Round Table Discussion

Bernard Oxman

Good morning. In inviting the participants to sit down this morning I said this was the Congress of Vienna and there was no precedence. I think I can say the same for the order of speaking. I propose the following order: Alexander Yankov, Tono Eitel, Gregory French, Karen Davidson, Francisco Orrego, Ulrich Beyerlin, Joachim Koch and Tullio Treves. I have been requested, quite rightly, to try to make sure that there is time for the participation of all of you in this discussion, and I therefore asked the panelists to try to limit their initial comments to ten minutes. Obviously each of their subjects could consume a book. We all understand that.

I would like to ask Ambassador Yankov if he would begin.

Alexander Yankov

Mr. Chairman, I would like, first of all, to express my gratitude for giving me the opportunity to say a few words on a subject on which, as you said, could be devoted several volumes relating to specific international organizations, whatever their number might be. But I should confine my observations to some main points. Firstly, the question of apportionment of competences between States and competent international organizations in relation to the management of global commons in ocean space. Secondly, the implications of UNCLOS for the competent international organizations, including the functions and tasks assigned by the Convention to these organizations in the implementation of its provisions. Thirdly, the rational and effective use of competent international organizations in order to prevent unjustified proliferation of parallel and overlapping institutions working in the same field.

Before turning to these three points, I would like to emphasize the important role assigned by UNCLOS to international organizations. This is a new phenomenon of international cooperation in ocean affairs. A

comparison between the four Geneva Conventions on the Law of the Sea of 1958, on the one hand, and the 1982 Convention (UNCLOS), on the other, is very indicative in this regard. The Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas is the only one which explicitly refers to FAO in connection with the notification of measures of conservation (Article 5) and the establishment of the special commission on peaceful settlement of disputes arising out of claims on the same fishing stock (Article 9). There are no other provisions in the other Geneva Conventions which allude to in general terms or specifically name competent international organizations. At the same time, according to my calculation, out of 320 articles of UNCLOS, about 80 articles attribute various functions to international organizations, indicated by name, or under the terms of "competent international organizations" or "appropriate international organizations". In addition, a significant number of articles, particularly in Part XI and several Annexes, refer to the International Sea-bed Authority, which is in substance an intergovernmental institution.

The noticeable reference to international organization in UNCLOS is an evidence of the important role attributed to them in the uses of the seas and the protection and management of marine resources. In my view this is a new trend in international law and international relations.

The role of international organizations under UNCLOS could be considered under two main categories. First, provisions which explicitly single out by name the competent international organizations in determining their special functions in the implementation of the Convention (for instance Articles 39(3), 93, Annex II, Article 3(2), Annex VIII, Article 2(2)). The second category relates to provisions which assign leading or contributory role to international organizations under the general expression "competent" or "appropriate" international organization. The relevant international organization could be identified on the basis of the object of the respective article. This more flexible approach of referring to the relevant international organization has been met with certain criticism. In a recent document containing a report by the Secretary-General of UN of 16 November 1994, it was maintained that the general expression "competent international organization" gave rise to certain confusion. I recall that during the negotiations in the Third United Nations Conference on the Law of the Sea there were some attempts at identifying the competent international organization in every specific article. However, the flexible approach reflected in most articles of UNCLOS prevailed. The main arguments in favour of the general expression "compe-

tent international organization" were the following: firstly, it was inappropriate to determine *a priori* by name that organization, since international organizations might change the scope of their powers and functions; and, secondly, it would be premature to indicate only existing international organizations at the time of the elaboration or adoption of the Convention, in view of the dynamic development of international institutions and the prospects of emerging new international organizations on global or regional level in the field of ocean affairs. This flexible and pragmatic approach was based on the evolutionary concept of the functions of international organizations. After the entry into force of the Law of the Sea Convention, international organizations may adjust their powers and functions to new requirements deriving from the relevant provisions of UNCLOS.

It might be appropriate mentioning that already at the stage of the negotiations in the Sea-bed Committee the evolutionary concept and flexible pragmatic approach had prevailed over the attempts to single out the competent international organizations by name at every article where reference to them had been made.

Consequently, there are only a few provisions in the Law of the Sea Convention where specific organizations such as IAEA, FAO, IMO, IOC, UNEP and the International Hydrographic Organization are named as the competent international organizations in their respective field of activity. Furthermore, in Annex VI of the Final Act containing the Resolution on Development of National Marine Science, Technology and Ocean Service Infrastructure, special reference is made to the World Bank, the United Nations Development Programme, and the United Nations Financing System for Science and Technology as multilateral funding agencies within the United Nations institutional structure.

Some of the international organizations have undertaken special studies on the implications deriving for them from the Law of the Sea Conference. I could mention as an example the comprehensive analytical review of the relevant articles of the Convention having a bearing on the activities of IMO. The Intergovernmental Oceanographic Commission (IOC-UNESCO) has also initiated similar studies since 1982 (even before UNCLOS was open for signature). An IOC *Ad hoc* Task Team to Study the Implications for IOC, of the UN Convention on the Law of the Sea and the New Ocean Regime was established in 1982. The United Nations University and IOC also held a Workshop on International Cooperation in the Development of Marine Science and Technology in the Context of the New Ocean Regime in 1982 (Paris, 27 September–1 October 1982).

These studies within IOC were pursued by the *Ad hoc* Study Group on IOC Development, Operations, Structure and Functions through 1992, and continued by the *Ad hoc* Working Group on IOC Responsibilities and Actions in Relation to UNCLOS. I have been involved in most of this work of IOC and had presented to the Executive Council and later to the Assembly of IOC in 1994 and 1995 a report entitled "IOC and UNCLOS: Responsibilities and Actions" (Doc. IOC/EC-XXVII/15). An Annex to this report contains an analytical tabulation of articles of UNCLOS relevant to the role and functions of IOC.

The tasks and responsibilities of competent international organizations refer to a wide range of functions, such as contribution to law-making and standard setting of rules and regulations, assistance in the implementation of the relevant provisions of the Law of the Sea Convention and promotion of international cooperation. The powers and tasks of competent international organizations *ratione materiae* encompass a wide range of marine affairs, including delimitation of marine areas, operation and safety of navigation, recommendations with regard to the designation of sea lanes and traffic separation schemes in the territorial sea and archipelagic waters, conservation and management of living resources in the exclusive economic zones and high seas, exploration and exploitation of the non-living resources, protection and preservation of the marine environment, regulation of marine scientific research in the exclusive economic zone and on the continental shelf, development and transfer of marine technology, and settlement of disputes. Relatively greater number of articles relate to the protection of the marine environment, marine scientific research, and marine technology. Thus, out of 36 articles on protection of the marine environment, 27 refer to competent international organizations. In the field of marine scientific research this ratio is 16 out of 27 articles, and on development and transfer of marine technology 9 out of 12 articles.

Turning to the study and practical measures taken by competent international organizations in response to UNCLOS, I have to emphasize that a significant work has been done in the last decade. I have already mentioned the extensive study on the impact of UNCLOS on the activities of IMO. The IOC has been reviewing its Statutes and Rules of Procedure with the same objective. Similar analytical work has been done by FAO, UNEP, particulary in the field of coastal zone management and enhancing regional cooperation. The World Meteorological Organization together with IOC and some other international organizations have adopted a special project on Global Ocean Observing System (GOOS),

taking into consideration the general provisions of UNCLOS underlying the importance of monitoring, observation and assessment of the pollution of the marine environment on global level. UNEP, IOC and other international organizations established joint programmes called GIPME, MARPOLMON and other interagency projects supported by interested governments. It is obvious that without effective committment by States these programmes cannot be accomplished.

In conclusion I wish to point out that the active involvement of international organizations in the protection and sustainable development of marine resources should contribute to achieving viable coordination and rational employment of funds, equipment and scientific and technological infrastructure. States and international organizations should avoid establishing parallel and overlapping programmes and institutions. Cost-benefit considerations of such programmes should be accorded priority. The existing network of intergovernmental and non-governmental organizations dealing directly or indirectly with ocean affairs is sufficient. This requirement of rational use of existing institutional mechanisms should apply also to the International Sea-bed Authority which should try to avoid creating organs of its own in areas where there are availabe competent international organizations equipped with adequate expertise in scientific investigation of marine non-living resources and related services, such as ocean cartography and mapping, data availability and establishment of database, geological surveys of continental shelf in order to determine its outer edge. This general consideration may apply also to observing and monitoring of processes and phenomena taking place in the marine environment. Evolutionary approach to the establishment of appropriate institutional arrangements and integrated management of marine resources should be the guiding rule in the appraisal of the role of international organizations in the uses and exploitation of the wealth of the world's ocean. The potential of international organizations in the implementation of UNCLOS is significant and needs to be employed adequately.

Bernard Oxman

Thank you very much Ambassador Yankov. It is indeed we who are the losers, not having adequate time to hear everything that you were prepared to say. I just wanted to observe that the philosophy of flexibility is entirely appropriate to a general constitutive instrument, including a dispute settlement instrument. The flexibility of the so called Montreux compromise and the choice of procedure under Article 287 is often noted in this regard. But that is not the sole source of flexibility. Another very

important provision is Article 282: if the parties to a dispute are parties to another agreement or instrument that permits one of the parties to submit the dispute to a third-party procedure that entails a binding decision, that procedure prevails over the procedures in the Convention.

Our next speaker, Ambassador Eitel, will address the question of the law of the sea and the United Nations Security Council.

Tono Eitel

We all are aware that Germany has been elected member of the Security Council for the next two years and therefore I thought it could be appropriate that this learned group might contribute a little to questions which may arise when both the Security Council and the Law of the Sea Convention are concerned.

I do not have to present the Security Council. It has been given primary responsibility for the maintenance of international peace and security and has therefore been granted specific powers under various chapters: Chapter VI dealing among other things with situations likely to endanger the maintenance of international peace and security, Chapter VII dealing with threats to and breaches of the peace and Chapter VIII dealing among others with regional arrangements and agencies. I do not go into Chapter XII because I think that the Security Council's competence for strategic areas has no practical relevance anymore. What is remarkable about the Security Council is the wide interpretation given to its competences since the dissolution of the Soviet Union. Cases in point are the two penal Courts recently established by Security Council Resolutions on former Yugoslavia and Ruanda.

The Law of the Sea Convention, on the other hand, responds to various responsibilities of the Security Council. First, through references to the maintenance of peace, the peaceful uses of the seas and oceans and the strengthening of peace and security in the preamble and the similar formulas in the fields of deep-sea mining: Article 138 mentions the interest of maintaining peace and security. Article 141 speaks of the use of the Area for peaceful purposes. Then outside deep-sea mining we have express references in the field of marine scientific research: Article 143 for the Area, Article 240 in general. The Convention, moreover, contains numerous provisions of direct relevance to peace and security. I refer to articles on warships (Articles 29 to 32), on possible problems of passage through territorial seas, through straits, through archipelagic waters, the consequences of installations and structures on the continental shelf and deep-sea mining inside or outside the Convention etc.

There is also a response of the Convention to the Security Council's functions and responsibilities under Chapter VIII because in the Convention there are numerous references to regional cooperation. One could think of Article 43 where States bordering straits, and Article 70 (3)(b) where regional cooperation by geographically disadvantaged States and coastal States in the exclusive economic zones are mentioned. One could think of Article 118 where fisheries in the high seas are concerned and Article 123 where regional cooperation in enclosed or semi-enclosed seas is envisaged. Prof. Yankov has moreover mentioned quite a number of other regional programmes, arrangements and agencies. I am sure that most of these agencies would fall, if the Security Council wants it, under Chapter VIII, particularly given the wide interpretation of the institutions mentioned in Chapter VIII by the Secretary General in his report Agenda for Peace where, I think quite correctly, he points out that when drafting the Charter the intention had been to make good use of any arrangement which could be helpful in solving the relevant problem.

We therefore find that the Security Council has a wide field of potential activity and this even before a dispute arises in a situation described in Chapter VI. This competence of the Security Council seems to me to be without any off-limit region. I do not see anything where the Security Council, given the preconditions of the various chapters I mentioned, would be barred from action. I would therefore assume that this competence would, in my view at least, supersede decisions taken by any organ, for example those of the Seabed Authority. Situations under Chapter VI could evolve in various combinations. Take for example warships travelling to a theatre of war, under a Chapter VII Security Council decision, having transit difficulties on their way to the theatre of war. Or let us assume that the Security Council intends to regulate marine scientific research in order to prevent progress in the development of A, B, or C weapons. So all these could be measures, in my view at least, under Chapter VI or possibly even under Chapter VII. The competence of the Security Council becomes, if possible, even more overriding in cases of disputes coming under Chapter VII.

To the extent, however, that a dispute has arisen, a new actor enters the scene competing in competence with the Security Council, and Tullio Treves yesterday morning in his paper has alluded to it. Article 298 para. 1 *lit.* c of the Convention explicitly grants only an optional exception and, I quote, "in respect of disputes of which the Security Council is exercising its functions". Only a few countries so far have made use of this option and excluded the jurisdiction of the Tribunal in these cases

thereby doing away with one of the two competitors. Not surprisingly the former Soviet Union, Ukraine, Byelorus, Cuba and, somewhat surprising, Tunesia have done so. Others, I assume, will follow. I take it that the four other permanent members of the Security Council will have an interest in doing so if and when they adhere to the Convention. But many other States Parties to the Convention will certainly not do so. In those cases the Tribunal and the Security Council will find themselves in a Lockerbie type of situation. I hesitate to predict the outcome of such a concurrence and I conclude only in expressing my hope that a solution would be found by the self-restraint of both organs; and I wish to stress, b o t h organs.

Bernhard Oxman

Thank you very much.

I want to underscore the importance of the remarks that Ambassador E i t e l made at the outset. We are now in a period in which it is possible to realize at least some of the ambitions for the Security Council of the Charter's drafters. To realize those ambitions, particularly under Chapter VII, the Security Council is going to have to rely on national naval forces either to enforce its economic measures or to take military measures which it orders or approves. Respect for the Law of the Sea Convention's provisions on navigation, particularly as they relate to security matters, will become a critical factor influencing the extent to which a Security Council mandate can be easily carried out. Provisions of the Conventions that were perhaps understood in the Cold War context as responding to a security system based on unilateral or bloc action must now be understood as responding to the need to facilitate the practical implementation of collective security by the Security Council in many different parts of the world.

Perhaps in defence of Article 298 (1) (c) on the Security Council, to which Ambassador E i t e l referred: It can be read more optimistically as an advance on Chapter VI of the U.N. Charter. Under subparagraph (c) the Security Council has the power to require the parties to resort to the means of settlement provided for in the Convention, that is arbitration or adjudication. This seems to go beyond the dispute settlement powers of the Council under Chapter VI.

We have asked our next speaker, Gregory F r e n c h, to focus, if he would, on the interface between the International Seabed Area and the continental shelf subject to the coastal State jurisdiction.

Gregory French

I have heard it said that international legal agreements and sausages are two things that one should never see being made. I think that would also apply to some aspects of the Agreement. I think, going back to first principles, we have heard many times about the existence of an international consensus that the Area and its resources are the common heritage of mankind. There is one very fundamental issue where the ends need to be tied up on that. When looking at the definitions, what is the Area? We have the definition of course in the Convention itself in Article 1 that the Area is the seabed and the subsoil beyond national jurisdiction. The definition of "resources" is very clear, that is found in Article 133 paragraph (a) of the Convention. But do we know what is within the limits of national jurisdiction and what is in the Area? In a legal sense it is clear we know what it is. But in a geographical sense it is not quite such a simple question. And that of course raises the question of the demarcation between the deep seabed, the so-called abyssal plains, in general and the continental shelf. Of course, there is a geographical, a geological issue here as well as a legal issue. And it was realized very soon that the definition which was developed in the 1958 Convention on the Continental Shelf was inappropriate for modern circumstances, that is the definition that the continental shelf extended to the 200 m isobath or to limits of exploitability. This would mean of course, if that definition was still valid at international law, that we Australians could do some sand mining off Newport Beach, California for example. Similarly, we suspect our friends in California could try doing something similar off the coast of Sydney. It would not be particularly useful.

Thus it was clear that a new definition of the Continental Shelf was required. We find it in Article 76 of the Convention where firstly, of course, we have a general limit of 200 nautical miles which is particularly relevant for those States which have narrow continental margins. And it also, of course, is linked to the definition in Article 57 of the Convention with regard to the exclusive economic zone as it relates to the seabed and the subsoil below that. The significant issue beyond that is when you have broad continental margins. We are one of the so-called "margineer" group of States with continental margins which extend beyond 200 nautical miles.

Two ingenious formulas were developed to describe the continental shelf beyond 200 nautical miles in a legal sense. That is either under Article 76 the Hedberg line formula which says that the continental shelf extends in a legal sense out to 60 nautical miles from the foot of the slope.

You must bear in mind that you have the continental shelf in the legal, as well as in the geomorphological sense. So you start from the shore with the geomorphological continental shelf and then it goes down on the continental slope, then you have the foot of the slope, and then the continental rise, which goes in a very gradual inclination down into abyssal plains. And so the Hedberg line extends from 60 nautical miles from the foot of the slope down onto the continental rise. Alternatively, there is the so-called Irish formula, which is dependent upon sediment depth. The Irish formula defines a line joining a series of points where the thickness of the sedimentary rock at those points is at least 1 percent of the distance from those points to the foot of the slope. In concrete terms, for example, if you have 1 km of sediment at the foot of the slope, then you can go out 100 km. And this was quite an important formula because you have many areas in the world where the gradiant of the slope is less than 1 percent. That means, that there will be several points where the Irish formula will allow for part of the International Seabed Area to include sedimentary rocks, which means that there would be the albeit small possibility of hydrocarbon exploration in the International Seabed Area, not just hard mineral resources exploration.

In addition to that there are some limits defined in Article 76 para. 5. The legal continental shelf cannot extend more than 350 nautical miles from the territorial sea baselines or 100 nautical miles from the 2500 m isobar, except on submarine ridges (Article 76 para. 6) to prevent the possibility of Iceland, for example, which sits astride the mid-Atlantic ridge, having a continental shelf which would extend all the way to Antarctica and beyond.

So we have these very precise definitions in the Convention. How do we realize them? This is where the institutional aspects become very important, and the institution of the Commission on the Limits of the Continental Shelf was created in order to determine or to systematize the process of determining the limits of the Continental Shelf. And so we have in Article 76 para. 8 the mention of the Commission and in Annex 2 of the Convention we have the description of the way in which the Commission will exist. The Commission will be made up of 21 members with 5 year terms. They are able to be re-elected and must be experts in geology, geophysics or hydrography. Looking also of course in terms of elections, to the issue of equitable geographical distribution and representation, an important point here is that the election must be held within eighteen months of the coming into force of the Convention, that is by 16th May 1996. An election will be conducted by the meeting of the

States Parties. So we are looking at a deadline which is approaching for election of these members. And another deadline which is approaching for several States, including Australia as a margineer State, is the fact that those States which wish to assert their jurisdiction and have it recognized over the continental margin beyond 200 nautical miles must have submitted their co-ordinates to the commission within 10 years of the coming into force of the Convention for that State. For us, for example, and for some other margineer States who are already States Parties to the Convention, that clock has started ticking. I am bearing in mind that it is stipulated in the Convention that the members of the Commission will be elected from States Parties. It is possibly advisable for some other margineer States who are not yet States Parties to attempt to get their instruments of ratification or accession in by the very latest on 16th of May 1996.

There are many technical issues which would need to be considered by the Commission which will have concrete consequences. As I mentioned before, depending on whether you use the Hedberg line or the Irish Formula, it is likely that there will be areas of the continental shelf which are part of the Area from the point of view of the international community, and some of these areas, although low in prospectivity may have resources which could be valuable. So it is crucial for the international community to know what potential resources will be at its disposal in future. The definition is not so important for manganese nodules because they are found, generally speaking, between 4500 and 5500 m in depth on the abyssal plains and they will not be found anywhere near the continental margins, but you have other resources as well as such as the polymetallic sulfide resources and the cobalt-rich manganese crusts which may also be found in these areas close to the continental margin. It would be important for the international community as a whole, to the extent they are interested in the redistribution of resources, to know what is the extent of the International Seabed Area under the Convention. There will also be important technical issues with regard to the data which would be submitted by the broad margin States, for example the completeness of the data which would be submitted. If you look at the Hedberg line formula for example, you are looking purely at the topographic profile of the seabed. That is sufficient, all you need to know is where is the foot of the slope and then you can extend your line out from there. But if you are using the Irish formula, you need to do a lot more, have a lot of seismic data. You need to know the depth of the sediment, and that requires a lot more research. In addition to that you will have to look at what would be

adequate data, what would be the number and interval of data points which will be needed to be provided to the Commission. The Convention itself tells us that straight lines may be drawn between point 60 nautical miles apart. But does that mean that that will be adequate from a technical prospective in terms of actually defining clearly the range of the continental shelf in a legal sense? So all these issues will need to be considered. To conclude, I would make a plea to all those other broad margin States which are not yet States Parties to the Convention to seriously consider getting their instruments of ratification and accession in before that date of 16th of May 1996 in order to ensure that the interest of both broad margin States as well as the international community, are adequately reflected in determining the extent of the continental shelf and of the International Area. We will, of course, have time after the constitution of the Commission on the limits of the Continental Shelf, up to ten years. I would imagine that very few States would think of putting in their data before the ten-year limit. It is very hard work. I know from our people that they have been working very hard for many years on getting these data together. But clearly the first few years in this Commission will be important. That is when many of the basic principles for their procedure, many of the basic ideas about the nature and extent of the data to be submitted will be determined. I think it will be a very important election and something which has possibly been a little bit out of the limelight in recent years in view of the very important tasks which we had before us. Thus I believe it is a task which must be taken very seriously and which we should all attempt to devote some effort to in the next year and a half.

Bernard Oxman

Thank you. The relevance of the system for determining the outer edge of the continental margin to the theme of this conference is apparent. It is one of the more innovative allocations of competence in the Convention. The coastal State submits its view of the boundary to the commission of experts, which means the coastal State is making legal judgments itself as an initial matter. The commission then makes recommendations to the coastal State. If the coastal State proceeds on its own to establish the boundary on the basis of the commission's recommendations, all the parties to the Law of the Sea Convention are bound. That ends it. And, of course, this fixes the limits of the International Seabed Area. The competence is not exclusively that of the coastal State and not exclusively international: the coastal State and an international institution working together produce a result which, when executed by the coastal State, binds other States.

I am a little concerned that some people might misunderstand Mr. French's reference to the possibility that there may be hydrocarbons in the international area. It is fair to say, to be blunt, that the definition of the continental margin reflects a deliberate effort to make sure all significant oil and gas deposits are going to be under coastal State jurisdiction. Indeed, the "Irish formula"-reference to thickness of sediment is of course a direct reference to the probability of finding oil in the seabeds. Moreover, I thought that one sign of the relative moderation of Ambassador Orrego yesterday is that he chose not to suggest an analogy between fisheries and the rule of Article 142. Pursuant to Article 142, in cases where mining activities in the deep seabed may result in the exploitation of resources within national jurisdiction, that is the continental shelf, the prior consent of the coastal State concerned is required. Therefore, if there is oil seaward of the continental shelf boundary, it could well be in a situation in which the coastal State is going to have substantial control over the oil anyway.

Our next speaker addresses a subject which introduces a new set of values into the law of the sea, namely the values we associate with art, archaeology and history. I invite Karen Davidson to take the floor.

Karen Davidson

Now that Professor Oxman has covered it, maybe I don't have to say anything more ... but I will. I come from an agency in the United States that has a lot of responsibility for protection of a wide range of values in the ocean, and one of these is protection of cultural, archeological and historical resources. In conjunction with what everyone has been saying in other contexts about the implications of new technology, I might add that over time, as new technology is developed, it also increases the capability of salvors to find wrecks, and to explore and remove wrecks and related items of cultural and historical significance. It has thus become more pressing to think a little bit more about the principles and approach that we might take to this subject and also about how we might act to protect the historical and cultural interest in these resources.

Turning first to the Law of the Sea (LOS) Convention, the Convention has at least two provisions which deal with this subject and I believe that these are new provisions that take a step beyond the 1958 Conventions and previous legal practice. I think that in the past there has been a lot of discussion about relevant applicable law and accommodation of various competing interests in historical and cultural resources, which is reflected in such questions as: what is "abandoned"; what is a "find"; who owns

the resource; what is the salvor's interest; what is the owner's interest; and can a coastal or other State assert some kind of jurisdiction, on a nationality theory, a territorial or other theory over these resources? These kinds of issues are continuing today. The LOS Convention provides a framework within which to address those issues, but does not resolve them.

Article 303 of the Convention states a general duty of States to protect objects of an archeological and historical nature found in the sea and to co-operate for this purpose.

Article 303 is not on its face limited to areas over which States have jurisdiction and seems to be a fairly broad duty. The second paragraph of that article basically says that within the contiguous zone of a coastal State – and I think this is a new provision – if there is a removal without the approval of that State, it can presume that the removal is an infringement of its laws. In other words, this provision allows for coastal State approval of removals of historical and archeological objects within the contiguous zone. You will note, though, that para. 3 tempers this provision by indicating it does not affect the rights of other interests, identifiable owners, the law of salvage or other rules of admiralty. Para. 4 says Article 303 is without prejudice to other international agreements and rules of international law, which I would take to mean that it would not preclude some future international agreement relating to the subject.

The other provision that I am aware of is Article 149, which deals with archeological and historical objects in the Area. This says that all objects of an archeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, with particular regard being paid to the preferential rights of States or countries of origin or the State of cultural origin or a State of historical or archeological origin. These two provisions basically set out some principles but, again, do not articulate exactly how this all should be reconciled.

In the United States we have tried to address this issue. We have one domestic statute called the Abandoned Shipwreck Act which is basically a multiple use approach. It contains a set of guidelines that try to accommodate a number of interests in terms of how submerged archeological and cultural objects are treated in the United States. It is basically a statute which gives states of the United States a great deal of authority in terms of defining policies about how these resources should be managed and used. Under international law, at least as I understand it, within internal waters States pretty much have a complete say about how these objects are addressed, and it seems, if you look at Article 303 that they

also have significant authority within the territorial sea and within the contiguous zone. The Abandoned Shipwreck Act applies at least in the territorial sea.

Once you get beyond the contiguous zone there is very little that can be done to protect archeological and cultural objects, especially as to foreign vessels and foreign salvors, under existing U.S. law. The one relevant statute, except for national parks which may occur on the coastline within the territorial sea or something like that, is one that is administered by my agency. This is the Marine Sanctuaries Act. That Act allows us to establish special management areas within areas of the seabed – actually to the outer extent of the EEZ – that need special management in order to protect certain values or uses. It is a multimanagement kind of system and it allows the Federal Government to establish particular rules for a particular area. Among the objectives of that Act is the protection of historical and cultural resources. I should mention a second important concern from the point of view of an agency like mine. In the course of salvage or removal of these cultural resources from the seabed, we have a concern about the impact of that activity on the marine environment, because corals are damaged and there is damage to other resources of the area. So we act, in the context of the marine sanctuaries, to protect this interest as well.

Most of the marine sanctuaries that we have designated in the United States include regulations for the protection of historical and cultural objects. In some sense, these regulations do not attempt to address the issue of ownership, but deal more with the need – it is almost a kind of trusteeship approach – to protect the use and also to protect the surrounding marine environment. We also have regulations in most of our sanctuaries which prohibit any disturbing of the seabed without a permit. This allows us to exercise some control in these specific areas, at least as to our own citizens, as to how these resources are both used and what kind of access will be allowed, keeping in mind other interests, the protection of the environment and the resource itself.

Turning to the International Law Association's draft Convention, this is a proposal for how to flesh out some of the principles in the Law of the Sea regime and to deal with some of the recurring questions. This Convention has a broad definition of underwater cultural heritage which basically applies to all underwater traces of human existence which have been abandoned or lost for 100 years. The definition of "abandonment" takes into account technological capability to find these resources and also considers the lack of an expression of continuing interest by a previous

owner. The Convention would allow establishment of a "cultural heritage zone", which would consist of the area beyond the territorial sea of a coastal nation to the outer limit of its continental shelf, within which coastal States would generally have sole jurisdiction over activities affecting underwater cultural heritage. The other thing I should point out, as the general matter, is that the Convention does not apply to public vessels, which is also an interest of the United States, and it says that the salvage laws do not apply, which addresses another issue of continuing concern.

The general principle that is found in the Convention is that States Parties should take all reasonable measures to preserve underwater cultural heritage for the benefit of mankind. In a way, this is an attempt at blending the two LOS provisions that I noted to you, in the sense that it mentions the principle of the benefit of mankind, which is found in Article 149 (but only as to the Area), and it also places on States an obligation to take reasonable measures, which reflects the general duties that you find in section 303. There is also mention of co-operation in the Convention's provisions, which draws from, but does not fully reflect Articles 303 and 149.

Within a cultural heritage zone, which a State Party may declare but is not required to declare, the coastal State may assert jurisdiction over activities affecting underwater or cultural heritage. With this authority comes a duty to comply, at a minimum, with a Charter for Protection and Management of Underwater or Cultural Heritage which would be appended to the draft agreement and which would contain, as I understand it, a scientific protocol for how resources may be developed, explored and so on. States would also be required to assure that authorities within their jurisdictions (I guess in the case of United States, this might mean states in the United States) take appropriate measures to apply the Charter to internal and territorial waters, as well as the obligations with regard to the cultural heritage zone.

There is also in this draft Convention a prohibition on a State allowing the use of its territory in support of an activity inconsistent with the Charter. That prohibition would appear to include activities in the cultural zone (beyond the territorial sea and not in the zones of another party), which reflects a kind of territorial interest or jurisdiction (note that the wording may also apply to the Area). There would also be an undertaking by States Parties to prohibit its nationals and flag-ships from activities inconsistent with the Charter beyond cultural zones or the territorial sea of another party, which, I guess, again would apply to the

Area beyond the jurisdiction of any nation, and reflects an approach based on nationality. The Convention also contains provision for importation permitting and for seizure, at the request of another party or on its own initiative, of cultural heritage which is brought within its territory directly or indirectly (which, I think, means by secondary transaction) and which has been retrieved inconsistent with the Charter.

In terms of co-operation, the Convention requires the consent of another party to seizure if the object was retrieved from its zone and notification of seizure to States of origin. It includes a duty to record, to protect and to take reasonable measures to conserve seized heritage. In addition, there are provisions to encourage public display and access to seized objects, collaboration with other interested States and joint study and information sharing, education and promotion. Finally, there is a dispute resolution provision which requires both internal State procedures for determining compliance with the Charter and, among States, calls for arbitration or subsequent submission of disputes to the ICJ at the request of a single party.

So basically what I am doing today is reporting to you that this draft Convention has been submitted to UNESCO and will be under consideration in the very near future. It gives coastal States broad jurisdiction to make decisions about what their priorities might be, beyond the minimum that may be in the Charter, in terms of both protection and disposal of cultural resources. It also contains some provisions to promote co-operation which relate to Articles 149 and 303 of the Convention.

Bernard Oxman

Thank you very much. The Law of the Sea Conference considered whether marine archeology should be a coastal State competence within the exclusive economic zone or on the continental shelf. This idea was firmly rejected by a substantial number of States and vehemently opposed by certain defence ministries. I wonder if priorities have changed, or if the ILA committee is insufficiently informed.

The problem is coastal State jurisdiction. If you move beyond the competences of the coastal State already included in the regime of the continental shelf, which relate not only to resources but to drilling and almost all installations, you get uncomfortably close to a view regarding coastal State jurisdiction that is probably most characteristic of Chile's northern neighbours. Indeed, one of the people involved in the drafting of the coastal State provisions of the ILA draft is an individual from Ecuador,

and of course Ecuador has rejected the Law of the Sea Convention precisely on the grounds that coastal State jurisdiction within 200 miles should be much more like a territorial sea. Australia was also highly influential in the ILA process and in fact has legislation on this question. I am simply noting that this was, at one time, such a delicate question at the Law of the Sea Conference in that work on legal philosophy in Germany in the early part of the century, which included research into the use of legal fictions in Roman Law, had a direct influence on achieving the solution: the solution in Article 303, paragraph 2, as many of you know, is a legal fiction. The coastal State may presume that the removal of an object within the contiguous zone is going to result in an illegal importation into the territory of the coastal State. But people were willing to live with the legal fiction precisely because it did not involve a new coastal State competence in principle.

I have no idea what the reaction of governments these days on this question will be. I have my doubts that the ILA draft will prove acceptable once it is closely scrutinized. It is unduly heavy on coastal State's sovereignty and remarkably light in fact on archeological duties when you work through the internal cross-references. It also contains an unusual provision that I suspect environmental groups may oppose, namely that the importation policies of States must be based upon the exploitation policies of the coastal State. That would, of course, implicate the sensitive issue of whether States may use their importation policies to implement their environmental policies.

Our next speaker has just published a major book on the Antarctic Treaty System. I would like to ask Ambassador Orrego if he would make a few remarks on the interface between the Law of the Sea Convention and the Antarctic Treaty System.

Francisco Orrego Vicuña

The subject of the law of the sea in the Antarctic Treaty System is also one where one can look with great interest into some new problems of redistribution of competences. In this particular context, as you will realize, the distribution takes place in an entirely different setting and with extremely interesting and also different legal connotations from what we normally know between States or international organizations. First of all, we should start from the legal principles and realize that there is no agreement on the matter as how to approach problems in Antarctica. But at the same time, and this is the interesting feature, there is agreement on the practice of handling those very issues. This makes all the difference as

far as the Antarctic Treaty system is concerned. Article 4 of the Antarctic Treaty provides the key for these practical arrangements in terms of referring to both claimants interest and non-claimants interest. The law of the sea as applied to Antarctica has of course a relationship to that distinction. Claimants quite naturally will also claim marine areas attached to their territorial claims. But non-claimants will of course disregard or not accept marine areas under national jurisdiction. Thus far, there is nothing new. It is the classical confrontation.

But the new element comes in here: while non-claimants do not recognize claims or marine areas under national jurisdiction they do not disregard the interest in those particular areas as to the relationship between the Antarctic Treaty system and the international community in general. That is to say, even non-claimants recognize that there is a special interest relating to marine areas in Antarctica. On the other hand, claimants have pursued their policy with great moderation and caution and there has been no attempt at individual enforcement of marine areas in Antarctica. So what we have in practice, although the legal description of this might vary, is a situation of joint jurisdiction in Antarctica, which some will regard as an exercise of national jurisdiction but not enforced as such, and some others will regard as an expression of collective interest in marine areas surrounding the continent, opposing national jurisdiction but not opposing the consequences of having those areas attached in some way to the Antarctic Treaty system.

This form of joint jurisdiction has some very specific applications to which I would like to refer. It has not been greatly elaborated upon in terms of the territorial sea. A few discussions took place in terms of the Agreed Measures in regard to some implementing action by the Consultative Parties but that was basically related to some areas for pollution control around the continent. The reference to 12 miles was introduced in that context. There is, however, a very interesting technical problem applicable not only to the territorial sea but to other areas as well, which is the drawing of baselines on ice. This is an old discussion under international law. It has not been particularly discussed in Antarctica but it certainly is underlying many of the measurements, if you wish, of various marine areas.

The two basic examples I would like to refer to in terms of how this joint jurisdiction has worked is, first, what has happened with the exclusive economic zone in Antarctica and next what has happened with the continental shelf. In terms of the exclusive economic zone there were claims to marine areas both before the Antarctic Treaty in 1959 and after-

wards. In fact, for example, there was one claim, that of Chile which related to maritime areas in Antarctica since 1947 when the first 200 mile-claim was made. After the Antarctic Treaty entered into force a number of claims have been made to the exclusive economic zone in Antarctica. The most recent is that of Australia last year. In the meanwhile, fisheries have got under way having started developing in Antarctic waters even before the Convention on the Conservation of Antarctic Marine Living Resources was made. So when the parties came to discuss what would be the regime actually governing living resources in the area, they were already confronted with some interests at play. The compromise that was made was embodied in common rules. First, on the part of claimants, the idea of no renounciation to claims prevailed, but at the same time the idea of no individual enforcement was also present. This lead quite naturally to a form of joint jurisdiction which is governed both by common rules and, above all, by the regulations of the institutions. Although legally the construction was quite interesting, the practice was difficult, particularly during the first years. The issue of conservation versus fisheries exploitation was very much at hand. The integration of science into political decisions did not work at all, and criticism was of course emerging quite strongly because of that situation. However, a second period started to develop about 1987–1988 and this is the period in which institutional co-operation was restructured in order to have these interests and bodies work in a way more conducive to proper conservation. The result of that was quite important. First, the implementation of the eco-system approach, the introduction of the precautionary approach to fisheries, and the regulation of new fisheries, not through a prior authorisation but through a prior procedure for adopting conservation measures in time. This was coupled together with a number of measures in terms of inspection, observation and others. There are still some difficulties although the outlook is quite promising today.

There has been some concern already expressed in terms of the Australian exclusive economic zone claim to Antarctica last year although it has not been actually enforced in relation to Antarctica. There is also a separate situation concerning the British maritime zone claim in the area of South Georgia and South Sandwich Islands. The discussion is about whether this policy should be handled only under common arrangements or in addition under some form of national jurisdiction. Not surprisingly there was a third item I would like to mention: that of straddling stocks. In fact there are some resolutions adopted by the Commission calling for the treatment of species in certain situations both in the common area, the

high seas beyond the common area and even, to some extent, under exclusive economic zones of neighbouring countries.

Let me turn lastly to what I regard as perhaps the most difficult issue in terms of the Law of the Sea, which is that related to the continental shelf. The philosophy here has been exactly the same: there have been no individual claims enforced in relation to the continental shelf although claims have been made. On the other hand, the continental shelf area is recognized as an area of importance through the Antarctic Treaty Regime as a general proposition. This was firstly dealt with, quite adequately in my view, in the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA). In fact CRAMRA indirectly, and the final Act of CRAMRA very specifically, refers to Article 76 of the Law of the Sea Convention. That meant that in spite of being a different context and in spite of not everyone recognizing national jurisdiction, in any event the same criteria embodied in the Law of the Sea Convention were applied to Antarctica. Of course there would be an area of the deep seabed beyond Antarctic Treaty Parties' jurisdiction but within the area of application of the Antarctic Treaty, that is south of 60 degrees south latitute. The first complication is the approval, the signing and perhaps entry into force at some moment in the future of the Protocol on environmental protection to the Antarctic Treaty. Here the approaches change entirely from the point of view that environmental protection is established for the whole area south of 60 degrees south latitute. The most important of the environmental measures adopted is the mining ban. Mining is prohibited in all that area and this has a number of consequences. First, it deprives the continental shelf of its content. The continental shelf, as we all know too well, has only one meaning, which is the exploration and exploitation of natural resources. It does not exist for other meanings except sedimentary species. But secondly, more difficult still, it means that the seabed regime under the Law of the Sea Convention could probably not apply south of 60 degrees south latitute because mining is altogether banned by the Protocol in that area. And this most probably means that the Antarctic Treaty Parties will have a conflict of interest. Under the Law of the Sea Convention and the agreement they could theoretically apply for mining anywhere in the seabed. But under the Protocol they could not apply for mining south of 60 degrees south latitute. So there is some degree of contradiction in the legal commitments set forth by both. The dismissal of CRAMRA and the mining ban, in my view, was not a good idea. Not to say that environmental protection was not needed, because it was very much needed, and the Protocol is very helpful in a number of ways. But I

don't think that the right approach was the dismissal of CRAMRA not only because of implications in terms of mining but also because of how this might eventually affect negotiations within the Antarctic Treaty system itself in the future.

There will be in addition a problem of submitting a continental shelf limit to the Commission on the Continental Shelf. If there is an individual submission by claimants in Antarctica this will raise a very complicated legal question between claimants and non-claimants. If there is no submission then this would mean, or be interpreted to mean a renounciation to claims in Antarctica which Antarctic claimants would not allow to happen. For non-claimants this would also be a bad business because then there would be no recognition of any form of jurisdiction whatsoever attached to the Antarctic Treaty regime, even if not attached to national jurisdiction. I have one suggestion to make in this regard: that there should be a joint submission by the Antarctic Treaty Parties to the Commission on the Continental Shelf under Article 4 of the 1959 Antarctic Treaty, collectively regarding this as the area where the definition of the continental shelf applies in Antarctica. There would be no prejudgment about whether this is national jurisdiction or else, and the matter would be controlled by Article 4 of the Antarctic Treaty. Internally we come back to a situation similar to that which was already agreed upon under CRAMRA. But externally it has a very different connotation, which means that collectively, jointly, hopefully under a regime, the Antarctic Treaty Parties might have a claim or a jurisdictional interest *vis-à-vis* third parties and the international community in general. This would have been very easy to do under CRAMRA because that was a regime already established. In the absence of CRAMRA this is also viable through some other procedure. I suggest that we explore this matter in the near future.

Bernard Oxman

Thank you very much. Another possibility, which is not inconsistent with Ambassador Orrego's suggestion, is to include in the environmental rules to be promulgated by the Sea-Bed Authority a cross-reference to the Protocol. The rules could provide that pending the entry into force of the Protocol, and upon entry into the force of the Protocol there will be no actions taken inconsistent with the Protocol. Another alternative is for the Council to announce in advance under Article 162 (2) (X) that it will disapprove applications inconsistent with the Protocol south of 60 degrees south latitute. Procedurally these options are a little more burdensome than Ambassador Orrego's proposal, which simply turns

on a submission by the Antarctic Treaty Parties to a group of experts. The adoption of regulations by the Authority or disapproval of mine-sites by the Authority requires, at least in the former case, a consensus on the Council and approval of the Assembly. On the other hand, in the long run, that might be a politically more acceptable and stable solution.

I wanted to use the occasion of introducing our next speaker to express all of our collective thanks not only to him but to Juliane Hilf, Karin Oellers-Frahm, Volker Röben and Sergei Vinogradov for the various papers that were prepared for our use and distributed to us. We have invited Ulrich Beyerlin to speak on the subject of his paper and to make some remarks on the relationship between the Convention and the UNCED process that has emerged from the Rio Conference.

Ulrich Beyerlin

The system of rules on the marine environment in the Law of the Sea Convention provides a general framework of rights and duties of States but contains only very few substantive provisions. Further treaty norms have to be elaborated by way of negotiation.

Nevertheless, the Montego Bay Convention has brought some fundamental improvements to marine environmental protection:

Thus, it lays much more emphasis on preventing and reducing environmental harm than on redressing damage. This shift from remedial to preventive action was certainly a decisive step forward, although the pertinent UNCLOS rules do not yet meet the specific demands of the precautionary principle which is today an emerging rule of customary international environmental law.

Seen from a genuinely ecological perspective, UNCLOS reveals certain structural deficiencies and shortcomings which result from its overall strategy of seeking to balance the conflicting interests of environmental protection and resource utilization. It is still too much influenced by the ideas of traditional international environmental law to be able to settle environmental utilization conflicts between individual States on the basis of equal treatment and respect for State sovereignty.

Today, a few regional Conventions, particularly the Paris Convention for the Protection of the Marine Environment of the North-East Atlantic and the corresponding Helsinki Convention for the Baltic Sea Area, both concluded in 1992, suggest that the gaps left by the UNCLOS framework rules will be best filled by more elaborate rules established by regional conventions. Both of these regional instruments are most promising attempts to establish procedures and mechanisms of co-operation for im-

plementing and further developing the conventional rules, as well as even monitoring compliance with them. As to their substantive rules, they do not yet bring about really satisfying solutions, but mark at least a very useful point of departure.

Turning now to the Earth Summit of 1992, the focus of the Rio Conference was on "sustainable development" which means "integration of environment and development concerns, aiming at the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future". This suggests that the Rio Conference has paid particular attention to the conservation of the oceans and their living resources. However, this issue was only one among several others.

Only in Chapter 17 of Agenda 21 is it dealt with more closely. This legally non-binding Agenda contains a comprehensive, dynamic "programme of action" which is fully inspired by the idea of "sustainable development".

Chapter 17 expressly declares that the relevant UNCLOS rules provide the international legal basis upon which protection and sustainable development of the marine and coastal environment and its resources are to be pursued. However, because of its non-legal nature, Chapter 17 does not establish any new binding rules of conduct to fill out the UNCLOS framework, but confines itself to placing an elaborate catalogue of different ways and means at the disposal of all actors engaged in promoting environmental protection and development at national, regional and universal levels.

Chapter 17 distinguishes seven programme areas; among them are:

– integrated management and sustainable development of coastal areas, including exclusive economic zones;

– marine environmental protection;

– sustainable use and conservation of marine living resources of the high seas and those under national jurisdiction;

– strengthening international, including regional, co-operation and coordination;

– sustainable development of small islands.

Chapter 17 pursues a threefold integrated approach:

First, it recognizes the need to combat cross-media pollution by means of medium-transcending strategies. This is certainly a wise concept.

Second, in its Programme Area A, Chapter 17 subjects marine and coastal areas which are separated under current international law to a

common regime of action. This may be the policy best suited to achieve the aim of combating social and economic under-development of people living in coastal areas. However, this approach considerably contrasts with UNCLOS which strictly separates not only maritime areas from land areas, but also territorial waters from the continental shelf and the exclusive economic zone. This approach based on separate legal regimes should not be relinquished in favour of the idea of an integrated management of maritime and coastal land areas. Otherwise, in the future coastal States perhaps could win undue influence over the management of the marine living resources to the detriment of the international community's interests even in areas beyond the 200 mile limit of their exclusive economic zones.

Third, Chapter 17 points to the need to intensify inter-State co-operation at universal, regional and subregional levels. In doing so, it declines to give preference to any one of these levels. Fortunately, however, it does not underestimate regional efforts. But regrettably, it does not recommend the establishment of any specific mechanisms or institutions which could help to integrate the individual efforts of States at whatever level into a joint framework of action.

Finally, Chapter 17 calls for some remarks on its underlying concept of "sustainable development".

This concept contains an inherent conflict of interests: environmental protection competes with development. Thus, it may be argued that the concept suffers already from a severe "in-born defect". However, without any doubt it has become an important political maxim. In the long run, it may even become a principle of customary international law. In any case, there is a need to identify reliable criteria for soundly balancing the said conflicting interests. Such criteria are still lacking.

In principle, both components of "sustainable development" are equally fundamental. This suggests treating them both on the basis of full equivalence. However, one should take into account that a more substantial conservation and restoration of at least the rudiments of our ecosystem appear to be an essential prerequisite for any successful development policy.

Measured against this theoretical acknowledgement, Chapter 17 suffers from severe deficiencies. Its proposals, particularly those dealing with the management of coastal areas and the sustainable use of marine living resources, appear to give more weight to developmental interests than to those of environmental protection. In many respects, these proposals are even more utilization-oriented than the pertinent UNCLOS rules. Thus,

if at all, they will hardly operate as a catalyst for filling up the gaps left by UNCLOS in a way that could strengthen environmental protection.

Judged as a whole, Chapter 17 will not considerably stimulate the process of establishing new legally binding international norms providing for more effective environmental protection. On the contrary, it could even mislead States to pursue a more utilization-oriented policy.

Certainly, the adoption of Agenda 21 does not diminish the state of environmental protection already guaranteed by today's international law. However, what counts is only the improvement of what has been achieved.

There is still hope that before it is too late all groups of States will become aware of the fact that in the long run any effort to achieve progress in socio-economic development must fail if there is no satisfactory protection of our global ecosystem.

Bernard Oxman

Thank you very much and thank you for sharing with our participants one of the great underground secrets of the UNCED documents. When you compare the environmental provisions of the Law of the Sea Convention carefully with the UNCED provisions ostensibly based on the Law of the Sea Convention, you could reach the conclusion that the UNCED provisions are weaker on a number of environmental issues. They are certainly not stronger. The reason that this is rarely discussed openly is that there is a fear that some judge may be listening, and may regard the UNCED documents as relevant instruments for interpreting the Law of the Sea Convention. It is regrettable that the younger environmentalists in particular seem less then fully aware of what was achieved in the Law of the Sea Convention and do not realize, as Rio certainly demonstrates, the great difficulty of replicating those achievements in environmental law.

Our next speaker was present at the creation. He was a participant in the drafting of provisions that create fascinating relationships with GATT and WTO. We have invited him to defend himself: Joachim Koch.

Joachim Koch

The relationship between the Law of the Sea Convention (LOSC) and GATT, WTO is only one aspect of a much broader feature, i.e. the relationship between the Convention and other international organizations as well as the rules and regulations adopted by them. Article 151 para. 8 LOSC deals with the relationship between the convention and multila-

teral trade agreements but does not refer explicitly to GATT. WTO didn't exist at the time when the Convention was negotiated. At that time it was not yet possible to make an express reference to GATT because some participants in the Third United Nations Conference on the Law of the Sea were not members of GATT and did not intend to become its members. Therefore the reference in Article 151 para. 8 LOSC refers only in general terms to multilateral trade agreements.

This provision contains two elements. The one is the substantial regulation that rights and obligations relating to unfair economic practices on relevant multilateral trade agreements shall apply to the exploration for and exploitation of minerals from the Area. The second element is the dispute settlement procedure. It sets out that members of the relevant multilateral trade agreements should use the dispute settlement procedures of the relevant multilateral trade agreements. In this provision is already enshrined a double approach. When we negotiated the text of section 6 of the Annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (Implementation Agreement) which deals with the production policy and especially with the prohibition of subsidization of activities in the Area, we again discussed whether it would be possible to have only one dispute settlement procedure or whether two dispute settlement procedures were needed. But as GATT and also the WTO provisions on dispute settlement procedures do not allow these procedures to be used by non-members, we again had to opt for a double approach, though it might lead to different interpretations of the substantive provisions. That is an outcome which is not satisfactory but under the circumstances it was unavoidable.

Article 151 para. 8 LOSC is only a general provision and needed elaboration in the Mining Code. But this had not been done when the UN Law of the Sea Office proposed the text for the part of the Mining Code on production policy. It did not include any elaboration of the principle contained in Article 151 para. 8 LOSC[1]. In the negotiations on the Implementation Agreement the question of the production policy was one of the major items, and this question was not only of interest to the producers from developing countries but also for producers from developed countries. I have to pay tribute to the delegation of Australia which took the initiative and proposed that we should elaborate the anti-subsidy principle in more detail and that then it would be possible

[1] Document LOS/PCN/SCN.3/WP.6/Add.1.

to give up the production limitation which was opposed by consumer countries for different reasons.

In section 6 of the Annex to the Implementation Agreement we find now a concrete reference to the General Agreement on Tariffs and Trade, the relevant codes and successor or superseding agreements; i.e. the agreement with which the Uruguay Round was concluded. In para. 1 (c) of that section you find the substantive provision which says: in particular there shall be no subsidization of activities in the Area except as may be permitted under the agreements referred to in subpara. (b). Subsidization for the purpose of these principles shall be defined in terms of the agreements referred to in subpara. (b). That means that the provisions of GATT/WTO on subsidization will be fully applicable to activities in the Area. A second principle which is contained in this provision is that there shall be no discrimination between minerals derived from the Area and from other sources and that there shall be no preferential access to markets for such minerals or for imports of commodities produced from such minerals.

As I already mentioned, these provisions also provide for a dispute settlement procedure on the basis of the GATT/WTO provisions. But there is a possibility for the members of GATT/WTO also to go back into the procedures under the Convention. Section 6, subpara. 1 (g) of the Annex to the Implementation Agreement says in circumstances where a determination is made under GATT/WTO procedures that a State Party has engaged in subsidization which is prohibited or which has resulted in adverse effects on the interests of another State Party and appropriate steps have not been taken by the relevant State Party or States Parties, a State Party may request the Council to take appropriate measures. This gives the party which brought forward the case the option to again go into the procedures under the Convention. One provision in particular might induce it to use these procedures. This is the provision which stipulates that the acception of subsidies constitutes a breach of the fundamental terms of the contract for exploration or exploitation. In that case the Council probably could revoke a contract. Such a result cannot be obtained under the GATT/WTO procedures. If that is done then the dispute settlement procedures of the Convention apply and the case can be brought before the Seabed Disputes Chamber.

This is only one of the cases where a close relationship exists between the Authority and another international organization. But there are other cases. One example is Article 146 LOSC on the protection of human life. This provision says expressly: "to this end the Authority shall adopt ap-

propriate rules, regulations and procedures to supplement existing international law as embodied in relevant treaties". We have another case in the Draft Mining Code. Part XI of that draft contains provisions on labour, health and safety standards[2]. Special Commission 3 of the Preparation Commission had a long discussion on the question of whether the Authority should elaborate labour standards of its own or whether it would be appropriate to rely on the labour standards developed by the International Labour Organization and which are accepted by many States[3]. The result of the discussion was that the latter way was chosen and that the Authority, when the time comes, should determine together with the International Labour Organization which labour standards should apply to deep seabed mining activities[4]. Another case will probably come up in the field of the protection of the marine environment. There are already existing rules developed by IMO and other institutions which could be taken over and applied to deep seabed mining activities. But the Authority will probably have to develop additional rules because deep seabed mining activities may have peculiar impacts on the marine environment not addressed in existing regulations. So there will be a two way approach. These are just some examples.

Bernard Oxman

Thank you very much. Our final commentator for this morning, Tullio Treves, will address the Convention and the development of the rule of law.

Tullio Treves

The title of these observations is very ambitious. The short time at my disposal will help me in making a presentation less ambitious than the title suggests.

When we reflect on what we mean by "rule of law" after entry into force of the U.N. Law of the Sea Convention, we are called to consider whether the effect of the Convention of promoting behaviour of States consistent with its provision is strengthened by the fact that the Convention is now in force.

Even before the entry into force the Convention was not without effect in influencing States' attitudes and behaviour in law of the sea matters. It

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[2] Document LOS/PCN/SCN.3/WP.6/Add.8.

[3] Documents LOS/PCN/L.99 and 106.

[4] Document LOS/PCN/SCN.3/1992/CRP.16/Rev.

is, however, to be expected that entry into force will enhance self-restraint by States Parties and discourage excessive claims of maritime jurisdiction. The fact that they are now bound by conventional obligations which have just become obligatory should make States more attentive than they have been so far to the legal implications of their behaviour.

Conformity with the Convention is also strengthened by the more solid basis for action to International Organizations given by a Convention in force. The Convention recognizes to International Organizations an important role, and international bureaucracies are always eager to expand the scope of their activities. It is to be expected that action by organizations with a view to implementing the Convention, already started before entry into force, will expand. Overall compliance with the Convention will thus be strengthened.

Leaving aside this enhancing of the self-restraining attitude of States and the effect of action by International Organizations, does entry into force of the Convention make it easier than before to claim and obtain compliance with the law in the field of the law of the sea?

From now on States Parties will be entitled to invoke conventional rights *vis-à-vis* other States Parties whose behaviour they claim to be a violation of the Convention. True enough, States have often invoked provisions of the Convention even before its entry into force. From now on, however, among States Parties it will not be possible anymore to reply by saying that the provisions invoked lack the character of customary rules. From now on, in the discussions arising among States Parties, it will not be possible to take advantage of the degree of imprecisions that often characterizes customary rules. The problems to be overcome now are of a different nature. They concern interpretation of written provisions.

States Parties will be able to add precision to protests addressed to other States Parties. If, however, a State Party wishes to go beyond protests and claim that the State that has allegedly violated the Convention incurs the consequences of such violation, the situation, as compared to that prevailing before entry into force of, or as between States not parties to, the Convention, seems changed only in so far as it is possible to resort to compulsory means for the settlement of disputes.

From the perspective of substantive rules the position of the State "injured" by the internationally wrongful act which consists in the violation of a rule of a multilateral treaty is the same as that of the State "injured" by the violation of a customary law rule. The work of the International Law Commission on State Responsibility witnesses to this. It shows that while there are difficulties in determining exactly which State is "the in-

jured State" in case of wrongful acts arising from violation of multilateral treaty and customary rules, as well as in determining which are the consequences of the wrongful act that the various categories of injured States can claim in these cases, it is undisputed that there is no difference between the case in which the obligation arises from the violation of a customary rule contained in a multilateral treaty.

If, however, a State is not only the State "injured" by the violation of a rule of the Convention, but finds itself, *vis-à-vis* the State that he claims has committed the violation, in a conflict of interests in which the legal claims of one party are positively opposed by the other, if, in other words, there is a dispute between the two States, the situation is very different in the framework of the Convention from what it is in the framework of customary law. Outside of the Convention disputes may be submitted to an international judge or arbitrator only on the basis of an agreement between the parties (which can be made in various ways, including the unilateral acceptance by both parties of the "optional" compulsory jurisdiction clause of Article 35 para. 2 of the Statute of the ICJ). Within the framework of the Convention disputes concerning interpretation and application of the Convention may be submitted by any State Party, because of the very fact of being a party, to compulsory settlement (Article 286). Even though this rule has important exceptions (Articles 297 and 298), compulsory settlement of disputes has a rather wide scope. From this point of view the obligations set out in the Convention are far more compelling than those of other codification treaties.

It would seem likely that the entry into force of the Convention, which contains many rules whose application is in the interest of all States, but whose violation may injure in different ways different categories of States Parties, will encourage courts and tribunals to make more precise the concept of "injured State" and its distinction from that of the State that is entitled to seize one of the courts and tribunals competent under the Convention for the settlement of disputes.

From the viewpoint of self-restraint of State Parties' claim mentioned before, the presence of the abovementioned important exceptions of the possibility of seizing a court or a tribunal of a dispute by the unilateral action of a State Party, might entail a dangerous consequence. States Parties might be tempted to consider the rules of the Convention which cannot be subjected to compulsory settlement of disputes as rules somehow "less binding" than the others. This may be a possible and certainly perverse effect of the fact that under the Convention the coverage of compulsory settlement of disputes, even though wide, is not complete.

Bernard Oxman

Thank you very much for these remarks, Professor Treves. You tread very delicate ground because, of course, we are not yet at the stage where we have a globally ratified Convention. Some States might be encouraged to ratify the Convention if they were told it doesn't make much difference, but other States, I think, will consider ratification of the Convention only if it can be demonstrated that it makes a significant difference.

I am firmly of the view that the general rules regarding the processes of international law and related procedures must be interpreted in light of the principles and purposes of the Charter of the United Nations. To interpret a concept such as *Etat lésé* to require a State, in order to frame the issue, to do what Great Britain did in the *Corfu Channel* case is to interpret *Etat lésé* in a way that is at variance with the principles and purposes of the Charter. In other words, I think a court should consider that if it took the position that a State potentially affected by a restriction on navigation does not have standing until this State sends in a ship and dares the coastal State to arrest or sink it, that the court is inviting behaviour in tension with the objectives of the Charter.

This point is made in the 1988 Report of the Special Working Committee on Maritime Claims of the American Society of International Law, a committee that I had the honor to chair. The Report states: "Theories of international law that require either a coastal state or a maritime state to take affirmative action that may entail a risk of armed conflict, solely to preserve its contested claims of right at sea, are in tension with the underlying principles and purposes of the Charter of the United Nations. Those theories encourage, rather than discourage, the use or threat of force."