Comments and Responses from the Panelists and Audience -- Fourth Session

Mr. Gordon Becker:

My name is Gordon Becker, and I would like to put a question to either or both of our panelists. To what extent, if any, do you think that the provisions of Section VII of Part XII relating to safeguards with respect to vessels that may be involved in enforcement proceedings by coastal states for alleged environmental violations are available to non-parties to the treaty? Is my question clear?

Professor Clingan:

Gordon, when I address the navigational provisions of the treaty, I am talking about all the non-sea bed provisions. Now this goes back to the pick and choose argument -- if one has to pick part of them and reject the rest, you are legitimately being accused of picking and choosing among provisions of the treaty which you either like of do not like. What I am saying is that all of these provisions relating to navigation, including the safeguard provisions, were all carefully negotiated. They are all part of that package, and the point is not the value of the treaty or the non-value of the treaty. The point is we find ourselves in a particular position -- that is, at least one maritime power is not going to sign that Convention -- and the point is that since these views, including the safeguards, reflected what most the people at the Conference thought was the best way to deal with the package, then it seems to me that if one is going to adopt the view that it is in everyone's political interest to utilize the provisions of treaty as guidelines for conduct, it would include those safeguards as well.

Mr. Burdick Brittin:

My name is Burd Brittin from Great Falls, Virginia. I would like to make a comment, or perhaps a query, to either Tom [Clingan] or Bruce [Harlow] and that is this, that the litany that Tom Clingan gave expressed his personal view, and I would trust that that view was shared by a great majority of people.

We find ourselves in this unique situation of a major power that has rejected the treaty, including the navigational provisions specifically in the treaty. What is it that the United States can do at this juncture to look to the uniform and universal appreciation of the freedom of navigation and indeed the treaty itself? We are looking at, as an example, just as an example, since we rejected the treaty, one of our friends, South Korea, has said it was going to support the treaty but was going to insist on prior notification or request for permission for warships to transit their territorial sea. China did the same thing. Argentina, for other reasons, decided not to go along with the treaty, and the odds of her stepping down from her 200 mile territorial sea now look sort of limited, I suspect. But these are the kinds of things that the country will have to deal with.

Let me go back then to the question -- what is it the United States can do to foster a tranquil period of development of ocean law? I suggest two things. The first is this: when the United States decided to reject the treaty, it could only be presumed that that was very thoroughly studied within the government and they came to the conclusion that it was a net detriment to us; therefore, we rejected. That is a fact of life now. There is, however, a companion question -- and that is what I think the government should be looking at at this time. The question is this: Is it

to the advantage of the United States to have the vast majority of states of the world community adhere to and be supportive of the Law of the Sea Treaty? I am not saying the United States, I say other states. If the answer to that question is no, then it is a very, very difficult situation, as Tom Clingan has indicated. I just cannot imagine how bad the situation would be. If the answer to that study is yes, that it is to the advantage of the United States for the world to be very supportive of that treaty, then to me that means the conduct of the United States in its foreign relations regarding the oceans must be very uniform in application. As an example -- and this is part of something Bruce [Harlow] said about picking and choosing what you like and do not like -- now there is introduced in the Congress a bill by Congressman Breaux dealing with the Exclusive Economic Zone. It is a poor bill, but it does in fact pick away another part of the treaty. Regardless of what you say, Bruce, perceptions in other parts of the world are that the United States is again picking and choosing. I think it is a poor show.

There is a second thing the United States can do that I would suggest, and it is this. If the answer to the first question is yes on the part of the Administration, then I would think that the United States could let it be known, uniformly, that except for the sea beds issue the United States understands and appreciates and values the balances required that made the treaty as it is -- the balances of interest that are reflected in that treaty. With that we strengthen our hand, and I think it would strengthen the world community. Thank you.

Ambassador Koh:

Both Tom and Bruce are excellent lawyers and they have made, I think, a very persuasive case this morning that all the goodies in the Convention on navigational and overflight rights are part of customary international law and therefore the United States, in spite of its decision not to become a party to the Conventions, may enjoy them.

I would like to, with your permission, make a number of comments on thesis, but first, if I may, Madame Chairman, make a comment on a point made by Dr. Pardo at his very interesting address after dinner. Dr. Pardo said, amongst other things, that the Convention is not clear on the rights of warships to enjoy the regime of innocent passage through the territorial sea of coastal states. With respect to Dr. Pardo, I think the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage through the territorial sea and there is no need for warships to acquire the prior consent, or even notification, of the coastal state.

Now, my comment on Tom and Bruce's thesis is this: it is true that as a matter of state practice, one can say that the maximum permissible breadth of the territorial sea today, under customary international law, is probably twelve miles. So we can say the the rule in the Convention stating that the maximum permissible breadth of the territorial sea being twelve miles coincides with the customary rule. But, I am not so sure whether we can then proceed from that premise to the next premise, which is the one that Tom and Bruce have stated, and that is that the regime of transit passage through straits, which you find in the Convention, is also part of general international law. If you look at the legislation of the

straits states, the states that border straits whose breadth is between six and twenty-four miles, there is not a single strait state which has enacted legislation extending its territorial sea in the strait to twelve miles, and which has incorporated the regime on transit passage in their law. And it is my view that if not for the Conference, if not for the pressure which we, the moderate states, put upon the extreme strait states, the regime of transit passage would never have evolved as a matter of state practice. I take the view that the regime of transit passage is the result of bargaining and of quid pro quo at the Conference, and I just want to ask that Tom and Bruce reflect on the grounds on which you say so confidently in stating your conclusion, that the regime of transit passage to straits used for international navigation is already part of the general international law?

My second point is on the regime of archipeligic sea lanes passage. At the 1958 U.N. Conference on the Law of the Sea, Indonesia and the Phillipines failed to obtain the agreement of the international community to their claim for archipelagic status. This did not deter them. Two years later, in 1960, Indonesia enacted its domestic law proclaiming itself as an archipelagic state, claiming the right to draw archipeligic base lines and claiming the waters landward of those base lines as archipelagic waters. It is also my view that apart from the Convention, the concept of archipelagic state, the concept of archipelagic waters have since 1960 won general recognition by the international community, and Indonesia, Phillipines, Fiji, the Bahamas and others would probably say that, quite apart from the Convention, the status of the archipelagic state has become part of general international law. Now, my question to Tom and Bruce is,

on what grounds do you reach your confident conclusion that the regime of archipelagic sea lanes passage, which you and I and others worked so hard at the Conference to negotiate and which was the subject of a bargain, of a quid pro quo, on what grounds are you confident that this part of the Convention, this Conventional rule, has become or will soon become part of general international law?

My third question -- it is true that since the 1950's, more than a majority of the states of the international community have claimed one form or another of resource jurisdiction out to 200 miles and much as I dislike it, I have to accept that a coastal state representative may validly argue that the Exclusive Economic Zone has become or will become a part generally accepted international law. But that is not the same as saying that the very complex arrangements that you find in Article 58 and the other articles that are referred to by Article 58 on the rights of the international community with respect to navigation, overflight, and other internationally lawful uses of the sea have also become part of general international law. And my question to you again, Tom, and to you, Bruce, is by what process of reasoning do you state the confident conclusion you do that Article 58, which was so painstakingly negotiated by us and which is very clearly an example of a bargain between contracting parties resting on quid pro quo, has to become or will become part of general law? Thank you.

Professor Clingan:

Thank you, Mr. President. Certainly you have raised the key issues, and I will try to comment very briefly because I know Bruce is going to have something to say too. Let me take your last point first -- on Article

58, the other international uses. I think that one is pretty clear as a matter of fact. The only reason, as you know better than I do, that that phrase was inserted was to give it a clarifying quality. The key phrase in Article 58 is freedom of navigation and overflight. That is the key phrase. That phrase was drawn from Article 87 which in turn was drawn from Article 82. It has meaning. It has a long tradition and background to it. And the only reason that other phrase was in there is in order to give the Article the balance that is requried and to make sure that the term freedom of navigation and overflight was qualitatively and quantitavely exactly the same without change as it had been in the 1958 Convention. I really think that that is the easier of your three questions to answer.

Now, with regard to straits and archipelagos, I am going to let Bruce respond because he really directed his paper toward the customary international law argument. You may have missed the thrust of my argument. I referred to the customary international law only to indicate that there are experts both within and without the United States that are of the view that it is either customary international law or an evolving rule because of the widespread consensus in the treaty. But I think my comment went beyond that, and I think if we get into arguing whether those provisions are customary or not customary we are starting to play a very dangerous game for all of us, for every single country in this world. The question is not, as Bruce has pointed out, a globally stable regime for navigation whether party or non-party, whether signatory or non-signatory, and I think that really that is important. I would point out that it is going to be a long time, in my judgment, before this treaty goes into force. What are we going to do in the interim if we are not going to recognize these patterns

as being valid? In the interim, as I pointed out before, you will have people who sign but do not ratify, and people who do not sign. What really is the difference? A country that signs the treaty, of course, is bound by the Vienna Convention, but it has not accepted the treaty. It has rejected the treaty up until the moment of ratification. Signing only indicates an intent to try to seek ratification. Why treat a country differently in that position from one who has not signed the treaty at all during this interim period? My point is a political one, Tommy [Koh], and I think we would be doing ourselves a disservice if we try to argue this one out on basic international law concepts. We are part of U.N. process and arguments have been made, not by us, that the process by which international law is made is changing, and that custom may have a different content than it may have had ten years ago. I would love to debate that with you with you privately, but my point is it is dangerous to get into that kind of an argument, both for the coastal and for the maritime powers, at this stage of the proceedings.

Admiral Harlow:

Let me address all three of your questions in one category. I think they can be answered as a group. You indicated, as I understood your remarks, that the twelve mile territorial sea, archipelagic claims, EEZ claims are becoming customary principles. I think you are probably correct that this is emerging, but the important accomplishment of the Conference was to articulate, not to create, a right that is concomitant with those principles. The rights of transit passage did not have to be articulated if you presume a high seas corridor through all significant straits. The

right of sea lane passage in archipelagos need not be articulated, and was not articulated, when everyone considered them to be free high seas. The rights of high seas navigation in EEZ's likewise did not have to be articulated if it retained clearly the status of high seas. The rights derived from the status.

The problem is created when that status changes. It then becomes necessary either to extinguish the rights that have existed for the maritime communities or to articulate in another way what those rights are. What I am suggesting is that the Conference did not create a right for the United States or other maritime powers. Its important accomplishment was to articulate what those rights are in light of a potential recognition of these new areas of coastal jurisdiction and competence. I think it is important to distinguish between the two -- one articulation of a practice that has existed for some length of time, that has been acquiesced in by the world community and one that is new and unique, created by the Conference. And I firmly believe that the category we are talking about is the former and it is from that that I derive my confidence that you detected in my presentation.

Ambassador Alan Beesley:

I am Alan Beesley. I have been the leader of the Canadian delegation since the sea bed days, and Chairman of the Drafting Committee for all too long. But I am speaking in my purely personal capacity today for reasons which I hope are obvious, because I do not like to see the U.S.A. put on the spot this way. I do not like it at all, but whether we do it or not, the questions are there and I think by and large it is preferable to bring them out in the open.

I am not satisfied with the explanations given. I accept that they are given in good faith, and they are given in most persuasive terms by people I respect. But I think there are some fundamental issues that cannot be glossed over. Now firstly, as background to the questions I would like to pose, are the actual operating principles of the Conference, in which the United States participated fully from the outset -- and indeed participated to the extent of being a major actor in the development of these ground rules and in the actual negotiations. And if I could reiterate a point I have often made, the U.S.A. consistently followed a problem-solving role. Maybe that is part of its problem now. It was always one of the protagonists. It cannot just say that other people drew up these rules, and we said we would think about them. You were one of those who helped create them, and it was a major act of creativity. But the background includes what went on in 1958 and 1960 and the inability to agree on the breadth of teh territorial sea. And we all know the reasons because of the effect the extensive territorial sea could have had upon international straits. So let us bear in mind that the preexisting rule was nonsuspendable innocent passage. I have not heard that phrase used. We cannot just pretend it did not happen. William Safire can, but we cannot. So that was the rule. Now the difficulty, of course, is the effect that a twelve mile territorial sea would have upon straits used for international navigation. Traditionally, an international strait has not been considered such unless the problem of passage arose, because it was enfolded by territorial sea. Otherwise it was just a strait -- a strait that happened to have the high seas corridor. No special rules were needed. So question number one I would ask you is whether you do remember that there was a rule called "nonsuspendable inno-

cent passage". Number two is whether you consider transit passage a different rule from that one, and a rule as new as the common heritage of mankind, the archipelagic concept, the economic zone concept, the new land ~~law~~ coastal rights, the arctic exception, etc. My point, of course, is that I believe that it is a new rule, and I would like to know whether you really seriously maintain it is not? We did not need that rule before because you did not have the problem, but now you do. That is why the new rule was created, under some tension and with some reservations right to the end. I still recall a series of questions I put to the co-chairman of the little negotiating group, and they never answered them, but I have accepted the results and my government has. So that is my first question. Was there a rule of nonsuspendable innocent passage, and whatever happened to it along the way? How did it get to be transit passage?

The second question is ancillary to that but it is closely related. Why did the Russians propose an agreement? I do not remember them calling for a Conference, so why did they propose agreement on a twelve mile territorial sea coupled with a high seas corridor? Was that not to resolve this very difficulty that we have been just discussing, as raised by Tommy Koh? That proposal evolved into the concept of transit passage, and maybe that was not such a clever idea, in retrospect. But the original concept put forth by the U.S.S.R. to Canada and to many other countries through diplomatic channels was a twelve mile territorial sea coupled with a high seas corridor.

Now those are just two basic questions. I know your answers will be honest ones, but certain conclusions follow from that. In the Conference -- and I am speaking now as someone who actually chaired the informal negotiations which led to the agreement on the consensus rule -- the U.S.

attached tremendous importance to the consensus rule. The U.S. did not invent the packet deal concept. It acepted it, I think, reluctantly, ~~in the situation~~. Their original approach was a manageable package, not the packet deal. The packet deal concept emerged as the comprehensive agenda emerged.

So you have, number one, the consensus rule; number two, the packet deal approach; and number three, what turned out to be the decision of the Conference but which was implicit from the beginning, no reservations. So that is part of the legislative history of this Convention. Now, I am aware that many answers can be given as to whether a particular convention was a law-making convention or not. At what point in time it becomes a law-making convention, at what point in time certain parts of its provisions become accepted as law-making in nature, declaratory of the law if you wish. But I cannot understand how this sharp distinction can be made in terms of what is received customary law, as between Part 11, for example, and Part 12. They are equally novel, equally controversial. For those of us involved in the environmental issues, emotions ran just as high and a quasi-ideological approach was taken. So I do not think you can get away from this argument being put to you that you are picking and choosing. I am not in favor of having a reversion to chaos that caused the Conference in the first place. I would like to see the U.S.A. operating on exactly the same ground rules as everybody else. Your influence is so powerful that I think it would help persuade others to do so, but when you have opted out -- and as has just been pointed out by Burdick Brittin -- and shown signs of going further and devising your own version of the economic zone incompatible with the Convention, and even your own version of the

continental shelf definition incompatible with the Convention, you just cannot have your cake and eat it too. Certainly ~~Sure~~ it is in everybody's interest that we not shoot at each other in international straits, but I do not see how you can impose on others obligations which you yourselves are not willing to accept. So I guess my question ~~here~~ is, what is the difference in terms of customary law between Part 11 and Part 12? Is it not simply that you accept one and reject the other? I know you do not want to get into the customary law argument. You say it is dangerous, but I find it equally dangerous that you reject Part 11 and still assume somehow you are going to be able to mine the sea bed without any let or hindrance.

My only other questions, really, were versions or variations on those asked by Tommy, and I am not personally that interested in ~~hammering~~ pressing anyone on the straits question, but it is illustrative because it goes the heart of the matter. And all the more so when we remember, and this is why I am raising these questions, that the argument made in the early years of this Conference, one which I never liked, was that the trade-off was to be resources in return for freedom of navigation. It was an implicit argument always that the developing countries would get the resources and the major powers would get the freedom of navigation. Now we find some developed countries demanding both, and one definitely demanding both on its own terms, so I do not think you can analyze this Convention and its legal import divorced from that legislative history. When you do, I think you have great difficulty in determining that this provision is customary law; this is not. I am not commenting on the ethics or morality of it. I am talking about it in strictly legal terms.

One final question I would like to put to you -- how much of the economic zone is recieved customary law? Just the fisheries part? I suspect myself that is the only part. What about the environmental provisions? What about the marine scientific research provisions? What about the sea bed provisions beneath the 200 mile zone? Are they all received customary international law? If so, does your legislation have to be founded on the convention?

And one very last question, the answer to which may trouble the Canadian government as much as anyone else, do you consider that the present provisions on the continental shelf reflect existing customary international law? If so, how would you explain legislation or intentions to pass legislation inconsistent with that definition? Now I know I have raised a host of questions. They all boil down to the same one -- What is customary law and what is not? And I suggest that it is impossible to say at the present stage, in light of variations in state practice, how much of the Convention's provisions are customary law and how much are not, with one possible exception, unfortunately, the twelve mile territorial sea. I think it is here to stay, and I do not think anybody would ever lose a case in the Court. We established it twelve years ago without protecting our position in the Court. No one has ever taken us there. I hope you know that at least some of the questions the answer could be shorter one, than the question. Thank you very much.

Admiral Harlow:

I will try to make the answer shorter than the question. Tom [Clingan] will hit your latter questions, but I will comment on the earlier part of

your intervention, in which you asked whether or nto we were aware of the nonsuspendable rule of innocent passage in straits. I can assure you it is etched firmly in my mind. That rule, in my judgment, made sense if we were talking about a three mile territorial sea. It is nonsense if we are talking about a 12 mile territorial sea because of the phenomenon of geography and the fact that it would thereby overlap straits -- significant straits -- and would fly in the face of a long term and essential practice of the bulk of the maritime community possessing maritime forces. So what happened is that as the perception grew that the twelve mile territorial sea was gaining legitimacy, the need to articulate this balance that I mentioned earlier. It is not creating a new right, or it is not envisioning that maritime nations will be able to do something they have not otherwise done. It is simply the need to articulate how you sort out these practices in order either to continue them, which was the judgment of the international community, or to prohibit them, which was not the judgment of the international community. So, when you asked if transit passage is different form nonsuspendable innocent passage -- yes, absolutely. It is a means of reflecting and articulating the practices that have continued where previously the general perception was that there was a high seas corridor through those straits.

Ambassador Beesley:

It was not just a general perception. There was a high seas corridor. Believe it or not there was as a simple question of fact.

Admiral Harlow:

Well, the Soviets, of course, would not have agreed to that, as far back as the 1930's.

Ambassador Beesley:

[Too soft to register on tape] That is why they proposed a twelve mile Territorial sea coupled with a high seas corridor a proposal which was not accepted.

Ambassador Harlow:

No, but it is hard for them to argue that they need not recognize territorial sea claims up to twelve miles. Under those circumstances one has to look at their practice and if you do, I think you will discover that they have stood for the proposition, and continue to stand for the proposition, that straits are unique, a separable regime from territorial seas generally.

You mentioned that the Soviet Union had porposed a high seas corridor. That is another type of bottle to put this wine into. It was another way of accomplishing what I think was accomplished by the Convention. It was not, I might add, just for your information, only a Soviet proposal. The United States had also sponsored that proposal. It was our judgment that perhaps that would have been a clearer way to express what states had exercised and felt had to continue to exercise even with the broader territorialsea claim. So nonsuspendable innocent passage, I think, is a dead letter if you presuppose the legitimacy of the twelve mile territorial sea, including such claims that would overlap international straits. The new way to articulate what I think has been going on for many years is the transit passage regime, and I think it does quite well articulate the rights that maritime nations have asserted. So I feel strongly that what

we are talking about is an articulation of an existing customary right, not a creation of a new one. The treaty did not create a new right the United States did not possess and had not consistently asserted for many years.

Ambassador Beesley:

Why did the rule nonsuspendable innocent passage exist then? It did not disadvantage certain states?

Admiral Harlow:

That is correct. Certainly there are twenty odd straits that are less than six miles wide of significance, and in those straits the balance, although significant for maritime communities, was not in any order of magnitude as important as the straits that would be overlapped by a twelve mile territorial sea. The United States judgment in 1958 was that a fair balance was that so long as you could not suspend the right of an innocent passage -- that is surface navigation was permitted to warships -- that that would accommodate the balance between the interests of the coastal states and the needs of the international community. But that is not the case when you are presupposing a twelve mile territorial sea at all.

Professor Clingan:

I will just comment briefly on two things that you raised with Alan [Beelsey]. The first thing, I want to take issue with your choice of words. I know you are always very careful with your choice of words. By the way, I am getting in trouble; this guy is my Chairman, you know. I am likely to get fired tomorrow. [Laughter] You choose your words carefully and for effect, and you are very good at it, and at one point you asked, why does the United States seek to impose these rules for straits and archipelagos

on somebody else while it at the same time reject the others. Now we are not seeking to impose anything on anybody. Now, so I take issue with the use of the word impose. My plea is just the opposite. My plea is for maritime powers and these other states alike to recognize the global national interest in avoiding chaos in these areas. That is the important thing as far as I am concerned. Now if we are going to continue in debates of this kind, I am afraid that what is going to happen, if you are successful in persuading me that these things should not be followed, then I think there will be no choice for the United States but to fall back on what it has traditionally perceived as customary rules -- the three mile limit for one, the rejection of the archipelagic principle for another. And I do not think that is in anybody's best interest, so that is why I think that is why we should avoid these debates and get on with the business of dealing with how we are going to have global stability and navigation around the world. I do not think it is wise or prudent to isolate one or more maritime powers and drive a wedge in traditional alliances for the benefit of arguing a customary international law argument.

Now, with regard to your specific questions, you asked me if the economic zone is customary international law. If so, what parts of it are included? Obviously, I can only give a partial answer to that. Do you want my own personal judgment? I think there is plenty of evidence on the record there that the principle of an exclusive economic zone is either customary international law or so close to it that no one would seriously argue any more a coastal states' rights with respect to resource management in a zone adjacent to their coast. Now, no one can say -- it is too early in the game -- no one can say what the precise content of that principle is.

I would have to withhold my judgment on the specifics, because I just do not know, and I do not think anyone else knows what it is. But I think that if you are going try to find out, the best guidance is what was agreed to by consensus in the treaty, because there is a large body of international lawyers that are giving their approval to a concept in a treaty that has some content to it, so why not take advantage of that as the best guidance. As the International Law Association Committee on the Exclusive Economic Zone itself said, it is the best guidance for the future conduct of activities with respect to the economic zone. Now with respect to the distinction between Part 11 and the rest of the treaty, I will in just one sentence simply ask a question back to you. How do you create International Sea Beds Authority by customary international law? And I think that is the distinction.

End of fourth session.