Recent Developments in the Law of the Sea 1984-1985

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Synopsis

RECENT DEVELOPMENTS IN THE LAW OF THE SEA 1984-1985

Nineteen eighty-five witnessed additional ratifications of the United Nations Convention on the Law of the Sea, but the LOS Convention still has not received one-half of the number necessary to bring it into force. Some success was seen in boundary delimitations, fishing treaties, and pollution control, yet news events brought the grim realization that many issues, such as terrorism at sea, the conflict between nuclear-testing nations and those wishing to eliminate such testing, and constraints on the freedom of navigation, are far from resolved. Lastly, the discovery of the Titanic and the movement to designate it as a memorial, free of salvage, brought hope that at least some treasures of the sea may be preserved for the benefit of mankind.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Ratification Status

The United Nations Convention on the Law of the Sea\(^1\) (LOS Convention) was adopted on April 30, 1982 and opened for signature on December 10, 1982. As of December 9, 1984, the signature closing date, 159 countries had signed the convention.\(^2\) Thirty-six states and entities made declarations in accordance with articles 287, 298, 310 and Annex IX, article 2.\(^3\)


\(^2\) The signatory countries of the LOS Convention, as of December 9, 1982, were comprised of 51 from Africa, 45 from Asia, 30 from Latin America, 10 from Eastern Europe, and 23 from Western Europe. Law of the Sea Bulletin, No. 4, at 1 (Feb. 1985) [hereinafter cited as LOS Bulletin No. 4]; see also Simmonds, The Status of the United Nations Convention on the Law of the Sea of 1982, 34 INT'L & COMP. L.Q. 359 (1985).

\(^3\) For the text of declarations made at the time of signature to the LOS Con-
While the United States finds that most provisions of the LOS Convention are consistent with United States interests and in general serve the interests of all nations, the deep seabed mining provisions expressed in part XI are deemed to be contrary to accepted principles of international law. The United States maintains that “deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations.” However, articles 136 and 137 of the LOS Convention state that mineral resources of “The Area” are the “common heritage of mankind,” which may only be explored and exploited under the authorization of the International Sea-Bed Authority (ISA).

United Nations Secretary-General Perez de Cuellar, in a December 10, 1984 statement made before the General Assembly, recognized this disagreement. He noted that some states, although supporting the LOS Convention as a whole, found the deep seabed mining provisions unsatisfactory. He vowed to encourage reconciliation between the signatory and nonsignatory nations and to promote the uniform and consistent application of the LOS Convention.

The LOS Convention will become effective one year after sixty states ratify or accede to it. By the beginning of 1985, fourteen

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6. “The Area” is defined as the “sea bed and ocean floor and subsoil thereof beyond national jurisdiction.” National jurisdiction extends to the outer edge of the continental margin, or to a distance of 200 miles from the baseline where the margin does not extend up to 200 miles. The area comprises approximately 60 percent of the seabed. R. CHURCHILL & A. LOWE, THE LAW OF THE SEA 160 (1985); see also Gamble, Assessing the Reality of the Deep Sea-Bed Regime, 22 SAN DIEGO L. REV. 779 (1985).

7. The International Sea-Bed Authority (ISA) is the body through which the state parties to the LOS Convention are to organize and control all resource-oriented uses of the seabed beyond national jurisdiction. LOS Convention, supra note 1, arts. 156-57. The ISA has three principal organs: The Plenary Assembly, Council, and the Secretariat. The mining area of the ISA is called the “Enterprise.” R. CHURCHILL & A. LOWE, supra note 6, at 160.

8. United Nations Secretary-General Perez de Cuellar was referring especially to the Republic of West Germany, the United Kingdom, and the United States.

9. However, Secretary-General de Cuellar did not elaborate upon how he proposed to reconcile these differences. LOS Bulletin No. 4, supra note 2, at 1.

10. Ratification is a process which takes place in a state’s legislative body. Article 304 defines “signature” as it is used in the LOS Convention. Articles 305 and 306 define “ratification” and “accession” as they are used in the LOS Convention. LOS Convention, supra note 1, arts. 304-06.
nations had ratified the LOS Convention. During 1985, it was ratified by eleven more nations, bringing the total to twenty-five. The LOS Convention will remain open indefinitely for any nation willing to accede to it.

There is no guarantee that all signatory nations will ratify the LOS Convention. Many nations expressed reservations in declarations accompanying their signatures. Articles 309 and 310 of the LOS Convention provide that, though a state may make declarations at the signing, ratification requires that the Convention be accepted in its entirety. Declarations will not exclude or modify the legal effect of the LOS Convention’s provisions in their application to that state.

The United States refusal to sign the LOS Convention or to participate in the Preparatory Commission meetings may deter ratification by other countries. With fewer than one-half of the sixty ratifications required to bring the LOS Convention into force, the United States refusal to sign the LOS Convention is a source of frustration to the Preparatory Commission. The Preparatory Commission, therefore, is exerting increased pressure on the United States to support the LOS Convention. For example, the Commission resolved at the second meeting of the Preparatory Commission of 1985, to condemn as illegal all deep seabed activities outside the LOS Convention.

11. LOS Bulletin No. 4, supra note 1, at 2-5.

13. LOS Convention, supra note 1, arts. 309-11.
14. Id.
15. The LOS Convention provides that after 50 signatures have been recorded, a Preparatory Commission shall meet in order to establish the institution of the LOS Convention. LOS Convention, supra note 1, Final Act, Annex I, Resolution I, art. 1; see also Simmonds, supra note 2, at 360. The activities of the Preparatory Commission are reported to the UN General Assembly annually in the Report of the Secretary-General. 1985 Report of the Secretary-General, supra note 12, at 5.
Resolution on Funding

On December 13, 1984, the United Nations General Assembly approved Resolution L.35 on the Law of the Sea.17 This resolution approved two meetings of the Preparatory Commission for 1985, requested the Secretary-General's continued assistance in the implementation of the LOS Convention, and solicited support from the various organs of the United Nations (UN) system to achieve these goals.18 As has been true in the past, the funding of the Preparatory Commission was subject to much debate.

L.35 and its accompanying budget requirements were approved by a vote of 138-2 in the UN General Assembly on December 12, 1984. The United States and Turkey voted against the resolution and five countries19 abstained. The United States, Turkey, and the United Kingdom objected to funding the Preparatory Commission out of the UN regular budget.

The United States maintains that the cost of the Preparatory Commission should be borne by those nations that are parties to the LOS Convention.20 This position was first espoused in President Reagan's December 30, 1982 statement,21 in which he declared that the Commission's costs should be funded by those nations party to the LOS Convention, because the Commission is legally independent and not answerable to the UN.22 Reagan also announced that funding of the Preparatory Commission from the general UN budget is not a proper expense under article 17(2) of the UN Charter.23

During 1985, the United States continued its policy of withholding its pro rata share of the Preparatory Commission costs from its an-

18. Id.
21. In his three page statement, the President stated:
[The UN General Assembly resolution which finances the Preparatory Commission budget from the regular UN budget] is not a proper expense of the United Nations within the meaning of its own Charter, as the Law of the Sea Preparatory Commission is legally independent and distinct from the UN. It is not a UN subsidiary organ. It is not answerable to the United Nations. Membership in the UN does not obligate any member to finance or to otherwise support any other organization. Statement by President Ronald W. Reagan (Dec. 30, 1982), U.N. Press Release USUN 1-(83) (Jan. 3, 1983).
22. Id.
23. Id. Article 17(2) of the UN Charter provides that: "The expenses of the organization shall be borne by the Members as apportioned by the General Assembly." LOS Convention, supra note 1, art. 17(2). President Reagan stated that the expenses of the Law of the Sea Preparatory Commission are not expenses "of the Organization" since that Commission is legally independent of and distinct from the UN organization. Statement by President Ronald W. Reagan, supra note 21.
On December 10, 1985, at the UN General Assembly, the United States and Turkey again opposed the funding of the Preparatory Commission from the UN general budget. The United States announced that it would continue to withhold its pro rata share of the Commission's funding from its annual UN assessment. The continuance of this withholding policy comes at a time when United States support for the UN is at a low ebb. The UN, observing its fortieth birthday, is seen as going through a "midlife crisis." The United States has withdrawn from the United Nations Educational, Scientific, and Cultural Organization and has refused to submit to the jurisdiction of the International Court of Justice (ICJ) in political matters.

Furthermore, unless the UN agrees, by the end of 1986, to weigh voting in the General Assembly according to each member's financial contribution, the United States intends to reduce significantly its share of the UN annual $806 million dollar budget, from twenty-five to twenty percent.

December 10, 1985 Meeting of the General Assembly

The General Assembly passed the annual Law of the Sea resolution on December 10, 1985, by a vote of 140 to 2. Turkey and the United States voted against the resolution, and five nations abstained. The three main issues debated were: the status of the August 30, 1985 declaration condemning as illegal any deep seabed mining licenses issued outside of the Preparatory Commission; the Philippines' declaration made upon ratification of the Convention in

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27. On October 7, 1985, the United States, reversing 39 years of policy, announced that it would limit United States acceptance of decisions by the International Court of Justice (ICJ) (which was hearing charges from Nicaragua that the United States was illegally supporting rebels attempting to overthrow the Sandinista government) to nonpolitical issues. Only about one-third of the countries in the world have agreed to accept the ICJ decisions. Nicaragua itself does not accept the compulsory jurisdiction of the ICJ, nor does the Soviet Union, France, West Germany, Italy, and Spain. San Diego Union, Oct. 7, 1985, at 1, col. 3.
30. Id. The five abstentions to Resolution A/40/RES/63 were: Federal Republic of Germany, Israel, Peru, United Kingdom, and Venezuela.
31. Declaration Adopted by the Preparatory Commission, supra note 16.
1984, and the early registration of pioneer investors.

The August 1985 declaration adopted by the Preparatory Commission was accepted without a vote, following an understanding between its sponsor, "the group of 77," and other delegations. This process led to the criticism that it did not represent a consensus of the Preparatory Commission.

The Philippines, upon its ratification of the LOS Convention on May 8, 1984, claimed that archipelagic waters, under the Constitution of the Philippines, are similar to internal waters. This declaration also removed the straits connecting archipelagic waters with either the EEZ or the high seas from transit passage, effectively destroying the right of innocent passage for international navigation. Several nations objected to the Philippines' declaration on the grounds that it was incompatible with article 310 of the LOS Convention. Article 310 permits states ratifying the LOS Convention to make declarations; however, it does not exempt them from the provisions of the LOS Convention which may be incompatible with the declaration.

32. LOS Bulletin No. 4, supra note 2, at 21.
33. Pioneer investors are those who had submitted applications with the ISA as of December 9, 1984, and are bound by rules and procedures drafted by the Preparatory Commission. Such procedures require minimum investments in the pioneer site, transfer of technology to both the ISA and developing nations, and the designation of two mining sites - one for the pioneer investor and one for the Enterprise, the mining area of the ISA. R. CHURCHILL & A. LOWE, supra note 6, at 172.
34. See Declaration Adopted by the Preparatory Commission, supra note 16.
35. The Group of 77 represents the developing, or third world countries. At the LOS Convention, the Group of 77 actually had a membership of 120 states. See Lee, The New Law of the Sea and the Pacific Basin, 12 OCEAN DEV. & INT'L L. 247, 256 (1983).
37. LOS Bulletin No. 4, supra note 2, at 21.
38. Id.
39. These protesting nations include Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, and the Union of Soviet Socialist Republics.
40. LOS Convention, supra note 1, art. 309, provides that no reservation or exceptions may be made to the Convention unless expressly permitted by other articles of the Convention. LOS Convention article 310 states: "Article 309 does not preclude a State, when signing, ratifying or acceding to the Convention from making declaration or statements . . . to the harmonization of its laws and regulations with the provision of the Convention, provided that said declaration or statements do not purport to exclude or to modify the legal effect of the provisions of the Convention in their application to that State." LOS Convention, supra note 1, arts. 309-10.
41. 1985 Report of the Secretary-General, supra note 12, at 5.
BOUNDARY DELIMITATIONS

Chile-Argentina Boundary Delimitation: The Beagle Channel Dispute

The Beagle Channel\(^4\) is a 150-mile long strait in the Tierra del Fuego archipelago, connecting the Atlantic and Pacific Oceans at the tip of South America. The strategic and economic value of this body of water has fueled a century-old dispute between Chile and Argentina, almost resulting in a 1978 military confrontation.\(^3\) The dispute concerns the sparsely populated islands of Lennox, Nueva, and Picton. These islands host lucrative fishing grounds, and contain the possibility of subsoil and subsurface petroleum resources.\(^4\)

Various attempts at negotiation, mediation, and arbitration have failed, including one by the United States, two by the Queen of England, and one by the Vatican.\(^4\) Following the collapse of an additional effort to mediate the dispute by the UN Security Council and the Organization of American States in December 1978,\(^4\) Argentina mobilized its troops for an invasion of Chile. The Vatican intervened on December 13, 1978. As a result, Argentina recalled its troops hours before the attack. Following this incident, the Vatican began mediating an agreement between the two countries. Frustrated by numerous rejections by the military regime of Argentina, the Vatican presented a "take it or leave it" agreement, which both countries accepted and signed on November 29, 1984.\(^4\)

The final steps in resolving the long-standing dispute occurred this year on May 1, 1985, when both governments and Pope John Paul II signed a treaty at the Vatican.\(^4\)

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\(^4\) The Beagle Channel was named after the ship Charles Darwin sailed through it in 1833. \(^2\)ENCYCLOPEDIA BRITANNICA 9 (1986).


\(^4\) N.Y. Times, Oct. 5, 1984, at A5, col. 1 (city ed.).

\(^4\) See, e.g., id. The 1978 arbitration under Queen Elizabeth II of Britain, proposed respecting claims by Chile to the islands and a part of the South Atlantic. Argentina rejected the proposed settlement, even though the arbitration was intended to be binding.

In 1980 Pope John Paul II proposed a compromise which favored Chile by creating a zone in the South Atlantic that would be shared by the two countries. Argentina, still under military rule, rejected the proposal.

\(^4\) Time, Oct. 29, 1984, at 59, col. 2.

\(^4\) Washington Post, July 26, 1984, at A26, col. 3.

\(^4\) Citizens for Ocean Law, Ocean Pol'y News, May 1985, at 1. The success of the treaty can be attributed, in large part, to Argentinean President Raul Alfonsin's newly elected democratic government, which placed a high priority on avoiding war with Chile and cutting military spending to promote internal economic recovery.
On October 12, 1984, the ICJ ruled to delimit the ocean boundary between the United States and Canada, in an area commonly referred to as “Georges Bank.”49 The court’s holding was criticised,60 however, as it left the parties to resolve numerous issues themselves.61 Among the unresolved issues were conflicts between fishery and oil interests,62 overfishing of migrating species, dumping disputes, and political issues.63

Northwest Passage

In 1985 Canada claimed the Northwest Passage as Canadian territory. The United States has long considered this maritime area an international waterway. Canada asserted its claim on September 10, 1985, when the Secretary of State for External Affairs issued an Order of Council, listing geographical coordinates from which Canada’s Arctic baselines would be drawn.64 The resulting baselines enclose as internal waters the Canadian Arctic archipelago, also known as the Northwest Passage.65

The designation of the baselines was in response to a long-standing rivalry of sovereignty over the Arctic Ocean and fear of misuse of the environment.66 Though the United States considers the Northwest Passage an international strait open to all shipping, Canada asserts that the Northwest Passage passes through islands claimed by Canada, and therefore lies within Canadian territory. In 1969 Canada protested the passage of the American oil tanker, Manhattan, when it sailed through the Northwest Passage without asking Ottawa’s permission.67 Fearful of pollution resulting from commercial

51. For an indepth discussion of the continuing disputes regarding the Georges Bank area, see Christie, Georges Bank: Common Ground or Continued Battleground?, 23 San Diego L. Rev. 491 (1986).
55. Id.
shipping, Canada, in 1970, enacted the Arctic Waters Pollution Prevention Act which prohibits the discharge of any substance from a ship in Canadian Arctic waters.\textsuperscript{58}

The claim to the Northwest Passage proclaimed Canada’s desire for sovereignty in the Arctic. It also fueled the fire of boundary disputes for the 1986 year.

**FISHING TREATIES**

Article 56 of the LOS Convention grants the expansion of coastal-state jurisdiction over living and nonliving resources within a 200-mile exclusive economic zone (EEZ).\textsuperscript{59} This grant has caused friction between distant-water fishing states, who have long enjoyed fishing as a freedom of the high seas, and small coastal states, who feel entitled to sovereignty over all fishery resources within that 200-mile zone.\textsuperscript{60}

To alleviate this friction, many littoral states negotiate fishing rights and conservation agreements with distant-water nations.\textsuperscript{61} While arrangements with some nations such as Japan have been successful, other attempted agreements have been disappointing. The Pacific Island nations contend that the difficulty in potential agreements with the United States lies in the United States attitude towards migratory species. This lack of accord stems from the United states refusal to recognize the 200-mile EEZ limit with regard to tuna resources.\textsuperscript{62} Pacific Island countries interpret article 56 as including tuna and other highly migratory species of fish. These nations strongly assert their sovereign rights of exploration, exploitation, conservation and management of all living and nonliving natural resources within the EEZ.\textsuperscript{63}

The Pacific Island nations cite articles 63 and 64 of the LOS Convention as permitting coastal states to conserve migratory species. These provisions permit the establishment of conservation programs

\begin{itemize}
\item[\textsuperscript{58}]. Arctic Waters Pollution Prevention Act, CAN. REV. STAT. ch. 2 (1970).
\item[\textsuperscript{59}]. LOS Convention, supra note 1, art. 56.
\item[\textsuperscript{60}]. Narokobi, The Tuna Issue: The South Pacific and the United States, in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 370 (J. Van Dyke ed. 1985).
\item[\textsuperscript{62}]. Id.
\item[\textsuperscript{63}]. Id.
\end{itemize}
in areas both internal and external to the 200-mile zone. To achieve the goal of conservation, the island-states must gather information concerning fish harvests beyond the 200-mile limit to determine whether overfishing of migratory species beyond the EEZ would deplete the stock within a coastal state's EEZ.

Distant-water fishing nations, such as the United States, are excluded from membership in the South Pacific Forum Fisheries Agency. This exclusion guarantees the littoral states sovereignty over species in their 200-mile EEZ. The policy-setting membership of this agency consists of only Pacific Island coastal states.

The United States refuses to accept coastal-state sovereignty over tuna; it prefers to establish international bilateral agreements. President Reagan, in his 1983 proclamation establishing a 200-mile EEZ for the United States, specifically excluded tuna from coastal-state sovereignty. He stated that such migratory species require international agreements for effective management. The United States failure to respect the 200-mile fisheries zones of many coastal states has lead to foreign relations problems and so-called “tuna wars.” Such disputes have resulted in the seizure of United States fishing vessels and the confiscation of their catch.

In sum, many island-states are attempting to negotiate agreements recognizing their sovereignty over tuna resources within their EEZ and their conservation efforts outside their EEZ. Other treaty goals are: 1) cooperation in tuna harvesting; and 2) the transfer of technology and skills to exploit the tuna resources for mutual benefit; and 3) scientific research designed to preserve tuna resources, partic-

64. Id.
65. Article 64, dealing with highly migratory species, permits conservation of such species both within and beyond the EEZ. LOS Convention, supra note 1, art. 64.
67. Id.
68. President Reagan’s March 10, 1983, Proclamation No. 5030, states: “This Proclamation does not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including high migratory species of tuna which are not subject to United States jurisdiction and require international agreements for effective management.” 48 Fed. Reg. 10,605 (1983).
69. In June 1984 for example, the Solomon Islands seized the United States tuna boat, Jeannette Diana, and held it until February 1985, at which time they sold it back to its owners for 700,000 dollars. Although the Solomon Islands have no navy or gunboats, they captured the Jeannette Diana by using a yacht of visiting Australians. These yachtsmen shared in the proceeds the Solomon Islands received from the Jeannette Diana’s owners. San Diego Union, Mar. 16, 1986, at C1, col. 1.
70. As developing nations, many Pacific Island nations lack both the capital and technology to develop tuna resources. In exchange for licenses to fish in their waters, they seek the transfer of fishing technology and capital. These nations also seek to have the fish processed in their countries, in order to benefit the local economies, rather than having the fish removed for processing elsewhere. Norokobi, The Tuna Issue: The South Pacific and the United States, in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION, supra note 60, at 370.
ularly their spawning grounds.\textsuperscript{71}

\textit{South Pacific Tuna Discussions}

While no final agreement has been reached, several meetings of the South Pacific Forum Fisheries Agency have stimulated much discussion. In December 1984 member states met with United States officials to discuss a possible umbrella agreement for access by United States tuna fleets to South Pacific waters.\textsuperscript{72} In March 1985 the countries agreed that a single license could be issued authorizing tuna fishing in an agreed area, rather than requiring fleets to acquire individual national licenses.\textsuperscript{73}

The South Pacific Forum Fisheries Agency met again with United States officials in June 1985 in Wellington, New Zealand. Although no concrete results emerged, the countries discussed the access of foreign tuna fishermen to South Pacific waters and enforcement rights of coastal and flag states.\textsuperscript{74}

\textit{United States-Canada Salmon Agreement}

In contrast to the disappointing South Pacific tuna discussions, the United States and Canada entered a salmon agreement which was signed and ratified by both countries in record time. The agreement was signed on January 28, 1985, resolving a fifteen year dispute between the two countries concerning west coast salmon resources.\textsuperscript{75}

The management of Pacific salmon represents a transboundary stock problem. Hatching in rivers along the west coast of North


\textsuperscript{72} Citizens for Ocean Law, Oceans Pol'y News, Jan.-Feb. 1985, at 7.

\textsuperscript{73} Citizens for Ocean Law, Oceans Pol'y News, Mar.-Apr. 1985, at 9.

\textsuperscript{74} Id.


Prior to 1985, Canada and the United States had unsuccessfully negotiated a salmon treaty for over fifteen years. The desired result was one limiting the number of salmon caught that originate in the rivers of the other country. The purpose of such an agreement is to assure that both parties reap the benefits invested in their salmon fisheries. \textit{See} Citizens for Ocean Law, Ocean Pol'y News, Jan.-Feb. 1985. One factor hindering an agreement is that the fishermen who would benefit from the agreement are not those who would pay its price. For example, an Alaskan fisherman may be asked to reduce his catch of salmon destined for Canadian rivers and a Canadian fisherman may be asked to reduce his catch bound for Washington state. \textit{Id.} The Alaskan fisherman suffers greatly but receives no corresponding benefit, while the Washington fisherman’s stock is increased with no corresponding detriment to him.

711
America, salmon spend most of their life cycle in the high seas; they return to rivers only at the end of their lives. On returning to the rivers of their birth, they are caught by commercial fisheries. The dispute arose because salmon, which spawn in the rivers of the United States, are caught by Canadian fishermen off the coast of Canada, before the fish come within United States jurisdiction and vice versa. Transboundary rivers, such as the Yukon, exacerbate the problem, as it is difficult to determine in which country the fish spawned and to which they should belong when caught.

Finally, the United States-Canadian Salmon Agreement was approved and satisfied the varied interests of both nations' commercial and sport interests, as well as Native American fishermen and fish processors.77

Other United States Fisheries Activity

In an amendment to the Magnuson Fishery Conservation and Management Act (MFCMA),78 the United States exclusive fishery management authority was extended to straddling stocks79 beyond the United States EEZ. The purpose of this amendment was to eliminate high seas interception of salmon of United States origin by other countries. The amendment recommends that negotiations be conducted with Canadian and Japanese fishermen to achieve this purpose.80 The MFCMA is consistent with the LOS Convention article 64, which permits a coastal state to exercise conservation measures beyond its EEZ to achieve conservation within its EEZ.81

Governing International Fisheries Agreements

United States law82 requires a 60-day review period after Governing International Fisheries Agreements (GIFAs) are submitted to Congress.83 If no contrary action is taken, such negotiated agreements automatically become effective.

77. The implementing legislation of the House of Representatives was HR-1093, H.R. 1093, 99th Cong. 1st Sess. 131 CONG. REC. H402 (1985). The implementing legislation of the Senate was Public Law 99-5.
79. The definition of a straddling stock is one located both within and beyond, but adjacent, to a nation's EEZ.
81. LOS Convention, supra note 1 art. 64.
82. The MFCMA requires the 60 day review period after a fishing agreement is submitted to Congress, before it can become law. 16 U.S.C. § 1823 (1976).
On August 1, 1985, Poland and the United States signed a GIFA covering fishing by Polish vessels within the United States EEZ. The mandatory 60-day review period ended on November 15, 1985. The United States-Poland GIFA becomes effective on January 1, 1986. A GIFA signed between the United States and the People’s Republic of China in July 1985 also completed its 60-day review period on November 15, 1985. This agreement will be implemented once the Department of State is apprised that the formal exchange of notes has taken place. A proposal to extend the existing United States-Soviet GIFA was submitted to Congress on October 1, 1985. This GIFA, which would have lapsed without the extension, is expected to complete its 60-day review period on December 12, 1985. It will enter into force on January 1, 1986 along with the GIFAs with Poland and the People’s Republic of China.

Soviet-Kiribati Fishing Treaty

During 1985, the Soviet Union quietly signed an agreement with Kiribati, formerly the Gilbert Islands, permitting the Soviet Union to dispatch one mother ship and sixteen lesser vessels to Kiribati waters. The pact, which gives the Soviet Union fishing rights over 1.4 million square miles of ocean, nets the poverty-stricken island of Kiribati 1.7 million dollars annually — about ten percent of its budget. The Soviet Union also is attempting to negotiate fishing agreements with a number of other islands in Oceania. Tuvalu, Fiji, Tonga, and the Solomon Islands refuse to permit Soviet fishing, but Vanatu is considering an agreement.

86. The United States-People’s Republic of China GIFA was signed during the Chinese President’s visit to the United States during July 1985. Id. at 2.
87. Id.
88. Id.
89. San Diego Union, Mar. 11, 1986, at C1, col. 1.
90. Id. Kiribati’s other main source of income is from fish licensing agreements, foreign aid, and a small copra trade.
91. Id. The American Tuna Association and some military sources believe that the purpose of the Soviet fishing licenses in the South Pacific is for intelligence gathering, rather than fishing pursuits.
92. Id.
MARINE MAMMALS: THE INTERNATIONAL WHALING COMMISSION
LAWSUIT

Under United States law, a nation must be certified when it acts to "diminish the effectiveness of the International Whaling Commis-
sion."93 The certification process automatically halves the quality of
fish, including whales, a nation is permitted to harvest in United
States waters.

In 1982 the International Whaling Commission (IWC) banned all
hunting of endangered sperm whale. In November 1984 the United
States, however, agreed to permit Japan to continue whaling, in con-
travention of the IWC ban.94 As part of the agreement, Japan with-
drew its objection to the IWC ban, and avoided the certification pro-
cess. The agreement allows Japan to continue to harvest up to 400
sperm whales during the 1984 and 1985 seasons and up to 200 dur-
ing the 1986 and 1987 seasons.95

The American Cetacean Society and other environmental organi-
zations filed a lawsuit96 against the Departments of State and Com-
merce challenging the right of the United States government to


94. The IWC was founded in 1945 to provide for the conservation, management, and optimum utilization of whale stocks, and adopted a five year commercial whaling moratorium in 1982. The moratorium was to enter into force in 1985-1986. The IWC has no enforcement powers and is required to release a state from the mandates of the decision if a formal objection is filed by a dissatisfied state within a 90-day time period. Of the seven nations voting against the phase-down moratorium, Japan, the Soviet Union, Norway, and Peru filed formal objections within the accepted period, and thus maintained their right to continue whaling after the moratorium took effect. Brazil, Iceland, and South Korea voted against the moratorium, but agreed to abide by it and have withdrawn from the whaling industry. Peru voted against the moratorium, but withdrew its objection in 1983 and agreed to comply with the moratorium. Only Japan, the Soviet Union and Norway remain engaged in commercial whaling. Leggett, supra note 93, at 1.


make a bilateral agreement with Japan that circumvented IWC decisions. The plaintiffs contended that Secretary of Commerce Malcolm Baldrige violated a clear and nondiscretionary duty by failing to certify Japan, because Japanese nationals were engaged in sperm whaling in violation of the IWC ban for the 1984-1985 season. The defendants maintained that agreements with the Japanese are within the scope of government discretion to determine what activities diminish the IWC’s effectiveness.

The United States District Court for the District of Columbia ordered the United States to certify Japan for its violation of the IWC ban on killing sperm whales. The D.C. Circuit affirmed the lower court’s decision; however, the Supreme Court granted certiorari on January 13, 1986.

In contrast to the governments handling of Japan, the United States application of the Packwood-Magnuson amendment to the USSR’s excessive minke whale catch in Antarctica was much more stringent. On April 3, 1985, Secretary Baldrige certified the Soviet Union, halving the quota of fish which the Soviet Union would be permitted to catch in United States waters. However, the Baldrige decision, by holding that in such situations that certification is mandatory and not discretionary, should equalize the application of United States law towards all foreign nations.

POLLUTION

The long-term consequences of pollution on marine life, both plant and animal, are unknown. Pollutants may interact with marine plants and animals, the atmosphere, ocean sediment, and the water itself. Concern over the control of dumping wastes into the sea in accordance with the LOS Convention has arisen. In 1985 this con-

97. See generally Ellis, Whaling, Conservation, and Diplomacy, OCEANUS, Fall 1985, at 76.
99. Id.
100. Id.
103. Leggett, supra note 93.
104. Kaharl, CAMS - A Think Tank for Global Ocean Problems, OCEANUS, Fall 1985, at 50.
cern focused on protecting the ocean from the radioactive waste and oil pollution.107

Nuclear Waste Dumping Bans

The London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (London Dumping Convention) prohibits high-level radioactive wastes from being dumped at sea.108 Annex II permits certain wastes, including low-level radioactive wastes, to be dumped at sea.109

At the Seventh Consultative Meeting in 1983, a resolution was adopted calling for the suspension of radioactive waste dumping including low-level wastes, pending expert reports.110 At the June 1985 meeting of the London Dumping Convention, Spain sponsored a resolution to continue the ban on the dumping of low-level wastes which was adopted by a vote of twenty-five to six.111 The United States, France, South Africa, Switzerland, United Kingdom, and Canada voted against the resolution and seven countries abstained.112

The Ninth Consultative Meeting in September 1985 reconsidered the moratorium on low-level radioactive wastes.113 The South Pacific nations called for a permanent ban.114 The Consultative Meeting examined the report of an expert scientific panel,115 which failed to reach unanimous agreement, or provide substantive conclusions or recommendations. Therefore, the resolution was considered to be devoid of expert advice. The parties voted to continue the present suspension of the dumping of all radioactive wastes, both high-level and

Los Convention article 194, paragraph 2, prohibits ocean dumping which could result in transboundary pollution. Article 210, paragraph 5, prohibits ocean dumping in the territorial sea, economic zone, or continental shelf without the permission of the coastal state. Ocean dumping in areas beyond national jurisdiction should be regulated under the 1972 Convention of the Prevention of Marine Pollution of Dumping of Wastes and Other Matter (Ocean Dumping Convention or London Dumping Convention). Kindt, supra note 105, at 583.

109. Id.
110. Id. The United Kingdom, however, declined to accept the resolution as binding and continued to dump low-level radioactive wastes in the Atlantic. The dumping finally was prevented by the National Union of Seamen and other transport unions which refused to allow their members to move waste for dumping.
111. Id.
112. Id.
113. Id.
114. Id.
low-level.\textsuperscript{118} No time limit on the ban was set; however, when considering dumping in the future, those who favor dumping have the burden of proving that it causes no harm to human health.\textsuperscript{117}

Sub-Seabed Disposal

Though the London Dumping Convention prohibits the dumping of high-level radioactive wastes, there has been much discussion of disposing these wastes beneath the seabed.\textsuperscript{118} Technologies for seabed emplacement and sub-seabed disposal of high-level radioactive wastes — such as radioactive waste disposal in boreholes drilled into the seabed — are being examined by several nuclear nations, including the United Kingdom.\textsuperscript{119} Disagreement exists as to whether the London Dumping Convention applies to such activities.\textsuperscript{120}

At the Eighth Consultative Meeting in 1984, which ended without agreement, two draft resolutions were circulated.\textsuperscript{121} One draft proposed that disposal of wastes into the seabed should not occur until research establishes that it is technically feasible and environmentally acceptable.\textsuperscript{122} The second resolution, which reflected the majority opinion of parties to the Convention, stated that for the purposes of the Convention, “disposal at sea” includes disposal of wastes into the seabed. Consequently, the burial of high-level radioactive wastes in the seabed is prohibited.\textsuperscript{123} Discussion of the issue has been suspended until 1986.\textsuperscript{124}

Oil Pollution

During 1985, coastal nations attempted to alleviate oil pollution through various legal and administrative remedies.\textsuperscript{125} Although most countries limited their measures to economic sanctions, others have resorted to punitive procedures.

The courts in West Germany, for example, have issued stringent

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item 16 Marine Pollution Bull. 431 (1985).
\item Id.
\item Id. at 432.
\item Id.
\item Id.
\item Id.
\item 1985 Report of the Secretary-General, supra note 12, at 16.
\item See generally Farrington, Oil Pollution: A Decade of Research and Monitoring, Oceanus, Fall 1985, at 2.
\end{enumerate}
\end{footnotesize}
judgments against oil polluters to establish their lack of tolerance for
pollution of Germany's territorial waters. A Brazilian engineer of
the Tapajos received a six-month suspended sentence for allowing oil
and water to be pumped overboard into the German Bight in August
1985.

In October 1985 an oil slick six miles long and fifty meters wide,
was traced to the Egyptian ship Nefertiti. Again, harsh sanctions
were imposed by the West German courts. Two crew members re-
ceived sentences for their involvement and the court ordered the ves-

New Events

The Achille Lauro: An Act of Piracy

Terrorism that frequently has disrupted air traffic expanded to
maritime traffic on October 7, 1985. Four members of a Palestine
Liberation Organization splinter group commandeered the Achille
Lauro, an Italian cruise ship. Four hundred passengers were aboard
the vessel. The hijackers segregated the Americans and British
from the other passengers and demanded the release of fifty Pales-
tinian prisoners held in Israel. When an attempted landing at Tar-
tus, Syria, was refused, the hijackers shot and killed an American
and dumped the body overboard.

Unaware that a passenger had been murdered, Egyptian Presi-
dent Hosni Mubarak agreed to give the hijackers safe transportation
out of Egypt in exchange for the release of the passengers and the
vessel. On October 10, 1985, American Navy F-14 fighter planes
intercepted the Egyptian airliner transporting the hijackers to Al-
giers and forced it to land in Sicily. The United States attempted

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127. Id.
128. Id.
129. Id.
130. There were approximately 118 passengers and 300 crew members on the
Achille Lauro at the time of the hijacking. 650 of the original 748 passengers had dis-
embarked at Alexandria for sightseeing and were to reboard at Port Said. The ship was
hijacked between Alexandria and Port Said. Newsweek, Oct. 21, 1985 at 34; Wall St. J.,
Oct. 9, 1985 at 1, col. 3.
132. In his negotiations with the hijackers, Egyptian President Hosni Mubarak
relied on a radio message from the ship's Captain de Rosa, stating that no one on board
had been harmed. The message was later found to be false when it was learned that Leon
Klinghoffer, an American, had been murdered. Time, Oct. 28, 1985 at 31, col. 1.
133. From Sicily, the hijackers were returned to Italy to stand trial. The Italians
claimed jurisdiction over the hijackers on the grounds that the ship was an Italian ship,
therefore an extension of Italian territory. Four Italian cities claimed jurisdiction, but as
of October 21, 1985, only Genoa, the port where hijackers boarded ship, had issued ar-
est warrants. The Italians filed charges ranging from high-seas hijacking to murder.
to extradite the hijackers and their leader from Italy, but Italy refused.\textsuperscript{134}

The ramifications of the \textit{Achille Lauro} hijacking and retaliatory United States air interception affected relationships among the United States, Egypt, Italy, and the Arab world.\textsuperscript{135} The Reagan Administration resolved to pursue a counter-terror crusade, even at the expense of tranquil relations with Italy and Egypt. At the November 1985 meeting of the International Maritime Organization in London, the United States requested the development of procedures for responding to acts of terrorism at sea.

\textbf{Bombing of the Greenpeace Environmental Ship, the Rainbow Warrior}

On July 10, 1985, while berthed at New Zealand's Auckland Harbor, the \textit{Rainbow Warrior}, a 160-foot Greenpeace\textsuperscript{136} environmental vessel, was sunk by explosives attached to its hull.\textsuperscript{137} The \textit{Rainbow Warrior} was to have led a flotilla protesting French nuclear testing at Mururoa Atoll in the South Pacific. New Zealand Prime Minister, David Lange, called the incident a criminal act with "terrorist overtones".\textsuperscript{138}

Two people were arrested and charged with murder and arson and were later discovered to be members of the French General Directorate for External Security, the French espionage and intelligence services.

\textsuperscript{134} Italy's Prime Minister Benetto Craxi said President Reagan had requested custody of the four hijackers, but Craxi refused. Italian Foreign Minister Giulio Andreotti stated that "[t]he Americans were not aware that the Italian judiciary had precedence." Newsweek, Oct. 21, 1985, at 33.

\textsuperscript{135} The hijacking increased awareness of terrorism and demonstrated the need for appropriate responses to terrorism. Egyptian President Mubarak denounced the United States interception. Time, Oct. 21, 1985, at 22. In Italy, the coalition government of Prime Minister Bettino Craxi collapsed under criticism of its handling of the crisis, although it was later revived. Wall St. J., Oct. 17, 1985, at 33, col. 1; Wall St. J., Oct. 31, 1985, at 1, col. 3. In response to United States outrage at terrorism on a world-wide scale, the UN General Assembly withdrew an invitation formerly extended to Yasser Arafat to speak during the UN's 40th anniversary celebrations. Time, Oct. 28, 1985, at 28.

\textsuperscript{136} Greenpeace, an environmental organization based in Lewes, England, was founded in 1971 by Canadian environmentalists. The \textit{Rainbow Warrior}, a 30 year old converted Scottish trawler has been seized by numerous countries during Greenpeace activities since it was purchased in 1977. One recent activity includes photographing Soviet whaling operations on the Bering Sea coast, at which time seven crew members where caught and briefly held in Siberian jails. N.Y. Times, July 12, 1985, at A3, col. 1 (city ed.).

\textsuperscript{137} N.Y. Times, July 11, 1985, at A4, col. 1 (city ed.).

\textsuperscript{138} N.Y. Times, July 12, 1985, at A3, col. 1 (city ed.).
agency. The French government eventually admitted that French agents had planted the bomb that sank the Rainbow Warrior. The level of the French government’s involvement in the bombing is still unknown, however, the episode highlights France’s attitude toward protecting its nuclear testing program in the South Pacific, which conflicts with the South Pacific nations’ desire to be nuclear free.

Iran-Iraq War

Frequent attacks on neutral merchant ships and oil tankers by the warring nations of Iran and Iraq hindered freedom of navigation in the Persian Gulf during 1985. Over the course of the year, Iraq continuously bombed the Kharg Island oil terminal in the Persian Gulf. The attacks were successful in achieving Iraq’s goal of slowing Iran’s oil shipments.

Iran threatened to blockade the Strait of Hormuz, a vital oil tanker route at the southern end of the Persian Gulf, in retaliation for Iraq’s raids on Kharg Island. Tarik Aziz, Iraq’s Deputy Prime Minister and Foreign Minister, declared that Iraq would stop the raids only when Iran agreed to sign a treaty to end the five year war.

MARINE ARCHEOLOGY

This year saw the discovery of the Titanic, as well as an English decision that the cargo of the sunken Lusitania did not belong to the home crown, since it was found in international waters. The United States attempt to establish a salvage-free international monument to the Titanic in an effort to maintain its treasures for the benefit of mankind, by preventing the looting of its cargo.

The law of salvage and customary international law controls na-
tional sovereignty over shipwrecks. Within the territorial sea, a nation may exercise full sovereign rights and therefore have complete authority to regulate underwater archaeological activities. International law permits coastal nations to assert jurisdiction and control over subsoil and seabed natural resources of the continental shelf which encompasses archeological resources.

Nevertheless, in *Treasure Salvors, Inc. v. the Unidentified Wrecked and Abandoned Sailing Vessel*, the Fifth Circuit Court of Appeals rejected the United States government ownership claim to an ancient Spanish galleon which had been discovered by salvors. The court held that the United States jurisdiction over the continental shelf did not extend to the ownership of shipwrecks of any vintage.

The LOS Convention’s view is somewhat at odds with both current international law principles and the decision in *Treasure Salvors*. Article 149 of the LOS Convention provides for giving preferred rights to the country of origin:

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

*The Lusitania*

The recently decided English case, *Pierce v. Bemis* concerned the ownership of salvaged materials found on the sunken *Lusitania*. At the time of her loss, the *Lusitania* belonged to the Cunard Steamship Company and had war risks insurance with the London and Liverpool War Risks Associated Limited. These insurance companies paid the owners in full for the total loss of the ship, thereby

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149. The United States, Britain, Singapore, and Belgium have territorial seas of three nautical miles. Some Latin American countries such as Brazil, Ecuador, and Nicaragua and some African nations claim territorial seas of 200 miles. See generally Cycon, *Legal and Regulatory Issues in Marine Archaeology*, OCEANUS, Spring 1985, at 1.
150. *Id.*
151. *Id.*
152. 569 F.2d 330 (5th Cir. 1978).
154. LOS Convention, supra note 1, art. 149.
156. *The Lusitania* was a British registered passenger liner which was torpedoed in international waters on May 7, 1915, by a submarine of the Imperial German Navy. The ship sank in 315 feet of water outside both Irish and British territorial sea. *Id.*
acquiring legal title. The ownership of the vessel itself was not in dispute, but rather the ownership of its contents: personal property and effects of the passengers and general cargo. The English Admiralty Court held that no one had a better right to the property than the salvors.

The Titanic

The Titanic, which sank after a collision with an iceberg in 1912, elicited several unsuccessful salvage expeditions. However, on September 2, 1985, a joint United States-French expedition discovered the Titanic 500 miles south of Newfoundland. The ship was intact and upright at a depth of 13,000 feet below sea level. The discovery of the Titanic raises legal issues involving ownership, salvage rights, and the implications of creating an international memorial.

Under present international law, the wreck of the Titanic is available for salvage by any individual who desires to invest in such an endeavor. The original owners, successors in interest, and modern finders or salvors may all claim ownership rights in the vessel. Most of the scientists on the expedition which discovered the Titanic want no salvage effort and would like the Titanic to remain an international memorial. A proposed federal law seeks to designate the Titanic shipwreck a maritime memorial. Because the wreck was found in international waters, the bill seeks a moratorium on salvage operations until an international agreement can be reached which would govern the activities at the site.

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157. Id. The insurers were legally entitled to the vessel, including her hull, machinery, appurtenances, fixtures, and fitting, loose equipment, and furniture and other goods owned at the time of the loss.

158. Id.


161. Id.


163. Cycon, supra note 162, at 94.

164. Id.


167. Cycon, supra note 162, at 95.