

INTERNATIONAL LAW OF THE SEA OF THE 1980's: EXCEPTION, RULE, OR TRIGGER?

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I. INTRODUCTION

There is an excitement connected with the law of the sea that, at least in the last decade, cannot be matched by any other area of international law. This excitement stems largely from the Third UN Conference on the Law of the Sea (UNCLOS III). UNCLOS III actually began in 1969 with the so-called Sea-Bed Committee; the actual conference sessions lasted from 1973 until the UN Convention on the Law of the Sea, also known as the Montego Bay Convention (MBC),¹ was opened for signature in 1982.² The expectations about UNCLOS III were high, primarily because of three factors: (1) the negotiations had lasted for more than a decade; (2) the United Nations had staked a great deal of its reputation on this conference; and (3) the subject matter, which included most aspects of ocean use, was of global importance.

The signing ceremony of a treaty often provides an opportunity for an assessment of the significance and role of a newly born agreement. Two of the most eloquent (some would say idealistic, even naïve) assessments of UNCLOS III and the MBC were provided by UN Secretary-General Javier Perez de Cuellar and Conference President Tommy T. B. Koh of Singapore. Secretary-General Perez de Cuellar wrote:

In order to affirm that international law is now irrevocably transformed, so far as the seas are concerned, we need not wait for the process of ratification of the Convention [MBC] to begin.

Today one phase is successfully concluded and a new one, equally demanding and difficult, begins. This Convention is like a breath of fresh air at a time of serious crisis in international co-operation and of decline in the use of international machinery for the solution of world problems. Let us hope that this breath of fresh air presages a warm breeze from North to

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1. THE LAW OF THE SEA, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, U.N. Doc. A/CONF. 62/122X, U.N. Sales No. E.83.V.5 (1983). [hereinafter MBC].

2. *Id.* at xxxiii.

South, South to North, East to West and West to East, for this will make clear whether the international community is prepared to reaffirm its determination to find, through the United Nations, more satisfactory solutions to the serious problems of the world in which the common denominator is interdependence.³

The Secretary-General's statement illustrates two important points. First, the prestige of the UN system and its values are intertwined with the success of the MBC. Second, the MBC is being asked to lead the way in solving other dilemmas confronted by international law. One might argue that because the MBC has so many intrinsic problems, it is unreasonable to ask that it also bolster international law as a whole.

The statement by Ambassador Koh has a slightly different focus, coming as it does from someone who participated actively in the negotiations:

On 10 December 1982, we created a new record in legal history. Never in the annals of international law has a Convention been signed by 119 countries on the very first day on which it was opened for signature. . . .

The Convention [MBC] will promote the maintenance of international peace and security because it will replace a plethora of conflicting claims by coastal States with universally agreed limits on the territorial sea, on the contiguous zone, on the exclusive economic zone and on the continental shelf. . . .

We have shown that with good leadership and management, the United Nations can be an efficient forum for the negotiation of complex issues. We celebrate the victory of the rule of law and of the principle of the peaceful settlement of disputes. Finally, we celebrate human solidarity and the reality of interdependence which is symbolized by the United Nations Conference on the Law of the Sea.⁴

While far more detailed, Ambassador Koh's remarks were hardly less optimistic than those of Secretary-General Perez de Cuellar. Ambassador Koh seemed to assume that the treaty would quickly enter into force or that it represented customary international law and hence was binding on all states.⁵

These high aspirations for the MBC may never be achieved. Perhaps the most sobering and realistic approach would be comparative—an exploration of how the MBC relates to other treaties. Once this approach is selected, the treaties that will form the comparison group must

3. *Id.* at xxxii.

4. *Id.* at xxxiii-xxxvii.

5. See Gamble and Frankowska, *The 1982 Convention and the Customary Law of the Sea: Observations, A Framework, and a Warning*, 21 SAN DIEGO L. REV. 491 (1984).

then be chosen. Since at least 1,000 multilateral treaties have become effective since World War II, the selection process could prove formidable.⁶ A reasonable way to proceed, however, is first to limit the scope by laterality. Since the MBC is a general multilateral treaty, and, therefore, open to all states, the comparison group should consist of multilateral treaties.⁷ Second, since the MBC deals with territory, often with the need to permit or restrict certain use of territory, it will be instructive to examine treaties that endeavor to allocate limited sovereignty over territory.

The selection of treaties that satisfy these criteria is straightforward, but there is always some room for interpretation and disagreement. For example, one might include the various conventions dealing with navigation.⁸ Further, pollution control conventions might arguably fit into the scheme suggested here.⁹ In view of the requirements of laterality and territoriality, however, the following six treaties seem to be an especially appropriate comparison group:

1. Convention on International Civil Aviation (1944)¹⁰
2. Geneva Conventions on the Law of the Sea (1958)¹¹
3. Convention on Transit Trade of Land Locked States (1965)¹²
4. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967)¹³
5. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof

6. Gamble, *Multilateral Treaties: The Significance of the Name of the Instrument*, 10 CAL. W. INT'L L. J. 1. (1980).

7. Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372, 379 (1980).

8. Convention for a Uniform System of Tonnage Measurement, June 10, 1947, 108 U.N.T.S. 3; International Convention for the Safety of Life at Sea, June 17, 1960, 16 U.S.T. 185, T.I.A.S. No. 5780, 536 U.N.T.S. 27.

9. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. No. 8068, 970 U.N.T.S. 0.

10. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter ICAO].

11. Convention on the High Seas, Apr. 29, 1958, 12 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on Fishing and Conservation of Living Resources of the High Seas, Apr. 19, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

12. Convention on Transit Trade of Landlocked States, July 8, 1965, 19 U.S.T. 7383, T.I.A.S. No. 6592, 597 U.N.T.S. 53 [hereinafter Transit Trade Treaty].

13. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 [hereinafter Space Treaty].

(1971)¹⁴

6. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979)¹⁵

In addition to fitting the specified criteria, these six treaties are a fairly distinctive set. Furthermore, the four 1958 Geneva Conventions will be treated as a group because they were negotiated that way and are generally dealt with as one entity.

The issue of the choice of specific grounds of comparison remains. One could analyze the content of all these treaties, and no doubt interesting similarities and differences would emerge. That type of analysis, however, might result in a catalogue of dissimilar characteristics from which no conclusions can be drawn. Thus, it may be more productive to seek comparisons along slightly different dimensions that still bear on important aspects of the treaties, but which do not rely on the minutiae. For example, trying to compare the powers of the MBC's board of management, the *Enterprise*,¹⁶ with the requirements for landing equipment on aircraft is futile.¹⁷

The following bases for comparison will be used: (1) the relationship between each treaty and both customary and conventional international law; (2) the level of participation of states parties in each treaty; (3) the position of each treaty regarding reservations; and (4) the requirements of each treaty regarding denunciation.

II. RELATIONSHIP BETWEEN EACH TREATY AND CUSTOMARY AND CONVENTIONAL INTERNATIONAL LAW

Neither the MBC nor any treaty in the comparison group exists in a legal vacuum. All operate within the context of existing customary and conventional international law. An important indicator of the intent and orientation of treaties can be gleaned from explicit statements made in an individual treaty about "other" international law. Issues to consider are whether each treaty's provisions replace, reinforce, or bear no relationship to other international law.

14. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337, 955 U.N.T.S. 0 [hereinafter *Seabed Arms Control Treaty*].

15. *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, Dec. 5, 1979, 34 U.N. GAOR Supp. (No. 46) at 77, U.N. Doc. A/34/664 (1979), reprinted in 18 I.L.M. 1434 [hereinafter *Moon Treaty*].

16. MBC, *supra* note 1, at arts. 170-83. The *Enterprise* is the body of authority responsible for the exploration and exploitation of minerals from the area of the seabed located beyond the limits of national jurisdiction.

17. ICAO, *supra* note 10, at art. 15.

A. *The MBC*

In first examining the MBC, it is important to separate actual provisions from the political rhetoric that ensued following the decision of the United States not to sign or ratify the MBC.¹⁸ Not surprisingly, the United States wants to enjoy advantages stemming from certain provisions of the MBC.¹⁹ It may seem that the MBC exercises great care in linking its provisions to existing law. About twenty-five such statements are in its provisions, but most are decidedly incidental. Typical of about a dozen provisions is the statement that the flag state will "bear international responsibility for loss or damage . . . resulting from the . . . non-compliance with this Convention or other rules of international law."²⁰ Such provisions contribute little and were probably inserted more as a diplomatic safety valve than for their substance. A few articles in the MBC refer to "international rules" rather than "international law," but the choice of these terms does not appear to be deliberate.²¹

In only one place are the terms, "customary" and "conventional," in referring to international law mentioned explicitly:

Nothing in the Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests. . . .²²

The most far-reaching provisions concerning the MBC's relation to other law are found in article 311:

1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.
2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or performance of their obligations under this Convention.
3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to relations between them,

18. Presidential Statement, White House Press Release, Department of State Bulletin, August 1982, at 71 [hereinafter President's Statement].

19. Statement by Ambassador James L. Malone, Department of State Bulletin, October 1982, at 48.

20. MBC, *supra* note 1, at art. 31.

21. *Id.* at arts. 212, 213, 219, 297.

22. *Id.* at art. 221.

provided that such arrangements do not relate to a provision derogation which is incompatible with the effective execution of the object and purpose of this Convention. . . .²³

On balance, it seems that the MBC pays scant attention to existing international law and generally opts to reject existing international law when there is any chance that it might be at variance with the provisions of the MBC.

B. Convention on International Civil Aviation

The 1944 Convention on International Civil Aviation (ICAO) dealt with a specialized topic in a substantially different way from previous efforts to manage civil aviation. Thus, the ICAO could be expected to make relatively few references to existing law. In 1944, there simply was not much law on the subject of civil aviation. Nonetheless, the ICAO does make the effort to incorporate existing law in several areas. For example, the ICAO mandates that when this convention comes into force, parties will "give notice of denunciation of the Convention relating to the Regulation of Aerial Navigation (1919) or the Convention on Commercial Aviation (1928)."²⁴

In those instances, however, where the ICAO clearly replaces existing conventional law, a different, more flexible approach is taken:

All aeronautical agreements which are in existence on the coming into force of this Convention . . . shall be forthwith registered with the Council.²⁵

The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings.²⁶

Subject to the provisions of the preceding Article, any contracting State may make arrangements not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible.²⁷

C. The Geneva Conventions

The 1958 Geneva Conventions were the first comprehensive, general treaty law of the sea, and as such, one would expect references to existing

23. *Id.* at art. 311.

24. ICAO, *supra* note 10, at art. 80.

25. *Id.* at art. 81.

26. *Id.* at art. 82.

27. *Id.* at art. 83.

law to concentrate on customary law. Each convention begins with an introductory sentence that indicates the kind of law the negotiators believed they were creating. Predictably, three of the four conventions begin in the standard way, "The States Parties of this Convention have agreed as follows. . . ."²⁸ An important exception is the Convention on the High Seas, which begins: "The States Parties to this Convention, desire to codify the rules of international law relating to the high seas. . . ."²⁹ This provision places the content of this treaty on a different plane, one that implies compatibility with customary law.

In references to existing law, the Convention on the Continental Shelf and the Convention on Fishing and Conservation of Living Resources of the High Seas are mute, save for platitudinous references to the UN Charter.³⁰ Both the Convention on the Territorial Seas and the Contiguous Zone and the Convention on the High Seas contain a number of standard fare provisions. Among these provisions is the right of innocent passage, which is to be exercised "in conformity with these articles and other rules of international law."³¹ Similar stipulations are made with respect to government ships,³² and the rights of landlocked states.³³

The most interesting provisions in these conventions are statements about the relationship between them and existing treaties. Each convention contains the following article: "The Provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them."³⁴ This provision is far different in tone and substance from any in the MBC, which requires no test of compatibility.

D. Convention on the Transit Trade of Landlocked States

It is possible to anticipate the position taken by the Convention on the Transit Trade of Landlocked States (Transit Trade Treaty) toward customary and conventional international law. The landlocked states are a small and diverse minority and have to compete vigorously to obtain the rights they desire.³⁵ A result of this relative impotence is likely to be a careful regard by landlocked states for existing international law. If the

28. Convention On the Territorial Sea and Contiguous Zone, *supra* note 11, at preamble.

29. Convention on the High Seas, *supra* note 11, at preamble.

30. Convention on Fishing and Conservation of Living Resources of the High Seas, *supra* note 11, at art. 9.

31. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 11, at art. 17.

32. *Id.* at art. 22.

33. Convention on the High Seas, *supra* note 11, at art. 3.

34. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 11, at art. 25; Convention on Fishing and Conservation of Living Resources of the High Seas, *supra* note 11, at art. 30.

35. MBC, *supra* note 1, at part X.

landlocked states receive concessions from the international community, such concessions will be carefully balanced with references to other rules of international law.

The opening line of the Transit Trade Treaty seems almost defensive when referring to the fact that the UN Charter "requires the United Nations to promote conditions of economic progress and solutions of international economic problems,"³⁶ Thereafter, much of the balance of the Transit Trade Treaty is conditioned upon observance of existing international law.³⁷ Similar sentiments are expressed when freedom of transit across territory is discussed:

The Contracting States shall permit the passage of traffic in transit across their territorial waters in accordance with the principles of customary international law or applicable international conventions and with their internal regulations.³⁸

E. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (Space Treaty) has relatively little to say about existing international law.³⁹ The MBC, in contrast, was confronted with a relatively large body of prior deep sea-bed law. This is probably due to the fact that there was little prior law.⁴⁰

The only significant reference to existing international law in the Space Treaty seems to have been inserted in the event applicable law is found or a court draws an unexpected inference:

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.⁴¹

36. Transit Trade Treaty, *supra* note 12, at preamble.

37. *Id.* at principle III. Access to the sea "shall [be] by common agreement...and in conformity with existing international conventions...."

38. *Id.* at art. 2, para. 4.

39. Space Treaty, *supra* note 13.

40. MBC, *supra* note 1, at part XI.

41. Space Treaty, *supra* note 13, at art. III.

F. *The Treaty on the Prohibition of Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil Thereof*

The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil Thereof (Seabed Arms Control Treaty) had to chart a delicate legal middle course. The *raison d'être* of the agreement was to restrict the location of certain kinds of weapons, yet states were chary of too much regulation of their territory. Since the Seabed Arms Control Treaty restricts certain kinds of weapons "beyond the outer limit of a seabed zone,"⁴² the negotiations used meticulous care in defining such a zone.

The zone is defined according to a twelve-mile territorial sea as enumerated in the 1958 Territorial Sea Convention⁴³ and "in accordance with international law."⁴⁴ The matter of inspection to see if violations have occurred is an obvious point of contention in international territorial agreements. The Seabed Arms Control Treaty is careful to specify that verification will take place "within the framework of the United Nations and in accordance with its Charter"⁴⁵ and "with due regard for rights recognized under international law, . . ."⁴⁶ Since this treaty was negotiated at a time of rapidly expanding claims to hydrospace, states did not want this convention to affect present or future claims and this was assured by article IV,⁴⁷ which provides that nothing in the Seabed Arms Control Treaty will prejudice the position of any party with respect to existing conventions or to future claims.

G. *The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*

The 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty) contains relatively few references to existing international law. Several general references are to the principles of the UN Charter⁴⁸ along with frequent references to the developing "international regime" for the resources of the moon.⁴⁹ The

42. Seabed Arms Control Treaty, *supra* note 14, at art. I.

43. Convention on the Territorial Sea and the Contiguous Zone, *supra*, note 11 at part I § II.

44. Seabed Arms Control Treaty, *supra* note 14, at art. II.

45. *Id.* at art. III, para. 5.

46. *Id.* at art. III, para. 6.

47. *Id.* at art. IV.

48. *Moon Treaty*, *supra* note 15, at arts. 2, 4.

49. *Id.* at art. 11, para. 4.

most concrete reference to existing international law is contained in article 11:

States Parties have the right to exploration and use of the moon without discrimination of any kind, on the basis of equality and in accordance with international law and the provisions of this Agreement.⁵⁰

III. LEVEL OF PARTICIPATION OF STATES PARTIES IN EACH TREATY

A vitally important characteristic of treaties is the number of States Parties willing to sign and ratify or accede to them. Substantial erosion exists at every phase of treaty creation.⁵¹ Specifically, if a certain number of states vote to accept a convention, a substantially smaller number is likely to sign the treaty,⁵² and many who sign will not ratify.⁵³ Since information about participation is quite concrete and measurable, it can be represented easily in a table.

Table I examines all the treaties being considered here. The MBC is listed first since it is the principal focus. For each treaty, the following information is provided:

1. Signature and force dates;
2. Number of parties required for entry into force;
3. Number of signatures;
4. Number of parties whether by ratification, accession, or acceptance; and
5. Type of parties—a general indication of whether the treaty seems to have been accepted more by any category of states, such as less developed countries.

An unavoidable asymmetry stems from the fact that the treaties were signed over a period of almost forty years. Thus, the 1944 ICAO has had much longer to garner signatures than has the 1982 MBC. The MBC, however, seems to be markedly different from the other treaties in the comparative group. The requirement set for entry into force is by far the largest, both in absolute terms and in relation to the number of states participating in the negotiations. Further, the number of signatures obtained is the highest in international legal history.

Four of the treaties in the table entered into force within three years

50. *Id.*

51. Gamble, *Post World War II Multilateral Treaty-Making: The Task of the Third UN Law of the Sea Conference in Perspective*, 17 *SAN DIEGO L. REV.* 527 (1980).

52. *Id.* at 535.

53. *Id.* at 547.

of signature whereas the MBC has achieved only one third of the necessary parties in the same period of time. One might surmise the UNCLOS III negotiating process, which consisted of decisionmaking by consensus,⁵⁴ may have influenced the high force standard and large number of signatures. However, unless a huge number of ratifications and accessions materializes quickly, these forces may be waning.

Table I
Participation by States

Convention Signature Date (Force Date)	Number Required For Force	Number of Signatures	Number of Parties	Type of Parties
MBC 1982	60	139	30	Mostly less Developed Countries
ICAO 1944 (1947)	26	37	109	Most of World
Geneva Law of Sea 1958				
High Seas (1962)	22	48	56	All Types
Territorial Sea (1964)	22	43	45	All Types
Continental Shelf (1964)	22	44	53	All Types
Fishing and Conservation (1966)	22	36	34	Lacking Major Fishing States
Transit Trade Treaty 1965 (1967)	4 ⁵⁵	29	30	All Types
Space Treaty 1967 (1967)	5 ⁵⁶	82	91	All Types
Seabed Arms Control Treaty 1971 (1972)	22 ⁵⁷	58	63	All Types
Moon Treaty 1979	5	10	3	Less Developed Countries

54. MBC, *supra* note 1 at xxii.

55. Transit Trade Treaty, *supra* note 12 at art. 20, para. 1. This paragraph requires at least two landlocked states and two transit states with sea coasts.

56. Space Treaty, *supra* note 13 at art. XIV. Article XIV requires that the depository states, the United States, the United Kingdom, and the Soviet Union be parties.

57. Seabed Arms Control Treaty, *supra* note 14, art. X, para. 3. Paragraph 3 requires that the depository states, the United States, the United Kingdom, and the Soviet Union be parties.

IV. THE POSITION OF EACH TREATY REGARDING RESERVATIONS

Reservations are an important attribute of multilateral treaties.⁵⁸ While some room for disagreement always exists, legal scholars now are in general agreement about the definition of a reservation. The Vienna Convention on the Law of Treaties (1969) defined a reservation as:

[A] unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.⁵⁹

Reservations are a two-edged sword. The goal of permitting reservations is to encourage wider participation in multilateral treaties; however, easy admissibility may not achieve the desired effect.⁶⁰ When the International Law Commission studied the matter more than thirty years ago, it concluded:

It is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it may often be more important to maintain the integrity of a convention than to aim, at any price, at the widest possible acceptance of it.⁶¹

The specific provisions of the treaties under review here are examined to see what stands, if any, each takes on the matter of these documents of reservations.

The MBC takes an unequivocal position:

No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.⁶²

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements . . . provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.⁶³

The former article would have precluded reservations were it not for the addition of the latter article, which almost invites states to test the limits of what constitutes a reservation. Nevertheless, such a blanket statement

58. Gamble, *supra* note 7, at 372-76.

59. Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 May 23, 1969, art. 2, para. 1, *reprinted in* 63 AM. J. INT'L L. 875 (1969) [hereinafter Vienna Convention].

60. Gamble, *supra* note 7, at 393.

61. *Report of the International Law Commission Covering the Work of its Third Session*, 3 U.N. GAOR Supp. (No. 9) at 5, U.N. Doc. A/1858 (1951), *reprinted in* [1951] 2 Y.B. INT'L L. COMM'N 123, 129, U.N. Doc. A/CN.4/SER. A/1951.

62. MBC, *supra* note 1 at art. 309.

63. *Id.* at art. 310.

in a convention as long and complex as the MBC is unusual in international law.

The ICAO is mute on the subject of reservations, which was the norm for conventions signed at that time. Two of the four 1958 Geneva Conventions, the Convention on the High Seas and the Convention on the Territorial Sea and the Contiguous Zone, are also mute on the subject. The lack of reservations in the Convention on the High Seas reflects its reliance on customary law. By definition, one cannot have a reservation to a rule of customary law. The third Geneva Convention, the Convention on the Continental Shelf, holds that "any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."⁶⁴ The excluded articles are the most basic, since they define the extent of the continental shelf and guarantee that a claim to the shelf will not affect other uses and claims.⁶⁵ The fourth Geneva Convention, the Convention on Fishing and Conservation of Living Resources of the High Seas, takes a parallel approach prohibiting reservations to articles 6, 7, 9, 11, and 12.⁶⁶ This is a somewhat curious group of articles, but the prohibition seems to have been inspired by the desire of the negotiators to protect coastal control over fishing⁶⁷ and to see that the dispute settlement provisions cannot be avoided completely through reservations.⁶⁸

The Transit Trade Treaty, the Space Treaty, the Seabed Arms Control Treaty, and the Moon Treaty do not mention reservations. This omission is surprising. It is possible, however, that certain of their provisions minimize the need for reservations.⁶⁹ When no explicit statements about reservations are made, the assumption will be that reservations are permitted provided they meet certain standards, such as those set out in the Vienna Convention on the Law of Treaties.⁷⁰

V. REQUIREMENTS OF EACH TREATY REGARDING DENUNCIATION

Provisions regarding denunciation play a role similar to that of reservations in that both protect states from undesired obligations although in very different ways. Several dimensions to denunciation are relevant.

64. Convention on the Continental Shelf, *supra* note 11 at art. 12.

65. *Id.* at art. 103.

66. Convention on Fishing and Conservation of Living Resources of the High Seas, *supra* note 11 at art. 19.

67. *Id.* at arts. 6-7.

68. *Id.* at art. 9.

69. Transit Trade Treaty, *supra* note 12 at arts. 11-12. Portions of the Transit Trade Treaty anticipate and permit exceptions.

70. Vienna Convention, *supra* note 59, at art. 32.

Conventions may not mention the subject. If it is mentioned, the denunciation may be conditioned by (1) requiring that explanations be offered or other conditions be met, (2) prohibiting all denunciations for some period of time, and (3) imposing a time lag until the denunciations take effect. Table II characterizes the treaties according to these criteria.

Table II
Denunciation Requirements

Convention (Signature Date)	Special Requirements	Delay After Force	Time Lag To Take Effect
MBC (1982)	Explanation Suggested	No	One Year
ICAO (1944)	None	Three Years	One Year
Geneva Law of Sea (1958)	NO MENTION OF DENUNCIATION		
Transit Trade Treaty (1965)	NO MENTION OF DENUNCIATION		
Space Treaty (1967)	None	One Year	One Year
Seabed Arms Control Treaty (1971)	"Extraordinary Events"	Three Months	None
Moon Treaty (1979)	None	One Year	One Year

The provisions in the MBC dealing with denunciations are extraordinary:

A State Party may, by written notification addressed to the Secretary-General of the United Nations, denounce this Convention and may indicate its reasons. Failure to indicate reasons shall not affect the validity of the denunciation. The denunciation shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.⁷¹

The MBC has provided an extremely easy way for states to denounce the

71. MBC, *supra* note 1 at art. 317, para. 1.

treaty. No reasons must be specified, a factor which removes the need to couch a political decision in legal terms. Furthermore, states may denounce at any time. Presumably a state could notify the Secretary-General of its denunciation immediately after becoming a party.

Several items from Table II are particularly noteworthy. Except for the implication that denouncing parties *should* provide an explanation, the MBC has weak requirements for leaving the treaty. Even those treaties that say nothing about requirements must abide by existing customary or conventional standards, but the MBC seems to have selected an even lower standard. The Vienna Convention on the Law of Treaties discussed the matter:

A treaty which contains no provisions regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.⁷²

By almost any interpretation of the above provisions, treaties without any provision on denunciation would be held to a stricter standard than the MBC. Thus, in the area of denunciation, the MBC seems to be excessively lenient.

VI. SUMMARY AND CONCLUSIONS

This discussion has avoided the important substantive aspects of the MBC. The MBC treaty implemented enormous changes in the patterns of use and control of the oceans. The MBC resolved the matter of the breadth of the territorial sea⁷³ and formulated a much more workable definition of the continental shelf.⁷⁴ The idea of the exclusive economic zone is developed⁷⁵ and seems to have been accepted almost universally. The MBC was able to strike many delicate balances between the interests of coastal states and those of maritime states. This is especially evident in the provisions on innocent passage,⁷⁶ transit passage through straits,⁷⁷ and the exclusive economic zone.⁷⁸ However, in the area of marine science research, few guarantees are given. In fact, save for a vaguely worded statement that coastal states should grant permission for marine

72. Vienna Convention, *supra* note 59, at art. 56.

73. MBC, *supra* note 1 at art. 3.

74. *Id.* at art. 76.

75. *Id.* at part V.

76. *Id.* at arts. 17-26.

77. *Id.* at arts. 34-44.

78. *Id.* at arts. 56, 58, 59, 73.

science research in their waters,⁷⁹ coastal states have achieved almost total control over all marine science research done in any coastal region.

The most controversial aspect of the MBC is part XI which deals with the deep sea-bed. An International Sea-Bed Authority is created that will manage the exploitation of the resources from the deep sea-bed.⁸⁰ The United States has announced that it finds part XI unacceptable and will continue its plans to permit its citizens to exploit these resources outside the regime created in the MBC.⁸¹ But, on balance, if one looked only at the substantive articles of this treaty, the dominant impression would be awe. The MBC would seem to have travelled a difficult road and achieved scores of well-reasoned compromises.

However, one cannot understand the MBC solely by reference to the substantive provisions any more than one can understand United States government by reference only to the Constitution. It is entirely possible that the process of negotiation, the so-called Gentleman's Agreement whereby the whole treaty was negotiated by consensus,⁸² obscured some of the disagreements that remain. The MBC emerged in an atmosphere of great expectation. It set the highest standard in history for parties required for entry into force. The fact that 140 signatures were affixed during the two years that it was open for signature suggested that it might become an international legal *tour de force*.

But these expectations must be tempered. The rigid stand taken on reservations may have caused states to reconsider ratification. The number of ratifications and accessions achieved in the past four years is decidedly underwhelming considering the enthusiasm voiced by many states. Even if the treaty achieves the needed sixty parties for entry into force, the ease with which it can be denounced may hamper its smooth operation. The MBC is decidedly different from the norm of recent general multilateral treaties. Thus, it is unlikely that the MBC will set the pattern (or be the trigger) for future multilateral negotiations. Quite the contrary: the subject matter, the confluence of political forces, and many unresolved problems suggest that UNCLOS III may have been a unique phenomenon. On balance, the MBC is an extraordinary effort in diplomatic negotiation and law creation. However, it is premature to declare that the United Nations has been elevated to a new plane or even that most of the major issues of the new law of the sea have been permanently resolved.

79. *Id.* at arts. 238, 239, 242, 252.

80. *Id.* at part XI, § 4.

81. President's Statement, *supra* note 18.

82. MBC, *supra* note 1, at xxii.