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Institutional Arrangements and the Law of the Sea

BERNARD H. OXMAN*

Many international institutions are concerned exclusively or primarily with the oceans. Most cannot avoid some connection. Much of this concern is a direct response to the increasing tempo, importance, and diversity of man's activities at sea. Current efforts to establish a universal charter for the oceans are another such response.

What is the relationship between these responses? Surely they are (or ought to be) complementary. The question is whether the relationship is more profound: whether the substance of the law of the sea and the nature of international institutions for the oceans are mutually dependent. One aspect of this question relates to the functions performed by international institutions within the overall structure of the law of the sea. A relevant inquiry then is whether, how, and to what extent the operation of the law depends upon such institutions. The author proposes to examine that question in connection with a basic legal problem, namely the allocation of jurisdiction at sea in a manner that best protects the interests affected.

There are two basic types of jurisdiction over activities at sea. One is jurisdiction based on nationality, more frequently the nationality of a ship, aircraft, or other vehicle or structure than the nationality of an individual or company.¹ Another is jurisdiction based on adjacency (or proximity) to land territory, such as jurisdiction over the territorial sea, contiguous zone, continental shelf, and more recently fisheries (or economic) zones.²

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1. The universal jurisdiction of a State over individuals and companies of its nationality of course obtains at sea as well as on land. However, it generally plays no special role in the organization of activities at sea, yielding as frequently to flag State jurisdiction at sea as it does to territorial jurisdiction on land.

2. While the rule of discovery and effective occupation has been the major basis for establishing territorial jurisdiction on land, it has had no significant role in the international law of the sea for centuries. The acquisition of prescriptive rights over so-called "historic bays," and isolated assertions of preemptive fishing rights prior to the advent of modern continental shelf and fisheries jurisdiction concepts, are easily distinguished as variants or precursors of the adjacency (proximity) basis of jurisdiction, and in any event are too narrow to support the existence of a generalized rule of discovery and occupation at sea. The existence of such a generalized rule of discovery and occupation at sea. The existence of such a generalized rule is contradicted by

Jurisdiction based on nationality is universal: the flag State retains jurisdiction over its ships wherever they may be. Jurisdiction based on adjacency (or proximity) is limited both as to area and generally as to subject matter. To determine whether a ship is subject to the concurrent jurisdiction of a coastal State, one must determine whether the ship is both in an area and conducting an activity subject to the jurisdiction of that coastal State. A ship may be in an area subject to coastal State jurisdiction (*e.g.*, fisheries jurisdiction) but conducting an activity that is not subject to coastal State jurisdiction in that area (*e.g.*, navigation); or, a ship may be conducting an activity subject to coastal State jurisdiction, in which case it is subject to the concurrent jurisdiction of the flag State and the coastal State.

These jurisdictional approaches significantly affect the need and potential for international cooperation. States usually will be least enthusiastic about international cooperation when the object is to limit their discretion with respect to activities subject to their jurisdiction; States usually will be most enthusiastic about international cooperation when the object is to limit activities that are not subject to their jurisdiction, particularly if they seek to prevent possible harm from such activities or, more recently, to participate in the benefits of such activities.³ Geographic and functional limitations on the jurisdiction of any given State to specific areas, specific activities, and specific ships tend to produce schizophrenic attitudes towards international cooperation in many, if not most, governments. While the problem of balancing costs and benefits exists with respect to all international cooperative arrangements, the more complex jurisdictional situation at sea complicates the problem, as Ambassador Richardson's discussion in this issue makes clear.

There is a tendency to associate cooperation with joint action. This is not necessarily the case. One function of establishing clear jurisdictional divisions is to permit a basic kind of cooperation—respect for the independence of others and noninterference in matters essen-

Article 2 of the Convention on the Continental Shelf, *done* April 29, 1958, 499 U.N.T.S. 311, 15 U.S.T. 471, T.I.A.S. No. 5578, which provides that the rights of the coastal State over the continental shelf do not depend on occupation, and by Articles 2 and 6 of the Convention on the High Seas, *done* April 29, 1958, 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200, which prohibit sovereignty claims, confirm that the freedoms of the high seas are exercised by all States, and provide for the exclusive jurisdiction of the flag State over its ships.

3. Participation can include direct protection from competition for activities of nations of the States concerned, transfer of technology, or the imposition and sharing of economic rent..

tially of concern to them. The United Nations Charter protects the "political independence" of States from the threat or use of force, and does not authorize the United Nations "to intervene in matters which are essentially within the domestic jurisdiction of any State."⁴ The restraint of an affected State in acquiescing in the acts or omissions of another may represent the highest degree of cooperation.

Seen in this light, the allocation of jurisdiction at sea should in theory promote a situation in which each State, to the maximum possible degree, is able to accept the decisions of other States on matters subject to their jurisdiction. The allocation therefore should be roughly proportionate to the distribution of interests.

While economists, environmentalists, political scientists, and others would probably agree that few if any significant acts of a State have purely "domestic" consequences, there is a substantial sphere of discretionary action in which foreign States are prepared to tolerate some adverse effects. Four of the factors that influence the size of the sphere of tolerable discretionary action are: (1) the sensitivity and magnitude of foreign interests affected; (2) the extent to which affected foreign States are prepared to rely on the informal political process, rather than legal or institutional limitations, to encourage a reasonable degree of restraint in the State or States with jurisdiction; (3) the ability of foreign States to induce the State or States with jurisdiction to accept legal or institutional limitations; and (4) the extent to which affected foreign States desire to preserve their own discretion to act in the same, related or analogous fields free from legal or institutional limitations.

There is no way to allocate jurisdiction at sea that would not subject significant interests of one State to the exercise of jurisdiction by another. Allocation of jurisdiction on the basis of nationality primarily reflects an economic or other interest (of the flag State or any other State being served) in conducting an activity free of foreign control. Allocation of jurisdiction on the basis of adjacency (or proximity) primarily reflects an economic or other interest of the coastal State in limiting the conduct of an activity close to its coast in order to reserve it to itself, extract economic rent, or minimize adverse effects. Accordingly, the source of pressures for legal or institutional limitations on the sphere of discretionary action of the State to which jurisdiction is allocated may be one or more of the following:

4. U.N. CHARTER art. 2, paras. 4, 7.

(1) Neither the nationality nor the adjacency (or proximity) basis for allocating jurisdiction reflects the interests of a State in limiting foreign discretion to conduct an activity in areas that are far from its coast or areas that are close to its coast but subject to the geographic jurisdiction of its neighbors.

(2) Allocation of jurisdiction on the basis of nationality does not reflect the interest of a State in limiting foreign discretion to conduct an activity in areas close to its coast.

(3) Allocation of jurisdiction on the basis of geographic proximity does not reflect the interest of a State in conducting activities in areas that are closer to the coast of one or more other States or in securing the maximum possibilities for procuring the conduct of an activity or a resultant service or product.

The interests of a State in navigation and communication extend far beyond any areas in which it could hope to exercise jurisdiction on a geographic basis. The interests of a State in protecting its coastal regions from pollution similarly extend to activities in areas far beyond those in which it could hope to exercise jurisdiction on a geographic basis. At the same time, its concern about pollution from foreign ships close to its coast may qualify its global interest in protecting navigation from coastal State interference. Allocation of jurisdiction on a geographic basis is certain to result in jurisdictional lines that divide common resource pools: fish stocks that should be conserved and managed as a whole; fluid nonliving resources that should be the subject of some understandings if unnecessary inefficiencies are to be avoided in a race to extract them; or entire seas or oceans that should be the object of coordinated environmental restraints imposed by many States on many activities, including activities on land. Allocation of jurisdiction on a basis of nationality is certain to result in competing demands to use the same area or resource, posing similar problems of conservation, avoidance of inefficiency, and environmental protection.

Customary international law is the classic instrument for allocating jurisdiction and establishing legal limitations on that jurisdiction. It is a blunt instrument. Acquiescence in a fairly broad sphere of discretion would normally be implicit in acquiescence in a system of allocation of jurisdiction. Separation of legislative and enforcement jurisdiction is not common. "Jurisdiction" follows upon, and in turn implies, the power to exercise direct physical control free of foreign interference. Accordingly, discomfort with the sphere of discretion of the State with jurisdiction need not manifest itself only in attempts to impose legal or institutional restraints on the exercise of jurisdiction.

It may manifest itself in opposition to the allocation of jurisdiction itself. That opposition may not be exclusively substantive: there may be attempts to impose legal and institutional restraints on the means by which an allocation is established. The Third United Nations Conference on the Law of the Sea may be viewed as such an institutional restraint.

Were a new island formed in the Pacific many hundreds of miles from the territory of any State, it would be *terra nullius*. Nationals of all States could visit and use the island. Sooner or later, a State might desire to limit foreign action on the island. It has three options, although many variants are possible:

(1) It could claim geographic jurisdiction over all or part of the island for some or all purposes, and seek to induce acquiescence in that claim through a combination of power and reassurances regarding foreign interests. (An attempt to control foreigners directly is generally a variant of this option.)

(2) It could seek an agreement with foreign States whose nationals are active on the island under which they will limit the actions of their nationals.

(3) It could seek an agreement with all States under which they will limit the actions of their nationals.

The fundamental difference between the regime of the land and the regime of freedom of the high seas is that the first option is generally precluded by the latter regime. Thus the Convention on the High Seas not only prohibits claims of sovereignty over the high seas, but confirms the exclusive jurisdiction of the flag State over its ships on the high seas save in exceptional cases expressly provided for in the Convention or some other treaty.⁵

The practical situation at sea historically supported the allocation of jurisdiction on the basis of nationality, emphasizing interests in conducting activities (or ensuring that they are conducted) rather than in limiting discretion to conduct activities. Navigation and communication interests of States were far flung and frequently global. Political and military alliances and interests were also far flung and fre-

5. Convention on the High Seas, *supra* note 2, art. 6; *accord*, Informal Composite Negotiating Text, arts. 89, 92, U.N. Doc. A/CONF. 62/WP. 10 (1977) [hereinafter cited as ICNT].

The question of whether this rule of high seas law is a matter of allocation or limitation, while an interesting historical, philosophical, and semantic inquiry, need not detain us here. It has already been noted that allocation of jurisdiction is a means of dealing with the problem of the sphere of discretion of a foreign State. The regime of freedom of the high seas reduces to zero the sphere of discretion of a State that might claim to exercise geographic jurisdiction.

quently global. Neighbors were not infrequently the perceived security threat, and a distant maritime power the protective or stabilizing force against both the neighbors and other maritime powers. Fish stocks were generally ample to support fishing efforts, which were primarily local. Environmental problems either did not exist or were largely ignored.

Even in such a situation, allocation of jurisdiction on the basis of nationality was not alone adequate to resolve certain problems. In particular, two problems required limitations on the sphere of exclusive discretion of the State of nationality: piracy and physical accommodation of uses.

Concepts of State responsibility were not an adequate response to the problem of piracy. Many pirate ships did not have the nationality of a State (at least a recognized State prepared to cooperate in the suppression of piracy). Moreover, the flag State could not effectively police all the ships of its nationality throughout the world, particularly those seized by pirates.

Major trading States were of course under constant pressure to suppress piracy, and had no interest in protecting pirates or pirate ships. The legal argument that the pirate is outside the protections of the international system of allocation of jurisdiction therefore accords with reality, but only if the individual really is a pirate. The problem lay in allocation of jurisdiction to make the determination: to board, inspect, arrest, and try those in control of any ship on the high seas, on suspicion of piracy.

Since the law of piracy developed from custom and practice, it can be argued that universal jurisdiction should be added as a "fourth option" with respect to the control of foreign activities on the new Pacific island, particularly since the law of piracy itself applies not only on the high seas but in any other "place outside the jurisdiction of any State." As a practical matter, this approach can be regarded as a variant of one of the two agreement options.⁶

In sum, a solution to the piracy problem was found in universal allocation of jurisdiction. It rested upon a pooling of national capabilities,

6. Convention on the High Seas, *supra* note 2, arts. 15, 19; *accord*, ICNT, *supra* note 5, arts. 101, 105. Although an emergency detention of a foreign national might prove necessary, and presumably might be justified after the fact on some universal protective (humanitarian) theory, a lawyer concerned with maintaining the principle of exclusive jurisdiction of the state of nationality could provide for the practical problem by arguing implied consent. Despite contemporary impatience with using legal fictions to adapt strict law categories to exceptional situations, one can see a certain

doubtlessly with informal international cooperation,⁷ but without any formal international institutions to further that cooperation or to control abuse.⁸

The problem of physical accommodation of uses is classically addressed by limiting the sphere of discretion of the user (and hence the State of nationality). Each State is bound to exercise the freedoms of the high seas "with reasonable regard to the interests of other States in their exercise of the freedoms of the high seas."⁹ It is important to bear in mind that the allocation of exclusive jurisdiction to the flag State is not altered by the imposition of this legal duty on the flag State. Putting aside actions to deal with imminent danger, enforcement at sea of the duty to exercise "reasonable regard" is the exclusive responsibility of the flag State.¹⁰

Avoidance of collisions and accidents—the classic maritime accommodation of use problem—is in the interests of all concerned. While some differences might emerge on questions of priority of uses, most of them would normally be resolved in favor of the less mobile user outside confined spaces (*e.g.*, the fishing boat with its nets out). The basic interest is in having the rules; as long as they make technical sense, there is no overriding interest in their substance.

There is however a considerable interest in universal respect for the rules. Since virtually all of the rules can be regarded as precise applications of the "reasonable regard" obligation, there is no difficulty in principle in relying upon the commonly accepted practices of

merit in avoiding the creation of an exception in principle to a system of jurisdictional allocation under customary law, particularly where an implication of consent by the State of nationality in fact comports with the likely position of that State.

7. Such cooperation is required. Convention on the High Seas, *supra* note 2, art. 15; *accord*, ICNT, *supra* note 5, art. 100.

8. There is liability to the flag State for seizure of a ship or aircraft on suspicion of piracy "without adequate grounds" and provision for compensating a ship that suffers loss or damage as a result of a boarding and search based on unfounded suspicions and not justified by action of the ship. Convention on the High Seas, *supra* note 2, arts. 20, 22; *accord*, ICNT, *supra* note 5, arts. 106, 110. However, no special institutions are created to implement this liability, at least pending adoption of a new Law of the Sea Convention containing a general system for third-party settlement of disputes. More widespread ratification of the 1958 Optional Protocol on Settlement of Disputes is unlikely.

9. Convention on the High Seas, *supra* note 2, art. 2; *accord*, ICNT, *supra* note 5, art. 87 (substituting "due consideration" for "reasonable regard").

10. Should the ship subsequently enter port or otherwise come within the jurisdiction of a foreign State, a question of civil liability and, in rare instances, criminal responsibility might be raised in the courts of that State.

mariners as the source of the international law obligation, binding on all States. The mariners are not making international law; rather, their customs are the reference point for determining the precise application of the "reasonable regard" rule.

Among the problems with relying on custom is that this presents difficulties with respect to change, adaptation to new technology, and communication of increasingly complex requirements. The rules of the road eventually must be written. Those written rules must be universally binding. A universal conference called to prepare a universally accepted treaty is the obvious conclusion. Since the subject matter is highly technical, a smaller body of maritime experts is likely to prepare texts for the conference. Since periodic revision may be necessary, provision may be made for periodic review and consultation. One may call this a system entailing a diplomatic conference, a treaty, and an amendment or revision procedure. Or one may call this an international regulatory organization. In practice, the work of the Intergovernmental Maritime Consultative Organization (IMCO) entails both aspects.¹¹ What is clear is that an international legislative drafting institution has evolved to meet the need for uniform technical limitations.¹²

There are now over one hundred-fifty independent States in the world. Each has the right to sail ships under its flag. It is probably impossible to get every State to ratify every technical treaty and amendment needed to achieve uniformity within any reasonable period of time, if at all. It is also difficult to get every State to ratify a treaty under which States parties are automatically bound by subsequent regulations adopted through some organization or procedure with less than unanimous affirmative consent. Recalling that the nature of the problem is to determine the precise application of the "reasonable regard" obligation of all States, another solution combines traditional reliance on maritime custom with highly advanced views regarding

11. See Convention on the Intergovernmental Maritime Consultative Organization, signed March 6, 1948, 289 U.N.T.S. 48, 9 U.S.T. 621, T.I.A.S. No. 444 [hereinafter cited as IMCO Convention].

12. It is interesting to note that these legislative functions are associated with the work of an international organization whose very title includes the word "consultative." In dealing with similar problems, the Chicago Convention on Civil Aviation is much more direct. It establishes a procedure for "rules and recommended practices" and requires adherence to the rules of the International Civil Aviation Organization for civil aviation over the high seas. Convention on International Civil Aviation, opened for signature December 7, 1944, art. 12, 15 U.N.T.S. 295, 61 Stat. 1180, T.I.A.S. No. 1591, 3 Bevans 944.

the legislative (not merely drafting) functions of international organizations. Article 10 of the Convention on the High Seas provides:

1. Every State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard *inter alia* to:

- (a) The use of signals, the maintenance of communications and the prevention of collisions;
- (b) The manning of ships and labour conditions for crews taking into account the applicable international labour instruments;
- (c) The construction, equipment and seaworthiness of ships.

2. In taking such measures each State is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance.

If the "international standard" is "generally accepted," it is binding on all whether or not the instrument elaborating the standard has been ratified.¹³ The question of what constitutes "general acceptance" is of course a substantial one. The functional purposes of the requirement would suggest that the standard is both quantitative and qualitative; that is, acceptance should be widespread among States with substantial interests at stake. If there is a division of opinion as to whether a stricter standard has replaced an earlier standard, that would not alter the duty to respect the earlier, less stringent standard pending emergence of "general acceptance" of the stricter standard.

In principle the solution to the problem of physical accommodation of uses under the regime of the high seas therefore is to place agreed limitations on the sphere of discretion of the State of nationality. If at least the safety limitations are "generally accepted," then the sphere of discretion of the State of nationality is accordingly limited whether or not that State has expressly agreed to be bound by the limitations in question. Enforcement of the limitations generally remains the responsibility of the State of nationality.

13. The express reference to international labor instruments has the effect of an exclusion. It is apparent that certain international labor instruments were regarded as inapplicable or, even if applicable, not generally accepted as they need only be taken into account. Article 94 of the ICNT, *supra* note 5, further elaborates the duties of the flag State and, lest there be any doubt that the reference to "international standards" was intended to include the work product of international institutions, substitutes for "generally accepted international standards" the term "generally accepted international regulations, procedures and practices" in specifying the duty of all States to comply.

The establishment of traffic separation schemes presents an interesting illustration of this process. "The objective of traffic separation schemes is to reduce the risk of collision in converging areas, dense traffic areas, or where restricted sea room limits freedom of movement by shipping."¹⁴ Under a traffic separation scheme, there is normally a traffic separation line or separation zone that divides traffic moving in opposite directions, much like the center island on a highway. Since IMCO was granted no binding legislative power in the field by its charter,¹⁵ and since it did not submit traffic separation schemes "adopted" by it to governments for ratification in treaty form, these schemes were generally regarded as recommendatory in character.

While a respectable argument could certainly be made that "generally accepted" traffic separation schemes are legally binding under the rule stated in Article 10 of the Convention of the High Seas, the desire to ensure that traffic separation rules are binding finally manifested itself in new provisions in the 1972 revisions to the International Regulations For Preventing Collisions at Sea (1972 COLREGS).¹⁶ Rule 1(d) permits IMCO to adopt traffic separation schemes "for the purpose of these Rules." "New Rule 10 makes previously recommended procedures respecting traffic separation schemes compulsory for vessels if in or near schemes adopted by IMCO."¹⁷ Thus parties to the 1972 COLREGS are automatically bound by traffic separation schemes adopted by IMCO. In addition, the inclusion of these provisions in the new international regulations adds further credence to the argument that generally accepted traffic separation schemes are binding on all States pursuant to the rule stated in Article 10 of the Convention of the High Seas.

Thus one has reached, or virtually reached, a situation in which a State is legally bound to respect a rule adopted by an international organization despite the fact that the State is not a member of the organization and has not approved the rule. Such a result is not, and should not be regarded as, the norm with respect to the legal effect of institutional arrangements regarding the oceans; rather, it is a response to the uncontested need for universally respected limitations in this field, and a reflection of the confidence of those affected in the

14. U.S. Coast Guard, Navigation Rules, CG-169 (1977) Comments to Rule 10, Convention on Regulations for Preventing Collisions at Sea, 1972, T.I.A.S. No. 8587 [hereinafter cited as 72 COLREGS].

15. IMCO Convention, *supra* note 11, arts. 2-4. See ICNT, *supra* note 5, art. 22.

16. 72 COLREGS, *supra* note 14, Rules 1 (d) & 10.

17. *Id.* Comments to Rule 10.

competence, responsiveness, and fairness of the institution to which virtual legislative power is delegated. In this regard, it should be noted that of the eighteen (formerly sixteen) members of IMCO's Council, six must be governments of States with "the largest interest in providing international shipping services" and six others must be governments of States with "the largest interest in international sea-borne trade."¹⁸ Eight of the sixteen (formerly fourteen) members of IMCO's Maritime Safety Committee must be "elected from among the ten largest ship-owning States."¹⁹

In sum, the accommodation of use problem posed by the allocation of jurisdiction on the basis of nationality is resolved by the imposition of legal limitations on the prescriptive discretion of the State of nationality coupled with an increasing role for international institutional limitations on the sphere of prescriptive discretion, with few limitations on exclusive enforcement discretion.

Allocation of jurisdiction on a geographic basis did not develop as the solution to the problem of accommodation of uses.²⁰ Thus it is interesting to note that although the classic international law of the sea does allocate some jurisdiction—indeed sovereignty—on a geographic basis in the form of internal waters and the traditional territorial sea, that jurisdiction is qualified by the establishment of a right of innocent passage for ships of all States in the territorial sea and certain internal waters. Thus a question of allocation of jurisdiction is posed once again. On the one hand, a right of innocent passage for the flag State would imply a measure of jurisdiction regarding the exercise of that right. At the same time, the sovereignty of the coastal State, particularly the rule that "passage is innocent so long as it is not

18. IMCO Convention, arts. 17 & 18, as amended, *resolution of* Sept. 15, 1964, 607 U.N.T.S. 276, 18 U.S.T. 1299, T.I.A.S. No. 6285.

19. *Id.* art. 28, as amended, *resolution of* Sept. 28, 1965. 629 U.N.T.S. 334, 19 U.S.T. 4855, T.I.A.S. No. 6490.

20. Geographic jurisdiction would have been contrary to the underlying assumption of the regime of the high seas, namely that the jurisdiction of the flag State is exclusive. Nevertheless, the principle could have been maintained through the device of agreement of flag States to qualify their exclusive jurisdiction by allowing some sharing of competence. Generally, this did not occur. The reasons probably relate primarily to the fact that the uses involved are transitory: the imposition of differing rules in different places might at best lead to confusion and a higher chance of accident and at worst to conflicting requirements with respect to matters that involve more than the behavior of a ship or aircraft while it is in a particular area, such as requirements with respect to construction, equipment, manning or design. Thus it might well be concluded that a sharing of jurisdiction with respect to such matters not only presented theoretical problems with respect to the exclusive jurisdiction of the State of nationality on the high seas, but very real problems of subor-

prejudicial to the peace, good order, or security of the coastal State,"²¹ would imply a measure of jurisdiction of the coastal State, particularly on matters other than innocent passage or affected by passage.

Under Rule 1 of the 1972 COLREGS, in general the solution is to apply the international regulations in the high seas and the territorial sea, while allowing special rules to be made by the coastal State in classic internal waters which "shall conform as closely as possible to" the international rules.²² Thus jurisdiction based on nationality and jurisdiction based on geographic proximity are both limited by the same rules in response to the need for functional uniformity.²³

One of the interesting aspects of the Informal Composite Negotiating Text (ICNT) before the Third U.N. Conference on the Law of the Sea relates to the attempt to clarify and modernize the rules regarding innocent passage in the territorial sea.²⁴ It deals in greater detail with the problem of allocation of jurisdiction between the coastal State and the flag State with respect to ships exercising the right of innocent passage. Article 21 of that text establishes the right of the coastal State to make laws and regulations relating to innocent passage through the territorial sea on specified matters, including the safety of navigation and the regulation of marine traffic. At the same time it requires foreign ships exercising the right of innocent passage to comply not only with the laws and regulations of the coastal State, but with all generally accepted international regulations relating to the prevention of collisions at sea. This would seem to require that at the least the coastal State regulations not be incon-

minating the interest in use—in this case navigation and communication—to the discretionary jurisdiction of a foreign State.

21. Convention on the Territorial Sea and the Contiguous Zone, *done* April 29, 1958, 516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639, art. 14(4) [hereinafter cited as Territorial Sea Convention] ICNT, *supra* note 5, art. 19(1).

22. 72 COLREGS, *supra* note 14. Paragraphs (a) & (b) of Rule 1 provide:

(a) These Rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels.

(b) Nothing in these Rules shall interfere with the operation of special rules made by an appropriate authority for roadsteads, harbors, rivers, lakes or inland waterways connected with the high seas and navigable by seagoing vessels. Such special rules shall conform as closely as possible to these Rules.

23. In this connection, it is interesting to note that the right of innocent passage does not apply to overflight, and that accordingly the question of allocation of jurisdiction does not arise in the same way. Thus, under the Convention on International Civil Aviation, *supra* note 12, the coastal State is permitted to take exception to the international rules with respect to its territorial sea as well as its internal waters.

24. ICNT, *supra* note 5, pt. II, Sec. 3.

sistent with the international regulations relating to the prevention of collisions at sea. The article, in perhaps its most controversial clause, goes on to provide that the coastal State laws and regulations "shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted rules or standards."²⁵

The combined effect of the ICNT provisions on innocent passage is to apply a rule to both the coastal State and the flag State analogous to the rule of Article 10 of the High Seas Convention. In effect, the legal and institutional limitations on the sphere of discretion of the State with jurisdiction not only become a solution to a problem posed by the allocation of jurisdiction, but in some cases become a means for resolving differences of opinion as to the appropriate allocation of jurisdiction, in this case between the coastal State and the flag State with respect to innocent passage. Thus, to the extent that international legal or institutional restraints significantly reduce the sphere of discretion of the State with jurisdiction, there should be less practical difficulty in reaching agreement on the allocation of such jurisdiction.

While institutional arrangements for physical accommodation of navigation and communications uses have been global in character, institutional arrangements with respect to fisheries have typically been regional. In this respect, it is important to note that the use of the term "regional" in this context generally refers to the area in which fishing is a subject of regulation, rather than to the geographic location of the States that will be engaged by the international institutional effort. A classic example of a traditional regional fisheries arrangement is the International Convention for Northwest Atlantic Fisheries, pursuant to which only a small minority of the States parties bordered the area in which fisheries were regulated.²⁶ In some cases the migratory characteristics of the particular stocks of interest necessitate the application of fisheries arrangements to a very broad geographic area, as for example under the Atlantic Tuna Convention²⁷ and the Inter-American Tropical Tuna Convention,²⁸ or indeed

25. *Id.* art. 21(2).

26. International Convention for Northwest Atlantic Fisheries, *done* Feb. 8, 1949, 157 U.N.T.S. 157, 1 U.S.T. 477, T.I.A.S. No. 2089. For a discussion of fisheries management, see Clingan, *The Changing Global Pattern of Fisheries Management*, 10 LAW. AM. 658 (1978).

27. International Convention for the Conservation of Atlantic Tuna, *done* May 14, 1966, 673 U.N.T.S. 63, 20 U.S.T. 2887, T.I.A.S. No. 6767.

28. Inter-American Tropical Tuna Convention, *signed* May 31, 1949, 80 U.N.T.S. 3, 1 U.S.T. 230, T.I.A.S. No. 2044.

to the oceans as a whole, as for example under the International Whaling Convention.²⁹

The allocation of jurisdiction over fishing to the coastal State within the territorial sea and to the flag State beyond the territorial sea (or a relatively narrow fishing zone) determined the composition of the regional fisheries organizations prior to the widespread adoption of 200-mile fishing zones. In theory the composition of a regional fisheries organization could be universal. In fact, those organizations typically included the coastal States bordering the area in question and States whose nationals were engaged in fishing in the area. These institutional arrangements were necessary because it was normally not possible for any one State to impose and enforce conservation regulations on foreigners fishing for a particular stock. A procedure was needed under which all those fishing for a stock would be bound to respect the conservation and management limitations established by (or with the consent of) all the flag States concerned.

Since the necessity for conservation limitations generally arises because a stock would be overfished by those currently engaged in the fishery in the absence of imposed limitations, interesting questions arise with respect to the legal rights and duties of a potential new entrant in the crowded fishery. One approach to the problem is of course to be willing to admit potential new entrants into the fisheries organization. Similarly, the new entrant, in order to implement its duty to cooperate with other States to conserve the fish stocks,³⁰ should be willing to enter the organization. The practical problem is one of allocation of quotas. If all existing members are already restraining excess capacity, they could hardly be expected to welcome a situation in which they would have to share future allocations with a new member. Even as the notion of a harvesting capacity "preference" for coastal State fishermen developed, the coastal State was wary of permitting the establishment of any new "traditional" interests, if not rights.³¹ The 1958 Convention on Fishing and Conser-

29. International Convention for the Regulation of Whaling, *signed* Dec. 2, 1946, 161 U.N.T.S. 72, 62 Stat. 1716, T.I.A.S. No. 1849.

30. Convention on Fishing and Conservation of the Living Resources of the High Seas, *done* April 29, 1958, 559 U.N.T.S. 285, 17 U.S.T. 138, T.I.A.S. No. 5969, arts. 1, 4; ICNT, *supra* note 5, art. 63.

31. It is interesting to note in this connection that throughout the life of the International Commission for North Pacific Fisheries—comprised of Canada, Japan, and the United States—no new members were admitted and there were no new entrants into the salmon fishery regulated by that commission, despite the fact that that period witnessed an immense increase in and diversification of global fisheries effort. *See also* Fisheries Jurisdiction Cases (United Kingdom v. Iceland), [1974] I.C.J. 3.

vation of the Living Resources of the High Seas³² attempts to deal with the strictly legal problem of the new entrant by obliging the new entrant to apply the existing measures, "which shall not be discriminatory in form or in fact," to its own nationals, and which subjects the new entrant to compulsory third-party dispute settlement procedures in the event it does not apply those measures.³³

There is no indication that the legal problem of new entrants was responsible to any significant degree for the eventual decision of a large majority of coastal States to seek a major alteration in the allocation of jurisdiction with respect to fisheries. It would seem rather that one of the major causes of the vast extension of coastal State fisheries jurisdiction can be found in the fact that the allocation of jurisdiction on the basis of nationality necessarily required the consent of a potentially large number of flag States to any limiting agreements, and that a juridical requirement for such consent—or any likely voting arrangement within an organization—tended to reflect the emphasis on utilization rather than limitation that is a general characteristic of allocation of jurisdiction on the basis of nationality. Whatever the reasons, the flag States were unwilling or unable to place limitations on the sphere of their discretion to fish that were extensive enough to satisfy the interests and rising expectations of the coastal States. Indeed it can be questioned whether anything short of a fundamental change in jurisdictional allocation could have satisfied the rising demands for national control of extractive industries in many countries of the world, particularly developing countries and other countries that are exporters of raw materials.

The Third United Nations Conference on the Law of the Sea was called to review the regimes of the law of the sea in a comprehensive manner. As might be expected, any such review would elicit objections from some quarters regarding any allocation of jurisdiction, since, as we have seen, no allocation can in and of itself deal adequately with the protection of interests other than those of the State to which jurisdiction is allocated. Needless to say, attempts to moderate divergences arising from opposing viewpoints on questions of allocation of jurisdiction would inevitably concentrate on the possibility of imposing legal or institutional limitations on the State to which jurisdiction is allocated. This process affected allocations of jurisdiction with respect to both area and subject matter.

32. Convention on Fishing and Conservation of the Living Resources of the High Seas, *supra* note 30.

33. *Id.* arts. 5, 9.

With respect to area, the ICNT would establish a twelve nautical mile maximum limit for the breadth of the territorial sea.³⁴ The greater detail of this text over the Territorial Sea Convention with respect to the rules of innocent passage³⁵ is probably to some degree due to the fact that the twelve-mile territorial sea would embrace a substantially larger area than the traditional three-mile limit. More importantly, this geographic allocation of jurisdiction drew attention to the problem of limitations on such jurisdiction in straits. States sought clearer protection for the jurisdiction of the flag State with respect to shipping in straits than would be afforded by the rules of innocent passage. In addition, the expansion of the territorial sea brought into focus the question of communications activities, such as overflight of straits, that are not within the scope of innocent passage.³⁶

Thus, the allocation of jurisdiction to the flag State with respect to transit of straits is broader and subject to fewer ambiguities and exceptions than it is in the territorial sea generally.³⁷ This attempt to balance the expansion of the territorial sea with new provisions to protect the interests of the flag State in turn required new provisions to ensure that the allocation of jurisdiction to the flag State in straits is subject to limitations designed to accommodate the interests of States bordering straits, particularly those regarding safety and environmental protection. Therefore, the ICNT elaborates in considerable detail obligations of the flag State with respect to the exercise of the right of transit passage of straits designed to protect and accommodate the relevant interests of States bordering straits. These obligations include a duty to respect international environmental and safety measures in general and, in particular, to respect traffic separation and related measures drawn up by the strait States and adopted by the competent international organization.³⁸ This marks still another step in the use of the principle of Article 10 of the Convention on the High Seas.

The provisions of the ICNT with respect to the 200-mile economic zone reflect the major effort of the Third United Nations Conference on the Law of the Sea with respect to reallocation of jurisdiction at sea. The effect of the concept of the economic zone is

34. ICNT, *supra* note 5, art. 3.

35. Compare *id.* arts. 17-32 with Territorial Sea Convention, *supra* note 21, arts. 14-23.

36. See ICNT, *supra* note 5, arts. 2, 18-20.

37. Compare *id.* arts. 17-26 with arts. 34-44.

38. *Id.* arts. 39, 41, 42.

substantial from both a geographic and substantive viewpoint. Over one-third of the oceans are within 200 nautical miles of the coast.³⁹ With the exception of migratory species and certain other stocks, virtually all of the world's salt water fisheries are found within 200 nautical miles of the coast.⁴⁰ A 200-nautical-mile line embraces a very substantial portion of most of the continental margins and related basins of the world's oceans, and therefore a very substantial proportion of that part of the seabed that has hydrocarbon potential.⁴¹ It is not possible to navigate between a majority of coastal States in the world without passing within 200 nautical miles of the coast of a third State.⁴²

The most hotly contested issue with respect to allocation of jurisdiction related to fisheries. Many coastal States proposed a complete reversal of the classic high seas allocation of jurisdiction to the flag State, namely an allocation of complete discretionary fisheries management jurisdiction to the coastal State throughout a 200-mile zone. These States did of course acknowledge that there would have to be a duty to cooperate and coordinate with respect to stocks of fish that fall within the jurisdictional limits of two or more States and, somewhat more reluctantly, with respect to stocks of fish that migrate seaward of the 200-mile zone. Despite general coastal State hostility to institutional arrangements regarding fisheries, agreement was possible on references to institutional arrangements where such arrangements would be necessary to manage a "common pool" resource, namely with particular respect to highly migratory species⁴³ and marine mammals,⁴⁴ and in enclosed and semi-enclosed seas,⁴⁵ where the cooperation of many States might be necessary to implement a sound program of conservation and management.

Management of the "common pool" fishery resource is generally the only exception to the opposition to institutional arrangements for fisheries.⁴⁶ Under the ICNT, the coastal States accept legal duties to

39. See generally J. PRESCOTT, *THE POLITICAL GEOGRAPHY OF THE OCEANS* (1975).

40. *Id.* See also A. KOLODKIN, *THE WORLD OCEAN* (1974).

41. *Id.*

42. *Id.*

43. ICNT, *supra* note 5, art. 64; see Utz, *Comment: U.S. Distant Water Fishing Industry*, 10 LAW. AM. 921 (1978).

44. ICNT, *supra* note 5, art. 65.

45. *Id.* arts. 122-23.

46. *Id.* arts. 61-62. With respect to anadromous species such as salmon "common pool" problems beyond 200 miles were largely reduced by allocation of jurisdiction to the State in whose rivers anadromous stocks originate; thus the reference to regional

conserve fish stocks and to ensure their optimum utilization; that is, to allow foreign access under reasonable terms and conditions to that portion of the allowable catch that the coastal State cannot, for the time being, harvest by itself.⁴⁷ Agreement also appears near on the question of access of landlocked and "geographically disadvantaged" States to the fisheries of the economic zones of their coastal State neighbors.⁴⁸ There are no mandatory institutional limitations in the text, however, that in general would serve to implement or complement these legal limitations.

The ICNT is unprecedented, among basic international political and economic instruments, in its elaborate and detailed attention to environmental questions. The text establishes sweeping legal limitations on all States with respect to activities at sea subject to their jurisdiction, propounding a duty to protect and preserve the marine environment.

The principle of Article 10 of the Convention on the High Seas dominates the approach of the ICNT to the question of institutional limitations on the exercise of jurisdiction for environmental purposes, but with an interesting new element. Not only are national environmental regulations with respect to activities at sea required to be "no less effective" than applicable international regulations, but States are required to cooperate with each other in the elaboration of international regulations by the "competent international organization" where such regulations do not exist or where they need to be supplemented.⁵⁰

While some of the references to the competent international organization, particularly with respect to ships, are regarded by many participants as references to IMCO, there are other institutions, such as the United Nations Environment Program for example, that may be regarded as the appropriate place to elaborate international standards, rules and practices with respect to particular types of activities. A fascinating aspect of these references is that the duty to comply

organizations is qualified by the words "where appropriate." *Id.* art. 66. Similar provisions for catadromous species contain no reference to an organization. *Id.* art. 67.

47. *Id.* art. 62.

48. *Id.* arts. 69-71; see Report of Negotiating Group 4 in X Off. Rec., Third U.N. Conference on the Law of the Sea (1978) [hereinafter cited as Off. Rec.].

49. *Id.* pt. XII.

50. *Id.* art. 198 generally urges global cooperation. *Id.* arts. 208-09 and 213 refer to such "competent international organizations, or diplomatic conference," while article 212 (vessel-source pollution) uses the word "organization" in the singular. Cf. Convention on the High Seas, *supra* note 2, arts. 25-26.

with international standards is elaborated without express reference to a known organization with known procedural safeguards and expertise. Even IMCO's Marine Environment Protection Committee is a "one state one vote" body.

One response to this point would doubtlessly be that under the rule of Article 10 of the Convention on the High Seas, States that are not otherwise legally bound by a standard by virtue of their other treaty commitments would become bound under the rule of Article 10 only if the standard becomes "generally accepted." ICNT Article 94, the equivalent provision, uses the "generally accepted" criterion as well. In the early stages of the Conference, however, a handful of delegates refused to permit similar language to be used consistently in the drafting of the chapter on protection and preservation of the marine environment.⁵¹ The problem now is that it is difficult to alter texts at a later stage of negotiation. Many delegations fear that there could be a general unraveling of delicate political compromises in any substantive review.

Some may argue that no clarification is necessary since there is no rational way of interpreting the marine environment chapter except in conformity with the principle of Article 10 of the Convention on the High Seas. It cannot be maintained that the duty under the ICNT to respect international regulations refers only to those regulations to which the particular State in question is bound by some other treaty, as this would render virtually all of the environmental provisions meaningless. Similarly, it cannot be maintained that a regulation adopted by the competent international organization, whether or not generally accepted, is binding upon all States parties to the Law of the Sea Convention, particularly when the procedures for adopting regulations and safeguarding relevant interests are not even mentioned.

It is difficult to argue with this legal reasoning, as most would surely agree that it is sound. Nevertheless, there is an opportunity to deal with the drafting problem in a way that would minimize, and in all probability eliminate, any substantial risk of reopening delicate compromises. The Drafting Committee of the Conference will be faced with the question of harmonizing terminology and texts. It will

51. Compare ICNT arts. 212(2), 212(4), & 212(5) (last sentence), which specify the "generally accepted" criterion in elaborating rights and obligations with respect to international rules and standards, with ICNT arts. 209(3), 211, 212(5) (third sentence), 215, 217, 218, 219, 220, 221, 227, & 229, which do not expressly refer to that criterion.

therefore have to examine various different phrases, including the differences in wording found in Article 94 and the provisions on protection and preservation of the marine environment. Thus the Drafting Committee would have a basis for examining this question without running the risk of reopening substantive negotiations, since substantive negotiation is beyond the mandate of the Committee.⁵²

The ICNT provisions on protection and preservation of the marine environment illustrate the use of legal and institutional limitations as a means of resolving problems regarding allocation of jurisdiction. It was argued that flag States must ensure that their ships respect relevant international limitations. Some coastal States argued that this alone was inadequate to protect coastal interests because many flag States lack sufficient interest or capacity to ensure enforcement of those limitations. A few States argued that international limitations even if enforced were inadequate, and that accordingly there was a role for coastal State prescriptive competence with respect to pollution from ships in a 200-mile zone.

The solution reached, although phrased in terms of prescriptive jurisdiction, is that the coastal State is given jurisdiction over pollution from ships in the 200-mile economic zone solely for the purpose of enforcing international standards or, in special cases, particular discharge standards proposed by the coastal State and approved by the competent international organization.⁵³ In addition a State is given power to enforce international standards with respect to foreign ships that voluntarily enter its ports.⁵⁴ The scope of coastal State enforcement jurisdiction is fairly broad in ports and in the territorial sea.⁵⁵ It is more limited in the economic zone,⁵⁶ where interference with freedom of navigation was regarded as more dangerous for juridical as well as practical reasons. In brief, the jurisdictional allocation of the provisions on protection and preservation of the marine environment can only be understood, at least with respect to vessel-source pollution, in the context of the limitations on the exercise of jurisdiction within the chapter.

The greatly expanded reliance in the ICNT on legal and institutional limitations as part of a consensus on allocation of jurisdiction gives considerably greater weight to the persistent questions of im-

52. Rules of Procedure, A/CONF. 62/30/Rev. 2, rule 53.

53. *Id.* art. 212. *But see id.* art. 235 (ice-covered areas).

54. *Id.* art. 219.

55. *Id.* art. 221.

56. *Id.* Compare paras. 1 & 2 with paras. 3-8.

plementation of and respect for legal and institutional limitations on the exercise of jurisdiction.

With respect to legal limitations, the Conference has made unprecedented strides with respect to the inclusion, as an integral part of the Convention, of mandatory third-party settlement of disputes leading, in many significant cases, to a binding decision.⁵⁷ This adds an institutional dimension to the legal limitations. That fact is made clear by a comparison of the subjects that are included or excluded from compulsory third-party procedures with those that are subject to institutional limitations in the relevant substantive articles.

While the correlation is only a rough one, it will be noted for example that there is virtually no role for binding third-party dispute settlement with respect to fisheries in the economic zone, although the proposed compromise would include some compulsory third-party conciliation in certain fisheries cases.⁵⁸ This is consistent with the general coastal State resistance to institutional limitations on coastal State jurisdiction with respect to fisheries in the economic zone. Conversely, with respect to navigation and protection and preservation of the marine environment, the system for compulsory and binding third-party settlement of disputes is generally applicable.⁵⁹ This is consistent with the reliance on institutional limitations in the substantive provisions regarding high seas freedoms and the protection and preservation of a marine environment.

With respect to institutional limitations, there are references to international organizations, whether global or regional, in seventy-two articles of the ICNT (not including references to the proposed Seabed Authority or dispute settlement organs under Parts XI and XV of the ICNT). Almost none of the references name the organizations.⁶⁰ This total does not include articles whose implementation is dependent upon the existence and smooth functioning of an international or regional organization, or references to the United Nations itself.

It is important to bear in mind that the need for new institutional limitations is created by the changes in allocation of jurisdiction at sea and in the effects of such allocation, not by a Convention on

57. See generally ICNT, *supra* note 5, pt. XV.

58. *Id.* art. 296; Report of Negotiating Group 5 in X Off. Rec., *supra* note 48.

59. ICNT, *supra* note 5, art. 296, para. 2.

60. ICNT, *supra* note 5, arts. 22, 39, 41, 53, 60, 61, 63, 64, 65, 66, 72, 93, 118, 119, 123, 139, 143, 160, 162, 168, 198, 199, 200, 201, 202, 203, 204, 205, 206, 208, 209, 211, 212, 213, 214, 215, 217, 218, 219, 221, 223, 224, 239, 240, 243, 244, 245, 247, 248, 249, 250, 252, 253, 254, 255, 256, 257, 258, 263, 264, 266, 267, 269, 270, 272, 273, 274, 276, 278, 296; Annex VII, arts. 2, 3.

the Law of the Sea as such. Similar need would exist if these changes occurred through the evolution of customary international law, although the slower pace of change might encourage the development of less formal mechanisms for restraint in some cases.

At least three major tasks must be undertaken in response to this need:

(1) a survey of the legal and technical competence of existing international and regional organizations in light of the new jurisdictional allocations and limitations;

(2) allocation of functions among international and regional organizations, considering any necessary changes in the functions or structure of existing organizations and the need for new organizations; and

(3) coordination among international and regional organizations in order to insure a reasonable harmony in the implementation of the rules of the law of the sea.⁶¹

Several States from various regions have now introduced a proposal for a Conference declaration or resolution that would deal with the general institutional questions posed by the ICNT.⁶² Among the measures contained therein would be a request that the Secretary General of the United Nations appoint an ad hoc study group of eminent persons to review and identify gaps in the present institutional arrangements in the field of international ocean affairs, evaluate the institutional implications resulting from the implementation of the Law of the Sea Convention, and formulate alternative proposals aimed at improving the effectiveness of the system.

One of the most fundamental contributions of the principle in Article 10 of the Convention on the High Seas is the merger it effects between legal and institutional limitations on the sphere of discretion of a State to which jurisdiction is allocated. The traditions of customary international law are ever present in the requirement that a standard must be "generally accepted" before it becomes binding on all States as a matter of international law. A quasilegislative role for in-

61. An explicit reference to the imposition of institutional limitations on the exercise of jurisdiction by a named international organization occurs in Article 39 in connection with the duty of civil aircraft to respect rules elaborated by the International Civil Aviation Organization during overflight of straits. This specific reference is perhaps appropriate because the functions of ICAO extend beyond the oceans themselves. Also it reflects the fact that the Convention on International Civil Aviation, *supra* note 12, is one of the most widely ratified treaties in the world. See also ICNT art. 297.

62. A/CONF.62/L.30, 18 May 1978.

ternational institutions is implicit in the drafting of Article 10 of the Convention on the High Seas and explicit in the equivalent Article 94 in the ICNT. Aside from Part XI with respect to the deep seabeds,⁶³ the approach of the ICNT is consistent with the underlying principle: that a Convention on the Law of the Sea is intended to elaborate fundamental international law on the subject, and therefore no attempt is made to confer specific legislative power on a specific international organization. Even the provisions on compulsory third-party settlement of disputes provide a wide range of institutional choices. The residual method of binding dispute settlement is arbitration—the least institutional of the alternatives.⁶⁴

By way of contrast, Part XI of the ICNT would establish a specific international organization with the power to make specific binding decisions with respect to seabed mining. For this reason Part XI deals with a whole range of institutional questions addressed in separate treaties with respect to the many other international organizations whose functioning is essential to the overall vitality of the Convention and its underlying accommodations.⁶⁵ The functions and powers of the proposed Seabed Authority as well as its decision-making processes are dealt with in the kind of detail that might be expected in an international treaty establishing an international organization. Indeed the provisions of Part XI are considerably more detailed than those of many such treaties. This probably reflects a desire of States to include legal protections in the treaty on certain points rather than rely on their capacity to influence decisions of the international organization: prolific detail is the result.⁶⁶

No amount of detail however can overcome the underlying legal problem posed by the desire to ensure that regulations of the Seabed Authority that are adopted by less than express unanimous consent are legally binding on all. There is no way to avoid the underlying

63. See generally ICNT, *supra* note 5. See also Orrego-Vicuña, *The Regime for the Exploitation of the Seabed Mineral Resources: A Latin American View*, 10 *LAW. AM.* 774 (1978).

64. ICNT, *supra* note 5, art. 287, paras. 3 & 5, establish arbitration as the residual means for dispute settlement. Annex VI details specific procedures for arbitration.

65. Compare the reliance on "generally accepted" international environmental rules and standards elaborated by other international organizations in ICNT, pt. XII, *supra* note 51, with the detailed environmental provisions in ICNT arts. 139, 145, 160(2)(xiv), 163(2) (xi)-(xiii), 210, 216, and Annex I, para. 11(a)(2)(xiii) and 11(b)(6).

66. ICNT, *supra* note 5, pt. XI contains 60 articles; Annexes II & III contain 28 paragraphs, some of which occupy several pages of print.

need for "general" acceptance. If the purpose of international institutions is to place limitations on the exercise of jurisdiction, then it must be recalled that the purpose of a Seabed Authority is to place limitations on the sphere of discretion of the flag State.⁶⁷ Unless the States capable of exercising that discretion are prepared to consent to the regulatory system, it cannot perform its restraining functions. These States cannot be expected to yield their ability to control the imposition of restraints under a contractual (universal express consent) approach to limitations, or even under a more liberal approach that binds all to "generally accepted" standards, without strong procedural protections for their interests in any decisionmaking process. Looking upon the creation of the Seabed Authority as an allocation of jurisdiction rather than a limitation on its exercise solves nothing: the same questions are posed regarding the acceptability of the allocation, but in a sharper ideological context.

Needless to say, the role of the Conference on the Law of the Sea itself as an institutional limitation on the process of allocation of jurisdiction has not escaped the participants. The question arises as to whether the overall implementation and growth of the Convention in the future should be subject to some institutional arrangements. This question is related to, but distinct from, the question of amendment and revision.

Third-party dispute settlement procedures would go far in promoting both uniformity and necessary flexibility. On a political level, Peru proposes the creation of an International Commission (or committee) on the Law of the Sea, composed of all States Parties to the Convention, that would meet periodically to review questions related to the interpretation and application of the Convention.⁶⁸ Portugal proposes that the Secretary General of the United Nations convene periodic conferences of the parties to the Convention to review its interpretation and application.⁶⁹

The Portuguese proposal, addressing the question of events outside the framework of the Convention itself, alludes to the need to take into account "institutional and legal developments." The implication is much clearer in the Peruvian proposal that the international

67. *Id.* For a discussion of the role of the Authority in seabed mining by States and their nationals, see Ratiner & Wright, *The Billion Dollar Decision: Is Deepsea Mining a Prudent Investment?*, 10 LAW. AM. 713 (1978).

68. A/CONF. 62/L.22, 10 April 1978.

69. A/CONF.62/L.23, 4 May 1978. These proposals are distinct from the question of a review clause in connection with the seabed mining regime in Part XI.

commission "examine all questions relating to the harmonization of the provisions of this Convention with . . . rules of customary international law governing various aspects of the Law of the Sea."⁷⁰ Peru's historic advocacy of unilateralism as the basis for allocation of geographic jurisdiction at sea may invite cautious inquiry regarding the impact of such language on the legal effect of the entire treaty.

Whatever the merits of these particular proposals, the implicit invitation to consider the problem of adaptation of the law is timely. At the least, it should emphasize the need for respected international interpretive institutions if the Convention is to be flexible enough to withstand the inevitable storms of controversy regarding the meaning and application of particular provisions.

The principles of the law of the sea, customary or conventional, are the reference points in the elaboration of an effective system of cooperation and governance in the oceans. The quality of various international institutions will increasingly affect not only the operation of that system, but the maturation of the legal principles themselves. The key to the process is the principle in Article 10 of the Convention on the High Seas. The concept of the legally binding character of the generally accepted international standard can serve mankind well in the broad twilight between contract and constitutional government. To protect its utility, the point must be repeated as often as necessary that the concept is not the equivalent of either. It is a servant of a world that needs stronger institutions than contract, but that is far from conferring legislative powers and legitimacy on most international institutions.

70. *Supra* note 68.