

The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?†

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INTRODUCTION

Hawaii is the only state in the United States that consists solely of islands. These islands are unique among the states in climate and life style, and they present unique problems to those who would define their jurisdiction over the adjacent ocean areas. The eight main inhabited Hawaiian islands are entitled to territorial seas,¹ contiguous

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1. Articles 2 and 3 of the United Nations Convention on the Law of the Sea (hereafter "LOS Convention") state that coastal nations are authorized to claim a "territorial sea" of up to 12 miles adjacent to their coastline or baselines over which they have "sovereignty" in the same sense that they have "sovereignty" over their land territory. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter LOS Convention]. See LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE

zones,² exclusive economic zones,³ and continental shelves,⁴ which are measured in the same way that similar zones are delineated outward from continental land territories.⁵ To the northwest of these main islands is a chain of smaller insular outcroppings that are a wildlife preserve for sea birds, monk seals, green turtles, and other unique species.⁶ Some of these formations may not be entitled to an Exclusive Economic Zone (EEZ) according to article 121 of the 1982 United Nations Convention on the Law of the Sea (LOS Convention).

Although the United States is not a signatory to the LOS Convention, it has made certain claims in the oceans consistent with the

SEA WITH INDEX AND FINAL ACT OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA U.N. Doc. A/CONF. 62/122, U.N. Sales No. E.83.V.5 (1983).

2. The LOS Convention defines the "contiguous zone" as a zone not to exceed 24 nautical miles from the baselines from which the territorial sea is measured. LOS Convention, *supra* note 1, art. 33(2). The purpose of this zone is to "(a) prevent infringement of . . . customs, fiscal, immigration or sanitary laws and regulations within [the] territory of sanitary laws and regulations within [the] territory or territorial sea [of the claiming state, and] (b) punish infringement of the above laws and regulations committed within [the] territory and territorial sea." *Id.*, art. 33(1).

3. The concept of the Exclusive Economic Zone (EEZ) is recognized in the LOS Convention. The EEZ can extend up to 200 nautical miles from a nation's coastline or baselines. *Id.*, art. 57. The EEZ also grants the coastal state, *inter alia*, sovereign rights for the purpose of "exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superadjacent to the [seabed] and of the [seabed] and its subsoil, and . . . other activities for the exploitation and exploration of the zone. . . ." *Id.*, art. 56(1)(a). Exploitation of the EEZ, however, is subject to certain restrictions itemized in the LOS Convention. *See, e.g., id.*, art. 58 (freedom of other nations to lay submarine cables and pipelines, of navigation and overflight, and of "other internationally lawful uses"), and *id.*, art. 62 (limited rights of other nations regarding the utilization of living resources).

4. Article 1 of the Convention on the Continental Shelf defines the continental shelf as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of superjacent waters admits of the exploitation of the natural resources of said areas." Convention on the Continental Shelf, art. 1, *done* in Geneva, April 29, 1958, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311 [hereinafter Continental Shelf Convention]. The LOS Convention defines the continental shelf as the seabed and subsoil "to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." LOS Convention, *supra* note 1, art. 76(1). Where the continental shelf extends beyond the 200 nautical mile limit, the coastal state may determine the outer margin by (1) a line 60 miles from the foot of the undersea slope, which is determined as the point of maximum change in gradient, or (2) a line fixed by determining the thickness of sedimentary rock of at least one percent of the shortest distance to the base of the continental slope. *Id.*, art. 76(4).

5. LOS Convention, *supra* note 1, art. 121.

6. See tables 1 and 2 *infra*. The Northwestern Hawaiian Island chain also contains a number of reefs and subsurface features that clearly do not generate ocean zones under any accepted definition of an island because they are underwater at high tide. Among these features are Brooks Bank, St. Rogatien Bank, Raita Bank, Northhampton Seamounts, Neva Shoal, Pioneer Bank, Salmon Bank, Gambia Shoal, Ladd Seamount, Nero Seamount, and Pogy Bank. *See generally* U.S. DEP'T OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, UNITED STATES COAST PILOT 7 at 428-33 (19th ed. 1983) [hereinafter COAST PILOT].

provisions of the Convention. The United States claims a territorial sea of three nautical miles in width around most of its coasts, less than the twelve nautical miles allowable by the LOS Convention, and an EEZ of two hundred nautical miles in width, as permitted by the Convention.⁷ Both claims are measured from the coast at low water as indicated on standard nautical charts.⁸

THE UNITED STATES AND EXTENDED MARITIME CLAIMS

The United States was the first nation to make an extended maritime claim for the resources of the oceans when President Truman proclaimed in 1945 that "the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coast of the United States" were regarded by the United States as appertaining to it and "subject to its jurisdiction and control."⁹ Most other nations eventually accepted this claim and the 1958 Convention on the Continental Shelf (Continental Shelf Convention)¹⁰ legitimized such claims for all nations. The Continental Shelf Convention also stated that the right to exploit the resources of the continental shelf included areas "adjacent to the coasts of islands,"¹¹ but it failed to define the term "islands."¹²

During the first negotiating sessions of the Third United Nations Conference on the Law of the Sea (UNCLOS III) in the early and mid-1970s, the United States opposed the establishment of any extended resource zone.¹³ By 1976, however, many other nations had claimed such zones and United States fishing interests recognized that the United States had much to gain from a similar claim. The United States Congress, therefore, enacted into law the Magnuson

7. Proclamation No. 5030, 3 C.F.R. 22-23 (1983) [hereinafter Reagan Proclamation]. At the time of this writing (October 1988), the Reagan Administration is giving active consideration to extending the territorial sea to twelve miles.

8. The United States does not use straight baselines, and recognizes only a few relatively unimportant historical bays.

9. Proclamation No. 2667, 3 C.F.R. 67 (1945), *reprinted in* 59 Stat. 884 (1945). *See also supra* note 4 (further details of the continental shelf regime).

10. Continental Shelf Convention, *supra* note 4. As of December 31, 1986, 54 nations were parties to this Convention. J. SWEENEY, C. OLIVER, N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM: DOCUMENTARY SUPPLEMENT* 313 (3d ed. 1988).

11. Continental Shelf Convention, *supra* note 4, art. 1(6).

12. *See infra* notes 46-50 and accompanying text.

13. *See, e.g.,* Colson, *The United States, the Law of the Sea, and the Pacific*, in *CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION* 39 (J. Van Dyke ed. 1985) [hereinafter *CONSENSUS AND CONFRONTATION*]. *See also id.* at 390 (remarks of Tommy T.B. Koh, President of the Third Conference on the Law of the Sea (UNCLOS III)).

Fishery Conservation and Management Act of 1976 (Fishery Conservation Act),¹⁴ which established a 200 nautical mile fishery conservation zone along all United States coasts.¹⁵ Although the boundaries of this zone are not explicitly defined in metes and bounds, the statute appears to state that such zones should be drawn around *all* territories or possessions of the United States,¹⁶ and a subsequent notice in the Federal Register claimed a 200 nautical mile fishery zone around United States insular possessions without regard to whether they were inhabited or not.¹⁷ Informal maps prepared by the United States Department of Interior show 200 mile circles around every isolated islet belonging to the United States, no matter how insignificant, including each of the Northwestern Hawaiian Islands.¹⁸

Following the enactment of the Fishery Conservation Act, the United States ceased its opposition to an extended resource zone, and the negotiators at UNCLOS III agreed on an EEZ in which the coastal nation would have exclusive sovereign rights over living and nonliving resources.¹⁹ Although the United States refused to sign the resulting LOS Convention, President Reagan nonetheless claimed an EEZ for the United States in his Presidential Proclamation of March 10, 1983.²⁰

The Proclamation states that this zone is "contiguous to the territorial sea . . . of the United States . . . and United States overseas

14. Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-82 (1982).

15. *Id.* § 1811.

16. *Id.* § 1802(21).

17. 42 Fed. Reg. 12937-40 (1977). The language in this notice that is relevant to the Northwestern Hawaiian Islands reads as follows: "*Hawaii and Midway Island*. The seaward limit of the fishery conservation zone is 200 nautical miles from the baseline from which the territorial sea is measured." This language is potentially ambiguous because no specific geographic coordinates are listed but it apparently is designed to claim a 200 nautical mile fisheries zone around any insular formation that can generate a territorial sea. Article 10 of the Convention on the Territorial Sea and Contiguous Zone (Territorial Sea Convention), allows any insular formation that is above water at high tide to generate a territorial sea. Convention on the Territorial Sea and Contiguous Zone, art. 10, *done* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter Territorial Sea Convention]. Article 121(2) of the LOS Convention provides similarly. LOS Convention, *supra* note 1, art. 121(2). The language in the Federal Register thus apparently was chosen to generate fishing zones around all insular formations that generate territorial seas, which would include, to use the language of article 121(3) of the LOS Convention, "rocks which cannot sustain human habitation or economic life of their own."

18. Interview with Alexander F. Holsen, Minerals Management Service, U.S. Dept't of Interior in Miami, Florida, July 21, 1986. For an example of such a map, see Feldman & Colson, *The Maritime Boundaries of the United States*, 75 AM. J. INT'L L. 729, 735 (1981).

19. LOS Convention, *supra* note 1, art. 56.

20. Proclamation No. 5030, *supra* note 7.

territories and possessions."²¹ The President's accompanying statement accepts most of the provisions of the LOS Convention, which, in his language, "fairly balance the interests of all states," and identifies only the deep seabed mining provisions of the Convention as objectionable to the United States position.²² Apparently, therefore, the United States is committed to following the language in the LOS Convention in delimiting the boundaries of its EEZ.²³

The United States' Position on Maritime Zones Generated by Uninhabited Islands

The United States, however, has not made public a formal statement on its EEZ boundaries, nor has it yet published an official map of its maritime zones. The relevant statements of its leading ocean law decisionmakers appear to be somewhat contradictory, although those officials who have commented have consistently asserted that

21. *Id.*

22. *Id.* (statement by President Reagan). The deep seabed mining provisions were the only provision objected to in the President's statement:

Last July I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help to attain the aspirations of developing countries.

...

However, the Convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all States.

Id. In addition to rejecting the seabed mining provisions of the LOS Convention, the Proclamation reiterates the United States position that coastal nations are not entitled to exercise jurisdiction over migratory species in the absence of international agreements concerning their management. *Id.* See generally Van Dyke & Hefstel, *Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency*, 3 U. HAW. L. REV. 1 (1981), and Van Dyke & Nicol, *U.S. Tuna Policy: A Reluctant Acceptance of the International Norm*, in *TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION* (D. Doulman ed. 1987).

23. The Proclamation states: "The United States will exercise these sovereign rights and jurisdiction in accordance with the rules of international law." Proclamation, *supra* note 7, at 23. See also Colson, *The Maritime Boundries of the United States: Where Are We Now?*, in 20 LAW OF THE SEA INSTITUTE PROCEEDINGS 464 (T. Clingan ed. 1988) [hereinafter 20 INSTITUTE PROCEEDINGS].

At least one international tribunal, in any event, has found article 121 of the LOS Convention to be a codification of customary international law, and thus to be binding on the United States and other nations. Conciliation Comm. on the Continental Shelf Area Between Iceland and Jan Mayen: Report to the Governments of Iceland and Norway, June 1981, reprinted in 20 I.L.M. 797, 803 (1981) ("In the opinion of the Conciliation Commission [Article 121 of the Law of the Sea Convention] reflects the present status of international law on this subject").

the United States is entitled to claim an EEZ around all its possessions, whether inhabited or not, without regard to size or location.

The contradictions in approach were illustrated at the July 1986 Annual Meeting of the Law of the Sea Institute in Miami, Florida. John D. Negroponete, Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs, gave a luncheon address in which he strongly argued against actions by coastal nations that curtail the navigational freedoms of the maritime powers.²⁴ In particular, he denounced the tendency of some nations to make increasingly broad claims based on their contention that their geography was "unique," and criticized these claims as promoting a trend of "creeping uniqueness" that would encourage additional unwarranted claims.²⁵

Later at the same meeting, however, David Colson, Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs in the United States State Department, discussed United States boundary negotiations and claims.²⁶ Colson stated that the United States had concluded that *all* islands should have the *same* capacity to generate EEZs, whether they are inhabited or not, and that isolated or awkwardly located islands should *not* be viewed as "special circumstances" or geographical anomalies in determining extended maritime boundaries.²⁷ Colson said, for instance, that the United States allowed Venezuela's small Aves Island, 300 miles (480 km) north of Venezuela's coast, to generate a full zone in the context of negotiating the boundary between Venezuela and Puerto Rico.²⁸ This was allowed, even though that decision reduced the size of the United States' EEZ in that region, because the United States interagency boundary policy group decided that United States' overall interests would be better served if small islands were permitted to generate zones without any limitations or qualifications.²⁹

24. Negroponete, *Who Will Protect Freedom of the Seas?*, in 20 INSTITUTE PROCEEDINGS, *supra* note 23, at 126.

25. *Id.* The term "creeping uniqueness" was coined by Lewis Alexander at the Honolulu Workshop on International Navigation sponsored by the Law of the Sea Institute and the East-West Center in January 1986. See INTERNATIONAL NAVIGATION: ROCKS AND SHOALS AHEAD? 1, 108, 120, 384, 403, 410 (J. Van Dyke, L. Alexander & J. Morgan eds. 1988) [hereinafter INTERNATIONAL NAVIGATION].

26. 20 INSTITUTE PROCEEDINGS, *supra* note 23, at 466.

27. *Id.* See also L. ALEXANDER, NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT: GEOGRAPHICAL IMPLICATIONS FOR THE UNITED STATES 33 (Offshore Consultants, Inc., Peace Dale, R.I., 1986).

28. Maritime Boundary Treaty Between the United States of America and the Republic of Venezuela, *done* March 28, 1978, T.I.A.S. 9890 (entered into force Nov. 24, 1980). Aves is located at 15° 42' N., 63° 38' W.

29. In his speech, Colson stated that the United States established an interagency group in the 1970s to establish overall boundary policy. This group determined that the United States should press for equidistant boundary lines in all its 25 maritime boundaries (with 15 countries) except for those involving (a) the Gulf of Maine Boundary with

The United States similarly accepted a loss of maritime space in the Gulf of Mexico negotiations because of Mexico's uninhabited islands in that area,³⁰ because the United States stood to gain substantially from claims based on islands in its negotiations with Cuba (i.e., the Florida Keys),³¹ and in the Pacific (Baker,³² Howland,³³ Jarvis,³⁴ and Palmyra Islands³⁵ in relation to Kiribati, and Swains

Canada, (b) the Soviet Union (Alaska), and (c) the Bahamas. See 20 INSTITUTE PROCEEDINGS *supra* note 23, at 466.

30. An executive agreement with Mexico has been in force since 1976. The United States Senate has not ratified this agreement as a treaty, apparently because of a concern about its impact on potential oil and gas in the affected region of the Gulf of Mexico. See Feldman & Colson, *supra* note 18, at 740, 743-45, (citing The Treaty on Maritime Boundaries Between the United States and the United Mexican States, S. Exec. Doc. F, 96th Cong., 1st Sess. (1979)).

31. The United States negotiated a boundary with Cuba in 1976-77 based on equidistance and giving full effect to all islands (which benefits the United States). Although the United States Senate has not yet ratified this agreement, it presently is in force as an executive agreement. See Feldman & Colson, *supra* note 18, at 746.

32. Located at approximately 0° 13' N., 176° 31' W., Baker Island is an arid coral island, rising some 15 to 20 feet (5 to 6 meters) above sea level. THE COLUMBIA LIPPENCOTT GAZETTEER OF THE WORLD 45 (L. Seltzer ed. 1962) [hereinafter GAZETTEER]; E. BRYAN, PANALAU MEMOIR 189 (1974). An airstrip used during World War II but now abandoned, dominates the geography of the island. *Id.* at 193.

The guano from this island was removed during 1859 to 1878 and again from 1886 to 1891. United States colonists landed on the island in April 1935 to solidify the United States claim to ownership and built a lighthouse and several substantial dwellings. They were evacuated in 1942. The island was used intermittently for military purposes in World War II, and a Coast Guard Long Range Aid to Navigation (LORAN) station subsequently was built there. The island presently is uninhabited, but it is said to be visited annually by the United States Fish and Wildlife Services on a Coast Guard ship transiting the area. PACIFIC ISLANDS YEARBOOK 209 (J. Carter ed. 1981) [hereinafter PAC. ISLANDS Y.B.]; D. STANLEY, MICRONESIA HANDBOOK: GUIDE TO AN AMERICAN LAKE 224 (1985).

33. Howland Island lies approximately 90 miles (144 km) north of Baker at 0° 48' N., 176° 38' W. It is 1.5 miles (2.5 km) long by about a half mile (1 km) wide. Vegetation is sparse, but the island supports a large sea bird population. Guano was mined on this island between 1858 and 1890, and a few United States colonists lived there between 1935 and the start of World War II to reinforce United States claims to possession. During this time, they constructed an airstrip on the island. The island currently is uninhabited, but, like Baker Island, the United States Fish and Wildlife Service visits periodically. PAC. ISLANDS Y.B., *supra* note 32, at 209; D. STANLEY, *supra* note 32, at 223-24.

34. "Jarvis Island is a small, bleak bowl-shaped place, about 3 by 1.5 [kilometers] [1 square mile], lying by itself just south of the equator, 0 degrees 23 min. [S.] and 160 degrees 0.2 min. W. long." PAC. ISLANDS Y.B., *supra* note 32, at 262. It occasionally has been occupied by guano prospectors and scientists, and by United States citizens fortifying the United States' claim (between 1935 and 1942), but it currently is uninhabited. *Id.* D. STANLEY, *supra* note 32, at 223.

35. Palmyra is located at 5° 53' N. and 162° 5' W. It consists of some fifty islets with a combined land area of only one square mile (2 square kilometers). Palmyra receives extensive rain and various attempts have been made over the years to bring economic life to the island, with projects and proposals including coconut plantations, tour-

Island in American Samoa in relation to Western Samoa).³⁶ When asked what the United States position was on the definition of an "island" as differentiated from a "rock" as used in article 121(3) of the LOS Convention,³⁷ Colson replied that

[W]e decided that any piece of real estate could fit under the definition of an island, and we made the decision based upon what areas had United States territorial seas drawn around them . . . If it had a territorial sea, we decided that it was entitled to be used as a base point for drawing equidistant line boundaries.³⁸

Thus, the United States' position is that any insular feature that can generate a territorial sea can also generate an EEZ. Under this view, there are no "rocks" that meet the criteria of article 121(3) of being unable to "sustain human habitation or economic life of their own."

The effect of this position is to expand the areas of the ocean where the living and nonliving resources can be claimed by one nation to the exclusion of all others, thus reducing the resources that

ists resorts, and storage sites for spent nuclear fuel rods. None of these efforts has succeeded. In 1970, the population was estimated to be 74. *See* E. BRYAN, *supra* note 32. In 1979, the population was estimated to be 25. PAC. ISLANDS Y.B., *supra* note 32, at 268. More recently, however, this island has been said to be uninhabited. PACIFIC ISLANDS YEARBOOK, 261-62 (J. Carter ed. 1984); D. STANLEY, *supra* note 32, at 222.

36. Located at 11° 3' S., 171° 15' W., Swains Island is a verdant ring of sand and coral that rises approximately 20 feet (6.5 meters) above sea level. The population according to the 1970 census was 74, a drop from the 125 recorded in 1937. PAC. ISLANDS Y.B., *supra* note 32, at 56. *See generally* Broder & Van Dyke, *Ocean Boundaries in the South Pacific*, 4 U. HAW. L. REV. 1, 50-56 (1982).

The present United States position is that Swains Island should "be given full effect in an equidistant delimitation with neighboring countries." In a letter dated October 1, 1986, from Colson to the author, Jon Van Dyke, the effect of the United States position regarding Swains Island was explained as follows:

This position was notified to the neighboring governments of Western Samoa and New Zealand on behalf of Tokelau It has since appeared as the limit of [United States] fishery jurisdiction/EEZ on [United States] nautical charts. As well, the Treaty Between the United States of America and New Zealand on the Delimitation of the Maritime Boundary Between the United States of America and Tokelau, *done* Dec. 2, 1980, [T.I.A.S. 10775 (entered into force Sept. 3, 1983)], utilizes this approach, albeit the equidistant line boundary is simplified.

Letter from David A. Colson, Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs to the United States State Department to Jon M. Van Dyke (Oct. 1, 1986).

37. *See infra* notes 54-73 and accompanying text. The question was asked by Professor John Knauss of the University of Rhode Island. 20 INSTITUTE PROCEEDINGS, *supra* note 23, at 472.

38. *See* the discussion following Mr. Colson's speech in 20 INSTITUTE PROCEEDINGS, *supra* note 23, at 472. This response also was supported by Brian Hoyle, Director of the Office of Ocean Policy, United States State Department, and Alexander F. Holser, of the Department of the Interior's Mineral Management Service, in conversations with the author, Jon Van Dyke, following Secretary Negroponte's speech in Miami on July 21, 1986. In response to a question whether any United States islands exist for which the United States does not claim an EEZ, Mr. Hoyle said, "Well, they are all capable of habitation." Mr. Holser said the United States EEZ claim parallels the fisheries zone claimed under the 1976 Fisheries Conservation and Management Act.

remain to be shared as the "common heritage" for all humankind. The spirit of this position appears to be inconsistent with the concern raised by Assistant Secretary Negroponete when he delivered his plea to maintain the traditional concept of the freedom of the sea. "The United States," Negroponete said, "has taken a conservative approach to its maritime claims for several reasons, one of which is the desire to lead by example."³⁹ Although Secretary Negroponete's immediate concerns (navigational freedoms) are not directly affected by expansive EEZ claims,⁴⁰ navigation is a "use" of the ocean — like resource exploitation — and most nations other than the major maritime powers view claims that restrict access to resources to be in the same category as claims that restrict navigational freedoms.⁴¹ The expansive EEZ claims now being made by the United States may, therefore, be setting a precedent that will haunt it in the future.

PAST AND PRESENT USE OF THE TERM "ISLAND"

The words used in article 121(3) of the LOS Convention to define the subcategory of islands that do not generate extended maritime zones — "[r]ocks which cannot sustain human habitation or economic life of their own" — are not defined and commentators have speculated at length about how this phrase should be interpreted.⁴² Geographically, the term "islands" may designate a variety of insular⁴³ features, from sand banks to large land masses depending upon

39. 20 INSTITUTE PROCEEDINGS, *supra* note 23, at 130; *see also* the discussion that follows in *id.* at 131.

40. All nations have navigational freedoms within the EEZs of other nations according to article 58(1) of the LOS Convention. *See supra* note 1. Certain conflicts may develop, however, as a result of a coastal nation's enforcement of its pollution control laws. *See* LOS Convention, *supra* note 1, art. 56(1)(b)(III). And controversy still exists over the rights of warships in the EEZ. *See, e.g.*, CONSENSUS AND CONFRONTATION, *supra* note 13, at 304-05 n.17 (quoting the statement made by Brazil at the time of signing the LOS Convention).

41. *See generally* Anand, *Transit Passage and Overflight in International Straits*, in INTERNATIONAL NAVIGATION, *supra* note 25, at 125.

42. *See, e.g.*, D. BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW 8-9, 33-34, 284 (1979); C. SYMMONS, Preface to THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW (1979); Van Dyke & Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Ocean's Resources*, 12 OCEAN DEV. & INT'L L. 265 (1983). For an interesting discussion of the relationship between some of the issues not addressed by the 1982 Convention, see Friedheim & Bowen, *Neglected Issues at the Third United Nations Law of the Sea Conference*, in 12 LAW OF THE SEA INSTITUTE PROCEEDINGS 2-36 (J. Gamble ed. 1979) [hereinafter 12 INSTITUTE PROCEEDINGS].

43. The term "insular" is used in order to avoid the confusion or syntactic commitment that would result from classifying any of the land formations discussed as "is-

the functional purpose of the usage.⁴⁴ The term "island" for purposes of claims to the surrounding waters initially was examined in the 1930 League of Nations Conference for the Codification of International Law, where the term was defined as "an area of land, which is permanently above [the] high-water mark."⁴⁵ This definition later was modified in the Territorial Sea Convention to read: "a naturally-formed area of land, surrounded by water, which is above water at high-tide."⁴⁶ The simultaneously-drafted Continental Shelf Convention used the term "islands" in its description of formations that can generate a continental shelf, but did not define the term.⁴⁷ Although apparently adopting the definition provided in the companion Territorial Sea Convention, the Continental Shelf Convention provided limitations on the use of islands in generating continental shelves. First, disputes over zones created by islands are to be settled by agreement of the parties concerned.⁴⁸ Second, "special circumstances" may require limitations on the ocean space generated by the islands.⁴⁹

lands" within the meaning used in article 121 of the LOS Convention. For a similar use of this term, see C. SYMMONS, *supra* note 42.

44. See Morgan, *Marine Regions and Regionalism in Southeast Asia*, 8 MARINE POL'Y, 299, 300 (1984).

45. *League of Nations Conference for the Codification of International Law*, League of Nations Doc. C.230.M.117.1930.V, at 219 (1930).

46. Territorial Sea Convention, *supra* note 17, at art. 10(1).

47. See Continental Shelf Convention, *supra* note 4, art. 1(b). Article 1 in its entirety states:

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of *islands*.

(Emphasis added).

48. *Id.*, art. 6.

49. *Id.*, art. 6(1). See, e.g., *Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, (Decision of June 30, 1977), 18 R. Int'l Arb. Awards, 95, para. 202 (1980) (location of the Channel Islands constitute a "special circumstance"), *reprinted in* 18 I.L.M. 397 (1979) [hereinafter *Anglo-French Arbitration*].

Although the term "special circumstances" was left undefined in the Continental Shelf Convention, at least one delegate to the First United Nations Conference on the Law of the Sea (UNCLOS I) in Geneva noted that "size, position and importance may well be deciding criteria in assessing whether or not any particular island should be taken into account when forming a sea boundary." Statement of Mr. H.R. Kennedy, Delegate to UNCLOS I, *reprinted in* Van Dyke & Brooks, *supra* note 42, at 276.

Factors relevant to determining when an island is to be given a reduced effect on maritime boundaries have been dealt with on a case-by-case basis. "The experience at Geneva [leading to UNCLOS I] reveals that while there was widespread agreement that the presence of islands might be a special circumstance, there was no agreement concerning possible criteria that might be used to determine whether any islands should be included or not." C. SYMMONS, *supra* note 42, at 282 n.128 (quoting Padwa, *Submarine Boundaries*, 9 INT'L & COMP. L.Q. 628, 648 (1960)). For a summary of the controversy over whether the "equidistance" or "equitable" approach should be applied to the maritime

The problem of defining islands for purposes of claiming maritime zones arose again during UNCLOS III. Proposals for giving all islands the same status as continental nations were submitted by the Pacific island and Greek delegates.⁵⁰ Romania, Turkey, and a group of African nations, on the other hand, proposed limiting the maritime zones of islands depending on factors such as size, habitation, and population.⁵¹ The resulting compromise was the ambiguous language of article 121.⁵² Article 121(1) defines an island as a "naturally formed area of land, surrounded by water, which is above water at high tide."⁵³ Although the term "rocks" is not defined in the LOS Convention, clearly, from the context in which the term appears, a rock is a particular type of island. Because the LOS Convention provides no specific definition for the term "rock," one can reasonably assume that ordinary definitions of the terms are applicable.⁵⁴

boundaries of offshore islands, see Broder & Van Dyke, *supra* note 36, at 4-5.

50. For a more detailed account of proposals for the regime of islands, see Van Dyke & Brooks, *supra* note 42, at 280-85 and accompanying notes.

51. See *id.* at 281. See also *infra* note 69.

52. For a discussion of the diplomatic value of leaving some issues unresolved, see Onuf, *International Codification: Interpreting the Last Half-Century*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 264, 265-66 (R. Falk, F. Kraatochwil & S. Mendlowitz eds. 1985) (Studies on a Just World Order no. 2) (codification does not create international law but rather restates it as international law develops through custom and practice), and Flemming, *Customary International Law and the Law of the Sea: A New Dynamic*, in 13 *LAW OF THE SEA INSTITUTE PROCEEDINGS* 489, 503 (T. Clingan ed. 1982) [hereinafter 13 *INSTITUTE PROCEEDINGS*] ("The flexibility of the continuing conference context form of law creation [e.g., UNCLOS IV or V] will better allow for reconciliation of differing economic systems, different ideological positions and different regional requirements on a broad variety of topics relating to the development of ocean space and perhaps other important areas of international law."). As discussed below, nations generally have resisted broad jurisdictional claims based on islands when those claims restrict the jurisdiction that a neighboring nation can claim. When no neighbor is in the vicinity, however, the claim frequently remains unchallenged. The high seas and the common heritage of humankind thus are undefended from increasing jurisdictional claims. See *infra* notes 107-63 and accompanying text.

53. LOS Convention, *supra* note 1, art. 121(1).

54. Vienna Convention on the Law of Treaties, art. 31(1), *opened for signature* May 23, 1969, U.N. Doc. A/Conf.39/27, *reprinted in* 63 *AM. J. INT'L L.* 875 (1969). It might be argued that the term "rock" should be given a purely geographical definition. Other barren and uninhabitable insular formations, such as cays and atolls, then would be considered "islands," no matter how small, and they would generate exclusive economic zones whether or not they are habitable or able to sustain economic life. See, e.g., Hodgson & Smith, *The Informal Negotiating Text (Committee II): a Geographical Perspective*, 3 *OCEAN DEV. AND INT'L L.* 225 (1976).

This approach is rejected as matter of logical construction, because it leads to a result that is manifestly absurd, namely that one type of inhabited insular formation would be able to generate an EEZ while another would not. Logic requires that the term "rocks" be given a definition that is not strictly geographical. Rather, "rocks" should be given a definition that conforms to the common sense usage of that term as found in the diction-

Among a number of definitions of "rock" found in *Webster's Third New International Dictionary* are the following: "A mass of stone lying at or near the surface of the water," and "a barren islet."⁵⁵ The *Navigation Dictionary*,⁵⁶ an official United States publication considered authoritative by mariners, defines an "island" as a "tract of land smaller than a continent, completely surrounded by water."⁵⁷ The *Navigation Dictionary* further defines an "islet" as "a very small and minor island,"⁵⁸ and a "rock" as "an isolated rocky formation or a single large stone, usually one constituting a danger to navigation. It may be always submerged, always uncovered, or alternately covered and uncovered by the tide. A pinnacle is a sharp-pointed rock rising from the bottom."⁵⁹

These definitions suggest two possible approaches to giving meaning to Article 121(3). The definition offered by the *Navigation Dictionary* supplies a purely⁶⁰ geographical description of the term. Clearly a "pinnacle" or a formation so designated, such as Gardner Pinnacles,⁶¹ would fall within this definition. The use of the term "rocky" within the definition, however, supplies little assistance in defining "rock." Historically, several proposals have used purely geographical factors in determining the appropriate size, shape, and constitution of an insular formation deemed a "rock." Usually these definitions also were tied to conditions for human habitability.⁶²

ary definitions — any barren islet. *See infra* text accompanying notes 55-59.

55. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1965 (1971). *See also* Hodgson & Smith, *The Informal Single Negotiating Text (Committee II): A Geographical Perspective*, 3 OCEAN DEV. & INT'L L. 225, 230 (1976) ("it is fairly obvious that 'rock' is intended to refer to a small-sized island").

56. United States Naval Oceanographic Office, NAVIGATION DICTIONARY (2d ed. 1969).

57. *Id.* at 114.

58. *Id.*

59. *Id.* at 215.

60. The term "purely" is used here to denote the use of objective features of the landmass, which are free from any socio-cultural interpretation to the extent possible. Although this goal is desirable in the science of geography, it is recognized that completely objective criteria are unattainable. *See, e.g.,* Sauer, *The Fourth Dimension of Geography*, in SELECTED ESSAYS 1963-1975 at 279, 283 (1981) ("Human geography [is] understood as cultural experience of a particular space"); Harvey, *Population, Resources and the Ideology of Science*, in PHILOSOPHY IN GEOGRAPHY 155, 174-77 (S. Gale & G. Olsson eds. 1979).

61. *See infra* note 285-86 and accompanying text.

62. For example, Gidel criticized one of the first definitions offered by the International Law Commission, which was stated in purely geographical terms. He proposed instead that an island be required to have natural conditions "permettent la résidence stable de groupes humaines organisés" (permitting stable residence of organized human groups). 3 B. Gidel, LE DROIT INTERNATIONAL PUBLIC DE LA MER 684 (1934), *cited in* Van Dyke & Brooks, *supra* note 42, at 272.

For a discussion of some of the early proposals put forth by other scholars *see id.* at 271-73. One early draft of what became the LOS Convention required that "[i]slets or islands without economic life and unable to sustain a permanent population shall have no marine space of their own." C. SYMMONS, *supra* note 42, at 52 (quoting a draft of art.

Article 121(1) creates some criteria for islands which, if read in conjunction with paragraph (3), would be required of insular rocks as well. First, the formation should be an area of land.⁶³ Second, the formation should be naturally formed.⁶⁴ Third, the formation should be surrounded by water.⁶⁵ Fourth, the formation should be above water at high tide.⁶⁶ Clearly, one of the purposes of the definitions offered by the *Navigation Dictionary* is to distinguish "islands" from insular formations of a smaller size such as "rocks." Hence the concept of a "rock" would seem to imply a protrusion of land above sea level, distinguished by its relatively small size.⁶⁷ Yet the explicit language of article 121(3) requires that other factors be considered as well.

The reference in article 121(3) to "human habitation" and "economic life" indicate that something more than a purely objective geographical definition is required by the term "rock."⁶⁸ Indeed these terms indicate that a cultural-geographic definition of rock is required. Given the emphasis on actual or potential human activity, the most important criterion in defining "rock" should be whether the insular feature supports a stable community of people who use the ocean space surrounding it.⁶⁹ This criterion may not inevitably require that the insular feature itself be permanently inhabited, but would require, at a minimum, that it provide support for a *nearby* stable community of persons. It could, for instance, be visited on a regular basis by fishers from neighboring islands who use it as a base to harvest the living resources of the area. In this way, the phrase "capable of sustaining human habitation or economic life of their own" is a single concept.⁷⁰ This criterion would, however, require a

3.1).

63. This criteria would exclude such things as technical installations, icebergs, and anchored ships. Heins, *The Role of Insular Formations in the Generation and Delimitation of Maritime Zones*, SEA CHANGES, No. 2, 63, 69 (1985).

64. *Id.* A strict interpretation of this criteria could affect, for example, Midway, Tern, and Johnston Islands, which have been enlarged through landfill. *See infra* notes 83, 281-84, and 302-03 and accompanying text.

65. Heins, *supra* note 63, at 69.

66. LOS Convention, *supra* note 1, art. 121(1). *Cf. id.*, art. 13 (low tide elevations).

67. Heins, *supra* note 63, at 70.

68. Article 121(3) indicates that two categories of "rocks" exist: (1) those that "cannot sustain human habitation or economic life of their own," and (2) those that can sustain either or both. LOS Convention, *supra* note 1, art. 121(3).

69. Gidel, *supra* note 62; Van Dyke & Brooks, *supra* note 42, at 288; Heins, *supra* note 63, at 72.

70. This interpretation is supported by early drafts of the article containing almost identical language. Proposals based solely on human habitability or economic utility

commitment to the resources surrounding the insular structure greater than sending an occasional explorer or scientist to visit the outcropping. It also would require a use of the island for purposes other than a recently discovered interest by a distant population in the resources surrounding the uninhabited rock. Limiting extended maritime zones to those insular formations capable of sustaining a resident or nearby stable community of persons avoids the *post hoc* justification of declaring an extended zone that creates an economic life for the insular feature.⁷¹

The term "stable community" can provide a good indication of the required size of a neighboring population. A common sense approach would yield some indication of what is expected. Clearly, five persons would be too few to constitute a stable community, but fifty very well could serve as a population of sufficient size. Infrequent visits from interested scientists would not constitute a stable community sufficient to create an EEZ for a rock or islet. Historic use of the surrounding waters could, however, provide a good indication of reliance on the area and thus, may serve to block competing claims to the adjacent marine resource.⁷² Of course, the burden of establishing

were rejected. C. SYMMONS, *supra* note 42, at 45-53. The concept of stable neighboring communities would further respond to several criticisms voiced during the first session of UNCLOS III in Caracas: (1) the criticism, offered by Pacific island delegates, that a human habitability requirement would prejudice island states, *id.* at 48; (2) the criticism, offered by the British delegate, that such a requirement would make the declaration of an extended zone subject to habitation at the time of declaration, *id.*; (3) the criticism, offered by certain African nations, that isolated uninhabited insular features should be scrutinized more closely than those in an archipelagic formation because the purpose of the creation of an EEZ was that the resources of such a zone should vest in the inhabitants of the adjacent land territory, *see id.* at 56-57.

Symmons recognizes the importance of "habitability" when he discusses the complaint made by the delegate of Fiji. Fiji argued that the adoption of a habitability requirement would discriminate against island nations because no one had suggested that a *continental* nation should be deprived of ocean resources adjacent to any of its uninhabited land areas. *Id.* at 48. Symmons responds by observing that:

[E]ven if a continental territory has no coastal settlements, it will at least have some populated areas as in a *unitary* land mass. Where there is no unitary land mass, however, as in the case of an island group, it is by no means self-evident on grounds of fairness and equity that the uninhabited "islands" of the group should be treated as generously as those inhabited, particularly in light of the development of the 200-mile EEZ.

Id.

71. An analogy can be drawn from the way in which artificial islands are treated in the LOS Convention. *See supra* note 1. Article 60(8) explicitly states that artificial islands, installations, and structures do *not* generate territorial seas of their own or "affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf." The obvious reason for this provision was to discourage nations from building artificial islands solely to expand their jurisdiction over ocean resources. Similarly, article 121(3) should be interpreted to discourage nations from populating their uninhabited insular possessions solely to expand their jurisdiction over ocean resources.

72. A historic claim to surrounding waters could be based on facts showing that: (1) surrounding communities have relied on the waters for fishing and navigation, (2) the waters were previously unclaimed prior to the codification of the LOS Convention negoti-

such claim must rest with the claiming nation, with a presumption that uninhabited insular features do not generate continental shelves or EEZs.⁷³

How these terms ultimately will be interpreted depends of course on the actual maritime claims made by nations on behalf of their uninhabited insular formations and the extent to which those claims are accepted by other nations. The section that follows examines the interests a nation may have in claiming an extended maritime zone, and the subsequent section surveys current claims and the results of some recent negotiations and arbitrations.

NATIONAL INTERESTS IN CLAIMING EXCLUSIVE ECONOMIC ZONES

Nations claim extended jurisdiction over the ocean areas adjacent to their coast in order to obtain exclusive rights over the resources of these zones. These resources include mineral deposits, petroleum reserves, and fishing grounds. National security, conservation, and environmental interests are also protected by these claims.

Mineral Resources

One of the primary motivations for developing the concept of an EEZ was the discovery of rich mineral deposits on the ocean floor.⁷⁴ Quantities of nodules⁷⁵ sufficiently abundant for seabed mining pur-

ations, and (3) other states have acquiesced to such extended and exclusive usage. Cf. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 115, 133 (“[O]ne consideration not to be overlooked, the scope of which extends beyond purely geographical factors [is] that . . . certain economic interests [are] peculiar to the region, the reality of which are clearly evidenced by long usage.”); *Juridical Regime of Historical Waters, Including Historic Bays, Study Prepared by the Secretariat, International Law Commission*, 14 U.N. GAOR at 37-40, U.N. Doc. A/CN.4/143 (1962) [hereinafter *Historic Waters Study*]. This approach serves only as an analogy, however, because historic waters are usually claimed as territorial or internal waters. See *id.* at 65, 67.

Historically, many island communities in Micronesia, for instance, have used nearby uninhabited atoll islands for fishing bases. The growing population in this area will make these fishing areas increasingly important.

73. Cf. *Historic Waters Study*, *supra* note 72, at 52.

74. See, e.g., F. LAURSEN, *SUPERPOWERS AT SEA* 9 (1983).

75. Manganese nodules are potato-sized, irregularly-shaped balls of ore resting on the ocean floor. The typical nodule contains approximately 20% manganese, 0.76% nickel, 0.54% copper, and 0.27% cobalt. See, e.g., C. Johnson & A. Clark, *Potential of Pacific Ocean Nodule, Crust, and Sulfide Mineral Deposits 2* [hereinafter *Pacific Ocean Mineral Deposits*] (manuscript on file in the East-West Center, Honolulu, Hawaii); Van Dyke & Yuen, “*Common Heritage*” v. “*Freedom of the High Seas*” - *Which Governs the Seabed?*, 19 SAN DIEGO L. REV. 493, 496 n.7 (1982), reprinted in *The Law of the Sea and Ocean Development Issues in the Pacific Basin*, 15 LAW OF THE SEA INSTITUTE PROCEEDINGS 206 (E. Miles & S. Allen eds. 1983).

poses lie near the Clarion and Clipperton Island Fracture Zone, stretching from the coast of Baja California to an area southeast of Hawaii.⁷⁶ Adjacent to this zone are Mexico's Revilla Gigedo Islands⁷⁷ and France's Clipperton Island.⁷⁸ Although mining of the nodules is not economically viable at present,⁷⁹ declaration of an EEZ preserves these resources for mining when market conditions make it more profitable.⁸⁰

Cobalt crust formations, another possibly valuable form of mineral deposits,⁸¹ lie near France's Chesterfield, Matthew, and Hunter Islands,⁸² the United States' Johnston Island,⁸³ New Zealand's Kermadec Islands,⁸⁴ Chile's Sala y Gomez Island,⁸⁵ the Northwestern Hawaiian Islands, and the Senkaku Islands,⁸⁶ among others.⁸⁷

76. See *Deep Ocean Mining Environmental Studies Project: Hearings Before the Subcomm. on Oceanography and the Comm. on Merchant Marine and Fisheries, House of Representatives*, 95th Cong., 2nd Sess. 55-56 (1978) (statement of Richard Frank, Administrator of National Oceanic and Atmospheric Administration). See generally A. Clark, Humphrey, Johnson & Pak, *Cobalt Rich Manganese Crust Potential* (United States Interior Dep't Minerals Management Service, 1985); J. Van Dyke, J. Clark, T. Pettit, & A. Clark, *An Analysis of Existing and Future Policy Options for Development of Marine Mineral Resources in the U.S. Affiliated Territories — The Johnston Island Exclusive Economic Zone* [hereinafter *Development of Marine Mineral Resources*] (unpublished paper prepared for the United States Dep't of Interior Mineral Management Service 1986).

77. Pacific Ocean Mineral Deposits, *supra* note 75, at 3. See *infra* notes 186-93 and accompanying text.

78. See N.Y. Times, Dec. 18, 1983, at 41, col. 1; Brewer, *The Prospect for Deep Seabed Mining in a Divided World*, 14 OCEAN DEV. & INT'L L. 363, 364 (1984); Van Dyke & Brooks, *Uninhabited Islands and the Ocean's Resources: The Clipperton Island Case*, in *Law of the Sea: State Practice in Zones of Special Jurisdiction*, 13 L. SEA INST. PROC. 355 (T. Clingan ed. 1982).

79. See Christian Science Monitor, Apr. 10, 1984, at 21, col. 1 ("It is 10 to 20 years before a commercial operation will be going out there.") (Statement of Richard Greenwold, Ocean Mining Associates); Brewer, *supra* note 78, at 365.

80. For an analysis of the legal issues associated with mining outside the regime established by the LOS Convention, see Van Dyke & Yuen, *supra* note 75.

81. See Pacific Ocean Mineral Deposits, *supra* note 75, figure 1; see also *Development of Marine Mineral Resources*, *supra* note 76.

82. France's claim to Matthew and Hunter Islands is disputed by Vanuatu. See Broder & Van Dyke, *supra* note 36, at 39-42.

83. Johnston Atoll is composed of four small islets in an egg-shaped reef and lagoon complex. It is located 717 nautical miles (1,328 km) southwest of Honolulu at 16° 14' N., 169° 31' W. Since World War II, it has been continuously populated by 300-600 civilian and military personnel on a rotating basis. Their primary mission at present is to store and maintain hazardous chemicals, and a chemical incineration plant is now being constructed on the atoll. Because of the relatively substantial population on the atoll and its continuous use for over 40 years, this atoll probably should be deemed to generate an EEZ. It could be argued, however, that because the land area has been increased dramatically through landfill, Johnston is essentially an artificial island without the capacity to generate an EEZ. See LOS Convention, *supra* note 1, art. 60(8), and see generally Van Dyke, Pettit, J. Clark & A. Clark, *The Legal Status of Johnston Atoll and its Exclusive Economic Zone*, 10 U. HAW. L. REV. ____ (1988) (forthcoming).

84. See *infra* note 217 and accompanying text.

85. See *infra* notes 210-14 and accompanying text.

86. See *infra* notes 134-44 and accompanying text.

87. Pacific Ocean Mineral Deposits, *supra* note 75, figure 1.

These mineral formations are closer to the ocean surface and may be more easily exploited commercially than the deep seabed nodules.

Hydrocarbon Resources

Petroleum and other hydrocarbon deposits have been very influential in encouraging nations to claim EEZs and continental shelves around island possessions. For instance, claims to the waters surrounding the Senkaku Islands arose soon after a United Nations commission projected some fifteen (15) million tons of petroleum deposits in the area.⁸⁸ Because of potential petroleum resources, the South China Sea is perhaps the area most noted for extended claims linked to uninhabited islands. The Socialist Republic of Vietnam, the People's Republic of China, the Republic of the Philippines, and to some extent Malaysia have claimed the Spratly Islands and the marine resources in the surrounding waters.⁸⁹ China and Vietnam currently are leasing exploration rights in the area.⁹⁰ Likewise, Britain's declaration of a continental shelf regime around Rockall undoubtedly is motivated by the potential for major petroleum deposits in the area.⁹¹

88. See Comment, *A Harbinger: The Senkaku Islands*, 10 SAN DIEGO L. REV. 664, 665 (1973), see also *infra* notes 134-44 and accompanying text.

89. The Spratly and Paracel Islands in the South China Sea are groups of largely uninhabitable coral reefs, but they have become important because they lie near strategic commercial shipping lanes and are close to potential oil deposits. In 1974, the People's Republic of China ousted South Vietnamese troops from the Paracel Islands, which are 225 miles (360 km) east of Da Nang, Vietnam. The North Vietnamese then sent troops to the Spratlys, which are 800 miles (1,290 km) south of the Chinese mainland and about 300 miles (480 km) east of Ho Chi Minh City (Saigon). Vietnam now controls seven of these outcroppings, and China, the Philippines, and Malaysia are thought each to occupy at least one. Taiwan also has made a claim on these islands. In March 1986, the People's Republic of China announced it soon would launch its first aircraft carrier with the capability of conducting long-range operations in the Spratlys. United Press Int'l Rep., Mar. 2, 1986, (quoting the Beijing People's Daily, Mar. 1, 1986) (Military confrontations over these islets, particularly between China and Vietnam, were continuing as of 1988). See also, e.g., J. PRESCOTT, MARITIME JURISDICTION IN SOUTHWEST ASIA: A COMMENTARY AND MAP 29-39 (1981); Trumbull, *Vying Over an Asian Archipelago*, N.Y. Times, Aug. 28, 1983, at L15., col. 1.

90. Dzurek, *Boundary and Resource Disputes in the South China Sea*, 5 OCEAN Y.B. 254, 264 (E. Borgese & N. Ginsburg eds. 1985). The Philippines and Indonesia have also begun drilling in the area. *Id.*

91. See *infra* notes 151-68 and accompanying text. See Symmons, *The Outstanding Maritime Boundary Problems Between Ireland and the United Kingdom*, in *U.N. Convention on the Law of the Sea: Impact and Implementation*, 19 L. SEA INSTITUTE PROCEEDINGS 235 (E. Brown & R. Churchill eds. 1987).

The South Orkney Islands also may be near rich petroleum deposits in the Antarctic region. Koch, *The Antarctic Challenge: Conflicting Interests, Cooperation, Environmen-*

Living Resources

Article 56(a) of the LOS Convention protects the right of coastal nations to regulate fishing in their EEZs.⁹² The impact of the LOS Convention on distant-water fishing nations is perhaps the most severe because some ninety (90) percent of the commercial fish catch comes from within 200 nautical miles of shore.⁹³ Clarifying the meaning of article 121(3) is imperative to determine whether fishing falls within the "economic life" of insular formations, and whether fishing alone empowers a nation to claim an EEZ around an uninhabited island.

Islands located far from other land areas will, if allowed to generate EEZs, have larger effects on the fishing activities of other nations. Insular formations such as Brazil's St. Paul and St. Peter Rocks, Chile's Sala y Gomez, Matthew and Hunter Islands, and the Senkaku Islands will have a dramatic effect on local and distant-water fishing nations.⁹⁴

Recent attention to the krill resource in the Antarctic region may bring pressure to create fishing zones there. Both Japan and Russia have been the principal harvesters of krill in the sub-Antarctic waters.⁹⁵ But Britain continues to maintain the right to regulate fishing in the region of the Falkland Islands and the nearby uninhabited islands.⁹⁶

Wildlife Conservation and Environmental Protection

A related but nonetheless distinct national interest in claiming an extended maritime zone around an uninhabited island might be to protect unique or endangered wildlife species in the region, or to establish an ocean "wilderness" area in which the ocean environment would be preserved in its natural state for future generations. A na-

tal Protection and Economic Development, 15 J. MAR. L. & COMM. 117, 121 (1984).

92. LOS Convention, *supra* note 1, art. 56(a). See also Ministry of Foreign Affairs, The Law of the Sea and New Zealand, Information Bulletin No. 10 (1984); C. BEEBY, THE UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: A NEW ZEALAND VIEW (1975).

93. Alexander, *The Ocean Enclosure Movement: Inventory & Prospect*, 20 SAN DIEGO L. REV. 561, 580 (1983).

94. See *infra* notes 134-44, 196-99, 208-14 and accompanying text.

95. The main catches by the Soviet fishers chiefly occur around the Kerguelen Islands with catches of as much as 432,000 metric tons a year. McElroy, *Antarctic Fisheries: Histories and Prospects*, 8 MARINE POLICY 239, 243 (1984). This increased pressure to create Antarctic fishing zones, coupled with the forthcoming review of the Antarctic Treaty, may lead to claims to extended maritime jurisdiction with respect to Norway's Bouvet and France's Crozet Islands.

96. Britain had originally claimed a 200 nautical mile fishery zone around the southernmost insular possessions of South Orkney and South Sandwich Isles, but later rescinded this claim. See McElroy, *supra* note 95. More recently, Britain extended its fishing zone around the Falkland Islands from three to 200 miles. N.Y. Times, Oct. 31, 1986, at A3, col. 4.

tion might regulate pollution over a broad region to protect a fragile ecosystem or to protect harvestable living resources. New Zealand, for instance, has established a wildlife preservation zone in its Kermadec Islands,⁹⁷ and the United States has established a wildlife refuge in the Northwestern Hawaiian Islands, as discussed below.⁹⁸

These national interests are valid and serve regional and international goals as well. The question can be raised, however, whether a valid national interest to protect wildlife is a sufficient interest to allow the claiming nation also to claim exclusive control over the region's resources. The international community may respect a nation's claim to exclude all resource exploitation based on its sovereignty over a remote uninhabitable island; nonetheless, it might reject a claim to the exclusive exploitation of the resources of that region based solely on title to the barren islet.

Other Interests

Coastal nations have exclusive jurisdiction to develop military structures within the EEZ;⁹⁹ to board and inspect boats, and arrest and try persons violating rules governing the area;¹⁰⁰ and to pursue foreign vessels within the area.¹⁰¹ Some nations also claim the right to regulate the military maneuvers of other nations within the EEZ, although the text of the LOS Convention does not appear to author-

97. Territorial Sea and Exclusive Economic Zone Act of 1977, New Zealand, arts. 5, 9, *reprinted in* 2 M. NORDQUIST & C. PARK, NORTH AMERICA AND ASIA-PACIFIC AND THE DEVELOPMENT OF THE LAW OF THE SEA, NEW ZEALAND, at II-C. 1 (1981) [hereinafter New Zealand Territorial Seas].

98. Scientists from the United States Fish and Wildlife Service have visited the various islands in the Northwestern Hawaiian chain. The visits included groups of two to five persons for periods of two to five months in recent years to study the animal species of the region, such as the endangered monk seal. *See, e.g.*, Letter to the Editor from Associate Professor Sheila Conant, Univ. of Hawaii at Manoa, Honolulu Star-Bulletin, Mar. 26, 1986, at A17, col. 3. *See also infra* notes 278, 280, 290 and 300.

99. Under articles 56 and 58 of the LOS Convention, coastal states have the right to maintain artificial islands and structures, drill into the ocean floor and carry out other uses not incompatible with the rights of other states to traverse the waters and lay submarine cables and pipelines. LOS Convention, *supra* note 1, arts. 56, 58.

100. *Id.*, art. 73.

101. *Id.*, art. 111(1). Isolated insular formations provide ideal locations for military activity because secrecy is preserved and the danger to the civilian population is minimized. The use of powerful submarine detection devices make insular formations in the middle of oceans strategic locations for the establishment of protective exclusive economic zones. *See generally* Morris, *Military Aspects of the Exclusive Economic Zone*, in 3 OCEAN Y.B. 320, 327-29 (E. Borgese & N. Ginsburg eds. 1982); Zedalis, *Military Uses of Ocean Space and the Developing International Law of the Sea: An Analysis in the Context of Peacetime ASW*, 16 SAN DIEGO L. REV. 575 (1979).

ize such regulation.¹⁰²

Finally, the coastal nation has the right to regulate marine research within the EEZ.¹⁰³ If all countries declared EEZs, an estimated thirty-seven (37) percent of the oceans, which constitutes eighty (80) percent of the most interesting areas, would require consent by the coastal nation prior to another nation conducting scientific research.¹⁰⁴ As one of the few countries able to perform sophisticated deep sea research, it is clearly within the interests of the United States to limit the amount of ocean space that falls within national EEZ jurisdiction.

STATE PRACTICE WITH REGARD TO SMALL INSULAR FORMATIONS

Because the language of the LOS Convention is ambiguous and some nations may never become parties to the treaty,¹⁰⁵ it is important to review the practice of nations to determine what international law standards govern claims to maritime zones based on insular land formations. Because the legitimacy of claims to maritime zones may differ, it is useful to examine separately the claims based on islands near larger land masses, those that are part of an archipelago, and those that are isolated in the middle of the ocean.¹⁰⁶

102. See the declaration issued by Brazil at the time it signed the LOS Convention on Dec. 10, 1982, at Montego Bay, Jamaica (Brazilian Declaration) reprinted in CONSENSUS AND CONFRONTATION, *supra* note 13, at 304-05 n.17. See also the analysis of this issue by Tommy T.B. Koh, *id.* at 303-04.

103. LOS Convention, *supra* note 1, arts. 56, 241.

104. Research institutions are already beginning to notice significant effects on the time and cost required to do research in foreign waters. Jacobson, *Marine Scientific Research Under Emerging Ocean Law*, 9 OCEAN DEV. & INT'L L. 187 (1981).

105. See, e.g., Malone, *America Is Not "Going It Alone,"* Washington Post, June 1, 1985, at A19, col. 2.

106. A complete list of uninhabited rocks and islets is difficult to assemble, but Professor Lewis M. Alexander of the University of Rhode Island, formerly in charge of the Office of the Geographer to the United States State Department, recently has compiled the following list of what he calls "Selected Non-Conforming Rocks":

Complete 200 Mile Circle Generated

Atlantic Ocean

Trinidad-Martin Vaz Islands, Brazil, 21° 00' S, 32° 00' W. Tristan da Cunha & Gough Island, United Kingdom (UK), 35° 30' S, 12° 15' W. South Georgia/South Sandwich Islands, UK, 54° 00' S, 37° W to 58° 00' S, 38° 00' W. Bouvet Island, Norway, 54° 26' S, 3° 24' E.

Indian Ocean

Prince Edward Islands, South Africa, 46° 36' S, 37° 57' E. Crozet Islands, France, 46° 20' S, 51° 30' E. Amsterdam and St. Paul Islands, France, 37° 55' S, 77° 40' E. Kerguelen Islands, France, 49° 50' S, 69° 30' E. Heard and McDonald Islands, Australia, 53° 07' S, 73° 20' E.

Pacific Ocean

Clipperton Island, France, 10° 20' N, 109° 13' W. San Felix and San Ambrosio Islands, Chile, 26° 30' S, 80° 10' W. Easter and Sala y Gomez Islands, Chile, 26° 30' S, 109° 00' E. Johnston Island, United States, 17° 00' N, 168° W. Marcus Island, Japan, 24° 00' N, 155° 00' W.

Insular Formations Near Continental Land Masses

Claims to maritime zones generated by off-shore islands are among the most frequent conflicts that require negotiation or arbitration.¹⁰⁷ The resolutions of these conflicts comprise a bountiful source of international opinion with regard to nearshore insular

*Partial 200-Mile Enclosure**Atlantic Ocean*

St. Peter and Paul Rocks, Brazil, 0° 56' N, 29° 22' W. Atol das Rocas and Fernando de Noronha, Brazil, 3° 50' S, 32° 25' W. South Orkney Islands, UK, 61° 00' S, 45° 00' W. South Shetland Islands, UK 62° 00's, 60° 00' W.

Indian Ocean

Rodriguez Island, Mauritius, 19° 43' S, 63° 26' E.

Pacific Ocean

Juan Fernandez Islands, Chile, 33° 30' S, 79° 00' W. Coco Island, Costa Rica, 5° 33' N, 87° 02' W. Malden & Starbuck Islands, UK, 4° 20' S, 154° 30' W. Ducie Island, France, 25° 30' S, 126° 20' W. Rapa and Marotiri Islands, France, 27° 35' S, 144° 20' W. Chatham Island, New Zealand, 44° 00' S, 178° 00' E. Antipodes Island, New Zealand, 49° 42' S, 178° 58' E. Campbell Island, New Zealand, 53° 20' S, 169° 00' E. Macquarie Island, Australia, 54° 36' S, 58° 45' E. Parace Vela, Japan, 20° 24' N, 138° 02' E. Kingman Reef/Palmyra Atoll, United States, 6° 27' N, 162° 24' W/5° 22' N, 162° 05' W. Jarvis Island, United States, 0° 23' S, 160° 02' W. Howland/Baker Islands, United States, 0° 48' N, 176° 38' W/0° 12' N, 176° 28' W. Midway Island, United States, 28° 12' N, 177° 24' W.

L. ALEXANDER, NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT: GEOGRAPHICAL IMPLICATIONS FOR THE UNITED STATES 89, Table 6 (1986).

Most of these islands are uninhabited or uninhabitable, but it is unclear what criteria were used in assembling this list. Certain key rocks discussed herein, such as Rockall and the Northwestern Hawaiian Islands are not mentioned. *See infra* notes 151-68 and 246-307 and accompanying text. In addition, some of the islands listed by Professor Alexander are now inhabited, such as Easter, Johnston, and Midway Islands. *See supra infra* notes 83, 302-03 and accompanying text. The main island in the Kerguelens intermittently is used by scientists and fishing vessels. *See infra* notes 172-78 and accompanying text. These examples illustrate the difficulty in addressing these issues comprehensively.

107. For example, negotiations have taken place between the United States and Venezuela over islands in the Caribbean, *see* Nweihed, *EZ (Uneasy) Delimitation in the Semi-Enclosed Caribbean Sea: Recent Agreements Between Venezuela and Her Neighbors*, 8 OCEAN DEV. & INT'L L.J. 1, 21 (1980); between Japan and Korea over the Danjo Gunto and Torishima formations, *see* Park, *Oil Under Troubled Waters: The Northeast Asia Sea Bed Controversy*, 14 HARV. INT'L L.J. 212, 223 & 239 (1973); between Italy and Yugoslavia over the Pelagruz (Pelagasa) and Cailoa islands, *see* C. SYMMONS, *supra* note 42, at 194; and between Saudi Arabia and Iran over Al'Arabia, *id.*; 8 I.L.M. 493 (1969).

There have been several disputes submitted to international arbitration. *See, e.g.*, Anglo-French Arbitration, *supra* note 49. Norway and Iceland submitted the problem of delimiting the maritime boundary between Iceland and the Norwegian island possession of Jan Mayen to conciliation. *See* Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Comm. on the Continental Shelf Area Between Iceland and Jan Mayen (1980), *reprinted in* 20 I.L.M. 797 (1981). Chile and Argentina submitted the Beagle Channel dispute to the Vatican for determination of the territorial and maritime boundary in the area. Treaty of Peace and Friendship, *reprinted in* 24 I.L.M. 11 (1985). *See also supra* notes 30-31.

formations.

The Continental Shelf and the International Court of Justice

A frequent justification for the granting of extended maritime zones using off-shore formations is the principle of the “natural prolongation” of the continental shelf. In 1969, this concept was recognized by the International Court of Justice (I.C.J.) in the *North Sea Continental Shelf*¹⁰⁸ which delimited the continental shelf between Denmark, West Germany, and the Netherlands. The I.C.J. in this same decision addressed the role of small insular formations in boundary determinations by stating that “islets, rocks and minor coastal projections” should not influence the placement of maritime boundaries.¹⁰⁹ This early boundary decision thus rejected the notion that all islands should generate equal zones. Although the I.C.J. recognized that the Territorial Sea and Continental Shelf Conventions did not differentiate formally among islands, it concluded that their size and location are inevitably factors in determining their impact on maritime boundaries.¹¹⁰

The France-United Kingdom Arbitration

One of the most significant of the recent arbitrations involving islands and boundary delimitations involved the ocean area in and near the English Channel. The *Anglo-French Arbitration*¹¹¹ concerned the delimitation of the maritime boundaries of Eddystone Rocks, the Channel Islands, and the Scilly Isles, all belonging to the United Kingdom.¹¹² The tribunal decided two issues that are significant to the present discussion. First, the tribunal rejected the arguments made by the United Kingdom that the Channel Islands generated a continental shelf independent of the English and French shelves.¹¹³ Second, it gave only a “half-effect” to the Scilly Islands.

France had argued that the Channel Islands are unlike islands at-

108. *North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.)*, 1969 I.C.J. 3, 22, para. 18.

109. *Id.* at 36, para. 57.

110. *See supra* notes 46-49 and accompanying texts.

111. *Anglo-French Arbitration*, *supra* note 49, at 3.

112. The arbitral tribunal determined that Eddystone Rock, the foundation for the Eddystone lighthouse lying some 14 miles off the main English island, could be used as a basepoint for purposes of delimiting the continental shelf boundary in the English Channel. *Id.*, 18 Rep. Int'l Arb. Awards at 74, para. 144.

113. *Id.* at 90-91, para. 190. Significantly, the United Kingdom conceded that the median line method of delimiting continental boundaries should not be used with:

[t]he presence of islets or small islands belonging to one country but nearer to the coast of an opposite country, when those islets or islands are not of sufficient importance as to warrant the influence they bear upon the course of the median line merely by their presence in the particular location. *Id.* at 85, para. 173.

tached to the United Kingdom land mass (like Eddystone and the Scilly Isles) and are more like mid-oceanic islands because of their distance from the main British isle.¹¹⁴ France reasoned that the Channel Islands thus should have only a six-mile enclave of continental shelf.¹¹⁵

The tribunal not only rejected the French characterization of the Channel Islands but also refused to allow these islands to generate the full zone sought by the British. The tribunal held that the two inhabited islands of Jersey and Guernsey, the Bailiwicks, constituted "special circumstances" and would therefore generate continental shelf enclaves of 12 miles.¹¹⁶ Significantly, the tribunal completely ignored the small rocks and islets in the Channel Islands that are not inhabited.¹¹⁷ The tribunal's rejection of uninhabited rocks for the purpose of establishing a right to the surrounding continental shelf area appears to give some credence to the distinctions contained in article 121(3) of the LOS Convention.

The Scilly Isles, lying some 21 miles (34 km) from the mainland, are "a group of 48 islands of which six are inhabited. . . ."¹¹⁸ The United Kingdom argued that these islands should be used as base-point to draw the equidistance line between the two countries, but France argued that they should be ignored altogether.¹¹⁹ The tribunal resolved the dispute by "splitting the difference." It constructed one set of baselines and equidistance lines using the Scilly Isles and another set that ignored the isles. The triangle thereby created was then divided in half to create the "half-effect" line.¹²⁰

Recent I.C.J. Decisions

The approach of giving only partial, or no, effect to small insular formations consistently has been followed by the I.C.J. In 1969, the

114. *Id.* at 79, para. 159.

115. *Id.* at 11-12, para. 8 (French reply).

116. *Id.* at 95, para. 202.

117. *Id.* at 88, para. 184.

118. *Id.* at 107, para. 227.

119. *Id.* at 101-09, paras. 213-31.

120. *Id.* at 116, para. 249. This "half-effect" was apparently taken from other situations where similar results were reached through negotiations. Italy and Yugoslavia, for instance, had a number of very small islands lying between them in the Adriatic Sea which were given partial effect in delimitation. Ely, *Seabed Boundaries Between Coastal States: The Effect to be Given Islets as "Special Circumstances,"* 6 INT'L LAW. 219, 227-28 (1971). Similarly, in the delimitation between Iran and Saudi Arabia, the island of Kharg was given half effect. *Id.* at 229.

I.C.J. said in *North Sea Continental Shelf*¹²¹ that “islets, rocks and minor coastal projections” should be ignored in delimiting continental shelf boundaries. Subsequently, in 1982, the Court determined that the 180 square kilometer (69 square mile) islands of Kerkennah off the Tunisian coast (with a population of 15,000) should be given only “half-effect” in delimiting the continental shelf boundary between Tunisia and Libya.¹²² Two years later, in the *Gulf of Maine Case*¹²³ between the United States and Canada, a chamber of the Court ruled that Seal Island, off the southwest coast of Nova Scotia, should be given only “half-effect” in drawing the maritime boundary of that region, even though this island is inhabited all year round.¹²⁴ Finally, and most significantly for this discussion, the Court ruled in 1985 that equitable principles required that the tiny uninhabited island of Filfla, belonging to Malta and situated three miles (5 km) south of the main island, *should not be taken into account at all* in determining the boundary between the two countries.¹²⁵

Argentina and Chile

Another dispute regarding offshore islands has concerned Argentina and Chile. Both countries declared 200 nautical mile territorial seas around all of their mainland and insular coasts.¹²⁶ These countries recently settled a century-old dispute concerning islands lying off the coast of Tierra del Fuego in the Beagle Channel.¹²⁷ The larger inhabited islands in the channel are fringed by many smaller uninhabited rocks and islets¹²⁸ that are included in the maritime boundary declaration. Resolution of the dispute limited the Chilean maritime claim by giving less than full effect to the smaller Chilean islets in the Atlantic waters off the Argentine coast of Tierra del

121. *North Sea Continental Shelf*, 1969 I.C.J. 3, 36, para. 57.

122. *Case Concerning the Continental Shelf (Tunisia v. Libya)*, 1982 I.C.J. 18, 89, para. 129.

123. *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Canada)*, 1984 I.C.J. 246.

124. *Id.* at 336-37, para. 222. Seal Island is 2.5 miles (four km) long and rises to a height of fifty feet (fifteen meters).

125. *Case Concerning the Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 48, para. 64 (after referring to the “half-effect” line, *see supra* note 120 and accompanying text, the I.C.J. stated: “The Court thus finds it equitable not to take account of Filfla in the calculation of the provisional median line between Malta and Libya”). Filfla has been used for target practice in previous years and is now a bird sanctuary. Interview with Arvid Pardo in Honolulu, Hawaii, May 18, 1988.

126. *See* Presidential Declaration on the Continental Shelf, art. 1, June 23, 1947, *reprinted in* 2 A. SZEKELY, *LATIN AMERICA AND THE DEVELOPMENT OF THE LAW OF THE SEA*, CHILE 13 (1980); Law No. 17,094-M24 of Dec. 29, 1966, art. 1, *reprinted in* 2 A. SZEKELY, *supra*, ARGENTINA 20.

127. *Treaty of Peace and Friendship, Chile-Argentina*, *reprinted in* 24 I.L.M. 11, 12 (1985).

128. *See generally* C. SYMMONS, *supra* note 42, at 118-20.

Fuego.¹²⁹

In summary, recent arbitrations, judicial decisions, and negotiations have been relatively consistent in refusing to give full effect to small insular formations in delimiting maritime boundaries.¹³⁰ The *Anglo-French Arbitration*,¹³¹ the resolution settling the longstanding dispute between Argentina and Chile, and the four opinions of the I.C.J. described above¹³² all stand for the proposition that uninhabited rocks and islets do *not* generate extended maritime jurisdiction in the same manner as other land masses. Even inhabited islands (such as Jersey and Guernsey in the English Channel, Kerkennah Islands near Tunisia, and Seal Island in the Gulf of Maine) may not generate full extended maritime zones if the result of such an extension would be to interfere with the rights of other nations.¹³³ Many ocean boundary disputes remain unresolved, however, and the survey that follows illustrates the nature and types of these disputes.

The Senkaku Islands

One example of a relatively early interpretation of the term "island" within article 1(b) of the Continental Shelf Convention¹³⁴ is illustrated in the dispute between Taiwan and Japan over the tiny Senkaku (Tiao-Yu-T'ai) Islands.¹³⁵ The Senkakus¹³⁶ are composed of five larger islands - Uotsuri, Kuba, Taisho, Minami Kojima, Kita Kojima - and three smaller islets — Okino Kitaiwa, Okino Minami-

129. See Treaty of Peace and Friendship, *supra* note 127, art. 7. The uninhabited islands of Evout, Barnevelt, and Horn generate only twelve mile zones.

130. A significant exception, of course, would be the negotiations carried out by the United States with, for instance, Venezuela and Mexico. See *supra* notes 28-30 and accompanying text. The United States accepted the Venezuelan and Mexican claims not out of altruism, but because it felt that it had much to gain if all small islands were allowed to generate 200 mile zones without limitation. See *supra* notes 27-38 and accompanying text. For other examples of agreements that have used tiny insular formations as basepoints for determining equidistance lines in resolving boundary disputes, see C. SYMONS, *supra* note 42, at 190-91.

131. See *supra* notes 111-20 and accompanying text.

132. See *supra* notes 121-29 and accompanying text.

133. One recent commentator said that this decision failing to give full effect to the Channel Islands was unjust because it failed to recognize the rights of the sizeable population that lives there. Brand, *The Legal Relevance of South African Insular Formations Off the SWA/Namibian Coast*, SEA CHANGES, No. 4, at 101 (1986).

134. Continental Shelf Convention, *supra* note 4.

135. The islands are located between longitude 123° 20' E. and 123° 45' E., and latitude 25° 40' N. and 25° N. See generally JAYARAMAN K., LEGAL REGIME OF ISLANDS 102-04 (1982).

136. The name "Senkaku" Islands is used because the Chinese use different names of the islands depending upon the type of romanization (Pin Yin or Wade-Giles).

iwa and Tobise.¹³⁷ The formations lie approximately ninety (90) miles away from the nearest Taiwanese territory and are separated from the Japanese Ryuku Islands by the Okinawan Trough, some 2,000 meters deep.¹³⁸ Taiwan, the Republic of China, has argued that these uninhabited islands are the natural prolongation of the Chinese continental shelf.¹³⁹

In 1970, after receiving a note of protest from the Japanese government, Taiwan ratified the Continental Shelf Convention with two reservations: (1) in "determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account;" (2) "the boundary of the continental shelf appertaining to two or more States whose coasts are adjacent to and/or opposite each other shall be determined in accordance with the principle of natural prolongations of their land territories."¹⁴⁰ An explanatory comment presented to the Taiwan legislature stated that exposed rocks and islets are part of the continental shelf upon which they sit.¹⁴¹ These continental shelf rights, therefore, were claimed to the *exclusion* of any separate right, such as those deriving from the EEZ, to the seabed in this area.¹⁴² The declaration of Taiwan appears to conform with article 121(3) of the LOS Convention. Rocks

137. Although called islands, actually only the largest insular formation, Uotsuri (Tiao-yu), is larger than one square mile (1.7 sq. km.). The areas of the other insular formations are considerably smaller: Kuba (Huang-wei), 0.4 sq. mi. (1.1 sq. km.); Minami-Kojima (Nan-hsiao), 0.18 sq. mi. (0.465 sq. km.); Kitakojima (Pei-hsiao), 0.12 sq. mi. (0.303 sq. km.); Taisho (Ch'ih-wei), 0.06 sq. mi. (0.15 sq. km.); Okinokitawa (Ch'ung-pei-yen), 0.005 sq. mi. (0.014 sq. km.); Okinominamiwa (Ch'ung-nan-yen) 0.002 sq. mi. (0.005 sq. km.); Tobise (Fei-lai) 0.00002 sq. mi. (0.00006 sq. km.). The total area of the islets is 2.5 square miles (6.5 square kilometers). Ma, *The East Asian Seabed Controversy Revisited: Relevance (or Irrelevance) of the Tiao-yu-t'ai (Senkaku) Islands Territorial Dispute*, [1982] Chinese Y.B. INT'L L. & AFF. 1, 7.

138. Okuhara, *The Territorial Sovereignty Over the Senkaku Islands and Problems on [the] Surrounding Continental Shelf*, 15 JAPANESE ANN. OF INT'L L. 97 (1971).

139. *Id.* at 100-93. Japan and the People's Republic of China (P.R.C.) have also claimed these islands and their adjacent ocean waters. The P.R.C. has, for instance, laid claim to the continental shelf around these islands and "the shallow seas adjacent to other parts of China." Chao, *East China Sea: Boundary Problems Relating to the Tiao-Yu-T'ai Islands*, 1982 Chinese Y.B. 45, 68, citing U.N. Doc. A/AC.138/SR.72 (1972). Japan has asserted a 12 mile territorial sea *erga omnes*, R. FRIEDHEIM, G. TOTTEM, H. FUKI, T. AKUHA, M. TAKEYAMA, M. KOGA, & N. KAKOHARA, *JAPAN AND THE NEW OCEAN REGIME* 40 (1984). It also asserted a 200 nautical mile zone against all nations except the P.R.C. and Korea. Chao, *supra*, at 73.

Taiwan has entered into negotiations with Japan for exploration of the oil resources in the area, but these discussions were cut short when the P.R.C. intervened. Dzurek, *Boundary Disputes in the South China Sea*, in 5 OCEAN Y.B. 254, 281 (E. Borgese & N. Ginsburg eds. 1985). See also Okuhara, *supra* note 138, at 97.

140. See C. SYMMONS, *supra* note 42, at 136 and 270 n.539 (citing Allen & Mitchell, *The Legal Status of the Continental Shelf of the East China Sea*, 51 OR. L. REV. 789, 808 (1972)).

141. *Id.* at 136.

142. *Id.* at 136-37 and 270 n.540.

and islets, which do not support any economic life of their own,¹⁴³ do not generate their own continental shelves or EEZs.¹⁴⁴

The Namibia Coast

A unique situation exists off the coast of Namibia (Southwest Africa) where South Africa has claimed twelve tiny guano islands, each relatively close to shore.¹⁴⁵ Houses built on ten of the twelve islets have been used by guano prospectors and fishing groups, but the islands are largely barren and hostile.¹⁴⁶ In recent years, these islands have sparked renewed interest because natural gas and diamonds may be found in their vicinity.¹⁴⁷ Because these rocks are so close to the coast and have been used historically, it probably would be acceptable to use them as basepoints provided they belonged to the adjacent coastal nation of Namibia. However, they are also claimed by another nation, thereby making it more difficult to determine whether the islands should generate extended maritime jurisdiction at all. One commentator¹⁴⁸ recently presented the argument that these islands support a "stable community of people"¹⁴⁹

143. In 1896, the Japanese Government leased the land to Mr. Koga Tatsushiro who constructed a business of fish and bird canning and collection of guano and bird feathers. Even during this time, however, food and raw materials were imported. After the initial lessee's death, his son continued production until World War II. See Cheng, *The Sino-Japanese Dispute Over the Tiao-Yu-T'ai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L L. 221, 246-47 (1974).

144. There is significant disagreement, however, as to whether the term "adjacent to the coast" in article 1 of the Continental Shelf implies some limitation on the distance from the coast the continental shelf may be claimed. Continental Shelf Convention, *supra* note 4. Prior to the LOS Convention, there was some discussion of limiting the claim to twenty-five (25) miles from the coast. See generally Comment, *A Harbinger: The Senkaku Islands*, 10 SAN DIEGO L. REV. 664, 676-81 (1973), citing 1956 Y.B. INT'L L. COMM'N (I) 135.

A related controversy concerns the tiny islets called Okinotorishima (meaning Offshore Bird Islands) which are two rocks about the size of king-sized beds. The islets are claimed by Japan and are located east of the Senkoku Islands, about 1200 miles (1800 kilometers) south of Tokyo. Japan has developed a plan to spend millions to build up the islands to prevent further erosion and apparently to justify a claim to an EEZ around these, clearly, uninhabitable rocks. See Haberman, *Japanese Fight Invading Sea for Priceless Speck of Land*, N.Y. Times, Jan. 4, 1988, at 1, col. 3; Letter by Jon Van Dyke to the Editor, N.Y. Times, Jan. 21, 1988; Sankei Shimbun, Jan. 26, 1988 (morning ed.).

145. The islands are named Hollam's Bird, Mercury, Ichaboe, Seal Island, Penguin Island, Halifax Island, Long Island, Possession Island, Pomona Island, Plum-Pudding Island, Sinclair's Island, and Shark Island. See generally Brand, *supra* note 133, at 88-105.

146. *Id.* at 89-95.

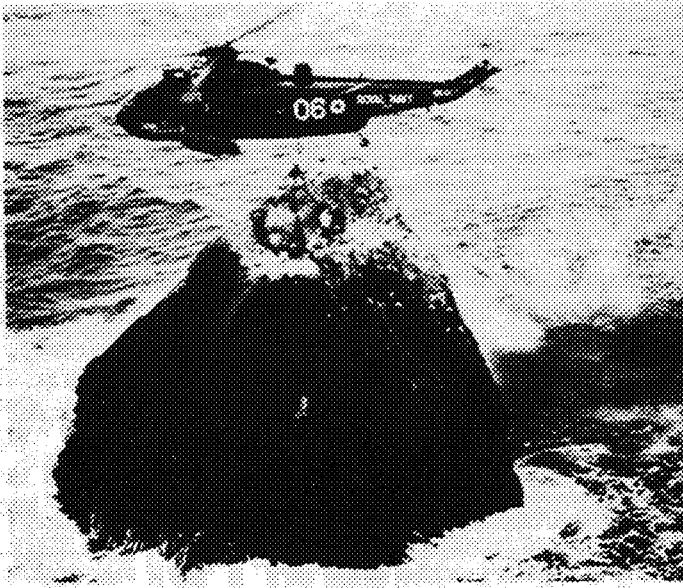
147. *Id.* at 90-91.

148. *Id.* at 100.

149. Brand, *supra* note 133, takes that test from Van Dyke & Brooks, *supra* note

because of the fishing groups that use them. But the commentator then concluded that the equitable solution would be to allow the islands to generate only 12-mile enclaves, not full 200 nautical mile zones.¹⁵⁰

Rockall



ROCKALL FORMATION

One of the most significant current disputes involves the insular formation called Rockall in the North Atlantic, which the United Kingdom has claimed as a continuation of British territory.¹⁵¹ Rockall is a single outcrop of granite measuring approximately 200 feet (61 meters) in circumference and reaching about seventy feet (21 meters) high.¹⁵² Underneath this outcropping exists a plateau measuring approximately 400 miles (640 km) by 600 miles (960 km).¹⁵³

42, at 285-88.

150. Brand, *supra* note 133, at 103.

151. See C. SYMMONS, *supra* note 42, at 135 (quoting the statement of the Irish Governments Services: "[The United Kingdom Government] seeks to justify their claim to jurisdiction over the continental shelf of the Faeroe Plateau surrounding Rockall on grounds that it is geomorphologically linked with the West Scottish coast.").

152. O'Donnell, *Rockall—The Smallest British Isle*, 23 SEA FRONTIERS 342 (1977). See also C. SYMMONS, *supra* note 42, at 51. Symmons states that Rockall is "a miniscule finger of rock about 70 feet high and 80 feet in circumference," *id.*, but he later corrected that to state that it is "80 feet in diameter." Symmons, *Maritime Boundary Disputes in the Irish Sea and Northeast Atlantic Ocean*, 91 MARINE POLICY REPORTS No. 1, 2 (1986) (U. of Del. Center for the Study of Marine Policy).

153. Symmons, *supra* note 152, at 2.

Rockall lies some 190 miles (300 km) from the British territory of St. Kilda off the Outer Hebrides of Scotland and some 240 miles (380 km) from the Irish coastal county of Donegal.¹⁵⁴ Its sheer, steep granite surface makes it habitable only for the heartiest of seaweeds and seabirds.¹⁵⁵

This "rock" was declared British territory in 1955, and came under the administration of Scotland by the Island of Rockall Act of 1972.¹⁵⁶ This act apparently was passed with a view towards the possibility that the continental shelf around the formation could be claimed in the future.¹⁵⁷ Subsequently, section 1 of the Fisheries Limits Act of 1976 proclaimed that "British fishery limits extend 200 miles from the baselines from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands, and the Isle of Man is measured."¹⁵⁸ Later a nautical chart attached to a notice to mariners plotted a 200 nautical mile arc around Rockall.¹⁵⁹

Ireland, Iceland, and Denmark have all strenuously objected to the declared zone on the basis of article 121(3) of the LOS Convention.¹⁶⁰ A protest issued by Ireland in 1977, for instance, cites an

154. O'Donnell, *supra* note 152.

155. A former British SAS soldier named McClean did climb up Rockall in 1985 and remained there for forty days. The Irish government was not impressed with this escapade, and said, "The fact that someone chooses to sit on a rock does not confer a government with a right to it." Symmons, *supra* note 91, at 246 n.68 (quoting *The Irish Times*, May 28, 1985).

156. C. SYMMONS, *supra* note 42, at 10 & n.10.

157. *Id.* at 135.

158. Fishery Limits Act of 1976, *reprinted in* 2 F. F. DURANTE & W. RODINO, *WESTERN EUROPE AND THE DEVELOPMENT OF THE LAW OF THE SEA* (United Kingdom) L.22.12.1976 (1984).

159. See C. SYMMONS, *supra* note 42, at 261 n.394, citing Notice to Mariners, No. 2611 (1976) and the Admiralty Notice to Mariners, No. 2611/76 (June 24, 1978). See also 1982 BRIT. Y.B. INT'L L. 337, 477 (the Parliamentary Undersecretary of State, Foreign and Commonwealth Office noted that the United Kingdom was entitled to the wide maritime zone measured from Rockall).

160. Symmons, *supra* note 91, at 240-41. The British claim apparently establishes a median line with the declared Icelandic 200 mile fishery zone. Cf. Notice to Mariners, No. 2611 (1976) (Britain's claim) with Law No. 44 (Oct. 15, 1975), *amending* Regulation of July 14, 1972 (Iceland's claim). Iceland, despite its use of uninhabited islands in its claims, has also objected to the use of Rockall as a basepoint for the 200 mile fishing zone by extending its fishing zone into Rockall's. See C. SYMMONS, *supra* note 42, at 126, 186.

Ireland proposed during the Third United Nations Conference on the Law of the Sea (UNCLOS III) that in delimiting ocean boundaries "account may be taken of an island only if it is inhabited and if (i) it is situated less than the breadth of the territorial sea from the low-water line of the coast or (ii) it contains at least one-tenth of the land area and population of the State concerned." *Id.* at 49, citing U.N. Doc. A/CONF.62/C2/L.43.

earlier version of what became article 121(3) as evidence that international law prohibits rocks and islets without economic life or human habitation from generating an EEZ.¹⁶¹ The statement concluded, "The British claims . . . that their fishery limits can be reckoned from Rockall as though it was part of the mainland is directly contrary to the views of the majority of the world's States as to the relevant rules of international law."¹⁶²

Britain claims either that Rockall is an extension of the continent upon which the United Kingdom rests or, alternatively, that Rockall sits upon its own continental shelf.¹⁶³ Rockall is separated from the continental shelf of the United Kingdom by the Rockall Trough, some 9,850 feet (3,000 meters) in depth. The British Government has officially stated that "the Island of Rockall generates its own continental shelf, and we are content to rely on that basis for the exploitation of oil and other purposes."¹⁶⁴ The area claimed is contested by the Irish Republic. Although both parties appear willing to submit to negotiations on that matter, none have occurred as of this writing.¹⁶⁵ If full effect were to be given to the Rockall claim, some 52,000 square miles (134,715 square kilometers) of ocean space would become subject to British jurisdiction.¹⁶⁶

In the meantime, the United Kingdom has not signed the LOS Convention and has adopted a cautious attitude toward article 121(3).¹⁶⁷ As the Parliamentary Under-Secretary of State for the Foreign and Commonwealth Office wrote:

The Law of the Sea Convention states that rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf In deciding our attitude to the convention we shall be examining the implications of this and other provisions of the Convention for the United Kingdom interests, including mineral rights.¹⁶⁸

161. *Id.* at 126, citing Irish Government Information Services, Jan. 25, 1977.

162. *Id.*

163. *See infra* note 164 and accompanying text.

164. C. SYMMONS, *supra* note 42, at 135 (statement of the Lord Advocate in response to a question in the House of Commons on January 22, 1975).

165. *See* Symmons, *supra* note 91, at 10-11 & nn.45-50. Britain has not yet licensed oil exploration in the areas that overlap with the Irish claim. *Id.* at 12.

166. Symmons, *supra* note 152, at 2. Symmons has characterized the British claim to extended maritime jurisdiction on the basis of Rockall as "distinctly suspect." *Id.* at 3. The United States "has never formally set forth a position" with regard to Rockall, according to David A. Colson, Asst. Legal Adviser to the United States State Department for Oceans, International Environmental and Scientific Affairs. But "[i]t would be consistent with U.S. practice in respect to its own claims, to recognize that Rockall may generate a zone or zones of extended maritime jurisdiction." Letter from David A. Colson to Jon Van Dyke (Oct. 1, 1986).

167. The United Kingdom opposed the inclusion of paragraph 3 of article 121 up to the last session. *See Proposed Amendments by the United Kingdom*, U.N. Doc. A/CONF.62/L.126, reprinted in 16 Official Records, *supra* note 124, at 233 (11th sess.), 16 U.N. Doc. V.1975.3 (1982).

168. 1982 BRIT. Y.B. INT'L L. 474.

Of course, the British Government's attitude toward the LOS Convention may be dramatically influenced by how other states interpret and respect the Convention.

Insular Formations Within Archipelagic Nations

The LOS Convention recognizes a special regime for archipelagic nations.¹⁶⁹ An archipelago consists not only of islands but also "parts of islands, inter-connecting waters and other natural features which are so closely interconnected that . . . [they] form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."¹⁷⁰ This definition is significant in that it could be interpreted to allow land formations other than "islands," in particular "rocks," to serve as basepoints for determining the EEZ of an archipelagic state. By declaring itself an archipelago, a nation can connect its islands and "other natural features" by means of straight baselines. These interconnecting lines then become the baselines for all the nation's ocean zones, including its EEZ.¹⁷¹

Although the concept of a mid-ocean archipelagic state has achieved international recognition, whether uninhabited islands within archipelagoes can serve as basepoints in defining the archipelago remains unresolved. If an archipelagic nation could use uninhabited or barren insular formations as basepoints for fixing its baselines, these insular formations would then generate broader EEZs than could otherwise be claimed given the limitations in article 121(3).

One such example appears to be the Kerguelen Islands, a Southern Ocean possession of France.¹⁷² In 1978, France declared these islands to be an archipelago, and included in its claim some islands that would not otherwise be entitled to generate EEZs.¹⁷³ Although

169. LOS Convention, *supra* note 1, arts. 46-54.

170. *Id.*, art. 46(b).

171. *Id.*, art. 48.

172. The Kerguelen Islands, like the Galapagos (*see infra* notes 179-183 and accompanying text), do not meet the formal criteria established by the LOS Convention to be an "archipelagic state" because they are linked politically to a continental state; hence they are not a state constituted "wholly by one or more archipelagos." *Id.*, art. 46(a) (emphasis added).

173. Decree No. 78-112 du 11 Janvier 1978, *Definissant les Lignes de Base Droites et les Lignes de Fermeture des Bases Servant a la Determination des Lignes de Base a Partir Desquelles est Mesure la Largeur des Eaux Territoriales Francais Adjacentes au Territoire des Terres Australes et Antarctiques Francais*, reprinted in 2 F. DURANTE & W. RODINO, *supra* note 158, France L.11.1.78 [hereinafter *Baselines Around French Antarctica*].

The largest island in the group, Main Island, also known as Desolation, serves as a seal

the main island is used on a relatively regular basis by research scientists and fishing vessels, it has no permanent resident colony. France has also used several small surrounding uninhabited islands, Isle du Roland,¹⁷⁴ Isle de Croy,¹⁷⁵ and Isle du Clugny,¹⁷⁶ as base-points for delineating the territorial sea around the islands.¹⁷⁷ Although the additional ocean jurisdiction claimed through this approach is modest because those structures are near the main island, if the uninhabited islands were evaluated individually, they could not generate the EEZ now declared around the archipelago as a whole.¹⁷⁸

Another example of an island in a nonconforming archipelago that might not generate an EEZ on its own is Isla Darwin, also known as Culpepper Island, in the Colon Islands (Galapagos). Ecuador claimed a twelve nautical mile territorial sea around all Ecuadorian coastlines, including the Galapagos in 1951.¹⁷⁹ The United States immediately objected to the declaration stating: "Both the purported establishment of a belt of Ecuadorian territorial waters twelve nauti-

hunter's ground and whale hunter's base. Settlements were first established at Port-Covereux and Port-Jeanne-d'Arc but were abandoned in 1932. Research scientists use facilities at Port-aux Francais on the northeast peninsula of Main Island. GAZATTEER, *supra* note 32, at 931; CENTRAL INTELLIGENCE AGENCY, INDIAN OCEAN ATLAS 62-63 (1976). In 1987, substantial discussion was given to the possibility that France might move its nuclear testing facility from Mururoa in French Polynesia to the Kerguelen Islands. *See, e.g.*, Sydney Morning Herald, Feb. 18, 1987. But apparently the French will continue to test in French Polynesia, perhaps moving some tests to Fangataufa. *See generally* Van Dyke, Smith & Siwatibau, *Nuclear Activities and the Pacific Islanders*, 9 ENERGY 733 (1984), also in 10 *J. Pac. Studies* 1 (1984).

174. Located at approximately 48° 34' S, 68° 47' E.

175. Located at approximately 48° 37' S, 68° 37' E.

176. Located at approximately 48° 45' S, 68° 42' E.

177. *Baselines Around French Antarctica*, *supra* note 173, points A, B, & D, respectively.

178. The French would argue that their claim is justified because of the geographical similarity of the Kerguelen Islands and Norway's skjaergaard. *See Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116. The absence of a local population would, however, weaken the French claim.

179. Ecuador Decree Law of Feb. 21, 1951. Prior to this enactment, Ecuador had established a three nautical mile territorial water zone in 1930. BOOK II REGISTRO OFICIAL 2-b-510, art. 582. *See also* UNITED STATES DEP'T OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, OFFICE OF THE GEOGRAPHER, LIMITS IN THE SEA NO. 36, NATIONAL CLAIMS TO MARITIME JURISDICTIONS 54 (5th ed. Mar. 1985).

The Galapagos chain is located approximately 600 miles (800 to 1,000 km) from the coast of South America. The island chain consists of some thirteen principal islands and sixty-five (65) or so named islets, rocks, and reefs. Islabella Island is by far the largest island comprising over half of the total land area of the island chain. Presently some 5,000 to 6,000 inhabitants reside on the four principal islands of Islabella, Floreana, San Cristobal, and Santa Cruz. *Id.* at 11.

Isla Darwin, also known as Culpepper Island, and Wolf, also known as Wenman Island, are the youngest of the islands, rising up from the seafloor quite dramatically. *See* T. MOORE, GALAPAGOS: ISLANDS LOST IN TIME 54 (1980); Cox, *Ages of the Galapagos Islands*, in PATTERNS OF EVOLUTION IN GALAPAGOS ORGANISMS 11, 18-22 (R. Bowman, M. Buson & A. Lewton eds. 1983).

cal miles in breadth, and the assertion to a claim of a single belt of territorial water around entire Colon [Galapagos] Archipelago, contravene . . . international law."¹⁸⁰ Ecuador again asserted the archipelagic status of the Galapagos in 1973 using Isla Darwin as the northernmost basepoint for the 200 nautical mile territorial sea of the island group.¹⁸¹ Although Isla Darwin may be capable of supporting human population, it is presently uninhabited.¹⁸² Therefore, the use of this island to generate an EEZ by a nonarchipelagic state appears to constitute a violation of article 121(3).¹⁸³

Mid-Oceanic Insular Formations

Small insular formations situated in the middle of the oceans seemed to be the focus of concern for the conference in drafting article 121(3). In his speech to the United Nations General Assembly on the need to preserve the ocean resources for the "common heritage," Ambassador Arvid Pardo of Malta noted that an unrestricted definition would give "the governing powers of islands such as Clipperton, Ocean, Azores, St. Helena and Easter, sovereign rights over millions of square miles of invaluable ocean floor."¹⁸⁴ The primary reason for giving coastal nations extended maritime jurisdiction was

180. UNITED STATES STATE DEPARTMENT, NOTE OF PROTEST (June 7, 1951), reprinted in Note, *Archipelagoes and Archipelagic States Under UNCLOS III: No Special Treatment for Hawaii*, 4 HAST. INT'L & COMP. L. REV. 509, 523 (1981).

181. *Regulations for the Granting of Permits to Foreign Vessels to Visit the Territorial Sea of Ecuador, Its Coasts Islands for the Purpose of Tourism or Scientific Research* (Feb. 27, 1973), reprinted and trans. in 2 A. SZEKELY, *supra* note 126, ECUADOR at 84.

182. Perry, *The Islands and Their History*, GALAPAGOS 3 (Key Environments Ser. No. 355, 1984).

Isla Darwin was first explored in 1964 by a research team from University of California at Berkeley. Because of the steep cliffs, helicopters were needed to land the research team on this land. Among some of the oddities found on the remote island were several species of tortoise previously thought to be extinct, wild tomatoes which needed to pass through the digestive tract of the tortoises to germinate, and a species of iguana with a third eye between the two other normally placed eyes. L. OTTERMAN, CLINKER ISLANDS: THE MYSTERIOUS GALAPAGOS 286-88 (1983).

183. In 1985, Ecuador expanded its claim further by proclaiming jurisdiction over the continental shelf between the 200 nautical mile zone around the Galapagos archipelago and the zone off the Ecuador mainland. See Ramakrishna, Bowen, and Archer, *Outer Limits of Continental Shelf: A Legal Analysis of Chilean and Ecuadorian Island Claims and U.S. Response*, 11 MARINE POL'Y 1 58, 61 (1987), citing PROCLAMATION BY ECUADOR (September 19, 1985), reprinted in LAW OF THE SEA BULL., No. 7, at 109 (1986).

184. Statement by Dr. Arvid Pardo before the United Nations General Assembly's First Committee, U.N. Doc. A/C.1/PV. at 1515 (Nov. 1, 1967); see also *Maltese Note Verbale*, U.N. Doc. A/6695 (Aug. 17, 1967).

to acknowledge the close economic linkage that exists between the people of those coastal regions and the resources in the adjacent ocean waters.¹⁸⁵ This rationale obviously does not apply to isolated uninhabited islands or rocks, but a number of states, nonetheless, have made claims to EEZs for mid-oceanic islands.

Mexico

Mexico presents an especially interesting example since, as a developing country, it stands to benefit from the use of the high seas for the "common heritage."¹⁸⁶ Mexico endorsed the principles of article 121(3) by specifically stating in its laws, "The islands which form part of the national territory also have an exclusive economic zone whose limits shall be established in conformity with the provisions of law *with the exception of those islands which cannot maintain human habitation or which do not have an economic life of their own.*"¹⁸⁷ Despite this language paralleling article 121(3), Mexico has laid claim to a 200 nautical mile zone around the Revilla Gigedo Islands group¹⁸⁸ which includes the uninhabited Clarion Island, also known as Santa Rosa.¹⁸⁹ This island is some five miles (8 km) long, 1.8 miles (3 km) wide and rises to an altitude of 388 feet (118 meters).¹⁹⁰ It faces the open Pacific Ocean and if permitted to generate an EEZ, it would create one to the west, unobstructed by

185. Numerous statements during the UNCLOS III negotiation stressed the inherent relationship between the sea and coastal populations relying on the sea's resources for their welfare, and a number of delegations argued that uninhabited islands in the middle of the ocean and under foreign dominations and control should be treated differently from islands adjacent to a coast and used by the coastal population. *See, e.g.,* Statement by the Chairman of the Joint Committee of the Congress of Micronesia, 2 *Official Records of the Third United Nations Conference on the Law of the Sea*, at 83 (1st Sess.), 2 U.N. Doc. A/CONF.62/1.6 (1974) [hereinafter *Official Records*] (stating the need for small island populations to use the maritime zones of uninhabited islands for fishing resources), *cited in* C. SYMMONS, *supra* note 42, at 232 n.332.; 16 *Official Records, supra*, at 15 (11th sess.), 16 U.N. Doc. V 1975.3 (1982) (statement of Venezuela); 2 *Official Records, supra*, at 282, 2 U.N. Doc. V 1975.3 (statement of the delegate of Trinidad and Tobago), *cited in* C. SYMMONS, *supra* note 42, at 232 n.326.

186. The concept of the "common heritage" of humankind requires the proceeds from the development of the resources within the high seas to be distributed to states on an "equitable" basis. *See* LOS Convention, *supra* note 1, arts. 140 & 160; *see generally* Van Dyke & Yuen, *supra* note 75, at 530-34.

187. *See* A. SZEKELY, MEXICO Y EL DERECHO INTERNACIONAL DEL MAR 205 (1979), quoting art. 3 of Ley Reglamentaria de Mexico; *see also* Mexico Const., art. 27 (establishing the 200 nautical mile EEZ).

188. U.N. Doc. ST/LEG/Ser.B at 19-20. The Revilla Gigealo Islands are located at approximately 19° 00' N., 111° 30' W.

189. Located at approximately 18° 21' N., 114° 44' W. One Mexican scholar has reported that a sole retired Mexican military officer has been living on Clarion. A. SZEKELY, MEXICO Y EL DERECHO INTERNACIONAL DEL MAR 207 (1979). Another report states that a military installation consisting of eleven men was established in 1979. Pitman, Letter to the Editor, 15:1 *Pacific Seabird Group Bull.* 57 (1988).

190. PACIFIC ISLANDS YEARBOOK 370 (J. Carter ed., 1984).

other maritime claims. In contrast to this claim, however, Mexico does not take into account the Alijos Rocks¹⁹¹ to the north of the Revilla Gigedo Islands in determining the western border of the EEZ.¹⁹² Thus, Mexico appears to endorse article 121(3) of the LOS Convention with respect to smaller rocky insular formations, but not larger ones. The presence of rich seabed resources in the area of Clarion Island assuredly plays some role as well.¹⁹³

France

France has claimed 200 nautical mile zones around its small island possessions. It has declared an EEZ around Clipperton Island which is directly south of Acapulco, Mexico,¹⁹⁴ and created a 200 nautical mile zone around the Antarctic island archipelago of Kerguelen, as discussed earlier.¹⁹⁵ Further, France has claimed an EEZ around New Caledonia and its dependencies, which apparently also includes the volcanic Matthew¹⁹⁶ and Hunter¹⁹⁷ Islands.¹⁹⁸ In 1985, a detachment of French Marines was reported to be permanently stationed on the previously uninhabited Matthew Island to protect France's claim to the adjacent maritime zone.¹⁹⁹ France has also claimed an extended maritime zone around the isolated Crozet Islands in the South Indian Ocean.²⁰⁰

191. Located at approximately 24° 57' N., 115° 44' W they rise to approximately twelve feet (4 meters) above the sea. GAZETTEER, *supra* note 32, at 45.

192. C. SYMMONS, *supra* note 42, at 126.

193. See *supra* note 76 and accompanying text.

194. Decree No. 78-147 du 3 Fevrier 1978, *Portent Creation, en Application de la Loi du 16 Juillet 1976, d'une Zone Economique au Large des Cotes de L'ile de Clipperton*, reprinted in F. DURANTE & W. RODINO, *supra* note 158, France, at L.3.2.1978/C. See generally, Van Dyke & Brooks, *supra* note 78.

195. See *supra* notes 172-78 and accompanying text.

196. Located at approximately 22° 20' S., 171° 18' E.

197. Located at approximately 22° 24' S., 172° 3' E.

198. See U.N. Doc. ST/LEG/Ser.B at 243. Vanautu has, however, also laid claim to these islands as part of its territory. See Broder & Van Dyke, *supra* note 36, at 40-41.

199. Pacific Islands Monthly, May 1985, at 7, col. 2 (quoting from La Depeche, Tahiti, March 12, 1985).

200. Located at approximately 46° S., 51° E. The Crozet Islands are composed of Hog Island, Possession Island, East Island, Penguin Island, and the Twelve Apostles. Although uninhabited, the islands were occasionally visited by whalers. GAZETTEER, *supra* note 32, at 468. The French EEZ claim is found in Decret No. 78-144 du 3 fevrier 1978, *Portant Cr ation, en Application de la Loi du 16 Juillet 1976, d'une Zone Economique au Large des Cotes des Terres Australes Francaises*. JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE 684 (Feb. 11, 1978).

Norway

Norway's Jan Mayen Island lies almost 620 miles (1,000 km) from Norway, 335 miles (540 km) from Iceland, and some 288 miles (460 km) from Greenland.²⁰¹ Much like the French Kerguelen Islands, the harsh climate has kept the human population limited to small research stations.²⁰² In 1963, Norway laid claim to the continental shelf of Jan Mayen²⁰³ and passed enabling legislation in 1976 opening the way for a monarchal decree establishing an EEZ around the island.²⁰⁴ The decree was never issued, however, and Norway entered into negotiations with Iceland over an extended 200 nautical mile continental shelf claim. These negotiations resulted in giving Iceland the full extent of its 200 nautical mile claim, with the two nations reaching other agreements with respect to the sharing of fish and other resources in the area.²⁰⁵

In contrast to Jan Mayen, the isolated Bouvet Island²⁰⁶ in the Southern Ocean has received very little attention. At present, Norway appears to have made no claims to an extended maritime zone around the island.²⁰⁷

Brazil

The most extensive claims to maritime zones are those of the Latin American countries that claim 200 nautical mile territorial seas off the coasts of their territories. On the Atlantic seaboard, Brazil has declared a 200 nautical mile territorial sea "measured from the low water line of the continental *and insular coast of Brazil*. . . ."²⁰⁸ This claim would appear to include the distant St. Peter

201. Located at approximately 71° 4' N., 8° W.

202. Jan Mayen is only fifteen to twenty kilometers wide, but approximately fifty-three kilometers long, giving it a total land area of some 373 square kilometers. Thirty to forty meteorologists and communications personnel are stationed on the island but are not considered permanent residents. Laursen, *Norwegian Marine Policy*, 8 MARINE POLICY REPORTS, No. 1, 5 (U. of Del. Center for the Study of Marine Policy, Oct. 1985).

203. See ROYAL DECREE (May 31, 1963), reprinted in 3 F. DURANTE & W. RODINO, *supra* note 158, *Norway*, at L.31.5.1963; ROYAL DECREE (Dec. 17, 1976), *id.* at L.17.12.1976/B.

204. ROYAL DECREE (1976), reprinted in 3 F. DURANE & W. RODINO, *supra* note 158, *Norway* at L.17.12.1976/A (relating to the establishment of the EEZ of Norway). ROYAL DECREE (Dec. 17, 1979), reprinted in *id.* at L.12.1976/B (relating to establishment of an EEZ off the coast of the mainland).

205. See Adopted Agreement on the Continental Shelf Between Iceland and Jan Mayen (Oct. 22, 1981), entered into force June 2, 1982, reprinted in 21 I.L.M. 1222 (1982).

206. Located at approximately 54° 26'S., 3° 24' E. Bouvet Island is on the same submarine mountain ridge as Jan Mayen.

207. See LIMITS IN THE SEAS NO. 36, *supra* note 179, at 128.

208. Presidential Decree No. 1098, THE LIMITS OF THE TERRITORIAL SEA, art. 1 (March 10, 1970), reprinted in U.N. ST/LEG/Ser.B/16 at 3 (unofficial translation).

and St. Paul Rocks.²⁰⁹

Chile

On the Pacific coast, Chile proclaimed in 1947 "national sovereignty over all the continental shelf adjacent to the continental and island coasts of its national territory. . . ."²¹⁰ The claim included the protection of fisheries and other resources within the zone and explicitly extended to 200 nautical miles from the coasts and islands of Chile.²¹¹ This claim appears to include the uninhabited island of Sala y Gomez which lies over 2,000 miles (3,220 km) from the Chilean coastline.²¹² The ocean jurisdiction encompassed by a 200 nautical mile zone generated by Sala y Gomez would overlap somewhat with the EEZ generated from Easter Island, which is about 250 miles from Sala y Gomez, but most of its arc covers unobstructed ocean space.

In 1985, Chile extended this claim further by asserting its sover-

209. Also known as the St. Paul Rocks, these formations are uninhabited rocky islets lying about 600 miles (965 kilometers) from the Brazilian coastal city of Natal. They are located at 0° 23' N., 29° 23' W. GAZETTEER, *supra* note 32, at 1643. The insular formations of Fernando, Noronha, and Trinidad closer to the coastline also appear to be included in the Brazilian claim. See C. SYMMONS, *supra* note 42, at 127.

210. Presidential Declaration, *Sovereignty over the Continental Shelf*, art. 1 (June 23, 1947) (emphasis added), reprinted in 2 A. SZEKELY, *supra* note 126, CHILE at 13.

211. *Id.*, arts. 2 & 3 (emphasis added), which state:

(2) The Government of Chile confirms and proclaims its national sovereignty over the seas adjacent to its coasts whatever may be their depths, and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas, placing within the control of the government especially all fisheries and whaling activities with the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of the said riches to the detriment of the country and the American Continent.

(3) The demarcation of the protection zones for whaling and deep sea fishery in the continental and island seas under the control of the Government of Chile will be made in virtue of this declaration of sovereignty at any moment which the Government may consider convenient, such demarcation may be ratified, amplified, or modified in any way to conform with knowledge, discoveries, studies and interests of Chile as required in the future. Protection and control is hereby declared immediately over all the seas contained within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory. *This demarcation will be calculated to include the Chilean islands, indicating a maritime zone contiguous to the coasts of the said islands, projected parallel to these islands at a distance of 200 nautical miles.*

212. Sala y Gomez is an arid uninhabited islet some 3,900 feet (1.19 km) long and 500 feet (152 meters) wide. It is located at 26° 28' S., 105° 28' W. GAZETTEER, *supra* note 32, at 1649.

eignty over the continental shelf extending to a distance of 350 nautical miles from both Easter and Sala y Gomez Islands.²¹³ The United States protested this claim, but only on the ground that the claim failed to meet the terms of article 74 of the LOS Convention.²¹⁴ No mention was made about the failure of the extended claim to meet the terms of article 121(3).

New Zealand

Pacific island countries have also made extensive claims to small uninhabited insular formations. New Zealand proclaimed an EEZ around "the coast of New Zealand, including the coast of all islands."²¹⁵ New Zealand defined "island" as any naturally formed area of land surrounded by water that is above water at mean high-water spring tides,²¹⁶ hence, the claim includes the Kermadec Islands group.²¹⁷ L'Esperance Rock,²¹⁸ the southernmost insular formation in the group, generates its own 200 nautical mile zone on New Zealand's maps.²¹⁹ This claim appears to be motivated by New Zealand's desire to protect the fishing and mineral resources in the area.²²⁰ New Zealand also claims 200 nautical mile zones around the uninhabited Chatham, Antipodes, and Campbell Islands to the east and south of its main islands.²²¹

Fiji

The motivation for Fiji's claim to an EEZ around Ceva-i-Ra, also known as Conway Reef, is similar.²²² Ceva-i-Ra is a six-and-one-half acre sandy cay located some 300 miles (480 km) from the nearest Fijian territory.²²³ Because the act establishing the EEZ also permits

213. See Ramakrishna, Bowen, and Archer, *supra* note 183, at 63 (citing Declaration by Chile (Sept. 12, 1985), reprinted in LAW OF THE SEA BULLETIN, No. 7, at 107-08 (1986)).

214. *Id.* at 63.

215. New Zealand Territorial Seas, *supra* note 97, Doc.1.C.1. at 7.

216. *Id.*, art. 1.

217. The Kermadecs lie some 600 miles (965 km) from the North Island of New Zealand. The only inhabitants on this "rocky group" of islands are about ten New Zealanders who staff the meteorological station on Raoul, the northernmost islet in the chain. PAC. ISLANDS Y.B., *supra* note 32, at 233.

218. Located at approximately 31° 38' S., 178° 58' E.

219. See NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS, THE LAW OF THE SEA AND NEW ZEALAND, Informational Bull. No. 10 (1984).

220. See C. BEEBY, THE UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: A NEW ZEALAND VIEW (1975).

221. See *id.*; NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS, *supra* note 219. Chris Beeby stated at the August 1987 annual meeting of the Law of the Sea Institute in Honolulu, Hawaii that New Zealand was reassessing its claims in light of article 121 of the LOS Convention.

222. For a more detailed discussion of possible justifications for Fiji's claim, see generally Broder & Van Dyke, *supra* note 36, at 40-42.

223. *Id.* at 39.

modification of the boundary,²²⁴ it remains to be seen if Fiji will continue to claim full island status for this insular formation.

Summary of Current State Practice

No consensus has yet emerged on the proper interpretation of article 121(3). The Territorial Sea and Continental Shelf Conventions broadly define "island" as any land mass projected above the surface of the water at mean high tide.²²⁵ Although these treaties previously were accepted as customary law, the LOS Convention explicitly supersedes the treaties in ratifying states.²²⁶ Recognition of the LOS Convention's provisions on the EEZ and continental shelf regimes by the I.C.J.²²⁷ and in President Reagan's 1983 Ocean Policy Statement²²⁸ seems to indicate the United States is bound by the new definition of the term "island" as presented in article 121.

State practice with regard to insular formations falling within ar-

224. See An Act to Make Provision for the Demarcation of Maritime Spaces, Act No. 18 of 1977, § 6 (1977).

225. See *supra* notes 46-49 and accompanying text. Many states are, however, also parties to the Convention on the High Seas, *done* Apr. 29, 1958, 15 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter High Seas Convention] and the Convention on Fisheries and Conservation of the Living Resources of the High Seas, *done* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. 5969, 559 U.N.T.S. 285. Article 2 of the High Seas Convention states:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty These freedoms [of navigation, fishing, overflight, and laying of submarine cables and pipelines], and others which are recognized by general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

This article was used by the United States Representative to UNCLOS III to justify free exercise of dominion over the high seas by the United States. See Press Release, United States Mission to the United Nations 163-82 (Dec. 3, 1982) (statement of Ambassador Kenneth L. Adelman). The use of the term "reasonable" also may require respect for emerging international law in claiming rights to areas considered high seas, such as areas around rocks and barren islands. Obviously, the interpretation of the term reasonable is subject to disagreement. See, e.g., M. MCDUGAL & W. BURKE, PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INT'L LAW OF THE SEA at Preface (1962).

226. LOS Convention, *supra* note 1, art. 311(1).

227. Continental Shelf (Tunisia v. Libya) 1982 I.C.J. 18, para. 100; *id.* at 115, para. 54 (sep. op. Jimenez de Arechaga, J.); Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Canada), 1984 I.C.J. 246, 294, para. 94. *But see* Continental Shelf, *supra*, at 229, para. 123 (Oda, J. dissenting) (although accepted as part of law, may not be *sui generis* regime recognized by international law). See also Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Comm. on the Continental Shelf Area Between Iceland and Jan Mayen 9 (1980) (statement that article 121 "reflects the present state of international law"), reprinted in 20 I.L.M. 797, 803-04 (1981).

228. Reagan Proclamation, *supra* note 7.

ticle 121(3) is increasingly significant as situations requiring an interpretation of these provisions become more common. At present, many states seem to have taken inconsistent positions with regard to their various island possessions. Some nations appear to have given priority to islands based on the size of the formation. Mexico's differing treatment of Clarion Island and Alijos Rocks is a prime example.²²⁹ France, on the other hand, has declared an EEZ around all its isolated islands, including the Kerguelen Islands and Crozet Island.²³⁰

Some inconsistencies in state practice may be explained in terms of the location of the islands. For example, islands located near European nations have been the basis for extensive claims, perhaps as a result of pressure on fishing areas from the European Economic Community.²³¹ Thus, Britain made claims to the ocean space near Rockall a number of years before it made claims to extended jurisdiction over the ocean areas adjacent to the Falkland Islands and its neighbors.²³² Similarly, Norway's claims to a continental shelf around Jan Mayen and its failure to claim a zone around Bouvet Island may indicate treatment on the basis of location rather than acceptability to the provisions of the LOS Convention.²³³

Nations have tended to assert broad claims for extended maritime zones based on small islands, especially when the islands are somewhat contiguous or near the nation's mainland. Claims to zones generated from islands somewhat near their main coastline have been

229. See *supra* notes 186-93 and accompanying text.

230. Merely because Main Island in the Kerguelen group is occasionally inhabited should not countenance zones around the other islands within the group. See *supra* notes 194-200 and accompanying text.

231. Within the European Economic Community, maritime resources are shared among the members, and nations within the Community receive preferences for any surplus fish in the EEZs of other members. Thus, all members benefit from the extended maritime claims of other members. Although Ireland has challenged the United Kingdom's claim for an extended zone around Rockall, it has noted the problem of leaving Rockall plateau unclaimed in that this may deprive the European Community of the shared resource. See Symmons, *supra* note 91, at 239.

232. The lack of a claim for the South Orkney Islands may be due in part to the existence of the Antarctic Treaty to which Britain is a party. Antarctic Treaty, 12 U.S.T. 794, T.I.A.S. 4780, date 1959. Article VI of the treaty designates the areas south of the 60th parallel as governed by the treaty. Article IV states that, "No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force." Because the islands are within the area governed by this treaty, the United Kingdom appears to be prevented from asserting any claim while the moratorium is in effect. *But see id.*, art. VI ("[B]ut nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.").

233. Bouvet's distance from Norway may make a declaration of an EEZ impractical at present. In the Jan Mayen decision, the island's distance from the Norwegian mainland and proximity to Iceland resulted in substantial reduction of the Norwegian claim to fishing rights around Jan Mayen. See Churchill, *Maritime Delimitation in the Jan Mayen Area*, 9 MARINE POLICY 16, 21-22 (1985).

made by the United Kingdom for the Scilly Isles,²³⁴ Chile for Sala y Gomez,²³⁵ Ecuador for the Galapagos,²³⁶ and Venezuela for Aves Island.²³⁷ Similarly, both Taiwan and Japan have made extended claims to the Senkaku Islands.²³⁸ Countries claiming the controversial Spratly Islands also have made jurisdictional claims to the islands relative to their ability to extend existing territorial claims.²³⁹

Finally, the relevant resources in the area are clearly a determining factor in claims to open space around smaller islands. France's claim to Clipperton in the manganese rich Clarion-Clipperton area is a good example.²⁴⁰ Similarly, Britain's EEZ around Rockall is undoubtedly motivated by the potential petroleum reserves in the area.²⁴¹

Claims based on small islands have almost always been disallowed — completely or partially — when those claims interfere with competing claims of other neighboring nations. It should not necessarily be assumed that just because claims to extended maritime jurisdiction around uninhabited mid-ocean insular possessions have not yet been challenged that such claims are legitimate and will stand the test of time.

APPLYING ARTICLE 121(3) TO THE NORTHWESTERN HAWAIIAN ISLANDS

The preceding sections have analyzed the meaning of article 121 of the LOS Convention in light of its negotiating history, the logical interpretation of its terms, and the practices of nations that have interpreted and applied the term. This section applies the analysis to the claim of EEZs around the islands extending northwest of the eight main Hawaiian islands. Again, the approach used in this section is one of common sense and logic, applying legal terminology to the unique insular formations of this region. Much of the discussion that follows is based on descriptions of the Northwestern Hawaiian

234. See *supra* notes 118-20 and accompanying text.

235. See *supra* notes 210-14 and accompanying text.

236. See *supra* notes 179-83 and accompanying text.

237. See *supra* notes 28-29 and accompanying text.

238. See *supra* notes 134-44 and accompanying text.

239. See generally J. PRESCOTT, MARITIME JURISDICTION IN SOUTHEAST ASIA: A COMMENTARY AND MAP 29-39 (1981); JAYARAMAN K., *supra* note 135, at 99-102.

240. See *supra* note 78 and accompanying text. In the mid-1980s, the French began talking about blowing a hole in the reef surrounding Clipperton and were apparently making some efforts to enlist French Polynesians to settle on Clipperton. Interview with Robert Pitman, Southwest Fisheries Comm., La Jolla, California, April 23, 1984.

241. See *supra* notes 91, 151-68 and accompanying text.

Islands found in official United States government publications.²⁴²

Introduction

The terms “atoll,” “island,” “reef,” “shoal,” “bank,” “pinnacle,” and “seamount” are used in geographic descriptions and on various maps and charts of the Northwestern Hawaiian Islands.²⁴³ The geographic terms employed in official documents can be used as a foundation for arguments regarding whether the land in question is a “rock” or another type of island. Unfortunately, the various authoritative publications available are not always consistent in their terminology. All of the land in question is under the sovereignty of the United States; hence, decisions of the United States Board of Geographic Names presumably constitute the official nomenclature. Because the State of Hawaii also has jurisdiction over the islands, the *State of Hawaii Data Book (Data Book)*, published by Hawaii’s Department of Planning and Economic Development, and the *Atlas of Hawaii*, produced by the University of Hawaii Geography Department, can also be considered authoritative sources.²⁴⁴ In the discussion that follows, the place names used in the *United States Coast Pilot 7 (Coast Pilot)*²⁴⁵ are generally employed, modified slightly to conform to the latest place name decisions of the federal government.

General Features of the Northwestern Hawaiian Islands

A number of small bits of land extend in a long chain northwest of the islands of Kauai and Niihau, the westernmost of the occupied Hawaiian Islands, to and including Kure Island. With a total land mass of only 5.2 square miles (13.2 square km), these land formations extend over almost 1,100 miles (1,760 km) of ocean.²⁴⁶ All but the Midway Islands, which are a federal territory under the jurisdiction of the United States Navy, are part of the State of Hawaii and are under the administration of the City and County of Honolulu.²⁴⁷ Most of the Northwestern Hawaiian Islands are included in the Hawaiian Islands National Wildlife Refuge (Wildlife Refuge) — ex-

242. See COAST PILOT, *supra* note 6.

243. See *infra* notes 244-304 and accompanying text.

244. Both, for instance, changed the name of Pearl and Hermes Reef to Pearl and Hermes Atoll in 1968, consistent with an official name change by the United States Board on Geographic Names. At the time, the name Kure Island was changed to Kure Atoll. Unfortunately, nautical charts produced by the National Ocean Survey and the current edition of the United States Coast Pilot for the region still employ some of the older place names. An atoll is “a coral reef in the shape of a ring or horseshoe enclosing a lagoon.” W. MOORE, A DICTIONARY OF GEOGRAPHY 18-19 (4th ed. 1968).

245. COAST PILOT, *supra* note 6.

246. Univ. of Haw. Dep’t of Geography, ATLAS OF HAWAII 29 (2d ed. 1983).

247. Hawaii Rev. Stat. § 4-1(3)(A)(1985); Honolulu Rev. Charter § 1-102.

tending some 200 nautical miles from Nihoa Island, Necker Island, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan Island, Lisianski Island, and Pearl and Hermes Reefs.²⁴⁸ Kure and Midway are excluded. The purpose of the Wildlife Refuge is to protect various species of endangered or threatened wildlife, principally the Hawaiian monk seal and a number of species of birds.²⁴⁹

The islands and their surrounding waters are fragile environments and are unusually susceptible to damage from pollutants. Accordingly, the International Maritime Organization, upon the advice and request of the United States, has designated the waters within a radius of fifty nautical miles of each of the islands an "area to be avoided"²⁵⁰ by ships in transit. This "area to be avoided" is a zone with status under international law separate from and independent of whether any of the land formations are entitled to EEZs.²⁵¹

The offshore topography below the ocean surface is generally steep. This topography evolved because the Northwestern Hawaiian Islands are volcanic in origin and are transitional between the typical high islands of the main inhabited group and coral atolls at the extreme northwestern end of the chain. Consequently, the islands have no geographical continental, or insular, shelves.²⁵²

248. For a discussion of current suggestions for managing this area, see, e.g., DEP'T OF THE INTERIOR, UNITED STATES FISH AND WILDLIFE SERVICE, HAWAIIAN ISLANDS NATIONAL WILDLIFE REFUGE: MASTER PLAN/ENVIRONMENTAL IMPACT STATEMENT (Draft, Aug. 28, 1984); Pfund, *Institutional Policymaking in the Management of Fisheries: Case Study—State of Hawaii*, in *Proceedings of the Second Symposium on Resource Investigations in the Northwestern Hawaiian Islands* 427 (R. Grigg & K. Tanoue eds. 1984); Harrison, *A Marine Sanctuary in the Northwestern Hawaiian Islands: An Idea Whose Time Has Come*, 25 NAT. RESOURCES J. 317 (1985); HAWAII DEP'T OF PLANNING & ECON. DEV. AND UNITED STATES DEP'T OF THE INTERIOR, MINING DEVELOPMENT SCENARIO FOR COBALT-RICH MANGANESE CRUSTS IN THE EXCLUSIVE ECONOMIC ZONES OF THE HAWAIIAN ARCHIPELAGO AND JOHNSTON ISLAND (1987).

249. ATLAS OF HAWAII *supra* note 246, at 29. Among the species that are indigenous to the Northwestern Hawaiian Islands are: the Hawaiian monk seal (*Monachus schauinslandi*), the green sea turtle (*Chelonia mydas*), the Laysan duck (*Anas Laysanensis*), the Laysan finch (*Telospiza cantans*), the Nihoa finch (*Telospiza ultima*), the Nihoa millerbird (*Acrocephalus familiaris kingi*), as well as several species of terns, petrels, noody, albatross, and frigatebirds.

250. COAST PILOT, *supra* note 6, at 422.

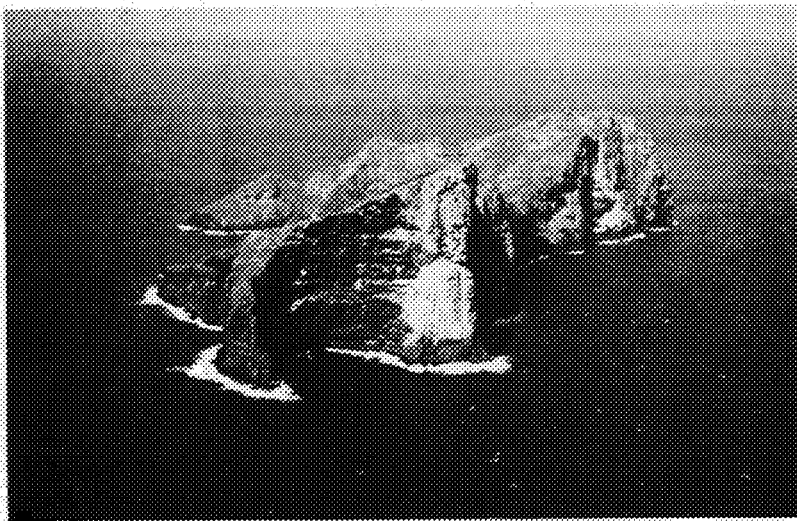
251. Provisions reasonably designed to protect the environment, for instance, could be justified under article 194(5) of LOS Convention, *supra* note 1.

252. If these insular formations are entitled to generate EEZs, these zones would include the ocean floor to a distance of 200 nautical miles from the land and would in some instances include seamounts with potentially valuable cobalt-rich crust formations. See, e.g., Clark, Johnson & Chinn, *Assessment of Cobalt-rich Manganese Crusts in the Hawaiian, Johnston and Palmyra Islands' Exclusive Economic Zones*, 8 NAT. RESOURCES F. 163, 163-74 (1984).

Descriptions of Individual Islands, Rocks, Shoals, Banks, and Atolls

This section describes the important geographic features of the Northwestern Hawaiian Islands to assist in determining whether the various land formations should be classified as “rocks” and whether they are habitable in accordance with article 121(3). The quoted descriptive information is from the *Coast Pilot*,²⁵³ unless otherwise indicated. The arguments and discussion are the thoughts and words of the authors. Geographically, the descriptions begin at the southeastern end of the island group and proceed northwestward. Generally, names are applied as used in the *Coast Pilot*; these descriptions may be viewed as one argument concerning the proper classification of each feature.²⁵⁴

Nihoa



NIHOA ISLAND

253. COAST PILOT, *supra* note 6.

254. One feature worth mentioning, although it is not formally a part of the Northwestern Hawaiian Islands, is Kaula, which is located about one mile southwest of Nihoa, and is described as a “small, bare rocky islet.” *Id.* at 421. It is about 0.7 miles (1.1 km) long and has a maximum elevation of 550 feet (168 meters). It is used as an aerial bombing and strafing target by military forces in the Hawaiian Islands area and is uninhabited. Because of its small size, lack of vegetation, steep slopes, and current use, it is clearly not capable of supporting human habitation. It appears to meet all of the criteria for classification as a “rock which cannot sustain human habitation or economic life on its own” and thus is not able to generate an EEZ.

"A barren, rocky and uninhabited island,"²⁵⁵ Nihoa is about 0.8 miles long (1.3 km) and 0.2 miles wide (0.3 km). The east, north, and west sides are high and precipitous, but the south side is much lower and slopes are more gradual. Adams Bay, on the south side, has a sandy beach and small boats can land. Mariners are warned by the *Coast Pilot*, however, that great caution must be exercised in landing anywhere on the island because of the possibility of strong wave action.²⁵⁶ The island has a small seepage of water that is not suitable for drinking purposes except in emergencies. Based on the current description of its geography, Nihoa would seem to be in the rock category, because of its general topography and unsuitability for human habitation.

In 1790 an explorer reported, "To the south it is covered with verdure: but on the North, West and East sides, it is a *barren rock*, perpendicularly steep, and does not appear to be accessible but to the feathery race, with which it abounds. It is therefore named 'Bird Island.'"²⁵⁷ Hawaiians apparently translated this into "Moku manu," an earlier name for the island before the name Nihoa was adopted. Corney sailed by the island in 1819 and described it thus: "Next day we passed Mokoo Manoo or Bird Island. There are no inhabitants here although the land seems good and covered with coconuts and plaintains."²⁵⁸

The island was once inhabited by ancient Hawaiian people and low stone walls of Polynesian ceremonial sites remain. As early as 1857, with the discovery of house terraces on the island, it was surmised that ancient Hawaiians had at one time occupied Nihoa. The 1923 Tanager Expedition surveyed Nihoa and Necker Islands, finding extensive ruins on both.²⁵⁹

Emory described the appearance of Nihoa from the east or west approaches as a "great rock tooth,"²⁶⁰ but he also reported that ledges in the middle cove afford a safe landing for boats during much of the year. He described the presence of vegetation on the half of the island that had level or gently sloping land and estimated

255. *Id.* at 422.

256. *Id.*

257. J. MEARS, VOYAGES MADE IN THE YEARS 1788 AND 1789 FROM CHINA TO THE NORTH WEST COAST OF AMERICA 360 (1790) (emphasis added); also quoted in K. Emory, *Archaeology of Nihoa and Necker Islands* 8 (B.P. Bishop Museum Bull. No. 53, 1928).

258. B. CORNEY, QUEST FOR OCCUPATION OF TAHITI 73 (Hakluyt Soc. 2d Ser., Vol. 43, 1918).

259. K. EMORY, *supra* note 257, at 3.

260. *Id.* at 7.

an annual rainfall of 25-30 inches. The few seeps or springs of water he found, on the other hand, were so heavily tainted with acrid-tasting matter, presumably bird droppings, that he deemed it "impossible that the natives could have become accustomed to it."²⁶¹ In 1924, during the Tanager Expedition, bird life was plentiful and the presence of seals and turtles was fairly common. The sea also might have afforded sustenance for ancient Hawaiians, since Adams Bay was found to abound in fish. Lobsters, crabs, and other shell fish were also available on wave cut terraces.²⁶²

Archeological evidence pointing to former habitation is impressive. Cultivation terraces and the ruins of house sites provide "ample evidence of occupation"²⁶³ and burial caves have been discovered containing the bones of adult males, females, and infants. According to Emory, "The once intensive cultivation of Nihoa, large number of dwellings and places of worship, the former presence of women and children, and the number and kind of utensils, implements, and instruments left about the old abodes point to a time when the tiny island sustained a permanent or semi-permanent population".²⁶⁴ Emory reported seeing 25-35 house terraces and about twelve acres of agricultural terraces. These could have sustained about 100 inhabitants with the food consisting primarily of sweet potatoes supplemented by fish, birds and birds' eggs. But, once again, he emphasized the fresh water puzzle: "In fact, the means by which they obtained enough water to exist is a mystery. Only three small seeps were discovered and the water from all of these was so tintured with the leachings from guano as to be as unpalatable as salt water."²⁶⁵ Carlquist's more recent comments on the habitation of Nihoa by an ancient Polynesian civilization concludes with the opinion that "[v]ery likely the colony was a short-lived one."²⁶⁶ Such an observation is significant. Those who contend that Nihoa currently is not capable of sustaining human habitation can argue that the ancient Polynesian settlers failed to maintain themselves on the resources of the island for any sustained period of time and that modern settlers likely would be no more successful. Certainly for Nihoa to sustain a population today it would be necessary to supply the

261. *Id.*

262. *Id.*

263. *Id.* at 11.

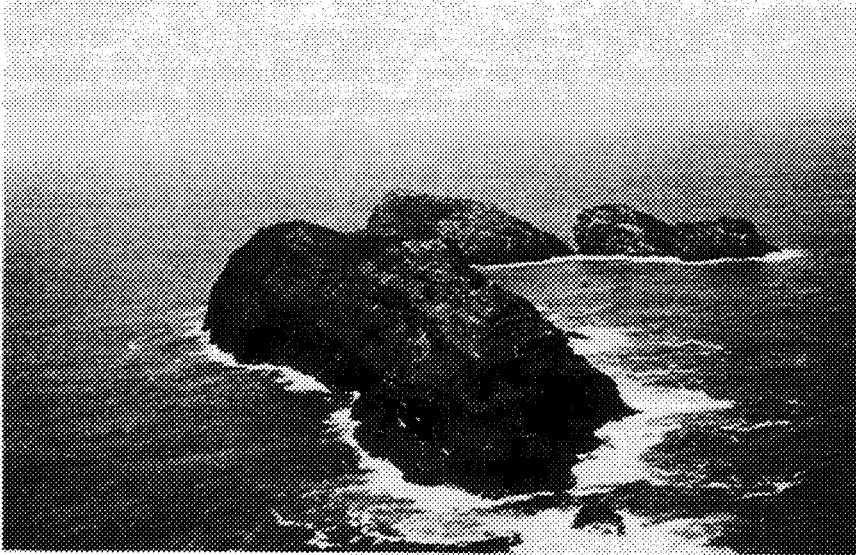
264. *Id.* at 12.

265. *Id.*

266. S. CARLQUIST, HAWAII: A NATURAL HISTORY: GEOLOGY, CLIMATE, NATIVE FLORA AND FAUNA ABOVE THE SHORELINE 379 (1970). *See also* Ten Bruggencate, *Nihoa Island a World Unto Itself*, Honolulu Advertiser, Sept. 23, 1986, at B1, col. 2 ("No matter which kind of Hawaii's people lived here, the stay was relatively brief," quoting University of Hawaii zoologist Sheila Conant who visited Nihoa four times in the early 1980s.).

inhabitants with food and water, a difficult procedure in view of the navigational problems that would be encountered in making landings from the sea. Supply by air would not be possible, except perhaps by helicopters in emergencies.

Necker Island



NECKER ISLAND

Much of what has been said about Nihoa applies to Necker Island²⁶⁷ as well, for "the island *which might well be called a rock*, is uninhabited, but like Nihoa, shows unmistakable evidence of ancient habitation."²⁶⁸ Even the sizes of the two islands are similar; Necker is about 1.7 miles (2.7 km) long and less than 0.2 miles (0.3 km) wide. Possible landing sites are West Cove and Shark Bay, but they are described as unusually hazardous. The Tanager Expedition found that landings were possible during trade wind conditions at West Cove and that slopes and natural trails provided relatively easy access to various parts of the island.²⁶⁹ As with Nihoa, water was the problem. Palmer, in 1927, estimated an annual rainfall of 20-25 inches, somewhat less than Nihoa's.²⁷⁰ He reported:

267. COAST PILOT, *supra* note 6, at 422, 426.

268. *Id.* at 422 (emphasis added).

269. K. EMORY, *supra* note 257, at 51.

270. H. PALMER, GEOLOGY OF KAULA, NIHOA, NECKER AND GARDNER ISLANDS

Two small seeps of ground water were found . . . It might be possible to collect five gallons of water a day from this seep The other seep is about thirty feet above sea level . . . and would yield probably less than five gallons a day. The water of both seeps is strongly contaminated with acrid salts, presumably leached from bird droppings.²⁷¹

Much earlier, La Perouse, who sighted the island in 1786, reported that it had no trees and that the naked rock was covered with bird dung.²⁷²

An unusual feature of the archeological remains on Necker is the large number of ceremonial platforms, similar in design to Tahitian marae, with relatively few agricultural terraces or house platforms.²⁷³ Perhaps ten terraces were house sites and fifteen were for cultivation of crops.²⁷⁴ Despite some puzzling features of the archeology and the absence of a supply of water suitable for drinking, Emory concluded, "That the occupation was not merely an occasion, such as the sojourn of a fleet of canoes, is apparent from the large number of marae and the evidence that all were not built simultaneously."²⁷⁵ He further stated, "It is very doubtful if Necker Island ever completely sustained more than the handful of people who dwelt for a time in Bowl Cave,"²⁷⁶ where expedition members had discovered human skeletal remains.

Carlquist has analyzed the question of habitation of Necker as follows:

Did a group of early Hawaiian people colonize Necker? Evidently so, if they stayed long enough to manufacture these articles and platforms. I would guess they were marooned, unable to sail for another island (there are no really woody plants on Necker so even a raft could not be constructed). They might have survived for a while on birds and eggs and the small seeps of water, but perhaps they eventually died, building their marae as a sort of desperate symbol of hope. A human colony could not exist isolated on Necker for long. Too little water is available, and the land is unfit for agriculture.²⁷⁷

If we accept Carlquist's views, the evidence of former habitation does *not* indicate that the rock is now capable of sustaining "human habitation or economic life" on its own.²⁷⁸

AND FRENCH FRIGATES SHOAL 3, 22 (B.P. Bishop Museum Bull. 35, 1927).

271. *Id.* at 23.

272. K. EMORY, *supra* note 257, at 53 (citing J. LA PEROUSE, A VOYAGE ROUND THE WORLD IN THE YEARS 1785, 1786, 1787, AND 1788 FROM CHINA TO THE NORTH-WEST COAST OF AMERICA 473-74 (1799)).

273. *Id.* at 59. Archeologists have found on both Necker and Nihoa stone male figures and stone bowls, which have not been found on any of the other Hawaiian islands, indicating that the people who lived for at least a brief time on these two rocks may have had links to the Marquesas or Easter Island. Hastings, *Mystery Isles: No Stone Left Unturned Checking Early Habitation*, Honolulu Advertiser, Aug. 6, 1984, at A-3, col. 2.

274. K. EMORY, *supra* note 257, at 70-71.

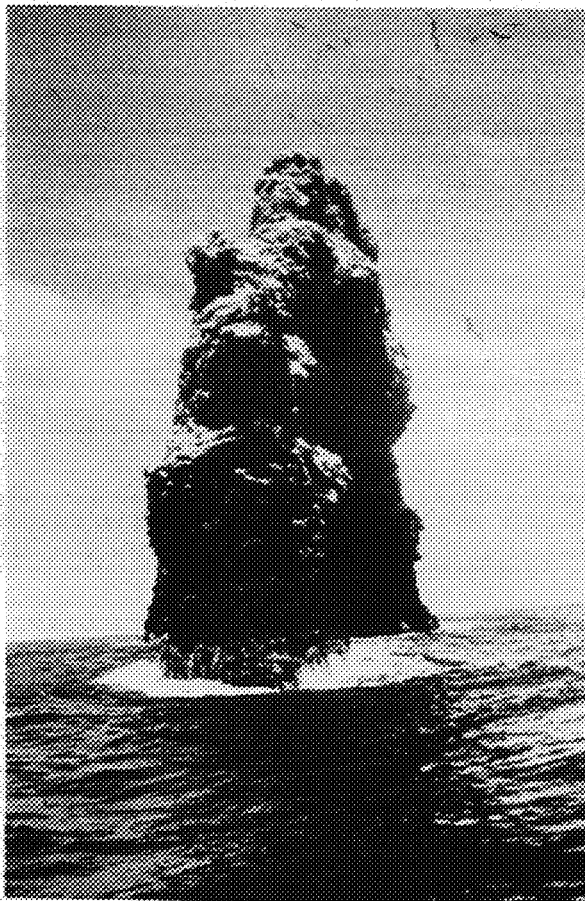
275. *Id.* at 116.

276. *Id.*

277. S. CARLQUIST, *supra* note 266, at 387.

278. Necker Island currently has a United States Fish and Wildlife field camp,

French Frigate Shoals



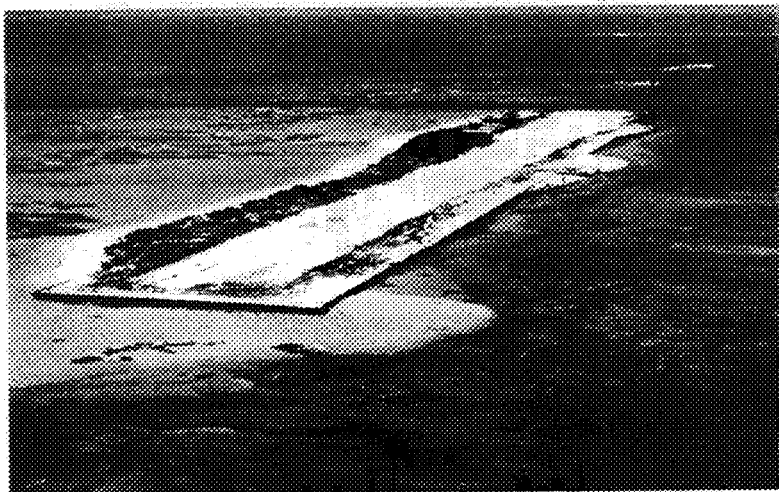
FRENCH FRIGATE SHOALS: LA PEROUSE PINNACLE

The official name of French Frigate Shoals²⁷⁹ is not only non-descriptive but also misleading from the standpoint of the LOS Convention's criteria. French Frigate Shoals is a crescent-shaped atoll, approximately seventeen miles (27 km) long. The typical ring-like coral reef has a number of bare, small sand islets on it. These forma-

however, which is occasionally occupied. Telephone interview with Stewart Fefer, Biologist for United States Fish and Wildlife Service (USFWS), by Ted Pettit, in Honolulu (April 2, 1986) [hereinafter Stewart Fefer Interview].

279. COAST PILOT, *supra* note 6, at 426-28.

tions are flanked by numerous coral heads and reefs and a volcanic rock, La Perouse Pinnacle. The pinnacle is described as a rock about sixty yards long, twenty yards wide, and 122 feet high, which is so steep and rugged that it is almost inaccessible. By all reasonable standards of geographic characteristics and international law, La Perouse Pinnacle is a rock rather than an island. Moreover, it is clearly uninhabitable.



FRENCH FRIGATE SHOALS: TERN ISLAND

The remainder of French Frigate Shoals, however, must be considered separately. Several of the small islets have names: Shark, Tern, East, Trig, Skate, Whale, Round, Mullet, Bare, Gin, Little Gin, and Disappearing. Tern Island has been inhabited by two to five researchers associated with the Wildlife Refuge. Buildings have been constructed on the island, and the personnel living there have been supplied with reasonable, albeit somewhat primitive, accommodations.²⁸⁰ Although the arguments for classifying La Perouse Pinnacle

280. The islet was enlarged from eleven to thirty-eight acres by the United States Navy in 1942 when they dredged a boat channel and later built an airstrip that takes up most of the island, giving it the appearance of an aircraft carrier. After World War II, the Coast Guard established a long-range-aid-to-navigation (LORAN) station there. Waves breaking over the island required evacuation in a December 1969 storm. In 1972, new Coast Guard quarters were built at a cost of \$1.2 million, but in 1979 the Coast Guard moved out permanently and the USFWS took over the facilities. Supplies for the two to five researchers in Tern are flown in every five weeks; a tractor is used to clear the runway prior to each landing. Ten Bruggencate, *U.S. May Close Down Tern Island Operations*, Honolulu Star-Bulletin & Advertiser, Feb. 15, 1987, at I-3, col. 1.

as a rock are persuasive, the continuous occupation of nearby Tern Island²⁸¹ presents at least a conceivable argument that this feature is entitled to generate an EEZ. This limited research presence does not, however, amount to a "stable community" of people.²⁸² Thus, even Tern Island probably fails to meet the criteria necessary to generate an EEZ.

In 1987, the United States Fish and Wildlife Service gave considerable attention to the possibility of shutting down full-time operations at the 45-year-old research station, both to save money and to give the wildlife even greater control of the islet.²⁸³ Under this plan, scientists would continue regularly to observe the bird and marine life, but they would camp out, and the permanent facilities would be permitted to deteriorate. If such an approach were adopted, the argument that this isolated outcropping can generate an EEZ would be even less persuasive. Later in 1987, however, sufficient funds were found to continue to maintain at least two scientists on Tern Island year round.²⁸⁴

The other islets comprising French Frigate Shoals are low, flat, sandy, and uninhabited. No strong argument can be made, therefore, that these other islands in the Shoals should generate an EEZ.

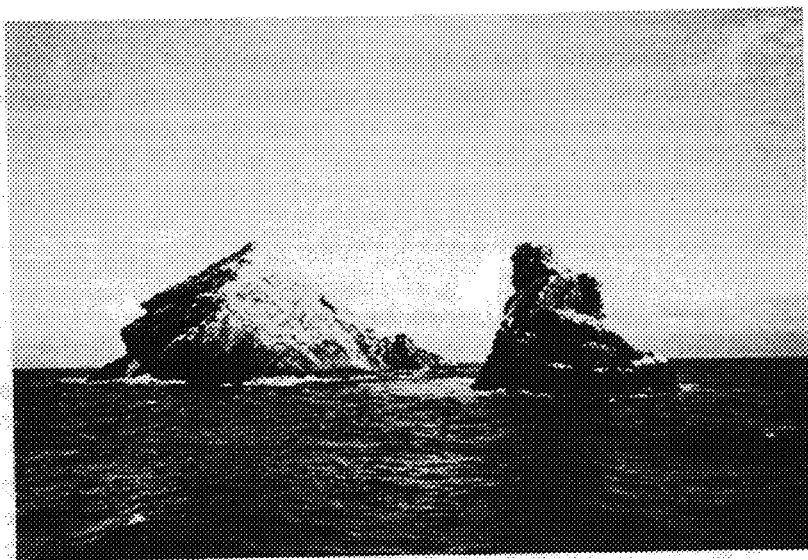
281. Tern Island and La Parouse Pinnacle are 7.5 miles (12 km) apart.

282. See *supra* notes 69-73 and accompanying text.

283. See *supra* note 280.

284. Interview with Richard C. Wass, Refuge Manager, Hawaiian Islands National Wildlife Refuge (May 15, 1987). The two permanent researchers would continue to be supplemented with additional scientists during the key breeding periods for the wildlife being studied.

Gardner Pinnacles



GARDNER PINNACLES

The Gardner Pinnacles²⁸⁵ are two solid, volcanic, rocky formations, barren of vegetation and covered with guano. Because of their exposed position, the surf usually breaks with considerable force on the sides of the larger pinnacle, making landing extremely hazardous and generally impossible. These formations are extremely small (0.004 square miles or 0.01 square kilometers and 170 feet or 50 meters high), have extremely steep slopes, and no indigenous life or water source. Because humans cannot survive or be reached with supplies, the Gardner Pinnacles must be classed as “rocks which cannot sustain human habitation or economic life of their own.”²⁸⁶

Maro Reef

Maro Reef was discovered in 1820 by the whaling vessel *Maro*. It consists of a large, oval-shaped coral bank thirty-one miles long and eighteen miles wide. The center of the bank contains a large area of reefs that are awash. “Only one very small rock, about two feet high and on the north side of the reef, shows above high water.”²⁸⁷ From the standpoint of delineating an EEZ, it is merely this small rock that is of any consequence, and it clearly should be categorized as a

285. COAST PILOT, *supra* note 6, at 428.

286. LOS Convention, *supra* note 1, art. 121(3).

287. COAST PILOT, *supra* note 6, at 430.

rock, rather than as an island. Maro Reef, therefore, is entitled only to a territorial sea, because a claim to an EEZ cannot be supported by the geographic evidence.

Laysan Island



LAYSAN ISLAND

Laysan is a low sand island, 1.6 miles (2.6 km) long and 1 mile (1.6 km) wide. Water can be obtained by digging shallow wells. According to the *Coast Pilot*, "the island is uninhabited and is seldom visited."²⁸⁸ However, the *Data Book* records a population of five.²⁸⁹ Apparently, at the time of the 1980 population count on which the *Data Book* figures were based, five visitors, probably scientists, were visiting the island.²⁹⁰ In the center of the island is an extremely hypersaline lake. This uninviting feature, plus the "millions of flies [which] make a visit there unpleasant most of the year,"²⁹¹ should be considered when deciding whether to classify Laysan as an island

288. *Id.*

289. HAWAII DEP'T OF PLANNING AND ECON. DEV., THE STATE OF HAWAII DATA BOOK, 1985: A STATISTICAL ABSTRACT 16 (Nov. 1984) (citing 1980 UNITED STATES CENSUS).

290. Laysan Island has been occupied by an average of two to four USFWS personnel from March to November in 1985 and March until August in the years 1980, 1982, 1983, and 1984. Stewart Fefer Interview, *supra* note 278.

291. COAST PILOT, *supra* note 6, at 430.

or as a rock incapable of supporting human habitation.

Laysan history provides evidence of former, temporary habitation. It was discovered on March 12, 1828 by Captain Stanikowich who named it after his ship.²⁹² Between 1892 and 1904, the island was inhabited by a few persons who worked to remove the guano for commercial purposes.²⁹³ The occupants introduced rabbits which devoured the existing vegetation and eventually, overran their own food supply. The last of the animals was killed in 1923 and the island has since revegetated.²⁹⁴

Laysan is the largest of the Northwestern Hawaiian Islands; its 1,001 acres (4.05 square kilometers) comprise approximately half of the total land area of the group. It contains twenty-five species of flowering plants, three species of land birds, and serves as a nesting site for thousands of sea birds.

Lisianski Island



LISIANSKI ISLAND

Lisianski²⁹⁵ is a small, low sand island, 1.2 miles (1.9 km) long and half-a-mile (0.8 km) wide. It has some vegetation, in the form of vines, bushes, and coconut trees, and it is possible to obtain brackish

292. M. PUKUI, S. ELBERT & E. MOOKINI, PLACE NAMES OF HAWAII 130 (1981).

293. *Id.*

294. S. CARLQUIST, *supra* note 266, at 400.

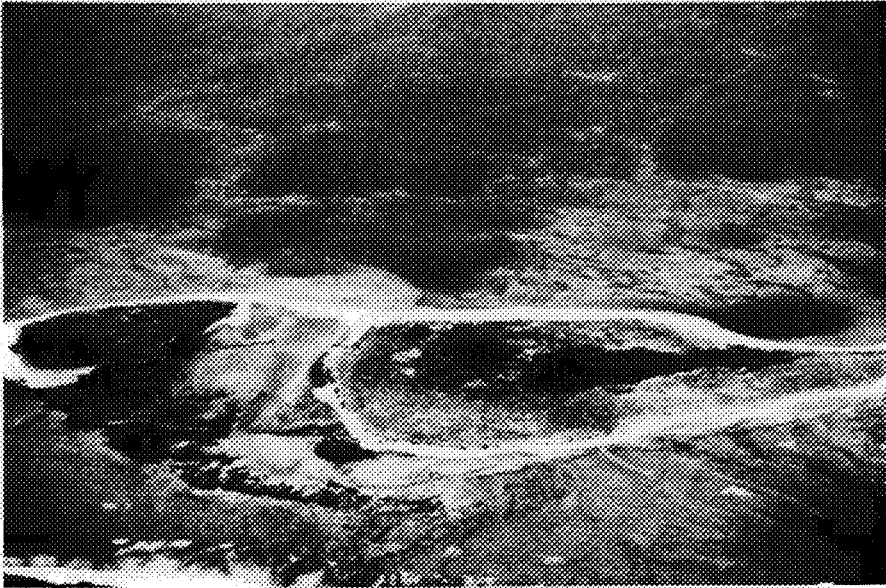
295. COAST PILOT, *supra* note 6, at 431.

water by digging shallow wells. The water is apparently undrinkable without some additional treatment. The presence of a large number of flies makes a stay unpleasant, and for this and other reasons, the island, like Laysan, is considered uninhabitable and is seldom visited.²⁹⁶

The history of Lisianski is similar to that of Laysan. It was discovered on October 15, 1805 by Captain Urey Lisianski, whose ship, the *Neva*, went aground on the nearby shoal.²⁹⁷ Once again, guano diggers colonized the island and introduced rabbits, which multiplied so rapidly that they became too numerous for the available food supply. The island was denuded and the rabbits died. Its vegetation cover is only now slowly regrowing.²⁹⁸

Although both Lisianski and Laysan did prove to be capable of supporting very small human populations during guano periods, no later habitation has been attempted, and neither island reasonably can be thought capable of sustaining an economic life of its own.

Pearl and Hermes Atoll



PEARL AND HERMES ATOLL: SOUTHEAST ISLAND

296. The island was occupied by an average of two to three USFWS personnel from March to August in 1983 and 1984. Steward Fefer Interview, *supra* note 278.

297. M. PUKUI, S. ELBERT & E. MOOKINI, *supra* note 292, at 133.

298. S. CARLQUIST, *supra* note 266, at 410.

Although the name was officially changed to Pearl and Hermes Atoll in 1968, which is a more accurate description, the *Coast Pilot* and pertinent nautical charts still refer to it as Pearl and Hermes Reef.²⁹⁹ It is actually an extensive oval-shaped atoll, seventeen miles (27 km) long by nine miles (14 km) wide, with a circumference of about forty miles (64 km). There are seven small islets, North, Little North, Bird, Sand Grass, Seal, and Kittery, with a total area of 78.1 acres (0.3 sq. km). The islands are vegetated with low plants and shrubs, but the small acreage is distributed over so many bits of land that habitability is doubtful.³⁰⁰

As with so many other islands in the group, discovery was due to navigational accident. On April 26, 1822, two English whalers, the Pearl and Hermes, grounded on the encircling reef which the crews named after the ships.³⁰¹

Midway Islands



MIDWAY ISLAND

A circular atoll roughly six miles (10 km) in diameter, Midway³⁰² is an important United States possession. It is under federal government administration and is not part of the State of Hawaii. The two

299. COAST PILOT, *supra* note 6, at 431-32.

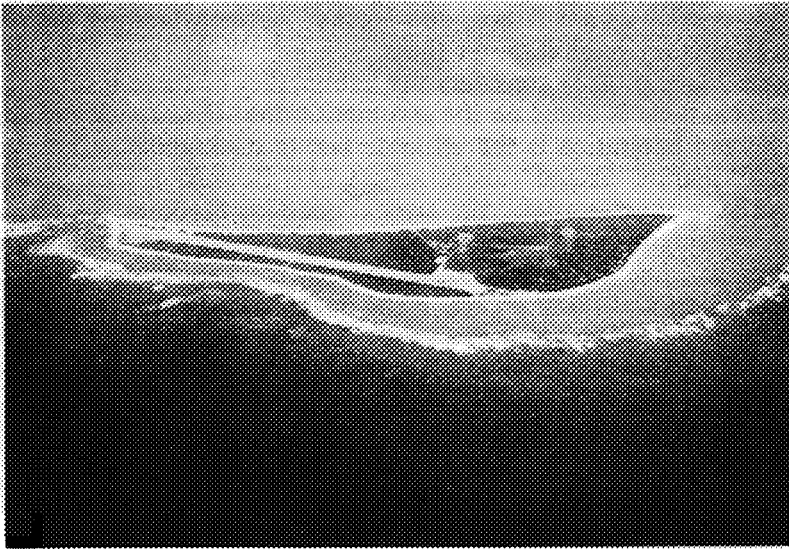
300. Pearl and Hermes Reef was occupied by an average of three to four USFWS personnel from March to August in 1984 and 1985. Stewart Fefer Interview, *supra* note 278.

301. M. PUKUI, S. ELBERT, & E. MOOKINI, *supra* note 292, at 182.

302. COAST PILOT, *supra* note 6, at 432-33.

islands in the atoll, Eastern and Sand, have a combined area of 1,280 acres (5.2 sq. km), by far the largest in the northwestern island chain. Sand Island contains a naval installation and has a sizeable population of military personnel, and civilian construction workers.³⁰³ The island can thus sustain human habitation and has an economic life of its own; hence, an EEZ can be drawn around it.

Kure Atoll



KURE ATOLL

Kure³⁰⁴ is an atoll, generally circular in form with a diameter of approximately 4.5 miles (7.2 km). Two islands are on the surrounding reef: Green and Sand. A United States Coast Guard LORAN (Long Range Aid to Navigation) station is located on Green Island along with twenty to twenty-five personnel who are rotated to the island to maintain the LORAN station. Although this human pres-

303. In May 1986, about 260 persons inhabited Midway — nine United States Navy personnel and the rest civilian contract employees. 200 of the civilians were from Sri Lanka, and most of the other civilians were from Thailand and Korea. Matsunaga, *Midway: 260 People and 7 Million Birds*, Honolulu Advertiser, May 12, 1986, at B1, col. 2.

304. COAST PILOT, *supra* note 6, at 433-34; Altonn, *Kure: Life with Goonys and Beer Cutbacks*, Honolulu Star-Bulletin, Jan. 3, 1986, at A-3, col. 1.

ence is small, it at least can be argued that an EEZ can legally be drawn around Kure.

Summary and Arguments

Table 1 (see p. 484) lists the geographic features in the Northwestern Hawaiian Islands.³⁰⁵ The formations are categorized as either islands or rocks based on their physical geography or characteristics. The entitlement column assigns a territorial sea (TS) to "rocks," and an EEZ to "islands," with the determinative factor in defining these terms being whether the land formation can sustain a human community. Under this criterion, La Perouse Pinnacle, Gardner Pinnacles, and the single rock above water in Maro Reef are clearly "rocks," as are Nihoa, and Necker, notwithstanding the previous temporary habitation on them.

Table 2 (see p. 485) considers the habitability of these insular features. This table is based on the assumption that the capacity to support human habitation is the ultimate test in distinguishing between a "rock" and an "island" under article 121. Because a rock may be defined as a "barren islet," the critical question becomes the formation's barrenness or habitability not merely its physical structure or appearance. Five of these features, Nihoa, Necker, Laysan, Lisianski, and Pearl and Hermes, are in the questionable category for reasons discussed previously.

In delineating the EEZ around the Northwestern Hawaiian Islands, the United States can arrive at numerous configurations depending on the various arguments or interpretations considered in this paper. Six are illustrated.

Figure 1 (see p. 489) makes no distinction between rock and island, nor does it consider the habitability criterion. All features on the map are centers of 200 nautical mile radii. This claim would result in an EEZ of 587,282 square nautical miles. The fisheries management zone declared by the United States in 1976 as shown on nautical charts appears to be based on this construction.

Figure 2 (see p. 490) assumes that Gardner Pinnacles and Maro Reef are rocks and cannot be used as bases for the construction of EEZs and that Pearl and Hermes Reef is a "rock" based on the "barren islet" definition. The resulting EEZ would consist of 553,899 square nautical miles.

Figure 3 (see p. 491) further reduces the EEZ claim by assuming that Nihoa and Necker are also rocks not capable of sustaining a human population, in addition to Gardner Pinnacles, Maro Reef, and Pearl and Hermes Reef. Accordingly, the area of the EEZ

305. The tables include Midway Islands, although Midway is not part of the State of Hawaii.

would be reduced to 443,121 square nautical miles.

Figure 4 (see p. 492) is based on classifying Nihoa and Necker as islands that can sustain a population because they did so in the past, at least temporarily. In this figure, however, Laysan and Lisianski are considered to be barren islets, rocks by one definition, and are not therefore legitimate bases for EEZ claims. Likewise, Pearl and Hermes Reef, Maro Reef, and Gardner Pinnacles are excluded for the reasons noted above. The EEZ created by this claim would contain 404,540 square nautical miles.

Figure 5 (see p. 493) assumes that only the presently inhabited islands — Kure, Midway, and Tern Island in the French Frigate Shoals — can be used to support EEZ claims. All other features are excluded on the basis of their status as rocks. Gardner and Maro are small pinnacles, while Pearl and Hermes, Laysan, Lisianski, Necker, and Nihoa are barren, currently uninhabited, and assumed to be incapable of sustaining a human population. Under this assumption, the United States could claim an EEZ of only 292,677 square nautical miles. If Tern and Kure Islands cannot generate EEZs, because the limited presence of researchers and maintenance personnel does not constitute a “stable community,” the eastern circle in Figure 5 (see p. 493) and the westernmost section would disappear. The result would be a reduction of the EEZ area to 167,077 square nautical miles. This version of the EEZ is depicted in Figure 6 (see p. 494).

In evaluating which interpretation best suits the United States, it is important to recall that the primary United States interest in the Northwestern Hawaiian Islands has been the preservation of wildlife and environmental protection.³⁰⁶ This interest can be preserved by preventing other nations from exploiting the ocean's resources adjacent to the fragile environments on these islands. Based on present international law, however, preservation concerns alone do not appear to justify a claim by the United States to the exclusive right to exploit the resources out to 200 nautical miles from these uninhabited spots of land areas.³⁰⁷

306. See *supra* notes 97-98, 250-51, and accompanying text.

307. A claim to an EEZ for Northwestern Hawaiian Islands as a group may be compared to claims under archipelagic regimes, particularly to Ecuador's claim regarding the Galapagos. See *supra* notes 179-83 and accompanying text. Neither island group meets the requirements of an archipelago as set forth in the LOS Convention because neither group is a separate sovereign nation. LOS Convention, *supra* note 1, art. 46(a). Both contain smaller uninhabitable islands within the chain of islands. Both are situated in tropical climates which makes cultivation of vegetation on the islands at least a possibility. Further, both groups are truly mid-oceanic archipelagoes because no surrounding claims to water territory compete with the 200 nautical mile area of their potential

TABLE 1
*EXTENDED MARITIME JURISDICTION GENERATED BY
 THE ISLANDS AND ROCKS OF THE
 NORTHWESTERN HAWAIIAN ISLANDS*

<u>FEATURE</u>	<u>CATEGORY</u>	<u>ENTITLEMENT</u>
Nihoa Island	Rock	TS
Necker Island	Rock	TS
French Frigate Shoals		
Tern Island	?	?
La Perouse Pinnacle	Rock	TS
Other Formations	Rocks	TS
Gardner Pinnacles	Rock	TS
Maro Reef	Rock	TS
Laysan Island	?	?
Lisianski Island	?	?
Pearl and Hermes Reef	?	?
Midway Islands	Island	EEZ
Kure Island	Island	EEZ

EEZs. Both claims would allocate the resources in substantial areas of ocean space to national jurisdiction and thus further reduce the amount of ocean space that would remain as part of the world's "common heritage." *See supra* note 184 and accompanying text, and *see generally* Van Dyke & Yuen, *supra* note 75. Both claims also have the potential to accelerate national claims and thus reduce the freedoms of the seas generally. Note, in particular, Chile's claim to a 350 mile continental shelf adjacent to uninhabited Sala y Gomez Island; *see supra* notes 210-14 and accompanying text. This trend is not in the interest of the United States nor any other maritime nation. *See supra* notes 24-41 and accompanying text.

TABLE 2

HUMAN HABITATION SUSTAINABILITY OF THE
NORTHWESTERN HAWAIIAN ISLANDS

<u>Feature</u>	<u>Can It Sustain Human Habitation?</u>
Nihoa Island	No
Necker Island	No
French Frigate Shoals	
Tern Island	Yes
La Perouse Pinnacle	No
Other Formations	No
Gardner Pinnacles	No
Maro Reef	No
Laysan Island	?
Lisianski Island	?
Pearl and Hermes Reef	No
Midway Islands	Yes
Kure Island	Yes

CONCLUSION

The language of article 121(3) of the LOS Convention is inherently ambiguous, but cannot be dismissed as meaningless. Although the drafters of the LOS Convention did not define the key terms used in that provision — “rocks” and “sustain human habitation or economic life of their own” — they clearly intended that some small insular formations should not be able to generate 200 mile EEZs.³⁰⁸ The present United States position that *every* insular formation is entitled to generate an EEZ³⁰⁹ is not, therefore, consistent with article 121(3). It also conflicts with the opinions of the I.C.J.³¹⁰ and the result of other recent arbitrations.³¹¹

To determine what meaning should now be given to the language of the LOS Convention, this article has surveyed the historical background of the article 121(3) and the state practice that has occurred

308. See JAYARAMAN K., *supra* note 135, at 60 (“What Article 121(3) contemplates therefore, amounts to a total denial of continental shelf to certain elevations which may, for some other purpose qualify the test of islands.”). (“[Article 121(3)], therefore, totally denies the EEZ to such rocks which may otherwise qualify the test of islands under Article 121(1).”) *Id.* at 70.

309. See *supra* notes 27-38 and accompanying text.

310. See *supra* notes 108-10 and 121-25 accompanying text.

311. See *supra* notes 111-20 and accompanying text.

since this language was included in the early drafts of the LOS Convention, beginning in the mid-1970s. The most instructive situations involve islands with locations that directly affect the maritime boundary delimitation between opposite or adjacent nations. In almost all of these situations, small or uninhabited islands are viewed as “special circumstances” or geographical anomalies and are not given their full potential effect in generating maritime zones. Examples discussed above include the Senkaku Islands near Taiwan,³¹² the Channel and Scilly Islands in an area that had been disputed between France and the United Kingdom,³¹³ and the islands near Tierra del Fuego affecting areas disputed between Chile and Argentina.³¹⁴ The ability of Rockall to generate a 200 mile zone has been challenged by Ireland and Denmark and is currently in dispute.³¹⁵ The United States has taken the opposite position — that all islands, no matter how small, can generate zones — because of the view that this will increase the overall maritime space over which the United States can exercise jurisdiction.³¹⁶

Many nations have made claims for 200 mile zones around remote and uninhabited mid-oceanic islands,³¹⁷ and these claims have been unchallenged for the most part. The institutions created under the LOS Convention that could examine such claims³¹⁸ have not yet been established. Nations seem reluctant to challenge claims in the name of the somewhat abstract interest of the “common heritage” of humankind for fear of unnecessarily exacerbating international relations. The absence of challenges should not yet, however, be viewed as international acquiescence because important principles are at stake. The examples involving boundary disputes between nations clearly indicate an understanding that small and uninhabited islands *are* different from other land formations in their ability to generate EEZs.

The proposal offered in an earlier article³¹⁹ — that an island should be able to generate an EEZ only if it has been supporting a stable community of permanent residents³²⁰ — is worthy of consideration on both practical and policy grounds. The policy of allowing coastal nations exclusive rights to the ocean resources adjacent to their coasts was accepted because of a recognition that coastal peo-

312. See *supra* notes 134-44 and accompanying text.

313. See *supra* notes 111-20 and accompanying text.

314. See *supra* notes 126-29 and accompanying text.

315. See *supra* notes 151-68 and accompanying text.

316. See *supra* notes 27-38 and accompanying text.

317. See *supra* notes 186-241 and accompanying text.

318. See LOS Convention, *supra* note 1, art. 76(8) and Annex II.

319. Van Dyke & Brooks, *supra* note 42, at 285-88; see also 3 B. GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER 684 (1934).

320. See *supra* notes 68-73 and accompanying text.

ples generally have a close relationship to and a dependence upon the nearby ocean resources. They are, therefore, best equipped to manage these resources and ensure their optimal utilization.³²¹ If no one lives on a small island, this logic does not apply, and it seems inappropriate to allocate exclusive resource rights to a people living far away whose only link to the island may be a claim made more than a century ago by guano prospectors.³²²

The standard of a "stable community of permanent residents" is designed to give a sense that some real commitment to the island must exist. Even this term is somewhat elusive, but it requires something more than an occasional explorer or scientist visiting and suggests a use of the island for purposes other than the newly-discovered interest in its surrounding ocean resources. Nations can, of course, establish "stable communities" and maintain them, and many examples exist of relatively recent occupations of previously uninhabited islands.³²³ The people of a nation should be required to demonstrate at least this type of commitment to an island if they want the benefit of exclusive rights to the resources of an EEZ the size of California.

If these principles were applied to the Northwestern Hawaiian Islands, only Midway, possibly Kure, and conceivably Tern Island in the French Frigate Shoals, would be permitted to generate EEZs.³²⁴ Although the other islands are visited periodically, no stable populations have lived on any of the others in modern times. The United States could maintain its legitimate interest in wildlife preservation by limiting the activities of other nations that would interfere with the endangered species of these regions.³²⁵ The United States could not, however, claim exclusive rights to the resources around the other islands in this chain, because the language of article 121(3) of the LOS Convention and the practices of most nations adjudicating and negotiating disputed claims involving uninhabited islands do not support such claims. Only if the United States could show continuous historical use of these waters by the indigenous people of Hawaii

321. *Id.*

322. Clipperton Island is perhaps the classic example. See Van Dyke & Brooks, *supra* note 78.

323. Johnston, Wake, Midway, Kure, and Jan Mayen Islands are examples. See *supra* notes 83, 201-02, and 302-04 and accompanying text. Wake Island, a U.S. possession halfway between Hawaii and Guam at 19° 18' N. and 166° 35' E., was previously uninhabited but now has about 450 persons on it operating a weather station and a small contingency military base.

324. See *supra* notes 242-307 and accompanying text.

325. See *supra* notes 97-98, 250-51, and accompanying text; see also Harrison, *supra* note 248.

might the result be otherwise.

The restrictions on extended maritime claims adjacent to uninhabitable insular possessions may seem injurious to United States economic interests in the short run, because the United States may be deprived of exclusive rights to some marine resources. But the restrictions would ultimately benefit the United States because they would limit the tendency for ever-greater coastal state claims of exclusive jurisdiction,³²⁶ preserve more ocean space for unrestricted scientific research,³²⁷ and ensure that sufficient ocean space remains to promote the values underlying the concept of the "common heritage."³²⁸ If these long-term values are seen as important ones, then the United States eventually may set an appropriate example for other nations by limiting its own claims.³²⁹

326. See *supra* notes 24-25 and accompanying text.

327. See *supra* notes 103-104 and accompanying text.

328. See *supra* note 184 and accompanying text; see also Van Dyke & Yuen, *supra* note 75.

329. See *supra* note 39 and accompanying text.

Figure 1
The Northwestern Hawaiian Islands
200 Nautical Mile Exclusive Economic Zone

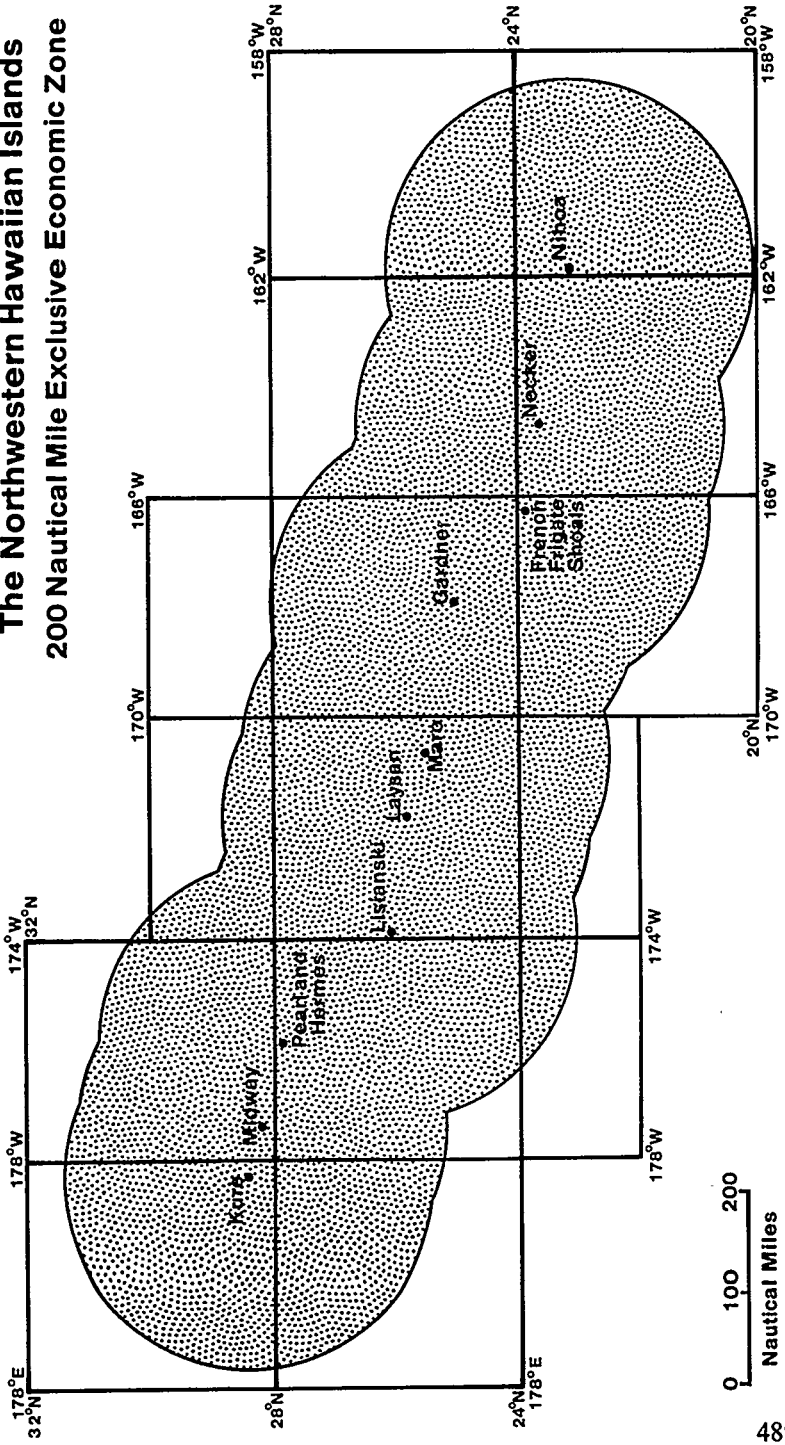


Figure 2
The Northwestern Hawaiian Islands
200 Nautical Mile Exclusive Economic Zone

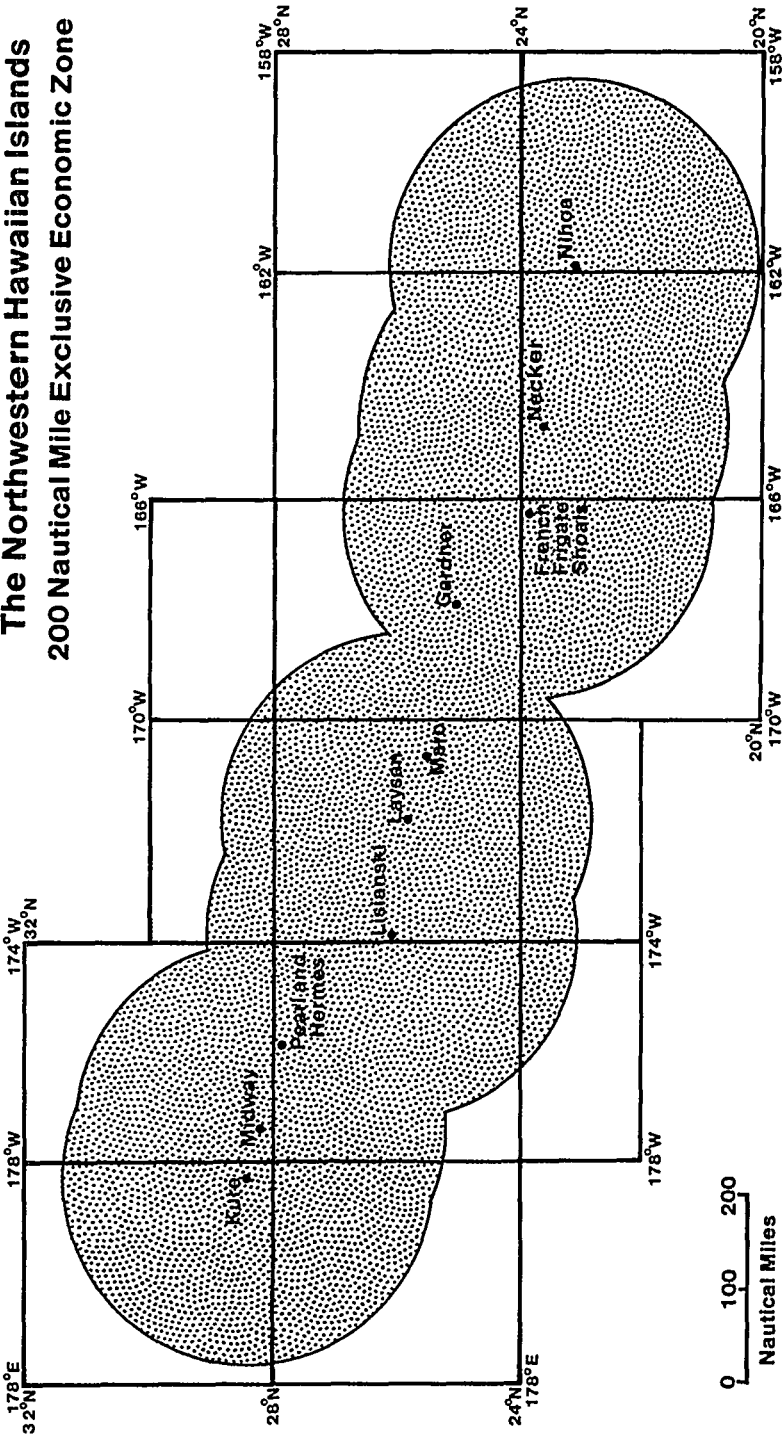


Figure 3
The Northwestern Hawaiian Islands
200 Nautical Mile Exclusive Economic Zone

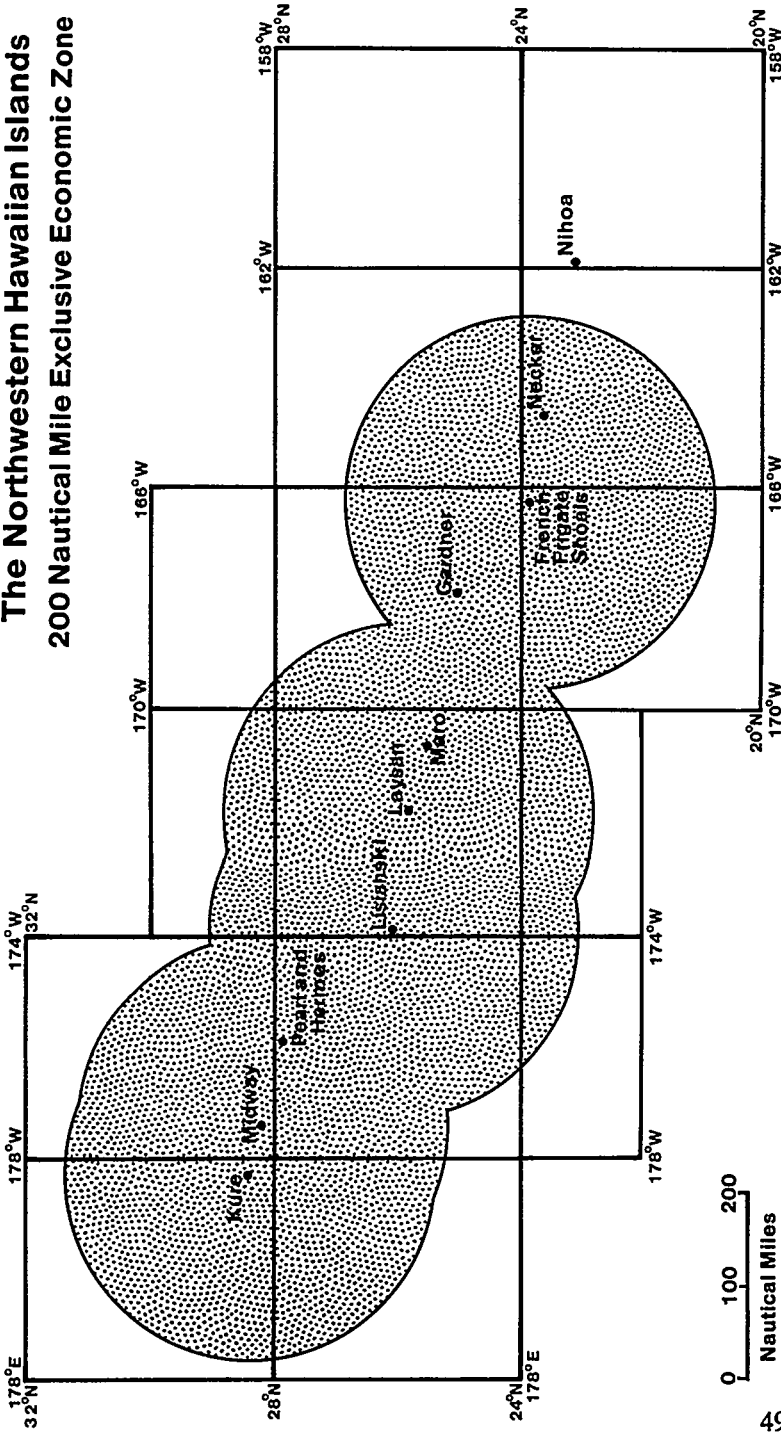


Figure 4
 The Northwestern Hawaiian Islands
 200 Nautical Mile Exclusive Economic Zone

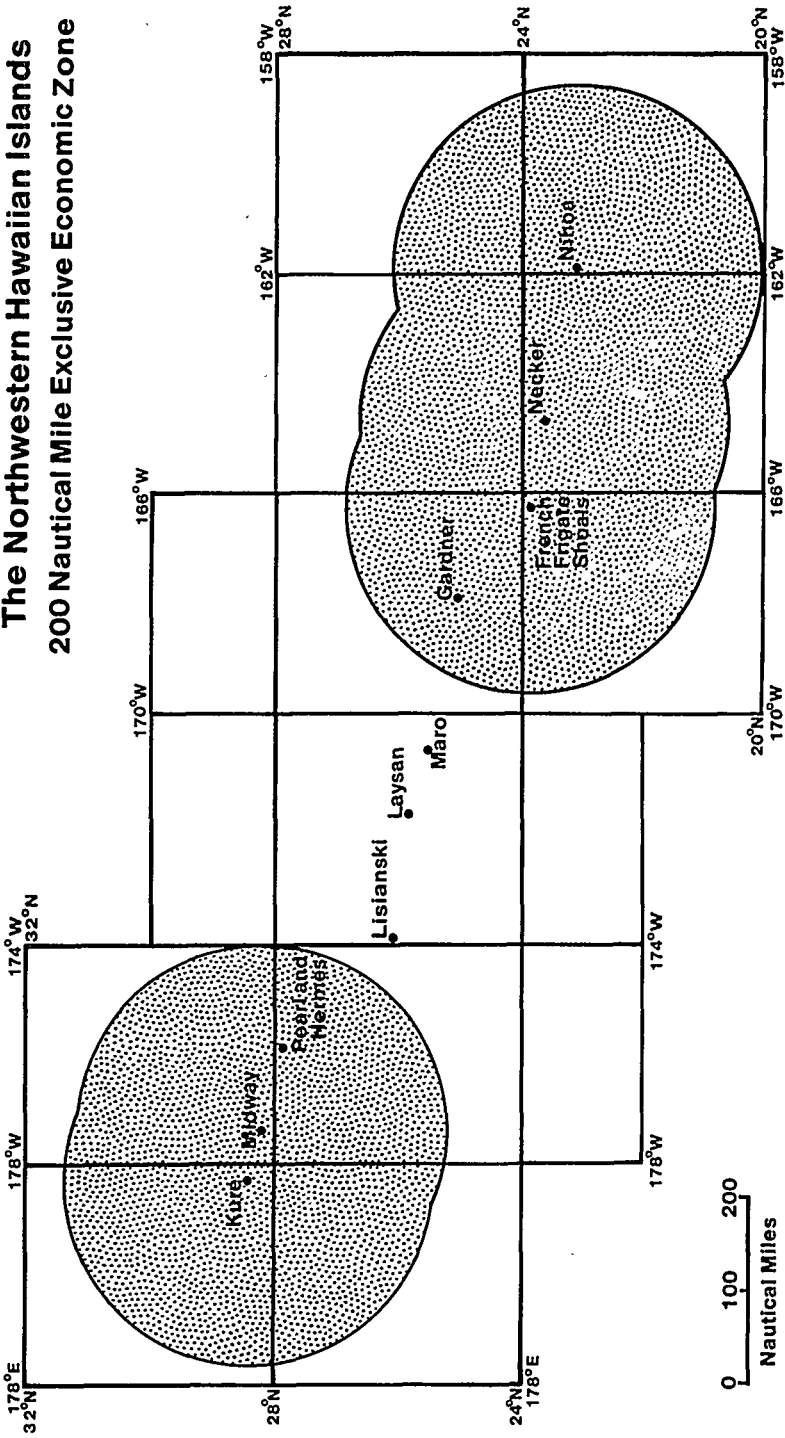


Figure 5
The Northwestern Hawaiian Islands
200 Nautical Mile Exclusive Economic Zone

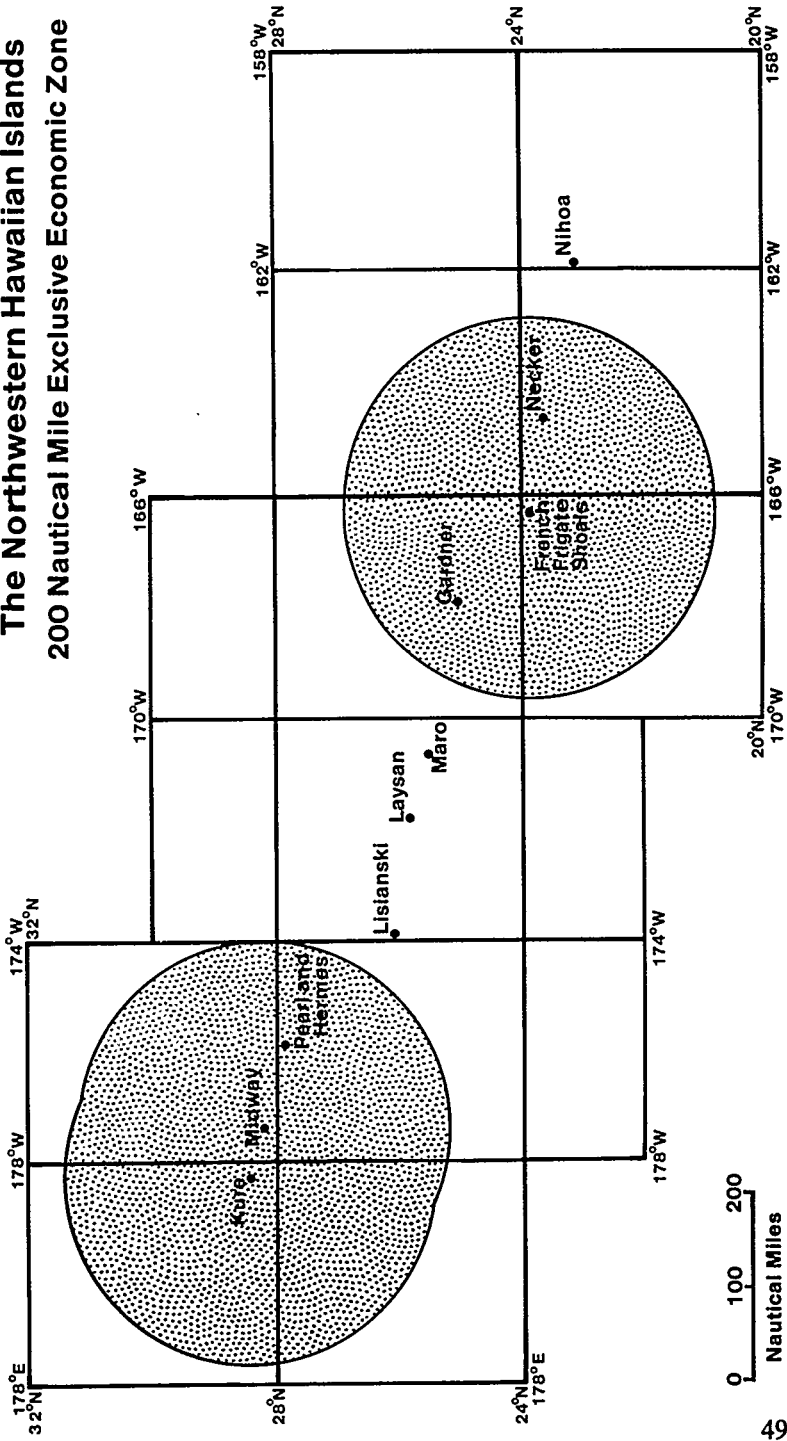


Figure 6
The Northwestern Hawaiian Islands
200 Nautical Mile Exclusive Economic Zone

