

Law of the Sea -- 1990's and Beyond

by

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against Iraq to liberate Kuwait, serve as a powerful reminder that this hope must be tempered by the reality that we still live in an uncertain world, a potentially dangerous world.

From a U.S. point of view, while the specific threats we will face in the years ahead undoubtedly will be different from those that have dominated our thinking over the past forty years, capable, vigilant forces will be required to deter aggression and, if deterrence fails, to defend vital interests. As stated in the recently published National Security Strategy of the United States, the foundations of this strategy are: ensuring strategic deterrence; exercising forward presence in key areas; responding effectively to crises; and retaining the national capacity to reconstitute forces should this ever be needed.<sup>1</sup>

Each of these foundations is dependent, in significant part, on exercising navigation and overflight rights and other traditional uses of the oceans in a manner that is consistent with the 1982 UN Convention on the Law of the Sea.<sup>2</sup>

It is widely recognized by the international community that these provisions provide a fair balance between coastal and maritime interests, and this was also pointed out by President Reagan in his 1983 Ocean Policy Statement.<sup>3</sup> This balance includes the preservation of vital navigational freedoms relied upon by our naval forces and much of our commerce. Just as

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### REMARKS

#### Appreciation

Admiral Martinez, Admiral Kelso sends his best wishes and, on behalf of the U.S. Defense Department, is deeply appreciative of the opportunity to have a representative make a presentation of the views of the U.S. government at this important conference. Your initiative in providing a forum on the law of the sea reflects your leadership and the prominent role and contributions of Chile towards resolution of critical international issues as the world community charts its course into the 21st Century.

#### Strategic Outlook for the 1990's and Beyond

Today, I would like to share some thoughts concerning the status and future prospects for the law of the sea. The themes being addressed at this conference reaffirm the close linkage between the law of the sea and the vital interests of national security, commercial relations, and global stability. The crucial importance of the law of the sea becomes readily apparent when examined in its strategic context.

We are living in a world transformed. The fundamental changes under way in Eastern Europe and the former Soviet Union offer great hope. However, recent events, such as the war

## Law of the Sea - Current Status

While the 1982 Convention has not entered into force, it continues to serve important functions. The Convention's most significant impact comes not from producing new law, but from restating and codifying existing law, especially in the navigation, overflight, and other traditional use articles. By serving as a single source of authority for the content and meaning of customary international law, it should guide the behavior of nations, promoting stability of expectations, and providing a framework for issue resolution.

Nothing illustrates this better than our recent experiences in the Persian Gulf. After Iraqi forces invaded Kuwait, the United States demonstrated its resolve by promptly moving forward naval forces already deployed in the region. In order to confront the Iraqi aggression, a massive deployment of troops followed, most arriving by sea.<sup>6</sup> As a member of the coalition, the United States undertook its largest strategic sealift of supplies in history, with more than 250 ships carrying nearly 18.5 billion pounds of equipment and supplies to sustain DESERT SHIELD and DESERT STORM forces.<sup>7</sup> Also, in the ten-month period starting in August 1990, the coalition's maritime interception force of more than 165 ships from 14 allied nations challenged more than 10,000 merchant vessels, boarding nearly 1,500 to inspect manifests and cargo holds and diverting over 75 vessels

importantly, since the close of the Conference that produced the 1982 U.N. Convention on the Law of the Sea, the Convention has served as a basis for settling differences between nations and for persuading nations to adopt maritime regimes consistent with customary international law as reflected in the Convention. Thus, upholding the integrity of the Convention (aside from Part XI) is in the interest of both maritime and littoral nations. It is in their interest to ensure that the Convention remains the principal articulation of the law of the sea.

A case in point is how the exercise of the navigational rights and freedoms embodied in the 1982 Convention are used by naval forces. In many States, these rights and responsibilities are a prominent component of operating guidance and orders used by forces at all levels, who look to the Convention as an authoritative embodiment of rules for the maritime environment. For the United States, an example of the Convention's influence and impact is the Commander's Handbook on the Law of Naval Operations, a U.S. Navy and U.S. Marine Corps warfare publication, which addresses both the law of the sea and law of naval warfare.<sup>4</sup> For military lawyers, an Annotated version has been developed, containing legal analyses, citations, and supplementary annexes.<sup>5</sup>

Environmental regimes must be consistent with those rights. The Convention thus recognizes the delicate balance between protecting and preserving the environment and other competing interests, and provides the balanced framework for environmental norms that now are being further developed.

From a national security perspective, an important example of this balancing of interests is the special nature of sovereign immune vessels and aircraft set forth in Article 236. While this article excludes sovereign immune vessels and aircraft from the Convention's environmental provisions, it requires that each State ensure that such ships and aircraft act in a manner consistent with those provisions "so far as is reasonable and practicable" without impairing their operations or operational capabilities.

States cannot use or construe the sovereign immunity provision to avoid responsibility for protecting the environment. In fact, the U.S. Department of Defense and the U.S. Navy view Part XII and Article 236 of the Convention as a mandate to ensure continued responsibility for environmentally sound practices, and have included environmental awareness and programs in Department of Defense activities as part of the national security mission.<sup>9</sup> Examples include incorporation of hardware on board our ships to remove oil from bilge discharges, installing shipboard trash compactors, using recycled steel grit and plastic beads to remove

old paint (instead of toxic chemical methods), and revising procurement practices (which has been successful in removing or reducing plastic packaging of over 70,000 items in our supply system).<sup>10</sup>

State practice also demonstrates widespread acknowledgement that the non-deep seabed mining provisions of the Convention reflect customary international law. For example, as of January, 1992, 133 States have established territorial seas not exceeding 12 miles, 33 States have adopted a 24-mile contiguous zone, and 82 States have established an exclusive economic zone extending 200 miles, measured from the baseline used to determine the breadth of the territorial sea.<sup>11</sup>

Concerning the status of the Convention, as of March 1, 1992, there have been a total of 51 ratifications (49 instruments of ratification and 2 accessions) deposited with the Secretary-General.

While the total ratifications are short of the 60 required to bring the Convention into force, there are efforts underway to focus on resolving various problem areas of the deep seabed mining regime, contained in Part XI of the Convention. Under the leadership of former Secretary-General Perez de Cuellar, and with the able assistance of the Special Representative of the Secretary-General for the Law of the Sea, Mr. Satya Nandan,

organizations, concerning the measures necessary to conserve these stocks in the adjacent area.<sup>17</sup>

For highly migratory species, the Convention requires the coastal State and fishing States to cooperate directly or through appropriate international organizations with a view to ensuring conservation.<sup>18</sup>

While considerable success has been achieved with the EEZ management regime, and in international agreements for the conservation of highly migratory species, less success is evident with management of straddling stocks. Current illustrative situations include fisheries management on the high seas adjacent to the EEZ of Chile, in the high seas "doughnut hole" in the Bering Sea, and on the high seas adjacent to Canada's EEZ in the Atlantic.

The increasing presence of distant water fishing fleets on the high seas of the Southeast Pacific adjacent to Chile's EEZ has caused concern, not only due to the amount of fishing of species which exist both in Chile's EEZ and in the adjacent high seas area, but also due to the competitive advantage gained by these fleets from data collection activities.<sup>19</sup>

In the Bering Sea, the EEZs of the United States and Russia totally enclose a high seas area referred to as "the doughnut

in the resource management area.

A general principle of fisheries management is that management be co-existent with the range of the stock. For the most part, the 1982 Convention was successful in achieving this through establishment of the exclusive economic zone (EEZ), where the coastal State has considerable regulatory authority to promote optimum utilization of living resources. Within the EEZ, the coastal State determines the allowable catch and establishes regulations, consistent with the Convention, that must be followed by nationals of other States wishing to fish in the zone.<sup>15</sup>

The Convention also sets forth the rights and obligations of States to conserve and manage living resources on the high seas. All States have the right to engage in fishing on the high seas, subject to various duties, including the duty to cooperate for conservation; to take measures for their nationals to ensure conservation of living marine resources to ensure sustainable yields; and to exchange scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks.<sup>16</sup>

Regarding straddling stocks, the coastal State and the States fishing in the adjacent area are to seek to reach agreement, either directly or through appropriate subregional or regional

having adverse impacts on the sustainability of this resource, which is of considerable economic importance to both the United States and Russia in our own EEZs.

Overfishing by distant water fishing fleets in the high seas adjacent to Canada's Atlantic EEZ reportedly has caused serious depletion of the certain stocks. In Canada's statement concerning the United Nations General Assembly LOS Resolution, it was related that this overfishing has contributed to the closure of 75 fishing plants and the loss of more than 5000 fishing jobs in the last two years.<sup>21</sup>

These are serious problems requiring serious attention on a priority basis -- due to the economic impact on the States involved and due to the precedential effect these solutions will have on approaching resolution of future resource management issues. Undoubtedly, this will be a challenge for the world community, and will require initiative, ingenuity, and cooperation to achieve a favorable resolution consistent with basic law of the sea principles.

#### The Need for International Cooperation

There is a tendency for coastal states caught in these situations to look for unilateral solutions to their problems. That is understandable -- and many fishermen in Alaska would like

hole."<sup>20</sup> It is referred to as "the doughnut hole" since, when shown on the chart, the high seas area is completely surrounded by exclusive economic zones of Russia and the United States, and thus resembles the inside of a doughnut. Located within this high seas area, which makes up about 10% of the Bering Sea, is pollock, a species of significant economic value. It is generally agreed that the pollock population found in the doughnut hole is not an independent stock, but a straddling stock. Foreign fishing fleets were permitted to fish for pollock in the U.S. Bering Sea EEZ until the U.S. fishing capability was sufficiently developed and, under principles of coastal state jurisdiction, the United States was entitled to utilize fully the resource in its zone.

The displaced foreign fishing fleets have since moved their operations to this doughnut hole, where, using mid-water trawls, they began a new fishery to harvest the same stock that exists in the U.S. and Russian EEZs, starting from virtually zero in 1984. By 1989 the doughnut hole fishery was yielding almost 1.4 million metric tons annually, as much as is harvested in the US or Russian EEZs in the Bering Sea. But by the end of 1991, the stock had crashed, yielding a fishery of less than 300,000 metric tons in the doughnut hole, and forcing the United States to close portions of its own EEZ to its own fishermen in order to conserve the stock. The United States and Russia believe that the rapid growth and unregulated character of this fishery has and is

in the Convention. Such a state of affairs also would likely impose long term costs on maritime States, such as Chile and the United States, whose future well-being and security are dependent in large part upon robust commercial relations with the Pacific Ocean community.

Additionally, from a strictly pragmatic viewpoint, unilateral solutions of this nature would face substantial difficulties in achieving the international support required for them to be accepted and, thus, effective. For example, with a 200 mile EEZ, many coastal states are zone locked; that is, they have no access to the ocean they face without going through the EEZ of another State. Areas where zone lock is prevalent include the Mediterranean Sea, the Caribbean Sea, and the west coast of Africa. It is unlikely that these States would be receptive to a regime that imposed further restrictions on their ability to pursue commercial relations and conduct activities deemed essential for their national defense.

The nature and complexity of these issues require engagement in a bilateral and multilateral context to arrive at effective solutions. Initiatives underway at multilateral negotiations, the United Nations, and the Preparatory Committee Meetings for the 1992 U.N. Conference on the Environment and Development (UNCED) recognize that the 1982 Convention provides such a framework.

the United States to impose a unilateral solution to the doughnut hole problem. But that is not what the law of the sea calls for. The law of the sea calls for a co-operative approach to solving problems of this kind.

The precedential impact of coastal state unilateral actions to manage resources would be substantial. While the 1982 Convention has been successful as a source for stability and predictability, there have been increasing pressures felt by individual States to adopt policies inconsistent with the Convention to manage what they consider to be their unique situation. Some leading ocean policy experts have referred to this as "creeping uniqueness," where individual States may seek to extend jurisdictional claims, beyond that contemplated by the Convention, to protect national interests in a manner not permitted by the existing legal framework.<sup>22</sup> Essentially, the State may propose taking such action on the basis that its situation is believed to be unique, thus justifying an exception from the provisions of the Convention.

The problem with this approach is that each State probably could view its own situation -- for the purpose of enhancing commercial, resource, or security interests -- as being unique. If a uniqueness exception were to become acceptable, exceptions to the Convention would become the norm. In all probability, this would destroy the delicate balance of interests recognized

of the Convention provide the international basis for pursuing the conservation and sustainable use of the marine environment and its resources. These provisions also underpin specific recommendations, ranging from commitments to deal with marine pollution from land-based activities to coordination of scientific observation of the marine environment.

The primary unresolved oceans issue for UNCED relates to high seas fisheries, particularly that of straddling fish stocks. Important progress was made on the issue, for example, recommendations calling for improved compliance, including action to deter reflagging of vessels as a means of avoiding compliance with agreed conservation and management measures, and for full, detailed, accurate and timely reporting of catches and effort. However, significant divergences remain between coastal interests, led by Chile, Canada, and other co-sponsors of the Santiago Declaration, and distant water interests, led by the European Community. The former contend that distant water fishing States have not met their obligations to cooperate in the conservation of fish stocks, while the latter argue that Coastal States seek unwarranted priority of right on the high seas.

It is significant that each side on this issue has invoked its interpretation of the relevant provisions of the 1982 Convention as the basis of its position. These references point the way to the possible solution -- specifically, commitment to

Multilateral meetings with all concerned states began in early 1991 for the purpose of developing arrangements to conserve fishery resources in the Bering Sea doughnut hole. Discussions with concerned states are continuing in 1992 with a view toward achieving an acceptable regime for the conservation of straddling stocks in the high seas area.

On December 20, 1991, the U.N. General Assembly adopted a resolution calling for a 50 per cent reduction in large scale pelagic driftnet fishing effort on the high seas by June 30, 1992, and a global moratorium on all large scale pelagic driftnet fishing on the high seas by December 31, 1992.<sup>23</sup> The resolution reflected the need for immediate and effective action to address a method of fishing that had been killing large quantities of non-targeted fish, dolphins, turtles and seabirds. While agreement on this resolution was obtained only after extensive study and discussion, the resolution is evidence that the world community can achieve progress in resolving difficult global issues in a multilateral forum.

The recently concluded fourth session of the Preparatory Committee for UNCED (PREPCOM IV) highlighted the importance of the 1982 Convention, and its balance of rights and obligations, as the framework within which to address complex issues of marine resource management. The oceans section of Agenda 21 - the Action Plan for UNCED - begins by recognizing that the provisions

While there are pressures to proceed on a unilateral basis, and while doing so may provide some short term gain, such a course of action must be resisted, as it most likely will result in reciprocal actions by other States and inflict long term damage. The reality is that the security and well-being of individual States will depend, in large part, on maintaining the stable law of the sea regime of the 1982 Convention -- a regime which strikes an appropriate balance among competing uses of the oceans.

The non-deep seabed provisions of the 1982 Convention clearly provide this requisite stability and, most importantly, reflect a fair balance of interests affecting navigation, overflight and other traditional uses of the oceans. Preserving this delicate balance serves national and global interests. Preserving this delicate balance also provides our great navies the best opportunity to make this a better world for our people and for the community of nations.

effective implementation of these provisions. The convening of an international conference, under United Nations auspices, to promote this result, as suggested at the end of PREPCOM IV, is, in the U.S. view, an equitable compromise. What is important is that any such conference not seek to reopen or renegotiate the carefully balanced law of the sea provisions relating to high seas fisheries, but concentrate upon pragmatic and cooperative steps to give practical effect to these provisions.

#### Closing Remarks

In closing, I would like to applaud Chile's important contributions and leadership in addressing important law of the sea and ocean policy issues. The increasing international cooperative efforts and international focus on resource management is evidence that progress is being made in resolving these difficult issues in a bilateral and multilateral context, as envisioned in the 1982 Convention.

Clearly, many nations, including the United States and Chile, have much at stake and are very interested in achieving an enduring resolution of important resource management issues. Such an achievement, in all probability, can be attained only through negotiation and cooperation.

Research and Development 3 (May 14, 1991).

11. Ocean Policy News, January 1992, p. 5, Council on Ocean Law, Washington, DC

12. U. N. Doc. A/46/L.44.

13. Text of Ambassador Pickering's statement may be found in Ocean Policy News, December 1991, p. 2, Council on Ocean Law, Washington, DC.

14. Id.

15. The coastal State, under Article 62 of the Convention, may enact laws and regulations that relate, inter alia, to the following: licensing of fishermen, fishing vessels and equipment; determining the species which may be caught; fixing quotas of catch; regulating seasons and areas of fishing, the types, sizes and amounts of gear, and the types, sizes and number of fishing vessels that may be used; fixing the age and size of fish that may be caught; requiring catch and effort statistics and vessel position reports; placing observers on board non-coastal State flag vessels; requiring that part or all of the catch be landed at a coastal State port; requirements for transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research; and enforcement procedures.

16. 1982 Convention, Art. 116 - 119.

17. 1982 Convention, Art. 63(2).

18. 1982 Convention, Art. 64.

19. See "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks," by Edward L. Miles and William T. Burke, in Ocean Development and International Law, Volume 20, Number 4, 1989, p. 347.

20. See U.S. Statement Presented by Mr. David A. Colson, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs, to the Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea, February 19 - 21, 1991, Washington, DC.

21. Ocean Policy News, Volume IX, Number 1, January 1992, p. 4.

22. See "Geographical Perspectives on International Navigation," Lewis M. Alexander, and "Threats to the Public Order of the Oceans," William T. Burke, in International Navigation: Rocks and Shoals Ahead?, Jon M. Van Dyke, Lewis M. Alexander, and

## NOTES

\* In addition to serving as Deputy Judge Advocate General of the Navy and Commander, Naval Legal Service Command, Rear Admiral Schachte serves as the DOD Representative for Ocean Policy Affairs. Rear Admiral Schachte was a member of the U.S. Delegation to the final sessions of the Third U.N. Conference on the Law of the Sea.

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1. National Security Strategy of the United States, The White House, August 1991. [Available from the U.S. Government Printing Office, Superintendent of Documents, Washington, DC]
2. Convention on the Law of the Sea, opened for signature December 10, 1982, U.N. Doc. A/CONF. 62/122, reprinted in 21 I.L.M. 1261 (1982) [hereinafter referred to as the 1982 Convention].
3. Statement by the President on United States Ocean Policy, 19 Weekly Comp. Pres. Doc. 353-85 (1983); 22 I.L.M. 461 (1983).
4. The Commander's Handbook on the Law of Naval Operations, Naval Warfare Publication 9, Rev. A/FMFM 1-10 (1989).
5. Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, Naval Warfare Publication 9, Rev. A/FMFM 1-10 (1989).
6. Statement by Vice Admiral F. R. Donovan, USN, Statement for the Record House Armed Services Committee, Subcommittee on Seapower and Strategic and Critical Materials 1 (February 19, 1991).
7. All Hands - Magazine of the U.S. Navy, Special Edition, 1991, Number 892, p. 3, Navy Internal Relations Activity, Alexandria, Virginia, USA. [Available through the Department of the Navy, Office of Information, Washington, DC 20350].
8. Id. at 13.
9. In Memorandum from the Secretary of Defense to the Secretaries of the Military Departments, dated 10 October 1989, Secretary Cheney called for the Department to be a leader in environmental compliance and protection.
10. Statement by Assistant Secretary of the Navy (Installations & Environment) Jacqueline E. Schafer, Statement for the Record, Senate Armed Services Committee, Subcommittee on Environmental

MES DEL MAR

EL MAR PRESENCIAL

ACTUALIDAD, DESAFIOS Y FUTURO

CLASE MAGISTRAL DICTADA POR EL SEÑOR  
COMANDANTE EN JEFE DE LA ARMADA  
ALMIRANTE DON  
*JORGE MARTINEZ BUSCH*

Joseph R. Morgan, (eds.), Law of the Sea Institute, William S. Richardson School of Law, University of Hawaii, Honolulu, HI.

23. U.N.G.A. Resolution 46/215, "Large-Scale Pelagic Drift-Net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas," U.N. Doc. A/46/645/ADD.6 (1991).

OCEANO  
PACIFICO

18° 20' S

I. SALA Y GOMEZ

I. DE PASCUA

I. SAN FELIX

I. SAN  
AMBROSIO

ARCHIPIELAGO

J. FERNANDEZ

ZONA ECONOMICA EXCLUSIVA

MAR PRESENCIAL

EL MAR  
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CHILE

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PROYECCION AZIMUTAL EQUIDISTANCIA

POLO SUR