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American Ocean Policy Adrift: An Exclusive Economic Zone as an Alternative to the Law of the Sea Treaty

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AMERICAN OCEAN POLICY ADRIFT: AN EXCLUSIVE ECONOMIC ZONE AS AN ALTERNATIVE TO THE LAW OF THE SEA TREATY

INTRODUCTION

During the past decade more than one hundred and fifty nations have attempted to codify a global law of the sea.[1] This effort resulted in the Third United Nations Law of the Sea Conference (UNCLOS III)[2] which produced a document that may be the most comprehensive agreement ever achieved by the world community.[3] Because the UNCLOS III Treaty is so comprehensive it has been analogized to a "constitution of the oceans."[4] Every maritime interest and ocean use from navigation to ocean mining is regulated by a rule of conduct.[5]

Until 1981, American presidents actively supported UNCLOS III throughout the negotiation process.[6] Just before its completion, however, President

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1. *See* Ratiner, *The Law of the Sea: A Crossroads For American Foreign Policy*, 60 FOREIGN AFFAIRS 1006, 1007 (1982). Preparations for the Third United Nations Law of the Sea Conference began as early as 1966. *Id. See also* Dubro, *Law of the Sea*, CAL. LAW., Nov., 1982, at 34, 34 (since 1972, negotiating conferences have been held each year in New York or Geneva). For an exhaustive study of the events leading up to The Law of the Sea Conference and the Conference itself, see A. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 240-349 (1981).

2. UNCLOS I and II dealt primarily with the nature and extent of coastal state jurisdiction in offshore areas. UNCLOS III goes beyond former agreements by including the specifics of a regime for seabed management and use beyond the national jurisdiction. *See generally* A. HOLLICK, *supra* note 1, at 103-55, 240-381.

3. *See* Allott, *Power Sharing in the Law of the Sea*, 77 AM. J. INT'L L. 1, 8 (1983). This comprehensiveness is best expressed by Professor Philip Allott, a Fellow of Trinity College, Cambridge, and a member of the United Kingdom's delegation to UNCLOS III.

> The Convention's main structural feature is its comprehensiveness. It is comprehensive in dealing with the whole nonland area of the world. It is also legally comprehensive. It has a rule for everything. The rule may be a permissive rule. It may be an obligation. It may confer an explicit freedom or leave a residual liberty by not specifying a right or a duty. But a Flying Dutchman wandering the sea areas of the world, carrying his copy of the Convention, would always be able to answer in legal terms the questions: who am I? who is that over there? where am I? what may I do now? what must I do now? The Convention would never fail him.

Id. See also Dubro, *supra* note 1, at 34 ("one of the most comprehensive international agreements yet formulated, a treaty seeking to protect and regulate four-fifths of the earth's surface").

4. *See A Reporter at Large — The Law of the Sea*, NEW YORKER, Aug. 8, 1983, at 56, 56.

5. Among the regulated interests and uses are resource exploration and exploitation, pollution, conservation, fishing, shipping, navigation and overflight. *See* Dubro, *supra* note 1, at 34.

6. *See generally* A. HOLLICK, *supra* note 1, at 196-349 (details the evolution of American support for the Treaty). For a discussion of the United States' view of UNCLOS III as a necessary conference, see Kissinger, SECRETARY KISSINGER DISCUSSES PROGRESS AND GOALS IN THE LAW OF THE SEA NEGOTIATIONS, 75 DEP'T ST. BULL. 333 (1976).

The Reagan Administration ordered a "policy review" of the entire Draft Convention in

Reagan stated that the United States would not sign the final agreement adopted by the Conference because of unacceptable provisions concerning the exploitation of deep seabed minerals.[7] Although several western European countries have also refused to sign,[8] the vast majority of nations have already signed.[9] One year after sixty nations ratify the Treaty's Final Act, UNCLOS III will become effective.[10] An unprecedented regime of world ocean authority will then regulate the ocean's use.[11]

How this world ocean authority will affect the United States as a nonsigning nation is unclear. To protect American interests within coastal waters, President Reagan issued a Presidential Proclamation in March 1983 establishing an Exclusive Economic Zone (EEZ).[12] An EEZ is a two-hundred mile wide belt adjacent to a nation's coastline.[13] The coastal state controls

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March 1981 on the eve of the Tenth Session of UNCLOS III. The review resulted in the presentation of a 43 page list of reservations to the Eleventh Session of UNCLOS III in March 1982. The United States refused to participate actively in the conference until this policy review was completed. Larson, *The Reagan Administration and the Law of the Sea,* 11 OCEAN DEV. & INT'L L.J. 297, 297 (1982).

7. Statement by the President on the Convention on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887 (July 12, 1982) [hereinafter cited as Statement].

Whether the deep seabed mining provisions were so adverse to American interests that they justified rejection of the Treaty is a matter of considerable debate. Leigh S. Ratiner, a Reagan Administration UNCLOS III negotiator, argues that the Reagan Administration based its decision to reject the Treaty on the faulty assumption that a mini-treaty among other nonsigning industrialized seabed-mining nations would be a viable alternative. Ratiner, *supra* note 1, at 1011. Ratiner also claims the Administration rejected the Treaty for ideological reasons rather than practical considerations of American interests. *Id.* at 1012. The specific objections listed by President Reagan in his Treaty rejection statement, *see* Statement, *supra,* 887-88, are all refuted by Ratiner in OCEAN SCI. NEWS, July 27, 1982, at 2, 3. The support of American ocean-mining interests for Treaty rejection has been called "a complex form of corporate suicide." Alexander, *The Reaganites' Misadventures at Sea,* FORTUNE 129, 129 (Aug. 23, 1982). *But cf.* NATIONAL ASSOCIATION OF MANUFACTURERS, LAW OF THE SEA ISSUE BRIEF (July, 1982) (supporting President Reagan's rejection of the Treaty because the Treaty fails to "provide assured, continuing access for the U.S. . . . to the resources of the sea, seabed, and subsoil beyond the limits of national jurisdiction"). For a general overview of arguments presented on both sides of the ocean mining issue, see Larson, *supra* note 6, at 297.

8. The industrialized western nations that have not signed are West Germany, Italy, Luxembourg, Belgium, Spain, and Great Britain. *See* 21 INT'L LEGAL MAT. 1477 (1982). Other nations that have not signed are Benin, Botswana, Israel, Jordan, Libyan Arab Jamahiriya, Oman, Peru, South Korea, Samoa, Switzerland and Venezuela. *Id.*

9. *See* Oxman, *The New Law of the Sea,* 69 A.B.A. J. 156, 156 (1983).

10. *Id.* at 162.

11. An examination of the Draft Final Act adopted by UNCLOS III reveals the magnitude of the authority established. The Act is over 220 pages long and contains more than 400 articles. No sea use was left unaddressed. *See* Draft Final Act of the Third United Nations Conference on the Law of the Sea, (*opened for signature* Dec. 10, 1982), *reprinted in* 21 INT'L LEG. MAT. 1245-1354 (1982) [hereinafter cited as Draft Final Act]. The magnitude of effort involved in UNCLOS III ensures that it will profoundly affect the way nations observe the law of the sea whether or not the Final Draft Act becomes operational through ratification. Allott, *supra* note 3, at 1.

12. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983) (to be codified at 3 C.F.R. § 5030) [hereinafter cited as Reagan Proclamation].

13. *See* Krueger & Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin,* 19 VA. J. OF INT'L L. 321, 321 (1979).

most ocean uses in its EEZ except for such high seas freedoms as navigation and overflight.[14] The Reagan Proclamation establishes the EEZ as part of United States domestic law, but it will not become fully operative until Congress passes implementing legislation such as that sponsored by Congressman Breaux of Louisiana and Senator Stevens of Alaska.[15]

The Reagan Proclamation brings over six million square miles of the earth's surface under American control.[16] Within this vast area, almost twice the size of the United States' total land mass,[17] the United States will exert exclusive control over all living and nonliving resources in the sea and seabed.[18] The United States will also control ocean energy production, construction, and environmental protection in the zone.[19] Because virtually all American fishery and oil reserves are located within this two-hundred mile zone, the economic benefit involved is enormous.[20] The Reagan EEZ seeks to guarantee that benefit to the United States.

Opposition does exist to this unilateral declaration by the United States.[21] Moreover, the near worldwide acceptance of UNCLOS III's detailed EEZ provisions could create new norms of international law. If new norms are established, the legality of the independent American EEZ may be questioned by the nations adhering to the Treaty. Precipitous unilateral action by the United States also creates strategic and political risks since signatory nations may retaliate by disrupting American shipping and military operations or declaring their own independent EEZ's contrary to American interests.

This note explores the legal and political prospects for a United States EEZ outside the ambit of UNCLOS III. After examining the historical development of the EEZ, the Reagan Proclamation and its implementing legislation will be compared with the UNCLOS III EEZ provisions. Next, the legality of an independent American EEZ under international law is considered. The questionable legality of the Reagan Proclamation only increases the likelihood

14. Oxman, *supra* note 9, at 159.

15. S. 750, 98th Cong., 1st Sess., 129 CONG. REC. S2550-53 (daily ed. Mar. 10, 1983) [hereinafter cited as S. 750]. Congressman Breaux of Louisiana is the chief author of this bill, known as the "Exclusive Economic Zone Implementation Act." *Id.* § 1. Congressman Breaux introduced the same measure to the House. H.R. 2061, 98th Cong., 1st Sess., 129 CONG. REC. H1142 (daily ed. Mar. 11, 1983).

16. *See* OCEAN SCI. NEWS, Sept. 27, 1982, at 2. Of this six million square mile figure, about two and one-half million square miles surround the continental United States. The remaining three and one-half million square miles are in the zones around Hawaii, United States overseas possessions and territories, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. *Id.*

17. The total area of all 50 states is 3,623,420 square miles. *See* THE WORLD ALMANAC AND BOOK OF FACTS 435 (1983).

18. *See* S. 750, *supra* note 15, § 102(1); Reagan Proclamation, *supra* note 12.

19. *See* S. 750, *supra* note 15, § 102(3); Reagan Proclamation, *supra* note 12.

20. Krueger & Nordquist, *supra* note 13, at 321.

21. *See* Memorandum from Ed Welch to Walter Jones (Jan. 27, 1983) (Walter Jones is Chairman of and Ed Welch is Chief Counsel to the House Committee on Merchant Marine and Fisheries). Fifty-two congressmen signed a letter sent to President Reagan urging him not to issue his EEZ proclamation. They reasoned that an American EEZ is unnecessary and will further anger those nations already disturbed over American rejection of UNCLOS III. The legislators also stated that Congress should have a chance to examine the issue.

that it will have a negative impact on American interests and foreign relations. By invoking current domestic and international law rather than declaring an independent EEZ, the Reagan Administration could avoid international problems and give the United States control over its coastal resources as effective as that provided by the EEZ.

EVOLUTION OF THE EEZ

The Exclusive Economic Zone concept evolved from two opposing international law doctrines: freedom of the seas and adjacent state territorial dominion.[22] The freedom of the seas doctrine allows all nations nondiscriminatory use of the oceans for "innocent" purposes such as navigation and fishing.[23] Adjacent state territorial dominion allows nations to claim sovereign control over a neighboring expanse of the ocean as though their territorial property.[24] An EEZ is a hybrid that expands the territorial scope of dominion but limits the expansion's impact by incorporating some elements of traditional high seas freedoms.[25]

The two theories have conflicted since Grecian antiquity,[26] yet the conflict was not methodically addressed until the seventeenth century[27] when the Dutch Jurist Hugo Grotius[28] incorporated Roman property concepts into the law of

22. *See generally* J. COLOMBOS, INTERNATIONAL LAW OF THE SEA 47-64 (6th ed. 1967) (discussing rights on high seas); A. HOLLICK, *supra* note 1, at 4-6 (examining the tension between concepts of free use of the seas and the enclosure principle); L. MacRae, Customary International Law and the United Nations, Law of the Sea Treaty 2-13 (Dec. 8, 1982) (unpublished manuscript) (analyzing the evolution of freedom of the seas and the opposing dominion of the seas theory). For a discussion of the gradual encroachment of national controls into ocean areas, see Alexander & Hodgson, *The Impact of the 200 Mile Economic Zone on the Law of the Sea*, 12 SAN DIEGO L. REV. 569 (1975).

23. A. HOLLICK, *supra* note 1, at 4.

24. J. COLOMBUS, *supra* note 22, at 87. The most dramatic of these claims came during the sixteenth century under the Treaty of Tordesillas, when a series of Papal Bulls divided the Atlantic Ocean between Spain and Portugal. *Id.* All other nations were to be excluded, with the limited exception of some rights of navigation for each other in their respective zones. A. HOLLICK, *supra* note 1, at 5.

25. The Draft Final Act of UNCLOS III is a good example of balancing these conflicting interests. The EEZ established by the Draft creates a series of rights and duties governing both the sovereign coastal state and any other state using the zone. Draft Final Act, *supra* note 11, arts. 56, 58. Territorial dominion is manifested in the sovereign and jurisdictional rights given the coastal state over economic resources found in the zone. *Id.* art. 56. Freedom of the seas is evident in art. 58, which specifically grants rights of navigation, overflight, laying of submarine cables and pipelines, "and other internationally lawful uses of the sea related to these freedoms." *Id.* art. 58.

26. *See* L. MacRae, *supra* note 22, at 3. For a general discussion of the early conflict between freedom and territorial dominion of the seas, see Newton, *Inexhaustibility as a Law of the Sea Determinant*, 16 TEX. INT'L L.J. 369, 369-85 (1981).

27. *See* WHO PROTECTS THE OCEAN? 20 (J. Hargrove ed. 1975) [hereinafter cited as WHO PROTECTS]. The controversies involved in the seventeenth century debate between Hugo Grotius and John Selden may mark the birthdate of modern international law. L. MacRae, *supra* note 22, at 4.

28. Grotius is considered the father of international law. Biggs, *Deep Seabed Mining and Unilateral Legislation*, 8 OCEAN DEV. & INT'L L.J. 223, 227 (1979). Grotius presented his arguments in his 1608 exposition entitled MARE LIBERUM (The Freedom of the Seas). His thesis is

the sea.[29] These concepts recognized ownership solely through occupation, and in that era of limited technology the oceans could not be occupied.[30] Furthermore, international trade began to expand at a rapid pace, providing economic incentive to allow free use of the seas. This combination of legal theory and economic practicality prompted the maritime nations to exercise freedom of the seas for the next three hundred years.[31]

Certain exceptions to the freedom of the seas doctrine developed during the same period, foreshadowing the EEZ concept.[32] The "cannon-shot" rule, formulated in 1702, is one such exception allowing nations to retain sovereignty over a three-mile belt contiguous to their coastlines.[33] The United States established a three-mile zone as its "territorial sea" in 1793.[34] In the nineteenth century the United States Supreme Court expanded this territorial sea exception by

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based on the "unimpeachable axiom [that] every nation is free to travel to every other nation, and to trade with it." H. GROTIUS, THE FREEDOM OF THE SEAS 7 (R. Magoffin trans. 1916).

29. H. GROTIUS, *supra* note 28, at 22 ("Now, in the legal phraseology of the Law of Nations, the sea is called indifferently the property of no one (*res nullius*), or a common possession (*res commonis*), or public property (*res publica.*"). Because the era's limited technology did not allow widescale ocean control, freedom of the seas inevitably became the established law of nations. L. MacRae, *supra* note 22, at 10. *See also,* Biggs, *supra* note 28, at 227 ("From . . . Hugo Grotius in the seventeenth century . . . emerged the principle of the freedom of the seas . . .").

30. Biggs, *supra* note 28, at 227-28; L. MacRae, *supra* note 22, at 10.

31. Schneider, *Something Old, Something New: Some Thoughts on Grotius and the Marine Environment,* 18 VA. J. OF INT'L L. 147, 149-50 (1977). Although some commentators think the advent of the UNCLOS III EEZ demonstrates that Grotius' ideas are now obsolete, Schneider believes Grotius' legacy lives on in the provisions specifying navigational freedoms. *Id.* at 150-51.

Numerous courts of various jurisdictions have upheld freedom of the seas from the seventeenth to the mid-twentieth century. One example of these decisions is *Le Louis,* 165 Eng. Rpts. 1464 (1817), in which an English admiralty court strongly upheld the notion of freedom of the seas despite illegal slave trading. The court declared: "In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another." *Id.* at 1475. Another example is the United States Supreme Court decision of the *Mariana Flora,* 24 U.S. (11 Wheat.) 1 (1826). The Court stated: "Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there." *Id.* at 42.

32. *See generally* E. DE VATTEL, THE LAW OF NATIONS (Chitty ed. 1883). Vattel argued that nations could not appropriate areas of the sea and forbid others from fishing or navigating there because those uses are "innocent and inexhaustible." *Id.* at 125. Vattel suggested, however, if free use of the neighboring ocean is prjudicial or dangerous to a nation, it should be authorized to exercise dominion over an area to ensure its own safety. *Id.* This qualification led some to conclude that even foreign fishing activity could be forbidden if it were prejudicial to a nation's interests, and the threat was used as a basis for later territorial claims. *See* L. MacRae, *supra* note 22, at 11.

33. Alexander & Hodgson, *supra* note 22, at 569. Although this rule was based on the idea that a nation's coastal artillery could control a three mile territorial sea contiguous to its coastline, no cannon at that time had a range close to three nautical miles. *Id.* According to Bynkershoek, the author of the rule, " 'the dominion of the land ends where the power of the arms ends.' " J. COLOMBOS, *supra* note 22, at 92.

34. Alexander & Hodgson, *supra* note 22, at 569. America's acceptance of the three mile

authorizing limited customs control beyond America's territorial sea.[35] Despite these intrusions the recognized law of the sea remained one of nearly complete freedom.[36]

The Truman Proclamation

The Truman Proclamation of 1945 was another departure from the pervasive freedom of the seas doctrine and began the movement toward the EEZ concept.[37] The Truman Proclamation unilaterally asserted American jurisdiction over the mineral resources of its continental shelf[38] to allow for the exploitation of large petroleum reserves stored there.[39] The area's fishery resources were also large but subject to depletion by foreign fleets;[40] therefore, a companion proclamation was issued establishing a right to create fishery conservation zones in areas of intensive fishing activity adjacent to the American coast.[41] The United States was the first nation to assert exclusive rights over the resources of its continental shelf despite the adverse effect that expanded coastal claims of other countries could have on American navigational and long range fishing interests.[42] The Truman Proclamation attempted

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limit eventually led Britain to recognize that limit, and Britain's naval supremacy following Trafalgar caused the three mile limit to spread to other nations. *Id.* at 569-70.

35. Church v. Hubart, 6 U.S. (2 Cranch) 187 (1804). Chief Justice Marshall declared that a nation might exercise its authority beyond its territorial limits to prevent injury to itself. If the means used were both necessary and reasonable to prevent a violation of the nation's law, then they must be accepted. *Id.* at 235. *Cf.* Hudson v. Guestier, 8 U.S. (4 Cranch) 293, 294 (1808) (when a vessel seizure is indisputably valid, the captor has lawful possession of the vessel). This customs zone eventually became the internationally recognized contiguous zone specified in both the Geneva Conference of 1958 and UNCLOS III. *See infra* note 54.

36. Fye, *The Law of the Sea,* OCEANUS, Winter, 1982-83, at 7 ("The Grotius principle was not seriously challenged until 1945 . . . ."). *See also* Schneider, *supra* note 31, at 149-50 (Grotius principle still found in Draft Final Act).

37. Proclamation No. 2667, 3 C.F.R. 67 (1943-48 Compilation) [hereinafter cited as Truman Proclamation]. *See also* Kreuger & Nordquist, *supra* note 13, at 324 ("On September 28, 1945, President Truman legitimated the nationalization of ocean space by issuing proclamations asserting jurisdiction over continental shelf and fisheries resources in and under the high seas contiguous to the United States."); Szekely, *Mexico's Unilateral Claim to a 200-Mile Exclusive Economic Zone: Its International Significance,* 4 OCEAN DEV. & INT'L L.J. 195, 204 (1977) (the United States began a new era in the law of the sea with the Truman Proclamation). For an exhaustive study of the Truman Proclamation, see A. HOLLICK, *supra* note 1, at 18-56.

38. Truman Proclamation, *supra* note 37, at 68. ("the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.").

39. The Truman Proclamation begins with a statement that the United States is determined to locate "new sources of petroleum and other minerals." *Id.* at 67. *See also* WHO PROTECTS, *supra* note 27, at 25 ("The Truman Proclamation was stimulated primarily by the justified expectation that the continental shelf contained commercially exploitable petroleum resources.").

40. *See generally* A. HOLLICK, *supra* note 1, at 23-25 (major reason for fisheries proclamation was concern over Japanese salmon fishing within 200 miles of Alaska).

41. Proclamation No. 2668, 3 C.F.R. 68 (1943-48 Compilation) [hereinafter cited as FISHERIES PROCLAMATION].

42. WHO PROTECTS, *supra* note 27, at 25. "The first and most dramatic attack on the

to thwart this adverse effect by specifically allowing free navigational rights over the continental shelf.[43] Although similar in economic intent to an EEZ, the Truman Proclamation was less inclusive than a true EEZ because it did not authorize control over non-economic interests.[44]

Despite the limitations on United States authority in the Truman Proclamation, some Latin American nations misinterpreted the United States' action as precedent for claims of plenary power over two-hundred mile coastal zones.[45] Unlike the United States, the Latin countries claimed jurisdiction over not only the continental shelf but the waters above it as well.[46] Ignoring United States' protests, Latin nations began seizing American tuna boats operating within their claimed two-hundred mile zones.[47] The Truman Proclamation thus

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dominance of the notion of the freedom of the seas beyond territorial waters came, somewhat paradoxically, from a great maritime nation. . . ." *Id. See also* Pollard, *The Exclusive Economic Zone — The Elusive Consensus,* 12 SAN DIEGO L. REV. 600, 605 (1975) (the Truman Proclamation *"was a claim to an economic zone of exclusive coastal State jurisdiction"*) (emphasis in original); Comment, *Jurisdiction Beyond 200 Miles: A Persistent Problem,* 10 CAL. WEST. INT'L L.J. 514, 516 (1980) ("the United States initiated what became, in effect, an oceanic 'land grab' . . .").

43. Truman Proclamation, *supra* note 37, at 68. (stating that the waters over the continental shelf are high seas and the Proclamation had no effect on the right to free, unimpeded navigation in those waters).

44. For an example of a true EEZ, see the Draft Final Act, *supra* note 11. Every ocean use within 200 miles is expressly covered. The Truman Proclamation's claims were not implemented until passage of the Outer Continental Shelf Lands Act of 1953, ch. 395, § 4, 67 Stat. 462 (codified as amended at 43 U.S.C. §§ 1341-1343) (1976 & Supp. V 1981). This statute grants power for management, lease authority, resource revenue provisions, and other powers necessary to control mineral resources of the continental shelf. For legislative history of the 1978 amendment, see 1978 U.S. CODE CONG. & AD. NEWS 1450; for legislative history of the original act, see 1953 U.S. CODE CONG. & AD. NEWS 2177. The Fisheries Proclamation was not implemented until the 1976 Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified as amended at 16 U.S.C. §§ 1801-1882 (1976 & Supp. V 1981)). The Fishery Conservation and Management Act (FCMA) replaced a prior statute establishing a nine-mile fishery zone. An Act to Establish a Contiguous Fishery Zone Beyond the Territorial Sea of the United States, Pub. L. No. 89-658, 80 Stat. 908 (1966) (repealed 1976). For a further discussion of the FCMA, see *infra* text accompanying notes 70-73.

45. Szekely, *supra* note 37, at 204. "Due to an erroneous interpretation of the Truman Proclamation, the Mexican act claimed jurisdiction also over the waters above the Continental Shelf. . . . It was precisely under this mistaken interpretation of the Truman Proclamation that other Latin American countries . . . put forward the first claims to a 200-mi [sic] maritime zone. . . ." *Id. See also,* Krueger & Nordquist, *supra* note 13, at 325. "The maritime claims following the Truman Proclamation were not always limited to continental shelf resource jurisdiction. Some developing countries that claimed full sovereignty over the waters above the shelf did not share the interest of the maritime powers in freedom of navigation." *Id.* at 325-26. These claims came in quick succession after the Truman Proclamation. Comment, *supra* note 42, at 516.

46. A. HOLLICK, *supra* note 1, at 61. *See also* Szekely, *supra* note 37, at 196 ("developing countries, mostly from Latin America, held firmly to the 200-mi [sic] 'territorialist' position").

47. A. HOLLICK, *supra* note 1, at 163. In 1951 Ecuador was the first country to seize an American tuna boat. Between 1951 and 1960, 42 such vessels were seized. The United States consistently opposed those claims which exceeded the scope of the Truman Proclamation. *Id.* at 161. Besides using the Truman Proclamation, Chile and Peru used as precedent for their claims the 300-mile neutrality zone adopted by the United States in 1939 to prevent American involvement in the then exclusively European war. *Id.* at 78.

resulted in a continuing effort over the next three decades to curtail the expanded coastal claims of other nations following the perceived American lead.[48]

The Latin claims were the precursor of the modern EEZ because they set a two-hundred mile jurisdictional limit and declared control over both economic and non-economic interest.[49] These early EEZ's had virtually no support outside Latin America.[50] Chile, Ecuador and Peru attempted to gain acceptance of their claims by clarifying them in the 1952 Declaration of Santiago.[51] The three countries hoped to protect their extensive fishery resources by declaring "sovereignty and jurisdiction" over a two-hundred mile coastal zone.[52] Despite the obvious interests of coastal states in protecting domestic fishermen, only seven nations had established two-hundred mile zones by the late 1950's.[53]

The Geneva Conference

The world community first attempted to define a uniform law of the sea at the 1958 Geneva Conference on the Law of the Sea.[54] Cold war hostilities and

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48. *Id.* at 19. From the responses made to it, the Truman Proclamation's greatest error may have been its unilateral nature. It was an out of step action taken by the world's most powerful nation during the formulation of significant international organizations such as the United Nations. *Id.* at 61. The same may be said of the Reagan Proclamation. *See infra* text accompanying notes 199-201.

49. *See generally* Comment, *supra* note 42, at 517.

50. Kunz, *Continental Shelf and International Law: Confusion and Abuse,* 50 AM. J. INT'L L. 828, 852 (1956) (vast majority of nations are opposed to the 200-mile limit).

51. Agreements Between Chile, Ecuador and Peru, signed at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, Santiago, 18 Aug. 1952, U.N. Doc. ST/LEG/SER B.8, at 723 (1957) [hereinafter cited as Declaration at Santiago], *reprinted in* 1 NEW DIRECTIONS IN THE LAW OF THE SEA 106, 231 (S. Lay, R. Churchill & M. Nordquist eds. 1973) [hereinafter cited as 1 NEW DIRECTIONS]. The Declaration of Santiago declared it the duty of governments to provide necessary food supplies for their peoples and to provide them with means of economic development. *Id.* at 232.

52. 1 NEW DIRECTIONS, *supra* note 51, at 232.

53. *See* Comment, *supra* note 42, at 520. The seven nations were Chile, Ecuador, Peru, Costa Rica, Honduras, Panama, and El Salvador. *Id.*

54. For a detailed analysis of the Geneva Conferences see A. HOLLICK, *supra* note 1, at 127-55. The Conference incorporated four conventions on the law of the Sea into its Final Act. Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, (entered into force for the United States Sept. 30, 1962); Convention on the Territorial Sea and Contiguous Zone, *opened for signature* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639 (entered into force for the United States Sept. 10, 1964); Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578 (entered into force for the United States June 10, 1964); Convention on Fishing and Conservation of Living Resources of the High Seas, *opened for signature* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969.

These four conventions established four regimes of ocean control covering internal waters, the territorial sea, the contiguous zone and the high seas. Internal waters such as harbors and gulfs are under the absolute control of the coastal state, a position relatively unchanged by UNCLOS III. *See* Draft Final Act, *supra* note 11, art. 8. The territorial sea extends beyond a nation's coastline to encompass adjacent coastal waters. In the territorial sea, the coastal state has plenary authority subject to other nations' right of innocent navigation. Although the Geneva Conference failed to establish a maximum width for the territorial sea, the Draft

the emergence of the third world as a potent political cartel, however, limited the Geneva Conference's success.[55] The Conference failed to set a maximum width for territorial seas or to delineate fishery limits,[56] and those issues remained unresolved after the Conference reconvened in 1960.[57]

Despite these failures, the Geneva Conference did advance acceptance of the EEZ concept. The Truman Proclamation's unilateral claims of continental shelf control and dispute resolution by "equitable principals" gained international recognition in Article Two of the Geneva Convention on the Continental Shelf.[58] Additionally, the United States for the first time supported a territorial sea wider than three miles.[59]

International Acceptance of the EEZ

Several events contributed to the incorporation of the EEZ concept into international law during the UNCLOS III meetings in the mid 1970s.[60] In the *North Sea Continental Shelf* cases,[61] the International Court of Justice (ICJ) addressed conflicting claims of continental shelf rights between the Netherlands, Denmark, and West Germany.[62] Applying the Truman Proclamation's standards, the court held coastal states have jurisdiction over seabed resources due to their sovereignty over adjacent land masses.[63] Other significant events that precipitated the acceptance of the EEZ concept were the 1972 Latin

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Final Act of UNCLOS III sets this width at 12 miles. Draft Final Act, *supra* note 11, art. 3. The contiguous zone is a zone adjacent to the territorial sea in which a nation may enforce the customs, fiscal, immigration and sanitary regulations of the territorial sea. *Id.* art. 33. Article 24 of the Convention on the Territorial Sea and Contiguous Zone of the Geneva Conference set the maximum width of the contiguous zone at nine miles beyond the territorial sea. Convention on the Territorial Sea and Contiguous Zone, *supra*, art. 58. The Final Act of UNCLOS III establishes a 24 nautical mile wide contiguous zone (21 actual miles). Draft Final Act, *supra* note 11, art. 33. Prior to UNCLOS III, the high seas began where the contiguous zone ended. Today, the 200 mile EEZ is the fifth regime of world ocean authority. *See id.* arts. 56-75. The high seas include all areas of the ocean beyond the EEZ of any nation. The freedom of the seas doctrine as articulated by Grotius is preserved for the high seas by the Draft Final Act of UNCLOS III. *See* Draft Final Act, *supra* note 11, arts. 86-120. For a discussion of pre-UNCLOS III maritime regimes, see M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 161-82 (3d ed. 1977).

55. *See* A. HOLLICK, *supra* note 1, at 135. *See also* J. COLOMBOS, *supra* note 22, at 23 (Conference failed to meet its promoters' high expectations).

56. J. COLOMBOS, *supra* note 22, at 23.

57. *Id.* For a detailed analysis of the failure of the Conference, see A. HOLLICK, *supra* note 1, at 155-59.

58. Pollard, *supra* note 42, at 605.

59. L. MacRae, *supra* note 22, at 21. The United Kingdom joined the United States in this support. *Id.*

60. *See* Burke, *National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea*, 9 OCEAN DEV. & INT'L L.J. 289, 289-90, 290 n.2 (1981). Between 1945 and 1970, 11 states claimed 200 mile zones. Between 1975 and 1980 in the midst of the UNCLOS III negotiations 71 states established such zones. *Id.* at 292.

61. 1972 I.C.J. 12, *reprinted in* 1 NEW DIRECTIONS, *supra* note 51, at 134.

62. *Id.* at 138.

63. *Id.* at 183.

American Declarations of Montevideo[64] and Santo Domingo[65] and the 1973 Organization of African Unity Declaration on the Issues of the Law of the Sea.[66] These pronouncements made the establishment of a two-hundred mile EEZ a major objective of third-world countries at UNCLOS III.[67] The United States joined this movement in 1974 when it first officially supported a limited two-hundred mile EEZ,[68] virtually assuring the EEZ's global acceptance.

In 1976, prior to the completion of UNCLOS III, the United States codified its first two-hundred mile zone.[69] Known as the Fishery Conservation and Management Act (FCMA),[70] the zone provides exclusive American control over all living resources except highly migratory species of fish.[71] The FCMA is not an EEZ, however, because it governs fishery resources alone. Although Congress expressly sought to align the FCMA's provisions with anticipated UNCLOS III articles,[72] the FCMA served notice on other nations that the United States would take unilateral action if UNCLOS III failed.[73]

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64. Montevideo Declaration on Law of the Sea, May 8, 1970, U.N. Doc. A/AC.138/34 (1970), *reprinted in* 1 NEW DIRECTIONS, *supra* note 51, at 235. The nations signing the Montevideo Declaration announced their sovereignty and jurisdiction over the ocean and continental shelf adjacent to their coasts to a distance of 200 nautical miles from the baseline of the territorial sea. *Id.*

65. Declaration of Santo Domingo, June 7, 1972, 27 U.N. GAOR Supp. (No. 21) (A/8721) 70, U.N. Doc. A/AC.138/80 (1972), *reprinted in* 1 NEW DIRECTIONS, *supra* note 51, at 247. The concept of the "Patrimonial Sea" arose from the Declaration of Santo Domingo. The width of this zone was still 200 nautical miles, but the Declaration specifically provided for the rights of navigation and the laying of submarine cables and pipelines. *Id.*

66. Declaration of the Organization of African Unity on the Issues of the Law of the Sea, 3 Official Records of the Third United Nations Conference on the Law of the Sea 63, U.N. Doc. A/CONF.62/33 (1975). The OAU declaration established an EEZ similar to the Latin patrimonial EEZ resulting from the Declaration of Santo Domingo, with an additional provision allowing landlocked states access to living resources in the EEZ. *Id.*

67. Krueger & Nordquist, *supra* note 13, at 328 (200-mile EEZ a recognized aim of the Group of 77, the largest block of third world nations). The third world's support for a 200-mile EEZ comes at the expense of the other major issue identified with the Group of 77 (G-77), the "Common Heritage of Mankind" concept. *See* A. HOLLICK, *supra* note 1, at 171; Comment, *supra* note 42, at 526-28. The Common Heritage concept was incorporated into UNCLOS III to govern the distribution of mineral wealth extracted from the sea floor. *See* Dubro, *supra* note 1, at 34.

68. A. HOLLICK, *supra* note 1, at 258, 357.

69. *Cf.* Burke, *supra* note 63, at 292. The United States' adoption of a 200-mile fishing zone may have either influenced other nations to declare their zones or just accelerated the inevitable. *Id.*

70. 16 U.S.C. §§ 1801-1882 (1976). For an analysis of the successes and failures of the FCMA see Apollonio, *Fisheries Management,* OCEANUS, Winter 1982-83, at 29. *See also* the statement of the President upon signing the FCMA into law, 12 WEEKLY COMP. PRES. DOC. 644 (1976) (FCMA is consistent with the general consensus emerging from the Law of the Sea Conference and is mandated by the slow pace of the Conference).

71. 16 U.S.C. § 1801(b) (1976).

72. Knauss, *Marine Policy for the 1980s and Beyond,* OCEANUS, Winter 1982-83, at 3, 4.

73. A. HOLLICK, *supra* note 1, at 314. Both the State and Defense Departments of the United States opposed the FCMA because they believed it would harm American negotiating efforts in establishing international obligations of the coastal state in offshore zones. *Id.* at 315, 353, 358. President Ford did not veto the bill because he had promised during the 1976 presidential campaign to sign it. *Id.* at 358. *See also* Howard, *The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy,* 16 TEX. INT'L L.J. 321, 331-

Although there was near unanimous support at UNCLOS III for an internationally codified EEZ, countries disagreed over the proper scope of authority within the zone. While some Latin countries still pressed for full territorial rights within the EEZ, maritime powers argued for resource authority alone.[74] The Conference compromised with a form of the moderate African EEZ.[75] The compromise EEZ grants adjacent coastal states full control over living and nonliving resource exploitation and limited control over related uses such as scientific research and environmental regulation.[76] The UNCLOS III EEZ also guarantees the high seas freedom of navigation and overflight, the key interests of the United States.[77]

COMPARISON OF THE AMERICAN AND THE UNCLOS III EEZ's

Despite President Reagan's rejection of UNCLOS III, the Treaty is recognized as a worldwide standard.[78] Thus, a comparison of the UNCLOS III EEZ with the American EEZ will reveal how the American version differs from the globally accepted norm.

The UNCLOS III EEZ

The UNCLOS III EEZ confers rights and duties upon the sovereign coastal state and any other state using the zone.[79] The coastal state's rights are divided into sovereign rights and rights of jurisdiction.[80] Sovereign rights provide the authority to control all living and nonliving resources including energy conversion.[81] Jurisdictional rights extend to any construction, scientific research, or environmental regulation in the EEZ.[82] The UNCLOS III EEZ affords all

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32 (1981) (the United States created upheaval in the law of the sea with the FCMA as it had with the Truman Proclamation).

74. *See* A. HOLLICK, *supra* note 1, at 294-95.

75. *See* Szekely, *supra* note 37, at 196-97. The African EEZ had the same basic provisions as the patrimonial EEZ of the Latin countries, *see supra* note 66, but the African proposal came first to the committee. Szekely, *supra* note 37, at 197.

76. *See infra* notes 79-91 and accompanying text.

77. *See infra* text accompanying note 83.

78. The world-wide support for UNCLOS III, irrespective of political or economic status, is reflected by the list of signatory nations. *See* 21 INT'L LEG. MAT. *supra* note 8, at 1477.

79. *See* Draft Final Act, *supra* note 11, arts. 56, 58. The rights and correlative duties are based on the Hohfeldian forms of jural relation: right, privilege, power, immunity; no-right, duty, disability, liability. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

80. Draft Final Act, *supra* note 11, art. 56.

81. *Id.* art. 56, para. (a).

82. *Id.* arts. 56, para. (b), 60. Part XII, Protection and Preservation of the Marine Environment, is not part of the Draft Final Act's EEZ provisions. However, Part XII does make specific reference to enforcement of environmental regulations within the EEZ:

> Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that

nations the traditional high seas freedoms and other internationally lawful uses of the sea not specifically granted to the coastal state.[83]

As a correlative to these rights, the UNCLOS III Treaty specifies certain duties. Each state must exercise "due regard" for the rights and duties of other states.[84] Coastal states also have the duty to determine their capacity to harvest living resources and to allow foreign fishing interests to harvest any allowable surplus.[85] Another duty, although circumscribed in its effect, provides for the international protection of marine mammals.[86]

Landlocked and "geographically disadvantaged States" are allowed primary access to the surplus of living resources in the UNCLOS III EEZ.[87] Highly migratory species of fish are subject to international control.[88] Because anadromous[89] and catadromous[90] fish spend most of their lives in the coastal waters of certain nations, those nations are given primary responsibility for and final authority over those species.[91] These are the EEZ provisions most of the world's coastal nations will follow.

The Reagan Proclamation

The Reagan Proclamation is a unilateral declaration by the United States establishing sovereign and jurisdictional rights over all resources and resource-

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State, without prejudice to the application of the relevant provisions of Part II, section 3, may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws, subject to the provisions of section 7.

Id. art. 220, para. 2. Because this provision allows temporary vessel seizures, its importance is significant in the evolution of the law of the sea, especially in regard to its potential as a further encroachment upon the freedom on the seas. *See infra* notes 183-87 and accompanying text.

83. Draft Final Act, *supra* note 11, art. 58.

84. *Id.*

85. *Id.* art. 62, para. 2.

86. *Id.* art. 65. (the right of coastal nations or international organizations to prohibit or regulate strictly the exploitation of marine mammals remains intact and nations shall cooperate in marine mammal conservation). For a detailed study of the problem of marine mammal conservation and the applicable UNCLOS III provisions, see Nofziger, *Global Conservation and Management of Marine Mammals,* 17 SAN DIEGO L. REV. 591, 606 (1980).

87. Draft Final Act *supra* note 11, arts. 69, 70. Paragraph 2 of art. 70 defines "geographically disadvantaged States":

> "[G]eographically disadvantaged States" means coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own.

88. *Id.* art. 64 (coastal states with highly migratory fish, such as tuna and billfish, shall cooperate with other states and international organizations in the region to ensure conservation and promote optimum use of such fish).

89. Anadromous fish live most of their lives in salt water, but migrate up freshwater rivers to spawn. WEBSTER'S NEW COLLEGIATE DICTIONARY 40 (1981).

90. Catadromous fish live in fresh water but return to the sea to spawn. *Id.* at 172.

91. *See* Draft Final Act, *supra* note 11, arts. 66, 67.

related interests within its EEZ.[92] Sovereign and jurisdictional rights are divided in the same manner as in the UNCLOS III EEZ.[93] Unlike UNCLOS III, the United States does not increase its territorial sea from three to twelve miles.[94] Maintaining the three mile limit is consistent with the Reagan Proclamation's considerable emphasis on guaranteeing all nations high seas freedoms throughout the American EEZ.[95] The Reagan Proclamation also differs from UNCLOS III in that the United States does not claim jurisdiction over marine scientific research in the EEZ.[96] Existing United States policies concerning the continental shelf, protection of marine mammals, and fishery management and use remain unaltered by the Proclamation.[97]

The Reagan Proclamation declares the United States will exercise its sovereign and jurisdictional rights "to the extent permitted by international law."[98] While this statement apparently acknowledges the supremacy of customary international law it actually gives up nothing.[99] A successful challenge of the Reagan Proclamation in American federal courts as being contrary to customary international law would be difficult if not impossible. In the

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92. Reagan Proclamation, *supra* note 12. Before the Reagan Proclamation was issued, a preliminary draft proclamation was published in OCEAN SCI. NEWS, Sept. 27, 1982, at 1. While the Reagan Proclamation was modified in several ways before its release, perhaps the most significant change is that an executive order accompanied the preliminary draft proclamation giving the Department of Interior jurisdiction over the EEZ. *Id.* at 2. The subsequent Reagan Proclamation, however, did not name any particular department of the federal government to control the EEZ. One reason for the deletion may have been the controversy created by Interior Secretary Watt when, on December 8, 1982, he unilaterally established Interior Department jurisdiction over the mineral resources of the continental shelf. The Interior Department's Notice specifically mentioned the polymetallic sulfides found on the Juan de Fuca Ridge, a geologic formation off the United States' northwestern coast. *See* Notice of Jurisdiction, 47 Fed. Reg. 55,313-14 (1982). The potential economic wealth of these deposits may have prompted Secretary Watt's action. Canada protested because it claims that a significant portion of the Ridge's northern boundary lies within the negotiated fisheries zones of Canada. *See* STRATEGIC MATERIALS MGMT., Feb. 1, 1982, at 1. The Canadian protest as well as pressure from the Departments of State and Commerce caused the Mineral Management Service of the Interior Department to clarify that its jurisdiction is limited to 200-miles in accordance with the UNCLOS III EEZ. *See* STRATEGIC MATERIALS MGMT., Feb. 15, 1983, at 5. Although the clarification has resolved this controversy for the present, similar disputes are likely to arise because of the Reagan Administration's unilateral declaration.

93. *See* Reagan Proclamation, *supra* note 12.

94. OCEAN SCI. NEWS, Mar. 14, 1983, at 1.

95. Throughout the history of the EEZ's development, the United States has constantly argued for resource jurisdiction alone. *See supra* text accompanying notes 37-44. The Reagan Proclamation guarantees resource jurisdiction and high seas freedoms within the EEZ for other nations. Reagan Proclamation, *supra* note 12.

96. *Id. See also* 129 CONG. REC. S2550 (daily ed. Mar. 10, 1983) (statement by President Reagan). In his statement accompanying the Proclamation, President Reagan acknowledged that the United States will recognize other nations' UNCLOS III rights to exercise jurisdiction over marine scientific research provided it is "exercised reasonably in a manner consistent with international laws." *Id.*

97. Reagan Proclamation, *supra* note 12.

98. *Id.*

99. Many nations believe UNCLOS III has established the "new" customary international law. Thus, if the President's statement were taken at face value, the American EEZ could not differ from UNCLOS III's. *See infra* text accompanying notes 142-46.

international law context, courts are bound by specific legislation.[100] Any legislation implementing the Proclamation would therefore override customary international law doctrine. Additionally, federal courts look to the State Department for advice on international law and usually accept the Department's judgment concerning ambiguous areas.[101] Finally, because of the political question exception to jurisdiction, courts are reluctant to overrule a presidential statement on foreign relations.[102] Thus, "to the extent permitted by international law" is apparently more a political statement than a juridical one.[103]

Legislative Implementation of the Reagan Proclamation

Although the Reagan Proclamation establishes an American EEZ as domestic law, its objectives cannot be fully realized until implementing legislation such as that introduced by Congressman Breaux and Senator Stevens is passed.[104] The bill, S. 750, matches the claim of sovereign and jurisdictional rights found in both UNCLOS III and the Reagan Proclamation.[105] Like the

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100. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 3 comment j (1965) ("[I]f there is domestic legislation contrary to international law that is also pertinent, courts in the United States will normally apply the legislation.") [hereinafter cited as RESTATEMENT (SECOND)].

101. *Id. See also* Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) (stating the executive branch's foreign affairs policy might be undercut if the court failed to adhere to the act of state doctrine).

102. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 180 (1978). The political question doctrine "is an important exception to [the] judicial review power, and demonstrates the Court's reluctance to take an active role in formulating foreign policy." *Id.*

103. *See generally* L. HENKIN, HOW NATIONS BEHAVE 48-50 (1968) (nations often find it advantageous to appear to comply with international law as part of their political policy). Of course, the "extent permitted" language could still provide the basis for an international challenge to the Reagan Proclamation through diplomatic channels or litigation in an international tribunal. *See infra* text accompanying notes 163-69.

104. *See supra* note 15. Congressman Breaux of Louisiana and Senator Stevens of Alaska introduced an EEZ bill last term that would have established an EEZ without the Presidential Proclamation. H.R. 7225, 97th Cong., 2d Sess., 128 CONG. REC. H8130 (1982). H.R. 7225 was revised to match the provisions of the Reagan Proclamation before being submitted to the ninety-eighth Congress. *See id.*

105. S. 750, *supra* note 15, § 102. The rights are described in S. 750:

> Within the exclusive economic zone, the United States asserts, and will maintain —
> (1) sovereign rights for the purpsoe [sic] of exploring, exploiting, conserving, and managing the living resources (other than highly migratory species of fish) and the nonliving resources of the seabed and subsoil and superjacent waters;
> (2) sovereign rights for the purpose of carrying out economic purposes, and exploitation not covered under paragraph (1), including, but not limited to, the production of energy from the water, currents, and winds; and
> (3) jurisdiction with regard to —
> (A) the establishment and use of artificial islands,
> (B) other installations and structures having economic purposes, and
> (C) the protection and preservation of the marine environment.
> As used in this section, the term "highly migratory species of fish" means species of

Reagan Proclamation, the guarantee of high seas freedom is the only duty S. 750 recognizes.[106] S. 750 differs from the proclamation by allowing some regulation of scientific research.[107] If a nation controls scientific research in its EEZ in a "reasonable manner that is not inconsistent with international law," the United States would allow that nation's scientists to conduct research in the American EEZ.[108] These provisions, far more flexible than earlier implementing legislation,[109] should allay any concern that an American EEZ would limit research opportunities.[110]

S. 750 would significantly amend three important domestic statutes. It changes the definition of "continental shelf" in the Outer Continental Shelf Lands Act[111] to negate UNCLOS III provisions that set a jurisdictional limit of three-hundred and fifty miles.[112] In addition, S. 750 does not require resource revenue sharing beyond two-hundred miles as does UNCLOS III.[113] S. 750 would give the United States sovereignty over mineral resources for a minimum of two-hundred miles and a maximum of sixty nautical miles from the continental slope.[114]

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tuna which, in the course of their life cycle, spawn and migrate over great distances in ocean waters.

106. *Id.* § 103. These freedoms include "those pertaining to navigation, overflight, marine scientific research, and the laying and maintenance of submarine cables and pipelines." *Id.*

107. *Id.* § 105.

108. *Id.* para. (b). The scientific research provisions of Congressman Breaux's earlier H.R. 7225 were a matter of considerable controversy. American scientists attacked H.R. 7225 because it provided for a strict reciprocating states agreement that could lead to severe restrictions on marine research. Moreover, inconsistencies between H.R. 7225 and UNCLOS III prevented any signatory nation from becoming a reciprocating state. *See* Letter from William T. Burke to Walter B. Jones (Oct. 27, 1982) (Walter B. Jones is Chairman of the House Committee on Merchant Marine and Fisheries, and William T. Burke is a professor of law at the University of Washington).

109. *See* H.R. 7225, *supra* note 104.

110. In response to American scientists' concerns over the research provisions of H.R. 7225, Congressman Studds of Massachusetts, whose congressional district includes the Woods Hole Oceanographic Institute, drafted H.R. 703 as a bill to "facilitate the conduct of international marine scientific research." H.R. 703, 98th Cong., 1st Sess., 129 CONG. REC. H97 (1983). H.R. 703 proposed that the Secretary of State enter into negotiations with other coastal states to obtain bilateral and regional agreements to promote scientific research. *Id.* § 4. When H.R. 7225 was revised and became S. 750, the formula for negotiated research agreements from H.R. 703 was incorporated into its provisions. *See* S. 750, *supra* note 15, para. (c). For further discussion of H.R. 703, see OCEAN SCI. NEWS, Jan. 10, 1983, at 1.

111. 43 U.S.C. §§ 1331-1343 (1976 & Supp. V 1981).

112. S. 750, *supra* note 15, § 201.

113. *See id.* The Draft Final Act's revenue sharing provisions, which provide for the "equitable sharing of financial and other economic benefits" are found in Draft Final Act, *supra* note 11, Part XI.

114. S. 750, *supra* note 15, § 201. Determining the precise width of the continental shelf at any particular point can be a difficult task that is often compounded by political factors. At the seventh session of UNCLOS III in 1979, the maximum seaward limit of continental shelf jurisdiction was debated. *See, e.g.*, Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)*, 73 AM. J. INT'L 1 (1979). Negotiating group 6 discussed several alternatives. Ireland suggested a formula to analyze the thickness of sedimentary rock at the foot of the continental slope to limit continental shelf breadth. The

The Deep Seabed Hard Mineral Resources Act,[115] which governs "hard" mineral exploitation beyond the continental shelf, would be amended to allow for exploitation of all mineral resources rather than only hard minerals.[116] S. 750 would also encourage the Secretary of State to negotiate international agreements relating to the exploitation of deep seabed "for the benefit of mankind" and with due regard for environmental protection.[117] Although the "benefit of mankind" language is similar to language in the UNCLOS III Treaty, S. 750 makes no direct reference to UNCLOS III because of Reagan's rejection of the Final Act.[118]

S. 750 would amend the Fishery Conservation and Management Act[119] to grant the United States "exclusive rights over all fish, except highly migratory species."[120] The bill also grants the United States control over all anadromous

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Soviet Union proposed placing an absolute 300-nautical-mile limit on the coastal states' jurisdiction over the continental shelf. The Group of 77 opposed any plan that prevented revenue sharing beyond the limits of the 200-mile EEZ. *See* Third United Nations Conference on the Law of the Sea, Summary Records of Meetings, 12 U.N. (resumed 8th sess.), 106-07, U.N. Doc. A/CONF.62/NG6/19 (1979). The Draft Final Act defines the continental shelf and provides an extremely technical geological formula for determining its maximum breadth. *See* Draft Final Act, *supra* note 11, art. 76. Currently, the United States follows Article 1 of the Geneva Convention on the Continental Shelf, which allows resource jurisdiction to the 200-meter isobath or to the depth that resource exploitation can proceed. This technology-based definition can be rendered meaningless by advances in deep sea mining capabilities. *See* Convention on the Continental Shelf, *supra* note 54. S. 750 would define the continental shelf in geologic terms, with the outermost boundary described as the "foot of the continental slope." S. 750, *supra* note 15, § 201(b).

115. 30 U.S.C. §§ 1401-1473 (Supp. V 1981).

116. S. 750, *supra* note 15, § 202(b) para. (1). The importance of this provision lies in the recent discovery of metal-rich sulfide deposits in various ocean areas, particularly the Juan de Fuca Ridge. *See* Notice of Jurisdiction, *supra* note 92. These mineral deposits are formed where metal-rich heated seawater vents from the sea floor. Hence, they are not hard minerals. Koski, Normark, Morton & Delaney, *Metal Sulfide Deposits on the Juan de Fuca Ridge,* OCEANUS, Fall, 1972, at 42, 43.

117. S. 750, *supra* note 15, § 202(b) para. (8). The reference to international agreements concerns the mini-treaty the Reagan Administration sees as an UNCLOS III alternative. Ratiner considers the assumption that a mini-treaty among ocean mining nations can substitute for UNCLOS III the "Achilles heel of the U.S. strategy." Ratiner, *supra* note 1, at 1011. While the UNCLOS III ocean mining provisions have fostered considerable debate and caused the United States to reject the Treaty, those provisions are only a small part of UNCLOS III. As stated in a letter to the New York Times, "The 400-plus articles of this treaty are not primarily, or even secondarily, about seabed mining, but what stranger to this excruciating debate would have a clue?" N.Y. Times, Mar. 9, 1983, at A22, col. 3. In addition, deep seabed mining may not be economically viable for a decade or more. Alexander, *The Reaganites' Misadventures at Sea,* FORTUNE, Aug. 23, 1982, at 129, 143. *See also* Knecht, *Deep Ocean Mining,* OCEANUS, Fall, 1982, at 3, 7 (fundamental test for ocean mineral recovery is economic).

118. S. 750, *supra* note 15, § 202(b) para. 13. The "benefit of mankind" language is obviously a reference to the "common heritage of mankind" language used to describe deep seabed resources in UNCLOS III. *See* Draft Final Act, *supra* note 11, art. 136.

119. 16 U.S.C. §§ 1801-1882 (1976).

120. S. 750, *supra* note 15, § 301, para. (1). The exclusion of "highly migratory" species from American control reiterates United States' opposition to any coastal state control over tuna. The provision is a pointed reminder to Latin American nations that the United States does not recognize their claims of control over tuna, which led to numerous seizures of American tuna fishing vessels in the past. *See supra* note 47 and accompanying text.

species anywhere in the ocean except the recognized EEZ or territorial waters of another nation.[121] Because this provision declares American control beyond the limits of the American EEZ, it could lead to clashes with other salmon fishing nations such as Japan.[122] The most controversial aspect of S. 750 may be its FCMA amendment, which is designed to gradually reduce foreign fishing in the American EEZ until 1987 when all foreign fishing will be eliminated.[123] If enforced, this provision could provoke retaliatory measures by other foreign fishing nations, including the Soviet Union.[124] S. 750 would then be the Truman Proclamation revisited, with coastal states reacting to the United States' action by denying American fishing vessels access to their EEZs.[125]

Domestic Authority for an American EEZ

Both the legislative and executive branches of the federal government have authority to establish policy over contiguous coastal waters.[126] Because the Reagan Proclamation is accompanied by effectuating legislation, it may avoid the two disadvantages of independent executive action in this area. First, when the executive branch makes a declaration, it often fails to adequately determine the long-term effects of a unilateral American action.[127] The Truman Proclamation's adverse consequences were in part caused by this lack of foresight.[128] Conversely, the adversarial nature of the legislative process forces proponents to anticipate and address a bill's possible adverse effects.[129] Second, presidential proclamations can establish general goals or clarify broad policy aims, but they do not provide the statutory mechanisms needed to implement the proclamation's objectives. For example, the objectives of the 1945 Truman Proclamation were not realized until passage of both the Outer Continental Shelf Lands Act[130] in 1953 and the FCMA[131] in 1976. If Congress passes the

121. S. 750, *supra* note 15, § 301, para. (6).

122. *See* N.Y. Times, Jan. 30, 1983, at E4, col. 3.

123. S. 750, *supra* note 15, § 301, para. (11).

124. Because S. 750 grants the Secretary of Commerce discretion to determine at what level foreign fishing should be allowed until 1987 or whether any foreign fishing should be allowed after 1987, *id.*, bilateral or multilateral agreements could be reached to prevent any serious retaliatory action. These arrangements should be made well before 1987 to avoid even temporary conflict over fishing rights.

125. *See supra* text accompanying notes 37-48.

126. *See generally* UNITED STATES DEPARTMENT OF COMMERCE, U.S. OCEAN POLICY IN THE 1970s: STATUS AND ISSUES, IX-3 to -4 (1978) ("national ocean policy is set by the interaction of the legislative, executive, and judicial branches of the Federal Government through the identification of goals and the development of procedures and organizations to use the ocean's resources and protect its environment.").

127. A. HOLLICK, *supra* note 1, at 19. According to Hollick, "When high-level officials have chosen to intervene in an oceans policy, it has been a mixed blessing at best." *Id.* at 376.

128. *Id.*

129. *See, e.g.*, P.M. Panel Meeting of the National Advisory Committee on Oceans and Atmosphere, at 19 (Dec. 13, 1982) (statement of Dr. Knauss) (legislation allows for public debate) [hereinafter cited as P.M. Panel Meeting].

130. *See supra* note 44.

131. *Id.*

Breaux/Stevens legislation this implementation problem will be avoided by the joint action of the executive and legislative branches.[132]

INTERNATIONAL LEGALITY OF A UNILATERAL UNITED STATES EEZ

The debate over the validity of an independent American EEZ focuses on general principles of international law. These principles develop through international custom, treaties, and decisions of the International Court of Justice (ICJ). An analysis of these international legal principles, the preemption doctrine of American constitutional law, and the International Court of Justice's status as the dispute settling authority supports pro-treaty arguments and reveals a potential bias against unilateral American action.

International Legal Principles

Treaty opponents argue that various international legal principles exempt the United States, as a non-signing nation, from the duties imposed by UNCLOS III. One such principle is "timely and continuous objection" established by the ICJ in the *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*.[133] Norway had historically declared a four-mile territorial sea, but English fishing vessels began to encroach upon Norwegian-claimed waters as the three-mile territorial sea became recognized as the customary norm.[134] The ICJ held that timely and continuous objection to an emerging norm of customary law will exempt the protesting state from the application of the norm.[135] Norway was therefore able to maintain its four-mile territorial sea even though the majority of nations followed the three-mile norm.

Similarly, American EEZ proponents argue that the United States, as a non-signatory nation, has objected to and therefore should not be bound by UNCLOS III.[136] The holding of the *Fisheries Case* does not apply to the present American EEZ controversy, however, because the UNCLOS III treaty is not an emerging norm of customary law. The development of customary international law involves the evolution of collective beliefs and legal principles over

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132. Before the Reagan Proclamation was issued, both Congressman Breaux and the administration expressed a willingness to work jointly even though at that time they were acting separately. *See* A.M. Panel Meeting of the National Advisory Committee on Oceans and Atmosphere, at 15 (Dec. 13, 1982) (statement of Congressman Breaux) [hereinafter cited as A.M. Panel Meeting]; P.M. Panel Meeting, *supra* note 129, at 20.

133. 1951 I.C.J. 116. For a detailed analysis of this case, see 31 THE BRITISH YEARBOOK OF INTERNATIONAL LAW 371-429 (1954).

134. 1951 I.C.J. 116, 119, 124-25.

135. *Id.* at 139. *See* Arrow, *The Proposed Regime for the Unilateral Exploitation of Deep Seabed Minerals Resources by the United States*, 21 HARV. INT'L L.J. 337, 373 (1980) ("Persistent, timely, and invariant protest by a state to an emerging customary norm may render the norm inapplicable against that state."); Jacobson, *Marine Scientific Research Under Emerging Ocean Law*, 9 OCEAN DEV. & INT'L L.J. 187, 189 (1981) ("even customary law, generally binding on all nations regardless of consent, does not bind a nation that consistently objects to the custom during its development.").

136. *See* A.M. Panel Meeting, *supra* note 132, at 16.

time,[137] allowing affected states to make timely and effective objections.[138] A treaty, however, is an event that establishes a norm rather than a process through which norms develop.[139] Failure to sign a treaty signifies objection to it, but an objection to established norms is not the timely and continuous objection to emerging norms of customary law contemplated in the *Fisheries Case*. Thus such an objection will not necessarily exempt non-signatory nations from following established norms, particularly when they are embodied in a treaty of UNCLOS III's magnitude.

A second international legal principle used in the argument against UNCLOS III's controlling a non-signing state is that of *res inter alios acta*.[140] This principle prevents a treaty from creating rights or obligations for a third state without its consent.[141] Because the United States wants the rights but not the duties codified in the Treaty,[142] application of *res inter alios acta* to support the American position is problematic. The Administration and S. 750 supporters believe a non-signing nation may enjoy the benefits codified by UNCLOS III (e.g., detailed provisions for an internationally recognized EEZ), yet reject the duties created by the same instrument (e.g., revenue sharing beyond the EEZ).[143] This view is premised on the belief that rights such as navigational freedom cannot be denied a non-signatory nation because they have been part of customary international law since the seventeenth century.[144] Treaty proponents, however, argue UNCLOS III not only codifies existing international law but also creates new international law.[145] Thus, the UNCLOS III Treaty

137. *See generally* M. AKEHURST, *supra* note 54, at 32-35 (general discussion of custom in international law).

138. *See* Arrow, *supra* note 135, at 352; Jacobson, *supra* note 135, at 189.

139. G. KNIGHT, CONSEQUENCES OF NON-AGREEMENT AT THE THIRD U.N. LAW OF THE SEA CONFERENCE, THE AMERICAN SOCIETY OF INTERNATIONAL LAW, STUDIES IN TRANSNATIONAL LEGAL POLICY No. 11, 25 (1976).

140. *Res inter alios acta alteri nocere non debet* means literally "Things done between strangers ought not to injure those who are not parties to them." BLACK'S LAW DICTIONARY 1178 (4th ed. 1968).

141. The *res inter alios acta* principle was codified in the 1969 Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969) ("[a] treaty does not create either obligations or rights for a third state without its consent . . ."), *id.* at 34 [hereinafter cited as Vienna Convention].

142. *See* 129 CONG. REC. S. 2253 (daily ed. Mar. 10, 1983) (statement of Senator Pell). Senator Pell believes the United States wishes to accept only beneficial treaty provisions and reject the "more onerous obligations in a treaty that the United States had agreed for years was to be a package deal." *Id.*

143. For a brief summary of the rights and duties of UNCLOS III, see text accompanying notes 79-91.

144. *See, e.g.*, P.M. Panel Meeting, *supra* note 129, at 10 (statement of Mr. Kronmiller).

145. Arrow, *supra* note 135, at 408, lists four advantages of signing UNCLOS III, all of which deal with arguably new rights:

> (1) guarantees of free transit-passage through international straits — and of innocent passage rights through the various other zones of coastal state jurisdiction; (2) limits to coastal state jurisdiction over its adjacent sea; (3) guarantees of the freedom to conduct scientific research in the Exclusive Economic Zone; and (4) the existence of a comprehensive dispute settlement mechanism.

Id.

is a "package deal" which must be accepted or rejected as a whole.[146]

Contract theory provides a third argument supporting an American EEZ. Some signatory nations claim the UNCLOS III Treaty embodies a new class of principles whose "acceptance is in the form of a contractual agreement."[147] Under this approach, the United States cannot be bound to the Treaty's provisions unless it signs and becomes a party to the contract.[148]

While contract theory appears to support unilateral American action, the contract argument has the same weakness as the *res inter alios acta* approach.[149] Just as a contract's benefits cannot ordinarily be accepted without its obligations,[150] a nation cannot accept a treaty's rights while rejecting its obligations. If the Treaty is seen as a contract rejected by the United States, there can be no selective acceptance of its provisions. Similarly, if the Treaty is seen as creating new rights under international law, a non-signing nation cannot claim those rights under the contract theory.[151]

Like contracts, international treaties require mutuality of obligation.[152] A non-signatory nation acting unilaterally does not bind itself to the treaty and thus cannot guarantee the reciprocity which mutuality of obligation requires.[153] Without such mutuality, signatory nations must rely on trust in their dealings with the United States.[154] Many countries will be unwilling to avoid the need for mutuality of obligation and to rely on trust alone in dealing with the United States. Moreover, reciprocity is needed to ensure the validity of American claims against signatory nations for breach of a treaty not signed by the United States.[155]

The Preemption Analog

Proponents of the UNCLOS III Treaty argue the creation of an American EEZ is invalid for reasons that are similar to those that render state action invalid under the preemption doctrine of United States constitutional law.[156]

146. *See* Arrow, *supra* note 135, at 407; Address by Covey T. Oliver, A.B.A. Annual Meeting 4 (1982). Comments made by developing nations and the Soviet Union at the UNCLOS III signing ceremony in Jamaica stress that the conference has been a "package deal" since the beginning. The Soviet delegate stated that no nation can "pick and choose from the basket of fruit." OCEAN SCI. NEWS, Dec. 20, 1982, at 2. Additionally, some nations suggested that nonsigning nations cannot enjoy UNCLOS III's liberal transit rights through international straits. *Id.*

147. L. MacRae, *supra* note 22, at 24.

148. *See id.* For a detailed examination of the status of contract in international law, see 2 D. O'CONNELL, INTERNATIONAL LAW 976-1010 (2d ed. 1970).

149. *See supra* text accompanying notes 140-46.

150. The obligation of a contract is the consideration which makes it mutually binding. *See* J. CALAMARI & J. PERILLO, CONTRACTS 134 (2d ed. 1977).

151. *See* Oliver, *supra* note 146, at 4; Ratiner, *supra* note 1, at 1018.

152. *See* Oliver, *supra* note 146, at 8.

153. *Id.* at 9. "How possibly can a non-signer—a picking and choosing non-signer at that—bind itself to others, under the treaty itself, to guarantee reciprocity? I put it to you that it cannot be done unilaterally so as to bind internationally." *Id.*

154. *Id.*

155. *Id.*

156. For a general discussion of United States preemption doctrine, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 376-412 (1978).

Labeling the Treaty a "constitution of the oceans,"[157] UNCLOS III supporters assert that wide-scale international treaties setting new norms preempt any conflicting laws of states objecting to such treaties.[158] Under the preemption doctrine, a field comprehensively regulated by an authority with power to supercede individual states' control may not be encroached upon by individual states unless in furtherance of the goals of that authority.[159] Thus, under the preemption analog the United States cannot act except to support objectives of the UNCLOS III Treaty, and the independent American EEZ is contrary to those objectives.

In addition to the preemption analog, the United States' Revised Restatement of Foreign Relations Law suggests that worldwide acceptance of "new" customary international law may control even non-signing nations.[160] If the United States wishes to rely upon its interpretation of UNCLOS III as merely codifying existing international rights, those rights must be in fact part of the "old" customary international law.[161] Thus, a unilateral American EEZ would be valid as already authorized under the "old" norm. The unprecedented nature of many provisions in UNCLOS III, however, makes the old norm argument suspect.[162]

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157. The comparison of the UNCLOS III Treaty to a "constitution of the oceans," *see supra* note 4 and accompanying text, supports the notion that the Treaty supervenes conflicting laws of objecting states. However, because the world community cannot make supreme "constitutions" the preemption analogue could not be argued before the ICJ as a valid legal position. At the United Nation's San Francisco Conference in 1945 a proposal was offered which would have given the United Nation's General Assembly the power to make international law. Such authority would have been tantamount to the power to make a national constitution, but the proposal was rejected by a vote of twenty-six to one. Arrow, *supra* note 135, at 369. *See also* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 1, 1980), at 14 [hereinafter cited as REVISED STATEMENT] which reads in part:

> The General Assembly and other organs of the United Nations influence the development of international law but it becomes law only when accepted by states. There is no executive institution to enforce law; the United Nations Security Council has limited executive power to enforce the provisions of the charter and maintain international peace and security, but not to enforce international law generally; within its jurisdiction, moreover, the Council is subject to the hazards of the veto power of its five permanent members.

Id. In addition, the ICJ lacks the supervening jurisdiction like that of the United States Supreme Court, making it ill-suited to interpret and enforce a constitution. *See infra* note 165.

158. This position is inherent in the arguments of the UNCLOS III Treaty supporters, at least to the extent they claim a "package deal" treaty can control nonsigners. *See, e.g., supra* note 146. The revisers of the Restatement of Foreign Relations Law of the United States also seem to take this position. *See* REVISED RESTATEMENT, *supra* note 157, at 16.

159. Tribe, *supra* note 155, at 379.

160. *See* REVISED RESTATEMENT, *supra* note 157, § 102 comment i, at 27-28. *See also* Oliver, *supra* note 146, at 7. Oliver suggests that the revisers intended *a fortiorari* that "new" international law would govern even nonsigning nations. *Id.*

161. *See* L. MacRae, *supra* note 22, at 23-24 (referring to viewpoint of Thomas Clingan, Acting Head of the United States delegation to UNCLOS III, that the treaty codifies only existing international law).

162. *See supra* text accompanying notes 79-91. The deep seabed mining provisions of the Draft Final Act are undeniably new. *See* Draft Final Act, *supra* note 11, arts. 133-91.

Dispute Settlement

A major problem in defending a separate American EEZ is the nature of the dispute settling authority, the International Court of Justice.[163] The ICJ would likely resolve any disputes over the EEZ's legality,[164] and even though the court lacks enforcement power,[165] the United States recognizes its authority.[166] Because the ICJ's judges are elected by the United Nations, the near dominance of third-world and "non-aligned" nations in the General Assembly may soon spill over to the ICJ.[167] These nations are often unsympathetic to western industrialized states' claims.[168] If third world views on distributive justice come to dominate the ICJ, the unpopularity of America's treaty rejection will almost guarantee a finding against the legality of the United States EEZ.[169]

CONSEQUENCES OF A UNILATERAL UNITED STATES EEZ

In addition to the international legal concerns facing an independent American EEZ, the unilateral action could also imperil American strategic and economic interests. The United States Navy's need for unencumbered navigation is particularly vulnerable. An independent American EEZ could also cause signatory nations to impede domestic oil, scientific, and shipping activity. The present uncertainties of state practice and the difficulty of anticipating future problems in the wake of UNCLOS III magnify these concerns.

Strategic and Economic Risks to American Interests

Because the Reagan Proclamation creates an EEZ inconsistent with the

163. The International Court of Justice (ICJ) is a principal organ of the United Nations. Any member of the United Nations, and in some instances nonmembers, may have the ICJ resolve disputes. The court consists of fifteen judges, five of whom are elected every three years. The court's jurisdiction depends on the consent of the affected parties. M. AKEHURST, *supra* note 54, at 227-28.

164. The ICJ is likely to resolve such disputes because almost all nations are now members of the United Nations and the ICJ is the traditional international forum for resolution of disputes among member states. Additionally, the President of the Conference, T. B. Koh of Singapore, has promised to challenge any nation's unilateral move in the United Nations general assembly and the ICJ. Ratiner, *supra* note 1, at 1017, 1019.

165. Theoretically, judgments of the ICJ are binding as are judgments of all international courts and arbitral tribunals. However, the Security Council has not invoked Article 94 of the United Nations Charter which authorizes it to recommend or decide on measures to give effect to a judgment of the ICJ. M. AKEHURST, *supra* note 54, at 230-31. Yet as Akehurst points out, "if a state is willing to accept the jurisdiction of the Court, it is *usually* willing to carry out the Court's judgment." *Id.* (emphasis in original). Still, the lack of effective compulsory jurisdiction and infrequency of the ICJ's use limits its enforcement potential. REVISED RESTATEMENT, *supra* note 157, at 14.

166. With some reservations, the United States also accepts the so-called optional clause (paragraphs 2 and 3 of Article 36 of the United Nations charter) which grants the ICJ compulsory jurisdiction over states accepting the optional clause. M. AKEHURST, *supra* note 54, at 229-30.

167. Oliver, *supra* note 146, at 8.

168. *Id.*

169. *Id.*

global UNCLOS III provisions, signatory coastal states might retaliate against the United States as a non-signing nation. For example, as a sovereign coastal state, Spain could assert that enlarged "transit passage" through international straits, such as the Strait of Gibraltar,[170] is not part of customary law. "Transit passage" is one of the new rights established by UNCLOS III which allows extensive navigational freedom through international straits and adjacent EEZs.[171] The former customary law was "innocent passage," which required submarines to navigate on the surface and show their flags when traversing an international strait.[172] Therefore, Spain could claim that American submarines have no right of submerged transit passage because the United States is not party to the Treaty creating the right.[173]

The "transit passage" problem could arise only in territorial waters, but other nations might discriminate against the United States throughout their EEZs if the United States continues to reject UNCLOS III.[174] An example of the possible strategic consequences of such discrimination occurred in Libya's

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170. *See* Ratiner, *supra* note 1, at 1018-19. Because Spain has not yet signed the Draft Final Act, this hypothetical is only valid if it someday does sign. According to Ratiner, most western nations will eventually support the Treaty because of the legal difficulties involved in operating outside its ambit. *Id.* at 1017. Whatever Spain does, many other coastal states could deny American submarines transit passage through straits adjacent to them based on the same rationale. *See* M. JANIS, SEA POWER AND THE LAW OF THE SEA 3 (1976). Worldwide, there are 121 straits between six and 24 miles wide. Thus, the straits are under some form of territorial control if the UNCLOS III 12-mile territorial sea is followed. The most important of these are the straits of Gibraltar, Dover, Hormuz, Bab el Mandeb and Malacca. *Id.* For a general discussion of the military importance of international straits, see *id.* at 3-7. For an analysis of the pre-UNCLOS III legal status of straits, see J. COLOMBOS, *supra* note 22, at 197-200.

171. Draft Final Act, *supra* note 11, Part III, § 2. Transit passage applies only to straits used for international navigation between points in the high seas or an EEZ. *Id.* at 37.

172. Ratiner, *supra* note 1, at 1019. While innocent passage is a norm of international law allowing peaceful transit of merchant vessels or warships, there is some debate concerning what constitutes innocent passage. *Cf.* The *Corfu Channel Case* (United Kingdom v. Albania) 1948 I.C.J. 15. The International Court of Justice held that even though the United Kingdom was using the Corfu Channel to conduct intelligence gathering operations to aid anti-leftist factions in the Greek Civil War, Albania had to compensate the United Kingdom for ship damage and loss of life. *See generally* 1 D. O'CONNELL, INTERNATIONAL LAW 495-500 (2d ed. 1970) (general discussion of *Corfu Channel Case*). The Draft Final Act still uses innocent passage to delineate navigational rights in the territorial sea. Because it specifically forbids any act aimed at collecting information that could harm the coastal state, the British activities in the Corfu Channel might now be forbidden. Draft Final Act, *supra* note 11, art. 19, para. 2(c). For a discussion of innocent passage, see generally *id.* arts. 17-19.

173. Ratiner, *supra* note 1, at 1019, OCEAN SCI. NEWS, Dec. 20, 1982, at 2. The argument has been made that submerged navigation through international straits is not necessary for a viable sea-based nuclear deterrent. *See* Osgood, *U.S. Security Interests in Ocean Law*, in NEW ERA OF OCEAN POLITICS 75, 90-124 (1974); Knight, *The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits*, 51 OR. L. REV. 759, 779-82 (1972). If this viewpoint is valid, the denial of submerged navigation would not have a significant effect on United States military interests.

174. *See*, G. KNIGHT, CONSEQUENCES OF NON-AGREEMENT AT THE THIRD U.N. LAW OF THE SEA CONFERENCE, REPORT OF THE WORKING GROUP OF TECHNICAL ISSUES IN THE LAW OF THE SEA FOR THE AMERICAN SOCIETY OF INTERNATIONAL LAW 56 (1976).

Gulf of Sidra in August of 1981.[175] The Libyan government had claimed territorial powers in its two-hundred mile zone which encompassed the Gulf of Sidra.[176] While in the zone on maneuvers, American fighter planes shot down two approaching Libyan jets after one of the Libyan jets fired on the American planes.[177] This incident lends credence to Congressman Breaux's claim that the United States Navy will interpret and enforce the Treaty in a way which guarantees navigational freedoms.[178] Although gunboat diplomacy may work in isolated incidents,[179] the Reagan Administration doubtless does not want to employ the confrontational approach as its official ocean policy.[180]

Confrontation could easily occur in a foreign nation's EEZ if that nation desired to retaliate against the United States. The rejection of UNCLOS III and the declaration of an independent EEZ provides a ready made excuse for such retaliation. Retaliation is made easier because UNCLOS III allows states to control marine scientific research[181] and environmental standards[182] within the EEZ. Vessels owned by domestic economic concerns, especially petroleum companies, could be detained by the coastal state under suspicion of conducting

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175. 41 FACTS ON FILE 589 (1981).

176. *Id.* The Libyan claim of territorial rights in the Gulf of Sidra was made unilaterally in 1973. Sovereign rights over the airspace were included in the claim. The United States routinely refuses to accept such territorial claims and continues to regard the area outside the three mile territorial sea (12 miles under UNCLOS III) as part of the international high seas. *Id.*

177. *Id.* According to one report, the Libyan pilot fired his missile when the American planes were in a position above and alongside his aircraft, making a hit impossible. *Id.* at 591. Thus, the incident may have been caused by a missile firing that was either accidental or a nervous reaction.

178. A.M. Panel Meeting, *supra* note 132, at 20 (statement of Congressman Breaux). In the statement by the President which accompanied the Reagan Proclamation, *see* 129 CONG. REC., *supra* note 96, President Reagan affirmed the United States' intention of enforcing high seas freedom: "The United States will not . . . acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses." *Id.* While both President Reagan and Secretary of Defense Weinberger publicly denied that the Gulf of Sidra maneuvers were provocative, Pentagon and State Department officials conceded to the Wall Street Journal that the exercises were held in the Gulf of Sidra "to forcefully demonstrate U.S. rejection of Libya's claim of sovereignty over the gulf." FACTS ON FILE, *supra* note 175, at 589. Although the Gulf of Sidra incident was not related to any UNCLOS III controversy, it represents the sort of conflict the United States, as a nonsignatory nation, could experience if naval exercises are carried out in the EEZs of hostile nations.

179. The success of the Gulf of Sidra incident is debatable. Without question, however, such incidents can have unforeseen and unwanted consequences. For instance, in the 1964 Gulf of Tonkin incident, North Vietnamese torpedo boats attacked United States destroyers in waters claimed as territorial by North Vietnam and as high seas by the United States. President Johnson used this seemingly isolated incident to justify an increased American presence in Vietnam. *See* Schick, *Some Reflections on the Legal Controversies Concerning America's Involvement in Vietnam*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 186-88 (R. Falk ed. 1969).

180. *See, e.g.*, FACTS ON FILE, *supra* note 175, at 590 (President Reagan stating he only intended to use international waters and did not wish to provoke Libya).

181. Draft Final Act, *supra* note 11, art. 56, para. b(ii).

182. *Id.* para. b(iii).

scientific research.[183] If a petroleum ship were detained, the coastal state could claim the alleged research infringed on its sovereign right over oil exploration.[184] American naval vessels could also be detained because the military conducts extensive marine scientific research at sea.[185] Investigation of possible environmental violations could likewise furnish an excuse to detain vessels.[186] Because UNCLOS III allows vessel seizure for environmental infractions under certain conditions,[187] coastal states have an internationally valid basis for such detainment.

State Practice as a Restraint on Treaty Effectiveness

Ratification alone of UNCLOS III will not guarantee its global acceptance. UNCLOS III will not be established as the new norm of international law until the signatory nations ratify the Treaty and follow its provisions for several years.[188] Conversely, the Treaty will not become the customary norm if a significant number of nations either fail to ratify or fail to abide by its provisions.[189] If this occurs, the Reagan Proclamation may face no international legal problems.[190]

It will be several years before the success or failure of UNCLOS III can be determined.[191] Much of the legal uncertainty facing the American EEZ could have been avoided had American policy makers waited until firm trends in post-UNCLOS III EEZ law developed.[192] Because the Reagan Administration and Congressman Breaux view the United States as a leader in world ocean affairs,[193] they were unwilling to wait for such trends to develop. Their view-

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183. *See* G. KNIGHT, *supra* note 174, at 56.

184. Draft Final Act, *supra* note 11, art. 56.

185. G. KNIGHT, *supra* note 174, at 56.

186. *Id.*

187. Draft Final Act, *supra* note 11, art. 220, para. 2.

188. The UNCLOS III Treaty will be legally binding one year after 60 nations, in addition to signing the Draft Final Act, ratify the Treaty. Oxman, *supra* note 9, at 162. Even if the Treaty is not ratified, it will doubtless have a profound effect on ocean law as individual nations formulate their own policies. *See* Allott, *supra* note 3, at 1.

189. *See, e.g.*, Knecht, *"Our Nation and the Sea"—Once Again a Time for Considered Action*, OCEAN SCI. NEWS, Dec. 6, 1982, at 1. For the UNCLOS III Treaty to be truly effective, coastal states will have to amend their domestic laws to conform with Treaty provisions. For novel parts of the Treaty, only actual practice over a period of years will guarantee their status as new customary norms of the law of the sea. *Id.*

190. *See generally* Arrow, *supra* note 135, at 411 (because the EEZ concept emerged only recently, no limits on its scope exist in customary international law absent UNCLOS III).

191. Knecht, *supra* note 189, at 1.

192. *See id.* According to Senator Pell, the issuance of the Reagan Proclamation "could not come at a worse time. . . ." 129 CONG. REC., *supra* note 142, at S. 2533. The Reagan Proclamation was poorly timed because the Preparatory Commission of UNCLOS III was scheduled to begin drafting its own comprehensive regulations concerning deep seabed mining in late March of 1983. *Id.*

193. *See* A.M. Panel Meeting, *supra* note 132, at 25 (statement of Congressman Breaux); P.M. Panel Meeting, *supra* note 129, at 9 (statement of Mr. Kronmiller).

point mandated that other nations be informed of the United States' post-UNCLOS III ocean policy.[194]

American ocean policy has been reasonably stable for the past decade, thus a policy proclamation was unnecessary.[195] President Reagan's pronouncement of American ocean policy that accompanied his EEZ declaration was a restatement of the United States' consistently reiterated positions of navigational freedom and control over coastal resources.[196] Prior to both the Reagan Proclamation and UNCLOS III's completion, the Administration stated that an American EEZ was needed because several nations had established EEZs inconsistent with one another.[197] Only in the unlikely event that those nations with differing EEZs refuse to ratify, or ratify and fail to follow the Treaty, would there be any need for clarifying American action. Although there may have been many divergent EEZs prior to UNCLOS III, once the Treaty is ratified there will be a single global norm by which to measure those inconsistencies. Furthermore, even if UNCLOS III's ratification is delayed, the American EEZ will only contribute to the present confusion by adding another form of EEZ.[198]

Anticipating the consequences of a major unilateral action is difficult even during a period of international stability. The law of the sea is currently in a state of flux.[199] The Truman Proclamation was issued when America was a supreme maritime power, yet it nevertheless triggered a series of Latin American declarations adverse to American interests.[200] Because the United States now holds a much less dominating position in world politics than at the time of the Truman Proclamation, foreign policy problems arising from the Reagan Proclamation may prove to be even more serious.[201]

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194. *See, e.g.*, P.M. Panel Meeting, *supra* note 129, at 11 (statement of Mr. Kronmiller).

195. The last major change in United States law of the sea policy, aside from the UNCLOS III Treaty rejection, was the acceptance of the 200-mile EEZ as a valid part of international law. *See supra* text accompanying note 68.

196. *See* 129 CONG. REC., *supra* note 96. In his statement, President Reagan stated that within the EEZ the United States will guarantee all nations "the high seas rights and freedoms that are not resource-related. . . ." *Id.* This statement is consistent with United States ocean policy since the Truman Proclamation. For an analysis of the United States Navy's ocean interests, see M. JANIS, *supra* note 170, at 1-22.

197. *See, e.g.*, P.M. Panel Meeting, *supra* note 129, at 24-25 (statement of Mr. Kronmiller).

198. *See generally* Alexander & Hodgson, *supra* note 22, at 571 (list of five general types of EEZs). According to a State Department brief, the American EEZ declaration brings the number of nations with EEZs to 57. *See* OCEAN SCI. NEWS, Mar. 14, 1983, at 4.

199. P.M. Panel Meeting, *supra* note 129, at 13 (statement of Dr. Knauss). The state of flux is caused by the enormity of UNCLOS III. *Cf.* Benthan, *The Third U.N. Law of the Sea Conference: Final Act or Failure — What Next*, 10 INT'L BUS. L. III-VIII (Mar. 1982) (no comparable effort has ever been made to develop and codify the law of the sea).

200. *See supra* text accompanying notes 45-48.

201. *Cf.* P.M. Panel Meeting, *supra* note 129, at 13 (statement of Dr. Knauss) (suggesting that because the UNCLOS III Treaty has put the law of the sea in a state of flux, it would be most difficult to foresee all the consequences arising from a presidential proclamation). One of the greatest problems in setting a national ocean policy during times of law of the sea transition is the interrelation of ocean uses. *See* Knecht, *supra* note 189, at 2. J. Y. Cousteau highlights this problem of interrelations as found in marine environmental concerns. To Cousteau, all the world's waters are one; a true global "commons" which ignores the EEZ's

CONCLUSION

Whether the American EEZ will be internationally recognized remains in doubt. If UNCLOS III not only codifies old international law but also states new law such that new norms binding on all nations are created, an independent EEZ may not be viable. Regardless of this uncertainty, the Reagan Proclamation may have been issued without a serious consideration of its consequences.[202] Because an independent EEZ could have potentially harmful consequences, EEZ supporters should more closely examine whether the United States needs an EEZ to control its resources within two-hundred miles of the coastline.[203]

American control over the continental shelf is currently based on a combination of domestic law and the 1958 Geneva Conventions.[204] These provisions adequately protect American interests from foreign exploitation in adjacent coastal waters. Domestic oil and mining interests have clear title to the oil and mineral resources of the continental shelf because the Geneva Conventions gave international legitimacy to the Truman Proclamation's claims.[205] The Outer Continental Shelf Lands Act of 1953 codifies American control over those resources, although amendment of the Act is needed to establish complete control.[206] Living resources are regulated by the Fishery Conservation Manage-

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200-mile jurisdiction cutoff. Cousteau, *Ocean Policy and Reasonable Utopias,* 16 FORUM 897, 905 (1982). The rapid development of ocean technologies compounds the interrelation problem by changing nations' perspectives on law of the sea issues. In fact, the evolution of EEZ may be traced to technological developments which allow previously unreachable resources to be exploited. *See generally* A. HOLLICK, *supra* note 1, at 175-90 (discussing technological advances as a primary factor in the rapid changes in the law of the sea during the 1960s). M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 4-5 (1962) (cause and effect relationship between advances in natural resources extraction technology and changes in the law of the sea.)

202. Ratiner suggests that the Reagan Administration did not seriously consider the possibility that UNCLOS III creates rights for signatory nations alone in deciding to reject the Treaty. Ratiner, *supra* note 1, at 1018.

President Reagan's statement accompanying the proclamation outlined three general United States ocean policies: first, recognition of other nation's coastal rights as codified in UNCLOS III provided the United States and other nations are not discriminated against; second, enforcement of American navigational rights in a manner consistent with UNCLOS III; and third, the unilateral declaration of a 200-mile EEZ. *See* 129 CONG. REC., *supra* note 96. These policy statements confirm the Reagan Administration's adherence to its questionable selective acceptance theory. *See supra* text accompanying notes 140-46.

203. This was a major issue discussed at the A.M. and P.M. Panel Meetings. *See, e.g.,* P.M. Panel Meeting, *supra* note 129, at 12-13 (statement of Dr. Knauss.) Despite the concerns raised at the Panel Meetings, the administration issued its proclamation and Congressman Breaux resubmitted his EEZ bill.

204. *Id.* at 13. The Geneva Conventions are implicitly contained in many UNCLOS III provisions and remain valid treaties among the nations that agreed to them. Allott, *supra* note 2, at 12-13.

205. Pollard, *supra* note 42, at 605.

206. *See* 43 U.S.C. §§ 1331-1343 (1976 & Supp. III 1979). Amendments will be needed for the OCS Lands Act to codify clear title to mineral resources. 3 STRATEGIC MATERIALS MGMT. Feb. 1, 1983, at 5-6. The OCS Lands Act was tailored for the exploration and development of petroleum reserves on the continental shelf. Legislative amendments and a strong policy statement from Congress will be needed for all mineral resources to be successfully exploited. *Id.*

ment Act,[207] and its provisions if enforced fully protect domestic fishing interests.[208] The Ocean Thermal Energy Conversion Act (OTEC) gives the United States authority over thermal energy generation in the zone.[209] If amended, it could encompass all forms of maritime energy production.[210]

Current environmental legislation under the Ocean Dumping Act,[211] Clean Water Act,[212] and Coastal Zone Management Act of 1976[213] provide more environmental protection for the coastal sea than do the minimum standards set out in the Treaty.[214] Thus, existing domestic legislation can give the United States control over all interests within a two-hundred mile zone[215] without the problems created by the Reagan Proclamation.

The United States Congress should carefully evaluate current and future maritime needs before statutorily implementing the Reagan Proclamation. Since UNCLOS III adequately addresses American interests, the United States

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at 5. *But see* Moliter, *The U.S. Deep Seabed Mining Regulations: The Legal Basis for an Alternative Regime,* 19 SAN DIEGO L. REV. 599, 609 (1982). Moliter believes the United States "has jurisdiction or control over all living and non-living resources within 200 nautical miles *except* the hard mineral resources lying on and beneath the deep seabed outside the continental shelf." *Id.* (emphasis in original). According to Moliter, an American EEZ is needed to grant control over those "hard" minerals within 200-miles. *Id.* at 607.

207. 16 U.S.C. §§ 1801-1882 (1976).

208. *See id.*

209. 42 U.S.C. §§ 9101-9167 (Supp. V 1981).

210. OTEC covers only the production of ocean thermal energy. It could be amended to give the United States control over ocean energy generated by wind and waves.

211. 33 U.S.C. §§ 1401-1441 (1976). The Ocean Dumping Act provides a regulatory framework controlling the dumping of any material into the ocean waters which "endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities." *Id.* § 1401(a).

212. 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981). The Federal Water Pollution Control Act (since 1977 known as the Clean Water Act) covers all phases of water pollution. Pollutants may be discharged into "navigable waters" only upon receipt of a permit. *Id.* § 1342.

213. 16 U.S.C. §§ 1451-1464 (1976 & Supp. III 1979). The Coastal Zone Management Act (CZMA) regulates the environmental protection of all United States coastal zones. "Coastal zone [is defined as] the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states. . . ." *Id.* § 1453(1). Beaches and wetlands are prominent examples of coastal zones under the CZMA's protection. *See id.*

214. *Compare* Draft Final Act, *supra* note 11, Part XII, arts. 192-237 *with supra* notes 211-213. The Draft Final Act of UNCLOS III's environmental protection provisions are found in Part XII, arts. 192-237. The articles are phrased in terms of general duties and obligations. They fail to specify allowable levels of pollutants as do the provisions of the Clean Water Act. *See id.* art. 194.

215. *But cf.* 129 CONG. REC., *supra* note 96. President Reagan stated that one reason for declaring an EEZ was to provide the United States with jurisdiction over mineral resources found within 200-nautical miles of the coast yet outside the continental shelf. However, questions about the authority over those resources could be resolved by an amendment to the Outer Continental Shelf Lands Act adopting the technology-based definition of the continental shelf found in Article 1 of the Geneva Convention on the Continental Shelf. *See supra* note 114. That definition grants resource jurisdiction to the limit of technologically feasible exploitation, making it far less restrictive than the definition found in S. 750. *See* S. 750, *supra* note 15, § 201(b).

should reconsider its decision not to sign UNCLOS III.[216] Such a policy change, however, is unlikely under the Reagan Presidency. An alternative is an interdisciplinary study of American maritime requirements to provide guidance for future American ocean policy. The Stratton Commission of the late 1960s was a highly effective study of national oceanographic policies completed just prior to UNCLOS III.[217] A similar analysis would be helpful now. From that analysis, policy could evolve to best meet American needs in light of global trends.

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216. The United States should sign UNCLOS III for two primary reasons: the deep seabed mining provisions are in the United States' best interests, and because the comprehensiveness of UNCLOS III may make it impossible to adequately pursue American interests outside its ambit. *Cf.* 129 CONG. REC., *supra* note 142, at S. 2533 (statement of Senator Pell) (stating that unilateral American action cannot possibly protect and further the wide variety of United States ocean interests).

217. MAKING OCEAN POLICY -- THE POLITICS OF GOVERNMENT ORGANIZATION AND MANAGEMENT 53-58 (F. Hoole, R. Friedheim, T. Hennessey eds. 1981). Known formally as the Commission on Marine Science, Engineering and Resources, the Stratton Commission (named for its chairman) in 1969 released OUR NATION AND THE SEA. The report fulfilled Congress' mandate to the Commission to conduct a "comprehensive investigation and [to] study all aspects of marine science in order to recommend an overall plan for an adequate national oceanographic program that will meet the present and future national needs." *Id.* at 53. One result of the Stratton Commission's findings was the creation of the National Oceanic and Atmospheric Agency (NOAA). *Id.* at 56. *See also* A. HOLLICK, *supra* note 1, at 188-90 (military interest in Stratton Commission's report).