ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

SAN FRANCISCO, APRIL 21-23, 1977

PANEL ON "THE LAW OF THE SEA CONFERENCE AND ITS AFTERMATH"

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INTRODUCTION

The last time I appeared on a panel discussion under the aegis of the American Society of International Law was in the spring of 1971. The subject of the panel discussion was "Conflicting Approaches to the Control and Exploitation of the Oceans". In 1971, we had barely begun the preparations for the Law of the Sea Conference and I was still engaged in attempting, at one and the same time, to defend certain unilateral action taken by Canada while participating actively in a series of multilateral law-making exercises. Much has happened since then in the field of the law of the sea. To illustrate the nature and extent of some of these changes, I need only refer to a personal but not confidential letter dated April 14, 1976 I wrote to the then Chairman of the USA Delegation to the Third United Nations Conference on the Law of the Sea which reads in part -- and I would not consider it appropriate to reveal the whole of that letter --

> "I have read with interest the text of the statement of President Ford made at the time of his signature of the Bill to extend USA fisheries jurisdiction to 200 miles. This is a historic moment... The purpose

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of this letter is not to protest the action of the USA but rather to say 'welcome to the club'."

I attached to that letter a copy of a statement I had made in the First Committee of the United Nations General Assembly on December 4, 1970 in the course of which I had presented a vigorous defence of state practice as a legitimate means of developing customary and conventional international law, and I invited the Chairman of the USA Delegation to feel free to draw upon my statement as he might see fit. I made clear, of course, that I did so with tongue in cheek.

I have not changed my personal views since 1971 as to the importance and legitimacy of state practice as a necessary part of the process of the development of international law. I remain, however, deeply committed to the multilateral law-making process as the preferred method of developing international law, and my comments will accordingly be directed primarily to the implications for the international community of the successes, failures and future prospects of the United Nations Conference on the Law of the Sea. On the subject of unilateral action, I wish only at this stage to reiterate my long-standing opposition to the thesis that all unilateral action is equal but some is more equal than others. I shall, moreover, endeavour also to grapple with the thorny issue of the extent to which unilateral action can, depending both upon its nature and its timing, have either a beneficial or destructive effect upon the multilateral law-making efforts underway within the United Nations.

THE POLITICAL PERSPECTIVE

I have expressed the view on a number of occasions that the Third United Nations Conference on the Law of the Sea is more analogous to the process that occurred approximately 350 years ago at the time of the classic debate between Grotius and Seldon than it is to the United Nations Law of the Sea Conferences of 1958 and 1960. The rationale behind this conclusion is not merely the obvious parallel in that Seldon and Grotius were addressing the very problem which has been at the heart of the present Conference, namely the pros and cons of wide coastal jurisdiction as compared to a narrow marginal belt, but rather that the process in both cases partake much more of progressive development of the law -- basic law reform, involving the creation of new concepts - than of codification of pre-existing rules of international law. In 1958 and 1960, the international community undoubtedly achieved a considerable measure of progressive development of the law, particularly in the case of the Conference on the Continental Shelf, and with respect also to some issues touched on in the Fisheries and Territorial Sea Conventions. The 1958 Conference was, however, in essence, concerned with codification of the law of the sea, while the 1960 Conference failed in its attempt at progressive development on the issues of the breadth of the territorial sea and a contiguous fishing zone.

So much has been said and written about the new principles emerging from the Conference on the Law of the Sea that I do not propose to dwell on them in any detail. The point of importance is, in my view, that the broad

outlines of the political settlement are now evident as a result of the creation and acceptance of a number of radical new legal concepts, including, in particular, the common heritage of mankind, the economic zone, transit passage and the archipelagic state. Admittedly, some basic elements in the comprehensive political foundation of the proposed new Constitution of the Oceans are not yet in place. I refer, in particular, to such problems as the rights of the landlocked and the so-called geographically disadvantaged states, and the overall package of trade-offs relating to the seabed regime. Nevertheless, in the light of the negotiations on the landlocked/disadvantaged question at the last Session of the Conference and subsequent developments in the informal Evensen Group discussions as recently as last month in Geneva on the seabed regime, it is possible to say that at last the basis for the political settlement exists, if states are prepared to seize the opportunity to concretize it in treaty form before it is too late. It goes without saying that, in spite of the tremendous progress made in elaborating a political framework for an overall settlement, we are very near that point in time -- the point of no return -- beyond which the Conference cannot be salvaged. As I have just suggested, the question of timing and the events which may affect the fate of the Conference are issues to which I propose to return.

There is no doubt that the basic political accommodations (and I use this phrase as including the underlying economic and military issues) must be based upon a 12 mile territorial sea, coupled, probably, with a further 12 miles of contiguous

zone for certain purposes; a 200 mile economic zone comprising sovereign rights over the living and non-living resources of the water column and the seabed, coupled with limited and defined coastal rights with respect to the preservation of the marine environment and control of scientific research; agreement on the definition of the outer edge of the continental margin where it extends beyond 200 miles, coupled with a revenue sharing formula with respect to the revenue derived from the resources of the shelf between 200 miles and the edge of the margin; guarantees of freedom of navigation in the economic zone and in international straits; the acceptance of the archipelagic state concept, coupled with a precisely defined regime for sea-lanes through international straits traversing the waters of archipelagic states; and the elaboration of the concept of the common heritage of mankind in the form of concrete treaty provisions. I propose to deal at a later stage with the political elements which might comprise the seabed "package". I suggest, however, that, for the first time, it is now possible to perceive the outlines of a possible agreed seabed "package".
I am quite sure that none of this is new to anyone here, although the elements of the seabed "package" have only recently begun to emerge clearly. I do not propose to dwell further on the basic elements required for a comprehensive political settlement, but to turn instead for a moment from the political perspective to the more strictly legal to provide some further background perspective/before discussing the prospects of the Conference and the implications of its success or failure.

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THE LEGAL PERSPECTIVE

It is no secret that the Drafting Committee of the Third Law of the Sea Conference has never met except for formal organizational purposes. It is a curious reflection of the political pressures at play in the Conference that, although intensive negotiations took place concerning the composition of the Drafting Committee, and it even proved necessary ultimately for its Chairman to be elected instead of appointed by one of the geographical groups, not one provision of the Revised Single Negotiating Text has yet been referred to the Drafting Committee. The reason is not hard to find. No-one is prepared to agree that any part of the text be referred to the Drafting Committee until all the inter-related issues are settled. Of course, virtually all of the issues are inter-related in terms of the political trade-offs entailed and many are also substantively inter-related. As a consequence, rather more attention has been devoted to the negotiation of the basic political accommodations than to the legal form and content of the formulations resulting from these negotiations.

A further curiosity of the Conference is that while it has proven impossible again and again to set up formal working groups charged by the Conference with the negotiating or drafting of the provisions of the proposed treaty, the Conference agreed, eventually, to a procedure far more radical, which is one unique in the law-making experience of the United Nations, namely the delegation to each of the Chairmen of the three Committees of the task of drafting negotiating texts

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covering the subject matter within the mandate of their respective committees. The Conference went further and accepted the assumption by the President of the Conference of the difficult task of drafting "Part Four" on the settlement of disputes. The role of the three Chairmen and the President of the Conference might be likened to that of the special rapporteurs appointed by the International Law Commission, although the differences may be more apparent than the similarities. Thus, while any codification exercise undertaken by the International Law Commission raises political, economic and, occasionally, military issues of varying importance and complexity, the test applied in determining whether any subject is "ripe for codification" by the Commission is, increasingly, the extent to which the exercise is primarily legal rather than political. In the case of the Law of the Sea Conference, the three Chairmen and the President have had to attempt to reflect or develop the outlines of broad generalized accommodations on a whole range of sensitive political, economic and military issues, while couching their proposed solutions in legal formulations. At some stage in the Conference, however, it will be necessary to examine every one of the nearly 500 draft treaty provisions from a strictly legal point of view.

Presumably this task will fall to the Drafting Committee. The mandate of the Drafting Committee specifically excludes, however, any re-negotiation of any issue and is confined to "drafting points". Yet there are a wide range of unsettled legal issues going well beyond drafting points which must eventually be addressed by the Conference if we

are to build into the new Constitution of the Oceans the necessary certainty of the law required to avoid unnecessary conflicts. I propose, therefore, to make a necessarily cursory and abbreviated analysis, for illustrative purposes only, of some of the legal implications raised by certain basic provisions of the Revised Single Negotiating Text. In order to maintain my neutrality as Chairman of the Drafting Committee, I shall refrain from attempting to suggest any solutions, but shall merely touch on some of the unresolved legal issues raised by the Revised Single Negotiating Text, resulting from obscurity of language, contradictory provisions, internal inconsistencies, gaps in the law or an inadequate legal foundation, in some cases, for effective third-party settlement procedures.

Internal Waters

It is interesting that there are no Articles in the RSNT dealing directly with the regime of internal waters. Presumably the explanation is the obvious one that the Geneva Convention on the Territorial Sea and the Contiguous Zone, which represents the point of departure of the RSNT on some of the traditional rules of international law, also did not deal directly with the regime of internal waters. The regime must be determined by inference from Article 1 of Part II of the RSNT which confirms that the coastal state has sovereignty over internal waters. Article 7 merely provides that waters on the landward side of the territorial sea baselines form part of the internal waters of that state. The Article also

maintains the previous rule in the 1958 Territorial Sea Convention whereby waters other than those which are historic which are enclosed as internal by the straight baseline system and which had previously been considered as high seas or territorial sea are subject to a right of innocent passage. Interestingly, Article 5,on Reefs,lays down that, in the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea (and thus the outer limits of internal waters) shall be the seaward low water line of the reef.

No major changes are proposed with respect to the regime of internal waters except the adoption of a novel approach involving the possibility of "moveable baselines" in Article 6(2) to cover problems of deltas where the baseline may actually physically alter every so often over a period of time. (The moveable baseline approach would apparently not apply to other situations in which the physical delimitation, as distinct from the legal, may vary, as in those areas in the Arctic or Antarctic where it is not possible to say with certainty exactly where the land area ends. *This brief review suggests that no basic changes are proposed in the regime for internal waters, but this is not necessarily so. The provisions on international straits, which I shall discuss later, may have important implications with respect to the regime of internal waters since

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* While the SNT left open this possibility, the change of the word "or" to the word "and" in the RSNT has closed it off.

they could have the effect of altering the status of waters presently regarded as internal. Other Articles found in Part III dealing with port jurisdiction may also have indirect implications for the regime of internal waters, but I do not propose to deal with this point except to note it in passing.

STRAIGHT BASELINES

The basic rules laid down by the Geneva Convention on the Territorial Sea and Contiguous Zones on the use of straight baselines are maintained in the Revised Sirgle Negotiating Text except for the changes relating to reefs and deltas previously referred to and a further seemingly minor change which may be of considerable importance to some countries. The pre-existing rule prohibiting the drawing of straight baselines to and from low tide elevations,unless light-houses or similar installations which are permanently above sea level have been built on them, is now subject to the exception "in instances where the drawing of baselines to and from such elevations have received general international recognition". Another potentially important addition to the pre-existing rule, in the light of the controversy which has arisen in the Law of the Sea Conference as to the status of the economic zone, is the inclusion of the phrase "the high seas or the exclusive economic zone" in the prohibition embodied in Article 6(6) of the RSNT against applying the straight baseline system in such a manner as to cut off the territorial sea of another state. The most significant changes to the regime of the straight baseline system, however, occur in the provisions on archipelagic states, a subject I propose to discuss separately.

HISTORIC BAYS

It is worth noting in passing that Article 9 maintains the pre-existing Geneva Convention rules concerning the 24 mile "semi-circle" closing line for bays as well as pre-existing exemption of "historic" waters, including bays, and the pre-existing exemption of cases where the straight baseline system is applied. It is worth noting also that Article 14 on the delimitation of the territorial sea between states with opposite or adjacent coasts does not apply to cases of "historic title" or "other special circumstances". This maintenance of the pre-existing rule is of particular interest in light of the significant changes proposed by the RSNT concerning delimitation rules for the continental shelf. A point of passing interest is that there appears to be no recognition of the possibility of historic claims to the shelf, a point which has not been addressed in the Conference except indirectly in the context of "acquired rights".

TERRITORIAL SEA

Articles 2 to 31 of Part II of the RSNT all touch on various aspects of the regime of the territorial sea. As expected, the breadth is fixed at a "limit not exceeding 12 nautical miles", a provision which may now be in accord with customary international law, although there are some who would argue the contrary. It is commonly assumed that the 12 mile territorial sea is one of the innovative concepts of the RSNT but, even from a strictly legal point of view, this conclusion does not hold up. Claims to a 12 mile territorial

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sea go back many years, although only in relatively recent times has it gained widespread acceptance. I suggest, however, and I emphasize that I do so on a purely personal basis, that if we were really attempting a logical and comprehensive development of the law of the sea then we might well fix on a 3 mile breadth for the territorial sea/for international straits and taking in light of the complications of a 12 mile sea into account the widespread measure of agreement at this time on a contiguous zone and an economic zone to provide the coastal state with the necessary right of self protection. The 12 mile territorial sea may represent a kind of anachronism reflecting the old-fashioned "either-or" approach whereby all bodies of salt water must be subject either to total sovereignty or total freedom. It is interesting to speculate as to the effects upon the Conference of a serious proposal to fix the territorial sea at 3 miles.

Articles 16-25 elaborate in some detail on the concept of innocent passage to which the territorial sea has always been subject. The articles are of considerable legal significance whether one argues that they merely reflect pre-existing law on such questions as the right of the coastal state to protect its security or its environment or, alternatively, that they represent a development of the law. For example, the coastal state security rights are spelled out in some detail and include one sub-paragraph, namely Article 18(2)h, which lists amongst the acts incompatible with innocent passage "any act of willful and serious pollution, contrary to the present convention". It is significant in the light of some of the legislative history of the environmental law principles finding their way into the RSNT that the definition of a state's security

interests now include the protection of the marine environment. (Less surprisingly, marine scientific research appears to be prohibited by virtue of the same rubric, a provision seemingly inconsistent in principle with the provisions in Part III of the RSNT relating to the regulation of scientific research in the economic zone,where the yardstick for protection of the interests of the coastal state is economic rather than security.)

It is difficult, however, to determine the precise legal effect of the environmental element in the definition of the right of innocent passage in the light of the corresponding sub-paragraph in Article 20(1)f which lays down the broad right of the coastal state to make laws and regulations relating to innocent passage in respect of "the preservation of the environment of the coastal state and the prevention of pollution thereof". Does the limitation of acts defined as incompatible with innocent passage to "willful and serious pollution" prevent a coastal state from legislating, for example, with respect to accidental pollution or pollution which is not "serious" or can it legislate but not enforce,as in the case of international straits. It is not easy to thread one's way through the legal issues raised by these two articles.

Article 20(2) is of particular interest in terms of the change it effects in the pre-existing rule. It not only prohibits unilateral imposition by coastal states of construction, design, manning and equipment standards, but prohibits also the imposition of any standards on "matters regulated by generally accepted international rules unless specifically authorized by such rules". This article would also appear to be in direct contradiction to Article 21(3)

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of Part III which provides that coastal states may "in the exercise of their sovereignty establish national rules and regulations for the prevention, reduction and control of marine pollution from vessels". Both the USA and Canada have pressed and continue to press for the deletion of Article 20(2) and even those states which insist on its retention agree that it may go too far in prohibiting coastal standard setting on other "matters",since the language is so broad that it would prevent, for example, coastal fishing standards. Presumably, if this article is accepted as is, then the USA would be obliged to amend its Ports and Waterways Authority Act and other countries, including the USSR and Canada, would also have to amend their existing legislation. I do not make this reference to score a political point but merely to underline that, from a strictly legal point of view, this provision either erodes the pre-existing sovereignty of the coastal state in its territorial sea or, alternatively, the legislation of the USA and the USSR and Canada is contrary to existing international law. The legal reasoning behind the Article is, of course, the well known "patchwork quilt" argument which, ironically, is now being applied against some of its authors as well as one of its opponents.

Articles 26-31 dealing, inter alia, with criminal and civil jurisdiction and defining warships and immunities breaks new ground of some considerable significance in providing for flag state responsibility going hand-in-hand with flag state jurisdiction. I refer to Article 30 of Part II which embodies the innovative, imaginative and, I suggest,

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progressive concept that the flag state shall bear international responsibility for any loss or damage to the coastal state resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal state concerning passage through the territorial sea or with the provisions of the convention or other rules of international law. Admittedly, Article 31 limits the effect of this provision by spelling out the sovereign immunities of such ships from legal process, but this does not lessen its legal significance. A parallel Article applying the same principle to international straits is found in Article 40(1)5 of Part II. It is curious that these provisions have attracted relatively little attention in the Conference or outside it, neither as an important element in the trade-off on the territorial sea and on straits nor as the reflection of a new approach to environmental law and, indeed, flag state jurisdiction. It should be noted, of course, that there are no similar articles applicable to the waters of the economic zone. Of course, law is not logic.

On one final point, it is curious that the pre-existing median line rule concerning delimitation of the territorial sea between states with opposite or adjacent coasts is maintained in Article 14 of Part II, although, as I shall point out later, a new rule is suggested for the delimitation of opposite or adjacent economic zones and continental shelves, an approach which produces interesting legal consequences.

CONTIGUOUS ZONE

Article 32 setsout the RSNT provisions on contiguous zones. From a strictly legal point of view, the most interesting question is perhaps the political decision reflected in the article that some states consider it necessary to have a contiguous zone to prevent and punish infringement of their customs, fiscal, immigration or sanitary regulations in their territory or territorial sea. A further point of interest is that the contiguous zone may not extend beyond 24 miles, a distance which appears to have no particular significance except as a multiple of the figure 12, which is the proposed breadth of the territorial sea.

It is worth noting also that there are no provisions concerning the delimitation of contiguous zones as between states with opposite or adjacent coasts. The question arises whether the delimitation of the lateral limits of the contiguous zone would follow the delimitation lines of the territorial sea, that is to say the median line, because of the intimate legal interrelationship between the contiguous zone and the territorial sea and their linkage of legislative history, or whether, because the contiguous zone may in law form a part of the economic zone, the new delimitation rules for the economic zone will have application to the contiguous zone. Perhaps it will prove necessary in some parts of the world for states to have a contiguous zone in order to enable lines to be drawn joining the lateral limits of the territorial sea with the lateral limits of the economic zone in cases where different delimitation rules are used for each.

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Alternatively, perhaps no-one has thought through the legal implications on these issues and changes may be required.

Archipelagic States

The new rules concerning archipelagic states, while still under negotiation, are of special significance in light of the long-standing controversy concerning the legal claims of archipelagic states. Article 1(1) provides that the sovereignty of a coastal state extends beyond its land territory and internal waters "and in the case of an archipelagic state, its archipelagic waters" over an adjacent belt of sea described as the territorial sea. Article 121 specifically provides that the sovereignty of archipelagic states extends to the air space above and to the seabed, subsoil and resources below the archipelagic waters. Other provisions laying down the regime for the archipelagic state concept are found in Articles 118 to 127 of Part II of the RSNT. An indication that the status of archipelagic waters approximates that of the territorial sea rather than internal waters is found in Article 122 which permits the delimitation of internal waters by archipelagic states only in accordance with the RSNT Articles 8, 9 and 10 dealing with baselines across rivers, 24 mile bays and the harbour works of ports. Further evidence that archipelagic waters are assimilable to the territorial sea regime is found in Article 124 which applies the territorial sea chapter on innocent passage.

The most interesting aspect of the archipelagic

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state concept perhaps, from a legal point of view, is that while the term "archipelago" is defined so broadly as to have application to many groups of islands and parts of islands and interconnecting waters and other natural features, the archipelagic concept is now confined to archipelagic states, which are defined as a state "constituted wholly by one or more archipelagos and may include other islands". Article 131 of the SNT, which had read "the provisions of Section I are without prejudice to the states of oceanic archipelagos forming an integral part of the territory of a continental state" has been deleted entirely from the RSNT. There is no suggestion, however, anywhere in the RSNT that the pre-existing rules of customary and conventional law permitting the application of the straight baseline system to fringes of islands have been altered.

A further point of interest is that the RSNT archipelagic state articles lay down certain geographical criteria in Article 119 such as the ratio of the area of the water to the area of the land (between 1-1 and 9-1) and the length of straight baselines (not to exceed 80 nautical miles except that up to 1 percent of the total number of baselines enclosing any archipelago may exceed that length up to a maximum length of 125 nautical miles). Moreover, not only the outer most points of the outer most islands may be joined by straight archipelagic baselines but so may drying reefs of the archipelago. These criteria are clearly based on political rather than legal considerations as anyone who has made a study of archipelagos can attest. Nevertheless, so

long as they can be given specific legal meaning, and I suggest that they can, then they may provide the certainty of the law required to resolve the long-standing legal dispute concerning the status of archipelagic claims.

While these criteria are of obvious interest to particular states claiming the status of archipelagic states, the heart of the solution to the archipelagic dispute is found in Articles 124 and 125 which deal with the right of innocent passage and with sea-lanes. Interestingly, the archipelagic state is entitled to suspend temporarily in specific areas of its archipelagic waters (other than international sealanes) the innocent passage of foreign ships if such suspension is essential for the protection of its security (the same right recognized in Article 18 with respect to innocent passage in the territorial sea). The most important provision on sea-lanes is probably Article 125 providing that sea-lanes and air routes shall traverse the archipelago and the adjacent territorial sea shall include "all normal passage routes for international navigation or overflight through the archipelago" and, insofar as ships are concerned, "all normal navigational channels" except in the case of duplication. The RSNT text indicates by blanks in the text that no agreement has yet been reached on the width of such sea-lanes or the percentage they must occupy of the distance between the nearest points on islands bordering the sea-lanes.

Of some interest from a strictly legal point of view, quite apart from the political or institutional implications is that Article 125(9) provides for the

referral of sea-lanes or traffic separation schemes to the competent international organizations with a view to their adoption. While the Article makes clear that the organization may adopt only such sea-lanes and traffic separation schemes as may be agreed with the archipelagic state, it does not say what happens if the organization rejects the archipelagic state proposals. There would seem to be ample scope for disputes arising out of this omission, however deliberate it may be.

INTERNATIONAL STRAITS

The provisions of transit passage are so well known that they hardly need elaboration here. It is important, of course, to note that they represent a major change in the pre-existing legal regime for navigation through international straits from one of non-suspendable innocent passage to one of "transit passage". I do not propose to express views for or against the basic regime of transit passage. I have already referred to it as amongst the elements which seemed to be required as part of the overall political accommodation if the text is to receive the approval of the major maritime powers (assuming that we refuse to reverse gears and move back ever so slightly from a 12 mile to a 3 mile territorial sea). The point of legal importance is that, in spite of the care which has gone into the drafting of these articles, it is difficult to make a legal judgment as to their precise meaning and application. Nowhere in Articles 33 to 43 of Part II is any attempt made to define an international strait. There is no geographical definition; similarly, there is no legal definition. Admittedly, Article 33 refers to "straits used

for international navigation" but this language does not make clear whether only those straits traditionally or normally used for international navigation are subject to the international straits regime or whether any strait can, through usage, become an international strait. Article 34 excludes internal waters within a strait but does not appear to exclude internal waters as a whole. Indeed, it is not clear that there is any longer the possibility of internal straits maintaining that status. Straits whose status is settled by international convention are not subject to the RSNT strait regime. No reference is made, however, to those straits whose status is settled by international adjudication or arbitration.

The articles do not establish the regime which would apply in a strait which has a high seas corridor within it but which requires navigation through the territorial sea on one or other side of the strait due to navigational obstructions or other hazards in the high seas corridor nor the regime which would apply to straits where there is a route through an exclusive economic zone but not a route of "similar convenience" to that of the strait. However, Article 43, combined with Article 35, Section I, would seem to have the effect of applying transit passage regime to such straits. It is not clear either what regime applies in the territorial sea of straits with a high seas corridor in which only a part of the high seas corridor is non-navigable.

A separate problem relates to straits formed by an island, specifically the determination as to which such straits are subject to the regime of transit passage under Article 37 (1) and which shall be deemed to be

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straits subject to the regime of innocent passage as provided in Article 43(1)a. Where there are a series of off-lying islands, three separate regimes can be envisaged: that of high seas, of transit passage and of innocent passage, all existing side by side and presenting a variety of choices to mariners. Moreover, not only may it be argued that the status of a strait can be altered by usage but its status can be based upon "convenience" although just who determines the convenience of any particular strait is not made clear.

Another equally difficult problem presented by Article 37(2) is the legal interpretation of that provision which proposes to embrace as an international strait subject to the regime of transit passage a strait composed in whole or in part of internal waters.

Some of these legal issues have already been clarified to some extent by agreed interpretations such as, for example, that straits whose status is internal cannot be transformed into international straits merely by usage, and it is understood that discussions and negotiations have been carried on since the last Session which will result in further agreed interpretations which may go a long ways to settling other unresolved legal issues concerning the straits regime (such as, for example, the rights of certain straits countries to establish minimum keel clearance standards.) Indeed, the point of my reference to the straits articlesis not so much to criticize the articles as to point to the need for such interpretations, if we are to avoid the possibility of serious disputes concerning their implementation. In the absence of such agreed interpretations or drafting changes, the chapter on straits used for international navigation may present difficulties in determining what is an international strait and, in the case of an international strait, which regime - transit passage or innocent passage - applies to it. (Perhaps the wave of the future is represented by two friends of mine, both master mariners, who have decided to obtain a law degree.)

ECONOMIC ZONE

The RSNT articles on the economic zone reflect the central part of the political accommodation I referred to earlier. Not surprisingly, they leave unanswered a number of strictly legal questions. Amongst those, for example, is the possibility of differences of interpretation as to what is the optimum sustainable yield with respect to the living resources. Article 51 of Part II leaves the determination of this question clearly to the coastal state; similarly, with respect to the conservation standards to be applied by the coastal state in the economic zone. What remains to be settled is the extent to which compulsory third party settlement procedures will apply to such issues. While there is little likelihood that coastal states will accept compulsory settlement of disputes on this issue, it is possible that compulsory conciliation may prove acceptable or even some limited application of the "abuse of powers" principle. Admittedly, such broadly legal questions are of a different order from the textual problems referred to earlier. With respect to the resources of the seabed within the economic zone and the continental shelf beyond, there is little scope for dispute as to coastal state rights,on the basis of Article 60 Part II. What is not so clear is what rights remain with respect to the activities of other states on the continental shelf of a coastal state.

Turning to the question of scientific research, the criterion of "resource oriented research" contained in Article 60 as requiring coastal state consent will obviously raise as many legal issues as it may resolve. Difficult

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legal questions will be entailed in any attempt to determine whether a particular scientific research project does or does not "bear substantially upon the exploration and exploitation of the living or non-living resources" or whether it "unduly interferes with economic activities performed by the coastal state in accordance with its jurisdiction as provided for in this Convention". It is well known that there has been as yet no final political settlement on the scientific research issue, but it seems unlikely at this stage that any political solution will resolve this type of broad legal issue.

With respect to the rights of coastal states to preserve the marine environment, a whole host of legal issues are raised by the RSNT. First and foremost amongst these is the apparent incompatability between Article 44(1)d of Part II and Article 21(4) of Part III which deal with the economic zone. Whereas Article 44 of Part II would appear to recognize the coastal state jurisdiction, including regulatory powers regarding the preservation of the marine environment, pollution control and abatement, it is clear from the language of Article 21(4) of Part III that the only coastal state power in the economic zone regarding the preservation of the marine environment is an enforcement power limited to "giving effect to international rules and standards". It is already very difficult now and it probably will become more difficult in the future for the coastal state to determine at any given point in time what is an "international rule and standard" (phrases found in Articles 21, 25 and 28) or an "applicable international rule and standard" (phrases found in Articles 23, 24, 26, 27, 29 and 30)

or "internationally agreed rules, standards and recommended practices and procedures" (the phrase found in Article 22). It is not clear either whether or not these differing phrases are all intended to be synonymous or to connote slightly different concepts. Assuming, however, that they represent only drafting problems, the underlying legal issues remain, with no solution as yet having been found to such questions as the applicability of international rules and standards to non-parties, the point in time at which rules embodied in a convention become international standards, or as to what are the coastal rights, pending the entry into force of treaties creating such rules or standards. These questions must be resolved if we are to avoid being accused of merely papering over a series of serious legal issues.

Assuming that the basic political compromise on coastal environmental jurisdiction is coastal enforcement of internationally agreed rules and standards (however defined), it should be possible to then determine without difficulty precisely what enforcement powers the coastal state can apply. This is not a simple task, however, for any lawyer attempting to interpret the RSNT Part III provisions on coastal and port state enforcement of environmental standards.

With regard to the coastal state enforcement as set out in Article 30 Part III, the legal difficulties of determining the exact nature of those powers are further

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complicated by the use of such subjective criteria as "flagrant or gross violation" and "substantial discharge and significant pollution" or "discharge causing major damage or threat of major damage". In light of all of these qualifications and preconditions, there is ample room for dispute as to when and where a coastal state and port state can take enforcement action. I am not now referring to the political acceptability to coastal states, in the light of the series of recent environmental disasters, of having to await the fullfilment of all those subjective preconditions before being permitted to take even the most minimal remedial action permitted to them, but rather the practical difficulty in giving these powers legal effect. Further negotiations will undoubtedly occur on these questions which may result in textual improvements or agreed interpretations.

While on the subject of Part III, I should note again that the Committee III text proposes a different solution in Article 21(3) than does Article 20(2) of Part II on the extent of coastal state standard setting powers in its territorial sea.

In this part of the RSNT, as in others, we may have created the basis for potential disputes, and it seems obvious that further work is required.

DELIMITATION OF MARINE BOUNDARIES

I referred earlier to the maintenance in the territorial sea provisions of the pre-existing rule of delimitation based on the median line or equidistance concept and the lack of any provision for delimitation of the lateral limits of contiguous

zones. Article 62 of Part II provides another example, however, of a new rule of law, in this case, the rules of delimitation applicable to the economic zone of states whose coasts are adjacent or opposite one another. In place of the reasonable degree of certainty provided by the median line or equidistance rule, modified only by special circumstances, and interpreted by a substantial body of state practices, the new rule is that "delimitation shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances". From the strictly legal point of view, the major criticism which is made of this new delimitation provision is that it lays down the highly subjective criterion of "equitable principles" without as yet linking it to binding third party adjudication procedures. If the Conference is able to reach agreement on such a linkage as is envisaged by Article 62(2), then this criticism will be answered. This will not, of course, remove the difficulty of determining what are the "equitable principles" applicable to any particular case. Given the potentially serious nature of boundary disputes, it would seem desirable for as much certainty of the law as possible on this kind of issue. The same proposed delimitation rule is contained in Article 71 Part II for the delimitation of the lateral limits of the continental shelf. In this case, apart from the other difficulties mentioned with respect to the delimitation of the lateral limits of the economic zone, there is the problem of what happens with respect to pre-existing continental

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shelf settlements. Presumably, there is no question of re-opening settled boundaries. In that event, however, we may well find examples of different principles being applied to the waters of the economic zone from those previously applied in the settlement of the subjacent continental shelf. When these potential difficulties are added to the problems referred to previously, arising out of the maintenance of the pre-existing rule for the territorial sea delimitation and the lack of any rule for the delimitation of contiguous zones, then it is difficult to avoid the conclusion that someone with a keen sense of humour has had a hand in the drafting of these delimitation provisions.

It can be seen that the kinds of problems I have referred to for purely illustrative purposes comprise, in some cases, mere drafting points, in other cases, internal contradictions and inconsistencies, and in still other cases, basic problems of interpretation and application of the proposed convention. Clearly, it cannot be left to the Drafting Committee to resolve all these difficulties (as well as those which we can expect to emerge from Committee I, assuming, as I hope to be the case, that it will prove possible to reflect the emerging political accommodation in precise treaty language). Nevertheless, whatever further progress is made in clarifying the legal text emerging from the negotiations on the range of legal, political, economic, military and other issues under negotiation, whether by means of agreed interpretations or through textual changes, there will remain a substantial job for the Drafting Committee. What worries the members of the Drafting Committee most is the

possibility that the whole RSNT will pour into the Drafting Committee at once, like a kind of legal avalanche. Other possible procedures are being considered, and I wish at this point only to note and draw attention to the problem.

UNRESOLVED ISSUES

I do not propose to examine at length the series of issues that remain unresolved in the law of the sea negotiations. I would like, however, first to draw attention to the progress made at the last Session of the Conference on rights of transit of landlocked states and also on the more difficult issue of rights of access to the living resources of the landlocked states. The issue has been considerably narrowed and the major unresolved problem now is whether there should be at least some kind of moral commitment on the part of coastal states even where there is no surplus. The problem of defining a geographically disadvantaged state also remains unresolved, and I know of no easy solutions to this issue.

Great progress was also made at the last Session on the definition of the outer edge of the continental margin and the related question of a revenue sharing formula applicable to the area between 200 miles from shore and the edge of the margin, although no final solutions were reached. Relatively little progress was made on resolving the question of coastal state rights to control scientific research in the economic zone, but there is at least one formula in play which may contain the seeds of a solution. Virtually no progress was made on the question of the legal status of the economic zone, but once again proposals were put forth which received wide support and may provide the basis for a future solution.

On the problem of delimitation of the economic zone and the continental shelf between adjacent and opposite states, opinions appeared to be equally divided as between the old rule and the new rule, and it is difficult to envisage what proposal might be acceptable to all. Much discussion, falling short, perhaps, of concrete negotiations, occurred on the settlement of disputes. There are a number of highly political issues remaining unresolved, including, in particular, some I have referred to concerning the judiciability of coastal state sovereign rights over resources. The working group on straits had some useful discussions but it is not yet possible to say that a formula has been devised which is acceptable to strait states and user states. What is important, however, is that the negotiating effort was made and the problem recognized as requiring further work. Indeed, intersessional negotiations between interested states may have already resolved some of the straits issues.

On another issue, relating to the territorial sea, no agreement has as yet been reached concerning the standard setting powers of the coastal state in its territorial sea. There remain deep divisions of views, but efforts are underway intersessionally to resolve the difficulty.

The major unresolved issues, however, relate to the seabed beyond national jurisdiction and it is this question which I now propose to address.

SEABED BEYOND NATIONAL JURISDICTION

It is well known that Committee I has lagged behind the other two Committees, in spite of the fact that it has had

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the benefit of over nine years of negotiations in the ad hoc and later permanent Seabed Committees and in the Conference. It is idle to attempt to assign blame. The fact is that there has been a stalemate between some of the most powerful developed countries on the one hand and the group of 77 on the other. There may now, however, for the first time, be a ray of hope on this issue as a result of the informal consultations held in Geneva in February and March of this year in the "Evensen Group". I do not propose to go into the results of these consultations in any detail, but it is extremely important that influential opinion-making groups such as this body be aware that significant progress was made on this important question and that it may no longer be accurate to refer to a continuing political stalemate or deadlock on the seabed issue. Indeed, to do so could be dangerously misleading. While much will turn on the results of the consultations of the group of 77 immediately prior to the opening of the next session of the Conference on May 23, and even more upon the progress made in the first two weeks of the Conference, during which Committee I will be the sole subject under negotiation, it is, as I have earlier suggested, at least possible now to see the outlines of the political accommodation on this issue. If I may express a purely personal view, such an accommodation would obviously include the establishment of an international authority comprising not only a Governing Council, an Assembly and a Tribunal but an operating arm to be termed "the Enterprise",

coupled with agreement upon the regime applicable to the seabed beyond national jurisdiction, to be subject to the regulation and control of the authority, and providing for the financing of the "Enterprise", the system of exploitation, spelling out the regulatory powers of the authority - and their limits - the establishment of "reserved" and "non-reserved" areas of the seabed, to be set aside respectively for the Enterprise and other (national and multinational) entities (referred to by some states, but not others, as the parallel access system); some stipulations on resource policy, including production controls; and provisions leaving open the possibility of a variety of forms of joint ventures, including the possibility of linkages between the reserved and non-reserved areas, while falling short of making any such joint ventures mandatory; the whole package to be tied to a review process after a stated period, but with the possibility that certain fundamental principles, such as the authority's power to regulate and control the exploitation of the international area to be enshrined in the treaty as jus cogens not subject to review.

I cannot conclude my comments on this issue with any predictions, but merely with an expression of hope and some degree of optimism. I shall be most interested in the comments of my colleague Ambassador Elliot Richardson on the issue.

UNILATERAL ACTION ON THE SEABED

I referred earlier to the question of the effects upon the Conference of certain types of unilateral action.

It is well known that a number of countries have now acted unilaterally to establish a 200 mile fishing zone in advance of the conclusion of the Conference, albeit in accordance with the emerging consensus on the issue. I doubt that such action will have any negative effects upon the Conference, mainly because it is based upon and, indeed, has resulted from the Conference negotiations. Such considerations do not apply at all, however, to unilateral action on the seabed beyond national jurisdiction, which would be viewed by many delegations as an attack upon one of the most important concepts to emerge from the Conference, namely the common heritage of mankind. While views may differ concerning the effects upon the Conference of such action, depending to some extent upon the precise form of such action, I have no doubt that any such unilateral action would have an extremely negative effect upon the Conference as a whole and upon the particular interests and negotiating position of any country taking such action. I have consulted widely concerning the question of the urgency for such action, and I remain wholly unconvinced of the immediate necessity to licence deep seabed mining, at least for another four years. Whatever views may be on that question, however, it is difficult to see how anyone can seriously argue that unilateral action on the deep ocean seabed would have even a neutral yet alone beneficial effect upon the Conference. I have also consulted very widely with other delegations on this issue, and have

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found, not surprisingly, that opinions are unanimous as to its negative and even potentially disastrous effects. I would add only that if I were concerned with the question of advising any government or any legislator on this issue, I would urge strongly against it if the country in question has any important interests at stake in the Conference. If strategic interests are the alleged rationale for such action, then there are many issues of real importance, including basic strategic considerations for certain states, that cannot be assumed to have been resolved merely because there are provisions in the Revised Single Negotiating Text covering such questions. Issues regarded as settled may be re-opened. Issues that may seem unrelated may suddenly become related. The old argument about the trade-off between navigational rights from one side in return for resource rights from the other, however false it may have been, has even less validity today, in light of the unilateral action taken by a number of developed states on resource issues. Such an argument might, however, now be resurrected and turned around by those very states to which it was formerly directed. Certainly, any further resource-oriented unilateral action by developed states would seriously weaken their bargaining power, some say to the point where it might become non-existent, because of the intense emotionalism with which the seabed issue has become charged. In such an event, the fate of the Conference itself could be imperiled. It may, therefore, be worth giving some consideration to the implications of success or failure of the Conference itself.

PROSPECTS FOR THE CONFERENCE

As with the last issue discussed, it is impossible to make any firm predictions concerning the fate of the Conference. It seems likely that the Conference will require at least another two years to conclude its work.

No-one can say with certainty whether the Conference will succeed or fail. What is certain is that there remains a good chance that the Conference can succeed, provided governments do not refuse to continue with the exercise because of the time it is taking and the costs involved,in terms not only of human and financial resources, but the self-restraint required of states on claims they wish to advance while the Conference continues. It is generally accepted that the next (Sixth) Session of the Conference is likely to prove the "make or break" Session. If the basis for agreement is worked out on the seabed regime, then there will be great pressure to conclude the negotiations on the other unresolved issues. Even so, at least one further full substantive session may be required in addition to considerable work by the Drafting Committee. It seems likely, however, that if visible progress is made at the next Session, governments will be willing to continue to commit themselves to pursue the Conference to a successful conclusion.

CONSEQUENCES OF SUCCESS OR FAILURE

I have pointed out in a series of recent speeches that a successful Conference could mean agreement on over 500

treaty articles, including annexes, which would together comprise a comprehensive constitution of the oceans - an area, we are often reminded, consisting of over 70 percent of the earth's surface. These rules of law would not exist in a vacuum. They would bind states to act in new ways. They would elaborate a wholly new regime for the rights of passage through international straits. They would lay down totally new principles concerning the management of ocean space. They would, for example, oblige all states to undertake the fundamental commitment to preserve the marine environment, to conserve its living resources, and to cooperate in the carrying out of scientific research. They would establish a single twelve mile limit for the territorial sea throughout the world. They would result in a major re-allocation of resources as between distant water fishing states and coastal states, and, more importantly perhaps, from developed to developing states. They would give recognition to the concept of the archipelagic state, consisting of sovereignty over the waters of the archipelago, with clearly defined rights of passage and over-flight through sea-lanes. They would bind states to peaceful settlement procedures on most - unfortunately not all - issues. They would, moreover, establish something new in the history of man - an international management system for a major resource of the planet earth - the seabed beyond national jurisdiction. They would reserve this area for purely peaceful purposes. They would subject it to a legal regime governed by an international institution unlike

anything known either in the UN system or outside it. The international community would actually become engaged in economic development activities whose benefits would be shared by mankind as a whole. Interestingly, the UN, in the process, could engage in economic competition with states and, perhaps, private enterprise.

These new rules, if accepted by the international community and coupled with binding peaceful settlement procedures, would undoubtedly make a major contribution to a peaceful world. Of equal importance perhaps, they would lay down an essential part of the foundation for a new international economic order, since it would effect a transfer, by consent, of powers and jurisdiction on many issues from the richer and more powerful states to the poorer and less powerful.

What are the consequences of the other alternative - a failure of the Conference? As I have suggested in a series of interventions in a variety of fora, a failed Conference would mean that while the 200 mile limit has come into existence as a fact of international life, none of the safeguards embodied in the draft treaty would necessarily apply. The 200 mile concept, if left to state practice following a failed Conference, is far more likely to become a 200 mile territorial sea than a 200 mile economic zone confined, as in the RSNT, to specific jurisdiction and coupled, as it is in the RSNT, with stringent safeguards. The 12 mile territorial sea is a fact of international life, but its application to international straits would not be coupled, as it is in the

draft treaty articles, with specific rules concerning rights of passage. New proposals concerning the delimitation of marine boundaries could have sufficient legal weight to erode the pre-existing equidistant-median line rules, but they would not be linked to binding third party settlement procedures, without which the new "equitable" approach would have little meaning. The nine years of work on the international regime and institutions to govern the seabed beyond national jurisdiction would be lost. Some developed states would almost certainly take unilateral action authorizing their own nationals and other legal entities to explore and exploit the deep seabed beyond the limits presently claimed by any state. Certain developing states might well respond by new kinds of unilateral action asserting national jurisdiction over these same areas. Indeed, they have said they would do so. Disputes over fishing rights, environmental jurisdiction, under-sea resource rights, conflicting delimitation claims, rights of passage in straits and claims to the deep ocean seabed could "surface" all over the globe. The conclusion is obvious. The Law of the Sea Conference has gone too far in developing new concepts and eroding the "old international law" for it to be permitted to fail at this stage. The particular interests of individual states, be they powerful or weak, maritime or coastal, landlocked or geographically disadvantaged, merge and coincide with the general interest of the international community as a whole in the over-riding need

for a successful conclusion to the Law of the Sea Conference. This is no longer merely a desirable objective. It is an international imperative.

CONCLUSIONS

As I have been pointing out, in the series of recent speeches to which I have referred, it seems clear that the international community is facing the choice, on the one hand, of a very real danger to peace and security - quite apart from the damage to the UN - should the Conference fail, or, on the other hand, of an opportunity to lay the foundations for a world order of the oceans, and, in so doing, demonstrate the heights to which mankind can rise when we are prepared to look beyond our narrow immediate interests to the broader long-term interests of all. In legal terms, the Law of the Sea Conference presents the opportunity to leave behind us both the narrow 19th century concept of sovereignty, and its faithful companion, the laissez faire principle of freedom of the high seas, and to create new laws in place of each, embodying a totally new conceptual approach reflecting the need to manage ocean space in the interests of mankind as a whole. For far too long, the Law of the Sea has been based on the notion of competing rights, with little or no recognition of the need reflected in even the most primitive systems of law, whereby duties go hand in hand with rights.

Areas of the sea have been treated as subject to the assertion of sovereignty of one state or another, with

no corresponding duties concerning the conservation of fisheries in such areas or the preservation of the environment itself. The oceans beyond the territorial sea have been subjected to the principle of first come first served, a regime which tended to benefit the powerful at the expense of the weak, while defended under the name of freedom of the high seas. Freedom of the high seas has meant, increasingly, freedom to over-fish and licence to pollute. These are the freedoms which must be circumscribed, while the essential freedom of navigation for purposes of commerce and "other internationally lawful uses" (including legitimate self-defence) must be protected.

The difficulties in the way of harmonizing the conflicting uses of the oceans and the divergent interests of states in a comprehensive constitution of the oceans are immense. The dangers of failure are increasingly acute. The benefits of success, however, are tremendous. Whatever the imperfections of the proposed treaty, it offers the possibility of an orderly regime, in place of the chaotic situation which would otherwise pertain. There is, in my view, a duty upon influential opinion-making groups such as this body to press upon governments the need to go forward with perseverence and determination toward the resolution of those problems still besetting the Conference. The greatest danger, at this stage, may well be the possibility of unilateral action on the seabed, stemming, admittedly, from years of frustration and mounting impatience. As I

see it, it is the duty of every one of us, particularly when meeting together as under the aegis of such a prestigious and important opinion-making group as has the American Society of International Law, to use our best efforts to encourage our governments and our legislatures not to give up on the Law of the Sea Conference, but to go that last nautical mile, and to make one further effort to reach the objective of a global constitution of the oceans.