

Emerging Customary Law of the Sea

The fifth session of the Third United Nations Conference on the Law of the Sea adjourned September 17 of this year with agreement on many matters and disagreement on others. The disagreements are so sharp that it has become clear a long time will pass before a convention acceptable to the developed nations and the developing world can be achieved. This means that for a considerable time issues arising between states will have to be resolved by bilateral or limited multilateral agreements, by recognition of the emerging customary international law, and a combination of these processes.

United States government officials and others, when advocating early agreement on a comprehensive multilateral convention, predicted chaos if the Law of the Sea (LOS) Conference failed promptly to succeed. Chaos could, of course, ensue; but it need not. Law-abiding States can promote order by taking the lead in stating and observing the customary law of the sea as it has existed and should be developing,¹ and eventually working out regulations for observing practices that have come to be regarded as binding.²

Disappointing as the last sessions of the Conference have been, they have contributed significantly to our understanding of the issues, of the different interests of States as affected by their geographical position and economical,

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¹AMERICAN SOCIETY OF INTERNATIONAL LAW, REPORT FOR A WORKING GROUP, POLICY No. 11 by H. Gary Knight (1976). At page 61 the REPORT concludes:

Likewise, it is reasonably clear that the failure of the Conference to produce a timely, comprehensive, and widely accepted law of the sea treaty would not lead to immediate chaos and anarchy in the ocean. There do exist normative standards already covering a great many uses of the sea, and there also exist law-creating procedures outside the treaty process. If all nations approach problems of the sea from a technical standpoint with a view toward maximizing even short-term economic interests, then the customary law process can be nearly as effective as a precise treaty, and more effective than an imprecise treaty, in maintaining world order in the ocean.

²Article 38 of the Statute of the International Court of Justice provides:

The Court, whose function is to decide in accordance with international law . . . shall apply
 (a) international conventions . . .
 (b) international custom, as evidence of a general practice accepted as law. . . .

technological and juridical stage of development, and of the matters on which there is general acceptance of practices adapted to a changing world. This understanding makes possible a realistic formulation of the principles and rules of customary international law now budding and winning recognition.³

The issues are many. They include:

- (1) width of the continental shelf
- (2) breadth of the territorial sea and contiguous zone
- (3) rights of transit through straits
- (4) width of the economic zone
- (5) limits of coastal State authority in the economic zone
- (6) regulation of mineral exploitation beyond the continental shelf
- (7) freedom of scientific research in the economic zone
- (8) rights of access of landlocked States
- (9) coastal States' rights as to pollution control
- (10) regulation of fishing in and beyond the economic zone
- (11) dispute settlement

This paper will be limited to a discussion of the first six items.

The delegates to the Third LOS Conference have reached a consensus or near consensus on the first four of the stated issues. They are divided on the remainder. The Conference has, in many respects, behaved as well but no better than the General Assembly which set it up. The character of its composition and performance was more political than legal, more legislative than juridical. To be sure, the Third LOS Conference was established not to codify the existing and emerging customary law of the sea but, in effect, to enact international sea law statutes in areas where past activity had been insufficient to give rise to the development of international regulations. An articulate group of delegates was at pains to state that their countries, having been under colonial rule in 1958, were not bound by the existing law codified by the Conventions of that date. Were we to have the tabulation of the position of each delegation on every issue, the information would be valuable in further negotiations toward reaching an agreement on the new conventional law of the sea, but not significant in determining the emerging customary law of the sea.

The positions taken by many delegations reflected not their country's view as to the existing law or as to the desirable new law but a trading ploy. Take, for instance, the issue of free transit through straits. The delegations were informed

³Professor R.Y. Jennings in a paper read at the 1976 Conference of the International Law Association referred to certain principles or rules now being accorded recognition in these words:

Indeed the conference itself even without a treaty may well assist to crystallise new custom which is already emergent from the actual practice of States; to take an obvious example, the 12-mile territorial sea is probably here to stay, but that will be so whether it is expressed in a treaty or not, and if it is expressed in a treaty, then irrespective of whether the treaty is widely ratified or not.

early in the deliberations that the United States and other maritime nations attached great importance to continued free transit in those straits that contain a band of the high seas under a three-mile territorial sea regime but which might become entirely territorial seas under a twelve-mile regime. Many of the delegates promptly saw an opportunity to bargain for concessions on issues important to them by holding back their support for free transit. Yet, their countries in a confrontation under customary international law would, in every probability, resist interference with passage of their vessels by States bordering straits now open to free transit.

This illustration suggests that a record of the States supporting given articles in the single negotiating text would indicate those not likely to oppose actions by other States in accordance with those articles. On the other hand, a record of those delegations opposing them would not necessarily tell us which of their governments would stand up against actions taken in accordance with those very articles.

What, then, can be said of the likelihood of acceptance by assertion and lack of protest of certain of the issues likely to arise before a comprehensive convention on the law of the sea is agreed to? What actions, we must ask, are taking place and being acquiesced or resisted so as to give rise to "international custom . . . accepted as law"?⁴

The Continental Shelf

Despite the disclaimers by some delegates against the effect upon them of the 1958 Law of the Sea Conventions entered into before they became independent, there seems to be general acceptance of the provisions contained in at least one of these—the 1958 Convention on the Continental Shelf. As of January 1, 1976 this convention had been ratified by 15 countries that in 1958 were under colonial rule.⁵ Furthermore, the International Court of Justice has by dictum accepted certain basic rules laid down in the Convention as declaratory of existing customary law.⁶

⁴Article 38, Statute of the International Court of Justice. O'Connell in his 1 *INTERNATIONAL LAW* (2nd ed. 1970) at page 15, explains:

Therefore, there are two basic elements to custom, first a generalised repetition of similar acts by competent State authorities, and secondly a sentiment that such acts are juridically necessary to maintain and develop international relations. The first element is mere usage, which by itself does not make law; the second is an intellectual conviction according to which identical situations of fact should lead to similar reciprocal behaviour patterns. Looked at in this way the law is dependent, not upon unanimity, but only upon generality of will. The dissenting minority of States are as much bound by the formulated rule as those who actively participated in its creation, the source of their obligation residing in the moral necessity which underlies observance of all law.

⁵These countries are Fiji, Jamaica, Kenya, Lesotho, Madagascar, Malawi, Malta, Mauritius, Nigeria, Senegal, Sierra Leone, Swaziland, Tonga, Trinidad and Tobago and Uganda.

⁶*North Sea Continental Shelf Cases* [1969], I.C.J. REP. 3, 22; Anthony D'Amato, *Manifest Intent*

The revised single negotiating text (RSNT)⁷ embodies much of the Continental Shelf Convention. It fixes the outer boundary of the Continental Shelf at 200 nautical miles from the baseline used to measure the territorial sea *plus* an area beyond "to the outer edge of the continental margin." (Part II, Art. 64-74) Views differ as to the method of drawing the line between States facing one another at a distance of less than 200 miles, also as to lateral boundaries between neighbors.

There seems to be general acquiescence in a shelf 200 miles wide but there is opposition, particularly by the landlocked and so-called geographically disadvantaged (e.g. shelf-locked) States, to inclusion of the area beyond that limit. To accommodate the opponents among the lesser developed States, the RSNT calls for distribution amongst them of contributions to be made "in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles . . ." (Part II, Art. 70, par. 1).

One may conclude that there is general recognition that under emerging customary law coastal states now have an exclusive right to control exploitation of the mineral resources of the seabed adjacent to their coasts seaward at least 200 nautical miles from the baseline for measuring their territorial seas and beyond to the 200 meter isopath in cases of exceptionally shallow shelves.

Territorial Sea

The First and Second LOS Conferences held in 1958 and 1960 failed to agree on the width of the territorial sea but did agree on regulations to govern the area.⁸ As of January 1, 1976, 44 countries had ratified the Convention on the Territorial Sea and Contiguous Zone. Of these, 13 were under colonial rule in 1958 and 1960.⁹

and the Generation by Treaty of Customary Rules of International Law, 64 AMER. J. INT'L. 892, 902 (1970); E.D. BROWN, *THE LEGAL REGIME OF HYDROSPACE* 32 et seq. (1971).

The decision did not pass upon the issue as to the seaward boundary. It was concerned with the lateral boundaries between neighboring coastal states. *See* Baxter, *Treaties and Customs*, 1 HAGUE REVEIL 31 (1970).

⁷A/CONF. 62/WP. 8/Rev. 1 Part II Arts 64-74. At the second and third sessions of the Conference delegations submitted a variety of alternative texts. Toward the close of the third session held in Geneva in the summer of 1975 the President of the Conference proposed that the Chairmen of Committees I, II and III submit their drafts of texts to form the basis of subsequent negotiation. The drafts they submitted represented only their views of the articles which provided useful starting points for future accommodation. As these texts were not negotiated each was called the single negotiating text (SNT). At the fourth session in New York the Chairmen presented revised single negotiating texts—RSNT. The RSNT for Committee I was rejected at the fourth session by spokesmen for the Group of 77.

⁸The 1960 Conference failed to agree by one vote on a territorial sea not over six miles in breadth.

⁹The two countries under colonial rule in 1965 that ratified the Continental Shelf Convention but not the Territorial Sea Convention are Senegal and Uganda.

There is widespread acceptance of the SNT on the width of the territorial sea. This reads:

Article 2—Breadth of the territorial sea: Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines in accordance with the present Convention.

Some States have asserted a right to a broader territorial sea but this has not been generally recognized. With the general acceptance of 12 miles as the maximum, the resistance heretofore posed against recognition of a wider territorial sea will doubtless continue and probably stiffen.

Those countries that have declared for a wider territorial sea will as a matter of pride probably not back down but they also will probably not enforce restrictions that go beyond those permitted on the high seas beyond the twelve-mile boundary.¹⁰

Contiguous Zone

The 1958 Convention on the Territorial Sea and Contiguous Zone provided for a zone "not to extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured" for enforcement of "customs, fiscal, immigration or sanitary regulations within its territory or territorial sea" (Article 24). This was carried over into the RSNT but widened to 24 miles (Part II, Article 32).

It is unlikely that any State will contest the exercise by a coastal State of control in the widened area for enforcement of its laws.

Free Transit Through Straits

It has already been mentioned that the importance the delegations of the United States and other maritime countries attached to the continued right to free transit through straits under the three-mile territorial sea rule has encountered opposition by some countries themselves the beneficiaries of open straits. It was also suggested that this opposition might have been tactical in order to bargain for concessions on other issues.

The leading maritime states will now most likely refuse to recognize any extension of the territorial seas where the effect would be to close international

¹⁰AMERICAN SOCIETY OF INTERNATIONAL LAW, REPORT FOR A WORKING GROUP, POLICY No. 11 by H. Gary Knight (1976). At page 18 the report conjectures:

In a few situations, more likely for ideological than economic purposes, territorial seas might be extended to 200 nautical miles, though in most of those instances the coastal state will probably offer guarantees of traditional navigational uses in areas beyond a relatively narrow band of absolute coastal state sovereignty. Examples of this type of action can be found presently in the extended territorial water decrees and laws of Argentina, Brazil, Ecuador, El Salvador, Gambia, Gabon, Ghana, Guinea, Madagascar, Mauritania, Nigeria, Panama, Peru, Sierra Leone, Somalia, Tanzania and Uruguay.

straits now open to free transit by ships and overflight by aircraft. Other countries will probably support this position tacitly if not expressly. Yet, some strait States, Spain and Algeria, for instance, may refuse to back down from the position in opposition taken by these delegations. A confrontation may, however, be avoided by scrupulous observance by ships in transit of rules set out in, or regulations issued in accordance with, RSNT, Part II. While under the text "States bordering straits may not hamper transit passage," they may make laws regarding safety of navigation, the regulation of marine traffic, and the prevention (a) of pollution by enforcing international regulations, (b) of fishing, and (c) of loading or unloading goods or passengers in contravention of their customs and immigration laws (Part II, Arts. 40 and 42).

It seems most unlikely that when reality replaces rhetoric many States would regard their own self-interest as calling for opposition to a position supported by strong arguments of law and policy advanced by the leading maritime States.¹¹

Economic Zone

The 1945 Proclamation by President Truman asserting the right of the United States to exploit the mineral resources of the continental shelf beyond the territorial sea led to comparable assertions by other states of a right to exploit not only the mineral seabed resources but the living resources off their shores. A significant number of States have claimed the right to regulate exploitation of living and non-living resources as far seaward as 200 miles.

The United States and other countries have, until recently, resisted such claims. They are now faced with the argument that if the importance to a coastal State of the natural resources of the adjacent seabed mineral resources conferred the right to preclude others from exploiting them, the importance to another coastal State of the living resources in the super-adjacent waters confers a comparable right.

The differences remained irreconcilable so long as the assertion of such a right was confused with an extension of the territorial sea beyond a twelve-mile limit. While some States continue to assert a territorial sea right beyond twelve miles, the differences between most of the coastal States have been reconciled by acceptance of the concept of a 200-mile zone of exclusive economic rights but not exclusive navigational or overflight rights.

There remains an unreconciled doctrinal difference over the so-called residual rights. Put simply, the position of the United States and most maritime and landlocked countries is that the coastal State will have only those economic

¹¹The report cited at footnote 1 discusses, beginning at page 49, the issues involved and points out that there is reason to believe that understandings have already been reached with various strait States which could quickly be formalized in bilateral treaties.

rights spelled out in the convention; all States will continue to enjoy the high seas rights not expressly limited.¹² The other group contends that the coastal States shall have all rights not expressly limited by the Convention.¹³

Without a Convention the extent of the rights in the economic zone must be left to the traditional process of assertion and response on which customary international law grows. There is, however, already a general consensus as to a 200-mile width of the economic zone and the right of the coastal State to regulate fishing of certain species in that zone. Coastal State regulation of fishing as to certain species remains to be resolved.

The High Seas

The sharpest differences between the delegations were over the high seas character of the area in the Economic Zone just discussed and over the freedom to explore and exploit the non-living as well as the living resources of the high seas.

A group of 77 developing States (calling itself the Group of 77), now grown to over 100 States, many of which were under colonial rule in 1958, have united behind spokesmen who assert that the non-living resources of the high seas seabed (deep seabed) may be exploited only after, and in accordance with, a convention acceptable to that Group.

As late as last September, in the closing debate of the fifth session of the LOS Conference, spokesmen for the Group of 77 declared they were not bound by the 1958 Convention on the High Seas or the customary law then existing and would

¹²States parties to the High Seas Convention have agreed in Article 1 that "all parts of the sea that are not included in the territorial sea or inland waters" are "high seas."

¹³The head of the United States Delegation, T. Vincent Learson, described the position of the United States and the group he calls the "territorialists" as follows:

The U.S. strongly advocated the position that the economic zone should be high seas without prejudice to the rights of the coastal State which are recognized in the Convention. This position does not detract from the broad resources and other rights granted to the coastal States. This position recognizes that a balance should be struck between the rights of the coastal State and the international community. The "territorialists" maintain that the coastal State should have sovereignty out to 200 miles. They are, however, a very small minority. At this last session there was a nearly even split of opinion as to whether the economic zone should be high seas or *sui generis*.

Hearings before Subcommittee on Ocean and International Environment, May 20, 1976, at page 28.

Article 47 of the RSNT, Part II straddles this issue. It provides:

Resolution of conflicts regarding the attribution of rights and
jurisdiction in the exclusive economic zone

In cases where the present Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

not accept a convention that recognized the freedom to explore and exploit the mineral resources of the high seas. Spokesmen for leading nations¹⁴—not members of the Group of 77—made clear that they would not accept a convention that took away that freedom. For the foreseeable future this means that exploration and exploitation must be conducted under the principles of customary law and, for the parties to the High Seas Convention, the rules of conventional law it contains.

Whatever rights States and their nationals have to exploit the resources of the high seas and deep seabed, it is clear that each in the exercise of its rights must respect the equal rights of others.¹⁵ It is also clear, though not universally conceded,¹⁶ that under customary law as understood in 1958 the right to explore and exploit the mineral resources of the deep seabed was one of the so-called freedoms of the seas. The Reports of the International Law Commission state this unequivocally.¹⁷

What was not clear in 1958 and remains debatable today is whether the right to exploit along with others having the same right would be followed up with a right by reason of occupation or long usage to exclude others. There had in 1958 been insufficient activity in exploiting the resources of the seabed to give rise to regulations covering the exercise of that right. This explains why the 1956 Report of the International Law Commission declares that the right to explore and exploit the resources was not listed in what became Article 2 of the High Seas Convention.¹⁸ It was, however, clearly taken into account in the phrase “*inter*

¹⁴These included the members of the European Economic Community, the Soviet Union and the United States.

¹⁵Convention on the High Seas, Article 2. After enumerating certain freedoms existing with others under “the rules of international law” the Article provides:

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

¹⁶OSGOOD, HOLLICK, PEARSON & ORR, *TOWARD A NATIONAL OCEAN POLICY* (1976). At page 159 the authors state: “International Law is sufficiently vague on title of seabed resources so that it has been used convincingly to justify positions on both ends of the spectrum.” For the proposition that the right to explore and exploit is not one of the freedoms of the seas they cite a Chilean lawyer—Gonzalo Biggs, *Deepsea's Adventures: Grotius Revisited*, 9 *INTERNATIONAL LAWYER* No. 2, at 271-81.

The Biggs article bases his case on the fact that the International Law Commission did not include this right in the list of freedoms set out in Article 2 of the High Seas Convention. It ignores the Commission's 1955 Report which is quoted in note 17, *infra*.

At the other end of the spectrum the same authors cite the eminent professor of international law at Oxford, D.P. O'Connell. In the 1970 edition of his *Treatise on International Law* at page 517 Dr. O'Connell states, “In practice, therefore, and with very localized possible exceptions, the seabed is free for general use and exploitation as partaking of the freedom of the seas.”

¹⁷The Commission's 1955 Report states:

It is aware there are other freedoms, such as freedom to explore and exploit the subsoil of the high seas and freedom to engage in scientific research therein.

Report to the General Assembly, [1956] 2 Y. B. INT'L L. COMM'N 278, U.N. Doc. A/3159, 10th sess., Supp. No. 9 (1956).

¹⁸U.N. GAOR, Supp. 9, at 3, U.N. Doc. A/2934 (); 50 AM. J. INT'L LAW 190, 195 (1956). See also 2 Y.B. INT'L L. COMM'N. 253, 278, 11 U.N. Doc. A/3159, Supp. 9 (1956).

alia" which precedes the listing in Article 2 of the Convention expression that the four freedoms comprised in the Freedom of the seas.¹⁹

Among those members of the Group of 77 that were under colonial rule in 1958 and have not since adhered to the 1958 Convention on the Law of the Sea, some have contended that customary international law which developed before they became independent is not binding upon them. Whatever merit this has as to their rights and duties it has little bearing on the rights and duties of others as between themselves.²⁰

Exploration and exploitation of the seabed beyond coastal-state jurisdiction has, of course, been practiced for centuries. Currently, the deep seabed is being explored and nodules are being reduced to possession by nationals of many countries.²¹

¹⁹A member of the International Law Commission that prepared the articles incorporated in the 1958 Convention on the High Seas, Dr. Garcia Amador, has confirmed that the right to use the high seas by way of exploitation of its natural resources was considered one of the freedoms coming within the phrase "*inter alia*." In *The Exploitation and Conservation of the Resources of the Sea* (1963) he states at page 19:

We have in mind the opinion that the high seas neither lend themselves to appropriation by any State nor "belong" to the international community, because the thing to which all States really have an equal right is the "use" of the high seas.

* * *

Now the principle of the freedom of the seas has always been conceived in terms of the twin purposes served by the sea; as a means of communication and as a source of wealth. Hence, it is not surprising that the principle since first formulated has always been regarded as applying both to navigation and trade and to the use and exploitation of the natural resources of the sea.

McDOUGAL & BURKE IN *THE PUBLIC ORDER OF THE OCEANS* (1962) comment on the "absolutistic conceptions of the freedoms of the seas" in the Commission's report, leaving to the "*Latin inter alia*" the task of taking care of freedoms other than the four listed. At page 85 they call attention to the need for "an invitation, more solicitous than that expressed in the Latin *inter alia*, to the acceptance and honoring of new uses, made possible by advancing technology."

Article 2 in its entirety is as follows:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

²⁰Algeria, whose delegate contended his country was not bound by customary law existing when Algeria became independent, cannot, for instance, by its refusal to abide by existing customary law deprive the United States of its rights vis-à-vis other nations. Refusal by Algeria to recognize succession to the treaties of France does not relieve it of the customary international law obligations of every state member of the world community of nations. "Just as a child is born into a system of law, and thereby gains rights as well as duties from being a part of a community, so a new state is born into a society which is held together by the bonds of law." O'CONNELL, *INTERNATIONAL LAW* 5 (1970).

²¹THE TRILATERAL COMMISSION, *THE TRIANGLE PAPERS: A NEW REGIME FOR THE OCEANS* 9 (1975). The Commission and "a Private North American-European-Japanese Initiative on Matters

Some members of the Group of 77 contend that whatever freedom existed has been limited by resolutions of the United Nations General Assembly. They cite the Declaration of Principles adopted in 1970 and the Moratorium Resolution adopted a year earlier.

The 1970 resolution declares that the resources of the deep seabed are "the common heritage of mankind."²² Whatever meaning one gives the phrase its incorporation in a resolution of the General Assembly means, at most, that the Assembly recommends that the principle be observed, not that it enacts it as a rule of law. The phrase was translated into Spanish by the Secretariat using the word "patrimonium" for "common heritage." This has encouraged some Latin Americans to argue that the resources of the deep seabed are the inherited property of mankind. From this they argue that exploitation may proceed only with the consent of the community of nations through a multilateral convention ratified by the overwhelming majority of the members of the United Nations. That view is, of course, not accepted by the United States or most States not members of the Group of 77 and probably not by all members of the Group.

The General Assembly's moratorium resolution calling upon States and their nationals to refrain from exploiting the resources of the deep seabed until a convention comes into effect is, of course, only a recommendation. Only 62 out of 118 States favored this recommendation. The roster of the 62 includes a majority of States lacking the capability of exploiting for decades to come the resources of the deep seabed.²³ The resolution is, of course, binding on no one.

The Third LOS Conference, unlike the First, had as an objective the enactment of new regulations to govern activities on and in the oceans rather than the codification of existing principles of international law and the practices that had come to be accepted as binding. The fact that it has failed thus far to agree on

of Common Concern," report at page 31:

Trilateral Commission nations are pursuing their interests in deep sea mining in two different and sometimes inconsistent ways: (1) through consortia arrangements among their respective mining firms and (2) through government proposals at UNCLOS III. The first joint venture, Ocean Resources, Inc., was formed in 1970 and now includes twenty-five companies. In January 1974, six firms announced a joint venture with \$50 million earmarked to work on prototype equipment. They included Kennecott Copper of the United States, Rio Tinto Zinc Corporation and Consolidated Gold Fields, Ltd. of Britain, Japan's Mitsubishi Corp. and Canada's Noranda Mines. Later in the year the United States firm Deep Sea Ventures of Tenneco, Inc. joined with three Japanese trading companies, Nichimen Co. Ltd., C. Itoh and Co., Ltd., and Kanematsu-Gosho Ltd., and subsequently with the United States Steel Corporation of Pittsburgh and Union Minere of Belgium. This group has programmed over \$20 million to develop its own ocean mining system. International Nickel Co. of Canada has also announced a joint venture with Japanese and European partners that calls for an estimated \$35 million to be spent on developing mining systems. Société le Nickel and Pechiney Ugine Kuhlmann of France are negotiating to form a consortium, as are Metallgesellschaft and several other German companies.

²²G.A. Res. 2749 (XXV), U.N. GAOR 25th Sess., Supp. 28 (A/8028) at 24 (1970).

²³States voting against the moratorium include those most likely to be capable of exploiting the resources of the deep seabed in the near future such as Belgium, Canada, Denmark, France, Italy, Japan, the Netherlands, Norway, the Soviet Union, United Kingdom and the United States.

regulations governing activities in mining the mineral resources of the deep seabed does not mean that all activity must await regulation by treaty.

Regulation is necessary and necessity will in the future, as it has in the past, give rise to acceptance in practice of customs that will grow out of the experience of those engaged in the new activity. There must be activity for customary law to emerge, because customary law grows from activity "first a generalized repetition of similar acts by competent authorities, and secondly a sentiment that such acts are juridically necessary to maintain and develop international relations."²⁴

Regulations are bound to evolve from the practices that come to be recognized as comporting with the principle that each must exercise its rights compatibly with the exercise by others of their rights.

Since Article 2 of the High Seas Convention requires that the freedoms "be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas," it can be said that States are under an obligation to enact regulations to assure that their nationals respect the rights of the nationals of other states.²⁵

It is the duty as well as the right of the states having the capability of exploiting the resources of the deep seabed to consult with one another and apply practices in deep seabed mining to protect the future as well as the present use of the oceans for the benefit of mankind. One of the benefits is to assure a continuing supply of the minerals found on the floor of the high seas at reasonable prices for all consumers. According to the Chairman of the First Committee of the LOS Conference, it is beginning to dawn on some members of the Group of 77 that it is to their interest to retain open access to the mineral resources of the deep seabed. In his report dated September 16, 1976, the Chairman stated:

Contrary to their initial reaction, developing countries increasingly recognized their interest in cheap and reliable supplies of metals, in order to facilitate their own national economic development. Consistent with these interests, developing countries have seen that other means can be devised to protect adequately the legitimate concerns of the land-based producers. The principal objective of increased availability of raw materials, originally held only by the developed countries, is now shared by the developing countries as well. Thus, today, there is common interest in encouraging rapid and efficient seabed mining.²⁶

²⁴O'CONNELL, *INTERNATIONAL LAW* 15 (1970).

²⁵E.D. BROWN, *THE LEGAL REGIME OF HYDROSPACE* 101 (1971):

The danger thus exists that the private enterprise might not execute its exploration and exploitation work with the required regard to the interests of other States. This would seem to be a very good reason why every State whose nationals engage in such activities on the basis of the still-fluid rules of international customary law, should ensure that its municipal law requires operators to act in accordance with licence conditions, so framed as to ensure respect for the interests of other States; and to provide for the application of its laws to any structures erected for the purpose of such work.

²⁶Report by Mr. Paul Bamela Engo, Chairman of the First Committee of the LOS Conference.

As more and more States come to see that it is best for them to encourage competitive mining of the deep seabed, recognition of the principle of freedom will become more and more general and as activities increase rules regulating the mining can be worked out between the countries concerned.

Those States whose delegations have worked constructively for a treaty can live and prosper without one; indeed, they can fare better without a multilateral convention than with one loaded down with concessions to those States that oppose competition between them and free enterprise. It may take years for the leaders in the Group of 77 to appreciate this. Until they do, further negotiation for a multilateral convention will drag on and on. If this continues for years, customary international law may have developed to the point that positive regulations can be formulated through codification or agreed upon in limited treaties on issues of concern to the maritime powers.²⁷

It remains so clearly to the interest of all States—especially the developing ones²⁸—that regulations for the exploitation of the mineral resources of the deep seabed be negotiated with the participation of all States that one must hope wiser counsels in the Group of 77 will succeed in bringing about the change in attitude necessary to produce a treaty that is better than no treaty at all. In the interval before the next session of the LOS Conference to be held probably in May, 1977, intersessional negotiations should be carried on leading toward bases for eventual agreement. This goal is likely to be reached with less delay if the States with the capability of carrying on activities giving rise to customary law themselves delay no longer in enacting parallel legislation regulating the mining of the deep seabed by their own nationals to assure that they respect the equal rights of one another and of the nationals of other States.

Parallel legislation will most likely be followed by limited treaties between the States most concerned. These should be open to adherence later on by other States. In view of the interdependence of all States, efforts to achieve a comprehensive treaty acceptable to both the developed nations and the developing world should remain the ultimate goal. Interim legislation and limited treaties should be designed to promote and fit into the eventual conventional regime.

²⁷A study prepared for the National Science Foundation entitled "Toward a National Ocean Policy: 1976 and Beyond" (1975) discusses a reduction of the principles agreed to by the States that want agreement through limited treaties. At page 40, the REPORT suggests:

Since limited treaties on some issues of concern to the United States could probably be concluded, such a strategy would seem to be a more favorable one than continuing a seemingly fruitless search for a comprehensive treaty.

²⁸AMERICAN SOCIETY OF INTERNATIONAL LAW, *supra* note 1. At page 62 the REPORT concludes:

Finally, it also seems clear, given the range of possible national actions in the ocean, that the technologically advanced nations, and those possessing strong navies, are more likely to benefit from a non-agreement situation than underdeveloped nations.