Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law – Comment

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Before commenting on what Prof. Orrego said, I should note in the context of what Prof. Wolfrum just said, that if you compare the text of article 63(2) with the text of article 64 you will find an interesting difference. Article 63(2) refers to conservation beyond and adjacent to the exclusive economic zone. Article 64 refers to conservation measures that apply both within and beyond the exclusive economic zone. I can't fault Prof. Orrego on this. Who hasn't from time to time overlooked inconvenient nuances?

My reaction to the challenge posed by Prof. Orrego's paper is possibly best symbolized by the introductory verses to the first gnomic poem of a revered medieval German poet. In translation: "I sat on a stone and covered one leg with the other and leaned my elbow upon it. My chin and my cheek nestled in my hand".

And so I too thought and thought. I cannot claim that the result of my pensive reaction is in any sense comparable to the poetry that followed the original, or even to the elegance of Prof. Orrego's analysis. But I do believe Prof. Orrego's paper poses profound problems of perspective that require some, however inadequate, response.

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Prof. Sohn just pointed out that the law always changes, always develops, always adapts to new conditions. No one contests that. But how are we supposed to think about the UN Convention on the Law of the Sea in this connection? What is its role in the future development of the law?

At least two basic points of view are possible. According to the first point of view the Convention is an event, even an important event, in a continuing development of State practice and customary law that sooner or later will overtake the Convention and render it increasingly irrelevant.

According to the second point of view, the Convention is, in its essence, what the President of the Law of the Sea Conference, Ambassador Koh, called "a constitution for the oceans". As such it of course requires detailed implementation and adaptation. But as a constitution it nevertheless defines the basic framework and procedures for developing the law of the future.

Some international lawyers may be tempted to embrace both points of view, depending on the circumstances. When the lawyers are preoccupied with the descriptive accuracy of their statements about the law, they are likely to wax conservative and embrace the first point of view. When the lawyers are preoccupied with building a stronger structure for international law and institutions for the future, they are likely to wax creative and embrace the second point of view.

What troubles me, and I want to emphasize this, is not the descriptive accuracy of Prof. Orrego's conclusion that the first point of view is more likely to prove correct if the problem of high seas fisheries is not resolved effectively, and reasonably soon. I think he is absolutely right. What troubles me is that Prof. Orrego appears to have lost sight of the goal of establishing and maintaining the Convention as the basic instrument for ordering the international law of the sea. What he called the changing role of international law I would call the effective implementation of the Convention. This is no mere semantic difference.

A common theme united many developing countries and industrial countries in undertaking the negotiation of the Convention. This theme can be summarized in one word: participation. It is not just the Seabed Authority, but the Convention as a whole, that is designed to represent a shift to global participation in negotiation as the means for settling the basic structure of the law of the sea. Self-interested bilateral power struggles were rejected as the preferred means for creating law.

The seriousness of this perspective is evident in many points of the Convention. I will cite just two. While it is common for many treaties to

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contain savings clauses on customary international law, the one in the Convention was very carefully negotiated and is unusual. The final preambular paragraph of the Convention affirms "that matters not regulated by this Convention" continue to be governed by the rules and principles of general international law. Since the Convention applies to all parts and all peaceful uses of the sea, the clear implication is that the Convention, not customary law, is the point of departure for developing the law of the sea as such in the future.

Second, as our discussions here have emphasized, the Convention provides for compulsory dispute settlement with respect to most issues, and establishes its own permanent court and its own arbitration procedures. This strengthens the idea that international institutions rooted in the Convention are to be accorded a much stronger role in adapting the law to new problems in the future.

I am afraid that one searches Prof. Orrego's paper in vain for the notion that what is now at stake whether we will or will not have a globally ratified Law of the Sea Convention. What is now happening here in Europe is important, but it is only part of the process. As European States proceed with ratification, they should not lose sight of what happened to the 1958 Conventions. Ratification to the Convention in Europe and North America is indispensable to, but not in and of itself, global ratification. Only global (or close to global) ratification can achieve the participatory goal that was originally envisaged.

At issue is whether we now realize the fundamental shift from unilateralism to global multilateralism as the foundation for the law of the sea. We must recognize that unilateralism is inconsistent with the very thesis of compulsory co-operation that commanded such widespread attention in our discussions in this room yesterday.

Ms. Davidson said yesterday that the whole range of United States interests in the sea would be considered by the United States Senate in reaching a decision on the Convention. She might have added that some important U.S. Senators see the high seas straddling stock issue in terms that Prof. Orrego would find quite congenial. Prof. Orrego was among many distinguished international lawyers to remind the United States some years ago that it cannot pick and choose what it likes and disregard what it dislikes. I feel constrained to note that the same is true of Chile. If, in Prof. Orrego's view, the prohibition of unilateral control of the deep sea beds is *jus cogens*, why is the same prohibition with respect to the high seas any different?

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High seas fisheries is not the only issue for the United States, for Chile, for the European Community or for anyone else. That essential point was obvious in the behaviour of delegations at the Law of the Sea Conference. It is much less obvious when countries send fishery bureaucrats to negotiate with each other. Such experts cannot be faulted if they attach a lower priority to other interests in the law of the sea, including establishment of the Convention as the guiding instrument of the law of the sea.

We are at risk of returning to the situation that existed before the Law of the Sea Conference in a profound institutional sense. Many governments and the European Commission are entrusting the future of the law of the sea, and all of their law of the sea interests, to those whose main constituency is fisherman who are overfishing their own coastal waters. At the same time international lawyers are being asked to devise strategies for achieving fisheries objectives. Not surprisingly some lawyers threaten unilateral action and of course invoke the processes for changing customary international law by unilateral action to support their theses.

In this regard I find unconvincing Prof. Orrego's distinction between unilateral claims of maritime zones and unilateral claims of jurisdiction without claiming a zone. But I also find highly individualistic rather than co-operative interpretations of high seas law under the Convention to be equally unconvincing. The purpose of the Law of the Sea Convention is to transform the debate between Grotius and Selden, not simply to shift the lines of the confrontation. The answer, as Prof. Orrego rightly recognizes, lies in constructive negotiation. I would add that the purpose of such negotiation should be to implement and build on the Convention, not to supplant it.

In this regard we must recognize that the Convention affords almost unlimited latitude to States in arriving at agreed practical fisheries management solutions on the high seas, subject to their individual and collective duty to ensure conservation. What the Convention requires is good faith negotiation resulting in conservation. What it does not require is any particular type of fisheries management arrangement. Flag States are free by agreement under the Convention to qualify their freedom of fishing in any appropriate way. But flag States are not free to ignore their duty to conserve or to co-operate with each other and with coastal States.

We need not rush into the very contentious intellectual world of objective regimes to deal with the problems of new entrants. A new entrant has the duty to conserve and to co-operate. This duty qualifies its freedom of fishing. An existing agreed conservation regime and institution simply

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cannot be ignored. The logic of the Convention could not be clearer on this point. The Convention requires conservation and co-operation, but it does not establish a global fisheries regulatory system; rather it mandates regional and sectoral regulation. Articles 63 and 118 entrust fisheries conservation measures and institutional arrangements on the high seas with respect of straddling stocks to the coastal State and the States currently fishing in the area. The right to fish on the high seas is expressly subject to both of those articles. This structure would simply make no sense if a new entrant could claim a right to ignore existing conservation regimes and institutions established in conformity with the Convention.

The Convention requires that high seas conservation measures be non-discriminatory. But this does not mean that agreed allocations consistent with those measures must be equal. Agreed allocations may favour fishermen of nearby States, or traditional fishing, or fishermen particularly dependent on an area, or other fishermen. Articles 62 and 63, and other provisions of the Convention, give ample evidence of the very wide range of allocational factors that were considered appropriate by the Convention's drafters in other contexts. What the costal States justifiably seek is not new preferences but conservation, protection of the rights and preferences in the exclusive economic zone accorded them by the Convention.

Nor does the Convention require only flag state enforcement. Article 92 makes it quite clear that States may co-operate by agreement in sharing competence over the activities of ships, and that such co-operation is an exercise of sovereignty, not a derogation from sovereignty. Co-operative enforcement agreements are a common feature of international co-operation in the suppression of traffic in narcotics. They have been and can be used for fisheries as well.

Moreover, duties with respect to high seas fishing are a subject to compulsory dispute settlement under the Law of the Sea Convention. As noted by Prof. Treves this morning, this includes the right to prescribe binding provisional measures. These measures may be prescribed either to preserve the respective rights of the parties (the traditional rule) or, under the Convention, to prevent serious harm to the marine environment. In transmitting the Convention to the Senate the United States Department of State pointed out that the marine environment includes marine life. Thus a tribunal may prescribe provisional conservation measures for living marine resources whether or not such measures are necessary to protect the respective rights of the parties.

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In this context the difference between Prof. Orrego's and my perspectives may have important consequences for fisheries conservation. By regarding specific conservation agreements as implementations of the duties of co-operation and conservation under the Convention, we add content to what those duties mean in a particular context. In the event of a dispute about compliance with those general duties under the Convention, a tribunal may seek guidance in the context created by the collective action of States in implementing those duties. Thus, for example, in its transmittal of the Law of the Sea Convention to the Senate, the US Department of State made the following interesting observation: "Fishing beyond the exclusive economic zone is subject to compulsory, binding arbitration or adjudication. This will give the United States an additional means by which to enforce compliance with the Convention's rules relating to the conservation and management of living marine resources and measures required by those rules, including, for example, the prohibition in article 6 b on high seas salmon fishing, the application of articles 63 (2) and 116 in the Central Bering Sea light up the new Pollock Convention, and the application of articles 66, 116 and 192 in the light of the United Nations General Assembly Resolutions creating a moratorium on large-scale high seas driftnet fishing".

It is wrong to regard the Convention as the enemy of progress in this field for either coastal States or flag States. What is required is constructive implementation of the duty to conserve and to co-operate. Both on a global level in negotiations called for by UNCED, and with respect to particular fisheries and particular areas, the key legal question is not whether some coastal state preferences or competences emerge from these negotiations. The key legal question is whether they are arrived at by agreement, and are exercised pursuant to that agreement and the Convention, including compulsory dispute settlement. It is in no one's interest to lose the benefits of the Convention because of a failure of will or imagination in dealing with the high seas fisheries issue.

Let me offer a bit of history that I think is instructive. During the Law of the Sea Conference we came very close to a consensus on a more detailed set of provisions on the issue of straddling stocks, based on a proposal offered by Argentina and Canada. At the very last minute, Spain threatened to re-open the straits articles in the Convention if the fisheries provisions were re-opened. This caused the Soviet Union to withdraw its acquiescence in the new fisheries texts in part because military members of its delegation withdrew their support. I think all of us are now paying the price for this quixotic dénouement. And I hope you will forgive me if

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I observe, given the particular location of this workshop, that in light of this history, the European Commission, which now represents Spanish fishing interests, might have a special moral responsibility to work constructively for an effective agreement that now adds the requisite details.

Drafted under Ambassador Yankov's wise guidance, article 195 of the Convention, which deals with pollution, prohibits the transfer directly or indirectly of damage or hazards from one area to another. In my opinion, that principle should guide governments and the European Commission in dealing with the hazards of overfishing as well.

This is not a zero sum game. Countries like Chile and Argentina, because of their geographic position, developing economies, and trade policies have interests in the law of the sea regarding navigation and communications that are quite similar to those of many industrialized countries of the northern hemisphere. It should be as obvious to them as to others that these interests are fundamental to security and prosperity and are best protected by a globally ratified Convention. Indeed, Chile is in the particularly unfavourable position of being separated from many parts of the world by two States that wish greater rights over navigation and overflight within the exclusive economic zone than are accorded by the Convention.

That being said, the reality is that there is no long term alternative to a reasonable accomodation of coastal state interest in straddling stocks. Distant water fishing States have only two choices: do it now and promote widespread ratification of the Convention, or do it later after time and practice have seriously erded the Convention's legitimacy. Albeit with a bit of tactical posturing design to get our attention, Argentina, Canada and Chile have extended a hand of friendship and co-operation. They must not be rebuffed by either the politics of confrontation or by unduly restrictive theories of international law that make it impossible to deal effectively with new entrants or rogue vessels except by unilateral coastal state action.

Let me pause here to make a point of history. Every time high seas law and the law of treaties have been interpreted conservatively to make international resource regulation ineffective, the answer has been to extend coastal state jurisdiction as the basis for promulgating a regulatory regime applicable to all. It is ironic that the very same people who insist on unqualified adherence to the requirement for consent by each flag state to regional fisheries regulations under high seas law and the law of treaties seem to have much more relaxed views about the legality of unilateral extensions of coastal state jurisdiction, and almost never suggest the need

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for express consent by each potential future user of the area in that context. Part of the reason for unilateral coastal state claims over the continental shelf is that – quite unbelievably to us today – respected international lawyers at the time we are raising questions as to whether it would be possible under high seas law to construct fixed installations for oil drilling or to grant exclusive rights for oil drilling. Only Germany pointed out at the 1958 Conference that in fact we could have had the same kind of internationally agreed regime for mining under the high seas that we finally wound up with under the Convention and the new implementing agreement for a much smaller area. If, once again, we make very conservative interpretations of the law of treaties and high seas law so as to preclude an effective solution to the problem of new entrant and rogue vessels under the high seas regime, the only solution will be coastal state jurisdiction. Rigid theories about high seas law and the law of treaties that ignore the legal and practical implications of the duty to conserve and cooperate are making extreme logical abstractions the enemy of good international management. One way or another all vessels fishing in a high seas area must respect relevant conservation limits. If these are to be fixed and enforced pursuant to international agreement, then Prof. Orrego is absolutely right that we must resolve the third-state vessel problem, and that we can profitably consult the Antarctic Treaty as a guide. Given the choice between a creative application of high seas law and the law of treaties that gives effect to the universal duty of co-operation and conservation on high seas, on the one hand, and a breach of the 200 mile line by coastal States and the damage this will do to the hopes for an ordered law of the sea, on the other hand, I think the former is the far more rational choice, for the oceans and for the future of international law.

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