five "international straits:" Soya, Tsugaru Strait, eastern and western channels of the Tsushima Strait, and the Osumi Strait. Japan’s desire to maintain a high seas corridor in these straits was achieved by maintaining a 3-mile limit drawn from defined straight lines.
(See Map 10 for territorial sea limits in the eastern and western channels of the Tsushima Strait).

In its 1996 Territorial Sea and Contiguous Zone Law, in which Japan claimed straight baselines, Japan has altered slightly the territorial sea in these five international straits. But, the limit remains less than 12 miles and high sea corridors remain in all of them.

South Korea, in similar fashion, claimed a 12-mile territorial sea in 1977, but maintained a 3-mile limit in the Korea Strait (see map 10). With both Japan and South Korea maintaining a 3-mile territorial sea in the western channel of Tsushima/Korea Strait a high seas corridor has been maintained.

Finland, in a 1995 law, extended its territorial sea to 12 miles. Because of the numerous islands situated along its coast, a 12 mile extension from all the islands would have pushed its territorial sea to the middle of the Gulf of Finland. This area is an important shipping route for vessels headed to Russia. Thus, to maintain a high seas corridor, and not to deal with transit passage issues, Finland opted to maintain only a 3-mile territorial sea in that area.

Islands and Maritime Boundary Delimitation

In addition to the impact islands, or more correctly the zones created from these islands, may have on navigation regimes in the adjacent waters, islands have played an instrumental role in many maritime boundary negotiations, and are often the focus of delimitation disputes. Several years ago I compiled a listing of “all” the boundary situations in the world. In my world survey, it became evident that with the advent of the 200-mile resource zones every coastal and island State would have at least
one maritime boundary to negotiate with at least one neighbor. Thus, it is no surprise that all coastal States took a great interest in the development of the LOS Convention pertaining to boundary delimitation.

At the time of this study, in 1990, approximately 420 maritime boundary situations were identified. Of this number, 154 boundary agreements had either entered into force or been signed. I recall discussing the state of play of boundaries at about the time of this study and making the comment that, for the most part, these 154 agreements represented the "easy" boundaries to resolve. This comment may still have some relevance today. But, I must admit, there have been some very difficult and complex boundaries resolved by some imaginative methods and techniques.

While the LOS Convention does address boundary delimitation, it does not provide concrete answers for all situations. Boundary delimitation is found in Articles 15 (territorial boundaries), 74 (exclusive economic zone boundaries), and 83 (continental shelf boundaries). Article 15 states the following:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Article 74 states:
1. 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.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Article 83 is identical to Article 74, substituting the term "continental shelf" for "exclusive economic zone."

Islands and Agreed Maritime Boundaries

In the development of state practice of maritime boundary delimitation, islands have played an important role. In many of the "easy" cases, islands have been treated no differently than any mainland territory. In many of the situations involving islands where the equidistance method is viewed as offering an equitable solution, the islands have not "distorted" the course of the line. Often, islands of both States have balanced out each other.
In 1976 as the United States was developing its law to extend its fisheries jurisdiction to 200 miles, it was recognized that with the stroke of a pen putting the Magnuson Fishery Conservation and Management Act into force would immediately create approximately 28 maritime boundary situations that formerly did not exist. The extension of maritime jurisdiction to 200 miles brought boundary situations ranging from boundaries with Kiribati and Tonga in the Pacific, to the then Soviet Union in the North Pacific, Bering Sea, and Arctic Ocean, to Canada off four different coastal areas, to Mexico in the Pacific Ocean and Gulf of Mexico, to Cuba and Venezuela, in the Caribbean. A comprehensive and consistent ocean policy was needed that addressed all the boundary situations in which United States interests found itself. In several of the boundary areas off the United States, islands (both the U.S. and its neighbor) affect bilateral boundary delimitations. It was decided that in those situations in which the equidistance method provided an equitable solution, all territory would be given equal weight in the determination of the boundary.

In my presentation this morning I do not intend to present an encyclopedia of island boundary situations. For those seeking a fuller understanding of the state practice of maritime boundary delimitation, and the roles played (or not played) by islands, I highly recommend the study produced by a team of experts under the guidance of Professors Charney and Alexander and sponsored by the American Society of International Law. In particular, Derek Bowett, in a chapter in Volume 1 of this study, gives a valuable overview of islands in maritime boundary delimitation. A third volume of this opus is due out in a few months.

Islands have been dealt with in different fashions in the maritime boundaries that have been negotiated or arbitrated.
They have been treated as an integral part of States, with no special treatment given to (or taken from) them. They have been given special consideration, and they, in some circumstances, have been given no consideration at all.

A word of caution regarding the relevance of equidistance should be expressed at this point. When terms such as "full weight" or "partial effect" are used in conjunction with a discussion of islands, the inference is that the equidistance method is being considered. An equidistant line is a mathematically derived line using identified locations along the coastline. Its calculation, by mathematical means or manually on the chart, can be performed by anyone. The resulting line, from a technical perspective, will be only as accurate and precise as the source data. It is probably common practice for those government officials involved in determining boundary policy to calculate the equidistant line to "see" how an equidistant line divides maritime space.

Looking at state practice it is evident that the equidistance method is frequently used. But international law does not make the use of equidistance mandatory for exclusive economic zone or continental shelf boundaries; there is some preference given to equidistance in Article 15 for the determination of territorial sea boundaries. There are many boundary agreements which use lines other than equidistant lines. In these cases, islands often have not been considered as factors in the delimitation. But, the non-use of these islands in the delimitation usually is not due to the island itself, such as its size or location, but to other considerations by the States.

State practice has many examples of States agreeing to use equidistant lines giving full consideration to islands. The United States, for example, concluded agreements with Mexico, Venezuela, Cook Islands, New Zealand (for Tokelau), and the
United Kingdom (two agreements: British Virgin Islands and Anguilla) in which some form of equidistant lines were used. Islands or each side were treated equally and given full weight in the calculation of the equidistant lines. Virtually all of the negotiated boundaries in the Pacific, which involve island states, are based on the equidistance method. As Bowett notes, in cases where islands of both States have been given full effect in calculating an equidistant line, it is usually due to the fact that both parties have offshore islands that balance or offset each other. 37

Then there are situations where, for various reasons, islands have been given special treatment in boundary agreements. Not only have States negotiated boundary agreements giving islands less than full weight in determining an equidistant line, but arbitral panels and the ICJ also have rendered judgments in which islands have been key issues.

In the 1982 Libya-Malta decision, for example, the ICJ did not allow Malta, an independent island-state, to receive full consideration in the establishment of its boundary with Libya. 38 In the 1977 Anglo-French Award, the British Scilly Islands were not given full weight in the delimitation. 39 In the Italy-Tunisia agreement, the Italian islands, which are situated near the Tunisian coast, were not considered in the boundary delimitation per se. The island of Lampione (which is uninhabited) was accorded a territorial sea of 12-miles while the other islands of Lampedusa, Linosa, and Pantellaria were given territorial seas and a one-mile band of continental shelf. 40 And, in March 1978, the Netherlands and Venezuela reached agreement on a boundary between the Dutch islands of Aruba, Bonaire, and Curacao and the Venezuelan mainland. 41 In that area where the Dutch islands are only about 30 miles opposite the mainland, the boundary approximates an equidistant line giving full weight to
the islands. But in the central Caribbean where the marine area is adjacent to the islands and Venezuelan mainland, the line deviates from the equidistant line, in Venezuela’s favor.

There are a couple of cases where rocks or islands were ignored in the maritime boundary delimitation. In the 1988 U.K.-Ireland delimitation the British island of Rockall was not used. And Canada and Denmark have delimited a continental shelf boundary between the eastern Arctic islands of Canada and Greenland based on equidistance. Points 122 and 123 of the boundary lie on the north and south coasts of Hans Island, respectively. Problems of sovereignty and the effect this disputed island would have on the delimitation resulted in the Parties ignoring the island completely.

Islands and Disputed Maritime Boundaries

Although many boundary agreements have been reached, there are even more that remain to be concluded. Some of these will be easy and the lack of negotiations may merely reflect that the Parties concerned have no pressing need to enter into talks. Other situations, however, may reflect an on-going dispute between the parties. In a couple of these cases, islands could very well be the cause of the disagreement. Table 2 lists several disputes in which islands play a prominent role in the disagreement. This table differs from Table 1 in that cited islands themselves are not disputed, rather it is the potential influence on the boundary delimitation that is at question.

Colombia and Venezuela periodically have entered into negotiations to settle their boundary disputes in the Gulf of Venezuela and Caribbean Sea. The stumbling blocks are the tiny Venezuelan Los Monjes islands, strategically situated at the
mouth of the Gulf of Venezuela. When applying the equidistance method, these islands have a significant impact on the course of the line.

In the southern part of the South China Sea, Indonesia and Vietnam have had boundary discussions over many years. One of the issues appears to be Indonesia’s insistence that its Natuna Islands be given full consideration in delimiting the boundary.

One of the most complex boundary areas in the world is the Aegean Sea where Greece and Turkey have several topics to resolve, including the delimitation of territorial seas, continental shelf, and exclusive economic zone. The location of Greek islands in proximity to the Turkish mainland has caused the dispute to be viewed on many levels, from issues of maritime jurisdiction to overflight rights to international transit rights.

Concluding Remarks:
Interim and Long-Term Solutions

Neither Brad nor I view our role in presenting this opening paper as offering solutions to all the disputes we have placed before you. And we do not have answers for these complex and difficult issues. To help start these discussions, Brad and I have attempted to distinguish different types of island disputes—from those involving the fundamental question of sovereignty over the island to the effect the island should have on delimiting the adjacent marine area shared with neighboring States. The distinction between the two types of disputes does get hazy when one looks at the means States are taking to resolve the disputes. As States refer their sovereignty disputes to third party arbitration often they are asking for a judgment on the maritime
delimitation as well. This was the case in the 1992 ICJ decision affecting the Gulf of Fonseca where both island sovereignty and maritime jurisdiction were resolved in the Gulf.

While there seems to be an element of nationalism involved in virtually all sovereignty disputes, it appears to us that with regard to at least the island disputes we have identified in this paper, jurisdiction over the resources in the adjacent marine areas more frequently has become the driving force behind the claims. To the extent that States are willing to place their sovereignty claims "on hold," then several mechanisms seem to be available to allow both sides to get on with exploring and exploiting the offshore area. Earlier in this paper Brad mentioned the creation by Argentina and the U.K. of a joint fishery conservation zone around the Falkland Islands.

With respect to offshore oil and gas production a precedent has been set by several countries in creating joint development zones. While disputed islands have not necessarily led to the creation of current joint development zones—such as those created by Malaysia and Thailand, Australia and Indonesia, Japan and South Korea, Bahrain and Saudi Arabia, Malaysia and Vietnam—there is no reason to think this mechanism cannot resolve, at least in the near term, some of the disputes involving the islands.

Countries could adopt a Canada-Denmark approach of just ignoring the island and delimit the maritime boundary around it. This could provide a basis for the U.S-Canada Machias Seal Island and North Rock dispute in the Gulf of Maine. This island is an important nature preserve. Both sides do work together each summer in limiting the number of people allowed to visit the island. A possible solution could be (1) to develop a permanent joint management scheme for preserving the island, (2) to ignore the island in the delimitation of a maritime
boundary, and (3) to acknowledge that each side preserves its respective claim to the island.

Islands could be given a limited extent of jurisdiction. The Italy-Tunisian agreement, mentioned earlier, is a good example where islands of one State which are situated close to a neighboring State, were given some maritime jurisdiction, but otherwise ignored in the boundary delimitation. The examples given for those countries which limited their territorial sea claims in certain strategic international straits, could have application in boundary delimitation situations as well. This possibly could be considered in the Aegean. It is interesting to note that Turkey presently claims a 12-mile territorial sea off its Black Sea and Mediterranean Sea coasts, but maintains only a 6-mile limit in the Aegean. Greece also claims a 6-mile territorial sea. If each of these States considered developing zones of territorial seas, ranging from 3 miles (in the Aegean) to 12 miles elsewhere, then they may have a basis for further talks.

Each of you probably can think of other means to suggest for other disputed areas. We look forward to hearing about these ideas during the next day and half. Brad and I hope this paper has provided some facts and suggestions for the next panels.
**TABLE 1**
Sovereignty Disputes over Islands*

<table>
<thead>
<tr>
<th>Claimants</th>
<th>Islands</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>North Atlantic Ocean</strong></td>
<td></td>
</tr>
<tr>
<td>United States/Canada</td>
<td>Machias Seal Island/North Rock</td>
</tr>
<tr>
<td>Canada/Denmark (Greenland)</td>
<td>Hans Island</td>
</tr>
<tr>
<td><strong>Caribbean Sea</strong></td>
<td></td>
</tr>
<tr>
<td>United States/Haiti</td>
<td>Navassa Island</td>
</tr>
<tr>
<td>Colombia/Nicaragua</td>
<td>San Andres y Providencia (and surrounding islets)</td>
</tr>
<tr>
<td>Belize/Guatemala/Honduras</td>
<td>Sapodilla Cays</td>
</tr>
<tr>
<td><strong>South Atlantic Ocean</strong></td>
<td></td>
</tr>
<tr>
<td>Argentina/United Kingdom</td>
<td>Falkland Islands, South Georgia and South Sandwich Islands</td>
</tr>
<tr>
<td>Equatorial Guinea/ Gabon</td>
<td>Several Islands in Corisco Bay</td>
</tr>
<tr>
<td><strong>Red Sea</strong></td>
<td></td>
</tr>
<tr>
<td>Eritrea/Yemen</td>
<td>Hanish Islands</td>
</tr>
<tr>
<td>Saudi Arabia-Yemen</td>
<td>Southern part of the Farasan Islands group</td>
</tr>
<tr>
<td>Claimants</td>
<td>Island(s)</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Indian Ocean</strong></td>
<td></td>
</tr>
<tr>
<td>Mauritius/United Kingdom</td>
<td>Diego Garcia (British Indian Ocean Territory)</td>
</tr>
<tr>
<td>France/ Mauritis/ Seychelles/ Madagascar</td>
<td>Tromelin</td>
</tr>
<tr>
<td>Comoros/ France</td>
<td>Mayotte</td>
</tr>
<tr>
<td>France/ Madagascar</td>
<td>Bassas da India, Europa, Glorioso, Juan de Nova, and Tromelin</td>
</tr>
<tr>
<td>Bangladesh/ India</td>
<td>South Talpatty Island (New Moore or Purbasha)</td>
</tr>
<tr>
<td><strong>Persian Gulf</strong></td>
<td></td>
</tr>
<tr>
<td>Iran/ United Arab Emirates</td>
<td>Abu Musa, Tunb as Sughra, Tunb as Kubra</td>
</tr>
<tr>
<td>Bahrain/Qatar</td>
<td>Hawar Islands</td>
</tr>
<tr>
<td>Kuwait/ Saudi Arabia</td>
<td>Qaruh and Umm al Maradim Islands</td>
</tr>
<tr>
<td><strong>Mediterranean/ Aegean Sea</strong></td>
<td></td>
</tr>
<tr>
<td>Greece/ Turkey</td>
<td>Imia (Kardak)</td>
</tr>
<tr>
<td>Morocco/ Spain</td>
<td>Penon de Alhucemas, Penon de Velez de la Gomera, Isla Chafarines</td>
</tr>
<tr>
<td>Claimants</td>
<td>Island(s)</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>N. Pacific Ocean</strong></td>
<td></td>
</tr>
<tr>
<td>Japan/ Russia</td>
<td>&quot;Northern Territories&quot; (Etorofu, Kunashiri, Shikotan, Habomai Islands)</td>
</tr>
<tr>
<td>Mexico /France</td>
<td>Clipperton Island</td>
</tr>
<tr>
<td><strong>South China Sea</strong></td>
<td></td>
</tr>
<tr>
<td>China/ Vietnam</td>
<td>Paracel Islands</td>
</tr>
<tr>
<td>China/ Malaysia/ Philippines/ Vietnam</td>
<td>Spratly Islands * (*not all of the Spratly Islands are claimed by all claimants)</td>
</tr>
<tr>
<td>Malaysia/Singapore</td>
<td>Pulau Pisang and Pulau Batu Puteh (Pedra Branca)</td>
</tr>
<tr>
<td><strong>South Pacific Ocean</strong></td>
<td></td>
</tr>
<tr>
<td>France/ Vanatu</td>
<td>Matthew and Hunter Islands</td>
</tr>
<tr>
<td><strong>East China Sea</strong></td>
<td></td>
</tr>
<tr>
<td>China/ Japan</td>
<td>Senkaku Islands (Diaoyu Tai)</td>
</tr>
<tr>
<td><strong>Sea of Japan</strong></td>
<td></td>
</tr>
<tr>
<td>Japan/ South Korea</td>
<td>Liancourt Rocks (Takeshima or Tok-do)</td>
</tr>
</tbody>
</table>

Table 1 cont.
<table>
<thead>
<tr>
<th>Claimants</th>
<th>Island(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Celebes Sea</td>
<td></td>
</tr>
<tr>
<td>Indonesia/ Malaysia</td>
<td>Sipadan and Ligitan Islands</td>
</tr>
</tbody>
</table>

Table compiled by Robert W. Smith and Bradford Thomas using best available information as of January 25, 1997.
**TABLE 2**  
Non-Disputed Islands  
Involved in Dispute Maritime Boundary Delimitations*  

<table>
<thead>
<tr>
<th>States</th>
<th>Islands</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Caribbean Sea</strong></td>
<td></td>
</tr>
<tr>
<td>Colombia/ Venezuela</td>
<td>Los Monjes (Venezuela)</td>
</tr>
<tr>
<td>Venezuela/ Dominica/ St. Kitts &amp; Nevis/ St.</td>
<td>Aves Island (Venezuela)</td>
</tr>
<tr>
<td>Lucia/ St. Vincent &amp; the Grenadines/</td>
<td></td>
</tr>
<tr>
<td>U.K. (Montserrat)</td>
<td></td>
</tr>
<tr>
<td><strong>North Atlantic Ocean</strong></td>
<td></td>
</tr>
<tr>
<td>Denmark/ Iceland/ United Kingdom</td>
<td>Rockall (U.K)</td>
</tr>
<tr>
<td><strong>Aegean Sea/ Black Sea</strong></td>
<td></td>
</tr>
<tr>
<td>Greece/ Turkey</td>
<td>Various Greek Aegean Islands</td>
</tr>
<tr>
<td>Romania/ Ukraine</td>
<td>Serpent’s Island</td>
</tr>
<tr>
<td><strong>South China Sea</strong></td>
<td></td>
</tr>
<tr>
<td>Indonesia/ Vietnam</td>
<td>Natuna Islands (Indonesia)</td>
</tr>
<tr>
<td><strong>South Pacific Ocean</strong></td>
<td></td>
</tr>
<tr>
<td>Australia/ New Zealand</td>
<td>Lord Howe Island (Australia)</td>
</tr>
</tbody>
</table>

* Table compiled by Robert W. Smith and Bradford Thomas
Map 1

Setting the Stage

The "Northern Territories"

Japan's claimed straight baselines

Inclosure by the SOVET UNION in 1945

Disputed by the USIA.

Japan, Amba, and Hhabomai Islands
Map 2
Sipadan and Ligitan Islands

Map 5
Map 7

Imia Islands / Kardak Rocks

Names are not necessarily authoritative
Map 8
Map 10
The International Tribunal for the Law of the Sea: 
The First Year

Thomas A. Mensah* 

The Mandate and Functions of the Tribunal

The International Tribunal for the Law of the Sea was established by the 1982 United Nations Convention on the Law of the Sea as one of the means for the settlement of disputes regarding the interpretation and application of the provisions of the Convention. The other alternative mechanisms for dispute settlement in the Convention are the International Court of Justice and ad hoc arbitral tribunal established in accordance with the provisions of Annexes VII and VIII to the Convention.¹

One of the primary functions of the Tribunal is provide an avenue for States Parties to the Convention to resolve differences and disputes which may arise between them concerning the meaning and scope of provisions of the Convention applicable in specific cases of interest to them.² In that role the Tribunal is not different from that of the International Court of Justice as far as disputes under the Convention on the Law of the Sea are concerned.

Special Features of the Tribunal’s Jurisdiction

There are, however, important differences between the Tribunal and the Court in this regard.³

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*President, International Tribunal for the Law of the Sea. The views in this paper are solely those of the author and may not in any way be attributed to the Tribunal.
In the first place, the International Court of Justice can only deal with disputes in which the parties are States: entities which are not States do not have access to the Court. On the other hand the International Tribunal for the Law of the Sea has the competence to deal not only with the disputes between two or more States, but also those involving entities which are not States.

In the first place, the Sea-Bed Disputes Chamber of the Tribunal is empowered to deal with disputes concerning the interpretation or application of the provisions of Part XI of the Convention (including the Agreement of 1994 relating to the Implementation of that Part) and involving any of the potential participants in "activities of exploration for, and exploitation of, the resources of...the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction". These entities include the State Parties to the Convention, the International Seabed Authority, state enterprises, commercial companies as well as consortia composed of state enterprises and commercial companies.

It is worth noting that, unlike the International Court of Justice, the competence of the Seabed Disputes Chamber does not depend on acceptance of its jurisdiction by the States or entities involved in a case. Every State which becomes a Party to the Law of the Sea Convention, and every entity which undertakes activities in the international seabed area within the framework of the Convention, comes automatically within the jurisdiction of the Seabed Disputes Chamber, to the extent and in the manner provided for in the Convention.

The Tribunal itself has the competence to deal with cases involving States Parties to the Convention, if the parties to the case have accepted the Tribunal's jurisdiction pursuant to the procedure provided for that purpose. The Tribunal may also have jurisdiction to deal with a case involving a State which is not a Party to the Convention, if such a State is a Party to another
agreement which confers jurisdiction on the Tribunal. And, like its Sea-Bed Disputes Chamber, the Tribunal itself has the capacity to exercise jurisdiction in respect of a case in which one other of the parties is not a State. This would be the case if an agreement conferring jurisdiction on the Tribunal were to provide that such non-state entity may be a party to a dispute before the Tribunal in connection with the agreement.

Prompt release of vessels and crew

Another important aspect of the jurisdiction of the Tribunal is its special competence in respect of the “prompt release” of a vessel of a State Party or its crew which have been arrested or detained by authorities of another State Party. Article 292 of the Convention gives to the Tribunal the competence to deal with such a case if the flag State of the arrested vessel contends that the detaining State is wrongfully detaining the vessel or crew or is demanding an unreasonably high bond or other financial security as a condition for their release. If the Tribunal is satisfied that the claim of the flag State is well-founded, it can order the release of the vessel or crew upon payment of what it considers to be a fair and reasonable bond or other financial security.

This jurisdiction of the Tribunal is “compulsory”: i.e. it does not depend on the agreement of the State detaining the vessel or crew. The Tribunal is competent to deal with the case if the parties involved (the state authorities and the shipowner or the flag State) have not been able to resolve the matter within TEN DAYS of the date of the arrest or detention of the ship. Such power to intervene in a national judicial process has not hitherto been previously available, in the same way or to the same extent, to any international judicial body.

An application for the release of a vessel or crew may be brought before the Tribunal by the flag State of the detained vessel
or on its behalf by any other person or entity specifically authorized by the flag State to do so. The entity may be an agency of the State or it may be a non-state body, such as the shipowner or an association of shipowners. This is another of the innovative features of the jurisdiction and competence of the Tribunal.

**Prescription of provisional measures**

Finally, the Tribunal has competence with respect to the prescription of provisional measures which differs significantly, for example, from the corresponding competence available to the International Court of Justice. Article 290 of the Convention gives to the Tribunal the power to prescribe (revoke or alter) provisional measures where it satisfied that there is a good reason to do so. This competence to prescribe provisional measures applies even in a case which is not being submitted to the Tribunal on merits. For the Article of the Convention provides that, where the parties to the dispute have agreed to submit a dispute to an arbitral tribunal but have not yet completed the composition of the tribunal, any one of the parties may submit a request for provisional measures to the International Tribunal for the Law of the Sea. There is, however, a condition precedent for this. It is that the parties must have failed to agree on a mutually acceptable court or tribunal to which the request should be addressed. Where, within two weeks of the notification of the request for such provisional measures, the parties are not able to agree on a forum for dealing with the request, the request may be submitted to the Tribunal. Upon such submission the Tribunal becomes competent to deal with the request and to prescribe such provisional measures as it may deem appropriate, having regard to the circumstance of the case. The measures prescribed may be revoked or amended by the arbitral tribunal once it is constituted. But pending such revocation or amendment, the measures
prescribed by the Tribunal will be binding on the parties to the dispute.\textsuperscript{14}

\textit{Scope of the Tribunal's jurisdiction.}

It may thus be seen that the jurisdiction of the Tribunal, in terms of the issues that may be dealt with by it and the nature of potential parties which may come before it, is more extensive than that of existing international courts. In sum the Tribunal may deal with:

a. A case between two or more States on a dispute relating to the interpretation or application of any of the provisions of the Convention, subject to the conditions specified in the Convention.

b. A dispute between a State and the International Seabed Authority concerning access to the resources of the (international seabed) Area or the procedures to be followed for operations in the Area.

c. A dispute between a State, on the one hand, and a non-state entity engaged in activities in the Area, on the other hand.

d. A dispute between the Authority and a non-state entity which is undertaking or wishes to undertake operations in the Area.

e. A dispute between two or more non-state entities operating in the Area.

f. A dispute between a flag State, or an entity authorized to act on its behalf, and the authorities of a port State concerning the release of a vessel or its crew which may have been detained.

The implication of the multi-faceted jurisdiction of the Tribunal and how it compares with other international judicial institutions will be addressed in other presentations to this conference, including presentations by some of my colleagues.
from the Tribunal. What I propose to do in my submission is to outline in brief the measures taken by the International Tribunal since its inception to prepare itself to discharge its mandate. I shall also take the opportunity to inform you about the first case which the Tribunal has been called upon to deal with in that period.

Work of the Tribunal to Date

The Tribunal held its first working session in October 1996, during which it was formally inaugurated. At this inauguration ceremony the Judges made the judicial declarations prescribed by the Statute of the Tribunal.

In the first week of the session, and prior to the inauguration ceremony, the Tribunal elected its officers—the President and the Vice-President. After the inauguration it selected and appointed the key officers to the Registry, namely, the Registrar and Deputy Registrar. Thereafter, it turned its attention to the organization of the institutional structure as well as the procedural mechanisms it would need to discharge its mandate in the most efficient way—in relation to the different cases likely to be dealt by it and the various types of parties which may be involved in these cases.

The organizational work was undertaken on many fronts: in the consideration and adoption of the Rules of the Tribunal and the internal procedures for the performance of the judicial functions; in the elaboration of guidelines to assist potential parties in cases before it; and in the preparation of regulations and procedures to govern the administration of its staff and its financial operations. In addition it was necessary to devote some time to establish arrangements to ensure the availability of the facilities and services needed by the Judges, officials of the Registry and the representatives of parties appearing before the
The International Tribunal for the Law of the Sea

Tribunal. These include such basic items as offices, furniture and equipment and library and documentary services.

As far as the physical premises are concerned, the Tribunal has had the extremely good fortune of having very co-operative and generous host government and host city authorities. Between them the Federal Government and the Hamburg City Government have planned and provided the funding for a magnificent permanent headquarters building on a uniquely imposing and desirable site. They have also provided temporary accommodation which has so far proved adequate for the requirements of the Tribunal and its staff. As in the case of international bodies in other countries, the Tribunal has had to consider and make appropriate inputs into the planning and construction of both the permanent and temporary premises in order to ensure that they fully respond to the needs of the Tribunal in all its many and different aspects.

The Tribunal has also found it necessary to discuss and reach agreement with the relevant governmental authorities on the terms and conditions on which the premises and facilities are to be made available to the Tribunal. These terms and conditions are to be incorporated in Agreements to be formally concluded between the Tribunal and the host authorities. Agreement also needed to be reached on the conditions under which the Tribunal’s personnel and the representatives of parties appearing before the Tribunal are to enter into, stay and operate in, the territory of the Federal Republic of Germany. Consideration has also been given to the privileges, immunities and courtesies to be accorded to the various categories of persons in order to enable them to perform their functions with the necessary dignity and independence. These matters are all regulated under formal agreements to be concluded with the host authorities. The Tribunal has undertaken negotiations with the Federal German authorities and the Government of the City of Hamburg on various issues. As a result of these consultations, agreement has been reached on the principal
questions; final texts are expected to be produced for signature within the next few months.

Finally the Tribunal has considered its relationship with certain international organizations whose activities are relevant to its work including, in particular, the United Nations and the International Seabed Authority. As a body created under the auspices of the United Nations, the Tribunal has considered it both useful and desirable to establish appropriate working and institutional relations with the United Nations. For that purpose a Relationship Agreement between the United Nations and the Tribunal has been negotiated. This Agreement sets out the terms and conditions under which the Tribunal and its staff may benefit from the services provided by the United Nations. This Agreement was formally signed on 18 December 1997 by the Secretary General of the United Nations and the President of the Tribunal. Pending its formal ratification by the General Assembly, the Agreement will be applied “on a provisional basis,” in accordance with its terms.

The Tribunal has also decided in favor of a suitable relationship agreement with the International Seabed Authority. The terms of this agreement are being negotiated between the Registrar of the Tribunal and the Secretary General of the Authority. The final text resulting from the negotiations will be submitted for approval by the Tribunal and by the appropriate organs of the Authority before the Agreement is formally concluded.

In the four sessions held since its inauguration, the Judges have taken all these issues on board, and they have taken final or provisional decisions on most of them.

Among the significant achievements of the Tribunal to date the following may be mentioned:

*Rules of the Tribunal*
Work has been completed on the Rules of the Tribunal. These were formally adopted and promulgated on 28 October, 1997 at the end of the Tribunal's fourth session. The Rules of the Tribunal constitute the basis and indispensable tools for the exercise of its judicial and related executive and administrative functions.

Consideration of the Rules of the Tribunal has been a particularly complex undertaking largely because of the many innovative features of the Tribunal as compared to existing international judicial bodies. As indicated earlier, the Tribunal's jurisdiction extends beyond customary inter-state disputes to cover cases involving international governmental organizations, private juridical persons as well as natural persons -- all appearing in their own right. In addition the Tribunal, through its Seabed Disputes Chamber, has the competence to deal with disputes involving complex regulatory, technical and commercial questions which may arise in connection with mining activities in the international seabed area. The Rules of the Tribunal must, therefore, be such that they approximately accommodate all these types of cases and all the different potential parties. For that reason the Judges could not simply follow the rules of any of the existing international courts. They were sometimes obliged to strike out in to new, and in many cases uncharted, territory in formulating some of the Rules. Consequently, although it had the advantage of having as the basis of its discussion a set of extremely helpful Draft Rules prepared by the Preparatory Commission established by the Third United Nations Conference on the Law of the Sea (Prepcom), the Tribunal found it necessary to give detailed and very painstaking examination to these Draft Rules. In some cases significant modifications were made to the Prepcom’s Draft Rules, to ensure that they met the requirements of the Tribunal, as the Judges understood them.
In addition the Tribunal has resolved, from the very inception of its work, that the Rules adopted by it should as far as possible be "cost-effective" i.e. that they should make it possible for cases before it to be determined efficiently and with the minimum of delay and expense to the Tribunal itself and, especially, to the parties. The Judges have also decided that the Rules of the Tribunal should be "user-friendly" in terms both of content and presentation. This approach, which has been unanimously agreed to by the Judges, has motivated and guided them at all stages of the work on the rules. It is possible that this has made the process slightly more extended than it might have been; but, on the other hand, I believe it has helped us to develop a set of Rules which will enable the Tribunal to dispense justice to the parties before it in a manner which makes it possible for them to present their cases fully but does not subject them to unnecessary delay and expense, as usually happens in cases before some existing international judicial institutions and arbitral tribunals. The Tribunal hopes that the approach it adopted in this respect will be welcomed by the States Parties, and the international community, when they have had the opportunity to examine the Rules produced by the Tribunal.

Resolution on Internal Judicial Practice

Following the adoption of its Rules, the Tribunal also approved its Resolution on the Internal Judicial Practice. The Resolution on Internal Judicial Practice sets out the internal rules and procedures to be followed by the Tribunal in dealing with cases. It covers such matters as the procedure to be followed by the Judges in deliberating on cases before and after the oral proceedings, the ways in which the views of individual judges, and the opinion of the Tribunal as a whole, are to be ascertained and how the judgments of the Tribunal are to be drafted and adopted.
Although these rules on internal practice are for the use of the judges themselves they are bound to be of significance to parties and potential parties to disputes before the Tribunal as well as to commentators interested in the practice and procedure of the Tribunal, especially in comparison with other international judicial institutions.

Guidelines to assist parties

The Tribunal decided, at a very early stage in the consideration of the Rules, that it would also prepare Guidelines to assist parties appearing before it. For this purpose a provision was included in the Rules to permit the Tribunal to issue such Guidelines. The Guidelines are to be for the benefit of the parties (and potential parties) who appear in cases before the Tribunal, especially their legal advisers. They give detailed information and guidance on the procedures of the Tribunal and how the requirements of the various Rules may be fulfilled by the parties and their agents. Unlike the Rules of the Tribunal, the Guidelines are not binding on the parties. However, they constitute a very useful source of information and guidance which all concerned will find it advisable to take seriously.

Staff and Financial Regulations

Work has also advanced in the preparation of Staff Regulations and Financial Regulations of the Tribunal. The Staff Regulations will specify the procedure for the recruitment of the Staff of the Registry and the conduct of the staff; while the Financial Regulations will set out the rules governing the financial transactions, including arrangements to ensure effective control of expenditure, the maintenance of proper accounts and the periodic audit of financial transactions.
Establishment of Chambers

One of the most important organizational decisions taken by the Tribunal concerns the establishment of Chambers to deal with special categories of cases. The Statute of the Tribunal requires the establishment of two Chambers—the Seabed Disputes Chamber and the Chamber of Summary Procedure. In addition, the Tribunal has the power to establish other Standing Chambers to deal with specified categories of cases. At its second session in February 1997, the Tribunal established the Seabed Disputes Chamber. The Chamber is composed of eleven Judges selected in accordance with criteria stipulated for that purpose by the Statute. The Sea-Bed Disputes Chamber has exclusive jurisdiction to determine cases concerning the interpretation or application of any provisions of Part XI of the Convention—the part which deals with activities for the exploration and exploitation of the resources of the international seabed area.

The Chamber of Summary Procedure is available to deal with cases where, in the opinion of the Tribunal or the parties to the case, the use of expedited or summary procedures is necessary or desirable. The Chamber consists of five Judges and is constituted annually.

In addition to these two Chambers whose establishment is required by the Statute, the Tribunal decided to establish two special standing Chambers to deal with particular categories of cases which the Judges considered to be suitable for treatment by fewer than the full plenary of twenty-one Judges. The two categories of cases are those relating to fisheries and the protection of the marine environment, respectively. These chambers are each composed of seven Judges, selected for a period of three years.

Library facilities
Finally the Judges have devoted some time and attention to the matter of the library facilities for the Tribunal. In this regard it is worth recalling that both the General Assembly of the United Nations and the Meeting of States Parties endorsed the view of the Judges that the Tribunal needs to have, within its premises, an operational library which is fully equipped with all the modern means for research and reference. The Judges of the Tribunal themselves agreed that the Library to be established in the premises of the Tribunal should serve not just as the reference Library for the Judges and the parties appearing before the Tribunal but should also meet the needs of other persons—professional and academic—who may be interested in the study and practice of international law of the sea, private maritime law or general international law. Indeed, the suggestion has been made that the Library of the Tribunal could form the focus of a world-class facility for study and research in the field of international maritime law and the law of the sea. The aim is that the library of the Tribunal, with appropriate cooperation and collaboration from the excellent collections in Hamburg, might make Hamburg a center of excellence in a field in which it has occupied a position of stature for centuries.

The first case

As many of you may already know the Tribunal received and dealt with its very first case. The case reached the Tribunal less than two weeks after the end of the fourth session at which it adopted the Rules and the Resolution on Internal Judicial Practice. The case involved an Application submitted on behalf of the Government of St. Vincent and the Grenadines against the Government of Guinea, under article 292 of the Convention on the Law of the Sea. The Application alleged that the authorities of Guinea had arrested and were detaining a vessel flying the flag
of St. Vincent and the Grenadines (the M/V SAIGA) and its crew, and that this action contravened provisions of the Convention. Accordingly, the Application requested the Tribunal to order a release of the vessel and its crew without requiring a bond or security. However, if the Tribunal decided that a bond or other financial security was warranted, the Tribunal was requested to determine that such a bond or security be posted with the Tribunal itself.

As indicated above, the Application was received barely two weeks after the close of the session of the Tribunal, when all the Judges had already left the seat of the Tribunal for their respective locations. Fortunately, this happened after the Tribunal had adopted its definitive Rules as well as the Resolution on Internal Judicial Practice. In the process the Tribunal had given extensive consideration to the procedure to be followed in dealing with applications for the "prompt release" of vessels and their crew under article 292 of the Convention. In the event the Rules adopted by the Tribunal on this issue (Articles 110-114 of the Rules of the Tribunal) came in very handy. Under the Rules as adopted, an application for the prompt release of a vessel or its crew under article 292 of the Convention was to be dealt with without delay. In fact the Rules stipulated that the date for the oral proceedings should be fixed not later than TEN DAYS from the date of the receipt of the application; and the judgment had to be delivered not later than TEN DAYS from the end of the oral proceedings. Given that the Rule allocated no more than TWO DAYS for the oral hearings, the upshot of all this is that the total time, from the receipt of an application to the delivery of the judgment in such a case, cannot exceed TWENTY-TWO DAYS.

Thanks to the co-operation of the Judges, it was possible for the Tribunal not only to meet, but also actually beat, this deadline. The Application from St. Vincent and the Grenadines was received in the Tribunal on 13 November. In accordance with the
Rules, the President made an Order for the hearing to be held on 21 November. This was the latest week day within the permitted time-limit of ten days from the date of the submission of the Application. In accordance with the relevant provisions of the Resolution on Internal Judicial Practice, a meeting of the Judges for deliberations prior to the oral proceedings was scheduled for 20 November. This meeting duly took place with the participation of no less than eighteen of the twenty-one Judges of the Tribunal.

At that meeting the Tribunal received a request from the Respondent for a postponement of the hearing. This request was based on the claim that there had been some difficulty in the receipt of some documents related to the Application. After due consideration the Tribunal agreed to grant to the Respondent an extension of time of SIX DAYS. However, it was decided that this would not constitute a postponement of the oral proceedings. Rather, it was considered as an "adjournment of the continuation of the hearing" pursuant to article 62 of the Rules of the Tribunal. This meant that the hearing scheduled for 21 November would be held as planned so that the Order for the postponement would be formally delivered. Accordingly, the Order for the postponement of the continuation of the hearing to 27 November was publicly read at the commencement of the hearing on 21 November.

When it was decided to postpone the continuation of the hearing by six days, the Tribunal agreed, nevertheless, that the judgment in the case would be given on 4 December. This is the same date on which judgment would have had to be given if the hearing had commenced on 21 November and ended on 24 November, as originally envisaged in accordance with the Rules of the Tribunal.

In spite of further problems in connection with the arrival in Hamburg of the advocates and counsel of New Guinea, the oral proceedings were commenced as planned on 27 November, and concluded on 28 November. The Tribunal commenced delibera-
tions on the case immediately thereafter, working throughout the week-end. Acting in accordance with the procedures set out in the Resolution on Internal Judicial Practice, the Tribunal was able to establish the majority opinion on how the case was to be disposed of, to create a drafting committee to prepare the judgment on the basis of that majority opinion, to consider the first and second drafts of the judgment produced by the drafting committee and to receive indications of separate and dissenting opinions—all within four days of the closure of the oral proceedings. In the evening of Tuesday, 2 December, the Tribunal formally adopted the Judgment; and this was delivered at a public hearing on 4 December 1997.

Concluding Remarks

It is not my intention to discuss the Judgment, which is now fully in the public domain and hence available for consideration, comment and evaluation by those who wish to do so. I merely wish to draw attention to two facts which I consider to be of some significance. The first is that the Tribunal has now dealt with its first case, using the “tools” fashioned by itself. As indicated above, these tools proved to be effective in practice. What is more, they were found to be sufficiently responsive to the special requirements of an application for the “prompt release” of an arrested vessel and its crew. Hence, with a degree of imagination the Tribunal was able to deal with the case as expeditiously as the circumstances required but, at the same time, also to afford the parties the time and opportunity needed by them fully to present their case. In that the Tribunal demonstrated its ability to be “user-friendly”, as the Judges had decided to try to be from the beginning.

The second fact to which I wish to draw attention is that the Tribunal was able to receive this case and deal with it to the
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judgment state within the space of less than ONE MONTH. Those who have some acquaintance with the normal workings of international judicial institutions and arbitral tribunals will, I am sure, agree that this is no mean achievement, especially when one considers that this was the first case before a Tribunal composed of twenty-one Judges drawn from all parts of the globe and representing all the legal systems of the world. It is also necessary to stress that the Tribunal was operating in this case with only the personnel and material resources provided for its “organizational phase”, that is, without the benefit of the budget and staff approved for the “operational phase” which is due to commence from 1 January 1998. For this a great deal of credit is due to the small but dedicated staff of the Registry who toiled beyond all reasonable calls of duty, to provide the services and facilities needed by the Judges of the Tribunal, all of whom showed extremely commendable readiness to make themselves available in spite of obvious inconvenience and to work at the most unreasonable times to enable the Tribunal to meet the deadlines it had set itself.

There is no doubt that we have, in the process, learned a number of lessons which will help us do some things differently in the future. And our experience has also reinforced some of our previous ideas regarding the financial and personnel requirements for the efficient operation of the Tribunal. These matters will be taken up in due time with the appropriate quarters. But one thing appears clear to me: the Judges of the Tribunal and the staff of its Registry are pleased with the way in which they discharged themselves in this case, and they are determined that the reputation of the Tribunal resulting from the case will serve as an incentive for the future. We intend to give to the States Parties to the Convention, and to the international community as a whole, every reason to feel that the creation of the Tribunal was justified.
Endnotes

1. These mechanisms are listed in Article 287, paragraph 1, of the Convention.

2. Article 288 of the Convention and article 20 of the Statute of the Tribunal (Annex VI to the Convention).


4. Article 34, paragraph 1, of the Statute of the ICJ states that “only states” may be parties in cases before the Court.

5. Definition of “activities in the Area” as given in Article 1, paragraph 3, of the Convention.


7. Paragraph 2 of Article 287 of the Convention makes it clear that the jurisdiction of the Sea-Bed Disputes Chamber over States Parties to the Convention and entities in relation to the
International Seabed Authority does not depend on the choice made by State pursuant to paragraph 1 of that Article.

8. Article 292, paragraph 1.

9. Ibid., paragraph 4.

10. Ibid., paragraph 1.

11. Ibid., paragraph 2.

12. On this see Rosenne, op.cit., note 3 above.

13. Article 290, paragraph 5.


15. Article 50 of the Rules of the Tribunal states that "The Tribunal may issue guidelines consistent with these Rules concerning any aspect of its proceedings, including the length, format and presentation of written and oral pleadings".

16. Article 14 and Article 15, paragraph 3, of the Statute of the Tribunal (Annex VI to the Convention).

17. Article 15, paragraph 1, of the Statute.

18. Article 187 and Article 287, paragraph 2, of the Convention.

19. Article 112 of the Rules of the Tribunal.
The Jurisdiction of the International Tribunal for the Law of the Sea: An Overview

Hugo Caminos

Preliminary Remarks

Generally speaking, jurisdiction is the legal power conferred to a court or tribunal to pronounce on certain matters. In the United Nations Convention on the Law of the Sea (hereinafter the Convention) and in the Statute of the International Tribunal for the Law of the Sea (hereinafter the Tribunal), the term "jurisdiction" refers to the power conferred to the Tribunal to adjudicate on any dispute concerning the interpretation or application of the Convention.

The English text of both documents uses the terms jurisdiction and competence as equivalents. For instance, the title of Section 2 of the Statute dealing with the jurisdiction of the Tribunal enlists the term "Competence" while the French text solely uses the term "Compétence."

In my remarks I shall touch upon the contentious jurisdiction and advisory opinions; the jurisdiction in personam, that is, which persons have locus standi in disputes brought before the Tribunal, and jurisdiction ratione materiae, that is, on which matters the Tribunal has the authority to adjudicate.

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Judge, International Tribunal for the Law of the Sea. The views expressed herein are those of the author and may not in any way be attributed to the Tribunal.
Contentious Jurisdiction

The jurisdiction in personam of the Tribunal constitutes one of the most remarkable innovations with respect to international judicial bodies. Article 20, para.1, of the Statute provides that "The Tribunal shall be open to States Parties." However, the meaning of "States Parties" is not confined to sovereign States. Under Article 1 of the Convention "States Parties" are States that have consented to be bound by the Convention and for which the Convention is in force, as well as other entities which under Article 30.5, become Parties to the Convention. Paragraph (f) of the latter provision includes international organizations which in accordance with Annex IX are entitled to participate in the Convention.

The jurisdiction in personam of the Tribunal is also related to the subject matter of the dispute, i.e., the jurisdiction ratione materiae. Article 20, para. 2 of the Statute declares:

The Tribunal shall be open to entities other than States Parties in any case specially provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

The first phrase of this paragraph refers to the jurisdiction of the Sea - Bed Disputes Chamber under Article 187 in disputes over activities in the Area, such as those between States Parties, between a State Party and the Authority, between parties to a contract, being States Parties, the Authority or the Enterprise, State enterprises and natural or juridical persons, and between the Authority and a prospective contractor.

The second phrase allows entities other than States Parties that enter into an agreement under which the Tribunal may also have
jurisdiction in disputes where the parties to it can be States, or international organizations and entities not Parties to the Convention, to have access to the Tribunal.

The exercise of the jurisdiction of the Tribunal to settle disputes concerning the interpretation or application of the Convention depends upon the choice by the States Parties of one or more of the procedures listed in Article 287: (a) the Tribunal; (b) the International Court of Justice; (c) an arbitral tribunal; and (d) a special arbitral tribunal for certain categories of disputes. If all of the parties to the dispute have chosen the Tribunal, only then may any of these States Parties institute proceedings before the Tribunal by means of an application. If the parties to a dispute have not accepted the same procedure, the dispute may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

Moreover, as in the case of all international courts or tribunals, the jurisdiction of the Tribunal is based on the consent of States, and as one author has put it, "States have shown little enthusiasm in the past for such procedures."

This fact was undoubtedly present in the minds of the architects of the "Montreux Formula" with the view of encouraging States to accept a flexible regime based on the freedom of choice between several compulsory procedures.

**Limitations and optional exceptions.**

However, these compulsory procedures are subject to certain exceptions. The Convention distinguishes between "limitations" and "optional exceptions."

Limitations to the applicability of the compulsory procedures are formulated in Article 297 and apply automatically. All States Parties are entitled to invoke them in relation to disputes concerning the interpretation or application of the Convention with regard to these subject matters: (1) the exercise by a coastal State of its
sovereign rights or jurisdiction provided for in the Convention; (2) marine scientific research; and (3) fisheries. As Treves has rightly observed, Article 297 is a very complex provision and the subject matter considered in the second and third paragraphs is almost completely included in the subject matter of the first. The language used in (1) is the same used in the Convention to describe the rights of the coastal State in the EEZ and over the continental shelf. Although the expression "sovereign rights or jurisdiction" is omitted in (2) and (3), many of the Convention's provisions concerning marine scientific research and on fisheries concern the exercise by the coastal State of its sovereign rights or jurisdiction in the EEZ.

Article 297 specifies three subject matters of disputes regarding the coastal State’s exercise of its sovereign rights or jurisdiction which are subject to compulsory procedures: (a) when it is alleged that the coastal State has acted in contravention of the provisions on the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines or in regard to other internationally lawful uses of the sea; (b) when it is alleged that a State has acted in contravention of the Convention or related rules adopted by the coastal State when exercising the aforementioned freedoms, rights or uses; or (c) when it is alleged that the coastal State has contravened applicable international rules and standards for the protection of the marine environment.

After stating that disputes concerning marine scientific research and fisheries shall be settled by compulsory procedures, paragraphs 2 and 3 of Article 297 provide that the coastal State shall not be obliged to accept these procedures in certain cases. These include: (1) the exercise by the coastal State of a right or discretion in accordance with Article 246, dealing with marine scientific research in the EEZ and on the continental shelf; (2) a decision by the coastal State to require suspension or cessation of a research project under Article 253; and (3) the sovereign rights of the coastal State with respect to the living resources in the EEZ.
or their exercise, including, inter alia, its discretionary powers for determining the allowable catch and its harvesting capacity.

The "optional exceptions" to the applicability of compulsory procedures are established in Article 298. These exceptions do not operate automatically. By a written declaration a State may opt out one or more of the following:

A. disputes concerning sea boundaries delimitations or those involving historic bays or titles;
B. disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service;
C. disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from compulsory jurisdiction under paragraphs 2 and 3 of Article 297. These refer to marine scientific research and fisheries in addition to law enforcement disputes which may also be excluded from the compulsory procedures; and
D. disputes in respect of which the U.N. Security Council is exercising the functions assigned to it by the Charter.

The exceptions and limitations can be put aside by agreement of the parties. Article 299, para. 1, provides that a dispute excluded from compulsory procedures in Article 297, and the exceptions allowed in Article 298, "may be submitted to such procedures only by agreement of the parties to the dispute". In respect to exceptions, Article 298, para. 2, further provides that "A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention."

Proceedings before the Tribunal may be instituted by a less formal means under the so called forum prorogatum. This occurs when an application by a party proposes to find the jurisdiction of the Tribunal only upon the subsequent consent given by the other
party. In this respect, Article 54, para. 5, of the Rules of the Tribunal states that the application “shall not however be entered in the List of cases, nor any action be taken in the proceedings, unless and until the party against which such application is made consents to the jurisdiction of the Tribunal for the purposes of the case.”

Independently of the choice of procedures under Article 287, the Tribunal has compulsory jurisdiction in two special instances: provisional measures and prompt release of vessels.

1. Article 290, para. 5 provides that pending the constitution of an arbitral tribunal to which a dispute has been submitted, any court or tribunal agreed upon by the parties, or, failing such agreement within two weeks from the date of the request of provisional measures, the Tribunal or, with respect to activities in the Area, the Sea - Bed Disputes Chamber, may prescribe provisional measures.

2. Under Article 292, on the question of prompt release of foreign vessels and crews detained by a State Party, if within ten days of the time of detention the parties have failed to agree on a court or tribunal and the flag State does not choose to bring the case to another court or tribunal accepted by the detaining State, the question of release may be submitted to the Tribunal by the flag State or on its behalf. This special jurisdiction applies to cases in which it is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release of vessels and their crews upon the posting of a reasonable bond or other financial security. Certain provisions of the Convention make provision for such prompt release: Article 73, para. 1, concerning arrest of foreign vessels by the coastal State to ensure compliance with its laws and regulations in the exercise
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of its sovereign rights to explore, conserve and manage the living resources of the EEZ; Article 220, paras. 6 and 7, regarding enforcement by coastal States of rules and standards for the prevention, reduction and control of pollution from vessels; and Article 226 on the investigatory powers of the coastal State and the port State concerning alleged violation of marine environmental laws.

*Jurisdiction emerging from other agreements.*

The jurisdiction of the Tribunal can also emerge from other international agreements. Article 288, para. 2, states that a court or tribunal which States Parties are free to choose for the settlement of disputes concerning the interpretation and application of the Convention "shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement." Furthermore, Article 21 of the Statute states that the jurisdiction of the Tribunal "comprises" all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". If this is the case, the extent of the jurisdiction of the Tribunal shall be governed by the provisions of the agreement.

The 1995 Agreement relating to straddling fish stocks and highly migratory fish stocks stipulates the application of the procedures for the settlement of disputes embodied in Part XV of the Convention. As a State which is not a Party to the Convention is allowed to become a party to the Agreement, the latter provides in Article 30, para. 1, that Part XV applies mutatis mutandis to any dispute between States Parties to it concerning its interpretation or application, "whether or not they are also parties to the Convention". The application of Part XV also extends to disputes concerning the interpretation or application of a subregional,
Hugo Caminos

regional or global fisheries agreement relating to these fish stocks to which the litigant States are Parties, including any dispute concerning the conservation and management of such stocks. Article 30 distinguishes between two situations: (a) States which are parties to both, the Agreement and the Convention, and (b) States which are parties to the Agreement but not to the Convention. In the first situation, any procedure accepted by the State concerned pursuant to Article 287 shall apply unless that State has accepted another procedure pursuant to Article 287 for the settlement of disputes under the Agreement (para. 3). In the second situation, the State "shall be free to choose one or more of the means set out in Article 287, paragraph 1 of the Convention for the settlement of the dispute under the Agreement (para. 4). The court or tribunal to which the dispute has been submitted is authorized, without prejudice of Article 290 of the Convention, to prescribe provisional measures to preserve the rights of the parties to the dispute or to prevent damage to the stocks in question. This implies, in accordance with Article 290, para. 3, that those measures may be prescribed, modified or revoked only at the request of a party to the dispute, and only after the parties have been given an opportunity to be heard. As stated in the aforementioned passage, the Tribunal can, in certain circumstances, prescribe, modify or revoke provisional measures pending the constitution of an arbitral tribunal to which a dispute is being submitted (Article 290, para. 5). However, a State Party to the Agreement which is not a Party to the Convention may declare that the Tribunal shall not be entitled to exercise that power without the agreement of such State (Article 31, para. 1 of the Agreement).

Another agreement falling under Article 288, para. 2, is the 1996 Protocol to the Convention of 29 December 1972 on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.
These examples suggest that international agreements related to the purposes of the Convention may become, in the future, an important source for the jurisdiction of the Tribunal. In accordance with Article 288, para 4, in the event of a dispute as to whether the Tribunal has jurisdiction, the matter shall be settled by decision of the Tribunal. (Compétence de la Compétence)

Advisory Jurisdiction

The Convention does not contain any provision conferring advisory jurisdiction of the Tribunal. However, any other agreement which confers jurisdiction to the Tribunal under Article 21 of the Statute may provide for the request of advisory opinion. This is the reason why Article 318 para. 1 of the Rules of the Tribunal states that "The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion."

The Seabed Disputes Chamber

The jurisdiction of the Seabed Disputes Chamber of the Tribunal constitutes one of the most innovative aspects of the Convention. The manner in which it shall exercise its jurisdiction is governed by the provisions of Part XI, Section 5, of Part XV and Annex VI of the Convention. The Chamber has contentious jurisdiction relating to disputes over activities in the Area and can also give advisory opinions.

Jurisdiction in personam on these disputes comprises not only those in which States Parties - which include the entities referred to in Article 305 that become parties to the Convention - are parties to the dispute. The Chamber shall also be open to the Authority, the Enterprise, State enterprises and the natural or juridical persons who possess the nationality of States Parties or
are effectively controlled by them or their nationals, when sponsored by such States or any group of the foregoing which meets the requirements established in the Convention (Article 37 of the Statute and Part XI, Section 5).

The jurisdiction ratione materiae of the Chamber over all disputes relating to activities in the Area is, with certain limitations, compulsory. The choice of means in Article 287 para. 1, does not apply to the jurisdiction of the Chamber. According to paragraph 2 of this provision “declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber. . . .”

The six categories of disputes subject to the jurisdiction of the Chamber are enumerated in Article 187. These are:

a. disputes between States Parties concerning the interpretation or application of Part XI and the Annexes relating thereto, which are to be interpreted and applied together as a single instrument with the 1994 Agreement relating to the implementation of Part XI. Although the Chamber is the main forum, under Article 188, para. 1, this category of disputes may be submitted (i) at the request of the parties to the dispute, to a special chamber of the Tribunal to be formed in accordance with Annex VI, articles 15 and 17; or (ii) at the request of any party to the dispute, to an ad hoc chamber of the Seabed Disputes Chamber to be formed in accordance with Annex VI, Article 36.

b. disputes between a State Party and the Authority concerning: (i) acts or omissions of the Authority or of the State Party which allegedly violate Part XI and its Annexes including the 1994 Agreement or rules, regulations and procedures adopted by the Authority in accordance therewith; or (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power.

c. disputes between parties to a contract, being States, the Authority, the Enterprise, State enterprises and natural or juridical
persons. These disputes concern the interpretation of a contract or plan of work and "acts or omission of a party to the contract related to activities in the Area and directed to the other party or directly affecting its legitimate interests." When these disputes concern the interpretation or application of a contract, the dispute may be submitted to commercial arbitration at the request of any party to the dispute. But a commercial arbitral tribunal shall have no jurisdiction to decide any question of interpretation of the Convention. When the dispute involves a question of interpretation of Part XI and the Annexes that question shall be referred to the Chamber for a ruling. This also applies when the decision of the arbitral tribunal depends upon a ruling of the Chamber. After the ruling the arbitral tribunal shall render its award in conformity with the ruling of the Chamber (Article 188, para. C, (a) and (b)). Disputes over the undertakings of the contractor referred to in Annex III, Article 5, para. 3 of the Convention concerning the transfer of technology are not mentioned in the 1994 Agreement that in Section 5, para. 2 of its Annex provides that the provisions of Annex III, Article 5 of the Convention shall not apply.

a. Disputes between the Authority and a prospective contractor that is sponsored by a State Party and has fulfilled the conditions established in Annex III of the Convention, concerning the refusal of a contract or a legal issue arising in the negotiation of a contract (Art. 187, (d)).

b. Disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party where it is alleged that the Authority has incurred liability as provided in Article 22 of Annex III. According to this provision the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations of the obligation of confidentiality placed upon the Secretary-General and the staff under Article 168, para. 2 (Article 187 (e)).
c. Finally, the Chamber shall have jurisdiction in any other disputes for which jurisdiction is specially provided in the Convention (Article 187 (f)). This could refer to the competence of the Chamber concerning the suspension of a State Party which has grossly and persistently violated the provisions of Part XI from the exercise of rights and privileges of membership of the Authority. This can be decided by the Assembly upon recommendation of the Council (Article 185, para. 1). However, no action may be taken until the Chamber finds out that the State Party has grossly and persistently violated those provisions (para. 2).

Two other categories of disputes arising from the 1994 Agreement would also fall within Article 187 (f): (a) disputes concerning the provisions of GATT, its relevant codes and successor agreements applicable to the production policy of the Authority, where one or more of the States Parties concerned are not parties to such agreements (Annex, Section 6, para. 2 (f) (ii) of the 1994 Agreement); and (b) disputes over the interpretation of the rules and regulations providing the basis of financial terms of contracts (Annex, Section 8, para. 1 (f)). In these two cases the 1994 Agreement provides for application of "the disputes settlement procedures set out in the Convention."

The compulsory jurisdiction of the Chamber is neither always exclusive nor without certain limitations.

As we indicated, a dispute between States Parties concerning the interpretation of Part XI and the annexes relating thereto, may be submitted to a special chamber of the Tribunal or to an ad hoc chamber under Article 188, paragraph 1 (a) and (b). Also, under certain conditions, contractual disputes may be submitted to commercial arbitration, though the latter has no jurisdiction to decide any question of interpretation of the Convention which remains within the compulsory jurisdiction of the Chamber.

The Convention establishes certain limitations concerning the jurisdiction of the Chamber with regard to decisions of the Authority. As has been observed; those limitations are aimed at
"reconciling the need to provide for effective judicial remedies against decisions of the Authority, and the need that the possibility to challenge the use of its discretion by the Authority should not be allowed". Along these lines, Article 189 states that the Chamber "shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority." This article further provides that in exercising its jurisdiction the Chamber "shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulation and procedures". Its jurisdiction shall be confined to: (a) deciding claims that the application of any of those rules, regulations and procedures in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under the Convention; (b) deciding claims concerning excess of jurisdiction or misuse of power; and (c) deciding claims for damages to be paid or other remedies to be given to the party concerned.

Advisory Opinions

The Convention confers upon the Chamber the jurisdiction to give advisory opinions. Under Article 191 these opinions can be given at the request of the Assembly or the Council "on legal questions arising with the scope of their activities." Also, according with Article 159, para. 10, the Assembly may request an advisory opinion on the conformity with the Convention of a proposal before the Assembly on any matter.

Closing Remarks

Which are the procedures chosen by States Parties under Article 287?
As of November 1997 the States Parties to the Convention were 122. Out of these only 19 have made declarations of choice. Indeed a very low figure. Eight expressed their preference for the Tribunal: Argentina, Austria, Cape Verde, Chile, Germany, Greece, Tanzania and Uruguay. Five have chosen the International Court of Justice: Algeria, the Netherlands, Norway, Oman, Spain and Sweden. Three have indicated both, the Court and the Tribunal: Finland, Italy and Oman. Egypt accepts an arbitral tribunal constituted under Annex VII. Cuba and Guinea - Bissau have not expressed a preference but have declared that they reject the jurisdiction of the International Court of Justice. The Government of Norway has also declared that it does not accept an arbitral tribunal under Annex VII.

What is the situation of those states which have yet to decide their choice?

Article 287, para. 1 provides that a State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII. Paragraph 2 further states that if the parties to a dispute have not accepted the same procedure, the dispute may only be submitted to arbitration, unless the parties otherwise agree.

In this manner, States Parties which have not made a choice of means still remain subject to the provisions on compulsory procedures entailing binding decisions. All the fora offered in Article 287 are competent to decide on disputes concerning interpretation and application of the Convention with the exceptions and limitations of Articles 297 and 298. The fact that a large number of countries from all the regions of the world have become Parties to the Convention accepting its jurisdiction without reservations illustrates that the system established in Part XV is indeed a step forward towards an international community under the rule of law.

Finally, I shall mention that the acceptance by States Parties to the Convention of the optional clause in Article 36, para. 2 of
the Statute of the International Court of Justice can pose some legal problems regarding the application of Article 287. On this question, I share the views expressed by Treves that acceptance of the optional clause can not be deemed to be equivalent in all cases neither to the acceptance of a binding procedure through a general, regional or bilateral agreement under Article 282 of the Convention - in which case that procedure shall apply in lieu of the procedures in Part XV - , nor to a choice for the Court under Article 287.
Endnotes


The Working Methods of the International Tribunal for the Law of the Sea

Gudmundur Eiriksson

Introduction

The International Tribunal for the Law of the Sea, when it began at its first session in October 1996 to develop its working methods, was by no means confronting an entirely clean slate. It was, of course, working within the parameters of its constituent instrument, the United Nations Convention on the Law of the Sea of 10 December 1982, which must now be read together with the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention. Furthermore, the Tribunal was conscious of the long-standing traditions relating to the judicial settlement of international disputes which could be identified in the work of the International Court of Justice and its predecessor, the Permanent Court of International Justice. More specifically, we were seeking to respond, within those parameters and taking account of those traditions, to the wishes of the international community, at the very least that portion of it which is represented among the States Parties to the Law of the Sea Convention. These wishes were made known in same cases in the results of the work of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea. In one relevant respect, these wishes were reflected in the Agreement of 28 July 1994, which in section 1, paragraph 2, of the Annex thereto provides that in order to minimize costs to States Parties

* Judge, International Tribunal for the Law of the Sea. This address is not a statement of the views of the International Tribunal for the Law of the Sea.
all organs and subsidiary bodies to be established under the Convention and the Agreement shall be cost-effective.

I plan to describe the working methods of the Tribunal as set out in the Convention itself and the three documents which the Tribunal adopted at the end of its organizational phase: the Rules of the Tribunal, adopted on 28 October 1997; the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, also adopted on 28 October 1997; and the Resolution on the Internal Judicial Practice of the Tribunal, adopted on 31 October 1997.

I will begin by expressing one general assessment. One of the problems which outside observers would note is that the mere size of the Tribunal, at 21 Judges, and other factors over which the Tribunal has little control (and I will point to some of them later) would militate against whatever attempts we may make to adopt efficient, cost-effective and user-friendly methods of work. I hope it will be apparent, however, that in the documents it has adopted the Tribunal has built in a great number of elements to achieve these goals. As some examples, I can mention at the outset, first, the statement in article 49 of the Rules that that proceedings be conducted without unnecessary delay or expense; secondly, the setting of specific time-limits for the various stages of proceedings; and, thirdly, the indication in article 68 of the Rules and in articles 2 and 3 of the Resolution on the Internal Judicial Practice that the Tribunal will take an early "hands on" approach in the proceedings. The decision to establish, already at this early stage of the work of the Tribunal, two standing special chambers, the Chamber for Fisheries Disputes and the Chamber for Marine Environment Disputes, goes in this direction also.

I will return to these themes in the course of my presentation. I would here stress, however, one element which is not apparent from the documents themselves but is a most important element of our working methods. I refer to a "spirit of collegiality" which
has come to characterize the work of the Tribunal. Already bound together by our common regard for the rule of law and our dedication to the law of the sea, the Judges of the Tribunal have over the course of the first year of work developed efficient working methods which might have been considered impossible in so large a body. With the firm but fair leadership of President Mensah and, in addition, in the work on the Rules, of Judge Treves we developed a method where the views of all Judges were aired and, each being prepared to respect the views of the others, we arrived at results which are truly a group product. I am sure, moreover, that President Mensah will not mind if I refer to his statement in another forum that this method continued into the deliberations on our first case, the M/V “SAIGA” case, in which the Tribunal delivered its judgment on 4 December 1997. This method must be nurtured and allowed to continue into the next phases of the Tribunal’s work.

Basic Instruments

The United Nations Convention on the Law of the Sea

The Convention includes a self-contained system for the peaceful settlement of disputes concerning the interpretation or application of the Convention.

The main elements of the system are contained in Part XV together with section 5 of Part XI, with detailed provisions contained in Annexes V to VIII. Annex VI is the Statute of the Tribunal.

As regards the provisions concerning the Tribunal, as a general rule questions of jurisdiction are contained in the main body of the Convention and organizational questions and questions of procedure are contained in the Statute. This division is not exact, however. For example, organizational questions or questions of
procedure which are of general application to the entire settlement of disputes system, such as the rules on experts (article 289) and on provisional measures (article 290), are to be found in Part XV.

Rules of the Tribunal

Article 16 of the Statute of the Tribunal provides that the Tribunal shall frame rules for carrying out its functions and, in particular, shall lay down rules of procedure. While many rules which regulate the Tribunal's functions are incorporated in the Convention itself and in particular in the Tribunal's Statute, it would not have been feasible to have included all the necessary rules therein. Nor would such an approach have been desirable, taking into account the need to adapt to changing circumstances. Therefore, the possibility was provided for the Tribunal to establish its own rules. This same approach had been followed in the case of the International Court of Justice.

The work of the Preparatory Commission referred to above was in many respects a continuation of the deliberations of the Law of the Sea Conference. The meetings of the Commission provided a forum where the agreements necessary for the elaboration of changes to the provisions of the Convention relating to deep seabed mining were negotiated. In the case of questions relating to the Tribunal, the deliberations were less politically charged but nonetheless an opportunity was presented to representatives of States which would eventually be bound by the settlement of disputes system of the Convention to make their views known on more detailed aspects of the Tribunal's work, not covered in the Convention itself.

Amongst the tasks given to the Preparatory Commission was the preparation of draft Rules of the Tribunal. The draft Rules elaborated by the Commission proved to have taken carefully into account the Rules of Court of the International Court of Justice,
with the necessary modifications reflected by the differences between the Court and the Tribunal. Specifically, the Preparatory Commission draft incorporated choices made among the various ways to deal with certain novel concepts. Examples include the rules with respect to applications for prompt release of vessels (article 292 of the Convention) and the treatment of non-State entities which could become parties to cases before the Tribunal.

The Tribunal decided to take the Preparatory Commission draft as basis for its deliberations on its rules. Indeed, after adopting provisionally some specific articles relating to elections and other organizational matters the Tribunal adopted the entire draft Rules provisionally for application if it should be called upon to deal with a case before it had completed the elaboration of its Rules.

The Tribunal adopted the Rules on 28 October 1997 after extensive deliberations during the first four sessions of the Tribunal. The Tribunal worked at its second, third and fourth sessions within a Working Group of the Whole chaired by Judge Treves who had prepared a working paper on the basis of a general discussion at the Tribunal’s first session. A comparison of the Preparatory Commission draft with the Rules adopted by the Tribunal would show that not all choices made by the Commission on novel aspects were endorsed by the Tribunal. Furthermore, even in more traditional areas, where precedents could be found in the Rules of Court of the International Court of Justice, the Tribunal adopted other approaches. In some cases, the Tribunal sought guidance in the practice of other courts, such as the Court of Justice of the European Communities and the European Court of Human Rights.

The leitmotif of the Tribunal in its deliberations was, to quote its Press Release of 3 November 1997, “that the Rules should ensure the efficient, cost-effective and user-friendly administration of justice—the goal being to serve the interests of justice
independently, fairly, affordably, with expedition and based on the rule of law”.

It should be noted that article 16 of the Statute refers generally to “rules” and in particular to “rules of procedure”. The Rules of the Tribunal as adopted are a combination of general rules, such as on organizational matters, and rules of procedure 

*stricto sensu*, and include enabling provisions for the elaboration of further more detailed rules. The rules of procedure are contained, generally, in Part III. This is not, however, a precise division: even in Part II some rules of a procedural nature are to be found. A further division in the Rules is between rules addressing the conduct of the parties to a case and rules on the conduct of the Tribunal itself, but here again the division is not precise. It is therefore more than axiomatic that the Rules must be read as a whole.

In general, the Rules, for reasons of economy of drafting, do not repeat provisions which are contained in the Statute or elsewhere in the Convention, although it might be argued that as a result the Rules are less “user-friendly.” There are exceptions to this approach where necessary to introduce adequately a specific question.

The Rules are drafted as a point of departure to apply to the Tribunal as a whole and as if a case were being dealt with by the Tribunal sitting as a whole. Some of the provisions are made applicable to chambers and to cases dealt with by chambers by means of cross-references or *mutatis mutandis* clauses. Although this approach is followed in the Rules of the International Court of Justice, some departure might have been justified by the special role of the Seabed Disputes Chamber in the work of the Tribunal, by certain special functions of the Chamber of Summary Procedure and by the decision by the Tribunal to establish already two standing chambers. However, it is not expected that the approach adopted will cause any insurmountable difficulties in
practice. In future sessions of the Tribunal the chambers will be called upon to consider whether further or modified rules would be required to carry out their functions. In such an event it would remain for the Tribunal itself to adopt such rules, the chambers having no independent right to adopt rules.

Guidelines concerning the Preparation and Presentation of Cases before the Tribunal

Article 50 of the Rules of the Tribunal provides that the Tribunal may issue guidelines consistent with the Rules concerning any aspect of its proceedings, including the length, format and presentation of written and oral pleadings and the use of electronic means of communication. The Tribunal has thus adopted a system similar to that of the International Court of Justice.

The Tribunal adopted its Guidelines on the basis of drafts prepared by Judge Chandrasekhara Rao with the assistance of Judge Alexander Yankov.

As is clear from their title, the Guidelines are not binding. They consist nearly exclusively of elements of a formal nature, for example the format of written pleadings, and I will not discuss them here in detail. Two elements deserve mention, however. First, the Guidelines make an appeal for succinctness, with respect to written proceedings in guideline 2 and with respect to oral proceedings in guideline 15. Secondly, guideline 11 gives a role to the Registrar of the Tribunal in ensuring that formal requirements of the Rules are satisfied, enabling him to return pleadings to a party for rectification.

Resolution on the Internal Judicial Practice of the Tribunal

Article 40 of the Rules of the Tribunal provides that the internal judicial practice of the Tribunal shall be governed by any
resolutions on the subject adopted by the Tribunal. The Preparatory Commission had drawn attention in this connection to the resolution adopted by the International Court of Justice on its judicial practice.

The Tribunal had begun preliminary discussions on the method to be followed in its deliberations already at its first session. At its fourth session it had before it a Working Paper prepared by Judge Anderson containing a draft resolution. Judge Anderson had drawn from the experience of the International Court of Justice but his proposals reflected his analysis of the practice of other international courts and national courts, including the Court of Justice of the European Communities, the European Court of Human Rights and the United States Supreme Court.

The Resolution on the Internal Judicial Practice of the Tribunal as adopted reflects certain desiderata identified by the Tribunal in its deliberations and reflected in its Rules. These include the desire for expeditious proceedings, the intention of the Tribunal to become engaged in a case at an early stage of the proceedings in order *inter alia* to provide guidance to the parties at later stages and the desire expressed to foster a tradition of collegiality. The resolution also reflects the situation pertaining at least in the initial stages of the Tribunal’s activities when the Judges other than the President will not be expected to be resident in Hamburg.

Under the resolution, the deliberations in a case before the Tribunal sitting as a whole with both written and oral proceedings would follow a five-stage pattern:

(a) within eight weeks after the closure of the written proceedings the President, on the basis of the pleadings and notes which each judge may prepare within five weeks of the closure of the written pleadings, draws up a working paper setting out *inter*
alia proposals on the issues to be discussed and decided by the Tribunal;

(b) before the opening of the oral proceedings, which take place as a rule within six months after the closure of the written proceedings (article 69 of the Rules), the Tribunal deliberates to exchange views concerning the written pleadings and the conduct of the case;

(c) after the closure of the oral proceedings judges have four working days to study the arguments; deliberations are then held during which the President may seek to establish the majority opinions; alternatively, the Tribunal may decide that each judge prepare a brief written note on the basis of which the deliberations are resumed;

(d) as soon as possible during the deliberations a Drafting Committee of five judges belonging to the majority is formed; the Drafting Committee prepares a first draft judgment within three weeks for circulation to the other judges who may submit comments within a further three weeks; the Committee then prepares a second draft;

(e) no later than three months after the closure of the oral proceedings the Tribunal deliberates on the draft judgment; the Tribunal carries out a first reading, after which the Drafting Committee prepares a revised draft judgment; the Tribunal then carries out a second reading after which it takes a vote on the judgment.

The foregoing procedure is modified in the case of shorter or accelerated proceedings or in cases heard by chambers. In the first case before the Tribunal, the MV Saiga case, the procedure was
in fact adapted to the time-limits established for cases dealing with the prompt release of vessels and crews.

I chose to deal in detail with the method of deliberations in order to underscore certain novel approaches. In summary, I can say that the Tribunal has adopted for itself a stringent time-table for the completion of its deliberations. I can speculate that the Tribunal’s confidence that it could meet the deadlines set was to some measure based on the fact that, unlike the International Court of Justice, it would be dealing with a relatively specialized field of law. I would hope that the discipline which the Tribunal imposed upon itself will be appreciated by parties to a case and influence positively their approach to proceedings before the Tribunal.

**General Description of Proceedings Before the Tribunal**

**Introduction**

Before turning to describe generally the proceedings before the Tribunal I would stress that the Tribunal cannot be expected to achieve efficiency and cost-effectiveness unless it plays a more active role vis-à-vis the parties in the organization of the proceedings than has been the tradition in international tribunals.

As for the general system, the Tribunal has adopted the traditional structure in international litigation involving, as a rule, two stages: a written stage where the parties present memorials and counter-memorials, and in some cases replies and rejoinders; and an oral stage where the Tribunal is addressed by the agents, counsel and advisers of the parties.

From this general system there are several exceptions, such as in proceedings before chambers and in some incidental proceedings. There is a hint, for example, in article 109(3) of the Rules of the Tribunal that oral proceedings need not be the rule in
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proceedings before the special chambers mentioned in article 15 of the Statute.

Written proceedings

As for the written proceedings, the Tribunal was concerned to find some way to keep pleadings as short as possible. Nonetheless, the Tribunal did not lay down in the Rules of the Tribunal any specific limits on the length of pleadings although article 50 envisages that the Tribunal may issue guidelines on the length of written (and oral) pleadings. On the other hand, an appeal for succinctness is made, as indicated above, directly in the Guidelines and, with more subtlety, in article 60 of the Rules which leaves to the Tribunal the discretion as to whether there should be more than one round of pleadings in the cases brought by way of an application. Similarly, in article 61 of the Rules, dealing with cases brought by the notification of a special agreement, the Tribunal may decide to depart from the arrangements agreed by the parties as to the number and order of the written pleadings. The Tribunal will not as a rule allow replies and rejoinders in such cases (article 61(3) of the Rules).

The main incentive for expeditious proceedings is the general rule set out in article 59(1) of the Rules that the time-limit for each pleading not exceed six months. Extensions are given only if the Tribunal, to use the terms of article 69(2) of the Rules, "is satisfied that there is adequate justification".

Oral proceedings

As for the oral proceedings, the Tribunal has adopted, in article 69(1) of its Rules, the general rule that oral proceedings shall open within six months of the closure of the written
proceedings. Exceptions are made only if the Tribunal is satisfied that there is adequate justification for deciding otherwise.

As for the scope and nature of the oral proceedings, article 75 of the Rules specifies that the oral statements shall be as succinct as possible and that they be directed to the issues that still divide the parties and not go over the whole ground covered by the written pleadings or merely repeat the facts and arguments they contain.

Article 76 of the Rules provides that the Tribunal may indicate points which it would like the parties specially to address or on which it considers that there has not been sufficient argument.

In implementing these provisions the Tribunal can significantly affect the proceedings. It can indeed be wondered whether, in a case with two rounds of written pleadings, any more remains to be said. Thus the parties can in the first place by exercising self-discipline affect their own costs. The costs to the Tribunal consist of interpretation and additional costs to make available the transcripts of the pleadings, which eventually form part of the published record but which are made available to the parties in order for each party better to prepare its responses to the pleadings of the other party.

The limited experience in the first case before the Tribunal shows that the Tribunal is prepared to play an active role in the organization of the oral proceedings.

**Specific Topics**

I shall now turn, not in any particular order, to a number of detailed aspects of the Tribunal’s procedure which, I think, will together give a good idea of the approach the Tribunal has followed.

**Languages**
The Rules of the Tribunal provide that the official languages of the Tribunal are English and French. Behind this simple statement lies a number of political and other considerations. French and English are also the official languages of the International Court of Justice. This is as prescribed by the Statute of the Court. The Law of the Sea Convention is, on the other hand, silent on this question, leaving open, as least theoretically, the possibility of the Tribunal adopting some other rule. Understandably, this gave rise to considerable discussion in the Preparatory Commission, during which some resentment of States which do not have French or English as their official languages surfaced.

The only direct consequence of the discussion in the Preparatory Commission on the possible use of third languages, a discussion which was carried over into Meetings of the States Parties, is found in article 64(4) of the Rules of the Tribunal which provides that if a party chooses to use Arabic, Chinese, Russian or Spanish in its written pleadings, the Tribunal’s decision will be translated into that language at no cost to the parties.

As regards third languages more generally, the Rules allow parties to submit pleadings in a language other than French or English provided that they are accompanied by a translation into either language. Similarly, a party may use a third language in the oral proceedings, in which case the party must arrange for interpretation into French or English.

It cannot be denied that the Tribunal is concerned about the implications of working fully in two languages. Ideally, at least "working translations" of all documents submitted to the Tribunal would be provided as well as simultaneous interpretation of all deliberations of the Tribunal. The associated costs can be great and, moreover, providing translations and interpretation inevitably delays proceedings. Fortunately, the Tribunal, in the spirit of "collegiality" to which I referred above, has found ways to reduce
the costs and potential delays by adopting flexible methods in its informal deliberations. That these methods have not detracted from the quality of the Tribunal’s work can be seen, for example, from the fact that the Rules of the Tribunal are truly a bilingual document. In their elaboration care was taken to ensure proper use of terms in both English and French, in some cases involving in-depth study of legal terminology. Furthermore, the experience in the Tribunal’s first case, in which pleadings were in both English and French, shows that the Tribunal was able to comply with its formal requirements without any delay associated with translation of documents.

Role of the President

It can be seen that there are numerous circumstances referred to in the Rules and other basic instruments where the powers of the Tribunal on procedural questions are left to the President when the Tribunal is not sitting. This is the same system as prevails in the International Court of Justice. However, because of the present working pattern of the Tribunal it can be expected that these powers will be exercised extensively by the President.

Agents

Article 53(1) of the Rules provides that all parties shall be represented by agents. In the Preparatory Commission draft a different status was envisaged on the one hand for the representatives of States or State-like parties, the traditional parties before international tribunals, and, on the other hand, for private parties involved in seabed activities. The Tribunal opted
for setting forth the same system for all parties. There is, however, nothing which precludes a private party involved in a case from acting as his own agent.

**Chamber of Summary Procedure**

The Statute of the Tribunal provides, as does the Statute of the International Court of Justice, for the establishment of a five-member Chamber of Summary Procedure. Such a chamber, as its name suggests, would be called upon to act more expeditiously than the Tribunal acting as a whole. In the case of the International Court of Justice the use of the Chamber requires in each instance the consent of the parties and no case has ever been referred to it. In the case of the Tribunal, the consent of the parties is also required with, however, one exception, the prescription of provisional measures in accordance with article 25(2) of the Statute. As implemented in article 91 of the Rules, if the President ascertains that at the date fixed for a hearing on provisional measures a quorum of the Tribunal would not exist, he would convene the Chamber of Summary Procedure to act on behalf of the Tribunal. It can also be pointed out that in the case of proceedings for the prompt release of vessels, article 112(2) of the Rules draws attention to the option of using the Chamber. In the *M/V "SAIGA"* case, in fact, the applicant requested the use of the Chamber, a request to which the Respondent did not consent.

In the light of the above and the Tribunal’s situation in its first years of work, I would not preclude, unlike the situation in the International Court of Justice, that extensive use may be made of the Chamber of Summary Procedure.

"*Transparency*"
The Tribunal has given careful consideration to ways to respond to what it sees as the wishes of the international community for more transparency in the way international institutions work.

First, the Tribunal has set in train, though not yet finalized, plans to make its basic documents and decisions made available through electronic means as early as possible. For the moment, the Tribunal has benefited from the facilities of the Office of Legal Affairs of the United Nations.

More specifically, article 67 of the Rules provides as a general rule that written pleadings be made available as soon as possible after their filing to States and other entities entitled to appear before the Tribunal which request them and, furthermore, that they be made accessible to the public on the opening of the oral proceedings or even earlier if the Tribunal so decides. In the case of advisory proceedings, article 134 of the Rules provides that documents be made accessible to the public as soon as possible after they have been presented to the Tribunal. This earlier availability of documents, as compared, for example, to the situation in the International Court of Justice, in addition to responding to the desires for greater transparency, fulfils certain procedural requirements related to possible intervention of third parties in proceedings.

Early involvement of the Tribunal in proceedings

As I noted above in dealing with the internal judicial practice, the Tribunal has institutionalized in article 68 of its Rules a meeting for so-called "initial deliberations". It is at this stage, following the closure of the written proceedings, that the judges first meet, in private, to exchange views, including on how to organize the subsequent proceedings. A certain number of corollary provisions are set out, for example in article 17 of the
Rules, which establish this initial meeting as the point in time when the Tribunal is constituted for a particular case. By comparison, the Rules of the International Court of Justice provide for a later time, the opening of the oral proceedings. This decision of the Tribunal reflects its intention to take an early “hands-on” approach to its proceedings.

*Intervention*

The Tribunal has inherited, with some differences, the system set out in the Statute of the International Court of Justice on possible intervention of third parties in proceedings before it. The International Court of Justice has in recent years had the occasion to deal with some of the complicated and controversial questions which can arise. It should, therefore, be no surprise that the Tribunal took a great deal of care in preparing the provisions in its Rules on intervention.

One of the differences between the rules applicable to the International Court of Justice and those set out in the Statute of the Tribunal is found in article 31(3) of the Tribunal’s Statute, which states specifically that decisions of the Tribunal are binding on intervenors. Thus one of the options which the International Court of Justice has availed itself of is not open to the Tribunal. But a major difference relates more to potential difficulties in practice, arising from the fact that the Tribunal will in most if not all of its cases be interpreting the Convention and consequently intervention “as of right” under article 32 of the Tribunal’s Statute would theoretically be open at present, there being 123 States Parties to the Convention, to up to 121 States.

The Tribunal has not dealt in its Rules with all foreseeable problems which could arise in a given case but has taken steps to obviate some of them. One such effort is found in articles 99 and 100 of the Rules which set, as a general rule, short time-limits for
parties to indicate their desire to intervene. The decision I referred to above to make proceedings available early is linked to this rule. Also the Tribunal would appear to have endorsed the view that intervenors do not acquire the status of the original parties. Under articles 103(4) and 104(3) of the Rules they do not have the right to appoint judges ad hoc or to object to discontinuance of a case.

Finally, it can be pointed out that the question of the "jurisdictional link" in the case of intervention under article 31 of the Statute of the Tribunal, a question which has featured prominently in the jurisprudence of the International Court of Justice, is dealt with in article 99(3) of the Rules of the Tribunal which provides that an intervenor need not have chosen under article 287 of the Convention to be subject to the Tribunal's jurisdiction.

*Judges ad hoc*

Article 17 of the Statute of the Tribunal sets out the circumstances under which a party to a case has the right to choose a judge ad hoc to sit on the bench for the purposes of the case. This article is modelled on Article 31 of the Statute of the International Court of Justice and, as such, was designed to deal with parties which are States. The Tribunal accordingly found it necessary to take certain decisions relating to its application to parties which are not States. These are reflected in article 22 of the Rules of the Tribunal.

First, as regards international organizations which can become parties to the Convention in accordance with Annex IX, that is, organizations such as the European Community, the Tribunal decided to treat judges of the nationality of a member State of such an organization as if they were nationals of the organization for the purposes of the right of a party to choose a judge ad hoc. It should be noted that this decision does not apply to other
international organizations which could be parties to a case. Secondly, in the case of natural or juridical persons or state enterprises, judges of the nationality of a sponsoring State of such an entity (see article 153(2)(b) of the Convention) will be treated for the purposes of the judge *ad hoc* system as if they were "nationals" of the entity. Thirdly, following upon these decisions, the Tribunal decided that a proper application of article 17 of the Statute would result in a party which is not a State not having an independent right to choose a judge *ad hoc* (unlike the situation under article 17(3) of the Statute of a party which is a State). Rather, its right would depend on the situation of the other party or parties. It would be entitled to choose a judge *ad hoc*, first, if the other party is a State Party and either: (a) there is upon the bench a national of that State or, in the case of an international organization, a national of a member State of the organization, or (b) the State Party has itself chosen a judge *ad hoc*. Secondly, such a non-State party could choose a judge *ad hoc* if there is upon the bench a judge of the nationality of the sponsoring State of one of the other parties.

*Revision and interpretation of judgments*

Articles 126 to 129 of the Rules set out a procedure for the revision and interpretation of judgments.

As for revision, unlike the situation in the International Court of Justice, where the Statute of the Court (Article 61) provides for the Court’s power to revise its decisions and sets the conditions for its exercise, there is no provision in the Convention setting out this power. In adopting the system applicable in the International Court of Justice, the Tribunal was treating the power to revise judgments as implicit in its judicial function. This view was apparently shared by the delegates of States Parties in the Preparatory Commission.
The provisions on revision and interpretation follow generally those applicable to the International Court of Justice, found in, on the one hand, in the Statute of the Court and, on the other hand, in its Rules. The Tribunal decided, however, to deal more elaborately than the comparable provision of the Rules of the International Court of Justice (Article 100(1)) with the procedure to be followed in cases of revisions and interpretations of judgments which had been given by chambers. Article 129(2) of the Rules of the Tribunal provides that, in the case where the judgment had been given by a chamber, the request for revision should, if possible, be given by that chamber. No difficulty would arise where the chamber is still able to act in its original composition or where the respective chamber still exists in a different composition, which would be the case as regards the Seabed Disputes Chambers and the Chamber of Summary Procedure and, for the period of their mandate, standing special chambers provided for in article 15(1) (of which, it will be recalled, two have been formed, the Chamber for Fisheries Disputes and the Chamber for Marine Environment Disputes). In other cases the chamber would have to be reconstituted, again no problem in the case of standing special chambers and an ad hoc chamber of the Seabed Disputes Chamber referred to in article 188(1)(b) of the Convention. Where, on the other hand, the constitution of the chamber requires approval of the parties which cannot be obtained, article 129(2) of the Rules provides that the request for interpretation or revision shall be dealt with by the Tribunal.

Advisory opinions

Article 191 of the Convention provides that the Assembly and Council of the International Seabed Authority may request an advisory opinion of the Seabed Disputes Chamber. Articles 130 to
137 of the Rules apply to such requests. The Tribunal also decided to deal, in article 138 of the Rules, with the possibility of requests for an advisory opinion being made to the Tribunal pursuant to an international agreement related to the purposes of the Convention. While there are at present no such agreements, the Tribunal thought it appropriate to set out the rules which would apply were such a request to be submitted.

Conclusion

I hope that the foregoing will serve to demonstrate that the Tribunal has achieved some success in structuring a system which be conducive to efficient and cost-effective administration of justice or, to quote again article 49 of the Rules, that proceedings will be conducted without unnecessary delay or expense. The limited experience of its first case augers well for the future but of course only time and the experience of many more cases will show how successful the Tribunal has been in its efforts.