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The Law of the Sea Crisis

Louis B. Sohn

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Mankind has been preoccupied with the sea from the very beginning. The first human beings that came to the shores of the sea found it fascinating, enticing, and dangerous. Some merely fished from the shore. Others, more venturesome, sailed the sea, first crossing small bays, then small seas, such as the Aegean Sea, later crossing bigger ones like the Mediterranean, and finally venturing with Columbus across the Atlantic. Now we are thinking about space, and flying from the earth to the moon or to other places—but still for us the greatest adventure is the sea. People forget that 70% of the earth's surface is covered by the oceans. By a recent Presidential decree, the United States increased its area by more than one-half through the addition of a 200-mile economic zone around its mainland and its many Pacific islands. More than 2 million square nautical miles of territory were added to the
United States just by the President's pen, without a costly war of conquest of the kind that was common in previous years.

For a long time, navigation was the primary use of the sea; later, fishing in coastal waters and in the high seas became equally important. Of course, wherever there is human activity, regulation by law follows. Since the early days, various nations have regulated activities on the oceans, giving rise to commercial maritime law. The international law of the sea developed well for a while; but, in the 15th century, dissension arose concerning the right to own the ocean or to exclude others from vast ocean areas. Finally, the rule was established that there is a freedom of the seas, that all nations may navigate the oceans, and that nations such as Spain and Por-

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2 Proclamation No. 5030, supra note 1. Proclamation No. 5030 appears to be the culmination of a recent trend to extend American influence into international waters. See, e.g., Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1401-1473 (Supp. V 1981) [hereinafter cited as the Mineral Resources Act]. The Mineral Resources Act provides for Government regulation of deep seabed mining activities engaged in by citizens of the United States, including corporations. Id. § 1411(a)(1). Citizens are required to obtain licenses before engaging in commercial activity or exploration within the area of the continental shelf. See id. The Mineral Resources Act, however, does not assert exclusive jurisdiction or sovereignty over any areas or resources in the deep seabed. Id. § 1402(a)(2).


5 See R. Dupuy, supra note 3, at 6-7. One of the oldest collections of maritime laws, dating from about the ninth century, was compiled on the island of Rhodes in the Aegean Sea. See W. Ashburner, THE RHODIAN SEA-LAW cxii-cxiii (1909). This legal system was further developed by the Hanseatic League, an association of seafaring states formed in the 13th century, which dominated maritime trade in northern Europe for several centuries. See C. Colombos, THE INTERNATIONAL LAW OF THE SEA 32 (6th rev. ed. 1967); see also F. Sanborn, ORIGINS OF EARLY ENGLISH MARITIME AND COMMERCIAL LAW 178-80 (1930).

6 See T. Fulton, THE SOVEREIGNTY OF THE SEA 534-41 (1976) (historical development of territorial waters); Walz, THE TERRITORIAL SEA, in MAJOR ISSUES OF THE LAW OF THE SEA 28, 32 (D. Larson ed. 1976) (origin of territorial claims). During the Middle Ages, the Italian republics appropriated vast stretches of the high seas. Walz, supra, at 29. The Scandinavian countries laid similar claims in the Baltic Sea. Id. During the Age of Exploration, the 15th and 16th centuries, Spain and Portugal divided the Atlantic, Pacific and Indian oceans between themselves. T. Fulton, supra, at 105-08, 339. Their claims were formally recognized by the Vatican's issuance of bulls. Id. at 105. Having obtained formal recognition of their claims, these nations sought to defend them by force; unlicensed travel on Spanish-claimed waters was punishable by death and confiscation. Id. at 106. But neither papal bulls nor severe sanctions could preserve the vast territorial claims laid by Spain and Portugal. See id. at 107. Such claims were vigorously challenged by the emerging naval powers—Great Britain and Holland. Id. at 106-08; Bouchez, THE FREEDOM OF THE HIGH SEAS: A REAPPRAISAL, in THE FUTURE OF THE LAW OF THE SEA 21, 21 (1973); see also R. Eckert, THE ENCLOSURE OF OCEAN RESOURCES 66 (1979) (statement by Queen Elizabeth that "use of the sea and air is common to all").
tugal could not lawfully exclude other nations from the oceans that border America and Southern Asia. This was a good rule for a long time, as long as the seas were inexhaustible, and anything one did to the sea had little apparent effect on it. But with the growth of world population and of the use of the oceans, more and more regulation became necessary. The League of Nations attempted to do something about this in the 1930's and was able to make some progress by codifying the practice of extending the sovereignty of a coastal state to a narrow strip of the bordering area of the sea, the so-called territorial sea. Preliminary agreement was reached on some basic rules, but the member nations could not agree on whether the width of the territorial sea should be limited to 3 miles. The United Nations began to deal with the question of the oceans in 1949 as one of its first activities. I was asked by that international body to collect the first laws about the new regulations that dealt with regions of the seas that extended beyond 3 miles, such as those relating to contiguous zones and continental shelves. By 1956, the International Law Commission had produced drafts, and in 1958 an international conference had agreed on a much broader codification of the law than the one attempted.
by the League. This conference produced four conventions: one on the high seas, one on the territorial sea and the contiguous zone, one on fishing, and one on the continental shelf.

It was expected in 1958 that the new regime would last a long time, but it soon became apparent that this was not possible. International activities multiplied in the next 10 years to an astounding degree. The oceans became overrun by fishing boats of a size never before imagined. These new factory ships practically emptied vast areas of the sea, leaving behind an oceanic desert virtually without living resources. Fish, which were always thought to be an inexhaustible resource, started disappearing. Pollution from tankers and dumping of wastes from the overpopulated coastal cities also slowly started destroying vast areas of the sea.

As traffic multiplied, more disasters occurred, some not far from here; vessels of ever-increasing size collided with each other, sometimes resulting in a great loss of life, and often causing oil spills and pollution. Examples of such disasters spring easily to mind. The collision of the Andrea Doria with the Stockholm occurred

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13 The first United Nations Conference on the Law of the Sea (UNCLOS) was convened in February 1958 in Geneva. See C. Colombos, supra note 5, at 71. The Conference approved an extension of sovereign rights over seabed resources to the limits of the continental shelf. Id. at 76. It also defined the term “continental shelf” as including the seabed adjacent to the coast up to the water depth of 200 meters or, beyond that limit, wherever seabed resources could be exploited. Id. at 71; see infra text accompanying notes 102-03; see also Amerasinghe, The Third United Nations Conference on the Law of the Sea, 6 UNITAR News 2, 3 (1974) (discussing accomplishments and failures of first conference).


near Nantucket in 1956.\textsuperscript{21} Heavy pollution of beaches in England and France resulted from the sinking of the oil tanker Torrey Canyon in 1967,\textsuperscript{22} and there were several subsequent spills as well, including those from the Argo Merchant and the Amoco Cadiz, and from oil wells in the Santa Barbara Channel, the Gulf of Mexico, and the North Sea.\textsuperscript{23} Consequently, people became aware that environmental concerns were as important a problem as the conservation of fish.\textsuperscript{24}

The other problem was the creeping jurisdiction of the coastal states. Three miles of territorial waters were not enough for these states; they wanted 6, 12, 50, even 100 miles.\textsuperscript{25} Of course, the major countries, comprising not only the major maritime powers but also the large countries of South Asia, such as India, Indonesia, Pakistan and Bangladesh, depend greatly on international maritime trade. All of these countries became concerned about the fact that if more and more of the coastal states were to expand their jurisdiction into the high seas, they would start regulating maritime commerce, making life more difficult and more costly for navies and the commercial ships of other countries, and causing numerous international incidents. Slowly, it was realized that something had to be done to bring the law of the sea more completely up to date.

Then, an additional discovery was made. In 1967, Ambassador Pardo, who was from the small country of Malta, brought to the attention of the General Assembly the fact that on the ocean bottom, 5 kilometers down, there lie great riches—the so-called manganese nodules.\textsuperscript{26} Although the nodules, when first brought up from the ocean depths, have a large proportion of manganese,

\begin{itemize}
  \item \textsuperscript{21} See N.Y. Times, July 26, 1956, at A1, col. 4.
  \item \textsuperscript{22} See Brown, The Lessons of the Torrey Canyon, 21 CURRENT LEGAL PROBS. 113, 114 (1968); Nanda, The "Torrey Canyon" Disaster: Some Legal Aspects, 44 DEN. L.J. 400, 400-01 (1967).
  \item \textsuperscript{23} See Cycon, Calming Troubled Waters: The Developing International Regime to Control Operational Pollution, 13 J. MAR. L. & COM. 35, 35 (1980). It has been estimated that 1,370,000 tons of oil are discharged into the ocean annually. Id.
  \item \textsuperscript{24} See Goldberg & Menzel, Oceanic Pollution, in WHO PROTECTS THE OCEAN? 37-38 (J. Hargrove ed. 1975).
  \item \textsuperscript{25} See, e.g., BUREAU OF INTELLIGENCE & RESEARCH, OFFICE OF THE GEOGRAPHER, U.S. DEP'T OF STATE, PUB. NO. 36, NATIONAL CLAIMS TO MARITIME JURISDICTION 1-141 (2d rev. ed. 1974); R. DUFUY, supra note 3, at 54-55; R. ECKERT, supra note 6, at 1-5; see also Walz, supra note 6, at 23-34. Statistics reveal that though only 38 states laid claim to territorial seas of 12 miles or more in 1967, 78 countries had made such claims by 1974. Walz, supra note 6, at 31 (table II-2).
  \item \textsuperscript{26} 22 U.N. GAOR (1515th mtg.) at 2, U.N. Doc. A/C.1/PV.1515 (1967).
\end{itemize}
manganese is but one of their components, the others being nickel, copper and cobalt—all of which are very important for a number of industrial processes.  

These nodules are lying down there by the millions, maybe by the trillions, of tons, and technology has reached the point where they could be exploited by combinations of devices. There are, for example, elaborate computers capable of keeping a ship steady in a particular spot by computing the speed of the winds, the waves, and the ship, and the effect of the currents. This permits the miner to use complex devices to go to the bottom of the sea, pick out the nodules by utilizing different kinds of processes, and bring them up to the ship, regardless of what happens on the surface of the sea. Another ship can then process the nodules at sea or take them to shore to extract the desired minerals from the nodules. Ambassador Pardo noted that in the past, the seabed was an area that did not belong to any nation. The United Nations, Ambassador Pardo asserted, should, in the

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27 See Anand, Winds of Change in the Law of the Sea, in LAW OF THE SEA: CARACAS AND BEYOND 36, 43 (R. Anand ed. 1980); Murphy, The Politics of Manganese Nodules: International Considerations and Domestic Legislation, 16 SAN DIEGO L. REV. 531, 534 (1979). There are many industrial uses for manganese, nickel, copper, and cobalt. For example, steel cannot be manufactured without manganese. See Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., Ocean Manganese Nodules 50 (Comm. Print 1975) [hereinafter cited as Ocean Manganese Nodules]; Pietrowski, Hard Minerals on the Deep Ocean Floor: Implications for American Law and Policy, 19 WM. & MARY L. REV. 43, 44 (1977). Nickel-alloy steel, which has enhanced heat resistant properties, is used in petroleum refining, as well as in the manufacture of jet engines, turbines, and pollution control equipment. Ocean Manganese Nodules, supra, at 47. Because of its high level of conductivity, copper is used extensively in electrical equipment, wire tubing, and sheeting. Id. at 49. Cobalt is used in space-age alloys. See id. at 52.


29 See Senate Comm. on Interior and Insular Affairs, 94th Cong., 2d Sess., Report on Deep Sea Bed Hard Minerals Act, S. Rep. No. 754, 3-5 (Comm. Print 1976). Sophisticated ship technology includes devices for acoustic, optic, and magnetic observation. Id. at 5. Three methods for recovering nodules from the ocean floor are presently in use. See Ocean Manganese Nodules, supra note 27, at 15. The first method utilizes an air-lift pump to vacuum nodules from the seabed. Id. The second method involves a hydraulic lift, which functions in much the same way as the air-lift pump, but requires pumped water to bring the nodules to the surface. Id. at 18. The third, and most widely used, device is the mechanical lift, or continuous-line bucket system, which dredges up nodules by dragging a bucket along the ocean bottom. Id.

name of mankind, declare it the common heritage of mankind, and should not permit the major powers to take it over as they had taken over Africa in the 19th century.\textsuperscript{31} That, of course, struck a very responsive chord among the developing countries that had recently joined the United Nations and were looking for a way to further their own progress; they asked to have the matter studied.\textsuperscript{32} A committee was established for this purpose, first temporarily,\textsuperscript{33} and then on a permanent basis.\textsuperscript{34} The committee published a comprehensive report that said, in effect, yes, there are riches on the deep seabed and they require some international regulation.\textsuperscript{35} 

By this time, the major powers discovered another important fact, namely, that the only way to prevent the further creeping appropriation of the ocean by coastal states would be to have an international conference that would establish some stability in the law in this area. They persuaded the General Assembly to add several important topics to the agenda of the future Law of the Sea Conference. The Conference was asked to deal not only with deep seabed mining, but also to reconsider the whole law of the sea and

\textsuperscript{31} 22 U.N. GAOR (1515th mtg.) at 1, 12, 14, U.N. Doc. A/C.1/PV.1515 (1967). The European colonial powers, including Great Britain, France, Belgium, Germany, and Italy, following in the footsteps of Portugal and Spain, ventured to Africa to conquer and divide the continent. \textit{See Colonial Rule in Africa} 7-8 (B. Fetter ed. 1979).

\textsuperscript{32} Pietrowski, \textit{supra} note 27, at 55 (Ambassador Pardo's proposal viewed by developing countries as a way to secure their proportionate share of seabed mineral riches). The developing nations support common global ownership of the riches of the sea, since such a scheme would ensure that they share in the exploitation of those riches. Alexander, Cameron & Nixon, \textit{The Costs of Failure at the Third Law of the Sea Conference}, 9 J. Mar. L. & Com. 1, 2 (1977). This concern is related to the broader issue of closing the prosperity gap between the developed and the developing countries. \textit{Id.} at 20.

\textsuperscript{33} The Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction was established on December 18, 1967. G.A. Res. 2340, 22 U.N. GAOR Supp. (No. 16) at 14, U.N. Doc. A/6716 (1968).


to determine whether it could be recodified.\textsuperscript{36} Some 150 nations went to work (almost 170 by the time the task was finished) and ultimately produced a treaty that was almost 160 pages long, containing more than 400 articles (320 in the main text, and more than 120 in the annexes), and which dealt with almost all of the areas and problems of the sea.\textsuperscript{37} There were twenty-five original subjects on the agenda, and the Conference dealt with every one of them. It would be impossible to consider all twenty-five in this Article, so just a few of them will be sketched briefly. Professor Janis and Professor Biblowit consider some of these problems in greater detail.\textsuperscript{38}

Starting from the shoreline and moving seaward, one comes first to the territorial sea, over which a coastal state has, in principle, the same sovereignty it has over its land.\textsuperscript{39} But there is an important difference: it was agreed long ago, and reaffirmed in 1958, that foreign ships should have the right of innocent passage through such waters.\textsuperscript{40} There has been, however, a longstanding controversy over the extent of the territorial sea.\textsuperscript{41} The United States and the United Kingdom had always claimed a very limited expanse because they wanted to have freedom of navigation be-


\textsuperscript{40} Slonim, The Right of Innocent Passage and the 1958 Geneva Convention on the Law of the Sea, 5 COLUM. J. TRANSNAT'L L. 96, 96 (1966); cf. R. Dupuy, supra note 3, at 89 (other than the maritime right of innocent passage, a state has equal sovereignty over land and sea); J. Prescott, The Political Geography of the Oceans 30 (1975) (right of innocent passage for alien vessels through territorial seas has no counterpart on land). The ancient maritime doctrine of innocent passage provides that foreign vessels may navigate freely through a coastal state's territorial waters only if such passage is not prejudicial to the peace, good order or security of that state. LOS Convention, supra note 37, arts. 18-19, at 6-7; see K. Koh, STRAITS IN INTERNATIONAL NAVIGATION 167 (1982); McConchie & Reid, Canadian Foreign Policy and International Straits, in CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 159 (1977). This right also includes the right to stop and weigh anchor, if necessitated by either a force majeure or danger. See C. Colombos, supra note 5, at 132.

\textsuperscript{41} See W. Extavour, THE EXCLUSIVE ECONOMIC ZONE 49 (1979); K. Koh, supra note 40, at 3-4; Alexander, Cameron & Nixon, supra note 32, at 4.
yond the territorial waters of other nations. Other countries, such as Spain, for a long time claimed 6 miles. The Soviet Union, following the precedents of old czarist Russia, claimed 12 miles. The new Latin American countries claimed even greater expanses of the sea because of another development, namely, the continental shelf doctrine, which some of them could not employ because there was no continental shelf off their shorelines. Nevertheless, since most continental shelves extend approximately 200 miles from the shore, these nations also claimed 200 miles of territorial waters. They claimed the 200-mile zone as territorial sea because that was the only theory they could invoke as a basis for the coastal states’ jurisdictional claims at sea. This 200-mile limit was very beneficial for them, because most of the fisheries off their shores were within that distance. The major powers were very upset, however, because the existence of a 200-mile territorial sea under national sovereignty would lead to restrictions on foreign navigation, mitigated only by the nebulous right of innocent passage. Innocent passage was long considered a subjective term, since each coastal state was permitted to determine for itself what con-

42 See C. Colombos, supra note 5, at 51; T. Fulton, supra note 6, at 650-52; L. Juda, Ocean Space Rights: Developing U.S. Policy 2-3 (1975).
43 See T. Fulton, supra note 6, at 664 (Spanish claim to 6-mile limit in 18th century); Heinzen, The Three-Mile Limit: Preserving the Freedom of the Seas, 11 Stan. L. Rev. 597, 642 (1959) (Spain is one of the few nations still claiming 6 miles of territorial waters in 1958).
44 See S. Riesenfeld, supra note 4, at 162 (Russian decree of 1911 establishing 12-mile zone on Pacific Coast). The Soviet Union established a 12-mile zone in the Arctic Ocean, including the White Sea, in 1921, and in 1957 extended the overall boundary of its territorial waters from 3 to 12 miles. Id. at 163-64; K. Koh, supra note 40, at 68. For a detailed study of the 3-mile limit and of deviations from it, see S. Swartz-Auber, supra note 9, at 51-177.
45 See Z. Slovka, International Custom and the Continental Shelf 43-44 (1968). The continental shelf doctrine originated with President Truman’s famous proclamation in 1945. See Proclamation No. 2667, 3 C.F.R. 67 (1945). In that proclamation, the United States claimed exclusive rights to explore and exploit not only the seabed and subsoil adjacent to its coastline, but also the seabed and subsoil beyond its territorial waters. Id.
47 See B. Smetherman & R. Smetherman, Territorial Seas and Inter-American Relations 5-6 (1974) (tracing the history of the disputed claim by the Latin American countries to the 200-mile zone).
duct was harmful to its peace, good order, and security, and therefore to consider it not innocent. Consequently, various countries have developed different definitions of innocent passage. Spain, for instance, out of concern for its beaches, forbade big tankers to come close to its shores because they were dangerous. Algeria, which was always a big proponent of radical doctrines in international law, discovered that Spain contemplated prohibiting ships carrying liquified Algerian gas to approach the Spanish shore of the Straits of Gibraltar because they were too dangerous. In view of that threat to its exports, Algeria shifted its position and became one of the major proponents of freedom of transit through narrow sea passages.

Many back-and-forth shifts of this kind, affecting several rules of international maritime law, occurred during the Conference, because the countries were looking out not simply for group interests but for their own national interests. Within the Conference, apart from the usual regional groups and the large group, the so-called “Group of 77,” there were the following groups: the developing countries, the coastal states, the fishing states, the states with broad continental shelves, and the so-called territorialists—those nations that wanted a territorial sea of 200 miles. The Group of

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50 See Slonim, supra note 40, at 100.
51 See U.N. Doc. A/CONF.62/C.2/L.20, 3 Official Records, Third United Nations Conference on the Law of the Sea 198, 198-99, U.N. Sales No. E.75.V.5 (1975) [hereinafter cited as UNCLOS Official Records]. Algeria, along with Libyan Arab Jamahiriya, Romania, Turkey and Yugoslavia, proposed a very liberal set of guidelines for the transit passage of merchant and military ships through straits and semi-enclosed seas. Id. at 198. The Algerian proposal provided for free, unhampered passage of ships through semi-enclosed waters, for international navigation, and for unimpeded overflight for aircraft. Id. at 199. These rights were unaffected by the presence of islands or archipelagic states within the waters. Id.
Spain, on the other hand, joined with Cyprus, Greece, Indonesia, Malaysia, Morocco, Republic of the Philippines and Yemen, to propose a much more limited draft article for navigation through straits. See Report of the Committee on the Peaceful Uses of the Sea Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 28 U.N. GAOR Supp. (No. 21) at 3, U.N. Doc. A/9021 (1973). The proposal concerned balancing the rights of international navigation against the interests of the coastal states and included a conditional right of passage providing for discretion in the coastal states control over what vessels could pass through their waters. Id.
52 See Evriviades, The Third World’s Approach to the Deep Seabed, 11 OCEAN DEV. & INT’L L. 201, 241 n.4 (1982). The term “Group of 77” is used to describe the Third World countries collectively. The group can be traced to the “Caucus of 75” developing countries, which was organized prior to the 1964 United Nations Conference on Trade and Development. Id. This group later added two members and issued a Joint Declaration of the 77 Developing Countries, and since has expanded to include more than 120 members. Id.
53 See B. BUZAN, SEALED POLITICS 198-205 (1976). In 1970, nine Latin American States
landlocked states joined the geographically disadvantaged states to form a powerful group which possessed more than one-third of the votes in the Conference and was able to threaten with a "blocking third" should a two-thirds vote be required on a treaty provision. As far as these groups were concerned, political and ideological disagreements did not matter. Eastern European nations, such as Poland and Czechoslovakia, were very active in the group of landlocked and geographically disadvantaged states, even though these states had interests different from those of the Soviet Union. The Africans divided into two groups: the landlocked states and the coastal states, as did, to some extent, the Europe-

claimed a 200-mile territorial sea. See Declaration of Montevideo on the Law of the Sea, May 18, 1970, 9 I.L.M. 1081, 1082-83. Claims to a 200-mile territorial sea were first made by Chile, Ecuador and Peru. See 1 S. LAY, R. CHURCHILL & M. NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA 231-32 (1973); Evolution of the Treaty, 62 Cong. Dig. 3, 3 (1983) [hereinafter cited as Evolution of the Treaty]. Different states had sought an expanded territorial sea, however, for different reasons. Coastal states, such as the Democratic People's Republic of Korea, Romania, and the Sudan, contended that they should have the right to safeguard their security interests. Sea Law, 19 U.N. MONTHLY CHRON. 8, 8 (1982). Countries with large continental shelves, such as Canada, India and Indonesia, argued for the codification of the principle of natural prolongation, which eventually was adopted with restrictions. Wani, An Evaluation of the Convention on the Law of the Sea from the Perspective of the Landlocked States, 22 Va. J. Int'l L. 627, 652 n.88 (1982); see LOS Convention, supra note 37, art. 77, para. 1, at 28. See generally B. SMETHERMAN & R. SMETHERMAN, supra note 47, at 37-55 (analysis of the 200-mile claim in the context of Latin American foreign policy).

54 Geographically disadvantaged states have a boundary on the sea but are surrounded by the economic zones of other countries. See LOS Convention, supra note 37, art. 70, at 24. Landlocked and shelf-locked states also have been referred to as geographically disadvantaged states. See R. ECKERT, supra note 6, at 44.

55 See Wani, supra note 53, at 630 n.10.

56 See Third United Nations Conference on the Law of the Sea, Rules of Procedure, U.N. Sales No. F.74.L18 (1979) (Rule 39) (two-thirds majority required to rule on substantive questions). There are 30 landlocked states, including Afghanistan, Bolivia, Hungary, Uganda and Zimbabwe. See Wani, supra note 53, at 628 & n.3. The Convention recognized the interests of the landlocked and geographically disadvantaged states in improving their economic status by granting them the right to participate in the exploitation of the living resources of the exclusive economic zones of the coastal states. See LOS Convention, supra note 37, arts. 69-70, at 24-25.

57 See B. BUZAN, supra note 53, at 201. The landlocked eastern European states have strayed from the Soviet position on a number of proposals and allied themselves with the Group of 77. Id. Overall, however, the unity of the landlocked states has been impaired by the persistent adherence of the socialist states to Soviet policy. See Wani, supra note 53, at 629 n.9.

58 See B. BUZAN, supra note 53, at 215 (division between landlocked states and coastal states necessitated compromises at 1974 Organization of African Unity (OAU) meeting). The existence of geographically based factions within the OAU became evident in preconference group meetings held by 19 of the developing landlocked and geographically disadvan-
ans. Thus, the usual geopolitical groups became divided because of individual economic and political interests.

The proposed change in the size of the territorial sea created another complication. If nations were to extend their territorial seas to 12 miles, as the general trend seemed to have been, many international straits would cease to be part of the high seas. In fact, more than 100 straits, which previously were free for navigation, would become subject to the regime of innocent passage, with its attendant restrictions. The major powers did not favor these restrictions; they wanted their right to freedom of transit through those straits to continue. Utmost patience was required on the part of those attempting to reconcile these conflicting positions. In trying to reach effective compromises, the members of the Conference separated the problems into groups, or packages. First, the
taged states. See id. The 19 states opposed the “extensive coastal state shelf claims that would exclude nearly all oil areas from the common heritage.” Id. The division was deepened by the fact that mineral-producing landlocked states were likely to suffer economic harm from seabed mineral production. See N. Rembe, Africa and the International Law of the Sea 75-76 (1980). The result of the growing concern was the Kampala Declaration, a proposal by the landlocked states demanding equal rights to the resources of the zone. B. Buzan, supra note 53, at 216. These demands have been adopted by the Convention only with respect to fishing. See LOS Convention, supra note 37, art. 69, at 24.


See Sharma, Navigation Through International Straits, in Law of the Sea: Caracas and Beyond 111, 113 (R. Anand ed. 1980). Extending the territorial sea to 12 miles would bring 116 straits within the jurisdiction of coastal states. Id. Included in this total would be many straits of international navigational significance, such as Dover, Gibraltar and Malacca. Id.

See Dickey, Freedom of the Seas and the Law of the Sea: Is What’s New for Better or Worse?, 5 Ocean Dev. & Int’l L.J. 23, 25 (1978) (United States would agree to greater limits only if passage through vital international straits is protected); see also Moore, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, 74 Am. J. Int’l L. 77, 79 (1980). The United States’ concern with restricted passage through international straits has been based on the perceived detrimental effect of such restrictions on national security. See Campbell, Navigation, in Major Issues of the Law of the Sea 125, 136 (D. Larson ed. 1976). This concern, along with the economic need to keep trade lanes unrestricted, has been the primary factor in the formulation of the American and Soviet positions. See Vitzthum, The Baltic Straits, in The Law of the Sea in the 1980’s, at 537, 538 (C. Park ed. 1980). Canada has taken an intermediate position. See Buzan, Canada and the Law of the Sea, 11 Ocean Dev. & Int’l L.J. 149, 166 (1982). During the Convention negotiations, the Canadian Government pressed for an “effective, non-obstructive regime of passage through international straits” while at the same time arguing for exclusion of the Northwest Passage from the scope of any rules governing passage through international straits. Id.
states most interested in a particular group of problems got together and tried to solve these problems. Then, the search for compromises was broadened, proposals of various groups were combined, and a unifying solution finally was reached for many problems put together.\(^6^3\)

The most important package consisted of four interconnected items: (1) a 12-mile limit to the territorial sea,\(^6^4\) thereby putting an end to the difficulty that destroyed several previous international conferences on the subject;\(^6^5\) (2) a second zone, contiguous to the first and extending no further than 24 miles from the baseline of the territorial sea,\(^6^6\) to protect states' rights in the territorial sea and within which the coastal states would have the right to enforce special regulations concerning customs, fiscal, immigration, and sanitary laws;\(^6^7\) (3) a 200-mile exclusive economic zone, to be measured from the same baseline,\(^6^8\) within which the coastal states would have only limited sovereign rights with respect to fishing or any other economic activities that might be possible there;\(^6^9\) (4) beyond the 200-mile line (and, in some circumstances, up to 350

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\(^{63}\) See McDorman, *Reservations and the Law of the Sea Treaty*, 13 J. MAR. L. & COM. 481, 489-90 (1982). The attainment of compromise was facilitated by the formation in 1978 of seven negotiating groups, which were responsible for solving some of the more “hard core areas of dispute.” Id. at 489.

\(^{64}\) See LOS Convention, supra note 37, art. 3, at 3. The Convention states that a nation’s territorial sea may not extend further than 12 miles from its baseline, which is the imaginary line from which all the Convention’s ocean zones are measured. Id. The location of the territorial sea differs according to the geographical configuration of the coast, but normally the low water mark is recognized as the baseline. Id. art. 5, at 3.

\(^{65}\) See Anand, *Introduction to LAW OF THE SEA: CARACAS AND BEYOND* 7 (R. Anand ed. 1980). The first Law of the Sea Conference was held in 1958 and produced a convention on the territorial sea that did not address the limit of that sea. Id. at 6-7. The second Law of the Sea Conference, held in 1960, likewise failed to produce any agreement on the territorial limit. Id. at 7. The failure of the 1958 and 1960 conferences, however, also can be traced to the lack of unity displayed by the third world countries. Id.; see Evriviades, supra note 52, at 207-08. The 1930 League of Nations Codification Conference is another example of disagreement over the issue of the size of the territorial sea, resulting in an unsuccessful conference. Anand, supra, at 6.

\(^{66}\) See LOS Convention, supra note 37, art. 33, para. 2, at 11.

\(^{67}\) See id. art. 33, para. 1(a), at 11. Creation of the contiguous zone has been justified by “the need to temper what would otherwise have been a rigid dichotomy between the freedom of the high seas and sovereignty over the territorial sea.” W. EXTAVOUR, supra note 41, at 29-30.

\(^{68}\) See LOS Convention, supra note 37, art. 57, at 18. The 200-mile zone extends 176 miles beyond the contiguous zone. Id.

\(^{69}\) See id. art. 56, para. 1(a), at 18; see also W. EXTAVOUR, supra note 41, at 187-90 (proposed rights, jurisdiction, and duties of a coastal state in the exclusive economic zone).
miles from the baseline), coastal states would have jurisdiction over the resources of the continental shelf, a submerged part of the continent, containing in some areas vast oil resources, such as those found in the Gulf of Mexico, or off the coasts of California and Alaska. Through this package of compromises, the coastal states obtained several levels of jurisdiction over coastal waters. The closer an area is to its shore, the broader the jurisdiction a state has; the farther an area is from the shore, the weaker coastal jurisdiction becomes, finally petering out somewhere around 350 miles from shore. Even at distances greater than 350 miles, coastal jurisdiction may exist. Since the United States and the Soviet Union were interested in some submerged plateaus near Alaska and Siberia that extended beyond 350 miles of either shore, they made sure that special exceptions were put into the Law of the Sea Convention that would enable certain states to exercise some kind of jurisdiction as far as 500 miles from shore. In addition to the United States and the Soviet Union, the main beneficiaries of this expanded jurisdiction are countries located near broad continental shelves, such as Argentina, Australia, Brazil, Canada, India, Indonesia, and New Zealand and Norway.

Another part of the larger package was the problem of passage through coastal waters. It became necessary to define innocent passage more precisely in two ways. First, it was necessary to determine what conduct is not innocent; for instance, neither military

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1 See id. art. 76, paras. 1, 5, at 27.
2 See Wani, supra note 53, at 652 (states with large shelves have an interest in the expansion of shelf jurisdiction while states with small shelves prefer to limit shelf jurisdiction). A coastal state's rights in the continental shelf area are distinguishable from its rights in the economic zone by the fact that the exercise of sovereign rights over the resources of the continental shelf does not affect the legal status of the water or airspace above it. See Highlights of the Treaty, 62 Cong. Dig. 6, 6 (1983) [hereinafter cited as Highlights of the Treaty].
3 See Jackson, Offshore Petroleum Development: A Practical Perspective, in The Law of the Sea: Issues in Ocean Resource Management 226, 226 (D. Walsh ed. 1977). In fact, most of America's prospective sources of petroleum are offshore and remain largely unexplored. Id. at 231; see also Anand, supra note 65, at 11 (seabed oil supply estimated to be large enough to satisfy world consumption for 140 years).
activity nor fishing is innocent. A list was prepared of 12 subjects that were not considered to be innocent, including, unfortunately, scientific research. Second, another list was agreed on that established the eight subjects about which coastal states may make regulations. For instance, they may regulate pollution, the safety of navigation, and a few other matters, but they may not regulate the design, construction, or manning of foreign ships. Another question to be decided was how submarines should be treated. This issue finally was resolved by deciding that submarines are entitled to innocent passage through the territorial sea provided they exercise this right on the surface; they may not pass under water. There also was continuous debate at virtually every session as to whether a military vessel might travel through the territorial sea of another coastal state without giving prior notification to, and obtaining permission from, that coastal state. There is no provision in the Convention on this issue because the various delegations could not agree on one. At present, various countries continue to have different rules on the subject, and some may in fact be in the process of changing their positions. For instance, the Soviet Union previously was very strongly opposed to the idea of foreign military ves-

75 LOS Convention, supra note 37, art. 19, at 6-7.
76 See id. art. 21, para. 1, at 7.
77 See id. art. 21, para. 2, at 7. By the terms of the Convention, polluters of the sea will be liable for the damage that they cause to nations possessing jurisdiction over the polluted areas. See id. art. 235, at 84. Such damage may originate either on land or at sea, and the offending nation is responsible whether the pollution-producing entity is public or private. See id. art. 194, at 1308; id. art. 235, at 1315; Note, Ixtoc I: International and Domestic Remedies for Transboundary Pollution Injury, 49 FORDHAM L. REV. 404, 412-13 (1980).
78 See LOS Convention, supra note 37, art. 20, at 7. In addition to the requirement that submarines navigate on the surface, the Convention provides that they also must show their flags while navigating territorial seas. Id.
80 Support for granting innocent passage to military vessels, at least under specified conditions, appears to be growing, though many nations still deny this right. See Pirtle, Transit Rights and U.S. Security Interests in International Straits: The "Strait's Debate" Revisited, 5 OCEAN DEV. & INT'L L.J. 477, 481-82 (1978). China, for instance, steadfastly adheres to the proposition that warships have no right of innocent passage, and has declared that a coastal state may require military ships of foreign states to tender prior notification to the coastal state's government before navigating its territorial sea. See Comment, The Innocent Passage of Warships in Foreign Territorial Seas: A Threatened Freedom, 15 SAN DIEGO L. REV. 573, 600 (1978). The Convention gives the coastal state the right to ask warships to leave its territorial waters if the vessel violates a regulation of the state, and the nation under whose flag the vessel sails is held responsible for damage resulting from such noncompliance. See LOS Convention, supra note 37, arts. 30-31, at 10.
sels entering its territorial waters; but now that it is becoming a major maritime power, it is likely to become more lenient on the subject.\textsuperscript{81}

All these compromises were necessary to settle just one point—the regime of the territorial sea. Once agreement was reached on that issue, another dispute started regarding the contiguous zone. This dispute focused primarily on two issues: whether a separate contiguous zone is needed, and, if so, whether the zone should extend only 24 miles or 200 miles. The latter proposal was the one the major powers rejected, preferring to limit the zone to 24 miles. This rule was accepted, thanks to support from countries that did not want to be concerned with having to police a larger area.\textsuperscript{82}

The problem of straits and archipelagoes was solved by establishing a freedom of transit passage, which was broader than the right of innocent passage in the sense that certain activities that were not permitted in innocent passage through ordinary territorial seas are permitted in passage through straits.\textsuperscript{83} For instance, submarines may travel under water through straits and airplanes may fly overhead without the permission of the coastal states.\textsuperscript{84} This issue was very important to the United States for strategic reasons. During the Israeli-Egyptian crisis in 1973, the United States suddenly discovered that, because of an agreement between Morocco and Spain, it was not permitted to fly aid to Israel over

\textsuperscript{81} See Comment, supra note 80, at 600. The present Soviet position, however, is to permit innocent passage of military vessels only if the Government receives notice within 30 days or more of the intended passage. See Pirtle, supra note 80, at 495 n.17.

\textsuperscript{82} See LOS Convention, supra note 37, art. 33, para. 2, at 11.

\textsuperscript{83} The major difference between the right of innocent passage and the right of transit passage is that while the coastal state may block passage that is not innocent and may interrupt innocent passage for security purposes under the innocent passage regime, neither of these acts is permissible under the transit passage regime. Maduro, Passage Through International Straits: The Prospects Emerging From the Third United Nations Conference on the Law of the Sea, 12 J. MAR. L. \& COM. 65, 82 (1980). The regulatory power of the coastal state also is more restricted in a strait than in the territorial sea. Compare LOS Convention, supra note 37, art. 21, at 7 (innocent passage) with id. art. 42, at 13-14 (transit passage).

\textsuperscript{84} See LOS Convention, supra note 37, art. 38, at 12. Article 39(1)(c) refers to the “normal modes of continuous and expeditious transit.” Id. art. 39, para. 1(c), at 12. For submarines, the normal mode of transit is under water. Cf. id. art. 20, at 7. Article 53(3) speaks of “rights of navigation and overflight in the normal mode” when referring to archipelagic passage. Id. art. 53, para. 3, at 17. Of course, aircraft and ships exercising transit rights still must comply with international rules and regulations, see id. art. 39, paras. 2-3, at 12-13, as well as with the schemes concerning sea lanes and traffic separation schemes promulgated by the states that border the straits, see id. art. 41, para. 7, at 13.
the Straits of Gibraltar. France would not permit American flight through its airspace either, so the American planes had to fly a roundabout route across the Netherlands, Germany, Switzerland (slightly violating its neutrality), Italy, and then into the Mediterranean—a much more complicated path. Thereafter, one of the points the United States Air Force insisted on, of course, was that there must be a right of passage through the straits for airplanes. The Convention’s rules on the freedom of passage permit this. A similar, though slightly more restrictive, rule was established for archipelagic passage. Foreign ships and airplanes were guaranteed the right of archipelagic sea lane passage through all archipelagic straits necessary for international navigation. This right is more limited, because foreign ships are confined to special corridors that the archipelagic states may establish; but apart from that, the passage rules applied are very much like the ones for ordinary straits. Incidentally, the Conference also was able to solve another archipelagic problem, the problem of archipelagic waters, by finally devising a definition of “archipelago” that would include the major archipelagoes such as Indonesia, the Philippines, the Ba-


67 See LOS Convention, supra note 37, art. 53, at 17. In archipelagic waters, which are not necessary to international navigation, ships of all states have the right of innocent passage, but an archipelagic state may, if necessary, temporarily suspend the passage of foreign ships if national security reasons necessitate such an act. Id. art. 52, para. 2, at 16-17.

68 Id. art. 54, at 18 (indicating that articles 39, 40, 42, and 44 apply to archipelagic sea lane passage).

69 Archipelagic waters lie within the baselines drawn from the outermost points and the drying reefs of the outermost islands of an archipelago. See LOS Convention, supra note 37, art. 47, at 15. The question of whether archipelagic states should be treated differently for the purpose of determining territorial waters was left unresolved by the First and Second Conferences on the Law of the Sea. The Third United Nations Conference on the Law of the Sea ultimately solved the problem by establishing a system of archipelagic baselines, with predetermined maximum lengths of 100 and 125 miles, and special ratios of water areas to land areas. See id. art. 47 (1), (2) (ratios between 1 to 1 and 9 to 1). The Convention text may be traced to the proposed Indonesian plan of embracing the entire body of water lying between the islands of the archipelago, instead of measuring the territorial distance from each individual island. See R. Eckert, supra note 6, at 28.
hamas, and even Fiji, but would not include other groups of smaller islands, or such larger islands as New Zealand and Great Britain, which theoretically also have some archipelagoes associated with them. In order to obtain acceptance for the new rule, it had to be limited to archipelagic states, or states composed only of islands; thus it does not extend to states, such as Greece, that are half mainland and half island.

Next, there were difficulties with respect to the exclusive economic zone. On the one hand, it was realized from the very beginning that the coastal states must be given fishing rights up to 200 miles from the coastline; but, on the other hand, the United States had opposed this for a long time because of its distant fishing—especially its tuna fishing off the coasts of Ecuador and Peru and its shrimp fishing off the coast of Brazil. In view of the increase in the number of foreign vessels fishing off the coasts of the United States, however, fishermen on the Atlantic coast, in the Pacific Northwest, and in Alaska shifted their position. Under their pressure, the United States adopted a 200-mile fishing zone. Thereafter, it was no longer possible for it to oppose such an economic zone for other countries. As a result, a 200-mile exclusive economic zone for coastal states has been established, which is of great importance to the economies of many coastal countries.

Of course, there was a fear that the establishment of such broad economic zones would impinge upon freedom of navigation. Past experience had always been that if a state extended its

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90 See supra note 89; see also LOS Convention, supra note 37, art. 46 para. (a), (b), at 15 (defining “archipelagic State” and “archipelago”).
94 See LOS Convention, supra note 37, art. 57, at 1280.
95 See Snow, supra note 93, at 293.
coastal jurisdiction with respect to subject “A,” its jurisdiction was slowly broadened to embrace subjects “B,” “C,” and “D,” as well; eventually the whole range of subjects came under that coastal state’s jurisdiction. Therefore, the major powers refused to accept an exclusive economic zone unless the coastal states agreed to strict limits on their jurisdiction. Consequently, the powers of the coastal states are clearly enumerated in the Convention and are restricted to the exploitation, conservation, and management of the living and non-living resources of the zone. At the same time, the basic freedoms of the sea, especially freedom of navigation, are carefully safeguarded.  

Only three exceptions to this rule of limited jurisdiction were agreed upon. First, coastal states were granted extensive discretionary rights over fishing within the zone, subject to a few minor restrictions. Second, it was generally recognized that coastal states need to be allowed to protect the coastal zone from pollution, especially by oil, because so many disasters of this kind occur. Therefore, special rules were developed for the protection of the marine environment. Again, a compromise was reached in that the rules to be applied in the economic zone by the coastal states must be generally accepted by the international community, though once they are accepted, the coastal states have the primary power to enforce them in their coastal areas. So the difference between the legislative power and the enforcement power was used here to divide jurisdiction along functional lines.

The third problem was scientific research. Here again, the Conference divided the subject along functional lines. Certain categories of research, such as those conducted by international institutions or by regional bodies, would be permitted with few restric-

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90 Compare LOS Convention, supra note 37, art. 56, at 18 (rights and duties of coastal state in its own economic zone) with id. art. 58, at 19 (rights and duties of other states in coastal state’s economic zone). For a discussion of the protection afforded the right to free navigation in the exclusive economic zone, see W. EXTAVOUR, supra note 41, at 233-43.

91 See LOS Convention, supra note 37, arts. 61-62, at 20-22; see also id. arts. 63-68, at 22-23 (regulations pertaining to particular categories of species). The primary fishing rights granted to the coastal state by the Convention were: the right to establish a maximum allowable catch of a particular species in its waters, the right to reserve to itself all the fish that its fishermen can catch, and the right to determine how the remainder shall be divided among the fishermen of other states. Id. arts. 61-62, at 20-22.

92 See id. art. 220, at 79-80 (providing for right of coastal state to enforce its anti-pollution measures); see also id. art. 56, para. 1(b)(iii), at 18 (granting coastal state jurisdiction to preserve and protect “the marine environment”).

93 See id. arts. 211, 220, at 75, 79-80.
On the other hand, some categories of research by national bodies would be subject to greater control, while other categories of research, such as research about natural resources, would be prohibited in the economic zone unless the coastal state expressly permitted it. Consequently, theoretical marine research will remain quite free under the Convention, but practical marine research will be more firmly under the control of the coastal state.

Another jurisdictional issue was presented by the existence of the continental shelf. In 1958, when the international community first faced the problem of deciding who should be permitted to exploit the shelf, a rather simplified solution was adopted. The coastal states were declared to be entitled to the resources of the continental shelf to an average depth of about 200 meters (100 fathoms). At the same time, however, it was agreed that, should developments in technology enable a state to exploit the shelf further, it could go further. Unfortunately, technology developed faster than expected and very quickly technology for exploiting the continental shelf to the deepest depths of the ocean became available. It thus became possible for all the coastal states to extend their jurisdiction to the middle of the ocean and put an end to the freedom of the seas. To prevent that, many nations argued that

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100 See id. art. 247, at 87-88; see also id. art. 252, at 89-90 (implied consent may be found if, 4 months subsequent to notice to coastal state, coastal state has not withheld consent). One commentator has explained that the Convention prohibits the coastal state from restricting scientific research in its economic zone if the research is to be conducted for peaceful purposes and for the benefit of all mankind, provided it does not interfere with the coastal state's right to the area. See P. Rao, The Public Order of Ocean Resources 130-31 (1975); see also LOS Convention, supra note 37, art. 246, para. 3, at 87.

101 See LOS Convention, supra note 37, art. 246, at 87-88. Article 246 stipulates circumstances under which it would be reasonable for a coastal state to withhold its consent to scientific research. Id. Paragraph 5, for instance, provides that a coastal state may withhold consent to scientific research if that research:

(a) is of a direct significance to the exploration and exploitation of natural resources, whether living or non-living; or
(b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment . . .

Id. art. 246, para. 5(a), (b), at 87.


103 See Continental Shelf Convention, supra note 18, art. 1, 15 U.S.T. at 473, T.I.A.S. No. 5578, at 3, 499 U.N.T.S. at 312. When a state has exceeded present technological limits, it may extend its jurisdiction beyond the 200-meter limit "to where the depth of the superjacent waters admits of the exploitation of the natural resources." Id.

104 Commentators have expressed concern that continued encroachment on the high
no state could be allowed to go that far, and that a coastal state's jurisdiction over the continental shelf had to be limited somehow to "adjacent" areas. The Conference had to resolve a battle over that issue between the states with a large continental shelf, such as Argentina and Australia, and those with a smaller shelf or with no shelf.105 Argentina and Australia were the leaders in this battle, though Canada, the United States, and the Soviet Union were not far behind; but some of the developing countries, especially Indonesia and India, also favored the approach that would extend their jurisdiction.106 Ultimately, a compromise was reached. It was agreed that, normally, every state would be entitled to continental shelf-type jurisdiction up to 200 miles from the baseline, whether it really possessed a shelf or not.107 Where there is a true continental "margin," however, reaching beyond 200 miles—and the Convention defines the margin as including not only the normal shelf that descends gently into the sea, but also the slope that goes down more steeply, and even the rise that often extends still another 100 miles, so that altogether some margins may extend 350 miles from shore108—the coastal states have limited jurisdiction over the living and nonliving economic resources of the "shelf."109 These include mainly oil and natural gas, as well as possibly some manganese nodules or other mineral resources, and in addition embrace some coastal species of marine life, such as oysters, clams, and certain types of lobsters.110 Some new mineral resources that have been

106 See generally id. at 68-72 (discussing debate concerning rights of disadvantaged states).
107 See LOS Convention, supra note 37, art. 76, para. 1, at 27. Chile actually has no shelf, P. Rao, supra note 100, at 51, but under article 76 it will have continental shelf jurisdiction for up to 200 miles from its baseline.
108 See LOS Convention, supra note 37, art. 76, paras. 3-6, at 27; see also Buzan & Middlemiss, Canadian Foreign Policy and the Exploitation of the Seabed, in CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 1, 2 (1977) (diagram illustrating configuration of continental margin).
109 See LOS Convention, supra note 37, art. 77, at 28. The waters over the continental shelf retain their status as high seas. See id. art. 78, at 28.
110 See id. art. 77, para. 4, at 1285. Since only "organisms which, at the harvestable
recently discovered within the 200-mile zone and on the continental shelf thus will be subject to coastal state jurisdiction.\textsuperscript{111} To make these extensions of coastal jurisdiction acceptable to landlocked countries, it was agreed that the international community would get a small share, a small percentage of revenue from any mineral resources found beyond the 200-mile limit, to be put into a common international fund.\textsuperscript{112} While the United States has been rather reluctant to accept this particular feature of the Convention, it is part of the compromise that was generally accepted.

This was the content of various packages as accepted by general consensus two years ago. When the Reagan Administration came into power in 1981, it discovered that it fundamentally disagreed with the Convention’s position concerning deep seabed mining beyond the limits of national jurisdiction. From the very beginning, the United Nations has said that the seabed has not been and cannot be regulated by any country, and that it therefore would be proper to regulate it through the special international authority on the subject—the United Nations Sea-Bed Mining Authority.\textsuperscript{113} That authority would ensure that the deep seabed would be accessible to all states on equitable terms. A large part of the negotiations over the last 15 years has been on that subject: how that authority should be established; what rules of decisionmaking should it use; what provisions should there be about the granting of applications for mining licenses presented by states; what rules would be applicable to mining activities; and to what extent the resources should be divided between the major powers, on the one

stage, either are immobile . . . or are unable to move except in constant physical contact with the sea-bed," are part of the seabed resources covered by the Convention, see id. art. 77, para. 4, at 28, there has been considerable debate as to whether lobsters are included, see, e.g., Note, The Dispute Between France and Brazil over Lobster Fishing in the Atlantic, 13 INT’L & COMP. L.Q. 1453, 1454-55 (1964).

\textsuperscript{111} See 1 Strategic Materials Management, No. 13, Nov. 1, 1981, at 3 (poly-metallic sulfides).

\textsuperscript{112} See LOS Convention, supra note 37, art. 82, at 29. The coastal state is permitted a 5-year grace period in order to recover its original investment. See id.

\textsuperscript{113} See Adede, The Group of 77 and the Establishment of the International Sea-Bed Authority, 7 OCEAN DEV. & INT’L L.J. 31, 37 (1979) (discussing development of concept of a Sea-Bed Authority). The Sea-Bed Authority will consist of five principal organs: the Assembly, the Council, the Enterprise, the Tribunal, and the Secretariat. See id. For a discussion of the powers and functions of these organs, see id. at 38-43. The Authority is considered by some commentators to be unique in that it will not be limited to drafting rules and regulations governing seabed exploitation, but actually will be involved in the business of seabed exploitation. See id. at 59; see also LOS Convention, supra note 37, arts. 157-70, at 52-64 (powers, functions, procedures and composition of Sea-Bed Authority).
hand, and the developing countries, on the other. In regard to this last matter, a half-and-half idea was once proposed by Henry Kissinger, the United States Secretary of State at that time, and was accepted reluctantly by the other nations. Under this plan, the major powers would get half of the prime seabed mining sites and the other countries would get half, each group exploiting its half pursuant to a different set of rules. But when the Reagan Administration came in, it decided that all these compromises on various subjects relating to deep seabed mining were not acceptable. Various ideological grounds were given for rejecting the compromise text. The new Administration did not like the idea of transfer of technology; it did not like the idea of limits on production; indeed, it did not like the idea of international regulation in the first place. One member of the Administration pointed out that since it was trying to abolish regulation of industry domestically, it could not be expected to accept international regulation of industry at the same time. After studying the question for more than a year, the Administration finally announced that it did not want this part of the treaty at all.

The Reagan Administration hoped that once the United States refused to accept the treaty, the whole enterprise would collapse. However, this is not what happened. Though the United States voted against the Convention, it was adopted by 130 votes, with only four votes against and a few abstentions, most of which were made by Soviet bloc countries, because their leaders felt that the United States got a better deal than they did under

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114 See Secretary of State Kissinger, Address Before the Foreign Policy Ass’n in New York City (Apr. 8, 1976), reprinted in 74 DEP’T ST. BULL. 533, 540 (1976). Secretary Kissinger advocated that when a contractor—who presumably would be from a developed country—wishes to mine the seabed, it should be required to propose two potential sites to the Sea-Bed Resource Authority, which would then select one site to be mined by the Enterprise, an arm of the Authority, or made available for present or future exploitation by a developing nation and would permit the contractor to mine the other. See id.


its provisions. Then, the Administration assumed that the treaty would not be signed. Unfortunately, it was wrong a second time. Most countries did sign the Convention; by now more than 130 states have actually signed it. Of course, now the Administration contends that the signatories will not ratify the Convention. For the moment, only 9 have ratified—mostly the small countries, such as the Bahamas, Belize, Fiji, Ghana, Jamaica, Zambia and Namibia, but also Mexico and Egypt, the first of the larger countries to do so. There is now a Preparatory Commission on the subject of seabed mining working in Jamaica, the headquarters of the seabed mining authority.

There is one more topic that needs to be mentioned—dispute settlement. In international law, all states are sovereign, all states are equal. These principles also apply to the interpretation of international agreements. For instance, interpretations of a treaty given by the United States, on the one hand, and Cuba, on the other hand, are of equal value. Neither country can impose its interpretation by force on the other one any longer—the Charter of the United Nations clearly prohibits it. Therefore, the only way to settle a dispute is by peaceful means, such as negotiation. If negotiation does not work, the parties often refer the matter to some third party for mediation or conciliation. If that does not result in a settlement, the parties may turn to arbitration or to the international court as a last resort.

When the United States delegation came to these negotiations, it was quite obvious that the treaty was going to be very long, very complicated, and also that many of the provisions would be the result of compromises—and it is the very nature of a compromise that problems are solved by drawing up an ambiguous text, so that everyone can have his own interpretation of what was agreed upon. It was generally accepted that the Law of the Sea Treaty would not work unless an effective system for settling disputes was included in it. But many thought that it was crazy to believe that

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121 U.N. Charter art. 2, para. 4. Although the Charter forbids the use of force, certain types of economic pressure are sometimes permitted.
122 See Adede, Law of the Sea—The Integration of the System of Settlement of Dis-
such a system could be devised. It was, after all, common knowledge that the Soviet Union had never accepted such a system, and that the new countries did not like the international court. How could anyone conceive of a system that would be accepted by everyone? As has often happened to me in the past, my colleagues observed that this was an impossible task, then threw it at me and asked me to negotiate it. To the surprise of most experts, we got a system after many years of hard work. It is not perfect and it is very complicated; but the miracle of it was that the Soviet Union was persuaded to participate in it. In fact by now, the Soviet Union likes it so much that it was the first nation to make a declaration officially accepting it at the final meeting in Jamaica. The African states, which also opposed the system very strongly at the beginning, became convinced it was a good idea once the type of forum they preferred was instituted, namely, a special international tribunal. It became clear during the negotiations that it would not be possible to have a system in which one forum would

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123 See Darwin, General Introduction to International Disputes: The Legal Aspects 57, 68-69 (1972). The Soviet Union places great emphasis on non-binding negotiation as a method for settling disputes, and argues that binding methods of dispute settlement should be accepted by states voluntarily. Id.

124 The developing states are wary of the International Court of Justice and of judicial settlement of international disputes in general. See id. at 66-67. Part of the reason for this is their belief that their interests would be prejudiced by the application of traditional principles of international law. See id. at 67. In particular, these states are unwilling to be held to standards of law developed prior to their involvement in the international community. Id.


127 A logical basis for the initial adverse reaction of the African States to the International Court can be found in the court's failure to hold that the African applicants had a legal interest in the matters at issue in the South West Africa cases. See South Africa, (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1962 I.C.J. 319, 328 (judgment of Dec. 21); Darwin, supra note 123, at 68. The African States consequently considered themselves to be inadequately represented in the court. Id. at 67.
handle all disputes. So the Conference members developed the idea that there should be a smorgasbord, a buffet table of forums at which the countries could choose from the International Court of Justice at the Hague, a special Law of the Sea Tribunal, ordinary arbitration, or what the Russians call technical arbitration (an arbitral tribunal composed of both lawyers and experts on the disputed subject). Each of the states, when joining the treaty, is free to declare which one of these four systems for settling disputes it prefers. If two states involved in a dispute have

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128 See generally Allott, The International Court of Justice, in INTERNATIONAL DISPUTES: THE LEGAL ASPECTS 128, 128-34 (1972) (discussing role of international adjudication). The International Court of Justice serves as the official judicial tribunal of the United Nations. See U.N. CHARTER art. 92; Statute of the International Court of Justice, 59 Stat. 1055 (1945). The court is composed of 15 judges, no two of whom may be from the same nation. Each judge must either qualify for appointment to the highest judicial position in his or her respective country, or must be a recognized expert on international law. Statute of the Court, annexed to U.N. CHARTER, arts. 2-3. The court was founded to resolve disputes between states, regardless of their membership in the United Nations. See S. ROSENNE, THE WORLD COURT, WHAT IT IS AND HOW IT WORKS 74-75 (1962).

129 See LOS Convention, supra note 37, annex 6, art. 1, at 140. The International Tribunal for the Law of the Sea is composed of 21 independent members and provides for representation according to equitable geographical distribution. Id. annex 6, art. 2, at 141. A Sea-Bed Dispute Chamber was established with broad jurisdiction over disputes not only between states, but also between the Sea-Bed Authority and a state, and between the Authority and a state enterprise or a natural or juridical person who is a contractor or a prospective contractor. Id. art. 187, at 68. The Chamber also has the authority to render advisory opinions at the request of the Assembly or the Council of the Authority. Id. art. 191, at 69.

130 See LOS Convention, supra note 37, annex 7, art. 1, at 149. Arbitration allows for dispute resolution by judges chosen by the states involved or, in cases of disagreement, by the President of the Law of the Sea Tribunal. Id. annex 7, art. 3, at 150; see Fox, Arbitration, in INTERNATIONAL DISPUTES: THE LEGAL ASPECTS 101, 101 (1972). In order to submit a dispute to an arbitral proceeding under the Convention, written notice containing a statement of the claim and the grounds on which it is based must be given to the opposing party. LOS Convention, supra note 37, annex 7, art. 1, at 149. Once the tribunal is convened, it determines its internal procedure, unless the parties to the dispute agree otherwise. Id. annex 7, art. 5, at 151.

131 Special arbitral tribunals are available to resolve disputes "concerning the interpretation or application of the articles of this Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation." LOS Convention, supra note 37, annex 8, art. 1, at 152. A list of experts in each field is to be maintained by the United Nations specialized agency in charge of matters relating to that field, and each state may select two experts in each field for inclusion on the list. Id. annex 8, art. 2, at 152-53. As a Soviet delegate observed, lawyers are not well informed concerning fish, except to eat it; similarly, lawyers know little about deep seabed mining or other relevant issues. Therefore, a tribunal that has both lawyers and technical experts is needed to resolve disputes in these areas.

132 Id. art. 287, para. 1, at 98.
accepted the same one, it applies. If they did not accept the same one, then it was generally agreed that the second choice would be ordinary arbitration, and that arbitration must be used if there is a disagreement or if a state has not made a choice. To ensure that a state will not be able to escape its obligation to arbitrate, a tight system of arbitration was provided for in an annex to the treaty.

There were many other problems. Most of the treaty, perhaps 90% of it, is subject to binding arbitration or another one of the binding decision systems. But conciliation had to be provided as an alternative to binding arbitration because of the unwillingness of the coastal states to accept another method of dispute settlement for certain conflicts. With respect to certain questions relating to the coastal states' jurisdiction in the new exclusive economic zone (for instance, some fishing issues), these states had reluctantly agreed to conciliation; but with respect to issues subject to their discretion, they had rejected international control completely. The same was true with respect to some issues concerning scientific research. The issue of boundaries in the sea between states also caused a big debate. It was agreed finally that

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133 Id. art. 287, para. 4, at 99.
134 Id. art. 287, paras. 3, 5, at 99.
135 See id. annex 7, art. 9, at 151; supra note 130.
136 See id. arts. 279, 285, 286, at 97-98 (disputes concerning application or interpretation of Convention should be settled peacefully either by negotiation, conciliation, or pursuant to part XI of the Convention). In the common instance where the parties to a dispute are unable to reconcile their differences by resort to negotiation or conciliation, the treaty provides that, at the request of any party, the dispute will be submitted to a compulsory and legally binding dispute resolution procedure. See id. arts. 286, 296, at 98, 101. Although the rule is subject to exceptions, see infra note 137, the majority of conflicts are resolved in this manner, Ball, Law of the Sea: Expression of Solidarity, 19 SAN DIEGO L. REV. 461, 471 (1982).
137 See, e.g., Highlights of the Treaty, supra note 71, at 32 (disputes involving scientific research); Ball, supra note 136, at 470-71 (disputes involving scientific research and fishing). Though conciliation invitations generally need not be accepted, the Convention provides for compulsory submission of certain enumerated controversies to conciliation procedures. LOS Convention, supra note 37, annex 5, art. 11, at 140; id. arts. 297-299, at 101-04. Any party to a dispute involving the exercise of a coastal state's sovereign rights or jurisdiction with respect to certain aspects of marine scientific research, fisheries management, or some categories of sea boundary delimitations shall, upon the written request of an opposing party, be obligated to submit to conciliation proceedings. Id. arts. 297, 298, at 101-04.
138 See id. art. 297, para. 3, at 102-03.
139 See id. art. 297, para. 2, at 102.
140 See Adele, The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention, 11 OCEAN DEV. & INT'L L.J. 125, 137-39 (1982). In order to satisfy both those who favored subjecting sea boundary disputes to compulsory, binding procedures and
all the sea boundary disputes that had arisen prior to the coming into force of the new treaty would not be subject to the new methods of settlement, but that all disputes arising subsequently would at least be subject to conciliation.¹⁴¹

Despite all these complications, most experts agree that one of the great achievements of the Law of the Sea Conference was that it established a very strict method of dispute settlement for most disputes that might arise as to the interpretation and application of the Convention.

CONCLUSION

By the time the Conference ended, the nations of the world had agreed on a treaty solving most of the problems of the law of the sea, both by a detailed text and by binding provisions for dispute settlement. The only problem still unresolved is the problem of deep seabed mining. The Reagan Administration has said that it is not going to ratify the treaty; it does not want to have any part of it, and it refuses to participate in the Preparatory Commission sitting in Jamaica.¹⁴² At the same time, in a recent proclamation on

¹⁴¹ See LOS Convention, supra note 37, art. 298, para. 1(a)(i), at 103. Section 1 of part 15 of the treaty, see id. arts. 279-285, at 1322, which outlines the dispute resolution procedures, emphasizes that the underlying principle of the treaty's dispute settlement provision is that disputes should be resolved by peaceful means chosen by the parties, see id. arts. 279, 280, 281 & 283, para. 1, at 97; Gaertner, The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea, 19 SAN DIEGO L. REV. 577, 580-81 (1982). Conciliation is recognized as one such method of peaceful settlement. See id. at 581-82.

¹⁴² See, e.g., OCEANS POLICY, supra note 116, at 1. According to President Reagan, the United States' decision not to sign the Convention is an expression of the country's refusal to support a deep seabed mining regime that frustrates the free enterprise system, deters future development of deep seabed mineral resources, fails adequately to reflect the respective interests of states, and permits amendments to bind the United States without its approval. OCEANS POLICY, supra note 116, at 1-2. The source of these shortcomings is the lan-
the exclusive economic zone, it said that the United States accepts the concept of such a zone as customary international law, even though it does not accept the Convention. In fact, the United States is willing to accept practically all non-seabed mining provisions of the treaty as customary international law. The Reagan Administration has also said that the United States might wish to adopt some slightly different rules in regard to some of the provisions that, in principle, it is willing to accept. By taking this stand, the United States might have opened a little loophole, which is rather dangerous to the consensus established by the treaty, because if the United States is allowed to make its own rules, other nations must be too. It would be safer for the United States to stick to the position announced in connection with the proclamation on the exclusive economic zone that it is willing to consider the rules of the Convention other than those relating to deep seabed mining to be customary international law binding on all states, and that it accepts the obligations that follow from these rules, such as those relating to exclusive economic zones of other states. At the same time, however, the United States would expect others to give it the treaty rights that parallel those obligations under customary international law.

The United States has also said that it believes that the provisions of the treaty reflect the customary law on non-seabed subjects quite well. This is something of an overstatement, of course, because some of those rules are clearly new law invented by this Conference, such as the transit rights through straits and archipelagoes and the complicated provisions on the continental shelf and the exclusive economic zone. Nevertheless, the United States seems to be saying that a kind of instant international law was created by the fact that all the nations reached consensus on the subject at the Law of the Sea Conference—a position that has general validity and important implications in other areas of international law.

How the treaty will work in practice remains to be seen, but at

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145 See MacRae, supra note 143, at 182; supra note 143 and accompanying text.
this point, one thing is clear—the treaty is going to be binding law, without any doubt, in regard to 90% of its provisions. The only strong shadow of doubt that remains is over the deep seabed mining issue. Here, the United States now is proceeding on a course parallel to the Convention, trying to persuade other industrial countries to agree on a system outside the treaty that would protect American investors. But whether it will succeed in this endeavor is difficult to predict. Some of America's friends, such as Australia, Canada, France, and Japan, have already deserted it. Now, the big issue is on which side Germany and Great Britain will finally land.

Those of us who have had the privilege to participate in the Law of the Sea Conference are proud of its many accomplishments and sad that no attempt is being made to enable the United States to take part in this great venture. I hope that a day will come when the United States again will become a leader in creating effective international legal institutions.

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146 See N.Y. Times, May 1, 1982, at 9, col. 2. Canada, France, and Japan are signatories to the Convention. Law of the Sea Bull., Sept. 1, 1983, at 6-7 (table). Canada, possibly because its geographical attributes create in it a far-reaching interest in the law of the sea, has been one of the leaders in supporting, as well as shaping, the new ocean regime pursuant to UNCLOS. See Buzan, Canada and the Law of the Sea, 11 Ocean Dev. & Int’l L.J. 149, 149-50 (1982). France and Japan, both major industrial nations engaged in seabed mining, were among the 130 nations that originally voted in favor of adopting the Convention, see N.Y. Times, May 1, 1982, at 9, col. 2, though Japan did not sign the treaty until Feb. 7, 1983, see Law of the Sea Bull., Sept. 1, 1983, at 7, 9 (table). The Soviet Union subsequently became one of the original signatories, having relinquished its opposition to some provisions of the Convention. See supra text accompanying note 117.