THE ENFORCEMENT OF NORMS AND RULES
WITH RESPECT TO NONPARTIES

by
Anthony D'Amato

My topic is not the enforcement mechanisms within the Convention, but rather the enforcement of norms and rules with respect to nonparties. I believe that to ask how international law is enforced is another way of asking whether international law is real. There has to be enforcement if we are talking about law in the real sense. But because enforcement is a function of what the law is, it may be useful first to deal with some of the themes that have been suggested in this meeting so far, where people are making claims about what is legal and what is illegal. We have heard a lot of rhetoric about law that leads us to ask whether in some cases the speaker was really talking about enforceable law. In this category, I want to deal with five different kinds of views.

China and International Law

First, Professor Yuan talked about bourgeois rules that are not binding on China, and then later he said that rules that are disadvantageous to China are not binding on China.1 I do not really think the professor was talking about law here. He is making a claim that

1 See pages 192 and 206 supra.
China is a major power, is not bound by any rules that it does not want to be bound by, and can do pretty much what it likes. I think the international community should reject this kind of rhetoric. It is not in the interest of the international community to have any one power self-defining what the rules are, because then there are no rules. Rhetoric aside, however, China, like most nations, has been behaving in ways that are relatively reasonable. Actions count, not rhetoric. We have to move beyond some of these verbal screens that are thrown up for reasons that do not really have to do with legal analysis.  

Descriptive and Normative Views of International Law

Second, Mr. Colson's view of law appears to be a description about what nations do as to the oceans, which is a highly descriptive view rather than a normative view. If nations engage in these practices, apparently that is law, according to him. How issues are managed between governments, he says, is what the law of the sea is really all about. But I do not see why the way nations manage their issues has anything to do with the compulsory process that we call law. A problem arises when nations disagree. When the United States and Canada disagree, and Mr. Colson ably represents the United States before the ICJ at the Hague on that issue, I am sure his arguments are not going to be: "Well, let the United States and Canada manage this issue." Instead, he will argue that the law favors the position of the United States.

We have to get away from a mere description of what nations do, to the more normative and realistic concept of law. Fortunately, when we see what Mr. Colson and Mr. Hoyle have to say about the U.S. position, we find in fact that the United States has a rather traditional view of international law, and I think we can be rather reassured by that. We find a

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2 Paul Yuan: Let me answer Professor D'Amato's statement. Yes, China is following international law in certain respects. This is happening because international law is now moving away from its traditional Western roots because of the efforts of China and other developing nations. China cannot, however, accept the international law that was developed and imposed on the rest of the world by the Western imperialist powers or, more recently, by the two superpowers.

3 The United States and Canada have submitted their boundary dispute in the Gulf of Maine to a special chamber of the International Court of Justice.
relatively sound, reasonable position. One can disagree with particular positions, but the commitment to the rule of law seems secure.

The reason the United States takes these discussions so seriously is that it believes in compliance with international law. I think this is a very big strength. One of the world's powers—and other major powers feel this way, too—believes in compliance. It is in the self-interest of nations to comply with international law because international law in the aggregate reflects the self-interest of nations. International law is not something that somebody imposed from the outside. Rather it comprises the rules that we infer from the behavior of nations over centuries. It is no surprise that the rules that have emerged are collectively in the interest of the nations that have generated them. Although a nation may not like a particular rule, when balanced against the regime of the international system, it almost invariably prefers a system of rules with a few rules it does not like rather than no rules at all.

Mini-Treaty

A third approach that has been suggested is the notion that a mini-treaty would be illegal. That I find very amusing. It is a rather poetic use of the term international law, not an analytic one, because clearly, nations are free to enter into treaties. There is nothing illegal about a group of nations entering into a mini-treaty. What might be illegal is what their practices might be under the treaty. We would have to wait and see whether the rules generated by the Convention would not be followed by the nations who were parties to a mini-treaty. But certainly signing a treaty is not illegal, any more than signing the Law of the Sea Convention was illegal.

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4 The Legality of the Mini-Treaty

Borgese: I want to try to clarify my own mind with regard to the dispute between Tommy Koh and myself on one hand and, on the other, Tony D'Amato, who says that the mini-treaty is legal. In order to do that, I suggest we divide the issue into two parts. Supposing that the Convention on the Law of the Sea was not in force yet, and that none of the parties of the mini-treaty were signatories, then I think your point would be well taken. But if members of the mini-treaties are signatories to the Convention, then this thing is illegal as far as they are concerned. It is in violation of Article 311 quite clearly.

(Footnote continued)
Specificity and Customary Law

A fourth, perhaps more troubling, notion is that customary law consists of vague and general provisions lacking specificity. That is not true. Professor Van Dyke has asked, "Can a nonsignatory nation claim the benefit of the implied consent provision on maritime scientific research in Article 252?" Article 252 provides basically that if within six months the coastal state has not responded to a request for permission to conduct scientific research, the requesting institution can claim implied consent. This rule is very specific. Six months is not vague like due process or equal protection.

Can a nonparty claim the benefit of that rule? Dr. Anand told us earlier that the United States cannot obtain any rights from the Convention because it has not signed it. I agree. No nonparty can claim a particular benefit within the Convention.

What might happen in practice? Suppose a nonparty asks a coastal state for consent and no consent is forthcoming. After six months, the nation goes ahead and engages in scientific research. If there is a dispute before an international court as to the legality of proceeding without consent, I think the answer would be very clear. The nation that engaged in marine scientific research would claim, citing McDougall and Burke, that "reasonableness" is the criterion. I was reasonable, I asked for consent, and I did not get it within a reasonable period of time. To support my claim that waiting for six months is "reasonable," I cite the Law of the Sea Convention, where it says six months. That is a Convention that a number of states have signed and ratified. If there is no other law on the subject about what the time period is, the Convention is the very best evidence. And I think this could

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Now suppose the other hypothesis, that the Convention has come into force, all the members of the mini-treaty are nonsigners, but they are only about five or six, whereas 130 have joined the Convention. Then, this matter will be taken to Court and the Court will decide. We all know how it will decide. It will declare the mini-treaty to be illegal, so it will turn out to be illegal under any circumstances.

5 See pages 114-20 supra.

be a winning argument. Even a detail like "six months" can become part of customary international law because no other alternative is better. Therefore, the detailed provisions of the Convention can become part of customary international law, binding, through the mechanism of customary law, upon nonparties as well as parties.

Uncertainty and International Law

A fifth notion is that when something is uncertain it might not be part of customary international law. Professor Van Dyke has quoted me as saying that we infer international law from the behavior of states. But then he added something that I did not say. He said that where we do not have enough behavior, we might conclude that the state of the law is uncertain. This issue has permeated many of our discussions. How certain would we have been three days ago about a five-to-four decision that the U.S. Supreme Court handed down yesterday? If we had been asked about the state of the law last week, would we have known what it was? Of course not. But that does not mean there was no law on the subject. We simply could not predict it very well in those cases. There are hundreds of cases in domestic legal systems where reasonable lawyers cannot state with much assurance which way the decision will go. But they will never say there is no law on the subject; they will just say that a particular area is uncertain. Unpredictability is not the same as lack of law. There is plenty of customary law out there, but sometimes the divergent behavior of states makes it difficult to predict exactly what it is. We should not ask, "Has the Law of the Sea Convention made any impact on law?" Of course it has, but in some areas the impact is less certain than in others.

The Obligations of Nations to Follow International Law

Once we have a norm of international law, what is the nature of nations' obligations to follow it? It is important to recognize that international law is not anything like national legislation. For example, a law that you cannot drive more than 55 miles an hour remains on the books, even though many cars exceed the speed limit. The fact that some cars speed will not change the law. The law is what is in the books. In other words, in domestic legal systems where we have statutes, behavior that is contrary to custom cannot change customary law. But in international legal

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7 See pages 4 and 131 supra.

8 See pages 129-31 supra.
systems, contrary subsequent behavior can and does change custom. If that were not true, customary law would not have evolved at all. We would still have the rules of 500 years ago. It is always true that customary law evolves if the subsequent behavior is contrary to the rule. We do have a possibility, through the mechanism of custom, of changing the very rules that regulate the behavior of nations.

We have the principle of the common heritage, for example, which by general consensus of this workshop, is a principle of customary international law. Can that be changed? I will suggest a way that it could be changed, although I do not think this scenario will happen in fact. Suppose the United States decided to appropriate a portion of the deep seabed, and a deep seabed venture company began to mine it.

If other nations did not object, we would have a new principle. Suppose other nations objected, claiming the United States cannot make this claim because of the common heritage concept, but did not do anything about it. Even then a new principle is becoming established. Contrary to the common heritage principle, we would have a principle of whoever wants it can get it. The common heritage principle would be destroyed by the subsequent behavior that contradicts it. In this sense, Mr. Colson is quite right in saying that it is not only the Convention that is important, but subsequent practice in conforming to it. We do not need subsequent practice to validate the Convention, but if subsequent practice opposes it, the subsequent practice becomes the new norm. If the United States does act in conformity with the Convention, it will help to create and reinforce the norms therein. If it acts contrary to the Convention, and gets away with it, then that practice begins to establish a new contrary norm.

Enforcement Mechanisms

Judicial enforcement. If the United States appropriated an area of the ocean bed, what could other nations realistically do about it to indicate contrary behavior so that the United States' practice would not destroy the common heritage principle? Three kinds of enforcement mechanisms are possible. The first is judicial enforcement. If other nations sued the United States in the ICI, what would be the outcome? It is crystal clear: The United States loses because we had a norm of common heritage and one nation's action in violation will not change the norm. If a court were called on to decide whether the United States or the plaintiff nation is right, the only material they can look to is the material that has established the common heritage principle up to now. Should there be international judicial enforcement, I think the common heritage provision would be reestablished. Sometimes this
type of enforcement is not pursued because of a lack of compulsory jurisdiction or a lack of ability and interest of nations in obtaining it.

Military enforcement. A second kind of enforcement is sheer power: police or military enforcement. Would it be possible for other nations to send their boats out to that area and relieve the deep sea venture boat of its manganese nodules? The military vessels would be acting under a claim of right, enforcing the common heritage principle. Would this work? The United States is a strong power, but many U.S. tuna vessels have been confiscated by states that could not face up to the United States in a war. Sometimes a show of strength would be enough to establish and reinforce the principle.

The reason the United Kingdom lost the Anglo-Norwegian Fisheries Case was not because of lack of protest. was not because of lack of protest. England had been protesting those fisheries since 1935 and 1937, but it could not protect English vessels that were being blocked from fishing in those waters. The United Kingdom could not expend millions of dollars to use military ships to protect its fishing vessels because the costs far exceeded the value of the fish. The rule of law, however nascent it was in its formation at that point, favored Norway. This is what the International Court in its wisdom figured out.

Systemic enforcement. The third possibility is systemic enforcement of rules. It has nothing to do with judicial enforcement or power enforcement, but rather it is enforcement of rules by applying pressure in some other areas. For example, if the United States were to start a deep seabed mining operation, other nations might retaliate by denying the United States some prerogatives in a different sphere. The systemic enforcement of the aggregate of rules gives rise to the potential of reciprocal rule violation as a means of enforcing the primary rules. This is the real reason why the United States is not going to expropriate a portion of the high seas. The United States does not want to unravel the international rules system, which it might do by defying international law on this point. Professor Henkin said in one of his books, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." Why is that? Because they do not

want to unravel that system of rules. If on the one hand they would like to achieve an immediate end, and on the other hand they realize that the whole fabric of rules can unravel, they will undoubtedly think twice before acting.

We are talking about something at this workshop that is very important. Even though some political scientists claim that international law is just positive morality and that you cannot predict the behavior of nations, I think that if you understand these international rules you can make some useful predictions. I can predict with some confidence that the United States is not going to try to appropriate a portion of the deep seabed area.
DISCUSSION

The Role of Force in Enforcing International Law

Hasim Djalal: Professor D'Amato, am I right in understanding your thesis that customary international law is a function of the force used to impose one nation's views on others? If a state continues to insist on something and nobody challenges that state either by force or by repetitious acts of protest or anything like that, did you say that the first state's view will become law? That sounds Machiavellian to me. It sounds like might makes right in the formation of customary international law. Am I right in interpreting it that way?

Anthony D'Amato: It would be nice if we had an ideal theory in international law that handled all questions on the basis of pure law without regard to the use of force. My reading of the history of international relations, however, is that force in international law has played a role in shaping the law just as force in domestic law does. The government in any domestic state has a monopoly of force and it has a police system. If you do not like some of the laws, you might wind up in jail if you try to dispute them. So force is used.

In the international system, the use of or show of force may likewise have a significant bearing on custom. Often, however, it is not cost-effective for a nation to use force to impose its views on others, as in the Anglo-Norwegian Fisheries case.² The international system tends to gravitate, therefore, toward those rules that are most efficient in allocating competences. Efficiency is usually defined

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² See discussion at page 494 supra.
as the absence of a need to employ force. Over the centuries, the rules that have evolved are those that best keep the international system in equilibrium without a need for force, even though force may have played some role in the original shaping of those rules. This is a good question, one that should be commended to pure scholars of international law for further research.

R.P. Anand: Ambassador Djalal has asked whether international law has historically developed through force. Yes, it has in fact. Freedom of the seas developed through force, enforced by the United Kingdom, which acted essentially as a policeman for almost a century.

Can Nonparties Use the Convention's Dispute-Resolution Mechanisms?

David Colson: Let us imagine that the Convention has come into force and is a functioning and viable international instrument with all its institutions in place, but the United States is not a party. Would the United States have access to the International Tribunal for the Law of the Sea (Annex VI) or the Commission on the Limits of the Continental Shelf (Annex II) under the Convention?

Tommy Koh: I would think that based upon the jurisprudential discussion we have had that clearly these are institutions to which a nonparty would not have access. Now, you may say, David, that the text of the Convention uses language such as "States," "all States," "any State," and one can say that by the common usage of these terms they could mean all states irrespective of whether they are parties or nonparties. But the reason why the text was written this way was because throughout the Conference it was assumed that the Convention would be supported by everyone, especially by the United States, which, until 1980, was the nation most committed to the treaty process. If you ask how we should interpret these words "all States," "every State," "any State," "States," I would say that—at least in those parts of the Convention that refer to institutions—they clearly should be interpreted to mean only states parties. I

2 See pages 136-37, 173-74 and 176-77 supra.


4 See id. at 548.
appreciate Tony D'Amato's point that one has to make a distinction between provisions in the Convention that are generalizable and those that are not, and I think he agrees with my view that provisions that establish institutions are clearly not provisions that are generalizable. With respect to other provisions of the Convention that speak about "any State," "every State," "all States," and "States," I think one has to look at them on a case-by-case basis to determine whether the benefits conferred may be enjoyed by all states irrespective of whether they are parties to the Convention.

Luke Lee: The text of the Law of the Sea Convention makes a very clear distinction between Part XI on Seabed Mining and Part XV on the Settlement of Disputes, on the one hand, and the rest of the Convention, on the other. In Parts XI and XV, the text uses "States Parties" rather than "all States," "any State," or "every State," thus indicating a conscious decision that insofar as seabed mining and dispute settlements are concerned, these apply only to member states, to the exclusion of other states.

Satya Nandan: I want also to respond to David Colson. Ambassador Koh has said that he did not think that a nonparty to the Convention will have access to the International Tribunal of the Law of the Sea. I think Ambassador Koh is right. He also pointed out that when the Convention was negotiated, it was very clearly understood that the most important negotiators would become parties to it. As it turns out, some have not, or do not intend to.

Article 20 of Annex VI states that the International Tribunal shall be open to states parties. It goes on to say the Tribunal shall be open to entities other than state parties in any case expressly provided for in Part XI or submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to the case. The first part of the subsection deals with entities other than state parties. Here, perhaps, there may be some confusion as to what entities other than state parties one is talking about. I suppose one interpretation could be that a nonsignatory state is an entity, but I believe that what was envisaged at the time was juridical entities (corporations and other business associations) rather than state entities. The Tribunal itself will ultimately have to decide whether it has compe-

5 See pages 136-37, 173-74, and 176-77 supra.
tence in particular cases where nonparties might wish to apply to it to adjudicate a particular dispute.

If, of course, two parties reach an agreement, they can submit the case to the Tribunal even if one is not a ratifying state. In this case as in all others, however, the Tribunal must apply the Convention or other rules of international law compatible with the Convention to the dispute submitted to it (Article 293). Finally, the type of issues that can be submitted must be issues related to the purposes of the Convention as provided in Article 288.

Koh: Ambassador Nandan has discussed whether, when the text speaks of entities other than states parties that may have access to the international tribunal, it refers to states that are not parties or refers to entities such as state enterprises and consortia and companies that will be undertaking exploration and exploitation in the international area. My recollection of the text is that when we made that exception in favor of entities other than states parties, we had in mind that we wanted to give access to the Tribunal to those entities that were engaged in developing the resources of the seabed—which may be state enterprises of socialist countries or private consortia or corporations.

Colson: I do not disagree with the remarks of Ambassadors Nandan and Koh concerning the text of Annex VI, although I might shade it slightly differently. The real question is whether the Convention is designed to help states settle disputes or whether we are still trying to politicize it because of other objectives. Let us take the United States out of it for a minute. Suppose Greece and Turkey have a pollution dispute of some sort in the Aegean Sea. Suppose Greece is a party to the Convention and Turkey is not. If they were prepared to submit it to dispute settlement in the Sea-Bed Tribunal, could the parties take their case there? The way I read the text, they could. By agreement, they could go to the Sea-Bed Tribunal.

Likewise, the Boundary Commission is basically the same. Imagine a coastal state in Latin America that has a long coastline but is not a party to the Convention. Suppose the Convention is operating, the Authority is geared up, deep seabed mining is going on. All parties would have an interest in knowing what the boundary is between the international area and the coastal state. Why should not the coastal state have access to the Boundary Commission in order to insure that a dispute does not arise? Even the ICJ is open to states not party to it and not members of the United Nations, and so there is no reason why the Sea-Bed Tribunal should be a closed shop.
Anand: I still think, in spite of what Mr. Colson has said, that nonparties cannot appear before the Law of the Sea Tribunal.

Environmental Protection and Port State Jurisdiction

Brian Doyle: In the area of environmental protection and marine pollution, I do not know where we are going to go in the future except that it will be within the parameters of international law set forth in the Convention. The United States in the Oceans Policy Statement did not see the need to extend our coastal state jurisdiction over offshore maritime traffic because we fortunately enjoy a situation in which 97% of the maritime traffic that comes within 200 miles of our coast is destined to a U.S. port. We can employ the port state jurisdiction principle much more effectively than jurisdiction over the zone off our shore. If a tanker comes into our port, we have jurisdiction over it. We also know that trying to stop a tanker on the high seas is likely to create a greater danger and threat to our coast than waiting until it comes into port.

Another reason why we have not sought to extend our jurisdiction over pollution is the question of dispute settlement. Dispute settlement was an objective of the United States in negotiation and we now do not have the means of dispute settlement contained in the Convention available to us. We are looking at alternative means, which exist outside the Convention but are less convenient. Part of our work agenda for the future is to create new dispute settlement mechanisms. I hope that it will be borne in mind that the United States continues to be the largest user of the oceans. As much as we need dispute settlement, other countries that feel that what we are doing in the oceans is inimical to their interests also need it. Somehow we have to sit down and work these things out.

How Does the United States Interpret Port State Jurisdiction?

Koh: One of the innovations of the Convention in the environmental protection area is the creation of a worldwide network of port states which have new jurisdiction to take enforcement action against ships that have caused pollution, pollution not only in the jurisdiction of the port states but anywhere else. My two questions to our American colleagues are: first, would the United States claim to exercise such port state jurisdiction against ships that come to your ports which have committed pollution outside your jurisdiction? Second, would you accept the right of other port states similarly to take such enforcement action against your ships?
Colson: Would the U.S. enforce in its ports international standards for violations outside? The only way I can answer that is that it would be consistent with the Oceans Policy Statement for us to do so.6

William Burke: Would we do it?

Colson: We do do it to some extent now, but it is consistent with the Oceans Policy Statement that we do it all the way. We would be prepared to do it, but we do not have the domestic legal infrastructure right now to do it all the way.

Port State Jurisdiction Is Part of Existing Customary Law

Burke: My reading of the enforcement provisions are that they restrict port state jurisdiction. They do not create it. Unless I am completely incorrect, a port state is authorized under existing customary international law to condition access to its ports as it wishes, and that can include subjection to port state jurisdiction for events taking place outside the port or outside the national jurisdiction totally. A number of other international agreements specifically provide not only for subjection of a ship for events taking place outside national jurisdiction but also for claims against any other ship that belongs to the owner of the ship in port.

As I read the Convention, it is more restrictive. It does not permit proceedings to be brought in a port state if the events occurred in an area subject to another national jurisdiction without a request by either the flag state or the other coastal state or some affected state. So port states are not unrestricted in what they can do insofar as actual actions called proceedings are concerned. Investigations can be conducted at the port state's initiative, but not proceedings.

Bernard Oxman: I agree with Professor Burke's conclusion that port state jurisdiction is part of customary law, but the international law on this question seems to depend in part on the language one speaks. English-speaking international lawyers, particularly in the United States, run around agreeing with Professor Burke and each other on that point. The French delegation, however, argued that one could not

6 See Appendix A infra at 552, para. 6.
support port state jurisdiction under the Lotus decision.7 You will recall that France was a party to the Lotus case. They interpret the Lotus decision as requiring an effect to support jurisdiction (prescriptive competence), and no effect in the port state is necessary under the Convention. Thus, I agree with Professor Burke that Article 218 is consistent with our own view of a permissible condition on port entry, but there was a different European view adhered to at least by the French and possibly by the British and Germans during the negotiations. We lost on that issue in the negotiation of the 1973 MARPOL Convention.8 Thus, the Law of the Sea Convention settles an important point of principle in our favor in exchange for some limitations on the application of that principle.

Port State Enforcement: Can National Standards Be Stricter Than International Norms?

Anatoly Kolodkin: Two trends are occurring in regard to marine pollution—multilateral conventions are being negotiated that adopt and apply generally accepted rules and standards, and unilateral and regional measures are also being taken to deal with pollution problems. The crucial point is that unilateral measures must now be in compliance with generally accepted rules. Current national measures must now recognize not only innocent passage through territorial waters and transit passage through straits, but also the regime of vessels in foreign ports. Can a nation impose standards on maritime traffic more strict than the international standards? Senator Magnuson told the U.S. Senate in 1977 that the United States had ample legal authority to establish safety standards stricter than those agreed upon internationally. This position was criticized by the president of the American Institute of Merchant Shipping, Mr. Reynolds, who said that "Neither the United States nor any other country has a monopoly of what is the best in maritime safety and environmental matters."

It is unclear at present whether a state may impose standards on foreign ships calling at their ports stricter than those recognized internationally.


Certainly it would be preferable if international agreement could be reached on these standards.

**Colson:** Professor Kolodkin has made an interesting comment concerning the desirability of an international agreement stating that port states could not impose stricter measures in their ports for visiting ships than the standards set internationally. This proposal is not one that the United States would agree to right now. I recall about a year and a half ago that a ship carrying nuclear waste wanted to come into Honolulu, and the governor of Hawaii gave the U.S. State Department fits because the State of Hawaii wanted to exclude this particular vessel from its port. We ended up telling a good friend and ally that they could not bring a particular ship into this port. It has over the years been a fundamental principle of international law that a nation has the complete authority to determine what ships might call at its ports.

**"Generally Accepted" Rules and Regulations**

**Anatoly Zakharov:** Some articles of the Convention raise a problem by saying that nations should adopt rules no less effective than "generally accepted international rules and standards" (see Article 211(2), for instance). The Convention does not clearly define how to identify these generally accepted rules and regulations. "Generally accepted" rules are rules that are accepted by almost all states or by the state participants in the international agreement or are recognized by such participants as rules of international customary law. A case for such a norm is stronger if it is recognized by the states of different social systems. Environmental norms that are new in this Convention cannot be thought of as binding until we see about 25 to 50 ratifications.

**Oxman:** I think Dr. Zakharov and Dr. Kolodkin should consult with each other because, although they share the same objective, they seem to be moving in different directions. If Dr. Zakharov's interpretation of "generally accepted" is correct, then it is likely that we will see unilateral standards not only by port states but by coastal states in the territorial sea, in straits, and in the exclusive economic zone. The only way we can avoid unilateral standards is by taking a liberal view of what international standards are "generally accepted," and thus enforceable by port states and coastal states. If you take as conservative a view as Dr. Zakharov just put forth, then it is clear that many coastal states will feel compelled to assert the right to establish standards unilaterally.