

U S D E P A R T M E N T O F S T A T E

# DISPATCH

B U R E A U O F P U B L I C A F F A I R S

# SD SUPPLEMENT

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Law of the Sea  
Convention

Letters of Transmittal and  
Submittal and Commentary



February 1995 Vol. 6, Supplement No. 1

# Law of the Sea Convention

## Letters of Transmittal and Submittal And Commentary

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## STATUS OF THE CONVENTION AND AGREEMENT

As of February 23, 1995, there are 73 parties to the Law of the Sea Convention, 12 States (of the 73 States and entities to have signed the Agreement) have consented to be bound by the Agreement in Implementation of Part XI, and 116 States and entities have agreed to apply provisionally the Agreement.

### Parties to the Convention

Angola, Antigua and Barbuda, Australia, The Bahamas, Bahrain, Barbados, Belize, Bosnia-Herzegovina, Botswana, Brazil, Cameroon, Cape Verde, Comoros, Cook Islands, Costa Rica, Cote d'Ivoire, Cuba, Cyprus, Djibouti, Dominica, Egypt, Federal Republic of Yugoslavia<sup>1</sup>, Fiji, The Gambia, Germany, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Honduras, Iceland, Indonesia, Iraq, Italy, Jamaica, Kenya, Kuwait, Lebanon, The Former Yugoslav Republic of Macedonia, Mali, Malta, Marshall Islands, Mauritius, Mexico, Federated States of Micronesia, Namibia, Nigeria, Oman, Paraguay, Philippines, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Singapore, Slovenia, Somalia, Sri Lanka, Sudan, Tanzania, Togo, Trinidad and Tobago, Tunisia, Uganda, Uruguay, Vietnam, Yemen, Zaire, Zambia, Zimbabwe.

In addition, the following countries have informally indicated their intention to become party to the Convention once their internal procedures are completed:

Austria, Belgium, Canada, Chile, China, Denmark, Finland, France, Greece, India, Ireland, Japan, Republic of Korea,

Luxembourg, Netherlands, New Zealand, Panama, Portugal, South Africa, Spain, Sweden, Switzerland, Ukraine, United Kingdom.

### Agreement in Implementation of Part XI

The following States have consented to be bound by the Agreement:

Australia, Belize, Cook Islands, Germany, Italy, Kenya, Lebanon, The Former Yugoslav Republic of Macedonia, Mauritius, Seychelles, Sierra Leone, Singapore.

The following States and entity have signed the Agreement:

Algeria, Argentina, Australia, Austria, The Bahamas, Barbados, Belgium, Brazil, Burkina Faso, Canada, Cape Verde, China, Cote d'Ivoire, Cyprus, Czech Republic, Denmark, European Community, Fiji, Finland, France, Germany, Greece, Grenada, Guinea, Iceland, India, Indonesia, Ireland, Italy, Jamaica, Japan, Republic of Korea, Laos, Luxembourg, Malaysia, Maldives, Malta, Mauritania, Federated States of Micronesia, Monaco, Mongolia, Morocco, Namibia, Netherlands, New Zealand, Nigeria, Pakistan, Paraguay, Philippines, Poland, Portugal, Senegal, Seychelles, Slovakia, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Tanzania, Togo, Trinidad and Tobago, Uganda, United Kingdom, United States, Uruguay, Vanuatu, Zambia, Zimbabwe.

The following States and entity have agreed to apply the Agreement provisionally:

Afghanistan, Albania, Algeria, Andorra, Argentina, Armenia, Australia, Austria, The Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Botswana, Brunei, Bulgaria, Burkina Faso, Burma, Burundi, Cambodia, Canada, Cape Verde, Chile, China, Congo, Cote d'Ivoire, Cuba, Czech Republic, Egypt, Eritrea, Estonia, Ethiopia, European Community, Fiji, Finland, France, Gabon, Germany, Ghana, Greece, Grenada, Guinea, Guyana, Honduras, Iceland, India, Indonesia, Iraq, Italy, Jamaica, Japan, Kenya, Republic of Korea, Kuwait, Laos, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Federated States of Micronesia, Moldova, Monaco, Mongolia, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan, Papua New Guinea, Paraguay, Philippines, Poland, Qatar, Russia, Senegal, Seychelles, Singapore, Slovakia, South Africa, Sri Lanka, Sudan, Suriname, Swaziland, Switzerland, Tanzania, Togo, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States, Vanuatu, Vietnam, Western Samoa, Zambia, Zimbabwe. □

<sup>1</sup>Serbia and Montenegro have asserted the formation of a joint independent state, but this entity has not been recognized as a state by the United States.

## Transmittal Letter

*Text of a letter from the President to the U.S. Senate, October 7, 1994.*

*To the Senate of the United States:*

I transmit herewith, for the advice and consent of the Senate to accession, the United Nations Convention on the Law of the Sea, with Annexes, done at Montego Bay, December 10, 1982 (the "Convention"), and, for the advice and consent of the Senate to ratification, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, with Annex, adopted at New York, July 28, 1994 (the "Agreement"), and signed by the United States, subject to ratification, on July 29, 1994. Also transmitted for the information of the Senate is the report of the Department of State with respect to the Convention and Agreement, as well as Resolution II of Annex I and Annex II of the Final Act of the Third United Nations Conference on the Law of the Sea.

The United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea. Since the late 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea that will be respected by all countries. Each succeeding U.S. Administration has recognized this as the cornerstone of U.S. oceans policy. Following adoption of the Convention in 1982, it has been the policy of the United States to act in a manner consistent with its provisions relating to traditional uses of the oceans and to encourage other countries to do likewise.

The primary benefits of the Convention to the United States include the following:

- The Convention advances the interests of the United States as a global maritime power. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements and of commercial vessels to carry sea-going cargoes. It achieves this, *inter alia*, by stabilizing the breadth of the territorial sea at 12 nautical miles; by setting forth navigation regimes of innocent passage in the territorial sea, transit passage in straits used for international navigation, and archipelagic sea lanes passage; and by reaffirming the traditional freedoms of navigation and overflight in the exclusive economic zone and the high seas beyond.

- The Convention advances the interests of the United States as a coastal State. It achieves this, *inter alia*, by providing for an exclusive economic zone out to 200 nautical miles from shore and by securing our rights regarding resources and artificial islands, installations and structures for economic purposes over the full extent of the continental shelf. These provisions fully comport with U.S. oil and gas leasing practices, domestic management of coastal fishery resources, and international fisheries agreements.

- As a far-reaching environmental accord addressing vessel source pollution, pollution from seabed activities, ocean dumping, and land-based sources of marine pollution, the Convention promotes continuing improvement in the health of the world's oceans.

- In light of the essential role of marine scientific research in understanding and managing the oceans, the Convention sets forth criteria and procedures to promote access to marine areas, including coastal waters, for research activities.

- The Convention facilitates solutions to the increasingly complex problems of the uses of the ocean—solutions that respect the essential balance between our interests as both a coastal and a maritime nation.

- Through its dispute settlement provisions, the Convention provides for mechanisms to enhance compliance by Parties with the Convention's provisions.

Notwithstanding these beneficial provisions of the Convention and bipartisan support for them, the United States decided not to sign the Convention in 1982 because of flaws in the regime it would have established for managing the development of mineral resources of the seabed beyond national jurisdiction (Part XI). It has been the consistent view of successive U.S. Administrations that this deep seabed mining regime was inadequate and in need of reform if the United States was ever to become a Party to the Convention.

Such reform has now been achieved. The Agreement, signed by the United States on July 29, 1994, fundamentally changes the deep seabed mining regime of the Convention. As described in the report of the Secretary of State, the Agreement meets the objections the United States and other industrialized nations previously expressed to Part XI. It promises to provide a stable and internationally recognized framework for mining to proceed in response to future demand for minerals.

Early adherence by the United States to the Convention and the Agreement is important to maintain a stable legal regime for all uses of the sea, which covers more than 70 percent of the surface of the globe. Maintenance of such stability is vital to U.S. national security and economic strength.

I therefore recommend that the Senate give early and favorable consideration to the Convention and to the Agreement and give its advice and consent to accession to the Convention and to ratification of the Agreement. Should the Senate give such advice and consent, I intend to exercise the options concerning dispute settlement recommended in the accompanying report of the Secretary of State.

WILLIAM J. CLINTON

## Submittal Letter

*Text of a letter from the Secretary of State to the President, September 23, 1994.*

*The President:*

I have the honor to submit to you the United Nations Convention on the Law of the Sea, with Annexes, done at Montego Bay, December 10, 1982 (the Convention), and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, with Annex, adopted at New York, July 28, 1994 (the Agreement), and signed by the United States on July 29, 1994, subject to ratification. I recommend that the Convention and the Agreement be transmitted to the Senate for its advice and consent to accession and ratification, respectively.

The Convention sets forth a comprehensive framework governing uses of the oceans. It was adopted by the Third United Nations Conference on the Law of the Sea (the Conference), which met between 1973 and 1982 to negotiate a comprehensive treaty relating to the law of the sea.

The Agreement, adopted by United Nations General Assembly Resolution A/RES/48/263 on July 28, 1994, contains legally binding changes to that part of the Convention dealing with the mining of the seabed beyond the limits of national jurisdiction (Part XI and related Annexes) and is to be applied and interpreted together with the Convention as a single instrument. The Agreement promotes universal adherence to the Convention by removing obstacles to acceptance of the Convention by industrialized nations, including the United States.

I also recommend that Resolution II of Annex I, governing preparatory investment in pioneer activities relating to polymetallic nodules, and Annex II, a statement of understanding concerning a specific method to be used in establishing the outer edge of the continental margin, of the Final Act of the

Third United Nations Conference on the Law of the Sea be transmitted to the Senate for its information.

### The Convention

The Convention provides a comprehensive framework with respect to uses of the oceans. It creates a structure for the governance and protection of all marine areas, including the airspace above and the seabed and subsoil below. After decades of dispute and negotiation, the Convention reflects consensus on the extent of jurisdiction that States may exercise off their coasts and allocates rights and duties among States.

The Convention provides for a territorial sea of a maximum breadth of 12 nautical miles and coastal State sovereign rights over fisheries and other natural resources in an Exclusive Economic Zone (EEZ) that may extend to 200 nautical miles from the coast. In so doing, the Convention brings most fisheries under the jurisdiction of coastal States. (Some 90 percent of living marine resources are harvested within 200 nautical miles of the coast.)

The Convention imposes on coastal States a duty to conserve these resources, as well as obligations upon all States to cooperate in the conservation of fisheries populations on the high seas and such populations that are found both on the high seas and within the EEZ (highly migratory stocks, such as tuna, as well as "straddling stocks"). In addition, it provides for special protective measures for anadromous species, such as salmon, and for marine mammals, such as whales.

The Convention also accords the coastal State sovereign rights over the exploration and development of non-living resources, including oil and gas, found in the seabed and subsoil of the continental shelf, which is defined to extend to 200 nautical miles from the coast or, where the continental margin extends beyond that limit, to the outer edge of the geological continental margin. It lays down specific criteria and procedures for determining the outer limit of the margin.

The Convention carefully balances the interests of States in controlling activities off their own coasts with those of all States in protecting the freedom to use ocean spaces without undue interference. It specifically preserves and elaborates the rights of military and commercial navigation and overflight in areas under coastal State jurisdiction and on the high seas beyond. It guarantees passage for all ships and aircraft through, under and over straits used for international navigation and archipelagos. It also guarantees the high seas freedoms of navigation, overflight and the laying and maintenance of submarine cables and pipelines in the EEZ and on the continental shelf.

For the non-living resources of the seabed beyond the limits of national jurisdiction (i.e., beyond the EEZ or continental margin, whichever is further seaward), the Convention establishes an international regime to govern exploration and exploitation of such resources. It defines the general conditions for access to deep seabed minerals by commercial entities and provides for the establishment of an international organization, the International Seabed Authority, to grant title to mine sites and establish necessary ground rules. The system was substantially modified by the 1994 Agreement, discussed below.

The Convention sets forth a comprehensive legal framework and basic obligations for protecting the marine environment from all sources of pollution, including pollution from vessels, from dumping, from seabed activities and from land-based activities. It creates a positive and unprecedented regime for marine environmental protection that will compel parties to come together to address issues of common and pressing concern. As such, the Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time.

The essential role of marine scientific research in understanding and managing the oceans is also secured. The Convention affirms the right of all States to conduct marine scientific research and sets forth obligations to

promote and cooperate in such research. It confirms the rights of coastal States to require consent for such research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that coastal States exercise the consent authority in a predictable and reasonable fashion to promote maximum access for research activities.

The Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, in providing options as to the appropriate means and fora for resolution of disputes, and comprehensive, in subjecting the bulk of the Convention's provisions to enforcement through binding mechanisms. The system also provides Parties the means of excluding from binding dispute settlement certain sensitive political and defense matters.

Further analysis of provisions of the Convention's 17 Parts, comprising 320 articles and nine Annexes, is set forth in the Commentary that is enclosed as part of this Report.

## The Agreement

The achievement of a widely accepted and comprehensive law of the sea convention—to which the United States can become a Party—has been a consistent objective of successive U.S. administrations for the past quarter century. However, the United States decided not to sign the Convention upon its adoption in 1982 because of objections to the regime it would have established for managing the development of seabed mineral resources beyond national jurisdiction. While the other Parts of the Convention were judged beneficial for U.S. ocean policy interests, the United States determined the deep seabed regime of Part XI to be inadequate and in need of reform before the United States could consider becoming Party to the Convention.

Similar objections to Part XI also deterred all other major industrialized nations from adhering to the Convention. However, as a result of the important international political and

economic changes of the last decade—including the end of the Cold War and growing reliance on free market principles—widespread recognition emerged that the seabed mining regime of the Convention required basic change in order to make it generally acceptable. As a result, informal negotiations were launched in 1990, under the auspices of the United Nations Secretary-General, that resulted in adoption of the Agreement on July 28, 1994.

The legally binding changes set forth in the Agreement meet the objections of the United States to Part XI of the Convention. The United States and all other major industrialized nations have signed the Agreement.

The provisions of the Agreement overhaul the decision-making procedures of Part XI to accord the United States, and others with major economic interests at stake, adequate influence over future decisions on possible deep seabed mining. The Agreement guarantees a seat for the United States on the critical executive body and requires a consensus of major contributors for financial decisions.

The Agreement restructures the deep seabed mining regime along free market principles and meets the U.S. goal of guaranteed access by U.S. firms to deep seabed minerals on the basis of reasonable terms and conditions. It eliminates mandatory transfer of technology and production controls. It scales back the structure of the organization to administer the mining regime and links the activation and operation of institutions to the actual development of concrete commercial interest in seabed mining. A future decision, which the United States and a few of its allies can block, is required before the organization's potential operating arm (the Enterprise) may be activated, and any activities on its part are subject to the same requirements that apply to private mining companies. States have no obligation to finance the Enterprise, and subsidies inconsistent with GATT are prohibited.

The Agreement provides for grandfathering the seabed mine site claims established on the basis of the exploration work already conducted by companies holding U.S. licenses on the

basis of arrangements "similar to and no less favorable than" the best terms granted to previous claimants; further, it strengthens the provisions requiring consideration of the potential environmental impacts of deep seabed mining.

The Agreement provides for its provisional application from November 16, 1994, pending its entry into force. Without such a provision, the Convention would enter into force on that date with its objectionable seabed mining provisions unchanged. Provisional application may continue only for a limited period, pending entry into force. Provisional application would terminate on November 16, 1998, if the Agreement has not entered into force due to failure of a sufficient number of industrialized States to become Parties. Further, the Agreement provides flexibility in allowing States to apply it provisionally in accordance with their domestic laws and regulations.

In signing the agreement on July 29, 1994, the United States indicated that it intends to apply the agreement provisionally pending ratification. Provisional application by the United States will permit the advancement of U.S. seabed mining interests by U.S. participation in the International Seabed Authority from the outset to ensure that the implementation of the regime is consistent with those interests, while doing so consistent with existing laws and regulations.

Further analysis of the Agreement and its Annex, including analysis of the provisions of Part XI of the Convention as modified by the Agreement, is also set forth in the Commentary that follows.

## Status of the Convention And the Agreement

One hundred and fifty-two States signed the Convention during the two years it was open for signature. As of September 8, 1994, 65 States had deposited their instruments of ratification, accession or succession to the Convention. The Convention will enter into force for these States on November 16, 1994, and thereafter for other States 30 days after deposit of their instruments of ratification or accession.

The United States joined 120 other States in voting for adoption of the Agreement on July 28, 1994; there were no negative votes and seven abstentions. As of September 8, 1994, 50 States and the European Community have signed the Agreement, of which 19 had previously ratified the Convention. Eighteen developed States have signed the Agreement, including the United States, all the members of the European Community, Japan, Canada and Australia, as well as major developing countries, such as Brazil, China and India.

### Relation to the 1958 Geneva Conventions

Article 311(1) of the LOS Convention provides that the Convention will prevail, as between States Parties, over the four Geneva Conventions on the Law of the Sea of April 29, 1958, which are currently in force for the United States: the Convention on the Territorial Sea and the Contiguous Zone, 15 UST 1606, TIAS. No. 5639, 516 UNTS 205 (entered into force September 10, 1964); the Convention on the High Seas, 13 UST. 2312, TIAS. No. 5200, 450 UNTS 82 (entered into force September 30, 1962); Convention on the Continental Shelf, 15 UST 471, TIAS No. 5578, 499 UNTS 311 (entered into force June 10, 1964); and the Convention on Fishing and Conservation of Living Resources of the High Seas, 17 UST 138, TIAS No. 5969, 559 UNTS 285 (entered into force March 20, 1966). Virtually all of the provisions of these Conventions are either repeated, modified, or replaced by the provisions of the LOS Convention.

### Dispute Settlement

The Convention identifies four potential fora for binding dispute settlement:

- The International Tribunal for the Law of the Sea constituted under Annex VI;
- The International Court of Justice;
- An arbitral tribunal constituted in accordance with Annex VII; and
- A special arbitral tribunal constituted in accordance with Annex VIII for specified categories of disputes.

A State, when adhering to the Convention, or at any time thereafter, is able to choose, by written declaration, one or more of these means for the settlement of disputes under the Convention. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree. If a Party has failed to announce its choice of forum, it is deemed to have accepted arbitration in accordance with Annex VII.

I recommend that the United States choose special arbitration for all the categories of disputes to which it may be applied and Annex VII arbitration for disputes not covered by the above, and thus that the United States make the following declaration:

The Government of the United States of America declares, in accordance with paragraph 1 of Article 287, that it chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention:

(A) a special arbitral tribunal constituted in accordance with Annex VIII for the settlement of disputes concerning the interpretation or application of the articles of the Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation, including pollution from vessels and by dumping, and

(B) an arbitral tribunal constituted in accordance with Annex VII for the settlement of disputes not covered by the declaration in (A) above.

Subject to limited exceptions, the Convention excludes from binding dispute settlement disputes relating to the sovereign rights of coastal States with respect to the living resources in their EEZs. In addition, the Convention permits a State to opt out of binding dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the United Nations Security Council is exercising the functions assigned to it by the Charter of the United Nations.

I recommend that the United States elect to exclude all three of these categories of disputes from binding dispute settlement, and thus that the United States make the following declaration:

The Government of the United States of America declares, in accordance with paragraph 1 of Article 298, that it does not accept the procedures provided for in section 2 of Part XV with respect to the categories of disputes set forth in subparagraphs (a), (b) and (c) of that paragraph.

### Recommendation

The interested Federal agencies and departments of the United States have unanimously concluded that our interests would be best served by the United States becoming a Party to the Convention and the Agreement.

The primary benefits of the Convention to the United States include the following:

- The Convention advances the interests of the United States as a global maritime power. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements and of commercial vessels to carry sea-going cargoes. It achieves this, *inter alia*, by stabilizing the breadth of the territorial sea at 12 nautical miles; by setting forth navigation regimes of innocent passage in the territorial sea, transit passage in straits used for international navigation, and archipelagic sea lanes passage; and by reaffirming the traditional freedoms of navigation and overflight in the EEZ and the high seas beyond.
- The Convention advances the interests of the United States as a coastal State. It achieves this, *inter alia*, by providing for an EEZ out to 200 nautical miles from shore and by securing our rights regarding resources and artificial islands, installations and structures for economic purposes over the full extent of the continental shelf. These provisions fully comport with U.S. oil and gas leasing practices, domestic management of coastal fishery resources, and international fisheries agreements.
- As a far-reaching environmental accord addressing vessel source pollution, pollution from seabed activities,

ocean dumping and land-based sources of marine pollution, the Convention promotes continuing improvement in the health of the world's oceans.

- In light of the essential role of marine scientific research in understanding and managing the oceans, the Convention sets forth criteria and procedures to promote access to marine areas, including coastal waters, for research activities.

- The Convention facilitates solutions to the increasingly complex problems of the uses of the ocean—solutions which respect the essential balance between our interests as both a coastal and a maritime nation.

- Through its dispute settlement provisions, the Convention provides for mechanisms to enhance compliance by Parties with the Convention's provisions.

- The Agreement fundamentally changes the deep seabed mining regime of the Convention. It meets the objections the United States and other industrialized nations previously expressed to Part XI. It promises to provide a stable and internationally recognized framework for mining to proceed in response to future demand for minerals.

The United States has been a leader in the international community's effort to develop a widely accepted international framework governing uses of the seas. As a Party to the Convention, the United States will be in a position to continue its role in this evolution and ensure solutions that respect our interests.

All interested agencies and departments, therefore, join the Department of State in unanimously recommending that the Convention and Agreement be transmitted to the Senate for its advice and consent to accession and ratification respectively. They further recommend that they be transmitted before the Senate adjourns *sine die* this fall.

The Department of State, along with other concerned agencies, stands ready to work with Congress toward enactment of legislation necessary to carry out the obligations assumed under the Convention and Agreement and to permit the United States to exercise rights granted by the Convention.

WARREN CHRISTOPHER

## Commentary—The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI

### INTRODUCTION

The United Nations Convention on the Law of the Sea, opened for signature on December 10, 1982 (the Convention or LOS Convention) creates a structure for the governance and protection of all of the sea, including the airspace above and the sea-bed and subsoil below. In particular, it provides a framework for the allocation of jurisdiction, rights and duties among States that carefully balances the interests of States in controlling activities off their own coasts and the interests of all States in protecting the freedom to use ocean spaces without undue interference.

This Commentary begins with a discussion of the maritime zones recognized by the Convention, emphasizing the rules regarding navigation and overflight in these areas. Next, the framework for the protection and preservation of the marine environment of these areas is examined. Thereafter, the Commentary reviews the regimes for dealing with the resources in these areas under the following headings:

- Living marine resources, including fishing;
- Non-living resources, including those of the continental shelf and the deep sea-bed beyond the limits of national jurisdiction; and,
- Marine scientific research.

The various mechanisms for settling disputes regarding these provisions are next examined. Finally, the Commentary considers other provisions of the Convention, including those relating to maritime boundary delimitation, enclosed and semi-enclosed seas, land-locked and geographically disadvantaged States, and technology transfer, as well as the definitions and the general and final provisions of the Convention.

### MARITIME ZONES

The Convention addresses the balance of coastal and maritime interests with respect to all areas of the sea. From the absolute sovereignty that every State exercises over its land territory and superjacent airspace, the exclusive rights and control that the coastal State exercises over maritime areas off its coast diminish in stages as the distance from the coastal State increases. Conversely, the rights and freedoms of maritime States are at their maximum in regard to activities on the high seas and gradually diminish closer to the coastal State. The balance of interests between the coastal State and maritime States thus varies in each zone recognized by the Convention.

The location of these zones under the Convention may be summarized as follows (and is illustrated in Figure 1).

Internal waters are landward of the baselines along the coast. They include lakes, rivers and many bays.

Archipelagic waters are encircled by archipelagic baselines established by independent archipelagic States.

The territorial sea extends seaward from the baselines to a fixed distance. The Convention establishes 12 nautical miles as the maximum permissible breadth of the territorial sea. (One nautical mile equals 1,852 meters or 6,067 feet; all further references to miles in this Commentary are to nautical miles.)

The contiguous zone, exclusive economic zone (EEZ) and continental shelf all begin at the seaward limit of the territorial sea.

The contiguous zone may extend to a maximum distance of 24 miles from the baselines.

The EEZ may extend to a maximum distance of 200 miles from the baselines.

The continental shelf may extend to a distance of 200 miles from the baselines or, if the continental margin extends beyond that limit, to the outer edge of the continental margin as defined by the Convention. The regime of the continental shelf applies to the sea-bed and subsoil and does not affect the status of the superjacent waters or airspace.

The regime of the high seas applies seaward of the EEZ; significant parts of that regime, including freedom of navigation and overflight, also apply within the EEZ.

The sea-bed beyond national jurisdiction, called the Area in the Convention, comprises the sea-bed and subsoil beyond the seaward limit of the continental shelf.

### Internal Waters

Article 8(1) defines internal waters as the waters on the landward side of the baseline from which the breadth of the territorial sea is measured. This definition carries forward the traditional definition of internal waters found in article 5 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, 15 UST 1606, TIAS No. 5639, 516 UNTS 205 (Territorial Sea Convention). The importance of baselines and the rules relating to them are discussed in the next section.

### Territorial Sea

Article 2 describes the territorial sea as a belt of ocean which is measured seaward from the baseline of the coastal State and subject to its sovereignty. This sovereignty also extends to the airspace above and to the sea-bed and subsoil. It is exercised subject to the Convention and other rules of international law relating to innocent passage, transit passage, archipelagic sea lanes passage and protection of the marine environment. Under article 3, the coastal State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 miles, measured from baselines determined in accordance with the Convention.

The adoption of the Convention has significantly influenced State practice. Prior to 1982, as many as 25 States claimed territorial seas broader than 12 miles (with attendant detriment to the freedoms of navigation and overflight essential to U.S. national security and commercial interests), while 30 States, including the United States, claimed a territorial sea of less than 12 miles. Since 1983, State practice in asserting territorial sea claims has largely coalesced around the 12 mile maximum breadth set by the Convention. As of January 1, 1994 128 States

claim a territorial sea of 12 miles or less; only 17 States claim a territorial sea broader than 12 miles.

Since 1988, the United States has claimed a 12 mile territorial sea (Presidential Proclamation 5928, December 27, 1988). Since the President's Ocean Policy Statement of March 10, 1983, the United States has recognized territorial sea claims of other States up to a maximum breadth of 12 miles.

### Contiguous Zone

Article 33 recognizes the contiguous zone as an area adjacent to the territorial sea in which the coastal State may exercise the limited control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occurs within its territory or territorial sea. Unlike the territorial sea, the contiguous zone is not subject to coastal State sovereignty; vessels and aircraft enjoy the same high seas freedom of navigation and overflight in the contiguous zone as in the EEZ. The maximum permissible breadth of the contiguous zone is 24 miles measured from the baseline from which the breadth of the territorial sea is measured.

In 1972, the United States claimed a contiguous zone beyond its territorial sea (historically claimed as 3 miles) out to 12 miles from the coastal baselines (Department of State Public Notice 358, 37 Federal Register 11,906). Since 1988, when the United States extended its territorial sea to 12 miles, the U.S. contiguous zone and territorial sea claims have thus been coterminous. Under the Convention, the United States could set the seaward limit of its contiguous zone at 24 miles, enhancing its ability to deal with illegal immigration, drug trafficking by sea and public health matters.

### Exclusive Economic Zone (EEZ)

The establishment of the EEZ in the Convention represents a substantial change in the law of the sea. The underlying purpose of the EEZ regime is to balance the rights of coastal States, such as the United States, to resources

*[Graphic Not Available on CD-ROM Version of Dispatch]*

Figure 1. The Legal Regimes and Geomorphic Regions

(e.g., fisheries and offshore oil and gas) and to protect the environment off their coasts with the interests of all States in preserving other high seas rights and freedoms.

Article 55 defines the EEZ as an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in Part V, which elaborates the jurisdiction, rights and duties of the coastal State and the rights, freedoms and duties of other States. Pursuant to article 56, the coastal State exercises sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the EEZ, whether living or non-living. It also has significant rights in the EEZ with respect to scientific research and the protection and preservation of the marine environment. The coastal State does not have sovereignty over the EEZ, and all States enjoy the high seas freedoms of navigation, overflight, laying and maintenance of submarine cables and pipelines, and related uses in the EEZ, compatible with other Convention provisions. However, all States have a duty, in the EEZ, to comply with the laws and regulations adopted by the coastal State in accordance with the Convention and other compatible rules of international law.

Article 57 requires the seaward limit of the EEZ to be no more than 200 miles from the baseline from which the breadth of the territorial sea is measured. The United States declared its EEZ with this limit by Presidential Proclamation 5030 on March 10, 1983. Congress incorporated the claim in amending the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.*, Pub. L. 99-659.

As of March 1, 1994, 93 States claim an EEZ. No State claims an EEZ beyond 200 miles from its coastal baselines, although, as discussed below in the section on navigation and overflight, several States claim the right to restrict activities within their EEZs beyond that which the Convention authorizes.

The EEZ of the United States is among the largest in the world, extending through considerable areas of the Atlantic, Pacific and Arctic Oceans, in-

cluding those around U.S. insular territories. From the perspective of managing and conserving resources off its coasts, the United States gains more from the provisions on the EEZ in the Convention than perhaps any other State.

### High Seas

Pursuant to article 86, the regime of the high seas applies seaward of the EEZ. The Convention elaborates the regime of the high seas, including the principles of the freedom of the high seas, as it developed over centuries, and supplements the regime with new safety and environmental requirements and express recognition of the freedom of scientific research. As discussed below in connection with living marine resources, the Convention makes the right to fish on the high seas subject to significant additional requirements relating to conservation and to certain rights, duties and interests of coastal States.

### Continental Shelf

Pursuant to article 76, 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 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. The coastal State alone exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. The natural resources of the continental shelf consist of the mineral and other non-living resources of the sea-bed and subsoil together with the living organisms belonging to sedentary species. Substantial deposits of oil and gas are located in the continental shelf off the coasts of the United States and other countries.

### The Sea-bed Beyond National Jurisdiction

The Convention defines as the Area the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. Possible exploration and development of the mineral resources found at or beneath the sea-bed of the Area are to be undertaken pursuant to the international regime established by the Convention, as revised by the Agreement, on the basis of the principle that these resources are the common heritage of mankind. The Area remains open to use by all States for the exercise of high seas freedoms for defense, scientific research, telecommunications and other purposes.

### Airspace

The Convention does not treat airspace as distinct zones. However, its provisions affirm that the sovereignty of a coastal State extends to the airspace over its land territory, internal waters and territorial sea. The breadth of territorial airspace is necessarily the same as the breadth of the underlying territorial sea. International airspace begins at the outer limit of the territorial sea.

### BASELINES

A State's maritime zones are measured from the baseline. The rules for drawing baselines are contained in articles 5 through 11, 13 and 14 of the Convention. These rules distinguish between *normal* baselines (following the low-water mark along the coast) and *straight* baselines (which can be employed only in specified geographical situations). The baseline rules take into account most of the wide variety of geographical conditions existing along the coastlines of the world.

Baseline claims can extend maritime jurisdiction significantly seaward in a manner that prejudices navigation, overflight and other interests. Objective application of baseline rules contained in the Convention can help prevent excessive claims in the future and encourage governments to revise existing claims to conform to the relevant criteria.

## Normal Baseline

Pursuant to article 5, the normal baseline used for measuring the breadth of the territorial sea is the low-water line along the coast. U.S. practice is consistent with this rule.

**Reefs.** In accordance with article 6, in the case of islands situated on atolls or of islands having fringing reefs, the normal baseline is the seaward low-water line on the drying reef charted as being above the level of chart datum. While the Convention does not address reef closing lines, any such line is not to adversely affect rights of passage, freedom of navigation, and other rights for which the Convention provides.

## Straight Baselines

**Purpose.** The purpose of authorizing the use of straight baselines is to allow the coastal State, at its discretion, to enclose those waters which, as a result of their close interrelationship with the land, have the character of internal waters. By using straight baselines, a State may also eliminate complex patterns, including enclaves, in its territorial sea, that would otherwise result from the use of normal baselines in accordance with article 5. Properly drawn straight baselines do not result in extending the limits of the territorial sea significantly seaward from those that would result from the use of normal baselines.

With the advent of the EEZ, the original reason for straight baselines (protection of coastal fishing interests) has all but disappeared. Their use in a manner that prejudices international navigation, overflight, and communications interests runs counter to the thrust of the Convention's strong protection of these interests. In light of the modernization of the law of the sea in the Convention, it is reasonable to conclude that, as the Convention states, straight baselines are not normal baselines, straight baselines should be used sparingly, and, where they are used, they should be drawn conservatively to reflect the one rationale for their use that is consistent with the Convention, namely the simplification and rationalization of the measurement of the territorial sea and other maritime zones off highly irregular coasts.

**Areas of Application.** Straight baselines, in accordance with article 7, may be used only in two specific geographic circumstances, that is, (a) in localities where the coastline is deeply indented and cut into, or (b) if there is a fringe of islands along the coast in the immediate vicinity of the coast. Even if these basic geographic criteria exist in any particular locality, the coastal State is not obliged to employ the method of straight baselines, but may (like the United States and other countries) instead continue to use the normal baseline and permissible closing lines across the mouths of rivers and bays.

### “Localities Where the Coastline Is Deeply Indented and Cut Into.”

“Deeply indented and cut into” refers to a very distinctive coastal configuration. The United States has taken the position that such a configuration must fulfill all of the following characteristics:

- In a locality where the coastline is deeply indented and cut into, there exist at least three deep indentations;
- The deep indentations are in close proximity to one another; and
- The depth of penetration of each deep indentation from the proposed straight baseline enclosing the indentation at its entrance to the sea is, as a rule, greater than half the length of that baseline segment.

The term “coastline” is the mean low-water line along the coast; the term “localities” refers to particular segments of the coastline.

**“Fringe of Islands Along the Coast in the Immediate Vicinity of the Coast.”** “Fringe of islands along the coast in the immediate vicinity of the coast” refers to a number of islands, within the meaning of article 121(1). The United States has taken the position that a such a fringe of islands must meet all of the following requirements:

- The most landward point of each island lies no more than 24 miles from the mainland coastline;
- Each island to which a straight baseline is to be drawn is not more than 24 miles apart from the island from which the straight baseline is drawn; and

- The islands, as a whole, mask at least 50% of the mainland coastline in any given locality.

### Criteria for Drawing Straight Baseline Segments.

The United States has taken the position that, to be consistent with article 7(3), straight baseline segments must:

- Not depart to any appreciable extent from the general direction of the coastline, by reference to general direction lines which in each locality shall not exceed 60 miles in length;
- Not exceed 24 miles in length; and
- Result in sea areas situated landward of the straight baseline segments that are sufficiently closely linked to the land domain to be subject to the regime of internal waters.

**Minor Deviations.** Straight baselines drawn with minor deviations from the foregoing criteria are not necessarily inconsistent with the Convention.

**Economic Interests.** Economic interests alone cannot justify the location of particular straight baselines. In determining the alignment of particular straight baseline segments of a baseline system which satisfies the deeply indented or fringing islands criteria, in accordance with article 7(5), only those economic interests may be taken into account which are peculiar to the region concerned and only when the reality and importance of the economic interests are clearly evidenced by long usage.

**Basepoints.** Except as noted in article 7(4), basepoints for all straight baselines must be located on land territory and situated on or landward of the low-water line. No straight baseline segment may be drawn to a basepoint located on the land territory of another State.

**Use of Low-tide Elevations as Basepoints in a System of Straight Baselines.** In accordance with article 7(4), only those low-tide elevations which have had built on them light-houses or similar installations may be used as basepoints for establishing straight baselines. Other low-tide elevations may not be used as basepoints unless the drawing of baselines to and

from them has received general international recognition. The United States has taken the position that "similar installations" are those that are permanent, substantial and actually used for safety of navigation and that "general international recognition" includes recognition by the major maritime users over a period of time.

**Effect on Other States.** Article 7(6) provides that a State may not apply the system of straight baselines in such a manner as to cut off the territorial sea of another State from the high seas or an EEZ. In addition, article 8(2) provides that, where the establishment of a straight baseline 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 the Convention shall exist in those waters. Article 35(a) has the same effect with respect to the right of transit passage through straits.

**Unstable Coastlines.** As provided in article 7(2), where a coastline, which is deeply indented and cut into or fringed with islands in its immediate vicinity, is also highly unstable because of the presence of a delta or other natural conditions, the appropriate basepoints may be located along the furthest seaward extent of the low-water line. The straight baseline segments drawn joining these basepoints remain effective, notwithstanding subsequent regression of the low-water line, until the baseline segments are changed by the coastal State in accordance with international law reflected in the Convention.

### Other Baseline Rules

**Low-tide Elevations.** Under article 13, the low-water line on a low-tide elevation may be used as the baseline for measuring the breadth of the territorial sea only where that elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea measured from the mainland or an island. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, even if it is within that distance measured from a

straight baseline or bay closing line, it has no territorial sea of its own. Low-tide elevations can be mud flats, or sand bars.

**Combination of Methods.** Article 14 authorizes the coastal State to determine each baseline segment using any of the methods permitted by the Convention that suit the specific geographic condition of that segment, i.e., the methods for drawing normal baselines, straight baselines, or closing lines (discussed below).

**Harbor Works.** In accordance with article 11, only those permanent man-made harbor works which form an integral part of a harbor system, such as jetties, moles, quays, wharves, breakwaters and sea walls, may be used as part of the baseline for delimiting the territorial sea.

**Mouths of Rivers.** If a river flows directly into the sea without forming an estuary, pursuant to article 9, the baseline shall be a straight line drawn across the mouth of the river between points on the low-water line of its banks. If the river forms an estuary, the baseline is determined under the provisions relating to juridical bays.

## BAYS AND OTHER FEATURES

### Juridical Bays

A "juridical bay" is a bay meeting the criteria of article 10(2). Such a bay is a well-marked indentation on the coast 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 is not a juridical 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.

For the purpose of measurement, article 10(3) provides that the indentation is that area 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 semi-circle 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 for satisfaction of the semi-circle test.

Under article 10(4), if the distance between the low-water marks of the natural entrance points of a juridical bay of a single State does not exceed 24 miles, the juridical bay may be defined by drawing a closing line between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters. Where the distance between the low-water marks exceed 24 miles, a straight baseline of 24 miles shall be drawn within the juridical bay in such a manner as to enclose the maximum area of water that is possible within a line of that length.

### Historic Bays

Article 10(6) exempts so-called historic bays from the rules described above. To meet the standard of customary international law for establishing a claim to a historic bay, a State must demonstrate its open, effective, long-term, and continuous exercise of authority over the bay, coupled with acquiescence by foreign States in the exercise of that authority. An actual showing of acquiescence by foreign States in such a claim is required, as opposed to a mere absence of opposition. The United States has in the past claimed Delaware Bay and the Chesapeake Bay as historic. These bodies also satisfy the criteria for juridical bays reflected in the Convention.

### Charts and Publication

Article 16(1) requires that the normal baseline be shown on large-scale nautical charts, officially recognized by the coastal State. Alternatively, the coastal State must provide a list of geographic coordinates specifying the geodetic data. The United States depicts its baseline on official charts with scales ranging from 1:80,000 to about 1:200,000. Drying reefs used for

locating basepoints shall be shown by an internationally accepted symbol for depicting such reefs on nautical charts, pursuant to article 6.

To comply with article 16(2), the coastal State must give due publicity to such charts or lists of geographical coordinates, and deposit a copy of each such chart or list with the Secretary-General of the United Nations.

Closure lines for bays meeting the semi-circle test must be given due publicity, either by chart indications or by listed geographic coordinates.

## Islands

Article 121(1) defines an island as a naturally formed area of land, surrounded by water, which is above water at high tide. Baselines are established on islands, and maritime zones are measured from those baselines, in the same way as on other land territory. In addition, as previously indicated, there are special rules for using islands in drawing straight baselines and bay closing lines, and even low-tide elevations (which literally do not rise to the status of islands) may be used as basepoints in specified circumstances. These special rules are not affected by the provision in article 121(3) that rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf.

## Artificial Islands and Off-shore Installations

Pursuant to articles 11, 60(8), 147(2) and 259, artificial islands, installations and structures (including such man-made objects as oil drilling rigs, navigational towers, and off-shore docking and oil pumping facilities) do not possess the status of islands, and may not be used to establish baselines, enclose internal waters, or establish or measure the breadth of the territorial sea, EEZ or continental shelf. Articles 60, 177(2), and 260 provide criteria for establishing safety zones of limited breadth to protect artificial islands, installations and structures and the safety of navigation in their vicinity.

## Roadsteads

Article 12 provides that roadsteads normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly beyond the outer limits of the territorial sea, are included within the territorial sea. Roadsteads included within the territorial sea must be clearly marked on charts by the coastal State. Only the roadstead itself is territorial sea; roadsteads do not generate territorial seas around themselves; the presence of a roadstead does not change the legal status of the water surrounding it.

## NAVIGATION AND OVERFLIGHT

### Internal Waters, Territorial Sea, Straits, Archipelagic States, Exclusive Economic Zone, And High Seas (Parts II-V, VII)

Parts II-V and VII of the Convention contain a critical, effective and delicate balance between the interests of the international community in maintaining the freedom of navigation and those of coastal States in their offshore areas. As discussed in the previous section of this Commentary, the Convention creates a distinct legal regime for each maritime zone. This section analyzes the rules set forth in each of these regimes regarding the rights, duties and jurisdiction of coastal States and maritime States relating to navigation and overflight.

The maritime zones off the coasts of the United States are among the largest and most economically productive in the world. The United States also remains the world's preeminent maritime power. Accordingly, the importance to the United States in maintaining the complex balance of interests represented by these provisions of the Convention cannot be overstated.

There are five elements of the Convention essential to the maintenance of this balance from the perspective of navigation, overflight, telecommunications, and related uses:

- The rules for enclosing internal waters and archipelagic waters within baselines, and the prohibition on territorial sea claims beyond 12 miles from those baselines;

- The express protection for and accommodation of passage rights through internal waters, the territorial sea, and archipelagic waters, including transit passage of straits and archipelagic sea lanes passage, as well as innocent passage;

- The express protection for and accommodation of the high seas freedoms of navigation, overflight, laying and maintenance of submarine cables and pipelines, and related uses beyond the territorial sea, including broad areas where there are substantial coastal State rights and jurisdiction, such as the EEZ and the continental shelf;

- The prohibition on regional arrangements in areas that restrict the exercise of these rights and freedoms by third States without their consent; and

- The right to enforce this balance through arbitration or adjudication.

Rights, freedoms and jurisdiction recognized and established by the Convention are subject to Part XII of the Convention on the Protection and Preservation of the Marine Environment, discussed below. This includes the duty of the flag State to ensure that its ships comply with international pollution control standards, and the rule of sovereign immunity set forth in article 236.

## Internal Waters

Internal waters are those landward of the baseline. Article 2 makes clear the generally recognized rule that coastal State sovereignty extends to internal waters. In articles 218 and 220, the Convention adds to general notions of sovereignty and jurisdiction over internal waters by expressly authorizing port State enforcement action within internal waters for pollution violations that have occurred elsewhere. This authorization does not imply any limitation on other enforcement actions that coastal States may choose to exercise in their ports or other internal waters.

Subject to ancient customs regarding the entry of ships in danger or distress (*force majeure*) and the exception noted below, the Convention does not limit the right of the coastal State

to restrict entry into or transit through its internal waters, port entry, imports or immigration.

The exception to the right of the coastal State to deny entry into or transit through its internal waters is found in article 8(2), which provides:

When the establishment of a straight baseline . . . 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.

If a foreign flag vessel is found in a coastal State's internal waters without its permission, the full range of reasonable enforcement procedures is available against a foreign commercial vessel. With respect to foreign warships and other government ships on non-commercial service, which are immune from the enforcement jurisdiction of all States except the flag State, it may be inferred that a coastal State may require such a vessel to leave its internal waters immediately (cf. article 30). In addition, a port State has the right to refuse to permit foreign ships from entering or remaining within its internal waters.

## Territorial Sea

**Right of Innocent Passage.** One of the fundamental tenets in the international law of the sea is that all ships enjoy the right of innocent passage through another State's territorial sea. (Innocent passage does not include a right of overflight or submerged passage.) This principle finds expression in article 17, and is developed further throughout Section 3 of Part II of the Convention (articles 17-32). These precise and objective rules governing innocent passage represent a significant advance in development of law of the sea concepts.

The Convention defines "passage" (article 18) and "innocent passage" (article 19), and lists those activities considered to be non-innocent or "prejudicial to the peace, good order or security of the coastal State" (article 19(2)(a)-(l)).

The definition of passage in article 18 is essentially the same as that in article 14(2) and (3) of the Territorial Sea Convention. Three new elements appear in article 18. First, the Convention recognizes that ports of a coastal State may be located outside that State's internal waters (as, for example, a roadstead or an offshore deep water port). Second, the Convention makes explicit that passage through the territorial sea must be continuous and expeditious. Third, the Convention provides that passage includes stopping and anchoring for the purpose of rendering assistance to persons, ships or aircraft in danger or distress, thereby expanding upon the customary right of "assistance entry."

Article 19(2) adds to the basic definition of innocent passage, i.e., that passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State, an all-inclusive list of activities considered to be prejudicial to the peace, good order, and security, and therefore inconsistent with innocent passage. (Such activities do not include the use of equipment employed to protect the safety or security of the ship.) This list provides criteria by which States can determine whether a particular passage is innocent.

Article 19(2) refers to activities that occur in the territorial sea. This means that any determination of non-innocence of passage by a transiting ship must be made on the basis of acts it commits while in the territorial sea. Thus cargo, means of propulsion, flag, origin, destination, or purpose of the voyage cannot be used as criteria in determining that the passage is not innocent. This point is of major national security significance, in particular because some 40 percent of U.S. Navy combatant ships use nuclear propulsion.

Article 20 requires that submarines and other underwater vehicles must navigate on the surface and show their flag while in the territorial sea, unless the coastal State decides to waive that requirement (as has been done in the NATO context).

Article 25(1) authorizes the coastal State to take appropriate measures in the territorial sea to prevent passage

that is not innocent. Pursuant to Article 25(2), the coastal State also may take the measures necessary to prevent any breach of the conditions for admission of foreign ships to internal waters, as well as calls at a port facility outside internal waters.

Article 21(4) requires foreign ships exercising the right of innocent passage to comply with the laws and regulations enacted by the coastal State in conformity with the Convention, as well as all generally accepted international regulations relating to the prevention of collisions at sea. Subject to the provisions regarding ships entitled to sovereign immunity, this duty applies to all ships. However, the Convention provides no authority for a coastal State to condition the exercise of the right of innocent passage by any ships, including warships, on the giving of prior notification to or the receipt of prior permission from the coastal State.

Articles 21-24 add new and useful details regarding the rights and duties of coastal States and foreign ships. For purposes such as resource conservation, environmental protection, and navigational safety, a coastal State may establish certain restrictions upon the right of innocent passage of foreign vessels, as set out in article 21. This list is essentially new in the Convention and is exhaustive.

Such restrictions must be reasonable and necessary and not have the practical effect of denying or impairing the right of innocent passage. Article 24(1) provides that the restrictions must not discriminate in form or in fact against the ships of any State or those carrying cargoes to, from, or on behalf of any State. Pursuant to article 22, the coastal State may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage to utilize designated sea lanes and traffic separation schemes; tankers, nuclear powered vessels, and ships carrying dangerous or noxious substances may be required to utilize such designated sea lanes. Article 23 requires such ships, when exercising innocent passage, to carry

documents and observe special precautionary measures established for such ships by international agreements, including the International Convention for the Safety of Life at Sea, 1974, 32 UST 47, TIAS No. 9700 (SOLAS).

Article 21(2) imposes an additional limitation, that such laws and regulations shall not apply to the design, construction, manning, or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards established by the International Maritime Organization (IMO). This rule does not affect the right of the coastal State to establish and enforce its own requirements for port entry, or preclude cooperation between coastal States to enforce their respective port entry requirements. States may also agree to establish higher standards for their ships or for trade between them.

Article 24(2) requires the coastal State to give appropriate publicity to any dangers to navigation of which it has knowledge within its territorial sea.

Article 26 provides that no charge (such as a transit fee) may be levied upon foreign ships by reason only of their passage through the territorial sea. The only charges which may be levied are for specific services rendered to the ship, and any such charges must be levied without discrimination.

**Temporary Suspension of Innocent Passage.** Article 25(3) provides that:

the coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

The prohibition against discrimination "in form or in fact" is designed to protect against acts which overtly discriminate in a manner that is prohibited by the article (discrimination "in form") and also against acts that, although not overtly discriminatory, have a discriminatory effect (discrimination "in fact"). "Weapons exercises" includes weapons testing.

**Rules Applicable to Merchant Ships and Government Ships Operated for Commercial Purposes (Articles 27 and 28).** Article 27, concerning criminal jurisdiction on board a foreign ship, and article 28, concerning civil jurisdiction in relation to foreign ships, are taken almost verbatim from articles 19 and 20 of the Territorial Sea Convention, respectively, but have been expanded to include the regime of the EEZ and the rules of Part XII on the protection and preservation of the marine environment introduced by the Convention.

**Rules Applicable to Warships and Other Government Ships Operated for Non-commercial Purposes (Articles 29 to 32).** Warships are defined in article 29 for the purposes of the Convention as a whole, including articles 95, 107, 110, 111 and 236. The Convention expands upon earlier definitions, no longer requiring that such a ship belong to the "naval" forces of a nation, under the command of an officer whose name appears in the "Navy list" and manned by a crew who are under regular "naval" discipline. Article 29 instead refers to "armed forces" to accommodate the integration of different branches of the armed forces in various countries, the operation of seagoing craft by some armies and air forces, and the existence of a coast guard as a separate unit of the armed forces of some nations, such as the United States.

Under article 30, the sole recourse available to a coastal State in the event of noncompliance by a foreign warship with that State's laws and regulations regarding innocent passage is to require the warship to leave the territorial sea immediately.

Article 31 provides that the flag State bears international responsibility for any loss or damage caused by its warships or other government ships operated for non-commercial purposes to a coastal State as a result of noncompliance with applicable law. This provision is consistent with the modern rules of State responsibility in cases of State immunity.

Article 32 provides, in effect, that the only rules in the Convention derogating from the immunities of warships and government ships operated for non-commercial purposes are those found in articles 17-26, 30 and 31.

### **Straits Used for International Navigation (Part III, Articles 34-39, 41-45)**

The navigational provisions of the Convention concerning international straits are fundamental to U.S. national security interests. Merchant ships and cargoes, civil aircraft, naval ships and task forces, military aircraft, and submarines must be able to transit international straits freely in their normal mode as a matter of right, and not at the sufferance of the States bordering straits. The United States has consistently made clear throughout its history that it is not prepared to secure these rights through bilateral arrangements. The continuing U.S. position is that these rights must form an explicit part of the law of the sea. Part III of the Convention guarantees these rights.

With the expansion of the maximum permissible breadth of the territorial sea from 3 to 12 miles, it was necessary to develop stronger guarantees for navigation and overflight on, over, and under international straits. Such rules were critical to maintain the essential balance of interests between States bordering straits and other concerned States.

Part III applies to all straits used for international navigation, regardless of width, including their approaches, unless there is a high seas/EEZ route through the strait of similar convenience with respect to navigational and hydrographic characteristics. Part III applies three legal regimes to different kinds of straits used for international navigation.

Transit passage applies to straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ (article 37), except as noted below. The great majority of strategically important straits, e.g., Gibraltar, Bonifacio, Bab el Mandeb, Hormuz,

Malacca, Singapore, Sunda, Lombok, and the Northeast, Northwest, and Windward Passages fall into this category. However, it is use for international navigation, not importance, that is the basic legal criterion, as described below.

Archipelagic sea lanes passage replaces transit passage as the relevant regime that applies to straits within archipelagic waters and the adjacent territorial sea, where archipelagic waters affecting such straits are established in accordance with Part IV of the Convention. This would be the situation, for example, in the Sunda and Lombok straits were Indonesia to designate archipelagic sea lanes. Transit passage applies to routes through islands groups to which the provisions regarding archipelagic waters do not apply.

Non-suspendable innocent passage applies to straits connecting a part of the high seas/EEZ and the territorial sea of a foreign State (article 45(1)(b)), and to straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ where the strait is formed by an island of a State bordering the strait and its mainland, if there exists seaward of the island a route through the high seas/EEZ of similar convenience with regard to navigation and hydrographic characteristics (article 38(1)).

In addition, the Convention does not alter the legal regime in straits regulated by long-standing international conventions in force specifically relating to such straits. This provision refers to the Turkish Straits (the Bosphorus and Dardanelles, connecting the Black Sea and the Aegean Sea via the Sea of Marmara) and the Strait of Magellan.

**Transit Passage.** Part III of the Convention protects long-standing navigation and overflight rights in international straits through the concept of transit passage. This is the regime governing the right of free navigation and overflight for ships and aircraft in transit in, over, and under straits used for international navigation. Recognition of such a right was a fundamental requirement for a successful Convention. With the extension by coastal

States of their territorial seas to 12 miles, over 100 straits, which previously had high seas corridors, became overlapped by such territorial seas. Without provision for transit passage, navigation and overflight rights in those straits would have been compromised.

Read together, articles 38(2) and 39(1)(c) define transit passage as the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit in the normal modes of operation utilized by ships and aircraft for such passage. For example, submarines may transit submerged and military aircraft may overfly in combat formation and with normal equipment operation; surface warships may transit in a manner necessary for their security, including formation steaming and the launching and recovery of aircraft, where consistent with sound navigational practices. Article 38(3) provides that any activity which is not an exercise of the right of transit passage remains subject to the other applicable provisions of the Convention.

Under article 44, a State bordering an international strait may not suspend transit passage through international straits for any purpose, including military exercises. Further, article 42(2) requires that the laws and regulations of the State bordering a strait relating to transit passage not be applied so as to have the practical effect of denying, hampering or impairing the right of transit passage.

**Innocent Passage in International Straits.** Under article 45(1)(b), the regime of innocent passage, rather than transit passage, applies in straits used for international navigation that connect a part of the high seas or an EEZ with the territorial sea of a coastal State. There may be no suspension of innocent passage through such straits, and there is no right of overflight in such straits. These so-called "dead-end" straits include Head Harbour Passage leading through Canadian territorial sea to the United States' Passamaquoddy Bay.

Under articles 38(1) and 45(1)(a), the regime of non-suspendable innocent passage also applies in those straits formed by an island of a State bordering the strait and its mainland, where

there exists seaward of the island a route through the high seas or EEZ of similar convenience with regard to navigational and hydrographical characteristics.

**International Straits Not Completely Overlapped by Territorial Seas.** The effect of article 36 is that ships and aircraft transiting through or above straits used for international navigation which are not completely overlapped by territorial seas and through which there is a high seas or EEZ corridor suitable for such navigation enjoy the high seas freedom of navigation and overflight while operating in and over such a corridor.

Moreover, if the high seas route is not of similar convenience with respect to navigational or hydrographical characteristics, the regime of transit passage applies within such straits. Thus, for example, a submarine may transit submerged through the territorial sea in a strait not completely overlapped by territorial seas where the territorial sea route is the only one deep enough for submerged transit.

**"Straits Used for International Navigation."** Under the Convention, the criteria in identifying an international strait is not the name, the size or length, the presence or absence of islands or multiple routes, the history or volume of traffic flowing through the strait, or its relative importance to international navigation. Rather, the decisive criterion is its geography: The fact that it is capable of being used for international navigation to or from the high seas or the EEZ.

The geographical definition contemplates a natural strait and not an artificially constructed canal. Thus, the transit passage regime does not apply to the Panama and Suez Canals.

**Legal Status of Waters Forming International Straits.** The regime of passage through international straits does not affect the legal status of these waters or the sovereignty or jurisdiction of the States bordering straits (article 34(1)). Article 34(2) requires States bordering straits to exercise their sovereignty and jurisdiction in accordance with Part III and other rules of international law. States bordering straits must not impede the right of transit passage.

**Rights and Duties of States Bordering Straits.** Articles 41-44 address the rights and duties of States bordering straits relating to a number of topics, including navigational safety and the prevention, reduction, and control of pollution from ships engaged in transit passage.

Pursuant to article 41, States bordering straits may designate sea lanes and prescribe traffic separation schemes to promote navigational safety. However, such sea lanes and separation schemes must conform to generally accepted international standards and be approved by the competent international organization (i.e., the IMO) before the sea lanes and traffic separation schemes may be put into effect. Ships in transit must respect properly designated sea lanes and traffic separation schemes. Such traffic separation schemes now exist in strategic straits such as Hormuz, Gibraltar and Malacca.

Article 42 specifically authorizes States bordering straits to adopt non-discriminatory laws and regulations relating to transit passage through straits in respect of the safety of navigation and regulation of maritime traffic as provided in article 41; the prevention, reduction and control of pollution by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait (i.e., the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, with annexes (95th Cong., 1st Sess., Sen. Ex. E, 96th Cong., 1st Sess., Sen. Ex. C (MARPOL) and any applicable regional agreement); the prevention of fishing, including the stowage of fishing gear by fishing vessels; and the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits. Due publicity must be given to these laws and regulations, and foreign ships exercising the right of transit passage are required by article 42(4) to comply with them (subject to the provisions of the Convention regarding ships entitled to sovereign immunity).

Article 43 encourages users and States bordering straits to cooperate by agreement in the establishment and maintenance of necessary navigational or safety aids in the strait, and in other improvements in aid of international navigation, and for the prevention, reduction and control of pollution from ships. The IMO has been active in promoting such cooperation.

**Duties of Ships and Aircraft During Transit Passage (Article 39).** Article 39(1) defines the common duties both ships and aircraft have while exercising the right of transit passage. They include the duty to proceed without delay through or over the strait, to refrain from the threat or use of force against States bordering straits, to refrain from any activities other than those incident to their normal modes of continuous and expeditious transit (unless rendered necessary by *force majeure* or by distress), and to comply with other relevant provisions of Part III.

In addition, ships in transit passage are required by article 39(2) to comply with the International Regulations for Preventing Collisions at Sea, 1972, 28 UST 3459, TIAS No. 8587 (COLREGS), and other generally accepted international regulations, procedures and practices for safety at sea and for the prevention, reduction and control of pollution from ships (i.e., those adopted by the IMO).

Aircraft in transit passage are required to observe the ICAO Rules of the Air (Annex 2 to the International Convention on Civil Aviation (61 Stat. 1180, TIAS No. 1591, 15 UNTS 295 (Chicago Convention)), as they apply to civil aircraft. Article 39(3)(a) states that State aircraft will normally comply with such safety measures and operate at all times with due regard for the safety of navigation, as required by article 3(d) of the Chicago Convention. Aircraft in transit passage are also required to maintain a continuous listening watch on the appropriate frequency.

## Archipelagic States (Part IV, Articles 46-54)

Part IV represents a successful resolution, following years of controversy, of the effort, led by Indonesia and the Philippines, to achieve a special regime for archipelagic States. The United States and other maritime States were willing to recognize the concept of archipelagic States only if its application were limited and precisely defined and did not impede rights of navigation and overflight. In effect, the concept of archipelagic States creates a geographic situation requiring the same kind of solution as transit passage of straits, i.e., the right of navigation and overflight on, over, and under the waters enclosed. Acceptance of this principle guarantees critical U.S. military and commercial navigation rights.

Article 46 describes an archipelagic State as one "constituted wholly by one or more archipelagos" and may include other islands. It defines an "archipelago" as a:

group of islands, including parts of islands, inter-connecting 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.

Thus, the special regime of Part IV only applies to island States; a continental State may not claim archipelagic waters.

**Archipelagic Baselines.** A State may enclose archipelagic waters within archipelagic baselines that satisfy the criteria specified in article 47. Depending on how the archipelagic baseline system is established, the following 20 States could legitimately claim archipelagic waters: Antigua & Barbuda, The Bahamas, Cape Verde, Comoros, Fiji, Grenada, Indonesia, Jamaica, Kiribati (in part), Maldives, Marshall Islands (in part), Papua New Guinea, Philippines, Saint Vincent and the Grenadines, Sao Tome & Principe, Seychelles, Solomon Islands (five archipelagos), Tonga, Trinidad & Tobago, and Vanuatu.

The legal status of archipelagic waters, of the air space over archipelagic waters, and of their bed and subsoil is described in article 49. Article 51 addresses existing agreements, traditional fishing rights, and existing submarine cables. Archipelagic States measure the breadth of their various maritime zones from the archipelagic baselines. They may also draw closing lines delimiting internal waters of individual islands following the rules set out in articles 9-11.

**Navigation and Overflight in Archipelagos.** The right to navigate on, under, and over archipelagic waters by all kinds of ships and aircraft was a critical goal of the United States during the negotiations leading to the Convention. As with respect to the right of transit passage through international straits, the result of the negotiation fully protects this right.

Archipelagic sea lanes passage is very similar to the concept of transit passage. Article 53(3) defines archipelagic sea lanes passage as the exercise of the rights of navigation and overflight in the normal mode solely for the purpose of "continuous, expeditious and unobstructed transit" through archipelagic waters. For example, submarines may transit submerged and military aircraft may overfly in combat formation and with normal equipment operation; surface warships may transit in a manner necessary for their security, including formation steaming and the launching and recovery of aircraft, where consistent with sound navigational practices. The provisions regarding the width of archipelagic sea lanes were specifically designed to accommodate defensive formations and navigation practices normally used in open waters. Article 54, referring back to article 44, provides that the right of archipelagic sea lanes passage cannot be impeded or suspended by the archipelagic State for any reason.

All ships and aircraft, including warships and military aircraft, enjoy the right of archipelagic sea lanes passage while transiting through, under, or over the waters of archipelagos and adjacent territorial seas via archipelagic sea lanes. Articles 53(4) and 53(12) mean that archipelagic sea lanes

passage must be respected in all routes normally used for international navigation and overflight, whether or not sea lanes are actually designated under the Convention.

Article 53 permits an archipelagic State to designate sea lanes and air routes for the exercise of archipelagic sea lanes passage. Such archipelagic sea lanes "shall include all normal passage routes . . . and all normal navigational channels . . ." Each sea lane is defined by a continuous line from the point of entry into the archipelago to the point of exit. Ships and aircraft in designated archipelagic sea lanes passage are required to remain within 25 miles from either side of the axis line and must approach no closer to the coastline than 10 percent of the distance between the nearest islands.

Archipelagic sea lanes must conform to generally accepted international regulations, and must be referred to the "competent international organization," the IMO, with a view to their adoption, before implementation. Only after adoption by the IMO may the archipelagic State implement archipelagic sea lanes. No archipelagic State has yet submitted any proposal to the IMO.

The elements of the transit passage regime for international straits apply to archipelagic sea lanes passage. Article 54 applies, *mutatis mutandis*, the provisions of articles 39 (duties of ships and aircraft during their passage), 40 (research and survey activities), and 42 and 44 (laws, regulations, and duties of States bordering straits relating to passage).

Article 52 provides that innocent passage applies in archipelagic waters other than designated archipelagic sea lanes or the routes through which archipelagic sea lanes passage is guaranteed. All the normal rules of innocent passage apply, and there is no right of overflight or submerged passage. In island groups where a State either may not claim archipelagic waters under the Convention, or has not done so, the other rules of the Convention apply, including the rules regarding transit passage of straits.

### The Contiguous Zone (Article 33)

In the contiguous zone, vessels and aircraft enjoy the same high seas freedoms of navigation and overflight as in the EEZ.

### The Exclusive Economic Zone (Part V, Articles 55-60, 73)

From the perspective of the United States, Part V (articles 55-75) provides a regime for the EEZ that achieves a proper, long-term balance between coastal interests and maritime interests. These provisions enable the coastal State to explore, exploit, conserve and manage resources out to 200 miles from coastal baselines, while allowing other States to navigate, overfly and conduct related activities in the EEZ.

The United States is far and away the world's primary beneficiary in each respect. From a coastal perspective, the United States has an EEZ which is among the largest and richest of any in the world, with extensive living and non-living resources. From a maritime perspective, U.S. military and commercial ships and aircraft, as well as U.S. trade and communications, are guaranteed in the EEZs of other States essential navigational and related freedoms, from military exercises to laying cables and pipelines.

Article 56 defines the rights, jurisdiction, and duties of the coastal State in the EEZ. Paragraph 1 of this article distinguishes sovereign rights and jurisdiction, as follows:

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 the Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures (i.e., article 60);

(ii) marine scientific research (i.e., Part XIII);

(iii) the protection and preservation of the marine environment (i.e., Part XII, particularly article 220);

(c) other rights and duties provided for in the Convention.

Article 56 enumerates the rights of the coastal State in the EEZ. Article 56(1)(a) establishes the sovereign rights of the coastal State. Article 56(1)(b) sets forth the nature and scope of coastal State jurisdiction with respect to specific matters. The terms "sovereign rights" and "jurisdiction" are used to denote functional rights over these matters and do not imply sovereignty. A claim of sovereignty in the EEZ would be contradicted by the language of articles 55 and 56 and precluded by article 58 and the provisions it incorporates by reference.

Pursuant to Article 58, in the EEZ all States enjoy the high seas freedoms of navigation and overflight, laying of submarine cables and pipelines, and other internationally lawful uses of the seas related to those freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and which are compatible with the other provisions of the Convention. Articles 88 to 115, which (apart from the fuller enumeration of freedoms in article 87) set forth the entire regime of the high seas on matters other than fisheries, apply to the EEZ in so far as they are not incompatible with Part V. These rights are the same as the rights recognized by international law for all States on the high seas.

Military activities, such as anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, operations and conducting military surveys are recognized historic high seas uses that are preserved by article 58. Under that article, all States have the right to conduct military activities within the EEZ, but may only do so consistently with the obligation to have due regard to

coastal State resource and other rights, as well as the rights of other States as set forth in the Convention. It is the duty of the flag State, not the right of the coastal State, to enforce this "due regard" obligation.

The concept of "due regard" in the Convention balances the obligations of both the coastal State and other States within the EEZ. Article 56(2) provides that coastal States "shall have due regard to the rights and duties of other States" in the EEZ. Article 58(3) places similar requirements on other States in exercising their rights, and in performing their duties, in the EEZ. Although it is not specific, article 59 provides a basis for resolving disputes over any rights and duties not allocated by articles 56, 58 and other provisions of the Convention. The conflict "should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

Article 60 sets out the provisions permitting the coastal State to construct and to authorize and regulate the construction, operation, and use of artificial islands, installations and structures used for the purposes provided for in article 56(1) and other economic purposes, and other installations and structures that may interfere with the exercise of the coastal State's rights in its EEZ. This provision does not preclude the deployment of listening or other security-related devices. Article 60(3) requires the coastal State to give "due notice" of artificial islands, installations and structures and to remove those no longer in use in accordance with generally accepted international standards established by the IMO (e.g., IMO Assembly Resolution A.672(16)). Article 60(4)-(6) permits the coastal State to establish and give notice of reasonable safety zones around such structures not to exceed 500 meters in breadth except in accordance with generally accepted international standards or as recommended by the IMO, and

requires ships to respect the zone and generally accepted international navigational standards.

Article 60(7) provides that artificial islands, installations and structures, and the safety zones around them, may not be located where they may cause interference with the use of recognized sea lanes essential to international navigation.

Of the remaining 15 articles on the EEZ (articles 61-75), 13 specifically relate to living resources jurisdiction in the zone, and are discussed below in the section on living marine resources; the other two are discussed below in the section on maritime boundary delimitation.

Consistent with article 73, the coastal State may, in the exercise of its sovereign rights over living resources in the EEZ, take such measures, including boarding, inspection, arrest, and judicial proceedings against foreign vessels as are necessary to ensure compliance with its rules and regulations adopted in conformity with the Convention. Arrested vessels and their crews are to be promptly released upon the posting of reasonable bond or other security. In cases of arrest or detention of foreign vessels, the coastal State is required to notify the flag State promptly, through appropriate channels, of the action taken and of any penalties imposed.

While no State has claimed an EEZ extending beyond 200 miles from coastal baselines, several of the States which have declared EEZs claim rights to regulate activities within the EEZ well beyond those authorized in the Convention. For example, Iran claims the right to prohibit all foreign military activities within its EEZ. The United States does not recognize such claims, which are not within the competence of coastal States under the Convention. Accession to the Convention will significantly enhance the ability of the United States to deal with such excessive claims, and to prevent their proliferation, on the basis of the balance of interests reflected in the Convention.

## High Seas (Part VII, Articles 86-115)

Freedom to navigate and operate on, over, and under the high seas is a central requirement of the United States. The high seas provisions of the Convention reproduce the provisions of the 1958 Convention on the High Seas, 13 UST 2312, TIAS No. 5200 (High Seas Convention), with some very useful clarifications and updating that, for example, protect scientific research and facilitate enforcement against drug smuggling and unauthorized broadcasting. The relatively sparse anti-pollution provisions of the High Seas Convention have been replaced by the strong and elaborate environmental provisions discussed in the next section of this Commentary.

Pursuant to article 87, all ships and aircraft, including warships and military aircraft, enjoy freedom of movement and operation on and over the high seas. For warships and military aircraft, this includes task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and ordnance testing and firing.

All of these activities must be conducted with due regard for the rights of other States and the safe conduct and operation of other ships and aircraft. The exercise of any of these freedoms is subject to the conditions that they be taken with "reasonable" regard, according to the High Seas Convention, or "due" regard, according to the LOS Convention, for the interests of other nations in light of all relevant circumstances. There is no substantive difference between the two terms. The "reasonable regard/due regard" standard requires any using State to be cognizant of the interests of others in using a high seas area, to balance those interests with its own, and to refrain from activities that unreasonably interfere with the exercise of other States' high seas freedoms in light of that balancing of interests. Articles 87, 89, and 90 prohibit any State's attempt to impose its sovereignty on the high seas; they are open to use by all States, whether coastal or land-locked.

**Security Zones.** Some coastal States have claimed the right to establish military security zones, beyond the territorial sea, in which they purport to regulate the activities of warships and military aircraft of other nations by such restrictions as prior notification or authorization for entry, limits on the number of foreign ships or aircraft present at any given time, prohibitions on various operational activities, or complete exclusion. There is no basis in the Convention, or other sources of international law, for coastal States to establish security zones in peacetime that would restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. Accordingly, the United States does not recognize the peacetime validity of any claimed security or military zone seaward of the territorial sea which purports to restrict or regulate the high seas freedoms of navigation and overflight, as well as other lawful uses of the sea.

**Peaceful purposes (article 88)** is discussed below in connection with article 301, on peaceful uses of the seas, in the section on general provisions.

**Nationality, Status, and Duties of Ships (Articles 91-96).** Articles 91-92 pertain to the nationality and status of ships. Article 91 requires, *inter alia*, that, for a State to grant its nationality to a ship, there must be a genuine link between the flag State and the ship. Article 92 provides that ships shall sail under the flag of one State only, save in certain exceptional cases, and be subject only to that State's jurisdiction while on the high seas. A ship that sails under two or more flags, using them according to convenience, may not claim any of the nationalities in question and may be treated as a stateless vessel.

Article 93 deals explicitly with ships flying the flag of the United Nations and its specialized agencies or the International Atomic Energy Agency. Article 94 sets out new, stricter duties of flag States with respect to their vessels, including such duties regarding the safety of navigation, that have been elaborated primarily under the auspices of the IMO.

While the general rule of exclusive flag State jurisdiction over vessels on the high seas has long standing in international law, the United States and other members of the international community have developed procedures for resolving problems that have arisen in certain contexts, including drug smuggling, illegal immigration and fishing, when States are unable or unwilling to exercise responsibility over vessels flying their flag. These procedures, several of which are contained in international agreements, typically seek to ensure that the flag State gives expeditious permission to other States for the purpose of boarding, inspection and, where appropriate, taking law enforcement action with respect to its vessels.

**Sovereign Immunity (Articles 29-32, 95-96, 236).** The Convention protects and strengthens the key principle of sovereign immunity for warships and military aircraft. Although not a new concept, sovereign immunity is a principle of vital importance to the United States. The Convention provides for a universally recognized formulation of this principle.

As discussed above, with respect to the territorial sea regime, articles 29 through 32 set forth the sovereign immunity rules applicable to warships and other government ships operated for non-commercial purposes.

Article 32 provides that, with such exceptions as are contained in subsection A and in articles 30 and 31 (discussed above), nothing in the Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

Regarding the definition of "warship," article 29 expands the traditional definition to include all ships belonging to the armed forces of a State bearing the external markings distinguishing the character and nationality of such ships, under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list of officers, and manned by a crew which is under regular armed forces discipline. A ship need not be armed to be regarded as a warship.

Concerning government ships operated for non-commercial purposes, these would include auxiliaries, which are vessels, other than warships, that are owned or operated by the armed forces. Like warships, they are immune from arrest and search, whether in port or at sea, and exempt from foreign taxes and enforcement of foreign laws and regulations; further, the flag State exercises exclusive control over all passengers and crew onboard.

Articles 95-96 address these issues with respect to the high seas regime. Article 95 provides that warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State. Article 96 provides that 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.

Finally, article 236 makes clear that the provisions of Part XII do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State must ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with the Convention.

**Penal Jurisdiction in Matters of Collision or Any Other Incident of Navigation (Article 97).** Article 97 restates existing international law relating to this subject.

**Assistance to Persons, Ships, and Aircraft in Distress (Article 98).** The law has long realized the importance of rendering assistance to persons in distress at sea. Article 98 replicates verbatim article 12 of the High Seas Convention. The duty to rescue also appears in the International Convention for the Unification of Certain Rules Relating to Salvage of Vessels at Sea, September 23, 1910, 37 Stat. 1658, TIAS No. 576, and the International Convention on Salvage, 1989, article 10, Sen. Treaty Doc. 102-12. Article 98 is implemented by 46 U.S.C. §§ 2303 & 2304.

**Duty of Masters.** In addition, the United States is a Party to the SOLAS Convention, which requires the master of every merchant ship and private vessel not only to speed to the assistance of persons in distress, but to broadcast warning messages with respect to dangerous conditions or hazards encountered at sea (Chapter V, Regulations 10 and 2).

**Prohibition of the Transport Of Slaves (Article 99).** Article 99 is identical to article 13 of the High Seas Convention and relates to the Convention to Suppress the Slave Trade and Slavery of September 25, 1926, 46 Stat. 2183, TS No. 778, 2 Bevans 607, 60 LNTS 253; the Protocol of December 7, 1953 Amending the Slavery Convention of September 25, 1926, 7 UST 479, TIAS No. 3532, 182 UNTS 51; and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of September 5, 1956, 18 UST 3201, TIAS No. 6418, 266 UNTS 3. This obligation is implemented in 18 U.S.C. §§ 1581-88 (1982), and gives effect to the policy enunciated by the Thirteenth Amendment to the Constitution of the United States.

The Slavery Convention, Amending Protocol, and Supplementary Convention do not authorize nonconsensual high seas boarding by foreign flag vessels. Nevertheless, article 22(1) of the High Seas Convention authorized nonconsensual boarding by a warship where there exists reasonable ground for suspecting that a vessel is engaged in the slave trade. Article 110(1)(b) of the LOS Convention reaffirms this approach.

**Piracy (Articles 100-107).** Despised by all nations since earliest recorded history, piracy continues to be a major problem in certain parts of the world. Articles 100-107 reaffirm the rights and obligations of all States to suppress piracy on the high seas.

The U.S. Constitution (article I, section 8) provides that:

The Congress shall have Power . . . to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations.

Congress has exercised this power by enacting 18 U.S.C. § 1651, which provides that:

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

Congress has further exercised this power, including with respect to certain acts not regarded as piracy under international law, by enacting 18 U.S.C. §§ 1651-61 (piracy), 49 U.S.C. §§ 1472(i)-(n) (aircraft piracy), 33 U.S.C. §§ 381-84 (regulations for suppression piracy), and 18 U.S.C. §§ 1654 (privateering). These statutes provide a firm basis for implementing the relevant provisions of the Convention and other applicable international law.

**Suppression of International Narcotics Traffic (Article 108).** Article 108 of the Convention provides a valuable additional tool in support of the war on illicit drugs. This article requires all States to cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions. This article also permits any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic to request the cooperation of other States to suppress such traffic.

This principle finds expression in other international law, including in the Single Convention on Narcotic Drugs, 1961, 18 UST 1407, TIAS No. 6298, 520 UNTS 204. Article 17 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Sen. Treaty Doc. 101-4, also mandates a consensual regime for the boarding of foreign flag vessels suspected of drug trafficking at sea. The United States has entered into a number of bilateral maritime counter-narcotics agreements, for example with the United Kingdom (33 UST 4224, TIAS No. 10296, 1285 UNTS 197), Belize (TIAS No. 11914), Panama (TIAS No. 11833) and Venezuela (TIAS No. 11827).

Implementing legislation in this field includes 49 U.S.C. §§ 781-789, 14 U.S.C. § 89, 22 U.S.C. § 2291, and 46 U.S.C. App. § 1903 *et seq.*

**Suppression of Unauthorized Broadcasting (Article 109).** Article 109 is designed to aid in the suppression of "pirate broadcasting" and supports the Regulations annexed to the 1973 International Telecommunication Convention, 28 UST 2495, TIAS No. 8572; the 1982 International Telecommunication Convention, 99th Cong., 1st Sess. Treaty Doc. 99-6; and the 1979 Radio Regulations, 97th Cong., 1st Sess. Treaty Doc. 97-21. Unauthorized broadcasting from international waters is made a crime in the United States by 47 U.S.C. § 502 (1982).

**Warship's Right of Approach And Visit (Article 110).** Article 110 of the Convention reaffirms the right of warships, military aircraft or other duly authorized ships or aircraft to approach and visit other vessels to ensure that they are not engaged in various illegal activities. This is a right of great importance to the United States. Article 110 permits the right of visit to be exercised if there are reasonable grounds for suspecting that a foreign flag vessel is engaged in piracy, the slave trade, or unauthorized broadcasting; is without nationality; or is, in reality, of the same nationality as the warship. The maintenance and continued respect for these rights are essential to maritime counter-narcotics and alien smuggling interdiction operations.

**Hot Pursuit (Article 111).** Article 111 of the Convention provides a detailed elaboration of the concept of "hot pursuit," based on article 23 of the High Seas Convention. However, the Convention expands this concept to take into account the development of the EEZ and archipelagic waters, and provides further details with respect to aircraft engaged in hot pursuit. These modifications increase U.S. ability to pursue criminals, such as drug traffickers, as well as those who violate U.S. fisheries laws.

**Cables and Pipelines (Articles 79, 87(1)(c), 112-115).** The provisions on submarine cables and pipelines codify the right to lay and operate them. These provisions replicate their counterparts in article 4 of the Convention on the Continental Shelf, 15 UST 471, TIAS No. 5578, and articles 26-29 of the High Seas Conven-

tion, which themselves reflect the provisions of the 1884 Convention on the Protection of Submarine Cables, 24 Stat. 989, TS No. 380, as amended 25 Stat. 1414, TS Nos. 380-1 and 380-2, 380-3, 1 Bevans 89, 112, 114. The 1884 Submarine Cables Convention is implemented in 47 U.S.C. § 21 *et seq.* (1982).

Submarine cables include telegraph, telephone, and high-voltage power cables, which are essential to modern communications. In light of the extraordinary costs and increasing importance to the world economy of undersea telecommunications cables, particularly the new fiber-optic cables, it is significant that the Convention strengthens the protections for the owners and operators of these cables in the event of breakage.

Pipelines include those which deliver water, oil and natural gas, and other commodities. The Convention recognizes that pipelines may pose an environmental threat to the coastal State and, therefore, it increases the authority of the coastal State on its continental shelf over the location of pipelines and with respect to pollution therefrom.

## PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT (PART XII, ARTICLES 192-237)

The Law of the Sea Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time. Part XII establishes, for the first time, a comprehensive legal framework for the protection and preservation of the marine environment. By addressing all sources of marine pollution, such as pollution from vessels, sea-bed activities, ocean dumping, and land-based sources, Part XII promotes continuing improvement in the health of the world's oceans. It effectively and expressly balances economic and environmental interests in general, and the interests of coastal states in protecting their environment and natural resources with the rights and freedoms of navigation in particular. Compliance with Part XII's environmental obligations is subject to compulsory arbitration or adjudication.

Part XII thus creates a positive and unprecedented framework for marine environmental protection that will encourage all Parties to take their environmental obligations seriously and come together to address issues of common and pressing concern.

## Definitions (Article 1)

Article 1 defines two terms used in Part XII: "pollution of the marine environment" and "dumping." The term "marine environment" is understood to include living resources, marine ecosystems, and the quality of seawater.

## General Obligations (Articles 192-196)

Section 1 sets forth general provisions relating to the protection and preservation of the marine environment. Article 192 clearly establishes the legal duty of all States to protect and preserve the marine environment. The remaining provisions require States, *inter alia*, to adopt pollution control measures to ensure that activities under their control are conducted so as not to cause environmental damage to other States or result in the spread of pollution beyond their own offshore zones.

## Global and Regional Cooperation (Articles 197-201)

Section 2 provides for global and regional cooperation for the protection and preservation of the marine environment. Cooperation includes, *inter alia*, development of rules, standards, and recommended practices and procedures for the protection and preservation of the marine environment (article 197), notification of imminent or actual damage to other States likely to be affected (article 198), development of contingency plans to respond to pollution incidents (article 199), promotion of research and exchange of information (article 200), and establishment of appropriate scientific criteria for rules, standards and recommended practices and procedures for the prevention, reduction and control of pollution of the marine environment (article 201). (Article 242 adds provisions for international cooperation in research for environmental purposes.)

### Technical Assistance (Articles 202-203)

Section 3 provides for the promotion of programs and appropriate scientific and technical assistance related to protection and preservation of the marine environment, especially to developing States.

### Monitoring and Environmental Assessment (Articles 204-206)

Section 4 establishes rules for monitoring and environmental assessment.

Article 204 sets forth obligations relating to monitoring the risks or effects of pollution on the marine environment, including the effects of activities which States permit or in which they engage.

Article 206 relates to the environmental assessment of certain activities on the marine environment. When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205. (The requirements for assessment of potential environmental impacts of deep sea-bed mining activity are discussed below in connection with the deep sea-bed mining provisions of the Convention and the 1994 Agreement generally.)

### International Rules and National Legislation to Prevent, Reduce, and Control Pollution of the Marine Environment (Articles 207-212)

Section 5 obligates States to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, sea-bed activities subject to national jurisdiction, deep sea-bed mining (activities in the Area), ocean dumping, vessels, and the atmosphere. As a general rule, these articles require States to adopt laws and regulations that are no less effective than international rules; to

endeavor to harmonize their policies at the regional level; and to cooperate to develop international rules.

Although States are not legally bound by an international agreement to which they are not party, the requirement that their national laws at least have the same effect as, or be no less effective than, internationally agreed minimum standards of environmental protection is an important step forward in marine environmental protection.

Below is a discussion of the status of the development of international standards, national legislation, and other international activity relating to the sources of pollution identified in section 5, noting where the United States has already implemented these articles.

**Pollution From Land-based Sources (Article 207).** The Convention will be the first legally binding global agreement governing marine pollution from land-based sources. Article 207 requires that national laws for the prevention of marine pollution from land-based sources take into account internationally agreed standards. The Montreal Guidelines for the Protection of the Marine Environment Against Pollution from Land-Based Sources, adopted by the Governing Council of the United Nations Environment Program (Decision 13/18/II of the Governing Council of UNEP of May 24, 1985), are internationally agreed guidelines adopted with a view to assisting governments in developing international agreements and national legislation relating to land-based sources of pollution.

Since land-based sources of pollution continue to account for approximately 80 percent of all marine pollution, global discussions are ongoing in an effort to address more fully this source of pollution. In recognition of the importance of this problem and as an outgrowth of the 1992 United Nations Conference on Environment and Development, the United States in late 1995 will host an international conference on land-based sources of marine pollution. This conference is expected, *inter alia*, to result in a global action plan to address land-based sources of marine pollution.

On a regional basis, the United States is party to two regional agreements that contain general provisions on land-based sources of marine pollution: the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (the SPREP Convention), Sen. Treaty Doc. 101-21, and the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (the Cartagena Convention), TIAS No. 11085. Under the auspices of the Cartagena Convention and the United Nations Regional Seas Program, the United States and other Caribbean States are presently considering the need for, and elements of, a possible protocol to the Cartagena Convention on land-based sources of marine pollution. In addition, the Protocol on Environmental Protection to the Antarctic Treaty, Sen. Treaty Doc. 102-22, to which the United States is a signatory, and the Arctic Environmental Protection Strategy address land-based sources of marine pollution.

The United States already has national legislation addressing land-based sources of marine pollution; this legislation takes into account the recommendations of the Montreal Guidelines described above. U.S. laws include the Clean Water Act, 33 U.S.C. §§ 1251-1387, which specifically addresses marine water quality, and other statutes (such as the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601-9675, and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y) which regulate the release of pollutants and other materials into the environment. See also the Refuse Act, 33 U.S.C. § 407 *et seq.*, and the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*

**Pollution From Sea-bed Activities Subject to National Jurisdiction (Article 208).** The Convention will be the first legally binding global agreement governing pollution from sea-bed activities. Article 208 requires that coastal State laws governing pollution from sea-bed activities be no less effective than international rules and standards. Although there are many

potential sea-bed activities, including the mining of coral, placers, and sand, the most common sea-bed activity is the exploration and exploitation of oil and gas. Internationally, the need for regulation of this industry is reviewed periodically by the IMO. Regionally, article 8 of the SPREP Convention and article 8 of the Cartagena Convention address pollution from sea-bed activities.

The United States has domestic legislation that addresses pollution from sea-bed activities of persons subject to U.S. jurisdiction, both in areas subject to U.S. jurisdiction and beyond. These include the Outer Continental Shelf Lands Act, 33 U.S.C. §§ 1331-1356 and the Deep Seabed Hard Minerals Resources Act ("DSHMRA"), 30 U.S.C. §§ 1401 *et seq.*

**Pollution From Deep Sea-bed Mining (Activities in the Area) (Article 209).** International rules and national legislation relating to pollution from deep sea-bed mining have yet to be developed. As discussed in the section of this Commentary on deep sea-bed mining, the environmental protection provisions of the Convention relating to activities in the Area are quite strong and comprehensive. The 1994 Agreement further strengthens these provisions by requiring, *inter alia*, that all applications for approval of plans of work be accompanied by an assessment of the potential environmental impacts of the proposed activities and that the International Sea-bed Authority adopt rules, regulations and procedures on marine environmental protection as part of its early functions prior to the approval of the first plan of work for exploitation (Annex, section 1(5)(g), (7)). The DSHMRA addresses pollution from sea-bed activities of persons subject to U.S. jurisdiction in areas beyond national jurisdiction, including provision for an environmental impact statement, monitoring, NPDES permits, and emergency suspension of activities.

**Pollution by Dumping (Article 210).** Article 210 requires that national laws regarding pollution from dumping be no less effective than the global

rules and standards. The global regime addressing pollution of the marine environment by dumping is long-established. The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention), 26 UST 2403, TIAS No. 8165, 1046 UNTS 120, governs the ocean dumping of all wastes and other matter.

Both the SPREP Convention (article 10) and the Cartagena Convention (article 6) contain general provisions addressing ocean dumping on a regional basis. In addition, a Protocol to the SPREP Convention contains provisions that parallel those of the London Convention as it existed in 1986.

Domestically, dumping is controlled by the Marine Protection, Research, and Sanctuaries Act (Ocean Dumping Act), 33 U.S.C. §§ 1401-1445.

**Pollution From Vessels (Article 211).** The Convention's provisions relating to pollution from vessels are developed in considerable detail. They are a significant part of the overall balance between coastal and maritime interests the Convention is designed to maintain over time.

Paragraph 1 requires States to establish international rules and standards to prevent, reduce and control vessel source pollution and the adoption of routeing systems to minimize the threat of accidents which might cause pollution of the marine environment. Such rules and standards are to be developed through the competent international organization, which is recognized to be the IMO. The IMO has developed several conventions that, directly or indirectly, address vessel source pollution. One of the most important of these is the MARPOL Convention, which contains general provisions on pollution from vessels, supplemented by five Annexes pertaining to vessel discharges of oil (Annex I), noxious liquid substances in bulk (Annex II), harmful substances carried by sea in packaged forms, or in freight containers, portable tankers or road and rail tank wagons (Annex III), sewage (Annex IV), and garbage (Annex V). Other IMO conventions include SOLAS; the 1978 International Convention on Standards of Training,

Certification and Watchkeeping, 96th Cong., 1st Sess. Sen. Ex. EE (STCW); and the International Convention on Oil Pollution Preparedness, Response, and Cooperation, Sen. Treaty Doc. 102-11. At present, the United States is party to all of the foregoing except MARPOL Annex IV.

Regionally, both the SPREP Convention (article 6) and the Cartagena Convention (article 5) contain broad obligations concerning pollution from vessels.

Paragraph 2 obligates States to adopt measures relating to vessels flying their flag or of their registry. Such laws and regulations must at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference (e.g., MARPOL).

Paragraph 3 recognizes the authority of port States to establish their own requirements relating to vessel source pollution as a condition of entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals. Although port state authority has long been exercised by many countries as a means of enforcing safety and environmental measures, including the United States pursuant to the Ports and Waterways Safety Act, 33 U.S.C. §§ 1223 & 1228, its prominent recognition in the Convention and the provisions for cooperation among port States are important steps forward in marine environmental protection.

Paragraph 4 recognizes the authority of coastal States, in the exercise of their sovereignty within their territorial sea, to establish requirements relating to pollution from foreign vessels in their territorial sea, including vessels exercising the right of innocent passage. This authority is balanced by the proviso in paragraph 4 that such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels. However, passage is not innocent if the vessel engages in "any act of wilful and serious pollution contrary to this Convention" (article 19(2)(h)).

Paragraph 5 recognizes the authority of coastal States, for the purpose of enforcement as provided for in section 6, to establish requirements relating to pollution from foreign vessels in their EEZs. Unlike requirements in the territorial sea, coastal State requirements regarding pollution from foreign ships in the EEZ must conform to and give effect to generally accepted international rules and standards established through the competent international organization (i.e., the IMO) or a general diplomatic conference.

Paragraph 6 sets forth circumstances under which coastal States may establish special anti-pollution measures for foreign ships in particular areas of their respective EEZs. Such measures, among other things, require IMO approval. This paragraph strikes an important balance between the need for universal respect for necessary supplemental anti-pollution measures in particular coastal areas and the need to protect freedom of navigation from unilateral coastal State restrictions.

Domestically, vessel source pollution is governed primarily by the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901-1912, the Clean Water Act, 33 U.S.C. §§ 1251- 1387, the Ports and Waterways Safety Act, 33 U.S.C. § 1221 *et seq.*, the Marine Protection, Research and Sanctuaries Act (Ocean Dumping Act), 33 U.S.C. § 1401 *et seq.*, the Oil Pollution Act of 1990, 33 U.S.C. § 2761 *et seq.*, the Refuse Act, 33 U.S.C. § 407 *et seq.*, and the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*

**Pollution From or Through the Atmosphere (Article 212).** There is at present no global agreement directly governing marine pollution from or through the atmosphere. The parties to MARPOL are currently negotiating a possible new Annex VI that would address air pollution from ships. Article 9 of the SPREP and Cartagena Conventions have broad obligations relating to pollution to those regions from discharges into the atmosphere. Domestically, such provisions are addressed through the Clean Air Act, 42 U.S.C. § 7401 *et seq.*

### Enforcement (Articles 213-222)

Section 6 sets forth the rights and obligations of States to ensure compliance with and to enforce measures adopted in accordance with articles 207 through 212. In this respect, the Convention goes beyond and strengthens existing international agreements, many of which do not have express enforcement clauses.

Pursuant to article 229, nothing in the Convention affects the institution of civil (as opposed to punitive) proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment.

There are express enforcement provisions relating to pollution from land-based sources (article 213), seabed activities (article 214), activities in the Area (article 215), dumping (article 216), vessels (articles 217-220), maritime casualties (article 221), and pollution from or through the atmosphere (article 222). Although all of these articles contain specific obligations, the provisions regarding the enforcement for vessel source pollution are set out in detail.

Article 217 places a duty on flag States to ensure that vessels flying their flag or of their registry comply with the measures adopted in accordance with the Convention. Among other things, flag States must ensure that vessels flying their flag or of their registry are in compliance with international rules and standards, carry requisite certificates, and are periodically inspected. If a vessel commits a violation of applicable rules and standards, the flag State must provide for immediate investigation and, where appropriate, institute proceedings irrespective of where the violation or pollution has occurred. Penalties must be adequate in severity to discourage violations wherever they occur. Article 217 is consistent with article 4 of MARPOL, chapter I of the Annex to SOLAS, and article VI of STCW.

Section 6 also sets forth the rights of port States and coastal States to take enforcement action against foreign flag vessels that do not comply with measures adopted in accordance with the Convention.

Article 218 recognizes the authority of the port State to take enforcement action in respect of a discharge from a vessel on the high seas in violation of applicable international rules and standards. (Discharges in the territorial sea or EEZ of the port State are addressed in article 220(1).) The port State may also take enforcement action in respect of a discharge violation in the internal waters, territorial sea or EEZ of another State if requested by that State, the flag State, or a State damaged or threatened by the discharge, or if the violation has caused or is likely to cause pollution to the internal waters, territorial sea, or EEZ of the port State.

Article 219 recognizes the authority of the port State to prevent a vessel from sailing when it ascertains that the vessel is in violation of applicable international rules and standards relating to seaworthiness and thereby threatens damage to the marine environment.

Article 220 provides an overall enforcement scheme for vessel source pollution based on various factors, including the location of the vessel, the location of the act of pollution, and the severity of the pollution. Article 220 affects only vessel discharges and does not apply to enforcement with respect to other types of pollution, such as by dumping.

Article 220 recognizes the authority of the coastal State to take enforcement action with respect to a foreign flag vessel in its EEZ or territorial sea, whether or not that vessel enters a port of the coastal State. However, such enforcement authority is not unfettered. Article 220 balances the interests of coastal States in taking enforcement action with rights and freedoms of navigation of flag States. It recognizes express safeguards applicable to enforcement action against foreign flag vessels (see section 7).

Article 220(1) recognizes the authority of a coastal State to take enforcement action against a vessel voluntarily within its port or off-shore terminal when a violation involving that vessel has occurred within the territorial sea or the EEZ of the coastal State.

Under Article 220(2), where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of the coastal State adopted in accordance with the Convention, the coastal State may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including the detention of the vessel.

Under Article 220(3), where there are clear grounds for believing that a vessel navigating in the EEZ or the territorial sea of a State has, in the EEZ, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels, or laws and regulations of the coastal State conforming and giving effect to such rules and standards, the coastal State may require the vessel to provide information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

Article 220(4) requires flag States to adopt laws and regulations and take other measures so that their vessels comply with requests for information by coastal States under paragraph 3.

Where a violation referred to in article 220(3) results in a substantial discharge causing or threatening significant pollution of the marine environment, article 220(5) authorizes the coastal State to undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

Where a violation referred to in article 220(3) results in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, article 220(6) authorizes the coastal State, under certain circumstances, to institute proceedings, including detention of the vessel.

Pursuant to article 233, Sections 5 and 6 do not affect the legal regime of straits. Article 233 applies to enforcement of laws and regulations applicable to transit passage under article 42 and, by extension, to archipelagic sea lanes passage under article 54.

### Safeguards (Articles 223-233)

Section 7 establishes several safeguards concerning enforcement authority. These include an obligation to facilitate proceedings involving foreign witnesses and the admission of evidence submitted by another State (article 223), a specification as to what officials and vessels may exercise enforcement authority against foreign vessels (article 224), a duty to avoid adverse consequences in the exercise of enforcement powers (article 225), safeguards concerning delay and physical inspection of foreign vessels (article 226), and a duty of non-discrimination against foreign vessels (article 227).

Under article 226, States may not delay a foreign vessel "longer than is essential" for the purposes of the investigations provided for in articles 216, 218, and 220. Moreover, any physical inspection of a foreign vessel is limited to an examination of such certificates, records or other documents as the vessel is required to carry. Any further physical examination may be undertaken only after such an examination and only when: (i) there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents; (ii) the contents of such documents are not sufficient to confirm or verify a suspected violation; or (iii) the vessel is not carrying valid certificates and records. While the Convention imposes different procedural restrictions on physical inspections than U.S. law, it is anticipated that one or more of the exceptions for allowing further physical examination will be met in cases where there are "clear grounds" to believe a violation has occurred.

Article 228, which applies only to vessel source pollution, sets forth circumstances under which proceedings shall be suspended and restrictions on institution of proceedings. For ex-

ample, consistent with the notion in Section 6 that the flag State is primarily responsible for ensuring compliance with the Convention of vessels flying its flag or of its registry, article 228(1) requires the suspension of enforcement proceedings against foreign vessels if the flag State institutes its own proceedings to impose penalties within six months of the date on which proceedings were first initiated. Suspension would not be required if the flag State fails to initiate proceedings within six months, if the proceedings relate to a case of major damage to the coastal State, or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels. The suspended proceeding will be terminated when the flag State has brought its proceedings to a conclusion. Article 228(2) imposes a limitation of three years in which to commence proceedings against foreign vessels.

Article 230, which applies only to vessel source pollution, provides that only monetary penalties may be imposed with respect to violations committed by foreign vessels beyond the territorial sea. With respect to violations committed by foreign vessels in the territorial sea, non-monetary penalties (i.e., incarceration) may be applied as well, but only if the vessel has committed a willful and serious act of pollution. The requirement that the act be "willful" would not constrain penalties for gross negligence. Article 230 applies only to natural persons aboard the vessel at the time of the discharge.

Article 231 provides for notification to the flag State and other States concerned of any measure taken against the foreign vessel. Under article 232, the enforcing State will be liable for damage or loss caused by measures taken that are unlawful or exceed those reasonably required in light of available information.

The extent to which, if at all, Sections 6 and 7 (on enforcement and safeguards, respectively) will enhance and/or constrain U.S. enforcement authorities is the subject of ongoing analysis.

### Ice-Covered Areas (Article 234)

Section 8 authorizes coastal States to adopt and enforce laws and regulations relating to marine pollution from vessels in ice-covered areas within the limits of the EEZ, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to, or irreversible disturbance of, the ecological balance.

Pursuant to this article, a State may enact and enforce non-discriminatory laws and regulations to protect such ice-covered areas that are within 200 miles of its baselines established in accordance with the Convention. Such laws and regulations must have due regard to navigation and the protection and preservation of the marine environment, based on the best available scientific evidence, and must be otherwise consistent with other relevant provisions of the Convention and international law, including the exemption for vessels entitled to sovereign immunity under article 236.

The purpose of article 234, which was negotiated directly among the key states concerned (Canada, the United States and the Soviet Union), is to provide the basis for implementing the provisions applicable to commercial and private vessels found in the 1970 Canadian Arctic Waters Pollution Prevention Act to the extent consistent with that article and other relevant provisions of the Convention, while protecting fundamental U.S. security interests in the exercise of navigational rights and freedom throughout the Arctic.

### Responsibility and Liability (Article 235)

Section 9 provides that States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment and that they shall be liable in accordance with international law. It further provides that States shall ensure recourse in their legal systems for relief from damage caused by

pollution of the marine environment. Finally, it obligates States to cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability.

### Sovereign Immunity (Article 236)

Section 10 provides that the provisions of the Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, or other vessels and aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, the second sentence of article 236 imposes on flag States the duty to ensure, by adopting appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned and operated by it, that such vessels and aircraft act in a manner consistent, so far as is reasonable and practicable, with the Convention.

This article acknowledges that military vessels and aircraft are unique platforms not always adaptable to conventional environmental technologies and equipment because of weight and space limitations, harsh operating conditions, the requirements of long-term sustainability, or other security considerations. In addition, security needs may limit compliance with disclosure requirements.

### Obligations Under Other Conventions on the Protection And Preservation of the Marine Environment (Article 237)

Section 11 (article 237(1)) provides that the provisions in Part XII are without prejudice to the specific obligations assumed by States under agreements previously concluded which relate to the protection and preservation of the marine environment and to agreement which may be concluded in furtherance of the general principles set forth in the Convention. Article 237(2) provides that specific obligations assumed by States under other agreements should be carried out in a manner consistent with the general principles and objec-

tives of this Convention. The United States does not anticipate any change in its implementation of other agreements, since it currently implements such agreements consistent with the principles and objectives of the Convention.

### LIVING MARINE RESOURCES (Articles 2, 56, 61-73, 77(4), 116-120)

Approximately 90 percent of living marine resources are harvested within 200 miles of the coast. By authorizing the establishment of EEZs, and by providing for the sovereign rights and management authority of coastal States over living resources within their EEZs, the Convention has brought most living marine resources under the jurisdiction of coastal States.

The Convention recognizes the need for consistent management of ecosystems and fish stocks throughout their migratory range, and sound management on the basis of biological characteristics. It imposes on the coastal State a duty to conserve the living marine resources of its EEZ.

While the Convention preserves the freedom to fish on the high seas beyond the EEZ, it makes that freedom subject to certain obligations, particularly the duty to cooperate in the conservation and management of high seas living resources. Failure to respect these obligations beyond the EEZ is subject to compulsory arbitration or adjudication. Tribunals are empowered to prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, including its living resources, pending the final decision.

The Convention's provisions relating to the conservation and management of living marine resources are consistent with U.S. law, policy and practice, and have provided the foundation for the international agreements governing this subject. These provisions are more critical today to U.S. living marine resource interests than they were in 1982 because of the dramatic overfishing that has occurred world-wide in the past decade.

## Territorial Sea and EEZ

**Basic Rights and Obligations.** The Convention gives the coastal State broad authority to conserve and manage living resources within its territorial sea and EEZ. Article 2 of the Convention provides that the sovereignty of the coastal State extends throughout the territorial sea. As part of the exercise of such sovereignty, the coastal State has the exclusive right to conserve and manage resources, including living resources, within the territorial sea, which may extend up to 12 miles from coastal baselines.

The Convention also provides that the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing living resources within its EEZ, including the right to utilize fully the total allowable catch of all such resources (articles 56, 61, 62). With these rights come general responsibilities for the coastal State, including the duty:

- To determine the allowable catch of living resources in its EEZ (article 61(1));
- To ensure that such resources are not endangered by over-exploitation (article 61(2));
- To take into account effects of its management measures on non-target species with a view to maintaining or restoring such species above levels at which their reproduction may become seriously threatened (article 61(3));
- To promote the objective of optimum utilization of such resources (article 62(1)); and
- To determine its capacity to harvest such resources and to give other States access to any surplus under reasonable conditions (article 62(2)).

The coastal State has significant flexibility in defining optimum utilization and in fixing allowable catch, in determining its harvesting capacity, and therefore in determining what, if any, surplus may exist. The coastal State must, taking into account the best scientific evidence available to it, ensure that over-exploitation of stocks within its EEZ does not jeopardize the maintenance of the stocks overall and

must maintain stocks of harvested species at levels which can produce maximum sustainable yields, as qualified by economic, environmental and other factors.

Similarly, the Convention gives coastal States wide discretion in choosing which other States will be allocated a share of any surplus. In making this choice, the coastal State must take into account "all relevant factors." Foreign fishing, to the extent authorized, may be conditioned upon observance of a wide variety of coastal State regulations, including area, season, vessel and gear restrictions, research, reporting and observer requirements, and compensation in the form of fees, financing, equipment, training and technology transfer.

U.S. law, primarily the Magnuson Fishery Conservation and Management Act, as amended (16 U.S.C. § 1801 *et seq.*) (MFCMA), fully enables the United States to exercise its rights and implement its obligations with respect to the provisions of the Convention discussed above.

The MFCMA provides the United States with exclusive fishery management authority over all fishery resources up to the 200-mile limit of the U.S. EEZ (16 U.S.C. § 1811(a)). The MFCMA requires conservation of such resources in a manner consistent with article 61 (16 U.S.C. § 1851) and provides the legislative basis on which the United States determines the allowable catch of the living resources in its EEZ, as required by article 61 (16 U.S.C. § 1852). The process for making that determination fully comports with the principles of conservation and optimum utilization contained in articles 61 and 62. Fishery management plans developed pursuant to the MFCMA must prohibit overfishing and must attempt to achieve "optimum yield" (16 U.S.C. § 1851(a)(1)).

While the MFCMA does not separately address the issue of associated or dependent species, it gives sufficiently broad authority to regional fishery management councils to permit them to protect non-target species to the extent required by article 61(3), and arguably requires the councils to do so by providing that, to the extent practicable, interrelated species shall

be managed as a "unit" (16 U.S.C. § 1851(a)(3)). The Endangered Species Act (16 U.S.C. § 1651 *et seq.*) would independently protect those non-target species that were endangered or threatened throughout a significant portion of their range.

The MFCMA authorizes the allocation of any surplus to foreign States and establishes terms and conditions for any foreign fishing in the U.S. EEZ, thus providing the basis on which to fulfill any such obligations under article 62 (16 U.S.C. § 1821 generally and § 1824(b)(7)). In fact, because the harvesting capacity of the U.S. domestic fishing industry has in recent years been estimated to equal the total allowable catch of all relevant species subject to U.S. management authority, the United States has had no surplus to allocate to potentially interested States.

To have an opportunity to receive an allocation, a foreign nation must have in force a "governing international fishery agreement" (GIFA) with the United States (16 U.S.C. § 1821). This requirement is fully consistent with article 62. Presently, the United States has GIFAs in force with 5 nations, although, as noted above, there has been no surplus to allocate under such GIFAs in recent years.

In the event that a surplus of one or more species becomes available in the future, the MFCMA lists a variety of factors to be considered in determining the allocation of such surplus among foreign States (16 U.S.C. § 1821(e)). The Convention also lists many of these same factors, either as relevant considerations or as permissible terms and conditions for foreign fishing (article 62(3) & (4)). The Convention's list is not exhaustive and does not restrict utilizing any of the factors set forth in the MFCMA.

Although articles 69 and 70 require coastal States to give some special consideration to land-locked and geographically disadvantaged States in the same subregion or region in allocating any surplus, the Convention does not provide clear standards by which to determine whether any such States exist in the U.S. subregion or region. In any event, the language of these articles and that of article 62 gives the

coastal State wide discretion in making such allocations and cannot be read to compel the making of an allocation to any particular State.

The MFCMA imposes other conditions on foreign fishing, including the payment of permit fees and compliance with fishery regulations and enforcement provisions (16 U.S.C. § 1821). The Convention permits the coastal State to impose all these conditions and requires nationals of other States fishing in an EEZ to observe regulations of the coastal State (article 62(4)).

In sum, the MFCMA provides a fully sufficient basis on which the United States could exercise its rights and implement its obligations with respect to the conservation and management of living resources within its territorial sea and EEZ.

#### **Particular Categories of Species.**

Articles 63 through 68 of the Convention set forth additional provisions relating to particular categories of living resources that do not remain solely within areas under the fishery management authority of a single coastal State. U.S. law, and the international agreements to which the United States is party, as well as the 1992 United Nations moratorium on high seas driftnet fishing, are fully consistent with these provisions.

Article 63(1) requires coastal States within whose EEZs the same stock or stocks of associated species occur to seek to agree on the measures necessary to coordinate and ensure the conservation and development of such stocks. The MFCMA calls for the Secretary of State to negotiate such agreements (16 U.S.C. § 1822). One example of such an agreement is the U.S.-Canada Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, March 2, 1953, 5 UST 5, TIAS No. 2900, 222 UNTS 77.

Articles 63(2) and 64, respectively, address "straddling" stocks and highly migratory species. These provisions are reviewed below in detail.

Article 65 of the Convention recognizes the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate exploitation of marine

mammals more strictly than is required in the case of other living resources.

Article 65 also requires States to cooperate with a view to conserving marine mammals and, in the case of cetaceans, to work in particular through appropriate international organizations. Article 120 makes article 65 applicable to the high seas as well.

These provisions lent direct support to the efforts of the United States and other conservation-minded States within the International Whaling Commission to establish a moratorium on commercial whaling. Prior to the adoption of these provisions in the text, whaling States argued that the Convention should require that protective measures for marine mammals may do no more than ensure the maintenance of maximum sustainable yield. These arguments were definitively rejected in the Third United Nations Conference on the Law of the Sea, paving the way for the commercial whaling moratorium and other measures that strictly protect marine mammals, including the Southern Ocean Whale Sanctuary adopted in 1994 by the International Whaling Commission.

U.S. law, including the Marine Mammal Protection Act of 1972, as amended, and the Whaling Convention Act of 1949, as amended (16 U.S.C. §916 *et seq.*), strictly limits the exploitation of marine mammals within the U.S. territorial sea and EEZ and by U.S. vessels and persons subject to U.S. jurisdiction elsewhere.

Article 66 sets forth provisions relating to anadromous stocks (fish that migrate from salt water to spawn in fresh water) such as salmon, which recognize their special characteristics and reflect a major U.S. policy accomplishment. Article 66(1) provides that "States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks."

Article 66(2) authorizes the State of origin, after consulting with other relevant States, to set total allowable catches for anadromous stocks originating in its rivers.

Article 66(3)(a) prohibits fishing for anadromous stocks on the high seas beyond the EEZ except when such a

prohibition would "result in economic dislocation" for a State other than a State of origin. On its face, this provision makes unlawful any new high seas salmon fisheries or the expansion of current ones. In fact, at the time the Convention was concluded, only Japan maintained a high seas salmon fishery. Since the entry into force of the 1992 Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, on February 16, 1993, that fishery has been prohibited as well. The 1982 Convention for the Conservation of Salmon in the North Atlantic Ocean, TIAS No. 10789, also prohibits high seas fishing for salmon in that region. Thus, the combined effect of the LOS Convention and these two treaties precludes any fishery for U.S.-origin salmon, or any other salmon, on the high seas, a major benefit to the United States.

U.S. law implementing the North Pacific and North Atlantic salmon treaties prohibits persons or vessels subject to the jurisdiction of the United States from fishing for salmon on the high seas of those regions (16 U.S.C. §§3606, 5009).

Article 66 does not supersede the sovereign rights of the coastal State over anadromous stocks exercised in the territorial sea and EEZ pursuant to articles 2 and 56(1)(a), respectively, or those coastal State rights recognized under articles 61 and 62.

Anadromous stocks that originate in one State and migrate through the internal waters, territorial sea or EEZ of another State are subject to interception by the latter. In such cases, article 66(4) of the Convention requires the States concerned to cooperate in matters of conservation and management. The 1985 Treaty Between the Government of the United States and the Government of Canada Concerning Pacific Salmon, TIAS No. 11091, currently the subject of additional negotiations, established the Pacific Salmon Commission to effect such cooperation on salmon in that region. It should be noted, however, that the so-called equity principle of the Pacific Salmon Treaty does not derive from article 66, but is specific to that Treaty.

Under article 67, catadromous stocks (fish that migrate from fresh water to spawn in salt water) are the special responsibility of those States where they spend the greater part of their life cycle, and may not be harvested on the high seas beyond the EEZ. The United States exercises exclusive fishery management authority over catadromous stocks within the U.S. EEZ under the general provisions of the MFCMA discussed above.

**Enforcement.** The Convention authorizes the coastal State to take a broad range of measures to enforce its fishery laws, including boardings and inspections, requirements for observer coverage and vessel position reports, and arrests and fines (articles 62(4) & 73). The Convention requires that vessels arrested in the EEZ and their crews must be promptly released upon posting of a bond or other security. This rule is consistent with U.S. law. The rare foreign fisherman charged with a criminal violation of fisheries law may post bail; the MFCMA also provides for the release of a seized vessel upon the posting of a satisfactory bond (16 U.S.C. § 1860(d)).

Under the Convention, penalties for violations of fisheries laws in the EEZ may not include imprisonment, unless the States concerned agree to the contrary, or other form of corporal punishment (article 73). The MFCMA provides for criminal fines of up to \$200,000 for fishing violations committed by foreign fishermen. The MFCMA also provides for imprisonment for such acts as forcible assault, resisting or interfering with arrest, and obstructing a vessel boarding by an enforcement officer (16 U.S.C. § 1859(b)). The Convention does not preclude imprisonment of those who assault officers, resist arrest, or violate other non-fishery laws.

The provisions of the Convention prohibiting imprisonment or corporal punishment for fishing violations responded to the severe treatment meted out to foreign fishermen in some places. Although the Convention limits the ability of the United States to impose prison sentences on foreign fishermen who violate U.S. fishery laws, the Convention promotes a major U.S.

objective in protecting U.S. fishermen seized by other States from the imposition of prison sentences. On balance, these provisions of the Convention serve U.S. interests overall, given that many U.S. fishermen are actively engaged in fishing within foreign EEZs, while no foreign fishing is authorized within the U.S. EEZ at present.

### Continental Shelf

Under articles 68 and 77 of the Convention, sedentary species, such as coral, are not subject to the Convention's provisions relating to the EEZ, but are dealt with in the articles relating to the continental shelf. Under article 77, the coastal State has sovereign rights for the purpose of exploring and exploiting the sedentary species of the continental shelf, unqualified by the duties specifically associated with the conservation and management of living resources in the EEZ. This result is consistent with article 2(4) of the Continental Shelf Convention.

The definition of sedentary species remains the same as that in the Continental Shelf Convention:

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.

Neither convention provides examples of sedentary species subject to coastal State jurisdiction. However, the MFCMA specifies a number of varieties of coral, crab, mollusks and sponges as included within the sedentary species subject to U.S. continental shelf jurisdiction, and permits identification of other species when published in the Federal Register (16 U.S.C. §1802(4)).

### High Seas

International law has long recognized the right of all States for their nationals to engage in fishing on the high seas (High Seas Convention, article 2(2)). The freedom of high seas fishing has never been an unfettered right, however. The High Seas Convention, for example, required this freedom to be

exercised by all States with "reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

By authorizing the establishment of EEZs out to 200 miles, the LOS Convention has significantly reduced the areas of high seas in which fishermen may exercise this freedom.

Moreover, while article 87(1)(e) of the Convention preserves the right of all States for their nationals to engage in fishing on the high seas, it makes this right *subject to* a number of important, though general, conditions set forth in articles 116-120:

- Other treaty obligations of the State concerned;
- The rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63(2) and articles 64-67; and
- Basic obligations to cooperate in the conservation and management of high seas living resources set forth in articles 117-119.

In furtherance of these provisions, the international community has concluded numerous treaties that regulate or prohibit high seas fisheries. Among these treaties are many to which the United States is party, including, *inter alia*:

- International Convention for the Conservation of Atlantic Tunas, May 14, 1966, 20 UST 2887, TIAS No. 6767, 673 UNTS 63;
- Convention for the Establishment of an Inter-American Tropical Tuna Commission, March 3, 1950, 1 UST 230, TIAS No. 2044, 80 UNTS 3;
- Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, February 11, 1992;
- Convention for the Conservation of Salmon in the North Atlantic Ocean, March 2, 1982, TIAS No. 10789;
- Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 UST 3476, TIAS No. 10240;
- Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, April 2, 1987, TIAS No. 11100;

- Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, November 24, 1989; and
- International Convention for the Regulation of Whaling, November 19, 1956, 10 UST 952, TIAS No. 4228, 338 UNTS 366.

The United States has also recently participated in the conclusion of two other treaties relating to high seas fishing that are not yet in force, namely, the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, Sen. Treaty Doc. 103-27, and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Sen. Treaty Doc. 103-24.

The United States was also instrumental in promoting the adoption, by consensus, of United Nations General Assembly Resolutions 44/225, 45/297 and 46/215, which have effectively created a moratorium on the use of large-scale driftnets on the high seas. In pressing for the adoption of these resolutions, the United States relied heavily on the fact that large-scale driftnets in the North Pacific Ocean intercepted salmon of U.S. origin in violation of article 66 of the Convention and indiscriminately killed large numbers of other species, including marine mammals and birds, in violation of the basic conservation and related obligations contained in the Convention. In creating the moratorium, the international community implemented obligations flowing from these provisions of the Convention.

Existing U.S. law implements all pertinent U.S. obligations flowing from the general provisions of articles 116-120 of the Convention and the additional treaties to which the United States is party. The MFCMA also calls upon the Secretary of State to negotiate any additional treaties and other international agreements that may be necessary or appropriate in the fulfillment of U.S. obligations under the Convention to cooperate in the conservation and management of living resources of the high seas (16 U.S.C. §1822).

### “Straddling” Stocks and Highly Migratory Species

While virtually all members of the international community accept the fishery provisions of the Convention as reflective of customary law, differences remain over their interpretation and application, particularly as they relate to so-called “straddling” stocks and highly migratory species. This part of the Commentary will review these provisions in detail, as well as on-going efforts to resolve the differences that remain.

**“Straddling” Stocks.** Although the Convention does not use the term “straddling’ stocks,” that term has come to refer to those stocks described in article 63(2), which provides that:

Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

This provision reflects the need for international cooperation in the conservation of stocks that “straddle” the line that separates the EEZ from the high seas beyond. While the Convention recognizes the rights and responsibilities of the coastal State with respect to stocks occurring within its EEZ (article 56), overfishing for the same stock (or stocks of associated species) in the adjacent high seas area can radically undermine efforts by the coastal State to exercise those rights and fulfill those responsibilities.

Article 63(2) obligates the coastal State and the States fishing for such stocks in the adjacent area to “seek to agree” on necessary conservation measures for these stocks in the adjacent area. Three features of this provision are worth noting. First, the coastal State has the right to participate in the negotiations contemplated by article 63(2) whether or not it maintains a fishery for the stocks in question either within its EEZ or in the adjacent high seas area. Second, the conservation measures to be negotiated are for ap-

plication only in the adjacent high seas area, not in the coastal State’s EEZ, although, to be effective, the measures applied in the two areas should be compatible. Finally, article 63(2) leaves unresolved the question of what happens when the States concerned have not been able to agree on necessary measures. The on-going United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, discussed below, is presently grappling with this issue.

While disputes over straddling stocks in other parts of the world remain, article 63(2) provided the basis on which the United States was able to resolve a conflict over the primary straddling stock fishery of concern to it, namely the fishery for the Aleutian Basin stock of Alaskan pollock. This pollock stock is a valuable straddling stock that occurs in the EEZs of both the United States and the Russian Federation, as well as in the high seas area of the Bering Sea, commonly known as the Donut Hole. Overfishing for pollock in the Donut Hole by other States led to a collapse of the stock in the late 1980s. Relying on article 63(2), the United States and the Russian Federation persuaded the fishing States in question to conclude the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, which, once it enters into force, will establish an effective conservation and management regime for pollock in the Donut Hole, consistent with U.S. interests in that stock as a coastal State.

**Highly Migratory Species.** Article 64 of the Convention provides separate treatment for highly migratory species (HMS), which are those listed in Annex I to the Convention. The list includes, *inter alia*, tuna and billfish. With respect to HMS, article 64 provides that:

1. The coastal State and other States whose nationals fish in the region for . . . highly migratory species . . . shall cooperate 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 cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of [Part V of the Convention].

At the time the Convention was concluded, the United States sharply disagreed with most other States over the interpretation of this article. The predominant view was that HMS are treated exactly the same as all other living resources in the sense that they fall within exclusive coastal State authority in the territorial sea and EEZ under articles 2 and 56(l)(a), and are subject to articles 61 and 62. The United States, however, contended that article 64, by calling for international management of HMS throughout their migratory range, derogated from coastal State claims of jurisdiction. According to the U.S. interpretation, a coastal State would not be permitted, absent an agreement, to prevent foreign vessels from fishing for HMS in its EEZ.

Effective January 1, 1992, however, the United States amended the MFCMA to include HMS among all other species over which it asserts sovereign rights and exclusive fishery management authority while such species occur within the U.S. EEZ (16 U.S.C. § 1812). That amendment also recognized, at least implicitly, the right of other coastal States to assert the same sovereign rights and authority over HMS within their EEZs. With this amendment, a long-standing juridical dispute came to an end.

The end of the juridical dispute has not rendered article 64 meaningless, however. While virtually all States now accept that article 64 does not derogate from the rights of coastal States over living resources within their EEZs, article 64 does require all relevant States to cooperate in international management of HMS throughout their range, both within and beyond the EEZ. Article 64 thus differs in this critical respect from article 63(2), which obligates relevant States to cooperate

in the establishment of necessary conservation measures for "straddling" stocks only in the high seas area adjacent to the EEZ.

State practice has generally followed this distinction between straddling stocks and HMS. For example, such tuna treaties as the International Convention for the Conservation of Atlantic Tunas and the Convention for the Establishment of an Inter-American Tropical Tuna Commission apply both within and beyond the EEZs in their respective regions. Similarly, the International Convention for the Regulation of Whaling applies on a global basis, both within and beyond EEZs. By contrast, the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea and the Convention on Future Multilateral Cooperation in Northwest Atlantic Fisheries, both of which regulate fisheries for "straddling" stocks, apply only in the high seas areas adjacent to the relevant EEZs.

One justification for this distinction rests on the biological differences between the two categories of stocks. Broadly speaking, "straddling" stocks, such as cod in the Northwest Atlantic and pollock in the Bering Sea, occur primarily in the EEZs of a very few coastal States. Outside the EEZs, these stocks are fished in relatively discrete areas of the adjacent high seas. Accordingly, it seems reasonable for the coastal State "unilaterally" to determine conservation and management measures applicable in its EEZ, while the high seas fishing States and the coastal State(s) jointly develop such measures applicable in the adjacent areas.

Most HMS, by contrast, migrate through thousands of miles of open ocean. They are fished in the EEZs of large numbers of coastal States and in many areas of the high seas. No single coastal State could adopt effective conservation and management measures for such a stock as a whole. As a result, international cooperation is necessary in the development of such measures for these stocks throughout their range, both within and beyond the EEZ.

The list of HMS contained in Annex I to the Convention may not, on the basis of scientific evidence available today, reflect most accurately those marine species that in fact migrate most widely. The MFCMA also defines HMS for the purpose of that statute by listing some, but not all, of the marine species included in Annex I (16 U.S.C. § 1802(14)). The absence of some Annex I species from the MFCMA definition would not prevent the United States from fulfilling its obligations under article 64 to cooperate in developing international regimes for HMS regulation, however. Indeed, the MFCMA calls upon the Secretary of State, in consultation with the Secretary of Commerce, to negotiate agreements to establish such regimes (16 U.S.C. § 1822(e)).

Finally, although Annex I includes dolphins and cetaceans among the listed HMS, this would not prejudice the provisions of articles 65 and 120, which preserve the right of coastal States and the competence of international organizations, as appropriate, to prohibit, limit or regulate the taking of marine mammals more strictly than otherwise provided for in the Convention.

**United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.** As noted above, articles 63(2) and 64 establish, for "straddling" stocks and HMS, respectively, general obligations for coastal States and other States whose nationals fish for these stocks to cooperate in conservation and management. Within the framework of these general obligations, the international community has concluded numerous treaties and other agreements to regulate fisheries for "straddling" stocks and HMS.

The existence of this framework and of these treaties and agreements has not resolved all differences regarding the conservation and management of these species, however. With a view to resolving these differences, Agenda 21, adopted by the 1992 United Nations Conference on Environment and Development, called upon the United Nations to convene a conference specifically devoted to this subject. As the

resulting United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks has not yet completed its work, it would be premature to speculate on its outcome, except to say that all participating States have agreed that any such outcome must be consistent with the LOS Convention.

### Dispute Settlement

The Convention's dispute settlement provisions, as they apply to fisheries disputes, reinforce the scheme of the fishery provisions of the Convention as a whole. A coastal State need not submit to binding arbitration or adjudication any dispute relating to the exploration, exploitation, conservation, or management of living resources in the EEZ, including, for example, its discretionary powers for determining the allowable catch. However, such disputes may, in limited circumstances, be referred to compulsory but non-binding conciliation.

Fishing beyond the EEZ is subject to compulsory, binding arbitration or adjudication. This will give the United States an additional means by which to enforce compliance with the Convention's rules relating to the conservation and management of living marine resources and measures required by those rules, including, for example, the prohibition in article 66 on high seas salmon fishing, the application of articles 63(2) and 116 in the Central Bering Sea in light of the new Pollock Convention, and the application of articles 66, 116 and 192 in light of the United Nations General Assembly Resolutions creating a moratorium on large-scale high seas driftnet fishing.

Neither the Convention's dispute settlement provisions nor any of its other provisions, however, limit the ability of the United States to use other means, including trade measures, provided under U.S. law to promote compliance with environmental and conservation norms and objectives.

The dispute settlement provisions as they relate to living marine resources are discussed more fully below in the section on dispute settlement.

### THE CONTINENTAL SHELF (Article 56(1); Part VI, Articles 76-78, 80-80, 85; Annex II; Final Act, Annex II)

Part VI of the Convention, together with other related provisions on the continental shelf, secures for the coastal State exclusive control over the exploration and exploitation of the natural resources, including oil and gas, of the sea-bed and its subsoil within 200 miles of the coastal baselines and to the outer edge of the geological continental margin where the margin extends beyond 200 miles.

United States interests are well served by the Convention's provision for exclusive coastal State control over offshore mineral resources to the outer edge of the continental margin. In addition, the Convention's standards and procedures for delimiting the outer edge of the margin will help avoid uncertainty and disagreement over the maximum extent of coastal State continental shelf jurisdiction. The resulting clarity advances both the resource management and commercial interests of the United States, as well as its interests in stabilizing claims to maritime jurisdiction by other States.

In order to provide necessary legal certainty with respect to coastal State control over exploration and development activities on the continental margin beyond 200 miles, the Convention sets forth detailed criteria for determining the outer edge of the margin. In addition, it provides for establishment of an expert body, the Commission on the Limits of the Continental Shelf, to provide advice and recommendations on the application of these criteria.

Only a limited number of coastal States, including the United States, have significant areas of adjacent continental margin that extend beyond 200 miles from the coast. Many States preferred a universal limit at 200 miles for all. The Convention balances the extension of coastal State control over the natural resources of the continental margin seaward of 200 miles with a modest obligation to share revenues

from successful minerals development seaward of 200 miles. The potential economic benefits of these resources to the coastal State greatly exceed any limited revenue sharing that may occur in the future.

### The Concept of the Continental Shelf

From a geological perspective, the continental shelf is only one part of the submerged prolongation of land territory offshore. It is the inner-most of three geomorphological areas—the continental slope and the continental rise are the other two—defined by changes in the angle at which the sea-bed drops off toward the deep ocean floor. The shelf, slope and rise, taken together, are geologically known as the continental margin (see Figure 2). Worldwide, there is wide variation in the breadths of these areas.

National claims to the continental shelf in modern times date from President Truman's 1945 Proclamation on the Continental Shelf, by which the United States asserted exclusive sovereign rights over the resources of the continental shelf off its coasts. The Truman Proclamation specifically stated that waters above the continental shelf were to remain high seas and that freedom of navigation and overflight were not to be affected (Presidential Proclamation No. 2667, Sept. 28, 1945, 3 CFR 67 (1943-48 Comp.)).

Differing interpretations and application of concepts underlying the Truman Proclamation led to international efforts to develop a more precise definition of the continental shelf. The first result of these efforts was the Continental Shelf Convention that emerged from the First United Nations Conference on the Law of the Sea in 1958. It provides that the continental shelf refers to:

the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

The "exploitability criterion" of the Continental Shelf Convention, however, itself created considerable uncertainty as to how far seaward a country was entitled to exclusive rights over the resources of the shelf.

The 1982 Convention discards this definition of the continental shelf in favor of expanded objective limits and a method for establishing their permanent location. This change was designed to accommodate coastal State interests in broad control of resources and in supplying the certainty and stability of geographic limits necessary to promote investment and avoid disputes.

### Definition of the Continental Shelf

Article 76(1) of the Convention defines the continental shelf as follows:

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.

This definition allows any coastal State, regardless of the sea floor features off its shores, to claim a 200-mile continental shelf. This is consistent with the provisions of articles 56 and 57, which include among the rights of a coastal State within its EEZ sovereign rights for exploring and exploiting non-living resources of the sea-bed and its subsoil.

The effect is to give coastal States whose physical continental margins extend less than 200 miles from the coast sovereign rights over the natural resources of the sea-bed and subsoil up to the 200-mile limit. This is of particular importance in those parts of the United States with a narrow continental margin, such as areas off the Pacific coast, Hawaii, the Commonwealths of Puerto Rico and of the Northern Mariana Islands, and most other islands comprising U.S. territories and possessions.

### Rights and Duties

The coastal State's rights under Part VI over the natural resources of the continental shelf exist independent of any action by the coastal State, and apply whether or not the coastal State has declared an EEZ. Article 77 reiterates that the coastal State has sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. The sovereign rights of the coastal State are balanced with provisions protecting the freedom of navigation and the other rights and freedoms of other States from infringement or unjustifiable interference by the coastal State. Under article 78, rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the airspace above those waters.

The right of all States to lay submarine cables and pipelines on the continental shelf is specifically protected by article 79, which is discussed above in the section on the high seas.

Several articles enumerate specific rights of the coastal State regarding activities on the continental shelf. Those relating to artificial islands, installations and structures (article 80) are the same as the rights in article 60 already

discussed in connection with the EEZ. Drilling for all purposes (article 81), and tunnelling (article 85) are under coastal State control. The provisions of article 83 on delimitation are discussed below in the section of this Commentary on maritime boundary delimitation.

### Limits of the Continental Shelf Beyond 200 Miles (Article 76)

**Definition.** Paragraphs 3-7 of article 76 provide a detailed formula for determining the extent of the continental shelf of a coastal State, based on the definition in paragraph 1, where its continental margin extends beyond 200 miles from the coast. Although this formula uses certain geological concepts as points of departure, its object is legal not scientific. It is designed to achieve reasonable certainty consistent with relevant interests and its effect is to place virtually all sea-bed hydrocarbon resources under coastal State jurisdiction.

The formula provides two alternative methods for determining the outer edge of the continental margin (paragraph 4). The first is based on the thickness of sedimentary rock (rock presumed to be of continental origin).

[Graphic Not Available on CD-ROM  
Version of Dispatch]

Figure 2. Profile of the Continental Margin

Reproduced by permission from University of Virginia Center for Oceans Law and Policy. *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II, page 877 (Nandan & Rosenne eds. 1993).

The limits of the margin are to be fixed by points at which the thickness of sedimentary rock "is at least 1 percent of the shortest distance from such point to the foot of the continental slope." (Thus, if at a given point beyond 200 miles from the baseline, the sediment thickness is 3 kilometers, then that point could be as much as 300 kilometers seaward of the foot of the continental slope.)

The second alternative is to fix the outer limits of the margin by points that are not more than 60 miles from the foot of the continental slope.

These alternative methods are subject to specific qualifications to ensure that their application does not produce unintended results.

First, the continental margin does not include the deep ocean floor with its ocean ridges (paragraph 3).

Second, the outer limit of the continental margin may not extend beyond 350 miles from the coast or 100 miles from the 2,500 meter isobath, whichever is further seaward (paragraph 5). This provision is neither an extension of the 200-mile limit in paragraph 1 nor an alternative definition of the continental margin and its outer edge contained in paragraph 4. It applies only to areas where the outer edge of the continental margin, determined in accordance with either of the methods specified in paragraph 4, might otherwise be located seaward of both of the limits contained in paragraph 5.

Third, notwithstanding the existence of alternative maximum limits in paragraph 5, the outer limit of the continental shelf shall not exceed 350 miles from the coast on submarine ridges, provided that this limitation on the use of either alternative limit set forth in paragraph 5 does not apply "to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs" (paragraph 6).

The United States understands that features such as the Chukchi plateau and its component elevations, situated to the north of Alaska, are covered by this exemption, and thus not subject to the 350-mile limitation set forth in paragraph 6. Because of the potential for significant oil and gas reserves in

the Chukchi plateau, it is important to recall the U.S. statement made to this effect on April 3, 1980 during a Plenary session of the Third United Nations Conference on the Law of the Sea, which has never given rise to any contrary interpretation. In the statement, the United States representative expressed support for the provision now set forth in article 76(6) on the understanding that it is recognized that features such as the Chukchi plateau situated to the north of Alaska and its component elevations cannot be considered a ridge and are covered by the last sentence of paragraph 6.

For the United States, the continental shelf extends beyond 200 miles in a variety of areas, including notably the Atlantic coast, the Gulf of Mexico, the Bering Sea and the Arctic Ocean. Other States with broad margins include Argentina, Australia, Brazil, Canada, Iceland, India, Ireland, Madagascar, Mexico, New Zealand, Norway, the Russian Federation and the United Kingdom.

**Delineation.** Article 76, paragraphs 7-10, deal with the delineation of the outer limits of the continental shelf. For reasons of simplicity and certainty, limits beyond 200 miles are to be delineated by straight lines no longer than 60 miles connecting fixed points defined by coordinates of latitude and longitude (paragraph 7). Coastal States with continental shelves extending beyond 200 miles are to provide information on those limits to the Commission on the Limits of the Continental Shelf, an expert body established by Annex II to the Convention. The Commission is to make recommendations to coastal States on these limits. The coastal State is not bound to accept these recommendations, but if it does, the limits of the continental shelf established by a coastal State on the basis of these recommendations are final and binding on all States Parties to the Convention and on the International Sea-bed Authority.

Article 76(9) requires the coastal State to deposit with the Secretary-General of the United Nations the relevant charts and data permanently

describing the outer limits of its continental shelf both at and beyond 200 miles. This promotes stability and predictability for investors and minimizes disputes.

### Commission on the Limits Of the Continental Shelf (Annex II)

The Commission on the Limits of the Continental Shelf is to consist of 21 members, who are to be experts in geology, geophysics or hydrography, but may only be nationals of States Parties. A coastal State that intends to establish its continental shelf beyond 200 miles is required by Annex II, article 4 to provide particulars of those limits to the Commission with supporting scientific and technical data no later than 10 years following entry into force for it of the Convention. In some cases, fiscal and technical limitations may mean that this submission merely begins a process that the coastal State will wish to augment with further study and data before the Commission makes its recommendations.

The Commission is authorized to make recommendations on the outer limits of the continental shelf beyond 200 miles. Such recommendations on the submission are prepared by a seven-member subcommission and approved by a two-thirds majority of Commission members (Annex II, articles 5 and 6). If the coastal State agrees, the limits of the continental shelf established by the coastal State on the basis of these recommendations are final and binding (article 76(8)), thus providing stability to these claims which may not be contested.

In the case of disagreement by the coastal State with the recommendations of the Commission, Annex II, article 8 requires the coastal State, within a reasonable time, to make a revised or new submission to the Commission.

The Commission is designed to provide a mechanism to prevent or reduce the potential for dispute and uncertainty over the precise limits of the continental shelf where the continental margin extends beyond 200 miles. The process is not adversarial, and the International Sea-bed Authority plays no

part in determining the outer limit of the continental shelf. Ultimate responsibility for delimitation lies with the coastal State itself, subject to safeguards against exaggerated claims. The procedures of the Commission are structured to provide incentives to ensure that recommendations are not made that are likely to be rejected by the coastal State. For example, if requested, the Commission may aid the coastal State in preparing its data for submission.

Annex II provides for the election of the Commission within 18 months of the entry into force of the Convention. Because the continental shelf of the United States extends beyond 200 miles in areas of potential oil and gas reserves, because of its interest in consolidating the rights of coastal States over their reserves, as well in discouraging exaggerated claims to offshore jurisdiction, it is important for the United States to become party as early as possible in order to be able to participate in the selection of the members of the Commission, as well as to nominate U.S. nationals for election to the Commission.

The Commission plays no role in the question of delimitation between opposite or adjacent States.

#### **Revenue Sharing (Article 82).**

Article 82(1) provides that coastal States shall make payments or contributions in kind in respect of exploitation of the non-living resources of the continental shelf beyond 200 miles from the coastal baselines. The choice between "payments" and "contributions in kind" is left to the coastal State, which normally can be expected to elect to make payments.

No revenue sharing is required during the first five years of production at any given site (article 82(2)). Thereafter, payments and contributions are to be made with respect to all production at that site. From the sixth to the twelfth year of production, the payment or contribution is to be made at the rate of one per cent per year of the value or volume of production at the site, increasing annually by one per cent. After the twelfth year, the rate remains at seven per cent.

The requisite payments are a small percentage of the value of the resources extracted at the site. That

value is itself a small percentage of the total economic benefits derived by the coastal State from offshore resources development. Article 82(3) exempts a small category of developing States from making payments or contributions in kind. Payments are to be distributed by the Authority to States Parties on the basis of criteria for distribution set out in article 82(4). These funds are distinct from, and should not be confused with, the Authority's revenues from deep mining operations under Part XI. They may not be retained or used for purposes other than distribution under article 82, paragraph 4.

Revenue sharing for exploitation of the continental shelf beyond 200 miles from the coast is part of a package that establishes with clarity and legal certainty the control of coastal States over the full extent of their geological continental margins. At this time, the United States is engaged in limited exploration and no exploitation of its continental shelf beyond 200 miles from the coast. At the same time, the United States is a broad margin State, with significant resource potential in those areas and with commercial firms that operate on the continental shelves of other States. On balance, the package contained in the Convention, including revenue sharing at the modest rate set forth in article 82, clearly serves United States interests.

**Statement of Understanding Concerning a Specific Method To Be Used in Establishing the Outer Edge of the Continental Margin (Annex II to the Final Act).** Annex II to the Final Act contains the Statement of Understanding adopted by the Third United Nations Conference on the Law of the Sea that addresses the unusual geographic circumstances involved in determining the outer edge of the continental margin of Sri Lanka and India in the southern part of the Bay of Bengal.

This Statement of Understanding bears upon the interpretation and application of the Convention, but is not part of the Convention as adopted by the Conference and submitted for the advice and consent of the Senate.

## **Domestic Legislation**

The principal U.S. legislation governing the U.S. continental shelf is contained in the Submerged Lands Act of 1953, as amended, 43 U.S.C. §1301 *et seq.*, and the Outer Continental Shelf Lands Act of 1953, as amended, 43 U.S.C. §1331 *et seq.*

## **DEEP SEA-BED MINING (Part XI and Agreement on Implementation of Part XI; Annexes III and IV)**

Part XI and Annexes III and IV to the Convention (Part XI) and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (Agreement) establish the legal regime governing exploration and exploitation of mineral resources of the deep sea-bed beyond coastal State jurisdiction (sea-bed mining regime).

Flaws in Part XI caused the United States and other industrialized States not to become parties to the Convention. The unwillingness of industrialized States to adhere to the Convention unless its sea-bed mining provisions were reformed led the Secretary-General of the United Nations, in 1990, to initiate informal consultations aimed at achieving such reform and thereby promoting widespread acceptance of the Convention. These consultations resulted in the Agreement, which was adopted by the United Nations General Assembly on July 28, 1994 by a vote of 121 (including the United States) in favor with 0 opposed and 7 abstentions. As of September 8, 1994, 50 countries had signed the Agreement, including the United States (subject to ratification). More are expected to follow.

The objections of the United States and other industrialized States to Part XI were that:

- It established a structure for administering the sea-bed mining regime that did not accord industrialized States influence in the regime commensurate with their interests;
- It incorporated economic principles inconsistent with free market philosophy; and

- Its specific provisions created numerous problems from an economic and commercial policy perspective that would have impeded access by the United States and other industrialized countries to the resources of the deep sea-bed beyond national jurisdiction.

The decline in commercial interest in deep sea-bed mining, due to relatively low metals prices over the last decade, created an opening for reform of Part XI. This waning interest and resulting decline in exploration activity led most States to recognize that the large bureaucratic structure and detailed provisions on commercial exploitation contained in Part XI were unnecessary. This made possible the negotiation of a scaled-down regime to meet the limited needs of the present, but one capable of evolving to meet those of the future, coupled with general principles on economic and commercial policy that will serve as the basis for more detailed rules when interest in commercial exploitation reemerges.

The waning of the Cold War and the increasing tendency by nations in Eastern Europe and the developing world to embrace market principles gave further impetus to the effort to reform Part XI. These factors led the States that had historically supported Part XI to accept the need for reform. Finally, the 60th ratification of the Convention on November 16, 1993, made it apparent that a failure to reform Part XI before the entry into force of the Convention on November 16, 1994, could jeopardize the future of the entire Convention and seriously impede future efforts to exploit mineral resources beyond national jurisdiction.

The Agreement fully meets the objections of the United States and other industrialized States to Part XI. The discussion that follows describes the sea-bed mining regime of the Convention and the changes that have been made by the Agreement. The legal relationship between the Convention and the Agreement is then considered, as well as the provisional application of the Agreement.

## The Sea-bed Mining Regime

**Scope of the Regime.** The sea-bed mining regime applies to "the Area," which is defined in article 1 of the Convention to mean the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. The Area is that part of the ocean floor seaward of coastal State jurisdiction over the continental shelf, that is, beyond the continental margin or beyond 200 miles from the baseline from which the breadth of the territorial sea is measured where the margin does not extend that far. It comprises approximately 60 percent of the sea-bed.

The sea-bed mining regime governs mineral resource activities in the Area. Article 1(3) defines "activities in the Area" as all activities of exploration for or exploitation of the mineral resources of the Area. Those resources are all solid, liquid or gaseous mineral resources on or under the sea-bed. Prospecting, however, does not require prior authorization, but may be subject to general regulation.

### Common Heritage of Mankind.

Article 136 provides that the Area and its resources are the common heritage of mankind. This principle reflects the fact that the Area and its resources are beyond the territorial jurisdiction of any nation and are open to use by all in accordance with commonly accepted rules.

This principle has its roots in political and legal opinion dating back to the earliest days of the Republic. President John Adams stated that "the oceans and its treasures are the common property of all men." With respect to the sea-bed in particular, President Lyndon Johnson declared that "we must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings." The United States joined in the adoption, by consensus, of the United Nations General Assembly Resolution 2749 (XXV)(1970), which set forth this principle. The Deep Seabed Hard Mineral Resources Act of 1980 (30 U.S.C. § 1401 *et seq.*)(DSHMRA) incorporated this principle into U.S. law.

For reasons of national security, the United States has also supported this principle to ensure that the deep sea-bed is not subject to national appropriation, which could lead to confrontation or impede the mobility or operations of U.S. armed forces. Article 137, like the DSHMRA, advances these interests by providing that no State shall claim or exercise sovereignty over any part of the Area or its resources or recognize such claims by others.

In furtherance of this principle, article 141 declares the Area to be open to use by all States. Only mining activities are subject to regulation by the International Sea-bed Authority (discussed below). Other activities on the deep sea-bed, including military activities, telecommunications and marine scientific research, may be conducted freely in accordance with principles of the Convention pertaining to the high seas, including the duty to have reasonable regard to other uses.

Part XI, as modified by the Agreement, gives specific meaning to the common heritage principle as it applies to the mineral resources of the sea-bed beyond coastal State jurisdiction. It is worth noting that the Agreement, by restructuring the sea-bed mining regime along free market lines, endorses the consistent view of the United States that the common heritage principle fully comports with private economic activity in accordance with market principles.

## Administration of the Regime

**International Sea-bed Authority.** To administer the sea-bed mining regime, articles 156-7 of the Convention establish a new international organization, the International Sea-bed Authority (Authority). Article 158 establishes the three principal organs of the Authority: the Assembly, the Council and the Secretariat. In addition, as subsidiary organs to the Council, article 163 creates a Legal and Technical Commission. Section 9 of the Annex to the Agreement adds a Finance Committee.

Article 163 of the Convention also provides for an Economic Planning Commission. However, section 1(4) of the Annex to the Agreement conditions the establishment of the Commission on a future decision by the Council and, for the time being, delegates its functions to the Legal and Technical Commission.

With the exception of the Secretariat, all of these organs consist of representatives whose salaries and expenses are paid by their own States.

**Assembly.** The Assembly provided for in articles 159-160 of the Convention is a plenary body of all members of the Authority. Its main specific functions are to elect the Council, to elect a Secretary-General, to assess contributions, to give final approval to rules and regulations and to the budget, and to decide on the sharing of revenues to the Authority from mining.

Because of the size of the Assembly, and because its composition and voting rules do not necessarily ensure adequate protection for all relevant interests, the Convention and the Agreement provide that the important decision-making functions of the Assembly are exercised concurrently with, or are based on the recommendations of, the Council or the Finance Committee, or both.

**Council.** The Council is the executive body of the Authority and as such is primarily responsible for the administration of the sea-bed mining regime. Article 161 provides that the Council is to be composed of 36 members, four from the major consumers of minerals, four from the largest investors in deep sea-bed mining, four from major land-based producers of minerals, six to represent various interests among developing countries, and the remaining 18 to achieve overall equitable geographic distribution.

The primary functions of the Council, outlined in article 161, are to supervise the implementation of the sea-bed mining regime, to approve plans of work for exploration or exploitation of mineral resources, to oversee compliance with approved plans of work, to adopt and provisionally apply rules and regulations pending final ap-

proval by the Assembly, to nominate candidates for Secretary-General of the Authority, and to make recommendations to the Assembly on subjects upon which the Assembly must make decisions.

Part XI requires the Assembly to make many of its decisions on the basis of recommendations from the Council. Section 3(4) of the Annex to the Agreement expands this requirement to cover virtually all decisions of the Assembly and further provides that, if the Assembly disagrees with a Council recommendation, it must return the issue to the Council for further consideration.

**Legal and Technical Commission.** The Legal and Technical Commission is a fifteen-member body of technical experts elected by the Council. Under article 165, its primary functions are to review and make recommendations to the Council on the approval of plans of work, to prepare draft rules and regulations, to direct the supervision of activities pursuant to approved plans of work, to prepare environmental assessments and recommendations on protection of the marine environment and to monitor the environmental impacts of activities in the Area.

**Economic Planning Commission.** Like the Legal and Technical Commission, the Economic Planning Commission was to be a fifteen-member technical body. As noted above, the Economic Planning Commission will not be established in the near term; its functions will be performed by the Legal and Technical Commission. Those functions, defined in article 164, are mainly to review trends and factors affecting supply, demand and prices for minerals derived from the Area and to make recommendations on assistance to developing States that are shown to be adversely affected by activities in the Area (see discussion of the assistance fund below). The fact that such questions will not arise until commercial mining takes place made it reasonable to defer the Commission's establishment.

**Finance Committee.** In response to proposals by the United States and other industrialized States, section 9 of the Annex to the Agreement establishes a Finance Committee. Section 9(3) requires the Committee to include the five largest contributors to the budget until such time that the Authority generates sufficient funds for its administrative expenses by means other than assessed contributions. Section 3(7) provides that decisions of the Council and the Assembly having financial or budgetary implications shall be based on recommendations of the Finance Committee, which must be adopted by consensus.

### The Functional-Evolutionary Approach

One of the major themes in the negotiations that led up to the Agreement was the need for the Authority to be cost-effective. While this was a prime concern of industrialized States, it also had broad support among developing countries. Sections 1(2) and (3) of the Annex to the Agreement accordingly stipulate that the establishment of the Authority and its organs, and the frequency, duration and scheduling of meetings, are to be governed by the objective of minimizing costs while ensuring that the Authority evolves in keeping with the functions it must perform.

Thus, as noted above, the Economic Planning Commission will not be established until a future decision of the Council, or the approval of a plan of work for commercial exploitation. In addition, sections 1(4) and (5) of the Annex to the Agreement identify the specific early functions on which the Authority should concentrate prior to commercial mining. These functions largely relate to approving plans of work for existing mining claims, monitoring compliance, keeping abreast of trends in the mining industry and metal markets, adopting necessary rules and regulations relevant to various stages of mining as interest emerges, promoting marine scientific research, and monitoring scientific and

technical developments (particularly related to protection of the environment).

The evolutionary approach also underlies the decision to postpone the elaboration of very specific rules to govern sea-bed mining until the international community better understands the nature of mining activities likely to occur on a commercial scale. Instead, the Agreement establishes a series of broad reforms based on free market principles that will serve as the basis for more specific rules at an appropriate time. Significant improvements to the decision-making structure of the Authority, discussed below, made it possible for the United States and other industrialized States to have confidence that such rules and regulations will protect their interests.

### Acquisition of Mining Rights

Article 153 and Annex III to the Convention govern the system for acquiring mining rights.

**Prospecting.** Article 2 of Annex III to the Convention does not require prior approval for prospecting. However, prospectors must submit a written undertaking to comply with the Convention. Prospecting, which may be conducted simultaneously by more than one prospector, does not confer any rights with respect to the resources.

#### Exploration and Exploitation.

Article 153 and article 3 of Annex III provide that exploration and exploitation activities may be conducted by States Parties or entities sponsored by States Parties. The applicant submits a written plan of work that upon approval will take the form of a contract between the applicant and the Authority.

Under article 4 of Annex III, entities shall be qualified if they meet standards for nationality, control and sponsorship set forth in article 153(2)(b), as well as other general standards related to technical and financial capabilities and to their performance under previous contracts.

**Protection of the Marine Environment.** Article 145 and Annex III, article 17 of the Convention provide for the adoption of rules, regulations and procedures by the Council to ensure effective protection of the marine environment from harmful effects of deep sea-bed mining activity.

Article 162 also authorizes the Council to disapprove areas for exploitation where there is a risk of serious harm from mining activities already underway.

Section 1(7) of the Annex to the Agreement strengthens these requirements by requiring that all applications for approval of plans of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities and a program for oceanographic and baseline environmental studies. Section 1(5)(g) of the Annex to the Agreement also requires the Authority to adopt rules, regulations and procedures on marine environmental protection as part of its early functions prior to the approval of the first plan of work for exploitation.

**Application Fees.** Article 13, paragraph 2 of Annex III to the Convention provides for an application fee of U.S.\$500,000. Section 8(3) of the Annex to the Agreement requires instead a U.S.\$250,000 fee for each phase (i.e., exploration or exploitation). If the fee exceeds the cost incurred in processing the application, the Authority is required to refund the difference to the applicant.

**Approval of Applications.** The Authority shall review and approve plans of work on a first-come first-served basis. Special decision-making procedures apply to the approval of plans of work. Under article 165(2), the Legal and Technical Commission shall review applications and make recommendations to the Council on the approval of plans of work. The Commission is required to base its recommendations on whether the applicant meets the financial and technical qualifications mentioned above, whether its proposed plan of work otherwise meets the rules and regulations adopted by the Council, and whether the applicant has included undertakings to comply with the Convention and

with rules, regulation and procedures adopted pursuant thereto. Decisions by the Commission are taken by a simple majority of its fifteen members.

If the Legal and Technical Commission recommends approval of a plan of work, section 3(1) of the Annex to the Agreement requires the Council to approve the plan of work within 60 days, unless the Council decides otherwise by a two-thirds majority of its members, including a majority of the members present and voting in each of its chambers. The effects of this provision are to require the Council to act in a timely manner and to allow two members of either the consumer or investor chambers of the Council to ensure that such a plan of work is approved. If the Commission recommends against approval of an application, the Council can nevertheless approve the application based on its normal decision-making procedures for issues of substance.

**Security of Tenure—Priority of Right.** Section 1(9) of the Agreement requires the Authority to approve plans of work for exploration for a period of 15 years. At the end of this period, an applicant must apply for approval of a plan of work for exploitation. If, however, the applicant can demonstrate that circumstances beyond its control prevent completion of the work necessary to move to exploitation, or that commercial circumstances do not justify proceeding to exploitation, the Authority must extend the approved plan of work for exploration in additional five-year increments at the request of the contractor.

Under article 16 of Annex III to the Convention, approved plans of work shall accord the contractor exclusive rights in the area covered by the plan of work in respect of a specific category of resources. Article 10 of Annex III provides that an approved plan of work for exploration confers a priority of right on the applicant for approval of a plan of work for exploitation in the same area. The priority may be withdrawn for unsatisfactory performance. However, section 1(13) of the Annex to the Agreement requires unsatisfactory

performance to be judged on the basis of a failure to comply with the terms of an approved plan of work notwithstanding written warnings by the Authority.

Article 19 of Annex III provides that contracts cannot be revised except by consent of both parties (i.e., the applicant and the Authority).

**Applications by Pioneer Investors.** A special procedure exists for grandfathering into the sea-bed mining regime the mining sites of enterprises that have conducted substantial activities prior to the entry into force of the Convention. This procedure applies to entities from Japan, the Russian Federation, France, China, India, Eastern Europe and South Korea that have registered sites with the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea (Prepcom) in accordance with Resolution II of the Final Act of the Third United Nations Conference on the Law of the Sea. The same procedure also applies to the sites of the mining consortia that have been licensed under the sea-bed mining laws of the United States, Germany or the United Kingdom.

Section 1(6)(a)(ii) of the Annex to the Agreement allows entities that have already registered sites with the Prepcom 36 months to file for the approval of a plan of work under the Convention without jeopardy to their rights to the mine site. When they file an application, and accompany it with the certificate of compliance recently issued by the Prepcom, it will be approved by the Authority, provided that it conforms to the rules, regulations and procedures of the Authority.

With regard to consortia licensed by the United States, Germany or the United Kingdom, section 1(6)(a)(i) of the Annex to the Agreement provides that they will be considered to have met the financial and technical qualifications necessary for approval of a plan of work if their sponsoring State certifies that they have expended U.S.\$30,000,000 in research and exploration activities and have expended no less than 10 percent of that amount in the location, survey and evaluation of

the area referred to in the plan of work. All three of the consortia with current exploration permits issued pursuant to the DSHMRA meet this standard. In addition, section 1(6)(a)(iii) provides that, in keeping with the principle of non-discrimination, the contracts with these consortia "shall include arrangements which shall be similar to and no less favorable than those agreed with" any pioneer investor registered by the Prepcom.

**Reserved Areas.** Applicants for exploration rights under the Convention must set aside reserved areas for possible future use by the Enterprise (an arm of the Authority that, under certain circumstances, may undertake mining activity in its own right). Article 8 of Annex III to the Convention requires that each application cover an area sufficiently large and of sufficient value to allow for two mining operations. The applicant is responsible for dividing the area into two parts of equal estimated value. The Authority must then designate one of the areas to be reserved for future use by the Enterprise and the other to be reserved for the applicant.

Section 2(5) of the Annex to the Agreement modifies articles 8 and 9 of Annex III to the Convention to take into account the fact that the Enterprise, if it begins to undertake mining activity, will operate through joint ventures and to allow an applicant to participate in the exploration and development of a reserved area that it prospected. Under section 2(5), the miner that contributed the area has the first option to enter into a joint venture with the Enterprise for the exploration and exploitation of that area. Furthermore, if the Enterprise does not submit an application for approval of a plan of work for the reserved area within 15 years of the date on which that area was reserved, or the date on which the Enterprise becomes operational, whichever is later, the miner that contributed the area can apply to exploit it if the miner makes a good faith offer to include the Enterprise as a joint venture partner.

The pioneer investors that registered their claims with the Prepcom complied with this obligation at the

time of registration. However, the areas registered by some pioneer investors (i.e., Japan, France and the Russian Federation) were not large enough to provide a reserved area. After some negotiation, the Prepcom allowed these pioneer investors collectively to reserve a single site and to self-select a major portion of the area they retained. If U.S.-licensed consortia confronted practical problems in registering claims with the Authority, they would be entitled to "no less favorable treatment" under section 1(6)(a)(iii) of the Annex to the Agreement.

**Compliance.** Article 153(4) of the Convention requires the Authority to exercise such control as is necessary to ensure compliance with the Convention, rules and regulations adopted by the Council, and approved plans of work. In addition, article 4(4) of Annex III and article 139 provide that States Parties are also responsible for ensuring compliance by the nationals or enterprises they sponsor. However, a State Party will not be liable for damage caused if it has taken reasonable measures within the framework of its legal system to ensure compliance by persons or entities under its jurisdiction.

### Decision-making

As noted above, decision-making was one of the key areas of concern for the United States and other industrialized States in the reform of Part XI. In particular, the United States objected to the absence of a guaranteed seat in the 36-member Council, to the possibility that the Assembly could dominate decisions within the Authority (discussed above) and to the fact that industrialized countries did not have influence on the Council commensurate with their interests.

**U.S. Seat.** The United States is now guaranteed a seat on the Council in perpetuity. Section 3(15) of the Annex to the Agreement provides that the consumer chamber in the Council shall include the State that, upon the entry into force of the Convention, has the largest economy in terms of gross domestic product.

### Decisions by the Council.

Because the requirements for representation of developing countries and for equitable geographic distribution set forth in article 161 of the Convention would likely produce a majority of developing States on the Council, the United States and other industrialized States sought to change the voting rules to ensure that the United States, and others with special interests that would be affected by decisions of the Authority, would have special voting rights in the Council. Section 3(5) of the Annex to the Agreement provides that, when consensus cannot be reached in the Council, decisions on questions of substance shall be taken by a two-thirds majority of the members present and voting, provided that the decision is not opposed by a majority in any of the four-member consumer, investor or producer chambers in the Council.

This chambered voting arrangement will ensure that the United States and two other consumers, or three investors or producers acting in concert, can block substantive decisions in the Council. The only exceptions to this rule are for four substantive decisions that, under article 161(8)(d) of the Convention, must be made by consensus. Thus, consensus is required for any decision to provide protection to developing States that are land-based producers of minerals from adverse effects from sea-bed mining; any decision to recommend to the Assembly rules and regulations on the sharing of financial benefits from sea-bed mining (revenue sharing); any decision to adopt and apply provisionally rules, regulations and procedures implementing the sea-bed mining regime or amendments thereto; and any decision to adopt amendments to the sea-bed mining regime. The requirement that these issues be made by consensus in effect gives the United States a veto with respect to them.

Developing States argued that the six-member developing country category in the Council should also be treated as a chamber for voting purposes. The United States and other industrialized States opposed this on the grounds that developing States in

the Council already were assured of sufficient numbers to protect their interests. Sections 3(9) and 3(15)(d) of the Annex to the Agreement represent a compromise on this issue. Those provisions combine the six-member developing State category with the developing States elected on the basis of ensuring overall equitable geographic distribution to serve as a chamber for voting purposes. This would allow 11 developing States acting in concert to block a decision, compared to the 13 votes needed to block an overall two-thirds majority in the Council.

**Composition of the Council.** Article 160(12)(a) of the Convention authorizes the Assembly to elect the members of the Council. Section 3(10) of the Annex to the Agreement refines this by providing for all States Parties that meet the criteria of a specific category (i.e., consumers, investors and producers) to nominate their representatives in those categories. This refinement ensures that each category of States Parties will be represented in the Council by members of its own choosing.

**Rulemaking: General.** Article 160(f)(ii) authorizes the Assembly to approve rules, regulations and procedures of the Authority governing the administration of the sea-bed mining regime that have been adopted by the Council. Article 162(2)(o)(ii) provides that the Council shall adopt and provisionally apply such rules, regulations and procedures pending their approval by the Assembly. As noted above, the Council decision to adopt and provisionally apply rules, regulations and procedures must be taken by consensus. The result is that no implementing rules can be adopted or applied without the consent of the United States.

Section 3(4) of the Annex to the Agreement further protects U.S. interests by requiring that decisions of the Assembly on any matter for which the Council also has competence, or any administrative, budgetary or financial matter, must be based on recommendations of the Council. If the Assembly disagrees with the Council, it must

send the recommendations back for further consideration in light of the views of the Assembly. In the meantime, rules adopted by the Council continue to apply provisionally pending their final approval by the Assembly.

**Commercial Exploitation Rules.** As noted above, the Agreement sets forth general market-oriented principles to provide the basis for future rulemaking when commercial production appears likely. The Agreement provides a special procedure for adopting such rules to create effective incentives for their development in a timely fashion so that delay in their adoption would not impede commercial operations.

Section 1(15) of the Annex to the Agreement sets forth two means by which the process of preparing the necessary rules can be initiated. Paragraph 15(a) provides that the Council can initiate the process when it determines that commercial exploitation is imminent or at the request of a State whose national intends to apply for approval of a plan of work for exploitation. Paragraph 15(b) requires the Council to complete its work on the rules within two years of receiving such a request. Paragraph 15(c) provides that, if such work is not completed within this timeframe and an application for approval of a plan of work for exploitation is pending, the Council must consider and provisionally approve the proposed plan of work based on the Convention and any rules adopted provisionally, as well as the principle of non-discrimination.

**Review Conference.** The United States and other industrialized States strongly objected to the Review Conference provided for in article 155 of the Convention. The Review Conference would have convened 15 years after the commencement of commercial production to reevaluate Part XI and to propose amendments to the Convention. Such amendments could have entered into force for all States if adopted and ratified by three-quarters of the States Parties. This would have allowed the possibility that the United States could be bound by amendments that it had opposed.

Section 4 of the Annex to the Agreement eliminates the Review Conference. Any reconsideration of the sea-bed mining regime is subject to the normal procedures for adopting amendments to the sea-bed mining provisions of the Convention contained in articles 314-316. Article 314 requires that amendments to the sea-bed mining regime be adopted by the Assembly and the Council of the Authority. Article 16l(8)(d) requires that amendments be adopted in the Council by consensus, thus ensuring the United States a permanent veto over amendments. Amendments to the sea-bed mining regime adopted by this procedure enter into force when ratified by three-quarters of the States Parties (article 316(5)).

### **Economic and Commercial Policy Concerns**

As discussed above, the United States and other industrialized States objected to many features of Part XI on economic and commercial policy grounds. The United States objected, for example, to the provisions of Part XI on production limitations, financial terms of contracts, technology transfer and the Enterprise because of the negative effect they would have had on commercial exploitation of sea-bed mineral resources.

While there developed a general willingness on the part of other States to meet these objections, the effort to reform Part XI had to address the difficulty of predicting when interest in commercial exploitation will reemerge, which specific resources will be of interest at that time, and what economic environment will prevail. The Agreement resolves these difficulties by adopting general principles designed to restructure the sea-bed mining regime along free market lines. The States Parties will implement these general principles through the Authority as the need arises, in accordance with the new decision-making rules discussed above.

The Agreement also contains specific provisions to meet certain specific objections. The substantive solutions to the individual issues of concern are next discussed.

**Production Limitations.** Article 151 of the Convention would have established an elaborate system of controls on production of minerals from the deep sea-bed, ostensibly to protect land-based producers of minerals from adverse impacts due to competition from deep sea-bed mining. The controls were based on a formula for estimating the growth in the demand for minerals and then limiting sea-bed mining to a percentage of that growth, by requiring miners to obtain production authorizations from the Authority. In addition, article 151 would have allowed the Authority to participate in commodity organizations with the objective of promoting growth, efficiency and stability of markets. This could have included commodity agreements with production controls, quotas or other economic provisions for intervening in commodity markets.

In response to the objections of the United States and other industrialized States, section 6 of the Annex to the Agreement eliminates all such provisions. In their place, section 6(1) bases the production policy of the Authority on sound commercial principles. It provides that the provisions of the General Agreement on Tariffs and Trade (or agreements that replace the GATT) will apply to sea-bed mining beyond national jurisdiction. In particular, there can be no subsidization of sea-bed mining beyond national jurisdiction that would not be permitted under GATT rules, and no discrimination between minerals produced from the deep sea-bed and minerals produced from other sources.

Disputes arising from allegations that a State Party is not complying with the relevant GATT provisions would be subject to GATT dispute settlement procedures where both States Parties are party to the relevant GATT arrangements. If one or more parties to the dispute are not party to the relevant GATT arrangements, disputes would be referred to the dispute settlement procedures under the Convention (see discussion of dispute settlement below).

The transition to the World Trade Organization from the present GATT may require clarification of these provisions. For example, issues may arise

concerning which agreement applies when some States Parties to the Convention remain party to the former GATT arrangements and others become party to the new arrangements. However, with the timing of the re-emergence of interest in commercial production from the deep sea-bed uncertain, it is possible that the question will resolve itself before issues arise in this context.

**Economic Assistance.** In negotiating the Agreement, land-based producers of minerals that are found on the sea-bed agreed to eliminate production controls in exchange for the establishment of an economic assistance fund.

Article 151(10) of the Convention empowers the Authority to establish a "system of compensation or take other measures of economic adjustment assistance" with the objective of assisting "developing countries which suffer serious adverse effects on their export earnings or economies 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 deep sea-bed mining.

Section 7 of the Annex to the Agreement contemplates that this provision will be implemented through the establishment of an economic assistance fund. However, such a fund may only be established when the revenues of the Authority exceed those necessary to cover its administrative expenses (i.e., when revenues from mining are sufficient to avoid the need for assessed contributions from members for administrative expenses and a surplus exists). Only revenues from mining and voluntary contributions may be used to finance the fund. The United States veto in the Finance Committee and its influence in the Council are adequate to insure that such a fund is not established or operated in a manner contrary to U.S. interests.

**Financial Terms of Contracts.** Article 13 of Annex III to the Convention established detailed financial arrangements that were to become part of the contracts between the

Authority and the miner and that would have served as the means for the Authority to recover economic rents from the development of mineral resources of the sea-bed beyond national jurisdiction.

Among these arrangements were a U.S.\$1,000,000 annual fee from the date of approval of a plan of work for exploration. Upon the commencement of commercial production, the miner would have had to elect between the payment of a production charge or a combination of a production charge and a share of net proceeds from mining. The rates of both were graduated, starting out lower in the early years and increasing in the latter years of production, and were also adjustable, based on profitability.

These arrangements were extremely complex and relied upon very specific assumptions about the nature and profitability of a sea-bed mining operation based on a specific economic model. The United States and other industrialized States objected that these arrangements were both excessive and unduly rigid, given the uncertainties regarding the timing and nature of future mining activities. In particular, the United States objected to charging a U.S.\$1,000,000 annual fee during the exploration stage, when miners would have no income stream.

In response to these objections, section 8 of the Annex to the Agreement dispenses with these detailed provisions and provides that a system of financial arrangements shall be established in the future based on certain basic principles. Specifically, it requires that the system be fair to the Authority and the miner, that the rates be comparable to those prevailing with respect to land-based mining to avoid competitive advantages or disadvantages, that the system not be complicated and not impose major administrative costs on the Authority or the miner, and that consideration be given to a royalty or a combination royalty and profit-sharing system.

The U.S.\$1,000,000 annual fee charged during the exploration stage is eliminated. The Council will fix the amount of an annual fee during commercial production, which can be

credited against payments due under the royalty or profit sharing arrangements. Thus, the effect is to establish a minimum annual fee during commercial production.

**Technology Transfer.** The United States and other industrialized countries objected to the mandatory technology transfer provisions contained in article 5 of Annex III to the Convention. These provisions mandated the inclusion in the miners' contract of an undertaking on the part of the miner to transfer sea-bed mining technology to the Enterprise or developing countries if they were unable to obtain the technology on the open market. If transfer were not assured, the miner could not use such technology in its own mining activities.

Section 5 of the Annex to the Agreement eliminates these compulsory transfer provisions. In very general terms, article 144 of the Convention encourages the promotion of the transfer of technology and scientific knowledge related to deep sea-bed mining, including programs to facilitate access under fair and reasonable terms and conditions and to promote training. Section 5 of the Annex to the Agreement provides that the Enterprise and developing countries wishing to acquire sea-bed mining technology should do so on the open market or through joint ventures. If they are unsuccessful in obtaining such technology, the Authority may request miners and their sponsoring States to cooperate with it in facilitating access to technology "on fair and reasonable commercial terms and conditions, consistent with the effective protection of intellectual property rights."

**The Enterprise: Background.** Article 170 of the Convention establishes an operating arm of the Authority called the Enterprise. Article 153(2)(a) provides that the Enterprise, as well as other commercial enterprises, may apply to the Authority for mining rights.

The origins of the Enterprise date back to the early days of the Third United Nations Conference on the Law of the Sea, when certain developing States sought a regime where all mining would be conducted directly by the Authority, with private miners

relegated to the role of service contractors. Industrialized States favored a system of mining by States and private companies licensed by the Authority. In 1976, Secretary of State Henry Kissinger proposed the compromise that came to be known as the "parallel system" in which the Authority, through the Enterprise, as well as States and private companies, would both engage in mining activities. However, the negotiations that followed left the Enterprise in a privileged position that could have made it difficult for private entities to compete.

Throughout the effort to reform Part XI, the United States sought to eliminate the Enterprise by pointing to the privatization programs underway in many parts of the world. Nevertheless, among many developing States, in particular the least developed countries, where economic reform had not yet begun to take root, strong resistance persisted. Largely because the Enterprise symbolized the aspirations of developing States to have a means to participate in sea-bed mining, retention of the Enterprise remained a bedrock position of the developing States as a whole.

The Agreement retains the Enterprise but renders it harmless by addressing the specific problems and ensuring that the Enterprise could only become operational following a decision by the Council, and only if the Council concludes that the operations of the Enterprise would conform to sound commercial principles.

**Problems.** The three main problems posed by the Enterprise were that its first operation would be financed by loans and loan guarantees from the industrialized States, that it would benefit from numerous provisions discriminating in its favor vis-a-vis other commercial entities, and that other commercial entities would be obliged to provide it with technology (discussed above).

**Solutions.** Responding to these concerns, section 2(2) of the Annex to the Agreement provides that the Enterprise will conduct its first operations through joint ventures with other commercial enterprises. Section 2(3) eliminates the obligation for States

Parties to finance its operations. Section 2(4) subjects the Enterprise to the same obligations as other miners and modifies article 153(3) of the Convention to ensure that any plan of work submitted by the Enterprise must be in the form of a contract like that of any other miner and thus be subject to the requirements applicable to any other contractor. Finally, section 5 of the Annex to the Agreement removes the compulsory technology transfer provisions.

**Council Decision.** Section 2(2) of the Annex to the Agreement contains one of the most significant limitations on the Enterprise by preventing the Enterprise from operating as an independent entity until the Council issues a directive to that effect. In the interim, the secretariat of the Authority, subject to the control of the Council, will perform any necessary functions to prepare for the possible future operation of the Enterprise.

The Council must take up the issue of the independent operation of the Enterprise when an application by another commercial entity is approved for commercial exploitation, or when a proposal is made by another commercial entity to form a joint venture with the Enterprise. The decision by the Council must be based on a conclusion that operations by the Enterprise would accord with sound commercial principles. If such a decision were ever made, the Enterprise would then have to proceed through the normal process of applying for mining rights.

The enhanced role of the United States and other industrialized countries in the Council will allow them to ensure that, if a decision is ever made to make the Enterprise operational, it will only be on a basis that the United States would find acceptable. For example, if sea-bed mining ever generates sufficient funds through royalties to service the budget of the Authority and still leave a surplus, the Authority might decide to use some of the funds to invest in a joint venture with other commercial entities. It is possible that such an equity position in a sea-bed mining operation could be structured so as to pose no serious problems from the

standpoint of United States interests. It is equally possible that, by the time commercial mining takes place, developing States as well as industrialized countries will recognize the Enterprise as a relic of the past and not seek to make it operational.

**Budget of the Authority.** Article 173 of the Convention provides that the administrative budget of the Authority will be met by assessed contributions made by States Parties to the Convention until the time that other funds (i.e., revenues from mining or voluntary contributions) are adequate to meet the administrative expenses of the Authority. Section 1(14) of the Annex to the Agreement modifies these provisions by requiring that, until the Agreement enters into force, the administrative expenses of the Authority will be met through the budget of the United Nations.

The decision to draw on the United Nations budget was based on the need to provide for provisional application of the Agreement prior to its entry into force (see below), in order to allow States that had not yet become party to the Convention, such as the United States, to participate in the Authority. States that had already ratified or acceded to the Convention insisted that those States which participated in the Authority only through their provisional application of the Agreement should also support the budget. Temporary funding through the United Nations provided a convenient means to accomplish this.

At the last session of the Prepcom (August 1994), the United States achieved a budget recommendation to the United Nations General Assembly that was approximately 30 percent lower than Secretariat estimates for 1995. It assumes a staff for the Authority of six professionals and 17 support personnel. The total budget is estimated at \$2,489,600 and will not necessitate an increase in the overall United Nations budget for the 1994-95 biennium, as it will largely be offset by savings from the discontinuation of activities in support of the Prepcom.

## Privileges and Immunities

Articles 177-183 of the Convention, as well as article 13 of Annex IV to the Convention, require States Parties to provide certain privileges and immunities to the Authority and to certain persons connected to the Authority. In the near term, due to the limited interest in deep sea-bed mining and the attendant need for only low-level activity by the Authority, the foreseeable activities of the Authority that may occur in the United States which would implicate these privileges and immunities will take place at United Nations Headquarters in New York, where representatives of the Authority's member States and members of the Authority's secretariat may travel for meetings.

With respect to such activities, the United States is already obligated to provide all relevant privileges and immunities pursuant to existing agreements in force for the United States, including the Agreement between the United Nations and the United States regarding the headquarters of the United Nations, as amended (TIAS 1676, 5961, 6176, 6750, 9955; 61 Stat(4) 3416; 17 UST 74, 17 UST 2319; 20 UST 2810, 32 UST 4414; 11 UNTS 11, 554 UNTS 308, 581 UNTS 362; 687 UNTS 408) and the Convention on the Privileges and Immunities of the United Nations (TIAS 6900; 21 UST 1418; 1 UNTS 16).

## The Agreement and Its Relationship to the Convention

The Agreement revises, in a legally binding manner, the objectionable provisions of Part XI. As discussed above, these revisions satisfactorily address the objections raised by the United States and other industrialized countries to Part XI.

The Agreement contains two parts, a main body and an Annex. All of the substantive revisions to Part XI appear in the Annex, while the main body of the Agreement establishes the legal relationship between the Convention and the Agreement, provides options by which States may consent to be bound

by the Agreement, and sets forth the terms of entry into force of the Agreement and of its provisional application, and addresses certain subsidiary issues.

Article 1 of the Agreement obligates States Parties to undertake to implement Part XI in accordance with the Agreement. Article 2 states that the provisions of the Convention and those of the Agreement are to be interpreted and applied together as one single instrument; in the event of any inconsistency, the provisions of the Agreement prevail. These articles make the original provisions of Part XI legally subject to those of the Agreement.

Under article 3, the Agreement became open for signature by States and certain other entities (including the European Union) during a twelve-month period beginning on the date on which the United Nations General Assembly adopted the Agreement, i.e., July 28, 1994. Article 4(1) and (2) seek to ensure that States may thereafter only become party to the Agreement and the Convention together.

Article 4(3) allows States to choose among several alternative procedures by which to express their consent to be bound by the Agreement. The United States signed the Agreement subject to ratification, pursuant to article 4(3)(b).

Article 4(3)(c), together with article 5, provide another mechanism by which those States that have already ratified or acceded to the Convention (a category that does not include the United States) may become party to the Agreement. Any such State may sign the Agreement and become party to it without further action unless that State otherwise notifies the Depositary within twelve months of the Agreement's adoption. In the event of such notification, the notifying State is eligible to accede to the Agreement under article 4(3)(d).

This simplified procedure resolved an overarching difficulty in the effort to revise Part XI. During negotiation of the Agreement, those States, including the United States, that *had not* ratified the Convention because of objections to Part XI insisted on the need for a legally binding instrument

to revise Part XI. Many of those States that *had* ratified the Convention insisted that they would not return to their parliaments and seek formal approval of a new instrument that would revise Part XI.

The simplified procedure satisfies both objectives in a legally sound manner. Under customary international law, as reflected in article 12(1)(a) of the Vienna Convention on the Law of Treaties (92nd Congress, 1st Session, Senate Executive "L"), "the consent of a State to be bound by a treaty is expressed by signature of its representative when . . . the treaty provides that signature should have that effect." In the case of the Agreement, article 4(3)(c) and article 5 provide that, for any State that has ratified or acceded to the Convention, signature of the Agreement will bind the signatory State to the Agreement 12 months after the Agreement's adoption, unless that State notifies the Depositary otherwise.

One distinct advantage of the simplified procedure is that it allows a large number of States that have already ratified or acceded to the Convention easily to become party to the Agreement as well, thereby reducing the possibility that some States will remain party only to the Convention.

Article 6 governs entry into force of the Agreement. By its terms, the Agreement will enter into force 30 days after the date on which 40 States have established their consent to be bound by it, provided that at least seven of those States meet the criteria established for pioneer investors in deep sea-bed mining set forth in Resolution II of the Third United Nations Conference on the Law of the Sea and that, of those seven States, five are developed States. The United States is a pioneer investor in deep sea-bed mining for these purposes.

Article 7 provides for provisional application of the Agreement pending its entry into force. If the Agreement does not enter into force by November 16, 1998, due to the failure of the requisite States with mining interests to adhere to it, provisional application must terminate.

Provisional application advances important U.S. objectives. Without provisional application of the Agreement, the Convention would enter into force on November 16, 1994 unrevised; i.e., the provisions of the Agreement that resolve the objectionable features of Part XI would not be effective. The Authority would begin to function under the terms of the Convention, unaffected by the remedial provisions introduced by the Agreement.

Provisional application also provides a means to give effect to the remedial provisions of the Agreement without using the cumbersome amendment procedures contained in the Convention itself. Those amendment procedures would at the very least substantially delay the entry into force of those provisions and could prevent them from *ever* coming into force.

By virtue of its signature of the Agreement, the United States agreed to apply the Agreement provisionally beginning November 16, 1994. Article 7(2) provides flexibility in allowing States to apply it provisionally "in accordance with their national or internal laws and regulations." This approach, which is similar to that taken in other international agreements that have been provisionally applied, ensures that existing legislation provides sufficient authority to implement likely U.S. obligations during the period of provisional application.

By provisionally applying the Agreement, the United States can promote its sea-bed mining interests by participating in the very first meetings of the Authority, at which critical decisions are likely to be taken. As discussed above, the Agreement gives the United States considerable influence over the decisions of the Authority, which would be lost if the United States did not participate from the outset.

Provisional application of the Agreement is consistent with international and U.S. law. Article 25 of the Vienna Convention on the Law of Treaties provides for the provisional application of agreements pending their entry into force. Substantial

State practice has developed in this regard; a growing list of international agreements have been provisionally applied.

The United States has provisionally applied numerous agreements, including several international commodity agreements and other treaties pending their entry into force for the United States.

Articles 8 through 10 of the Agreement address subsidiary issues relating to the application of the Agreement.

### United States Deep Sea-bed Mining Legislation

The DSHMRA constitutes the national licensing and permitting regime for U.S. entities engaged in deep sea-bed mining activities.

The basic premise of the DSHMRA is that the interests of the United States would best be served by U.S. participation in a widely acceptable treaty governing the full range of ocean uses, including establishment of an international regime for development of mineral resources of the sea-bed beyond national jurisdiction. Recognizing in 1980 that an acceptable international regime had not been achieved, Congress enacted the DSHMRA both to provide a legal framework within which U.S. entities could continue deep sea-bed mining activities during the interim period pending an acceptable treaty (and environmental protection concerns could be addressed), and to facilitate a smooth transition from this national regime to the future international regime established by such a treaty.

Anticipating the components of an acceptable international regime, Congress incorporated into the DSHMRA basic elements that are similar to those now found in Part XI as modified by the Agreement. These include:

- Recognition of U.S. support for the principle that the deep sea-bed mineral resources are the common heritage of mankind (30 U.S.C. §1401(a)(7));
- A disclaimer of sovereignty over areas or resources of the deep sea-bed (30 U.S.C. § 1402(a));

- Recognition of the likelihood of payments to an international organization with respect to hard mineral resources (30 U.S.C. § 1402(a)(15));
- Provision of measures for protection of the marine environment, including an environmental impact statement and monitoring (e.g., 30 U.S.C. § 1419(a) and (f)); and
- Establishment of a regime based on a first-in-time priority of right, on objective, nondiscriminatory criteria and regulations, and on security of tenure through granting of exclusive rights for a fixed time period and with limitations on the ability to modify authorization obligations.

In addition to these basic elements, Subchapter II of the DSHMRA sets forth criteria that would need to be met for an international regime to be acceptable to the United States, namely, assured and nondiscriminatory access for U.S. citizens, under reasonable terms and conditions, to deep sea-bed resources, and assured continuity in mining activities undertaken by U.S. citizens prior to entry into force of the agreement under terms, conditions, and restrictions that do not impose significant new economic burdens that have the effect of preventing continuation of operations on a viable economic basis (30 U.S.C. § 401(1)). The DSHMRA also recognizes that a treaty must be judged by the totality of its provisions (30 U.S.C. § 1441(2)).

As described above, the Agreement clearly revises Part XI in a manner that satisfies these criteria. Of particular importance in this context are the elimination of production controls, mandatory technology transfer by operators, the annual U.S.\$1,000,000 fee during exploration and the onerous economic rent provisions of Part XI; the provision to U.S. entities of non-discriminatory access to deep sea-bed mineral resources on terms no less favorable than those provided for registered pioneer investors; the limitations on contract modifications; the restraints imposed on the operation of the Enterprise; and the revisions to the decision-making provisions of Part XI that will allow the United States to protect its interests and those of U.S. citizens.

Provisional application of the Agreement, discussed above, advances a central policy reflected in the DSHMRA of providing for a smooth transition and continuity of activity between the regime established in the DSHMRA and an acceptable international regime established by treaty. For the reasons set forth above, provisional application provides the only workable transition to the new treaty regime.

The DSHMRA seeks to ensure that the transition to an international regime does not result in premature termination of on-going commercial recovery operations by U.S. citizens. In fact, no commercial sea-bed mining is currently being conducted by U.S. citizens or by those of other nations, nor is such activity anticipated in the near future.

Under these circumstances, and in view of article 7(2) of the Agreement (providing for provisional application in accordance with national or internal laws or regulations), amendments to the DSHMRA will not be necessary during the provisional application period. International agreements regarding mutual respect of claims in force with nations of other pioneer investors will also remain in force during this period. As implementation of the international regime proceeds, the Administration will consult with Congress regarding the need for additional legislation prior to entry into force of the Convention and the Agreement for the United States.

### MARINE SCIENTIFIC RESEARCH (Articles 40, 87, 143, 147; Part XIII, Articles 238-265; Final Act, Annex VI)

The Convention recognizes the essential role of marine scientific research in understanding oceanic and related atmospheric processes and in informed decision-making about ocean uses and coastal waters. Part XIII affirms the right of all States to conduct marine scientific research and sets forth obligations to promote and cooperate in such research. The Convention encourages publication or dissemination of the data and information resulting from

marine scientific research, consistent with the general U.S. policy of advocating the free and full disclosure of the results of scientific research.

Part XIII confirms the rights of coastal States to require consent for marine scientific research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that the consent authority is exercised in predictable and reasonable fashion so as to promote maximum access for research activities.

The United States is a leader in the conduct of marine scientific research and has consistently promoted maximum freedom for such research. The framework offered by the Convention offers the best means of pursuing this objective, while recognizing extended coastal State resource jurisdiction. Although the United State does not exercise the option of requiring consent for marine scientific research in the U.S. EEZ, the Convention's procedures and criteria for obtaining coastal State consent to conduct marine scientific research in areas under national jurisdiction provide a sound basis for ensuring access by U.S. scientists to such areas.

The term "marine scientific research," while not defined in the Convention, generally refers to those activities undertaken in the ocean and coastal waters to expand knowledge of the marine environment and its processes. It is distinguished from hydrographic survey, from military activities, including military surveys, and from prospecting and exploration.

### **General Provisions (Section 1, Articles 238-241)**

Part XIII sets forth principles governing the conduct of marine scientific research, proceeding from the right set forth in article 238 of all States (irrespective of their geographic location), as well as competent international organizations, to conduct marine scientific research in accordance with the terms of the Convention. Article 239 further calls upon States and competent international organizations to promote and facilitate such research.

Article 240 requires marine scientific research to be conducted exclusively for peaceful purposes. (See discussion below regarding article 301.) It is to be carried out with appropriate scientific methods and means, compatible with the Convention; it is not to interfere unjustifiably with other legitimate uses of the sea compatible with the Convention; it is to be duly respected in the course of such other uses; and it is to be conducted in compliance with all relevant regulations adopted in conformity with the Convention, including those for the protection and preservation of the marine environment.

Article 241 provides that marine scientific research is not to constitute the legal basis for any claim to any part of the marine environment or its resources. This provision parallels similar provisions in articles 89 and 137(1) and (3) on the high seas and the Area, respectively.

### **International Cooperation (Section 2, Articles 242-244)**

Articles 242 and 243 elaborate upon the obligation of States and competent international organizations to promote international cooperation in marine scientific research and to cooperate, through conclusion of bilateral and multilateral agreements, in creating favorable conditions for the conduct of research and in integrating the efforts of scientists in studying marine phenomena and processes and their interrelationships.

Article 244 further obligates States and competent international organizations to make available by publication and dissemination through appropriate channels information on proposed major research programs, as well as knowledge resulting from marine scientific research. To this end, States and competent international organizations are called upon to promote actively the flow of data and information resulting from marine scientific research. Likewise, the capabilities of developing countries to carry out marine scientific research are to be promoted.

The Intergovernmental Oceanographic Commission (IOC) plays a leading role in marine scientific research programs, particularly in cooperative undertakings with other United Nations agencies and with other governmental and non-governmental organizations.

### **Conduct and Promotion of Marine Scientific Research (Section 3, Articles 245-257)**

The Convention sets forth the rights and obligations of States and competent international organizations with respect to the conduct of marine scientific research in different areas.

**Territorial Sea.** Article 245 recognizes the unqualified right of coastal States to regulate, authorize and conduct marine scientific research in the territorial sea. Therefore, access to the territorial sea, and the conditions under which a research project can be conducted there, are under the exclusive control of the coastal State (see also articles 21(1)(g), 19(2)(j)), 40 and 54).

**EEZ and Continental Shelf.** Under article 246, coastal States have the right to regulate, authorize and conduct marine scientific research in the EEZ and on the continental shelf. Access by other States or competent international organizations to the EEZ or continental shelf for a marine scientific research project is subject to the consent of the coastal State. The consent requirement, however, is to be exercised in accordance with certain standards and qualifications.

In normal circumstances, the coastal State is under the obligation to grant consent. (It is explicitly provided that circumstances may be normal despite the absence of diplomatic relations.) The coastal State, nevertheless, has the discretion to withhold its consent if the research project is of direct significance for the exploration and exploitation of living or non-living resources; involves drilling, the use of explosives or introduction of harmful substances into the marine environment; or involves the construction, operation and use of artificial islands, installations or

structures. (The first of these grounds for withholding consent may be used on the continental shelf beyond 200 miles only in areas specially designated as under development.) It may also withhold consent if the sponsor of the research has not provided accurate information about the project or has outstanding obligations in respect of past projects.

The consent of a coastal State for a research project may be granted either explicitly or implicitly. Article 248 requires States or organizations sponsoring projects to provide to the coastal State, at least six months in advance of the expected starting date of the research activities, a full description of the project. The research activities may be initiated six months after the request for consent, unless the coastal State, within four months, has informed the State or organization sponsoring the research that it is denying consent for one of the reasons set forth in article 246 or that it requires more information about the project. If the coastal State fails to respond to the request for consent within four months following notification, consent may be presumed to have been granted (article 252). This provision should encourage timely responses from coastal States to requests for consent.

Consent may also be presumed under article 247 to have been granted by a coastal State for a research project in its EEZ or on its continental shelf undertaken by a competent international organization of which it is a member, if it approved the project at the time that the organization decided to undertake the project and it has not expressed any objection within four months of the notification of the project by the organization.

Article 249 sets forth specific conditions with which a State or competent international organization sponsoring research in the EEZ or on the continental shelf of a coastal State must comply. These include the right of the coastal State to participate in the project, in particular through inclusion of scientists on board research vessels; provision to the coastal State of reports and access to data and

samples; assistance to the coastal State, if requested, in assessing and interpreting data and results; and ensuring that results are made internationally available as soon as practicable. Additional conditions may be established by the coastal State with respect to a project falling into a category of research activities over which the coastal State has discretion to withhold consent pursuant to article 246.

If a State or competent international organization sponsoring research in the EEZ or on the continental shelf of a coastal State fails to comply with such conditions, or if the research is not being conducted in accordance with the information initially supplied to the coastal State, article 253 authorizes the coastal State to require suspension of the research activities. If those carrying out the research do not comply within a reasonable period of time, or if the non-compliance constitutes a major change in the research, the coastal State may require its cessation.

#### **The High Seas and the Area.**

Article 87 expressly recognizes conduct of marine scientific research as a freedom of the high seas. Articles 256 and 257 further clarify that marine scientific research may be conducted freely by any State or competent international organization in the water column beyond the limits of the EEZ, as well as in the Area, i.e., the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction. Under article 143, research in the Area is to be carried out exclusively for peaceful purposes. (See discussion of article 301 below.)

#### **Research Installations and Equipment (Section 4, Articles 258-262)**

The conditions applicable to marine scientific research set forth in the Convention apply equally to the deployment and use of installations and equipment to support such research (article 258). Such installations and equipment do not possess the status of islands, though safety zones of a reasonable breadth (not exceeding 500 meters) may be created around them, consistent with the Convention. They may not be deployed in such fashion as to

constitute an obstacle to established international shipping routes. They must bear identification markings indicating the State of registry or the international organization to which they belong, and have adequate internationally agreed warning signals (articles 259-262).

#### **Responsibility and Liability (Section 5, Article 263)**

Pursuant to article 263(1), States and competent international organizations shall be responsible for ensuring that marine scientific research, whether undertaken by them or on their behalf, is conducted in accordance with the Convention. Pursuant to article 263(2), States and organizations shall be responsible and liable for any measures they take in contravention of the Convention in respect of research by other States, their natural or juridical persons or by competent international organizations and shall provide compensation for damage resulting from such measures. With respect to damage caused by pollution of the marine environment arising out of marine scientific research undertaken by or on the behalf of States and competent international organizations, such States or organizations shall be liable pursuant to article 235 (discussed above in connection with Part XII of the Convention.)

#### **Settlement of Disputes (Section 6, Articles 264-265)**

The application of the dispute settlement provisions of the Convention to marine scientific research is discussed below in the section on dispute settlement.

#### **DISPUTE SETTLEMENT (Part XV, Articles 279-299; Annexes V-VIII)**

The Convention establishes a dispute settlement system to promote compliance with its provisions and ensure that disputes are settled by peaceful means. The system applies to disputes between States and, with respect to deep sea-bed mining, to disputes

between States or miners and the Authority. The dispute settlement procedures of the Convention are:

- Flexible, in that Parties have options as to the appropriate means and fora for resolution of their disputes;
- Comprehensive, in that the bulk of the Convention's provisions can be enforced through binding mechanisms; and
- Accommodating of matters of vital national concern, in that they exclude certain sensitive categories of disputes (e.g., disputes involving EEZ fisheries management) from binding dispute settlement; they also permit a State Party to elect to exclude other such categories of disputes (e.g., disputes involving military activities) from binding dispute settlement.

The dispute settlement system of the Convention advances the U.S. policy objective of applying the rule of law to all uses of the oceans. As a State Party, the United States could enforce its rights and preserve its prerogatives through dispute settlement under the Convention, as well as promote compliance with the Convention by other States Parties. At the same time, the procedures would not require the United States to submit to binding dispute settlement matters such as military activities or the right to manage fishery resources within the U.S. EEZ.

### General Provisions (Articles 279-285)

Section 1 contains general provisions concerning the settlement of disputes under the Convention. Article 279 obligates the parties to a dispute concerning the interpretation or application of the Convention to settle the dispute by peaceful means in accordance with the United Nations Charter. Articles 280 to 282 elaborate the right of States to agree on alternative means for settling their disputes. Article 284 provides for optional conciliation in accordance with the procedure set forth in Annex V, section 1, or any other conciliation procedure chosen by the parties to the dispute.

### Compulsory, Binding Dispute Settlement (Articles 286-296)

Section 2 addresses compulsory dispute settlement procedures entailing binding decisions. Except as otherwise provided in section 3, if no settlement has been reached under section 1, section 2 of Part XV provides for disputes concerning the interpretation or application of the Convention to be submitted, at the request of any party to the dispute, to the court or tribunal having jurisdiction under this section.

Section 2 (article 287(1)) identifies four potential fora for compulsory, binding dispute settlement:

- The International Tribunal for the Law of the Sea constituted under Annex VI;
- The International Court of Justice;
- An arbitral tribunal constituted in accordance with Annex VII; and
- A special arbitral tribunal constituted in accordance with Annex VIII for specified categories of disputes.

A State, when signing, ratifying, or acceding to the Convention, or at any time thereafter, is able to choose, by written declaration, one or more of these means for the settlement of disputes under the Convention.

If the parties to a dispute have not accepted the same procedure for settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree (article 287(5)). If a State Party has failed to announce its choice of forum, it shall be deemed to have accepted arbitration in accordance with Annex VII.

As stated in the Secretary of State's report to the President, it is recommended that the United States make the following declaration:

The Government of the United States of America declares, in accordance with article 287(1), that it chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention:

(A) a special arbitral tribunal constituted in accordance with Annex VIII for the settlement of disputes concerning the interpretation or application of the articles of the Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation, including pollution from vessels and by dumping; and

(B) an arbitral tribunal constituted in accordance with Annex VII for the settlement of disputes not covered by the declaration in (A) above.

Choice of forum does not affect the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea, as provided for in Part XI (see below).

Article 290 authorizes a competent court or tribunal, which considers that *prima facie* it has jurisdiction, to prescribe appropriate provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision. The term "marine environment," as used in the Convention, includes "marine life," so that a competent court or tribunal may prescribe provisional conservation measures for living marine resources under this authority whether or not such measures are necessary to protect the respective rights of the parties.

Article 292 provides specifically for expedited dispute settlement to address allegations that a State Party has not complied with the Convention's provisions for the prompt release of a vessel flying the flag of another State Party and its crew.

Article 293 provides for a court or tribunal having jurisdiction under section 2 to apply the Convention and other rules of international law not incompatible with the Convention.

Any decision rendered by a court or tribunal having jurisdiction under section 2 is final and is to be complied with by all the parties to the dispute; however, the decision has no binding force except between the parties and in respect of that particular dispute (article 296).

### Limitations on Compulsory, Binding Dispute Settlement (Articles 297-299)

Section 3 provides for limitations on, and optional exceptions to, the applicability of compulsory, binding dispute settlement under section 2.

**Limitations.** Disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction are subject to compulsory, binding dispute settlement under section 2 only in certain cases (article 297(1)). These cases involve allegations that:

- A coastal State has acted in contravention of the provisions of the Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;
- A State, in exercising such rights and freedoms, has violated the Convention or certain laws and regulations adopted by a coastal State; and
- A coastal State has violated specified rules and standards for the protection of the marine environment.

Disputes concerning marine scientific research fall within the scope of compulsory, binding dispute settlement under section 2, with two exceptions (article 297(2)). The first exception involves the exercise by the coastal State of its explicit right or discretion to withhold consent (e.g., with respect to research directly related to resources or involving drilling). The second pertains to the coastal State's decision to exercise its right to suspend or cancel a research project for non-compliance with certain required conditions. There is provision, however, for disputes falling within such exceptions to be addressed through compulsory, non-binding conciliation under Annex V, section 2.

Under article 297(3), fisheries disputes are subject to compulsory, binding dispute settlement under section 2, except that a coastal State need not submit to such settlement any dispute relating to its sovereign rights with respect to the living resources in its EEZ, or the exercise thereof,

including, for example, its discretionary powers for determining the allowable catch. However, such disputes may, under certain conditions, be referred to compulsory, nonbinding conciliation under Annex V, section 2. Conciliation may be invoked if it is alleged that a coastal State has:

- Manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
- Arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
- Arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

**Optional Exceptions.** Article 298 provides for a State to opt out of one or more of the dispute settlement procedures in section 2 with respect to one or more enumerated categories of disputes. These include:

- Maritime boundary disputes (to which compulsory, nonbinding conciliation may apply under certain conditions);
- Disputes concerning military activities and certain law enforcement activities; and
- Disputes in respect of which the UN Security Council is exercising the functions assigned to it by the United Nations Charter.

As stated in the Secretary of State's report to the President, it is recommended that the United States invoke all three of these exceptions and, thus, that the United States make the following declaration:

The Government of the United States of America declares, in accordance with paragraph 1 of article 298, that it does not accept the procedures provided for in section 2 of Part XV with respect to the categories of disputes set forth in subparagraphs (a), (b) and (c) of that paragraph.

### Particular Regime For Deep Sea-bed Mining

The Convention contains provisions that apply specifically to disputes relating to deep sea-bed mining. Unlike other disputes arising under the Convention, deep sea-bed mining disputes may be brought before the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea, established by article 14 and section 4 of Annex VI to the Convention.

Article 187 gives the Sea-Bed Disputes Chamber jurisdiction, *inter alia*, over disputes:

- 1) Between States Parties regarding the interpretation or application of Part XI and its related annexes, as modified by the Agreement;
- 2) Between the Authority and States Parties regarding:
  - i) Acts or omissions of the Authority in contravention of the Convention or rules and regulations adopted pursuant thereto,
  - ii) An allegation of acts by the Authority in excess of its jurisdiction or a misuse its power, and
  - iii) Disapproval of a contract for exploration and exploitation rights;
- 3) Between the Authority and mining companies regarding:
  - i) The refusal to approve a plan of work or legal issues arising during the approval process, and
  - ii) The interpretation or application of a contract and activities undertaken pursuant to an approved plan of work.

In the case of disputes regarding the interpretation or application of a contract, or acts or omissions of a party to a contract, the mining companies have standing to initiate proceedings and need not rely on the sponsoring State. In addition, article 188 provides that such disputes shall be submitted to commercial arbitration at the request of any party to the dispute.

Article 189 provides that the Tribunal shall not substitute its discretion for that of the Authority. It also provides that the Tribunal shall not declare invalid any rules and regulations

adopted by the Authority, but shall confine itself to determinations of whether their application in specific cases is consistent with the Convention or with a contract, or whether the Authority has exceeded its jurisdiction or has misused its power.

### Arbitration Under Annex VII

Annex VII sets forth detailed rules concerning the procedure governing arbitration under this Annex:

- The list of potential arbitrators is maintained by the Secretary-General of the United Nations; each Party may nominate up to four arbitrators to appear on the list.

- An arbitral panel generally consists of five members. Each party to the dispute appoints one member; the other three members are appointed by agreement between the parties. Annex VII provides a mechanism for appointments, should the parties be unable to agree on members; in general, the President of the International Tribunal for the Law of the Sea makes the necessary appointments.

- The arbitral tribunal determines its own procedure.
- Decisions of the tribunal are to be by majority vote.
- Arbitral awards are final and without appeal (unless otherwise agreed) and are to be complied with by the parties to the dispute.

### Special Arbitration Under Annex VIII

Annex VIII contains somewhat different rules concerning the procedure governing arbitration of disputes concerning the interpretation or application of articles of the Convention relating to (1) fisheries; (2) protection and preservation of the marine environment; (3) marine scientific research; and (4) navigation, including pollution from vessels and by dumping:

- States Parties may nominate two experts in each of these fields, whose names shall appear on lists of experts to be established and maintained.

- A special arbitral panel generally consists of five members, preferably appointed from the relevant list. Each

party to the dispute appoints two members; the other member is appointed by agreement between the parties. Annex VIII provides a mechanism for appointments, should the parties be unable to agree on a fifth member; in general, the Secretary-General of the United Nations is to make the necessary appointments.

- The provisions for arbitration under Annex VII shall otherwise apply.

- In addition, the parties to a dispute may agree to request the special arbitral tribunal to carry out an inquiry and establish the facts giving rise to the dispute and, if the parties further agree, to formulate recommendations which shall constitute a basis for review by the parties.

## OTHER MATTERS

### MARITIME BOUNDARY DELIMITATION (Articles 15-16, 74-75, 83-84)

Where the territorial seas, EEZs or continental shelves of States with opposite or adjacent coasts overlap, the Convention provides rules for the delimitation of those zones.

With respect to the territorial sea, delimitation is to be based on equidistance (i.e., a median line), unless historic title or other special circumstances call for a delimitation different from equidistance (article 15).

With respect to the EEZ and the continental shelf, articles 74 and 83 provide that delimitation of the EEZ and the continental shelf, respectively, are to be effected by agreement, on the basis of international law, in order to achieve an equitable solution.

Pending agreement on delimitation of the EEZ or the continental shelf, the States concerned are to make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement (articles 74(3) and 83(3)). Such arrangements are without prejudice to the final delimitation of the EEZ or the continental shelf (article 74(3)).

Where there is an agreement in force between the States concerned, questions relating to the delimitation of the EEZ or the continental shelf are to be determined in accordance with the provisions of that agreement.

**Implications for U.S. Maritime Boundaries.** The United States has 28 maritime boundary situations with its neighbors. To date, 10 of them have been negotiated or adjudicated in whole or in part.

U.S. maritime boundary positions are fully consistent with the rules reflected in the Convention. These positions were determined through an interagency process in the late 1970s, prior to the U.S. extension of its maritime jurisdiction to 200 miles. As a result of that process, the United States determined that equidistance was the appropriate boundary in most cases, but that three situations required a boundary other than the equidistant line: with Canada in the Gulf of Maine/Georges Bank area; with the U.S.S.R. (now the Russian Federation) in the Bering and Chukchi Seas and North Pacific Ocean; and with the Bahamas north of the Straits of Florida. These positions were reflected in the outer limit of the U.S. EEZ, published in the Federal Register (November 4, 1976, March 7 and May 12, 1977, and January 11, 1978).

The Senate has given its advice and consent to ratification of boundary treaties related to the following areas: U.S.-Mexico (regarding the territorial sea boundary); U.S. (Puerto Rico and U.S. Virgin Islands)-Venezuela; U.S. (American Samoa)-Cook Islands; U.S. (American Samoa)-New Zealand (Tokelau); and U.S.-U.S.S.R. (now the Russian Federation). The Senate has before it, for its advice and consent, treaties establishing equidistant line boundaries with Cuba and Mexico. The Senate also has before it two recently concluded equidistant line treaties with the United Kingdom in respect of Puerto Rico and the U.S. Virgin Islands, and Anguilla and the British Virgin Islands. (Pending entry into force, the U.S.-Cuba boundary treaty is being applied provisionally pursuant to its terms, extended through biannual exchanges of notes. The U.S.-Mexico

boundary is being applied through an interim executive agreement. The U.S.-Russia treaty is being applied provisionally pending ratification by Russia.)

With respect to the U.S.-Canada maritime boundary in the Gulf of Maine, most of that boundary was determined through a 1984 award of a Chamber of the International Court of Justice. Regarding the United States and Japan, they have recorded an understanding that recognizes that the respective outer limits of their maritime jurisdiction coincide and constitute a line of delimitation.

In addition to the President's constitutional authority in this area, Congress has authorized the Secretary of State to negotiate with foreign States to establish the boundaries of the EEZ of the United States in relation to any such State (16 U.S.C. §1822(d)) and called upon the President to establish procedures for settling any outstanding international boundary disputes regarding the outer continental shelf (43 U.S.C. §1333(a)(2)(B)).

### **ENCLOSED OR SEMI-ENCLOSED SEAS (Part IX, Articles 122-123)**

The Convention defines an enclosed or semi-enclosed sea as a "gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States" (article 122).

The Convention calls upon States bordering an enclosed or semi-enclosed sea to cooperate in carrying out their duties under the Convention, but gives such States no greater or lesser rights vis-a-vis third States. The Convention does, however, specifically require them to endeavor to coordinate with each other in the areas of management of living resources, environmental protection and scientific research and to invite, as appropriate, other interested States and international organizations to cooperate with them in these undertakings (article 123).

These provisions do not place or authorize any additional restrictions or limitations on navigation and overflight with respect to enclosed or semi-enclosed seas beyond those that appear elsewhere in the Convention.

### **RIGHT OF ACCESS OF LAND-LOCKED STATES TO AND FROM THE SEA AND FREEDOM OF TRANSIT (Part X, Articles 124-132)**

Part X addresses the rights of access of land-locked States to and from the sea. It draws from, and expands upon, article 3 of the High Seas Convention. Part X also tracks quite closely the 1965 Convention on Transit Trade of Land-locked States, 19 UST 7383, TIAS No. 6592, 597 UNTS 42.

Article 124 defines several terms applicable to this Part of the Convention. In particular, a land-locked State is one which does not have a sea coast, and a transit State is one that is situated between a land-locked State and the sea, through whose territory traffic in transit passes.

Article 125 gives land-locked States the right of access to and from the sea. The remaining articles of Part X address the specific rights and obligations of land-locked and transit States. Exact terms of transit are to be agreed upon between the land-locked and transit States concerned. The United States is neither. It does, however, have interests in trade with land-locked States and in their economic development. Those interests are furthered by Part X.

Worldwide, there are now 42 land-locked States:

Africa (15): Botswana, Burkina, Burundi, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia, Zimbabwe

Asia (12): Afghanistan, Armenia, Azerbaijan, Bhutan, Kazakhstan, Kyrgyzstan, Laos, Mongolia, Nepal, Tajikistan, Turkmenistan, Uzbekistan

Europe (13): Andorra, Austria, Belarus, Czech Republic, Holy See, Hungary, Liechtenstein, Luxembourg, F.Y.R.O.M.<sup>1</sup>, Moldova, San Marino, Slovakia, Switzerland

South America (2): Bolivia, Paraguay.

### **OTHER RIGHTS OF LAND-LOCKED STATES AND GEOGRAPHICALLY DISADVANTAGED STATES (Articles 69-71, 160-161, 254, 266, 269, 272)**

Several articles in the Convention require that specific consideration be given to land-locked and geographically disadvantaged States. Article 70(2) defines a geographically disadvantaged State (GDS) as one which either can claim no EEZ of its own, or one whose geographical situation makes it dependent upon the exploitation of living resources in the EEZs of other coastal States in its region or subregion. The articles relating to access to fisheries are discussed above in connection with living marine resources.

The Assembly of the Authority is to consider problems of a general nature in connection with activities in the Area arising in particular for developing States, particularly for land-locked States and geographically disadvantaged States (article 160(1)(k)).

Article 254 provides for land-locked States and GDS to be given the opportunity to participate in marine scientific research in areas off neighboring coastal States. Articles 266, 269 and 272 further call upon States, either directly or through competent international organizations, to endeavor to promote the development of marine scientific and technological capacity through programs of technical cooperation with land-locked States and geographically disadvantaged States.

### **DEVELOPMENT AND TRANSFER OF MARINE TECHNOLOGY (Part XIV, Articles 266-278)**

Part XIV of the Convention is largely declaratory of policy and imposes few specific obligations. It will not compel any change in U.S. practices or policy. It encourages States to promote the development and transfer of marine technology, particularly in relation to achieving more widespread participation in and benefit from marine scientific research activities covered in Part XIII. Technology transfer

<sup>1</sup>Former Yugoslav Republic of Macedonia.

regarding deep sea-bed mining was discussed above, except for articles 273-275, which are discussed below.

Article 266 urges States to cooperate in accordance with their capabilities in promoting development and transfer of marine science and technology on fair and reasonable terms and conditions, as well as to promote the marine scientific and technological capacity of States, particularly developing countries, which may need and request assistance in this field. In promoting such cooperation, States are to have due regard for the rights and duties of holders, suppliers and recipients of marine technology.

Article 268 lists basic objectives to be promoted by States, directly or through competent international organizations. These include the acquisition, evaluation and dissemination of marine technological knowledge and facilitation of access to data and information; the development of appropriate marine technology, as well as of the infrastructure to facilitate transfer of marine technology; and the development of human resources through training and education of developing country nationals. In that regard, the IMO has established the World Maritime University in Malmo, Sweden, and the International Maritime Law Institute in Malta.

Article 269 identifies measures to achieve these objectives, including the establishment of technical cooperation programs; promotion of favorable conditions for conclusion of agreements, contracts and other similar arrangements, under equitable and reasonable conditions; holding conferences, seminars and symposia; promotion of the exchange of scientists and experts; and undertaking projects and promotion of joint ventures and other forms of bilateral and multilateral cooperation.

International cooperation to promote development and transfer of marine technology should include use of existing programs (article 270); establishment of generally accepted guidelines, criteria and standards for the transfer of such technology on a bilateral basis or within the framework

of international organizations (article 271); and coordination of the activities of competent international organizations (article 272).

Article 273 calls upon States to cooperate with competent international organizations and the Authority to encourage and facilitate transfer to developing countries and the Enterprise of skills and marine technology regarding activities in the Area (i.e., exploration and exploitation of sea-bed minerals). With further respect to activities in the Area, article 274 urges the Authority itself, subject to the rights and duties of holders, suppliers and recipients of marine technology, to provide training and employment opportunities to developing country nationals; to make available, as requested and particularly to developing countries, technical documentation on relevant technologies; and to facilitate technical assistance to developing countries in acquiring skills and know-how as well as hardware.

Article 275 encourages States to promote, particularly in developing coastal States, establishment of national marine scientific and technological research centers, as well as strengthening of existing centers, while article 276 emphasizes the establishment of regional marine scientific and technological centers, particularly in developing countries. The functions of such centers are to include training and education; management studies and studies on the health of the marine environment; organization of regional conferences, seminars and symposia; acquisition and processing of marine scientific and technological data and information, as well as dissemination of results of marine scientific and marine technological research; and compilation of information on specific technologies and study of national policies on transfer of marine technology (article 277).

Under Part XIII (marine scientific research), as well as Part XIV, competent international organizations are called upon to take all appropriate measures directly or in close cooperation to carry out their responsibilities under Part XIV (article 278).

## DEFINITIONS (Part I, Article 1)

Various provisions of the Convention define key terms. Article 1(1) contains the definitions of five terms for purposes of the entire Convention: Area; Authority; activities in the Area; pollution of the marine environment; and dumping. The first three of these definitions relate to the regime for deep sea-bed mining and are discussed above. The next two definitions relate to marine environmental issues, and are also discussed above.

Article 1(2) contains a standard definition for the term "States Parties" and also makes clear that the term applies, *mutatis mutandis*, to certain other entities (such as the European Community) entitled to become party to the Convention under article 305, in accordance with the conditions relevant to each.

Certain terms are defined elsewhere in the Convention, but also for purposes of the entire Convention: archipelagic baselines (article 47); archipelagic sea lanes passage (article 53(3)); archipelagic State (article 46); archipelago (article 46); bay (article 10(2)); contiguous zone (article 33); continental shelf (article 76); enclosed or semi-enclosed sea (article 122); EEZ (article 55); innocent passage (article 19(2)); internal waters (article 8); land-locked State (article 124(1)(a)); low-tide elevation (article 13(1)); means of transport (article 124(1)(d)); passage (article 18(1)); piracy (article 101); pirate ship or aircraft (article 103); territorial sea (article 2); transit passage (article 38(2)); transit State (article 124(1)(c)); unauthorized broadcasting (article 109); and warship (article 29).

Certain terms are given specific meanings for a particular Part or a given article of the Convention, particularly in relation to deep sea-bed mining. Neither the term "ship" nor the term "vessel" is defined in the Convention; the two are considered to be synonymous.

Few of these terms were defined in the Territorial Sea Convention, the Continental Shelf Convention, or the High Seas Convention. The definitions

included in the LOS Convention thus represent an advance in the effort to make the law of the sea more precise and predictable.

### **GENERAL PROVISIONS (Part XVI, Articles 300-304)**

Part XVI of the Convention contains five "general provisions" to guide the interpretation and application of the Convention as a whole, or of specific parts of it.

#### **Good Faith and Abuse of Rights (Article 300)**

This article restates existing customary law. The requirement of good faith reflects article 2(2) of the United Nations Charter and the fundamental rule *pacta sunt servanda*, reflected in article 26 of the Vienna Convention on the Law of Treaties.

#### **Peaceful Uses of the Seas (Articles 88, 141, 143(1), 147(2)(d), 155(2), 240(a), 242(1), 246(3), 301)**

Article 301 reaffirms that all States Parties, whether coastal or flag States, in exercising their rights and performing their duties under the Convention with respect to all parts of the sea, must comply with their duty under article 2(4) of the United Nations Charter to refrain from the threat or use of force against the territorial integrity or political independence of any States.

Other provisions of the Convention echo this requirement. Article 88 reserves the high seas for peaceful purposes, while articles 141 and 155(2) reserves the Area for peaceful purposes. Under articles 143(1), 147(2)(d), 240(a), 242(1) and 246(3), marine scientific research is required to be conducted for peaceful purposes.

None of these provisions creates new rights or obligations, imposes restraints upon military operations, or impairs the inherent right of self-defense, enshrined in article 51 of the United Nations Charter. More generally, military activities which are consistent with the principles of international law are not prohibited by these, or any other, provisions of the Convention.

#### **Disclosure of Information (Article 302)**

Without prejudice to the use of the Convention's dispute settlement procedures, in fulfilling its obligations under the Convention, a State Party is not required to supply information the disclosure of which is contrary to the essential interests of its security.

#### **Archaeological and Historical Objects Found at Sea (Articles 33, 149 and 303)**

Article 303 imposes a general duty on States to protect objects of an archaeological and historical nature found at sea and to cooperate for this purpose. This obligation was implemented by the Abandoned Shipwreck Act of 1987, 42 U.S.C. §§ 2101-2106, and implementing regulations 54 Fed. Reg. 13642 *et seq.*; the National Marine Sanctuary Act, 16 U.S.C. section 1431 *et seq.*; the Archaeological Resources Protection Act, 16 U.S.C. § 470aa-ll, and its uniform regulations 43 CFR Part 7, 36CFR Part 296, 18 CFR Part 1312, 32CFR Part 229; the National Historic Preservation Act, 16 U.S.C. § 470, 36CFR Part 800; the Antiquities Act of 1906, 16 U.S.C. §§ 431-433; and the National Register of Historic Places, 36CFR Parts 60 & 63.

Coastal State competence to control the activities of foreign nationals and foreign flag ships in this regard is limited to internal waters, its territorial sea, and if it elects, to its contiguous zone (article 303(2)). The United States has not decided whether to extend its contiguous zone for this purpose.

Under article 149, all such objects found on the sea-bed beyond the limits of national jurisdiction must be preserved and disposed of for the benefit of mankind as a whole. Particular regard must be paid to the preferential rights of the State or country of origin, the State of cultural origin, or the State of historical or archaeological origin.

Article 303(3) clarifies that the Convention is not intended to affect the rights of identifiable owners, admiralty law, and the laws and practices con-

cerning cultural exchanges. Article 303 is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature (article 303(4)). For example, in 1989, the United States and France entered into an agreement for the protection and study of the wreck of the CSS *Alabama*, sunk by USS *Kearsarge* on June 19, 1864, in waters now forming part of the French territorial sea (TIAS No. 11687).

The term "objects of an archaeological and historical nature" is not defined in the Convention. It is not intended to apply to modern objects whatever their historical interest.

#### **Responsibility and Liability For Damage (Article 304)**

The many specific provisions of the Convention regarding State responsibility and liability for damage (articles 31, 42(5), 106, 110(3), 139, 232, 235, 263) are without prejudice to existing rules and the development of further rules.

### **FINAL PROVISIONS (Part XVII, Articles 305-320)**

The final provisions of the Convention contain a number of innovations in addition to the usual final clauses.

#### **Signature (Article 305)**

The Convention was open for signature for two years from the date of its adoption, December 10, 1982. By December 9, 1984, the Convention had been signed by 159 States and other entities entitled to sign it (Cook Islands, EEC, United Nations Council for Namibia and Niue). Along with the United States, 13 other States then in existence did not sign the Convention: Albania, Ecuador, Federal Republic of Germany, the Holy See, Israel, Jordan, Kiribati, Peru, San Marino, Syria, Turkey, the United Kingdom, and Venezuela. The Trust Territory of the Pacific Islands and the West Indies Associated States also did not sign the Convention, although they were eligible to do so.

## **Ratification and Accession (Articles 306 and 307)**

The Convention makes signature subject to ratification. As of September 8, 1994, 65 States had deposited their instruments of ratification, accession or succession to the Convention.

## **Entry Into Force (Article 308)**

Pursuant to article 308, the Convention enters into force 12 months after the deposit of the 60th instrument of ratification or accession. That instrument was deposited on November 16, 1993; accordingly, the Convention will enter into force on November 16, 1994.

Thereafter, the Convention will enter into force for a State ratifying or acceding to it 30 days following deposit of its instrument of ratification or accession.

(The entry into force of the Agreement, and its effect in revising Part XI, is discussed above in the section relating to deep sea-bed mining.)

## **Reservations, Exceptions, Declarations and Statements (Articles 309 and 310)**

Article 309 prohibits reservations and exceptions to the Convention, except where expressly permitted by other articles. No other article permits reservations; only article 298 permits exceptions and allows a Party to exclude certain categories of disputes from compulsory dispute settlement.

Article 310 provides that a State may make declarations or statements when signing, ratifying or acceding to the Convention, provided they are not reservations, i.e., that they do not purport to exclude or modify the legal effect of the provisions of the Convention in their application to that State.

## **Relation to Other International Agreements (Article 311)**

The Convention considers the effect of the Convention on earlier agreements, and of later agreements on the Convention, where the same State is party to both, in a manner that is generally consistent with the Vienna Convention on the Law of Treaties.

Agreements, existing or future, that are expressly permitted or preserved by the Convention are not affected by the Convention. Examples of such agreements would include maritime boundary treaties between States with opposite or adjacent coasts.

## **Amendment (Articles 312-316)**

The Convention creates distinct regimes for amendments relating to activities in the Area (i.e., deep sea-bed mining activities) and to all other parts of the Convention.

With respect to amendments not relating to activities in the Area, amendments to the Convention may be adopted in either of two ways. First, beginning in November 2004, the States Parties may convene a conference, if more than half the States Parties agree to do so, for the purpose of considering and adopting amendments to the Convention (article 312).

Second, proposed amendments that are circulated at any time after entry into force of the Convention shall be considered adopted if no State objects to the amendment, or to use of the simplified procedure, within 12 months of circulation of the amendment (article 313).

In either case, amendments are subject to ratification. They enter into force only for States ratifying them, after they have been ratified by two-thirds of, but not fewer than 60, States Parties (article 316(1)).

With respect to amendments relating to activities in the Area (i.e., deep sea-bed mining), amendments to the deep sea-bed mining regime can only be adopted upon the approval of the Council and Assembly of the Authority. The Council, on which the United States is guaranteed a seat in perpetuity (provided we are party), can only adopt such amendments by consensus (article 161(8)(d)).

Because the sea-bed mining regime creates an institutional structure that can operate only on the basis of one set of rules applicable to all, amendments to this regime enter into force for all States Parties one year after three-fourths of the States Parties ratify.

As noted above, the Agreement abolishes the Review Conference.

## **Denunciation (Withdrawal) (Article 317)**

A State Party may denounce the Convention on one year's notice. Article 317 also addresses certain consequences of denunciation.

## **Status of Annexes (Article 318)**

The Annexes form an integral part of the Convention.

## **Depositary (Article 319)**

The Secretary-General of the United Nations is the depositary and is assigned the normal functions of a depositary, as well as those consequential to particular provisions in the Convention.

## **Authentic Texts (Article 320)**

The texts in the six official languages of the United Nations are equally authentic. ■