CHAPTER 1

THE ORIGIN OF U.S. RIGHTS AND RESPONSIBILITIES IN THE OCEANS

1. INTRODUCTION

The oceans represent the interface of United States national sovereignty and jurisdiction with international waters and waters of other nations. Although the U.S. federal government shares jurisdiction over the marginal seas with the adjacent coastal states, the scope of U.S. jurisdiction, rights and responsibilities in the oceans derives in many respects from international law. State boundaries extend from the land into the marginal seas, but as one moves seaward from the coastline, state and local government prerogatives quickly become subordinate to federal constitutional interests in commerce, navigation and foreign affairs. Because these seas are bounded by international waters and waters of other countries, international law also circumscribes the limits and scope of United States sovereignty and jurisdiction.

When Congress in 1966 created the Commission on Marine Science, Engineering, and Resources, also known as the Stratton Commission, to investigate and make recommendations on United States marine law and policy, the Commission's report focused more on issues related to coastal land uses and how use of the oceans might alleviate the pressures on our highly developed coastlines. In recent decades, however, the oceans have become the focus of greater attention as the intensive use of oceans has depleted resources, led to serious pollution of the seas, and created conflicts in ocean uses. The oceans are the site for new kinds of renewable energy production and genetic resources. The oceans also play an important role in climate and global warming. In short, the economic and environmental importance of oceans is becoming an issue that can no longer be given a low priority in development of a coastal nation's policies, management and regulation.

This chapter deals with rights and jurisdiction over the ocean and its resources from the perspective of the United States as a coastal nation in the international community.
CHAPTER 1

SECTION 2

2. EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA

A. A BRIEF HISTORY OF THE LAW OF THE SEA TO 1945

An historical perspective is necessary to understand the issues and problems of the modern law of the sea. For centuries before recorded history, the seas were freely used for navigation and trade before questions of access and control began to arise. The Age of Exploration and Discovery began in the fifteenth century and evolved as Europeans sought new trade routes and treasures. The era included expansive claims to the seas including Papal Bulls in 1493 and 1506 dividing most of the oceans between Portugal and Spain. England, too, extended the concept of closed seas to the “British Seas,” a right which was enounced in John Selden’s Mare Clausum (1635). The early 1600s also saw claims to the seas by Denmark, Genoa, Tuscany, Turkey, Venice and even the Papacy. Paradoxically, it was England that successfully challenged Spain’s expansive claim and established freedom of the seas for navigation, trade and fishing—the concept that prevailed by the late seventeenth century.

The beginning of the era of freedom of the seas is usually benchmarked by scholars to the publication in 1609 of Mare Liberum by Hugo Grotius, a young Dutch scholar who later came to be regarded as the “father of modern international law.” Mare Liberum was a justification for the rights of the Dutch and the East India Company to participate in ocean navigation and commerce. Arguing that the oceans were limitless and could not be possessed, occupied or enclosed, Grotius concluded that the seas must be free and open to navigation, which did not harm or exhaust the sea to anyone’s disadvantage. The ensuing debate among scholars, including Selden supra, provided unique insights into the state of the law of the sea at that time. Grotius’s view ultimately prevailed and was reinforced by state practice and was solidified by the power of the British navy in the next two centuries.

The only encroachment on the rule of freedom of the high seas during the next three centuries was recognition of a territorial sea—a narrow belt of water and submerged lands extending seaward from a country’s baselines. The development of this maritime zone was influenced by work, De Dominio Maris (1702), by Bynkershoek, who argued that coastal waters within the range of a cannon were subject to the sovereignty of the adjacent state. This “cannon-shot rule” provided an argument for effective control and a basis for the authority to make a claim to the marginal sea, but did not provide a basis for a specific distance for the width of the territorial sea. Later in the century, the Italian jurist Galani proposed three miles or one marine league as the breadth of the territorial sea to provide a continuous, uniform belt of coastal state sovereignty. By the early part of the nineteenth century, the notion of a three-mile territorial sea seemed to be “crystallizing” as customary practice. Although state practice was not completely uniform, by the beginning of the twentieth century, it seemed that a three-mile territorial sea was clearly the practice of a majority of coastal nations. In this zone, state sovereignty extended to the waters, the seabed, the living and non-living resources, as well as to the airspace over it. An important limitation on this sovereignty evolved, however, as the principle of the territorial sea developed—foreign ships retained a right of innocent passage through territorial waters. Passage that did not threaten the coastal state’s peace and security could not be impeded by the coastal state. The right of innocent passage did not extend, however, to the later-developing kinds of passage by aircraft and submerged passage of submarines.

The beginning of the twentieth century, however, was a period of developing dissatisfaction with the three-mile limit. Numerous states extended claims to six or twelve miles, over the objection of major maritime countries who sought to preserve the greatest extent of freedoms of the high seas. In fact, the question of the breadth of territorial waters was hotly debated in the Preparatory Commission leading to the Hague Codification Conference of 1930, which was unable to reach agreement on the issue in its draft articles on the breadth of the territorial sea.

By the end of World War II, the United States had become aware of the vast oil and gas resources that existed off its coasts and the strategic importance of controlling those resources. But the United States also had a compelling interest, as a naval superpower, to assure the continuance of the broadest definitions and scope of the freedoms of the sea. In September 1945, President Truman issued two proclamations: one addressing conservation of high seas fisheries, and the second claiming exclusive United States jurisdiction and control over the natural resources of the country’s adjacent continental shelf.

PROCLAMATION 2667 OF SEPTEMBER 28, 1945,
POLICY OF THE UNITED STATES WITH RESPECT TO THE NATURAL RESOURCES OF THE SUBSOIL AND SEA BED OF THE CONTINENTAL SHELF

WHEREAS the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and
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**POLICY OF THE UNITED STATES WITH RESPECT TO THE NATURAL RESOURCES OF THE SUBSOIL AND SEA BED OF THE CONTINENTAL SHELF**

*Executive Order 9522 of September 28, 1945 (The Truman Proclamation)*

**WHEREAS** the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and
WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and the with modern technological progress their utilization is already practicable or will become so at an early date and;

WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

NOW THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

QUESTIONS

1. The Truman Proclamation carefully excluded claims to any rights in water column over the continental shelf. Why?

2. What was the scope of the U.S. claim to the continental shelf—substantively and geographically?

3. While lacking any foundation in international law, the United States claim to the continental shelf was widely accepted. Why? For a history of the doctrine prior to the Truman proclamation, see Richard Young, Further Claims to Areas beneath the High Seas, 43 Amer. J. Int'l L. 790 (1949), cited

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in Arbitration Between Petroleum Development (Trucial Coast) Ltd. and Sheikh of Abu Dhabi, 47 Amer. J. Int'l L. 156 (1953) (legal doctrine of the continental shelf did not exist in 1939 when Abu Dhabi awarded exclusive oil drilling concession to British company).

4. President Truman’s “other” proclamation claimed the right to establish “explicitly bounded conservation zones” in certain areas of the high seas contiguous to the U.S. coasts where fisheries of a substantial scale have or may be established. It provided that if the fisheries were conducted by U.S. nationals, they would be subject to U.S. regulation and control. If the fisheries were jointly maintained by the U.S. and other countries, the zones and regulations would be established by agreement. An accompanying executive order, No. 9634 (Sept. 28, 1949), provided for the establishment of fishery conservation zones pursuant to the proclamation. Why didn’t the president declare a 200-mile fishery conservation zone of unilateral U.S. control and regulation?

B. UNCLOS I AND II: THE 1958 GENEVA CONVENTIONS

NOTE: THE MOVEMENT TOWARD CODIFICATION

In the second half of the twentieth century, nations were deeply divided by political and ideological issues in an era that also included the potential for nuclear warfare. The ability of submerged submarines to exercise freedom of navigation of the seas became the world’s primary nuclear deterrent during the Cold War. New technologies developed during World War II, like sonar and monofilament line, led to increased efficiency of fishing vessels, dramatic increases in catches, and expansion of distant water fishing fleets. The world’s reliance on petroleum also made control and development of newly discovered offshore oil fields a matter of crucial national state importance. Of equal importance was the transportation of that oil around the globe, and oil tankers became larger and larger to accommodate the world’s immense appetite for oil.

The world was also changing geopolitically. With the end of the colonial era, the number of independent nations exploded. These nations were mostly poor and less developed, without extensive navies or technology for development of large-scale fisheries. Freedom of the high seas was much less important to these newly independent countries than to the maritime powers. To these nations, protection of the resources just off their coasts from distant water fishing fleets and the protection of their shores from pollution by intensifying traffic and increasingly larger oil tankers were the paramount concerns. Marine scientific research, a luxury affordable by a relative few of the richest countries of the world, was often viewed with suspicion when carried out off their shores. With protection of coastal resources more important to these nations than high seas freedoms, it is not surprising that the trend for


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newly independent and other less developed coastal nations was to claim 12-mile territorial seas.

The Truman Proclamation on the continental shelf provided an analogy for some nations that did not have extensive continental shelves—and therefore, no offshore oil reserves to protect—to make claims to protect other resources in the adjacent seas. In 1947, Chile and Peru made claims of jurisdiction to 200 miles to protect fisheries and other resources. Peru’s claim has been characterized as a 200-mile territorial sea. In 1952, Ecuador extended its territorial sea to 200 miles. Unlike the virtually immediate and positive international response to the Truman Proclamation, however, the opposition to these claims was strong, especially from countries with navies and distant water fishing interests. In spite of this opposition, however, the number of Latin American and African countries making claims to 200-mile territorial seas or fishing zones gradually grew.

In the mid-1950s, the International Law Commission (ILC), a group of international law experts within the United Nations system charged with codifying and developing international law, took on the task of unifying the law of the sea. Four proposed law-making treaties developed by the ILC addressing the territorial sea, the continental shelf, the high seas, and high seas fisheries were presented to the First United Nations Conference on the Law of the Sea (UNCLOS I) at Geneva and were adopted in 1958 following a few weeks of negotiations. The treaties were not viewed as radically changing the status quo of international law at the time, although the recognition of the doctrine of the continental shelf was rather remarkable in that it had evolved from a theory connected in 1945 by the United States to something akin to a natural law right of coastal states by 1958. This was not the only indication that the law of the sea was rapidly evolving. In light of rapidly developing offshore technology, no agreement could be reached to establish the limit of the continental shelf either by depth or distance. In addition, the Conference could not agree on a maximum breadth for the territorial sea. Although there was a growing trend for claims to 6- or 12-mile territorial seas, the United States and other maritime powers staunchly defended the 3-mile limit. The Second United Nations Conference on the Law of the Sea (UNCLOS II) in 1960 again failed to resolve these issues.

**NOTE: SOVEREIGNTY AND JURISDICTION**

Sovereignty is one of the most basic principles of international law, but does not have a single meaning. The concept certainly embodies the principles of equality of states and nonintervention. Most fundamentally, however, sovereignty is the supreme authority over a territory and a population. Sovereignty also includes the right to acquire territory. International law historically allowed states to acquire territory through domination or conquest. Today, territory may be gained through voluntary cession by another nation, by prescription and by occupation of unclaimed land or resources. In modern times, unoccupied land is virtually non-existent, but until very recently the ocean and its resources were not the territory of or subject to the sovereignty of any state.

The supreme authority of a state over its territory includes legislative competency over the territory subject to its sovereignty. This is the related international law principle of jurisdiction. A nation has jurisdiction to prescribe and enforce its laws throughout its territory, and importantly for purposes of the law of the sea, it also has jurisdiction over its nationals and over ships and aircraft flying its flag even beyond national boundaries.

Sovereignty and jurisdiction of states is derived from and limited by international law, but states have a great deal of discretion on how to exercise that sovereignty and jurisdiction within their territories. For example, a state may claim a territorial sea of only three miles, even though international law recognizes the competence of states to claim up to twelve miles. International law takes on a special importance in the parts of the earth—the oceans—beyond any state’s territory and sovereignty, because the law of the sea, a part of public international law, creates the applicable norms governing humanity’s use of the sea and its resources. These norms developed extremely slowly since the earliest use of the sea for navigation and trade, until the second half of the twentieth century, when national security issues and technology development for resource exploitation (among other political, economic and social changes) combined to create an explosion in the development of the law.

Consider how sovereignty and jurisdiction are related in the following case. At the time of the foreign fishing vessel’s arrest, the U.S. had an exclusive fishing zone of 9 miles contiguous to its territorial sea.

**UNITED STATES v. F/V TAIYO MARU 28**

D. Me., 1975
396 F.Supp. 413

GIGNOUX, DISTRICT JUDGE.

These two proceedings arise from the seizure of a Japanese fishing vessel, the F/V TAIYO MARU 28, by the United States Coast Guard for violation of United States fisheries law. On September 5, 1974, the Coast Guard sighted the TAIYO MARU 28 fishing at [a] point approximately 18.25 miles off the coast of the State of Maine and approximately 10.5 miles seaward from Monhegan Island. It is conceded to be within the contiguous fisheries zone of the United States. 16 U.S.C. § 1062. The Coast Guard signaled the TAIYO MARU 28 to stop, but the vessel attempted to escape by accelerating toward the high seas. The Coast Guard immediately pursued and seized the vessel on the high seas at . . . a point approximately 67.9 miles at sea from the mainland of the continental United States. The vessel was thereafter delivered to the port of Portland, and on
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September 6, 1974, the United States filed in this Court a civil complaint for condemnation and forfeiture of the vessel and a criminal information against the master, Miantoshi Kawaguchi. Both actions charge violations of 16 U.S.C. §§ 1081 and 1091 and seek imposition of the sanctions for such violations provided by 16 U.S.C. § 1082.

On October 4, 1974, Miho Maguro Gyogyo Kabushiki Kaisha of Shimizu, Japan, a corporation, as the sole owner and party entitled to possession of the TAIYO MARU 28, appeared through local counsel and filed its demand for restitution and right to defend, and an answer to the complaint, in the forfeiture action. On October 18, 1974, the master was arraigned and pleaded not guilty to the criminal information.3 ... Defendant seeks dismissal of all proceedings on the ground that the Court lacks jurisdiction, since the vessel, unlawfully, was seized on the high seas in violation of the territorial limits. The United States contends that this Court has jurisdiction under international agreements on the power of the United States to pursue and seize foreign vessels and arrest foreign nationals for violation of its domestic fisheries law.

There is no dispute as to the events, recited above, which led to the seizure of the TAIYO MARU 28. For the purposes of the instant motions, the following undisputed facts are significant: (1) On September 5, 1974, the United States Coast Guard sighted the TAIYO MARU 28, a commercial Japanese fishing vessel, within waters which the United States claims as part of its contiguous fisheries zone, and had reasonable cause to believe that the vessel was fishing in the zone in violation of United States fisheries law; and (2) at that point, the Coast Guard signaled the TAIYO MARU 28 and, after giving immediate and continuous hot pursuit, effected seizure of the vessel on the high seas.

The United States contends that, by fishing in the contiguous fisheries zone, the TAIYO MARU 28 and her captain violated the Bartlett Act, 16 U.S.C. § 1081 et seq., and the Contiguous Fisheries Zone Act, 16 U.S.C. § 1091 et seq., and that international law permits, and United States law authorizes, the hot pursuit of a foreign vessel from the contiguous fisheries zone and the seizure of the vessel on the high seas for violation of domestic fisheries law. Defendant's position is that this Court lacks jurisdiction over the TAIYO MARU 28 and her master, because the vessel was seized on the high seas in violation of the 1958 Geneva Convention on the High Seas, opened for signature April 22, 1958, 13 U.S.T. 2312 (entered into force September 29, 1960), a multilateral treaty agreement to which both Japan and the United States are parties signatory.

16 U.S.C. § 1081 provides in relevant part:

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in fishing in the territorial waters of the United States ... or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishing fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party.

By the Bartlett Act, enacted in 1964, Congress made it unlawful for any foreign vessel, or for the master of such a vessel, to engage in fishing within the territorial waters of the United States, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters ... except ... as expressly provided by an international agreement to which the United States is a party. 16 U.S.C. § 1081. The Bartlett Act established criminal penalties for violators and provided for the seizure and forfeiture of any vessel and its catch found in violation. 16 U.S.C. § 1082. In enacting the Bartlett Act, the intent of Congress was to fill a gap in existing law by making it clear that foreign vessels are denied the privilege of fishing within the territorial waters of the United States and by providing effective sanctions for unlawful fishing by foreign vessels within territorial waters. H.R.Rep. (Merchant Marine and Fisheries Committee) No. 1356 (1964), U.S. Cong. & Ad- min. News, 1964, pp. 2183, 2183–84. The Bartlett Act did not define the width of the territorial sea, 'thereby leaving the opportunity for the United States to follow the lead of Canada and other nations in establishing a limit beyond the present 3 miles for fishery purposes.' Id. at p. 2187. The words 'within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters' were added in anticipation of the United States extending its fishery jurisdiction out to 12 miles. H.R.Rep. (Merchant Marine and Fisheries Committee) No. 2096 (1966), U.S. Cong. & Admin. News, 1966, pp. 2982, 2989.

By the Contiguous Fisheries Zone Act, enacted in 1966, Congress established a fisheries zone contiguous to the territorial waters of the United States and provided with respect to such zone:

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3 The vessel, its captain, and the crew have since been released upon posting a bond conditioned upon the payment of any penalty or fine which might be imposed in these proceedings.
September 6, 1974, the United States filed in this Court a civil complaint for condemnation and forfeiture of the vessel and a criminal information against the master, Missanishi Kagoshiki Kaisha of Shimizu, Japan, a corporation, as the sole owner and party entitled to possession of the TAIYO MARU 28, appeared through local counsel and filed its demand for restitution and right to defend, and an answer to the complaint, in the forfeiture action. On October 18, 1974, the master was arraigned and pleaded not guilty to the criminal information.3... Defendant seeks dismissal of all proceedings on the ground that the Court lacks jurisdiction, since the vessel, unfreighted, was seized on the high seas in violation of the territorial limits of the United States. The Court's jurisdiction and the power of the United States to seize and seize and arrest foreign nationals for violation of its domestic fisheries law.

There is no dispute as to the events, recited above, which led to the seizure of the TAIYO MARU 28. For the purposes of the instant motions, the following undisputed facts are significant: (1) On September 5, 1974, the United States Coast Guard sighted the TAIYO MARU 28, a commercial Japanese fishing vessel, within waters which the United States claims as part of its contiguous fisheries zone; and (2) at that point, the Coast Guard signaled the TAIYO MARU 28 and, after giving immediate and continuous hot pursuit, effected seizure of the vessel on the high seas.

The United States contends that, by fishing in the contiguous fisheries zone, the TAIYO MARU 28 and her captain violated the Bartlett Act, 16 U.S.C. § 1081 et seq., and the Contiguous Fisheries Zone Act, 16 U.S.C. § 1091 et seq., and that international law permits, and United States law authorizes, the hot pursuit of a foreign vessel from the contiguous fisheries zone and the seizure of the vessel on the high seas for violation of domestic fisheries law. Defendant's position is that this Court lacks jurisdiction over the TAIYO MARU 28 and her master, because the vessel was seized on the high seas in violation of the 1958 Geneva Convention on the High Seas, opened for signature April 22, 1958, 13 U.S.T. 2312 (entered into force September 20, 1960), a multilateral treaty agreement to which both Japan and the United States are parties.

By the Bartlett Act, enacted in 1964, Congress made it unlawful for any foreign vessel, or for the master of such a vessel, to engage in fishing within the territorial waters of the United States, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters... except... as expressly provided by an international agreement to which the United States is a party. 16 U.S.C. § 1081. The Bartlett Act established criminal penalties for violations and provided for the seizure and forfeiture of any vessel and its catch found in violation. 16 U.S.C. § 1082. In enacting the Bartlett Act, the intent of Congress was to fill a gap in existing law by making it clear that foreign vessels are denied the privilege of fishing within the territorial waters of the United States and by providing effective sanctions for unlawful fishing by foreign vessels within territorial waters. H.R.Rep. (Merchant Marine and Fisheries Committee) No. 1366 (1964), U.S. Cong. & Ad-min.News, 1964, pp. 2183, 2183–84. The Bartlett Act did not define the width of the territorial sea, 'thereby leaving the opportunity for the United States to follow the lead of Canada and other nations in establishing a limit beyond the present 3 miles for fishery purposes.' Id. at p. 2187. The words 'within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters' were added in anticipation of the United States extending its fisheries jurisdiction out to 12 miles. See H.R.Rep. (Merchant Marine and Fisheries Committee) No. 2086 (1966), U.S. Cong. & Admin.News, 1966, pp. 2982, 3289.

By the Contiguous Fisheries Zone Act, enacted in 1966, Congress established a fisheries zone contiguous to the territorial waters of the United States and provided with respect to such zone:

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3 16 U.S.C. § 1081 provides in relevant part:
It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in fishing within the territorial waters of the United States... or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fisheries fleet or to engage in the taking of any continental shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party.

4 16 U.S.C. § 1082(a) and (b) provide:
(a) Any person violating the provisions of this chapter shall be fined not more than $100,000, or imprisoned not more than one year, or both;
(b) Every vessel employed in any manner in connection with a violation of this chapter including its tackle, apparel, furniture, appurtenances, cargo, and stores shall be subject to forfeiture and all fish taken or retained in violation of this chapter or the monetary value thereof shall be forfeited. For the purposes of this chapter, it shall be a rebuttable presumption that all fish found aboard a vessel seized in connection with such violation of this chapter were taken or retained in violation of this chapter.

5 16 U.S.C. § 1085(a) makes applicable to such seizures and forfeitures the existing law relating to seizure, forfeiture, and condemnation of a vessel for violations of the customs laws, except when inconsistent with the provisions of the Act.

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The vessel, its captain, and the crew have since been released upon posting a bond conditioned upon the payment of any penalty or fine which might be imposed in these proceedings.
The United States will exercise the same exclusive rights in respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States. 16 U.S.C. § 1091.1 The contiguous fisheries zone was defined by Congress in the Contiguous Fisheries Zone Act as having 'as its inner boundary the outer limits of the territorial sea and as its seaward boundary a line drawn so that each point on the line is nine nautical miles from the nearest point in the inner boundary.' 16 U.S.C. § 1092.8 In so defining the contiguous zone, Congress recognized that the territorial sea of the United States extends three miles from the United States, which is where Thomas Jefferson set the outer limit in 1793 and where 'it has remained unaltered to this day.' H.R.Rep.No.2086, supra at pp. 3284–85. See Cunard Steamship Co. v. Mellon, 282 U.S. 100, 122–23 (1923). It was the expressed intent of Congress in the 1969 legislation to 'unilaterally establish a fishing zone contiguous to the present 3-mile territorial sea of the United States by extending our exclusive fisheries rights to a distance of 12 miles from our shores.' H.R.Rep.No.2086, supra at p. 3286.

III

Defendant makes no contention that the contiguous fisheries zone created by the United States in the Contiguous Fisheries Zone Act violates customary international law. Defendant also recognizes that, within the three-mile territorial sea, the United States has the right to prohibit foreign fishing and that Article 23 of the Convention on the High Seas provides express authority for the United States to conduct hot pursuit from the territorial sea onto the high seas for the purpose of apprehending foreign ships which have violated domestic fisheries law within the territorial sea. And defendant does not contest that the Contiguous Fisheries Zone Act extended to a zone nine miles from the seaward limit of the territorial sea all the rights with respect to fisheries which the United States previously had in its territorial sea, and that, unless restricted by treaty, the United States has the right to conduct hot pursuit from a contiguous zone onto the high seas for violations of its domestic law. See The

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16 U.S.C. § 1091 reads in full:

There is established a fisheries zone contiguous to the territorial sea of the United States. The United States will exercise the same exclusive rights in respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.

16 U.S.C. § 1092 reads in full:

The fisheries zone has as its inner boundary the outer limits of the territorial sea and as its seaward boundary a line drawn so that each point on the line is nine nautical miles from the nearest point in the inner boundary.

It is not disputed that the territorial sea extends a distance of three miles around Mocha Island, as well as from the coastline of the mainland. See Convention on the Territorial Sea and the Contiguous Zone, infra, Art. 1092.
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The United States will exercise the same exclusive rights in respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States. 16 U.S.C. § 1091. The contiguous fisheries zone was defined by Congress in the Contiguous Fisheries Zone Act as having "as its inner boundary the outer limits of the territorial sea, and as its seaward boundary a line drawn so that each point on the line is nine nautical miles from the nearest point in the inner boundary." 16 U.S.C. § 1092. In so defining the contiguous zone, Congress recognized that the territorial sea of the United States extends three miles from the United States, which is where Thomas Jefferson set the outer limit in 1783 and where it has remained unaltered to this day. H.R. Rep. No. 2096, supra at pp. 3284-85. See Cunard Steamship Co. v. Mellon, 302 U.S. 100, 122-23 (1938). It was the express intent of Congress in the 1986 legislation to "unilaterally establish a fisheries zone contiguous to the present 3-mile territorial sea of the United States by extending our exclusive fisheries rights to a distance of 12 miles from our shores." H.R. Rep. No. 2096, supra at p. 3285.

Defendant makes no contention that the contiguous fisheries zone created by the United States in the Contiguous Fisheries Zone Act violates customary international law. Defendant also recognizes that, within the three-mile territorial sea, the United States has the right to prohibit foreign fishing and that Article 23 of the Convention on the High Seas provides express authority for the United States to conduct hot pursuit from the territorial sea onto the high seas for the purpose of apprehending foreign ships which have violated domestic fisheries law within the territorial sea. And defendant does not contest that the Contiguous Fisheries Zone Act extended to a zone nine miles from the seaward limit of the territorial sea all the rights with respect to fisheries which the United States previously had in its territorial sea, and that, unless restricted by treaty, the United States has the right to conduct hot pursuit from a contiguous zone onto the high seas for violations of its domestic law. See The

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Newton Bay, 36 F.2d 729, 731-32 (2d Cir. 1929); Gillam v. United States, 27 F.2d 296, 299-300 (4th Cir.), cert. denied, 278 U.S. 635 (1929); The Resolution, 30 F.2d 534, 537 (E.D.La.1929); The Pescahwa, 45 F.2d 221, 222 (D.Ore.1928); The Vinco, 20 F.2d 164, 172-73 (E.D.S.C.1927). Defendant's sole contention is that the United States had no right to conduct hot pursuit from the contiguous zone and to effect seizure of the TAIYO MARU 28, because the vessel was seized on the high seas in violation of Article 23 of the 1958 Convention on the High Seas.

The Convention on the High Seas provides, in Article 2, that: The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas . . . comprises, inter alia, both for coastal and non-coastal States:

(2) Freedom of fishing; . . .

Article 5 of the Convention vests "exclusive jurisdiction" in each signatory over its vessels "on the high seas." Article 23 of the Convention, however, recognizes certain instances in which a State may seize a foreign vessel on the high seas, based on hot pursuit:

The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. . . . If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, opened for signature April 29, 1958, 15 U.S.T. 1607 (entered into force September 10, 1964), contains the following pertinent provisions:

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
   a. prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
   b. punish infringement of the above regulations committed within its territory or territorial sea.
2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

Defendant asserts that Article 23 of the Convention on the High Seas must be read in conjunction with Article 24 of the Convention on the Territorial Sea and the Contiguous Zone. The argument is that since Article 24 only authorizes the establishment of a contiguous zone for the purposes of enforcing the coastal State's customs, fiscal, immigration or sanitary regulations, and since Article 23 permits hot pursuit of a foreign ship from such a contiguous zone only for the four purposes listed in Article 24, the United States was without authority to commence hot pursuit of the TAIYO MARU 24 from within the contiguous fisheries zone for the purpose of enforcing its fisheries regulations.

Both parties recognize that the general rule of law is that the power of the government to enforce a forfeiture or to prosecute a defendant is not impaired by the illegality of the method by which it has acquired control over the property or the defendant. Dodge v. United States, 372 U.S. 530, 532 (1966); The Caledonian, 17 U.S. 100 (1819); The Richmond, 13 U.S. 102 (1815) (unlawful seizure of property); Frisbie v. Collins, 342 U.S. 519, 522 (1952); Ker v. Illinois, 385 U.S. 473, 444 (1986); Lejuan v. Gengler, 510 F.2d 62, 65-66 (2d Cir. 1975); but cf. United States v. Tocacino, 500 F.2d 267, 271-79 (3d Cir. 1974) (unlawful apprehension of defendant). Defendant relies upon the exception to this general rule established in Cook v. United States, 238 U.S. 102 (1915). In Cook, the United States Coast Guard seized a British vessel, the Mazel Tov, caught in running, on the high seas outside the American jurisdictional limits set by a British-American treaty covering the apprehension of prohibited war vessels.19 The Supreme Court held that the United States 'lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.' Id. at 121-22. . . . Mr. Justice Brandeis made clear, however, that the exception to the general rule recognized in Cook covers the particular situation where the United States has by treaty 'imposed a territorial limitation upon its own authority.' Cook v. United States, supra, 288 U.S. at 121. As stated in Autry v. Wiley, 440 F.2d 799 (1st Cir. 1971), the Cook doctrine is a 'narrow' exception to the general rule; it 'applies only to violations of a specific territorial jurisdictional circumscription set by treaty.' Id. at 802.

Defendant strenuously argues that the Cook exception destroys the jurisdiction of this Court in these proceedings because by Article 23 of the Convention on the High Seas, read together with Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the United States has undertaken a specific obligation not to institute hot pursuit of a foreign ship from the contiguous fisheries zone for violation of its fisheries law. Defendant's position is that Article 23 limits the government's right of hot pursuit from a contiguous zone to the four purposes for which Article 24 authorizes the establishment of such a zone, and the enforcement of domestic fisheries law is not one of the purposes recognized by Article 24. The Court is persuaded, however, that neither the language nor the history of the Conventions shows that the signatory parties intended to limit the right of a coastal State to exercise exclusive fisheries jurisdiction within 12 miles of its coast, to establish a contiguous zone for such a purpose, or to conduct hot pursuit from such a zone.

Analysis of the text of Article 23 of the Convention on the High Seas shows that the Article provides general authority to undertake hot pursuit from a contiguous zone when the authorities of the coastal State have good reason to believe that a foreign vessel has violated the coastal State's laws and regulations. It is true that Article 23 permits hot pursuit from a contiguous zone, created for one of the four purposes enumerated in Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, only if there has been a violation of the rights for the protection of which the zone was established. But Article 23 does not in terms deny a coastal State the right to commence hot pursuit from a contiguous zone established for a purpose other than one of the purposes listed in Article 24. Nor does Article 24 in terms prohibit the establishment of a contiguous zone for a purpose other than one of those specified in the Article. The language of Article 24, relating the purposes for which a contiguous zone may be established, is permissive, rather than restrictive. It provides that a coastal State 'may' establish a contiguous zone for the purposes of enforcing its customs, fiscal, immigration or sanitary regulations. Although Article 24 only affirmatively recognizes the right of a coastal State to create a contiguous zone for one of the four enumerated purposes, nothing in the Article precludes the establishment of such a zone for other purposes, including the enforcement of domestic fisheries law. In short, unlike the British-American treaty in Cook, the Conventions in the case at bar contain no specific undertaking by the United States not to conduct hot pursuit from a contiguous fisheries zone extending 12 miles from its coast. The Cook exception, therefore, is not applicable, because the United States has not by treaty 'imposed a territorial limitation upon its own authority.'

The history of the 1958 Conventions confirms the conclusion that the United States did not specifically undertake to limit its authority to exercise exclusive fisheries jurisdiction within 12 miles of its coast, to establish a contiguous zone for such a purpose, or to conduct hot pursuit from such a zone. The Convention on the High Seas and the Convention on the
3. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

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Both parties recognize that the general rule of law is that the power of the government to enforce a forfeiture or to prosecute a defendant is not impaired by the illegality of the method by which it has acquired control over the property or the defendant. Dodge v. United States, 372 U.S. 530, 532 (1967); The Caledonian, 17 U.S. 100 (1819); The Richmond, 13 U.S. 102 (1815) (unlawful seizure of property); Frisbie v. Collins, 342 U.S. 519, 522 (1953); Ker v. Illinois, 387 U.S. 473, 444 (1967); Lujan v. Gonzalez, 513 F.2d 65, 67 (2d Cir. 1975); but cf. United States v. Toccarino, 500 F.2d 267, 271-72 (2d Cir. 1974) (unlawful apprehension of defendant). Defendant relies upon the exception to this general rule established in Cook v. United States, 228 U.S. 102 (1913). In Cook, the United States Coast Guard seized a British vessel, the Mael Ton, caught in running, on the high seas outside the American jurisdictional limits set by a British-American treaty covering the apprehension of prohibition law violators. The Supreme Court held that the United States 'lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.' Id. at 121-22. . . . Ms. Justice Brandeis made clear, however, that the exception to the general rule recognized in Cook covers the particular situation where the United States has by treaty 'imposed a territorial limitation upon its own authority.' Cook v. United States, supra, 228 U.S. at 121. As stated in Atwater v. Wiley, 440 F.2d 799 (1st Cir. 1971), the Cook doctrine is a 'narrow' exception to the general rule; it 'applies only to violations of a specific territorial jurisdictional circumscription set by treaty.' Id. at 802.

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Territorial Sea and the Contiguous Zone were the product of the Conference on the Law of the Sea, convened at Geneva in 1958 pursuant to Resolution 1105 of the General Assembly of the United Nations. U.N. General Assembly, 11th Sess., Official Records, Supp. No. 17 (A/5372). Although the Conference was convened to resolve a variety of matters pertaining to the codification of the Law of the Sea, most commentators agree that the two principal issues presented for the Conference's consideration were the question of the breadth of the territorial sea, and the closely related question of whether there should be an additional contiguous zone in which the coastal States could exercise exclusive jurisdiction over fishing. See, e.g., McDougal and Burke, The Public Order of the Oceans, 524-48 (1st ed. 1962); Fitzmaurice, Some Results of the Geneva Conference on the Law of the Sea, 8 International and Comparative Law Quarterly 73, 72-73 (1959); Dean, The Geneva Conference on the Law of the Sea: What Was Accomplished, 52 The American Journal of International Law 607, 607-08 (1958). See also Hearings on the Conventions on the Law of the Sea, Executives J, K, L, M, N, before the Committee on Foreign Relations, United States Senate, 86th Cong. 2nd Sess., p. 4 (January 20, 1960). The 1968 Geneva Conference was unable to achieve agreement on either issue, primarily because of the volatile political ramifications involved in acting to limit the territorial sea.\[14\] In recommending that the Senate give its advice and consent to ratification of the Conventions, the Senate Report from the Committee on Foreign Relations made clear that the Convention on the Territorial Sea and the Contiguous Zone did not define the width of the territorial sea, or circumscribe the right of a coastal State to assert exclusive fisheries jurisdiction.

This convention does not fix the breadth of the territorial sea. This subject and the closely related one of the extent to which the coastal state...

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should have exclusive fishing rights in the sea off its coast were hotly debated without any conclusion being reached. Exec. Rept. No. 5, Law of the Sea Conventions, to accompany Ex. J to N, inclusive, 86th Cong. 1st Sess., p. 4 (1960).

It is clear from the foregoing history that, in becoming a signatory to the 1958 Conventions, the United States could not have intended to accept any limitation on its right to conduct hot pursuit for violations of exclusive fisheries rights occurring within 12 miles of its coast, since the Geneva Conference could not agree as to whether a contiguous zone could be established for the purpose of enforcing domestic fisheries law.

It is apparent that Congress was well aware of its obligations under the 1958 Conventions when the 1966 Contiguous Fisheries Zone Act was enacted, and that Congress perceived no conflict between the Act and the treaty provisions. This is evident from the House Report, which discusses the Conventions and their relationship to the proposed legislation:

In 1968, and again in 1966, the Law of the Sea Conferences held in Geneva, Switzerland, left unresolved the twin questions of the width of the territorial sea and to the extent to which a coastal State could claim exclusive fishing rights in the high seas off its coast. At the second conference in 1960, the United States and Canada put forward a compromise proposal for a 6-mile territorial sea, plus a 6-mile exclusive fisheries zone (12 miles of exclusive jurisdiction in all) subject to the continuation for 10 years of traditional fishing by other states in the outer 6 miles. This compromise proposal failed by one vote to obtain the two-thirds vote necessary for adoption.

Since the 1958 Law of the Sea Conference, there has been a trend toward the establishment of a 12-mile fisheries zone in international practice. Thirty-nine nations acting individually or in concert with other countries have extended their fisheries limits to 12 miles since 1958. H.R. Rep. No. 2086, supra at p. 3286.

The Report also notes that, as of July 1, 1969, of the 99 United Nations coastal nations, slightly more than 60 countries asserted a 13-mile exclusive fisheries zone, either as territorial sea or as territorial sea plus a contiguous zone. Id.\[15\]

IV

Since the seizure of the TAIYO MARU 28 on the high seas following hot pursuit from the contiguous zone was not in violation of Article 23 of the 1958 Convention on the High Seas, and, moreover, was sanctioned by...
Territorial Sea and the Contiguous Zone were the product of the Conference on the Law of the Sea, convened at Geneva in 1958 pursuant to Resolution 1105 of the General Assembly of the United Nations. U.N. General Assembly, 11th Sess., Official Records, Supp. No. 17 (A/5772). Although the Conference was convened to resolve a variety of matters pertaining to the codification of the Law of the Sea, most commentators agree that the two principal issues presented for the Conference's consideration were the question of the breadth of the territorial sea, and the closely related question of whether there should be an additional contiguous zone in which the coastal States could exercise exclusive jurisdiction over fishing. See, e.g., McDougall and Burke, The Public Order of the Oceans, 524–48 (1st ed. 1962); Fitzmaurice, Some Results of the Geneva Conference on the Law of the Sea, 5 International and Comparative Law Quarterly 73, 73–75 (1959); Dean, The Geneva Conference on the Law of the Sea: What Was Accomplished, 52 The American Journal of International Law 607, 607–08 (1958). See also Hearings on the Conventions on the Law of the Sea, Executives J, K, L, M, N, before the Committee on Foreign Relations, United States Senate, 86th Cong. 2nd Sess., p. 4 (January 20, 1960). The 1968 Geneva Conference was unable to achieve agreement on either issue, primarily because of the volatile political ramifications involved in setting a limit to the territorial sea. In recommending that the Senate give its advice and consent to ratification of the Conventions, the Senate Report from the Committee on Foreign Relations made clear that the Convention on the Territorial Sea and the Contiguous Zone did not define the width of the territorial sea, or circumscribe the right of a coastal State to assert exclusive fisheries jurisdiction:

This convention does not fix the breadth of the territorial sea. This subject and the closely related one of the extent to which the coastal State could exercise exclusive jurisdiction over fishing, see, e.g., The Law of the Sea, supra note 14, make it clear that a three-mile limit was chosen because this is the breadth of the territorial sea as defined in the 1958 Convention on the Law of the Sea. This subject and the closely related one of the extent to which the coastal State could exercise exclusive jurisdiction over fishing is a matter of concern to the United Nations and the states of the world. In this connection, it should be noted that the Convention on the Territorial Sea and the Contiguous Zone does not define the breadth of the territorial sea. See Arts. 1, 3, and 6. Thus, nothing in the language of the Convention prohibits the United States from claiming a territorial sea of 24 miles, in which it could exercise exclusive fishing rights.

14 The position of the United States at the Conference was that the territorial sea should be defined as narrowly as possible, preferably at the three-mile limit which it had traditionally recognized. In advancing this position, a major concern of the United States was to avoid undue limitation of its right to fish off the coasts of other nations. In this position, it was supported primarily by the maritime nations, which had traditionally engaged in fishing off foreign shores. Opposition to the American position was centered principally in the Soviet bloc countries and the newly-emerging and underdeveloped countries. When it became apparent that any proposal for a three-mile territorial sea would fail to attract the two-thirds vote necessary for adoption, the United States sponsored a compromise proposal which called for a six-mile territorial sea and a further six-mile contiguous fisheries zone. This proposal barely failed of passage, and since no other proposal was able to attract a two-thirds vote, the final Convention was silent as to the breadth of the territorial sea, or the extent to which a coastal State may assert exclusive fisheries jurisdiction. See generally Dean, supra at 613–16; McDougall and Burke, supra at 559–69; Hearings, supra at 4–9, 21–22.

When the Law of the Sea Convention was reconvened at Geneva in 1969, the participants again were unable to agree on the width of the territorial sea or the extent to which a coastal State could exercise exclusive fishing jurisdiction in the waters off its coast. See generally Dean, Second Geneva Conference on the Law of the Sea: The Right for Freedom of Navigation, 64 Am. J. Int'l L. 751, 779–81 (1969). A joint American-Canadian compromise proposal, in most respects similar to one made by the United States at the 1968 Conference, failed of passage by one vote. See McDougall and Burke, supra at 547.
THE ORIGIN OF U.S. RIGHTS AND RESPONSIBILITIES IN THE OCEANS

CH. 1

domestic law and in conformity with the prevailing consensus of international law and practice, this Court has jurisdiction to decide the present proceedings on their merits. Defendant's motions to dismiss for lack of jurisdiction are therefore denied.

It is so ordered.

NOTES AND QUESTIONS

1. By 1966, when the Contiguous Fishing Zone Act was enacted, the U.S. Congress had given up on the idea put forth in the Truman proclamation of relying on international agreement to regulate intensive foreign fisheries adjacent to the territorial sea. Judge Gignoux had to determine whether the 1966 zone was consistent with the 1958 Convention on the Territorial Sea and Contiguous Zone. From the defendant's argument, what do you think Japan's position was on exclusive fishing zones at the 1958 U.N. Geneva conference on the law of the sea, discussed in footnote 12? The conference adopted four conventions, discussed in the notes below.

2. The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas was not a codification of existing international law, but rather an attempt to deal with the growing tension between coastal countries and countries whose distant water fleets were a growing presence in the high seas just beyond territorial waters. The Fishing Convention would have created a mechanism for coastal states to initiate unilateral, nondiscriminatory regulation of threatened fisheries in the high seas off their coasts if negotiations failed to result in an international agreement. Although the treaty was adopted and received enough ratifications to come into force, it was never effective because the major distant water fishing nations did not become parties and could not be bound by a coastal state's unilateral attempt to regulate high seas fishing. This resistance led coastal nations with domestic fishing industries to adopt exclusive fisheries zones, like the 1966 U.S. act promulgated by Judge Gignoux. Then, less than a year after Judge Gignoux upheld the 9-mile contiguous fishery zone, the U.S. Congress adopted a 200-mile fishery conservation zone, Pub. L. No. 94-285 (April 13, 1976). The bill had been introduced in January 1975 by Representative Gerry E. Studits (D-Mass) with 24 co-sponsors as H.R. 200, the "Interim Fisheries Zone Extension and Management Act." Why do you think the House members called it an "interim" zone?

3. In its 1958 attempt at codification of the law of the sea, the International Law Commission dealt with each offshore jurisdictional zone in a separate treaty. Some concepts, however, were not ripe for codification. What issues remained controversial in regard to the territorial sea?

4. The Convention on the Territorial Sea and the Contiguous Zone codified the traditional sovereign rights of coastal states in the marginal territo-

EVALUATION OF THE INTERNATIONAL LAW OF THE SEA

SEC. 2

rial sea, incorporating also the important exception for the right of innocent passage for foreign vessels transiting on the surface. The convention also set out the rules that had evolved to separate the territorial sea from internal waters, which are generally not the subject of international law, including the requirements for drawing ordinary baselines, straight baselines, and the closing of bays and rivers was set out.

The Convention also identified some exceptions to the standard rules for extension of sovereignty over areas and exercising the right of innocent passage. "Historic" bays or waters, for example, are not subject to the treaty's limitations on bays or baselines, expanding the possible scope of coastal sovereignty over offshore areas. International straits are also recognized as having a special status to protect international navigation from interference and even temporary closure.

5. Baselines are also often relevant when the offshore zones claimed by coastal nations overlap. Maritime delimitations by agreement or an international judgment that are based on equidistant or median lines are usually projected from the nations' territorial sea baselines. What happens if these baselines change significantly because of sea level rise? Do the international boundaries change? Should they? See "Climate Change, Sea Level Rise and the Ongoing Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict," Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea 1–17 (Seung-Youg Hong and Jon M. Van Dyke, eds., Martius Nijhof, 2009). See also Julia Liszwan, Stability of Maritime Boundary Disputes, 37 Yale J. Int'l L. 153 (2012).

6. The Convention on the Territorial Sea and the Contiguous Zone introduced a new concept—the "contiguous zone"—which recognized the increasing practice of states to assert authority beyond a 3-mile territorial sea. The convention recognized only a limited enforcement jurisdiction in the contiguous zone, however, allowing a coastal state to prevent and punish violations of its customs, fiscal, immigration, and sanitary laws applicable to its territory or territorial sea. How did fisheries regulation relate to the contiguous zone? Consider the note on sources of international law following these questions when thinking about the relation of state practice and treaties.

7. The Convention on the Continental Shelf codified the continental shelf doctrine, adopting the 1945 Truman Proclamation's rationale that a coastal state's sovereign rights over the living and non-living resources of the adjacent seabed arise because the shelf is merely the "natural prolongation" of the land territory under the ocean. Consequently, the convention provides that these rights exist ab initio, that is, they are inherent and do not depend on any explicit claim by the coastal state. The coastal state's rights to explore and exploit the continental shelf and its resources are exclusive. How did the concept of the continental shelf evolve in such a short period of time from a rationale conjured up by the United States to justify extension of sovereignty over seabed resources to a right justified by something akin to natural law?
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EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA

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The limit of the continental shelf, like the breadth of the territorial sea, was a controversial issue within the 1958 negotiations. The continental shelf, as a geologic feature, is relatively easy to identify as the shallow submerged edge of the continental land mass that ends where the continental slope steepens to the deep seabed. The natural boundaries were not necessarily precise enough to provide a legal definition, however, and perhaps of more importance in the 1958 negotiations, the technology needed to exploit further offshore and deeper in the sea was developing rapidly. A limit based on depth, the 200-meter isobath, was chosen as a convenient approximation for the outer shelf limit, but the definition qualified this by adding "or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources." This exploitability test provided no real limit, and the many questions raised by it have been termed by some authors as "dangerously imprecise."

8. The Convention on the High Seas applied to the area seaward of the outer boundary of the territorial sea. The treaty codified the established principles that the high seas are open to all nations and that no nation may purport to subject any part of the high seas to its sovereignty. Four specific "freedoms of the high seas" were listed: (1) freedom of navigation (meaning both surface and submerged); (2) freedom to fish; (3) freedom of overflight; and (4) freedom to lay cables and pipelines on the sea floor. The list was not exhaustive, and the treaty provided room for other freedoms recognized by customary international law that would not involve appropriation of areas of the high seas, including marine scientific research.

The freedoms of the high seas are required to be exercised by nations "with reasonable regard to the interest of other states" in their exercise of the same freedoms. In general, no nation can unreasonably interfere with the flag vessels, aircraft or activities of other nations on the high seas. The High Seas Convention did list some limited exceptions, including control of piracy and boarding of ships engaged in slavery.

9. What is "hot pursuit"? What are the limitations of a coastal state in pursuing a vessel that has violated the state's laws? The 1982 Law of the Sea Convention, art. 111, provides further details for exercise of hot pursuit:

**Right of hot pursuit**

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous
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3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft, working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

6. Where hot pursuit is effected by an aircraft:

the provisions of paragraphs 1 to 4 shall apply mutatis mutandis, the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

NOTE: SOURCES OF INTERNATIONAL LAW

Public international law is the law that regulates the behavior of nations in their relations with one another. Most of the ocean was for many centuries considered beyond the jurisdiction of any coastal or maritime nation, so international law has played and plays a particularly important role in ocean jurisdiction and management.

But international law does not develop like the domestic law of modern legal systems. A fundamental understanding of how international law develops and the sources of international law is, therefore, necessary to comprehend how a legal system without statutes or binding court decisions works to regulate the behavior of nations concerning the jurisdiction, rights and duties of nations in regard to the seas.
The most often cited list of international law sources is found in Article 38 of the Statute of the International Court of Justice (ICJ). The Statute of the ICJ, a treaty to which almost all the world’s nations are parties, requires the Court to apply international law in deciding the disputes before it. According to Article 38, the three primary sources of international law are (1) international agreements or treaties, (2) custom, and (3) general principles of law.

**International agreements (treaties).** Agreements between nation-states are frequently analogized to contracts between individuals in a domestic legal system. Although many international agreements or treaties are similar to contracts, most of the international agreements related to the law of the sea are in the category of “law making” treaties—treaties that attempt to codify the law of nations in regard to the oceans. Such treaties are typically negotiated at a conference called for that purpose by the interested states. In the case of the development of the law of the sea, three major conferences between 1958 and 1982, provided the fora for these negotiations.

“Law making” treaties are not, however, international legislation. Unlike a domestic statute, a treaty is binding only on those nations that have explicitly expressed their consent to be bound, i.e., ratified the treaty. For a treaty to be an effective lawmaking instrument, therefore, it is essential that all directly concerned states, and not just a majority of states, become parties to it. The 1982 United Nations Convention on the Law of the Sea, currently with 162 parties, is one of the most prominent examples of a lawmaking treaty.

**Custom.** Custom or customary international law arises through general state practice that is accepted as law. In the *North Sea Continental Shelf Cases*, I.C.J. Reports (1999), the International Court of Justice (ICJ) described the elements of custom as follows:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, the existence of a subjective element, is implicit in the very notion of the *opinio juris sine necessitate*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

Substantial uniformity of practice is a required element, but even complete uniformity of practice does not suffice if the psychological element is lacking. A mere usage, with no sense of legal obligation, does not establish a legally binding custom.

How then is a customary norm created and how can one identify a rule of customary international law? The modern development of the law of sea provides two excellent examples. In 1945, President Truman claimed jurisdiction and control over the natural resources of the continental shelf off U.S. coasts for the United States. This claim of exclusive rights over resources extended far beyond the three mile territorial sea, to resources under the high seas.
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Nothing in customary practice or treaty law supported such a unilateral assertion, and it most certainly violated international law at the time it was asserted. The response of the international community, however, was acquiescence and general approval—and the extension of such claims by other states. By no later than the mid-1950s the acceptance, approval and practice of states had clearly created a rule of international law granting sovereign rights to coastal nations over the living and non-living natural resources of their adjacent continental shelves. This "claim and response" process is a standard way for customary international law to arise. The rapid development of the doctrine regarding the exclusive rights of adjacent states to their continental shelf natural resources demonstrates that long duration is not a necessary element of custom in international law (in contrast to the "time immemorial" requirement for custom in the common law) if the primary elements of general practice and opinio juris are met.

Custom may also arise from a concept developed in context of a lawmaking treaty like the United Nations Convention on the Law of the Sea (UNCLOS). The Exclusive Economic Zone (EEZ), a 200-mile zone in which the adjacent coastal state has exclusive jurisdiction over the living and non-living resources and other economic uses of the water column and seabed, was conceived in the negotiation of this convention. In the North Sea Continental Shelf Cases, supra, the ICJ considered whether such a norm adopted in a treaty can be recognized also as customary law through subsequent practice and the impact of the treaty. The court noted that "[t]here is no doubt that this process is a perfectly possible one and does from time to time occur; it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed." The court explained further, however, that for "conventional or contractual provisions of a "norm-creating" character to become custom and binding even on countries that are not parties to the treaty and "even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected." If a norm that first arises in a treaty passes into customary law, unlike treaty law, it will bind not only the parties to the treaty, but all members of the international community. An exception applies, however, to nations who have persistently objected to the formation of a rule of customary law while it is in the process of formation.

The provisions for the extension of the EEZ in UNCLOS are clearly of a "norm-creating character" and form a clearly defined basis for a general rule of law. Further, the principle has been widely accepted, with rapid, wide-spread adoption by states even before the UNCLOS negotiations had concluded. In fact, in both the Libya-Malta case, 1986 ICJ Reports at paras. 27-34, and the Gulf of Maine case, 1982 ICJ Reports at paras. 94-96, cases decided prior to the treaty entering into force, the ICJ recognized the impact of the EEZ concept on international law.
General principles of law. The scope of "general principles" is not a clear or rigid concept, but usually refers to those common principles that are recognized within domestic legal systems throughout the world. General principles that can be traced to state practice include good faith, equality of states, laches, estoppel, and restitution based on unjust enrichment. General principles help fill in the gaps in the coverage of international treaty and customary law. For example, in the case of maritime boundary delimitation, the ICJ has used "equitable principles" to formulate ocean boundaries between states. While the Statute of the ICJ provides that the court may not decide a case et aequo et bono without the agreement of the parties, the court has distinguished use of equitable principles as applying normative general principles of law recognized in all legal systems. See North Sea Continental Shelf Cases at para. 83.

General principles of law may also refer to general principles of international law. The doctrines of pacta sunt servanda and jus cogens fall into this category.

Article 38 of the ICJ Statute provides two additional sources "as subsidiary means for the determination of rules of international law." The first of these secondary sources is judicial decisions. Because the Statute specifically states that an ICJ decision is not binding on any nation other than the parties to the case before it, there is no principal of precedent or stare decisis, and the Court is not bound to follow even its own prior judgments. Nevertheless, the ICJ treats its previous judgments as very persuasive, and reference to these earlier judgments contributes to creating a consistent body of international law. The judicial decisions referenced by Article 38 are not, however, limited to ICJ decisions. Other international and regional courts and international tribunals have proliferated, and the relevant decisions of these courts are within the scope of the sources of international law. It is also clear that Article 38's reference to judicial decisions includes decisions of national courts that analyze, interpret or apply rules of international law.

The writings of highly regarded publicists or scholars of all nations in the field of international law are the second category of subsidiary means of determining international law. In addition to looking to the most influential treatises and articles, one may also refer to such authorities as the International Law Commission (e.g., Articles on State Responsibility) and the American Law Institute (e.g., Restatement of Foreign Relations Law) as sources of evidence of international law.

The language of Article 38 actually dates back to the provisions for the Permanent Court of International Justice, the judicial arm of the League of Nations, so its scope may not adequately recognize the influence of the developing international organizations in the creation of international law. For example, the resolutions or declarations of the United Nations General Assembly (UNGA) are not binding law, yet they have had an important role in the development of the law of the sea. In the case of the law of the sea, the pattern of voting and development of UNGA resolutions demonstrates that the resolutions can be an important source of state practice in the development or "crystallizing" of customary law. Specialized international institutions have also arisen, primarily in the context of the League of Nations and later the United Nations. The administrative functions of these agencies have largely replaced ad hoc negotiations in development of the law in certain areas, for example, marine pollution or management of deep seabed resources. Conferences and publications of organizations like the International Maritime Organization and the UN Food and Agriculture Organization have also strongly influenced the development of the law of the sea.

International law of the sea developed primarily through custom during most of its history, but treaties began to play the most important role as the law of the sea began to develop quickly after World War II. In addition, the ICJ and the International Tribunal for the Law of the Sea (ITLOS) have played an increasingly important role in interpreting and applying these law-making treaties.

3. LAW OF THE SEA: THE LATE TWENTIETH-CENTURY REVOLUTION

The Law of the Sea has developed over the many centuries that the oceans have been used for navigation, trade and its resources, but the rapid development and new directions since the last half of the twentieth century can truly be called a revolution.

A. THE AFTERMATH OF UNCLOS I AND II

During the ten years after the adoption of the four Geneva Conventions on the law of sea in 1958, the inadequacies of these treaties to meet the challenges created by even more intensive use of the oceans and their resources became apparent. The treaties' lack of clear limits on coastal state sovereignty and jurisdiction also failed to stifle the trend toward expanded jurisdictional claims. Not only were 12-mile territorial seas becoming the dominant state practice, but countries were also extending unilateral, exclusive fisheries zones beyond the territorial sea, and more Latin American and African countries were asserting claims to 200-mile zones or territorial seas. At the same time developed countries were enjoying expanding claims to continental shelf resources due to development of offshore technology, the United States and the Soviet Union, the major maritime powers, had grave concerns about "creeping jurisdiction" and the deterioration of the freedoms of the high seas. Their concern for maintaining broad definitions of the freedom of navigation and overflight led...
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The writings of highly regarded publicists or scholars of all nations in the field of international law are the second category of subsidiary means of determining international law. In addition to looking to the most influential treatises and articles, one may also refer to such authorities as the International Law Commission (e.g., Articles on State Responsibility) and the American Law Institute (e.g., Restatement of Foreign Relations Law) as sources of evidence of international law.

The language of Article 38 actually dates back to the provisions for the Permanent Court of International Justice, the judicial arm of the League of Nations, so its scope may not adequately recognize the influence of the League. 1

1 See Ian Brownlie, Principles of Public International Law 29-26, 216 (Seventh Ed. 2006). Brownlie explains that et aequo et bono "involves elements of compromise and conciliation, whereas equity in the English sense is applied as part of the normal judicial function." Equitable principles, on the other hand, are principles of "honesty, reasonableness and policy" that inform in the courts' "process of decision" to achieve an equitable result.
these two superpowers in 1970 to jointly call for a new international conference to reassess the ocean regime in a way that protected both coastal state interests and the freedom of navigation.

The event most often cited, however, as the tipping point for the initiation of a new regime for the oceans was the potential for the exploitation of manganese nodules—potato-sized polymetallic masses of manganese, copper, nickel and cobalt. The existence of these nodules had been known since the voyage of the H.M.S. Challenger in 1872–1876, one of the first marine scientific research expeditions and the foundation of modern oceanography. The Challenger recovered these nodules scattered on the deep-sea floor at depths of over 3000 meters in possibility. Recently independent and other less developed countries, which by that time constituted a majority of the United Nations members, anticipated a new hegemony by a few technologically advanced countries as they appropriated the resources of the deep-sea seabed beyond national jurisdiction in “land grab” that amounted to “neo-colonialism” in the seas. Although the 1958 Conventions were less than a decade old, many of these new countries had had no opportunity to participate in the development of a regime that did not protect their interests, and they sought a new legal regime for the deep seabed. The fundamental issue that had to be decided was whether the seabed minerals were res nullius—belonging to no one and subject to appropriation and ownership as a high seas freedom—or res communis—belonging to everyone and subject to appropriation by the detriment of the community.

Arvid Pardo, Malta’s ambassador to the United Nations, became the voice of these states when he addressed the General Assembly in November 1967. Pardo proposed that the seabed beyond national jurisdiction be set aside for peaceful purposes and be declared the “common heritage of mankind” and exploited for the benefit of all mankind, particularly the least developed countries. He also called for an effective international regime to be established to regulate the seabed through an international treaty of universal character. The General Assembly moved quickly to establish an ad hoc seabed committee in 1967, which was replaced in 1968 by the permanent Committee on the Peaceful Uses of the Seabed the Ocean Floor beyond the Limits of National Jurisdiction (resolution 2467 A (XXIII)) of 21 December 1968). In 1969, the General Assembly passed the Moratorium Resolution (over the 28 negative votes of the United States and most other developed states), calling for a prohibition on commercial exploitation of deep-sea minerals until an international regime could be put in place. By unanimous vote (including an affirmative U.S. vote), the General Assembly in 1970 passed the Declaration of Principles Gov-
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**B. THE UNCLOS III NEGOTIATIONS**

The Third United Nations Conference on the Law of the Sea (UNCLOS III) began its deliberations in late 1973 with 190 national delegations participating. It was historic in many ways: It was the largest and most complex international law-making conference ever convened, and it continued for almost ten years. The negotiations addressed issues that were considered vital to virtually every nation on earth. Even land-locked countries were affected and sought to protect their access rights to new offshore zones that could be created in areas that had been high seas.

Developing countries were in a definite majority and were anxious to assert their role in a New International Economic Order. These nations realized, however, that their goals could not be achieved simply by a majority vote, but only through complex negotiations. This led to a unique process of negotiations, called “the package deal.” The Conference put on the table virtually every issue dealing with the use of the oceans, providing a possibility for states to determine its priorities and what interests it might be willing to trade to protect those priorities. The Rules of Procedure for UNCLOS III, U.N. Doc. A/CONF.62/30/Rev. 3, included an agreement establishing the following principles for the negotiations: 1) the problems of the seabed are interrelated and need to be considered as a whole; 2) to be effective, the treaty must secure broad acceptance; 3) every effort should be made to reach agreement on substantive matters through consensus; and 4) there will be no voting until all consensus efforts are exhausted. The approach was one of attempting to reach an overall consensus on all issues, rather than on securing a majority vote on individual points within the treaty. This created an opportunity for trade-offs and political compromise across a broad spectrum of widely divergent issues, so that in the final text, the disposition of many seemingly unrelated matters were actually quite closely related.

As the world’s preeminent naval power and the country with the world’s second longest coastline, the United States had important interests to consider in regard to virtually every agenda item in UNCLOS III. The U.S. had both coastal fishermen and a distant water tuna fleet. The research of its renowned oceanographic institutions ranged around the
The Origin of U.S. Rights and Responsibilities in the Oceans

...
THE ORIGIN OF U.S. RIGHTS AND RESPONSIBILITIES IN THE OCEANS

SEC. 3  THE LATE TWENTIETH-CENTURY REVOLUTION

zones. The concept of the 200-mile zone was quickly becoming state practice and accepted as customary international law.

By 1976, the negotiations were also headed for deadlock on complex deep seabed mining issues. While most developing countries wanted mining solely by an international mining institution charged with distributing profits consonant with the principle of the common heritage of mankind, a subset of this group, land-based producers of the same metals, had additional concerns. Mining for metals like manganese represented a large proportion of the GDP for these producing states, and they wanted production limits to protect their important export markets for the metals. The developed countries, with their companies already involved in technology development and prospecting, wanted access to be as open as possible, protection of technology and patents, and adequate compensation for the huge investment of these companies.

The United States was, of course, among the developed countries who wanted to assure that there was no monopolistic regime created baring opportunities for free enterprise to mine the deep seabed and receive an adequate return for the investment in research, technology and production. But like the United States, most developed countries were willing to compromise to protect the favorable arrangements that already had been negotiated concerning navigation. (Recall that all provisions remained open until consensus was reached on the entire "package.") The compromise reached involved the creation of a parallel mining regime, and by 1980, the treaty was nearing completion.

In 1981, however, this changed. The new president of the United States, Ronald Reagan, ordered a year-long reassessment of the treaty in light of the views of the new administration. Several last minute changes were made in the seabed provisions to try to meet new U.S. objections and demands for changes, but irrevocable differences remained concerning the deep seabed mining regime. With the decision that all efforts at reaching consensus on those issues had been exhausted, the treaty was put to a vote and adopted on 30 April 1982 in New York with 130 States voting in favor, 4 against (including the United States) and 17 abstaining. In December of the same year, the treaty was opened for signature in the final session of UNCLOS III at Montego Bay, and received a record 119 signatures the first day.

The treaty provided that it would come into force one year after its sixtieth ratification, which occurred on November 16, 1985, with the ratification of Guyana. The problem was that almost all of these ratifications were by developing countries. In anticipation of the treaty coming into force without support from developed countries, the Secretary-General of the United Nations began negotiations in 1990 to address the defects and shortcomings of the seabed provisions and establish the "universality of..."
the treaty. Intense negotiations through the summer of 1994 resulted in the Agreement Relating to the Implementation of Part XI of the LOS Convention, commonly called the Boat Paper, which, although termed an implementation agreement, effectively amends the deep seabed provisions of the LOS Convention. The Agreement, which was co-sponsored by the United States, addressed many of the concerns of developed countries and received no negative votes. The changes to the seabed mining regime assured broad acceptance of the Convention by the time it came into force on November 16, 1994, with virtually all the major developed countries having signed or ratified the Convention at that point. The U.S. signing of the Agreement also served as signing the Convention. The Agreement relating to the implementation of Part XI of the Convention entered into force on 28 July 1996, thirty days after the deposit of the fortieth instrument of ratification. By 2012, 165 nations had become parties to the Convention by ratification, accession, or succession.

The United States is not, however, among those parties, nor has it yet ratified or acceded to the Convention. In late 1994 the Clinton Administration transmitted the Convention to the Senate and, as the U.S. Constitution requires, requested the Senate's consent to ratification. It was not until February 2004 that the Senate Foreign Relations Committee recommended, by unanimous vote, that the Senate give its advice and consent to ratification of the Convention. By 2012, the Convention has been supported by three presidents (Presidents Clinton, Bush and Obama) and has twice been favorably recommended by the Senate Foreign Relations Committee, but has yet to be subject to a vote of the U.S. Senate.

The United States thus remains outside the Convention and has no direct rights or duties under its provisions. Yet the 1982 Convention, together with the conference that brought it into being, has had a major impact on the customary international law of the sea, which does bind the United States. As early as 1983, President Reagan, while rejecting the deep seabed provisions of the Convention, 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, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

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The provisions of the 1982 Convention are the best evidence of what the international law of the sea is today, either by treaty for the Convention's now 163 parties (as of November 2012) or by customary law for the few that have not become parties, including the United States. The new law of the sea is, in very significant respects, quite different from the 1958 attempt to codify its terms.

4. THE POLITICAL GEOGRAPHY OF THE OCEANS TODAY

This section will focus on the rights and obligations of coastal nations, such as the United States, currently recognized by the international law of the sea, principally as reflected in the 1982 U.N. Convention on the Law of the Sea (LOSC). The ocean zones within which coastal nations now have substantial governance rights are: (1) internal waters, (2) the territorial sea, (3) the contiguous zone, (4) the exclusive economic zone, and (5) the continental shelf. Table A provides an overview of maritime claims internationally. Figure 1–1 diagrams the scope of U.S. offshore jurisdictional claims.

Table A. Summary of National Claims to Maritime Zones

<table>
<thead>
<tr>
<th>Distance (n.m.)</th>
<th>Territorial Sea</th>
<th>Contiguous Zone</th>
<th>EEZ</th>
<th>Fisheries Zones*</th>
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<td>200 or to international boundary</td>
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<td>134</td>
<td></td>
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<tr>
<td>Other</td>
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<td>1 (25)</td>
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<td></td>
<td>&gt;125</td>
<td>1 (18)</td>
<td>1 (32 or 53)</td>
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</tr>
</tbody>
</table>

*Only indicated if no additional claim to an EEZ of the same distance.
**Distance of claim indicated in parentheses.


A. INTERNAL WATERS

The only zone of marine waters that was not changed by the LOSC was the jurisdictional zone of internal waters. Internal waters are those that lie landward of the inner boundary of the territorial sea. Most ports, harbors and estuarine areas are internal waters. As part of the nation’s territory, these areas are subject to the complete sovereignty of the coastal nation.

The inner boundary of the territorial sea is referred to in the treaty as the baseline from which the breadth of the territorial sea is measured. The rules for drawing baselines are virtually unchanged from those found in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. The normal baseline is the mean low-water line of the coast, but non-normal baselines can be drawn across river mouths, the openings of bays, and along the outer points of complex coastlines using the formulas set out in the treaty. The LOSC also added new provisions for drawing baselines around delta areas and certain fringing reefs.

The drawing of non-normal baselines has been one of the more controversial areas of the implementation of the LOSC. The areas enclosed by baselines as internal waters are not subject to the treaty’s rules to pro-
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Figure 1–1. United States Marine Jurisdictional Zones

Source: Adapted from NOAA Office of the General Counsel, Maritime Zones and Boundaries

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The Origin of U.S. Rights and Responsibilities in the Oceans

The political geography of the oceans today was substantially expanded to provide more explanation of the principle that passage is innocent so long as it is “not prejudicial to the peace, good order or security” of the coastal state.

President Reagan extended the U.S. territorial seas to 12 miles by presidential proclamation in 1988.

Territorial Sea of the United States, Presidential Proclamation 5928

December 27, 1988

International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas.

The territorial sea of the United States is a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as to its bed and subsoil.

Extension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States.

Now, Therefore, I, Ronald Reagan, by the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty.

The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.

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.

Nothing in this Proclamation:

a. extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; or

B. THE TERRITORIAL SEA

The first notable change in the regime of the territorial sea instituted by the LOSC was the provision of a definite maximum breadth of the territorial sea. Article 3 of the convention provides a right of a coastal state to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles.

The second change provided the crucial compromise for the acceptance of the treaty by the United States and the other maritime powers. The LOSC creates a special regime for transit through most straits used for international navigation incorporated in territorial seas. This special regime replaces the traditional right of innocent passage with a non-suspendable right of “transit passage” in most international straits. Importantly, the transit passage regime allows for submerged passage of submarines and a right of overflight—rights not included in innocent passage of other areas of territorial seas.

Except for the straits transit regime, which applies only to territorial seas in straits used for international navigation, the LOSC regime is essentially the same as the 1958 treaty. Coastal states exercise absolute sovereignty, subject only to the right of innocent passage by foreign vessels on the surface. To assure that the term was not interpreted in ways that unreasonably restrict navigation, the definition of innocent passage...
test international navigation rights, so illegal baselines greatly compromise the bargain struck in the negotiations to balance the rights of the coastal states and the maritime powers. Because the United States is not a party to the LOSC and its dispute resolution mechanisms, it must resort to other means to object to illegal baselines. Through the Freedom of Navigation Program, started in 1978 under President Carter, the United States uses both diplomatic notices and, in some instances, operational responses to demonstrate that the United States does not acquiesce to such illegal claims. To assert innocent passage or other navigation rights, operational responses involve sending ships and aircraft into areas claimed as internal or territorial waters based on illegal or excessive claims. The United States asserts that the Program is operated in accordance with principles of customary international law as codified in the LOSC. Ironically, the United States, the only non-party developed nation, is serving as the primary "policeman" for assuring compliance with the Treaty.

The LOSC also authorizes the use of special archipelagic baselines around the island groups of those nations composed entirely of islands, but since the United States is mainly a continental nation, this set of rather complicated rules and formulas does not apply to U.S. island groups, such as Hawaii, and therefore will not be discussed here.

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Now, Therefore, I, Ronald Reagan, by the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty.

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Nothing in this Proclamation:

a. extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; or
b. impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

**QUESTIONS**

1. President Reagan grounded the Territorial Sea Proclamation on customary international law as reflected in the 1982 U.N. Convention on the Law of the Sea. He made it clear, however, that the United States would recognize 12-mile territorial seas of other coastal nations only if they were consistent with the U.S. view of customary international law, including the right of transit passage through international straits. Could the United States "pick and choose" the provisions of the Convention it was willing to recognize as custom?

2. In extending the U.S. territorial sea from three to 12 miles, the proclamation limited its effect to U.S. international relations and specifically noted that the proclamation did not change the domestic law of the United States as it applied to its territorial sea. What kind of issues might be raised by this extension?

**C. THE CONTIGUOUS ZONE**

The LOSC, like the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, authorizes coastal nations to exercise a limited enforcement jurisdiction, including drug interdiction and immigration laws, in a contiguous zone beyond the territorial sea. The 1982 Convention allows extension of the contiguous zone out to 24 miles from the baseline.

When President Ronald Reagan extended the U.S. territorial sea from three to 12 miles in 1988, he did not also assert a claim to extend the U.S. contiguous zone's outer boundary to 24 miles. The Reagan administration reasoned that the United States, as a party to the still-binding 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, could not validly claim a contiguous zone beyond the 12-mile line. In September 1999, however, President Clinton declared a contiguous zone to 24 miles from the U.S. baselines by Presidential Proclamation.

**CONTIGUOUS ZONE OF THE UNITED STATES, PRESIDENTIAL PROCLAMATION 7219**

*September 2, 1999*

A Proclamation

International law recognizes that coastal nations may establish zones contiguous to their territorial seas, known as contiguous zones.

**SEC. 4**

The contiguous zone of the United States is a zone contiguous to the territorial sea of the United States, in which the United States may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations committed within its territory or territorial sea.

Extension of the contiguous zone of the United States to the limits permitted by international law will advance the law enforcement and public health interests of the United States. Moreover, this extension is an important step in preventing the removal of cultural heritage found within 24 nautical miles of the baseline.

Now, Therefore, I, William J. Clinton, by the authority vested in me as President by the Constitution of the United States, and in accordance with international law, do hereby proclaim the extension of the contiguous zone of the United States, including the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty, as follows:

The contiguous zone of the United States extends to 24 nautical miles from the baselines of the United States determined in accordance with international law, but in no case within the territorial sea of another nation. . . .

**QUESTIONS**

1. Is the U.S. 24-mile contiguous zone claim valid under international law? Why?

2. Can the U.S. Coast Guard arrest a foreign flag vessel and its crew for attempting to bring illegal drugs into the United States at a place nine nautical miles from the coast? What about a place at 20 nautical miles?

**D. THE EXCLUSIVE ECONOMIC ZONE**

In the 1970s, coastal nation claims to 200-mile exclusive economic zones (EEZs) or similar 200-mile zones proliferated at a rapid rate, due to UNCLOS III's unmistakable embrace of the 200-mile zone concept and the 1976 enactment by the U.S. Congress of a 200-mile exclusive fisheries conservation zone. Before the conclusion of the UNCLOS III negotiations, ninety nations had established 200-mile offshore jurisdictional zones.

The national rights and jurisdictions asserted by coastal nations usually, but not always, track those authorized by the 1982 U.N. Convention on the Law of the Sea's EEZ provisions. For example, the United Kingdom claims only a 200-mile fisheries zone.
h. impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

**QUESTIONS**

1. President Reagan grounded the Territorial Sea Proclamation on customary international law as reflected in the 1982 U.N. Convention on the Law of the Sea. He made it clear, however, that the United States would recognize 12-mile territorial seas of other coastal nations only if they were consistent with the U.S. view of customary international law, including the right of transit passage through international straits. Could the United States "pick and choose" the provisions of the Convention it was willing to recognize as custom?

2. In extending the U.S. territorial sea from three to 12 miles, the proclamation limited its effect to U.S. international relations and specifically noted that the proclamation did not change the domestic law of the United States as it applied to its territorial sea. What kind of issues might be raised by this extension?

**C. THE CONTIGUOUS ZONE**

The LOSC, like the 1958 Geneva Convention on the Territorial Sea and the Continental Shelf, authorizes coastal nations to exercise a limited enforcement jurisdiction, including drug interdiction and immigration laws, in a contiguous zone beyond the territorial sea. The 1982 Convention allows extension of the contiguous zone out to 24 miles from the baseline. When President Ronald Reagan extended the U.S. territorial sea from three to 12 miles in 1988, he did not also assert a claim to extend the U.S. contiguous zone’s outer boundary to 24 miles. The Reagan administration reasonned that the United States, as a party to the still-binding 1958 Geneva Convention on the Territorial Sea and the Continental Shelf, could not validly claim a contiguous zone beyond the 12-mile line. In September 1999, however, President Clinton declared a contiguous zone to 24 miles from the U.S. baselines by Presidential Proclamation.

**Contiguous Zone of the United States, Presidential Proclamation 7219**

September 3, 1999

**A Proclamation**

International law recognizes that coastal nations may establish zones contiguous to their territorial seas, known as contiguous zones.

**D. THE EXCLUSIVE ECONOMIC ZONE**

In the 1970s, coastal nation claims to 200-mile exclusive economic zones (EEZs) or similar 200-mile zones proliferated at a rapid rate, due to UNCLOS III’s unmistakable embrace of the 200-mile zone concept and the 1976 enactment by the U.S. Congress of a 200-mile exclusive fisheries conservation zone. Before the conclusion of the UNCLOS III negotiations, ninety nations had established 200-mile offshore jurisdictional zones.

The national rights and jurisdictions asserted by coastal nations usually, but not always, track those authorized by the 1982 U.N. Convention on the Law of the Sea’s EEZ provisions. For example, the United Kingdom claims only a 200-mile fisheries zone.
In the exclusive economic zone, the coastal State has:

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

b. jurisdiction provided for in the relevant provisions of this Convention with regard to:
   i. the establishment and use of artificial islands, installations and structures;
   ii. marine scientific research;
   iii. the protection and preservation of the marine environment;

c. other rights and duties provided for in this Convention.

This summary list of EEZ rights and jurisdiction is fleshed out in other articles of the Convention. Although the Convention and customary law reflect do not grant to coastal nations full sovereignty in their EEZs, international law now permits an EEZ nation the primary governance role for nearly all types of activities that occur in the zone.

**EXCLUSIVE ECONOMIC ZONE OF THE UNITED STATES, PRESIDENTIAL PROCLAMATION 5030**

March 10, 1983

A Proclamation

Whereas the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law;

Whereas international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction; and

Whereas the establishment of an Exclusive Economic Zone by the United States will advance the development of ocean resources and pro-
LOS Convention, Article 56(1)

Rights, jurisdiction and duties of the coastal State
In the exclusive economic zone

In the exclusive economic zone, the coastal State has:

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

b. jurisdiction provided for in the relevant provisions of this Convention with regard to:
   i. the establishment and use of artificial islands, installations and structures;
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This summary list of EEZ rights and jurisdiction is fleshed out in other articles of the Convention. Although the Convention and the customary law it reflects do not grant to coastal nations full sovereignty in their EEZs, international law now permits an EEZ nation the primary governance role for nearly all types of activities that occur in the zone.

**Exclusive Economic Zone of the United States, Presidential Proclamation 5030**

March 20, 1983

A Proclamation

Whereas the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law;

Whereas international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction; and

Whereas the establishment of an Exclusive Economic Zone by the United States will advance the development of ocean resources and protect the renewable and non-renewable resources in the Exclusive Economic Zone of the United States.

The President of the United States of America, by and with the advice and consent of the Senate, do hereby proclaim the following:

The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. In cases where the maritime boundary with a neighboring State remains to be determined, the boundary of the Exclusive Economic Zone shall be determined by the United States and other State concerned in accordance with equitable principles.

Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, 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 with jurisdiction with regard to the establishment and use of artificial islands, installations and structures having economic uses, and the protection and preservation of the marine environment.

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 United States jurisdiction and require international agreements for effective management.

The United States will exercise these sovereign rights and jurisdiction in accordance with the rules of international law.

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 of submarine cables and pipelines, and other internationally lawful uses of the sea.
In Witness Whereof, I have hereunto set my hand this tenth day of March, in the year of our Lord nineteen hundred and eighty-three, and of the Independence of the United States of America the two hundred and seventh.

RONALD REAGAN

Figure 1-2. The United States' Exclusive Economic Zone

Source: U.S. Commission on Ocean Policy, An Ocean Blueprint

1. Fishing

Within its EEZ, a coastal nation has "sovereign rights" to the living resources, which includes the exclusive right to manage fisheries as well as a priority for the EEZ nation's fishermen to harvest the fish. The coastal nation can thus adopt and enforce laws regulating access to fishing and fishing within its EEZ. The coastal states have broad discretion in managing their fisheries resources and most of the process is not subject to the LOSC dispute resolution provisions. LOSC, art. 207(3)(a) provides that coastal states:

[are not] obliged to accept the submission to [compulsory] settlement of any dispute relating to its sovereign rights with respect to the living resources in the [EEZ] or their exercise, including its discretion-

The political geography of the oceans today

ary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

The Convention does, however, in articles 61 and 62, impose some duties on the coastal state. The managing states are required to set an allowable catch that prevents overexploitation and achieves optimum utilization and maximum sustainable yield (MSY) taking into account the best available scientific information. The duty of optimum utilization requires that foreign fishing be allowed for the part of the allowable catch beyond the capacity of the coastal country's vessels to harvest. The concept of allowable catch is, however, so easily manipulated, that most foreign fishing can be excluded by coastal nations. First, the allowable catch is determined by reference to MSY. The LOSC allows the coastal state discretion to qualify MSY by considering "relevant environmental and economic factors." Further, scholars and commentators agree that there is no obligation to set an allowable catch above zero or above domestic harvesting capacity. The vague management principles and unenforceability of the fisheries obligations make the treaty a weak vehicle for ensuring conservation of these marine resources.

The sovereign rights are also difficult for the coastal state to police, as the following case, decided more than thirty years after U.S. v. FV Taiko Maru 28, illustrates.

** UNITED STATES V. MARSHALLS 201**

D. Guam, 2008

Not opined in F.Supp.2d, 2008 WL 2018299

TYRONECO–GATEWOOD, CHIEF JUDGE.

FACTUAL BACKGROUND

An Exclusive Economic Zone ("EEZ") is a sea zone over which a state (including its territories) has special rights over the exploration and use of marine resources. The EEZ starts at the coastal baseline and extends 200 nautical miles out into the sea, perpendicular to the baseline. The outer boundary of the zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline. United States EEZs were originally established by Presidential Proclamation in 1983. Even earlier, in 1976, the Fishery Conservation and Management Act of 1976 established a fishery conservation zone contiguous to the territorial sea of the United States, effective March 1, 1977. EEZs were designed to grant exclusive jurisdiction to the United States for the purposes of "exploring,
In Witness Whereof, I have hereunto set my hand this tenth day of March, in the year of our Lord nineteen hundred and eighty-three, and of the Independence of the United States of America the two hundred and seventh.

RONALD REAGAN

Figure 1-2. The United States’ Exclusive Economic Zone

Source: U.S. Commission on Ocean Policy, An Ocean Blueprint

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[are not] obliged to accept the submission to [compulsory] settlement of any dispute relating to its sovereign rights with respect to the living resources in the [EEZ] or their exercise, including its discretion-

SEC. 4

THE POLITICAL GEOGRAPHY OF THE OCEANS TODAY

any powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

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The sovereign rights are also difficult for the coastal state to police, as the following case, decided more than thirty years after U.S. v. F/V Taiyo Maru 25, illustrates.

* * *

UNITED STATES v. MARSHALLS 201

D. Guam, 2008

Not appealed in F.Supp.3d, 2008 WL 2016299

TYNDING-GATEWOOD, CHIEF JUDGE.

FACTUAL BACKGROUND

An Exclusive Economic Zone (“EEZ”) is a sea zone over which a state (including its territories) has special rights over the exploration and use of marine resources. The EEZ starts at the coastal baseline and extends 200 nautical miles out into the sea, perpendicular to the baseline. The outer boundary of the zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline. United States EEZs were originally established by Presidential Proclamation in 1983. Even earlier, in 1976, the Fishery Conservation and Management Act of 1976 established a fishery conservation zone contiguous to the territorial sea of the United States, effective March 1, 1977. EEZs were designed to grant exclusive jurisdiction to the United States for the purposes of “exploring,
exploiting, conserving, and managing natural resources." Presidential Proclamation No. 5030.

The controlling law governing the territorial seas, EEZs, and fisheries of the United States is the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"). See 16 U. S. C. § 1857. The Magnuson Act provides for the conservation and management of United States fisheries. Since 1977, the United States has claimed an exclusive fishery zone around both Baker and Howland Islands. These islands are undisputed territories of the United States, and are located on the equator, about 1,600 miles southwest of Hawaii. The Magnuson Act also codifies the EEZs of Baker and Howland Islands, and other United States territories in the Pacific.

On September 7, 2006, the United States Coast Guard ("USCG") performed a routine patrol of the EEZ of Baker and Howland Islands, and noticed a foreign flagged fishing vessel (Marshall Islands flagged) fishing within the EEZ. At the time, the boom was lowered and the fishing nets were not properly covered or stowed. This, in itself, is a violation of the Magnuson Act 16 U.S.C. § 1857(a)(A) and (B). According to the USCG, two other fishing vessels were detected inside the EEZ that day, the F/V KOOS 101 and the F/V KOOS 108.

On September 9, 2006, the USCG again spotted the F/V MARSHALLS 201 while on patrol, and again it was located within the United States EEZ. When detected on this date, active fishing on the vessel was observed within the EEZ, a clear violation of the Magnuson Act. See 16 U.S.C. § 1857(d). The USCG contacted a nearby USCG cutter to intercept the fishing vessel and to determine whether the F/V MARSHALLS 201 was permitted to fish in the EEZ. The USCG Cutter WALNUT viewed F/V MARSHALLS 201 actively hauling nets, but the persons aboard the vessel refused to respond to repeated attempts at communication. The Cutter WALNUT tried to reach F/V MARSHALLS 201 by radio and by signal flag. After several minutes of effort by the USCG to make contact with F/V MARSHALLS 201, the vessel abruptly headed out of the EEZ, with her nets still hanging from the boom. The Cutter WALNUT pursued F/V MARSHALLS 201 out of the EEZ.

The vessel eventually stopped, and the USCG boarded and secured the F/V MARSHALLS 201 in order to investigate whether any illegal fishing activity had taken place. The USCG determined that the F/V MARSHALLS 201 did not possess a permit to fish in the EEZ, and it appeared that the vessel had a recent catch of 110 metric tons of tuna in its possession, from fishing in the United States EEZ on September 9, 2006.

The next day, USCG law enforcement seized the F/V MARSHALLS 201 and her catch and escorted the vessel to Guam. On September 20, 2006, the F/V MARSHALLS 201 reached port in Apra Harbor, where the current market value of the F/V MARSHALLS 201 was determined to be $2,650,000.00, and the current market value of the tuna onboard was found to be $650,000.00.

PROCEDURAL BACKGROUND

On October 4, 2006, the United States filed a Complaint for Forfeiture of the vessel and its catch and appurtenances under 16 U.S.C. § 1860. In the Complaint, the United States alleged violations of the Magnuson Act, for illegally fishing without a permit in the EEZ of the United States. On October 17, 2006, U.S. Magistrate Judge Manibusan granted a Stipulated Motion for Release of the vessel. Substituting for the vessel in rem was a bond in the amount of $2,650,000.00, which represented the value of the vessel and the catch. F/V MARSHALLS 201 left Guam soon after her release.

DISCUSSION

There are two main arguments on which the Defendant bases its Motion to Dismiss. The first argument is that Baker and Howland Islands are "rocks" under the Law of the Sea Treaty definition. The second argument is that the United States' enforcement of these EEZs is contrary to customary international law.

At the outset, the court notes that the United States addressed the issue of standing in its Opposition Brief and in oral arguments on April 3, 2008. The United States argued in its Opposition that the Defendant had no standing to dispute the EEZs of the United States because it believes the case is based on interpretations of international law. However, the court finds that because the legal premise of this case involves the seizure of the F/V MARSHALLS 201 by the United States, for allegedly being located in and engaged in fishing within the EEZ of the United States, the Defendant has standing to pursue its Motion to Dismiss in the District Court of Guam.

The court will now address the Defendant's Motion to Dismiss. The Defendant first argues that the United States lacks the legal authority to claim and enforce a 200-mile EEZ around Baker and Howland Islands. Specifically, the Defendant states that the complaint should be dismissed for lack of subject matter jurisdiction in rem jurisdiction under Rule 12(b)(1),(2), and (3) of the Federal Rules of Civil Procedure. The Defendant

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1 The vessel was later identified as F/V MARSHALLS 201.
2 These fishing vessels were later determined to be partially owned by Marshall Islands Fishing Company ("MIUCO").
3 This statute governs civil forfeitures, and states that "any fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used, and any fish (or fair market value thereof) taken or retained, in any manner, in connection with or as a result of the commission of any act prohibited by section 1857 of this title . . . shall be subject to forfeiture to the United States." 16 U.S.C. § 1860a.
4 In the Complaint, the United States alleged violations of the Magnuson Act, for illegally fishing without a permit in the EEZ of the United States.
exploiting, conserving, and managing natural resources." Presidential Proclamation No. 5030.

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On September 7, 2006, the United States Coast Guard ("USCG") performed a routine patrol of the EEZ of Baker and Howland Islands, and noticed a foreign flagged fishing vessel (Marshall Islands flagged) in the EEZ. At the time, the boom was lowered and the fishing nets were not properly covered or stowed. This, in itself, is a violation of the Magnuson Act 16 U.S.C. § 1857(4)(A) and (B). According to the USCG, two other fishing vessels were detected inside the EEZ that day, the F/V KOOS' 101 and the F/V KOOS' 108.

On September 9, 2006, the USCG again spotted the F/V MARSHALLS 201 while on patrol, and again it was located within the United States EEZ. When detected on this date, active fishing on the vessel was observed within the EEZ, a clear violation of the Magnuson Act. See 16 U.S.C. § 1857(2). The USCG contacted a nearby USCG cutter to intercept the fishing vessel and to determine whether the F/V MARSHALLS 201 was permitted to fish in the EEZ. The USCG Cutter WALNUT viewed F/V MARSHALLS 201 actively hauling nets, but the persons aboard the vessel refused to respond to repeated attempts at communication. The Cutter WALNUT tried to reach F/V MARSHALLS 201 by radio and by signal flag. After several minutes of effort by the USCG to make contact with F/V MARSHALLS 201, the vessel abruptly headed out of the EEZ, with her nets still hanging from the boom. The Cutter WALNUT pursued F/V MARSHALLS 201 out of the EEZ.

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THE ORIGIN OF U.S. RIGHTS AND RESPONSIBILITIES IN THE OCEANS

claims that under international law, Baker and Howland Islands are not actually islands, but are considered "rocks" and therefore, do not provide a basis for claims of EEZs.

Article 121(3) of the United Nations Law of the Sea Convention ("Convention") states that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." (See United Nations Law of the Sea Convention, Dec. 10, 1982, U.N. Doc. A/CONF.62/122.) The Defendant argues that Baker and Howland Islands fit this definition, and more importantly, that the Convention is binding on the United States because it is a signatory to it. It should be noted, though, that the United States has yet to ratify the Convention. As a result, it is not yet legally enforceable on the United States.

Not only is the Convention not presently binding on the United States, the Defendant's argument is further weakened by the enactment of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act") (See 16 U.S.C. § 1852) which specifically cites to "Pacific Insular Areas" as areas "containing unique historical, cultural, legal, political, and geographical circumstances which make fisheries resources important in sustaining their economic growth." 16 U.S.C. § 1801(9)(10). "Pacific Insular Area" is a term of art and is defined to mean "American Samoa, Guam, the Northern Mariana Islands, Baker Island, Howland Island..." 16 U.S.C. § 1802(30). The Magnuson Act also specifically and explicitly recognizes the EEZs off of Baker and Howland Islands. Section 1802(4)(8) of Title 16 (as amended) states that "[i]n the case of violations by foreign vessels occurring within the exclusive economic zones off... Howland, Baker, and Wake Islands, amounts received by the Secretary attributable to fines and penalties imposed under this Act, shall be deposited into an account named for the action. (See 16 U.S.C. § 1854(6), as amended by Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, section 6, Pub.L. 109-479 (2007)).

Additionally, the Magnuson Act specifically recognizes jurisdiction for enforcement of the EEZs. It states that "in the case of Guam or any possession of the United States in the Pacific Ocean, the appropriate court is the United States District Court for the District of Guam..." 16 U.S.C. § 1801(16).

In sum, Congress has unequivocally established EEZs around its territories of Baker and Howland Islands, and has given jurisdiction for their protection, and jurisdictional relief for violations occurring within those EEZs, to the District Court of Guam.

The United States also suggests that even if Congress had not expressly declared EEZs around Baker and Howland Islands, these Islands do not fit the Convention definition of "rocks." In order to find that Baker and Howland Islands are "rocks" one must first determine that they "cannot sustain human habitation." The United States introduced evidence that both islands can sustain human habitation and "have had periods of habitation in the relatively recent past and... have played a role in various economic ventures." (See Docket No. 121 at 13, Van Dyke Depo- sition 107-120, Exh. 8-15 (Attachment D)).

The Defendant argues that the principal determinant is whether a particular island or "archipelago" can sustain human habitation or economic life of its own. According to Professor Jon M. Van Dyke, a professor at University of Hawaii School of Law, the habitation must "exist for its own sake, as part of an ongoing community that sustains itself and continues through generations." (See Docket No. 88 at 5, 9). Because Baker and Howland Islands "have no economic life of their own," they should be considered "rocks" under the Convention. (See Docket No. 98 at 5).

The court finds that the Defendant's argument misconstrues Article 121. The specific language of the statute reads that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." (See United Nations Law of the Sea Convention, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, emphasis added). In the present case, the United States has provided sufficient evidence in its pleadings to give the impression that Baker and Howland Islands are in fact islands as defined under the Convention.

Notwithstanding the arguments over the definition of an island under the Convention, Federal law makes clear that the United States may declare EEZs around its territories. As noted above, Baker and Howland Islands have been designated as two such territories. Jurisdiction regarding actions taking place in these EEZs is clearly set out in the Magnuson Act. As such, the Defendant has not met the burden of Rule 12(d)(1), (2), and (3) of the Federal Rules of Civil Procedure, and as such the Motion to Dismiss is DENIED.

NOTES AND QUESTIONS

1. Was the U.S. Coast Guard exercising the right of "hot pursuit" as defined in article 111, supra p. 187 Article 111(c) applies the right of hot pursuit to violations of the EEZ?

2. Why did the judge dismiss the defendant's argument that the U.S. is not entitled to an EEZ around Baker and Howland islands because they cannot sustain human habitation or an economic life of their own?

3. Can both rocks and islands generate 200 mile EEZs? How are rocks and islands distinguished? Is a coral reef a rock or an island? See LOSC art.
claims that under international law, Baker and Howland Islands are not actually islands, but are considered "rocks" and therefore, do not provide a basis for claims of EEZs.

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The United States also suggests that even if Congress had not expressly declared EEZs around Baker and Howland Islands, these Islands do not fit the Convention definition of "rocks." In order to find that Baker and Howland Islands are "rocks" one must first determine that they "cannot sustain human habitation." The United States introduced evidence that both islands can sustain human habitation and "have had periods of habitation in the relatively recent past and... have played a role in various economic ventures." (See Docket No. 121 at 13, Van Dyke Deposition 107-120, Exh. 8-15 (Attachment D)).

The Defendant argues that the principal determinant is whether a particular island or "islet" can sustain human habitation or economic life of its own. According to Professor Jon M. Van Dyke, a professor at University of Hawaii School of Law, the habitation must "exist for its own sake, as part of an ongoing community that sustains itself and continues through generations." (See Docket No. 98 at ¶ 5). Because Baker and Howland Islands "have no economic life of their own," they should be considered "rocks" under the Convention. (See Docket No. 98 at ¶ 2).

The court finds that the Defendant’s argument misconstrues Article 121. The specific language of the statute reads that "rocks which cannot sustain human habitation or economic life on their own shall have no exclusive economic zone or continental shelf." (See United Nations Law of the Sea Convention, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, emphasis added). In the present case, the United States has provided sufficient evidence in its pleadings to give the impression that Baker and Howland Islands are in fact islands as defined under the Convention.

Notwithstanding the arguments over the definition of an island under the Convention, Federal law makes clear that the United States may declare EEZs around its territories. As noted above, Baker and Howland Islands have been designated as two such territories. Jurisdiction regarding actions taking place in those EEZs is clearly set out in the Magnuson Act. As such, the Defendant has not met the burden of Rule 12(b)(3)(B), and (3) of the Federal Rules of Civil Procedure, and as such the Motion to Dismiss is DENIED.

**NOTES AND QUESTIONS**

1. Was the U.S. Coast Guard exercising the right of "hot pursuit" as defined in article 111, supra p. 187 Article 111(2) applies the right of hot pursuit to violations of the REZ.

2. Why did the judge dismiss the defendant’s argument that the U.S. is not entitled to an EEZ around Baker and Howland islands because they cannot sustain human habitation or an economic life of their own?

3. Can both rocks and islands generate 200 mile EEZs? How are rocks and islands distinguished? Is a coral atoll a rock or an island? See LOSC, ar-

5. In President Reagan’s Proclamation No. 5030, the U.S. declared EEZs around all of its island territories and dependencies. If the U.S. did not have EEZs around these features in the Pacific, which nations would enforce regulations governing Pacific tuna fisheries in those waters? See LOSC, art. 84. See also the Western and Central Pacific Fisheries Convention Implementation Act, Pub. L. No. 108-479, title V, § 902, Jan. 12, 2007, 120 Stat. 3935, codified at 16 U.S.C. §§ 6901–6910.

6. Can the captain of the illegally-fishing foreign-flag vessel be arrested for violations of U.S. EEZ fishing law? Do the U.S. statutory provisions meet the requirements of the LOSC for arrest and detention of vessels violating fisheries regulations in the U.S. EEZ?

7. On June 8, 2009, Judge Tydingo-Gatwood signed an order, dismissing the civil forfeiture action against the Marshall Islands Fishing Co. and its vessel, when the company agreed to forfeit $250,000 of the $2.95 million in funds being held in a Bank of Hawaii account. The civil penalty was transferred to NOAA. The consent decree required the fishing vessel, a tuna purse seiner, to stay within U.S. government radar and the company to give NOAA and the Coast Guard "near real-time access to the ship’s Vessel Monitoring System tracking information in all areas of its fishing operations for three years." Because the vessel sets its nets around drifting buoys called "fish aggregating devices" the company is also required to deploy two satellite-tracked drifting buoys per fishing trip for five years. Given how difficult (and expensive) it is for coastal nations to patrol their EEZs for illegal fishing, was the agreed-to civil penalty too small relative to the value of the illegally caught tuna? Did these conditions make up for the small amount of the civil penalty? How does this line and conditions compare to those approved by the law of the sea tribunal under the LOSC article 73 on prompt release? See materials below.

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The judicial body created by the 1982 LOSC, the International Tribunal on the Law of the Sea (ITLOS), has jurisdiction to order the prompt release of vessels and crews under LOSC art. 292 upon application for release by the flag state of the vessel. The majority of the ITLOS cases have involved the issue of prompt release. The following excerpt outlines the primary issues that arise in such cases. The lucrative fishery for Patagonian toothfish, made infamous by the Australian arrest of the Viera I after a three-week hot pursuit, has attracted significant illegal fishing in the southern waters of the Atlantic and Indian oceans. See G. Bruce Kniecht, Hooked: Pirates, Poaching, and the Perfect Fish (2007). ITLOS has heard several applications for prompt release of vessels arrested for EEZ violations while fishing for toothfish.

** THE "Camoęcu" Case (Panama v. France) **

(Case No. 5, 7 February 2000)

57. In the view of the Tribunal, it is not logical to read the requirement of exhaustion of local remedies or any other analogous rule into article 292. Article 292 of the Convention is designed to free a ship and its crew from prolonged detention on account of the imposition of unreasonable bonds in municipal jurisdictions, or the failure of local law to provide for release on posting of a reasonable bond, inflicting thereby avoidable loss on a ship owner or other persons affected by such detention. Equally, it safeguards the interests of the coastal State by providing for release only upon the posting of a reasonable bond or other financial security de-

5. In President Reagan's Proclamation No. 6030, the U.S. declared EEZs around all of its island territories and dependencies. If the U.S. did not have EEZs around these features in the Pacific, which nations would enforce regulations governing Pacific tuna fisheries in those waters? See LOSC, art. 64. See also the Western and Central Pacific Fisheries Convention Implementing Act, Pub. L. No. 109-479, title V, § 502, Jan. 12, 2007, 120 Stat. 3035, codified at 16 U.S.C. §§ 6901–6910.

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**THE POLITICAL GEOGRAPHY OF THE OCEANS TODAY**

**NOTE: LOSC ART. 73 AND PROMPT RELEASE PROVISIONS LOSC, ARTICLE 73**

Enforcement of Laws and Regulations of the Coastal State

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

The judicial body created by the 1982 LOSC, the International Tribunal on the Law of the Sea (ITLOS), has jurisdiction to order the prompt release of vessels and crews under LOSC art. 292 upon application for release by the flag state of the vessel. The majority of the ITLOS cases have involved the issue of prompt release. The following excerpt outlines the primary issues that arise in such cases. The lucrative fishery for Patagonian toothfish, made infamous by the Australian arrest of the Viarsa I after a three-week hot pursuit, has attracted significant illegal fishing in the southern waters of the Atlantic and Indian oceans. See G. Bruce Knoche, Hooked: Pirates, Poaching, and the Perfect Fish (2007). ITLOS has heard several applications for prompt release of vessels arrested for EEZ violations while fishing for toothfish.

**THE "CAMOUFCO" CASE (PANAMA V. FRANCE)**

(Case No. 5, 7 February 2000)

**57.** In the view of the Tribunal, it is not logical to read the requirement of exhaustion of local remedies or any other analogous rule into article 292. Article 292 of the Convention is designed to free a ship and its crew from prolonged detention on account of the imposition of unreasonable bonds in municipal jurisdictions, or the failure of local law to provide for release on posting of a reasonable bond, inflicting thereby avoidable loss on a ship owner or other persons affected by such detention. Equally, it safeguards the interests of the coastal State by providing for release only upon the posting of a reasonable bond or other financial security de-
terminated by a court or tribunal referred to in article 292, without prejudice to the merits of the case in the domestic forum against the vessel, its owner or its crew.

58. Article 292 provides for an independent remedy and not an appeal against a decision of a national court. No limitation should be read into article 292 that would have the effect of defeating its very object and purpose. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period. ***

66. In the MV "SAIGA" Case, the Tribunal stated that "the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable." (Judgment of 4 December 1997, paragraph 82).

67. The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offence, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form. ***

71. That the Camouco has been in detention is not disputed. However, the parties are in disagreement whether the Master of the Camouco is also in detention. It is admitted that the Master is presently under court supervision, that his passport has also been taken away from him by the French authorities, and that, consequently, he is not in a position to leave Réunion. The Tribunal considers that, in the circumstances of this case, it is appropriate to order the release of the Master in accordance with article 292, paragraph 1, of the Convention. ***

**NOTES AND QUESTIONS**

1. In the Camouco case, France required the vessel's owner to post a bond of 20 million French francs. The ITLOS found that the bond was not reasonable under the circumstances and reduced it to 8 million French francs. The bottom-fishing longline vessel was arrested with 6 tons of frozen Patagonian toothfish onboard, and the crew was seen jettisoning a 34-kq bag of fresh toothfish in the EEZ of the Crozet Islands. The vessel was fishing under license from Panama and had a Spanish master. Panama argued that a reasonable bond would be only 100,000 French francs (approximately US$15,000). See Erik Francky, "Reasonable Bond" in the Practice of the ITLOS, 32 Cal. W. Int'l L.J. 983 (2002).

2. After the Viarasa I arrest, the Australian federal court upheld the confiscation of the Uruguay-registered vessel as forfeited, but the master's criminal prosecution resulted in a hung jury due to the circumstantial nature of the evidence. After the vessel was forfeited, it was sent to India for dismantling and recycling. See Laurence Blakely, The End of the Viarasa Saga and the Legality of Australia's Vessel Forfeiture Penalty for Illegal Fishing in Its Exclusive Economic Zone, 17 Pac. Rim L. & Pol'y J. 677 (2008). An increasing number of coastal states are applying forfeiture sanctions to illegal fishing vessels. What would the ITLOS rule if a flag state challenged the validity of vessel forfeiture sanctions imposed by a coastal state?

3. In the 1976 Fishery Conservation and Management Act, the United States claimed exclusive "jurisdiction" over living resources within its Exclusive Economic Zone. Following the 1983 presidential proclamation of an EEZ, Congress changed "jurisdiction" to "sovereign rights" for living resources in the zone. The legislation also claims exclusive U.S. management authority, even beyond the EEZ, over anadromous stocks of U.S. origin, generally following the provision of LOSC art. 66 which gives the state in whose rivers the stock originates the "primary interest in and responsibility for such stocks." The EEZ provisions of the 1982 Convention do not apply to so-called sedentary species of the sea floor bottom. See LOSC, art. 68. These species—lobsters, for example—are treated as resources of the coastal nation's continental shelf and governed by that regime. LOSC, art. 77. See discussion of the continental shelf regime at p. 51. The 1982 Convention specially authorizes EEZ countries and international organizations to protect marine mammals to a greater degree than the general rules on optimum utilization of living resources would otherwise require. LOSC, articles 65, 120. Are the conservation duties for continental shelf species to be treated differently from those for the living resources of the EEZ under articles 61 and 62? ***

**NOTE: TRANSBOUNDARY AND MIGRATORY FISHERIES AND STRADDLING STOCKS**

Coastal nations must also cooperate with other affected nations in managing stocks of fish whose habitats or migratory ranges overlap the boundary between the EEZs of neighboring nations ("transboundary stocks") and stocks that migrate into the high seas beyond the EEZ ("straddling stocks"). Where the vessels of other countries have the freedom to fish. In addition, all affected nations are obligated to cooperate in the management of "highly migratory species," such as tuna, which frequently migrate throughout broad areas of the high seas and several EEZs. The 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks is intended to implement articles 63-64 of the LOSC that require coordination of conservation and management measures for these stocks. The Agreement highlights the responsibility of coastal states over the requirements imposed by article 61 of the LOSC. Terms used in LOSC article 61, such as "take into account" and "consider," are generally replaced in the Agreement with "shall" adopt, ensure and protect. An important element of the Agreement is its adoption of the precautionary approach, an emerging principle of international environmental law that requires resource managers to exercise caution in the face of scientific uncertainty. The Agreement provides a detailed description of the elements of
The Origin of U.S. Rights and Responsibilities in the Oceans

58. Article 292 provides for an independent remedy and not an appeal against a decision of a national court. No limitation should be read into article 292 that would have the effect of defeating its very object and purpose. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period. ** *

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67. The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form. ** *

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Note: Transboundary and Migratory Fisheries and Straddling Stocks

Coastal nations must also cooperate with other affected nations in managing stocks of fish whose habitats or migratory ranges overlap the boundary between the EEZs of neighbor nations ("transboundary stocks") and stocks that migrate into the high seas beyond the EEZ ("straddling stocks"). Where the vessels of other countries have the freedom to fish. In addition, all affected nations are obligated to cooperate in the management of "highly migratory species," such as tuna, which frequently migrate throughout broad areas of the high seas and several EEZs. The 1986 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks is intended to implement articles 63-64 of the LOSC that require coordination of conservation and management measures for those stocks. The Agreement heightens the responsibility of coastal states over the requirements imposed by article 61 of the LOSC. Terms used in LOSC article 61, such as "take into account" and "consider," are generally replaced in the Agreement with "shall" adopt, ensure and protect. An important element of the Agreement is its adoption of the precautionary approach, an emerging principle of international environmental law that requires resource managers to exercise caution in the face of scientific uncertainty. The Agreement provides a detailed description of the elements of
the precautionary approach, giving clear definition to the obligation of coastal
states. Effective coastal state management is also encouraged by the “com-
patibility” provisions. Article 7(2)(a) of the Agreement requires compatible
management of straddling stocks within and beyond national jurisdiction
taking into account “the conservation and management measures adopted
and applied . . . by the coastal States within areas under national jurisdic-
tion and ensure that measures established in respect of such stocks for the
high seas do not undermine the effectiveness of such measures.”

The treaty received its 35th ratification and came into force in December
2001, and currently has 78 parties. The United States was among the first
states to ratify it. The Agreement urges the creation of effective regional fish-
eries organizations (RFMOs) to manage fisheries on the high seas. See gener-
ally Alison Reiser, International Fisheries Law, Overfishing and Marine Biodi-
iversity, 9 Geo. J. Int’l Envtl. L. Rev. 253 (1999); Donna Christel, It Don’t Come
EEZ: The Failure and Future of Coastal State Fisheries Management, 14 J.
Transatl. L. & Pol’y 1 (2004–05). Today, most of the high seas lies within
jurisdiction of one or more of the more than 28 RFMOs that now manage fish-
eries in particular areas of the high seas or a particular fishery throughout its
migratory range. The Agreement also includes innovative enforcement provi-
sions. These provisions were supplemented by the adoption in 2009 of the
U.N. FAO Port State Measures Agreement, which onsets the ship of certain
states where illegally caught fish is often off-loaded, to help overcome any
stalemate resulting from the balance struck by the LOSC between the au-
thority of coastal states and flag states. In November 2011, President Obama
submitted the agreement to the Senate for advice and consent to ratification.

2. Non-Living Resources

“sovereign rights” of the EEZ in the zone’s non-living natural re-
sources as it does in the zone’s living resources. This includes all kinds of
economic exploitation and exploration of the zone, such as the production
of energy from the water, currents and winds, not just extractive activi-
ties.

This sovereignty includes resources of the seabed and subsoil, as well
as the water column. The law concerning exploration for and exploitation
of offshore non-living resources, however, is set out much more completely
in the articles on the continental shelf. Further, customary law’s conti-
nental shelf doctrine, reflected in the Convention, is the traditional
framework for addressing coastal nation rights and jurisdictions over the
continental shelf. This redundancy contributes to a large, and sometimes
confusing, overlap of EEZ and continental shelf law. U.S. law governing
exploitation of the non-living resources of the continental shelf is exam-
ined in Chapter 5.

3. Marine Scientific Research

The LOSC creates a coastal nation consent regime for marine scientific
research in the EEZ. LOSC, articles 245, 246. Researchers must ap-
ply for consent at least six months before the start of their proposed proj-
jets, but states are expected to give their consent “in normal circum-
stances,” and to research projects that have as their purpose the expa-
nition of scientific knowledge of the marine environment “for the benefit of
all mankind.” Consent is implied if the coastal nation does not respond to
a research request within four months. A state may deny consent at its
discretion for any research of direct significance to the exploration for or
exploitation of the EEZ’s or continental shelf’s natural resources. The
Convention subjects a researcher, who has been granted consent, to a
long list of potentially costly obligations generally designed to assure that
the coastal state is fully informed about the project as it progresses and to
provide the opportunity for coastal state participation.

QUESTION

When the United States’ EEZ was proclaimed by President Reagan in
1983, the president recognized that the Convention’s consent regime for ma-
rine scientific research was part of customary law, but refused to assert the
regime on behalf of the United States. Why? Today, the U.S. requires ad-
vance consent for marine research only if part of the research is conducted
within the territorial sea, or if the research involves marine mammals or the
taking of commercial quantities of marine resources, or if the research in-
volves contact with the continental shelf.

4. Vessel Navigation and Overflight

The LOSC article 58 and current customary law continue to allow freedom
of surface and submerged vessel navigation and freedom of over-
flight in the EEZ. The treaty’s incorporation of these high seas freedoms
into the EEZ was an important UNCLOS III victory for U.S. negotiators
and those of other naval and maritime countries. However, some coastal
nations, such as Brazil, contend that neither the Convention nor custom-
ary law permits military maneuvers in the EEZ without the consent of
the coastal nation, especially if these maneuvers involve the use of weap-
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gation and overflight, on the high seas and in the EEZ, encompass the
freedom to conduct military exercises if done with reasonable regard for
the rights and freedoms of other nations.
2. Non-Living Resources

The 1982 U.N. Convention on the Law of the Sea recognizes the same "sovereign rights" of the EEZ nation in the zone's non-living natural resources as it does in the zone's living resources. This includes all kinds of economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds, not just extractive activities.

This sovereignty includes resources of the seabed and subsoil, as well as the water column. The law concerning exploration for and exploitation of offshore non-living resources, however, is set out much more completely in the articles on the continental shelf. Further, customary law's continental shelf doctrine, reflected in the Convention, is the traditional framework for addressing coastal nation rights and jurisdictions over the continental shelf. This redundancy contributes to a large, and sometimes confusing, overlap of EEZ and continental shelf law. U.S. law governing exploitation of the non-living resources of the continental shelf is examined in Chapter 5.

3. Marine Scientific Research

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5. Protection of the Marine Environment

The protection of the marine environment is another area where the LOSC provides extensive new dimensions to the law of the sea. Collectively, the marine environment articles purport to impose an impressive array of duties on all nation states to prevent, reduce, and control ocean pollution from all sources subject to their jurisdiction, including land-based sources, vessels, and offshore installations. The treaty also requires nations to cooperate globally and regionally to establish rules and standards for protecting the marine environment.

The Convention allows different degrees of coastal state regulatory authority for vessels in ports, in the territorial sea and in the EEZ. Coastal states are given a great deal of authority to set standards for pollution prevention over vessels in their ports or territorial sea, so long as innocent passage is not impeded. The regime attempts to balance the rights of coastal nations to control vessel source pollution in their EEZs with recognition of freedom of navigation within EEZs. The Convention requires its parties to act through "the competent international organization" or general diplomatic conference to establish uniform rules and standards for protecting the marine environment from vessel-source pollution. The "competent international organization" is understood to mean the International Maritime Organization (IMO). Only in carefully restricted situations, in which a foreign flag vessel in the EEZ has clearly committed a violation that has caused or is threatening to cause serious damage, is the coastal nation authorized to interfere with the vessel's passage. The treaty continues to give primary jurisdiction for enforcing the vessel-source rules and standards to flag states and in certain circumstances, even where the offense is committed outside the waters of the port nation, to countries whose ports are visited by offending vessels.

The LOSC's frequent reference to and incorporation of "standards of competent international organizations" recognizes the extensive framework created by treaties like the 1970 London (Dumping) Convention, numerous regional seas treaties, MARPOL 73/78 and others. It also encourages other international agreements designed to protect and preserve the marine environment. Further, the 1992 U.N. Conference on Environment and Development (UNCED) referred to the marine environment articles of the Law of the Sea Convention as a basis or framework for further development of international rules for protecting and preserving the marine environment. As described in Chapter 8, the United States has not always followed the norm of giving primary to international standards for marine pollution control, choosing instead to lead through the enactment of unilateral standards such as the oil-tanker double-hull requirement of the Oil Pollution Act of 1990.

E. THE CONTINENTAL SHELF

In general, the sovereign rights of coastal nations in the natural resources of the continental shelf remain the same today as the rights asserted in the 1945 Truman Proclamation and later codified in the 1958 Continental Shelf Convention. The most startling difference in the continental shelf in the LOSC regime is the physical extent of the legal continental shelf.

The 1958 Continental Shelf Convention began the process of distinguishing a coastal nation's legal continental shelf from the underwater geologic feature by defining the outer limit of the shelf as the 200-meter depth line or, beyond that, to the limit of exploitability of the natural resources. Although the 200-meter isobath in some locations lies hundreds of miles from the coast, the average is between 40 and 50 miles offshore. To be consistent with the development of the EEZ concept, the LOSC now establishes the minimum outer limit of the legal continental shelf, measured from the territorial sea baseline, at 200 miles. This means that the legal continental shelf may extend far beyond the geologic continental shelf and may encompass areas that would geologically be considered the deep seabed. Where the geologic continental margin (shelf, slope, and rise) extends farther than the 200-mile distance, the LOSC provides a choice of two complex formulas to allow a coastal state to claim a continental shelf beyond 200 miles: The boundary can be claimed along a line where the thickness of sediment on the seafloor is at least 1 percent of the distance to the foot of the slope (Formula 1), or the boundary can be asserted 80 km beyond the foot of the slope (Formula 2). Such extended claims are limited to either 350 nautical miles seaward of the baseline, or 100 nautical miles seaward of the 2,500-meter depth contour. The coastal nation's rights are, however, somewhat qualified on the far "outer continental shelf." LOSC, articles 76–77, 82.

While it can be asserted that the 200-mile minimum continental shelf boundary is now part of customary international law, the LOSC Convention's complicated formulas for delimiting the boundary of the outer shelf beyond 200 miles may not yet be part of custom. Because the delimitation of the extent of the continental shelf beyond 200 miles continues to be an indeterminate and complex process, the Convention provides for the establishment of an expert scientific and technical group, the Commission on the Limits of the Continental Shelf (CLCS), to review such claims. The Commission provides technical assistance, and when a country adopts a continental shelf limit based on the recommendations of the Commission, the limit of the shelf is "final and binding." LOSC, article 76(8). Because the provisions on the CLCS in LOSC Annex II, article 9 state that the Commission's actions "shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts," it seems
5. Protection of the Marine Environment

The protection of the marine environment is another area where the LOSC provides extensive new dimensions to the law of the sea. Collectively, the marine environment articles purport to impose an impressive array of duties on all nation states to prevent, reduce, and control ocean pollution from all sources subject to their jurisdiction, including land-based sources, vessels, and offshore installations. The treaty also requires nations to cooperate globally and regionally to establish rules and standards for protecting the marine environment.

The Convention allows different degrees of coastal state regulatory authority for vessels in ports, in the territorial sea, and in the EEZ. Coastal states are given a great deal of authority to set standards for pollution prevention over vessels in their ports or territorial sea, so long as innocent passage is not impeded. The regime attempts to balance the rights of coastal nations to control vessel source pollution in their EEZs with recognition of freedom of navigation within EEZs. The Convention requires its parties to act through "the competent international organization" or general diplomatic conference to establish uniform rules and standards for protecting the marine environment from vessel-source pollution. The "competent international organization" is understood to mean the International Maritime Organization (IMO). Only in carefully restricted situations, in which a foreign flag vessel in the EEZ has clearly committed a violation that has caused or is threatening to cause serious damage, is the coastal nation authorized to interfere with the vessel's EEZ passage. The treaty continues to give primary jurisdiction for enforcing the vessel-source rules and standards to flag states and in certain circumstances, even where the offense is committed outside the waters of the port nation, to countries whose ports are visited by offending vessels.

The LOSC's frequent reference to and incorporation of "standards of competent international organizations" recognizes the extensive framework created by treaties like the 1970 London (Dumping) Convention, numerous regional seas treaties, MARPOL 73/78 and others. It also encourages other international agreements designed to protect and preserve the marine environment. Further, the 1992 U.N. Conference on Environment and Development (UNCED) referred to the marine environment articles of the Law of the Sea Convention as a basis or framework for further development of international rules for protecting and preserving the marine environment. As described in Chapter 8, the United States has not always followed the norm of giving primary international standards for marine pollution control, choosing instead to lead through the enactment of unilateral standards such as the oil-tanker double-hull requirement of the Oil Pollution Act of 1990.

E. THE CONTINENTAL SHELF

In general, the sovereign rights of coastal nations in the natural resources of the continental shelf remain the same today as the rights asserted in the 1945 Truman Proclamation and later codified in the 1958 Continental Shelf Convention. The most startling difference in the continental shelf in the LOSC regime is the physical extent of the legal continental shelf.

The 1958 Continental Shelf Convention began the process of distinguishing a coastal nation's legal continental shelf from the underwater geologic feature by defining the outer limit of the shelf as the 200-meter depth line or, beyond that, to the limit of exploitations of the natural resources. Although the 200-meter isobath in some locations lies hundreds of miles from the coast, the average is between 40 and 50 miles offshore. To be consistent with the development of the EEZ concept, the LOSC now establishes the minimum outer limit of the legal continental shelf, measured from the territorial sea baseline, at 200 miles. This means that the legal continental shelf may extend far beyond the geologic continental shelf and may encompass areas that would geologically be considered the deep seabed. Where the geologic continental margin (shelf, slope, and rise) extends farther than the 200-mile distance, the LOSC provides a choice of two complex formulas to allow a coastal state to claim a continental shelf beyond 200 miles: The boundary can be claimed along a line where the thickness of sediment on the seafloor is at least 1 percent of the distance to the foot of the slope (Formula 1), or the boundary can be asserted 80 nautical miles seaward from the foot of the slope (Formula 2). Such extended claims are limited to either 350 nautical miles seaward of the baseline, or 100 nautical miles seaward of the 2,500-meter depth contour. The coastal nation's rights are, however, somewhat qualified on the "outer continental shelf." LOSC, articles 76–77, 82.

While it can be asserted that the 200-mile minimum continental shelf boundary is now part of customary international law, the LOSC Convention's complicated formulas for delimiting the boundary of the outer shelf beyond 200 miles may not yet be part of custom. Because the delimitation of the extent of the continental shelf beyond 200 miles continues to be an indeterminate and complex process, the Convention provides for the establishment of an expert scientific and technical group, the Commission on the Limits of the Continental Shelf (CLCS), to review such claims. The Commission provides technical assistance, and when a country adopts a continental shelf claim, it must have been made on the recommendation of the Commission. The limit of the shelf is "final and binding." LOSC, article 76(8). Because the provisions on the CLCS in LOSC Annex II, article 9 state that the Commission's actions "shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts," it seems
relatively clear that the determination is intended to be “final and binding” primarily in regard to the boundary between a coastal state’s continental shelf and the deep seabed administered under U.N. authority. This is not to say, however, that recognition by the CLCS of the legitimacy of a coastal state’s claim to a submerged area as continental shelf would not carry significant weight in the resolution of a subsequent maritime boundary dispute with a country claiming the same area.

The United States has currently embarked on an “Extended Continental Shelf Project” to establish the full extent of the continental shelf of the United States, consistent with international law.” See Extended Continental Shelf Project at http://continentalshelf.gov/. The project is described as the “largest and potentially most significant interagency marine survey ever undertaken by the U.S.” The melting of the Arctic Ocean ice cover due to global warming is a primary impetus for this project. Arctic seabed resources, previously unrecoverable, may soon be exploitable due the diminished ice cover, and nations surrounding the Arctic Ocean have been submitting claims to extended continental shelves to the CLCS for several years. If the United States ever joins the treaty, it will have ten years to submit a claim.

The substance of coastal nation rights in the continental shelf are expressed in both the 1958 and 1982 treaties as “sovereign rights for the purpose of exploring and exploiting its natural resources.” These rights exist without any declaration by the coastal state, and no one may undertake these activities without the consent of the coastal nation.

The non-living natural resources of the continental shelf continue to create the main economic value of continental shelves. Oil and gas deposits are still the most valuable commercially exploited resources of the seabed and subsoil. With respect to any exploitation of non-living resources undertaken in a coastal nation’s “outer continental shelf” beyond 200 miles, the 1982 Convention requires the coastal nation to contribute a small percentage, eventually a maximum of seven percent, of the value of the production to a fund to benefit developing countries. LOSC Article 82.

The resources of the continental shelf also include the living resources of the seabed and subsoil, so-called “sedimentary species.” Sedimentary species are defined as those “organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.” This is a strange definition, with no basis in categories recognized by marine biology, created in the 1985 Convention to provide a basis for coastal state control over certain commercially important species. Although not even clearly within the definition of “sedimentary species,” the United States and many other countries include such creatures as lobsters and crabs in the category. A coastal nation’s management of the continental shelf’s seden-

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tary species is not qualified by the duties to conserve and optimally utilize them found in the LOSC’s E2Z articles. The 1958 Continental Shelf Convention did not impose any such obligations, and the 1982 treaty did not restrict these rights of coastal countries already recognized by international law.

NOTES AND QUESTIONS

1. Can the U.S. claim a 200-mile continental shelf where geology does not support the claim? As a non-party to the treaty, the U.S. will not be able to have the benefit of a CLCS validation of its claim to an extended continental shelf. How can the U.S. assert its rights? Can the U.S. object to claims of other nations that are recognized by the CLCS?

2. Are a coastal nation’s continental shelf rights limited to natural resources of the seabed and subsoil? Are sunken ships or their cargoes, or submerged archaeological sites considered resources of the continental shelf? Rights in these objects have traditionally been governed by the law of salvage and other rules of admiralty law. The LOSC does include a section, however, oddly placed in a General Provisions near the end of the treaty that a coastal state may “presume that . . . removal [of objects of an archaeological and historical nature] from the seabed in the contiguous zone . . . without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.” LOSC art. 303 effectively extended coastal state jurisdiction through the contiguous zone to protect submerged cultural heritage, but beyond that, the continental shelf regime provides no basis for control or protection.

5. THE DEEP SEABED AND HIGH SEAS

A. THE DEEP SEABED MINING REGIME

Much time and energy was expended during the years of UNCLOS III in a largely successful attempt to compromise the often widely separated positions of the delegation blocs on the major topic that instigated the conference: the international mining regime for the deep seabed beyond national jurisdiction. Yet it is the part of the 1982 Convention, Part XI, devoted to that regime that caused the United States to vote against adoption of the treaty by the conference and to refuse to sign or ratify it after its adoption, over U.S. objection, by an overwhelming majority of nations. Considerations of length do not permit us to examine in detail the LOS Convention’s complex provisions that make up Part X1 and its Annexes. Many of the Convention’s seabed mining provisions have been modified in response to U.S. objections, but it is, nevertheless, important to have a general understanding of the original provisions of Part XI in order to comprehend why the United States objected to them so strongly.
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rejecting a treaty that otherwise was quite favorable to other U.S. ocean interests.

In announcing his administration's decision in mid-1982 to refuse to sign or ratify the treaty, President Reagan did, indeed, recognize that the Convention's non-sealed parts were acceptable to the United States, but he went on to raise serious U.S. objections to Part XI. Basically, the objections of the United States to the 1982 Convention can be characterized as ideological. The Reagan administration strongly favored the free-enterprise system as a general tenet and viewed the Convention's deep-sea mining regime, which required private miners to compete with the semi-monopolistic Enterprise, as not sufficiently rewarding technological innovation and investment.

In addition, the Reagan administration took the position that the favorable non-sealed parts of the Convention had, by 1982, become customary international law, while the mining regime could be created only by the Convention and bind only the parties to it. According to this thinking, the United States could take advantage of the new customary law of the sea it liked and, by refusing to become a party to the Convention, renounce the deep-sea mining provisions and the International Seabed Authority. Critics rejected the idea that a nation might accept piecemeal portions of the treaty. The argument was that the consensus negotiations led to a treaty with provisions that were based on complex bargaining and inter-relationships; the treaty could only be accepted as a "package deal."

In the waning days of the UNCLOS III negotiations, the U.S. Congress, with approval of the Executive Branch, enacted the Deep Seabed Hard Mineral Resources Act. Under this Act, the United States could issue licenses to its own nationals and companies to mine the deep seabed. The Act made no territorial claims to the seabed beyond the U.S. continental shelf and seemed to recognize the common heritage concept. It also encouraged other countries to enact similar legislation with the potential for reciprocal recognition of national licenses. The United States and other industrialized countries also pursued the potential for an international agreement among themselves to establish a seabed mining system.

Ironically, in the years since the United States took its position in opposition to the 1982 Convention's Part XI, changed circumstances reduced the significance of the Convention's deep-sea regime. First, world market prices for the important minerals of the seabed plummeted since UNCLOS III, making the expensive deep sea mining commercially impracticable in most cases. Second, the end of the Cold War and the consequent disarray of centrally managed economies caused many nations to look more favorably at the principles of market-driven systems and thus with increased empathy for the U.S. position. There was also a growing realization that the Convention could not succeed in achieving its hoped-for status as a constitution for the world ocean unless the most important ocean nations were parties.

As the treaty approached the submission of the 60th ratification needed for it to come into force, a series of efforts were made to make the seabed mining provisions of the Convention more palatable to the United States and other industrialized countries. These efforts led to the 1984 Implementation Agreement for Part XI and the ratification of the treaty by every developed country except the United States. Despite support for the treaty by the Clinton, Bush and Obama administrations, the Senate has not yet voted on the treaty. The United States remains outside the treaty.

The current seabed regime, the International Seabed Authority, has three principal organs—the Assembly, the Council, and the Secretariat. The Assembly is a representative body, but its decisions must be made in collaboration with a Council, the executive organ of the Authority. The Council has a more limited membership, elected according to a complex formula considering importing, exporting and producing countries, countries with most substantial investments, and geographical distribution. The Council establishes specific policies in conformity with the Convention and the general policies set by the Assembly. It supervises and coordinates implementation of the seabed regime and to date has concluded 11 contracts for exploration for deep-sea minerals. Each contractor has the exclusive right to explore an initial area of up to 150,000 square kilometers. Contractors include governments (India, the Republic of Korea and a consortium formed by Bulgaria, Cuba, Czech Republic, Poland, Russian Federation and Slovakia) and companies from countries that include Germany, China, Japan, Russia, Tonga and Nauru.

Seabed mining beyond national jurisdiction seems to be becoming a topic of interest again to mining companies. In addition to the manganese nodules that started the whole controversy over ownership of seabed resources, "massive-sulphide formations," occurring in areas only 1–2 km below the sea surface around deep sea vents, contain high concentrations of copper, gold, zinc and silver. Rare earths, elements crucial to electronics and currently exclusively controlled by China, have also reportedly been discovered offshore in relatively shallow seas.

B. JURISDICTION IN THE HIGH SEAS

In spite of the ocean enclosure movement of the past half century, sixty percent of the world's oceans still lie beyond coastal state jurisdiction. The traditional freedoms of the seas—the freedom of surface and submerged navigation, the freedom of overflight, the freedom to fish, and the freedom to lay submarine cables and pipelines—continue to be part of customary and treaty law. In addition, the 1982 LOSC, in Article 87, specifi-
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THE ORIGIN OF U.S. RIGHTS AND RESPONSIBILITIES IN THE OCEANS

CH. 1

The freedom to construct artificial islands and other installations permitted under international law. In general, no nation may interfere with any other nation's exercise of the freedoms of the high seas. However, most of the freedoms of the high seas are subject to certain qualifications. Most fundamentally, the LOSC codifies the principle that high seas "freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas." In addition to this rather vague limitation, certain other restrictions are set out in the treaty.

The freedom to fish is restricted in the Convention by the duty to conserve the living resources of the high seas and to cooperate with other nations to this end. The treaty also requires nations whose nationals fish the high seas to recognize the rights and duties of coastal nations with respect to straddling stocks, highly migratory species, anadromous stocks, and marine mammals. The 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks and the widespread development of regional high seas fisheries organizations are serving to flush out the obligations of states whose nationals fish the high seas.

The high seas freedoms to lay submarine cables and pipelines and to construct artificial installations are subject to the treaty's provisions on the continental shelf. The freedom to conduct scientific research is subject to the "consent regime" applicable to the EEZ and to the exclusive right of the coastal nation to explore its continental shelf.

Vessels navigating the high seas are subject to the laws and regulations of their flag nations. Countries also have jurisdiction over nationals on the high seas. Therefore, persons and events occurring on U.S. flag vessels and aircraft are governed by U.S. law while on or over the high seas. This flag-state jurisdiction is somewhat like nationality jurisdiction, and it has also been analogized to territorial jurisdiction, with the ship or aircraft "assimilated to the territory" of the flag nation. A flag state has exclusive jurisdiction over its vessels on the high seas, except when it consents to the exercise of jurisdiction by another state or when the vessel has committed certain offenses enumerated in the LOSC.

The following case concerns one such offense, that of piracy, which, as a crime of universal jurisdiction, effectively preempts the principle of exclusive flag state jurisdiction.

UNITED STATES v. ABDI WAD DIRE
United States Court of Appeals for the Fourth Circuit, 2012
680 F.3d 446

KING, Circuit Judge.

In the early morning hours of April 1, 2010, on the high seas between Somalia and the Seychelles (in the Indian Ocean off the east coast of Africa), the defendants—Abdi Wad Dile, Gobul Abdullahi Ali, Abdi Mohammed Umar, Abdi Mohammed Gurwarabher, and Mohammed Medin Hassan—imprudently launched an attack on the USS Nicholas, having confused that mighty Navy frigate for a vulnerable merchant ship. The defendants, all Somalis, were swiftly apprehended and then transported to the Eastern District of Virginia, where they were convicted of the crime of piracy, as proscribed by 18 U.S.C. § 1651, plus myriad other criminal offenses. In this appeal, the defendants challenge their convictions and life—plus-eighty—year sentences on several grounds, including that their fleeting and fruitless strike on the Nicholas did not, as a matter of law, amount to a § 1651 piracy offense. As explained below, we reject their contentions and affirm.

I.

A.

** The defendants' strike on the USS Nicholas was consistent with an accustomed pattern of Somali pirate attacks, designed to seize a merchant ship and then return with the vessel and its crew to Somalia, where a ransom would be negotiated and secured. Indeed, on April 4, 2010, during questioning aboard the Nicholas, the defendants separately confessed to participating willingly in a scheme to hijack a merchant vessel, and they provided details about their operation.

B.

The grand jury in the Eastern District of Virginia returned a six—count indictment against the defendants on April 20, 2010, and a fourteen—count superseding indictment (the operative "Indictment") on July 7, 2010. The Indictment, which alleged facts consistent with the subsequent trial evidence, included:

Count One—Piracy as defined by the law of nations (18 U.S.C. § 1651).

The Indictment identified the Eastern District of Virginia as the proper venue under 18 U.S.C. § 3238, which provides that "[t]he trial of all offenses begun or committed upon the high seas... shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought."
cally includes the freedom of scientific research and the "freedom to construct artificial islands and other installations permitted under international law." In general, no nation may interfere with any other nation's exercise of the freedoms of the high seas. However, most of the freedoms of the high seas are subject to certain qualifications. Most fundamentally, the LOSC codifies the principle that high seas "freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas." In addition to this rather vague limitation, certain other restrictions are set out in the treaty.

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SEC. 5

THE DEEP SEABED AND HIGH SEAS

UNITED STATES V. ABI WALI DIRE

660 F.3d 446

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At the conclusion of an eleven-day trial, conducted between November 9 and 24, 2010, the jury returned separate verdicts of guilty against all defendants on all counts. **

II

In these consolidated appeals, the defendants first contend that their ill-fated attack on the USS Nicholas did not constitute piracy under 18 U.S.C. § 1651, which provides in full:

> "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life. According to the defendants, the crime of piracy has been narrowly defined for purposes of § 1651 as robbery at sea, i.e., seizing or otherwise robbing a vessel. Because they boarded the Nicholas only as captives and indisputably took no property, the defendants contest their convictions on Count One, as well as the affixed fine sentences.

A.

**

1. **"[A]rticle I of the Constitution accords Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 10 (the "Define and Punish Clause"). In its present form, the language of 18 U.S.C. § 1651 can be traced to an 1819 act of Congress, which similarly provided in pertinent part:

> "That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, be punished."

See Act of Mar. 3, 1810, ch. 7, § 5, 3 Stat. 510, 512–14 (the "Act of 1819"). Whereas today's mandatory penalty for piracy is life imprisonment, however, the Act of 1819 commanded punishment "with death." Id. at 514. Examining the Act of 1819 in its United States v. Smith decision of 1820, the Supreme Court recognized:

> "There is scarcely a writer on the law of nations, who does not alude to piracy, as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, animo furandi, is piracy."**

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18 U.S.C. (5 Wheat.) 153, 161 (1820). Accordingly, the Smith Court, through Justice Story, articulated "no hesitation in declaring, that piracy, by the law of nations, is robbery upon the sea." Id. at 162.

2. Here, the district court ** focused on piracy's unusual status as a crime defined by the law of nations and subject to universal jurisdiction. ** **

The district court began by recognizing that, "[f]or centuries, pirates have been universally condemned as hostis humani generis—enemies of all mankind—because they attack vessels on the high seas, and thus outside of any nation's territorial jurisdiction, . . . with devastating effect to global commerce and navigation." Hassan I, 747 F. Supp. 2d at 602. **

a. ** The court further recognized, however, that Congress encountered early difficulties in criminalizing "general piracy" (that is, piracy in contravention of the law of nations), rather than solely "municipal piracy" (i.e., piracy in violation of United States law). See id. at 606. On the one hand, "[w]hile municipal piracy is flexible enough to cover virtually any overt act Congress chooses to dub piracy, it is necessarily restricted to those acts that have a jurisdictional nexus with the United States."**

On the other hand, "general piracy can be prosecuted by any nation, irrespective of the presence of a jurisdictional nexus." Id. (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in the judgment)) ("In the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him."). Importantly, though, "because it is created by international consensus, general piracy is restricted in substance to those offenses that the international community agrees constitute piracy." Id. **

b. The district court in Hassan I astutely traced the meaning of "piracy" under the law of nations, from the time of the Act of 1819 to the modern era and the crime's codification at 18 U.S.C. § 1651. The court commenced with the Supreme Court's 1820 decision in United States v. Smith, relating that Justice Story easily concluded that the Act of 1819 'sufficiently and constitutionally' defined piracy by expressly incorporating the definition of piracy under the law of nations." See Hassan I, 747 F. Supp. 2d at 616 (quoting Smith, 18 U.S.C. (5 Wheat.) at 162).**

Having noted that "[n]o other Supreme Court decision since Smith has directly addressed the definition of general piracy," and recognizing the necessity of looking to foreign sources to determine the law of nations, the district court then focused on case law from other countries. See Hassan I, 747 F. Supp. 3d at 614, 616 & n.16. The district court then reviewed the Privy Council of England's 1934 decision in In re Piracy Juris Gentium, [1934] A.C. 586 (P.C.), which it considered to be "[t]he most significant foreign case dealing with the question of how piracy is defined
At the conclusion of an eleven-day trial, conducted between November 9 and 24, 2010, the jury returned separate verdicts of guilty against all defendants on all counts. ** * * *

II. In these consolidated appeals, the defendants first contend that their ill-fated attack on the USS Nicholas did not constitute piracy under 18 U.S.C. § 1651, which provides in full:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

According to the defendants, the crime of piracy has been narrowly defined for purposes of § 1651 as robbery at sea, i.e., seizing or otherwise robbing a vessel. Because they boarded the Nicholas only as captives and indisputably took no property, the defendants contend their convictions on Count One, as well as the affixed life sentences.

A. ** * * *

1. ** * * “[A]rticle I of the Constitution accords Congress the power “[t]o define and punish Piracies and Fugitives committed on the high Seas, and Offenses against the Law of Nations.” U.S. Const. art. I, § 8, cl. 10 (the “Define and Punish Clause”). In its present form, the language of 18 U.S.C. § 1651 can be traced to an 1819 act of Congress, which similarly provided in pertinent part:

That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof . . . be punished . . .

See Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (the “Act of 1819”). Whereas today’s mandatory penalty for piracy is life imprisonment, however, the Act of 1819 commanded punishment “with death.” Id. at 514. Examining the Act of 1819 in its United States v. Smith decision of 1820, the Supreme Court recognized:

There is scarcely a writer on the law of nations, who does not allude to piracy, as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, animo furandi, is piracy.

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18 U.S. (5 Wheat.) 153, 161 (1820). Accordingly, the Smith Court, through Justice Story, articulated “no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea.” Id. at 162.

2. Here, the district court ** * * focused on piracy’s unusual status as a crime defined by the law of nations and subject to universal jurisdiction. ** * * The district court began by recognizing that, “[f]or centuries, pirates have been universally condemned as hostis humani generis—enemies of all mankind—because they attack vessels on the high seas, and thus outside of any nation’s territorial jurisdiction, . . . with devastating effect to global commerce and navigation.” Hasan I, 747 F. Supp. 2d at 602. ** * * **

a. ** * * The court further recognized, however, that Congress encountered early difficulties in criminalizing “general piracy” (that is, piracy in contravention of the law of nations), rather than solely “municipal piracy” (i.e., piracy in violation of United States law). See id. at 606. On the one hand, “[w]hile municipal piracy is flexible enough to cover virtually any overt act Congress chooses to dub piracy, it is necessarily restricted to those acts that have a jurisdictional nexus with the United States.” ** * * **

On the other hand, “general piracy can be prosecuted by any nation, irrespective of the presence of a jurisdictional nexus.” Id. (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in the judgment) (“[I]n the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him.”)). Importantly, though, “because it is created by international consensus, general piracy is restricted in substance to those offenses that the international community agrees constitute piracy.” Id. ** * * **

b. The district court in Hasan I astutely traced the meaning of “piracy” under the law of nations, from the time of the Act of 1819 to the modern era and the crime’s codification at 18 U.S.C. § 1651. The court commenced with the Supreme Court’s 1820 decision in United States v. Smith, relating that Justice Story easily concluded that “the Act of 1819 ‘sufficiently and constitutionally’ defined piracy by expressly incorporating the definition of piracy under the law of nations.” See Hasan I, 747 F. Supp. 2d at 616 (quoting Smith, 18 U.S. (5 Wheat.) at 162). ** * * **

Having noted that “[n]o other Supreme Court decision since Smith has directly addressed the definition of general piracy,” and recognizing the necessity of looking to foreign sources to determine the law of nations, the district court then focused on case law from other countries. See Hasan I, 747 F. Supp. 2d at 614, 616 & n.16. [The district court then reviewed the Privy Council of England’s 1934 decision in In re Piracy Juris Gentium, 1934 A.C. 586 (P.C.), which it considered to be “[t]he most significant foreign case dealing with the question of how piracy is defined]
under international law." There the Privy Council concluded: "Actual robbery is not an essential element in the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium." The district court also examined Kenya's 2006 Republic v. Ahmed prosecution of "ten Somali suspects captured by the United States Navy on the high seas"—"the most recent case on [general piracy] outside the United States of which [the district court was] aware," which affirmed the defendants' convictions for piracy jure gentium, culling from international treaties a modern definition of piracy that encompasses acts of violence and detention.

As detailed in 

Huson I, "there are two prominent international agreements that have directly addressed, and defined, the crime of general piracy." See 

747 F. Supp. 2d at 618. The first of those treaties is the Geneva Convention on the High Seas (the "High Seas Convention"), which was adopted in 1958 and ratified by the United States in 1961. . . . [and] the United Nations Convention on the Law of the Sea (the "UNCLOS"), which has amassed 162 parties since 1982—albeit not the United States, which has not ratified the UNCLOS but has recognized that its baseline provisions reflect customary international law." See United States v. Alaska, 505 U.S. 569, 588 n.10 (1992) (internal quotation marks omitted). ** Relevant here, the UNCLOS provides that

[piracy consists of any of the following acts:

a. any illegal acts of violence or detention, or any act of depre-
dation, committed for private ends by the crew or the pas-
sengers of a private ship or a private aircraft, and directed:

i. on the high seas, against another ship or aircraft, or
against persons or property on board such ship or aircr
raft;

ii. against a ship, aircraft, persons or property in a place
outside the jurisdiction of any State;

b. any act of voluntary participation in the operation of a ship
or of an aircraft with knowledge of facts making it a pirate
ship or aircraft;

c. any act of inciting or of intentionally facilitating an act de-
scribed in subparagraph (a) or (b).


c. ** First, the district court interpreted 18 U.S.C. § 1651 as an
unequivocal demonstration of congressional intent "to incorporate . . . any subsequent developments in the definition of general piracy under the law of nations." Huson I, 747 F. Supp. 2d at 623. The court rationalized:
under international law." There the Privy Council concluded: "Actual robbery is not an essential element in the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium." The district court also examined Kenya's 2003 Republic v. Ahmed prosecution of "ten Somali suspects captured by the United States Navy on the high seas"—[the most recent case on [general piracy] outside the United States of which [the district court was] aware," which affirmed the defendants' convictions for piracy jure gentium, culling from international treaties a modern definition of piracy that encompasses acts of violence and detention.]

As detailed in Hasan I, "there are two prominent international agreements that have directly addressed, and defined, the crime of general piracy." See 747 F. Supp. 2d at 618. The first of those treaties is the Geneva Convention on the High Seas (the "High Seas Convention"), which was adopted in 1982 and ratified by the United States in 1983. In 1961, ... [and] the United Nations Convention on the Law of the Sea (the "UNCLOS"), which has amassed 162 parties since 1982—albeit not the United States, which has not ratified the UNCLOS "but has recognized that its baseline provisions reflect customary international law." See United States v. Alaska, 503 U.S. 569, 588 n.10 (1992) (internal quotation marks omitted). *** Relevante here, the UNCLOS provides that:

[piracy consists of any of the following acts:

a. any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

i. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

ii. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

b. any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a piracy or aircraft;

c. any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).


c. *** First, the district court interpreted 18 U.S.C. § 1651 as an unequivocal demonstration of congressional intent "to incorporate... any subsequent developments in the definition of general piracy under the law of nations." Hasan I, 747 F. Supp. 2d at 623. The court rationalized:

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The plain language of 18 U.S.C. § 1651 reveals that, in choosing to define the international crime of piracy by [reference to the "law of nations"], Congress made a conscious decision to adopt a flexible— but at all times sufficiently precise—definition of general piracy that would automatically incorporate developing international norms regarding piracy. Accordingly, Congress necessarily left it to the federal courts to determine the definition of piracy under the law of nations based on the international consensus at the time of the alleged offense.

Id. citing Ex parte Quirin, 317 U.S. 1, 29-30 (1942), where the Supreme Court reiterated its 1820 ruling in Smith that "[a]ct of Congress punishing the crime of piracy, as defined by the law of nations' is an appropriate exercise of its constitutional authority to 'define and punish' the offense, since it has adopted by reference the sufficiently precise definition of piracy in international law.

*** Engaging in [an analysis of contemporary law to determine the definition of piracy], the court concluded:

As of April 1, 2010, the law of nations, also known as customary international law, defined piracy to include acts of violence committed on the high seas for private ends without an actual taking. More specifically, the definition of general piracy under modern customary international law is, at the very least, reflected in Article 15 of the 1958 High Seas Convention and Article 101 of the 1982 UNCLOS.

Id. at 632-33 ***. [The court relied on the UNCLOS definition of piracy as reflecting customary international law, the court chose the UNCLOS, which—in addition to "contains... a definition of general piracy that is, for all practical purposes, identical to that of the High Seas Convention"— "has more states parties than the High Seas Convention" and "has been much more widely accepted by the international community than the High Seas Convention." Id. at 633.

In the course of its discussion of the High Seas Convention and the UNCLOS, the district court recognized that "[t]reaties are proper evidence of customary international law because, and insofar as, they create legal obligations akin to contractual obligations on the States parties to them." Hasan I, 747 F. Supp. 2d at 633 (quoting Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 137 (2d Cir. 2010)). According to the court, "[w]hile all treaties shed some light on the customs and practices of a state, 'a treaty will only constitute sufficient proof of a norm of customary international law if an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles.' " Id. (emphasis omitted) (quoting Kiobel, 621 F.3d at 137). "In this regard," the court emphasized, "it is also important to un-
understand that a treaty can either "embolden or create] a rule of customary international law," and such a rule "applies beyond the limited subject matter of the treaty and to nations that have not ratified it." Id. (alterations in original) (quoting Kieboel, 621 F.3d at 138). With those principles in mind, the court recognized:

There were 63 states parties to the High Seas Convention as of June 10, 2010, including the United States, and there were 161 states parties to UNCLOS (including the European Union) as of October 5, 2010, including Somalia. The 161 states parties to UNCLOS represent the "overwhelming majority" of the 192 Member States of the United Nations, and the 194 countries recognized by the United States Department of State. UNCLOS's definition of piracy therefore represents a widely accepted norm, followed out of a sense of agreement (or, in the case of the states parties, treaty obligation), that has been recognized by an overwhelming majority.

Accordingly, UNCLOS's definition of general piracy has a norm-creating character and reflects an existing norm of customary international law that is binding on even those nations that are not a party to the Convention, including the United States.

Hasson I, 747 F. Supp. 2d at 633-34 (footnote and citations omitted). The court further observed "that UNCLOS does not represent the first time that acts of violence have been included in the definition of general piracy." Hasson I, 747 F. Supp. 2d at 651. The court took special note of Kenya's recent reliance on the UNCLOS to define general piracy in the 2006 Republic v. Ahmed case, concluding:

The district court then reaffirmed that, as of the alleged offense date of April 2010, the definition of piracy under the law of nations was found in the substantively identical High Seas Convention and UNCLOS, the latter having "been accepted by the overwhelming majority of the world as reflecting customary international law." Hasson I, 747 F. Supp. 2d at 640. Mirroring those treaties, the court pronounced that "piracy within the meaning of § 1651 consists of any of the following acts and their elements:"

(A)(1) any illegal act of violence or detention, or any act of deprivation; (2) committed for private ends; (3) on the high seas or a place outside the jurisdiction of any state; (4) by the crew or the passengers of a private ship . . . ; (5) and directed against another ship . . . , or against persons or property on board such ship . . . ; or

(B)(1) any act of voluntary participation in the operation of a ship . . . ; (2) with knowledge of the facts making it a pirate ship; or

(C)(1) any act of inciting or of intentionally facilitating (2) an act described in subparagraph (A) or (B).

On appeal, the defendants maintain that the district court erred with respect to Count One both by misinstructing the jury on the elements of the piracy offense, and in refusing to award post-trial judgments of ac-
understand that a treaty can either "embody[] or create[] a rule of customary international law," and such a rule "applies beyond the limited subject matter of the treaty and to nations that have not ratified it." Id. (alterations in original) (quoting Kiebel, 621 F.3d at 138). With those principles in mind, the court recognized:

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(B)(1) any act of voluntary participation in the operation of a ship . . . ; (2) with knowledge of the facts making it a pirate ship; or

(C)(1) any act of inciting or of intentionally facilitating (2) an act described in subparagraph (A) or (B).

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The court further held that the defendants' conduct fell within the definition of piracy as set forth in the United States Department of State's Note on Infractions of the Law of the High Seas, the United States' recognition of UNCLOS as binding, and the defendants' knowledge of the law of the High Seas Convention and UNCLOS. Additionally, the court rejected the defendants' arguments that their conduct did not constitute piracy because they were not "pirates" under international law or that the United States had not ratified UNCLOS. The court concluded that the defendants' conduct constituted piracy under UNCLOS and that the United States had ratified UNCLOS.

On appeal, the defendants maintain that the district court erred with respect to Count One both by misinterpreting the jury on the elements of the offense, and in refusing to award post-trial judgments of ac-
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The crux of the defendants' position is now, as it was in the district court, that the definition of general piracy was fixed in the early Nineteenth Century, when Congress passed the Act of 1819 first authorizing the exercise of universal jurisdiction by United States courts to adjudicate charges of "piracy as defined by the law of nations." **

The defendants' view is thoroughly refuted, however, by a bevy of precedent, including the Supreme Court's 2004 decision in Sosa v. Alvarez-Machain. The Sosa Court was called upon to determine whether Alvaro could recover under the Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS"). At the time, the ATS predates the criminalization of general piracy, in that it was passed by the first Congress as part of the Judiciary Act of 1789. See Sosa, 542 U.S. at 712–13 (citing Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77 (authorizing federal district court jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States"). Yet the Sosa Court did not regard the ATS as incorporating some stagnant notion of the law of nations. Rather, the Court concluded that, while the first Congress probably understood the ATS to confer jurisdiction over only the three paradigmatic law-of-nations torts of the time—including piracy—the door was open to ATS jurisdiction over additional "claims based on the present day law of nations," albeit inextraordinary circumstances. See id. at 724–25. **

Moreover, in its 1820 Smith decision, the Supreme Court unhesitatingly approved of the piracy statute's incorporation of the law of nations, looking to various sources to ascertain how piracy was defined under the law of nations. See Smith, 18 U.S. (5 Wheat.) at 158–61.

The defendants would have us believe that, since the Smith era, the United States' prescription of general piracy has been limited to "robbery upon the sea." But that interpretation of our law would render it incongruous with the modern law of nations and prevent us from exercising universal jurisdiction in piracy cases. See Sosa, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in the judgment) (explaining that universal jurisdiction requires, inter alia, "substantive uniformity among the laws of the [existing] nations"). At bottom, then, the defendants' position is irreconcilable with the noncontroversial notion that Congress intended in § 1651 to define piracy as a universal jurisdiction crime. In the circumstances, we are constrained to agree with the district court that § 1651 incorporates a definition of piracy that changes with advancements in the law of nations.

Notes and Questions

1. LOSC, art. 100; 301.1916, art. 10016, that "[n]o one State shall cooperate to the fullest possible extent in the repression of piracy on the high seas . . . ." If piracy is an international crime, what is the role of domestic law? Does the jurisdiction in the "sea of communications" reflect the need for an international convention to address this problem? Has the modern law of the EEZ, as interpreted by the district court, contributed to this problem? Is Somalia able to exercise its sovereign rights and responsibilities in its EEZ?

2. In H.R. 384 Rebuttal Research v. Sea Shepherd Conservation Society, 800 F. Supp. 2d 1216 (W.D. Wash. 2012), a Japanese whaling company brought an action in federal court under the Alien Tort Statute, alleging that the conservation organization's activities protesting the defendant's whaling violated the terms of the LOSC. The district court held that the alleged conduct did not violate international norms against piracy but did not thereby support a claim for injunctive relief. Without the Ninth Circuit, the district court's decision would have been overruled by the Ninth Circuit.

** Notably, as one of the permanent members of the Security Council, the United States supported the adoption of Resolution 2020, which was approved by a unanimous Security Council.
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quittal. Each aspect of the defendants' position obliges us to assess whether the court took a mistaken view of 18 U.S.C. § 1651 and the incorporated law of nations.***

The crux of the defendants' position is now, as it was in the district court, that the definition of general piracy was fixed in the early Nineteenth Century, when Congress passed the Act of 1819 first authorizing the exercise of universal jurisdiction by United States courts to adjudicate charges of "piracy as defined by the law of nations."***

The defendants' view is thoroughly refuted, however, by a bevy of precedent, including the Supreme Court's 2004 decision in Sosa v. Alvarez-Machain. The Sosa Court was called upon to determine whether Alvarez could recover under the Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS"). Significantly, the ATS predates the criminalization of general piracy, in that it was passed by "[t]he first Congress ... as part of the Judiciary Act of 1789." See Sosa, 542 U.S. at 712–13 (citing Act of Sept. 24, 1789, ch. 20, § 6, 1 Stat. 77 (authorizing federal district court jurisdiction over "all causes where an alien suing for a tort only in violation of the law of nations or a treaty of the United States").) Yet the Sosa Court did not regard the ATS as incorporating some stagnant notion of the law of nations. Rather, the Court concluded that, while the first Congress probably understood the ATS to confer jurisdiction over only the three paradigmatic law-of-nations torts of the time—including piracy—the door was open to ATS jurisdiction over additional "claim[s] based on the present-day law of nations," albeit in narrow circumstances. See id. at 724–25.***

Moreover, in its 1820 Smith decision, the Supreme Court unhesitatingly approved of the piracy statute's incorporation of the law of nations, looking to various sources to ascertain how piracy was defined under the law of nations. See Smith, 18 U.S. (5 Wheat.) at 158–61.

The defendants would have us believe that, since the Smith era, the United States' prescription of general piracy has been limited to "robbery upon the sea." But that interpretation of our law would render it incongruous with the modern law of nations and prevent us from exercising universal jurisdiction in piracy cases. See Sosa, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in the judgment) (explaining that universal jurisdiction requires, inter alia, "substantive uniformity among the laws of [the exercising nations]"). At bottom, then, the defendants' position is irreconcilable with the noncontroversial notion that Congress intended in § 1651 to define piracy as a universal jurisdiction crime. In those circumstances, we are constrained to agree with the district court that § 1651 incorporates a definition of piracy that changes with advancements in the law of nations.

We also agree with the district court that the definition of piracy under the law of nations, at the time of the defendants' attack on the USS Nicholas and continuing today, had for decades encompassed their violent conduct. That definition, spelled out in the UNCLOS, as well as the High Seas Convention before it, has only been reaffirmed in recent years as nations around the world have banded together to combat the escalating scourge of piracy. For example, in November 2011, the United Nations Security Council adopted Resolution 2020, recalling a series of prior resolutions approved between 2008 and 2011 "concerning the situation in Somalia"; expressing "grave [ ] concern [ ] about the ongoing threat that piracy and armed robbery at sea against vessels pose"; and emphasizing "the need for a comprehensive response by the international community to repress piracy and armed robbery at sea and tackle its underlying causes." Of the utmost significance, Resolution 2020 reaffirmed "that international law, as reflected in the [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea."10 Because the district court correctly applied the UNCLOS definition of piracy as customary international law, we reject the defendants' challenge to their Count One piracy convictions, as well as their mandatory life sentences.

IV.

Pursuant to the foregoing, we affirm the convictions and sentences of each of the defendants.

AFFIRMED

NOTES AND QUESTIONS

1. LOSC, art. 100 sets out the requirement that "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas ..." If piracy is an international crime, what is the role of domestic law? Does the rise of modern piracy in the "sea lanes of communication" reflect a breakdown of ocean governance? Has the new regime of the EEZ, ironically, contributed to this breakdown? Is Somalia able to exercise its sovereign rights and responsibilities in its EEZ?

2. In Institute for Cetacean Research v. Sea Shepherd Conservation Society, 880 F.Supp. 2d 1216 (W.D. Wash. 2012), a Japanese whaling company brought an action in federal court under the alien tort statute, alleging that the conservation organization's activities protesting the plaintiffs' whaling violated international norms including the LOSC. The district court held that the alleged conduct did not violate international norms against piracy so as to support a claim for injunctive relief under the statute. The Ninth Circuit,

10 Notably, as one of the permanent members of the Security Council, the United States supported the adoption of Resolution 2020, which was approved by a unanimous Security Council.
however, reversed; holding, inter alia: "You don't need a peg leg or an eye patch. When you run ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be." 708 F.3d 1099 (9th Cir. 2013), 2013 WL 2278588 (May 24, 2013)(amending opinion supporting an injunction, denying petition for rehearing en banc; and ordering reassignment to another district court judge). Are the Society's protests for "private ends" under LOSC art. 107? If Captain Paul Watson is found in the U.S., can he be imprisoned for life under 18 U.S.C. § 1651? For background on Watson's activities and views, see R. Khatchadourian, A Reporter at Large: Neptune's Navy, The New Yorker (Nov. 5, 2007).

3. The U.N. Security Council's Resolution 2020 refers to "the need for a comprehensive response ... to tackle its underlying causes." What are these causes? See Emmanuel Kisingini, Somali Pirates: Villains or Victims? 17 S. African J. Int'l Aff. 361 (2010) (illegal fishing and dumping of toxic industrial wastes in Somalia's EEZ), Does Resolution 2020, which allows international forces to enter Somalia's territorial sea to apprehend pirates, constitute a comprehensive response?

4. Any country's warships can stop and board any ship if there is a basis for suspecting that the ship is engaged in the slave trade or that it is a ship without nationality, but the LOSC provides no universal jurisdiction for prosecution of slave traders. Is this a gap in the treaty?

5. Consider the question again following Section C on the Contiguous Zone on p. 55. Rights of non-flag countries do not extend to the high seas for illicit drug trafficking. See LOSC, art. 108. Can the U.S. interdict a vessel on the high seas if it is suspected of smuggling drugs intended to be taken into the country?

In U.S. v. Epifanio Matox-Lutchi, 627 F.3d 1 (1st Cir. 2010), the U.S. Coast Guard interdicted a boat about 25 miles from Haiti. "No ensign, flag, registration, or other evidence of the vessel's nationality was found on board," and no one on board the vessel made a claim of nationality for the boat.

Although enforcement jurisdiction presumptively lies with the flag state, 1 Oppenheim, supra, § 266, at 603, "[i]t is not enough that a vessel have a nationality; she must claim it and be in a position to provide evidence of it." Anderson, Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law, 13 J. Mar. L. & Com. 323, 341 (1982), peremptorily to a Privy Council judgment:

"[T]he freedom of the open sea, whatever those words may connote, is a freedom of ships which fly, and are entitled to fly, the flag of a State. . . . Their Lordships would accept as a valid statement of international law, the following passage from Oppenheim's Interna-

ional Law . . .: "In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever. . . ."

Molvary v. Att'y-Gen. for Palestine, [1948] A.C. 351 (P.C.) 369-70; see also 1 Oppenheim, supra, § 261, at 595.

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Practically every vessel, including the legendary Flying Dutchman, has links with some country; but the stateless vessel concept in the MDEA [Maritime Drug Law Enforcement Act] and in international law is designed prudentially. The controlling question is whether at the point at which the authorities confront the vessel, it bears the insignia or papers of a national vessel or its master is prepared to make an affirmative and sustainable claim of nationality. To read the MDEA more restrictively would mean that the master and crew need only carry no papers and jump overboard to avoid having their vessel classed as stateless.

The defendants are not entitled to raise a violation of international law as an objection, see 46 U.S.C. § 70505, but in any case the MDEA does not conflict with international law. For international law too treats the "stateless vessel" concept as informed by the need for effective enforcement. Thus, a vessel may be deemed "stateless," and subject to the enforcement jurisdiction of any nation on the scene, if it fails to display or carry insignia of nationality and seeks to avoid national identification.

This occurs if a "ship" repeatedly refuses, without reasonable excuse, to reveal its allocation of nationality. If no registration number is visible and no other indicator of nationality can be discerned, the cog- noeasibility is already demonstrably insufficient, and interference will then often be justifiable . . . From the basic design of [the law of sea] and from the place the institution here called allocation occupies in it already it may be concluded that a "ship" which obscures the cognoeasibility of its allocation repeatedly, deliberately, and successfully may be treated as stateless.


Id. at 6-7.

6. In the excerpt in note 5 above, the court notes that "[t]he defendants are not entitled to raise a violation of international law as an objection. . . . If the international law obligation is to the flag state and not individuals, can a flag state waive the right, i.e., give permission to another state to board the vessel? Consider the following analysis:

Malta, under whose flag Suerte's vessel was registered, consented to the boarding and search of his vessel, as well as to the application of United States law. A flag nation's consent to a seizure on the high seas consti-
however, reversed, holding, inter alia: "You don’t need a pea leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be." 708 F.3d 1099 (9th Cir. 2013), 2013 WL 2278588 (May 24, 2013)(amending opinion supporting an injunction, denying petition for rehearing en banc; and ordering reassignment to another district court judge). Are the Society’s protests for “private ends” under LOSC art. 107? If Captain Paul Watson is found in the U.S., can he be imprisoned for life under 18 U.S.C. § 1651? For background on Watson’s activities and views, see R. Khatchadourian, A Reporter at Large: Neptune’s Navy, The New Yorker (Nov. 5, 2007).

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5. Consider the question again following Section C on the Contiguous Zone on p. 35. Rights of non-flag countries do not extend to the high seas for illicit drug trafficking. See LOSC, art. 108. Can the U.S. interdict a vessel on the high seas if it is suspected of smuggling drugs intended to be taken into the country?

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Although enforcement jurisdiction presumptively lies with the flag state, 1 Oppenheim, supra, § 266, at 603, “[i]t is not enough that a vessel have a nationality; she must claim it and be in a position to provide evidence of it.” Anderson, [Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law, 13 J. Mar. L. & Com. 323, 341 (1982)], particularly quotes a Privy Council judgment: “The freedom of the open sea, whatever those words may connotate, is a freedom of ships which fly, and are entitled to fly, the flag of a State.... Their Lordships would accept as a valid statement of international law, the following passage from Oppenheim’s Interna-

6. In the excerpt in note 5 above, the court notes that “[t]he defendants are not entitled to raise a violation of international law as an objection.” If the international law obligation is to the flag state and not individuals, can a flag state waive the right, i.e., give permission to another state to board the vessel? Consider the following analysis: Malta, under whose flag Suerie’s vessel was registered, consented to the boarding and search of his vessel, as well as to the application of United States law. A flag nation’s consent to a seizure on the high seas consti-
tates a waiver of that nation's rights under international law. See United States v. Williams, 617 F.2d 1063, 1090 (6th Cir. 1980) (en banc). "Interference with a ship that would otherwise be unlawful under international law is permissible if the flag state has consented," RESTAT-EMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 522 cmt. e (1987) ... Along this line, ... the MDEA provides: "[A] vessel subject to the jurisdiction of the United States includes a vessel registered in a foreign nation whose flag nation has consented or waived objection to the enforcement of United States law by the United States," 46 U.S.C. App. § 1903(c)(1)(C). This codifies the above-described generally accepted principle of international law: a flag nation may consent to another's jurisdiction. See RESTATEMENT (THIRD) § 522 reporters note 8 (the MDEA "confirmed the practice" of relying on informal grants of consent by flag nations (emphasis added)). ... U.S. v. Suerte, 291 F.3d 860, 375-76 (6th Cir. 2012). See also, Joseph E. Krunek, Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?, 31 University of Miami Int'l & Comparative Law Review 21 (2000).

6. THE FUTURE OF U.S. OCEAN POLICY AND THE LAW OF THE SEA CONVENTION

The United States, whose coastal length and configuration give it the world's largest geographic area of offshore authority, is the chief beneficiary of the new ocean regime as a coastal nation. The United States has also benefitted from the protection of freedom of navigation rights, particularly through the provisions on transit passage and archipelagic sea lane passage that assure the continued ability of submarines to traverse international straits submerged and freedom of overflight. But customary law of the sea has been rapidly evolving in the last decade. Can the United States lead the direction of that evolution from outside the UNCLOS treaty regime?

In May and June 2012, the Senate Foreign Relations Committee once more held hearings concerning U.S. accession to the LOSC. The following excerpts from the testimony of Secretary of State Hillary Rodham Clinton set out the current U.S. interests at stake in remaining outside the treaty.

TESTIMONY OF HILLARY RODHAM CLINTON, SECRETARY OF STATE, BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS

[May 23, 2012]

[One could argue, that 20 years ago, 10 years ago, maybe even five years ago, joining the convention was important but not urgent. That is no longer the case today. Four new developments make our participation a matter of utmost security and economic urgency.

First, for years, American oil and gas companies were not technologi- cally ready to take advantage of the convention's provisions regarding the extended U.S. continental shelf. Now they are. The convention allows countries to claim sovereignty over their continental shelf far out into the ocean, beyond 200 nautical miles from shore. The relevant area for the United States is probably more than 1.5 times the size of Texas. In fact, we believe it could be considerably larger.

U.S. oil and gas companies are now ready, willing, and able to ex- plore this area. But they have made it clear to us that they need the max- imum level of international legal certainty before they will or could make the substantial investments*. If we were a party to the convention, we would gain international recognition of our sovereign rights, including by using the convention's procedures, and therefore be able to give our oil and gas companies this legal certainty. Staying outside the convention, we simply cannot.

The second development concerns deep seabed mining, which takes place in that part of the ocean floor that is beyond any country's jurisdiction. Now for years, technological challenges meant that deep seabed mining was only theoretical; today's advances make it very real. But it's also very expensive, and before any company will explore a mine site, it will naturally insist on having a secure title to the site and the minerals that it will recover. The convention offers the only effective mechanism for gaining this title. But only a party to the convention can use this mechanism on behalf of its companies.

So as long as the United States is outside the convention, our compa- nies are left with two bad choices—either take their deep sea mining business to another country or give up on the idea. Meanwhile, * * * China, Russia, and many other countries are already securing their licenses under the convention to begin mining for valuable metals and rare earth elements. And as you know, rare earth elements are essential for manu- facturing high-tech products like cell phones and flat screen televisions. They are currently in tight supply and produced almost exclusively by China. * * * If we expect to be able to manage our own energy future and our need for rare earth minerals, we must be a party to the Law of the Sea Convention.
The Future of U.S. Ocean Policy and the Law of the Sea Convention

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So as long as the United States is outside the convention, our companies are left with two bad choices—either take their deep sea mining business to another country or give up on the idea. Meanwhile, China, Russia, and many other countries are already securing their licenses under the convention to begin mining for valuable metals and rare earth elements. And as you know, rare earth elements are essential for manufacturing high-tech products like cell phones and flat screen televisions. They are currently in tight supply and produced almost exclusively by China. If we expect to be able to manage our own energy future and our need for rare earth minerals, we must be a party to the Law of the Sea Convention.
The third development that is now urgent is the emerging opportunities in the Arctic. As the area gets warmer, it is opening up to new activities such as fishing, oil and gas exploration, shipping, and tourism. This convention provides the international framework to deal with these new opportunities. We are the only Arctic nation outside the convention. Russia and the other Arctic states are advancing their continental shelf claims in the Arctic while we are on the outside looking in. As a party to the convention, we would have a much stronger basis to assert our interests throughout the entire Arctic region.

The fourth development is that the convention’s bodies are now up and running. The body that makes recommendations regarding countries’ continental shelves beyond 200 nautical miles is actively considering submissions from over 40 countries without the participation of a U.S. commissioner. The body addressing deep seabed mining is now drawing up the rules to govern the extraction of minerals of great interest to the United States and American industry. It simply should not be acceptable to us that the United States will be absent from either of those discussions.

Our negotiators obtained a permanent U.S. seat on the key decision-making body for deep seabed mining. I know of no other international body that accords one country and one country alone—as we—a permanent seat on its decision making body. But until we join, that reserved seat remains empty.

So those are the stakes for our economy.  

* * * Our security interests are intrinsically linked to freedom of navigation. We have much more to gain from legal certainty and public order in the world’s oceans than any other country. U.S. Armed Forces rely on the navigational rights and freedoms reflected in the convention for worldwide access to get to combat areas, sustain our forces during conflict, and return home safely all without permission from other countries.

Now as a non-party to the convention, we rely—we have to rely—on what is called customary international law as a legal basis for invoking and enforcing these norms. But in no other situation at which—in which our security interests are at stake do we consider customary international law good enough to protect rights that are vital to the operation of the United States military. So far we’ve been fortunate, but our navigational rights and our ability to challenge other countries’ behavior should stand on the firmest and most persuasive legal footing available, including in critical areas such as the South China Sea.

* * * The benefits of joining have always been significant, but today the costs of not joining are increasing. So much is at stake, and I therefore urge the Committee to listen to the experts, listen to our businesses,
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