

MILITARY INSTALLATIONS, STRUCTURES, AND DEVICES ON THE SEABED

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I. INTRODUCTION

Functions and Importance of Military Objects on the Seabed

The legal regulation of military objects on the seabed¹ and in general of military uses of the seabed seems to have ceased to attract the attention of the international community since the conclusion in 1971 of the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor (the Seabed Treaty).² Attention now seems to be concentrated on other military uses of the sea, especially those concerning the mobility of naval fleets.³ This shift

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¹ Present and prospective military uses of the seabed, including those involving installations, structures, and devices, are reviewed by: E. LUARD, THE CONTROL OF THE SEABED 49–60 (1974); STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE [hereinafter referred to as SIPRI], YEARBOOK 1969–70, at 99–154 (1970) and 1974, at 303–25 (1974); Bosma, *The Alternative Futures of Naval Force*, 5 OCEAN DEV. & INT'L L. 181–248 (1978); N. Brown, *Military Uses of the Ocean Floor*, in PACEM IN MARIBUS I: THE QUIET ENJOYMENT 115–21 (Young & Ritchie-Calder eds., 1971); Hirdman, *Weapons in the Deep Sea*, ENVIRONMENT, No. 36, 1971, at 28–42; UN Secretariat, *The Military Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction*, UN Doc. A/AC.135/28 (1968). Discussions on the legal aspects of the use of these installations, structures, and devices are in: R. J. DUPUY, L'Océan PARTAGÉ 256–59 (1979); W. GRAF VITZTHUM, DER RECHTSSTATUS DES MEERESBODENS 122–33, 283–91 (1972); U. JENISCH, DAS RECHT ZUR VORNAHME MILITÄRISCHER ÜBUNGEN UND VERSUCHE AUF HÖHER SEE IN FRIEDENSZEITEN 30–31, 139–49 (1970); D. P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 146–59 (1975); B. RÜSTER, DIE RECHTSORDNUNG DES FESTLANDSOCKELS 68–73 (1977); Evensen, *The Military Uses of the Deep Ocean Floor and its Subsoil*, in SYMPOSIUM ON THE INTERNATIONAL LEGAL REGIME OF THE SEA-BED, PROCEEDINGS 535–56 (Stucki ed., 1970); Gehring, *Legal Rules Affecting Military Uses of the Sea-bed*, 54 MIL. L. REV. 168, 215–20 (1971); Petrowski, *Military Use of the Ocean Space and the Continental Shelf*, 7 COLUM. J. TRANSNAT'L L. 279–301 (1968); Krüger-Sprengel, *Militärische Aspekte der Nutzung des Meeresbodens*, in DIE NÜTZUNG DES MEERESGRUNDSES AUSSERHALB DES FESTLANDSOCKELS (TIEFSEE) 48–79 (1970).

² The so-called Seabed Treaty, 23 UST 701, was signed in London, Moscow, and Washington on February 11, 1971, and came into force on May 18, 1972.

³ This results from the trends in the Third UN Conference on the Law of the Sea towards accepting a 12-mile limit for the territorial sea and a 200-mile exclusive economic zone. These trends make it important for naval powers to have guaranteed freedom of navigation through straits and within the economic zone. See, for the U.S. position, Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFF. 902 (1980). Cogent analyses of the importance for security of free passage through straits, though with divergent views on the adequacy of the current proposals in the conference's negotiating text to guarantee it, have been recently developed by Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AJIL 48 (1980) and by Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AJIL 77 (1980). The security importance of

in focus is particularly noticeable if one considers the work of the Third United Nations Conference on the Law of the Sea.⁴

Yet the emplacement of objects on the seabed for military purposes continues to play a considerable role in the military use of the sea. Though not explicitly considered, military objects on the seabed certainly are on the minds of the negotiators at the Law of the Sea Conference, and it seems clear that the results of the conference will have an impact on their legal regime.

These objects can be emplaced on the seabed directly or by means of storage and other facilities; they can be placed on board submersibles moving on the seabed, or on rigs and platforms or installations moored to the seabed. They can be carried by facilities designed for military purposes or installations whose main purpose is not military, such as oil rigs and platforms,⁵ scientific research installations,⁶ and thermal energy conversion plants.⁷ Whatever the way they are installed, these objects seem to fall into two categories: weapons⁸ and detection and communication devices.⁹

The different functions performed by these two categories of objects seem to evoke different value judgments from the viewpoint of the preservation of peace and security. Thus, listening and other detection or communi-

free passage through straits has been criticized by Osgood, *U.S. Security Interests and the Law of the Sea*, in *THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES* 11 (Amacher & Sweeney eds., 1976) and, more recently, by Darman, *The Law of the Sea: Rethinking U.S. Interests*, 56 FOREIGN AFF. 373 (1978).

⁴ The conference (which started in 1973 and at the time of writing had concluded the first part of its ninth session) has proceeded utilizing a series of "informal negotiating texts." The first was prepared in 1975, THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, 4 OFFICIAL RECORDS [hereinafter cited as UNCLOS III, OFF. REC.] 137; the second in 1976, 5 id. at 125; the third in 1977, 8 id. at 1; the fourth in 1979, UN Doc. A/CONF.62/WP.10/Rev.1; the fifth in 1980, UN Doc. A/CONF.62/WP.10/Rev.2: this latter text is the Informal Composite Negotiating Text, Revision 2 [hereinafter, ICNT/Rev.2]. In this paper, references to the conference's negotiating text (unless otherwise indicated) are to the ICNT/Rev.2.

⁵ M. S. McDougal & W. T. Burke, *THE PUBLIC ORDER OF THE OCEANS* 754 (1962); Bosma, *supra* note 1, at 169; Holst, *The Strategic and Security Requirements of North Sea Oil and Gas*, in *THE POLITICAL IMPLICATIONS OF NORTH SEA OIL AND GAS* 131–41 (Sater & Smart eds., 1975); Larson, *Security, Disarmament and the Law of the Sea*, 3 MARINE POL'Y 40, 51 (1979). According to British Vice-Admiral Sir Ian McGeoch, underwater military devices are not deployed around oil installations for their defense; *OCEANIC MANAGEMENT, CONFLICTING USES OF THE CELTIC SEA AND OTHER WESTERN UK WATERS* 179 (Sibthorpe & Unwin eds., 1977).

⁶ Baker & Gruson, *The Coming Race Under the Sea*, in *THE PENTAGON WATCHERS* 335, 351ff. (Rodberg & Glearer eds., 1970); Evensen, *supra* note 1, at 532; Knauss, *The Military Role in the Ocean and its Relation with the Law of the Sea*, in *A NEW GENEVA CONFERENCE, PROCEEDINGS OF THE SIXTH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE* 77, 84 (Alexander ed., 1972); Tegger Kildow, *Nature of Present Restrictions on Marine Scientific Research*, in *FREEDOM OF OCEANIC RESEARCH* 5, 14–16 (Wooster ed., 1973).

⁷ Hollick, *International Political Implications of Ocean Thermal Energy Conversion Systems*, in *OCEAN THERMAL ENERGY CONVERSION* 75, 84–85 (Knight, Nyhart, & Stein eds., 1977).

⁸ E. Luard, *supra* note 1, at 49–53; Bosma, *supra* note 1, at 191–94; SIPRI Y.B. 1969–70, at 116–17, 141–48.

⁹ T. Burns, *THE SECRET WAR FOR THE OCEAN DEPTHS* 64–68, 90–102, 152–59 (1978); D. P. O'Connell, *supra* note 1, at 72–78; Bosma, *supra* note 1, at 194, 236–37; SIPRI Y.B. 1969–70, at 110–11, 120–21, 123, 148–52; SIPRI Y.B. 1974, at 305–08, 316–18.

cation devices are considered more acceptable than weapons. Weapons are inherently dangerous, while detection and communication devices are not. This judgment will probably have some bearing on the solution of conflicts among different uses of the seabed. It seems easier to accommodate the emplacement of detection or communication devices to other uses, such as those related to resources,¹⁰ than the emplacement of weapons. Moreover, in the current situation, deterrence between the two major powers appears to be the main guarantee against generalized conflicts, and weapons on the seabed do not seem to contribute to strategic deterrence. Weapons used for nuclear deterrence are placed on submarines, and the 1971 Seabed Treaty clearly indicates the intention of the main nuclear powers to preclude use of the seabed to deploy them.¹¹

Listening and other detection and communication devices, though they may perform other functions relevant to military activities,¹² can be seen as linked to nuclear deterrence.¹³ Some of these devices provide submarines carrying nuclear missiles with information essential to command, targeting, and navigation.¹⁴ Others are used by the superpowers to detect each other's nuclear submarines and to gather knowledge about their positions, movements, and numbers. This knowledge probably plays an important role in avoiding (or countering) surprise attacks and maintaining the balance of forces, and, ultimately, in the proper exercise of deterrence. Moreover, whatever disarmament or arms limitation measures are taken, detection devices may be a primary means of verification.¹⁵ A divergent opinion, however, has been expressed, which argues that "from the point of view of security, excessive transparency of the oceans may prove harmful" and that surveillance systems should be limited.¹⁶ The deterrent efficacy of submarines carrying ballistic missiles would depend on their ability to stay undetected. While this argument may be correct in theory,¹⁷ in practice the above-mentioned considerations would seem to prevail for two reasons. First, the cogency of the argument against the use of detection devices depends on

¹⁰ Though this kind of accommodation also is not devoid of difficulties. For a recent example of possible conflict between noise-generating ocean thermal energy conversion plants and military acoustic devices, see Washom, *Spatial and Emerging Use Conflicts of Ocean Space*, in OCEAN THERMAL ENERGY CONVERSION, *supra* note 7, at 91, 99.

¹¹ Art. I.

¹² Especially that of aiding navigation.

¹³ See M. W. JANIS, SEA POWER AND THE LAW OF THE SEA 9 (1976); Knauss, *supra* note 6, at 78, 79, 84; Zeni, *Defence Needs and Accommodation Among Ocean Users*, in THE LAW OF THE SEA: INTERNATIONAL RULES AND ORGANIZATIONS FOR THE SEA 334 (Proceedings, 3d Annual Conference of the Law of the Sea Institute, Alexander ed., 1969).

¹⁴ See McGwire, *Naval Power and Soviet Global Strategy*, 3 INT'L SECURITY 134, 168 (1978).

¹⁵ Craven, *International Security on the Seabed*, in THE LAW OF THE SEA, *supra* note 13, at 414, 419.

¹⁶ Goldblat, *Law of the Sea and the Security of the Coastal States*, in LAW OF THE SEA: CARACAS AND BEYOND 301, 306 (Christy, Clingan, Gamble, Knight, & Miles eds., 1975). See also SIPRI Y.B. 1974, at 304: "an ASW [antisubmarine warfare] system designed to attack missile-carrying submarines could threaten the second-strike capability of these submarines," and this would be undesirable for the proper functioning of deterrence.

¹⁷ Reisman, *supra* note 3, at 52, considers detection of nuclear missile-carrying submarines "systemically dangerous" under "deterrence theory."

whether these devices can locate all the other power's nuclear weapons submarines, or at least so many of them that their destruction would prevent the surviving ones from constituting a credible deterrent.¹⁸ In view of the continuing race between developing more and more sensitive listening devices and developing more and more sophisticated antidection technology,¹⁹ this does not seem very likely.²⁰ Second, submarines carrying ballistic missiles might also be used for first-strike action and for other, nondeterrent naval missions. The possibility of detection might discourage such use and thus might contribute to limiting the use of these submarines to strategic deterrence.

These observations are not expressed in legal terms. They may nevertheless have some relevance to the consideration of legal questions, especially because the objectives of peace and security are both commonly shared and legally relevant, the maintenance of peace and security being the first purpose of the United Nations.²¹

The Evolving Legal Framework

The situation of international law concerning military objects on the seabed is "one of obscurity," as a learned writer recently remarked,²² or, at least, one requiring close scrutiny. The elusiveness of the subject seems to lie, on the one hand, in a certain reluctance, especially of the major powers, to discuss it explicitly,²³ and, on the other, in the present inclination of international law to focus mainly on the economic uses of the sea. As a consequence, rules concerning military activities and military objects on the seabed are almost never clearly spelled out. They have to be inferred from the most general principles of the law of the sea, such as the sovereignty of the coastal state over its territorial sea and the freedom of the high seas, and from an assessment of what more detailed rules, usually concerning jurisdictional rights and economic uses, do not say.

These difficulties are found in the "traditional" or "old" law of the sea, which consists mainly of customary law and is evidenced in part by the Geneva Conventions of 1958.²⁴ The concept of the continental shelf, the

¹⁸ See McGwire, *supra* note 14, at 167.

¹⁹ Bosma, *supra* note 1, at 194-96; SIPRI, TACTICAL AND STRATEGIC ANTI-SUBMARINE WARFARE 31 (1974); Craven, *supra* note 15, at 417.

²⁰ See Osgood, *supra* note 3, at 17-18.

²¹ UN Charter, Art. I, para. 1.

²² D. P. O'CONNELL, *supra* note 1, at 151.

²³ Booth, *The Military Implications of the Changing Law of the Sea*, in LAW OF THE SEA: NEGLECTED ISSUES 328-97 (Proceedings, 12th Annual Conference of the Law of the Sea Institute, Gamble ed., 1979) says, at p. 340, that the negotiating text "has adopted the tactic of silence" on military matters, an area, he observes, "where the prospects for disagreement are strong, and the prospects for legal clarity are weak."

²⁴ Geneva Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958, 516 UNTS 205; Geneva Convention on the High Seas of April 29, 1958, 450 UNTS 11; Geneva Convention on Fisheries and the Conservation of the Living Resources of the High Seas of April 29, 1958, 559 UNTS 285; and Geneva Convention on the Continental Shelf of April 29, 1958, 499 UNTS 311.

most recent addition to the traditional international law of the sea, immediately raises the problem of determining a regime for objects placed for noneconomic purposes in an area of the seabed where the coastal state enjoys rights that are defined in terms of economic activities.²⁵

The same kind of difficulty arises within the framework of the "new" law of the sea now being shaped by recent practice and the Third United Nations Conference on the Law of the Sea. This new law of the sea is characterized by the emergence of new zones of national jurisdiction, such as the exclusive economic zone and archipelagic waters, by new definitions of existing concepts, such as the continental shelf and the territorial sea, and by the entirely new concept of the International Seabed Area as "the common heritage of mankind." In the new jurisdictional areas, apart perhaps from archipelagic waters, and in the International Seabed Area, rights and duties of states are defined functionally, in terms of nonmilitary activities. Thus, the difficulties already mentioned as regards the continental shelf are multiplied in the new law of the sea.

In solving these difficulties, a more general problem has to be faced, which arises from the very notion of the new law of the sea.²⁶ The expression seems to have two meanings in current international practice and literature. The first refers to the rules embodied in the convention that is the expected outcome of the Third Law of the Sea Conference and whose blueprint is the negotiating texts produced by it thus far.²⁷ The second is the customary law in the process of being formed by recent state practice, a practice that influences, and is in turn influenced by, the behavior of states at the conference.

Once these two notions of the new law of the sea are clearly distinguished, the most important task is to determine the degree of correspondence between them. In other words, how much does the convention under negotiation reflect customary law?

The problem poses the usual difficulties in assessing the significance of state practice in order to discover the contents of international customary law; but these difficulties are compounded by the need to assess the impact of the specific and new phenomenon constituted by the Third United Nations Conference on the Law of the Sea.

The work of the conference cannot be set aside in considering state practice, and its relevance seems to be growing as it nears completion. This conclusion seems to emerge from a comparison of the International Court of Justice's decision of 1974 in the *Fisheries Jurisdiction* case and the *Anglo-French* arbitral award of 1977 on the delimitation of the continental shelf.²⁸

²⁵ Geneva Continental Shelf Convention, Art. 2, para. 1. The problems mentioned are studied *infra* in sec. IV.

²⁶ On this notion, see especially de Lacharrière, *La réforme du droit de la mer et le rôle de la Conférence des Nations Unies*, 84 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [RGDIP] 216 (1980); and McWhinney, *The Codifying Conference as an Instrument of Law-Making: From the "Old" Law of the Sea to the "New,"* 3 SYR. J. INT'L L. & COMM. 301 (1975).

²⁷ This is the meaning explicitly accepted, e.g., by Riphagen, *La Navigation dans le nouveau droit de la mer*, 84 RGDIP 144 (1980).

²⁸ *Fisheries Jurisdiction* (United Kingdom v. Iceland) (Merits), Judgment, [1974] ICJ REP. 3; The United Kingdom of Great Britain and Northern Ireland and the French Republic

In 1974, at the very beginning of the conference, and before the publication of the first negotiating text, the World Court indicated that it was "aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a Third Conference on the Law of the Sea the further codification and progressive development of this branch of the law as it [was] of various proposals and documents produced in this framework." It emphasized, however, that these endeavors and proposals "must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than expressing principles of existing law."²⁹ In 1977, after various sessions of the conference and the publication of the first negotiating texts, the Anglo-French arbitral tribunal recognized "the importance of the evolution of the law of the sea which is now in progress" and went so far as to acknowledge "the possibility that a development of customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations." Evidence of such assent could be sought (though it was not found by the arbitral tribunal) in the "records of the Third United Nations Conference on the Law of the Sea" and in "the practice of States outside the Conference."³⁰

The passages just quoted from the 1977 arbitral award not only indicate the importance of considering the conference in assessing the present status of the law, but also give some guidance in determining which aspects of the conference are the most relevant for this purpose: recent state practice, both inside and outside the conference, seems to be decisive. The compromises and provisional rules formulated so far in the negotiations are considered as far less significant, though not irrelevant.³¹

This distinction does not diminish the importance of the conference to the development of customary law. On the contrary, it throws light on two aspects of the conference's activities with different impact on customary law. On the one hand, the conference is a powerful accelerating factor in the development of state practice. Not only does it provide a forum for state opinion, but it influences unilateral as well as treaty action of states on the outside.³² On the other hand, the conference's "package deal" approach,

Delimitation of the Continental Shelf Decision of 30 June 1977, HMSO Cmnd. 7438, Misc. No. 15 (1978), reprinted in 18 ILM 398 (1979).

²⁹ [1974] ICJ REP. 25, para. 53.

³⁰ Decision of 30 June 1977, *supra* note 28, para. 47. Comments on this paragraph are in Brown, *The Anglo-French Continental Shelf Case*, 16 S. DIEGO L. REV. 461, 525-27 (1979); and in Queneudec, *L'Affaire de la délimitation du plateau continental entre la France et le Royaume-Uni*, 83 RGDIP 1, 18-20 (1979).

³¹ As it appears from the fact that the arbitral tribunal considered rules of the 1976 Revised Informal Negotiating Text, though emphasizing that they "have not yet been adopted by the Conference" and that they "are still a matter of discussion"; Decision of 30 June 1977, *supra* note 28, para. 96.

³² It may be sufficient to indicate that the conference's negotiating texts have been followed closely by many states in their domestic laws on the economic zone (*see, e.g.*, the Mexican law of Dec. 4, 1975, reprinted in 15 ILM 382 (1976)) and that fisheries agreements have been concluded "taking into account the work of the Third United Nations Conference on the Law of the

combined with decisionmaking by consensus,³³ results in making the acceptance by some states of certain rules in the negotiating text conditional on the acceptance by other states of other, sometimes totally unrelated, rules. While the first aspect of the conference's activities directly impinges on the formation of customary law, the second does not, because the behavior of states is strictly related to the negotiating process. It would seem safe to conclude that the more the rules in the negotiating texts are confirmed by state practice, the more they are indicative of customary law, while great caution is required before accepting the idea that rules resulting from the package approach reflect or anticipate the precise content of customary law.

This conclusion, however, needs further qualification. First, even when practice confirms the trends in the conference, there is a difference between the customary rules emerging from this practice and the written rules embodied in the negotiating text. While the principle may be the same, it would not be wise to presume that the customary rule corresponds in every detail and shade of meaning to the written rule. Indeed, it is in the nature of written rules to cover details and convey shades of meaning that unwritten rules cannot express. This seems to apply in particular to the new law of the sea, when one considers the amount of detail in the provisions of the negotiating text.

Second, rules contained in the negotiating text can take the form in subsequent state practice of models or legitimizing arguments, whatever their origin in the negotiations at the conference. Because of the conference's long duration, some rules emerging from the compromise imposed by the package approach may be confirmed by state practice, while others, also agreed upon in the package, are not. In this way, negotiating packages can be unbound by practice and by the customary rules it generates.³⁴ Of course, states can try to avoid this consequence by consistently opposing the application of the emerging rule to themselves.³⁵ In adopting this attitude, however, they run a risk. Although they may succeed in making the emerging customary rule inapplicable to themselves, they may provoke actions by other states that would strengthen the very rule they oppose.³⁶

Sea and resulting State practice"; Fisheries Agreement between Canada and the European Economic Community, initialed on July 28, 1978 and provisionally applicable since 1979, preamble, in *IL REGIME DELLA PESCA NELLA COMUNITÀ ECONOMICA EUROPEA* 248 (Leita & Scovazzi eds., 1979). Moreover, agreements for the delimitation of the continental shelf have been concluded which do not take into account the limits set out in the Geneva Convention on the Continental Shelf and consider as "continental shelf" to be delimited the whole seabed lying between the two states, provided that the distance between the coasts does not exceed 400 miles; Italy-Spain Agreement of 19 February 1974, in *ATLANTE DEI CONFINI SOTTOMARINI/ATLAS OF THE SEABED BOUNDARIES* 75 (Conforti & Francalanci eds., 1979). See also de Lacharrière, *supra* note 26, at 244-46.

³³ On these aspects: Treves, *Devices to Facilitate Consensus: The Experience of the Law of the Sea Conference*, 2 ITALIAN Y.B. INT'L L. 39 (1976).

³⁴ De Lacharrière, *supra* note 26, at 247-49, 251.

³⁵ See the ICJ's Judgment of December 18, 1951 on the Fisheries case (United Kingdom v. Norway), [1951] ICJ REP. 116, 131.

³⁶ An example might be the initiative taken by the U.S. Government in 1979 in ordering the

Third, when there is insufficient practice following a rule negotiated at the conference to affirm that it has become customary, the rule might still be considered an agreement reached by some states within the framework of the conference. Of course, this conclusion cannot be drawn in every case, but it may be indicated when the states most active in negotiating the rule were those most directly involved, and when their subsequent practice has conformed strictly to the rule.

Peaceful Purposes

Before examining the legal situation of military objects in the various areas of the seabed, it may be useful to consider the concept of the use of the sea "exclusively for peaceful purposes."³⁷ This concept is contained in the Declaration of Principles of 1970,³⁸ as well as in various provisions of the negotiating texts of the Law of the Sea Conference.³⁹ Since the earliest mention of it in the context of the law of the sea, the expression "peaceful purposes" has undergone an evolution in meaning which, though never reaching total clarification, has considerably narrowed its scope.

The concept was first debated, focusing exclusively on activities on the seabed, in the UN General Assembly's Seabed Committee.⁴⁰ In that context,

navy and air force "to undertake a policy of deliberately sending ships and planes into or over the disputed waters of nations that claim a territorial limit of more than the three miles accepted by the U.S. and 21 other nations" (The New York Times, Aug. 10, 1979, at 1). In the discussions at the Law of the Sea Conference which followed the appearance of this news in the daily press, the United States, though declaring the reports "distorted," emphasized that the 12-mile limit would be acceptable only within a general package deal and coupled with transit passage through international straits (UN Docs. A/CONF.62/92 and A/CONF.62/SR.118 (1979)). The Group of Coastal States firmly emphasized the conformity of the 12-mile limit to customary international law (UN Docs. A/CONF.62/90 and A/CONF.62/SR.118). This position was explicitly supported by some other states and was opposed by none (UN Doc. A/CONF. 62/SR.118). Thus, the U.S. initiative may have had an effect contrary to the intentions that originated it (*see* the observations of de Lacharrière, *supra* note 26, at 244). Considering, however, that it seems unlikely that transit passage through straits will be seriously challenged at the conference, the kind of compromise sought by the United States seems to have already been reached.

³⁷ On this principle, see particularly: W. GRAF VITZTHUM, *supra* note 1, at 288-90; U. JENISCH, *supra* note 1, at 65-66; E. LUARD, *supra* note 1, at 97-100; Dupuy, *L'Affection exclusive du lit des mers et des océans à une utilisation pacifique*, in LE FOND DES MERS 29-49 (Colliard, Dupuy, Polvèche, & Vaissière eds., 1971); Krüger-Sprengel, *supra* note 1, at 54-55; A. Myrdal, *Preserving the Oceans for Peaceful Purposes*, 133 RECUEIL DES COURS 5-15 (1971 II); *see also* the interventions by Hirdman, De Soto, and Gorove in A NEW GENEVA CONFERENCE, *supra* note 6, at 90, 95, 97.

³⁸ GA Res. 2749 (XXV), Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Sub-soil thereof, beyond the Limits of National Jurisdiction, paras. 5 and 8.

³⁹ The concept of the peaceful uses of the seas is mentioned in the following articles of the ICNT/Rev.2: 88, 141, 143, 147, 155, 240, 242, and 246.

⁴⁰ See especially, for the discussion in 1968, UN Docs. A/AC.135/SR.14,16,17, and A/AC.135/20, 24, 26, 27, and A/AC.135/WG.1/SR.8. For the discussion in 1969, A/AC.138/SR.5, 6,8,10,12,13. For 1970, especially A/AC.138/SR.22 and the debates in the General Assembly on the adoption of the Declaration of Principles (*supra* note 38), A/C.1/PV.1798-1799. Useful summaries of these discussions are in E. D. BROWN, ARMS CONTROL IN HYDROSPACE, LEGAL ASPECTS 26, 46-49, 53-64 (Woodrow Wilson International Center for Scholars, Ocean Series

numerous states, including the Soviet Union, favored demilitarization of the seabed, and consequently maintained that no military use of the seabed could be considered peaceful.⁴¹ In taking this view, these states could invoke the precedent of the 1959 Antarctic Treaty. After affirming that "Antarctica shall be used for peaceful purposes only," this treaty states that "there shall be prohibited *inter alia* any measures of military nature."⁴² Other states on the Seabed Committee rejected this position. They asserted that the decisive factor was whether the purpose of the military activities was defensive⁴³ or, and this was the position taken especially by the United States, whether they were consistent with the Charter of the United Nations.⁴⁴

The importance of this debate was reduced and its tensions eased when the two major powers agreed in another forum, the Geneva Disarmament Committee, to negotiate a Treaty for the Banishment of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed.⁴⁵ This agreement facilitated the inclusion of the peaceful purposes principle in the 1970 Declaration of Principles without further qualification or clarification of meaning.⁴⁶ The conclusion of the Seabed Treaty in 1971 and the provision in it calling for further negotiations "in the field of disarmament for the prevention of an arms race on the seabed"⁴⁷ suggest that the contracting parties felt they had done what was possible, for the time being, towards giving legal content to the idea of peaceful purposes.⁴⁸ The precedent of the 1967 Outer Space Treaty could be recalled.⁴⁹ Though affirming the principle of the use of the moon and other celestial bodies "exclusively for peaceful purposes," this treaty does not forbid, as the Antarctic Treaty does, "any measures of military nature," but only specific military activities. Moreover, opening the way for the kind of prohibition contained in the 1971 Seabed

301, 1971); and in L. MIGLIORINO, FONDI MARINI E ARMI DI DISTRUZIONE DI MASSA 15–18 (1980).

⁴¹ See the interventions by the USSR in UN Docs. A/AC.135/SR.16 (1968), A/AC.135/WG.1/SR.8 (1968), A/C.1/PV.1592 (1968), A/AC.138/SR.6,10,12,22,56 (1969), and A/C.1/PV.1798 (1970). See also those of Bulgaria (A/AC.135/SR.16), Poland (*ibid.*), Libya (*ibid.*), Peru (A/AC.135/SR.17), Malta (A/C.1/PV.1589), and Trinidad and Tobago (A/AC.138/SR.50).

⁴² Antarctic Treaty, signed at Washington on Dec. 1, 1959, 12 UST 794, TIAS No. 4780, 402 UNTS 71, Art. I.

⁴³ See the intervention in the 1968 debates of the British delegate, Mr. Auckland: UN Doc. A/AC.135/SR.17.

⁴⁴ See the U.S. interventions in UN Docs. A/AC.135/SR.17, A/C.1/PV.1590 (1968), and A/AC.138/SR.6,12 (1969). See also the British intervention in A/C.1/PV.1594 and the Norwegian one in A/AC.135/SR.17.

⁴⁵ See L. MIGLIORINO, *supra* note 40, at 18–23.

⁴⁶ Whatever its position in the debates, the concrete proposals of the USSR did not go beyond this in the Seabed Committee: see the Soviet proposal in UN Doc. A/AC.135/20 of June 20, 1968. See also the observations by M. W. JANIS, *supra* note 13, at 34–35.

⁴⁷ Art. V.

⁴⁸ See the interventions by the United States (UN Docs. A/AC.138/SR.18 and A/C.1/PV.1799), by the USSR (A/AC.138/SR.12), and by Sweden (A/AC.138/SR.46).

⁴⁹ Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, of Jan. 27, 1967, entered into force on Oct. 10, 1967, 610 UNTS 205, 18 UST 2410, TIAS No. 6347.

Treaty, it prohibits the emplacement in orbit of nuclear weapons and other weapons of mass destruction.⁵⁰

During the Third United Nations Law of the Sea Conference, the subject has been debated only during the fourth session of 1976.⁵¹ The contrast between the states that opposed all forms of military uses of the seas and those that affirmed that military uses compatible with the UN Charter were peaceful was registered again.⁵² On the whole, however, the positions were more moderate and the tone of the debate more subdued.⁵³ The fact that the discussion no longer focused on the seabed but on the wider topic of the peaceful uses of "ocean space" certainly contributed to this change of tone. But, most remarkably, this change was caused by the change in attitude of the USSR. The Soviet delegate did not state his country's support for the demilitarization of ocean space. Rather, he emphasized that the solution to the problem "of strengthening peace on the seas . . . was beyond the scope of the work facing the Conference on the Law of the Sea."⁵⁴ In this, the Soviet position came very close to that of the United States.⁵⁵

In the negotiating text, the principle of the use of ocean space for peaceful purposes is not affirmed as a general rule but in provisions regarding various areas of the sea and seabed. Thus, its geographical scope is limited. It applies to the International Seabed Area, the high seas, and, through the reference to the provisions on the high seas contained in Article 58, paragraph 2, the economic zone.⁵⁶ It does not extend to internal waters, the territorial sea, and archipelagic waters. It seems to apply to the continental shelf beyond 200 miles even though this part of the seabed is not included in the economic zone or the Area;⁵⁷ because the coastal state's rights over it are related to the conduct of economic activities, for all other purposes the continental shelf beyond 200 miles must be considered a part of the bed of the high seas to which, as we have seen, the principle applies.

In addition to this specification of the geographical scope of the principle, the negotiating text seems to confirm the trend towards a narrowing of its meaning. Indeed, one article permits states to declare that they do not accept the competence of the dispute settlement organs provided for by the convention for "disputes concerning military activities."⁵⁸ As there is no doubt that some of the activities conducted in areas where the peaceful purposes principle applies could be submitted to dispute settlement or-

⁵⁰ Art. IV.

⁵¹ UNCLOS III, 5 OFF. REC. 54–68 (66th to 68th meeting of the Plenary).

⁵² The positions in the debate were ably summarized by the Iranian delegate, Mr. Bavand: 5 *id.* at 65–66. For a review, see L. MIGLIORINO, *supra* note 40, at 110–15.

⁵³ A clear example seems to be the intervention of Tunisia: UNCLOS III, 5 OFF. REC. 67.

⁵⁴ *Id.* at 58.

⁵⁵ *Id.* at 62.

⁵⁶ See the articles of the ICNT/Rev.2 listed *supra* at note 39. Arts. 240(a) and 242 are, however, general provisions on marine scientific research, with no restriction of geographical scope.

⁵⁷ Compare Art. 76 with Art. 1(1) of the ICNT/Rev.2.

⁵⁸ ICNT/Rev.2 Art. 298, para. 1(b). Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, 4 OCEAN DEV. & INT'L L.J. 51 (1977).

gans,⁵⁹ it follows that military activities can be conducted in these areas and that, consequently, military activities in themselves cannot be considered not peaceful.

The meaning of the principle is not further clarified by the negotiating text. Yet, when incorporated in a treaty, as it eventually will be, the principle could have legal consequences. The use of certain areas of the sea for non-peaceful purposes will become illegal. However, because the principle is still undefined, the effect of the provisions containing it will depend on whether there are rules that make a specific interpretation of "peaceful purposes" binding on the interested parties. This can happen either when one of these parties may impose its interpretation on another or when the interpretation of a third party is made binding on all interested parties. In the negotiating text, the first situation is only possible, if at all, under the rules on scientific research. According to one article,⁶⁰ if the coastal state decides that a research project to be conducted in its economic zone or on its continental shelf is not "exclusively for peaceful purposes," it is not bound to grant its consent "in normal circumstances" as it would be otherwise. It seems that the researching state can do very little to challenge this interpretation judicially.⁶¹ The second situation would arise whenever a mechanism for third-party, binding dispute settlement is provided. Even though most disputes involving the notion of peaceful purposes fall in principle within the jurisdiction of judges or arbitrators, the already mentioned optional exception to this competence for "disputes concerning military activities" can nullify the possibility that judges or arbitrators will pronounce on the matter. As the main military powers seem inclined to resort to the exception, the chances for judicial or arbitral consideration of peaceful purposes are limited to the rather marginal situation of litigation between states that do not avail themselves of the exception.

The various peaceful purposes clauses in the new Law of the Sea Convention will thus have some, though limited, legal consequences. What about peaceful purposes in the new law of the sea according to current customary law?

The provisions of the negotiating text that give the principle its binding effect are of a kind that needs to be incorporated in a treaty in order to be

⁵⁹ See especially Arts. 296, 298, and 187 of ICNT/Rev.2. On the dispute settlement system negotiated at the conference, see Adede, *Law of the Sea: The Scope of the Third-Party Compulsory Procedures for Settlement of Disputes*, 71 AJIL 305 (1977); Pastor Ridruejo, *La solución de controversias en la III Conferencia de las Naciones Unidas sobre el derecho del mar*, 30 REV. ESPAÑOLA DERECHO INT'L 11 (1977); Rosenne, *The Settlement of Disputes in the New Law of the Sea*, IRANIAN REV. INT'L REL., Nos. 10–11, 1978, at 401; Sohn, *Towards a Tribunal for the Oceans*, *id.*, Nos. 5–6, 1975–76, at 247.

⁶⁰ ICNT/Rev.2 Art. 246, para. 3.

⁶¹ This depends on the stringent limitations the ICNT/Rev.2 imposes on compulsory third-party settlement in the field of marine scientific research; see Art. 296, para. 2. For an interpretation which (apart from the "military activities" optional exception) would make it possible to submit to third-party compulsory settlement disputes involving the point of whether a research project is conducted "exclusively for peaceful purposes," see Treves, *Principe du consentement et recherche scientifique dans le nouveau droit de la mer*, 84 RGDIP 253, 265 (1980).

effective. This holds true for the rules on the settlement of disputes, and apparently also for the pertinent provision on marine scientific research, at least as far as its very complex details and shades of meaning are concerned.⁶² Thus, the principle seems more a part of the United Nations resolution-generated "soft law"⁶³ than a rule (or a component of rules) of customary law.⁶⁴

Were the substantive rules of the negotiating text in which the concept is contained to be accepted as customary law, their binding effect, except perhaps for the rule on scientific research, would depend on whether a reasonably precise meaning of peaceful purposes is generally recognized. This seems possible if the trend towards a narrowing of the meaning continues and is widely accepted. Three concepts seem likely to serve as guidelines. The first is the compatibility of the purposes with the United Nations Charter, a concept that has been upheld since the outset by the United States and other states. The second may be found in the prohibitions contained in the 1971 Seabed Treaty. They might serve for identifying activities which, even when compatible with the United Nations Charter, can be considered not conducted for peaceful purposes. The third is the idea that listening and communication devices on the seabed can be presumed to be for peaceful purposes. The already emphasized link with nuclear deterrence between the two major powers and the lack of specific objections to their use (apart from jurisdictional reasons), even by countries favorable to demilitarization of the seabed,⁶⁵ are indications in this direction.⁶⁶

II. INTERNAL AND TERRITORIAL WATERS

According to general international law, the coastal state has sovereignty over its internal and territorial waters. This sovereignty extends to the seabed and its subsoil.⁶⁷ Accordingly, the coastal state is free to emplace any kind of installations or weapons on or beneath the seabed of its internal

⁶² Treves, *Principe*, *supra* note 61, at 266–68.

⁶³ See, e.g., Dupuy, *Droit déclaratoire et droit programmatoire: de la coutume sauvage à la "soft law,"* in SOCIÉTÉ FRANÇAISE DE DROIT INTERNATIONAL, COLLOQUE DE TOULOUSE, L'ÉLABORATION DU DROIT INTERNATIONAL PUBLIC 132–48 (1975).

⁶⁴ It would seem that this is the position of D. P. O'Connell (*supra* note 1 at 159) when he observes that "the persistent lip service" which has been given to the peaceful purposes formula has "created a political milieu in which no credit is likely to accrue to any assailant in the seabed, however defensible its motives." U. Jenisch (*supra* note 1 at 66) considers that in contemporary international law the concept of "peaceful purposes" "can only be the basis of confusion."

⁶⁵ E.g., Mexico: intervention by J. Castañeda of July 9, 1970, Doc. CCD/PV.477, para. 54, U.S. ARMS CONTROL AND DISARMAMENT AGENCY [hereinafter cited as ACDA], [1970] DOCUMENTS ON DISARMAMENT 307.

⁶⁶ E. D. BROWN, *supra* note 40, at 33; M. W. JANIS, *supra* note 13, at 91. See also the intervention of the British delegate, Mr. Auckland, at the Seabed Committee on August 23, 1968: UN Doc. A/AC.135/SR.17.

⁶⁷ Geneva Convention on the Territorial Sea, Art. 2; ICNT/Rev.2, Art. 2, para. 2. Marston, *The Evolution of the Concept of Sovereignty over the Bed and Subsoil of the Territorial Sea*, 48 BRIT. Y.B. INT'L L. 320 (1976–77).

and territorial waters,⁶⁸ and it has the right to forbid or authorize other states to do so.

These rights apply to territorial seas established in accordance with international law. Though some states claim a wider territorial sea,⁶⁹ the maximum limit that now seems to be recognized is 12 miles.⁷⁰ Not only is this limit set forth in the negotiating text, but its acceptance has been an important part of the package deal that has led to general acceptance of the concept of the exclusive economic zone.⁷¹ It is unlikely that a need for further compromise will induce the conference to recognize the rights claimed by states that have adopted wider limits.⁷² Thus, the existence under domestic law of a territorial sea of more than 12 miles will not serve as a basis for claims to the exclusive use of the seabed beyond the 12-mile limit as flowing from sovereignty over the territorial sea.

Treaty law injects some exceptions into this rather clear picture, particularly the Partial Test Ban Treaty of 1963, the Seabed Treaty of 1971, and the Tlatelolco Treaty of 1967.⁷³

Under the Partial Test Ban Treaty,⁷⁴ the freedom to use the bed under internal and territorial waters for military purposes is substantially curtailed. The carrying out of "any nuclear weapon test explosion, or any other nuclear explosion" is prohibited;⁷⁵ but the prohibition does not include the emplacement or storage of nuclear weapons.

The treaty contains two levels of prohibitions. Nuclear explosions are prohibited altogether if conducted by a state party "at any place under its jurisdiction or control . . . under water, including territorial waters or high seas." If they are conducted "in any other environment," the prohibition is valid only if "the explosion causes radioactive débris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted."⁷⁶ The prohibition of explosions "under water, including territorial waters or high seas," seems to include not only those in the water column but also those on the surface of the seabed.⁷⁷ Explosions under the surface of the seabed (independently of the status of the area where they take place) are prohibited only if they entail the above-mentioned

⁶⁸ Provided that it does not create difficulties for the innocent passage of foreign ships.

⁶⁹ See the table—based upon information available to the FAO in November 1978—in UN DEPARTMENT OF PUBLIC INFORMATION, A GUIDE TO THE NEW LAW OF THE SEA 49 (Reference Paper No. 18, 1979).

⁷⁰ ICNT/Rev.2 Art. 3.

⁷¹ For references to recent practice, see *supra* note 36. See also the observations by Reisman, *supra* note 3, at 59; Moore, *supra* note 3, at 86, 115–16; and B. CONFORTI, APPUNTI DALLE LEZIONI DI DIRITTO INTERNAZIONALE 131–33 (1976).

⁷² By accepting, for instance, the Ecuadorian proposal contained in Conf. Doc. C.2/Informal Meetings/11 of April 27, 1979.

⁷³ For a review of these treaties, see Brown, *The Demilitarization and Denuclearization of Hydrospace*, 4 ANNALS INT'L STUD. 71 (1973).

⁷⁴ Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water of August 8, 1963, 480 UNTS 43, 14 UST 1313, TIAS No. 5433.

⁷⁵ Art. I, para. 1 (chapeau).

⁷⁶ Art. I, para. 1(a) and (b).

⁷⁷ L. MIGLIORINO, *supra* note 40, at 10; Evensen, *supra* note 1, at 547.

consequences.⁷⁸ Any place under a state's "jurisdiction or control" qualifies the otherwise general geographical scope of the prohibition. While places "under its jurisdiction" include the territory, airspace, and sea areas of a state, as well as ships flying its flag and aircraft and space objects registered by it, places "under its control" seems to indicate control of the explosion in practical or technical terms, so as to include any place beyond the jurisdiction of the state concerned. According to the Legal Adviser of the U.S. Department of State, "for the purposes of the Test Ban Treaty, a party is considered to have temporary control over any place in which it conducts a nuclear test explosion during the time the explosion is conducted."⁷⁹

The 1971 Seabed Treaty⁸⁰ has only limited influence on the legal situation of coastal states regarding the emplacement of military installations and devices on the bed of internal and territorial waters. The treaty prohibits emplacing or emplanting "any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons."⁸¹ The concept of "nuclear weapons" can serve as a guideline for interpreting the rather imprecise expression, "other weapons of mass destruction." These would include weapons existing at present, or to be developed in the future, whose effects are comparable to those of nuclear weapons.⁸² Chemical, biological, and radioactive weapons have been mentioned.⁸³ Vehicles that carry nuclear weapons and can move only when in contact with the seabed can be considered included in the prohibition because "emplace," as opposed to "emplant," seems also to cover mobile

⁷⁸ This interpretation was upheld by Japan at the 4th meeting of the 1977 Review Conference of the 1971 Seabed Treaty: Doc. SBT/CONF/SR.4, para. 7. E. D. BROWN, ARMS CONTROL, *supra* note 40, at 60, and *The Demilitarization*, *supra* note 73, at 11, considers as the "most logical" the interpretation that explosions in the bed of the high seas are in all cases illegal, because this part of the seabed is outside the territorial limits of the state and that, presumably, radioactive debris will be present, at any rate where the explosion has taken place. The logical cogency of this interpretation notwithstanding, it seems to us, as it seems to Brown, that the intention of the parties "was to place the subsoil of the high seas in the same position as the 'underground' of national territories, thus banning only those explosions which caused radioactive pollution of the water or the atmosphere."

⁷⁹ M. WHITEMAN, 11 DIGEST OF INTERNATIONAL LAW 791 (1968).

⁸⁰ See note 2 *supra*.

⁸¹ Art. I, para. 1.

⁸² The following definition given by the U.S. negotiator seems adequate:

[I]t has . . . the meaning of embracing nuclear weapons, embracing also chemical and biological weapons and then being open-ended . . . in order to take care of developments which one cannot specify at the present time, some form of weapon which might be invented or developed in the future, which would have devastating effects comparable to those of nuclear or chemical or biological weapons but which one cannot simply describe at the present time.

Seabed Arms Control Treaty: Hearing on EX. H. 92-1 before the Senate Comm. on Foreign Relations, 92d Cong., 2d Sess. 13 (1972).

⁸³ Nuclear mines moored to the seabed seem to be already included in the nuclear weapons concept. See especially E. D. BROWN, ARMS CONTROL, *supra* note 40, at 54-56; L. MIGLIORINO, *supra* note 40, at 60-61; Goralczyk, *Legal Problems of the Peaceful Uses of the Sea-bed and the Ocean Floor: Denuclearization*, 5 POLISH Y.B. INT'L L. 43, 51-58 (1972-73).

installations.⁸⁴ "Dual-purpose" installations, *i.e.*, those designed for storing, testing, or using conventional as well as nuclear weapons, appear to be forbidden, no matter what kind of weapon they contain, because the accent in the provision falls on the purpose they were designed for.⁸⁵ In sum, the prohibition in the Seabed Treaty extends to nonnuclear weapons, though it excludes most conventional weapons; but it does not comprehend seabed devices and installations that are not weapons and are not designed for storing, testing, or using them—in particular, listening and other warning devices.⁸⁶

The treaty prohibition applies only to the area of the seabed beyond the outer limit "of the zone referred to in Part II of the Convention on the Territorial Sea and the Contiguous Zone, signed at Geneva on 29 April 1958." This zone "shall be measured in accordance with the provisions of Part I, section II, of that Convention and in accordance with international law."⁸⁷ The outer limit has already been set at 12 miles. The section of the Geneva Convention to which reference is made concerns (apart from the rules on delimitation) the baseline from which the 12 miles are to be measured.

The reference to international law does not seem to be directed at states that are not parties to the Geneva Convention because the rules of the latter are incorporated by reference;⁸⁸ rather, it seems to refer to baselines whose

⁸⁴ A further difficulty may reside in drawing a distinction between vehicles that can move only when in contact with the seabed and vehicles navigating at a very short distance from the seabed and possibly resting on it from time to time. The prevalent position is that the latter vehicles are excluded from the treaty prohibitions. This is also the U.S. view: *see* the statements of Mr. Leonard at the Conference of the Committee on Disarmament (CCD) on Oct. 7, 1969 (Doc. CCD/PV.440, paras. 24–25, *reprinted in* ACDA, [1969] DOCUMENTS ON DISARMAMENT 479) and before the U.S. Senate's Committee on Foreign Relations (*Hearing on EX. H. 92-1*, *supra* note 82, at 6; *see also* p. 12, Sen. Pell and Mr. Irwin). The same view is held by E. D. BROWN, ARMS CONTROL, *supra* note 40, at 58; D. P. O'CONNELL, *supra* note 1, at 157; Goralczyk, *supra* note 83, at 52; Skowronski, *Some Aspects of the Demilitarization of the Sea-bed*, in SCIENTIFIC AND TECHNOLOGICAL REVOLUTION AND THE LAW OF THE SEA 52, 58 (Frankowska ed., 1974).

⁸⁵ However, it is difficult to distinguish these dual-purpose installations from installations designed for conventional weapons but that also can accommodate nuclear weapons. The records show only the quite obvious U.S. view that "facilities specifically designed for using nuclear weapons or weapons of mass destruction would not, because they could also use conventional weapons, be exempted from the prohibitions" (Mr. Leonard, Oct. 7, 1969, Doc. CCD/PV.440, para. 24, *supra* note 84, at 479). E. D. BROWN, ARMS CONTROL, *supra* note 40, at 57, rightly observes that "the Treaty seems deficient in this respect."

⁸⁶ This is the U.S. position: Mr. Leonard in *Hearing on EX. H. 92-1*, *supra* note 82, at 14–15. Mexico, while taking a strong position for the demilitarization of the seabed, excluded from the objects it wanted banned "those devices of a purely passive or indirect defensive character, such as means of communication, shipping and surveillance" (Castañeda, July 9, 1970, Doc. CCD/PV.477, para. 54, *supra* note 65, at 307).

⁸⁷ Art. II. Thus, the zone to which the treaty prohibitions do not apply coincides with the contiguous zone as defined by the Geneva Convention.

⁸⁸ The U.S. representative emphasized that the reference to the Geneva Convention "in no way implies that any party to the sea-bed treaty which was not a party to the 1958 Convention would find itself bound by or, so to speak, adhering to that Convention" (Oct 30, 1969, Doc. CCD/PV.447, para. 14, *reprinted in* ACDA, [1969] DOCUMENTS, *supra* note 84, at 512). *See also* the statement of the Argentinian representative at the meeting of the UN General Assembly's First Committee on Dec. 11, 1969: UN Doc. A/C.1/PV.1722, at 87–92.

drawing is not regulated by the Geneva Convention.⁸⁹ The most relevant are those for historic waters and bays.⁹⁰ This interpretation permits a substantial expansion of the area exempt from the treaty prohibitions. Whatever its width, if a bay can be considered historic, its waters are internal and the 12-mile zone is measured from the closing line; if it cannot, the Geneva Convention's rule setting a 24-mile maximum for the closing line has to be applied.⁹¹ These provisions explain the Soviet Union's interest in the reference to international law now under consideration.⁹² The USSR claims that significant sea areas adjacent to its coasts are historic waters and bays.⁹³ However, these claims have not always been undisputed. While the view prevailing among Western (and not only Western) powers is that the prerequisites for the designation "historic" include the well-known, long-standing, and undisputed exercise of state prerogatives over the claimed waters,⁹⁴ the Soviets believe that either historical tradition or a special economic or strategic interest in the waters or bay suffices for them to be considered historic.⁹⁵ This difference of opinion emerged during the protests that followed the Soviet Union's decision of 1957 to declare the waters of Peter the Great Bay "internal," even though its historical arguments were extremely thin.⁹⁶

It is certain that the other contracting parties, and particularly the United States, which cosponsored the draft treaty with the USSR, were aware of the Soviet interpretation of the rules of international law on historic bays⁹⁷ and of the possibilities of concealment of nuclear weapons the USSR would acquire by taking advantage of the reference to international law in the provision on the measurement of the 12-mile zone. While this awareness

⁸⁹ Statement of the U.S. representative, Mr. Leonard, of Oct. 30, 1969, Doc. CCD/PV.447, para. 13, *supra* note 88, at 512.

⁹⁰ Geneva Convention on the Territorial Sea and the Contiguous zone, Art. 7, para. 6, and Resolution VII adopted by the Geneva Conference at its 20th plenary meeting, UN CONFERENCE ON THE LAW OF THE SEA, 2 OFFICIAL RECORDS 145 (1958).

⁹¹ Art. 7, para. 4.

⁹² See the Soviet intervention in Doc. CCD/PV.440, *supra* note 84 (Oct. 7, 1969); and D. P. O'CONNELL, *supra* note 1, at 155-56.

⁹³ The legislation and other materials are presented in W. E. BUTLER, THE LAW OF SOVIET TERRITORIAL WATERS 12-15 (1967); and in V. SEBEK, 1 THE EASTERN EUROPEAN STATES AND THE DEVELOPMENT OF THE LAW OF THE SEA 166-72 (1977-79).

⁹⁴ A recent statement of the U.S. position is in A. W. ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 291 (1974). Among legal writers, see especially, L. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 281 (1964); C. DE VISSCHER, PROBLÈMES DE CONFINS EN DROIT INTERNATIONAL 134 (1969); F. LAURIA, IL REGIME GIURIDICO DELLE BAIE E DEI GOLFI 148-56 (1970).

⁹⁵ W. E. BUTLER, *supra* note 93, at 13-14.

⁹⁶ See the positions taken by the United States, Japan, and the Federal Republic of Germany and the replies of the USSR in M. WHITEMAN, 4 DIGEST OF INTERNATIONAL LAW 251-57 (1965). That the definition of historic bays is still uncertain seems also to emerge from the fact that attempts at codification have been postponed more than once since the Geneva Conferences of 1958 and 1960. Lastly, in 1977 the International Law Commission decided that the subject did not require further consideration in the near future and that it could be taken up in the light of the results of the Third Conference on the Law of the Sea: [1977] 2 Y.B. INT'L L. COMM'N, 2d part, at 127.

⁹⁷ See *Hearing on EX. H. 92-1*, *supra* note 82, at 8, 12.

certainly cannot be considered as recognition of the Soviet interpretation,⁹⁸ it might indicate the intention of those states not to raise disputes with the USSR on this subject.⁹⁹

Within the 12-mile zone, the treaty's impact on the situation under customary law depends on whether the coastal state has a territorial sea of 12 miles or one of a lesser extent. In the first case, as the treaty provisions do not apply to the territorial sea, no exception is made to the coastal state's power to establish installations and devices of any kind and to authorize or forbid other states to do so.¹⁰⁰ In the second case, the situation is less simple, as appears from the following rule of the treaty: "The undertakings of paragraph 1 of this article [the prohibition] shall also apply to the sea-bed zone referred to in the same paragraph, except that within such sea-bed zone, they shall not apply either to the coastal State or to the sea-bed beneath its territorial waters."¹⁰¹ Though far from clear, this language indicates that the coastal state is exempt from the prohibition set forth in the treaty as regards the 12-mile zone, even when its territorial sea is of a lesser width. Yet other states are not exempted from the prohibition in the intermediate zone between the outer limit of the territorial sea and the 12-mile limit, as they otherwise would be. Consequently, the coastal state may exclude other states from the intermediate zone exactly as it may from its territorial sea. In this regard, the treaty has brought about an interesting innovation. Its importance, however, depends on the situation under customary law of the continental shelf, to which the intermediate zone belongs.¹⁰²

Apart from this, the provision in question does not provide for exceptions to general international law. It does not "permit" the coastal state to emplace

⁹⁸ Especially in the light of the so-called disclaimer clause contained in Article IV of the treaty.

⁹⁹ This appears to be confirmed by a recent modification in the conference's negotiating text (ICNT/Rev.2 Art. 298, para. 1(a)), which provides that compulsory settlement of disputes concerning boundary delimitation or "historic bays or titles" can be excluded by contracting parties by resorting to an optional exception, though these disputes have to be submitted to conciliation. It is well known that excluding compulsory arbitral or judicial settlement on delimitation and on historic bays and titles has been an objective of the USSR throughout the conference: see especially the intervention of the Head of the Soviet delegation, Mr. Kozyrev, at the 106th meeting of the Plenary on May 19, 1978 (UNCLOS III, 9 OFF. REC. 84). See also Irwin, *Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations*, 8 OCEAN DEV. & INT'L L. 105 (1980).

¹⁰⁰ "This provision is designed to leave unaffected the sovereign authority and control of the coastal State within such territorial sea" (Mr. Leonard, United States, at the General Assembly's First Committee, Nov. 16, 1970, UN Doc. A/C.1/PV.1762, at 34-35). "That provision must be interpreted as embodying the intangible rights of all coastal States arising from such sovereignty under international law" (Mr. Roschin, USSR, at the same forum on the same day, *id.* at 47).

¹⁰¹ Art. I, para. 2.

¹⁰² Thus the opinion, upheld by E. D. BROWN, ARMS CONTROL, *supra* note 40, at 71, Goralczyk, *supra* note 83, at 63, and Skowronski, *supra* note 84, at 55, that the coastal state cannot authorize other states to emplace or implant in the intermediate zone the weapons and installations considered in the treaty, is acceptable only if one accepts the idea that the coastal state enjoys no such power regarding its continental shelf. The power of the coastal state to authorize other states to utilize the bed of its territorial sea is explicitly linked to the situation of sovereignty there by Mr. Irving, U.S. Under Secretary of State, in *Hearing on EX. H. 92-1*. *supra* note 82, at 23.

or emplant nuclear weapons and installations on the bed of the territorial sea and the intermediate zone; it simply does not apply to the coastal state as far as these parts of the seabed are concerned.

Significantly, the coastal state seems to have exclusive rights in the intermediate zone over verification of compliance with the treaty obligations, even though the treaty provides for a multistage procedure involving other states. This conclusion follows from the fact that the observation rights of other states are limited to the area beyond the 12-mile zone referred to in Article I.¹⁰³

As regards states claiming territorial seas of more than 12 miles, nothing in the treaty authorizes them to claim that the prohibition does not apply to the seabed beyond the 12-mile line.¹⁰⁴ The reference to the width of the contiguous zone in the Geneva Convention (it cannot exceed 12 miles from the baseline) precludes such a claim.

Unlike the Seabed Treaty of 1971, the Tlatelolco Treaty of 1967¹⁰⁵ places substantial limitations on the coastal state's freedom to emplace weapons and installations on or beneath the bed of the territorial sea. The prohibition in this treaty refers to the contracting parties' "territory,"¹⁰⁶ which is defined as including "the territorial sea, air space and any other space over which the State exercises sovereignty in accordance with its own legislation."¹⁰⁷ Thus, the parties are forbidden from doing something that would otherwise be within their sovereignty.

In contrast with the Partial Test Ban Treaty, the prohibition in the Tlatelolco Treaty does not depend upon the environment in which explosions are conducted or upon the radioactive debris they cause. The treaty exempts explosions for peaceful purposes, while the Partial Test Ban Treaty does not.¹⁰⁸

Compared to the Seabed Treaty, the prohibition in the Tlatelolco Treaty is narrower in scope. It concerns only "nuclear weapons" and not other weapons of mass destruction. Moreover, although it prohibits the "receipt, storage, installation, deployment and any form of possession" of such weapons,¹⁰⁹ it does not prohibit, as the 1971 treaty does, emplacing or emplanting on the seabed structures or installations designed for storing, testing, or using such weapons.

The most interesting aspect of the provision on the territorial scope of the prohibition is the reference to "any other space over which the State exercises sovereignty *in accordance with its own legislation.*" This reference

¹⁰³ Art. III, para. 1. This conclusion was explicitly set forth by the USSR delegate, Mr. Roschin, at the CCD meeting of July 7, 1970 (Doc. CCD/PV.476, para. 71, reprinted in ACDA, [1970] DOCUMENTS, *supra* note 65, at 297), while rejecting as redundant a Swedish proposal concerning the exclusive right over verification in the intermediate zone.

¹⁰⁴ Krieger, *The United Nations Treaty Banning Nuclear Weapons and Other Weapons of Mass Destruction on the Ocean Floor*, 3 J. MAR. L. & COMM. 107, 118 (1971).

¹⁰⁵ Treaty for the Prohibition of Nuclear Weapons in Latin America of Feb. 14, 1967, 634 UNTS 364.

¹⁰⁶ Art. 1, chapeau.

¹⁰⁷ Art. 3.

¹⁰⁸ Art. 18.

¹⁰⁹ Art. 1(a) and (b).

would seem to include territorial seas of more than 12 miles, provided the coastal state exercises sovereignty over them according to its domestic law.¹¹⁰ This conclusion is not contradicted by the declaration made by the United Kingdom when it deposited its ratification of Protocols I and II. The declaration states:

the reference in Article 3 of the Treaty to "its own legislation" relates only to such legislation as is compatible with the rules of international law and as involves an exercise of sovereignty consistent with those rules and accordingly . . . signature or ratification of either Additional Protocol by the Government of the United Kingdom could not be regarded as implying recognition of any legislation which did not, in their view, comply with the relevant rules of international law.¹¹¹

The USSR made a similar declaration.¹¹²

Unilateral extensions of the territorial sea, as we have seen, may be contrary to international law, and the United Kingdom and the USSR have rightly indicated their unwillingness to acquiesce in them. This unwillingness, however, does not imply that the legislation containing those extensions may not be used in a treaty as a spatial criterion, according to which states accept certain rights and obligations. Thus, the state party not recognizing the lawfulness under international law of a given extension of the territorial sea beyond 12 miles is not precluded from claiming that a state that has adopted the extending legislation must observe its obligations under the Tlatelolco Treaty.

This discussion will lose much of its relevance when, and if, the treaty applies not only to the "territories" of the parties but also to the wider zone indicated in Article 4, paragraph 2. This zone includes, and goes further than, the 200-mile territorial sea claimed by some of the contracting parties.¹¹³ The conditions for making this zone applicable, however, have not yet been met. They include the ratification of the treaty by all sovereign states situated in their entirety south of the 35° north latitude, and cf Additional Protocol II by all the nuclear powers.¹¹⁴ Some Latin American republics,

¹¹⁰ D. P. O'CONNELL, *supra* note 1, at 157; Brown, *The Demilitarization*, *supra* note 73, at 77. According to the national laws collected by A. SZEKELY, 1 LATIN AMERICA AND THE LAW OF THE SEA (1978), the Latin American states claiming sovereignty over zones of 200 miles are Argentina, Brazil, Ecuador, El Salvador, Panama, and Uruguay. See also Szekely's commentaries in 2 *id.*, ch. IIB, 2(c) and (d). It must be stressed, however, that the term "sovereignty" in the treaty can raise serious difficulties because legislations using it do not always refer to the same fullness of powers to which the Geneva Convention refers regarding the territorial sea, where the only exception is innocent passage.

¹¹¹ UNITED NATIONS, STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS 64–65 (Special supp. to 2 UN DISARMAMENT Y.B. 1977 (1978)). A. García Robles, the Mexican Under Secretary of State who chaired the preparatory commission for the denuclearization of South America, commented upon the UK declaration in the following terms: "it is obvious that no one would contest this statement which, in light of the preparatory work of the treaty, corresponds to what its authors had in mind all the time" (SIPRI Y.B. 1969–70, at 231).

¹¹² 3 UN DISARMAMENT Y.B. 1978, at 492 (1979).

¹¹³ A map showing the zone to which the treaty will apply according to Art. 4, para. 2 is in SIPRI Y.B. 1972, at 548.

¹¹⁴ These conditions are set out in Art. 28, para. 1.

including Cuba, have not yet ratified the convention, and while all the nuclear powers have ratified Additional Protocol II, it must be stressed that the USSR, when it overcame its reluctance¹¹⁵ and became party to the protocol, declared that its ratification in no way signified "recognition of the possibility of application of the Treaty, as prescribed in article 4, paragraph 2, beyond the territories of States parties, including the air space and the territorial sea established in accordance with international law."¹¹⁶

III. ARCHIPELAGIC WATERS

Archipelagic waters are among the characteristic features of the future Law of the Sea Convention.¹¹⁷ Provisions in the negotiating text¹¹⁸ permit states "constituted wholly by one or more archipelagos,"¹¹⁹ under certain conditions and with certain limitations,¹²⁰ to "draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago."¹²¹ The breadth of the territorial sea, the economic zone, and the continental shelf is measured from these baselines,¹²² and the waters situated within them are archipelagic waters.¹²³

According to the negotiating text, archipelagic states enjoy sovereignty over archipelagic waters. This sovereignty extends to the airspace, the bed and subsoil, and the resources contained in them.¹²⁴ Though sovereignty is a feature of the coastal state's rights over both internal and territorial waters, archipelagic waters are neither of the two. Explicit provisions entitle the archipelagic state to internal¹²⁵ as well as territorial waters.¹²⁶ Consequently, archipelagic waters may be considered an entirely new concept. It differs from the concept of internal waters because sovereignty over archipelagic waters is limited. Though the main limitation is the right of innocent passage,¹²⁷ archipelagic waters are different from territorial waters because a particular kind of passage, "archipelagic sea lanes passage," is

¹¹⁵ On the Soviet attitude, see SIPRI Y.B. 1972, at 544-45.

¹¹⁶ 3 UN DISARMAMENT Y.B. 1978, at 492.

¹¹⁷ D. W. BOWETT, *THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW* 73-113 (1979); B. H. DUBNER, *THE LAW OF TERRITORIAL WATERS OF MID-OCEAN ARCHIPELAGOS AND ARCHIPELAGIC STATES* (1976); J. SYATAUW, *SOME NEWLY INDEPENDENT STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW* 168-82, 185-89 (1961); C. F. AMERASINGHE, *The Problem of Archipelagos in the International Law of the Sea*, 23 INT'L & COMP. L.Q. 538-75 (1974); COQUIA, *Territorial Waters of Archipelagos*, 1 PHILIPPINE J. INT'L L. 119 (1962); EVENSEN, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos*, 1 UN CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 289-302 (1958); KUSUMAATMADJA, *The Legal Regime of Archipelagos: Problems and Issues*, in *THE LAW OF THE SEA: NEEDS AND INTERESTS OF DEVELOPING COUNTRIES* 166 (Alexander ed., 1973); O'CONNELL, *Mid-Ocean Archipelagos in International Law*, 45 BRIT. Y.B. INT'L L. 1-72 (1971); SØRENSEN, *The Territorial Sea of Archipelagos*, 6 NETH. INT'L L. REV. SUPP. 315 (1959).

¹¹⁸ ICNT/Rev.2 Arts. 46-54.

¹¹⁹ ICNT/Rev.2 Art. 46.

¹²⁰ Set forth in Arts. 46(a) and 47, paras. 2-8.

¹²¹ Art. 47, para. 1.

¹²² Art. 48.

¹²³ Art. 49, para. 1.

¹²⁴ Art. 49, paras. 1 and 2.

¹²⁵ Art. 50.

¹²⁶ Art. 48.

¹²⁷ Art. 52.

provided. It is similar to "transit passage" through straits and includes the right of overflight.¹²⁸

Though the Law of the Sea Conference has agreed on the main features of archipelagic waters, there is room for doubt about the status of the concept under international law, as it stands today. The unilateral action of archipelagic states in drawing baselines around archipelagoes, and usually in proclaiming the waters so encompassed as "internal waters,"¹²⁹ has met opposition from the states most interested in navigation.¹³⁰ At the Caracas session of the Law of the Sea Conference, various delegations pointed out that "so far international law has not admitted the concept of the archipelagic State."¹³¹ Apart from making claims on the basis of historic waters,¹³² none of the delegates from the archipelagic states who took the floor affirmed that the concept was already a part of international law. One of them explicitly referred to it as a matter of "progressive development of international law."¹³³ Nonetheless, during the debate most delegations sympathized with the concept. They stressed, however, that its acceptance depended upon the formulation of a definition that would protect navigational interests and exclude archipelagoes whose islands were considered too far apart.¹³⁴ The present provisions in the negotiating text seem to meet these requirements.¹³⁵

¹²⁸ Art. 53. According to paragraphs 1 and 2, if the archipelagic state designates "sea lanes and air routes thereabove" for archipelagic passage, the right of overflight undoubtedly exists; see Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AJIL 57, 66 (1978), and Moore, *supra* note 3, at 110–11. When the archipelagic state does not designate such sea lanes and air routes, Article 53, paragraph 12 provides that "the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation." The implication seems to be that the right to fly "thereabove" is included, but the language could open the way to disagreement over this interpretation.

¹²⁹ Philippine note of Dec. 12, 1945 to the UN Secretary-General, in UN, **LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEAS** 39–40 (ST/LEG/SER.B/6, 1957); Philippine Republic Act No. 3046 of June 17, 1961, sec. 2, UN, **NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA** 103 (ST/LEG/SER.B/15, 1970); Philippine Constitution of Jan. 17, 1973, Art. 1, sec. 1, **NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA** 30 (ST/LEG/SER.B/18, 1976). Indonesian communiqué of Dec. 13, 1973 (in J. SYATAUW, *supra* note 117, at 173); Indonesian Act No. 4 of Feb. 18, 1960, Art. 1(1), in UN Doc. A/CONF.-19/5/Add.1, at 3; *see also* the Indonesian reservations to the Geneva Convention on the High Seas, in **MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS** 559 (ST/LEG/SER.D/12, 1979).

¹³⁰ For a summary, see M. WHITEMAN, **4 DIGEST OF INTERNATIONAL LAW** 282–85 (1965). For a discussion of the relevance of these protests, see O'Connell, *Mid-Ocean Archipelagos*, *supra* note 117, at 60–69. *See also* the objections to Indonesia's reservations to the Geneva High Seas Convention by Australia, Denmark, the Federal Republic of Germany, Japan, Madagascar, the Netherlands, Thailand, the United Kingdom, and the United States (**MULTILATERAL TREATIES**, *supra* note 129, at 561–62). Fiji and Tonga accepted the Indonesian reservations, while stressing the continuing existence of the right to innocent passage through the waters which, before being included in Indonesian internal waters, belonged to the high seas (*ibid.*).

¹³¹ Algeria, UNCLOS III, 2 OFF. REC. 271. *See also* the United Kingdom, *id.* at 261, and the USSR, *id.* at 266.

¹³² Philippines, *id.* at 264.

¹³³ Mauritius, *id.* at 269.

¹³⁴ For example: Japan, *id.* at 261; Bulgaria, *ibid.*; the Netherlands, *id.* at 262; France, *id.* at 263; the USSR, *id.* at 266; Egypt, *id.* at 268; Singapore, *ibid.*; Canada, *id.* at 271.

¹³⁵ Since the compromise that appears in Arts. 117–131 of part II of the 1975 Single Negotiating Text (UNCLOS III, 4 OFF. REC. 168) was reached, there have been only minor

These developments suggest that the idea that archipelagic states are entitled to some specific rights over the waters connecting their component islands, which would otherwise belong to the high seas, has not yet become part of international law, even though the process for establishing it as customary seems to have started.¹³⁶ However, it may well be that, in practice, the concepts of the economic zone and of historic waters will be sufficient to cover this idea. The precise definition of archipelagic waters, as well as the detailed indication of the rights recognized for other states as regards these waters, seems to belong to the domain of provisions that become binding only when included in a duly ratified convention. Nonetheless, especially (but perhaps not exclusively) if the Law of the Sea Conference adopts a treaty with provisions on archipelagic waters along the lines of those of the negotiating text, and the most directly involved states do not dissent, it seems likely that the archipelagic states will quickly start seeing a limit to their claims in the provisions and that other states will find in them reason for recognizing those claims. Custom would grow out of accepted compromise.¹³⁷

Under the detailed rules of the negotiating text, the limitations on the archipelagic state's sovereignty over its archipelagic waters and the underlying bed and subsoil do not concern the placing of military installations and devices on or beneath the seabed. Therefore, the situation seems to be the same as for internal and territorial waters, and it will hold true if, even before the entry into force of the new Law of the Sea Convention, the archipelagic state's sovereignty over archipelagic waters becomes generally accepted through the process described above. On the contrary, under today's international law, even if one were to accept the idea that archipelagic states enjoy some specific rights in their archipelagic waters, it would be difficult to maintain that they include the exclusive power to emplace military installations or devices on or beneath the bed of these waters. Although states have invoked security reasons for proclaiming archipelagic waters,¹³⁸ the debate has concentrated mostly on navigational rights and rights to the resources of the seabed, and other uses have not been discussed.¹³⁹ Conse-

changes, the essential aspects remaining unchallenged. Yet, states with offshore archipelagoes would also like to apply the archipelagic waters concept to these archipelagoes.

¹³⁶ This would seem to be the situation in the light of the weakening of the protests against archipelagic states during the Third Law of the Sea Conference and of the fact that some leading maritime states actively participated in the elaboration of proposals on the subject. Most authors do not try to assess the situation as it stands but prefer to formulate guidelines for the solution of the problem on a *de lege ferenda* basis; see, e.g., Amerasinghe, *supra* note 117, at 575; O'Connell, *Mid-Ocean Archipelagos*, *supra* note 117, at 75-77; B. H. DUBNER, *supra* note 117, at 67-81.

¹³⁷ This would be one of the consequences mentioned above (sec. I, "The Evolving Legal Framework") of the accelerating effect of general diplomatic conferences on state practice and of decisionmaking by consensus in such conferences. On the importance of the compromise on archipelagoes, see Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AJIL 763, 784-85 (1975).

¹³⁸ See, e.g., the Philippines, *SECOND UN CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS* 51, and Indonesia, *UNCLOS III*, 2 OFF. REC. 260. Also D. W. BOWETT, *supra* note 117, at 98-102.

¹³⁹ The exception, among legal writers, seems to be Amerasinghe, *supra* note 117, at 571.

quently, the legal situation is the same as the one otherwise prevailing for the continental shelf or the bed of the high seas.

As far as treaty law is concerned, the most relevant question is whether the 1971 Seabed Treaty (which excludes from its area of application a zone coterminous with the contiguous zone, as defined in the 1958 Convention on the Territorial Sea and measured according to either that convention or international law) can be interpreted as referring to a contiguous zone measured from an archipelagic baseline. The implications of an answer in the affirmative run counter to the interest of disarmament. Vast seabed areas, in which emplanting and emplacing nuclear weapons and installations are precluded under the treaty, would be excluded from the prohibitions. Because of their sovereignty over these areas, archipelagic states would also be entitled to permit other states to use them. Archipelagic waters could then hide depositories of the hitherto prohibited weapons and installations.

One possible interpretation of the treaty supports this answer. Under this interpretation, the reference to international law in Article II would be considered to have paramount importance. Provided that international law recognized the concept of archipelagic waters, the archipelagic baseline would be the baseline of the contiguous zone, and archipelagic waters would not be included in the prohibitions as regards archipelagic states.

However, a different interpretation is also possible. This interpretation would consider the reference to the 12-mile zone defined in part II of the Geneva Convention on the Territorial Sea and the Contiguous Zone as the most important factor in Article II of the treaty. The reference to international law would thus concern only baselines not dealt with in the convention (such as those of historic bays) and not those regulated by it. In Article 10, the convention provides for determining the baselines for islands, without distinguishing between those belonging to archipelagoes and other islands. Consequently, the existence of archipelagic waters would be irrelevant to the obligations set forth in the Seabed Treaty. The coastal state would be exempted from their observance only within a 12-mile zone drawn for each island.

That the principle of the "peaceful uses" of the seas does not extend to archipelagic waters could be invoked in favor of the first interpretation. The second interpretation, however, seems closer to the expectations of the parties that negotiated the treaty, when archipelagic waters certainly were not an accepted concept in international law.

In practice, the relevance of this discussion depends on whether archipelagic states are, or are likely to become, bound by the Seabed Treaty. By the end of 1979, the main archipelagic states, Indonesia and the Philippines, were not. On the other hand, the Seychelles and Mauritius were parties to the treaty. The position of the Seychelles, however, is not entirely clear,¹⁴⁰

¹⁴⁰ The Seychelles Maritime Zones Act, 1977 defines the "limits" of the various maritime zones by referring to "the individual or composite group or groups of islands constituting the territory of Seychelles" (NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA 112, ST/LEG/SER.B/19 prel. issue, 1978).

and Mauritius, though a member of the Group of Archipelagic States from the outset, does not qualify as such under the rules of the negotiating text on the maximum length of the archipelagic straight baselines and on the required ratio of land to water.¹⁴¹

IV. THE CONTINENTAL SHELF AND ECONOMIC ZONE

The Applicable Rules

The emplacement of military objects on or beneath the seabed under national jurisdiction beyond the territorial sea¹⁴² is not explicitly permitted or prohibited by the traditional, or by the new, law of the sea. The legal problems must therefore be solved on the basis of the general rules concerning that area of the seabed. Under the traditional law of the sea, these are the rules on both the continental shelf and the high seas. The former recognize broad powers as belonging to the coastal state, but they pertain to the exploration and exploitation of resources. Among the latter, as will be seen, is the residuary rule of freedom. Under the articles elaborated by the Third Law of the Sea Conference, the legal regime of the seabed under national jurisdiction falls under the rules not only on the continental shelf, but also on the exclusive economic zone.¹⁴³ This conclusion is to be drawn from the fact that the negotiating text does not ascribe sovereign rights to the coastal state in the exclusive economic zone for the exploration and exploitation of the resources of the water column only, but of the seabed and subsoil as well.¹⁴⁴

The distinction between the two sets of rules is important. The outer limit of the continental shelf, while never being at a shorter distance from the baseline than that of the economic zone, may in some cases extend farther, according to developments at the conference.¹⁴⁵ Consequently, for the area of the seabed that is included in the continental shelf, but lies beyond the economic zone, the rules designed for the latter do not apply and only those regarding the continental shelf can be invoked.

¹⁴¹ Gayan, *Mauritius and the Law of the Sea*, IRANIAN REV. INT'L REL., Nos. 11-12, 1978, at 220-21; see also D. W. BOWETT, *supra* note 117, at 92.

¹⁴² See M. S. McDUGAL & W. T. BURKE, *supra* note 5, at 716-24; E. D. BROWN, ARMS CONTROL, *supra* note 40, at 22-33; U. JENISCH, *supra* note 1, at 84-87; W. KÜHNE, DAS VÖLKERRECHT UND DIE MILITÄRISCHE NÜTZUNG DES MEERESBODENS 39-59 (1975); B. RÜSTER, *supra* note 1, at 224-27; Baxter, *Legal Aspects of Arms Control Measures Concerning the Missile, Submarine and Anti-Submarine Warfare*, in THE FUTURE OF THE SEA-BASED DETERRENT 209, 218-19 (Tsipis ed., 1979); Gehring, *supra* note 1, at 188-95; Knight, *The Law of the Sea and Naval Missions*, U.S. NAVAL INST. PROC., June 1977, 32, 37, 39; O'Connell, *Resource Exploitation, the Law of the Sea and Security Implications*, in NEW STRATEGIC FACTORS IN THE NORTH ATLANTIC 160-67 (Bertram & Holst eds., 1977); Petrowski, *supra* note 1, at 279.

¹⁴³ ICNT/Rev.2, pts. V and VI, respectively. On the relationship between these two parts, see R. J. DUPUY, *supra* note 1, at 112-14; Pistorelli, *La piattaforma continentale: Un istituto ancora vitale?*, 61 RIVISTA DIRITTO INTERNAZIONALE 496 (1978); Phillips, *The Exclusive Economic Zone as a Concept in International Law*, 26 INT'L & COMP. L.Q. 585, 614-15 (1977); Pulvenis, *Zone économique et plateau continental—Unité ou dualité?*, IRANIAN REV. INT'L REL., Nos. 11-12, 1978, at 103-20.

¹⁴⁴ ICNT/Rev.2 Art. 56, para. 1(a).

¹⁴⁵ ICNT/Rev.2 Art. 76.

Admittedly, the rules on activities on the seabed of the economic zone are almost the same as those for the continental shelf.¹⁴⁶ Regarding artificial islands, installations, and structures, there is a specific cross-reference from the set of rules on the continental shelf to the rule on the subject in the chapter on the economic zone.¹⁴⁷ Moreover, the general rule on the economic zone in the negotiating text provides that "the rights set out in this article shall be exercised in accordance with part VI,"¹⁴⁸ which is the part on the continental shelf.¹⁴⁹

These parallels have prompted the idea that the concept of the economic zone—regardless of the formulation in the negotiating text—does not apply to the seabed and its resources, which would autonomously be regulated by the rules on the continental shelf.¹⁵⁰ The fact that the coastal state's rights over the continental shelf "do not depend . . . on any express proclamation,"¹⁵¹ which does not hold true for the exclusive economic zone, is invoked in support of this idea.¹⁵² This observation indicates the importance of the continental shelf within the 200-mile line when no economic zone has been proclaimed. Yet, when an economic zone exists, there is an important difference between the legal regimes of the seabed under national jurisdiction within and beyond the 200-mile line: the negotiating text's part on the economic zone sets forth a general rule on the rights and duties of other states in the economic zone and a rule on the resolution of conflicts between the latter and coastal states when the convention "does not attribute rights or jurisdiction" to either of them.¹⁵³ The first rule makes applicable to the economic zone a relatively specific group of principles on the high seas; the second indicates the intention of avoiding the choice of a residuary rule, be it coastal state jurisdiction or freedom of the high seas.¹⁵⁴ The regimes for the seabed within and beyond the 200-mile line differ in that these rules apply only within the line, while beyond it the residuary rule of freedom prevails.

This difference does not seem to exist within the framework of today's customary international law. It is true that many aspects of the coastal state's powers in the economic zone, as described in the negotiating text,

¹⁴⁶ The only discrepancy seems to concern the laying of cables and pipelines. According to Article 58, paragraph 1, all states enjoy the freedom to lay cables and pipelines in the economic zone, while Article 79, paragraph 3 provides that on the continental shelf "the delineation of the course" for the laying of cables and pipelines "is subject to the consent of the coastal State." See Phillips, *supra* note 143, at 615, and R. J. DUPUY, *supra* note 1, at 112. As Article 58 states that the freedoms it mentions are to be enjoyed "subject to the relevant provisions of this Convention," and as Article 79, paragraph 1 states that "[a]ll States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article," it seems that the requirement of the coastal state's consent to the delineation of the course for the cable or pipeline is a modality of the exercise of this freedom, which thus applies to the shelf as a whole and so also within the 200-mile line. Therefore, no contradiction seems to exist. Another interpretation would lead to the absurd result that the coastal state would have more powers over the continental margin beyond the 200-mile limit than within that limit.

¹⁴⁷ ICNT/Rev.2 Arts. 80 and 60.

¹⁴⁸ ICNT/Rev.2 Art. 56, para. 3.

¹⁴⁹ On scientific research on the continental shelf beyond 200 miles, see *infra* note 220.

¹⁵⁰ Pistorelli, *supra* note 143, at 503.

¹⁵¹ ICNT/Rev.2 Art. 77, para. 3.

¹⁵² Pistorelli, *supra* note 143, at 504.

¹⁵³ ICNT/Rev.2 Arts. 58 and 59.

¹⁵⁴ For further developments, see "The New Law of the Sea," in this section *infra*.

are now generally accepted, especially as far as fisheries are concerned.¹⁵⁵ Though perhaps in a less definite way, other powers regarding the preservation of the marine environment and marine scientific research seem already to be recognized as belonging to the coastal state.¹⁵⁶ To these must be added the coastal state's well-established powers regarding the continental shelf. Taken together, these powers tend to coincide with those listed in the negotiating text's article on "rights, jurisdiction and duties of the coastal State in the exclusive economic zone."¹⁵⁷ Consequently, it is possible to say that in today's international law, coastal state powers within a 200-mile zone are recognized or, at least, that there is a definite trend towards recognizing them. Saying this, however, does not mean that the legal nature of these powers coincides with the concept of the economic zone set forth in the negotiating text. The widespread recognition of the coastal state's powers within the 200-mile limit has developed gradually, activity by activity. Thus, the powers regarding resource-oriented activities on the seabed were recognized first, within the concept of the continental shelf, and of those regarding activities in the water column, powers over fishing were accepted before and more clearly than others. Because the concept of the economic zone has not developed in contemporary practice as a general, all-encompassing legal institution, but as a bundle of powers each of which has a different history and whose merging has not yet taken place, the residuary rule of freedom still seems to apply, as in the traditional law of the sea. The rule in the negotiating text for cases where rights or jurisdiction are attributed neither to the coastal state nor to other states is an attempt at compromising the opposing views of the coastal and the maritime states on the desirable residuary rule for the future Law of the Sea Convention. There is no evidence that it is followed in today's practice. This conclusion is reinforced when one considers that the impact of the rule is mostly procedural, which will be seen later. Procedure is a domain eminently dependent on treaty rules. Consequently, even though more and more powers are and will be recognized as belonging to the coastal state, the residuary rule continues to be the same as in the traditional law of the sea.

The Traditional Law of the Sea

A starting point in assessing the evolution of the law on military installations and devices is the Geneva Conference on the Law of the Sea of 1958,

¹⁵⁵ Among the elements upholding this view, the most persuasive seem to be the following: (1) that even states not yet ready to accept the notion of the exclusive economic zone have proclaimed 200-mile fisheries zones, in particular the United States, the USSR, the EEC countries, and Japan; (2) that bilateral fisheries agreements have been concluded recognizing the rights of states that have proclaimed fisheries or economic zones (*see, e.g.*, the agreement cited *supra* at note 32); and (3) that multilateral regional fisheries agreements have been abrogated and renegotiated for the purpose of taking into account the coastal states' claims to sovereign rights over fisheries in 200-mile zones (*see, e.g.*, the Convention on future Multilateral Cooperation in the Northwest Atlantic Fisheries, opened for signature at Ottawa on Oct. 24, 1978, 21 O.J. EUR. COMM. (No. C 271) 2 (1978)).

¹⁵⁶ See Kiss, *La pollution du milieu marin*, 38 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 903, 929–31 (1978); Treves, *Principe*, *supra* note 61, at 266–68.

¹⁵⁷ ICNT/Rev.2 Art. 56.

where the doctrine of the continental shelf was consecrated. During the discussion of the articles on the continental shelf, India made a proposal (which replaced a narrower one put forward by Bulgaria) stipulating that "the continental shelf adjacent to any coastal State shall not be used by the coastal State or any other State for the purpose of building military bases or installations."¹⁵⁸ The proposal was defeated by 31 votes to 18, with 6 abstentions.¹⁵⁹

Interestingly, both the states making the proposal and those opposing it started from the same premise. This premise, in the words of the Bulgarian representative, was that, "except for the purposes of exploration and exploitation of natural resources, the continental shelf was subject to the regime of the high seas."¹⁶⁰ The Federal Republic of Germany, perhaps the most outspoken of those against the proposal, resorted to almost the same words: "except for the express purpose of the exploration and exploitation of its natural resources, the continental shelf, including its subsoil, was subject to the regime of the high seas."¹⁶¹ The two sides diverged, however, on the consequences to be drawn from this premise. Bulgaria, followed by India, continued its argument by saying: "hence, the presence of any military installations on the continental shelf would be a violation of international law." The Federal Republic of Germany concluded its intervention by stressing that "any State could build installations on it [*i.e.*, on the continental shelf], provided that they did not interfere with the exploration and exploitation of natural resources."

In the light of this discussion, the rejection of the Indian proposal seems to indicate that the interpretation set forth by the Federal Republic is the correct one and that the Geneva Convention does not support the contention that "the construction of military bases or installations on the continental shelf [is] illegal," as it "constitute[s] a violation of the freedom of the high seas."¹⁶² Consequently, in principle, the freedom of the high seas confers on both coastal and other states the right to emplace military installations, devices, and weapons on or in the continental shelf.¹⁶³ Any interference

¹⁵⁸ UN Doc. A/CONF.13/C.4/L.57, UN CONFERENCE ON THE LAW OF THE SEA, 5 OFFICIAL RECORDS 141 (1958). The Bulgarian proposal (which was withdrawn in favor of the Indian one) was formulated as follows: "The Coastal State shall not use the continental shelf for the purposes of building military bases or any installations which are directed against other States." In a revised version, the words "which are directed against other States" were deleted: UN Doc. A/CONF.13/C.4/L.41 and L.41/Rev.1, *id.* at 137.

¹⁵⁹ UN CONFERENCE ON THE LAW OF THE SEA, 6 OFFICIAL RECORDS 91.

¹⁶⁰ *Id.* at 73. See also the Indian intervention at p. 85 and the one by the USSR at p. 77.

¹⁶¹ *Id.* at 83.

¹⁶² Intervention by India: *id.* at 85. See also O. DE FERRON, 2 LE DROIT INTERNATIONAL DE LA MER 213 (1960).

¹⁶³ This implies that on the continental shelf the residuary rule of allocation of powers between the coastal state and the generality of states is in favor of the latter because of the functional character of the rights of the coastal state. They are limited to the purposes of exploration and exploitation of resources, while the freedom of the high seas has a general character. Consequently, whenever the functional rights of the coastal state are not involved, the general rule, which obviously applies to the coastal state also, prevails. This view—though rejected by some writers, e.g., E. D. BROWN, ARMS CONTROL, *supra* note 40, at 27–28, and W. T.

with the exercise of this right, unless justified by international law, is an international wrong that causes international responsibility.

There are, however, international law rules that limit this right in many ways. While some of the limitations apply generally, others apply only to states other than coastal states and thus give the latter, as far as their continental shelf is concerned, a stronger position. The limitations that only the coastal state can invoke are particularly relevant here because, as will be seen, those that apply to all states are based on principles that can be used not only for the purpose of limiting the freedom to emplace military installations, devices, etc., on the continental shelf, but also for the opposite purpose of reinforcing the claim of the emplacing state.

The most important of the general limitations derives from the principle contained in the last part of Article 2 of the Geneva Convention on the Continental Shelf. According to it, the high seas freedoms "shall be exercised by all States with reasonable regard to the interest of other States in the exercise of the freedom of the high seas."

What states wishing to emplace weapons, installations, and other military devices on the continental shelf (as well as on the seabed of the high seas) are obliged to do in order to have "reasonable regard" to the exercise of other states' high seas freedoms can be found in the provisions of the Geneva Convention on the Continental Shelf that set forth the obligations binding on coastal states when they exercise their right to "construct and operate" installations and devices necessary to exploring the continental shelf and exploiting its resources.¹⁶⁴ As these provisions limit and set conditions for the emplacement and operation of installations and devices when in the exercise of a specific right, they seem to be all the more applicable to limiting and setting conditions for the exercise of a general freedom. In other words, if the coastal state, which is in a privileged position, must abide by such limitations and conditions, all other states, which are on an equal level, have to abide by them, too, though they may also have to take supplementary precautions.

These limitations and conditions provide for particular safeguards of the freedom of navigation and of other freedoms of the high seas. Thus, due notice must be given of installations that may interfere with high seas

Burke, *Contemporary Legal Problems in Ocean Development*, in SIPRI, TOWARDS A BETTER USE OF THE OCEAN 13, 111-12 (1969)—not only is upheld by the above-quoted *travaux* of Geneva and seems to be accepted by the USSR (UN Doc. A/C.1/PV.1605, meeting of Nov. 11, 1968), but also seems to correspond to the assessment of the present state of the law prevailing at the Third Law of the Sea Conference. The discussions at the conference on the "residuary rule" to be applied to the economic zone appear to indicate that states agree in thinking that such a rule exists in the traditional law of the sea regarding the high seas. The same conclusion seems to ensue from the discussions at the conference on the legality of mining the deep seabed. One position is that the freedom of the high seas includes this activity. The position opposing it relies, more than on the idea that there is no treaty or custom specifically permitting seabed mining, on the alleged existence of a rule forbidding it, a rule that would be evidenced by the Declaration of Principles of 1970: see UN Docs. A/CONF.62/BUR/SR.41 (1978) and A/CONF.62/SR.-109 (1978) (*see also infra* sec. V).

¹⁶⁴ Geneva Convention on the Continental Shelf, *supra* note 24, Art. 5.

freedoms, "and permanent means for giving warning of their presence must be maintained."¹⁶⁵ Installations that are abandoned or no longer used must be removed.¹⁶⁶ Installations and devices are prohibited "when interference may be caused to the use of recognized sea lanes essential to international navigation."¹⁶⁷

As indicated earlier, the obligation of paying "reasonable regard" to the exercise by other states of the freedoms of the high seas can also be an argument for upholding the right to emplace installations and other military devices on the continental shelf when this obligation is applied not to the emplacing state, but to other states. The latter may not interfere with the emplacement or operation of these installations and devices. They may not impede or hamper their emplacement or remove or destroy them. They may not interfere with their functioning, for instance, through the use of magnetic or electronic devices or lasers. However, if no interference with their functioning is implied, apparently they may inspect them, provided that they are unmanned; if they are manned, inspection would entail by definition a violation of the jurisdiction of the state having control over them. They may in all cases observe them, as observation does not imply interference.

The principles that limit the freedom of all states, except the coastal states, to emplace weapons and military installations and devices on the continental shelf work only one way, because they may only be invoked by coastal states. The most important of these principles provides that the coastal state enjoys on its continental shelf "sovereign rights for the purpose of exploring it and exploiting its natural resources."¹⁶⁸

This principle can be invoked, first of all, to reinforce the coastal state's position when it emplaces military objects on its own continental shelf. The coastal state is likely to resort to it in order to prevent interference with installations built for purposes of resource exploration and exploitation but used more or less overtly for military ones as well.

However, the most relevant application of the principle is to the emplacement by a state of military installations and other objects on another

¹⁶⁵ *Id.*, Art. 5, para. 5. The establishment of safety zones (Art. 5, paras. 2 and 3) is something the coastal state is entitled, but not obliged, to do.

¹⁶⁶ *Id.*, Art. 5, para. 5. On the environmental implications of this article, see Treves, *La pollution résultant de l'exploration et de l'exploitation des fonds marins en droit international*, 24 ANNUAIRE FRANÇAIS DROIT INT'L 827, 835 (1978). Commenting on a case decided by the French Conseil d'Etat, Dec. 4, 1970, 99 JOURNAL DROIT INT'L 572 (1970), in which an abandoned target moored to the continental shelf by the French Navy had caused damage to a ship navigating in the area, Queneudec (*id.* at 577-78) makes the point that the use of the continental shelf for military activities is to be considered lawful because it is not forbidden by international law. Consequently, the rule on removal of installations should also apply to military installations "by analogy and for the same reasons of navigational security." It would seem that it is not necessary to invoke analogy. The application of the rule to military installations is a consequence of the need to ensure reasonable regard for the interests of other states in their exercise of the freedom of the high seas. There is also a literal argument in this direction: Article 5, paragraph 5 of the Continental Shelf Convention says that "any" installations must be removed, and thus not only those for exploration and exploitation.

¹⁶⁷ Geneva Convention on the Continental Shelf, *supra* note 24, Art. 5, para. 6.

¹⁶⁸ *Id.*, Art. 1, para. 2.

state's continental shelf. In this case, the coastal state can invoke the principle in order to claim that these installations and devices hamper the exercise of its sovereign rights over resource exploration and exploitation.

States emplacing the military objects can respond by pointing out that the objects cannot possibly interfere with exploration or exploitation, or by invoking the Geneva Convention on the Continental Shelf, which provides that the coastal state's sovereign rights over exploring the continental shelf and exploiting its resources shall not interfere with navigation and the laying of cables and pipelines.¹⁶⁹ The latter counterclaim is particularly strong because it relies on the rule that navigation and the laying of cables and pipelines by any state prevail over the economic uses of the continental shelf by the coastal state. The difficulty in resorting to it, however, lies in proving that the emplacement of the military objects can be considered, in the specific instance, as included in the concepts of navigation or of laying cables or pipelines. This may be claimed, though with some difficulty and not in all cases, for listening devices,¹⁷⁰ but certainly not for weapons. The former counterclaim is based even more on the facts of the situation, as it requires proving noninterference in the resource-oriented activities of the coastal state. In view of the coastal state's sovereign rights over the continental shelf for the purpose of conducting these activities, one might reasonably conclude that its position as to whether there is interference in them will carry substantial weight.¹⁷¹

Were the problems raised by these claims and counterclaims to be decided upon by a judge or arbitrator, the first question to be ruled upon would be the factual-legal problem whether the military objects interfere with the resource-oriented activities of the coastal state and whether their emplacement is included in the freedom of navigation and the freedom to lay cables and pipelines. Then it would be easy to determine whether inspection or removal of the objects by the coastal state is lawful. The existence of the already mentioned optional exception for military activities makes judicial or arbitral settlement of the dispute rather unlikely. Thus, if the situation comes into the open and is not brought before a dispute-settling organ, the conflict between the emplacing state and the coastal state may cause political tension because both parties will consider that important rights on sensitive matters are at stake.¹⁷² It must be observed, however, that, in practice,

¹⁶⁹ *Id.*, Art. 5, paras. 1 and 4.

¹⁷⁰ Which might be considered included in the freedom to lay cables: see O'Connell, *Resource Exploitation*, *supra* note 142, at 167.

¹⁷¹ Though the legal premises are different, this conclusion seems to be equivalent, in practice, to that reached, on considerations of policy, by M. S. McDUGAL & W. T. BURKE, *supra* note 5, at 724, and by Petrowski, *supra* note 1, at 289. According to McDougal and Burke, the emplacement of military installations on the continental shelf "should come within the same exclusive authority" (of the coastal state); this use of the continental shelf by the coastal state "should be regarded as reasonable, subject to the requirement of relatively slight interference with navigation" (*ibid.*). For reasoning closer to that followed in the text: Baxter, *supra* note 142, at 218-219.

¹⁷² Buzan, *A Sea of Troubles?*, 143 ADELPHI PAPERS 12 (1978), observes that "a dispute arising out of the detection of unsuspected military devices could be quite serious if both parties stood by what they felt to be their rights."

military objects on the continental shelf, and especially on another state's continental shelf, are emplaced covertly and, more often than not, removed covertly if found by the coastal state.¹⁷³

Another legal rule the coastal state could rely upon, in some cases, is the provision of the Geneva Convention on the Continental Shelf that "the consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there."¹⁷⁴ If the objects are emplaced on the continental shelf of another state, allegedly for conducting "purely scientific research" but, according to the coastal state, really for military research,¹⁷⁵ the coastal state may claim to be freed from the obligation set out in the same provision "normally" not to withhold its consent, and may deny it. Here the position of the coastal state is stronger because consent has to be asked for in any case, and the researching state cannot emplace its equipment and installations without having obtained it, whatever the merits of its claims regarding the purely scientific nature of the project. In some situations, however, it may prove easier for the emplacing state to obtain the coastal state's consent by claiming that the objects are being placed on the continental shelf in order to conduct military research. This situation can occur when the politico-military relations between the two states are good and the coastal state is wary of having other states conduct research concerning its natural resources.

Evolutionary Trends

After the 1958 conference, a position that had already been vaguely implied in a statement by India at Geneva,¹⁷⁶ and that contradicted the basic assumptions of the reasoning developed above, came to the fore. According to this position, the sovereign rights of the coastal state are not to be considered as limited to exploration and exploitation but as having a more general scope. It follows from this premise that no state can construct, operate, or maintain installations of any kind (including military installations and devices) on the continental shelf of another state unless the latter has given its consent.

This view was strongly advocated by Mexico during the debates leading to the adoption of the 1971 Seabed Treaty.¹⁷⁷ India also upheld it on various occasions: in the declaration accompanying its ratification of the Seabed Treaty¹⁷⁸ and, more recently, in an intervention at the 1977 Review Conference of the same treaty. On the latter occasion, India stated that "other countries could not use its continental shelf for military purposes"; moreover, India had "the sovereign right to . . . verify, inspect, remove or destroy any weapon, device, structure, installation or facility, which might be

¹⁷³ Knight, *supra* note 93, at 37.

¹⁷⁴ Geneva Convention on the Continental Shelf, *supra* note 24, Art. 5, para. 8. See also this section *infra*, "Installations and Equipment for Military Scientific Research."

¹⁷⁵ See the references at note 6.

¹⁷⁶ UN CONFERENCE ON THE LAW OF THE SEA, 6 OFFICIAL RECORDS 83 (but see also 85) (1958).

¹⁷⁷ UN Doc. A/C.1/PV.1763, at 4: intervention of Mr. García Robles of Nov. 17, 1970.

¹⁷⁸ STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, *supra* note 111, at 111. See also Jain, *India and the Sea-Bed Arms Control Treaty*, 30 INDIA Q. 300 (1974).

emplanted or emplaced on or beneath its continental shelf by any other country."¹⁷⁹ The same thought seems to underlie the declaration accompanying Canada's ratification of the Seabed Treaty.¹⁸⁰

This trend culminated at the Caracas session of the Third United Nations Conference on the Law of the Sea in 1974 in the presentation by Mexico and Kenya (rapidly joined by 35 other states) of a proposal stating that "no State shall be entitled to construct, maintain, deploy or operate on or over the continental shelf of another State any military installations or devices or any other installations for whatever purposes without the consent of the coastal State."¹⁸¹ This proposal sufficiently impressed the French Government for it to have referred to it in its arguments before the arbitration tribunal of its continental shelf dispute with the United Kingdom. France took the view that a solution to the dispute that would deprive it of parts of its claimed continental shelf would entail "detriment to French security." These detriments were "all the more substantial in that the new law of the sea relating to the exclusive economic zone may include provisions debarring other States from placing any military or other installation on the continental shelf without the consent of the coastal State."¹⁸²

No trace of the Mexican-Kenyan proposal is present, however, in all the negotiating texts so far produced by the Law of the Sea Conference. According to one writer, "the United States apparently made it clear that it would be willing to see the entire Conference collapse rather than compromise on this kind of issue," and subsequently, according to the same writer, the efforts of the United States and other states "to phrase draft articles so as to avoid direct reference to military uses such as detection devices proved relatively successful."¹⁸³ No serious effort has been made at the conference since the Caracas session to revive the Mexican-Kenyan proposal. Nor was any such step taken in the general debate held in Plenary during the fourth session (spring 1976) on the "peaceful uses of the oceans."¹⁸⁴

These events seem to reinforce, as far as today's international law is concerned, the conclusions already reached on the basic rule of freedom concerning the emplacement of military installations and other devices on the continental shelf. Two reasons may be mentioned in support of this view. The first is that the Mexican-Kenyan proposal did not deny (as the Indian proposal at Geneva did) the right to emplace military installations and other devices on the continental shelf to *all* states, but to all but the coastal

¹⁷⁹ Doc. SBT/CONF/SR.5, paras. 11-14 (and corrigendum thereto).

¹⁸⁰ STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, *supra* note 111, at 108-09.

¹⁸¹ UN Doc. A/CONF.62/C.2/L.42/Rev.1 (1974), 3 OFF. REC. 220. The original Mexican proposal, UN Doc. A/CONF.62/C.2/L.42, was limited to *military* installations and appliances.

¹⁸² Arbitral award of June 30, 1977, *supra* note 28, para. 161.

¹⁸³ Purver, *Canadian Foreign Policy and the Military Uses of the Seabed*, in CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 202, 245-46 (Johnson & Zacher, eds., 1977). See also Buzan, *supra* note 172, at 12. According to Stevenson and Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AJIL 1, 23-24 (1975), the U.S. position seemed to be that "arms control questions were more properly addressed in other forums and could complicate the negotiations."

¹⁸⁴ 5 OFF. REC. 54-68.

state. The fact that the proposal was not accepted appears to make untenable the view that such emplacement is forbidden to all states by international law. The same conclusion can be drawn from France's arguments before the Anglo-French arbitration tribunal. The second reason can be found in the way the Mexican-Kenyan proposal disappeared from the Law of the Sea Conference's negotiating table. The main military powers (none of which has dissociated itself from the alleged "heavy pressure"¹⁸⁵ exerted by the United States) have let it be known that inclusion of a principle like the one in the Mexican-Kenyan proposal would jeopardize the conclusion of a new law of the sea convention acceptable to them and would change the existing law in a direction incompatible with their interests.

The New Law of the Sea

The legal situation of military installations and devices on the continental shelf changes considerably under the negotiating text. This change results from the presence in the text, on the one hand, of the economic zone concept, with its corollaries as to the residuary rule of competence, and, on the other, of a much more detailed formulation of the article on the coastal state's rights regarding installations, structures, and devices. The effect of this change is a widening of the powers explicitly recognized for the coastal state. This widening of powers, however, is counterbalanced by the use of more precise terms, which seems to open the way for a distinction, entailing different legal regimes, between objects emplaced on the bed of the economic zone for military purposes and those emplaced on the bed for other purposes.

The article on "installations and structures" in the economic zone (which applies to the continental shelf as well) also considers artificial islands, which were not mentioned in the Geneva Convention. These islands are subject to the coastal state's "exclusive right" both to construct them and to authorize and regulate their construction and operation whatever their purpose.¹⁸⁶ Consequently, artificial islands for military purposes cannot be built or operated against the coastal state's will.

The coastal state's exclusive right regarding the construction, authorization, regulation, and use of installations and structures is not limited, as it is in the Geneva Convention, to those used for exploring and exploiting seabed resources.¹⁸⁷ It applies to all the purposes of such structures over which the coastal state enjoys rights or jurisdiction in the economic zone. Apart from resource-related activities, these purposes include "other activities for the economic exploration and exploitation of the zone, such as the production of energy from the water, currents and winds," marine scientific research, and the preservation of the marine environment.¹⁸⁸

Besides the installations and structures encompassed by this already comprehensive list, to which those serving "all other economic purposes" must

¹⁸⁵ Buzan, *supra* note 172, at 12.

¹⁸⁶ ICNT/Rev.2 Art. 60, para. 1(a).

¹⁸⁷ ICNT/Rev.2 Art. 60, para. 1(b).

¹⁸⁸ ICNT/Rev.2 Art. 56, to which reference is made in Art. 60, para. 1(b).

be added, the coastal state's exclusive right extends to "installations and structures which may interfere with the exercise of the rights of the coastal State in the zone."¹⁸⁹ This provision amounts to a spelling out of the consequences of the rule that the coastal state enjoys sovereign rights over the exploration and exploitation of resources. However, it seems somehow to strengthen the position of the coastal state,¹⁹⁰ especially since it includes installations and structures that *may* interfere with the exercise of the coastal state's rights. The extension to potential interference makes the coastal state's assessment even more difficult to challenge than it is under the Geneva Convention. Such a challenge has to be based on the claim that the military installations or structures *may not* interfere with the exercise of the coastal state's rights. When this is the case, the latter state has no right to authorize or regulate the emplacement of the installations and structures.

In designating the objects on or beneath the seabed over which coastal states have the exclusive right mentioned above, the negotiating text uses language different from that of the Geneva Convention; it permits a narrower interpretation of the scope of the coastal state's rights. While the Geneva Convention speaks of "installations and devices,"¹⁹¹ the negotiating text speaks of "installations and structures."¹⁹² To define "structures" is not easy, especially if one wants to distinguish them from "installations."¹⁹³ It is certain, however, that "structure" is a narrower concept than "device"; it cannot include relatively small objects such as some of those used for the tracing of submarines and as navigational aids. Consequently, those devices that cannot be considered installations or structures are not among the objects over whose deployment and operation the coastal state enjoys an exclusive right. This exception holds true even when such devices may interfere with the exercise of the rights of the coastal state in the economic zone.¹⁹⁴

¹⁸⁹ ICNT/Rev.2 Art. 60, para. 1(c).

¹⁹⁰ Stevenson and Oxman, *The 1975 Geneva Session*, *supra* note 137, at 777, observe that this provision "tilts" heavily towards the coastal state even with respect to noneconomic installations in the economic zone."

¹⁹¹ Art. 5, para. 2.

¹⁹² Art. 60, paras. 1(b) and (c). This variation was introduced by the Evensen Group during the 1975 Geneva session. See the group's final document on the economic zone in THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, DOCUMENTS OF THE GENEVA SESSION 273 (ed. Platzöder, 1975), Arts. I, para. 1(c) and 4, para. 1(b). This variation in the English text notwithstanding, the original translation of "devices" as "*dispositifs*" was maintained for translating "structures" in the French version of the various negotiating texts up to the ICNT/Rev.1 (1977). The French language group of the Drafting Committee proposed adoption of the term "*ouvrages*," which is closer to "structures": Conf. Doc. FLGDC/1 (May 11, 1979). This proposal was adopted in the French version of the ICNT/Rev.2.

¹⁹³ Indications are in the Evensen text, *supra* note 192, Art. 1, para. 1(c) and in the ICNT/Rev.2 Art. 1, para. 5, which speak of "installations and similar structures" and of "platforms and other man-made structures at sea."

¹⁹⁴ Clingan, in *LAW OF THE SEA: NEGLECTED ISSUES*, *supra* note 23, at 418, argues, in the same vein, that under Art. 60 of the ICNT any installation which falls within one of the three categories listed therein is prohibited, while any installation "which does not fall in these categories is not prohibited, be it military or not." Fraser, *id.* at 401, argues that Art. 60 "implicitly" prohibits military installations, and the same view seems to be held by D. W. BOWETT, *supra* note 117, at 122.

The legal situation of these devices, as well as that of military installations and structures that cannot interfere with the exercise of the coastal state's rights in the economic zone or on the continental shelf, varies according to whether these devices, installations, and structures are emplaced in the seabed of the economic zone or on the continental shelf beyond the 200-mile limit. This conclusion seems valid even though the rules on the coastal state's powers regarding "artificial islands, installations and structures" are identical for the two areas.

As for the continental shelf beyond the 200-mile limit, the situation does not appear to differ from that for the continental shelf as a whole under traditional law and the Geneva Conventions. The principle is the freedom to emplace these objects on or beneath the seabed, subject to the limitations mentioned above and with the consequence, also mentioned above, that unjustified interference with their emplacement and operation amounts to an international wrong.¹⁹⁵

As far as the economic zone is concerned, the implication just drawn for the continental shelf beyond 200 miles—*i.e.*, that whatever activity is not within the coastal state's exclusive rights (such as the emplacement of military "devices") comes under the principle of the freedom of the high seas and consequently is protected by international law in the sense that unjustified interference with it is an international wrong—cannot be drawn in such an easy and unqualified way.

In carefully and painfully negotiated articles of the negotiating text,¹⁹⁶ the regime of the economic zone is defined as a "specific" one "under which the rights and jurisdictions of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."¹⁹⁷ The text attributes some freedoms in the economic zone to all states. These are the freedoms of navigation and overflight, and of laying submarine cables and pipelines, "and those other internationally lawful uses of the sea related to these freedoms such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention."¹⁹⁸ The negotiators of this provision probably had uppermost in their minds military activities on the surface of the sea or in the water column, such as naval maneuvers, firing exercises, and the movement of submarines. It can have some applicability, however, to devices, installations, and structures emplaced on the seabed for military purposes.

It may be contended that the emplacement of sensor arrays, at least in some circumstances, is included in the freedom to lay cables.¹⁹⁹ In any

¹⁹⁵ However, a Soviet proposal aiming at making this freedom somewhat more explicit (Conf. Doc. NG.6/8 of April 18, 1979, in *DOKUMENTE DER DRITTEN SEERECHTSKONFERENZ DER VEREINTEN NATIONEN—GENFER SESSION 1979*, at 640 (ed. Platzöder, 1979)) did not obtain enough support and did not find its way into the ICNT/Rev.1.

¹⁹⁶ Oxman, *The 1977 New York Session*, *supra* note 128, at 67–75; Treves, *La Conferenza sul diritto del mare dal "Testo unico riveduto" del 1976 al "Testo composito informale di negoziato" del 1977*, 60 RIV. DIRITTO INTERNAZIONALE 566, 569–72 (1977).

¹⁹⁷ ICNT/Rev.2 Art. 55.

¹⁹⁸ ICNT/Rev.2 Art. 58, para. 1.

¹⁹⁹ *Supra* note 170.

event, seabed devices used as navigational aids for military purposes certainly are "associated with the operation of ships." In addition, sensors used to trace other states' submarines can be considered as "associated with the operation of ships," provided the idea is accepted that the efficient use of warships and submarines implies recourse to the best available means of locating the position and tracing the movements of those of other states. In any case, sensors emplaced as navigational aids are difficult to distinguish from those used to locate other states' submarines.

Although the emplacement of military devices, installations, and structures can be considered a freedom recognized for all states in the economic zone, there is an important limitation to consider. In exercising its freedom, the emplacing state "shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations established by the coastal State in accordance with the provisions of this Convention and other rules of international law not incompatible with this Part."²⁰⁰ This limitation is counterbalanced, however, by another provision of the negotiating text: the coastal state, in exercising its rights under the convention, "shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."²⁰¹ Nevertheless, the reference in the former provision to the duty of complying with the laws and regulations established by the coastal state may tilt the balance in its direction, even though it may be interpreted as merely spelling out, without going beyond, the rights and jurisdiction explicitly recognized as residing in the coastal state in the economic zone.²⁰²

What is the situation if the emplacement of devices and of installations and structures (which cannot interfere with the coastal state's rights in the economic zone) cannot be considered the exercise of a freedom specifically attributed to all states in the economic zone? It would seem that it falls in the no-man's-land of the "cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone."²⁰³ As already noted, the negotiating text acknowledges the existence of the problem; but instead of solving it with a residuary rule, it provides that when in such cases

a conflict arises between the interests of the coastal State and any other State . . . , 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.²⁰⁴

This provision tries to furnish a procedural solution for the problem of the "residuary rule" by setting forth a guideline for solving disputes. A dispute might be brought before one of the organs for compulsory dispute

²⁰⁰ ICNT/Rev.2 Art. 56, para. 2.

²⁰¹ ICNT/Rev.2 Art. 58, para. 3.

²⁰² Moore, intervention in NEW TRENDS IN MARITIME NAVIGATION 32 (Proceedings of the 4th International Ocean Symposium, Nov. 20–22, 1979, the Japan Shipping Club, Tokyo, 1980).

²⁰³ ICNT/Rev.2 Art. 59.

²⁰⁴ ICNT/Rev.2 Art. 59. This rule was first introduced in 1975: UN Doc. A/CONF.62/WP.8, pt. II, Art. 47(3), 4 OFF. REC. 159.

settlement established by the negotiating text. Resort to these organs, however, requires overcoming an array of legal obstacles, not least of which is the already mentioned optional exception for military activities.²⁰⁵ The difficulty of overcoming these obstacles makes it far from certain whether this kind of dispute is amenable to compulsory arbitral or judicial settlement under the negotiating text, but the dispute may also be solved by the parties through negotiation leading to an agreement. The way the rule is drafted, by indicating criteria for settling the dispute, seems to imply that the parties have an obligation at least to start negotiating in good faith. This view is reinforced by the fact that the rule incorporates concepts such as "equity," "relevant circumstances," and "the importance of the interests involved."²⁰⁶ Thus, the situation seems to be similar to those considered by the International Court in the *Fisheries Jurisdiction* case and the *North Sea Continental Shelf* case, where the Court found "implicit" in rights defined as "preferential," and in principles defined as "equitable," "that negotiations are required."²⁰⁷

Negotiations may not, however, bring agreement, and the procedural "solution" to the problem of the residuary rule can fail. It then becomes necessary to look for the substantive meaning, if any,²⁰⁸ of the rule. Its foremost purpose would seem to be negative. Its presence in the text indicates that when rights and jurisdiction are attributed neither to the coastal state nor to other states, it cannot be presumed either that jurisdiction belongs to the coastal state or that the principle of freedom applies. The

²⁰⁵ First of all, it has to be established that the dispute concerns the "interpretation or application" of the convention, as the means of settlement provided for in the ICNT/Rev.2 apply only to these disputes (Arts. 279 ff.). This obstacle overcome, it has to be determined whether the dispute relates to the "exercise" by a coastal state of its sovereign rights or jurisdiction (Art. 296, para. 1). If the answer is in the negative (because one considers that a question regarding the existence of these rights is different from one regarding their exercise), resort to arbitral or judicial procedures is possible. If the answer is in the affirmative, in order to resort to arbitral or judicial settlement, the dispute must be included in those listed in Article 296, para. 1 of the ICNT/Rev.2. Paragraph 1(a) seems particularly relevant, as it considers the case

when it is alleged that a coastal State has acted in contravention to the provisions of this Convention in regard to the freedoms and rights of navigation or overflight or of the laying of submarine cables and pipelines or other internationally lawful uses of the sea specified in article 58.

Even when applicable in principle, arbitral or judicial means of settlement must be ruled out if the already mentioned optional exception for military activities included in Article 298, paragraph 1(b) is applicable.

²⁰⁶ Brown, *The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts Between Different Users of the EEZ*, 4 MAR. POL'Y & MGMT. 325, 338-44.

²⁰⁷ Fisheries Jurisdiction case, *supra* note 28, at para. 74; North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands), Judgment of Feb. 20, 1969, [1969] ICJ REP. 3, especially para. 85. See the observations of Brown, *Exclusive Economic Zone*, *supra* note 206, at 343-44.

²⁰⁸ Skeptical observations on the legal effects of this provision are in Queneuclec, *Un Problème en suspens: la nature de la zone économique*, IRANIAN REV. INT'L REL., Nos. 4-5, 1975-76, at 39, 40; and in Gündling, *Die exklusive Wirtschaftszone*, 38 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 616, 654-55 (1978).

meaning of the former presumption seems clear. One must not deduce from the presence of sovereign and jurisdictional rights specifically attributed to the coastal state that, when there is no such attribution, the coastal state has jurisdiction as well;²⁰⁹ the concept of the economic zone cannot grow into something more comprehensive than the sum total of the powers specifically recognized for the coastal state.

The meaning of the second presumption is less clear. What does it mean to say that activities not specifically indicated as free cannot be presumed to be free? Activities envisaged in the provision under consideration, be they conducted by the coastal state or by other states, do not enjoy the same position as those encompassed by the freedoms of the high seas, whose exercise in the economic zone the negotiating text recognizes for all states. Both coastal and other states only have "interests" in conducting the former activities. However, the rule in Article 59 indicates that these interests are recognized, provided that the activity conducted in their pursuit does not cause a conflict with the interest of other states. This qualification puts the state that emplaces military objects, of the kind and under the conditions now under consideration, on the bed of the economic zone of another state in a relatively better position than the other state. While it cannot be presumed (even though for weapons it might be) that the emplacement of these objects conflicts with the interest of the coastal state, it is obvious that their removal or destruction by the coastal state conflicts with the interest of the emplacing state. Thus, emplacement of the objects may precede negotiations (or the arbitral or judicial settlement) because it does not necessarily cause a conflict; but their removal and destruction, unless the coastal state can rely on other rules such as those on self-defense,²¹⁰ have to be preceded by negotiation (or by judicial or arbitral settlement) because they invariably cause a conflict of interest. Consequently, objects may be removed or destroyed only if it is agreed or decided that they cannot be emplaced "on the basis of equity and in the light of all the relevant circumstances, taking into account" the other factors indicated in Article 59.

This situation is not entirely reflected in current customary international law. The position seems to be somewhere in between traditional law and the new law of the sea, as it emerges from the conference's negotiating text.

The evolutionary trends that have found acceptance in the negotiating text have weight from two viewpoints. The first is that of the width of the continental shelf. The new limits may reasonably be thought to have some influence on customary law. Though the precise definition of the outer limit

²⁰⁹ According to Riphagen, *supra* note 27, at 170–71 n.96, the legal importance of Article 59 is mostly negative "as it rules out 'residual' rights of the coastal State."

²¹⁰ While it would seem difficult to rely on self-defense for the purpose of justifying the emplacement of military objects on the seabed of another state (*see* E. D. BROWN, *supra* note 40, at 29–32), in some instances, especially when the objects emplaced are weapons, it appears possible to do so in order to justify the removal of the objects emplaced by another state. This position can be upheld either by accepting the interpretation that anticipatory self-defense is admissible under international law, or by relying on the fact that removal of the objects may be considered as not constituting use of force against a state and that it would fall into a concept of self-defense broader than that envisaged in Article 51 of the UN Charter.

of the shelf beyond the 200-mile line²¹¹ can hardly be considered to have become customary, apparently the criteria in the Geneva Convention²¹² are now obsolete and the coastal state's sovereign rights over resources are in the process of being recognized at least within the 200 miles,²¹³ and possibly soon beyond them, up to some yet undetermined reasonable limit based upon the physical characteristics of the shelf. The second is a consequence of the widening of the coastal state's jurisdiction. The duty of not interfering with activities conducted by the coastal state in the exercise of its sovereign rights over the continental shelf has been widened in scope to include noninterference with the new sovereign and jurisdictional rights of the coastal state within the 200-mile zone. Of course, the converse is also true. The coastal state must comply with a similar duty regarding other states' freedoms while it exercises its new powers within the 200-mile limit.

Two other aspects of the rules in the negotiating text do not seem to be reflected in current customary law. The first is the distinction among objects on the seabed, which has already been described as deriving from the replacement in the negotiating text of the word "devices" from the Geneva Convention with the word "structures." This distinction is so dependent on textual interpretation and on the history of the provision that it hardly can have an echo outside the framework of treaty law. The second, and more important, concerns the residuary rule. Because the rule in Article 59 on the "basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone" is the outcome of a compromise in the negotiation and is not confirmed by practice, the residuary rule remains that of freedom, as in traditional law. Though this rule is tilted toward the emplacing state for the time being, the situation might turn to its disadvantage in the long run. Were the concept of the economic zone to become more general and comprehensive than the sum of sovereign and jurisdictional rights on specific and different matters, the trend towards accepting the idea of the residuary competence of the coastal state might prove irresistible. From this point of view, the rule in the negotiating text seems to be a fair compromise and its widespread acceptance desirable.

Consequently, the legal situation of military objects emplaced on or beneath the seabed under national jurisdiction is not likely to undergo radical changes in the near future. The acceptability of using the seabed for the emplacement of detection and communication devices²¹⁴ is confirmed by the trend in the negotiating text towards reinforcing their inclusion within the high seas freedoms, and in particular within the freedoms recognized for all states in the economic zone. As regards weapons, though their emplacement in principle is free, it is likely that it would not be tolerated by the coastal state, which would possibly invoke interference with the exercise of its sovereign or jurisdictional rights within the 200-mile line.

²¹¹ ICNT/Rev.2 Art. 76.

²¹² Art. 1, Continental Shelf Convention, *supra* note 24.

²¹³ See, e.g., the agreement on delimitation quoted in note 32 *supra*.

²¹⁴ See the references in notes 65 and 66 *supra*.

Installations and Equipment for Military Scientific Research

The regime resulting from the negotiating text of the Law of the Sea Conference requires further qualification as to installations and equipment used for military scientific research on the bed of the economic zone or on the continental shelf.²¹⁵ According to the text, the deployment and use of such installations and equipment are subject "to the same conditions as those for the conduct of marine scientific research" in the various zones of the sea.²¹⁶

The general principle underlying the regime for marine scientific research in the economic zone and on the continental shelf is the consent of the coastal state.²¹⁷ The coastal state has "discretion" to deny its consent when the research project involves "the construction, operation or use of artificial islands, installations and structures," as referred to in the relevant articles in the parts on the economic zone and the continental shelf.²¹⁸ Yet, even if the scientific installations and equipment are no more than "devices," consent is still at the coastal state's discretion whenever the research involves exploration and exploitation of resources, drilling, the use of explosives, or the introduction of harmful substances into the marine environment.²¹⁹ Only when none of those conditions is verified²²⁰ will consent be granted "in normal circumstances," and then only if the research "to be carried out in accordance with this Convention [is] exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind."²²¹

At this point, the question of determining the meaning of "peaceful purposes" arises,²²² as well as whether this determination may be submitted to compulsory dispute settlement.²²³ Once it is established that the research equipment for which discretionary consent is not otherwise prescribed is to

²¹⁵ N. PAPADAKIS, *THE INTERNATIONAL LEGAL REGIME OF ARTIFICIAL ISLANDS* 205–25 (1977); Caflisch & Piccard, *The Legal Regime of Marine Scientific Research and the Third United Nations Conference on the Law of the Sea*, 38 *ZEITSCHRIFT AUSL. OEFF. R. U. VÖLKERRECHT* 848, 882–90 (1978); Yusuf, *Towards a New Legal Framework for Marine Research: Coastal-State Consent and International Coordination*, 19 *V.A. J. INT'L L.* 411, 427 (1979).

²¹⁶ ICNT/Rev.2 Art. 258.

²¹⁷ ICNT/Rev.2 Art. 246, paras. 1 and 2.

²¹⁸ ICNT/Rev.2 Art. 246, para. 4(c).

²¹⁹ ICNT/Rev.2 Art. 246, paras. 4(a) and (b).

²²⁰ It must be added that even when these conditions are met the coastal state "may not exercise" its discretion when research of direct significance for the exploration and exploitation of resources is to take place on the continental shelf beyond the 200-mile limit, provided, however, that the area where the research is conducted has not been publicly designated as an area "in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time" (ICNT/Rev.2 Art. 246, para. 6). This is the outcome of a long negotiation aiming at a compromise between states wishing to have the same regime for research on the continental shelf both within and beyond the 200-mile line and those maintaining that the regime of research on the outer continental shelf should be as liberal as possible. *Compare* Art. 246 bis(b) in UN Doc. A/CONF.62/91 (1979) and the Soviet proposal cited in note 195 *supra*.

²²¹ ICNT/Rev.2 Art. 246, para. 3.

²²² See *supra* sec. I, "Peaceful Purposes."

²²³ See Art. 296, para. 2 of the ICNT/Rev.2, and the comments by Caflisch & Piccard, *supra* note 215, at 877–78 and by Treves, *Principe*, *supra* note 61, at 264–65.

be used exclusively for peaceful purposes (some military equipment may be included, according to one interpretation of "peaceful purposes"), consent will be granted "in normal circumstances." Thus, an obligation on the part of the coastal state is implied. In order not to abide by it, the coastal state has to claim that circumstances of an abnormal character prevail. Although it has a certain discretion in defining those circumstances, the burden of claiming their existence falls on the coastal state. On the other hand, if it is established that the scientific installations and equipment (always assuming discretionary consent is not otherwise required) are not exclusively for peaceful purposes, there is no obligation to grant consent "in normal circumstances." Because consent also is not at the coastal state's discretion, the case does not fit into the categories established by the rules on scientific research, apart from the general one that requires the coastal state's consent.²²⁴ The degree of obligation, and, conversely, of discretion, devolving upon the coastal state in granting its consent would then seem to depend on the degree to which the research project and its installations and equipment are linked to activities that all states are free to pursue under the general rules of the negotiating text on the economic zone.²²⁵ Thus, for instance, a scientific device for studying the propagation of sound in the marine environment in order to improve the performance of submarine sensing devices ought to be authorized, even assuming that it has been classified as not exclusively for peaceful purposes.

Treaty Law Exceptions

Treaty law permits substantial exceptions to the legal regime just described.

As already mentioned, under the Partial Test Ban Treaty of 1963, nuclear explosions may not be carried out in the water column or on the surface of the seabed; whether they may be carried out beneath the seabed seems to depend on their not leaving radioactive debris in the water column or in the atmosphere.²²⁶ The first prohibition is in a provision that speaks of explosions "under water including territorial waters or high seas." The new concept of the economic zone suggests the question whether explosions in the economic zone or on its seabed are excluded, especially considering that the regime for the economic zone is defined as a "specific" one.²²⁷ This kind of question is likely to be asked about a number of treaties that are framed in terminology shaped under the traditional law of the sea but will be applied under the new law of the sea.²²⁸ The answer, at least as far as the 1963 Partial Test Ban Treaty is concerned, appears to be in the negative: the distinction between absolute and conditional prohibitions probably in-

²²⁴ ICNT/Rev.2 Art. 246, para. 1.

²²⁵ Treves, *Principe*, *supra* note 61, at 267.

²²⁶ *Supra* sec. II.

²²⁷ ICNT/Rev.2 Art. 55.

²²⁸ This question has been asked regarding the reference to the "high seas" contained in Article 12 of the 1944 Chicago Convention on Civil Aviation: does this reference in the conditions now prevailing exclude the economic zone? Compare Heller, *Airspace over Extended Jurisdictional Zones*, in THE LAW OF THE SEA: NEGLECTED ISSUES, *supra* note 23, at 135, 144-48, and Hailbronner, *id.* at 154.

dicates that the treaty provision envisages every area of the seas.²²⁹ Consequently, explosions on the bed of the economic zone continue to be prohibited.

As to the prohibitions in the Tlatelolco Treaty of 1967, their scope of application will include the continental shelf when the conditions for the full application of the treaty are met. At present, there may be some difficulty in determining whether the treaty applies to the continental shelf of the contracting states because this depends on whether they exercise "sovereignty" over the shelf under their own laws.²³⁰

The Seabed Treaty of 1971 has prompted discussion, both among states and among legal writers, that requires three different sets of observations. First, it has already been pointed out that the area covered by the prohibition includes all the continental shelf and the economic zone beyond the line that the treaty defines by cross-reference to the Geneva Convention on the Territorial Sea.²³¹ Nevertheless, it has been suggested that if the parties to the treaty were to agree to the definition of the contiguous zone in the negotiating text, under which this zone may extend up to 24 miles from the baselines of the territorial sea,²³² the nuclear-free zone set forth by the treaty would shrink by 12 miles.²³³ This opinion apparently stems from the assumption that the exempted zone is defined with reference to the notion of the contiguous zone, no matter what it may be, provided it is applicable to the parties. But, as already noted, the reference in the treaty is to a precise 12-mile measure, "coterminous" with the contiguous zone as defined in the Geneva Convention.

Second, the treaty does not grant the contracting parties the right to emplace or emplant conventional weapons and related structures, installations, and facilities on the continental shelf or in general where the emplacement and emplanting of nuclear weapons, weapons of mass destruction, and related structures are prohibited.²³⁴ The legal situation of conventional weapons remains as it is under the general law of the sea on the continental shelf and the economic zone.²³⁵ The only inference that can be drawn in this respect is that the contracting states believe that there is no general rule preventing them from emplacing conventional weapons on the seabed: the presence of such a rule would make the prohibition in the treaty superfluous. Yet even this inference could raise some doubts: in a specific article, the treaty disclaims any consequence on the parties' positions on the most important problems of the law of the sea.²³⁶

²²⁹ This seems to be confirmed by the Legal Adviser to the Department of State, who stated that "the phrase 'including territorial waters or high seas' is illustrative and not limiting": M. WHITEMAN, 11 DIGEST OF INTERNATIONAL LAW 790 (1968).

²³⁰ See *supra* sec. II.

²³¹ Arts. I and II: see *supra* sec. II.

²³² ICNT/Rev.2 Art. 33, para. 2.

²³³ Larson, *supra* note 5, at 50-51.

²³⁴ The opposite line of reasoning seems to have been taken by the USSR, whose representative said at the United Nations on Nov. 11, 1968: "if we should prohibit military uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction, we would, as it were, be permitting the use of the continental shelf for military purposes" (UN Doc. A/C.1/PV.1605, para. 39).

²³⁵ E. D. BROWN, ARMS CONTROL, *supra* note 40, at 28.

²³⁶ Art. IV.

Third, the Seabed Treaty provides for an elaborate multistage verification procedure²³⁷ that allows any state party to engage in observation if it does not interfere with the seabed activities of other parties. More penetrating forms of verification, such as "inspection of objects, structures, installations and other facilities," may be carried out only after consultation with the state suspected of acting inconsistently with the treaty, and provided they are effected in cooperation with other states.

One might draw the implication from the provisions on verification that any form of verification they do not regulate is precluded. This implication, however, is difficult to accept. It has already been shown that all states may observe and inspect objects emplaced on the continental shelf of any other state (unless this interferes with their functioning).²³⁸ It would be absurd for states to have more powers over verification regarding conventional weapons than they have regarding the infinitely more dangerous nuclear weapons. Consequently, it seems preferable not to interpret the provisions on verification so as to restrict the existing verification powers of both coastal and other states.

The declaration made by Canada when it ratified the treaty may have proceeded from a premise of this kind. Canada stated:

[T]he provisions in article III cannot be interpreted as indicating any restrictions or limitations upon the rights of the coastal State, consistent with its sovereign rights with respect to the continental shelf, to verify, inspect or effect the removal of any weapon, structure, facility or device implanted or emplaced on the continental shelf or the subsoil thereof appertaining to the coastal State. . . .

India made the same point and mentioned, in addition, the coastal state's right to destroy the objects emplaced by other states on or beneath its continental shelf.²³⁹

As the procedures regulated by the treaty cannot thus be seen as restrictions on the coastal state's (as well as any other state's) rights of verification, the innovative aspect of the treaty has to be sought in its improvements on these rights. These improvements are apparent when one considers that the treaty provides for cooperation among states and for assistance to be given to states needing it by other states, as well as through "appropriate international procedures within the framework of the United Nations and in accordance with its Charter."²⁴⁰ These provisions improve the contracting states' capacity to perform verification activities. The procedures set forth in

²³⁷ Art. III. Apart from the unilateral "observation" set forth in paragraph 1, the procedures for verification considered in the article have never been utilized: Final Act of the 1977 Review Conference under Art. III, in UN Doc. SBT/CONF/25/II. The article is analyzed by E. D. BROWN, ARMS CONTROL, *supra* note 40, at 75–88, and by L. MIGLIORINO, *supra* note 40, at 73–89.

²³⁸ See *supra* sec. IV, "The Traditional Law of the Sea."

²³⁹ STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, *supra* note 111, at 109–11. This does not mean that it is possible to agree with these states on the rights which international law recognizes for the coastal state on the shelf. See also *id.*, the objections by the Federal Republic of Germany, the United States, and the United Kingdom.

²⁴⁰ Art. III, para. 5.

the treaty, including inspection under certain conditions, may be carried out by all state parties on the continental shelves of all other state parties, and by the coastal state not only when it claims interference with its sovereign rights over resource-oriented activities but in all cases.

The principle of interpretation used above, *i.e.*, that the provisions of the treaty cannot reduce verification powers already existing under international law, helps in assessing whether other declarations made by state parties conform to the treaty. According to Brazil, the word "observation" in the treaty "refers only to observation that is incidental to the normal course of navigation in accordance with international law."²⁴¹ This declaration did not meet with any objections, probably because it was assumed that international law permits navigation for any purpose in the sea above the continental shelf. However, it would be contrary to the treaty if it were meant to refer to a situation—such as the one consequential to Brazil's claim to a 200-mile territorial sea—in which only innocent passage is admitted in those waters.²⁴²

Yugoslavia declared that

article III, paragraph 1, should be interpreted to the effect that a State exercising a right under this article shall be obliged to notify in advance the coastal State, in so far as observations are to be carried out within the stretch of the sea extending above the continental shelf of that State.²⁴³

The United States, the United Kingdom, and the Federal Republic of Germany objected to this declaration by stating that it could not have an effect on the existing law of the sea.²⁴⁴ The decisive reason for considering the declaration as incompatible with the treaty is probably that it would diminish, and not improve, the verification powers already existing under the treaty and international law of all but the coastal state.

V. THE INTERNATIONAL SEABED AREA

Few observations are needed on the legal situation of military installations, structures, and devices on the seabed beyond national jurisdiction under the traditional law of the sea. It is the same as for that of the continental shelf, though with the obvious difference that claims that the coastal state can exercise by taking advantage of its sovereign rights over resource-oriented activities are out of place for the deep seabed. Thus, according to the traditional international law of the sea, all states are free to emplace any kind of military installation, structure, or device on the deep seabed. The main limitations on this freedom come, first, from the duty to pay

²⁴¹ STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, *supra* note 111, at 108.

²⁴² Decree Law No. 1098 of March 25, 1970, Art. 3, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA (ST/LEG/SER.B/16, at 3, 1974); A. SZEKELY, *supra* note 110, vol. 2, Booklet 3, at 49 (Jan. 1978).

²⁴³ STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS, *supra* note 111, at 113.

²⁴⁴ *Id.* at 111, 113.

"reasonable regard" to the interests of other states in their exercise of the freedom of the high seas and, second, from treaty obligations.

The observations already made about the interests of other states also apply to the deep seabed, especially the possibility of resorting to the rules on installations emplaced on the continental shelf for economic purposes, which safeguard the freedom of navigation and other high seas freedoms. As for the second kind of limitation, the prohibitions under the 1963 Partial Test Ban Treaty and the 1971 Seabed Treaty apply to the whole deep seabed, and the Tlatelolco Treaty of 1967, when it is applied in its full geographical scope, will include some portions of the deep seabed.

Will this situation change in the framework of the new law of the sea? The main features of this new law, as it emerges from the conference's negotiating text, relevant to this question are the principle that the International Seabed Area and its resources are the "common heritage of mankind"²⁴⁵ and the rules providing that the exploration and exploitation of resources in the Area shall be "organized, carried out and controlled" by a new international entity, the International Seabed Authority,²⁴⁶ which will grant "exclusive rights" to the exploration and exploitation of given portions of the Area²⁴⁷ to states, state entities, natural or juridical persons, and a new international industrial entity, the Enterprise.²⁴⁸

Under the UN General Assembly's Declaration of Principles of 1970 and the negotiating text, the principle of the common heritage of mankind applies not only to the resources of the Area, but also to the Area itself.²⁴⁹ As military activities are not resource oriented, it seems necessary to determine, preliminarily, whether the principle that the Area as such is the common heritage of mankind entails a legal situation different from that prevailing under the rules on the high seas.

The answer would seem to be that it does not, and that the proclamation of the Area as the common heritage of mankind is essentially rhetorical. Although there are some provisions in the negotiating text that mention activities conducted in the seabed Area beyond national jurisdiction different from the resource-oriented activities defined as "activities in the Area," they do not seem to add anything to what is already implied in the regime of the high seas.

Thus, the rule on marine scientific research in the Area repeats the general principle of freedom applicable to research in the high seas.²⁵⁰

²⁴⁵ GA Res. 2749 (XXV) of Dec. 17, 1970, para. 1; ICNT/Rev.2 Art. 136.

²⁴⁶ ICNT/Rev.2 Art. 153, para. 1.

²⁴⁷ ICNT/Rev.2, Ann. III, Art. 16.

²⁴⁸ ICNT/Rev.2 Art. 153, para. 2.

²⁴⁹ "The Area and its resources are the common heritage of mankind": ICNT/Rev.2 Art. 136 (emphasis added).

²⁵⁰ ICNT/Rev.2 Arts. 143(3), 256, and 257. The proposals for an "internationalization of research" in the Area (*see, e.g.*, the Iranian intervention at the 68th meeting of the Plenary, 5 OFF. REC. 66) had no further consequence than the adoption of rules permitting the Authority to engage in marine scientific research "concerning the Area and its resources" and providing that states shall promote scientific cooperation in the Area (ICNT/Rev.2 Art. 143, paras. 2 and 3).

The rule on the use of the Area exclusively for peaceful purposes does not add anything to the rule on the same subject for the high seas.²⁵¹ Nor does the rule forbidding appropriation of any part of the Area add to the rule that "no State may validly purport to subject any part of the high seas to its sovereignty."²⁵²

Moreover, some rules concerning (resource-oriented) "activities in the Area" consider the non-resource-oriented activities in order to safeguard the freedom to pursue them and to accommodate them to the "activities in the Area." Thus, the first revision of the Informal Composite Negotiating Text contained a rule permitting the Authority to close a particular zone of the Area to prospecting for resources when there is a risk of "unjustifiable interference with other uses of the Area."²⁵³ The second revision includes an article on "accommodation of activities in the Area and in the marine environment" that provides that "activities in the Area shall be conducted with reasonable regard for other activities in the marine environment."²⁵⁴

Thus, no change seems to follow from the fact that the Area as such has been proclaimed the common heritage of mankind. This is not so, however, with regard to the application of the common heritage principle to the resources of the Area and with regard to the international regime of exploration and exploitation that the negotiating text sets forth to substantiate the principle.²⁵⁵ The key article is the one on the accommodation of activities in the Area to other activities in the marine environment. This article contains two general rules: the first one, already quoted, states that activities in the Area shall be carried out with "reasonable regard" for other activities in the marine environment; the second states that "other activities in the marine environment shall be conducted with reasonable regard for activities in the Area."²⁵⁶

These provisions give no priority to one kind of activity over the other. They repeat the general rule on the exercise of high seas freedoms with reasonable regard for the exercise of these freedoms by other states. The only detailed indication of how this "reasonable regard" should be construed can be found in the provisions on installations for conducting "activities in the Area." When emplacing and using these installations, the entities engaged in exploration and exploitation shall take various precautions for safeguarding the freedom (and the safety) of navigation that are similar to those set forth for installations emplaced for the same purpose on the con-

²⁵¹ Compare Art. 141 with Art. 88 of ICNT/Rev.2.

²⁵² Compare Art. 137, para. 1 with Art. 89 of ICNT/Rev.2.

²⁵³ ICNT/Rev.1, Ann. II, Art. 2, para. 1(d). The article was deleted from the ICNT/Rev.2 "since the nature of prospecting activities is such that it is unlikely to have such major effects as to cause irreparable harm to the marine environment or interfere seriously with other uses of the Area" (UN Doc. A/CONF.62/91, at 39 (1979)).

²⁵⁴ Art. 147, para. 1.

²⁵⁵ Even apart from the distinction in the text, the literature on the consequences of the common heritage principle for military activities is scant. See, however: O'Connell, *Resource Exploitation*, *supra* note 142, at 166–67; Buzan, *supra* note 172, at 13–14; Booth, *supra* note 23, at 354–56.

²⁵⁶ ICNT/Rev.2 Art. 147, paras. 1 and 3.

tinental shelf.²⁵⁷ As argued before, when the problems of military installations on the continental shelf were examined, the same precautions should apply whenever possible to installations emplaced for purposes other than the exploration and exploitation of the Area. Because these obligations apply to entities with an exclusive right to explore and exploit a given portion of the Area, they should be all the more applicable to states that have not obtained such rights.

There are further obligations states and entities conducting "activities in the Area" and states engaged in other activities in the marine environment have to comply with in order to pay "reasonable regard" to each other's activities. It may be useful to distinguish between the situation preceding and leading to the grant of an exclusive right to explore and exploit a given portion of the Area, and the situation following approval of the plan of work which grants this right.

In the former situation, prospecting is the most relevant activity. Though prospecting imposes some obligations on the prospector towards the Authority,²⁵⁸ it does not seem to imply any privilege in respect to other states' activities. Consequently, states engaging in prospecting shall manifest the same reasonable regard for other activities, including military ones, as states conducting the latter shall observe towards prospecting. The Authority, directly through the Enterprise or indirectly through other entities, is involved in the "activities in the Area" and consequently bound by the article on accommodation of activities. Thus, it should avoid creating situations of conflict or unreasonable conflict. There is, however, no specific provision for ensuring this result. On the contrary, it is likely that the procedure for approving plans of work will not even serve to inform the Authority of other competing or conflicting interests in the seabed. This situation results from the otherwise justifiable lack of publicity inherent in the procedure for approving plans of work²⁵⁹ and the policy reflected in the negotiating text of preventing the Authority from interfering in fields other than the exploration and exploitation of the Area.²⁶⁰

In the second period, after the plan of work has been approved, the general rules on reasonable regard will still be applicable. Exploration and exploitation of resources are on the same footing as other activities and enjoy no special status. Thus, in principle, if entities conducting "activities in the Area" claim, for instance, that military sensors on the mining site al-

²⁵⁷ ICNT/Rev.2 Art. 147, para. 2. The main difference between this provision and the rules on installations in the economic zone and on the continental shelf (Arts. 60 and 80) seems to be that the establishment of safety zones is compulsory, while, according to the articles just mentioned, it is a right of the coastal state.

²⁵⁸ ICNT/Rev.2, Ann. III, Art. 2, para. 1(b).

²⁵⁹ ICNT/Rev.2, Ann. III, Art. 6.

²⁶⁰ Besides the already mentioned article on marine scientific research, see the definition of "activities in the Area" as the "activities of exploration for, and exploitation of, the resources of the Area" (ICNT/Rev.2 Art. 1). This definition entails a substantial limitation to the scope of the Authority's powers in most articles of part XI of the ICNT/Rev.2. However, for an indication of the potential for expansion of the powers of the Authority, see Darman, *supra* note 3, at 387.

lotted to them are hampering their activities and ask that the sensors be removed, they will not be in a better position than the emplacing states if the latter claim that the mining is interfering with the functioning of their sensors. In practice, however, there are factors that give some advantage to the former claim. The rights of the entity engaged in exploration or exploitation, though not sovereign, are "exclusive." Moreover, they are granted by an international organization acting "on behalf of mankind." These considerations seem to rule out the possibility that the "activities in the Area," especially those of the Enterprise, might be conducted "not exclusively for peaceful purposes," an assumption that cannot be taken for granted for the conflicting activities.

Judicial or arbitral decisions, of course, could contribute to making the law clearer in this, as in other, fields. It is not likely, however, that these problems will be examined by a court or tribunal because the optional exception to compulsory settlement of disputes related to military activities, mentioned earlier, also applies here. Apart from this exception, which, as mentioned, is optional, compulsory settlement seems to apply to the situation here considered, though only to some extent. The Seabed Disputes Chamber of the Law of the Sea Tribunal, as envisaged by the negotiating text, has jurisdiction over "disputes between States parties concerning the interpretation and application" of the part of the convention dealing with activities in the Area.²⁶¹ This part includes the article on the accommodation of activities in the Area and other activities in the marine environment. Thus, a dispute over whether the exclusive right to explore and exploit a portion of the Area entitles the state that has been granted this right to obtain or effect the removal of sensors emplaced there by another state may be submitted to the Seabed Chamber, unless one of the parties to the dispute has resorted to the "military activities" exception. What seems possible for disputes between states, however, is problematical for disputes of this kind with the Authority, and seemingly impossible for disputes with the Enterprise.²⁶² This gap must be viewed as a serious flaw in the system for settling disputes relating to the International Seabed Area.

Accommodating "activities in the Area" with "other activities in the marine environment" becomes even more difficult if the state conducting the latter is not a party to the Law of the Sea Convention. In this case,

²⁶¹ ICNT/Rev.2 Art. 187(a).

²⁶² Regarding disputes with the Authority, the Chamber has jurisdiction over those that concern acts or omissions violating part XI of the convention (or the annexes thereto, or the rules, regulations, and procedures promulgated in accordance with it) or acts of the Authority alleged to be in excess of jurisdiction or misuse of power (ICNT/Rev.2 Art. 187(b)). The state whose military objects on the seabed are interfered with by mining activities could claim that the Authority, in granting exclusive rights to the mining entity, has violated the rule of Article 147 on accommodation of uses. The same article could be invoked by the Authority against the emplacement of military objects in a zone of the seabed for which it has granted a mining contract. It would seem, however, that both of these claims would be quite indirect. Concerning disputes with the Enterprise, there seems to be no possibility of bringing them before the Chamber because such disputes are taken into account by the negotiating text only when they arise between the parties to a contract for exploration and exploitation (ICNT/Rev.2 Art. 187(c)).

not only will recourse to compulsory settlement of disputes under the convention be ruled out, but the reasons for giving greater weight to the claims of the entity conducting "activities in the Area" under the convention will be less compelling. A strict application of the "reasonable regard" concept in the exercise of high seas freedoms seems to be the only answer, though it may not be entirely satisfactory for avoiding conflicts.

What is or will be the situation of military installations, structures, and devices on the seabed beyond national jurisdiction pending the entry into force of the Law of the Sea Convention? In other words, has the concept of the common heritage of mankind already produced some consequences that can influence the legal situation of these installations, structures, and devices?

If the assumption were true that under present international law, as influenced by the 1970 Declaration of Principles and by the work of the Third United Nations Conference on the Law of the Sea, the recovery of minerals from the seabed beyond national jurisdiction is illegal if not conducted according to the system regulated by the Law of the Sea Convention, there would be no doubt that, in principle, a claim to use the seabed for the emplacement of military objects would prevail over an invalid claim to use it for mining purposes. If, however, this assumption, which the Group of 77 strongly upholds at the conference,²⁶³ were not found to be acceptable, and the position of the most interested industrialized states were followed,²⁶⁴ seabed mining would be an activity included in the high seas freedoms. The "reasonable regard" test would be decisive. Yet, especially if mining were conducted under an arrangement (domestic or international) designed to respect the common heritage principle, for instance by diverting a part of the profits to developing countries and international assistance organizations,²⁶⁵ some of the reasons already indicated for preferring the claims of the mining states, in case of conflict, could be invoked.

²⁶³ See especially the interventions of the Group of 77's spokesman, the representative of Fiji, on Aug. 28 and Sept. 15, 1978: UN Docs. A/CONF.62/BUR/SR.41 and A/CONF.62/SR.109. The full text of the latter intervention is reprinted in 10 LAW. AMERICAS 977 (1978). See also UN Doc. A/CONF.62/77 (April 25, 1979), with a memorandum by a special group of legal experts of the Group of 77. See also Orrego Vicuña, *Les législations nationales pour l'exploitation des fonds des mers et leur incompatibilité avec le droit international*, 24 ANNUAIRE FRANÇAIS DE DROIT INT'L 810-26 (1978).

²⁶⁴ See especially the interventions by the U.S. representative on Aug. 28 and Sept. 15, 1978: UN Docs. A/CONF.62/BUR/SR.41 and A/CONF.62/SR.109, the latter being reprinted in 10 LAW. AMERICAS 981 (1978). See also the interventions by France, the Federal Republic of Germany, Italy, Belgium, Japan, the Netherlands, and the United Kingdom in UN Doc. A/CONF.62/SR.109 (1978). Among legal writers, T. G. KRONMILLER, THE LAWFULNESS OF DEEP SEABED MINING (1979); Burton, *Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims*, 29 STAN. L. REV. 1135 (1977); Jackson, *Deepsea Ventures: Exclusive Mining Rights to the Deep Seabed as a Freedom of the Sea*, 28 BAYLOR L. REV. 170 (1976).

²⁶⁵ This kind of provision is included in the U.S. Deep Seabed Hard Minerals Resources Act of 1980, Pub. L. No. 96-283 §403 (see also §§102(c) and 201), 94 Stat. 553. The international arrangements mentioned in the text could include the "mini-treaty" envisaged by Darman, *supra* note 3, at 393-95, and criticized by Orrego Vicuña, *supra* note 263, at 824.

Whatever opinion is considered preferable on the legality of seabed mining under present international law, it would seem reasonable that states conduct their nonmining activities on the seabed beyond national jurisdiction so as to avoid jeopardizing the feasibility of mineral exploration and exploitation. If, for instance, the emplacement of military installations, structures, or devices were to require making huge crevasses in a part of the seabed rich in manganese nodules, and if these crevasses would substantially hamper seriously envisaged mining activities, an important question would be presented as to feasibility.

The rules in the Partial Test Ban Treaty, the Seabed Treaty, and the Treaty of Tlatelolco do not seem to conflict with the regime for the exploration and exploitation of the Area set forth in the negotiating text. On the contrary, the prohibitions stipulated by those treaties, inasmuch as they concern the Area, contribute to eliminating possible conflicts with "activities in the Area."

The idea of granting verification powers to the Authority, which would include those granted to states parties to the 1971 Seabed Treaty, has been proposed.²⁶⁶ The negotiating text seems to rule out this possibility, however, by limiting the Authority's inspection powers to "all facilities in the Area used in connexion with activities in the Area."²⁶⁷ Nonetheless, this provision gives the Authority the opportunity to determine whether states use installations for military purposes that were emplaced for conducting "activities in the Area." This discovery, when made public, would already amount to a sanction. Yet the Authority would have further means to apply pressure on the emplacing state by claiming violation of the "peaceful purposes" clause. It could issue warnings and, if certain conditions were met, suspend or terminate the contract.²⁶⁸ Moreover, were the emplacing state subsequently to ask for another contract, the Authority could claim it was not qualified because the military use of the installations under the previous contract amounted to an unsatisfactory performance of that contract.²⁶⁹

Verification conducted by member states in cooperation with the Authority (or by the Authority on behalf of member states) might also be considered, in the words of the Seabed Treaty, as verification conducted "through the appropriate international procedures within the framework of the United Nations and in accordance with its Charter."²⁷⁰ Though attractive, this possibility does not seem to correspond either to the provisions of the negotiating text or to those of the Seabed Treaty.²⁷¹ From the vantage point of the former, it implies that the Authority and its activity are included in the framework of the United Nations. From that of the latter, it requires a wider power of inspection than is now admitted.

²⁶⁶ Canadian intervention of March 6, 1972, at the Seabed Committee (UN Doc. A/AC.138/SC.1/SR.33), and Iranian intervention at the Third Law of the Sea Conference on April 26, 1976, UNCLOS III, 5 OFF. REC. 66 (especially para. 26). E. LUARD, *supra* note 1, at 243.

²⁶⁷ ICNT/Rev.2 Art. 153, para. 5.

²⁶⁸ ICNT/Rev.2, Ann. III, Art. 18.

²⁶⁹ ICNT/Rev.2, Ann. III, Art. 4, para. 2.

²⁷⁰ Seabed Treaty Art. III, para. 5.

²⁷¹ L. MIGLIORINO, *supra* note 40, at 85-87.