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## Impact of the Reagan Administration on the Law of the Sea

George D. Haimbaugh, Jr.

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# IMPACT OF THE REAGAN ADMINISTRATION ON THE LAW OF THE SEA

GEORGE D. HAIMBAUGH, JR.\*

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## I. INTRODUCTION

A few weeks after he entered the White House, President Reagan ordered a review of the negotiating text of the draft treaty then before the Third United Nations Conference on Law of the Sea, as President Carter had done at the outset of his administration. On January 29, 1982, the President announced that the United States would "return to those negotiations and work with other countries to achieve an acceptable treaty." President Reagan added that, in the deep seabed mining area, the United States would seek changes necessary to correct unacceptable elements of the draft treaty and to achieve a treaty that

[w]ill not deter development of any deep seabed mineral resources to meet national and world demand;  
 will assure a national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the International Authority, and to promote the economic development of the resources;  
 will provide a decisionmaking role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;  
 will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;  
 will not set other undesirable precedents for international organizations; and  
 will be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.<sup>1</sup>

On July 9, 1982, President Reagan issued the following statement concerning the Third United Nations Law of the Sea Conference's April 30 adoption of its draft of a Convention on the Law of the Sea:

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1. Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, 1 PUBLIC PAPERS OF THE PRESIDENT 92 (Jan. 29, 1982) [hereinafter Statement on U.S. Participation].

We have now completed a review of that convention and recognize that it contains many positive and very significant accomplishments. Those extensive parts dealing with navigation and overflight and most other provisions of the convention are consistent with United States interests and, in our view, serve well the interests of all nations. That is an important achievement and signifies the benefits of working together and effectively balancing numerous interests. . . . Our review recognizes, however, that the deep seabed mining part of the convention does not meet United States objectives. For this reason, I am announcing today the United States will not sign the convention as adopted.<sup>2</sup>

In a statement that accompanied the Proclamation of an Exclusive Economic Zone (EEZ) on March 10, 1983, President Reagan set a goal of continued United States leadership in the development of customary and conventional sea law within "a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources." Reagan added that the Convention "contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states."<sup>3</sup>

This statement of the United States' goal of balancing interests conforms to statements made in a 1972 address by John R. Stevenson, the legal adviser of the Department of State and United States Representative at the United Nations Seabed Committee. The United Nations Seabed Committee acted as the preparatory committee for the plenipotentiary United Nations Law of the Sea Conference that began its work the following year. Ambassador Stevenson described the balance being sought as acceptance by maritime powers of a territorial sea as wide as twelve miles, conditioned on the recognition of free transit through and over straits, and acceptance by developing nations of a territorial sea as narrow as twelve miles, conditioned on the developing nations' receiving greater control of resources off their coasts beyond twelve miles than the 1958 Geneva Conventions on the Law of the Sea provided.<sup>4</sup> In that 1972 address Stevenson said that the "present crises and U.S. policy are best understood in a global and historic context." Ambassador Stevenson described this context as follows:

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2. Statement of the United States' Actions Concerning the Conference on the Laws of the Sea, 2 PUBLIC PAPERS OF THE PRESIDENTS 911 (July 9, 1982).

3. Statement on United States Ocean Policy, 1 PUBLIC PAPERS OF THE PRESIDENTS 378 (March 10, 1983); Proclamation No. 5030, 48 Fed. Reg. 10,601 (1983), reprinted in 16 U.S.C.A. 1453, at 226 (West Supp. I 1983) [hereinafter EEZ Proclamation].

4. Stevenson, *Who Is to Control the Oceans: U.S. Policy and the 1973 Law of the Sea Conference*, 6 INT'L LAW. 465, 472 (1972). For a description of the general status of negotiations during the 1972 Geneva meeting of the U.N. Seabed Committee, at which Ambassador Stevenson led the U.S. delegation, see Haimbaugh, *Technological Disparity and the United Nations Seabed Debates*, 6 IND. L. REV. 690-98 (1973).

The law of the sea in essence comprises the rules governing the activities of man and nations on the 70% of this planet occupied by its oceans. Its fundamental premise, the freedom of the seas, goes back to the 17th Century (1609) when the dutch scholar Hugo Grotius' concept of the *Mare Liberum* (free sea) prevailed over the English scholar John Selden's *Mare Clausum* (closed sea). It has been the cornerstone of the law of the sea for the last three and a half centuries. Today this doctrine is under serious attack.<sup>5</sup>

This Article is devoted primarily to the Reagan Administration's response to challenges stemming from conflicting claims for differing uses of the oceans. These responses include the negotiation and implementation of international agreements and relevant domestic legislation and actions taken to safeguard traditional elements of customary international law and to participate in their progressive development.

## II. USES OF THE OCEANS

Among the many uses of the oceans—for transportation, communication, as a source of food and of hard and soft minerals, and for scientific research—navigation and overflight have received the greatest emphasis in President Reagan's Law of the Sea statements and proclamations. This importance is explained by John Norton Moore, successor to John Stevenson at the Law of the Sea Conference:

Despite the contemporary development of new uses of the oceans, their use as a global highway for trade and commerce remains economically the most important. Oceans commerce is an indispensable part of the highly interdependent global economy. If to this economic dependency is added the vital, and often interdependent, interests of many nations in the use of ocean space for strategic deterrence and defense, the protection of the community interest in navigational freedom throughout the world's oceans becomes of first-rank importance.<sup>6</sup>

### A. *Navigation and Overflight*

#### 1. Zonal Divisions

Navigational and overflight rights are greater in territorial waters than on the seas beyond. Territorial waters include the territorial sea, straits not broader than twenty-four miles, and certain archipelagic waters. The waters beyond the territorial sea are divided by the LOS Convention into the

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5. Stevenson, *supra* note 4, at 465.

6. Moore, *The Regime of the Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 119 (1980).

contiguous zone, the exclusive economic zone, the continental shelf, and the high seas.

*a. Territorial and Archipelagic Waters*

The Reagan statement accompanying the March 10, 1983 Proclamation of an Exclusive Economic Zone announced that

[f]irst, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.<sup>7</sup>

(1) Territorial Sea

The First United Nations Law of the Sea Conference of 1958, which produced four Law of the Sea Conventions,<sup>8</sup> and the Second United Nations Law of the Sea Conference of 1958, which produced none,<sup>9</sup> were unable to resolve the question of the breadth of the Territorial Sea. The 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>10</sup> answered that question in Article 3. "Every State has the right to establish the breadth

7. Statement on United States Ocean Policy, *supra* note 3, at 379. The President's statement of March 10, 1983 is published together with his EEZ Proclamation of the same date. The President's affirmations regarding high seas rights and freedoms find support, for example, in the writings of publicists. Alfred von Verdross stated that "[g]eneral international law requires states, for instance, not to disturb each other in the use of the high seas." von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 572 (1937). Georg Schwarzenberger has written that "the rules governing the principle of the freedom of the seas are . . . as much *jus dispositivum* as any of the other rules of international law." G. SCHWARZENBERGER, *INTERNATIONAL LAW* 352 (1957). Freedom of the open seas in general and from piracy in particular are listed as being included within the concept of *jus cogens* in Haimbaugh, *Jus Cogens: Root & Branch (an Inventory)*, 3 *TOURO L. REV.* 203, 209, 216 (1987).

8. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter *Territorial Sea Convention*]; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T., T.I.A.S. No. 5960, 559 U.N.T.S. 285. The four Conventions on the Law of the Sea passed the United States Senate together on May 26, 1960 by a margin of 79 to 4. 106 CONG. REC. 11,192 (1960). The conventions came into force for the United States on September 10, 1964. Complete texts of the Conventions also were published in 52 AM. J. INT'L L. 830-862 (1958).

9. A joint United States-Canadian proposal of a six mile territorial sea and six mile contiguous zone lost by one vote.

10. United Nations Convention on the Law of the Sea, 21 INT'L LEGAL MATERIALS 1261, reprinting U.N. Docs. A/CONF. 62/122, A/CONF. 62/122/Corr. 3, A/CONF. 62/122/Corr. 8 (1982) [hereinafter 1982 Convention on Law of the Sea].

of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."<sup>11</sup>

On December 27, 1988, President Reagan issued a proclamation extending the territorial waters of the United States from its traditional three mile limit to twelve miles thus claiming, for an additional nine miles, "sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as to its bed and subsoil." The President added,

In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits.<sup>12</sup>

Articles 17 and 18 of UNCLOS provide that "ships of all States . . . enjoy the right of innocent passage through the territorial sea." Passage means "navigation through the territorial sea for the purpose of" traversing that sea with or without calling at internal waters, port facilities or roadsteads. Passage must be "continuous and expeditious" and "includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation" or necessity.<sup>13</sup> Article 19 provides that to be "innocent," a passage must not be "prejudicial to peace, good order or security of the coastal State." Articles 17 and 18 substantially recodify Article 14 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone,<sup>14</sup> but the 1982 Convention also sought in Article 19 to reduce the discretion of the coastal state by specifying the grounds for determining when a vessel is not in innocent passage.<sup>15</sup> William T. Burke points out that Article 19

11. *Id.* at 1272. Convention Article 5 provides that the normal baseline is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state. *Id.*

12. Presidential Proclamation of December 27, 1988 on the Territorial Sea of the United States, 24 WEEKLY COMP. PRES. DOC. 1661 (Jan. 2, 1989).

13. 1982 Convention on the Law of the Sea, *supra* note 10, at 1273.

14. Territorial Sea Convention, *supra* note 8, Article 14, at \_\_\_\_.

15. 1982 Convention on the Law of the Sea, *supra* note 10, at 1274. Article 19 reads as follows:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
  - (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner violation of the principles of international law embodied in the Charter of the United Nations;
  - (b) any exercise or practice with weapons of any kind;
  - (c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State;

does leave a small loophole for creative coastal state officials because Article 19 includes a catch-all category of events in the clause "any other activity not having a direct bearing on passage." Burke adds, "Whatever this might be interpreted to include, it needs emphasis that the coastal state's characterization under this category must still be tied to an activity during passage."<sup>16</sup>

(2) Straits: Tiran & Hormuz, Gibraltar

Rear Admiral Harlow estimates that the exercise by all coastal states of a right to claim a 12 mile territorial sea would close off the high seas channels in "roughly 100 international straits that dominate the major ocean avenues of world trade [and an] additional 161 straits that are similarly susceptible of use and may become important to maritime communication in the future."<sup>17</sup> The question of which navigational and overflight rights are granted to compensate for the loss of high seas rights is addressed in UNCLOS Articles 37 through 45.<sup>18</sup> Convention Articles 37 through 44 provide that in "straits which are used for international navigation between one part of the high seas or an exclusive economic zone, . . . all ships and aircraft enjoy the right of [nonsuspendable] transit passage. . . ." "Transit Passage" is defined as meaning the exercise within such straits of the freedom of navigation and overflight solely for the purposes of continuous and expeditious transit of the strait with or without entering the internal waters of states bordering the strait. Ships and aircraft exercising the right of transit passage must proceed without unnecessary delay and in compliance with nondiscriminatory security, safety, antipollution, fishing, customs,

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- (d) any act of propaganda aimed at affecting the defense 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 loading or unloading 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.

16. W. Burke, *Changes Made in the Rules of Navigation and Maritime Trade by the 1982 Convention on the Law of the Sea* 4-5, Paper delivered at the Eighteenth Annual Law of the Sea Conference sponsored by the University of Hawaii School of Law in San Francisco (Sept. 19, 1984); see also W. BURKE & M. McDUGAL, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962).

17. Harlow, *UNCLOS III and Conflict Management in Straits* 3-4, Address prepared for the Eighteenth Annual Conference on the Law of the Sea sponsored by the Law of the Sea Institute and the University of San Francisco (Sept. 24-27, 1984). Admiral Harlow is a former Vice Chairman of the U.S. Delegation to the Third United Nations Conference on the Law of the Sea.

18. 1982 Convention on the Law of the Sea, *supra* note 10, at 1276-78.



fiscal, immigration, or sanitary laws and regulations established by coastal states or by applicable international agreements. Convention Article 45 provides that the regime of innocent passage, as described above and in UNCLOS Articles 18 and 19 in connection with navigation in the territorial sea, "shall apply in straits used for international navigation . . . between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State."<sup>19</sup>

To those who argue that the absence of specific reference to the right of *submerged* transit to the straits articles means that there is no such right,<sup>20</sup> Rear Admiral Bruce A. Harlow, who served as a Vice Chairman of the U.S. delegation to the Third U.N. Conference on the Law of the Sea, answers that those articles do contain specific provision for "freedom of navigation"<sup>21</sup> and for the use of "normal modes of continuous and expeditious transit."<sup>22</sup> He adds, "There is no evidence in the negotiating history that the word 'normal' was somehow intended as a restrictive term of art, and common sense is otherwise sufficient to discern what mode of navigation would be 'normal' for a ship called a submarine."<sup>23</sup> Harlow's position is supported by Thomas Clingen<sup>24</sup> and, in a highly detailed analysis, by John Norton Moore.<sup>25</sup>

*Tiran and Hormuz.*<sup>26</sup> In the face of the impossibility of securing U.N. action, President Reagan, on December 29, 1981, signed into law a joint resolution authorizing the participation of approximately 1,250 Americans in the Multinational Force and Observers (MFO) to assist in the implementation of the 1979 Treaty of Peace between Egypt and Israel.<sup>27</sup> The President explained that the functions and responsibilities of the MFO included "the operation of checkpoints, reconnaissance patrols, and observation posts; verification of the implementation of Annex I of the Peace Treaty; and

19. UNCLOS Article 18 provides that ships and aircraft, while exercising the right of transit passage shall "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distresses. See also *Kate A. Hoff*, 4 R. INT'L ARB. AWARDS 444 (1929). Commissioner Nielsen stated that recognition has been given to "the immunity of a ship whose presence in territorial waters is due to a superior force."

20. See, e.g., Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48, 62 (1980).

21. 1982 Convention on the Law of the Sea, *supra* note 10, at \_\_\_\_ (reprinting UNCLOS Article 38(2)).

22. *Id.* at \_\_\_\_ (reprinting UNCLOS Article 39(1)(c)).

23. Harlow, *Comment*, 46 LAW & CONTEMP. PROBS. 125, 130, 131 (Spring 1983).

24. Clingen, *Freedom of Navigation in a Post-UNCLOS IV Environment*, 46 LAW & CONTEMP. PROBS. 107, 120 (Spring 1983).

25. Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. (1980). For UNCLOS's impact on naval operations generally, see *The U.N. Convention on the Law of the Sea: Impact & Implementation* (1987), a publication of the University of Hawaii's Law of the Sea Institute.

26. See generally R. RAMAZANI, *THE PERSIAN GULF & THE STRAIT OF HORMUZ* (1979).

27. Multinational Force and Observers Participation Resolution, Publ. L. No. 97-132, §§ 3(a)(1), 3(a)(4), 95 Stat. 1693, 1694 (1981).

ensuring freedom of navigation through the Strait of Tiran in accordance with Article V of the Peace Treaty."<sup>28</sup>

During the Iraqi-Irani Persian Gulf Tanker War, American, British, French, Italian, Dutch, and Belgian warships and military aircraft cooperated to protect innocent neutral shipping engaged in transit passage through the Straits of Hormuz and the sea lanes of the Persian Gulf. These countries acted pursuant to the inherent individual and collective right of self-defense as reflected in Article 51 of the U.N. Charter, the right of transit passage through international straits described in UNCLOS Part III, and an obligation to notify the international community of loose mines provided for by the Hague Convention VIII of 1907.<sup>29</sup>

President Reagan's decision to reregister and reflag a number of Kuwaiti oil tankers reflected a policy that, although it drew scattered criticism from members of Congress,<sup>30</sup> was in line with decisions of both the International Court of Justice and the United States Supreme Court. The International Court of Justice upheld the validity of "flags of necessity" when the Court decided that the International Maritime Consultative Organization Assembly did not hold its election properly when it excluded Liberia and Panama from its fourteen member Maritime Safety Committee. The membership of the committee is to be made up of not fewer than eight of the largest shipowning nations. The International Court of Justice decided that the proper test to determine the identity of the largest shipowning nations is not that of the nationality of the stockholders, but that of "registered tonnage."<sup>31</sup> In the *Inces-Hondurena* Cases, the United States Supreme Court held that, in the absence of congressional prescription to the contrary, "jurisdictional provisions of the [National Labor Relations] Act do not extend in the maritime operations of foreign-flag ships employing alien seamen."<sup>32</sup>

*Gibraltar.* These and numerous other examples have been cited by Rear Admiral William L. Schachte, Jr. in support of the rule that transit passage

28. President's Letter to Congress, 18 WEEKLY COMP. PRES. DOC. 349 (Mar. 29, 1982), reprinted in Leigh, *Contemporary Practice of the United States Relating to International Law*, 73 AM. J. INT'L L. 611, 613-15 (1982).

29. R.J. Grunawalt, 9 Naval War Publications (NWP) 3-9 (1988) (citing April 29, 1988 policy statement of Secretary of Defense Frank C. Carlucci).

30. Rasky, *Legislators Are Uneasy Over U.S. Policy in Gulf*, New York Times, April 21, 1988, at A8, col. 5.

31. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150, 167-70 (Advisory Opinion of June 8, 1960); see also 1982 Convention on the Law of the Sea, *supra* note 10, at 1287 (reprinting UNCLOS Articles 90-94).

32. *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 13 (1963); see also Goldie, *Recognition & Dual Nationality—A Problem of Flags of Convenience*, 39 BRIT. Y.B. INT'L L. 220, 262-76 (1963); *Persian Gulf: History of the U.S. Combat Role*, New York Times, April 19, 1988, at A10, col. 5 (presenting chronology of Persian Gulf beginning in March 1987). For discussion of the downing of an Iranian passenger plane in the Persian Gulf by planes of the U.S. cruiser *Vincennes*, see *infra* note 72.

is a regime of customary international law. Another illustration he describes is

the defensive [1987] raid on Libya [in which] U.S. aircraft stationed in the UK transited the Strait of Gibraltar when routes over continental Europe were denied. This overflight of the strait, which is approximately 8 miles wide, took place notwithstanding the overlapping 12 mile territorial sea claims of the bordering states of Spain and Morocco.<sup>33</sup>

### (3) Archipelagic Waters: Canadian Arctic Archipelago

The 1982 Convention on the Law of the Sea allows the archipelagic states to seek to integrate themselves politically and economically by encompassing themselves within an envelope of sovereignty. Articles 46 through 54 of the Convention<sup>34</sup> initiate a regime of archipelagic sea lane passage and provide in Article 47 that an archipelagic state may join "the outermost points of the outermost islands and drying reefs" with straight archipelagic baselines limited in length and not departing "to any appreciable extent from the general configuration of the archipelago."<sup>35</sup> In return, UNCLOS Article 52 provide that "all States enjoy the right of innocent passage through archipelagic waters"<sup>36</sup> except where an archipelagic state has exercised the option provided under Article 53 to "designate sea lanes and air routes thereabove," in which case "[a]ll ships and aircraft enjoy the right of archipelagic sea lanes passage" therein.<sup>37</sup> This right is described as "the exercise of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious, and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."<sup>38</sup> The right is to be exercised in accordance with substantially the same coastal state and international laws and regulations to which the Convention subjects the exercise of the right of transit passage in straits.<sup>39</sup>

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33. W.L. Schachte, Jr., *Transit Passage Is a Regime of Customary International Law*, Address to American Bar Association Subcommittee on Law of the Sea, Washington, D.C. (April 23, 1987). See generally S. TRUVER, *THE STRAIT OF GIBRALTAR & THE MEDITERRANEAN* (1980).

34. See 1982 Convention on the Law of the Sea, *supra* note 10, at 1278-79 (reprinting UNCLOS Articles 46-54).

35. See *id.* (reprinting UNCLOS Article 47(1)) see also *Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. 116 (approving limited use by Norway of strait baselines drawn by Norway along most seaward points on islands that line Norwegian coast).

36. See 1982 Convention on the Law of the Sea, *supra* note 10, at 1279 (reprinting UNCLOS Article 52(1)).

37. See *id.* (reprinting UNCLOS Article 53(1)).

38. See *id.* (reprinting UNCLOS Article 53(3)).

39. See *id.* at 1276-78 (reprinting UNCLOS Articles 37-44).

*Canadian Arctic Archipelago.*<sup>40</sup> The archipelago nearest the U.S. is the Canadian Arctic Archipelago, an area seen by Canada as internal waters over which it has sovereignty and by the United States as containing international straits and passages open to archipelagic sea lane passage. This dispute became more than theoretical in 1969 when the American oil tanker, *Manhattan*, traversed the Northwest Passage in a voyage that led directly to the adoption by Canada of the Arctic Waters Pollution Prevention Act.<sup>41</sup> The Arctic Waters Pollution Prevention Act claimed the right to regulate shipping in zones as far as 100 miles north of Canadian Arctic coasts. At the same time Canada adopted an act extending Canada's territorial sea from three to twelve miles.<sup>42</sup> In 1985, without consulting Canada, the U.S. sent the *Polar Sea*, an icebreaker lacking the polluting potentiality of the oil tanker, *Manhattan*, from Thule, Greenland through Canadian waters to Pt. Barrow, Alaska. Although Canada gave unsolicited authorization for the *Polar Sea's* voyage, at the same time it reasserted its sovereignty over the waters of its Arctic Archipelago by announcing the enclosure of the Arctic archipelago with straight baselines effective January 1, 1986.<sup>43</sup> In Ottawa, on January 11, 1988, the two countries adopted an Agreement on Arctic Cooperation in which the United States pledged "that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada."<sup>44</sup> The United States and Canada continue to disagree as to whether the Archipelago's straits and passages are "internal" or "international."<sup>45</sup>

40. See generally WILLIAM E. BUTLER, *NORTHWEST ARCTIC PASSAGE* (1978).

41. CAN. REV. STAT. ch. 2 (1st Supp. 1970).

42. Act to Amend the Territorial Sea & Fishing Zones Act, CAN. REV. STAT. ch. 45, § 1 (1st Supp. 1970) (amending Territorial Sea & Fishing Zones Act, CAN. REV. STAT. ch. T-7 § 3(1) (1970)).

43. FRANKLYN GRIFFITHS, *POLITICS OF THE NORTHWESTERN PASSAGE 269-273* (1987) (reprinting September 10, 1985 statement of Canadian Secretary For External Affairs Joe Clark).

44. *Current Actions: Bilateral*, 88 DEP'T ST. BULL. 83, 84 (1988); see also *Recent Actions Regarding Treaties to Which the United States is a Party*, 27 INT'L LEGAL MATERIALS 849, 850 (1988) (reproducing DEP'T ST. BULL. information). In response to such a request for consent, the Canadian cutter *John A. MacDonald* escorted the *Polar Star* in its passage from Prudhoe Bay, Alaska, through the Canadian Arctic archipelago to Baffin Bay, Newfoundland. The request of October 10, 1988, from the American Embassy in Ottawa, read in part:

The Government of the United States would welcome the presence of a Canadian scientist and an officer of the Canadian Coast Guard on board the *Polar Star* and would also be pleased if a Canadian Coast Guard vessel were to choose to accompany the *Polar Star* during its navigation and conduct of marine scientific research in the Northwest Passage.

*Polar Star* will operate in a manner consistent with the pollution control standards and other standards of the Arctic Waters Pollution Prevention Act and other relevant Canadian laws and regulations. Costs incurred as a result of a discharge from the vessel, including containment, cleanup and disposal costs incurred by the United States or Canada and any damage that is an actual result, will be the responsibility of the United States Government, in accordance with international law.

U.S. Digest, Ch. 7, § 12; 83 AM. J. INT'L L. 63-64 (1989).

45. See generally Note, *Breaking the Ice: The Canadian-American Dispute Over the*

*b. Beyond the Territorial Sea*

In his March 10, 1983 statement, President Reagan also stated:

Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.<sup>46</sup>

(1) High Seas

The "rights and freedoms of the international community in navigation and overflight and other related high seas uses" open to all states are listed in UNCLOS Article 87:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.<sup>47</sup>

These freedoms of the high seas are to be "exercised under the conditions laid down by this Convention and by other rules of international law . . . with due regard for the interests of other States in their exercise of the freedom of the high seas."<sup>48</sup> Examples of these conditions are listed in UNCLOS Article 110, which provides that those manning "duly authorized ships or aircraft clearly marked and identifiable as being on government service" are justified in boarding ships when there is reasonable ground for suspecting that the ship is engaged in piracy, the slave trade, or unauthorized broadcasting, or when the ship is "without nationality."<sup>49</sup>

*Navigation: Achille Lauro.* A prime example of President Reagan's resolve to protect navigation from violence on the high seas was his response to the murder of an American citizen, hostage Leon Klinghoffer, by

*Artic's Northwest Passage*, 26 COLUM. J. TRANSNAT'L L. 337 (1988) (tracing arguments of Canada and United States on whether archipelago's straits and passages are internal or international).

46. Statement on United States Ocean Policy, *supra* note 3, at 379.

47. See 1982 Convention on the Law of the Sea, *supra* note 10, at 1286-87 (reprinting UNCLOS Article 87).

48. See *id.* (reprinting UNCLOS Article 87, § 1).

49. See *id.* at 1289 (reprinting UNCLOS Article 110, §§ 5, 1)

members of a Palestinian group who hijacked the Italian cruise ship *Achille Lauro* on October 7, 1985.<sup>50</sup> Upon learning that Egypt's President Mubarak had decided to free the hijackers and provide them with an Egypt Air 737 to take them out of the country to safety, President Reagan ordered F-14 fighter jets of the Aircraft Carrier *Saratoga* to intercept the 737 and order it to land at a U.S. airbase in Sicily.<sup>51</sup> Because both Egypt and the United States are parties to the International Convention Against the Taking of Hostages,<sup>52</sup> Egypt's action was a violation of its obligation, as a party to that Convention, to take into custody and to either prosecute or extradite the *Achille Lauro* hostagetakers who had disembarked in Egypt.

Discussions of these events reflect the tension between U.N. Charter Article 2(4) and Article 51 that, respectively, forbid the use of force between countries and authorize self-defense, at least until the U.N. can intervene effectively. Critics of the United States action cite the case of the *Caroline*, which limited the right of self-defense to cases in which the "necessity of that self-defense is instant, overwhelming and [leaves] no choice of means, and no moment for deliberation."<sup>53</sup> The U.S. cited the immediate danger that would result from the release of the anti-American terrorists, one of whom was Abu Nidal, a leader of the Palestine Liberation Front. Some described the conflict as a double hijacking and President Mubarak accused the United States of "piracy."<sup>54</sup> Neither the seizure of the *Achille Lauro* nor the interception of the 737 was piracy as defined in UNCLOS Article 101, a recodification of Article 15 of the 1958 Convention on the high Seas, because the terrorists' illegal acts were not "committed for private ends," and the interception by the F-14s was not "committed . . . by the crew or passengers of a private ship or a private aircraft."

President Reagan's action reflected a broadening view of varieties of violence at sea subject to states' universal jurisdiction.<sup>55</sup> The broadening view has been exemplified by antiterrorist stands taken by the U.N. Security Council,<sup>56</sup> the U.N. General Assembly,<sup>57</sup> the International Maritime Organization, the International Civil Aviation Organization,<sup>58</sup> every Summit of

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50. See *Cruising On a Murderous Course*, NEWSWEEK, Oct. 21, 1985, at 34 (reporting details of *Achille Lauro* hijacking and Leon Klinghoffer murder).

51. *You Can Run But You Can't Hide*, NEWSWEEK, Oct. 21, 1985, at 22, 22-24.

52. U.N. OFFICE OF LEGAL AFFAIRS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL at 610, U.N. Doc. ST/LEG/SER. E/6, U.N. Sales No. E.88.V.3 (1987).

53. 2 MOORE, DIGEST OF INT'L LAW § 217, at 412 (1906).

54. *Getting Even*, NEWSWEEK, Oct. 21, 1985, at 20.

55. W.L. Schachte, Jr., Violence at Sea, Commentary prepared for the 20th Annual Conference on the Law of the Sea sponsored by the Law of the Sea Institute and the University of Miami (July 21-24, 1986).

56. 579, U.N. Doc.S/RES/579 (1985).

57. U.N. General Assembly Resolution on Measures to Prevent International Terrorism, G.A. Res. 40161, 40 GA/7272 at 607 (Jan. 13, 1986).

58. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

the Seven Industrial Nations since 1978,<sup>59</sup> the U.S. Congress,<sup>60</sup> and President Reagan's efforts to further implement his "you can run but you can't hide" warning by renegotiating extradition treaties for the purpose of removing the "political offenses" exception in many of these agreements.<sup>61</sup>

## (2) Overflight: KAL Flight 007

In the early morning of September 1, 1983, a Soviet fighter pilot shot down an unarmed, Korean civilian plane over the Sea of Japan, killing all 269 passengers aboard including many Americans. Korean Airlines Flight 007 (KAL 007) had strayed off course and had crossed over Kamchatka Peninsula and Sakhalin Island in the Soviet Union.<sup>62</sup> At the behest of representatives of the United States, Korea, Canada, Japan, and Australia, the United Nations Security Council met on September 6 and drafted a resolution that recognized the importance of territorial integrity as well as the necessity that only internationally agreed procedures should be used in response to intrusion into the airspace of a state. The draft resolution declared "that such use of armed force against international civil aviation is incompatible with the rules governing international behavior and elementary considerations of humanity" and urged "all States to comply with the aims and objectives of the Chicago Convention on International Civil Aviation."<sup>63</sup> The draft resolution also welcomed the decision of the International Civil Aviation Organization (ICAO) to convene an urgent meeting of its Council to consider the Korean airlines incident.<sup>64</sup> The Soviet Union vetoed the draft resolution.<sup>65</sup>

59. Levitt, *International Counterterrorism Cooperation: The Summit Seven and Air Terrorism*, 20 VAND. J. TRANSNAT'L L. 259, 261-65 (1987).

60. U.S. Legislation for the prosecution of certain acts of terrorism includes the International Security & Development Corporation Act, §§ 503, 505, 507-08, 554(a), Pub. L. No. 99-83 (Aug. 8, 1985), reprinted in INT'L LEGAL MATERIALS 1558-59, 1562 (1985); and H.R. Res. 228, 99th Cong., 1st Sess. (1985).

61. See Paust, *Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT'L L. 235-57 (1987); see also Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, 1982 U.S. NAVAL INSTITUTE PROCEEDINGS 28 (reprinting October 11, 1973 declaration of Libyan Arab Jamahiriya regarding jurisdiction of Gulf of Sidra). For a description of Assistant Attorney General Victoria Toensig's efforts to persuade Congress to pass a law making the seizure of international aircraft with American citizens on board a violation of U.S. law (18 U.S. Code, section 1203), see ABA Standing Committee on Law & National Security, INTELLIGENCE REPORT, No. 3, Mar. 1988, at 3-4.

62. See Leich, *Destruction of Korean Airliner: Action by International Organizations*, AM. J. INT'L L. 244-45 (1984) (reporting facts of KAL incident).

63. The Chicago Convention on International Civil Aviation was agreed to on December 7, 1944. 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

64. S/15966/Rev. 1, September 12, 1983; 22 INT'L LEGAL MATERIALS 1148 (1983). S/PV.2476 of September 12, 1983; INT'L LEGAL MATERIALS 1138, 1144 (1983).

65. 22 INT'L LEGAL MATERIALS 1138, 1144 (1983). The vote was as follows: France, Jordan, Malta, the Netherlands, Pakistan, Togo, Great Britain, Northern Ireland, the United States, and Zaire voted in favor of the resolution; Poland and the Soviet Union voted against the resolution. China, Guyana, Nicaragua, and Zimbabwe abstained. *Id.*

On September 8, 1983, acting "to ensure appropriate redress for this tragic loss of life and property," President Reagan requested Civil Aeronautics Board chairman Daniel McKinnon to reaffirm the suspension of Aeroflot flights to and from the United States, to suspend Aeroflot's right to sell any air transportation in the United States, and to direct U.S. air carriers to suspend any interline service arrangements with Aeroflot.<sup>66</sup> On September 16, 1983, the White House announced that the United States would make available to civilian aircraft the facilities of its Global Positioning System when they became available, probably in 1988.<sup>67</sup>

Also on September 16, the ICAO Council, of which the United States is a member, met in Montreal in an extraordinary session and adopted a resolution that reaffirmed "the principle that States, when intercepting civil aircraft, should not use weapons against them," directed the Secretary General of the ICAO to investigate the flight and destruction of KAL 007 and to consider possible amendments to the Chicago Convention "to prevent a recurrence of such a tragic incident."<sup>68</sup> Twenty-six nations voted in favor of the resolution. The Soviet Union and Czechoslovakia voted against the resolution. Algeria, China, and India abstained.

On March 6, 1984, the ICAO's governing council adopted a resolution introduced by the United States that condemned as a violation of international law the "use of armed force which resulted in the destruction of the Korean airliner and tragic loss of 269 lives."<sup>69</sup> The resolution deplored "the Soviet failure to cooperate in the search and rescue efforts of other involved states and the Soviet failure to cooperate with the ICAO investigation of the incident."<sup>70</sup> The resolution also recognized that "no evidence was found to indicate that the deviation was premeditated or that the crew was at any time aware of the flight's deviation."<sup>71</sup> The Council adopted the resolution after considering the report of the investigation by the ICAO's Secretary General and the subsequent technical review by its Air Navigation Commission.<sup>72</sup> On May 10, 1984, ICAO opened for ratification a draft Protocol

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66. *Soviet Downing of Civilian Aircraft KAL 007*, 83 DEP'T ST. BULL. 12-13 (October 1983). Air service between the U.S. and the Soviet Union was resumed in 1986 pursuant to an agreement allowing Aeroflot to fly into New York and Pan Am to fly into Moscow. N.Y. Times, Feb. 14, 1986, at A4, col. 4.

67. 19 WEEKLY COMP. PRES. DOC. 1266 (Sept. 19, 1983).

68. 22 INT'L LEGAL MATERIALS 1149, 1149-51 (1983).

69. 23 INT'L LEGAL MATERIALS 937 (1984).

70. *Id.*

71. *Id.*

72. *Id.* The secret vote on the resolution was twenty in favor, two against, and nine abstaining. *Id.* For further information on the KAL 707 incident, see *Air Navigation Commission Technical Review of the Fact-Finding Investigation*, INT'L LEGAL MATERIALS 865-922; see also *Aviation Council Faults Soviet*, N.Y. Times, Mar. 7, 1984, at A4, col. 4.

Seymour Hersch presented a different view of the attack on KAL 007. S. HERSCH, *THE TARGET DESTROYED: WHAT REALLY HAPPENED TO FLIGHT 007 AND WHAT AMERICA KNEW ABOUT IT*. For skeptical review of the Hersch book, see *007, Licensed to Kill?*, NEW REPUBLIC,



relating to an amendment to the Chicago convention which, in effect, would codify the principle reaffirmed in the ICAO resolution of September 16, 1983.<sup>73</sup>

### (3) Contiguous Zone

UNCLOS Article 33 provides that, in the contiguous zone, "the coastal state may exercise the control necessary to prevent [or punish] infringement of its customs fiscal, immigration or sanitary laws and regulations within its territory or territorial sea." Article 33 describes the contiguous zone as a zone contiguous to a state's territorial sea, not extending beyond twenty-four nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>74</sup>

Although President Reagan's comprehensive Proclamation and Statement of March 10, 1983 did not specifically refer to the "Contiguous Zone" or the "Bays" (often referred to as Gulfs), the status of those ocean areas are defined, respectively, in UNCLOS Articles 33 and 10. In the statement, the President announced that the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, if the coastal states recognize the rights and freedoms of the United States and others under international law.<sup>75</sup>

October 13, 1986, at 33-36.

In answering those who drew an analogy between the shooting down of Flight 007 and the shooting down on July 3, 1988 of an Iranian airliner with a loss of 290 lives by the U.S. cruiser USS *Vincennes*, Admiral William Crowe, chairman of the Joint Chiefs of Staff, drew the following distinctions. First, while Flight 007 was in an area free of hostilities, the Iranian airliner was in a war zone in the Persian Gulf at a time when Iranian forces were engaged in military activity against the American Navy. Second, while the KAL 007 pilots had received no warning from the Soviet fighters prior to the attack, the Iranians failed to heed repeated warnings to steer clear of the *Vincennes*. Finally, the Soviets remained silent for six days following their action over the Sea of Japan, but President Reagan expressed "deep regret" soon after the Persian gulf tragedy. N. Benac, *Admiral Denies Similarities in Korean, Iran Jet Attacks*, The State (Columbia, S.C.) July 4, 1988, at 4. One commentator called attention to a New York Times headline, *Damned If They Do and If They Don't* and added that "the skipper of the *Stark* who didn't [fire on approaching aircraft], was fired on by Iraqi missiles, lost 37 members of his crew and retired from service. Captain Rogers [of the *Vincennes*] who did [fire on an approaching aircraft], brought down an airliner." *Blunder in the Gulf*, July 9, 1988, at 19. *But see World Aviation Panel Faults U.S. Navy in Downing of Iran Air Jet*, N.Y. Times, Dec. 4, 1988, 1, at 3. The New York Times reported that it had a leaked copy of a report prepared by experts for ICAO with a different emphasis from that of the Pentagon Study. the report was said to have found that "vague and otherwise inadequate precautions by the Navy for keeping civilian aircraft away from combat operations in the gulf had caused 'confusion and danger' before the incident of July 3." *Id.*

73. 23 INT'L LEGAL MATERIALS 705-07 (1984). One hundred two states must ratify the protocol to bring the provisions into force. *Id.*

74. 1982 Convention on Law of the Sea, *supra* note 10, at 1276.

75. Statement on United States Ocean Policy, *supra* note 3 at 379.

## (4) Bays: Gulf of Sidra

The United States' response to Libya's claim to the Gulf of Sidra exemplifies willingness to *act* "in accordance with the balance of interest relating to traditional uses of the oceans—such as navigation and overflight." In 1973 Colonel Muammar el Qaddafi had claimed the 275 mile wide Gulf of Sidra to be internal waters over which Libya "has exercised its sovereignty . . . through history and without any dispute."<sup>76</sup> Apparently Qaddafi had never heard the line in the Marine hymn, "to the shores of Tripoli" or of Thomas Jefferson and the Barbary Powers.<sup>77</sup> The United States<sup>78</sup> and other maritime powers, including the Soviet Union,<sup>79</sup> promptly protested the Libyan claim. The protestors charged that Libya made the claim in disregard of the widely accepted state practice described in Article 7 of the 1958 Geneva convention on the Territorial Sea and Contiguous Zone,<sup>80</sup> and since restated in UNCLOS Article 10.<sup>81</sup> These two articles limit claims to bays or gulfs that are either "historic" or to well marked indentations with mouths that may not exceed twenty-four miles in width. In August 1981, two Soviet-built Libyan Su-22 fighter aircraft attacked two United States Navy F-14 aircraft from the carrier *U.S.S. Nimitz* sixty miles from the nearest land.<sup>82</sup> In a proportionate response, the F-14s returned fire and shot down their attackers in the exercise of the right of self-defense that is codified in Article 51 of the U.N. Charter.<sup>83</sup> Periodic U.S. naval exercises in the Gulf of Sidra have continued. For example, exercises were held for two days in July 1984. F-14 fighters flew from the aircraft carrier *Saratoga* conducting without incident "routine flight operations over international waters" as close as thirty-eight miles from the Libyan coast.<sup>84</sup> Commander Dennis Neutze of the United States Navy Judge Advocate General's Corps described these naval exercises as part of "the process of

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76. See Neutze, *supra* note 54, at 28 (reprinting declaration of Libyan Arab Jamahiriya regarding jurisdiction of Gulf of Sidra).

77. See Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 OCEAN DEV. & INT'L L.J. 65-85 (1983); D. MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM 1805-1809*, 35-44 (1974); *Off Tripoli's Shores*, NEW REPUBLIC, September 9, 1981, at 7-8.

78. Neutze, *supra* note 54, at 29.

79. See DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 293-94 (A.W. Rovine ed. 1974).

80. See Territorial Sea Convention, *supra* note 8, 15 U.S.T. at 1609.

81. See Convention on Law of the Sea, *supra* note 10, at 1272-73.

82. Statement by acting Department of State spokesman Alan Romberg (August 19, 1981); see also 81 DEP'T ST. BULL. 58 (October 1981) (publishing Romberg's statement); *Sixth Fleet F-14s Down Libyan Su-22s*, AVIATION WEEK & SPACE TECHNOLOGY, August 24, 1981, at 20-21.

83. The right of self-defense is codified in Article 51 of the United Nations Charter. U.N. CHARTER art. 51; see also U.N. CHARTER art. 51; 59 Stat. 1031, 1044-1045 (1945) (reprinting Article 51 of U.N. Charter).

84. *U.S. Jets Maneuver Near Libyan Coast*, N.Y. Times, July 27, 1984, at A5, col. 1.

claim and counterclaim, by which international law evolves [and which] demands that the United States continue to assert fully its legal rights in disputed areas such as the Gulf of Sidra." Neutze cautioned, "In the absence of such an assertion, our rights will surely atrophy."<sup>85</sup>

On January 4, 1989 two U.S. F-14s shot down two Libyan MIG-23 aircraft in international waters approximately seventy miles north of Libya. The two U.S. F-14s were operating from the aircraft carrier *John F. Kennedy*, which was located about 127 miles north of Tobruk, slightly southwest of Crete. At a Pentagon briefing later that morning, U.S. Secretary of Defense Frank Carlucci explained that the MIG aircraft were being tracked as they closed on the F-14s. The pilots of the F-14s "maneuvered to avoid the closing MIGs [by changing] speed, altitude and direction. When the Libyan aircraft continued to close in a hostile manner, the U.S. Section Leader decided his aircraft was in jeopardy" and the F-14s fired their missiles. Libyan spokesmen denied hostile intent and said the U.S. action was premeditated. On January 11 a U.N. Security Council resolution criticizing the U.S. for the downing of the MIGs was vetoed by three permanent members of the Security Council (France, the U.S. and the U.K.) who, along with Canada, voted "no ." Voting in favor of the resolution were the Soviet Union, China, Ethiopia, Colombia, Malaysia, Algeria, Nepal, Senegal and Yugoslavia.<sup>86</sup>

#### (5) Exclusive Economic Zone

In his March 10, 1983 Proclamation, President Reagan announced:

Without prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying submarine cables and pipelines, and other internationally lawful uses of the sea.<sup>87</sup>

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85. Neutze, *supra* note 54, at 31. For editorials critical of U.S. policy in the gulf of Sidra, see *The Taste of War*, 145 *AMERICA* 84 (1981); *The "Other Fellow" Was Shot Down*, 98 *CHRISTIAN CENTURY* 851 (1981).

86. *4 Nations Veto MIG-23 Downing Resolution*, *The News* (Greenville, S.C.), Jan. 12, 1989, at 1A, 5A. Page five of the *New York Times* for Jan. 5, 1989, carried stories entitled, *Excerpts From Briefing By U.S. on Libyan Jets, Libya Says U.S. Action Was Premeditated, and Years of Enmity*, a chronology of Libyan-U.S. confrontations.

87. EEZ Proclamation, *supra* note 3, at 10,601; see also *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* 55-56 (Tent. Draft 1982); *Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriva)*, 1982 *I.C.J.* 18, (Judgment of Feb. 24) 170-71, 228-31, 233 (Feb. 24, 1982) (Oda, J., dissenting). The introduction to the *RESTATEMENT* section on the Law of the Sea stated:

Except with respect to [the deep seabed part] of the Draft Convention, this restatement, in general, accepts the Draft Convention as codifying the customary international law of the sea, and as law of the United States. In a few instances, however, provisions of the Draft convention may be at variance with United States law or

Beginning with the words "all States," President Reagan's pronouncement is taken nearly verbatim from UNCLOS Article 58 on the "Rights and duties of other States in the Exclusive Economic Zone."<sup>88</sup> Article 58 in turn cites Article 87 on "Freedom of the High Seas." Article 57 defines the breadth of the exclusive economic zone as not extending "beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

#### (6) Continental Shelf

The President's Proclamation of March 10, 1983 contains the assurance that the proclamation "does not change existing United States policies concerning the continental shelf."<sup>89</sup> As a party to the 1958 Geneva Convention on the Continental shelf, the relevant existing policy of the United States is contained in Article 3 of that Convention. "The rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters."<sup>90</sup> UNCLOS Article 78 restates this article verbatim and adds: "The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustified interference with navigation and other rights and freedoms of other States as provided for in this Convention."<sup>91</sup> UNCLOS Article 76 states that the "continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine area" that may extend from 200 to 350 nautical miles from the baseline from which the breadth of the territorial sea is measured, depending on the depth of the seabed.<sup>92</sup>

#### (7) Sea Lanes Security<sup>93</sup>

During the Reagan Administration the United States acted to protect navigation and overflight on the high seas and in strategic sea lanes. President Reagan stressed the importance of keeping open the sea lanes through which vessels bring oil and strategic minerals from around the world.<sup>94</sup> While visiting the member states of the Association of South East

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with the United States understanding of customary international law, and in such cases the Restatement reflects the domestic United States law or the United States view of international law.

RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 55-56 (Tent. Draft 1982).

88. Convention on the Law of the Sea, *supra* note 10, at 1279.

89. EEZ Proclamation, *supra* note 3, at 10,601.

90. Convention on the Continental Shelf, Apr. 29, 1958, art. 3, 15 U.S.T. 471, 473; T.I.A.S. No. 5578, at 3; 499 U.N.T.S. 311, 314.

91. Convention on the Law of the Sea, *supra* note 10, at 1285.

92. *Id.*

93. See H. INTON, *THE CHINA SEA: THE AMERICAN STAKE IN ITS FUTURE* (1980).

94. Remarks and a Question-and-Answer Session with Reporters on Foreign Policy Issues, 2 PUBLIC PAPERS OF THE PRESIDENTS 1143, 1146 (Aug. 11, 1983); N.Y. Times, Aug. 12, 1983, at B5, col. 1.

Asian Nations (ASEAN) in the spring of 1980, Chinese foreign minister Huang Hua said that Soviet strategy in Asia "is shaped like a dumb-bell; Afghanistan and Cambodia are the weights; the Malacca Strait is the bar connecting them. Sooner or later the Russians will decide to grasp the bar."<sup>95</sup> Other observers viewed the Soviet occupation of Afghanistan as related to Soviet activity in the states bordering the Mediterranean and Red Sea approaches to the Suez Canal.<sup>96</sup> Addressing Congress on April 27, 1983, President Reagan warned that the Caribbean-Panama Canal lifeline through which two-thirds of all our foreign trade and petroleum pass may be threatened by Soviet activities in Cuba, Nicaragua, and Grenada.<sup>97</sup>

(a) *Malacca Strait*<sup>98</sup>

The focus of United States policy with respect to the Malacca Strait has been one of diplomatic and economic cooperation with ASEAN, an organization consisting of Indonesia, Singapore, Malaysia, Thailand, the Philippines and Brunei. ASEAN was organized behind the SEATO shield at the height of the Vietnamese war.<sup>99</sup> Since its occupation of Kampuchea,

95. *ASEAN and China: Marching Together Out of Step*, *ECONOMIST*, March 22, 1980, at 42; see also Kramer, *U.S. Philippines Talks on Big Military Bases Are Really About the Balance of Power in Asia*, *Wall St. J.*, Sept. 10, 1976, at 30, col. 1.

96. Farer, *Horning In on the Persian Gulf: Strategic Connections in the Wake of Afghanistan*, 17 *WILLAMETTE L. REV.* 210, 215 (1980). Farer writes that Ethiopian bases in Eritrea could be "less useful for shipping in the Indian Ocean [than bases] in Afghanistan, which are closer to the sealines emerging from the Persian gulf and far less accessible to Western and Arab air power." *Id.*

97. President Reagan's Address to Congress on Central America, *CONG. Q.* 853 (Apr. 30, 1983). In December, 1981, Nestor Sanchez, Deputy Assistant Secretary of Defense for Inter-American Affairs, stated:

The primary objective in the Western Hemisphere is to maintain the security of the North American Continent, the contiguous Caribbean Basin and the vital sea and air approaches to the Panama Canal. To achieve this objective, we must: (1) counter soviet and Cuban supported terrorism, military intervention and destabilizing actions in the Caribbean Basin; (2) broaden regional military-to-military contacts and seek the active cooperation of the countries of the region for regional, territorial and air defense of the Caribbean and South Atlantic sea lines of communication; (3) maintain, or acquire as needed, operational facilities, transit, and overflight rights; (4) maintain access to strategic raw materials, including energy sources and processing facilities; (5) help create a favorable security environment in which economic, political and social development can take place in a rational manner; and (6) maintain the capability to neutralize Soviet and Cuban military assets in Cuba and elsewhere in the Caribbean which would impede in time of war, United States power projection and strategic retaliation.

Sanchez, *Regional Security: United States Security Interests and Concerns in Latin America*, 12 *CAL. W. INT'L L.J.* 434, 435 (1982).

98. The major passages or sealanes between the Pacific and Indian Oceans are the Malacca Strait (between Malaysia and Sumatra), the Sunda Strait (between Sumatra and Java), the Lombok Strait (off the east coast of Bali) and the Ombai Strait (off Timor). See generally M. LEIFER, *MALACCA, SINGAPORE & INDONESIA* (1978).

99. See Haimbaugh, *The ASEAN Factor*, in *CHINA POLICY & NATIONAL SECURITY* 92-106 (1984). ASEAN was founded in 1967; SEATO was disbanded in 1977. Brunei, the newly independent sultanate in North Borneo, became the sixth member of ASEAN on January 7, 1984.

Vietnam has been the object of a wide variety of ASEAN-led diplomatic initiatives and intermittent military pressure by China.<sup>100</sup> These efforts are beginning to meet with some success.<sup>101</sup> Every fall since 1979 the United Nations General Assembly has adopted by wide majorities ASEAN-sponsored resolutions calling for United Nations supervision of the withdrawal of foreign, *i.e.*, Vietnamese, troops from Kampuchea and for the holding of free elections in Kampuchea.<sup>102</sup> The United States has supported this and similar ASEAN initiatives in the United Nations Security Council,<sup>103</sup> the United Nations Economic and Social Council, the United Nations Human Rights Commission, and at the 1981 Ottawa summit conference of industrial states.<sup>104</sup> Former Secretary of State George Shultz noted that the ASEAN governments were "playing an effective and constructive role in the Non-aligned Movement, the Islamic Conference, and other international fora" in which ASEAN goals for Kampuchea have been approved.<sup>105</sup>

Because the Vietnamese have given the Soviet Union access to former American bases at Danang and Cam Ranh Bay, U.S. air and naval bases

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100. Suhrke calls China Thailand's *de facto* ally, citing China's one month invasion of Vietnam in February 1979 and periodic border skirmishes since 1979 that have tied down Vietnamese soldiers' support for the Thai insurgency movement. Suhrke, *ASEAN: Adjusting to New Regional Alignments*, ASIA PACIFIC COMMUNITY, Spring 1981, at 11, 15.

Speaking before Chinese community leaders in the Great Hall of the People in Beijing, China, on April 27, 1984, President Reagan said: "America and China both condemn military expansionism, the brutal occupation of Afghanistan, the crushing of Kampuchea; and we share a stake in preserving peace on the Korean Peninsula." Remarks to Chinese Community Leaders in Beijing, China, 1 PUBLIC PAPERS OF THE PRESIDENTS 579 (Apr. 27, 1984).

101. *Peace Comes Dropping Slow: Why So Many of Today's Wars Take So Long to End*, ECONOMIST, Aug. 13, 1988, at 12-13; *Oh, What a Peaceful World*, ECONOMIST, Aug. 13, 1988, at 11-12.

102. See General Assembly Resolutions 34/22 of Nov. 14, 1979; 35/6 of Oct. 22, 1980; 36/5 of Oct. 21, 1981; and 37/6 of Oct. 28, 1982. The 1982 resolution was adopted by a vote of 105 for the resolution, 23 against, and 20 abstaining. Afghanistan, Angola, Bulgaria, Byelorussia, Congo, Cuba, Czechoslovakia, Democratic Yemen, Ethiopia, German Democratic Republic, Grenada, Hungary, Lao People's Democratic Republic, Libya, Mongolia, Mozambique, Nicaragua, Poland, Seychelles, Syria, Ukraine, the Soviet Union, and Vietnam voted against the resolution. Algeria, Benin, Cape Verde, Finland, Guinea-Bissau, Guyana, India, Lebanon, Madagascar, Malawi, Mexico, Panama, Sao Tome and Principe, Sierra Leone, Suriname, Trinidad and Tobago, Uganda, United Arab Emirates, United Republic of Tanzania, and Vanuatu abstained from voting.

103. The Soviet Union vetoed the resolution that the United Nations Security Council had passed.

104. Paragraph 8 of the Conference Chairman's Summary of Political Issues stated: "Believing as we do that the Kampuchean people are entitled to self-determination, we welcome and support the Declaration of the [U.N. Economic & Social Council sponsored] International conference on Kampuchea." Summary of Political Issues by the Chairman of the Ottawa Economic summit conference, PUBLIC PAPERS OF THE PRESIDENT 635, 636 (July 20, 1981); see also *Ottawa Economic Summit Conference*, 20 INT'L LEGAL MATERIALS 955, 956 (1981) (reprinting Summary). The Ottawa Summit was attended by Canada, the Federal Republic of Germany, Italy, Japan, the United Kingdom, and the United States.

105. Shultz, *The U.S. and East Asia: A Partnership for the Future*, U.S. DEPARTMENT OF STATE CURRENT POLICY, 459, at 2 (March 5, 1983).

at Clark Field and Subic Bay in the Philippines are seen as contributing to the balance of power in the area.<sup>106</sup> Reports indicate that “[n]eighboring countries, particularly some of the Philippines’ partners in ASEAN, privately support the bases to counter a growing Soviet presence in the region.”<sup>107</sup> In October 1988, the basic forty-one year old bases agreement was extended until 1991 in return for \$481 million in economic, military, and development assistance in 1990 and 1991. Because of the importance of the bases for the defense of both the Pacific and the Indian Oceans, the United States is considering the possibility of constructing alternative bases in Guam or other Mariana Islands at an estimated cost of from four to six billion dollars in case the agreement with the Philippines runs out in 1991.<sup>108</sup>

(b) *Suez Canal*

The U.S. government has participated jointly with the British, French, and Italian governments in a mission to help Lebanon “while the Lebanese government tries to regain control over its own territory.”<sup>109</sup> This mission figured prominently in the 1984 presidential and vice-presidential debates.<sup>110</sup> The Reagan Administration also has helped nations bordering the western and southern approaches to Suez resist external aggression and destabilization. One example of such assistance came after Libya’s Colonel Muammar Qaddafi invaded Chad in support of former Chadian President Goukouni’s rebel forces in July 1983. The invasion was described as another step in Qaddafi’s scheme for an Islamic Saharan empire unifying Moslems from Mauritania on the Atlantic to Sudan on the Red Sea. President Reagan responded to the Libyan attack by making available twenty-five million dollars in military aid for the government of President Hissene Habre, and, after consulting with President Francois Mitterrand of France, by deploying airborne warning and control system (AWAC) aircraft to the area.<sup>111</sup> Un-

106. See Leng, *Supranationalism in Southeast Asia: The Case of ASEAN*, 46 J. TROPICAL GEOGRAPHY 27, 30 (1978) (quoting December 21, 1976 joint communique between Philippine President Ferdinand Marcos and Prime Minister Thanin of Thailand).

107. Mydans, *Aquino Indicates Last Details on Bases Accord Are Now Resolved*, N.Y. Times, Oct. 17, 1988, at 1, 10, Col. 1.

108. Sciolino, *U.S. Concludes Accord to Run Philippine Bases: Pledges Almost a Billion in Aid Over Two Years*, N.Y. Times, Oct. 16, 1988, at 1, col. 2; Cooper, Waller, & Vokey, *To Base or Not to Base: Washington Looks Seriously at Life after Subic*, NEWSWEEK, Aug. 15, 1988, at 34. The U.S. has withstood “dismantle-the-bases” movements not only in the Philippines but also in Spain and Greece. Naval landing rights have been withdrawn, however, by New Zealand. See *Manila View: Bases Go Home, Slowly*, N.Y. Times, Aug. 6, 1988, at 1, col. 4.; What the U.S. Has to Gain from Papandreou’s Troubles, N.Y. Times, Feb. 26, 1989, § 4, at 2, col. 1.

109. *Central America and Chad*, President Reagan’s remarks at a press conference, August 11, 1983, 83 DEP’T ST. BULL. No. 2079, at 31-32 (Oct. 1983).

110. See *Transcript of Reagan-Mondale Debate on Foreign Policy*, N.Y. Times, Oct. 22, 1984, at B4, col. 5; *Transcript of Philadelphia Debate Between Bush and Ferraro*, N.Y. Times, Oct. 11, 1984, at B5, col. 3.

111. *Clearing Chad: A Chance to Winkle Out Colonel Qaddafi*, ECONOMIST, Dec. 3, 1983, at 18.

dersecretary of State for African Affairs, Chester Crocker, described United States efforts and the coordinated efforts of France, Zaire, and the Organization of African unity (OAU)<sup>112</sup> as being: "aimed at bringing about the withdrawal of all foreign troops from Chad so that the internationally recognized government [of Habre] can get on with the urgent tasks of economic development and political reconciliation."<sup>113</sup> Crocker added, "The Administration has also, in a few selective and important cases, increased our security assistance to friendly African countries. Almost all of these increases have been to Sudan, Kenya, and Somalia, countries which play a key role affecting U.S. strategic interests in the Indian ocean."<sup>114</sup>

In September 1984, the French and Libyans announced a short-lived agreement to withdraw their troops from Chad.<sup>115</sup> In 1987, Chad's President Hissen Habre, speaking of a napalm and toxic gas attack by the Libyans the day before, declared, "It's a permanent and constant aggression."<sup>116</sup> August 19, 1981, the day of the dogfight in the Gulf of Sidra, Qaddafi was in Aden to sign a friendship and cooperation treaty with South Yemen and Ethiopia. Both countries, like Libya, have close links with the Soviet

112. President Reagan acted pursuant to his authority under chapters 2 and 5 of Part II and Section 506(a) of the foreign Assistance Act of 1961, as amended. The Congress was duly notified. *U.S. Military Assistance to Chad*, 50 DEP'T ST. BULL. \_\_\_\_ (Sept. 1983); see also *AWACS of August*, NATION, Aug. 20, 1983, at 24-27; *Another Trouble Spot Erupts for U.S.*, U.S. NEWS & WORLD REPORT, Aug. 15, 1983, at 21-22; Guest, *Chad, A Pattern of Destabilization: Libya's designs on a neighbor provoke a firm U.S. response*, TIME, August 15, 1983, at 23-26; *Chad Mitterrand Draws the Line*, NEWSWEEK August 29, 1983, at 28; *Bloodless 'Victory' for U.S. in Chad*, U.S. NEWS & WORLD REPORT, Sept. 5, 1983, at 8.

113. In July 1980, the OAU had appealed unsuccessfully to the United Nations Security Council for financial assistance to support OAS peacekeeping in Chad undertaken to replace Libyan troops sent to support Oueddei. PEACE AND SECURITY: THE UNITED NATIONS AND NATIONAL INTERESTS 23 (1984); see also *Containment of Qaddafi*, ECONOMIST, Aug. 29, 1981, at 11, 12; *Libya's Foreign Strategy*, NEW STATESMAN, Aug. 21, 1981, at 12, 13-14.

114. *Reagan Administration's Africa Policy: A Progress Report*, U.S. DEPARTMENT OF STATE CURRENT POLICY No. 527, at 2 (Nov. 1983).

115. *Id.*; see also *U.S. Will Spend \$38.6 Million to Refurbish Port in Somalia*, N.Y. Times, Sept. 20, 1984, at 1, col. 6.

Work on the port in southern Somalia will be carried out by an American Construction company, the radio said. The scheduled completion date is June 1987. The United States built the original port in Kismayu in 1964, but it was used by the Soviet Navy after a military coup in Somalia in 1969. The Russians were expelled in 1978 after they sided with Ethiopia in the Ogaden war against Somalia. Following the expulsion, the United States obtained the use of naval facilities at Mogadishu and the northern port of Berbera, as well as a Soviet-built airstrip at Berbera.

116. N.Y. Times, Aug. 16, 1987, at 1, col. 1; French Troops Start the Withdrawal From Chad, N.Y. Times, Sept. 26, 1984, at 1, col. 5; *Chadian Confers with Mitterrand: Obstacles to a French-Libyan Withdrawal Are Discussed*, N.Y. Times, Oct. 6, 1984, at 4, col. 1. Also in September 1984 Libya and Morocco announced that the two countries had entered into a treaty of friendship. See Iyer, *Odd Bed Fellows*, TIME, Sept. 17, 1984, at 51 (speculating that treaty may be rejoinder to 1983 alliance of Algeria, Mauritania and Tunisia); see also Brooke, *Chad's Leader Predicts Long War*, N.Y. Times, Aug. 16, 1987, at 9, col. 1; *A Message for Kaddafi: The U.S. Steps into Chad*, NEWSWEEK, Jan. 5, 1987, at 35 (describing continuing French and American aid to Chad).



Union and lie strategically on either side of the narrow Red Sea entrance to Suez.<sup>117</sup>

(c) *Caribbean Sea-Panama Canal*

(i) *Central America*

On May 10, 1984, in an opinion that foreshadowed its final decision on the merits in *Nicaragua v. United States*,<sup>118</sup> the International Court of Justice indicated unanimously that, pending its final decision, "the United States should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines." The Court cited principles embodied in the Charters of the United Nations and of the Organization of American States.<sup>119</sup>

The United States contended that the International Court of Justice lacked jurisdiction in the case because of Nicaragua's failure to ratify the relevant Protocol.<sup>120</sup> The U.S. also rejected the Court's jurisdiction because "the United States expressly excluded by the terms of Proviso C of its consent to the Court's compulsory jurisdiction all multilateral disputes arising under multilateral treaties" unless all the treaty parties who would be affected by the decision of the Court were before the Court.<sup>121</sup> United States' agents at the Hague also pointed out that "the primary responsibility for the maintenance of international peace and security is assigned by the Charter of the United Nations to the Security Council" under Chapters VII and VIII. Chapter VIII provides for regional arrangements for dealing with such matters when appropriate. The United States contended that this allocation of responsibility to the political branches of the U.N. cannot be "circumvented, as Nicaragua has attempted to do here, merely by purporting to isolate an issue of the lawfulness of the force in one part of an ongoing armed conflict through large parts of Central America and unilaterally calling it a 'legal dispute.'" <sup>122</sup>

117. *The Gulf: Gulp*, ECONOMIST, Sept. 5, 1981, at 33.

118. Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. U.S.*), 1986 I.C.J. 14 (Judgment of June 27).

119. I.C.J. Order of May 10, 1984, pp. 19-20; 1984 I.C.J. 169 (Provisional Measures), 1984 I.C.J. 392 (Jurisdiction).

120. Counter-Memorial submitted by the United States of America on the question of the Jurisdiction of the International Court of Justice to Entertain the Dispute and of the Admissibility of Nicaragua's Application 5-6, 8 (Aug. 17, 1984).

121. Declaration dated August 14, 1946, by President Harry S. Truman, of the United States' acceptance with reservations of the compulsory jurisdiction of the International Court of Justice. The disputes covered by the limiting provisions of the Declaration included "(c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction."

122. I.C.J. *Compte Rendu*, (T/CR/T16/np) p.82, Deputy Agent Daniel W. McGovern speaking (April 27, 1984).

Costa Rica, El Salvador, and Honduras communicated directly with the International Court to express similar concern about the effect the Nicaraguan case may have on the Contadora process. Honduras, in its communication to the Court, stated that

[o]nce again the Government of Nicaragua is seeking to flout the Contadora negotiation process by attempting to bring the Central American crisis, essentially a political issue, under the jurisdiction of the International Court of Justice. This is detrimental to the negotiations in progress and fails to recognize the resolutions of the United Nations and the Organization of American States or the full international endorsement that the Contadora peace process has so deservedly received.<sup>123</sup>

The arguments of the United States were rejected by the International Court of Justice on November 26, 1984.<sup>124</sup> This case was the first case in the history of the International Court of Justice or of its predecessor, the Permanent Court of International Justice, in which the Court undertook to decide a case involving open hostility or guerrilla war. United States Ambassador to the United Nations Jeane Kirkpatrick's counsel, Allan Gerson, said at the time the decision was announced: "Undoubtedly, serious consideration will be given to whether the U.S.'s acceptance of the Court's jurisdiction makes sense at a time when so few other nations, and certainly no other great powers, have accepted the authority of the Court to decide questions related to ongoing armed hostilities."<sup>125</sup>

On October 7, 1985, President Reagan terminated the 1946 acceptance of the compulsory jurisdiction of the International Court of Justice; the termination was to become effective six months from that date.<sup>126</sup> Abraham Sofaer, legal adviser of the State Department, observed at the time that a majority of the Court's judges came from states that had not accepted the compulsory jurisdiction of the Court and that no Soviet bloc state ever had accepted such jurisdiction.<sup>127</sup> The President's termination of U.S. acceptance of compulsory jurisdiction was an attempt to level the playing field at the Hague, where ocean law sometimes is determined.

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123. *Departmental Statement*, U.S. Department of State, April 8, 1984 and I.C.J. *Compte Rendue*, *supra* note 122, at 75; *Departmental Statement*, U.S. Department of State, April 8, 1984.

124. Vincour, *World Court Acts to Overrule U.S. in Nicaragua Case: Says It Has Authority*, N.Y. Times, November 27, 1984, at A1, col. 5; Taylor, *World Court Step Poses Test For U.S.*, N.Y. Times, Nov. 27, 1984, at A1, col. 5; International Court of Justice *Communiqué*, No. 84/39 (1984).

125. *See Statement On The U.S. Withdrawal From The Proceedings Initiated by Nicaragua in the International Court of Justice*, 24 INT'L LEGAL MATERIALS 246 (1985).

126. *Termination of Acceptance of Compulsory Jurisdiction*, AM. J. INT'L L. 163 (1986).

127. HENKEN, PUGH, SCHACHTER, & SMIT, INTERNATIONAL LAW 646-48 (1986). Eighteen appraisals of the International Court of Justice opinions in the case of Nicaragua v. U.S. appear in 81 AM. J. INT'L L. 1-183 (1987).

(ii) *Grenada*

In late October 1983, the Organization of Eastern Caribbean States (OECS)<sup>128</sup> and Grenadian Governor General Sir Paul Scoon requested the United States, Barbados, and Jamaica to join in the formation of a "multinational force for the purpose of undertaking a preemptive defensive strike in order to remove this dangerous threat to peace and security in the sub-region and to establish a situation of normality in Grenada."<sup>129</sup> Tensions between different provisions of the United Nations and Organization of American States' charters and the Rio Treaty were reflected in the criticism<sup>130</sup> and defense<sup>131</sup> of the legality of the ensuing brief, successful military

128. Treaty Establishing the Organization of Eastern Caribbean States, done at Basseterre, St. Kitts/Nevis, June 18, 1981, 20 INT'L LEGAL MATERIALS 1166 (1981). The Agreement establishing the East Caribbean Common Market executed June 11, 1968, appears as Annex I to the OECS Treaty. *Id.* at 1176. The seven OECS member states are Antigua, Dominica, Grenada, Montserrat, St. Kitts/Nevis, Saint Lucia and Saint Vincent, and The Grenadines. The seven OECS members have a common market, currency, judicial system and to some extent shared diplomatic representation and security arrangements. See *Organization of Eastern Caribbean States: Grenada, 1983*, 78 AM. J. INT'L L. 661-65 (1984).

129. *Panorama: Interview with Governor-General of Grenada Sir Paul Scoon* (BBC-TV broadcast, Oct. 31, 1983), in J. MOORE, LAW AND THE GRENADA MISSION 10 (1984); Letter of Invitation to the OECS from the Governor-General of Grenada, Sir Paul Scoon (October 24, 1983), in J. MOORE, LAW AND THE GRENADA MISSION 87 (1984); Statement by Deputy Secretary of State Kenneth W. Dam before the Committee on Foreign Affairs of the U.S. House of Representatives (Nov. 2, 1983), in J. MOORE, LAW AND THE GRENADA MISSION 101-05 (1984) [hereinafter Dam Statement]; *Statement on the Grenada Situation from the OECS Secretariat*, in J. MOORE, LAW AND THE GRENADA MISSION 89 (1984) [hereinafter Statement from OECS Secretariat].

130. Gordon, Bilder, Rovine, & Wallace, *International Law and the United States Action in Grenada: A Report*, 18 INT'L LAW 331, 380 (1984). Other articles criticizing the U.S. action in Grenada included Boyle, Chayes, Dore, Falk, Feinrider, Ferguson, Fine, Nunes, & Weston, *International Lawlessness in Grenada*, 78 AM. J. INT'L L. 172 (1984); Joyner, *Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131 (1984). The United States vetoed a U.N. Security Council resolution that would have condemned the Grenada mission. Eleven states voted for the resolution and Great Britain, Togo, and Zaire abstained. See *U.S. Vetoes U.N. Resolution 'Deploring' Grenada Invasion*, N.Y. Times, Oct. 29, 1983, at A1, col. 4. A similar resolution passed the U.N. General Assembly on November 2 by a vote of 108 to 9 with 27 abstentions. The general Assembly debate was terminated before the OECS states or the United States could present the facts. See Kirkpatrick, *The U.N. and Grenada: A Speech Never Delivered*, 12 STRATEGIC REVIEW 11 (1984); *U.N. Assembly Adopts Measure 'Deeply Deploring' Invasion of Isle*, N.Y. Times, Nov. 3, 1983, at A21, col. 1. CBS News polled residents of Grenada on their opinions of the U.S. invasion. Ninety-one percent of the respondents said that they were "glad the United States troops came to Grenada" and eighty-five percent said that they felt their families were in danger before the troops arrived. *Grenadians Welcomed Invasion, A Poll Finds*, N.Y. Times, Nov. 6, 1983, at A21, col. 1. See *Democratic Pres Candidates Assail Military Actions*, L.A. Times, Oct. 30, 1983, at 1 (reporting remarks of candidates McGovern, Cranston and Mondale).

131. Robinson, *Letter from The Legal Adviser, United States Department of State*, 18 INT'L LAW 381, 382, 385-386 (1984); see also Dam Statement, *supra* note 119, at 103-04; Moore, *Grenada and the International Double Standard*, AM. J. INT'L L. 145 (1984); Statement from the OECS Secretariat, *supra* note 119, at 89. Professor Moore believed that perhaps "the clearest legal case for regional peacekeeping action in a setting of breakdown of authority

operation. Deputy Undersecretary of State Kenneth W. Dam included in the results of the Grenada operation the expulsion of those who would use Grenada "as a staging area for subversion of nearby countries, for interdiction of shipping lanes, and for transit of troops and supplies from Cuba to Africa and from Eastern Europe and Libya to Central America."<sup>132</sup> One observer described the Grenada operation as a manifestation of a "Reagan Doctrine" that was "the contemporary parallel" to previous Johnson, Truman, and Monroe doctrines.<sup>133</sup>

### B. Marine Scientific Research

In the statement that accompanied his March 10, 1983 Exclusive Economic Zone Proclamation, President Reagan explained:

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the U.S. interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognize the right of other coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised reasonably in a manner consistent with international law.<sup>134</sup>

In an address delivered the same day that the President issued the Proclamation, Ambassador James Malone said that: "[w]e will continue our effort to influence state practice [concerning marine scientific research] in a fa-

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is that presented by Ambassadors Stevenson and Yost at the U.N. Security Council debate on the 1965 OAS Dominican action" at the 1220th and 1222nd meetings of the Security Council. Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 155 n.32; U.N. Doc. S/PV 1220 (June 3, 1965) and U.N. Doc. S/PV 1222 (June 9, 1965).

132. Dam statement, *supra* note 119, at 104-05. American officials discovered three agreements marked "Top Secret" signed in Havana in 1980 and 1981 and in Moscow in 1982 by representatives of the Soviet government and leaders of the leftwing New Jewel Movement (NJM) government established in Grenada in 1979. The NJM was headed by Maurice Bishop, who was overthrown in a 1983 coup by the Revolutionary Military Council, which viewed Bishop as a "right" opportunist and a "bourgeois deviationist" who was moving too slowly toward a "Leninist" society. The agreements provided, *inter alia*, for the delivery free of charge by the Soviet Union to Grenada via Havana of 19.4 million rubles worth of arms and military equipment, most of which had been delivered by 1983. See Loeber, *Insights into Soviet Treaty Practice: The Secret Soviet-Grenadian Military Agreements of 1980-1982*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 297-316 (1987); *Rescue Operation by Armed Forces—Grenada*, 78 AM. J. INT'L L. 200-04 (1984).

133. Dore, *The U.S. Invasion of Grenada: Resurrection of the "Johnson Doctrine"?*, 20 STAN. J. INT'L L. 173, 177 (1985); see also *Grenada's Battle Scars Healing Five Years After U.S. Invasion*, The State (Columbia, S.C.), October 23, 1988 at 7A, col. 1 (reporting, "It is quiet in Grenada now, so tranquil, in fact that it is hard to imagine that this was a battlefield where 19 Americans, 24 Cubans and 44 Grenadians died . . . Grenada is thriving") See generally W. GILMORE, *THE GRENADA INTERVENTION: ANALYSIS & DOCUMENTATION* (1984).

134. Statement on United States Ocean Policy, *supra* note 3, at 379.

avorable way by recognizing only those jurisdictional claims that are reasonable."<sup>135</sup>

The UNCLOS provides that the coastal state must give consent to foreign scientific teams for appropriate peaceful and scientific purposes unless the projected scientific activity would interfere with other legitimate uses of the ocean or be of direct significance for the exploration or exploitation of the Exclusive Economic Zone. The UNCLOS further provides that consent is to be implied after four months unless the coastal state has requested further information concerning whether the proposed research is of the types for which the treaty authorizes the coastal state to withhold consent or whether the performance by other researchers from the same country has been inadequate. These delays would make marine research more costly than it has been under the previous *laissez-faire* regime of the high seas. Treaty authorized requirements that the foreign research team accommodate and train coastal state personnel also would make marine research more costly.<sup>136</sup> In the 1983 Proclamation, the United States reserved the right to challenge a coastal state's withholding of consent to research in its Exclusive Economic Zone if the denial is arbitrary or unreasonable and thus beyond the jurisdictional authority authorized in the UNCLOS.

The report of the first meeting of the Ocean Policy Roundtable held at Woods Hole concluded that, "[t]he Presidential Proclamation resolved the major foreign water EEZ problem facing U.S. marine scientists, *i.e.*, recognizing foreign jurisdiction over marine science research in the EEZ." The report called for the prompt development of bilateral arrangements with Canada and Mexico and with other countries later.<sup>137</sup> The report warned, "If we should differ in important ways from the Convention, we could introduce additional confusion in the furthering of national domestic interests and precipitate similar actions by other states, to our disadvantage."<sup>138</sup> Some senior scientists who are administrators and who appreciate standardization of procedures argue that a bad convention may be better than no convention. A spokesman for the National Science Foundation has stated that:

[t]he President demonstrated clearly in this Proclamation the firmly-held United States position that oceanographic research is open and for the benefit of all mankind and therefore need not be regulated, even within the exclusive economic zones of coastal states. The National Science Foundation had taken the lead in urging a clear

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135. *Id.* at 378.

136. 1982 Convention on Law of the Sea, *supra* note 10, at 1316-20 (reprinting UNCLOS Part XIII); see also Wooster, *Sea Law and Ocean Research: View for the Northwest*, 63 OR. L. REV. 121, 137 (1984).

137. ASSESSING OCEAN GOVERNANCE: REPORT OF THE FIRST MEETING OF THE OCEAN POLICY ROUNDTABLE 11 (1983) (reporting findings and conclusions of meeting held at Marine Policy & Ocean Management Center of Woods Hole Oceanographic Institution, November 29-30, 1983).

138. *Id.* at 7.

U.S. statement of this position. We therefore could not have been more pleased with the outcome. All in all we believe the two major actions cited above will, jointly, benefit oceanographic research throughout the world and will facilitate, rather than obstruct, such research in the future.<sup>139</sup>

This language is similar to the language found in the Outer Space Treaty, of which the United States is an original party. "There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international cooperation in such investigation."<sup>140</sup>

### C. *Transoceanic Communication*

In his 1983 Exclusive Economic Zone Proclamation, President Reagan stated that:

[w]ithout prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.<sup>141</sup>

These high seas freedoms that were codified in Article 2 of the 1958 Geneva Convention on the High Seas<sup>142</sup> and restated in Articles 79 and 87 of the 1982 United Nations Convention on the Law of the Sea<sup>143</sup> safeguard communication by cable under the seas and by ships and planes on and over the oceans. The United States cooperates with other countries in maintaining world wide postal, telecommunications, and satellite communications under the auspices of the Universal Postal Union (UPU),<sup>144</sup> the

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139. Letter from Louis B. Brown, science associate of the National Science Foundation, writing on behalf of Dr. Albert A. Bridgewater (August 17, 1984).

140. Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967, art. 1, 18 U.S.T. 2410, T.I.A.S. No. \_\_\_\_\_, 610 U.N.T.S. 205. This exploration and use "shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind." *Id.* at 2412, T.I.A.S. No. \_\_\_\_\_ U.N.T.S. at \_\_\_\_\_.

141. EEZ Proclamation, *supra* note 3, at 10,605.

142. Convention on the High Seas, *supra* note 8, Article 2.

143. INT'L LEGAL MATERIALS 1261, 1285-87 (1982). UNCLOS Articles 100 and 101 require all States "to cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State" including "any act of inciting" piracy. *Id.* at 1288.

144. The Universal Postal Union was founded in Berne, Switzerland in 1874 and became a specialized Agency of the United Nations in 1947.

International Telecommunications Union (ITU),<sup>145</sup> the International Telecommunications Satellite Organization (INTELSAT),<sup>146</sup> the International Maritime Satellite Organization (INMARSAT)<sup>147</sup> and the Outer Space Treaty.<sup>148</sup> Together, these sources of positive international law support international legal principles calling for the maximum channel dispersion and development of the orbit and spectrum resource that includes the encouragement of satellite communications.<sup>149</sup>

With regard to the use of direct broadcasting satellites (DBS), a debate continues about whether those operating the satellites should be required to obtain prior consent from receiving states. The United States continues to support free enterprise and freedom of expression for DBSs, albeit in the United Nations forum in which one nation-one vote is the rule. While the United States' view is in a distinct minority, it is not without effect.

One example of U.S. influence was the modification of a long-in-the-making draft resolution before passage of the resolution by the U.N. General Assembly in 1982. The original DBS clauses of the draft developed between 1968 and 1981 by the United Nations Committee on Principles on the Use of Outer Space (COPUOS) reflected the Soviet Union's 1972 proposal of a highly restrictive convention of Principles Governing the Use by States of

145. The International Telecommunications Union (ITU) is the result of a merger between the International Telegraph Union founded in 1865 and the International Radiotelegraph Union in 1932. Headquartered in Geneva, Switzerland, the ITU became a specialized agency of the United Nations in 1947, with more than 150 member States. The ITU's constituent instrument is the International Telecommunication Convention, enacted November 12, 1965, 18 U.S.T. 575, T.I.A.S. No. 6267. The technological aspects of Distant Broadcasting Satellites are primarily the concern of the ITU, while questions of prior consent and content regulation are dealt with by COPUOS, UNESCO and, ultimately, by the U.N. General Assembly.

146. INTELSAT was organized to develop and operate the space segment of a global commercial telecommunications satellite system and operates under the Agreement Relating to the International Telecommunications Satellite Organization ["INTELSAT"], August 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532. The Agreement entered into force February 12, 1973 and has more than one hundred members.

147. INMARSET is authorized to lease the capacity required to furnish all categories of ships with safety-related telecommunications services and operates under the Convention on the International Maritime Satellite Organization ["INMARSAT"], Sept. 3, 1976, 31 U.S.T. 1, T.I.A.S. No. 9605. The Convention entered into force July 16, 1979 and has more than two dozen members.

148. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 [hereinafter *Outer Space Treaty*]. Article I of the Outer Space Treaty declares outer space to be a domain to be co-operatively utilized "for the benefit and in the interests of all countries." The Treaty has more than 90 signatories. It entered into force for the United States on October 10, 1967. *Id.* at 2412-13. See Note, *The International Telecommunication Union and the Third World's Quest for Equitable Access to the Orbit/Spectrum Resource*, 4 B.C. THIRD WORLD L.J. 183, 190-96 (1984); and Gorove, *The Geostationary Orbit: Issues of Law and Policy*, 73 AM. J. INT'L L. 444, 447-48 (1979).

149. Rothblatt, *The Impact of International Satellite Communications Law upon Access to the Geostationary Orbit and the Electromagnetic Spectrum*, 16 TEX. INT'L L.J. 207, 211-25 (1981).

Artificial Earth Satellites for Direct Television Broadcasting,<sup>150</sup> the 1972 UNESCO Declaration of Guiding Principles on the Use of Satellite Broadcasting,<sup>151</sup> and the 1978 UNESCO Declaration of Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War.<sup>152</sup> By 1982, however, U.N. General Assembly passed the Resolution of Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting<sup>153</sup> without the prior COPUOS language that had limited advertising and had required the exclusion of any communications "detrimental to the maintenance of international peace and security" or publicizing "war, militarism, national and racial hatred, and enmity between peoples which is aimed at interfering in the domestic affairs of other states or which undermines the foundation of the local civilization, culture, way of life, tradition or language."<sup>154</sup> On the other hand, the 1982 Resolution, which easily passed over the objections of the United States, endorsed the right of nations to veto incoming satellite broadcasts from abroad.<sup>155</sup>

On February 11, 1988, the White House released the President's national space policy statement emphasizing transportation as well as communication. The statement also called for continuing and increased reliance on private sector investment, construction and operation in space and related activities.<sup>156</sup> Earlier manifestations of this policy include the Land Remote-Sensing

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150. U.N. Doc. A/8771 (1972). A U.N. General assembly resolution called for a binding treaty of this type on principles governing the use of direct satellite broadcasting. G.A. Res. 2916, 27 U.N. GAOR Supp. (No. 30) at 14, U.N. Doc. A/8730 (1972).

151. UNESCO General Conference Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information and the Spread of Education and Greater Cultural Exchange, U.N. Doc. 17 C/Res. 4.111 (1972). Despite the title, the Declaration has been described as "not so much a balance between two conflicting positions of national sovereignty and freedom of information as it was a ringing affirmation of 'prior restraint.'" K. QUEENEY, *DIRECT BROADCAST SATELLITES AND THE UNITED NATIONS* 117 (1978). The U.N. referred both this Declaration and the Soviet draft convention to COPUOS.

152. U.N. Doc. 4/9.3/2, at 100-04 (1978).

153. U.N. Resolution of Principles governing the Use By States of Artificial Earth Satellites for International Direct Television Broadcasting, U.N. Doc. A/37/92 (1982).

154. 1978 COPUOS Working Group's Draft, U.N. Doc. A/AC.105/218, Annex II (1978), and 1981 COPUOS Working Group Draft, U.N. Doc. A/AC. 105/288, Annex II (1981).

155. See *supra* note 138. General Assembly Resolution 37/92 was adopted on December 10, 1982, by a vote of 107 to 13 (Belgium, Denmark, Federal Republic of Germany, Iceland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Spain, United Kingdom, United States), with 13 abstentions (Australia, Austria, Canada, Finland, France, Greece, Ireland, Lebanon, Malawi, Morocco, New Zealand, Portugal, Sweden). See *supra* note 143; see also Georgetown, *Space Law Group, DBS Under FCC and International Regulation*, 37 *VAND. L. REV.* 67, 118-31 (1984); Hagelin, *Prior Consent or the Free Flow of Information Over International Satellite Radio and Television: A Comparison and Critique of U.S. Domestic and International Broadcast Policy*, 8 *SYRACUSE J. INT'L L. & COM.* 265, 383 (1981); Paust, *Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act*, 45 *LAW & CONTEMP. PROBS.* 53 (1982).

156. White House Fact Sheet, *U.S. Space Policy: The President's Directive on National*



Commercialization Act of 1984,<sup>157</sup> the Commercial Space Launch Act of 1984,<sup>158</sup> the President's November 1984 determination that separate non-INTELSAT international systems were free to compete with INTELSAT and that such competition was required in the best interest of the nation,<sup>159</sup> and the decision to build a U.S.-Europe fiber-optic submarine cable (TAT-8) that would provide a subterrestrial alternative to the use of communication satellites.<sup>160</sup> The United States also has pursued the objective of increased competition in transoceanic communication through participation in several meetings. The President authorized United States Information Agency Director Charles Wick to begin negotiations with Soviet officials at the 1986 Reykjavik Summit to end or reduce Soviet jamming of the Voice of America, Radio Free Europe, and Radio Liberty.<sup>161</sup> The Paris based Organization for Economic Cooperation and Development (OECD) issued a 1988 Report stating "that growth in the satellite business depends upon letting new services . . . develop unchecked."<sup>162</sup> The World Administrative Radio Conference (WARC) on October 6, 1988 in Geneva adopted a plan for the use of expansive bands to assure all countries guaranteed "equitable access" to geostationary orbit.<sup>163</sup>

*Space Policy* (Feb. 11, 1988) (available from Office of White House Press Secretary). See Craft & Nesgos, *The Emerging Commerce in Space: New National Policy Sets the Tone*, Nat'l L. J., June 6, 1988, at 22, col. 2.

157. Land Remote-Sensing Commercialization Act of 1984, 15 U.S.C. §§ 4201-4292 (Supp. 1988).

158. Commercial Space Launch Act of 1984, 49 U.S.C. App. §§ 2601-2623 (Supp. 1988); Commercial Space Transportation; Licensing Regulations, 53 Fed. Reg. 11004 (1988).

159. 3 C.F.R. § 254 (1984). As of 1988, The FCC had conditionally authorized eight such systems. One of the systems, the Pan American Satellite corporation, had established correspondence with Peru pursuant to an April 1986 arrangement made in consultation with the INTELSAT Assembly of Parties, which was acting on the recommendation of its Board of Governors. *International Satellite*, BROADCASTING, Sept. 26, 1988, at 24; *Per Ardua ad ESA*, THE ECONOMIST, Nov. 7, 1987, at 93. Some observers wonder if such unprecedented competition may eventually harm INTELSAT in such a way as to violate Article XIV(d) of the Agreement, which established the 11 nation satellite consortium. See 23 V.S.T. 3813, 3854, T.I.A.S. No. 7532; see also Pirrotti, *The Global Satellite Cooperative: Is the U.S. Cooperating?*, COMM. & L., Feb. 1987, at 57. U.S. support of INTELSAT is administered under the Communications Satellite Act of 1962. Pub. L. No. 87-624, 76 Stat. 419 (1962) (codified as amended at 47 U.S.C. §§ 701-702, 721, 731-735, 741-744 (1981)).

On December 4, 1988, the space shuttle *Atlantis* launched a military satellite. Although the Department of Defense and the Central Intelligence Agency do not usually comment on the capacities or missions of "spy" satellites, civilian experts believe this satellite to be capable of gathering space images regardless of weather or time of day and that it may be crucial to policing the U.S.-U.S.S.R. treaty to eliminate intermediate-range nuclear weapons in Europe, most of which are mobile. N.Y. Times, Dec. 4, 1988, at 1, col. 1.

160. SCI. & TECH., Oct. 1984, at 46. See AT&T Announces a Historic Trans-Atlantic Crossing: The Completion of TAT-8, *The First Underwater Fiber Optic Cable System Between the U.S. and Europe*, N.Y. Times, Dec. 15, 1988, § D, at 3 (full page advertisement).

161. *Cubans Cause AM Interference*, BROADCASTING, July 27, 1987, at 42.

162. Giget, *Satellites & Fibre Optics: Competition & Complementarity*, THE ECONOMIST, Sept. 24, 1988, at 94, 95.

163. *International Satellite*, BROADCASTING Oct. 24, 1988, at 15; see also *The World According to WARC*, BROADCASTING, May 4, 1987, at 66.

#### D. Natural Resources

In his March 10, 1983 Proclamation, President Reagan asserted that:

[w]ithin the Exclusive Economic Zone, [200 nautical miles out from its coast], the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent 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; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.<sup>164</sup>

The President added, "This Proclamation does not change existing United States policies concerning the continental shelf, marine mammals, and fisheries, including highly migratory species of tuna which are not subject to the United States' jurisdiction and require international agreements for effective management."<sup>165</sup> Existing United States policy concerning the continental shelf is spelled out in Article 2 of the 1958 Convention on the Continental Shelf and in UNCLOS Article 77. Both Articles authorize, in identical language, the exercise by the coastal state of sovereign rights over the continental shelf "for the purpose of exploring it and exploiting its natural resources." More specifically:

The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.<sup>166</sup>

#### 1. Living Resources

##### a. Marine Mammals

Ambassador Malone has pointed out that "[t]he establishment of an EEZ will not affect our present marine mammal management policies or

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164. EEZ Proclamation, *supra* note 3, at 10,605.

165. *Id.*

166. 15 U.S.T. 471, 473, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (1964), *reprinted in* 21 INT'L LEGAL MATERIALS 1261, 1285 (1982). No reference is made to EEZ participatory rights of landlocked and geographically disadvantaged states described in UNCLOS Articles 69 and 70. Although the U.S. has no landlocked neighboring states, Caribbean states that are fewer than 400 miles from their neighbors cannot take full advantage of the 200 mile EEZ rule. See G. HAFNER, *DIE SECRECHTLICHE VERTEILUNG VON NUTZUNGSRECHTEN: RECHTE DER BINNENSTAATEN IN DER SUSSCHLIESLICHEN WIRTSCHAFTZONE* (1987)—a book on the Rights of Landlocked States in the Exclusive Economic Zone, which is reviewed in 38 AM. J. INT'L L. 214-17 (1989).

the present U.S. policy of deferring to the International Whaling Commission [I.W.C.]<sup>167</sup> with regard to the protection of whales."<sup>168</sup> The United States supports the I.W.C.'s 1982 decision to impose a moratorium on all commercial whaling after 1986 and the Whaling Commission's 1984 vote to cut by one-third, from 6,655 to 4,224, the number of minke whales available to commercial fleets during 1985.<sup>169</sup> Japan, Norway, and the Soviet Union have filed objections to the nonbinding moratorium and thus automatically have exempted themselves from it.<sup>170</sup> Under the terms of the 1979 Packwood-Magnuson Law, the United States may take by fifty percent the allocation of fish that a country may take from U.S. coastal waters if that country "diminishes the effectiveness" of any international whaling conservation measure. In ongoing negotiations, officials of the U.S. Department of Commerce and the National Oceanic and Atmospheric Administration (NOAA) have offered to allow the Japanese to catch 400 sperm whales during each of the next two seasons in exchange for the Japanese withdrawing their objection to the I.W.C. sperm whale ban.<sup>171</sup> In February 1988, Commerce Secretary Verity declared that Japan was in violation of the moratorium on commercial whaling, thus giving the President an embargo power that enhances his negotiating position. On November 23, 1988, the President signed Public Law 100-711, an act to authorize appropriations to carry out the Marine Mammal Protection Act of 1972 for fiscal years 1989 through 1993. The goal of the Marine Mammal Protection Act is "that the incidental killing or serious injury of marine mammals permitted in the course of commercial fishing be reduced to insignificant levels approaching a zero mortality and serious injury rate."

### b. Tuna

As Ambassador Malone has explained, "The United States neither recognizes nor asserts jurisdiction over highly migratory species of tuna [believing that] such species are best managed by international agreements with concerned countries."<sup>172</sup> Acting consistently with this belief, President

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167. See International convention for the Regulation of Whaling, Dec. 2, 1946, T.I.A.S. No. 1849, 161 U.N.T.S. 72 (1946) (ratified by U.S. July 18, 1947) (entering into force Nov. 10, 1948) (establishing International Whaling Commission). The United States is one of 40 members of the Convention.

168. See EEZ Proclamation, *supra*, note 3, at 3.

169. Schedule for the International Convention for the Regulation of Whaling, February 1983, at ¶ 10(e). See Carlson, *The International Regulation of Small Cetaceans*, 21 SAN DIEGO L. REV. 577, 607-20 (1984).

170. *Whaling Body Cuts Quota and Bars '85 Sperm Whale Hunt*, N.Y. Times, June 24, 1984, at 5, col. 1.

171. Statement by the President released by White House Press Secretary, June 7, 1988. See Pritchard, *Tuna Fishing Causes Row Between U.S. and Pacific Islands*, Christian Sci. Monitor, Oct. 9, 1984, at 16-17; Hoover, *A Case Against International Management of Highly Migratory Fishery Resources: The Atlantic Bluefin Tuna*, 11 B.C. ENVTL. AFF. L. REV. 11 (1983).

172. Statement on United States Ocean Policy, *supra* note 3, at 378.

Reagan on June 7, 1988, signed into law the South Pacific Tuna Act of 1988, paving the way for the President's ratification of the South Pacific Regional Fisheries Treaty on July 15, 1988. The principal provisions of the treaty are summarized in a June 15 State Department press release:

The United States deposited its instrument of ratification today with the Government of Papua New Guinea in Port Moresby, thereby bringing into force the South Pacific Regional Fisheries Treaty. The treaty will enable U.S. tuna vessels to purchase regional licenses to fish for tuna in some ten million square miles of the South Pacific Ocean. License fees totaling \$1.75 million for 35 licenses are expected to be issued within 48 hours. In addition, the U.S. tuna industry has agreed to provide technical assistance to the island nations valued at \$250,000 annually.

A related five year, \$50 million economic assistance agreement becomes effective with the treaty's entry into force. The first annual \$10 million cash transfer will also be made today.

The President stated that the treaty's "successful implementation will set a tone of cooperation rather than confrontation in our fisheries relations with fifteen island nations of the South Pacific."<sup>173</sup>

### c. Fisheries

The President's 1983 EEZ Proclamation will not materially affect the United States' exclusive management and conservation authority exercised since 1976 under the Magnuson Fishery Conservation and Management Act of 1976<sup>174</sup> and all fishery resources, except tuna, within the EEZ. The Proclamation is expected "to enhance our negotiating position with foreign nations by clearly establishing our sovereign rights to the resources as opposed to the present 'exclusive management authority.'"<sup>175</sup> For example, on July 25, 1984, the State Department informed the Soviet Union that the U.S. would allow the Soviet Union to catch approximately 50,000 metric tons of bottom fish (polack, sole, and hake) in American waters from the central California coast to the Bering Sea off Alaska. President Reagan thus ended a ban on Soviet commercial fishing in American waters that President Carter had imposed in January 1980 in response to Soviet military intervention in Afghanistan. Prior to the ban the Soviets were taking approximately 400,000 tons of fish each year from American waters. The U.S. will grant the Soviet Union an increase over the 50,000 metric ton limit if the Soviet Union opens its waters to the harvesting of fish by American fisherman.<sup>176</sup>

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173. Department of State Press Release No. 110, June 15, 1988.

174. Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-1882 (1985 & Supp. 1988)).

175. See EEZ Proclamation, *supra* note 3, at 10,602.

176. Gwertzman, *Reagan Citing Bid for Better Ties, Ends U.S. Ban on Soviet Fishing*,

## 2. Nonliving Resources

### a. U.S. Reservations

At the close of the statement that accompanied his 1983 EEZ Proclamation, President Reagan said that:

[i]n addition to the above policy steps [concerning the uses of the resources of the EEZ and the Continental Shelf] the United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when the market permits, exploit these resources.<sup>177</sup>

The President explained this rejection of UNCLOS Part XI's projected monopoly control of deep seabed mining<sup>178</sup> in his January 29, 1982 statement<sup>179</sup> and amplified the rejection in his July 9, 1982 statement that specified the additional objection to "stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits."<sup>180</sup> The *United Nations Chronicle* reported that the reason for the United States' vote against the UNCLOS<sup>181</sup> was the treaty's

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N.Y. Times July 26, 1984, at 1, 8, col. 1; Burke, *The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction*, 63 OR. L. REV. 73 (1984); Burke, *U.S. Fishery Management and the New Law of The Sea*, 76 AM. J. INT'L L. 24 (1982); Corroz, *Institutional Aspects of Fishery Management Under the New Regime of the Oceans*, 21 SAN DIEGO L. REV. 513 (1984).

177. Statement on United States Ocean Policy, *supra* note 3, at 379.

178. See 1982 Convention on Law of the Sea, *supra* note 10, at 1293-1308 (text of UNCLOS Part XI).

179. Statement on U.S. Participation, *supra* note 1 at 92 (1982); see also van Dyke & Teichmann, *Transfer of Seabed Mining Technology: A Stumbling Block to U.S. Ratification of the Law of the Sea Convention?*, 13 OCEAN DEV. & INT'L L. 427 (1984); *A Few Good Words* [about America by a Canadian] (editorial), U.S. NEWS & WORLD REPORT, June 11, 1984, at 96. For comments concerning technology transfers and their relations to national security, see Wallis, *Review of East-West Economic Relations*, U.S. Dept. of State Bureau of Public Affairs Current Policy No. 567 (Mar. 29, 1984); Schneider, *East-West Relations and Technology Transfer*, U.S. Department of State Bureau of Public Affairs Current Policy No. 568 (March 29, 1984).

180. See *supra* note 2, at 2.

181. The Convention on the Law of the Sea (UNCLOS) was adopted by the United Nations Conference on the Law of the Sea at Montego Bay, Jamaica on April 30, 1982. One hundred-seventeen States and two entities (Botswana and the Council for Namibia) became signatories. Four voted against and seventeen abstained. Those voting against the treaty were Israel, Turkey, the United States, and Venezuela. Those abstaining were Belgium, Bulgaria, Byelorussian SSR, Czechoslovakia, German Democratic Republic, the Federal Republic of Germany, Hungary, Italy, Luxembourg, Mongolia, the Netherlands, Poland, Spain, Thailand, the Ukrainian SSR, the USSR, and the United Kingdom. States participating were Albania, Ecuador, the Holy Sec, and Liberia. The Convention requires sixty ratifications (or accessions) to enter into force. 1982 Convention on Law of the Sea, *supra* note 10, at 1327.

failure to provide, *inter alia*, assured access to seabed minerals, the lack of a proportionate voice in decisionmaking for countries most affected, the provision for amending the convention, the creation of precedents that were "inappropriate," and the barrier that the Convention would set up in the development of seabed resources by play of basic economic forces in the market place.<sup>182</sup> The Administration's objections to UNCLOS Article XI are not unlike those of Arvid Pardo, the Maltese Ambassador to the United Nations. Pardo, who in his now famous 1967 "Common Heritage of Mankind" memorandum,<sup>183</sup> sparked the drive for the creation of a United Nations deep seabed authority. In 1983 Pardo wrote,

Finally, the fact that the Authority is based on the erroneous assumption that it would have a virtual monopoly of exploitable manganese nodule deposits has had highly unfortunate consequences. Thus it was considered unnecessary to pay much attention to the efficiency of mineral resource exploitation in the international seabed area. Only this, and perhaps hopes of more or less permanent subsidies by developed countries, can explain general acceptance of the enormously inefficient "parallel system" and the unimaginative way in which the structure of the future Authority and the related Enterprise have been conceived.<sup>184</sup>

#### b. Answering the Critics

Critics of the Administration's Law of the Sea policy argue that the 1982 Convention is a comprehensive, contractual treaty arrived at by con-

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182. *Sea Law*, U.N. CHRON., June 1982, at 16.

183. U.N. Doc. A/6695 (1967); see also Adede, *The System for Exploitation of the "Common Heritage of Mankind" at the Caracas Conference*, 69 AM. J. INT'L L. 31 (1975).

184. Pardo, *The Convention on the Law of the Sea: A Preliminary Appraisal*, 20 SAN DIEGO L. REV. 489, 499-500 (1983). Pardo added: "Among other things, provision is made for heavy bureaucratic superstructures—the initial annual costs of which are estimated to range from \$145 to \$280 million, to which should be added \$350 to \$700 million in loans required to permit the future Enterprise to begin operations. U.N. Doc. A/CONF. 62/L.65 (1982). *Id.* at 500 n.46. For pre-Third U.N. LOS Conference views, see Haimbaugh, *Technological Disparity and the United Nations Sea-Bed Debates*, 6 IND. L. REV. 690, 695-96 (1973) (some developed states believe [that the projected seabed machinery] could only lead to topheavy bureaucracy—a floating Chinese pagoda as one critic put it.); see Ely, *United States Sea Bed Minerals Policy*, 4 NAT. RESOURCES LAW, 597 (1971). For a more optimistic view, see Zuleta, *The Law of the Sea After Montego Bay*, 20 SAN DIEGO L. REV. 475 (1983). Zuleta, who was Special Representative of the UN Secretary-General to the Third U.N. Law of the Sea Conference, hopes "that the work of the [LOS] Preparatory commission will enable those States that still have misgivings regarding the new legal regime to reexamine their position, not by applying to every treaty provision the worst-case analysis method, but by accepting that other nations can discharge their obligations in good faith. . . ." *Id.* at 487-88. Compare this view with remarks of Sir John Hoskyns, director general of the Institute of Directors, who, while addressing the German Chamber of Industry & Commerce on March 2, 1989, expressed his fears that the Single European Market scheduled to come into effect in 1992 may produce a "collectivized, protectionist, over-regulated Utopia." *The Times* (of London), Mar. 3, 1989, at 25, col. 3.

sensus that is to be considered as a package not allowing reservations, and therefore states are not entitled to pick and choose among the Convention's provisions.<sup>185</sup> James Malone, Special Representative of the President for Law of the Sea, answers that, apart from the seabed mining text of part XI, UNCLOS is the product of a "successful effort to articulate and codify existing rules of maritime law and actual States practice with respect to traditional uses of the oceans such as navigation and overflight."<sup>186</sup> Malone and others support this claim with several arguments.

### (1) Nonparties

Navigation rights, as seen from the very wording of the UNCLOS, were frequently drawn from the 1958 Geneva Conventions on the Law of the Sea, which embodied customary law as it had developed to that time. Thomas Clingen, a Vice Chairman of the U.S. Law of the Sea Delegation, notes that the 1958 Geneva Conventions, "while not signed by many states participating in the [First] Law of the Sea Conference, were recognized as valuable, and they were uniformly applied by all signatories to all states, signatory or not."<sup>187</sup> Rear Admiral Harlow, who also served as Vice Chairman of the U.S. delegation to the Third United Nations Conference on the Law of the Sea, points out that in contrast to the contractually oriented language such as "states parties" used in the deep seabed mining provisions of the Convention, the navigation and overflight provisions refer to "states" in general and "all ships and aircraft." The navigation and overflight provisions thus extend rights to third parties, assuming that the third parties assent to the rights extended and agree to comply with the conditions for their exercise as has been done in the President's proclamation of March 10, 1983.<sup>188</sup> This third party beneficiary approach, Harlow explains, is consistent with Article 36 of the Vienna Convention on the Law of Treaties. A right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assent shall be presumed so long as the

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185. Clingen, *supra* note 24, at 120. Koh, *The Third United Nations Conference on the Law of the Sea: What was Accomplished?*, 46 LAW & CONTEMP. PROBS. 6, 8-9 (Spring 1983); Bailey, *The Future of the Exploitation of the Resources of the Deep Seabed and Subsoil*, 46 LAW & CONTEMP. PROBS. 71, 76 (Spring 1983).

186. Malone, *Freedom and Opportunity: the Foundation for a Dynamic National Oceans Policy 8*, Address to the Eighteenth annual conference on the Law of the Sea, Sponsored by the Law of the Sea Institute and the University of San Francisco, San Francisco, California (Sept. 24, 1984).

187. Clingen, *supra* note 24, at 123. In the case of *Free Zones of Upper Savoy and the District of Gex*, the Permanent Court of International Justice stated that "no accession by Switzerland to the Declaration of November 20th was necessary and, in fact, no such accession was sought: it has never been contended that this Declaration is not binding owing to the absences of any accession by Switzerland." P.C.I.J., Ser. A/B No. 46, at 96, 147 (1932); 2 HUDSON, WORLD COURT REPORTS 508, 547 (1935).

188. Harlow, *supra* note 23, at 128-29.

contrary is not indicated, unless the treaty otherwise provides. A state exercising a right in accordance with paragraph one shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.<sup>189</sup> The Vienna Convention is an example of a convention that the United States follows without ratification because the Convention is considered to be a part of the law of nations.

## (2) Custom

Ambassador Malone believes that navigational rights of nonparties to the UNCLOS currently exist as customary international law as a result of state practice and therefore could not be extinguished in the future by the coming into force of that Convention.<sup>190</sup> This argument finds support in the conclusions of the International Court of Justice in the North Sea Continental Shelf cases<sup>191</sup> and the Tunisia-Libya Continental Shelf case. In the Tunisia-Libya Continental Shelf case, the Court stated that the concept of the exclusive economic zone may be regarded as part of modern international law.<sup>192</sup> Judge Oda came to a similar conclusion in his dissenting opinion:

In this connection, certain provisions . . . which have been inherited from the provisions of the 1958 Conventions on the Law of the Sea, may of course be regarded as already representing customary international law. In addition, what has been formulated with almost worldwide cooperation throughout the decade may contribute to the development of customary international law, quite apart from the entry into force of the draft as treaty law.<sup>193</sup>

Support for this view is also found in the introductory note to the American Law Institute's tentative draft of the RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES:

Many of the provisions of the Draft Convention repeat, with minor modifications, provisions in the 1958 Conventions which the United States had ratified and which very largely restated customary law accepted by states generally. Also, most of the provisions of the Draft convention that deviate from, or add to, the 1958 Conventions

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189. Vienna convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/Conf. 39/27, art. 36, *reprinted in* 63 AM. J. INT'L. L. 875, 886 (1969), and 8 INT'L L. MATS. 679, 693 (1969).

190. Malone, *The United States and the Law of the Sea after UNCLOS III*, 46 LAW & CONTEMP. PROBS. 29, 33-34 (Spring 1983); Malone, *supra* note 186, at 8.

191. North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.F. 3 (Judgment of Feb. 20); North Sea Continental Shelf (Den. v. W. Ger.), 1968 I.C.J. 3 (Order of Mar. 1), North Sea continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20).

192. Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18, 74 (Judgment of Feb. 24).

193. *Id.* at 170 (Oda, J., dissenting).



were accepted at the Conference, after hard negotiations, by consensus, and many of these provisions have influenced and reflect the practice of states. The United States and other states generally regard the provisions of the Draft Conventions, with the exception of Part XI relating to seabed mining, as authoritative statements of existing international law.<sup>194</sup>

### (3) Procedure

Ambassador Malone recalls that "the 'package deal' concept was . . . nothing more than a UNCLOS procedural device, based on a December 1973 'Gentleman's Agreement' and designed to further the achievement of consensus [and] as such, the concept died upon conclusion of the UNCLOS negotiations."<sup>195</sup> Substantive packages existed, however, aside from the overall procedural consensus arrangement. Harlow states, "It is indicative of the settled nature of the navigation and overflight principles reflected in the treaty that the Committee II package has remained basically unchanged since the mid-seventies, while other portions of the negotiating text seesawed until the eleventh hour."<sup>196</sup> This package, the arrangement of which is at the heart of President Reagan's March 10, 1983 Proclamation, recognizes coastal state resources jurisdiction in the Zone and on the shelf in return for the continued acknowledgment of the right of all states to enjoy navigation, overflight, and other high seas freedoms. Clingen explains that the factors that led to the creation of this "global package deal" were prime motivating forces leading to the convening of the Third United Nations Law of the Sea Conference in 1973.<sup>197</sup>

The Reagan Administration's free market philosophy is expressed and applied with regard not only to deep seabed mining, but also to many other activities at home and abroad. By way of example, the President and members of his administration have championed the free market over third world and Group of 77<sup>198</sup> versions of the so-called "New International Economic Order" (NIEO).<sup>199</sup> The U.S. has argued its case at the United

194. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, introductory note to pt. V, at 55 (Tent. Draft No. 3, 1982).

195. Malone, *supra* note 186, at 8.

196. Harlow, *supra* note 23, at 129.

197. Clingen, *supra* note 24, at 108-09; *see also* Lay, *An Analysis of the Deep Seabed Mining Provisions on the Law of the Sea Convention*, 10 U. DAYTON L. REV. 319-37 (1985).

198. The Group of 77, an alignment that considers itself nonaligned, was organized in the early 1960s as an organ for expressing and promoting the economic interests of the Third World. The Group of 77 now has more than 120 members. *See generally* O. JANKOWITSCHE & K. SAUVANT, 77: THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES (1978) (containing material gathered between 1963 and 1980); K. SAUVANT, THE GROUP OF 77: EVOLUTION, STRUCTURE, ORGANIZATION (1980).

199. *See generally* F. GARCIA-AMADOR, THE CHANGING LAW OF INTERNATIONAL CLAIMS, (1984); Declaration on the Establishment of a New International Economic Order, May 1974, U.N.G.A. Res. 3201 (S-VI), 13 INT'L LEGAL MATERIALS 715 (1974); Program of Action on the

Nations General Assembly,<sup>200</sup> the International Monetary Fund, (IMF),<sup>201</sup> the International Bank for Reconstruction and Development (World Bank),<sup>202</sup> the United Nations Education, Scientific and Cultural Organization (UNESCO),<sup>203</sup> the World Health Organization (WHO),<sup>204</sup> the International

Establishment of a New International Economic Order, May 1, 1974. U.N.G.A. Res. 3202 (S-VI), 13 INT'L LEGAL MATERIALS 720 (1974); U.N.G.A. Declaration on the new International Economic Order (NIEO), G.A. Res. 3201, Sixth Special Sess. U.N. GAOR Supp. 1, at 3, U.N. Doc. A/9559 (1974); Charter of Economic rights and duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. 31, at 50, U.N. Doc. A/9631 (1974); *see also* Fatournos, *The International Law of the New International Economic Order: Problems and Challenges for the United States*, 17 WILLAMETTE L. REV. 93 (1980); Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 3-6 (1976). With regard to U.N. General Assembly resolutions, declarations and charters concerning development, Schachter has written:

They are, by and large, challenges to the existing order and their leading motif is the demand for a wider distribution of wealth. Moreover, their adoption by large majorities through parliamentary and conference voting procedures is seen as an attempt to impose obligatory norms on dissenting minorities and to change radically the way in which international law is created.

200. *Id.* at 4. *See Transcript of Reagan's Address to the U.N. General Assembly*, N.Y. Times, Sept. 25, 1984, at A1D, col. 1. President Reagan said, "There's an increasing realization that economic freedom is a prelude to economic progress and growth and is intricately and inseparably linked to political freedom." *Id.* at A10, col. 2.

201. *See Text of President's Remarks to I.M.F. and World Bank*, N.Y. Times, Sept. 26, 1984, at DS, col. 1. President Reagan said, "while we would not impose our ideas or our policies on anyone else, we felt obliged to point out that no nation can have prosperity and successful development without economic freedom. Nor can it preserve personal and political freedoms without economic freedom. *Id.*; 13 IMF Surv. 305, 305-07 (1984). In an address to the 1981 annual meeting of the Bank and Fund (IBRD and IMF), President Reagan said that the nations which have made the most progress are those that "believe in the magic of the marketplace." United Press International Dispatch, September 30, 1981.

202. *Id.*

203. The President's decision to withdraw the United States from UNESCO was explained by Assistant Secretary for International Organization Affairs Gregory Newell at Stanford University. The reasons include:

Extraneous politicization of virtually every subject dealt with: education, natural and social science, culture, communications, human rights, disarmament. UNESCO programs and personnel are heavily freighted with an irresponsible political content and answer to an agenda that is consistently inimical to U.S. interests. The approach that UNESCO consistently takes to "disarmament" reflects either a specific pro-Soviet bias or, at best, adheres to the naive and simplistic New Delhi declaration. Human rights programs and resolutions in UNESCO are almost invariably infected with Soviet and statist concepts of alleged "collective rights," in denigration of individual rights and freedoms recognized in the Universal Declaration of Human Rights. . . .

An endemic hostility toward the basic institutions of a free society, especially a free market and a free press, coupled with the promotion of statist theories of development. Various UN agencies seek to give life to their vision of a "new international economic order"—compulsively statist and necessarily ineffectual.

Patent Conference,<sup>205</sup> and the International Conference on Population.<sup>206</sup>

Assistant Secretary of State for Economic and Business Affairs Robert Hormats has summed up the Reagan Administration's approach to international economic negotiations as follows:

We are persuaded that the more effective integration of the various considerations which affect economic policy is essential to our well-being, both economically and politically. Energy security, vigorous exports and open and fair trade, a world investment climate which encourages the development of productive enterprises, smoothly functioning financial markets, and the sound economic expansion of the developing countries—these are the key requirements for an improved U.S. and world economy. They also are essential contri-

UNESCO functionaries soon undertook their own quest—to create the “new world information and communication order.”

Address by Gregory J. Newell, *Perspectives on the U.S. Withdrawal From UNESCO*, U.S. Department of State Bureau of Public Affairs CURRENT POLICY No. 634, at 2 (Oct. 31, 1984) (emphasis omitted); see also *Mind Control*, Wall St. J., Nov. 29, 1983, at 32, col. 1. On November 22, 1984 the United Kingdom followed the lead of the Reagan Administration and announced its intention to leave UNESCO at the end of 1985. *British Decision Is Said to Cloud UNESCO's Future Hopes*, N.Y. Times, Nov. 24, 1984, at A1, col. 5.

204. Assistant Secretary of State Elliott Abrams explained the Government's decision to vote “no” on the World Health Organization's marketing code for infant formula. Abrams said, “The United States will continue to promote breast feeding, but we cannot support a detailed and inflexible code, global in scope and rigid in structure, that our laws and our traditions would never permit us to implement at home.” N.Y. Times, May 24, 1981, at E18, col. 4.

205. Michael Kirk, head of the international division at the United States Office of Patents and Trademarks, explained the Reagan Administration's opposition, with backing from American, European, and Japanese industry, to changes in the 1883 Paris Patent Convention backed by the Third World and some western states. The changes would give states the right to take over manufacture on an exclusive basis any patent invention if the original patent holder does not produce it in their country within 30 months of receiving a patent. Kirk said, “It's tantamount to expropriation [of private property], and it's bad for the developmental process.”

206. See N.Y. Times, Aug. 15, 1984, at A8, col. 3. The Times story reported, “An amendment proposed by the United States calling for improving economies by ‘fostering the conditions where the human entrepreneurial and commercial spirit can flourish’ was defeated by the [Population] Conference.” *Id.* at A8, col. 4. “It did agree, however, to urge governments to ‘examine which economic approaches most effectively advance development.’” *Id.* at A8, col. 4-5; see also *Text of Declaration by International Population Conference in Mexico City*, N.Y. Times, Aug. 16, 1984, at A10, col. 1. James L. Buckley, former chief of the U.S. delegation to the Mexico City Population Conference and current president of Radio Free Europe/Radio Liberty wrote:

In private meetings with other Western delegations we hammered away at the point that unless a stop were put to the practice of converting every international conference into an ideological battlefield, the United Nations would soon lose any utility as a forum for the discussion and settlement of problems that clearly lay outside the realm of politics.

Buckley, *All Alone at the UN*, NAT'L REV., December 14, 1984, at 25, 26.

butions to world peace and fruitful political relations among countries.<sup>207</sup>

### III. OTHER CONSIDERATIONS

#### A. Protection of the Marine Environment

Because the customary international law principle of "neighborlines," or *sic utere tuo ut alienam non laedas*, is based on local state-to-state practice, doubts exist as to its availability for application on global or even a regional basis.<sup>208</sup> For this reason, when President Reagan issued his 1983 EEZ Proclamation asserting United States jurisdiction "with regard to . . . the protection and preservation of the marine environment," he issued a statement the same day adding that "[i]n this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping."<sup>209</sup> Besides the International Maritime Organization (IMO), the United States has continued to work for the protection of the environment with other international and regional organizations, including the United Nations Environmental Programme (UNEP), the U.N. Food and Agriculture Organization (FAO), the Intergovernmental Oceanic Commission (IOC), the Organization of Economic Cooperation and Development (OECD) and the nongovernmental Union for the Conservation of Nature and Natural Resources (IUCN).

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207. Address by Robert D. Hormats, Assistant Secretary for Economic and Business Affairs, *International Economic Policy Priorities*, U.S. Department of State, Bureau of Public Affairs CURRENT POLICY No. 278, p. 4 (May 19, 1981).

208. See Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 50 (1975). Handl's article has been called the *locus classicus* of international law in the area of transnational pollution. Of special interest is Handl's reference to the *Lake Lanoux* arbitration between France and Spain. *Id.* at 63. See also Handl's discussion of the *Trail Smelter* arbitration between the United States and Canada. *Id.* at 60-64. The *Trail Smelter* Tribunal stated that "under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another. . . ." 3 R. INT'L ARB. AWARDS 1911, 1965 (1941). Relevant domestic cases include *Georgia v. Tennessee Copper Co.*, 237 U.S. 230 (1907) (air pollution) and *Rylands v. Fletcher*, 1868, L.R. 3 H.L. 330, 37 L.J. Ex. 161, 19 L.T. 220, in the House of Lords (water pollution). See Andrassy, *Les Relations internationales de voisinage*, Hague Academy of International Law, 79 *Recueil des cours* 77 (1951-II). See also the contributions of Handl, Jajost (of the U.S. Environmental Protection Agency), and Gundling (of the Max-Planck-Institute of Public International Law, Heidelberg), to the panel of International Law and the Protection of the Atmosphere, which was held in Chicago on April 5, 1989, to be published in the forthcoming issue of the *Proceedings of the 83rd Annual Meeting* of the American Society of International Law.

209. Statement on United States Ocean Policy, *supra* note 3, at 379.

In 1982 the United States moved beyond its environmental obligations under the 1958 Convention on the High Seas<sup>210</sup> and the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter<sup>211</sup> when President Reagan signed into law a bill amending section 104 of the Marine Protection Research and Sanctuaries Act of 1972.<sup>212</sup> This amendment imposed a two year moratorium on the granting of any permits for ocean dumping of radioactive waste, except for certain "research" purposes.<sup>213</sup> The amendment also required that applicants prepare a Radioactive Material Disposal Impact Assessment before applying for a postmoratorium permit<sup>214</sup> and required that both Houses of Congress approve within ninety legislative days the EPA's grant of a postmoratorium permit.<sup>215</sup>

Understanding that waste which is not dumped in the oceans must be placed somewhere, President Reagan signed the 1982 Nuclear Waste Policy Act,<sup>216</sup> providing a specific plan and timetable for finding deep underground geological formations that have been stable for millions of years for the disposal of spent fuel from nuclear power plants. The independent United States Nuclear Regulatory Commission gave its unanimous approval in June 1984 of the Department of Energy's guidelines for selecting the nation's first permanent waste disposal site pursuant to the 1982 Nuclear Waste Policy Act. Since 1984 the U.S. Department of Energy has spent \$700 million to develop an underground nuclear waste depot designated as the Waste Insolation Pilot Plant or WIPP. This plant, which is carved from salt deposits 2,000 feet below ground near Carlsbad, N.M., is expected to receive waste in the fall of 1989. The Energy Department also plans to

210. Article 25:

(1) Every State Shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations.

(2) All states shall cooperate with the competent international organizations in taking measures for the prevention of pollution of the seas or airspace above with radioactive materials or other harmful agents.

Convention on the High Seas, *supra* note 8, at 2319, T.I.A.S. No 5200 at \_\_\_\_\_, 450 U.N.T.S. at 96.

211. December 29, 1972, entered into force for the United States August 30, 1975, 26 U.S.T. 2303, T.I.A.S. No. 8165 [hereinafter cited as London Dumping Convention]. The convention requires contracting parties to promote measures to protect the marine environment against pollution by specified causes and requires them to cooperate in developing procedures for the assessment of liability and the settlement of disputes regarding dumping. *Id.* at \_\_\_\_\_, T.I.A.S. No. 8516 at 2409-10 (Articles VII and XIV).

212. 33 U.S.C. § 1414 (1982). The amendment is in the form of a rider to the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 424, 96 Stat. 2097, 2165-67 (1983).

213. 33 U.S.C. § 1414(h) (1982).

214. *Id.* at § 1414(j)(1).

215. *Id.* at § 1414(i)(4).

216. 42 U.S.C. § 10101 (1982).

build another nuclear waste site deep within Nevada's Yucca Mountain Range.<sup>217</sup> Following the 1982 U.S. legislative initiative, the states party to the London Dumping Convention passed a two year anti-ocean dumping resolution at their Seventh Consultative meeting held in March 1983, with the cooperation of the IMO.<sup>218</sup>

In April and May of 1984 the U.S. participated in a diplomatic conference convened by the IMO. The Conference adopted Protocols to the 1969 Convention of Civil Liability for Oil Pollution Damage (CLC) and to the 1971 Convention on the Establishment of an International Fund for Compensating Oil Pollution Damage (the Fund Convention). The Protocols expand significantly the scope and effect of the international system of compensation for oil pollution.<sup>219</sup>

On March 24, 1983, at a plenipotentiary conference at Cartagena, Colombia, organized by the United Nations Environmental Programme (UNEP), the United States was one of fourteen signatories to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region<sup>220</sup> and a related IMO drafted Protocol Concerning Cooperation in Combating Oil Spills in the Wider Caribbean Region.<sup>221</sup> The Cartagena Convention binds ratifying states to "prevent, reduce and combat pollution . . . and to ensure environmental management." According to Mostafa K. Tolba, Executive Director of the UNEP, Caribbean environmental problems include oil pollution, the impact of mass tourism, the destruction of coral reefs and seagrass beds, and the problems of fragile island ecosystems with limited resources and large populations.<sup>222</sup>

Also related to pollution problems in the Caribbean, and in the Pacific, is the Mexican-American Agreement to Cooperate in the Solution of En-

217. See *U.S. Program for Nuclear Waste Disposal Takes Major Step Forward*, Wall St. J., July 27, 1984, at 3, col. 5. This information is published in a notice sponsored by the U.S. Committee for Energy Awareness, P. O. Box 37012, Washington, D.C. 20013 and *USA Today*, Mar. 21, 1989, p. 5A.

218. Report of the Seventh Consultative Meeting, IMO, LDC 7/12, ¶¶ 67-69 (March 9, 1983); see also Haimbaugh, *Protecting the Seas from Nuclear Pollution*, 33 S.C.L. REV. 197, 197-214, 216-25 (1981).

219. See Forster, *The 1984 Protocols to the Oil Pollution Compensation Conventions*, 13 ENVTL. POL'Y & L. 42 (1984). For text of amendments, see 13 ENVTL. POL'Y & L. 61-68 (1984). For a survey of pre-Reagan administration initiatives related to oil pollution, see Haimbaugh, *Sources of Initiatives Designed to Prevent Pollution by Tankers*, in CONFERENCE ON OIL TANKER TRANSPORTATION: AN INTER-DISCIPLINARY ANALYSIS OF NATIONAL AND INTERNATIONAL POLICY AND PRACTICE 123-27 (1979). Published by the U.S. Department of Transportation, the Belle W. Baruch Institute for Marine Biology & Coastal Research, and the University of South Carolina.

220. 22 INT'L LEGAL MATERIALS 221-40 (1983). The Convention was signed by Columbia, France, Grenada, Honduras, Jamaica, Mexico, Netherlands, Antilles, Nicaragua, Panama, Saint Lucia, United Kingdom, United States, Venezuela, and the European Economic Community.

221. 22 INT'L LEGAL MATERIALS 240-45 (1983).

222. *Caribbean Environmental Protection Accord Signed*, U.N. CHRONICLE 77-78 (June 1983); see also Barros, *Marine Pollution [by Oil and Other Harmful Substances]*, in J. BARROS & D. JOHNSTON, *THE INTERNATIONAL LAW OF POLLUTION* 200-62 (1974).

vironmental Problems in Border Areas, signed by President Reagan and the President of Mexico at La Paz, Baha, California on August 14, 1983. Border areas are defined as "the area situated 100 kilometers on either side of the inland and maritime boundaries between the Parties." Pursuant to this agreement officials of the Environmental Protection Agency are conducting bilateral negotiations with Mexico and have reported that "good progress is being made in developing plans to prevent untreated Mexican sewage from polluting California beaches."<sup>223</sup>

The section of this article devoted to "Living [Marine] Resources," pages 37-38, describes examples of the Reagan Administration's cooperation with International Whaling Commission conservation efforts.

On February 1, 1984, the Council of the Organization for Economic Cooperation and Development (OECD), of which the United States is a member, adopted a Decision and Recommendation on Transfrontier Movements of Hazardous Wastes.<sup>224</sup> The Council decided that member countries shall control the transfrontier movements of hazardous waste. The Decision defines hazardous waste to include any waste other than radioactive waste.<sup>225</sup> Agreements concerning radioactive waste drafted by the OECD or the OECD and the IAEA were already in existence.<sup>226</sup>

In 1976 the Food and Drug Administration and the Environmental Protection Agency announced the decision to ban chlorofluorocarbon molecules in nonessential aerosol uses beginning in 1978. The 1985 announcement of the Antarctic ozone hole provoked calls for strict regulation of other CFC uses. The ozone in the stratosphere that extends from twelve to fifty-five kilometers above sea level is diminished greatly by industrial CFCs, especially over the Antarctic areas. The diminished ozone permits increased ultraviolet light from the sun to reach the earth, causing increased skin cancer and weakened immune systems among humans and harm to the one-celled plants especially common in the Antarctic Ocean.

Fear of a continued reduction in the world's supply of phytoplankton, which forms the base of all aquatic food chains that sustain life on earth, led to the convening in Vienna of the Conference of Plenipotentiaries on

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223. For the text of the U.S.-Mexican Border Protection Agreement, see 22 INT'L LEGAL MATERIALS 1025-32 (1983). The current negotiations with Mexico are reported on in Pasztor, *U.S. Reversing Position, Seeks Big Role in International Effort Against Pollution*, Wall St. J., Sept. 5, 1984, at 35, col. 3.

224. See 12 ENVTL. POL'Y & L. 55-56 (1984); 23 INT'L LEGAL MATERIALS 214 (1984).

225. *Id.*

226. The OECD and the International Atomic Energy Agency (IAEA) cooperatively drafted the Convention Relating to Liability in the Field of Maritime Carriage of Nuclear Material (Carriage Convention). See 11 INT'L LEGAL MATERIALS 277 (1972). The 1960 Paris convention on Third Party Liability in the Field of Nuclear Energy, a regional agreement presaging the Carriage Convention, was drafted by the European Nuclear Energy Agency of the OECD. This agency is charged in the preamble to the Paris Convention with "encouraging the elaboration and harmonization of legislation relative to nuclear energy" in the OECD countries. For the text of the Paris Convention, see J. BARROS & D. JOHNSTON, INTERNATIONAL LAW OF POLLUTION 422-31 (1974).

the Protection of the Ozone Layer in 1987. In the Spring of 1987, following the Vienna Conference, the major producers of CFCs, the U.S., the countries of the EEC, Japan, the Soviet Union and Canada attended drafting sessions in Vienna and Geneva. In September 1987 the United Nations Environmental Programme sponsored a conference in Montreal where the United States and thirty-six other nations signed the "Montreal Protocol." The Montreal Protocol caps CFC production at 1986 levels by 1989 and at approximately fifty percent of that level by 1999.<sup>227</sup>

In the fall of 1988, the United States made a major contribution to improving the monitoring of ozone loss when the National Oceanic and Atmospheric Administration (NOAA) launched the \$54.5 million spacecraft, NOAA-11, into a polar orbit some 540 miles above the Earth's surface. Although primarily a weather satellite, the NOAA-11 carries other sensors, one of which measures ozone levels around the world and is more sensitive than similar devices already in orbit.<sup>228</sup> During the 1988 presidential campaign, then Vice-President George Bush pledged that "the United States will implement the Montreal Protocol to reduce global CFC use by fifty percent" and that he would "encourage American industry to develop safe and effective alternatives with the goal of phasing out all domestic production of CFCs."<sup>229</sup>

Nitrogen oxides also contribute to ozone loss. Nitrogen oxides are produced in great quantities from the burning of fossil fuels in motor vehicles and industrial plants. Along with CFCs, nitrogen oxides, as greenhouse gases, contribute to global warming and play a role in the formation of acid rain and urban smog. On November 1, 1988, in Sofia, Bulgaria, the United States and twenty-four other industrialized nations signed a protocol to the Transboundary Air Pollution Agreement of 1981 that was sponsored by the United Nations Economic Commission for Europe (both

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227. See Eberlee, *Ozone Layer and Warming CFCs*, INT'L PERSP. 23-25 (July-Aug. 1987); Rowland, *Can We Close the Ozone Hole?*, 90 TECH. REV. 51-58 (Aug.-Sept. 1987); Sagan, *A Piece of the Sky is Missing*, PARADE MAGAZINE 10-15 (Sep. 11, 1988). In February 1989 a conference on global warming that was held in New Delhi, India called on developing countries to "improve existing energy efficiency, pioneer renewable energy use such as solar energy, improve forest growth, stop deforestation and curb the population explosion." The conference was dominated by representatives of third world countries, most of which were not members of the Montreal Convention of 1987, but American and British experts also attended the conference, N.Y. Times, Feb. 26, 1989, at 6.

228. Broad, *Satellite to Improve Monitoring of Ozone Loss*, N. Y. Times, Oct. 25, 1988, at C4, col. 1.

229. *Elections '88 Forum: Environmental Platform of Vice President George Bush*, S.C. ENVTL. REP. (1988). Addressing the National Academy of Sciences on March 3, 1989, President Bush endorsed a March 2d proposal by the 12 members of the European Community for the elimination, by the year 2000, of chlorofluorocarbons used in refrigerants, solvents, foams, and many other applications. *Bush Backs Halt in Use of Pollutants in Ozone*, N.Y. Times, Mar. 4, 1989, at 9, col. 1. For coverage of the European Community proposal, see London Times, Mar. 3, 1989, at 1. The U.S. and the E.C. account of 75% of worldwide CFC production. See Cousteau, *Ozone Concerns Filter Down Beneath the Sea's Surface*, Miami Herald, Mar. 26, 1989, at 3C.



East and West) with the participation of the U.S., Canada, and the Soviet Union. The 1988 Protocol contains an agreement to freeze the rate of emission of nitrogen oxides at levels no higher than those prevailing in 1987. Former Administrator of the Environmental Protection Agency Lee M. Thomas, who signed the Protocol for the United States, pointed out that the U.S. already is reducing nitrogen oxides pollution pursuant to the Clean Air Act of 1970, and that under that Act the U.S. was able to become a party to the Protocol without the consent of the U.S. Senate.<sup>230</sup>

Part XII of the Convention on the Law of the Sea,<sup>231</sup> dealing with the protection of the Marine Environment, is suffused with suggestions for requirements that states act singly or cooperatively for the "conservation of the living resources of the sea," and "the protection and prevention, reduction and control of pollution" of the marine environment.<sup>232</sup> Commentators have interpreted UNCLOS Part XII as addressing global cooperation only in principle, as relying on the already established foundation of a viable legal regime created by the IMO and other international organizations, and as emphasizing the need for future symbiotic developments of a system of interlocking global treaties in such fora.<sup>233</sup> In an exchange during a symposium on the Law of the Sea at Duke Law School in the autumn of 1982, Arvid Pardo posed the following question:

I understood Ambassador Malone to state that existing international law provides adequate standards for the protection and preservation of the marine environment and hence that the provisions of the Convention in this respect were unnecessary. I would like to ask Ambassador Malone what international standards govern the dumping of radioactive waste, and what international standards govern oil discharges in the marine environment, such as the recent IXTOC disaster, which are due to seabed exploitation activities within national jurisdiction.<sup>234</sup>

Malone answered by naming the London Dumping Convention and referred to the standards and norms applicable to the environmental and marine

230. Shabecoff, *U.S. Agrees to Limit Emissions of Pollutant Linked to Acid Rain*, N.Y. Times, Nov. 2, 1988, at A24, col. 4.

231. 1982 Convention on Law of the Sea, *supra* note 10, at 1308-16 (Articles 192-237).

232. *Id.* (Arts. 194, 216, 237); *see also* Haimbaugh, *supra* note 182, at 207-10.

233. *See* Curtis, *The United States and the Law of the Sea—Marine Environmental Concerns*, 63 OR. L. REV. 139, 142, 146 (1984); Schneider, *Codification and Progressive Development of International Environmental Law at the Third United Nations Conference on the Law of the Sea: The Environmental Aspects of the Treaty Review*, 20 COLUM. J. TRANSNAT'L L. 243, 244, 273 (1981).

234. *Audience Response*, 46 LAW & CONTEMP. PROBS. 61 (1983). For contemporary coverage of the IXTOC oil spill, *see The Great Gulf Oil Spill*, NEWSWEEK, Sept. 10, 1979, at 26-27, with its oblique reference to the Trail Smelter case [(U.S. v. Canada) 3 U.N. Rep. Int. Arb. Awards 1911 (1941)]. The IXTOC oil spill was also discussed in NBC legal correspondent Carl Stern's interviews with U.S. Attorney General Civiletti and with University of South Carolina Law School Professor Haimbaugh, excerpts of which were broadcast on the NBC Sunday Evening News, August 12 and on the Today Show, August 13, 1979.

pollution areas that had been developed by the IMO, regional organizations, and port-state jurisdictions. Enforcement aspects of this problem, he added, can be achieved through the IMO.<sup>235</sup> Efforts of the Reagan Administration to tighten regulatory machinery governing the areas of radioactive waste and oil spills singled out by Pardo are described above in this Article.

### B. Maritime Boundaries

In his EEZ Proclamation, President Reagan said that the boundary of the Exclusive Economic Zone shall be determined by the United States and other States concerned in accordance with equitable principles. During the Reagan Administration, boundary disputes with New Zealand,<sup>236</sup> the Cook Islands,<sup>237</sup> and Canada<sup>238</sup> were settled amicably.

## IV. CONCLUSION

Hailing the important achievements of the United Nations Convention on the Law of the Sea, President Reagan expressed the view that those extensive parts of the resulting LOS Convention dealing with navigation and overflight, and most of the Convention's other provisions, are consistent with U.S. economic and security interests and that the provisions fairly balance the interests of all states. The heart of the President's March 10, 1983 Exclusive Economic Zone Proclamation was the recognition of coastal state jurisdiction over the exploration, exploitation, conservation and management of natural resources in the 200 mile Exclusive Economic Zone and on the Continental Shelf in return for continued acknowledgment of the right of all states to enjoy their traditional high seas freedoms of navigation, overflight, communication, and other internationally lawful uses of the sea. Though recognizing reasonable coastal state jurisdiction over marine scientific research with the EEZ, the President has elected not to assert that right on behalf of the United States, hoping thereby to encourage reciprocal hospitality in the practice of other states.

The President rejected, however, the part of the Convention concerning deep seabed mining that was sponsored by those developing states who constitute a majority of the members of the world community and who have been working in various international fora for the creation of a "New

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235. *Id.*

236. Treaty on the Delimitation of the Maritime Boundary Between Tokelau and the United States of America, United States-New Zealand, Dec. 2, 1980 (entered into force on September 3, 1983 and proclaimed by President on Oct. 31, 1983).

237. Treaty of Friendship and Delimitation of the Maritime Boundary between the United States of America and the Cook Islands, United States-Cook Islands, June 11, 1980 (entered into force on Sept. 8, 1983 and proclaimed by President on Oct. 31, 1983).

238. Bernstein, *World Court Settles Dispute on U.S.-Canada Boundary*, N.Y. Times, Oct. 13, 1984, at 3, col. 5. The issues of the case were stated in an Order of a Chamber of the International Court of Justice on January 20, 1982, General List No. 67, 21 INT'L. LEGAL MATERIALS 69-73 (1982). The procedure in the case was prescribed in an Order of February 1, 1982, General List No. 67, 21 INT'L. LEGAL MATERIALS 76-77 (1982).

World Economic Order.” This new “Order” is exemplified in the Convention by a production controlling, pricefixing, technology transferring, access determining, profligately structured, multimetallic nodule monopoly cartel that would allow Convention amendments to be binding on states that might not consent to the amendments.

The Reagan Administration followed announced goals by supporting the equitable and efficient management and conservation of marine resources and defending traditional ocean freedoms by the occasional use of force against encroachments. The Administration also followed these goals through the processes of unilateral claim and counterclaim, bilateral agreements, and multilateral accords negotiated if possible through appropriate and experienced international and regional organizations.