CORRESPONDENCE

TO THE EDITOR IN CHIEF:

As the regular reviewer of this *Journal* for the *Annuaire français de droit international*, I am much concerned over an increasingly noticeable and disturbing trend: American authors quote and cite less and less French doctrine. The reverse is not as markedly true, although French lawyers could certainly benefit from greater awareness of American international legal writings.

An empirical comparison I have made between the *Journal* (vol. 80, 1,095 pp.) and the *Annuaire* (1986, 1,255 pp.) shows that out of a total of 2,880 footnotes in the former, only 41 (i.e., 1.4 percent) cite references in French, while 209 footnotes—out of a total of 2,874—(i.e., 7.3 percent) refer to texts written in English in the *Annuaire*;[1] and there is absolutely no doubt that some major books in French were overlooked in the articles published by the *Journal* in 1986.

The French figures are surely not very satisfactory, but the American ones are really deplorable. What can the reasons be for this American ignorance (or arrogance)?

One explanation might be that French writings in international law are not worthy of attention, but, if this be the case, it would apply to other languages as well, to which American lawyers pay even less attention, only 22 footnotes (i.e., 0.76 percent) citing works in all other languages in the 1986 AJIL.

A second explanation could relate to acquisitions. In a recent book review devoted to a book in Slovenian, Professor Peter B. Maggs wrote:

> The footnote citations and bibliography reflect the current crisis in the distribution of international legal materials, a crisis caused by the combination of high book and journal prices and the need to conserve foreign exchange for debt service. Cutbacks in book purchasing and library subscriptions inevitably have a negative effect on the quality of scholarship not only in Yugoslavia, but in the numerous other countries with balance-of-payments problems.[2]

I am aware that the United States is facing balance-of-payments problems, but I do not think the situation is that bad!

Moreover, the existence of French writings cannot be said to be ignored. To the *Journal*'s credit, the Book Reviews section makes a reasonable effort to present international law books written in French (11 reviews out of 128 in 1986, compared to 19 publications in English, out of 81, reviewed in the "*bibliographie critique*" of the *Annuaire*); and the tone of the reviews is generally favorable.

[1] The comparison is even more impressive if it deals only with the articles, excluding Notes and Comments and other features: 112 notes—out of 600—refer to English texts in the *Annuaire* (18.7%), whereas 29—out of 1,370—refer to French texts in the *Journal* (2.1%).

[2] Maggs, Book Review, 80 AJIL 403, 403–04 (1986) (reviewing DANILO TÜRK, NAČELO NEINTERVENCIJE V MEDNARODNIH ODNOSIH IN V MEDNARODNEM PRAVU (1984)).

The most convincing explanation therefore seems to be, quite simply, that our American colleagues do not read French. But, as the same seems to be true for Spanish, German, Italian, Japanese and Russian, they certainly deprive themselves of the indispensable comparative dimension, and this also raises a more general and difficult "cultural" problem. "Self-confinement"[3] might be the way empires collapse. . .

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TO THE EDITOR IN CHIEF:

October 23, 1987

On March 7, 1986, the Panel on the Law of Ocean Uses, under the Chairmanship of Louis Henkin, adopted a statement on U.S. Policy on the Settlement of Disputes in the Law of the Sea (*reprinted in* 81 AJIL 438 (1987)). The statement proposes the reciprocal acceptance by the United States, in its relations with other states, of "the obligation to submit to third-party arbitration or adjudication, disputes regarding the interpretation and application of the rules affecting navigation, overflight and pollution, as set forth in the [1982 UN] Convention" on the Law of the Sea (*id.* at 439). Although 2 years were devoted to formulating the statement,[1] it seems to express no more than a rather general vision of a possibly beneficial course for U.S. oceans policy and to ignore the difficulties inherent in implementation of the complex dispute settlement scheme established under the Convention.[2]

For the sake of completeness, however, it should be noted that members of the Panel, in particular Louis B. Sohn, Horace B. Robertson and Bernard H. Oxman, have referred generally to these obstacles in studies published elsewhere.[3] In 1984 Sohn and Kristen Gustafson suggested that the United States file a supplementary declaration with the International Court of Justice accepting the Court's jurisdiction with respect to the principles and rules of customary international law codified in the Convention, except

[3] The French word "*nombrilisme*" would probably be more appropriate, but I do not find any convenient English translation. A literal rendering would be "navelism."

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[1] *See* the 1984 *Exchange between Expert Panel and Reagan Administration Officials on Non-Seabed-Mining Provisions of LOS Treaty*, 79 AJIL 151 (1985).

[2] UN Doc. A/CONF.62/122, *opened for signature* Dec. 10, 1982, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, UN Sales No. E.83.V.5 (1983), and 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY 206 (M. Nordquist ed. 1985). For the status of the Convention, see LAW OF THE SEA BULL., Special Issue No. 1, March 1987 (UN Office for Ocean Affairs and the Law of the Sea).

[3] *See, e.g.*, Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 LAW & CONTEMP. PROBS. 195 (1983); Sohn, *Dispute Settlement*, in THE UNITED STATES WITHOUT THE LAW OF THE SEA TREATY 126 (L. Juda ed. 1983); Robertson, *Navigation in the Exclusive Economic Zone*, 24 VA. J. INT'L L. 865, 913 (1984); Oxman, Dispute Settlement with and among Non-Parties to the Law of the Sea Convention: Navigation and Pollution (20th Annual Conference of the Law of the Sea Institute (LSI), Miami, July 24, 1986).

those dealing with deep seabed mining (governed by part XI).[4] This alternative was not included in the Panel's 1986 statement or in what, to my knowledge, is the only major assessment of its considered effect by a Panel member, a paper presented by Oxman at the Law of the Sea Institute in July 1986. While endorsing the idea proposed in the statement, Oxman stressed what was missing from it, namely, that "[t]he most difficult obstacle to this approach is convincing other states to agree."[5]

Although the anticipated difficulty of persuading other states to go along should not serve as a deterrent, efforts to this effect should be preceded by a careful examination of both the undoubted pros and the numerous cons of the proposed action. The usefulness of linking the dispute settlement obligation to substantive navigational and environmental rights and duties of states as established in the Convention should not be permitted to obscure the obstacles attendant upon linking procedural questions with substantive problems pertaining to the rights and duties of states under international law in general, and the law of the sea in particular. Such obstacles were clearly evidenced during the *travaux préparatoires* of the 1969 Vienna Convention on the Law of Treaties in the context of the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty (part V). Shabtai Rosenne has shown that the International Law Commission rejected the view (strongly urged upon it by two of its special rapporteurs, Sir Gerald Fitzmaurice and Sir Hersch Lauterpacht) that the good faith of a party claiming grounds for invoking the invalidity or termination of a treaty should be tested by that party's willingness to submit the claim to impartial binding settlement.[6] As a result, if there are objections to such claims, the Vienna Convention obliges states merely to "seek a solution through the means indicated in Article 33 of the Charter of the United Nations"—a provision of the Convention whose viability has not yet been tested.[7] Moreover, the same obligation is contained in the 1986 Convention on the Law of Treaties Between States and International Organizations or Between International Organizations; Special Rapporteur Reuter referred to it as "the minimum that could be done and the maximum that could be envisaged."[8]

The compulsory dispute settlement scheme established in part XV of the 1982 Law of the Sea Convention is characterized by numerous limitations and exceptions; in fact, the only categories of dispute specifically subjected to it are those related to *jus communicationis* and pollution. This limited scope of part XV is the result of careful accommodation of the conflicting positions of the maximalists and the minimalists on the general question of compulsory impartial settlement going beyond the formulation of Article 33 of the Charter.[9] The legislative history of this delicate compromise does

[4] L. B. SOHN & K. GUSTAFSON, THE LAW OF THE SEA IN A NUTSHELL 246 (1984).

[5] Oxman, *supra* note 3, at 14.

[6] Rosenne, *The Settlement of Treaty Disputes under the Vienna Convention of 1969*, 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] 1, 2–4 (1971).

[7] Art. 65, para. 3 of the Convention, *opened for signature* May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27, *reprinted in* 63 AJIL 875 (1969), 8 ILM 679 (1969).

[8] [1982] 1 Y.B. INT'L L. COMM'N 153, UN Doc. A/CN.4/SER.A/1982. *See* Art. 65, para. 3 of the Convention, *done* Mar. 21, 1986, UN Doc. A/CONF.129/15, *reprinted in* 25 ILM 543 (1986).

[9] *Cf., e.g.*, Oda, *Some Reflections on the Dispute Settlement Clauses in the UN Convention on the Law of the Sea*, in ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE MANFRED LACHS 646 (J.

not seem to justify any assumption about the readiness of other states (especially maritime powers and states granting flags of convenience) to commit themselves in advance to compulsory arbitration or adjudication of navigational and environmental disputes without becoming parties to the Convention. This is all the more reason to believe that states' reluctance to accede to the Convention may be due not only to objections regarding part XI, but also to misgivings about the compulsory settlement of disputes provided for by part XV.[10] It also seems worth mentioning that Soviet writers expressly maintain that the lack of recourse to compulsory procedures (and accordingly, the impossibility of defending shipping interests in the 200-mile zones), so long as the Convention has not entered into force, is an important reason for the prompt ratification of the Convention.[11]

In addition, one of the main incentives for states to accept compulsory dispute settlement under the Convention was its limitation to disputes related to the interpretation or application of the Convention itself.[12] Implementation of the Panel's proposal outside the Convention would thus entail recourse by the court or tribunal to the norms of customary (and not conventional) law, as partly embodied or crystallized in the Convention, a written law not yet in force.[13] Another obstacle related to the substance of part XV is posed by the flexibility with respect to the choice of a competent forum and the multiplicity of forums that evolved from the Montreux Compromise.[14] In particular, notwithstanding the advance preparation in this regard, the International Tribunal for the Law of the Sea will only be established when the Convention enters into force; consequently, until then and as long as the United States remains a nonparty, its options as to the competent forums will (presumably) be reduced in most cases to the ICJ and arbitration.[15] Furthermore, for those states which are reluctant to accept, or even clearly preclude, jurisdiction of the ICJ, arbitration will arguably be the only possible "choice" in the period preceding the establishment of the Tribunal.

A whole set of more specific problems may also be encountered in the implementation of the expert Panel's submission; for instance, those relating to the controversial "incidental" jurisdiction governed by Article 290, which stipulates the binding (and not simply advisory as with the ICJ) char-

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Makarczyk ed. 1985); Rosenne, *The Settlement of Disputes in the New Law of the Sea*, IRANIAN REV. INT'L REL., Nos. 11–12, 1978, at 401.

[10] Shabtai Rosenne made this point in a conversation I had with him in February 1987.

[11] *See, e.g.*, A. Kolodkin, V. Andrianov & V. Kisilev, The Legal Implications of Participation or Non-Participation in the UNCLOS, and G. G. Shinkaretskaya, Legal Order in the World Ocean and Peaceful Settlement of International Disputes (papers presented at the 15th *Pacem in Maribus* Convocation, Malta, Sept. 7–11, 1987). *Cf.* the discussion at the 1984 LSI workshop, in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 496–503 (J. Van Dyke ed. 1985).

[12] *See* Art. 293, para. 1. *Cf.* Jaenicke, *Dispute Settlement under the Convention on the Law of the Sea*, 43 ZAÖRV 814, 816 (1983).

[13] *Cf.* Sohn, *Unratified Treaties as a Source of Customary International Law*, in REALISM IN LAW-MAKING: ESSAYS IN HONOUR OF WILLEM RIPHAGEN 231 (A. Bos & H. Siblesz eds. 1986).

[14] *Cf.* Rosenne, *UNCLOS III—The Montreux (Riphagen) Compromise*, in *id.* at 169, 170.

[15] *Cf.* Finlay, Letter to the Editor in Chief, 81 AJIL 927 (1987).

acter of provisional measures.[16] In particular, the fact that the Convention grants a clear *privilège de juridiction* in this respect to the Law of the Sea Tribunal necessitates consideration of how the provisional measures are to be applied before the Tribunal is established and the United States becomes a party to the Convention. Other matters deserving further in-depth inquiry include the lack of a time limit for the exhaustion by states of noncompulsory procedures of dispute settlement; the protection of states provided for in Article 294 against unjustified legal proceedings instituted in abuse of legal process, or those which are not prima facie well founded;[17] and the requirement of prior exhaustion of local remedies established in Article 295.[18] Moreover, although it is often assumed and is repeated in the Panel's statement that the Tribunal might play an important role at least in settling disputes related to the prompt release of detained vessels, the detailed arguments made by Judge Shigeru Oda against this assumption deserve careful consideration.[19]

The foregoing remarks are by no means intended to imply that the expert Panel's proposal in the main amounts to no more than an interesting theory invented with a view to accommodating the U.S. position as a nonsignatory.[20] Instead, I have tried to express certain reasons for doubt, which, in their complexity, seem to require further examination.

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[16] *Cf.* A. O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 65, 140–42 (1987); Rosenne, *supra* note 9, at 424; Ranjeva, *Le Règlement des différends*, in TRAITÉ DU NOUVEAU DROIT DE LA MER 1105, 1147–50 (R. J. Dupuy & D. Vignes eds. 1985).

[17] On obstacles related to preliminary proceedings, see Rosenne, *Settlement of Fisheries Disputes in the Exclusive Economic Zone*, 73 AJIL 89, 101 (1979).

[18] For detailed examination of controversy over application of this requirement (especially with regard to transboundary pollution), see, e.g., Goldie, *Concepts of Strict and Absolute Liability and the Ranking of Liability in Terms of Relative Exposure to Risk*, 16 NETH. Y.B. INT'L L. 175, 218–19 (1985); J. G. LAMMERS, POLLUTION OF INTERNATIONAL WATERCOURSES 618–24 (1984).

[19] *See* Art. 292 of the Convention. *Cf.* Oda, *Fisheries under the United Nations Convention on the Law of the Sea*, 77 AJIL 739, 747–49 (1983); and Oda, *supra* note 9, at 649–51.

[20] This attitude was evident in an oral comment by Ambassador Hasjim Djalal of Indonesia on Oxman's paper, *supra* note 3. See also the rather careful reaction of David Colson of the U.S. Department of State to Oxman's comment, in CONSENSUS AND CONFRONTATION, *supra* note 11, at 512–13 and 521. Note also, however, the statement of the U.S. Panel on the Law of Ocean Uses dated Sept. 25, 1987, *Deep Seabed Mining and the 1982 Convention on the Law of the Sea, reprinted infra* at p. 364, which emphasizes the benefits of adherence to the Convention to be gained by the United States (and its limited economic and security interests in deep seabed mining in the foreseeable future).

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