

CHAPTER TEN: THE GLOBAL COMMONS

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A. The Sea

Introduction. If measured in terms of square miles of the earth's surface, the sea would be the most important subject of international law. Oceans cover 71% of the planet. The law of the sea developed over centuries, a growing customary law. But today, the law is dominated by the United Nations Convention on the Law of the Sea of 1982. Ratifications continue to pour in. The United States, which had participated actively in the ten-year drafting of the Convention, refused to ratify it during the Reagan Administration in 1984 due to dissatisfaction with its seabed mining provisions. However, there are signs that the Clinton Administration may ratify the treaty. Because of the treaty's comprehensiveness, the fact that its provisions are already cited in countless diplomatic communications, and the increasing number of state ratifications, it is safe to say that the most efficient way today to study the law of the sea is to study the Convention. Naturally, specialists will go beyond the text of the Convention to the underlying customary law, especially when disputes arise over the meaning of terms in the Convention. But for introductory purposes, let us proceed by the question-and-text approach for an overview of the salient points in the law of the sea.

Reading Assignment: *International Law Anthology*, pp. 20-21 (the seabed), 30-31 (history of freedom of the seas), 279-80 (common heritage and common concern).

Re-read: The Fisheries Case (Chapter 8).

QUESTION 1. The territorial sea used to be thought of as the distance that a land-based cannon can fire out into the sea. That distance, in seventeenth century reckoning, was three miles. The "three mile limit" persisted through the first half of the twentieth century even though cannons became capable of firing over far greater distances. What is the present breadth of the territorial sea? What jurisdictional competences do nations have over their territorial seas? What provisions did the Convention include that track the holding of the Fisheries Case (United Kingdom v. Norway)?

United Nations Convention on the Law of the Sea

Article 2

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Article 3

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Article 4

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 5

Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 6

In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.

Article 7

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
2. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the

appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.

3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

5. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.

6. The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.

Article 8

1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

Article 9

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks.

Article 10

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semicircle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions do not apply to so-called "historic" bays, or in any case where the system of straight baselines provided for in article 7 is applied.

QUESTION 2. How is the territorial sea apportioned between neighboring states along a coastline?

Article 15

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

QUESTION 3. A nation's sovereignty over its territorial sea isn't quite as complete as its sovereignty over its land. What's the exception?

Article 17

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage

through the territorial sea.

Article 19

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

Article 20

In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.

Article 26

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

QUESTION 4. Is the United States allowed to board and search a vessel passing through its territorial sea in order to find narcotics?

Article 27

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

QUESTION 5. Is there an extra zone beyond the territorial sea in which the coastal state may take measures to protect its territorial sea? If so, how far does it extend?

Article 33

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

QUESTION 6. Does an island get its own territorial sea? How is an island defined?

Article 121

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

QUESTION 7. What if a state consists of a cluster of islands, and some of the islands are more than 24 miles apart? Would there then be a "high seas" zone dividing the state? Is there any reasonable way to define the limits of a state that consists of a cluster of islands?

Article 46

For the purposes of this Convention:

- (a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;
- (b) "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

Article 47

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.
2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.
3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.
4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.
5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.
6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighboring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.
7. For the purpose of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.

Article 48

The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with article 47.

QUESTION 8. Can the coast guard pursue a foreign vessel out of the territorial sea or the contiguous zone and onto the high seas, and capture the vessel on the high seas? If so, what conditions must be fulfilled?

The I'm Alone

3 UN Rep. Int'l Arbitral Awards 1609 (1935)

Facts. A notorious Canadian liquor smuggling schooner, the I'm Alone, was hailed by a U.S. Coast Guard vessel, the Wolcott, off the coast of Louisiana on March 20, 1929. When sighted the I'm Alone was outside the three-mile territorial sea but within one hour's sailing distance of the shore. The master of the I'm Alone several times refused the Wolcott's request to permit search, and headed for the open sea with the Wolcott in hot pursuit. The Coast Guard vessel fired three blank shots across the bow of the I'm Alone and then commenced firing shells through the sails and rigging until its gun jammed. It radioed the Dexter, another revenue cutter, for assistance. The pursuit continued through the next day and to the morning of March 22nd, at which point the I'm Alone was two

hundred miles off the U.S. coast. The second revenue cutter had in the meantime caught up with the pursuit, and on the morning of March 22nd issued a warning to the I'm Alone to heave to or be sunk. The I'm Alone ignored the warning and was sunk. The master and crew of the I'm Alone jumped into the heavy seas and were rescued, with the exception of the boatswain, Leon Mainguy, who was drowned.

Arbitration Treaty. The United States and Great Britain were party to a bilateral treaty of 1924 for the suppression of intoxicating liquors into the United States. This treaty provided for arbitration of disputes. Canada filed a claim for damages for the I'm Alone, and it was referred to the arbitral tribunal. The I'm Alone was registered as a Canadian vessel; however, its shareholders were American.

The Canadian brief. The brief for Canada contended that the doctrine of hot pursuit "had not found complete acceptance in international law." Where it is recognized, the pursuit must be initiated within territorial waters. Moreover, the pursuit is not hot or continuous when another vessel is substituted for the original pursuing vessel. Finally, the doctrine of hot pursuit does not permit the sinking of the vessel pursued.

The American brief. There were three American cases in 1927 and 1928 in which federal courts had applied the doctrine of hot pursuit to the seizure of vessels suspected of violating the laws of the United States where such vessels had escaped not from territorial waters but from the distance of one hour's sailing from the coast of the United States.¹ Although municipal law cases cannot necessarily be regarded as laying down principles of international law binding on foreign states, here no protests had been made by the British or Canadian governments against the enforcement of hot pursuit in these cases. Moreover, the pursuing vessel, the Wolcott, was present at all times and cooperated with the Dexter up to and including the time of the sinking. No member of the crew of the I'm Alone was injured by the gun fire, and had there been life-preservers on board the I'm Alone, there is every reason to believe that the life of Mr. Leon Mainguy would have been spared.

Interim Report of the Arbitral Commission. On the assumption that the United States had the right of hot pursuit in the circumstances, it might use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention.

Final Report of the Arbitral Commission. The Commissioners now add that the sinking of the I'm Alone could not be justified by any principle of international law.

The I'm Alone was a British ship of Canadian registry; after her construction she was employed for several years in rum running, the cargo being destined for illegal introduction into, and sale in, the United States. In December, 1928, and during the early months of 1929, down to the sinking of the vessel on the 22nd of March, of that year, she was engaged in carrying liquor from Belize, in British Honduras, to an agreed point or points in the Gulf of Mexico, in convenient proximity to the coast of Louisiana, where the liquor was taken from her in smaller craft, smuggled into the United States, and sold there.

We find as a fact that, from September, 1928, down to the date when she was sunk, the I'm Alone, although a British ship of Canadian registry, was de facto owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned.

The Commissioners consider that, in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo.

The act of sinking the ship, however, by the officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of \$25,000 to His Majesty's Canadian Government; and they recommend accordingly. The United States should pay an additional sum of \$25,666.50 to His Majesty's Canadian Government for the benefit of the captain and members of the crew, none of whom was a party to the illegal conspiracy to smuggle liquor into the United States.

United Nations Convention on the Law of the Sea

Article 111

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or

the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

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

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

6. Where hot pursuit is effected by an aircraft:

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

8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

QUESTION 9. In the years leading up to the signing of the Convention on the Law of the Sea, there was a great disparity of claims regarding the breadth of the territorial sea. One extreme position was represented by the United States, which wanted as narrow a territorial sea as possible. The United States preferred a territorial sea of 3 miles because that would give maximum area to the high seas and hence the greatest freedom of movement both to the nuclear submarines of the United States Navy and to American fishing vessels. At the other extreme, represented by Latin American countries such as Argentina, Brazil, and Ecuador, was a claim for a broad territorial sea of up to 200 miles. These nations were primarily interested in keeping away foreign fishing vessels and reserving for their own people the fisheries within 200 miles of their coast. The Convention on the Law of the Sea represented, as we might expect, a compromise. We have already seen one aspect of that compromise: a territorial sea of 12 miles. The second aspect of the compromise is the institution of a new 200-mile zone called the EEZ, or Exclusive Economic Zone. The EEZ has fewer of the attributes of "sovereignty" than either the territorial sea or the contiguous zone; which ones does it have? Does the EEZ satisfy the main interests of the Latin American countries?

Article 55

The exclusive economic zone is an area beyond and adjacent to the territorial sea, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 56

1. In the exclusive economic zone, the coastal State has:

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

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

- (ii) marine scientific research;
- (iii) the protection and preservation of the marine environment;
- (c) other rights and duties provided for in this Convention.

Article 57

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 58

1. In the exclusive economic zone all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

Article 60

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

- (a) artificial islands;
- (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
- (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands installations and structures, including jurisdiction with regard to customs fiscal health, safety and immigration laws and regulations.

3. Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed.

4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.

6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.

7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

8. Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

Article 61

1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall co-operate to this end.

3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

Article 62

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.

2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.

3. In giving access to other States to its exclusive economic zone under this article the coastal State shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, inter alia, to the following:

(a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;

(b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;

(c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;

(d) fixing the age and size of fish and other species that may be caught;

(e) specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;

(f) requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(g) the placing of observers or trainees on board such vessels by the coastal State;

(h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;

(i) terms and conditions relating to joint ventures or other co-operative arrangements;

(j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;

(k) enforcement procedures.

5. Coastal States shall give due notice of conservation and management laws and regulations.

Article 64

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.

Article 65

Nothing in this Part [on the EEZ] restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than

provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.

Article 66

1. States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks.

2. The State of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters landward of the outer limits of its exclusive economic zone and for fishing provided for in paragraph 3(b). The State of origin may, after consultations with the other States referred to in paragraphs 3 and 4 fishing these stocks, establish total allowable catches for stocks originating in its rivers.

3. (a) Fisheries for anadromous stocks shall be conducted only in waters landward of the outer limits of exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin. With respect to such fishing beyond the outer limits of the exclusive economic zone, States concerned shall maintain consultations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and the needs of the State of origin in respect of these stocks.

(b) The State of origin shall co-operate in minimizing economic dislocation in such other States fishing these stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred.

(c) States referred to in subparagraph (b), participating by agreement with the State of origin in measures to renew anadromous stocks, particularly by expenditures for that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.

(d) Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.

4. In cases where anadromous stocks migrate into or through the waters landward of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall co-operate with the State of origin with regard to the conservation and management of such stocks.

5. The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations.

Article 67

1. A coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species and shall ensure the ingress and egress of migrating fish.

2. Harvesting of catadromous species shall be conducted only in waters landward of the outer limits of exclusive economic zones. When conducted in exclusive economic zones, harvesting shall be subject to this article and the other provisions of this Convention concerning fishing in these zones.

3. In cases where catadromous fish migrate through the exclusive economic zone of another State, whether as juvenile or maturing fish, the management, including harvesting, of such fish shall be regulated by agreement between the State mentioned in paragraph 1 and the other State concerned. Such agreement shall ensure the rational management of the species and take into account the responsibilities of the State mentioned in paragraph 1 for the maintenance of these species.

Article 68

This Part does not apply to sedentary species as defined in article 77, paragraph 4 [relating to the Continental Shelf].

QUESTION 10. It is one thing for coastal states to compromise over the breadth of the territorial sea, as we have seen in the previous Question. But it is another thing for land-locked states to go along with any extension of the territorial sea. Land-locked states would appear to have a strong interest in as much "high seas" as possible, because the high seas are a common resource. How did the Convention on the Law of the Sea take account of the interests of land-locked states in establishing the 200-mile EEZ? Did the Convention safeguard those interests, or did it fall short of the mark?

Article 69

1. Land-locked States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62.

2. The terms and modalities of such participation shall be established by the States concerned through

bilateral, subregional or regional agreements taking into account, inter alia:

- (a) the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State;
- (b) the extent to which the land-locked State, in accordance with the provisions of this article, is participating or is entitled to participate under existing bilateral, subregional or regional agreements in the exploitation of living resources of the exclusive economic zones of other coastal States;
- (c) the extent to which other land-locked States and geographically disadvantaged States are participating in the exploitation of the living resources of the exclusive economic zone of the coastal State and the consequent need to avoid a particular burden for any single coastal State or a part of it;
- (d) the nutritional needs of the populations of the respective States.

3. When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall co-operate in the establishment of equitable arrangements on a bilateral, subregional or regional basis to allow for participation of developing land-locked States of the same subregion or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on terms satisfactory to all parties. In the implementation of this provision the factors mentioned in paragraph 2 shall also be taken into account.

4. Developed land-locked States shall, under the provisions of this article, be entitled to participate in the exploitation of living resources only in the exclusive economic zones of developed coastal States of the same subregion or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone.

5. The above provisions are without prejudice to arrangements agreed upon in subregions or regions where the coastal States may grant to land-locked States of the same subregion or region equal or preferential rights for the exploitation of the living resources in the exclusive economic zones.

Article 70

1. Geographically disadvantaged States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62.

2. For the purposes of this Part, "geographically 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.

3. The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account, inter alia:

- (a) the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State;
- (b) the extent to which the geographically disadvantaged State, in accordance with the provisions of this article, is participating or is entitled to participate under existing bilateral, subregional or regional agreements in the exploitation of living resources of the exclusive economic zones of other coastal States;
- (c) the extent to which other geographically disadvantaged States and landlocked States are participating in the exploitation of the living resources of the exclusive economic zone of the coastal State and the consequent need to avoid a particular burden for any single coastal State or a part of it;
- (d) the nutritional needs of the populations of the respective States.

4. When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall co-operate in the establishment of equitable arrangements on a bilateral, subregional or regional basis to allow for participation of developing geographically disadvantaged States of the same subregion or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on terms satisfactory to all parties. In the implementation of this provision the factors mentioned in paragraph 3 shall also be taken into account.

5. Developed geographically disadvantaged States shall, under the provisions of this article, be entitled to participate in the exploitation of living resources only in the exclusive economic zones of developed coastal States of the same subregion or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimize

detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone.

6. The above provisions are without prejudice to arrangements agreed upon in subregions or regions where the coastal States may grant to geographically disadvantaged States of the same subregion or region equal or preferential rights for the exploitation of the living resources in the exclusive economic zones.

Article 71

The provisions of articles 69 and 70 do not apply in the case of a coastal State whose economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone.

QUESTION 11. Prior to 1945, nations were aware that the mineral and sedentary fisheries resources of the sea-bed were a potentially rich future resource, but mining those resources was too expensive. Technology developed before and during the Second World War made it apparent that, sooner or later, exploitation of the resources of the sea-bed and the ocean floor would quickly become economically feasible. Geologists also began publishing studies showing that offshore oil drilling platforms might be constructed that could tap immense additional oil reserves. Nations began to focus upon two areas of the sea-bed—the "continental shelf" and the "ocean floor." In 1945, President Truman issued a unilateral proclamation that "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" were regarded by the United States as appertaining to it and "subject to its jurisdiction and control."² Many other states followed by issuing similar claims to their own continental shelves.

How is the continental shelf defined? What are its limits?

Article 76

1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

Article 77

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent

of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

Article 78

1. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.

2. The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.

Article 79

1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.

3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.³

4. Nothing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.

5. When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

Article 80

Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.

Article 81

The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.

Article 82

1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter. Production does not include resources used in connection with exploitation.

3. A developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource.

4. The payments or contributions shall be made through the Authority,⁴ which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.

QUESTION 12. How is the continental shelf delimited between adjoining coastal states?

Article 83

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Articles 279-299 [relating to Settlement of Disputes.]

QUESTION 13. But that doesn't answer the question! Isn't Article 83 a cop-out? Has there been any international adjudication on this issue?

North Sea Continental Shelf

Federal Republic of Germany v. Denmark;
Federal Republic of Germany v. Netherlands
International Court of Justice
1969 ICJ 3

What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea?

The North Sea has to some extent the general look of an enclosed sea without actually being one. Round its shores are situated, on its eastern side and starting from the north, Norway, Denmark, the Federal Republic of Germany, the Netherlands, Belgium and France; while the whole western side is taken up by Great Britain, together with the island groups of the Orkneys and Shetlands. From this it will be seen that the continental shelf of the Federal Republic is situated between those of Denmark and the Netherlands.

The waters of the North Sea are shallow, and the whole seabed consists of continental shelf at a depth of less than 200 metres. Much the greater part of this continental shelf has already been the subject of delimitation by a series of agreements concluded between the United Kingdom (which, as stated, lies along the whole western side of it) and certain of the States on the eastern side, namely Norway, Denmark and the Netherlands. These three delimitations were carried out by the drawing of what are known as 'median lines' which, for immediate present purposes, may be described as boundaries drawn between the continental shelf areas of 'opposite' States, dividing the intervening spaces equally between them. An 'equidistance line' may be described as one which leaves to each of the parties concerned all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other party. An equidistance line may consist either of a 'median' line between 'opposite' States, or of a 'lateral' line between 'adjacent' States.

[Germany argued that an equidistance line would be unfair, because Germany's coast bordering on the North Sea is relatively concave in configuration. A concave, or indented, coast would capture a lesser area of the North Sea using the equidistance method (measuring out from the "nearest" point on Germany's coast compared to the "nearest" point on an adjacent state's coast). If all coastlines were on a straight line, then the equidistance method would favor all adjacent states equally. If one state had a convex coast (an outwardly curving coast that protrudes into the sea), then the equidistance method would disproportionately favor it over its adjacent neighbors. To a moderate extent, both the Netherlands' and Denmark's coasts on the North Sea were convex. Thus, because of Germany's concave configuration, it opposed the application of the equidistance method as to the North Sea. Note that the existence of vast oil reserves in the North Sea made this delimitation a matter of extraordinary economic significance for Germany, the Netherlands, and Denmark!]

The Court has to determine what principles and rules of international law are applicable to the delimitation of the areas of continental shelf involved. On this question the Parties have taken up fundamentally different positions. On behalf of the Kingdoms of Denmark and the Netherlands it is contended that the whole matter is governed by a mandatory rule of law which, reflecting the language of Article 6 of the Convention on the Continental Shelf concluded at Geneva on 29 April 1958, was designated by them as the 'equidistance-special circumstances' rule. According to this contention, 'equidistance' is not merely a method of the cartographical construction of a boundary line, but the essential element in a rule of law which may be stated as follows, namely that in the absence of agreement by the Parties to employ another method or to proceed to a delimitation on an ad hoc basis, all continental shelf boundaries must be drawn by means of an equidistance line, unless, or except to the extent to which, 'special circumstances' are recognized to exist. As regards what constitutes 'special circumstances,' all that need be said at this stage is that according to the view put forward on behalf of Denmark and the Netherlands, the configuration of the German North Sea coast, its recessive character [concavity], and the fact that it makes nearly a right-angled bend in mid-course, would not of itself constitute, for either of the two boundary lines concerned, a special circumstance calling for or warranting a departure from the equidistance method of delimitation: only the presence of some special feature, minor in itself--such as an islet or small protuberance--but so placed as to produce a disproportionately distorting effect on an otherwise acceptable boundary line would, so it was claimed, possess this character.

The Federal Republic of Germany, for its part, while recognizing the utility of equidistance as a method of delimitation, and that this method can in many cases be employed appropriately and with advantage, denies its

obligatory character for States not parties to the Geneva Convention, and contends that the correct rule to be applied, at any rate in such circumstances as those of the North Sea, is one according to which each of the States concerned should have a 'just and equitable share' of the available continental shelf, in proportion to the length of its coastline or sea-frontage. It was also contended on behalf of the Federal Republic that in a sea shaped as is the North Sea, the whole bed of which, except for the Norwegian Trough, consists of continental shelf at a depth of less than 200 metres, and where the situation of the circumjacent States causes a natural convergence of their respective continental shelf areas, towards a central point situated on the median line of the whole seabed--or at any rate in those localities where this is the case--each of the States concerned is entitled to a continental shelf area extending up to this central point (in effect a sector), or at least extending to the median line at some point or other. In this way the 'cut-off' effect, of which the Federal Republic complains, caused by the drawing of equidistance lines at the two ends of an inward curving or recessed coast, would be avoided. Alternatively, the Federal Republic claimed that if, contrary to its main contention, the equidistance method was held to be applicable, then the configuration of the German North Sea coast constituted a 'special circumstance' such as to justify a departure from that method of delimitation in this particular case.

It will be convenient to consider first the contentions put forward on behalf of the Federal Republic. The Court does not feel able to accept them--at least in the particular form they have taken. It considers that its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned, or their division into converging sectors. Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area.

More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised.

It follows that even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all,--for the fundamental concept involved does not admit of there being anything undivided to share out. Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made. But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole.

The Court will now turn to the contentions advanced on behalf of Denmark and the Netherlands. It has never been doubted that the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases. It constitutes a method capable of being employed in almost all circumstances, however singular the results might sometimes be, and has the virtue that if necessary,--if for instance, the Parties are unable to enter into negotiations,--any cartographer can *de facto* trace such a boundary on the appropriate maps and charts, and those traced by competent cartographers will for all practical purposes agree. In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise, or in which 'special circumstances' cannot be shown to exist. Juridically, if there is such a rule, it must draw its legal force from other factors than the existence of these advantages, important though they may be. It should also be noticed that the counterpart of this conclusion is no less valid, and that the practical advantages of the equidistance method would continue to exist whether its employment were obligatory or not. It would however be ignoring realities if it were not noted at the same time that the use of this method, can under certain circumstances produce

results that appear on the face of them to be extraordinary, unnatural or unreasonable. It is basically this fact which underlies the present proceedings. The plea that, however this may be, the results can never be inequitable, because the equidistance principle is by definition an equitable principle of delimitation, involves a postulate that clearly begs the whole question at issue.

The Court now turns to the legal position regarding the equidistance method. The first question to be considered is whether the 1958 Geneva Convention on the Continental Shelf is binding for all the Parties in this case--that is to say whether, as contended by Denmark and the Netherlands, the use of this method is rendered obligatory for the present delimitations by virtue of the delimitations provision (Article 6) of that instrument, according to the conditions laid down in it. Clearly, if this is so, then the provisions of the Convention will prevail in the relations between the Parties, and would take precedence of any rules having a more general character, or derived from another source.

The relevant provisions of Article 6 of the Geneva Convention, paragraph 2 of which Denmark and the Netherlands contend not only to be applicable as a conventional rule, but also to represent the accepted rule of general international law on the subject of continental shelf delimitation, as it exists independently of the Convention, read as follows:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

The Convention received 46 signatures and, up-to-date, there have been 39 ratifications or accessions. It came into force on 10 June 1964, having received the 22 ratifications or accessions required for that purpose (Article 11). But, under the formal provisions of the Convention, it is in force for any individual State only in so far as, having signed it within the time-limit provided for that purpose, that State has also subsequently ratified it; or, not having signed within that time-limit, has subsequently acceded to the Convention. Denmark and the Netherlands have both signed and ratified the Convention, and are parties to it, the former since 10 June 1964, the latter since 20 March 1966. The Federal Republic of Germany was one of the signatories of the Convention, but has never ratified it, and is consequently not a party.

It is admitted on behalf of Denmark and the Netherlands that in these circumstances the Convention cannot, as such, be binding on the Federal Republic, in the sense of the Republic being contractually bound by it. But it is contended that the Convention, or the regime of the Convention, and in particular of Article 6, has become binding on the Federal Republic in another way--namely because, by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional regime; or has recognized it as being generally applicable to the delimitation of continental shelf areas.

As regards these contentions, it is clear that if it were a question not of obligation but of rights--if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.

A further point, not in itself conclusive, but to be noted, is that if the Federal Republic had ratified the Geneva Convention, it could have entered--and could, if it ratified now, enter--a reservation to Article 6, by reason of the faculty to do so conferred by Article 12 of the Convention. This faculty would remain, whatever the previous conduct of the Federal Republic might have been--a fact which at least adds to the difficulties involved by the Danish-Netherlands contention.

Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention--that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is

no evidence whatever in the present case.

It is maintained by Denmark and the Netherlands that the Federal Republic, whatever its position may be in relation to the Geneva Convention, considered as such, is in any event bound to accept delimitation on an equidistance-special circumstances basis, because the use of this method is not in the nature of a merely conventional obligation, but is, or must now be regarded as involving, a rule that is part of the corpus of general international law--and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter. This contention has both a positive law and a more fundamentalist aspect. As a matter of positive law, it is based on the work done in this field by international legal bodies, on State practice and on the influence attributed to the Geneva Convention itself--the claim being that these various factors have cumulatively evidenced or been creative of the *opinio juris sive necessitatis*, requisite for the formation of new rules of customary international law. In its fundamentalist aspect, the view put forward derives from what might be called the natural law of the continental shelf, in the sense that the equidistance principle is seen as a necessary expression in the field of delimitation of the accepted doctrine of the exclusive appurtenance of the continental shelf to the nearby coastal State, and therefore as having an *a priori* character of so to speak juristic inevitability.

The Court will begin by examining this latter aspect, both because it is the more fundamental, and was so presented on behalf of Denmark and the Netherlands--i.e., as something governing the whole case; and because, if it is correct that the equidistance principle is, as the point was put in the course of the argument, to be regarded as inherent in the whole basic concept of continental shelf rights, then equidistance should constitute the rule according to positive law tests also. On the other hand, if equidistance should not possess any *a priori* character of necessity or inherency, this would not be any bar to its having become a rule of positive law through influences such as those of the Geneva Convention and State practice--and that aspect of the matter would remain for later examination.

The fundamental notion appears to be the principle of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because--or not only because--they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion--in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural--or the most natural--extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State--or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.

In the present case, although both sides relied on the prolongation principle and regarded it as fundamental, they interpreted it quite differently. Both interpretations appear to the Court to be incorrect. Denmark and the Netherlands identified natural prolongation with closest proximity and therefrom argued that it called for an equidistance line: the Federal Republic seemed to think it implied the notion of the just and equitable share, although the connection is distinctly remote.

Before going further it will be convenient to deal briefly with [question of] the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionately distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved. This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problem--a conclusion which also finds some confirmation in the difference of language to be observed in the two paragraphs of Article 6 of the Geneva Convention as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.

The Court must now proceed to the argument put forward on behalf of Denmark and the Netherlands. This is

to the effect that a rule of customary international law in favour of the equidistance principle has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice--and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Considered in abstracto the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties--but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention--of which there is at present no official indication--it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.⁵

Thus, the use of the equidistance method is not obligatory for the delimitation of the areas concerned in the present proceedings. In these circumstances, it becomes unnecessary for the Court to determine whether or not the configuration of the German North Sea coast constitutes a 'special circumstance' for the purposes either of Article 6 of the Geneva Convention or of any rule of customary international law--since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using that method.

The legal situation therefore is that the Parties are under no obligation to apply either the 1958 Convention, which is not opposable to the Federal Republic, or the equidistance method as a mandatory rule of customary law, which it is not. But as between States faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties. Equally, it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule.

The Court is not called upon itself to delimit the areas of continental shelf appertaining respectively to each Party, and in consequence is not bound to prescribe the methods to be employed for the purposes of such a delimitation. The Court has to indicate to the Parties the principles and rules of law in the light of which the methods for eventually effecting the delimitation will have to be chosen. The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the Parties have expressly reserved to themselves.

It emerges from the history of the development of the legal regime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that,

if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves--that is to say, rules binding upon States for all delimitations;--in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field, namely:

(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;

(b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied--for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;

(c) the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.

It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense:

(a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.

(b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unquestionably consists of continental shelf. A study of these convergences, as revealed by the maps, shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method.

If for the above reasons equity excludes the use of the equidistance method in the present instance, as the sole method of delimitation, the question arises whether there is any necessity to employ only one method for the purposes of a given delimitation. There is no logical basis for this, and no objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods. The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.

Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.

[In the delimitation negotiations, the parties should take into account the following factors]:

(1) The continental shelf is, by definition, an area physically extending the territory of most coastal States into

a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong.

(2) The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal regime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea.

(3) Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent States is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no farther than the North Sea, the practice of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted. The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it.

(4) A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines--these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions. The choice and application of the appropriate technical methods would be a matter for the parties. One method discussed in the course of the proceedings, under the name of the principle of the coastal front, consists in drawing a straight baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines. Where the parties wish to employ in particular the equidistance method of delimitation, the establishment of one or more baselines of this kind can play a useful part in eliminating or diminishing the distortions that might result from the use of that method.

SEPARATE OPINION OF JUDGE JESSUP

Although, for reasons which were not fully disclosed, but which may be surmised, the Parties in this case chose to deal obliquely in their pleadings with the actuality of their basic interests in the continental shelf of the North Sea, it is of course obvious that the reason why they are particularly concerned with the delimitation of their respective portions is the known or probable existence of deposits of oil and gas in that seabed.

The North Sea is one of the great historic fishing grounds of the world, but there is no indication in the pleadings of the Parties in this case that, in connection with delimiting the shelf, they were in any way concerned about control over living organisms.

Difficult as the problems are, it is fortunate that the three States which confront them are expressly committed to various methods of amicable settlement.⁶

QUESTION 14. Now that the coastal states have grabbed as much of the seas and sea-bed that they were able to grab, the vast area of the high seas remains. What international rules regulate the high seas? (Later we will deal with whether comparable rules apply to the ocean floor and to the airspace above the oceans.)

Article 87

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under

the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to subsequent Articles in this Convention;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to subsequent Articles in this Convention;
- (e) freedom of fishing, subject to the conditions laid down in Articles 116-120;
- (f) freedom of scientific research, subject to subsequent Articles in this Convention.

Article 88

The high seas shall be reserved for peaceful purposes.

Article 89

No State may validly purport to subject any part of the high seas to its sovereignty.

QUESTION 15. We encountered the idea of a "genuine link" that was taken up by the International Court of Justice in the Nottebohm Case, in Chapter 3. Is this principle now applied to ships? What if a ship is not flying any state flag? What if a ship switches between one flag and another?

Article 90

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

Article 91

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.⁷

Article 92

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Article 93

The preceding articles do not prejudice the question of ships employed on the official service of the United Nations, its specialized agencies or the International Atomic Energy Agency, flying the flag of the organization.

Article 94

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

(a) the construction, equipment and seaworthiness of ships;

(b) the manning of ships, labor conditions and the training of crews, taking into account the applicable international instruments;

(c) the use of signals, the maintenance of communications and the prevention of collisions.

Article 95

Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

Article 96

Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.

QUESTION 16. Does the Convention on the Law of the Sea incorporate the result of the Lotus Case?

Article 97

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

QUESTION 17. A significant portion of international "commerce" in the eighteenth and nineteenth centuries involved the transport of slaves. Does the Convention on the Law of the Sea address the question of slavery?

Article 99

Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.

QUESTION 18. Piracy was another feature of international commerce in past centuries. What is the definition of piracy? Since there are still occasional acts of piracy on the high seas or in the air, what does international law now say about it?

Article 101

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 102

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 105

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 106

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

Article 110

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

QUESTION 19. May any nation use the ocean floor to lay cables and pipelines?

Article 112

1. All States are entitled to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf.

Article 113

Every State shall adopt the laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable, shall be a punishable offence. This provision shall apply also to conduct calculated or likely to result in such breaking or injury. However, it shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury .

Article 114

Every State shall adopt the laws and regulations necessary to provide that, if persons subject to its jurisdiction who are the owners of a submarine cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the repairs.

QUESTION 20. What are the rights and restrictions of fishing on the high seas?

Article 116

All States have the right for their nationals to engage in fishing on the high seas subject to:

- (a) their treaty obligations;
- (b) the rights and duties as well as the interests of coastal States; and
- (c) the provisions of this section.

Article 117

All States have the duty to take, or to co-operate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Article 119

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

(a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield,⁸ as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;

(b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

Article 120

Article 65 also applies to the conservation and management of marine mammals in the high seas.

QUESTION 21. Does international law recognize a right of access to the sea for land-locked states?

Article 124

1. For the purposes of this Convention:

(a) "land-locked State" means a State which has no sea-coast;

(b) "transit State" means a State, with or without a sea-coast, situated between a land-locked State and the sea, through whose territory traffic in transit passes;

(c) "traffic in transit" means transit of persons, baggage, goods and means of transport across the territory of one or more transit States, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport, is only a portion of a complete journey which begins or terminates within the territory of the land-locked State;

(d) "means of transport" means:

(i) railway rolling stock, sea, lake and river craft and road vehicles;

(ii) where local conditions so require, porters and pack animals.

2. Land-locked States and transit States may, by agreement between them, include as means of transport pipelines and gas lines and means of transport other than those included in paragraph 1.

Article 125

1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.

2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements.

3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests.

Article 127

1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic.

2. Means of transport in transit and other facilities provided for and used by land-locked States shall not be subject to taxes or charges higher than those levied for the use of means of transport of the transit State.

Article 131

Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.

Article 132

This Convention does not entail in any way the withdrawal of transit facilities which are greater than those provided for in this Convention and which are agreed between States Parties to this Convention or granted by a State Party. This Convention also does not preclude such grant of greater facilities in the future.

QUESTION 22. The Reagan Administration refused to ratify the Convention on the Law of the Sea solely because of its provisions concerning mining on the ocean floor. The Reagan Administration wanted the ocean floor to be a free resource to any nation wishing to engage in mineral extraction. On the other hand, a majority of the nations in the world felt that the United States and other advanced countries, which have the necessary technological resources, might engage in wholesale extraction of mineral resources years before the other nations could effectively compete. These other nations argued for some kind of tax on all mineral exploitation of the ocean floor, the tax to be distributed to all nations. What mechanism did the Law of the Sea Convention set up to deal with this majority claim? Which of the following provisions do you think the Reagan Administration may have regarded as particularly bothersome, onerous, or a "give-away"? How do you regard these provisions? Should the Reagan Administration have ratified the treaty anyway? Should the Clinton Administration ratify the treaty (it has not done so as this Coursebook went to press)?

NOTE: The Convention uses the unfortunate term "the Area" to refer to the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. The "Authority" refers to a new institution established up by the Convention. The "Enterprise" refers to a kind of corporation set up by the Convention which itself will carry out activities in the Area, including prospecting, mining, transporting, processing, and marketing of minerals recovered from the Area.

Article 133

For the purposes of this Part:

(a) "resources" means all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules;

(b) resources, when recovered from the Area, are referred to as "minerals".

Article 136

The Area and its resources are the common heritage of mankind.

Article 137

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

2. All rights in the resources of the Area are vested in mankind as a whole on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this [Convention] and the rules, regulations and procedures of the Authority.

Article 140

1. Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status.

2. The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism on a non-discriminatory basis.

Article 141

The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part.

Article 143

1. Marine scientific research in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole.

2. The Authority may carry out marine scientific research concerning the Area and its resources, and may enter into contracts for that purpose. The Authority shall promote and encourage the conduct of marine scientific research in the Area, and shall co-ordinate and disseminate the results of such research and analysis when available.

3. States Parties may carry out marine scientific research in the Area. States Parties shall promote international co-operation in marine scientific research in the Area by:

(a) participating in international programmes and encouraging co-operation in marine scientific research by personnel of different countries and of the Authority;

(b) ensuring that programmes are developed through the Authority or other international organizations as appropriate for the benefit of developing States and technologically less developed States with a view to:

(i) strengthening their research capabilities;

(ii) training their personnel and the personnel of the Authority in the techniques and applications of research;

(iii) fostering the employment of their qualified personnel in research in the Area;

(c) effectively disseminating the results of research and analysis when available, through the Authority or other international channels when appropriate.

Article 144

1. The Authority shall take measures in accordance with this Convention:

(a) to acquire technology and scientific knowledge relating to activities in the Area; and

(b) to promote and encourage the transfer to developing States of such technology and scientific knowledge so that all States Parties benefit therefrom.

2. To this end the Authority and States Parties shall co-operate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States Parties may benefit therefrom. In particular they shall initiate and promote:

(a) programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, inter alia, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;

(b) measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area.

Article 145

Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia:

(a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

Article 147

1. Activities in the Area shall be carried out with reasonable regard for other activities in the marine environment.

2. Installations used for carrying out activities in the Area shall be subject to the following conditions:

(a) such installations shall be erected, emplaced and removed solely in accordance with this Part and subject to the rules, regulations and procedures of the Authority. Due notice must be given of the erection, emplacement and removal of such installations, and permanent means for giving warning of their presence must be maintained;

(b) such installations may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation or in areas of intense fishing activity;

(c) safety zones shall be established around such installations with appropriate markings to ensure the safety of both navigation and the installations. The configuration and location of such safety zones shall not be such as to form a belt impeding the lawful access of shipping to particular maritime zones or navigation along international sea lanes;

(d) such installations shall be used exclusively for peaceful purposes;

(e) such installations do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

Article 149

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

Article 150

Activities in the Area shall, as specifically provided for in this Part, be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries, especially developing States, and with a view to ensuring:

(a) the development of the resources of the Area;

(b) orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste;

(c) the expansion of opportunities for participation in such activities. . . ;

(d) participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in this Convention;

(e) increased availability of the minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals;

(f) the promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and from other sources, and the promotion of long-term equilibrium between supply and demand;

(g) the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area;

(h) the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area;

(i) the development of the common heritage for the benefit of mankind as a whole; and

(j) conditions of access to markets for the imports of minerals produced from the resources of the Area and for imports of commodities produced from such minerals shall not be more favourable than the most favorable applied to imports from other sources.

Article 152

1. The Authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area.

2. Nevertheless, special consideration for developing States, including particular consideration for the land-locked and geographically disadvantaged among them, specifically provided for in [Articles 133-191] shall be permitted.

Article 153

1. Activities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole in accordance with this article as well as other relevant provisions of this Part and the relevant Annexes, and the rules, regulations and procedures of the Authority.

2. Activities in the Area shall be carried out as prescribed in paragraph 3:

(a) by the Enterprise, and

(b) in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in [Articles 133-191] and in Annex III.

3. Activities in the Area shall be carried out in accordance with a formal written plan of work drawn up in accordance with Annex III and approved by the Council after review by the Legal and Technical Commission. In the case of activities in the Area carried out as authorized by the Authority by the entities specified in paragraph 2(b), the plan of work shall, in accordance with Annex III, article 3, be in the form of a contract. Such contracts may provide for joint arrangements in accordance with Annex III, article 11.

4. The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of [Articles 133-191] and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3.

Article 156

1. There is hereby established the International Sea-Bed Authority, which shall function in accordance with [Articles 133-191].

2. All States Parties are ipso facto members of the Authority.

4. The seat of the Authority shall be in Jamaica.

Article 157

3. The Authority is based on the principle of the sovereign equality of all its members.

Article 158

1. There are hereby established, as the principal organs of the Authority, an Assembly, a Council and a Secretariat.

2. There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in article 170, paragraph 1.

Article 159

1. The Assembly shall consist of all the members of the Authority. Each member shall have one representative in the Assembly, who may be accompanied by alternates and advisers.

5. A majority of the members of the Assembly shall constitute a quorum.

6. Each member of the Assembly shall have one vote.

7. Decisions on questions of procedure, including decisions to convene special sessions of the Assembly, shall be taken by a majority of the members present and voting.

8. Decisions on questions of substance shall be taken by a two-thirds majority of the members present and voting, provided that such majority includes a majority of the members participating in the session. When the issue arises as to whether a question is one of substance or not, that question shall be treated as one of substance unless otherwise decided by the Assembly by the majority required for decisions on questions of substance.

10. Upon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly on any matter, the Assembly shall request the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion thereon and shall defer voting on that proposal pending receipt of the advisory opinion by the Chamber. If the advisory opinion is not received before the final week of the session in which it is requested, the Assembly shall decide when it will meet to vote upon the deferred proposal.

Article 160

1. The Assembly, as the sole organ of the Authority consisting of all the members, shall be considered the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided for in this

Convention. The Assembly shall have the power to establish general policies in conformity with the relevant provisions of this Convention on any question or matter within the competence of the Authority.

2. In addition, the powers and functions of the Assembly shall be:

- (a) to elect the members of the Council in accordance with article 161;
- (b) to elect the Secretary-General from among the candidates proposed by the Council;
- (c) to elect, upon the recommendation of the Council, the members of the Governing Board of the Enterprise and the Director-General of the Enterprise;
- (d) to establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with [Articles 133-191].

Article 161

1. The Council shall consist of 36 members of the Authority elected by the Assembly in the following order:

(a) four members from among those States Parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent of total world consumption or have had net imports of more than 2 per cent of total world imports of the commodities produced from the categories of minerals to be derived from the Area, and in any case one State from the Eastern European (Socialist) region, as well as the largest consumer;

(b) four members from among the eight States Parties which have the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals, including at least one State from the Eastern European (Socialist) region;

(c) four members from among States Parties which on the basis of production in areas under their jurisdiction are major net exporters of the categories of minerals to be derived from the Area, including at least two developing States whose exports of such minerals have a substantial bearing upon their economies;

(d) six members from among developing States Parties, representing special interests. The special interests to be represented shall include those of States with large populations, States which are land-locked or geographically disadvantaged, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals, and least developed States;

(e) eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this subparagraph. For this purpose, the geographical regions shall be Africa, Asia, Eastern European (Socialist), Latin America and Western European and Others.

5. The Council shall function at the seat of the Authority, and shall meet as often as the business of the Authority may require, but not less than three times a year.

6. A majority of the members of the Council shall constitute a quorum.

7. Each member of the Council shall have one vote.

Article 162

1. The Council is the executive organ of the Authority. The Council shall have the power to establish, in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.

Article 170

1. The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2(a), as well as the transporting, processing and marketing of minerals recovered from the Area.

Article 186

The establishment of the Sea-Bed Disputes Chamber and the manner in which it shall exercise its jurisdiction shall be governed by the provisions of this section, of Part XV and of Annex VI.

Article 187

The Sea-Bed Disputes Chamber shall have jurisdiction under [Articles 133-191] and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories:

(a) disputes between States Parties concerning the interpretation or application of [Articles 133-191] and the Annexes relating thereto;

(b) disputes between a State Party and the Authority concerning:

(i) acts or omissions of the Authority or of a State Party alleged to be in violation of [Articles 133-191] or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith; or

(ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power;

(c) disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises

and natural or juridical persons referred to in article 153, paragraph 2 (b), concerning:

- (i) the interpretation or application of a relevant contract or a plan of work; or
- (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests;
- (d) disputes between the Authority and a prospective contractor who has been sponsored by a State as provided in article 153, paragraph 2(b), and has duly fulfilled the conditions referred to in Annex III, article 4, paragraph 6, and article 13, paragraph 2, concerning the refusal of a contract or a legal issue arising in the negotiation of the contract;
- (e) disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party as provided in article 153, paragraph 2(b), where it is alleged that the Authority has incurred liability as provided in Annex III, article 22;
- (f) any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention.

Article 188

1. Disputes between States Parties referred to in article 187, subparagraph (a), may be submitted:

- (a) at the request of the parties to the dispute, to a special chamber of the International Tribunal for the Law of the Sea to be formed in accordance with Annex VI, articles 15 and 17; or
- (b) at the request of any party to the dispute, to an ad hoc chamber of the Sea-Bed Disputes Chamber to be formed in accordance with Annex VI, article 36.

2. (a) Disputes concerning the interpretation or application of a contract referred to in article 187, subparagraph (c) (i), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree. A commercial arbitral tribunal to which the dispute is submitted shall have no jurisdiction to decide any question of interpretation of this Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, with respect to activities in the Area, that question shall be referred to the Sea-Bed Disputes Chamber for a ruling.

Article 191

The Sea-Bed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

Annex III. Article 1

Title to minerals shall pass upon recovery in accordance with this Convention.

Article 2

1. (a) The Authority shall encourage prospecting in the Area.

(b) Prospecting shall be conducted only after the Authority has received a satisfactory written undertaking that the proposed prospector will comply with this Convention and the relevant rules, regulations and procedures of the Authority concerning co-operation in the training programmes referred to in articles 143 and 144 and the protection of the marine environment, and will accept verification by the Authority of compliance therewith. The proposed prospector shall, at the same time, notify the Authority of the approximate area or areas in which prospecting is to be conducted.

(c) Prospecting may be conducted simultaneously by more than one prospector in the same area or areas.

2. Prospecting shall not confer on the prospector any rights with respect to resources.⁹ A prospector may, however, recover a reasonable quantity of minerals to be used for testing.

Article 3

1. The Enterprise, States Parties, and the other entities referred to in article 153, paragraph 2(b), may apply to the Authority for approval of plans of work for activities in the Area.

2. The Enterprise may apply with respect to any part of the Area. . .

3. Exploration and exploitation shall be carried out only in areas specified in plans of work referred to in article 153, paragraph 3, and approved by the Authority in accordance with this Convention and the relevant rules, regulations and procedures of the Authority.

QUESTION 23. What does the Convention do for protecting the marine environment?

Article 192

States have the obligation to protect and preserve the marine environment.

Article 193

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Article 194

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

3. The measures taken pursuant to [Articles 192-237] shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent:

(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;

(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;

(c) pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

(d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

Article 196

1. States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.

2. This article does not affect the application of this Convention regarding the prevention, reduction and control of pollution of the marine environment.

Article 235

1. States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

QUESTION 24. Marine scientific research sounds like an activity everyone would favor. Yet it has led in recent years to a great many disputes. There have been claims that some states are using "research" as a cover to engage in illegal whaling or fishing activities. There are other claims that research is being conducted in the EEZ to enable foreign vessels to pinpoint schools of fish heading outward toward the high seas and then to capture them, placing the coastal state at a disadvantage. A "research vessel" may also be used as a cover to engage in commercial mineral exploration. Can any convention deal in advance with all of these problems? Does the Convention on the Law of the Sea address them? If so, does the Convention deal with them adequately?

Article 238

All States, irrespective of their geographical location, and competent international organizations have the right to

conduct marine scientific research subject to the rights and duties of other States as provided for in this Convention.

Article 240

In the conduct of marine scientific research the following principles shall apply:

- (a) marine scientific research shall be conducted exclusively for peaceful purposes;
- (b) marine scientific research shall be conducted with appropriate scientific methods and means compatible with this Convention;
- (c) marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea compatible with this Convention and shall be duly respected in the course of such uses;
- (d) marine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.

Article 241

Marine scientific research activities shall not constitute the legal basis for any claim to any part of the marine environment or its resources.

Article 244

1. States and competent international organizations shall, in accordance with this Convention, make available by publication and dissemination through appropriate channels information on proposed major programmes and their objectives as well as knowledge resulting from marine scientific research.

2. For this purpose, States, both individually and in co-operation with other States and with competent international organizations, shall actively promote the flow of scientific data and information and the transfer of knowledge resulting from marine scientific research, especially to developing States, as well as the strengthening of the autonomous marine scientific research capabilities of developing States through, inter alia, programmes to provide adequate education and training of their technical and scientific personnel.

Article 245

Coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea. Marine scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal State.

Article 246

1. Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.

2. Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.

3. Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States or competent international organizations in their exclusive economic zone or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind. To this end, coastal States shall establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably.

4. For the purposes of applying paragraph 3, normal circumstances may exist in spite of the absence of diplomatic relations between the coastal State and the researching State.

5. Coastal States may however in their discretion withhold their consent to the conduct of a marine scientific research project of another State or competent international organization in the exclusive economic zone or on the continental shelf of the coastal State if that project:

(a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;

(b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;

(c) involves the construction, operation or use of artificial islands, installations and structures. . .

6. Notwithstanding the provisions of paragraph 5, coastal States may not exercise their discretion to withhold consent under subparagraph (a) of that paragraph in respect of marine scientific research projects to be undertaken in accordance with the provisions of this Part on the continental shelf, beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, outside those specific areas which coastal States may at any time publicly designate as areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time. Coastal States shall give reasonable notice of the designation of such areas, as well as any modifications thereto, but shall not be obliged to give details of the operations therein.

7. The provisions of paragraph 6 are without prejudice to the rights of coastal States over the continental shelf as established in article 77.

8. Marine scientific research activities referred to in this article shall not unjustifiably interfere with activities undertaken by coastal States in the exercise of their sovereign rights and jurisdiction provided for in this Convention.

Article 248

States and competent international organizations which intend to undertake marine scientific research in the exclusive economic zone or on the continental shelf of a coastal State shall, not less than six months in advance of the expected starting date of the marine scientific research project, provide that State with a full description of:

- (a) the nature and objectives of the project;
- (b) the method and means to be used, including name, tonnage, type and class of vessels and a description of scientific equipment;
- (c) the precise geographical areas in which the project is to be conducted;
- (d) the expected date of first appearance and final departure of the research vessels, or deployment of the equipment and its removal, as appropriate;
- (e) the name of the sponsoring institution, its director, and the person in charge of the project; and
- (f) the extent to which it is considered that the coastal State should be able to participate or to be represented in the project.

Article 249

1. States and competent international organizations when undertaking marine scientific research in the exclusive economic zone or on the continental shelf of a coastal State shall comply with the following conditions:

- (a) ensure the right of the coastal State, if it so desires, to participate or be represented in the marine scientific research project, especially on board research vessels and other craft or scientific research installations, when practicable, without payment of any remuneration to the scientists of the coastal State and without obligation to contribute towards the costs of the project;
- (b) provide the coastal State, at its request, with preliminary reports, as soon as practicable, and with the final results and conclusions after the completion of the research;
- (c) undertake to provide access for the coastal State, at its request, to all data and samples derived from the marine scientific research project and likewise to furnish it with data which may be copied and samples which may be divided without detriment to their scientific value;
- (d) if requested, provide the coastal State with an assessment of such data, samples and research results or provide assistance in their assessment or interpretation;
- (e) ensure, subject to paragraph 2, that the research results are made internationally available through appropriate national or international channels, as soon as practicable;
- (f) inform the coastal State immediately of any major change in the research programme;
- (g) unless otherwise agreed, remove the scientific research installations or equipment once the research is completed.

Article 252

States or competent international organizations may proceed with a marine scientific research project six months after the date upon which the information required pursuant to article 248 was provided to the coastal State unless within four months of the receipt of the communication containing such information the coastal State has informed the State or organization conducting the research that:

- (a) it has withheld its consent under the provisions of article 246; or
- (b) the information given by that State or competent international organization regarding the nature or objectives of the project does not conform to the manifestly evident facts; or
- (c) it requires supplementary information relevant to conditions and the information provided for under articles 248 and 249; or
- (d) outstanding obligations exist with respect to a previous marine scientific research project carried out by that State or organization, with regard to conditions established in article 249.

Article 253

1. A coastal State shall have the right to require the suspension of any marine scientific research activities in progress within its exclusive economic zone or on its continental shelf if:

- (a) the research activities are not being conducted in accordance with the information communicated as provided under article 248 upon which the consent of the coastal State was based; or
- (b) the State or competent international organization conducting the research activities fails to comply with the

provisions of article 249 concerning the rights of the coastal State with respect to the marine scientific research project.

2. A coastal State shall have the right to require the cessation of any marine scientific research activities in case of any non-compliance with the provisions of article 248 which amounts to a major change in the research project or the research activities.

3. A coastal State may also require cessation of marine scientific research activities if any of the situations contemplated in paragraph 1 are not rectified within a reasonable period of time.

4. Following notification by the coastal State of its decision to order suspension or cessation, States or competent international organizations authorized to conduct marine scientific research activities shall terminate the research activities that are the subject of such a notification.

5. An order of suspension under paragraph 1 shall be lifted by the coastal State and the marine scientific research activities allowed to continue once the researching State or competent international organization has complied with the conditions required under articles 248 and 249.

Article 256

All States, irrespective of their geographical location, and competent international organizations have the right, in conformity with the provisions of [Articles 133-191], to conduct marine scientific research in the Area.

QUESTION 25. Modern capitalism, and the free-market principle, seem to suggest that persons or corporations engaging in industrial activities strive to create for themselves as monopolistic a situation as they can. One type of quasi-monopoly is the safeguarding of industrial secrets and processes. Does the Convention on the Law of the Sea run counter to this capitalistic drive? Is it psychologically naive? Or is it a realistic effort to change one of the fundamental drives of capitalistic entrepreneurship? Is the Convention likely to work? Can its provisions be subverted? Will an entrepreneur (whether a nation or a corporation) be able to invent ways to subvert the purposes of the Convention? Does the Convention depend upon an assumption of good faith on the part of the entrepreneur? In formulating your answer to this Question, consider the provisions that you have already read above, as well as the particular Articles that follow.

Article 266

1. States, directly or through competent international organizations, shall cooperate in accordance with their capabilities to promote actively the development and transfer of marine science and marine technology on fair and reasonable terms and conditions.

2. States shall promote the development of the marine scientific and technological capacity of States which may need and request technical assistance in this field, particularly developing States, including land-locked and geographically disadvantaged States, with regard to the exploration, exploitation, conservation and management of marine resources, the protection and preservation of the marine environment, marine scientific research and other activities in the marine environment compatible with this Convention, with a view to accelerating the social and economic development of the developing States.

3. States shall endeavor to foster favorable economic and legal conditions for the transfer of marine technology for the benefit of all parties concerned on an equitable basis.

Article 267

States, in promoting co-operation pursuant to article 266, shall have due regard for all legitimate interests including, inter alia, the rights and duties of holders, suppliers and recipients of marine technology.

Article 268

States, directly or through competent international organizations, shall promote:

(a) the acquisition, evaluation and dissemination of marine technological knowledge and facilitate access to such information and data;

(b) the development of appropriate marine technology;

(c) the development of the necessary technological infrastructure to facilitate the transfer of marine technology;

(d) the development of human resources through training and education of nationals of developing States and countries and especially the nationals of the least developed among them;

(e) international co-operation at all levels, particularly at the regional, subregional and bilateral levels.

Article 269

In order to achieve the objectives referred to in article 268, States, directly or through competent international organizations, shall endeavor, inter alia, to:

(a) establish programmes of technical co-operation for the effective transfer of all kinds of marine technology

to States which may need and request technical assistance in this field, particularly the developing land-locked and geographically disadvantaged States, as well as other developing States which have not been able either to establish or develop their own technological capacity in marine science and in the exploration and exploitation of marine resources or to develop the infrastructure of such technology;

(b) promote favourable conditions for the conclusion of agreements, contracts and other similar arrangements, under equitable and reasonable conditions;

(c) hold conferences, seminars and symposia on scientific and technological subjects, in particular on policies and methods for the transfer of marine technology;

(d) promote the exchange of scientists and of technological and other experts;

(e) undertake projects and promote joint ventures and other forms of bilateral and multilateral co-operation.

Article 276

1. States, in co-ordination with the competent international organizations, the Authority and national marine scientific and technological research institutions, shall promote the establishment of regional marine scientific and technological research centres, particularly in developing States, in order to stimulate and advance the conduct of marine scientific research by developing States and foster the transfer of marine technology.

2. All States of a region shall co-operate with the regional centres therein to ensure the more effective achievement of their objectives.

Article 300

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

QUESTION 26. When the Reagan Administration decided not to ratify the Convention on the Law of the Sea, why didn't it simply ratify the Convention with a reservation to the Articles it didn't like concerning mineral exploitation of the ocean floor?

Article 309

No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.

Article 310

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

Article 311

6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.

B. Antarctica

Introduction. The continent of Antarctica contains great mineral wealth beneath its ice-covered surface. As a result, various nations have claimed sovereignty over various sectors of Antarctica. Over forty states have ratified the Antarctic Treaty. As you read its main provisions, consider whether, and to what extent, any of the various sovereign claims to sectors of Antarctica have been modified or resolved.

The Antarctic Treaty Entered into force, 23 June 1961¹⁰

Article 1

1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any types of weapons.

2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.

Article 2

Freedom of scientific investigation in Antarctica and co-operation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.

Article 3

1. In order to promote international co-operation in scientific investigation in Antarctica, as provided for in Article 2

of the present Treaty, the Contracting Parties agree that, to the greatest extent feasible and practicable:

- a) information regarding plans for scientific programs in Antarctica shall be exchanged to permit maximum economy and efficiency of operations;
- b) scientific personnel shall be exchanged in Antarctica between expeditions and stations;
- c) scientific observations and results from Antarctica shall be exchanged and made freely available.

2. In implementing this Article, every encouragement shall be given to the establishment of co-operative working relations with those Specialized Agencies of the United Nations and other international organizations having a scientific or technical interest in Antarctica.

Article 4

1. Nothing contained in the present Treaty shall be interpreted as:

- a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
- b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
- c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Article 5

1. Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.

2. In the event of the conclusion of international agreements concerning the use of nuclear energy, including nuclear explosions and the disposal of radioactive waste material, to which all of the [original contracting parties to this treaty] are parties¹¹ the rules established under such agreements shall apply in Antarctica.

Article 6

The provisions of the present Treaty shall apply to the area south of 60 deg South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.

Article 7

1. In order to promote the objectives and ensure the observance of the provisions of the present Treaty, each [original contracting party] shall have the right to designate observers to carry out any inspection provided for by the present Article. Observers shall be nationals of the Contracting Parties which designate them. The names of observers shall be communicated to every other Contracting Party having the right to designate observers, and like notice shall be given of the termination of their appointment.

2. Each observer designated in accordance with the provisions of paragraph 1 of this Article shall have complete freedom of access at any time to any or all areas of Antarctica.

3. All areas of Antarctica, including all stations installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, shall be open at all times to inspection by any observers designated in accordance with paragraph 1 of this article.

4. Aerial observation may be carried out at any time over any or all areas of Antarctica by any of the Contracting Parties having the right to designate observers.

5. Each Contracting Party shall, at the time when the present Treaty enters into force for it, inform the other Contracting Parties, and thereafter shall give them notice in advance, of

- a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory;
- b) all stations in Antarctica occupied by its nationals; and
- c) any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article 1 of the present Treaty.

Article 8

1. In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers designated under paragraph 1 of Article 7 and scientific personnel exchanged under subparagraph 1 (b) of Article 3 of the Treaty, and members of the staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in

Antarctica for the purpose of exercising their functions.

2. Without prejudice to the provisions of paragraph 1 of this Article, and pending the adoption of measures in pursuance of subparagraph 1 (e) of Article 9, the Contracting Parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution.

Article 9

1. Representatives of the [original] Contracting Parties shall meet at the City of Canberra within two months after the date of entry into force of the Treaty, and thereafter at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding:

- a) use of Antarctica for peaceful purposes only;
- b) facilitation of scientific research in Antarctica;
- c) facilitation of international scientific cooperation in Antarctica;
- d) facilitation of the exercise of the rights of inspection provided for in Article 7 of the Treaty;
- e) questions relating to the exercise of jurisdiction in Antarctica;
- f) preservation and conservation of living resources in Antarctica.

2. Each Contracting Party which has become a party to the present Treaty by accession under Article 8 shall be entitled to appoint representatives to participate in the meetings referred to in paragraph 1 of the present Article, during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition.

3. Reports from the observers referred to in Article 7 of the present Treaty shall be transmitted to the representatives of the Contracting Parties participating in the meetings referred to in paragraph 1 of the present Article.

4. The measures referred to in paragraph 1 of this Article shall become effective when approved by all the Contracting Parties whose representatives were entitled to participate in the meetings held to consider those measures.

5. Any or all of the rights established in the present Treaty may be exercised as from the date of entry into force of the Treaty whether or not any measures facilitating the exercise of such rights have been proposed, considered or approved as provided in this Article.

Article 10

Each of the Contracting Parties undertakes to exert appropriate efforts consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty.

Article 11

1. If any dispute arises between two or more of the Contracting Parties concerning the interpretation or application of the present Treaty, those Contracting Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent, in each case, of all parties to the dispute, be referred to the International Court of Justice for settlement; but failure to reach agreement or reference to the International Court shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 of this Article.

Article 12

1. a) The present Treaty may be modified or amended at any time by unanimous agreement of the Contracting Parties whose representatives are entitled to participate in the meeting provided for under Article 9. Any such modification or amendment shall enter into force when the depositary Government has received notice from all such contracting Parties that they have ratified it.

b) Such modification or amendment shall thereafter enter into force as to any other Contracting Party when notice of ratification by it has been received by the depositary Government. Any such Contracting Party from which no notice of ratification is received within a period of two years from the date of entry into force of the modification or amendment in accordance with the provisions of subparagraph 1 (a) of this Article shall be deemed to have withdrawn from the present Treaty on the date of the expiration of such period.

2. a) If after the expiration of thirty years from the date of entry into force of the present Treaty, any of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article 9 so

requests by a communication addressed to the depositary Government, a Conference of all the Contracting Parties shall be held as soon as practicable to review the operation of the Treaty.

b) Any modification or amendment to the present Treaty which is approved at such a Conference by a majority of the Contracting Parties there represented, including a majority of those whose representatives are entitled to participate in the meetings provided for under Article 9, shall be communicated by the depositary Government to all the Contracting Parties immediately after the termination of the Conference and shall enter into force in accordance with the provisions of paragraph 1 of the present Article.

c) If any such modification or amendment has not entered into force in accordance with the provisions of subparagraph 1 (a) of this Article within a period of two years after the date of its communication to all the Contracting Parties, any Contracting Party may at any time after the expiration of that period give notice to the depositary Government of its withdrawal from the present Treaty, and such withdrawal shall take effect two years after the receipt of the notice by the depositary Government.

Article 13

1. The present Treaty shall be subject to ratification by the signatory States. It shall be open for accession by any State which is a Member of the United Nations, or by any other State which may be invited to accede to the Treaty with the consent of all the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article 9 of the Treaty.

2. Ratification of or accession to the present Treaty shall be effected by each State in accordance with its constitutional processes.

3. Instruments of ratification and instruments of accession shall be deposited with the Government of the United States of America, hereby designated as the depositary Government.

4. The depositary Government shall inform all signatory and acceding States of the date of each deposit of an instrument of ratification or accession, and the date of entry into force of the Treaty and of any modification or amendment thereto.

5. Upon the deposit of instruments of ratification by all the signatory States, the present Treaty shall enter into force for these States and for States which have deposited instruments of accession. Thereafter the Treaty shall enter into force for any acceding State upon the deposit of its instruments of accession.

6. The present Treaty shall be registered by the depositary Government pursuant to Article 102 of the Charter of the United Nations.

NOTE

Jockeying for territorial position in Antarctica continues to take place. The parties to the Antarctic Treaty have designated themselves as members of the Antarctic Treaty System (ATS). They are opposed by numerous developing nations that are working through the United Nations to create a "common heritage" regime for Antarctica, similar to the "common heritage" system for the sea-bed and ocean floor created by the Law of the Sea Convention of 1982. The parties to the ATS responded to the UN initiative by inviting India, Brazil, China, and Uruguay to become Consultative Parties to the ATS. Acting together, the ATS parties successfully resisted the creation of a United Nations Committee on Antarctica. Nevertheless, the ATS parties have refrained from instituting mining activities in Antarctica. Perhaps to ward off further pressure from the developing nations, the ATS parties approved a Protocol to the Antarctic Treaty in 1991, which imposed a moratorium on mining.

C. Airspace

Reading Assignment: Re-read *International Law Anthology*, p. 5 ("Airspace")

Powers Case Supreme Court Military Collegium, USSR 30 Int'l L. Rep. 69 (1966)

On May 1, 1960, at 5 hours 36 minutes, Moscow time, a military unit of the Soviet anti-aircraft defense in the area of the city of Kirovabad, the Tajik S.S.R., at an altitude of 20,000 metres, unattainable for planes of the civil air fleet, spotted an unknown aircraft violating the State frontier of the U.S.S.R.

The military units of the Soviet anti-aircraft defense vigilantly followed the behavior of the plane as it flew over major industrial centres and important objectives, and only when the intruder plane had penetrated 2,000 kilometres into Soviet territory and the evil purpose of the flight, fraught with disastrous consequences for world peace in an age of thermonuclear weapons, became absolutely obvious, a battery of ground-to-air missiles brought the aggressor plane down in the area of Sverdlovsk at 8 hours 53 minutes as ordered by the Soviet Government.

The pilot of the plane bailed out and was apprehended upon landing. On interrogation, he gave his name as Francis Gary Powers, citizen of the United States of America. Examination of the wreckage of the plane which had been brought down showed that it was of American make, specially designed for high altitude flights and fitted with various equipment for espionage reconnaissance tasks.

In view of this, the pilot Powers was arrested and committed for trial on charges of espionage against the Soviet Union.

During the court hearings, the defendant Powers testified in detail about his espionage activity and the circumstances connected with the violation of Soviet air space on May 1, 1960.

On the night of April 30, 1960, Colonel Shelton gave Powers the assignment to fly over the territory of the Soviet Union at an altitude of 20,000 metres along the following course: Peshawar, the Aral Sea, Sverdlovsk, Kirov, Archangel, Murmansk, and to land in Norway, at Bodoe airport, with which Powers familiarized himself back in 1958.

Flying over Soviet territory, Powers, on Shelton's orders, was to switch on at definite points his special equipment for aerial photography and the registration of the operation of Soviet anti-aircraft defence radar stations. Powers was to give special attention to two spots--in one of them American intelligence suspected the presence of missile launching ramps and in the other a particularly important defense objective.

The material evidence of the case and his testimony has established that Powers fulfilled the criminal mission given him.

Having taken off from Peshawar airport in Pakistan, Powers flew over the territory of Afghanistan and for more than 2,000 kilometres over the Soviet Union in accordance with the established course. Besides Powers' testimony, this is confirmed by the American flight map discovered in the debris of the U-2 plane and submitted to the Court, bearing the route plotted out by Major Dulak, navigator of the detachment ``Ten-Ten," and also notes and signs made by Powers, who marked down on this map several important defence objectives of the Soviet Union he had spotted from the plane.

Throughout the flight, to the very moment the plane was shot down, Powers switched on his special intelligence equipment, photographed important defense objectives and recorded signals of the country's anti-aircraft radar installations. The development of the rescued aerial photography films established that defendant Powers photographed from the U-2 plane industrial and military objectives of the Soviet Union--plants, depots, oil storage facilities, communication routes, railway bridges and stations, electric transmission lines, aerodromes, the location of troops and military equipment.

The numerous photos of the Soviet Union's territory, taken by defendant Powers from an altitude of 20,000 metres, in possession of the Military Collegium of the U.S.S.R. Supreme Court, make it possible to determine the nature of industrial establishments, the design of railway brides, the number and type of aircraft on the airfields, the nature and purpose of military material.

Powers tape-recorded impulses of certain radar stations of the Soviet Union with a view to detecting the country's anti-aircraft defense system.

According to the conclusion of experts, the information collected by defendant Powers during his flight in Soviet air space on May 1, 1960, constitutes a State and military secret of the Soviet Union, which is specially guarded by law.

Thus, the court hearings have established definitely that the Lockheed U-2 reconnaissance aircraft belonged to the United States Air Force and that defendant Powers was a secret agent of the Central Intelligence Agency of the United States of America.

Powers was an obedient executor of the perfidious designs of the Central Intelligence Agency of the United States of America, carried out with the consent of the American Government.

Powers himself admitted that he realized when intruding into the air space of the Soviet Union that he was violating the national sovereignty of the U.S.S.R. and flying over its territory on an espionage mission, whose main purpose consisted of detecting and marking down missile launching sites.

Article 2 [of the Law on Criminal Responsibility for State Crimes] provides:

Espionage. The giving away, theft or collection with the intention of conveying to a foreign Power, a foreign organization, or their agents, of information constituting a State or military secret, as well as the giving away or collection on the instructions of foreign intelligence agencies of other information to be used against the interests of the U.S.S.R., if the espionage is committed by a foreigner or by a stateless person--is punishable by deprivation of liberty for a period of from seven to fifteen years with confiscation of property, or by death and confiscation of property.

In considering the Powers case, the Military Collegium of the U.S.S.R. Supreme Court takes into account that

the intrusion of the American military intelligence plane constitutes a criminal breach of a generally recognized principle of international law, which establishes the exclusive sovereignty of every State over the air space above its territory. This principle, laid down by the Paris Convention of October 13, 1919, for the regulation of aerial navigation, and several other subsequent international agreements, is proclaimed in the national legislations of different States, including the Soviet Union and the United States of America.

Violation of this sacred and immutable principle of international relations creates in the present conditions a direct menace to universal peace and international security.

At the present level of military technology, when certain States possess atomic and hydrogen weapons, as well as the means of delivering them quickly to targets, the flight of a military intelligence plane over Soviet territory could have directly preceded a military attack. This danger is the more possible in conditions when the United States of America, as stated by American generals, constantly keeps bomber patrols in the air, always ready to drop bombs on earlier marked-out targets of the Soviet Union.

Under these conditions the aggressive act of the United States of America, carried out on May 1 of this year by defendant Powers, created a threat to universal peace.

Having examined the materials of the case, material and other evidence and expert findings, and having heard the testimony of the defendant and the witnesses, the speeches of the State Prosecutor and of the Defence Counsel, and also the last plea of the defendant, the Military Collegium of the U.S.S.R. Supreme Court holds established that defendant Powers was for a long time an active secret agent of the United States Central Intelligence Agency, directly fulfilling espionage missions of this agency against the Soviet Union; and that on May 1, 1960, with the knowledge of the Government of the United States of America, in a specially equipped U-2 intelligence plane, he intruded into Soviet air space and with the help of special radio-technical and photographic equipment collected information of strategical importance, which constitutes a State and Military secret of the Soviet State, thereby committing a grave crime covered by Article 2 of the Soviet Union's Law "On Criminal Responsibility for State Crimes."

At the same time, weighing all the circumstances of the given case in the deep conviction that they are inter-related, taking into account Powers' sincere confession of his guilt and his sincere repentance, proceeding from the principles of socialist humaneness, and guided by Articles 319 and 320 of the Code of Criminal Procedure of the Russian Federation, the Military Collegium of the U.S.S.R. Supreme Court sentences Francis Gary Powers, on the strength of Article 2 of the U.S.S.R. Law "On Criminal Responsibility for State Crimes," to ten years' confinement with the first three to be served in prison.¹²

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. If a Soviet reconnaissance plane had been shot down over Iowa, would an American court have rendered a decision substantially different from the Soviet decision in the Powers Case?

2. Prior to the First World War, it was the consensus of international scholars that the airspace was open and free to all nations, to be treated as a resource in common just like the high seas. But once the war started, and planes were perceived to have the capacity to drop bombs, people everywhere realized that the airspace could not be open to all nations. (See the brief discussion in the *Anthology*, p. 5.) Are we better off today with the principle of national sovereignty over airspace? Or would we be better off with the principle of open and free airspace accessible to all nations?

3. The following story could be apocryphal, but it makes a memorable point. A wealthy man, living in New York, was sued in a Kentucky state court for a huge amount of money. He figured he was safe so long as he never stepped foot in Kentucky where the plaintiff could obtain personal jurisdiction over him. One day he was in the first class cabin on a routine flight from New York to Chicago when an announcement came over the loud speaker that the plane had decided to take a more southerly route. The plane in fact crossed the northern tip of Kentucky. At that moment, a gentlemen in the coach compartment came forward into the first class section and handed the wealthy man a summons. He had in fact been served in the jurisdiction of Kentucky. The plaintiff in the lawsuit had arranged--at considerable expense--to have the flight diverted slightly so as to be able to serve the defendant within Kentucky airspace. On these facts, the Kentucky court found that there was jurisdiction.

4. A well-known scholar of international law, Professor Myres McDougal, has argued that national superjacent sovereignty over airspace is a wasteful rule of international law as it has led to a proliferation of economically inefficient national airlines. Every nation, it appears, wants to have its "own" airline, as a badge of its sovereignty. Yet the waste and inefficiency, from a global perspective, must be enormous. Should present-day rules

of international law be reexamined in terms of their economic efficiency? Should the particular rule of national sovereignty over superjacent airspace be reexamined according to economic theory?

5. If we were to take an economic approach, what value should we assign to the popular sense of safety that an aircraft flying overhead is not likely to drop a bomb? Is that worth enough to overcome the inefficiencies that Professor McDougal worried about?

6. But do we need a rule of national sovereignty over superjacent airspace in order to protect people from hostile bomb-carrying aircraft? Or might we have a free airspace rule coupled with internationally-mandated institutional procedures to screen all aircraft?

D. Outer Space

Introduction. When the first human being landed on the moon, in 1969, he placed an American flag there (unwaving in the breeze-less non-atmosphere). Did the United States thereby acquire sovereignty over the moon? International law has a clear answer to this question:

The Outer Space Treaty
Done at Washington, London, & Moscow, Jan. 27, 1967.
610 U.N.T.S. 205.

Article 1

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international cooperation in such investigation.

Article 2

Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Article 4

States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

Article 7

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the moon and other celestial bodies.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. The Outer Space Treaty says nothing about exploitation of the resources of outer space. In Articles not excerpted above, the Treaty talks about "exploration and use of outer space," but not exploitation. In 1979 a United Nations Committee produced the draft of a Moon Treaty which *does* talk about exploitation of the moon and other celestial bodies within the solar system. The Moon Treaty entered into force in 1984 when it had obtained five ratifications. The United States has not ratified the Moon Treaty; neither has Russia nor the United Kingdom. The government of the United States has found objectionable Article 11 of the Moon Treaty.

Agreement Concerning the Activities
of States on the Moon and Other
Celestial Bodies
18 I.L.M. 1434 (1979)

Article 1

1. The provisions of this Agreement relating to the moon shall also apply to other celestial bodies within the solar

system, other than the earth. . .

Article 11

1. The moon and its natural resources are the common heritage of mankind. . .

5. States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.

7. The main purposes of the international regime to be established shall include:

(d) An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.

2. Suppose an enormous diamond deposit is found on Saturn or Jupiter. Assuming the cost of a space mining expedition would be greatly exceeded by the value of the diamonds that could be brought back to Earth and sold, would any company undertake such a mission if it had to give up an unspecified amount of the profits to developing countries?

3. Does the previous question suggest that future treaties similar to the Moon Treaty should specify a percentage "common heritage" give-up of net profits resulting from exploitation of outer space resources?

FOOTNOTES Chapter 10

1 The *Pescawha*, 19 F.2d 506 (1927); *The Newton Bay*, 30 F.2d 444 (1928), affirmed, 36 F.2d 729 (1928), and *The Vincennes*, 20 F.2d 164 (1927), affirmed, 27 F.2d 296 (1928).

2 Presidential Proclamation No. 2667, 59 Stat. 884 (Sept. 28, 1945).

3 [ADDITIONAL QUESTION: What if the coastal state keeps rejecting each delineation proposed by the state that wants to lay the pipelines? Should the term "consent" be construed as "consent, providing that such consent shall not be unreasonably withheld"? If so, why didn't the framers of the Convention add such a qualification into Article 79?]

4 [The "Authority" means the International Sea-Bed Authority, set up by this Convention.]

5 [Editor's Note: References to articles in law reviews concerning the norm-creating character of treaties and how the Court dealt with this question in the Continental Shelf Cases, can be found in the *Anthology*, at p. 100, nn.137-39.]

6 [ADDITIONAL QUESTION: Is Judge Jessup impliedly suggesting that, in the "old days," we would we have expected Germany, the Netherlands, and Denmark to go to war over the question of their claims to the valuable resources of the North Sea?]

7 [Editor's Note: Recall the *Nottebohm* Case in Chapter 3.]

8 [For a discussion of maximum sustainable yield, see *International Law Anthology*, p. 292.]

9 [ADDITIONAL QUESTION: Will this provision flatly discourage prospecting?]

10 Approximately 35 ratifications, including the original contracting parties (for their names, see the next footnote).

11 Namely, Argentina, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the USSR, the United Kingdom, and the United States.

12 [Editor's Note: Francis Gary Powers returned to the United States in exchange for a Soviet spy whom the United States had captured.]