Foreword

ARVID PARDO*

The *San Diego Law Review* is to be congratulated for its ninth annual Law of the Sea (LOS) symposium: The contents are well written, and all the articles make a significant contribution to the understanding of present and evolving law of the sea.

Apart from a useful annotated synopsis of recent LOS developments,[1] the issue contains two different groups of papers: those dealing with the interpretation of customary rules and of agreements made when such rules were accepted international law and papers commenting on developments at the 1976 sessions of the United Nations Conference on Law of the Sea (UNCLOS).

Papers in the first group are those by Messrs Lowe,[2] Froman,[3] and Sisco.[4] All are based on extensive research, and their con-

* Professor of Political Science and Senior Fellow, Institute for Marine and Coastal Studies, University of Southern California.

1. Synopsis: *Recent Developments in the Law of the Sea 1976-1977*, 14 SAN DIEGO L. REV. 718 (1977).

2. Lowe, *The Right of Entry into Maritime Ports in International Law*, *id.* at 597.

3. Comment, Kiev *and the Montreux Convention: The Aircraft Carrier that Became a Cruiser to Squeeze Through the Turkish Straits*, *id.* at 681.

4. Comment, *Hot Pursuit from a Contiguous Fisheries Zone—An Assault on the Freedom of the High Seas*, *id.* at 656.

clusions are convincing. Also all, either implicitly or explicitly, demonstrate the weaknesses of present law.

Professor Lowe's paper on the *The Right of Entry into Maritime Ports in International Law* reaches the conclusion that "the ports of a State . . . designated for international trade are, in the absence of express provisions to the contrary, presumed to be open to the merchant ships of all States" and that such ports "should not be closed to foreign merchant ships except when the peace, good order or security of the coastal State necessitates closure."[5]

The presumption that ports are open may well be reasonable as Professor Lowe suggests, but Professor Lowe himself is constrained to note considerable State practice suggesting that no right of entry exists and the presumption is further eroded by recent practice of some States prohibiting or restricting access to their ports of certain categories of vessels (nuclear powered vessels, large tankers, and others) while denial of entry on vague security or political grounds appears to be becoming more common in some parts of the world. Under these circumstances it is difficult to maintain the existence of any clear presumption of a right of entry[6] of foreign merchant vessels into the ports of a State, and we could well expect, in the present international climate and in the present chaotic state of the LOS, that the entry of foreign merchant vessels into a State's ports may become a matter entirely within the discretion of the State concerned unless the UNCLOS makes some effort to clarify the situation.

Mr. Froman's important and timely paper on the Kiev *and the Montreux Convention: The Aircraft Carrier that Became a Cruiser to Squeeze Through the Turkish Straits* demonstrates another weakness of international law. Here we are not confronted with the problem of attempting to deduce a presumption or a rule of law from the varying practice of States, but rather with the failure to update an important convention in order to take into account technological developments and with the political reluctance to protest a serious violation of an important and reasonably explicit agreement. This inaction undermines a convention as surely as the changing practice of States erodes presumed customary law. Mr. Froman convincingly demonstrates that the passage of the *Kiev* has weakened the 1936 Montreux Convention and that continued failure

5. Lowe, *supra* note 2, at 622.

6. Professor Lowe does not discuss the rights of exit of foreign merchant vessels from the ports of a coastal State. What restrictions can reasonably be applied to the departure of foreign merchant vessels by the coastal States? It is an interesting question which merits analysis and perhaps also some attention at UNCLOS.

on the part of Turkey and the NATO powers to oppose evasion of its terms may deprive the Convention of all meaning, with incalculable political and strategic consequences in the Mediterranean and the Indian Ocean.

The third article in this group, *Hot Pursuit from a Contiguous Fisheries Zone—An Assault on the Freedom of the High Seas*, although well researched and argued has historical rather than contemporary significance in view of the increasingly numerous claims of States to exclusive economic zones (EEZ's). Nevertheless, the article is useful because it spotlights the often overlooked role of municipal courts in the United States, as elsewhere, in undermining present LOS in order to protect the convenience of States.

The four papers analyzing and commenting upon various aspects of the 1976 LOS negotiations constitute the major part of the contents of this issue of the *San Diego Law Review*. Professor Fleischer's[7] approach is legal: His main, indeed his only, concern is to demonstrate that the coastal State has already acquired the legal right to establish by unilateral decision a 200-mile wide fishery zone. Professor Clingan's[8] interesting paper is written from the perspective of a country with a wide spectrum of important ocean space interests, including political and strategic interests. Professor Clingan is mainly concerned with the possible erosion of the traditional high seas freedom of navigation and communication[9] as a consequence of the wording of the definition of *the high seas* contained in Article 75, part 2 of the Revised Single Negotiating Text (RSNT) read in conjunction with articles 44, 46, 47, and others dealing with the rights of the coastal State within the EEZ. Dr. Barkenbus[10] and Mrs. Borgese[11] are concerned with international seabed issues dis-

7. Fleischer, *The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone*, 14 SAN DIEGO L. REV. 548 (1977).

8. Clingan, *Emerging Law of the Sea: The Economic Zone Dilemma*, *id.* at 530.

9. Art. 2, Convention on the High Seas, *done at* Geneva, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82. The term *navigation and communication* is found in Revised Single Negotiating Text, U.N. Doc. A/Conf. 62/WP. 8/Rev. 1/pt. 2, art. 46(1) (1976) [hereinafter cited as RSNT].

10. Barkenbus, *Seabed Negotiations: The Failure of United States Policy*, 14 SAN DIEGO L. REV. 623 (1977).

11. Borgese, *The New International Economic Order and the Law of the Sea*, *id.* at 584.

cussed in Committee I of UNCLOS. Dr. Barkenbus comments upon the failure of United States policy and advocates its accommodation to the political goals of the Group of 77 in the context of an evolving institutional framework for seabed minerals beyond national jurisdiction. Mrs. Borgese's essay has a wider perspective. She demonstrates the need for the UNCLOS to create an institutional framework embodying the principles of the New International Economic Order advocated by developing countries and makes constructive suggestions in this connection with regard to the concept of the Enterprise which, according to the RSNT, will be the operational organ of the future International Sea-bed Authority.[12] Finally, Ms. Ferguson[13] describes the goals of landlocked countries in the LOS negotiations and analyzes the prospects for their achievement.

All the essays make a significant contribution to the understanding of the complex and vital issues of law, politics, economics, and equity which the international community is attempting to resolve at the UNCLOS. Nevertheless, inevitably, the essays reflect, in greater or lesser measure, the ideological conflict and conceptual disarray which have delayed the work, and are likely to distort the results, of the UNCLOS. With the possible exception of Mrs. Borgese's all too brief paper, all the essays are written from the viewpoint of national or group interest and consider only legal or political issues. Unfortunately, this situation accurately reflects the reality of the negotiations and is a major factor in the difficulty experienced by the UNCLOS in producing results which can be acquiesced in by the overwhelming majority of States large and small, coastal and landlocked, rich and poor.

A number of factors, analyzed by many authors, make the present LOS negotiations exceptionally difficult. Among these factors are the inherent importance and complexity of the subject, the number of participating States, the irrational division of the subject matter among the conference plenary and three different committees, the number of conflicting national and group interests involved, and many others. However, a major factor, if not *the* major factor, is the inability of the negotiators to develop a comprehensive concept of the purpose of the negotiations.

12. The term *International Sea-bed Authority* (ISA) is used both in the Single Negotiating Text and in the RSNT. However, in the RSNT all references to any direct competence of the future Authority over the *sea-bed* have disappeared and have been replaced by references to Authority control over activities (defined as "all activities of exploration for, and exploitation of, the resources of the Area") in the Area. Hence some writers now use the term *International Sea-bed Resource Authority* (ISRA).

13. Comment, *UNCLOS III: Last Chance for Landlocked States?*, 14 SAN DIEGO L. REV. 637 (1977).

It is naively assumed that the purpose of the negotiations is merely to produce stability of expectations and to accommodate divergent or conflicting interests in the marine environment: When these interests cannot be accommodated, resort should be made either to power politics to further national or group interests or to acceptable ambiguous formulations to be interpreted in due course through future binding dispute settlement procedures.

Obviously, stability of expectations and accommodation of conflicting interests are necessary goals, but LOS negotiations are not trade negotiations; they involve not only national, group, or sectoral interests but also the future of a dangerously weakened world order. In this perspective the exercise of power to impose gross inequities should be avoided, although its exercise to abate claims either that endanger world order or that are inherently inequitable may be constructive. Finally, the predilection for ambiguity in crucial matters which marks the RSNT guarantees future conflict and the ineffectiveness of any compulsory and binding dispute settlement system that may be established by the UNCLOS.[14]

In short, if the UNCLOS is to be successful—that is, if it is to produce results which are viable and stabilizing—participating States must keep in mind not only their national interests but also the interests of the entire international community in the context of rapidly evolving technology and intensifying and diversifying ocean space uses. This situation places a particular responsibility for the success of the UNCLOS on the major maritime powers and on those countries, whether "developed" or "developing," which have long coasts fronting on the open oceans. The former have world-wide interests and a complete spectrum of maritime capabilities; the latter have the geographical prerequisities to utilize the UNCLOS for the purpose of appropriating the resources of the greater part of the oceans to the detriment of the majority of States.

14. Part IV of the RSNT, *supra* note 9, provides for the creation of a comprehensive, but flexible, compulsory, and binding dispute settlement system. The practical effectiveness of the system proposed is, however, doubtful not only because of the exceptions listed in Article 18, but also because the *quality of the agreement* which is being negotiated—for example, the degree of *specificity* and *comprehensiveness* in the treatment of important issues—is mediocre. This limitation critically affects acceptability of the compulsory dispute settlement procedures envisaged. When the law is not reasonably clear, States cannot permit an international court to dispose of their important interests.

However, instead of providing an example of responsibility and restraint, both the major maritime powers and States with long coastlines have concentrated on protection of their perceived national interests with little thought for others or for the future. Indeed wealthy states, such as Norway, Canada, and Australia, renowned for their love of peace and for their respect for international law, have distinguished themselves among the organizers and leaders of the Gadarene rush toward maximum feasible appropriation of ocean space.

Perhaps voluntary restraint and consideration of the vital needs of others should not be expected when the goal is merely preservation of the existing legal order in ocean space modified only by a shift in its balance from freedom in the greater part of ocean space to sovereignty or national jurisdiction. Apparently forgotten is the original major purpose of the UNCLOS—the creation of a new, more rational, and more equitable international order in ocean space to replace a traditional order which is irremediably collapsing, not because a group of States may want it to collapse but because the assumptions on which it was constructed have ceased to correspond to reality.[15]

The details of a new order in ocean space may be conceived in different ways, but the basic choice which the international community faces is clear—either progressive, but eventually complete, *nationalization* of ocean space or effective *internationalization* of ocean space beyond reasonable national jurisdictional limits on the basis of the common-heritage-of-mankind concept.

This is not the place to analyze the consequences for international order of the adoption of one or the other option. It is sufficient to note that the UNCLOS appears to have definitely chosen nationalization. I do not attach, in this connection, excessive importance to the concept of an EEZ which is quite compatible with effective internationalization of ocean space beyond national jurisdiction. In fact, the EEZ concept only consolidates conveniently into an integrated regime a variety of claims to exclusive access to resources

15. Grotius explicitly based the principle of freedom of the seas on the assumption that the living resources of the sea were inexhaustible—a clearly erroneous assumption under modern conditions. Grotius also believed that the oceans were sufficiently vast to accommodate all navigational uses without need for regulation. *See* Comment, *supra* note 4; at 660-61 n.25. This belief no longer holds true in congested seas such as the British Channel or the Mediterranean. Furthermore, three hundred years ago, it was assumed that humanity's activities could not seriously impair the quality of the marine environment and that the oceans were so vast and their resources so unlimited that serious conflicts of use were impossible.

and to control of activities in the marine environment which coastal States have advanced with increasing frequency in recent years. Far more significant indications of the intention in due course completely to nationalize ocean space are: (a) the refusal by the UNCLOS majority to set clear limits to national jurisdiction in the seas;[16] (b) the minimal, unambiguous legal obligations of coastal States in the vastly expanded areas which it is proposed to place under their jurisdiction;[17] (c) the failure to establish a permanent mechanism to supervise treaty implementation and to facilitate the achievement of the goals set by the RSNT with regard to a wide variety of matters from conservation of migratory fish stocks to establishment of international marine pollution standards; and (d) the establishment of two not necessarily compatible regimes for ocean space beyond national jurisdiction—an obsolescent high seas regime for the seas and a recessive and unworkable regime based

16. Although the 200-nautical mile wide EEZ has been much discussed, few observers have drawn attention to the fact that the breadth of the EEZ is measured not from the coast but from baselines and that the coastal State may draw straight baselines of unlimited length (straight baselines more than 350 miles long have already been drawn by some coastal States) enclosing as internal waters very large marine areas. As a consequence of the baseline provisions of the RSNT, the limits of the EEZ will be far more than 200-nautical miles from the nearest coast. Also the sovereign rights of a coastal State over the continental shelf will extend either to 200-nautical miles "from the baselines [*not the coast*] from which the breadth of the territorial sea is measured" or "throughout the natural prolongation of its land territory to the outer edge of the continental margin" at the choice of the State concerned. RSNT, *supra* note 9, pt. 2, art. 64. Because it is very difficult in practice objectively to delimit the continental shelf on the basis of the criterion of the "outer edge of the continental margin" and because the RSNT establishes no impartial verification mechanism, coastal States have ample opportunity to delimit and re-delimit their legal continental shelves as they choose. All islands, however minute (apart from rocks "which cannot sustain human habitation or economic life"), also are recognized extensible EEZ's and continental shelves. In addition, coastal States have recognized competence with regard to resources beyond the EEZ (*e.g.*, RSNT, *supra* note 9, pt. 2, arts. 55 & 56).

17. Instances of coastal State duties couched in general or ambiguous language are too numerous to quote. In some cases the duties are clear enough, but their practical significance is small. For instance, coastal States which do not have the capacity to harvest the entire allowable catch of living resources in the EEZ have the duty through "agreements and other arrangements" to give other States access to the surplus of the allowable catch. But it is the coastal State itself which determines both the allowable catch and its own capacity to harvest it. *Id.* arts. 50(1) & 51 (2)-(3). The duty to concede access, in short, is more apparent than real. *See* Fleisher, *supra* note 7.

on the common-heritage concept for the seabed.[18] Neither regime can effectively fill the present political and jurisdictional vacuum in marine areas beyond national jurisdiction. Therefore, the vacuum will be filled as interests dictate and opportunity offers by coastal State authority. The result can be only increased inequality[19] and increased conflict among States.

The alternative to nationalization of ocean space is effective internationalization. Internationalization does not ignore national interests; rather it aims at their accommodation within a legal framework conducive to the achievement of common goals. This concept is similar to the rationale underlying the traditional principle of the high seas.[20] The high seas principle is, in a sense, negative: Nobody is responsible for the high seas; everybody may use the high seas for any purpose and as intensively as desired subject to a reasonable regard for the interests of other States. The concept

18. The regime for the international seabed area is recessive—that is, the area over which it applies will diminish more or less rapidly for reasons beyond the control of the future Authority, for the limits of the international area are determined *exclusively* by whatever action may be taken by coastal States with respect to the legal continental shelf. The future Authority is obligated to conform without question to whatever notifications it receives from States Parties. RSNT, *supra* note 9, pt. 1, art. 2. The regime is unworkable, partly for the reasons mentioned in Mrs. Borgese's paper, *supra* note 11, and partly because the UNCLOS has not realized that, because of unlimited straight baselines, virtually undefined continental shelves, archipelagic and island provision, coastal State authority over the seabed will extend many hundreds of miles from the coast. (Canada, for instance, has already made "continental shelf" claims to seabed areas lying more than 650 miles from the coast.) Under these circumstances the future Sea-bed Authority will control only a *portion*—a diminishing portion—of manganese nodule resources. This situation makes it impossible for the Sea-bed Authority to fulfill many of its assigned functions, such as "to protect against the adverse economic effects of a substantial decline in the mineral export earnings of developing countries." RSNT, *supra* note 9, pt. 1, art. 9(4). The organizational structure of the Authority and of the Enterprise is also unrealistic. The latter, for instance, is provided with a political Governing Board and a staff of civil servants chosen on the basis of "equitable geographical distribution," when the need is to compete effectively with manganese nodule development within national jurisdiction.

19. On the assumption of a median line division of ocean space, 15 States would acquire nearly 45% of the oceans. More than 60 States (landlocked, fronting on internal seas, or with short coastlines on the oceans) would acquire little or nothing. On the basis of the provisions of the RSNT, present inequality is also markedly increased. A few States acquire millions of square miles of ocean space, while States like Gambia, Ghana, and Togo acquire very little.

20. Unrestricted use for trade and fisheries (with reasonable regard to the interests of other States) of an area considered immeasurably vast and rich in living resources accommodates the interests of all, including nonusers (who can obtain imported products at prices lower than they would otherwise be).

is rooted in the assumption of abundance—abundance of space, abundance of resources—in conditions of limited demand and of unsophisticated technology. Under modern conditions these assumptions are no longer realistic, and hence the high seas will disappear. A new legal order which reflects modern conditions must take its place, if total nationalization of ocean space is to be avoided.

The high seas are now a commons, abused and threatened with division: The commons requires management by the users to avoid abuse and to improve yields. Thus the new legal order must have *positive* goals such as (1) flexible accommodation of multiplying exclusive and inclusive uses of ocean space; (2) the provision of expanding opportunities to all countries in the use of ocean space beyond national jurisdiction;[21] (3) ecological protection of ocean space;[22] (4) management and development of ocean space resources beyond national jurisdiction for the benefit of *all* countries and equitable sharing of the financial and other benefits derived from resource development, with particular regard to the needs of poor countries.

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21. In a condition of total division of ocean space the opportunities of the coastal State would decrease (in general) in the fields of trade and communications and would increase in the field of resources only until all resources within national jurisdiction are intensively exploited. This limit is soon reached when resources within national jurisdiction are limited or when the area is small. Efficient international management of the major part of ocean space avoids the constraints on activities imposed by fragmentation of the oceans into more than 100 large and small sovereign areas with different rules, standards, and procedures for the conduct of activities.

22. Part 3 of the RSNT deals with prevention and control of marine pollution. The general principles proposed by the RSNT are a constructive development of present international law, but the methods proposed for the implementation of these principles are likely to be quite ineffective in practice (except for vessel source pollution, probably responsible for less than 10% of total marine pollution). The approach adopted in the RSNT, generally speaking, urges States to act through an unnamed "competent international organization or through general diplomatic conferences" in establishing international rules, standards, and recommended practices with regard to vessel source marine pollution and through competent (or appropriate) international (or intergovernmental or regional) organizations for other actions recommended. It is notorious that at the international level (pollution abatement) competences are highly fragmented and uncoordinated at the policy level. The RSNT does not attempt to give some order to the present chaos, largely because most UNCLOS representatives lack any general concept of a *marine order.*

An effective international order in ocean space can be established if international accord is reached on six points.

(1) Adoption of the concept of *ocean space* comprising the surface of the sea, the water column, the seabed, and its subsoil. This action is essential because activities in the marine environment increasingly involve the seas in all their dimensions.

(2) Agreement on a clear and precise definition of *the limits of national jurisdiction for all purposes.* This point is vital because otherwise coastal State jurisdiction will continue to expand.[23]

(3) Supersedure of the concept of *common heritage of mankind* over the traditional concept of the high seas. The concept of common heritage of mankind has five basic characteristics. First, *nonappropriation*: The common heritage of mankind cannot be subjected to national sovereignty or jurisdiction;[24] *it can be used, but not owned.* Second, *management*: The common heritage of mankind requires a system of management in which all users share. Third, *active sharing of benefits*, not only financial but also those derived from shared management and transfer of technologies. This sharing changes traditional concepts of development aid and the structural relationship between rich and poor countries. Fourth, *reservation for peaceful purposes* (disarmament implications); and fifth, *reservation for future generations* (environmental implications).

(4) Distinguishing between the concepts of functional sovereignty and territorial sovereignty. Functional sovereignty means *jurisdiction over specific uses* as distinguished from sovereignty over a geographic area. Functional sovereignty permits secure accommodation of inclusive and exclusive uses of the sea and the interweaving of national and international jurisdiction in the same geographical area.

(5) Dealing with the concept of regional development within the framework of global organization. Many activities, including most aspects of fisheries management, pollution abatement, and harmonization of uses, can be dealt with successfully on a regional basis within the framework of general principles, while other activities,

23. It has already been suggested that coastal State jurisdiction in ocean space has a natural tendency to expand with technological advance, new uses of the seas, and the prospect of exclusive control over increasingly desirable resources. An additional factor is the desire of coastal States to protect themselves against the adverse effects of the activities of other States in the general vicinity of marine areas already under national jurisdiction.

24. Non-appropriation also characterizes the regime of the high seas (1958 Geneva Convention on the High Seas, *supra* note 9, art. 2).

such as navigation or scientific research, require more direct global concern.

(6) The creation, not merely of a seabed agency, but of a balanced international system for ocean space, with powers of administration and management beyond national jurisdiction, the nature of which will vary according to the nature of the activity. Only thus can there be some assurance that the jurisdictional vacuum of the high seas will be filled, that all States will benefit in same measure from the new international order, and that serious attempts will be made to correct environmental and other abuses in ocean space beyond national jurisdiction.

The question immediately arises: Is the vision of such a new legal order in the oceans, whatever its theoretical merits, realistic in the present state of world organization? Would an attempt to achieve such an order oblige the UNCLOS to start its work again from scratch and make the results attained so far useless? A rapid examination of the six requirements for an effective international order in ocean space will show that comparatively few major changes would be needed in the present RSNT.

(1) *The concept of ocean space.* This concept was implicit in customary law of the sea. All parts of ocean space in a given area were, with minor exceptions, subject to the same regime—either internal waters, territorial sea, or high seas. Only recently were areas of ocean space fragmented under different regimes with the introduction into LOS of the continental shelf concept. Although the RSNT proposes to increase this fragmentation, the unity of regime of different marine areas probably can be restored without insuperable political objection.[25]

25. Perhaps the text is a little simplistic. There are three major problems: the number of regimes in the oceans, the unity of regimes in each given area, and the content of each regime. It is unfortunate that the RSNT has increased unnecessarily the number of regimes in the oceans in order to satisfy the desires of relatively small groups of coastal States. Are the contiguous zone and the continental shelf really necessary in the context of the creation of the EEZ? They add little of substance to the powers of the coastal State. The unity of regime in each area of ocean space depends upon the extension of the common heritage regime to the waters above the international seabed area and upon the solution of the legal continental shelf problem (see *infra*). The content of each regime is a rather complex matter that cannot be discussed in a footnote.

(2) *Clear and precise definition of the limits of national jurisdiction.* Such definition was supposed to be one of the objectives of the UNCLOS. The main difficulties are the question of baselines[26] and that of the continental shelf, principally the latter. States which have legitimate expectations of being able to assert their sovereign rights over continental shelf resources substantially beyond 200-nautical miles from the coast on the basis of the 1958 Continental Shelf Convention (Article 1) are scarcely more than a dozen; however, States insistent on retaining the right to extend their legal continental shelf beyond the EEZ are more numerous—perhaps one fifth of the States represented at the UNCLOS. Opposition to making the limits of the legal continental shelf (if, indeed, such a concept need be retained with the creation of the EEZ) coincide with those of the EEZ could be considerably weakened by appropriate compromise proposals,[27] and in any case States in-

26. Only minor amendments to the present RSNT are required. These should make clear that straight baselines may be drawn only between land points and that they may not exceed a length of x nautical miles.

27. The continental shelf concept was proclaimed by President Truman, largely in order to enable the United States to exercise sovereign rights over seabed resources beyond the territorial sea, while maintaining freedom of naval and commercial navigation in the superjacent waters. The new concept, however, did not work out in practice as intended. With no precise limits to the "continental shelf" (the United States has not officially determined the limits of the "outer continental shelf," and neither is the 1958 Continental Shelf Convention nor the RSNT much help), coastal State control inevitably expands outwards toward the ocean deeps; equally inevitably, as Professor Henkin (Editorial Comment [Henkin], *International Law and "the Interests": the Law of the Seabed*, 63 AM. J. INT'L L. 504 (1969); Henkin, *Comments on* Address, "The Limits of the Continental Shelf—and Beyond," 62 AM. SOC. INT'L L. PROC. 243 (1968)) and others have shown, coastal State assertion of jurisdiction creeps upwards through the water column to the surface of the sea. Legal characterization of any specific marine area as "high seas" cannot stop this process; hence I attach little practical significance to provisions such as those contained in Article 66, part 2, RSNT, *supra* note 9. If it is desired to stop progressive assertion of coastal State authority over the waters of ocean space, it is vital to make the limits of the continental shelf coincide with those of the EEZ (at least the latter are based on verifiable criteria—distance from baselines). In present conditions of rapid change, however, the coincidence of continental shelf and EEZ limits is probably not sufficient; a permanent political forum for ocean related questions must be created where alleged violations of the limits provisions of a future LOS convention can be discussed and political opinion mobilized. In this context the so-called compromise proposals contained in RSNT (*supra* note 9, pt. 2, art. 70) miss the main point. Compromises which could weaken resistance to achievement of the vital objective of integration of the continental shelf with the EEZ could be (a) purchase at a negotiated price by the future International Seabed Authority of national claims to seabed areas under waters less than 200 metres deep lying more than 200-nautical miles beyond the appropriate baselines (many countries need money; the ISA could borrow money from

sisting on the present formulation of Article 64 (part 2 of the RSNT) could in the last resort be outvoted with comparative ease.[28]

(3) *The concept of common heritage.* The concept has been accepted for the seabed beyond national jurisdiction. What is now required is the extention of the concept to the superjacent waters. This extension should not meet with insuperable political objections if it is explained that not all the characteristics of the common heritage concept need to be implemented in the same manner in a future Convention.[29]

(4) *Concept of functional sovereignty.* This concept is often misunderstood and is unlikely to be accepted explicitly at the UNCLOS. Nevertheless the concept can provide a useful frame of reference that would tend to make the RSNT less inconsistent and more able to regulate constructively activities in the marine environment.

(5) *Regional development within the framework of global organization.* This requirement of an effective international order raises little political difficulty; indeed the RSNT recognizes the desirability of regional cooperation.[30] What is lacking is a conceptual framework to provide some order and a minimum of functionality in implementing present inchoate ideas.

(6) *Creation of a balanced international system for ocean space.*

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the IBRD or other quarters for this purpose); or (b) joint management of the above defined areas by the ISA and the coastal State concerned *with the coastal State receiving the greater part of potential revenues*; or (c) a combination of (a) and (b) above. The proposals suggested above have not been made at the UNCLOS.

28. States making extensive continental shelf claims could not muster a blocking third against determined opposition. The opposition at the UNCLOS, however, has been lacking not only in determination but also in political understanding (*see* note 27 *supra*), as witness the unbalanced position of landlocked countries on this issue.

29. This point is very important. The major objection to extension of the common-heritage concept to the waters above the international seabed area is fear of undue interference with military uses of the seas and with commercial navigation. These fears could be dispelled by appropriate provisions in the text of a treaty. However, *general* principles for the conduct of navigation (supplemented by provisions on the lines of RSNT, *supra* note 9, pt. 2, art. 82) and even for the conduct of peacetime military activities—for instance, prohibition of the use of ocean space for nuclear explosions—would be essential in a common-heritage regime. Neither should they arouse excessive opposition.

30. *E.g.*, RSNT, *supra* note 9, pt. 2, arts. 129 & 139, pt. 3, *passim.*

The elements of this system either already exist[31] or may soon be created.[32] What is required here is the fashioning of some order and efficiency from the chaotic proliferation of organizations which could be far more useful than they are at present. Effective administrative reorganization is notoriously difficult to achieve; nevertheless, with regard to organizations whose primary focus is ocean space activities, internal reorganization and closer coordination would have been urgent even without an UNCLOS. They are now indispensable. The UNCLOS cannot, of course, deal with the problems of internal reorganization of intergovernmental and other organizations. It can, however, formulate in a protocol to the future UNCLOS a pattern of interorganizational relationships to which present ocean space oriented intergovernmental organizations would be expected to conform, and it can make the necessary provisions within the UNCLOS to ensure that the prerequisites for the desired reorganization of relationships are created.[33] Neither of these steps has been taken; however, they could be accomplished against predictable bureaucratic opposition, but without insuperable political objection, provided that there is a clear idea of what is indispensable and how it can be achieved.[34]

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31. *E.g.*, Intergovernmental Maritime Consultative Organization (IMCO); Intergovernmental Oceanographic Commission (IOC); Food and Agricultural Organizations (FAO); Committee on Fisheries (COFI); Fisheries Department of FAO, the Marine Resources section of the United Nations; the International Hydrographic Bureau (IHB); the International Whaling Commission (IWC); the fisheries commissions and numerous other international, intergovernmental, and nongovernmental organizations.

32. *E.g.*, ISA.

33. In my view these prerequisites are (a) the creation of a continuing political mechanism (i) to serve as a forum where all questions relating to ocean space may be discussed in their multiple interrelationships; (ii) to oversee treaty implementation; (iii) to integrate at the *policy* level the activities of ocean space oriented intergovernmental and other organizations; (b) insofar as possible, specific, instead of general, references to institutional mechanisms in the RSNT (*see, e.g.*, RSNT, *supra* note 9, pt. 2, arts. 50(2), 53(1)); (c) a protocol outlining the desired pattern of interorganizational relationships with a recommendation addressed to the UN General Assembly and the UN Agencies concerned to take such appropriate action as may be within their competence.

34. Some ocean space oriented organizations are United Nations Specialized Agencies (*e.g.*, IMCO); others are outside the United Nations system of organizations (*e.g.*, IWC). Also major activities are conducted by more or less independent entities within larger organizations (*e.g.*, IOC, COFI) or administrative subdivisions of much larger organizations (*e.g.*, marine resources and LOS sections in the United Nations). It is not easy to fashion some order out of the present situation to enable the various elements of the existing system to realize their potential. A possible approach could be:

A permanent mechanism with the nucleus of its Secretariat drawn from

In conclusion a new, effective, viable, and equitable international order in ocean space can be attained by the UNCLOS without encountering overwhelming political objections and without discarding the bulk of the work done over the past three years.

I believe that the UNCLOS is drifting toward a national, inefficient, and grossly inequitable order in the seas, mainly through lack of leadership. No State has consistently reminded the UNCLOS that beyond issues of national interest, vital issues of world order exist. No State has presented and consistently supported a concept of a new, balanced world order in the seas that attempts honestly and realistically to accommodate the objective realities (technological advance, diversifying ocean uses, growing demand for resources, new needs for environmental protection, new needs for international organization, etc.) with the interests of States. So the UNCLOS has drifted, having as its sole aim the achievement of a package deal in the context of last ditch defense of the most peripheral national interest. In this atmosphere of a cattle market, it is obvious that Ms. Ferguson's landlocked States are unlikely to make significant progress toward their goals. Neither can they reasonably complain, for their proposals and initiatives have been narrowly conceived, exclusively in their group's interests, and satisfaction of these interests is not necessary for the adoption of the Convention. Neither can Professor Clingan be surprised that "it is unlikely that many countries have backed away from strictly parochial ideas about the zone." Even if "the interests

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the present U.N. LOS section to integrate at the policy level the following organizations:
(a) ISA (part of its Secretariat drawn from the present United Nations marine resources section);
(b) IMCO;
(c) International Fisheries Organization, composed of a reconstituted COFI (with Secretariat drawn from FAO Fisheries S.O.), the IWC, a streamlined system of regional fisheries commissions and miscellaneous other existing entities. FAO would divest itself of its interests in fisheries.
(d) International Marine Scientific and Technological Organization, constituted by the present IOC, the IHB, and a number of other small organs, entities, and organizations and also possibly some sections of the World Meteorological Organization (WMO) dealing with prevalently marine scientific matters. In addition to present functions of its separate parts, the future IMSTO would deal with the promotion of the interchange and transfer of marine technology, including perhaps the promotion of the establishment of the regional marine scientific research centres mentioned in part 3 of

of the various countries are . . . identified and understood,"[35] as Professor Clingan recommends, this understanding will be of only marginal help. Why should any country recede from its perception, however irrational, of the national interest if the UNCLOS is exclusively an exercise in competitive self-interest?

The vision of a new international order in the seas was the determining factor in the convening of the UNCLOS; progressive liquefaction of this vision will result either in a treaty unacceptable to significant States or in ocean space regimes more retrogressive than those established by the four 1958 Geneva Conventions.

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the RSNT. UNESCO would divest itself of its interests in oceanography and marine science.

The subject area of protection of the marine environment remains open. One could envisage UNEP retaining full control, but this view does not seem either practical or satisfactory in view of UNEP's many other concerns. Alternatives are three: (a) competence of the permanent mechanism under the over-all aegis of UNEP; (b) creation of an international marine ecological organization; (c) competence for its own sector, under the over-all aegis of UNEP, of each of the proposed four basic international organizations for ocean space. What should be the relationship of the ocean space system outlined with the United Nations system? For a large number of reasons, I would favour no direct relationship between any of the four basic international organizations and the United Nations or the United Nations Specialized Agencies (with the doubtful exception of UNEP). There would be little objection, however, were the permanent mechanism to establish with the United Nations a loose relationship similar, *mutatis mutandis*, to that established by the IBRD.

35. Clingan, *supra* note 8, at 546.