Prospective Impacts of the Draft Sea Convention

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The United States has raised serious objections to the Draft Convention on the Law of the Sea, thus jeopardizing its final passage and implementation. These objections evidence a broader dichotomy of interests between developing and developed nations. Professor Arrow focuses upon the sovereign and jurisdictional rights of coastal states, as well as the governance of oceanic areas beyond national jurisdictional boundaries. United States' objections to the Draft Convention are highlighted, and some potential bases for compromise are explored.

I. INTRODUCTION

The UNCLOS² process, which over the past nine years has produced a tentative ocean-law compromise now designated the "Draft Convention on the Law of the Sea"³ has been interrupted by the issuance of the following statement by the Department of State on March 2, 1981:

After consultations with the other interested Departments and Agencies of the United States Government, the Secretary of State has instructed our representative to the U.N. Law of the Sea Conference to seek to ensure that the negotiations do not end at the present (Tenth) Session of the Conference, pending a policy review by the United States Government. The interested Departments and Agencies have begun studies of the serious problems raised by the Draft Convention, and these will be the subject of a thorough review which will determine our position toward the negotiations.⁴

Prior to this announcement, although some important substantive issues were held over to the spring 1981 Tenth Session,⁵ it had been generally hoped that the text might be finalized by the end of 1981 and subsequently signed in Caracas, thereby concluding the negotiating process.⁶ Despite the United States' announced position, plans were proceeding,
as of mid-summer, to open the treaty for signature by the end of 1982 in Caracas, the site of the first UNCLOS III meeting in 1973 (this despite the fact that Venezuela is a potential non-signatory to the Convention).

Although Administration policymakers have been understandably reluctant to attempt prediction of the outcome of the policy review publicly, recent Congressional testimony of James Malone, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, exposes some of the problems likely to be of concern:

The Draft Convention places under burdensome international regulation the development of all of the resources of the seabed and subsoil beyond national jurisdiction ... [It would] establish a supranational mining company, called the Enterprise, which would benefit from significant discriminatory advantages relative to the companies of industrialized countries ... Moreover, [it] requires the U.S. and other nations to fund the initial capitalization of the Enterprise, in proportion to their contributions to the U.N. ... [It] compels the sale of proprietary information and technology now largely in U.S. hands ... [It] limits the annual production of nodules ... for the first twenty years of production. [It] creates a one-nation one-vote international governing Assembly, characterized as the "supreme" organ [of the proposed International Seabed Authority] ... [In the] 36-member Executive Council, the Soviet Union and its allies have three guaranteed seats, but the U.S. must compete with its allies for representation.

[It] imposes revenue-sharing obligations ... which would substantially increase the costs of seabed mining. [It] lacks any provisions for protecting investments made prior to entry into force of the Convention. [It] imposes a revenue-sharing obligation on the production of hydrocarbons from the continental shelf beyond the 200-mile limit ... [It] contains provisions concerning liberation movements, like the PLO, and their eligibility to obtain a share of the revenues of the Seabed Authority.

Finalization of the policy review is expected in early 1982. Depending upon the fundamentality of the division between the resultant Draft Convention and United States approaches, a more or less extensive period of renegotiation may be foreseen,
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with vigorous debate concerning the relative merits of the competing proposals. It is the purpose of this article to attempt to shed light on this debate by highlighting the major impacts of the Draft Convention on the preexistent customary and conventional legal regime.

Rather than attempting to footnote the Draft Convention on an article-by-article basis, a functional organizational approach will be employed. First, the substantive rights of coastal states in their various zones of oceanic sovereignty and jurisdiction will be described. Next, the high seas and seabed regimes governing areas beyond the limits of national jurisdiction will be examined, after which some potential bases for compromise will be explored.

II. ZONES OF NATIONAL JURISDICTION

A. Internal Waters

The internal waters regime may be broadly defined as the oceanic zone lying landward of the baseline in which the coastal state may exercise complete sovereignty, including the right of exclusion. Although minor changes from the 1958 convention may be found, the major characteristics of this regime are not appreciably altered by the Draft Convention.

Since the attendant quantity of coastal state jurisdiction is not at issue, the areas of controversy have focused upon the problems of delimitation. Analytical clarity may be better served by considering the various baseline issues first, then turning to delimitation problems presented by the geography of opposite and adjacent states.

1. Baseline delimitation

The Draft Convention, like the Territorial Sea Convention, provides that the baseline will normally be the low-water line along the coast. Both permit the use of straight baselines in
delimitations involving deeply indented or island-fringed coast-
lines, with the Draft Convention further specifying the per-
manency of baselines, once drawn, in areas of significant coastal
instability. Both specify that where straight baselines are used
to enclose areas not previously considered internal waters, rights
of innocent passage through those waters will continue to
exist. While the Territorial Sea Convention precludes straight-
baseline delimitations which will cut off another state's terri-
torial sea from the high seas, the Draft Convention would
extend this protection to the other state's economic zone as
well. Although customary international law arguably per-
mitted coastal states to treat off-shore installations and artificial
islands as part of the coast, the Draft Convention, in recogni-
tion of the potential for jurisdictional bootstrapping resulting
from technological advancement, does not. Finally, both
documents apply a 24-mile closing line criterion for drawing
straight baselines across bays, and both recognize the validity
of asserting sovereignty over historic bays which both leave
undefined.

2. Opposite and Adjacent Delimitations

The criteria for delimitation between opposite and adjacent
states have remained controversial since 1958, when the com-
promise which resulted in Article 12 of the Territorial Sea Con-
vention was reached. That article provides:

[w]here the coasts of two States are opposite or adjacent to each
other, neither of the two States is entitled, failing agreement
between them to the contrary, to extend its territorial sea beyond
the median line every point of which is equidistant from the nearest
points on the baselines from which the breadth of the territorial seas
of each of the two States is measured. The provisions of this
paragraph shall not apply, however, where it is necessary by reason
of historic title or other special circumstances to delimit the terri-
torial seas of the two States in a way which is at variance with this
provision.
The controversy has centered, of course, around the appropriate roles of equidistance and equity, which the Territorial Sea Convention takes cognizance of through its "special circumstances" provision. Interestingly enough, although the level of controversy has remained high, the Draft Convention has now returned to the 1958 language virtually verbatim, due, inter alia, to the flexibility inherent in all the proposals, and the difficulty of reaching accord on the exact formula to be applied.

B. The Territorial Sea

Other than by limiting its breadth to 12 nautical miles, the Draft Convention's major impact in this context lies in its clarification of the right of innocent passage, and of the extent of attendant coastal state rights to enforce pollution requirements therein. The Draft Convention vests plenary jurisdiction to conduct and regulate scientific research in the territorial sea with the coastal state, as does customary international law.

1. Innocent Passage

With the Territorial Sea Convention providing only that passage was innocent so long as it was not prejudicial to the peace, good order, and security of the coastal state (and otherwise legal), and with prior customary law not totally satisfactory on the point, the Draft Convention further specifies twelve activities which render passage non-innocent:

(a) any threat or use of force;
(b) any exercise or practice with weapons;
(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
(d) any act of propaganda aimed at affecting the defence or security of the coastal State;
(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device;
(g) the embarking or disembarking of any commodity, currency, or person contrary to the customs, fiscal, immigration, or sanitary laws and regulations of the coastal State;

(h) any act of wilful and serious pollution contrary to this Convention;

(i) any fishing activities,

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage. 

While the Territorial Sea Convention recognized only a general coastal State authority to "take the necessary steps in its territorial sea to prevent passage which is not innocent," the Draft Convention is again more specific, authorizing regulations with respect to:

(a) the safety of navigation and the regulation of maritime traffic;

(b) the protection of navigational aids and facilities and other facilities or installations;

(c) the protection of cables and pipelines;

(d) the conservation of the living resources of the sea;

(e) the prevention of infringement of the fisheries laws and regulations of the coastal State;

(f) the preservation of the environment of the coastal State and the prevention, reduction, and control of pollution thereof;

(g) marine scientific research and hydrographic surveys;

(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State. 

Although both conventions permit a coastal state to suspend innocent passage in a nondiscriminatory manner in specified areas of its territorial sea if "essential for the protection of its
security," the Draft Convention permits such suspension to occur if essential to weapons exercises of the coastal state as well. The coastal state's duties in its territorial sea are also more specific pursuant to the Draft Convention. While Article 15 of the Territorial Sea Convention requires only that the coastal state not "hamper" innocent passage, the Draft Convention precludes the coastal state from imposing requirements which either practically impair the right, or which discriminate "in form or in fact against the ships of any State or against ships carrying cargoes to, from, or on behalf of any State." Finally, the Draft Convention defines "warship," and, in addition to reaffirming that compliance with coastal state regulations is a condition of continued passage, assigns international responsibility to warships and noncommercial government ships for any damage caused the coastal state through failure to abide by either coastal state regulations, other provisions of the Draft Convention, or international law.

2. Pollution Control by the Coastal State

Pursuant to their plenary jurisdiction over internal waters, states are a fortiori authorized to make and enforce regulations concerning pollution therein, and generally to establish the criteria for entry as well. Where port facilities are located in the territorial sea rather than internal waters, analogous authority to establish conditions for entry may be found in the Draft Convention. Finally, coastal states are authorized to implement and enforce pollution control regulations affecting ships in innocent passage by virtue of both the Territorial Sea and Draft Conventions. In addition to clarifying the enforcement powers of coastal states generally, the Draft Convention specifically establishes coastal state jurisdiction regarding dumping in the territorial sea, pollution of sovereign coastal state airspace superjacent to it and to its territorial sea, and unseaworthy vessels likely to cause environmental damage if
permitted to embark. The enforcement rights are cumulative along with others enjoyed by the coastal (and navigational) states pursuant to other international agreements. Only monetary penalties may be imposed for pollution of the territorial sea, unless both serious and wilful.

Coastal state duties include the prevention of dumping into even their own territorial seas based on national laws which are less effective than international standards. They are required, in broad terms, to adopt regulations, taking into account internationally agreed-upon standards, which prevent and reduce pollution of the marine environment from all land-based sources as well. Finally, the Draft Convention provides for coastal state liability in cases where the enforcement measures taken were unlawful or in excess of those reasonably required in light of available information.

C. The Contiguous Zone

Although the contiguous zone concept may be traced historically from the early eighteenth-century British “hovering acts” through subsequent divergent state practice and custom, its modern incarnation first appeared at the 1930 Hague Codification Conference. By 1958, the drafters of the Territorial Sea Convention were able to agree that in a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; [and]

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

The Draft Convention adopts this formulation substantially intact, while permitting the contiguous zone to extend to 24 nautical miles from the baseline, rather than the 12 permitted by the Territorial Sea Convention. No special delimitation method is provided.
D. The Economic Zone

The economic zone (hereinafter EZ), having more recent roots, may be traced from the Santiago, Montevideo, Lima, Santo Domingo, and Yaounde Declarations. Its status in customary international law, however, was by no means assured prior to the convening of UNCLOS III in 1973. It was not mentioned in any of the 1958 conventions. Nevertheless, the prospective existence of a zone of exclusive coastal state resource jurisdiction extending to 200 miles from the baseline has not been seriously disputed since 1973. Although only France among major maritime nations claims such a zone, 86 nations have claimed some authority over a 200-mile zone as of 1980. Due to the general acceptance of such zones in state practice, this analysis will deal only with those areas which have given rise to significant controversy, including delimitation, fisheries conservation, pollution control, scientific research, and the rights of landlocked and geographically disadvantaged states. These issues will now be addressed in turn.

1. Delimitation

While the Draft Convention presently establishes delimitation criteria for territorial sea purposes in virtually the same language as the 1958 Convention, and establishes no criteria whatsoever for delimitation of the contiguous zone, the criteria established for both the economic zone and the continental shelf delimitations are somewhat different:

[T]he delimitation of the exclusive zone between States with opposite or adjacent coasts should be effected on the basis of International Law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

In any case, while much controversy has surrounded this attempt to emphasize equity at the expense of equidistance as a criterion, the verbal formulation is unlikely to be dispositive in any delimitation arbitrations. More likely to be persuasive
are arguments based on geological ("natural prolongation"), geographical (i.e. concave coastline), mathematical (proportionality), and other equitable factors considered by the International Court of Justice in the North Sea Continental Shelf Cases, which likely now states customary international law in any case. Ultimate reference to positive or customary international law is, of course, compelled by all formulations. If no agreement between the parties is forthcoming, the Draft Convention compels reference to its dispute settlement procedures.

2. Fishery Conservation

While the 1958 Convention on Fisheries contained provisions designed to insure the optimum sustainable yield, that convention has not been widely ratified. Customary international law, plagued by conflicting interests and the hard death of Grotius' inexhaustibility premise, was similarly unable to evolve a rigorous conservation practice. Although UNCLOS I and II convened respectively in 1958 and 1960, the problem of fisheries conservation was sidetracked by the vexing and persistent problem of preferential rights. As a result, in virtually every part of the world, some fish stocks are either already overfished or threatened with serious depletion. In response, some states have established regional fisheries commissions, and others have entered into bilateral agreements in an attempt to preserve fishery stocks. So far, however, these voluntary restraints have remained the exception to the general rule establishing the freedom of the seas. By vesting conservation authority in the economic zone with the coastal state, the Draft Convention attempts to vest resource control primarily in the party with the greatest interest in its preservation. Except as otherwise provided, the coastal state is given jurisdiction to determine the allowable fisheries catch in its economic zone, and it, in cooperation with relevant international organizations, the state shall determine the conservation and management
measures to be applied. Supporting scientific information and other relevant data are to be shared with all concerned global, regional or subregional fisheries organizations, with participation by states whose nationals are permitted to fish in the zone.

Utilization constitutes the other side of the issue. While coastal states are given broad authority to conserve, they are also required to promote the objective of optimum utilization of resources. If the coastal state is incapable of harvesting the entire allowable catch within its economic zone, it is required to give access to the surplus to other states, with particular regard to the developing landlocked and geographically disadvantaged states, considering, inter alia,

the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, ... the requirements of developing States in the subregion ... and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

Once foreign nationals are given access, the coastal state acquires virtually plenary regulatory authority, which includes control over licensing, equipment, fees, quotas, seasons, research, unloading, required reports, required transfer of technology, and enforcement. The coastal state is empowered to place observers or trainees aboard licensed vessels.

Finally, new and more protective language was added during the Ninth Session concerning marine mammals. In reference to this addition, Professor Oxman writes,

The revised text on marine mammals long sought by various environmental groups and strongly supported by the U.S. delegation was finally approved with minor revisions by the Second Committee at the first part of the session. The text makes clear that it permits either a complete prohibition or more restrictive limitations or regulations to protect marine mammals than the Convention would otherwise require and directs particular attention to the need for appropriate organizational arrangements for the protection of whales and other cetaceans. Thus, once this Convention enters into force, it will definitively overrule arguments made by some whalers and
sealers that protective measures for marine mammals can do no more than ensure the maintenance of a maximum sustainable yield, and that international regulation of whales and other cetaceans can be approached in the same way as such regulation is pursued in the case of ordinary commercial fisheries. The Convention would therefore remove legal roadblocks and open the substantive and procedural doors to the type of strong and effective protection of marine mammals that is being urged by environmentalists and conservationists of many nations.93

3. Scientific Research

Prior to the evolution of the Draft Convention, the conduct of scientific research in areas seaward of the territorial sea and off the continental shelf was generally considered one of the freedoms of the seas.94 The establishment of the economic zone, of course, creates water column rights in the coastal state analogous to those it formerly enjoyed pursuant to the continental shelf regime. The coastal-state consent requirement imposed on prospective researchers by the Draft Convention in the zone should not, therefore, be controversial in principle.95 What remains controversial concerns the practical effect of requiring consent to research in so large an oceanic area,96 and the efficacy of the discretion-guiding criteria of the Draft Convention97 to insure the possibility for research unhampered by burdensome or unreasonable restrictions.

The Draft Convention would grant coastal states the right to "regulate, authorize, and conduct" scientific research in their economic zones, and would prevent research absent consent.98 While such consent must be express in the case of proposed research in the territorial sea,99 consent will be implied after six months from the date the required notice to the coastal state100 is provided, unless the coastal state has responded within four months of notice.101 As generally provided in the Continental Shelf Convention, coastal states are "normally" expected to consent to research, even absent diplomatic relations with its sponsor.102 The Draft Convention, however,
further provides in broad language that a coastal state may with-
hold consent if the proposed project "is of direct significance
for the exploration and exploitation of natural resources...."103
Other specified grounds for rejection encompass any project
which
[(a)] involves drilling into the continental shelf, the use of
explosives or the introduction of harmful substances
into the marine environment;
[(b)] involves the construction, operation, or use of artificial
islands, installations, and structure; or
[(c)] contains information submitted pursuant to article 248
regarding the nature and objectives of the project
which is inaccurate or if the researching State or com-
petent international organization has outstanding oblig-
gations to the coastal State from a prior research pro-
ject.104

Coastal states may require that they be allowed to participate
in research,105 and neighboring landlocked and geographically
disadvantaged states are granted the right to participate "when-
ever feasible," if the coastal state does not object to the experts
proposed by that state.106 Although the Draft Convention
specifies that participating coastal state scientists will serve
without payment from the research team,107 it establishes no
limit on research licensing fees.108

Once authorized, the researching entity has several con-
tinuing duties. It is required to provide the coastal state, upon
request, with samples, data, and interpretive information, and
to notify the coastal state of any change in research plans.109 It
is required to disseminate the information internationally,110
unless precluded from doing so by the terms of the authoriza-
tion with which it is required to comply.111 The research must,
of course, be conducted for peaceful purposes, utilizing appro-
priate scientific methods, and in a manner which does not inter-
fere with coastal state activities or with other legitimate uses of
the sea.112

The coastal state is authorized to suspend research in the
zone if the research is conducted without due diligence, in a manner different from what was originally proposed, or at variance with the terms of the authorization.\textsuperscript{113} State liability is imposed for any conduct by it or on its behalf in violation of the Convention, as well as for resultant damage to the marine environment.\textsuperscript{114} Any dispute regarding interpretation or application of the terms of the Convention affecting research shall be submitted ultimately to nonbinding conciliation procedures,\textsuperscript{115} with a temporary cessation of research provided for in the interim.\textsuperscript{116} The cessation may, of course, become permanent should a coastal state reject the conciliators' report.

4. Landlocked and Geographically Disadvantaged States\textsuperscript{117}

The general acceptance of the economic zone, and the consequent removal of a large and rich oceanic area from that still available for fishing by non-coastal states, has obviously prejudiced the traditionally asserted freedom of the seas position of the landlocked and geographically disadvantaged states (hereinafter LL/GDS).\textsuperscript{118} Since this group comprises approximately one-third of the states participating at UNCLOS,\textsuperscript{119} it is not surprising that some accommodation of these interests would be essential. The Draft Convention accomplishes this result by granting the LL/GDS a preferential interest in economic zone fisheries in the region or subregion involved.\textsuperscript{120} \textit{Developed} LL/GDS may assert this interest only in regard to developed coastal states in the region or subregion.\textsuperscript{121} In addition to the generally applicable criteria for fisheries licensing in the economic zone,\textsuperscript{122} the Draft Convention further provides that the terms of their participation shall be established by agreement between the states involved, taking into account, \textit{inter alia}:

(a) the need to avoid effects detrimental to fishing communities or fishing industries of the coastal state;

(b) the extent to which the (LL/GDS) is participating or is entitled to participate under existing agreements in the
exploitation of living resources of the exclusive economic zones of other coastal states;
(c) the extent to which other (LL/GDS) are participating in the exploitation of the living resources of the exclusive economic zone of the coastal state and the consequent need to avoid a particular burden for any single coastal state or a part of it; and
(d) the nutritional needs of the population of the respective states.\(^{123}\)

The rights of LL/GDS apply only to the surplus which the coastal state is unable to harvest from its economic zone.\(^{124}\) Should the coastal state’s harvesting capacity subsequently increase, the Draft Convention mandates an equitable agreement, taking into consideration the various factors enumerated above.\(^{125}\) The rights of the LL/GDS are inalienable,\(^ {126}\) and may not be asserted against any coastal state whose economy is “overwhelmingly dependent” on the exploitation the fishery resources of its economic zone.\(^ {127}\)

**E. The Continental Shelf**

The continental shelf, traceable as a zone of coastal state jurisdiction to the Truman Proclamation of 1945\(^ {128}\) was defined in the following terms in the Continental Shelf Convention of 1958:

> The term “continental shelf” is used as referring ... to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas ...\(^ {129}\)

While this definition probably stated customary international law as of that time, at least the related delimitation provision\(^ {130}\) did not.\(^ {131}\) Moreover, the vague “adjacency” and “exploitability” criteria provided in the definition have not contributed to certainty in the regime.

The ever-mounting pressures favoring broader zones of
coastal state jurisdiction (with the notable example of the sea-
beds in question) is reflected in the Draft Convention’s
approach. It defines the continental shelf as generally extending
to the continental margin or to 200 miles from the coast,
whichever is greater, and defines the criteria for establishment
of the margin. Where the margin is more than 200 miles
from the coast, the shelf must be delineated so that its outer
boundaries are either 350 nautical miles or less from the base-
line, or 100 nautical miles or less from the 2500 meter iso-
bath. A Commission on the Limits of the Continental Shelf
is established, to be composed of elected experts in the fields of
geology, geophysic, or hydrography, and with the power to
decide the seaward shelf boundary where the coastal state is
asserting a shelf greater than 200 miles in breadth. The Com-
mision is excluded from jurisdiction over both lateral shelf
delimitations, and those involving a geographically opposed
state. An absolute limit of 350 nautical miles is imposed
on delineations based upon submarine ridges which are not
natural components of the margin.

The Draft Convention defines the extent of coastal-state
shelf jurisdiction in the same language as was employed by the
Continental Shelf Convention. In addition, it imposes a
duty on the coastal state to refrain from “unjustifiable inter-
ference” with navigation and with other rights provided for in
the Convention. The delimitation criteria regarding opposite
and adjacent states are the same as for the economic zone as
is the extent of permissible coastal state control over scientific
research. It may be noted that in the continental shelf con-
text, this level of coastal state control is not substantially more
burdensome than could be exercised pursuant to the Con-
tinental Shelf Convention. The most conspicuous distinction
between the economic zone and continental shelf regimes
concerns the absence of a coastal state duty to exploit its con-
tinental shelf.

Probably the most controversial aspect of the continental
shelf regime (apart from its breadth) concerns the Draft Con-
The Convention’s requirements for revenue sharing by the coastal state with respect to non-living shelf resources exploited beyond 200 nautical miles from the coast. It provides for an annual payment of 1% of the value of such production during the first year, increasing by 1% each year until the twelfth year, at which time it reverts to 7% indefinitely. The International Seabed Authority would then distribute the revenue among the parties to the Convention on the basis of equitable criteria “taking into account the interests and needs of developing states, particularly the least developed and the land-locked amongst them”. Developing states which are net importers of minerals so produced are exempted from revenue-sharing contributions regarding those minerals.

F. Archipelagic Waters

Delimitation and related jurisdictional questions constitute the major issues affecting archipelagoes. One extreme approach would permit an archipelago to draw straight baselines around its outermost islands, and designate all oceanic areas “landward” of the baseline as internal waters (through which no right of innocent passage would exist). This type of claim would obviously close extensive areas to international use.

The extreme alternative approach would be to treat the islands individually, granting to each a territorial sea, economic zone, and continental shelf, but allowing no internal waters to the archipelago as a whole.

The International Court of Justice, in the Fisheries case (United Kingdom v. Norway) recognized some flexibility in the baseline criteria due to geographic anomalies, but weighted the historic claims at least equally in its decision. Thus, although there is no consensus concerning the delimitation of archipelagic baselines, the archipelagic states were apparently no freer to disregard general delimitation norms as of 1973 than was any other state. In the words of the International Court,

The delimitation of sea areas always has an international aspect; it
cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law.\textsuperscript{151}

The Draft Convention defines an archipelago as a group of islands which is so closely interrelated that their lands and waters "form an intrinsic geographical economic, and political entity, or which historically have been regarded as such."\textsuperscript{152} An archipelagic state is one comprised \textit{wholly} of one or more archipelagoes.\textsuperscript{153} Such states may generally draw straight archipelagic baselines provided the land to water ratio is between 1:1 and 1:9. Straight baselines may not exceed 100 nautical miles in length, except that up to 3\% of all baselines may extend as far as 125 nautical miles. The archipelagic state may not employ straight baselines in a manner which would cut off another state's territorial sea from its economic zone or from the high seas.\textsuperscript{154} The territorial sea, contiguous zone, economic zone, and continental shelf of the archipelagic state are measured from this baseline,\textsuperscript{155} and the waters interior of the baseline are designated "archipelagic waters."\textsuperscript{156} Internal waters may be designated for each component island by the normal methods.\textsuperscript{157}

The archipelagic state enjoys "sovereignty" over archipelagic waters and the superjacent airspace subject to the limitations contained in the Draft Convention. Such states are bound to respect existing agreements and historic fishing rights, as well as other legitimate activities, as negotiated, of "immediately adjacent neighboring states." The described rights of third party states are not to be transferred or shared.\textsuperscript{158} Archipelagic states are required to respect pre-existent cables and pipelines, and to permit their maintenance and repair upon notice.\textsuperscript{159} A right of innocent passage similar to that affecting the territorial sea is provided, with the proviso that sea-lanes for both air and sea traffic may be designated by the archipelagic state.\textsuperscript{160} The archipelagic state may also suspend such passage temporarily
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under conditions similar to those justifying a suspension of
innocent passage through the territorial sea.\textsuperscript{161}

\textbf{G. Straits}

The decision expressed by the Draft Convention to distinguish
the straits regime from that of the territorial sea constitutes a
major departure from the approach taken by UNCLOS I in
1958.\textsuperscript{162} In that year, the right of passage through straits was
defined wholly be Article 16 (4) of the Territorial Sea Con-
vention:

\begin{quote}
There shall be no suspension of the innocent passage of foreign ships
through straits which are used for international navigation between
one part of the high seas and another part of the high seas or the
territorial sea of a foreign state.
\end{quote}

Maximum freedom of passage through straits has historically
been a cornerstone of both United States\textsuperscript{163} and Soviet\textsuperscript{164}
policy. From this perspective, three problems have been found
to inhere in the 1958 approach.

First, coastal states have occasionally exploited the ambiguity
of the \textquote{innocent}\ criterion of innocent passage, asserting rights
to control passage based on its purpose, destination, cargo, or
flag.\textsuperscript{165} Furthermore, although the Territorial Sea Convention
at least impliedly extends a right of innocent passage to war-
ships,\textsuperscript{166} this right, also a cornerstone of U.S. policy,\textsuperscript{167} has not
been universally applied.\textsuperscript{168} The remaining two problems relate
to the absence of a guaranteed right of overflight,\textsuperscript{169} and to the
requirement of surface passage concerning submarines.\textsuperscript{170}

The Draft Convention provisions concerning the right of
transit passage through straits constitute a significant compro-
mise with these strategic interests.\textsuperscript{171} It establishes a right of
transit passage\textsuperscript{172} through straits used for international
navigation,\textsuperscript{173} absent an equally convenient high seas or
economic zone route.\textsuperscript{174} The transit passage right is specifically
extended to aircraft,\textsuperscript{175} and no requirement for surface sub-
marine passage is established.\textsuperscript{176} The right is extended to \textit{all}
ships and aircraft, although some states are still contending for a “prior notification” provisions concerning warships.

Ships exercising the right are required to proceed expeditiously, and to comply with generally recognized international regulations concerning pollution and the safety of life and property at sea. They are further required to refrain from the threat or use of force or the conduct of scientific research, to respect whatever sea lanes and traffic separation schemes may be established by the coastal state, and to refrain from any activities other than those incident to normal, continuous, and expeditious transit absent force majeure. Violation of these provisions subjects the flag state to liability notwithstanding sovereign immunity. While coastal states are required to refrain from hampering transit passage, they are empowered to regulate navigation, pollution, fishing, and the onloading or offloading of any commodity, currency, or person. Enforcement authority is granted to the coastal state, provided that the regulations and their application do not discriminate in form or in fact against foreign ships, or have the practical effect of denying the transit passage right. The Draft Convention specifically prohibits suspension of the right.

III. THE HIGH SEAS

The high seas regime, also the subject of an attempted 1958 codification, is, most obviously, physically diminished by the Draft Convention to the extent of the area now tentatively subject to recognition as economic zone or archipelagic waters. In addition, the traditional Grotian freedom-of-the-seas model, arguably never absolute (given the customary requirement that all uses were to be carried on with reasonable regard for other competing uses), has been further qualified by the imposition of more specific conservation and allocation requirements heretofore imposed only by the largely unratified 1958 Convention on Fisheries and by specific regional fisheries agreements. Ascertaining whether the Draft Conven-
tion's conservation and allocation provisions effect a significant derogation from the pre-existing freedom of fishing therefore necessitates further examination of those conventions.

The Fisheries Convention requires states to impose restrictions on their high seas fishermen designed to promote conservation by precluding total harvests in excess of the optimum sustainable yield. Where the nationals of two or more states are engaged in fishing the same stock, the parties are directed to negotiate concerning allocation, subject to a qualified right of the coastal state to take provisional unilateral conservation measures in areas of the high seas adjacent to its territorial sea, in recognition of its "special interest" therein. Failing agreement, the Fisheries Convention provides for compulsory arbitration based upon specified criteria.

The convention is not to be interpreted so as to prejudice existing fishery conventions, which generally fulfill similar conservation and allocation goals. The Draft Convention's high seas conservation requirements are also ultimately derivative of the "reasonable regard" requirement described above.

Omitted from the 1958 approach, however, is the coastal state right to take provisional unilateral measures in the "adjacent" high seas (due to the recognition of exclusive coastal state fishery jurisdiction to 200 miles inherent in the economic zone regime). Retained are the duties of cooperation and negotiation. Added is a reservation of the high seas area for exclusively peaceful purposes. While the Draft Convention urges states to reject conservation measures, which discriminate in form or in fact against the fishermen of any state, this exhortation may be at least partially impeached by the Draft Convention's specification of the ever elusive criteria for allocation:

In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall: (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and
economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional, or global. 208

The Draft Convention treats the other traditional high seas freedoms more favorably. It explicitly recognizes the other three freedoms (navigation, overflight, and the freedom to lay submarine cables and pipelines) enumerated by the High Seas Convention. In addition, it also explicitly recognizes the heretofore unenumerated right to conduct scientific research in the water column of the high seas, subject to the duties of publication and assisting in the development of the research capabilities of the developing states, and permits the construction of permanent research installations subject to the same conditions.

The other essentialities of the old high seas regime (excluding, for the moment, the seabed provisions) remain. Sovereign high seas claims are precluded. Coastal as well as landlocked states are authorized to permit ships to sail under their flags, subject to the elusive “genuine link” requirement, which the Draft Convention retains from the 1958 approach. High seas criminal jurisdiction remains vested in either the flag state or that of the dependent’s nationality, except in piracy, slave trade, unauthorized broadcasting, or flag violation cases. In addition to traditional hot pursuits, those which commence suprajacent to the continental shelf, in the economic zone, or in archipelagic waters (and which enforce their policies) are recognized. Such pursuits are permitted to continue through the high seas, and need only cease if the pursued vessel reaches its own territorial sea, or that of a third state.

Flag state duties continue to include the taking of necessary measures to insure vessel seaworthiness and the safety of life and property at sea, and the offering of assistance to persons and vessels in distress. Flag state pollution-control responsi-
IV. THE DEEP SEABED

The deep seabed, designated the "Area" by the Draft Convention, while historically subject only to the "reasonable regard" limitations appurtenant to the exercise of any high seas freedom, is extensively regulated by the Draft Convention. Due to the resultant virtually complete destruction of this pre-existant freedom, the Draft Convention's seabed provisions have remained its most troublesome and controversial component.

Like the General Assembly's 1971 Declaration of Principles, the Draft Convention defines both the Area and its resources to be the "common heritage of mankind," to be exploited for the benefit of mankind as a whole. Revenues obtained by the International Seabed Authority (ISA) from exploitation of the Area are to be equitably shared:

- taking into particular consideration the interests and the needs of the developing States and peoples who have not attained full independence or other self-governing status.

States are precluded from asserting sovereign claims over the area or its resources, and are obliged to reject any assertion of rights to minerals recovered other than in accord with the Draft Convention.

More specific applications of the "common heritage" principle (most, if not all of which are undoubtedly required pursuant to the "reasonable regard" doctrine in any case) include restrictions on pollution, provisions designed to safeguard human life, and a restatement of the "reasonable regard" doctrine itself. The seabed is reserved for peaceful purposes, and the right to free scientific research (with a dissemination caveat) is preserved. The right to prospect for minerals may be conducted only pursuant to notice to the
ISA, specific acknowledgement of the binding force of the Convention and implementing ISA regulations, cooperation in research training programs, and acquiescence in inspection by ISA agents. Prospects may recover reasonable amounts of resources for testing, but acquire no preferential resource rights by virtue of their research.

A. Resource Policy

Exploitation of the resources of the Area is to be accomplished through the so-called "parallel system," permitting both private and international development. Each private applicant is required to submit a plan delimiting a tract of sufficient value to allow for two mining operations, and to specify the coordinates for dividing the proposed area into two tracts of approximately equal value. Within 45 to 90 days, the ISA is required to designate the half to be reserved for international exploitation by the "Enterprise" component of the ISA. Once selected, the Enterprise may exploit the reserved tract at any time.

Upon approval of the work plan by the ISA, the applicant is granted exclusive exploitation rights to the tract. Title to the minerals passes upon their recovery in conformity with the Convention, and contractural rights, once established, may not be modified without both parties' consent. The duration of a diligently pursued contractural exploitation right is indefinite, and may be transferred, upon ISA approval, to another qualified applicant who accepts all contractural obligations if such transfer would not violate the "antimonopoly" provision of Annex III, art. 6(3)(d). Applicants are considered qualified if they either are or are sponsored by a State Party, and if they follow the procedures and meet the qualification standards contained in Annex III.

The Draft Convention requires license applicants to include a general description of the equipment and methods to be used in the proposed work plan. Substantially, it further requires appli-
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cants, as a condition of license approval, to make available to the Enterprise, upon fair and reasonable commercial terms and conditions, all technology which the applicant will use and which it is legally entitled to transfer. Technology which the applicant plans to use, but which it is not legally entitled to transfer, can be used only if its owner agrees to make it available to the Enterprise on similar terms as are available to the applicant.

If, during the initial licensing period, all qualified applications can be approved without exceeding the production limitation, the ISA is required to issue the license. Where selection among competing applicants is required, the selection is to be based on articulated "objective and non-discriminatory" standards, giving priority to those applicants which give better assurance of performance, provide earlier prospective financial benefits, and/or have the greatest resource investments in prospecting or exploration. Overriding these standards, however, is the so-called "antimonopoly" provision contained in Annex III, art. 6, which precludes any state or nationals sponsored by it from exploitation of non-reserved tracts which collectively exceed in size:

... 30 per cent of a circular area of 400,000 square kilometers surrounding the center of either part of the area covered by the proposed plan of work ... (or) which in aggregate size constitute 2 per cent of the total sea-bed area which is not reserved or otherwise withdrawn ... from eligibility for exploitation ...

Due to the resultant limitation on the scope of exploitation which may be performed by any one state or its nationals, the instant provision has remained a cornerstone of United States objection to the treaty. The implementation of such a provision might well, in fact render the protections of the "objective and nondiscriminatory" language illusory or semantic at best.

Financially, the Draft Convention imposes on applicants a $500,000 processing fee, and an annual fixed fee of $1 million from the date the application enters into force. From the date of commencement of commercial production, the contractor is
required to pay either a production charge\textsuperscript{268} or the annual fixed fee, whichever is greater.\textsuperscript{269} In addition, States Parties will be assessed contributions for ISA administrative purposes based upon the scale used for the regular United Nations budget until such time as ISA income (largely from Enterprise earnings) is sufficient to meet its administrative costs.\textsuperscript{270} Finally, States Parties are required to provide the Enterprise with half the funds necessary to explore and exploit one reserved mine site with the assessment based on the regular United Nations budget scale.\textsuperscript{271}

\textit{B. I.S.A. Governance}

The International Seabed Authority (ISA), to be headquartered in Jamaica,\textsuperscript{272} is invested with both the specific powers enumerated in the Draft Convention, and such incidental powers, consistent with its provisions, which are "implicit in and necessary for the performance of these powers and functions with respect to activities in the Area."\textsuperscript{273}

The Assembly, to be comprised of all ISA members on a one-nation-one-vote basis, is designated the "supreme" ISA organ, with power to establish general policies, to assess members for ISA costs, to approve the budget and the revenue sharing proposals of the Council, and to elect the ISA Secretary-General, the members of the Council, and the Director-General and Governing Board of the Enterprise.\textsuperscript{274}

The Council, elected by the Assembly in accord with a specified and complex seat — allocation provision,\textsuperscript{275} is designated the "executive" ISA organ,

having the power to establish in conformity with the provisions of this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority \ldots \textsuperscript{276}

In addition, the Council is to propose to the Assembly a list of candidates for the office of ISA Secretary-General, and to recommend candidates to the Assembly for election to the Enterprise Governing Board. It is also empowered, \textit{iteralia}, to propose the budget for Assembly approval,\textsuperscript{277} to supervise the
inspection team, to issue emergency orders to prevent serious environmental harm, and to generally supervise the financial management of the Authority.\textsuperscript{278} Most importantly, it is to approve proposed work plans for seabed exploitation by virtue of a specified voting procedure which vests enormous power in a subordinate Council agency known as the Legal and Technical Commission.\textsuperscript{279}

A Secretariat is established as the “administrative” ISA organ,\textsuperscript{280} and an Enterprise established to exploit reserved\textsuperscript{281} seabed sites directly.\textsuperscript{282} While both the ISA and Enterprise are granted cognizable legal capacity to act,\textsuperscript{283} only the ISA enjoys absolute legal immunity.\textsuperscript{284} While the Enterprise — considered distinct from the Authority for these purposes — is also absolutely immunized from local executive or legislative action,\textsuperscript{285} local judicial actions may be brought against it in conformity with the following provisions:

Actions may be brought against the Enterprise only in a court of competent jurisdiction in the territories of a member in which the Enterprise has an office, has appointed an agent for the purpose of accepting service or notice of process, has entered into a contract for goods or services, has issued securities or is otherwise engaged in commercial activity. The property and assets of the Enterprise, wheresoever located and by whomsoever held, shall be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Enterprise.\textsuperscript{286}

A state party may avoid liability for the actions of its sponsored nationals provided the State has taken all necessary and appropriate measures to secure effective compliance as required by the Draft Convention.\textsuperscript{287}

\textbf{V. POTENTIAL BASES FOR COMPROMISE}

The United States’ expressed objections to the regime proposed by the Draft Convention have been described.\textsuperscript{288} The Reagan Administration’s policy review, expected at any time, may be anticipated to take a sufficiently strong freedom-of-the-seas position to enable it to partially “stack” the negotiating deck,
thereby permitting the United States to negotiate from a greater position of strength than in the past. Both the strength of the United States' legal position and the technological monopoly enjoyed by it and its allies contribute to the availability of this policy alternative.289

Nevertheless, neither the permissive limits of international law nor exclusively self-interested criteria should wholly guide American thought on this issue. Both global poverty — and resultant developing state demands for a New International Economic Order — continue to present real and pressing problems, and are unlikely to dissipate spontaneously.290 Moreover, both economic interdependence291 and the need for a secure oceans regime292 mitigate in favor of a negotiated settlement, and the United States' "alternative" seabed regime reflects its unwillingness to defend its seabed miners, if necessary, by force.293 Consequently, a more or less extensive period of renegotiation may be foreseen, with likely major areas of confrontation including production controls,294 required technology transfer,295 the protection of prior investments,296 revenue sharing to liberation movements,297 the mechanics of the licensing process,298 revenue obligations,299 and the so-called "antimonopoly" provisions. Also likely to be significant are ISA governance questions including the relative distribution of powers between the Assembly and Council,300 the Council selection formula,301 the powers of the Legal and Technical Commission,302 and dispute settlement mechanisms generally.

Other more radical modifications might also be proposed. Among the more controversial of these are proposals to "trade-off" common heritage status to the seabeds in exchange for a Grotian "freedom-of-the-skies" approach to outer space (or vice versa); or to sever the Draft Convention's seabeds and nonseabeds provisions entirely. Nevertheless, the latter approach would fail to appreciate both the "package" nature of the UNCLOS negotiations,303 and that, at least from a developing state perspective, a navigation/resource tradeoff has already taken place.304 Thus, if an ocean law compromise
more favorable to developed state seabed exploitation is to occur, additional compromises by United States — directed at the achievement of a New International Economic Order through some other, non-oceanic policy initiatives — might well be required.

The extent of the United States' ability and willingness to provide the requisite financial support-like the willingness of the developing states to compromise the newly sacrosanct common heritage principle as applied to the oceans — may as of this date only be surmised. Unless the developing state demands for a New Economic Order can be meaningfully severed from their demands for common heritage status for the seabeds, the possibility of compromise in the Draft Convention's terms are as remote as the possibility that it will ever be of meaningful effect.
FOOTNOTES


"The text of the Draft Convention has been revised pursuant to the decision taken by the Conference at its 153rd meeting on 24 August 1981, on the basis of recommendations by the collegium (A/CONF.62/BUR.14) endorsed by the General Committee (A/CONF.62/114*). In this decision, the Conference specified that, in accordance with A/CONF.62/62, the revision would incorporate the recommendations of the Drafting Committee, approved by the Informal Plenary, and the decisions taken by the Informal Plenary on the sites of the International Sea-Bed Authority and the International Law of the Sea Tribunal. It also specified that the revision would take into account the results of the consultations and negotiations conducted during this session and which, when presented to the Plenary, satisfied the criterion in A/CONF.62/62.

The Conference recognized that the text when so revised would no longer be an informal text. It is now the official Draft Convention, subject to the following three conditions:

"First, the door would be kept open for the continuation of consultations and negotiations on certain outstanding issues. The results of these consultations and negotiations, if they satisfy the criterion in A/CONF.62/62, will be incorporated in the Draft Convention by the collegium without the need for formal amendments.

Secondly, the Drafting Committee will complete its work and its further recommendations, approved by the Informal Plenary, will be incorporated in the text.

Thirdly, in view of the fact that the process of consultations and negotiations on certain outstanding issues will continue, the time has, therefore, not arrived for the application of rule 33 of the Rules of Procedure of the Conference. At this stage, delegations will not be permitted to submit amendments. Formal amendments may only be submitted after the termination of all negotiations."

Id. at xix. The earlier drafts of this document are cited in note 3, infra.
2. The Third United Nations Conference on the Law of the Sea (hereinafter UNCLOS) has been meeting at least annually since 1973, with all states represented on a one-nation one-vote premise. Recognizing the need for broad ultimate support if the resultant convention is to achieve general ratification, UNCLOS has attempted to work by consensus insofar as is possible. See U.N. G.A. Res. 3067 (XXVIII), Nov. 16, 1973; UNCLOS, Rules of Procedure, Appendix, U.N. Doc A/CONF.62/30/Rev. 2 (1976). UNCLOS is organized along the lines of the U.N. Seabed Committee, with three main committees of the whole. The First Committee is assigned responsibility for codifying the rules to be applied to the deep seabed beyond the limits of national jurisdiction. The Second Committee is given responsibility for the traditional — as well as any prospective nontraditional — zones of coastal state jurisdiction. The Third Committee is assigned responsibility, inter alia, for dealing with the pollution, research, and transfer of technology issues.

In addition, seven negotiating groups were appointed during the early part of the Seventh Session (1978) to deal with the most troublesome residual issues. The first three have dealt with the seabed issues concerning the exploitation system and resource policy, financial arrangements, and structure of the International Seabed Authority (ISA), respectively. The fourth has dealt with access to the economic zone (EZ) by landlocked and geographically disadvantaged states (LL/GDS); the fifth, with fisheries disputes in the EZ; the sixth, with the outer limits of the continental shelf; and the seventh, with delimitation problems as between geographically opposed or adjacent states.


5. Included were (1) completion of the resolution setting up a preparatory commission to draft provisional rules, regulations, and procedures for the International Seabed Authority; (2) establishment of protections for pre-Convention seabed mining investments; and (3) establishment of the eligibility of non-state entities to participate in the Convention. In addition, further work was expected on the problem of delimiting oceanic boundaries as between opposed or adjacent states. Oxman 5, supra note 2, at 211-212.

6. Id. at 212.

8. See generally, Hearing on Proposed Rulemaking Pursuant to the Deep Seabed Hard Mineral Resources Act 5, National Oceanic and Atmospheric Administration (Washington, D.C., May 8, 1981) (hereinafter cited as NOAA Hearings). This was the fourth of four hearings conducted by NOAA concerning a preliminary version of its licensing regulations for prospective seafloor explorers. See 46 Fed. Reg. 18,448 (March 24; 1981). Since these hearings remain unpublished at this article goes to press, the pagination cited corresponds to that of the original hearing transcript (copy on file with the author).

9. The extreme approach of rejecting the proposed Draft Convention outright and without counterproposals is not anticipated at this time.


11. See text accompanying notes 17-187, infra.

12. See text accompanying notes 188-228, infra.

13. See text accompanying notes 228-287, infra.


15. See generally, DC, supra note 1, art. 2; COTS, supra note 10, art. 1. It is the right of exclusion, and the concomitant absence of a right of innocent passage, which distinguishes the internal waters regime from that of the territorial sea. See generally M. McDougal & W. Burke, The Public Order of the Oceans 121 (1962) (hereinafter cited as McDougal & Burke); C. Fincham & W. Van Rensburg, Bread Upon the Waters 33 (1980) (hereinafter cited as Fincham & Van Rensburg). The practical ramifications of this right are discussed in Lowe, The Right of Entry into Maritime Ports in International Law, 14 San Diego L. Rev. 597 (1977). One limitation on its exercise, the right of entry in distress, is obliquely recognized by COTS, art. 14, supra note 10. Art. 18 (2) of the DC, supra note 1, perpetuates this
language, and adds the further proviso that rendering assistance to persons, ships, or aircraft in distress is consistent with the exercise of the right of innocent passage through the territorial sea. See generally, 2 Moore, Digest of International Law 339-362 (1906); P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 194 et seq. (1927); McDougal & Burke, supra, at 110; Restatement (second), Foreign Relations Law of the United States, sec. 48 (hereinafter cited as Restatement); United States v. Mexico (The Kate A. Hoff Claim), General Claims Commission, United States and Mexico, (1928-29) Opinions of the Commissioners 174, 4 U.N. Rep. Int'l Arb. Awards 444 (1929).

16. See, e.g., text accompanying notes 21-23 infra.
17. COTS, supra note 10, art. 3; DC, supra note 1, art. 5. The archipelagic baseline provisions of DC, supra note 1, art. 47 will be considered in the text accompanying notes 150-162 infra.
18. DC, supra note 1, art. 7 (2).
19. COTS, Supra note 10, art. 5 (2); DC, supra note 1, art. 8 (2).
20. COTS, supra note 10, art. 4 (5); DC, supra note 1, art. 7 (6). The economic zone regime, generally unrecognized in 1958, is discussed further in the text accompanying notes 69-128 infra.
21. But see COCS, supra note 10, art. 5 (4); Stevenson & Oxman 3, supra note 2, at 771 n. 10.
22. DC, supra note 1, art. 11.
23. COTS, supra note 10, art. 7; DC, supra note 1, art. 10.
24. COTS, supra note 10, art. 7 (6); DC, supra note 1, art. 10 (6). Concerning the Convention’s failure to agree on a definition of historic bays, Stevenson and Oxman report that

(s)ome attempts were made to define historic bays with greater precision; it is indicative of the general workmanlike atmosphere that after a few meetings on the issue it was recognized that the effort could be very time-consuming and might adversely affect progress. Attempts by one delegation to introduce a new open-ended concept of historic waters met with widespread opposition.

Stevenson & Oxman 3, supra note 2, at 771 n. 10. The problems inherent in the definitional ambiguity were recently highlighted by the recent U.S. Libyan dispute over the status of the Gulf of Sidra. See generally, Claim of Libya over the Gulf of Sirte, Department of State Telegram 261 418 2 (unclassified), October, 1973, reprinted in G. Knight, The Law of the Sea; Cases Documents, and Readings 5-91, 5-92 (1980) (hereinafter cited as Knight). For recent statements of United States policy concerning this issue, see United
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States Position on Historic Bays, Dep't State File No. POL 33-26 (September 17, 1973), reprinted in id. at 5-90; see also United States v. Alaska, 422 U.S. 184 (1975).

25. COTS, supra note 10, art. 12 (emphasis added).

26. Id.

27. See DC, supra note 1, art. 15. For an excellent exposition and application of internationally-evolved criteria within the context of United States domestic law, see Charney, The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Fontext, 75 Am.J. Int'l L. 28, (1981). See also text accompanying notes 72-78 and notes 29 and 132 infra.

28. See Oxman 3, supra note 2, at 22-24; Oxman 4, supra note 2, at 7, 29-32; Oxman 5, supra note 2, at 231-233. Concerning delimitation of the economic zone and continental shelf regimes, alternative language, with a slightly greater perceivable emphasis on the equities, is employed, with "mandatory" dispute settlement employed pursuant to articles 279-299 of the Draft Convention, if the parties fail to agree to a delimitation within a reasonable time. See, text accompanying notes 72-78 and infra; DC, supra note 1, arts. 74, 83; but see id., art. 298 (1). The dispute settlement procedures are more fully discussed in Section V infra.

29. DC, supra note 1, art. 3. While it would seem that art. 24 (2) of COTS, supra note 10, by establishing a 12-mile limit to the contiguous zone, established a fortiori a similar limit to the territorial sea, state practice has not been consistent with this interpretation. See, e.g., 2 S. Lay, R. Churchill, & M. Norquist, New Directions in the Law of the Sea 835-854 (1973) (hereinafter cited as 2 Lay); MacDougal & Burke, The Sea 835-854 (1973), supra note 15, at 490.

30. DC, supra note 1, art. 245; see also text accompanying 99-106 infra.

31. COTS, supra note 10, art. 14. Submarine innocent passage is also limited to surface passage by this same article, and by article 20 of the Draft Convention.

32. See generally, McDougal & Burke, supra note 15, at 231.

33. DC, supra note 1, art. 19.

34. COTS, supra note 10, art. 16 (1).

35. DC, supra note 1, art. 21. Such laws may not apply to the design, construction, manning, or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards. Id.

36. COTS, supra note 10, art. 16 (3); DC, supra note 1, art. 25 (3).

37. DC, supra note 1, art. 25. In addition, article 23 of the Draft Con-
vention requires foreign nuclear ships and those carrying inherently dangerous or noxious substances to observe any special, internationally agreed-upon precautionary measures, and to carry appropriate and supporting documentation.

38. Id., art. 24 (1). See also, id., art 119 (3).

39. Id., art. 29.

40. See COTS, supra note 10, art 17; DC, supra note 1, art. 30.

41. DC, supra note 1, arts. 31, 32. But cf. id., art. 230 (discussed in the text accompanying note 51 infra).

42. See text accompanying note 15 supra.

43. COTS supra note 10, art. 16 (2); DC supra note 1, art. 25 (2).

44. See, DC, supra note 1, art. 211 (3); see also id., art. 220.

45. Concerning jurisdiction to prescribe, see COTS, supra note 10, art. 16 (1). Concerning jurisdiction to enforce, see id., arts. 17 and 19, and the contiguous zone provisions contained in id., art. 24.

46. Concerning jurisdiction to prescribe, see DC, supra note 1, arts. 21 (1) (f), 211 (4). The generally applicable enforcement provisions of id., art. 220 permit the coastal state to generally employ its own enforcement procedures where the offending ship is voluntarily in port, and where the pollution has occurred within the coastal state's territorial sea or economic zone. Where there exists a clear basis for the belief that a pollution violation has occurred during innocent passage, and the offending ship is still engaged therein, the coastal state is generally empowered to apply its inspection laws through the right of visitation and detention. Where there exists a clear basis for the belief that a pollution violation has occurred in the economic zone, and where the offending vessel is navigating on the territorial sea, the coastal state is authorized to require notice from the vessel concerning its identity, port of registry, its next and last port of call, and any other relevant information required to establish the existence of a violation. If such violation may be objectively evidenced as flagrant or gross, resulting in a discharge causing the threat or actual existence of major environmental or related damage, the coastal state is again generally authorized to detain the vessel, and to prosecute it in accordance with its laws. Concerning the right of investigation, see id., arts. 218, 226. Concerning the residual "primary" jurisdiction of the flag state, see id., arts. 231, 228. Concerning the requirement of nondiscriminatory enforcement, see id., art. 227.

47. Id., art. 216 (1) (a).

48. Id., art. 212, 222.

49. Id., art. 219 is worded strongly enough to establish a qualified coastal state duty as well.
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50. *Id.*, art. 237; see also notes 53 and 114 infra.

51. This provision was not contained in earlier drafts. *Compare id.*, art. 230 (2), with ICNT Rev. 2, *supra* note 3, art. 231.

52. DC, *supra* note 1, art. 1 (5) (b) defines "dumping" to mean "any deliberate disposal of wastes . . . , vessels, aircraft, platforms or other man-made structures at sea", but not to include

(i) the disposal of wastes or other matter incidental to, or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment, other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or structures;

(ii) placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of this Convention.

53. *Id.*, art. 210 (6). The Draft Convention also requires that the coastal state, in evaluating the decision whether to dump, give due consideration to the interests of "other states which by reason of their geographical situation may be adversely affected thereby". *Id.*, art. 210 (5).

54. *Id.*, arts. 207, 213.

55. *Id.*, art. 232.

56. These acts which have been adopted by the United States since 1790, extend coastal state jurisdiction to ships "hovering" outside its territorial sea where necessary to the enforcement of customs policy and where (at least originally) a "constructive presence" within the territorial sea could be found. *See generally*, W. Bishop, *International Law* 622-629; *Harvard Research in International Law, Territorial Waters*, Article 20, 23 Am J. Int'l L. Spec. Supp. 241, 333 (1929); 19 U.S.C. §§1581, 1584-1587, 1594.


58. COTS, *supra* note 10, art. 24 (1).

59. The words "of the high seas", of course, were deleted in the Draft Convention due to the evolution of the economic zone as that which now lies seaward of the contiguous zone. *Compare COTS, supra* note 10, art. 24 (1) with DC, *supra* note 1, art. 33 (1).

60. DC, *supra* note 1, art. 33 (2).

61. COTS, *supra* note 10, art. 24 (2).

62. Agreements between Chile, Ecuador, and Peru, signed at the First


68. The Draft Convention provides that, in the economic zone, the coastal state has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil and the super-jacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention. DC, supra note 1, art. 56 (1). In addition, Id., arts. 58 and 87 guarantee to all states subject to the Convention, three of the four free-freedoms (navigation, overflight, and the laying of submarine cables and pipelines) enumerated by COHS, supra note 10, art. 2. The fourth freedom (fishing) was made subject to certain limitations. Compare DC, supra note 1, arts. 87 (e), 116.

69. Stevenson & Oxman 2, supra note 2, at 16.
70. See Burke, supra note 67, at 289-311; see also 2 Lay, supra note 29, at 835-869.
71. See DC, supra note 1, art. 15; see also text accompanying notes 25-28 supra.
72. See DC, supra note 1, art. 33.
73. Id., art. 74 (1). Similar language is applied to continental shelf delimitations by id., art. 83 (1). Compare the DC's language with that of the 1980 DC(IT), which still explicitly acknowledged equi-distance as a criterion. This was effected by the colloquium despite some serious protest, including that of the United States. See OXMAN 6, Supra n. 2.
74. See generally Oxman 4, supra note 2, at 29-32; Nweihe'i, EZ (Un-easy) Delimitation in the Semi-enclosed Caribbean Sea: Recent Agreements Between Venezuela and her Neighbors, 8 Ocean Dev. & Int'l L. 1 (1980); see also notes 27 supra & 132 infra.
77. See generally DC, supra note 1, arts. 186-91.
78. COF, supra note 10.
79. Id., arts. 2-8.
80. See, e.g., 2 Lay, supra note 29, at 800-805.
81. " . . . (E)veryone admits that if a great many persons hunt on the land or fish in a river, the forest is early exhausted of wild animals and the river of fish, but such a contingency is impossible in the case of the sea." H. Grotius, Mare Liberum 57 (1608; Magoffin Translation 1916). Cf. D. Johnston, International Law of Fisheries 321-326 (1965) (hereinafter cited as Johnston).
82. See generally, id. at 433; McDougal & Burke, supra note 15, at 935-941. The fishery ramifications of the requirement that the freedoms of the high seas be exercised with reasonable regard for the interests of other states is discussed in id. at 81-86. See also COHS, supra note 10, art. 2; COF, supra note 10, arts. 1-10.
83. The 1958 Geneva Conference on the Law of the Sea (UNCLOS I) considered a number of proposals dealing with the recognition of preferential fishing rights beyond 12 miles. The first such proposal was presented by Iceland and stated that where a people is primarily dependent on its coastal fisheries for its economic development, the
state concerned has the right to exercise jurisdiction up to whatever distance is justified by its dependence. See U.N. DOC A/CONF. 12/C. 3/L. 79 (1958). There was considerable opposition to this proposal and as a consequence it was modified to read as follows:

Where a people is overwhelmingly dependent upon its coastal fisheries for its livelihood or economic development and it becomes necessary to limit the total catch of a stock or stocks of fish in areas adjacent to the coastal fisheries zone, the coastal state shall have preferential rights . . . to the extent rendered necessary by its dependence upon the fishery. See U.N. DOC. A/CONF. 13/C. 3/L. 79/Rev. 1 (1958) (emphasis added).

This modified proposal changed the original Icelandic resolution in two respects. First, it raised the standard of dependency from "primarily dependent" to "overwhelmingly dependent." Second, it reduced the coastal states claim from "exclusive jurisdiction" to a mere "preferential right." In its modified form, this proposal was accepted by the Fisheries Committee of the 1958 Conference, passing by a vote of 25 nations in favor, 18 against, with 12 abstentions. However, even in its modified form the proposal failed to achieve the necessary support in plenary session. see U.N. DOC A/CONF. 13/SR. 15, para. 44 (1958).

After the failure of the Icelandic proposal, the Union of South Africa introduced an independent resolution in plenary session. See U.N. DOC. A/CONF. 15/L. 56 (1958). In essence, this resolution recommended two special situations under which a coastal state might exert preferential rights in the high seas adjacent to its coast. The first situation might occur when the coastal population is overwhelmingly dependent upon the fishery resources of the area for its economic development. The second situation could occur when the coastal population depends primarily on coastal fisheries for the animal protein of its diet. This resolution was approved by a 68-0-10 vote at the Conference. See U.N. DOC. A/CONF. 13/SR. 16, para. 12 (1958).

At UNCLOS II, convened in Geneva on March 17, 1960, a similar effort to codify the conditions for the exercise of preferential rights was made. This attempt took the form of an amendment to the United States/Canadian proposal to establish a six mile territorial sea and an additional six mile fisheries zone. U.N. DOC. A/CONF. 19/L. 12, 1 United Nations Conference on the Law of the Sea, Official Records, Vol. II, at 173 (1960). The amendment was jointly sponsored by Brazil, Cuba, and Uruguay, and allowed preferential
fisheries claims beyond twelve miles to coastal states which were "greatly dependent" on coastal fisheries for economic or nutritional reasons. This amendment was significant due largely to its recognition of both factors (economic and nutritional) which were cognizable pursuant to the 1958 resolutions discussed above, while lowering the requisite level of dependency from "overwhelming" or "primary" to "great." See U.N. DOC. A/CONF. 19/L. 12; UN. DOC. A/CONF. 19/C. 1/SR. 2, para. 18 (1960); Johnston, supra note 81, at 286-288 (1965). See also text accompanying note 128 infra.

84. Several of the regional arrangements are examined in detail in Johnston, supra note 81, at 176-218, 253-282, and 326-411.


86. The Draft Convention follows this latter premise, even when the resultant fishery management jurisdiction would not be vested exclusively with the coastal state in whose economic zone the fish are located. For example, a duty of cooperation is imposed upon states which share a fishery resource, and jurisdiction over highly migratory species is vested collectively in the coastal state and all other states whose nationals fish for the species in the region. Primary jurisdiction over anadromous species is established in the state in whose rivers they spawn, qualified by a duty of cooperation with other states in whose economic zones they migrate. Jurisdiction over catadromous species is vested in the coastal state in whose waters they spend the greater part of their life cycle. DC, supra note 1, arts. 63-67.

87. See id.

88. Id., art. 61.

89. Id., art. 61 (5).

90. See id., arts. 69, 70; see also text accompanying notes 117-127 infra.

91. Id., art. 62 (3). The evolution of this compromise is described in Oxman 3, supra note 2, at 16-18.

92. DC, supra note 1, art. 62 (4).

93. Oxman 5, supra note 2, at 233. DC, supra note 1, art. 65 provides, [n]othing in this Part restricts the right of a coastal State or international organization . . . to prohibit, limit or regulate the exploitation of marine animals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine animals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management, and study.

94. See, e.g., COHS, supra note 10, art. 2; see also the 1955 Report of the International Law Commission wherein it states,

The list of freedoms of the high seas contained in (Article 2) is not restrictive; the Commission has merely specified four of the main freedoms. It is aware that there are other freedoms, such as the freedom to explore or exploit the subsoil of the high seas and the freedom to engage in scientific research therein. (1955) 1 Y.B. Int'l L. Comm'n. 3, U.N. Doc. A/CN. 4/ser.A (1955) (emphasis added); c.f. COCS, supra note 10, art. 5 (8) which provides that

(t)he consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless the coastal state shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate in the research, and that in any event the results shall be published.

See also note 97 infra.

95. Compare, e.g., DC, supra note 1, arts. 246, 248, & 249 with COCS, supra note 10, art. 8. See generally the Report by the Chairman of the Third Committee, U.N. Doc. A/CONF. 62/L. 41 (August 23, 1979). The evolution of this compromise is described in Oxman 2, supra note 2, at 75-78; see also Oxman 3, supra note 2, at 27-30.

96. Of course, such consent was already required as a condition of research concerning the continental shelf. See note 94 supra. Concerning the application of this requirement, see Wooster, *Research in Troubled Waters: U.S. Research Vessel Clearance Experience 1972-78*, 9 Ocean Dev. & Int'l L. 218 (1981). Concerning the coastal state right to participate in research in areas "adjacent to" its territorial sea, see, e.g., COF, supra note 10, art. 6 (2).


98. DC, supra note 1, art. 246.

99. Id., art. 245.

100. Prospective economic zone researchers are required to provide the
coastal state with at least six months notice concerning the project's nature, objectives, methods, vessels, dates, locations, sponsors, and the contemplated participation plan for the coastal state. Id. arts. 248, 244 (1).

101. The permissible coastal state responses are enumerated in id., art. 252. Article 254 (1) also requires that notice be provided to neighboring landlocked and geographically disadvantaged states.

102. See note 94 supra.

103. DC, supra note 1, art. 246 (5) (a).

104. Id., art. 246 (5) (b)-(d).

105. Id., art. 249 (1) (a).

106. Id., art. 254 (3).

107. Id., art. 249 (1) (a).


109. Id., art. 249 (1).

110. Id., art. 249 (1) (e). See also id., art. 254 (2) concerning the informational interests of neighboring landlocked and geographically disadvantaged states. Concerning the informational interests of the developing states generally, see id., art. 244 (2). More general dissemination obligations are contained in id., art. 242 (2).

111. Id., art. 249 (2).

112. Id., arts. 240, 246 (8).

113. Id., art. 253.

114. Id., art. 263.

Concerning coastal state rights to prevent pollution of their exclusive economic zones or territorial seas, see, e.g., The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, done, Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. No. 8068, reprinted in 9 Int'l Legal Materials 25 (1970). The United States ratified this Convention on May 6, 1975. As of 1980, 35 states were party to this Convention.

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...Concerning Oil Pollution at Sea, 8 Case W. Res. Int'l L.J. 126 (1976); Juda, Imco and the Regulation of Ocean Pollution from Ships, 26 Int'l & Comp. L.Q. 577 (1977).


116. DC, *supra* note 1, art. 265.

117. Article 70 of the Draft Convention defines such states as coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own.

DC, *supra* note 1, art. 70 (2).

Initially, the member of this group designated themselves the “shelf-locked” states, but the “geographically disadvantaged” language had replaced the earlier designation by 1974. See, e.g., Jayakumar, *The Issue of the Rights of Landlocked and Geographically Disadvantaged States in the Living Resources of the Economic Zone*, 18 Va. J. Int'l L. 69 n. 1 (1977) (hereinafter cited as Jayakumar); Stevenson & Oxman 2, *supra* note 2, at 20, 21. While art. 254 of the DC, *supra* note 7, refers, *inter alia*, to “geographically disadvantaged” states, *id.*, article 70, which defines them, refers to them as “states with special geographic characteristics.” An explanatory note clarifies that these terms are yet to be harmonized by the Conference.


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Marino, Swaziland Switzerland, Uganda, Upper Volta, Zambia, and Zimbabwe. Claiming “geographically disadvantaged” status were Algeria, Bahrain, Belgium, Bulgaria, Cameroon, Ethiopia, Finland, Gambia, both Germanies, Greece, Drape, Jamaica, Jordan, Kuwait, the Netherlands, Poland, Qatar, Singapore, Sudan, Sweden, Syria, Turkey, the United Arab Emirates and Zaire. Jayakumar, supra note 117, at 116. Concerning the high seas rights of the landlocked states, see note 216 infra.

120. While art. 69 of the ICNT, supra note 3, permitted the exercise of this interest only regarding “adjoining” coastal states, art. 69 of the DC, supra note 1, now broadens the zone of invocation to include all states in the region. See also Convention on Fisheries, supra note 10, art. 1, and note 83 supra.

121. DC, supra note 1, art. 69 (4).

122. Id., art. 62 (3); see also text accompanying notes 90 & 91 supra.

123. DC, supra note 1, arts. 69 (2), 70 (3).

124. Id., arts. 62, 69 (1), 70 (1).

125. Id., arts. 69 (3), 70 (4); see also text accompanying note 123 supra.

126. DC, supra note 1, art. 72.

127. Id., art. 71; see also note 84 supra.


129. COHS, supra note 10, art. 1.

130. Id., art. 6.


132. DC, supra note 1, art. 76(3) defines the margin as the “submerged prolongation of the land mass of the coastal State, and [consisting] of the seabed and subsoil of the shelf, the slope, and the rise.” The deep seabed, its ridges, and subsoil are specifically excluded.

133. Under these circumstances, Article 76 (4) of the Draft Convention provides that

(a) . . . the coastal State shall establish the outer edge of the continental margin . . . by either:

(i) A line (connecting fixed points not more than 60
nautical miles distance) . . . by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 percent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line (connecting fixed points not more than 60 nautical miles distant) . . . by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as to the point of maximum change in the gradient at its base.

Id., art. 76 (4).

134. Id., art. 76 (5).

135. DC, supra note 1, art. 76 (8); id., Annex II, arts. 1-8. An ambiguity concerning the binding nature of this process arguably may be raised, however, pursuant to DC, supra note 1, art. 76 (7), (8).

136. DC, supra note 1, art. 76 (10); id., Annex II, arts. 3 (1) (a) and 9.

137. Id., art. 76 (6).

138. Compare COCS, supra note 10, art. 2, with DC, supra note 1, art. 77.

139. Id., art. 78 (2).

140. Compare id., arts. 83, 74; see also text accompanying notes 71-77 supra; Emery, Geological Limits of the "Continental Shelf," 10 Ocean Dev. & Int'l L. 1 (1981).

141. DC, supra note 1, arts. 246-255; see also text accompanying notes 94-116 supra; Mangone, The Effect of Extended Continental Shelf Jurisdiction over the Seas and Seabed upon Marine Scientific Research, 9 Ocean Dev. & Int'l L. 201 (1981).

142. COCS, supra note 10, art. 5 (8).

143. Compare DC, supra note 1, arts. 62 & 77 (2).

144. Id., art. 82 (2). ICNT Rev. 2, supra note 3, confined the duration of increase and ultimate percent to ten years and 5%, respectively.

145. See generally DC, supra note 1, arts. 156-185, discussed in the text accompanying notes 235-287 infra.

146. Id., art. 82 (4).

147. Id., art. 82 (3). Concerning the development of the revenue-sharing concept generally, see Stevenson & Oxman 3, supra note 2, at 782-783; Oxman 2, supra note 2, at 80-81; Oxman 3, supra note 2, at 21, Oxman 4, supra note 2, at 23; and Oxman 5, supra note 2, at 231.

148. McDougal & Burke, supra note 15, at 413.
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149. (1951) I.C.J. 116 (hereinafter cited as Fisheries Case).
151. Fisheries Case, supra note 149, at 132.
152. DC, supra note 1, art. 46 (b).
153. Id., art. 46 (a) (emphasis added). Pursuant to this limitation, the United States, for example, could not claim archipelagic waters on behalf of Hawaii.
154. Id., art. 47 (5).
155. Id., art. 48.
156. Id., art. 49 (1).
157. Id., art. 50.
158. Id., art 51 (1).
159. Id., art 51 (2).
160. Id., arts. 52 (1), 53.
161. Suspensions in both cases must be without discrimination in form or in fact against foreign ships and may be undertaken when essential to security. Id., arts. 25, 52. While weapons exercises may justify temporary suspensions of innocent passage through the territorial sea, no such authorization exists regarding sea lane passage through archipelagic waters.
162. Because of the limited number of internationally used straits less than 6 miles in width in 1958, when the 3-mile territorial sea still generally prevailed, the negotiating strategies of the “free passage” advocates tended to focus on the preservation of the three-mile limit rather than creating a separate straits regime. See Oxman 2, supra note 2, at 63. Because of the general acceptance of a twelve mile limit by 1974, however, straits less than 24 miles in width would be included in the territorial seas of the coastal state or states, thereby implicitly necessitating the creation of a separate straits regime to insuring unimpeded passage. Stevenson & Oxman 1, supra note 2, at 10; see also Robertson, Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea, 20 Va. J. Int’l L. 801, 804 (1980) (hereinafter cited as Robertson). Concerning the problems with simply perpetuating the 1958 approach, see text accompanying notes 165-70 infra.
164. See, e.g., USSR Draft Articles on Straits Used for International Navigation, Reports of the Committee on the Peaceful Uses of the


166. COTS, supra note 10, art. 23.

167. See Stevenson & Oxman 2, supra note 2, at 15.

168. The group of resisting states has included Oman, the People's Republic of China, Malaysia, Morocco, Yemen, and North Korea. The Soviet Union, Indonesia, and the Philippines have required notice prior to warship passage. An unqualified right to such passage during peacetime is recognized by the United States, the United Kingdom, and France. See Pirtle, Transit Rights and U.S. Security Interests: The "Strait Debates" Re-Visited, 5 Ocean Dev. & Int'l L. 477, 481-82 (1978) (hereinafter cited as Pirtle).

169. See, e.g., COTS, supra note 10, art. 14 (2); Robertson, supra note 162, at 804 n. 10; Pirtle, supra note 168, at 481.

170. COTS, supra note 10, art. 14 (6).


172. The term "transit passage" was used in lieu of the "innocent passage" designation in an attempt to ameliorate the problems described in the text accompanying notes 165-68 supra. Concerning the evolution of this critical concept, see generally Reismen and Moore, The Regime of Straits and National Security: An Appraisal of International Law - making, 74 Am. J. Int'l L. 48, 68-71 (1980).

173. DC, supra note 1, arts. 36-38.

174. Id., arts. 36. See also, id., art. 38 (1) which excludes straits between a coastal state and one or more of its islands, if there exists an equally convenient route seaward of the island or islands. but cf. id., art. 45, which protects the right of innocent passage in these areas.

175. Id., art. 38.

176. The adjoining state is empowered, however, to promulgate regula-
tions establishing sea lanes and traffic separation schemes which are designed to insure the safety of navigation and the regulation of marine traffic. *Id.*, arts. 41, 42 (1), (2). Whether requiring surface passage might be required by the coastal state pursuant to this authorization will be left, of course, to further interpretations of these provisions.

177. *Id.*, art. 38 (1).


179. DC, *supra* note 1, art. 39.

180. *Id.*, art. 40.

181. *Id.*, art. 41; *see also* note 176, *supra*.

182. DC, *supra* note 1, art. 39 (c).

183. *Id.*, art. 42 (5).

184. *Id.*, art. 44.

185. *Id.*, art. 42.

186. *Id.*, art. 44.


190. As codified in the High Seas Convention, the requirement states, “These freedoms . . . shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.” COHS, *supra* note 10, art. 2. *See also* McDougal & Burke, *supra* note 15, at 81. Arguably, this requirement establishes *ipso facto* some sort of conservation or maximum-sustainable-yield limitations on high seas fishermen, in interest of accommodating the high seas fisheries interests of other states. *See generally id.* at 84, 94. *See also* DC, *supra* note 1, art. 87 (2).

191. *See note* 80 *supra*.


193. *See note* 84 *supra*.


195. *Id.*, art. 4; *See also* McDougal & Burke, *supra* note 15, at 982-84; *Johnston*, *supra* note 81, at 415-16.

196. The requirement that negotiations must have proved unproductive over a six-month period constitutes a condition precedent to unilateral measures. In addition, the coastal state must be able to demonstrate a need for urgency, a scientific basis for the restrictions, and that the limitations do not discriminate in form or in fact against foreign fishermen. COF, *supra* note 10, art. 7. Should another state object, it may initiate the compulsory arbitration
procedures alluded to in the text accompanying note 198 infra. Id. See also McDougal & Burke, supra note 15, at 981-96.

197. Id., arts. 6 (1), 7. The attempts to further define this "special interest" in 1960 are discussed in note 83 supra.

198. COF, supra note 10, arts. 9-12. The criteria described by id., art. 10 (1), are similar to the criteria for unilateral measures described in note 196, supra. See also McDougal & Burke, supra note 15, at 996-998; Johnston, supra note 81, at 417-23. Objection to the Convention's compulsory arbitration provisions likely constituted the chief obstacle to wider ratification. See, e.g., id. at 423.

199. Id. at 411.

200. DC, supra note 1, arts. 116-120.

201. See text accompanying note 191 supra.

202. The Draft Convention's generally applicable dispute settlement provisions, of course, remain relevant here as well. See DC, supra note 1, arts. 186-91.

203. Compare notes 196 and 197 supra. See also note 114 supra.

204. DC, supra note 1, arts. 117, 118. See also id., arts. 63-67, 120.

205. Id., art. 88. But see id., art. 95.

206. Id., art. 119 (3).

207. See generally notes 83, 196, 198 supra.

208. DC, supra note 1, art. 119 (1) (emphasis added).

209. Id., art. 87. The right to lay submarine cables and pipelines is defined further in id. arts. 112-115, which concern liability for damages done either to cables and pipelines or incurred in avoiding injury to them. See also id. art. 79. These provisions, although somewhat more specific, do not substantially modify the 1958 approach. Compare COHS, supra note 10, arts. 26-29.

210. Id., art. 2.

211. But see, e.g., note 94 supra. See also [1956] 1 Y.B. Int'l L. Comm'n 24.

Research on the seabed subjacent to the high seas is treated separately by the Draft Convention. See DC, supra note 1, arts. 143, 256.

212. Id., art. 257. Concerning the relationship between unimpeded research and effective conservation, see McDougal & Burke, supra note 15, at 457-463.

213. Id., art. 244. The "due regard" provisions of id., art. 87 (2), also apply mutatis mutandis to the conduct of scientific research in the high seas. See also note 190 supra.

214. DC, supra note 1, art. 258, 261. See also id., arts. 259, 260, 262, and notes 190, 211 supra.

215. DC, supra note 1, art. 89. Compare COHS, supra note 10, art. 2.
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216. DC, supra note 1, art. 90. Compare COHS, supra note 10, art. 4. The rather limited landlocked state access rights found in Article 3 of the High Seas Convention is supplanted by a more detailed scheme of privileges and immunities pursuant to part X of the Draft Convention. Id., arts. 124-132. See also The Convention on Transit Trade of the Landlocked States, 597 U.N.T.S. 42, U.S.T. 7383, T.I.A.S. 6592 (1965). While attempting to facilitate transit for landlocked states, the absence of wide ratification of the latter convention by coastal states has limited this effect. As of 1980, only Afghanistan, Austria, Bolivia, Chad, Czechoslovakia, Hungary, Luxembourg, Mongolia, and Niger were direct beneficiaries of this convention. See generally text accompanying notes 91 and 92 supra. See also the Nottebohm Case (Lichtenstein v. Guatemala), (1955) I.C.J. Rep. 4; Jones, The Nottebohm Case, 5 Int'l & COMP. L.Q. 230 (1956); UNCTAD, Committee on Shipping, Economic Consequences of the Existence or Lack of a Genuine Link between Vessel and Flag of Registry, U.N. Doc./TD/B/C. 4/168, at 20 (1977).

217. DC, supra note 1, art. 91. The last clause of Art. 5 of the High Seas Convention, which required that states effectively exercise their jurisdiction and control in administration, technical, and social matters over ships flying their flags, has resurfaced as Art. 94 (1) of the Draft Convention.

218. DC, supra note 1, art. 97; COHS, supra note 10, art. 11. These provisions, of course, were expressly designed to preclude, inter alia, the type of “passive personality” jurisdiction successfully asserted by Turkey in 1927 as then not specifically prohibited by international law. See Case of the S. S. Lotus (France v. Turkey), (1927) P.C.I.J., ser. A, No. 10, at 19. In such cases, a mutual inquiry is contemplated. DC, supra note 1, art. 94 (7).

219. The 1958 piracy provisions were adopted intact, with the additional requirement that pursuing authorities be clearly marked and identifiable. Compare, DC, supra note 1, arts. 100-107 & 110 (1) with COHS, supra note 10, arts. 14-22.

220. DC, supra note 1, art. 99, which restates COHS, supra note 10, art. 13, provides,

Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship . . . shall ipso facto be free.

221. DC, supra note 1, art. 109 (3) provides an extremely broad jurisdictional grant in this respect. See also id., art. 110 (1) (c).

222. Id., art. 110 (1) (d) and (e).
223. See e.g., COHS, supra note 10, art. 23.

224. DC, supra note 1, art. 111.

225. DC, supra note 1, art. 94, although somewhat more specific in these respects, does not fundamentally alter the 1958 approach. Compare COHS, supra note 10, art. 10.

226. DC, supra note 1, art. 98: COHS, supra note 10, art. 12.

227. Compare COHS, supra note 1, arts. 25 and 26 with DC, supra note 1, arts. 192, 194, 198, 210, 211, 216, 217, 235, and 237.

228. "'Area' means the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction . . . ." DC, supra note 1, art. 1 (1). Id., art. 135, specifies that the special Area regime created by the Draft Convention does not affect the legal status of the superjacent waters or air space. Id., art. 142, provides for consultations with the coastal state prior to exploitation of resource deposits which are partially contained within a zone of national jurisdiction, and precludes exploitation without coastal state consent if activities within the Area may result in simultaneous exploitation of resources within a national jurisdictional zone.


230. DC, supra note 1, arts. 1, 133-191; id., Annexes III, IV; Annex VI, arts. 36-41.

231. The economic and strategic consequences of seabed nodule mining, the most imminent seabed use, are discussed, e.g., in Unilateral Exploitation of the Deep Seabed, supra note 229, at 339-344. The economic value of Area hydrocarbons and other minerals has not as yet been satisfactorily researched.


233. DC, supra note 1, arts. 136, 140.

234. See text accompanying notes 236-88, infra.

235. DC, supra note 1, arts. 140, 160 (f) (i).

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237. See text accompanying note 190 supra.
238. DC, supra note 1, art. 145.
239. Id., art. 146.
240. Id., art. 147.
241. Id., art. 141. Strictly defensive or monitoring devices, however, arguably might be implanted in the seabed consistent with the general language of the cited provision.
242. Id., art. 143.
243. Id., Annex III, art. 2 (1).
244. Id., Annex III, art. 2 (2).
245. "For the purposes of this Part . . . 'resources' means all solid, liquid, or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules." DC, supra note 1, art. 133.
246. Such applicants are described in id., art. 153 (2) (b) as natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part including Annex III.
247. See text accompanying notes —, infra.
249. Id., Annex III, art. 9.
250. Id., Annex III, arts. 3 (4) (c), 16.
251. Id., Annex III, art. 1.
252. DC, supra note 1, arts. 153 (6) and 155 (5); id., Annex III, art. 19 (2).
253. See id., Annex III, art. 17 (2) (c).
254. Id., Annex III, arts. 17 (2) (b), (c); 18.
255. Id., Annex III, art. 20. The "antimonopoly" provision alluded to in the text is discussed in the text accompanying notes 265-66, infra.
256. DC, supra note 1, Annex III, art. 4.
257. See text accompanying notes 246-49 supra and 258-260, 272 & 281-86 infra.
258. DC, supra note 1, Annex III, art. 5. A precondition to the assertion of the right to technology transfer by the Enterprise is that it must be unable to obtain the same or equally efficient and useful technology on the open market and on fair and reasonable commercial terms and conditions. Id.
259. Id.
260. See id., Annex III, art. 7 (1).
261. See id., Annex III, art. 4.
262. See DC, supra note 1, art. 151. See also note 294 infra.

263. Id., Annex III, arts. 5.6 (3), 7 (1). Presumably the mandatory language of this provision removes issuance under these circumstances from ISA discretion as that term is used in id., art. 189.

264. Id., Annex III, art. 7 (2), (3).

265. See text accompanying note 247 supra.

266. DC, supra note 1, Annex III, art. 6 (3), (c).

267. See text accompanying note 264 supra.

268. The production charge may or may not, at the contractor’s election, include a percentage of net proceeds as a component in the equation. If the contractor elects to pay a fee based solely on the market value of the minerals produced, the percentage shall be 5% during the first ten years of commercial production and 12% thereafter. DC, supra note 1, Annex III, art. 13 (5). If the contractor elects a “combination”-type fee, an elaborate method of computation is provided by id., Annex III, art. 13 (6).

269. Id., Annex III, art. 13 (3).

270. DC, supra note 1, art. 160 (e).

271. Id., Annex IV, art. 11 (3). See also id., arts. 160 (2), 162 (2), and 172.

272. Id., art. 156.

273. Id., art. 157.

274. Id., arts. 159, 160.

275. Id., art. 161 (1) specifies that:

   The Council shall consist of 36 members of the Authority elected by the Assembly, the election to take place in the following order:

   (a) four members from among the eight States Parties which have the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals, including at least one State from the Eastern (Socialist) European region;

   (b) four members from among those States Parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent of total world consumption or have had net imports of more than 2 per cent of total world imports of the commodities produced from the categories of minerals to be derived from the Area, and in any case one State from the Eastern (Socialist) European region;

   (c) four members from among countries which on the basis of
production in areas under their jurisdiction are major net exporters of the categories of minerals to be derived from the Area, including at least two developing countries whose exports of such minerals have a substantial bearing upon their economies;

(d) six members from among developing States, representing special interests. The special interests to be represented shall include those of States with large populations, State which are landlocked or geographically disadvantaged, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals, and least developed States;

(e) eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this subparagraph. For this purpose the geographical regions shall be Africa, Asia, Eastern Europe (Socialist), Latin America and Western Europe and others.

276. *Id.*, art. 162 (1).

277. The consequences of an Assembly-Council deadlock concerning the budget are left unclear by the Draft Convention.

278. *DC, supra* note 1, art. 162 (2).

279. *Id.*, art. 162 (2) (i) provides that:

(i) if the Commission recommends the approval of a plan of work, it shall be deemed to have been approved by the Council if no Council member submits to the President within 14 days a specific written objection alleging non-compliance with the requirements of Annex III, article 6. In the event that there is an objection, the conciliation procedure contained in article 161, paragraph 7 (e), shall apply. If, at the end of the conciliation process, the objection to the approval of the plan of work is still maintained, the plan of work shall be deemed to have been approved by the Council unless the Council disapproves it by consensus among its members excluding the State or States, if any, making the application or sponsoring the applicant;

(ii) if the Commission recommends the disapproval of a plan of work or does not make a recommendation, the Council may decide to approve the plan of work by a three-fourths majority of the members present and voting, provided that such majority includes a majority of members participating in that session[.]
The selection and function of the Legal and Technical Commission is described in detail in id., arts. 163 and 165. See also note 263 supra.

280. Id., art. 166.
281. See text accompanying note 247 supra.
282. DC, supra note 1, art. 170; id., Annex IV.
283. DC, supra note 1, arts. 170, 176.
284. Id., arts. 178, 179.
286. Id., Annex IV, art. 13 (3).
287. DC, supra note 1, art. 139; see also id., art. 153 (4); Annex III, art. 4 (3).
288. See text accompanying notes 4-7, supra.
290. See, e.g., The "Alternative" Seabed Mining Regime, supra note 4 at 29-33.


Concerning the dangers presented by the dumping of radioactive waste, see Haimbaugh, Protecting the Seas from Nuclear Pollution, 33 S.C.L. Rev. 197 (1981).

291. See id. at 30, 31.
292. See id. at 7 n. 27.
294. See DC, supra note 1, art. 151, which both establishes an elaborate formula by which the production ceiling is to be computed and empowers the ISA to "take necessary measures to promote the growth, efficiency, and stability of markets for those commodities produced from the Area, at prices remunerative to producers and fair to consumers." In addition, id., art. 150 (g), requires that activities in the Area be carried out in such a manner as to insure:

the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a
reduction in the price of an affected mineral, or in the volume of that mineral exported, to the extent that such reductions are caused by activities in the Area . . . .

295. *See* text accompanying notes 259-260 *supra.*

296. *See* e.g., *The "Alternative" Seabed Mining Regime, supra* note 4, at 7.

297. *See DC, supra* note 1, arts. 140 (1) and 160 (2) (f) (i), quoted in relevant part in the text accompanying note 235 *supra.*

298. *Compare* the DC cited in the text accompanying note 263 and in note 279 *supra.*

299. *See* text accompanying notes 268-271 *supra.*

300. DC, *supra* note 1, Annex III, art. 6 (3) (c), *cited in* the text accompanying note 266 *supra.*

301. DC, *supra* note 1, art. 161 (1), *cited in* note 275 *supra.*

302. *See* DC, *supra* note 1, arts. 162 (2) (j), 163, and 165. *See also* notes 263 and 279 *supra.*


304. Primary among the navigational concessions sought and secured by the United States in the current draft convention's approach are guarantees concerning passage through international straits, archipelagic waters, and territorial seas. Primary among the resource concessions sought and secured by the developing states are extended resource rights in the economic zone, and revenue sharing from both seabed and remote continental shelf exploitation. Whether this trade-off either constitutes or can lead to an ultimately acceptable compromise is, of course, the critical issue in the upcoming negotiations. *Cf. Unilateral Exploitation of the Deep Seabed, supra* note 229, at 407-413.