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FINN SOLLIE et al.

The Challenge of New Territories

New Problems – Old Solutions *Gunnar Skagestad & Kim Traavik* 39

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Foreword

Reinforced by advanced technology and the surging demand for energy and raw materials, Man's natural curiosity has now led to the systematic exploration and exploitation of the vast areas which have not formerly been part of the organized system of territorial states. The continental shelf and the deep seabed, as well as the icy reaches of the polar regions, are gradually being brought into the realm of economic and industrial activity. To make this 'colonization' of new territories – comprising more than three quarters of the globe – an orderly process, and to develop a legal, political and organizational framework for that process, may be Man's greatest challenge in the last quarter of the twentieth century.

Both from an international point of view and in terms of the specific interests of the several nations involved, current negotiations for an international agreement on a new law of the sea and the seabed to regulate conditions in the oceans of the world, concern a wide range of issues and problems that cannot be couched in narrow technical-juridical terms.

The present volume comprises a series of articles on important aspects of the many-faceted *problematique* of the present day new territories. The articles are a product of a research program at the Fridtjof Nansen Foundation for the study of international legal, political and organizational problems arising in connection with the development of the new territories.

The volume is the first in a series to be published. Of the contributors, Per Antonsen, Gunnar Skagestad, Kim Traavik and Willy Østreng are research fellows at the Nansen Foundation. Tønne Huitfeldt is a Major General in the Norwegian Army and Helge Vindenes is the Deputy Director of the Legal Department in the Norwegian Ministry of Foreign Affairs.

The Fridtjof Nansen Foundation
at Polhøgda, Norway

June 1974

Finn Sollie
Director

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New Problems — Old Solutions

GUNNAR SKAGESTAD & KIM TRAAVIK

The verdict in 1933 by the Permanent International Court of Justice in the so-called 'Eastern Greenland Case' brought to the fore the dilemma of adapting the traditional sovereignty concept to the novel political/legal problems characterizing the 'new territories'. With the opening up of other 'new territories' for exploration and subsequent exploitation, this dilemma has grown ever more acute in recent years.

This chapter highlights some general regulation problems in 'new territories', gives a description of attempts made to solve such problems in the past, and identifies the key elements in the various 'solution models' (notably the Svalbard Treaty, the Antarctic Treaty and the Continental Shelf Convention). These elements are described and analysed comparatively, with a certain emphasis on the somewhat divergent preconditions prevalent in the three separate examples. In the final section, the authors proceed to discuss the applicability of the old solution models to the present and emerging regulation problems in the new territories.

I. INTRODUCTION

1. *New Territories as New Tension-Fields in International Politics*

The 'new territories'[1] are typical *marginal regions,* in respect of geography, as well as in respect of politics (international law). An important feature of the development of such regions has been the formation of *new tension-lines* and *new tension-patterns.* New regions which used to be (and which, in some cases, still are) 'no-man's land' in the political and legal sense, have been opened up for systematic exploration and to some extent also for exploitation. The involvement of individual states displays considerable differences in kind and intensity, e.g. with regard to motives and aspirations, and, not least significantly, with regard to their practical exploitative means – their *capability.* These circumstances have resulted in *international conflicts of interests* which to a varying extent have come to characterize the development in the various 'new territories'. This is a development that entails an increased *conflict potential,* in the relations between individual nations, as well as between national and international interests and objectives.

There are two aspects of the 'new-territories issue' which we shall deal with here:

(1) That new activity in new regions creates new types of problems, requiring *new types of solutions;*[2] and

(2) that the development threatens to alter the *status quo ante* in an unfavorable direction, i.e. in the direction of greater insecurity, something which calls for measures to be taken to *preserve* the *status quo* in areas where this is considered desirable (e.g. with regard to environmental protection, demilitarization, etc.).

From these two aspects of the 'new territories issue', one would also expect to find *two corresponding aspects* in the *solution-models*[3] which might possibly be applied in tackling the problems of the 'new territories':[4]

(1) *Innovation,* i.e. the invention of novel, viable forms of solutions, adapted to the concrete requirements present in a given 'new territory'; and

(2) *Conservation,* i.e. the preservation of (parts of) the situation already present (*status quo ante*), so as to impede or prevent a development in an undesired direction.

2. *The Historical Background*

As regards the factors that affect the new territories, *international law* is rather deficient. This, however, does not preclude

the transference, modification, or further development of the principles of international law with an eye to these factors.[5] The community of international law is based, *inter alia*, on the principle of *sovereignty*.[6] Traditionally, sovereignty applies to a geographically delimited territory, and consists in that right which an independent state has within its own territory. This right includes, e.g., the jurisdiction of the state, and its monopoly on the legitimate use of physical force within the territory concerned.

In a historical perspective, sovereignty is almost inextricably linked to the nation-state. The *acquisition* of sovereignty has come about in various ways, by violent, as well as by non-violent, means. Through the international common law that was gradually established, *effective occupation* became the principal criterion of sovereignty, as well as the requirement which had to be fulfilled for the acquisition of sovereignty to count as an accomplished fact. This held true whether the territory in question, prior to the acquisition of sovereignty, was considered no-man's land – *terra nullius* – or whether it had previously been subject to the sovereignty of another state.

As we have defined the concept 'new territory', this coincides in part with the traditional category *terra nullius* – i.e. no-man's land which, under certain conditions (ultimately effective occupation), could be made the subject of national acquisition of sovereignty – but in certain respects the new territories differ essentially from those of the category *terra nullius*. A prominent feature of the situation in the new territories is the combination of an ambiguous status *vis-à-vis* international law, and a recently established resource-political attractiveness to a potentially very large number of agents. As a historical analogy close to hand, we recall the race for colonies on the African continent in the 19th and early 20th centuries, but the comparison is slightly strained. Contrary to the new territories, Africa had an indigenous population, and could be made the subject of effective occupation (with certain modifications) on the part of the colonial powers. This latter is essential. The new territories are of such a nature that effective occupation, in the traditional sense, is not possible. The question therefore arises as to whether these types of region really *can* be made the subject of national acquisition of sovereignty. If one answers, 'Yes', it is at the same time clear that one must undertake a reappraisal and redefinition of the traditional criteria of sovereignty. This is what actually happened in the case concerning the legal status of East Greenland in 1933, when the Permanent International Court of Justice in the Hague recognized Denmark's sovereignty on the basis of a somewhat watered-down interpretation of the requirement of international law for effective occupation:[7]

> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereignty rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

Even though the verdict in the East Greenland case was an important precedent also in historical perspective, it did not solve the political and legal problem of regulation which occupies such a central place in the new territories question. It seems to be generally recognized that this problem of regulation cannot be solved within the framework of that system of established nation-states on which international law has so far been based. The solution does not lie in ever more comprehensive (in principle unlimited) extensions of national sovereignty. In this connection, the attention of politicians and of scholars of international law has to some extent been drawn toward the *terra communis* alternative; i.e. the idea that certain regions are 'the common heritage of mankind', in a picturesque phrase.

In recent years these questions have become pressing through the development within the sea- and seabed-problem area that has taken place since the Geneva Conventions on the law of the sea in 1958.[8] The rather dramatic development of man's technological capacity – and hence his capacity for the exploitation of resources – with regard to the sea/seabed-regions, has entailed an ever more widely recognized need for the creation of a new legal order in the regions not dominated by any political authority, and that lack, therefore, the law and order that is necessary for a regulated and defensible exploitation of resources.

II. THE NEED FOR REGULATION: WHAT AREAS?

1. *Research/Exploration*

In the case of the new territories special circumstances are brought into play that create special needs for regulatory measures with regard to research/exploration. Two factors will be emphasized here:

(1) The circumstance that, within the new territories, several *states* ('national agents') are frequently found engaged in scientific activity within the same area, partly in mutual rivalry. Research will thereby, from the very start, be 'politicized'. In addition, a situation will arise which carries the risk of a (economically or politically motivated) *scientific rush,* something which in its turn carries the seeds of international conflict. This notwithstanding the fact that scientific exploration, considered as a subject area, is really an at least relatively uncontroversial enterprise.[9]

(2) The circumstance that the tasks of research in the new territories – *inter alia,* because these regions are still relatively unexplored – are so *comprehensive,* and the practical scientific work in these regions – due to the geographic and climatic nature of the regions – is so *costly* and *difficult,* raises demands for greater efforts towards an effective solution of the research tasks than one is able to muster within the limits dictated by the more or less limited resources of individual states. For these reasons, it may be expedient to opt for international cooperation. An indication of this is found in the formulation, in the Antarctic Treaty, of one of the objectives of the scientific cooperation stipulated in the treaty: '... to permit maximum economy and efficiency of operations'.[10]

2. *Economic/Extractive Activity*

The actual and potential findings of exploitable resources in the new territories carry the obvious risk of an international resource-race, something which may promote conflict with regard to the relations between states and, hence, have unfortunate security-political consequences.[11] The prevention of such eventualities entails in itself a need for regulation.

There will also arise, however, certain needs for regulation with a more direct linkage to such economic/extractive activity. The practical exploitation of natural resources which are not found within the dominion of any individual state requires a minimal degree of law and order. The exploration and exploitation of such resources – the so-called 'extra-national' resources – necessitate a heavy investment of capital, personnel, and equipment. An enterprise, whether private or public, which makes such an investment, has a legitimate claim to a certain assurance of a return on its investment. On the national level, this is secured partly through franchises and the protection of property rights, and partly through patent and copyright legislation which protects against 'piracy' and parasitism on the efforts of other people. Unless such protection is also given in the exploitation of the new territories, one will not obtain the efforts necessary for exploitation of the resources there.[12]

The problem-situation and the needs for regulation mentioned here, are today particularly relevant in connection with

the economic/extractive aspects of the sea/seabed-question.

The need will also arise for a system of rules which can protect other and wider interests in connection with this subject-area. Partly, it will be a question of special security- and standardization-rules for the execution of operations; partly, it will be a question of general rules for the protection of interests other than those directly involved in the operations. This leads us directly on to the question of the need for eco-control.

3. *Eco-Control*

As regards the need for eco-control – i.e. endeavors aimed at preventing, impeding, or reducing undesirable ecological disturbances – there are certain special circumstances which come into play in the new territories.

In the first place, these regions are 'virgin territory' also in the sense that their natural environment is relatively intact. This generalization does not, indeed, hold to the same degree in all the new territories; while, e.g., pollution in the polar regions is quite insignificant, the high seas are exposed to a pollution which, notably in the case of certain oceanic regions, is sometimes characterized as disturbing. It is clear, nonetheless, that, as compared to the permanently settled parts of the world where all sorts of ecological disturbances form, for better or for worse, an integrated element of the human condition, the new territories appear *en bloc* as rather uncontaminated.

In the second place, certain of the new territories – specifically the polar regions – are so constituted that their ecological balance is particularly labile and easy to upset.[13]

Not the least important, the increasing economic / extractive activity entails an acknowledged risk of increasing ecological disturbances in the still relatively intact natural environment which, on the whole, is found in the new territories. The question of the need for eco-control arises, then, from two different types of premises:

(1) The desire to protect the 'intact natural environment' *per se,* as scientific laboratories, natural museums, or recreational resorts in their original state of innocence, stamped, as it were, 'untouched by human hand'; and

(2) the desire to prevent ecological disturbances in the new territories in so far as such factors might have negative consequences for the environment of life in the rest of the world.

Paragraph (2), in particular, may in the present context be worthy of certain attention. The crucial point here is the global approach: That the 'new' and the 'old' territories constitute an environmental whole, with essential reciprocal, mutual interrelations.[14] One cannot, therefore, remain indifferent to possible radical changes in the environment of the new territories.

In addition to the fact that the new territories, by definition, lie outside the jurisdiction of national states, it is clear that the very problem-types involved in the question of eco-control are of such a nature that they transcend the territorial and jurisdictional state borders.[15] Primarily, therefore, eco-controlling endeavors in the new territories seem to present themselves as a natural object of international cooperation. Those needs for regulation which are present in this area, therefore appear strongly as needs for organized international cooperation as well.

4. *Sovereignty- and Jurisdiction-Status*

In a discussion of the need for regulation with regard to the new territories, the *regulation of sovereignty- and jurisdiction-status* stands out as a subject-area of a particularly fundamental kind. This may already have appeared indirectly from the definition of new territories. We may further note that:

(1) The regulation of sovereignty- and jurisdiction-status is something which affects fundamental relations, such as indeed the legal and political status of the regions which we are here concerned with; and

(2) the legal and political status of the regions is of crucial importance for the possible regulation that might take place within other subject-areas in these regions.

With regard to the internal affairs of the new territories, the question of regulation of sovereignty- and jurisdiction-status is chiefly a question of whether there should be a minimal degree of law and order, or continued anarchy. With regard to the situation of the new territories in an external (regional or global) context, the question also has a world-political (power- and security-political) aspect: A politically/legal unregulated region will also be a power-political vacuum, and, as such, will be a possible subject of international rivalry and controversy. Clarification of the problems of sovereignty and jurisdiction will therefore serve a conflict-preventive function.[16]

5. *Military/Security-Political Activity*

The new territories are, *ex hypothesi,* non-militarized regions. With the rapid military-technological development of our time, this conception, however, must be considerably modified: The high seas, the seabed, and the no-man's land parts of the Arctic are exploited in the advanced strategy of the super-powers, for logistical and communication purposes, as well as for training purposes, and as (potential) military deployment zones.[17]

From the point of view that any expansion of the conflict zones of the world (e.g. in the form of an arms race in previously non-militarized regions, or in politically unregulated regions) is in principle undesirable, the need for regulation in respect of military/security-political activity in new territories seems to be obvious enough. With regard to territories which no state has as yet begun to utilize in its security-political planning or its military strategy, a natural desideratum is the *conservation of the existing situation* (cf. introduction), e.g. by the establishment of demilitarized zones. Examples of this type of situation, where just this type of regulation was introduced, are found in the conclusion of the Svalbard (Spitsbergen) Treaty of 1920 and of the Antarctic Treaty of 1959, respectively. In such new territories, where a certain measure of militarization has already taken place, the need for regulation will primarily concern the reduction or neutralization of various uncontrolled variables of a conflict-promoting kind. To some extent this may happen through treaties on arms control measures. A crucial uncontrolled variable in the security-political context, however, is the insufficiently regulated political and legal status of the region concerned. In practice this entails that the possible regulation of the sovereignty- and jurisdiction-status of a given new territory will at the same time meet an essential part of that need for regulation which concerns possible military/security-political activity.[18]

III. SOLUTION-VARIANTS

In the preceding, we have presented the main features of the syndrome connected with the new territories, with special emphasis on those *needs for regulation* which are found within this syndrome. Although one may discern here between the respective needs for regulation within several different subject-areas, nonetheless all of these needs are, to a greater or lesser extent, connected with the need for regulation of the political and legal status of the respective regions. Initially, in somewhat abstract and general terms, we touched upon the question of which *solution-models* might possibly be applied to the task of tackling the problems of the new territories. In what follows, we shall discuss more concretely certain variants of such models.

1. *The Svalbard Treaty*

The Svalbard Treaty of 9 February 1920 served several objectives. The main one may be summarized as follows: To regulate the political and legal status of the archi-

pelago, in order thereby to regulate the economic activity taking place there. Before the treaty came about, the archipelago was considered no-man's land (*terra nullius*). With the increase in multinational activity (i.e. especially coal-mining) that was undertaken in Svalbard after the turn of the century, the anarchic conditions grew ever more untenable, and the need for a normalization of the conditions grew ever more urgent. The Svalbard question was discussed in connection with the Versailles Conference in the fall of 1919, and the discussions resulted in an international agreement – the Svalbard Treaty. This treaty gave Norway sovereignty over the region; the exercise of sovereignty, however, was made conditional upon certain rather narrow terms. The main principles of the treaty are demilitarization and neutralization of the region, and furthermore, free access for, and equal treatment of, the treaty parties and their subjects, with regard to engagement in economic activity in Svalbard.

As a model for the regulation of sovereignty and jurisdiction status, the Svalbard Treaty displays a number of interesting traits, of which three, in particular, will be emphasized as essential:[19]

(1) Relations of sovereignty are *not* established by the unilateral actions of a single state or by the bilateral agreement between two states, but as the result of cooperation and agreement among a number of states. This multilaterality is not, however, based on any principle of universality, but concerns an *exclusive group* of states which, due to particular regional interests and/or positions of power, assumed authority over and responsibility for the regulation of sovereignty and jurisdiction relations in the given region.

(2) Relations of sovereignty are established according to the principle of *national, territorial sovereignty*; a principle which entails that the concept of sovereignty is regarded as indivisible, and rooted in the nation-state. One state – viz. in this particular case, Norway – is accorded the 'full and absolute sovereignty' over the region.

(3) The national sovereignty ('the full and absolute sovereignty') is made conditional on essential restrictions on the exercise of sovereignty, and on positive obligations placed upon the state to which sovereignty is accorded (i.e. Norway). These restrictions and obligations are partly of a security-political character, and partly aimed at safeguarding the interests in the region of other nations and their citizens.

The character of security-political zone-arrangement found in the Svalbard Treaty displays certain features of interest on matters of principle:

(1) The arrangement concerns an exactly delimited geographic region – a 'zone' comprising all islands between 10 and 35°E and 74 and 81°N.

(2) The arrangement entails complete demilitarization and neutralization of the region concerned (Art. 9).

(3) The arrangement entails that responsibility for maintaining the security-political status of the region is placed on one nation.

(4) The arrangement has no formal element of inspection. On the other hand, the parties have a general right to free and unobstructed access to and occupancy in the region. This 'right of presence' gives the parties the possibility of individually ascertaining that the security-political status of the region is not changed, and it thereby compensates for the lacking right of inspection.[20]

Also subject-areas like research exploration[21] and eco-control[22] are to some extent regulated by the Svalbard Treaty. In the context of the treaty, these subject-areas, however, are relatively peripheral, and the regulatory measures are not particularly far-reaching.

The Svalbard Treaty is an example of regulation of sovereignty- and jurisdiction-status through international negotiations, and it is thereby, to some extent, to

be regarded as an *international-cooperation solution* (by contrast to possible solution of the relevant regulation questions through unilateral national action or through international conflict). When such a solution fell natural, this was a consequence of the historical situation and the prevailing political premises, of which the following circumstances should be emphasized in particular:[23]

(1) The economic activity in Svalbard had come under way *before* the sovereignty-status had been clarified, and a number of countries were actively involved in the development in Svalbard.

(2) No single nation had an incontestable basis for unilateral occupation of the archipelago.

(3) Security-political reasons advised against a solution on a unilateral, national basis: Several great powers attached strategic importance to the archipelago, while at the same time not one of them had sufficient predominance in the region to act on its own.

2. *The Antarctic Treaty*

The chief objective of the Antarctic Treaty of 1 December 1959 was to secure continued and undisturbed scientific exploration of the Antarctic, and international cooperation for this purpose.[24] The background for this was the large-scale international scientific cooperation-program which was launched in the International Geophysical Year (abbr. IGY, 1957–58). In connection with IGY, the participating states had made considerable investments in research activity (expeditions, bases, material, etc.). It was early clear that full utilization of these efforts would require scientific activity beyond the brief IGY-period. It was likewise clear that continued practical scientific cooperation was considered desirable by all the parties concerned. To preside over the practical aspect of this cooperation – i.e. primarily to coordinate the respective national research projects of the individual countries – a scientifically sponsored, internationally constituted committee was appointed in 1957, with the abbreviated designation SCAR (Scientific Committee on Antarctic Research). This committee has since played a continuing and important part with regard to international scientific cooperation (and, in a wider sense, the political development) in this part of the world. The Antarctic Treaty was concluded between the same states that cooperated during IGY (and in SCAR) to secure the *political* conditions for this scientific cooperation.

Among the subject-areas regulated by the Antarctic Treaty, matters concerning the international scientific cooperation naturally occupy a central position. The treaty furthermore prescribes, *inter alia,* demilitarization of the entire continent, atomic test ban, etc. The treaty also gave a certain – albeit limited – clarification and regulation of the problems which had arisen with regard to the jurisdictional relations on this continent (or more precisely, in the region defined as all land, islands, and permanent ice-formations south of 60°S).

As a model for the regulation of new territories, the Antarctic Treaty shows certain features which must be regarded as essential for this particular solution alternative, and which will therefore be emphasized:

(1) The treaty is not based on any principle of universality, but includes an *exclusive group* of states which, due to particular regional interests and/or positions of power, assumed authority over and responsibility for the regulation of the current problems in the given region. (The treaty, it is true, is open to ratification by all states which are members of the UN. Ratifying states, however, may not participate in the stipulated consultations on an equal footing with the original signatories, unless they, too, have proved their interest by actively carrying out enterprises in the Antarctic.)[25]

(2) The most prominent feature of this solution-model is its character as a 'non-

ic exploitation, it still provides (and still by contrast to the Svalbard Treaty) an 'apparatus' which makes it possible to tackle such problems via international cooperation.

Eco-control is another area where the consultation arrangement and the recommendation system of the Antarctic Treaty give the parties the opportunity of coordinated action, but in this area there is a more direct mandate in so far as Art. IX obliges the parties to consult on and recommend to their governments '... measures regarding' *inter alia,* 'preservation and conservation of living resources in Antarctica', etc.

The Antarctic Treaty is an example – in the context of new territories – of a solution-model based on international negotiations, and giving a central role to international cooperation. One was faced with a unique situation, where a number of historical and political circumstances pointed in the direction of a unique solution. The treaty has both *conservative* (such as non-militarization, as well as a 'freeze' on sovereignty disputes) and *innovative* (such as the establishment of an apparatus for political consultations and cooperation) elements. The treaty gave a *dualistic* solution, in so far as it united the national claims with the demands for internationalization, and it gave a minimum solution, in so far as it represented the point of intersection (coincidence) of the somewhat divergent interests and premises of the various national agents. By contrast to the Svalbard Treaty, the Antarctic Treaty gives an incomplete, unfinished framework of rules, and the expression 'solution-model' would be apt to mislead, were it taken to imply a complete political regulation of the status of the new territory concerned. The 'solution' of the Antarctic Treaty lies in its combination of, on the one hand, the recipe it gives for a practical and constructive international cooperation and, on the other hand, the recipe for a certain (at least temporary) neutralization of such politically charged factors (especially with regard to the sovereignty- and jurisdiction-syndrome) as might obstruct the international cooperation.

3. *The Shelf Convention*

In connection with the Geneva Conference on the international law of the sea, in 1958, a convention was adopted for regulating the jurisdictional relations on the continental shelf.[31]

It has been a common definition of the continental shelf that it comprises the part of the seabed off the coast which does not lie deeper than 200 meters below the surface of the sea. Since the shelf can be regarded as a natural extension of the littoral state, it seemed reasonable to hold that the sovereign rights of the coast state also must include the continental shelf. Before 1958, however, this was not part of international common law; although more than 30 states maintained certain claims, the continental shelf in general, like the deep-seabed, had to be considered no-man's land. The Shelf Convention of 1958, however, confirmed the sovereign rights of the coast state over the continental shelf off its coast.

As a solution-model in the context of new territories, the Shelf Convention is distinguished by the following three very simple principal characteristics:

(1) The solution is a result of *international action* (namely, the cooperation-geared negotiations which issued in the convention), based on the principle of *universal participation.*

(2) The convention prescribed a *national solution*; – the jurisdictional relations were regulated on the basis of the traditional principle of national, territorial sovereignty.

(3) By defining the national continental shelves (see below), the convention laid down the principle of *demarcation* between parts of the seabed subject to national sovereignty, and those parts that are not (and which are thus to be regarded as what we here understand by the term 'new territories').

We wish to maintain that paragraph (3), above, is the most interesting *innovative* element of the convention. At the same time, precisely at this point lies the greatest weakness of the convention, because this demarcation was carried out from premises which were partly vague and partly faulty. (Cf. Art. I of the Shelf Convention).

The so-called exploitation-criterion has resulted in a notably labile situation. Since sovereignty of the coast state is in practice limited only by the factor of maritime technology, the borders for the various shelf-dominions are pushed ever further out from the shore, in time with the rapid technical development. The Shelf Convention, therefore, no longer gives a satisfactory solution to the practical problems connected with seabed rights. The problem with regard to the rights of sovereignty over the seabed has gradually grown ever more acute, and, since 1967, has been discussed by a special Seabed Committee in the UN. Here one has succeeded in achieving a certain agreement on the following principles:[32]

(1) A definite lower limit for the rights of coastal states over the seabed (continental shelf, etc.) must be established.

(2) Underwater regions outside this limit should be given the status of joint international territory.

(3) The internationalized regions should be placed under the jurisdiction of the UN, and the UN itself or a special agency should regulate exploration and exploitation of the international seabed.

(4) The UN should be empowered to grant franchises for the exploration and exploitation of the international parts of the seabed to individual states and/or private groups, and to demand fees for such franchises.

A final solution to the current problems of regulation will be sought achieved in connection with the planned UN-conference on the international law of the sea.[33]

IV. THE APPLICABILITY OF THE SOLUTIONS

The three selected solution variants that have been treated in the preceding must all be considered in the context of the concrete situations in which they were framed, and of the concrete problems with which one sought to cope. These circumstances are not identical, and the three models are – as would be expected – conditioned by time, place, and subject-matter. From our point of view, one important common feature is that all three solution-models, to a considerable (albeit varying) extent, concern and exhibit central aspects of the general new-territories problem. If we look specifically at the *solution* aspect, we shall find marked differences between the three models:

The Svalbard Treaty gives a *final* solution; it is a '*static*' model in so far as the status of the region, the respective rights and obligations of the parties, etc., are purported to be finally decided in and by the signing of the treaty.

The Antarctic Treaty gives *no final* solution; it is a '*dynamic*' model by virtue of the possibilities it gives for innovation and further development; a development, however, which is dependent on the ability and willingness of the parties to exploit these possibilities through active international *cooperation.*

The Shelf Convention gives a *final but incomplete* solution; it is a '*static*' model in so far as it lacks the apparatus for cooperation, problem-solving, and possible innovation found in the Antarctic Treaty; nor does it, like the Svalbard Treaty, give any complete solution of actual and potential needs for regulation. The still unregulated status of the deep-seabed, and the inadequate demarcation between the latter and the national shelf-regions, actualize the need for a *new, supplementary* convention.

As regards present and future needs for regulation with regard to sea/seabed and the Arctic, one should however – from the preceding model-analysis – be able to

extrapolate certain principles which may have application.

One must presumably acknowledge that the new territories are so far different – in respect of both regional peculiarities, problem-types, and the political premises involved – that it is hardly possible to sketch a general 'new-territories model' that might presumably meet the most essential needs for regulation in an arbitrarily given new territory. It seems evident, nonetheless, that there are certain general elements which must be present in possible solution-models intended for the sea/seabed and the Arctic.

(1) *International participation.* A possible solution must come, not as the result of unilateral national actions, but, as the result of the concerted action of several states (cooperation-geared negotiations). Whether this international participation should be universal (open to all states) or exclusive (e.g. regionally limited) is a subordinate, even if very important, question, which should be answered on the basis of the concrete situations.

(2) *The problem of demarcation.* A chief element in a solution-model must be to implement a satisfactory demarcation between, on the one hand, indisputably national territories and, on the other hand, regions which do *not* have this status. The latter category (which, in practice, corresponds roughly to what we understand by 'new territories') will encompass regions with a recognized status as no-man's land, as well as more disputed regions where certain, restricted forms of national sovereignty may possibly be debated (cf. paragraph (4), below).

(3) *Balancing of national and international interests.* To establish a new legal order in the no-man's land is a matter of obvious international interest. In its widest ramifications, this may mean an international regime over the deep-seabed, the open seas, and the high Arctic. On the other hand, the individual states – some more than others – have more or less clear and legitimate interests to protect in larger or smaller parts of the regions in question. A *balancing of interests* is therefore necessary.

(4) *Differentiation with regard to sovereignty and jurisdiction.* A convenient balancing of interests (between national and international interests) necessitates a greater *differentiation* of the forms of sovereignty and jurisdiction than has traditionally been the case. The eventuality of an 'international regime' in itself entails such a differentiation in relation to the traditional concept of sovereignty. A solution-model, however, must also leave room for *intermediate variants,* such as, e.g. 'zones' where the national authorities are granted certain restricted rights of sovereignty, combined with special international obligations.

The object of the preceding paragraphs is *not* to propose any cut-and-dried all-purpose solution, but roughly to indicate certain elements seeming indispensable to an arrangement striving toward a serious solution to the general regulation problems which arise with regard to the sea/seabed issue and the Arctic. Without here taking issue on the proposals, which in later years have appeared from various political quarters, we shall note that the need for a differentiation of the traditional concepts of sovereignty and jurisdiction seems to be something of a *leitmotif.* As a concrete example concerning the seabed, we may note the American proposal to give the 'continental slope' (i.e. the slope from the continental shelf down toward the deep-seabed) a political/legal intermediate status, between the national continental shelves and the deep-seabed, which is proposed to be completely internationalized. As regards the high seas, there is a parallel example in the proposal (which, *inter alia,* has received the preliminary support of Norway) which is expected to be taken up at the scheduled conference on the law of the sea concerning an 'economic zone' of 200 nautical miles, where the coast states are given certain jurisdictional and regulatory rights, though not full

rights of sovereignty.[34] In the case of the Arctic, scholars have proposed an arrangement entailing a division of the region into several 'zones' with varying degrees of internationalization and national control, respectively.

There may also be room for various alternative solutions in the case of those regions concerning which there might be consensus, in principle, that they should be made the subject of full internationalization. One solution might possibly be, e.g. the establishment of a special body under the UN for purposes of presiding over the administration and regulation of the relevant types of activity in the region(s) concerned. Another could be the establishment of one or several 'territory-possessing international organizations'.

As an important aspect of the general new-territories question, we noted initially that new activity in new regions creates new problem-types requiring *new types of solutions*. This seems, *a fortiori*, to have consequences for traditional international law. For instance, the needs for regulation with which one is faced in the case of the new territories entail that *the concept of sovereignty* is in the process of altering its content in certain respects and in certain contexts. It seems evident that the actual and potential forms of solutions which we have discussed in the preceding presuppose a more flexible concept of sovereignty than that with which one has previously ordinarily operated.

NOTES

[1] For a definition of this concept, cf., *inter alia*, the introductory article, and Finn Sollie, 'The New Development in the Polar Regions', in this volume.

[2] For a brief presentation and discussion of various such types of solutions, cf. Gunnar Skagestad, 'Spørsmålet om regulering av ressursutnyttelse i 'nye territorier': Løsningsalternativer og muligheter', *Minerva's Kvartalsskrift*, 1972 Nos. 3/4, pp. 225–231.

[3] In our context, the term 'solution model' is used as referring to the basic provisions and principles in a set of rules, which may find application in areas other than that particular area, the regulation of which was the original objective of the said set of rules.

[4] A solution model for the 'new territories' should thus have – in the terms of the current popular-political vernacular – a 'radical' as well as a 'conservative' element.

[5] Cf. in this context Bjarne Solheim, 'Å utvikle folkeretten', *Aftenposten*, 22 July 1969.

[6] It is referred to the so-called *territorial sovereignty* or 'dominium', as distinguished from the so-called *political sovereignty* or 'imperium'; the latter concept referring to the authority which a state wields over its subjects, regardless of territorial movements.

[7] Quoted and discussed more closely in, *inter alia*, Oscar Svarlien, 'The Legal Status of the Arctic', *Proceedings of the American Society of International Law*, 52nd Annual Meeting, Washington, D.C., 24–26 April 1958, p. 141; Gerard J. Mangone, *The Elements of International Law*, Dorsey Press, 1963, p. 106; and Trygve Krogdahl, 'Folkerettslige spørsmål vedrørende suverenitetsspørsmål i Antarktis', *Internasjonal Politikk*, 1968, No. 3, p. 278.

[8] Cf. esp. Kim Traavik, 'The Conquering of Inner Space. Resources and Conflicts on the Sea Bed', in this volume; and Kim Traavik, *Et nytt territorium åpnes. En studie av forhandlingene om kontinentalsokkelkonvensjonen av 1958* (study AA:H006), The Fridtjof Nansen Foundation at Polhøgda, 1973, pp. 193–202.

[9] Cf. Gunnar Skagestad, *Vitenskapelig utforskning som internasjonalt samarbeidsobjekt i polarområdene* (study AA:S/I), typed manuscript, The Fridtjof Nansen Foundation at Polhøgda, 1973.

[10] The Antarctic Treaty, Article III.

[11] Cf. Jens Evensen, *Muligheter og rettigheter på havbunnen*, Elingaard, Oslo 1970.

[12] This particular topic has already been dealt with in Truls Hanevold, Gunnar Skagestad and Finn Sollie, 'Ektra-nasjonale rikdommer – Hvem skal kontrollere havbunnen, Antarktis og verdensrommet?' in *FN etter 25 år?* The Norwegian Institute of International Affairs, 1970, pp. 72–91.

[13] Cf. Kim Traavik and Willy Østreng, 'The Arctic and the Law of the Sea', in this volume.

[14] Ibid.

[15] Ibid.

[16] For a more comprehensive discussion of this topic, cf. Gunnar Skagestad, *Samarbeidsformer: Aktuelle modeller for polområdene* (study AA:P116), The Fridtjof Nansen Foundation at Polhøgda, 1972, esp. pp. 27–28.

[17] Cf. Tønne Huitfeldt, 'Strategic Uncertainty in the Arctic?' in this volume.

[18] Cf. Skagestad, *Samarbeidsformer: Aktuelle modeller for polområdene*, op. cit., esp. pp. 23–26.

[19] Ibid., p. 18.