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Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on the Topic of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law

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INTRODUCTION

The International Law Commission ("ILC" or the "Commission"), the treaty-drafting division of the United Nations,[1] has been wrestling, in one form or another, with the legal ramifications of transboundary pollution since the early 1970's.[2] Two Special Rapporteurs have supervised the Commission's work in this area, which has been carried out under the ponderous title "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law."

The first Special Rapporteur was the scholar and diplomat, Mr. Robert Q. Quentin-Baxter of New Zealand. The second Special Rapporteur is Ambassador Julio Barboza, an Argentine diplomat. When Ambassador Barboza assumed office upon the death of Mr. Quentin-Baxter, Ambassador Barboza stated and "reiterated" that he did not intend to reopen a general debate on the basic concepts developed by Mr. Quentin-Baxter.[3] With his Fifth Report on the topic,[4] submitted the year of his death, Mr.

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1. Article 13 of the United Nations Charter, G.A. Res. 174(II), U.N. Doc. A/519, at 105 (1947), authorizes the General Assembly to "initiate studies and make recommendations . . . for the purpose of encouraging the progressive development of interntional law and its codification." Acting on this Charter mandate, the General Assembly created the International Law Commission in 1947 to carry out the twin efforts of codification and development of international law. *See* arts. 15-24 of the Statute of the International Law Commission, *reprinted in* United Nations, *The Work of the International Law Commission* (4th ed. 1988). Professor Sinclair has noted that the distinction between codification and development has not been maintained: "[t]he Commission has never, since its very early days, sought to characterize the fruits of its labours on any specific topic as falling squarely within one or the other of the two categories." SINCLAIR, THE INTERNATIONAL LAW COMMISSION 46-47 (1987) [hereinafter SINCLAIR]. *See also* H. Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L. L. 16 (1955) and RAMCHARAN, THE INTERNATIONAL LAW COMMISSION: ITS APPROACH TO THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW (1977). As a rule, the Commission meets in early summer in Geneva and the General Assembly's Sixth Committee (Legal) reviews the report of the Commission during the Assembly's meeting in New York in the fall.

2. *See* notes 187-212 and accompanying text, *infra*.

3. *Preliminary Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, by Mr. Julio Barboza, Special Rapporteur* ¶ 13, U.N. Doc. A/CN.4/394, *reprinted in* [1985] II Y.B. INT'L L. COMM'N., U.N. Doc. A/CN.4/SER.A/1985 (Part 1) [hereinafter *Preliminary Report*]. Ambassador Barboza also stated that "[a] first comparison of the earlier reports . . . with the materials setting out the practice of States seems to indicate that certain trends and general lines exist independently of any personal conceptions, and that many of the courses proposed by the previous Special Rapporteur have already been marked out in State Practice." *Id.* at ¶ 12. In the same report, Ambassador Barboza stated that the "whole topic [would] be entirely reviewed, with a view not to making changes, but to seeking the certainty which alone gives inner conviction." *Id.* at ¶ 16(f).

4. *Fifth Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur*, U.N. Doc. A/CN.4/383 and Add. 1, *reprinted in* [1984] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER. A/1984 (Part 1) [hereinafter Quentin-Baxter *Fifth Report*].

Quentin-Baxter had proposed five draft articles, which had evolved from the schematic outline of the topic included in his Third Report in 1982.[5] By the second year of his tenure, Ambassador Barboza was announcing that he intended to focus on the schematic outline rather than the Quentin-Baxter draft articles, and was questioning the "unity of the topic,"[6] expressing concern about the continuum Quentin-Baxter had worked out to accommodate the prevention and reparation aspects of the topic. In his view, "the concept of 'injury' in the sense of material harm constituted the cement of that 'continuum': injury in that sense, whether as injury which had already occurred or as potential injury, which was the equivalent of risk, was the focus of the entire topic."[7]

Special Rapporteur Barboza's Fourth Report, presented in April, 1988, also contained draft articles, ten in all. A comparison of the first of the articles he proposed there with the first of the articles proposed by Special Rapporteur Quentin-Baxter indicates that Ambassador Barboza, rather than focusing on liability for injury or harm, would have liability follow the creation of "an appreciable risk of . . . transboundary harm." Indeed, the Special Rapporteur's 1988 proposals, at least on their face, *eliminated* any liability for actual injuries, establishing *creation of risk* as the sole possible source of liability.[8]

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5. *Third Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur*, U.N. Doc. A/CN.4/360 (incorporating A/CN.4/360/Corr. 1), *reprinted in* [1982] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER. A/1982 (Part 1) [hereinafter Quentin-Baxter *Third Report*]. Professor Magraw has stated that Special Rapporteur Quentin-Baxter's "schematic outline received what may be described as tentative tacit approval in the Sixth Committee." Magraw, *Transboundry Harm: The International Law Commission's Study of International Liability*, 80 AM. J. INT'L L. 305, 308 (1986) [hereinafter Magraw I].

6. *Report of the International Law Commission on the Work of its Thirty-eighth Session*, ¶ 193, U.N. Doc. A/41/10 (1986), *reprinted in* [1986] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER. A/1986 (Part 2) [hereinafter *1986 ILC Report*]. Specifically, Ambassador Barboza said that

> he intended to give detailed consideration to such questions as causality, shared expectations, the incomplete obligations of prevention envisaged in the schematic outline, the duty to make reparations and the role of international organizations, which had all been commented on during the discussions, and to leave open the question of the final scope of the topic. He had also indicated that [he] intended to re-examine the five draft articles submitted by the previous Special Rapporteur.

Summary Records of the Meetings of the Thirty-eighth Session, ¶ 29, *reprinted in* [1986] I Y.B. INT'L L. COMM'N., U.N. Doc. A/CN.4/SER. A/1986 (Part 1). *See also First Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, by Mr. Julio Barboza, Special Rapporteur*, ¶ 69, U.N. Doc. A/CN.4/402, *reprinted in* [1986] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER. A/1986 (Part 1) [hereinafter *First Report*].

7. *Id.*

8. Mr. Quentin-Baxter's proposed Article 1 states:

> Article 1. Scope of the present Articles: The present articles apply with respect to activities and situations which are within the territory or control of a State, and which give rise or may give rise to a physical consequence affecting the use

Commentary in the Commission's 1988 session and in the debates of the Sixth Committee that year made it clear that, rather than the approval that had previously been accorded the broad, general outlines of Special Rapporteur Quentin-Baxter's work, this topic had become quite controversial:[9]

> The debate [at the ILC's 1988 Session] highlighted the fact that, while the Commission has been working on this topic since 1980, the project is still at an embryonic stage of development. There remains no clear understanding within the Commission of the kinds of activities to which the draft would apply, nor is there agreement on the fundamental question whether the applicable standard of liability is strict (objective) or based on fault. There is even disagreement within the Commission over whether the purpose of the draft is to provide for prevention or compensation.[10]

Virtually all the representatives who participated in the 1988 Sixth Committee debate on this topic expressed difficulties with the risk concept as set forth and defined in the draft Article 1 Ambassador Barboza proposed in his Fourth Report.[11] Even those who seemed to view Special

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or enjoyment of areas within the territory or control of any other State.

Quentin-Baxter *Fifth Report*, *supra* note 2, at ¶ 1.

The first draft article proposed in Special Rapporteur Barboza's 1988 Report reads thusly:

> Article 1. Scope of the present Articles: The present articles shall apply with respect to activities carried out under the jurisdiction of a State as vested in it by international law, or, in the absence of such jurisdiction, under the effective control of the State, when such activities create an appreciable risk of causing transboundary injury.

Fourth Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law by Julio Barboza, Special Rapporteur, ¶ 17, U.N. Doc.A/CN.4/413, *to be reprinted in* [1988] II Y.B. INT'L L. COMM'N., U.N. Doc. A/CN.4/SER. A/1988 (Part 2) [hereinafter *Fourth Report*].

9. One member of the Commission, Mr. Stephen J. McCaffrey, who is also Special Rapporteur for the International Watercourses topic (see notes 47-67 and accompanying text, *infra*), has summarized the shift effected by Ambassador Barboza by stating that:

> During the Commission's discussion of the fourth report, a basic division emerged between those members who believed that the topic should be confined to activities that create a risk of transboundary harm and those who thought it should cover the entire field of international liability for transboundary harm. While the former would base the topic upon risk, the latter focused upon harm and believed that risk should not play such a predominant role. The distinction has important implications for the extent to which the draft emphasizes prevention over reparation, anticipatory procedures of notice and consultation over post hoc obligations of compensation.

83 AM. J. INT'L L. 153, 170 (1989).

10. 82 AM. J. INT'L L. 144, 150-51 (1988).

11. *See generally Report of the International Law Commission on the Work of its Fortieth Session (1988): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its Forty-third Session, Rerort by the Secretariat* ¶¶ 11-63, U.N. Doc. A/CN.4/L.431, 18 January 1989.

The representative of Brazil, Carlos Calero Rodrigues, stated that he "believed that 'harm' should constitute an essential criterion in the question of remedy whereas 'risk' should remain the basis for the rule of prevention." *Forty-third General Assembly, Sixth*

Committee, 25th Meeting, 31 October 1988, 2, U.N. Doc. GA/L/2570 [hereinafter *31 October 1988 Press Release*]. He did not favor working with only "harm" as a criterion, thus covering only reparation and limiting the topic to its current title, believing instead that the articles "should also deal with prevention." *Summary Record of the 25th Meeting, Sixth Committee* 18, U.N. Doc. 1/C.6/43/SR.25 [hereinafter *Summary Record*]. In his view:

> If the articles were to cover both prevention and reparation, then both the concept of "harm" and that of "risk" might have a place in them. However, "risk" should not become the predominant concept. If that approach prevailed, reparation for harm actually caused would be conditional on the determination that the activity causing the harm involved risk, *i.e.*, in the words of article 2, that it was an activity "highly likely" to cause harm. If harm had been produced, it was immaterial to try to ascertain whether the activity created risk. It might even be said that in every case in which harm occurred, there was a risk of it occurring. The demonstration was made by the very fact that harm was produced. However, that amounted to admitting that the basis for reparation was "harm", not "risk". The introduction of the concept of "risk" was unnecessary and might be a source of confusion. If an action was not considered highly likely, or even simply likely, to cause harm and harm was caused, should the victim then be left to bear his loss or injury? That would contravene one of the principles . . . on which there had been general agreement in the Commission.

Id.

Another of Mr. Calero Rodrigues' comments indicated that he did not believe it was proper to turn the topic around so that its primary emphasis was on risk: "The principle of reparations was the very essence of responsibility; he hoped to see included in the formulation for implementing this matter, all damages, whatever they might be." *31 October 1988 Press Release, supra* at 3.

Mr. Calero Rodrigues also endorsed the idea that liability should not result from a finding of wrongfulness, and indicated approval for a flexible liability regime but one that nevertheless provides compensation for all appreciable harm: "There had been examples in the past of compensation being given *ex gratia* for harm caused by lawful activities. That had been done on the basis of a sort of moral obligation; it was now a matter of making that obligation, in such cases, a legal obligation." *Summary Record, supra* at 18-19.

The representative of Sierra Leone, Abdul Koroma, also indicated that he was uncomfortable with a risk-based analysis. He reported to the Committee that:

> While in favour of the proposed topic, he had reservations on the question of liability. He insisted on the need for observing the rule that: a State which caused harm to another State, incurred liability to the injured State which was entitled to compensation by the source State. Liability ensued from the very existence of an injurous act.

31 October 1988 Press Release, supra at 3.

In his view liability had to be linked with harm:

> Liability was not a consequence of the risky nature of the enterprise, but flowed from the fact that harm had been caused to the injured State. That was a more solid foundation and should be the basis of the topic. Risk was a matter of fact and not of law and, therefore, could not be the main criterion for liability.

Summary Record, supra at 22.

The representative of Ireland, Francis Mahon Hayes, was equally critical of the risk-based regime, stating that although risk "should serve as a rational basis for the notion of prevention . . . and while it was an essential element of liability, it was unacceptably restrictive, providing for a regime of liability that would be rendered inoperable in many cases." *Forty-third General Assembly, Sixth Committee, 27th Meeting*, 2 November, 1988, 1, U.N. Doc. GA/L/2572 [hereinafter *2 November 1988 Press Release*]. The representative of the German Democratic Republic agreed: "the term 'appreciable risk' was too vague to serve as a criterion in actual situations, especially since it limited the range of liability to mea-

Rapporteur Barboza's approach with some favor had criticisms.[12] Only two nations — the United Kingdom and Japan — expressed wholehearted approval of the risk-based approach.[13]

Ambassador Barboza responded to these many criticisms in his Fifth Report[14] and presented substantially revised versions of his proposed articles, which now total twelve. Ambassador Barboza labeled the ILC and the Sixth Committee debates of the proposals of his Fourth Report "extremely fruitful,"[15] and then went on to spend a large portion of his report explaining and, to a certain extent, altering the concept of risk he had propounded the previous year. He stated that his emphasis on risk was designed to avoid introducing the "dreaded" concept of strict or ab-

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sures for prevention." *Id.* at 2.

Andreas Jacovides, the representative of Cyrpus, noted that "[u]sing the notion of appreciable risk as the sole basis of liability would limit the scope of the topic," and in commenting on the Watercourses topic endorsed the "concept of 'appreciable harm' " as providing "as factual and objective a standard as possible." *2 November 1988 Press Release, supra*, at 3.

Robert B. Rosenstock, the representative of the United States, seemed to agree that harm rather than risk should be the preferred approach: "It was better to consider the actual injury rather than the risk, and to deal within a strict framework of objective liability in which the causal relationship between a legal act and an injury suffered by third parties was the condition for the implementation of the liability process." *2 November 1988 Press Release, supra*, at 7.

12. Harmut Hillgenberg, the representative of the Federal Republic of Germany, while expressing satisfaction that " 'appreciable risk' had been retained as the main criterion of liability," also stressed that "the Commission should have a clear idea of the criteria of liability." In his view, the "basis for defining the concept of liability" requires considerations of 'appreciable risk' along with considerations of 'transboundary injury.' *2 November 1988 Press Release, supra* note 11, at 2-3. The Chinese representative, Xu Guanjian, while stating that "[h]e supported the notion of 'appreciable risk' as a criterion for liability," nevertheless argued that "other criteria . . . should be retained because risk, as a single criterion, would exclude certain activities from the scope of the future instrument." *Id.* at 5. Helmut Tuerk, the representative of Austria, stated that liability in transboundary pollution situations had "two functions": covering the risk of the accident and covering significant harm caused in the territory of other States. *Id.* at 4. Francisco Villagran-Kramer, the representative of Guatemala, while acknowledging the validity of consideration of risk, stated that "there was an equation between risk and injury: 'risk' allowed for the delimitation of liability; appreciable injury was an essential component." *Id.* at 7.

13. Arthur Watts, the representative of the United Kingdom, stated that "[h]e supported including the notion of appreciable risk, which, even if it allowed the exclusion of certain lawful actions, still allowed this innovative regime to be reconciled with the demands of technological evolution and scientific research." *2 November 1988 Press Release, supra* note 11, at 6. Sumio Tarui, the representative of Japan, stated that "[t]he proposed instrument should only aim at activities which created an 'appreciable risk,' as in draft article 1." He, too, though, expressed the opinion that "[t]he notion of appreciable risk should be better defined." *Id.* at 7.

14. *Fifth Report on International Liability for Injurious Consèquences Arising Out of Acts Not Prohibited by International Law by Julio Barboza, Special Rapporteur*, U.N. Doc. A/CN.4/423 and Corr. 1 and Corr. 2, *to be reprinted in* [1989] II Y.B. INT'L L. COMM'N., U.N. Doc. A/CN.4/SER. A/1989 (Part 2) [hereinafter *Fifth Report*].

15. *Fifth Report, supra* note 14, at ¶ 1.

solute liability,[16] and to establish workable limits on the topic.[17] Ambassador Barboza did, however, note that "[t]he Commission and the Sixth Committee were . . . reluctant to accept the concept of 'risk' in the form in which it was used in the fourth report."[18] He went on to state that he could not "disregard the important body of opinion in the Commission which prefers not to use the concept of 'risk' as a limiting factor," and expressed confidence that "such thinking" could be incorporated in the draft articles, implying that only minor alterations need be made.[19] Then, without any further acknowledgment that he was introducing a change, Ambassador Barboza included liability for actual harm along with liability for creation of the risk of harm in his new first article.[20] He rather offhandedly, after his explanation about limiting the topic, stated that "[a] legal text can . . . mix two different types of liability. . . ."[21]

This change, however, did not completely satisfy those who had expressed problems with the "risk" theory, and many still objected to the Special Rapporteur's continuing focus on risk. While some commentators expressed their appreciation for the changes introduced by Ambassador Barboza,[22] many still expressed concern about any dependence whatso-

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16. *Id.* at ¶¶ 7, 11 and 14.

17. *Id.* at ¶ 4. In Ambassador Barboza's view, there are three possible instances of harm: the first involves "an injury that has occurred," which must be compensated for by the "one who is to blame, in the broadest sense"; the second involves situations where "no one is to blame for the specific act which caused the injury," in which case, "the person who undertook the activity of which that act forms a part must pay compensation normally because it is he who benefits from the results of that activity" or because he created the danger; the third involves situations where, as he put it, "the distinction between the two [former] kinds of fault cannot be made, as would be the case with injury caused not by an activity but by an isolated act beyond the control of the perpetrator or by a thing which is not normally dangerous." *See id.* at ¶¶ 5-6. According to Ambassador Barboza, only the first two instances are covered by his risk theory, and the third represents the anathema absolute of strict liability he designed the risk theory to avoid. The third instance, he stated, is one where there is no link of the harmful act to an activity. Ambassador Barboza has long insisted on using the word "activities" rather than the "acts" of the formal title of his topic, arguing that it is more appropriate. He emphasizes that, according to his risk theory, "[l]iability is linked to the nature of the activity," and for that reason the isolated "acts" of the third instance are not "included in the scope of [this] topic." *Fifth Report, supra* note 14, at ¶ 14.

18. *Fifth Report, supra* note 14, at ¶ 11.

19. *Id., supra* note 14, at ¶ 12.

20. The new proposed Article 1 ("Scope of the present articles") reads as follows:

> The present articles shall apply with respect to activities carried out in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create an appreciable risk of causing transboundary harm throughout the process.

Fifth Report, supra note 14, at ¶ 16. *See also* note 8 *supra*, for comparison of Quentin Baxter Proposed article 1 and the first version of Barboza's Proposed article 1.

21. *Fifth Report, supra* note 14, at ¶ 3.

22. The representative of Ireland, Francis Mahon Hayes, noted that his country "particularly welcomed an amendment to article 1 so as to give "harm" and "risk" an equal role. *Forty-fourth General Assembly, Sixth Committee, 32nd Meeting*, 3 November, 1989, 7,

ever on a risk-based theory.[23] By far, the largest number of comments in the Sixth Committee emphasized the importance of the topic,[24] and the need for more innovative approaches to deal with the increasingly serious environmental problems that face the international community.[25] Many

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U.N. Doc. GA/L/2628 [hereinafter *3 November 1989 Press Release*]. Ghassan M. Hussain, the representative of Iraq, expressed the opinion that his country "welcomed the extension of the scope of the topic to include not only activities creating an appreciable risk of causing transboundary harm, but also caused harm." *Forty-fourth General Assembly, Sixth Committee, 33rd Meeting*, 6 November, 1989, 7, U.N. Doc. GA/L/2629 [hereinafter *6 November 1989 Press Release*]. The representative of Bahrain, Husain M. Al-Baharna, stated that "[h]is delegation was pleased that redrafting articles on international liability seemed a step towards dealing with that controversial area." *Id.* at 3.

23. Carlos Calero Rodriques, the representative of Brazil, asserted that "his delegation had consistently maintained that harm should be the basis for . . . compensation and that risk should have its place in provisions related to prevention." *Forty-fourth General Assembly, Sixth Committee, 31st Meeting*, 2 November, 1989, 2, U.N. Doc. GA/L/2627 [hereinafter *2 November 1989 Press Release*]. The representative of Canada, Edward G. Lee, stated that "the two concepts of risk and harm should be dealt with separately," and that his country's position was that "liability should attach in the case of 'appreciable harm,' " while the "concept risk" had a "important role" to play in stimulating preventive measures, and even, perhaps, identifying the standard of care to be applied." *Id.* at 3. The representative of Bahrain agreed with the latter part of this approach, stating that "his delegation proposed that the Commission adopt a dual approach to the question of risk and liability. One would establish the criterion of harm or injury for liablity; the other would determine the risk criterion from preventive measures." *6 November 1989 Press Release*, *supra* note 22, at 3.

The representative of the Federal Republic of Germany, Helmut Hillgenberg, deplored the fact that "after 11 years of work" on the topic, " 'clear contours' could not yet be discerned," *id.* at 4, while the representative of the German Democratic Republic, Wolfgang Hampe, questioned the risk-based theory, suggesting that further work on the topic "should concentrate on particularly hazardous activities." *3 November 1989 Press Release*, *supra* note 22, at 4.

24. *See* comments of Hans Correll, representative of Sweden, *2 November 1989 Press Release*, *supra* note 23, at 5 (Sweden seeks "high priority for the proposed convention"); Gerhard Hafner, representative of Austria, *6 November 1989 Press Release*, *supra* note 22, at 2 (the subject has "increasing importance . . . because of growing threats to the environment"); Husain M. Al-Baharna, *id.* at 3 ("recent catastrophes emphasized the urgent need for international rules regarding the grave risks stemming from transboundary pollution"); and James Crawford, representative of Australia, *id.* at 4 ("Australia welcome[s] the new draft articles . . . because of the increased importance of environmental issues").

25. *See* comments of Mr. Lee, *2 November 1989 Press Release*, *supra* note 23, at 3 ("The time ha[s] come to go beyond the precedents of the *Trail Smelter*, *Lac Lanoux* and *Corfu Channel* Cases and the *Stockholm Principle 21*, as well as the results of law-making conferences"); Mr. Correll, *id.* at 5 ("the Committee [is] developing progressive law where classical concepts might not apply, since the required approach was to protect the victim's interest without identifying a culprit. Political and other considerations had resulted in an overly vague draft, and some means to put it into effect should be included in a new text"); Tullio Treves, the representative of Italy, *3 November 1989 Press Release*, *supra* note 22, at 6 ("The obligation of reparation at the State of origin for damages caused by activities not prohibited by international law should be residuary in character . . . it would be advisable for the Commission to consider in detail the provisions relating to the obligations of cooperation and prevention . . . "); S.A. Ordzhonikidze, representative of the Soviet Union, *6 November 1989 Press Release*, *supra* note 22, at 3 ("The instrument should be of a universal character and be acceptable in cases covering all forms of harmful activities. Due account

of those who commented in the Sixth Committee expressed support for the inclusion of provisions designed to protect the "commons," or the general world environment.[26] It is particularly ironic that the members of the United Nations are thus themselves increasingly sensitive to the intensification of world opinion on environmental matters and are supporting, at least rhetorically, new approaches to defining and new proposals for solving the environmental problems that affect all the inhabitants of this globe, whatever their nationality,[27] even while agreement on the most fundamental matters continues to elude those charged with codification of international law in this area.

This article examines the risk vs. harm distinction introduced in the Fourth Report (1988) of Ambassador Barboza, the alterations he made to this approach in his Fifth Report (1989) and the effect the issue of strict liability may have on the success of attempts to codify international law on liability for transboundary harm. It argues that even though Special Rapporteur Barboza claims that he is working assiduously to avoid the "dreaded" concept of strict or absolute liability his approach is one that, rather than avoiding the issue, inevitably emphasizes the need to resolve it before there can be any meaningful progress on this important topic.

This article also argues that, while the issue of strict liability is one that should be considered seriously and that a form of strict liability should be adopted on the international plane in order to provide relief for those harmed physically by transboundary events, especially in pollution-related situations, Special Rapportuer Barboza's approach to the question of strict liability has, because it has been contradictory, not been conducive to progress. Special Rapporteur Barboza shifted the focus of the topic itself to "risk" from the "harm" emphasized by Special Rapporteur Quentin-Baxter, and then reinserted liability for actual harm in the scope of his topic.[28] His Fourth Report can be interpreted as an attempt, by means of his liability-for-risk standard, to introduce a disguised strict liability standard, but in his Fifth Report he specifically denounces the

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should be taken of the fact that existing conventions on the subject were limited and precedents were consequently hard to come by."); Mr. Al-Baharna, *id.* ("There [is] a definite need for an 'umbrella' convention in the area of international law."); and Mr. Rosenstock, *id.* at 5 (the Commission's work is "a search for ways to respond to relatively new needs and concerns, a search for 'law for politicians,' rather than codifying even moderately well-established State practice").

26. *See* comments of Mr. Lee, *2 November 1989 Press Release*, *supra* note 23, at 3 ("the global commons should be addressed in the future within the context of the draft"); Mr. Treves, *3 November 1989 Press Release*, *supra* note 22, at 6 ("The Commission would be missing an opportunity if it were to leave outside the scope of its articles the concept of global commons, whose importance was increasing in parallel with the general shrinking of the world"); and Mr. Crawford, *6 November 1989 Press Release*, *supra* note 22, at 4 ("his country particularly supported the need for articles to deal with situations threatening harm to areas beyond national jurisdiction—the 'global commons' ").

27. *See* discussion of Declaration of the Hague at notes 109-12 and accompanying text, *infra*.

28. *See Fifth Report*, *supra* note 14, at ¶ 16.

"dreaded" concept of strict liability.[29] What has been lost in this process is a chance for the international community to debate strict liability.

Special Rapporteur Quentin-Baxter's "soft-law" formulations of the prevention duties of States with respect to transboundary harm also seemed to be another victim of Ambassador Barboza's approach: in the past, Special Rapporteur Barboza indicated that his risk-based approach to the topic was intended to completely abrogate the "soft-law" approach. With his Fifth Report, however, Ambassador Barboza, without acknowledging what he is doing, seems to be embracing at least some elements of the Quentin-Baxter approach: he strengthened the prevention obligations of states and proposed new articles on "Notification, Information and Warning by the Affected States."

This article concludes that strict liability for transboundary injury is a concept that the international community needs to adopt in order to face up to its obligation to compensate for, and deter, activities that cause such harm. However, that same standard is unworkable for the duties of States that bear on the prevention of such harm. For these reasons the scheme developed by Special Rapporteur Quentin-Baxter to promote co-operation of States for prevention of environmental damage, while not perfect, is certainly the best alternative possible.

I. BACKGROUND

A. *International Liability: The Origins and Bases of the Work of the International Law Commission on Transboundary Pollution*

The World Commission on Environmental and Development (the "World Commission"), an independent body established by the General Assembly in 1983, published a 1987 Report that began with the following assessment:

> In the middle of the twentieth century, we saw our planet from space for the first time. Historians may eventually find that this vision had a greater impact on thought than did the Copernican revolution of the 16th century, which upset the human self-image by revealing that the Earth is not the centre of the universe. From space, we see a small and fragile ball dominated not by human activity and edifice but by a pattern of clouds, oceans, greenery and soils. Humanity's inability to fit its doings into that pattern is changing planetary systems, fundamentally. Many such changes are accompanied by life-threatening hazards. This new reality from which there is no escape, must be recognized — and managed.[30]

The threat is perceived as immediate. The Governing Council of the United Nations Environment Programme ("UNEP") has stated that

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29. Special Rapporteur Quentin-Baxter, too, worked to avoid controversy related to the application of strict liability. *See* notes 189-98 and accompanying text, *infra*.

30. World Commission on Environment and Development, *Our Common Future* 1 (1987).

"[e]nvironmental degradation, in its various forms, has assumed such proportions as can cause irreversible changes in ecosystems which threaten to undermine human well being."[31]

But the solution will not be an easy one. There are legal as well as scientific issues to be managed in this area. The General Assembly and the Commission recognized these issues early on and moved deliberately toward dealing with them in the Commission. Presently at the ILC, however, notwithstanding broad-based concern about protecting the environment, the most elementary legal propositions remain quite controversial. Early on, this did not seem to be the case. In 1970, when the Commission adopted a plan for future work on the topic of state responsibility, it set aside for separate treatment "questions relating to responsibility arising out of the performance of certain lawful activities — such as spatial and nuclear activities" . . . [because, "o]wing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it, its content and the forms it may assume, a simultaneous examination of the two subjects could only make both of them more difficult to grasp."[32] The Commission also stated that "[f]rom the outset of its work on the topic of State responsibility, [it] agreed that topic should deal only with the consequence of internationally wrongful acts. . . . That conclusion met with broad acceptance in the discussion of the Sixth Committee of the General Assembly at its twenty-fifth session, in 1970."[33]

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31. United Nations Environment Programme, *Environmental Perspective to the Year 2000 and Beyond*, U.N. Doc. UNEP/GC.14/26 [hereinafter *UNEP Report*]. This Report was adopted by the General Assembly in Resolution 42/186 on December 11, 1987 "as a broad framework to guide national action and international co-operation on policies and programmes aimed at achieving environmentally sound development." *See also* McCaffrey *Fourth Report*, *infra* note 52, at §33.

32. *Second Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur* ¶ 6, U.N. Doc. A/CN.4/233, *reprinted in* [1970] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER. A/1970. The Commission has been quite consistent in this view, stating nine years later that it

> fully recognizes the importance not only of questions of responsibility for internationally wrongful acts, but also of questions concerning the obligation to make good any injurious consequences arising out of certain activities not prohibited by international law (especially those which, because of their nature, present certain risks). The Commission takes the view, however, that the latter category of questions cannot be treated jointly with the former. A joint examination of the two subjects could only make both of them more difficult to grasp. To be obliged to bear any injurious consequences of an activity which is itself lawful, and to be obligated to face the consequences (not necessarily limited to compensation) of the breach of a legal obligation, are not comparable situations. It is only because the relative poverty of legal language that the same term is used to designate both.

Report of the International Law Commission on the Work of its Thirty-first Session ¶ 60, U.N. Doc. A/34/10/1979, *reprinted in* [1979] II Y.B. INT'L COMM'N, U.N. Doc. A/CN.4/SER. A/1979 (Part 2).

33. *Report of the International Law Commission on the Work of its Thirtieth Session* ¶ 172, U.N. Doc A/33/10/1978, *reprinted in* [1978] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER. A/1978 (Part 2) [hereinafter *1978 ILC Report*].

In 1973, there was again acknowledgment in the Commission that, in the framework of the state responsibility topic, "it was becoming increasingly difficult to make a clear distinction between responsibility deriving from a wrongful act and responsibility deriving from a lawful act."[34] That same year the General Assembly endorsed the general proposition that the Commission begin studying the international liability topic "at an appropriate time." In 1974 and 1975, the General Assembly suggested that the Commission begin work on the topic "as soon as appropriate," and, by 1976, had employed the phrase "at the earliest possible time,"[35] and in 1977 "invited" the Commission to begin work.[36] In 1978, the Commission established a Working Group to consider future work on the topic. The group consisted of Mr. Quentin-Baxter (Chair), Mr. Robert Ago (the Special Rapporteur for the State Responsibility topic), Mr. Jorge Castaneda and Mr. Frank X.J.C. Njenga.[37] On the basis of the report of the Working Group, the Commission decided to appoint a Special Rapporteur, choosing Mr. Quentin-Baxter for the job.[38] At the beginning of his task, Mr. Quentin-Baxter expressed confidence in the Commission's commitment to the topic and in his mandate from the Commission for work that met the development as well as the codification functions of the ILC.[39] When the Commission discussed Mr. Quentin-Baxter's Preliminary Report, "[t]here was . . . broad agreement that the existing title of the topic, although abstract and rather unwieldy, was . . . an extremely valuable guideline. . . . [because it] enumerated each of the four key elements of the topic, and was in itself a directive endorsed by the General Assembly as well as the Commission."[40] Moreover, "[a] majority of the speakers took

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34. *Summary Records of the Twenty-fifth Session of the International Law Commission, reprinted in* [1973] I Y.B. INT'L L. COMM'N ¶ 3, U.N. Doc. A/CN.4/SER. A/1973.

35. *1978 ILC Report, supra* note 33, at ¶ 174.

36. *Id.* at ¶ 175. Professor Magraw has characterized this as "prodding from the General Assembly," Magraw I, *supra* note 5, at 307.

37. 1978 ILC Report, *supra* note 33, at ¶ 9. The language the Commission employed in describing the topic as it stood when the Working Group was formed is instructive:

> In past years, the new topic has been described in varying terms; for example, "responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities," "this other form of responsibility, which is in reality a safeguard against the risks of certain lawful activities," and "a study of that other form of responsibility, which is the protection against the hazards associated with certain activities that are not prohibited by international law." In the Sixth Committee similar expressions have been used, although during one discussion some representatives said they believed that there might be "a third category of acts . . . which, because of their dangerous nature, fell halfway between lawful and unlawful acts." The simple distinction between lawful and unlawful acts has prevailed however, and by 1974 the title of the new topic had assumed its present wording.

1978 ILC Report, *supra* note 33, at ¶ 176 (footnotes omitted).

38. *Id.* at ¶ 177.

39. *See* discussion of the work of the ILC at note 1 and accompanying text, *supra*.

40. *Report of the International Law Commission on the Work of its Thirty-Second Session*, U.N. Doc. A/35/10, *reprinted in* [1980] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1980 (Part 2).

the view that the topic was adequately founded in existing legal doctrine and that the Commission's task was to develop this doctrine to meet the unprecedented needs of the present day."[41]

In his Preliminary Report,[42] Special Rapporteur Quentin-Baxter focused on the injury the title of his topic commended to his attention and noted that "the elaboration of rules relating to liability for injurious consequences in respect of acts not prohibited by international law revolves around the variable concept of 'harm.' "[43] He emphasized the good faith element essential to effectively govern relations between States in the event of such injury and the necessary subsequent negotiations and agreement on reparation/compensation. He also noted again that his topic dealt with injuries caused by lawful acts

> if such an injury . . . is not caused by a breach of a specific international obligation, a State suffering such an injury or danger is not justified in demanding any limitation of the freedom of action of another State in relation to matters arising within that State's jurisdiction, except the minimum needed to ensure the redress and abatement of the injury or danger, taking into account any beneficial, though competing interests.[44]

Mr. Quentin-Baxter acknowledged that the basic fact of the topic — that the injuries or harm involved do not result from breaches of international law — was balanced by the obligation of States to nevertheless make good the harm.[45] With his topic so neatly outlined, with an acknowledg-

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41. *Id.* at ¶ 139.

42. *Preliminary Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur*, U.N. Doc A/CN.4/334 and Add. 1 and 2, *reprinted in* [1980] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1980 (Part 1) [hereinafter Quentin-Baxter, *Preliminary Report*].

43. *Id.* at ¶ 60.

44. *Id.*

45. As one publicist has put it:

> In the view of the Commission, the very title of the topic is an affirmation of the broad principle that States, even when undertaking acts that international law does not prohibit, have a duty to consider the interests of other States which may be affected. The topic is thus concerned with situations in which liability does not depend on "wrongfulness" — a term used to characterize an act that is the breach of an obligation imposed by law through prohibition — but rather with a liability arising directly from a primary rule of obligation generally expressed in the maxim "*sic utere tuo et alienum non laedas*" ("so use your own property as not to injure another's"). It deals essentially with dangers that arise from activities within the jurisdiction of one State and cause harmful effects beyond the limits of that jurisdiction. The object and purpose of elaborating rules should be to minimize the possibility of injurious consequences, and to provide adequate redress in any case in which such consequences do occur, with the least possible recourse to measures that prohibit or hamper such activities.

Pinto, *Reflections on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, XVI NETH. Y.B. INT'L L. 17, 34 (1985) [hereinafter Pinto].

ment of the importance of the topic and an expression of optimism about the ability to develop international law in this area, Special Rapporteur Quentin-Baxter began his work.[46]

B. *International Watercourses: A Parallel Effort by the International Law Commission*

The International Law Commission is working on another topic, the Non-Navigational Uses of International Watercourses, that shares many characteristics with the International Liability topic. The aim of this topic's codifiers is prescription of "equitable and reasonable" "use, development and protection" of international watercourses.[47] The principles being proposed in this topic embody "a specific application of the principle of the harmless use of territory, expressed in the maximum *sic utere tuo et alienum non laedas*, itself a reflection of the sovereign equality of states."[48] In its specifics, the International Watercourses topic also reflects many of the concerns of those working on the International Liability topic, and the general obligation-to-co-operate procedural obligations imposed by Articles 9 through 21[49] mirror the continuum of obligations set forth in Mr. Quentin-Baxter's Fourth Report[50] of prevention, providing information, entering negotiations and providing reparations.[51] In addition to the general obligation to "co-operate on the basis of sovereign equality, territorial integrity and mutual benefit to attain optimum utilization and adequate protection of an international watercourse" imposed by art. 9 of the Watercourses draft, there are obligations of: regular exchange of data and information (arts. 10 and 20); exchange of information

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Another has acknowledged the difficulties involved in the focus on liability, but reaffirmed its primacy: "it is the question of liability proper that alone poses a profound theoretical challenge and has prompted the launching of the study in the first place." Handl, *Liability as An Obligation Established By A Primary Rule of International Law — Some Basic Reflections on the International Law Commission's Work*, XVI NETH. Y.B.INT'L L. 49, 51 (1985) [hereinafter Handl II].

46. Professor Magraw has characterized Special Rapporteur Quentin-Baxter's efforts thusly: "Quentin-Baxter had a rather fine line in attempting to accommodate various conflicting views about some of [the topic's] fundamental aspects and in assisting the Commission in refining its understanding of this challenging subject." Magraw I, *supra* note 5, at 309.

47. Draft art. 6, *reprinted in* 82 AM. J. INT'L L. No. 1, 144, 149 (1988) [hereinafter *Watercourses Draft*].

48. McCaffrey, *The Fortieth Session of the International Law Commission*, 83 AM. J. INT'L L., No. 1, 153, 164 (1989) [hereinafter *83 AJIL*]. *See also* discussion of the *sic utere* principle in the context of the International Liability topic at notes 71-74 and accompanying text, *infra*.

49. *See Watercourses Draft*, *supra* note 47, at 161-64.

50. *Fourth Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, by Robert Q. Quentin-Baxter, Special Rapporteur*, Annex, U.N. Doc. A/CN.4/373 (incorporating Docs. A/CN.4/373/Corr. 1 and 2), *reprinted in* [1983] II Y.B. INT'L L. COMM'N., U.N. Doc. A/CN.4/SER.A/1983 (Part 1) [hereinafter Quentin-Baxter *Fourth Report*].

51. Magraw I, *supra* note 5, at 311-13.

on possible effects of planned measures (arts. 11, 19 and 20); notification of planned measures with possible adverse effects on other watercourse States (arts. 12-14); reply to such notification (arts. 15-16); and consultations and negotiations on such planned measures (art. 17), as well as procedures established for situations in which the requisite notification is not given (art. 19). In discussing the "large number of international agreements, declarations and resolutions," etc., that "contain general provisions concerning, or recognize the need for, the regular collection and exchange of a broad range of data and information relating to international watercourses,"[52] Special Rapporteur McCaffrey, in addition to referring to materials relevant to that particular field, pointed to several examples of more relevance to the International Liability topic, including the 1975 Agreement Between the United States and Canada Relating to Exchange of Information on Weather Modification Activities,[53] the 1978 Treaty for Amazonian Co-operation,[54] the 1979 Convention on Long Range Transboundary Air Pollution,[55] the 1983 United Nations Convention on the

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52. *Fourth Report on the Law of the Non-Navigational Uses of International Watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur* ¶ 16, U.N. Doc. A/CN.4/412, *to be reprinted in* [1988] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER. A/1988 (Part 1) [hereinafter McCaffrey *Fourth Report*]. Special Rapporteur McCaffrey's 1989 Fifth Report, which focused on water-related hazards and dangers, also emphasized the requirements of cooperation, notification and information sharing in international agreements concerning such hazards. *Fifth Report on the Law of Non-Navigational Uses of International Watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur*, U.N. Doc. A/CN.4/421 and Corr. 1, *to be reprinted* in [1989] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1989 (Part 1) [hereinafter McCaffrey *Fifth Report*]. Examples of these duties as set forth in various international agreements are given with respect to floods (¶¶ 18-29), ice (¶¶ 32-34), drainage (¶¶ 36-40), flow obstruction (¶¶ 42-43), siltation (¶ 48) and erosion (¶¶ 51-53).

53. Agreement between the United States of America and Canada Relating to the Exchange of Information on Weather Modification Activities, March 26, 1975, 26 U.S.T. 540, T.I.A.S. 8056. Art. II provides that "[i]nformation relating to weather modification activities of mutual interest . . . shall be transmitted as soon as practicable to the . . . other Party." Art. IV requires each Party to "notify and fully inform the other concerning any weather modification activities" in advance of such activities. Art. V provides for consultations. This agreement, however, has no provision on settlement of disputes, and specifically reserves the question of liability. Art. VII provides that "[n]othing herein relates to or shall be construed to affect the question of responsibility or liability for weather modification activities, or to imply the existence of any generally applicable rule of international law."

54. Treaty for Amazonian Cooperation, July 3, 1978, *reprinted in* SELECTED MULTILATERAL TREATIES IN THE FIELD OF THE ENVIRONMENT 496 (Kiss, ed. 1983, U.N. Environment Programme).

55. *See* note 147, *infra*. Art. 3 provides that "by means of exchanges of information, consultation, research and monitoring," the Parties will work together to develop "policies and strategies to combat air pollution." Art. 4 requires the Parties to "exchange information on and review their policies, scientific activities and technical measures" to combat air pollution. Art. 8, captioned "Exchange of Information," lists seven types of information the Parties are pledged to exchange, and, in art. 9 the Parties agree that exchanges are desirable and necessary. The settlement of disputes article provides no compulsory mechanism, merely stating that disputes on the interpretation or application of the convention should be sought "by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute." There is no provision for liability, which is not surprising in light of the language of article 2 (*see* note 149, *infra*).

Law of the Sea,[56] and the 1983 Agreement Between the United States and Mexico on Co-operation for the Protection and Improvement of the Environment in the Border Area.[57]

The World Commission[58] has also recognized the importance of the exchange of data and information: "The duty to provide information may in principle pertain to many of the factors . . . which may have to be taken into account in order to arrive at a reasonable and equitable use of a transboundary natural resource."[59] The General Assembly, too, has recognized the importance of co-operation and information-sharing between States, at least with respect to natural resource exploitation:

> In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.[60]

What seems to distinguish the International Watercourses topic from the International Liability topic is the apparent progress that has been achieved. Like the International Liability topic, International Watercourses was included on the Commission's general program of work in 1970, and in 1974 the ILC set up a Sub-Committee on the topic and appointed a Special Rapporteur who was succeeded by a second Special Rapporteur in 1977, a third in 1982 and a fourth in 1985.[61] Despite these many changes in Special Rapporteurs, the Commission provisionally adopted six articles in 1987 at its Thirty-ninth Session (Arts. 2-7), and another fourteen at its Fortieth Session in 1988 (Arts. 8-21).[62] As we have seen, the International Liability topic, which also first received Commis-

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56. United Nations Convention on the Law of the Sea, U.N. Pub. No. E.83.V.5 (1983), U.N. Doc. A/Conf.62/122.

57. Agreement between the United States and Mexico on Co-operation for the Protection and Improvement of the Environment in the Border Zone, August 14, 1983, T.I.A.S. 10827.

58. *See* note 30 and accompanying text, *supra*.

59. World Commission on Environment and Development, Experts Group on Environment Law Report, *Environmental Protection and Sustainable Development, Legal Principles and Recommendations* 95 (1986) [hereinafter *Brundtland Report*]. The Brundtland Report, in its statement of General Principles and Recommendations, set forth a general obligation to co-operate (art. 8), as well as obligations of information exchange (art. 15), notice (art. 16) and consultation (art. 17).

60. Charter of Economic Rights and Duties of States, art. 3, General Assembly Resolution 3281 (XXIX), 12 December 1974.

61. *Second Report on the Law of the Non-Navigational Uses of International Watercourses by Mr. Stephen C. McCaffrey, Special Rapporteur*, U.N. Doc. A/CN.4/399, *reprinted in* [1986] II Y.B. INT'L L. COMM'N., U.N. Doc. A/CN.4/SER. A/1986 (Part 1).

62. *83 AJIL, supra* note 48, at 160-61. This means that the draft articles have already passed muster with the Commission's Drafting Committee, McCaffrey, *The Work of the International Law Commission Relating to the Environment*, 11 ECOLOGY L. Q. 189, 190 (1983). *See also* SINCLAIR, *supra* note 1, at 34-35. Five articles, including the controversial art. 1, were previously adopted in 1980.

sion attention in 1970, has, after ten years of formal work, not progressed much, if at all, beyond its initial formulations.

But the Commission and the international legal community should perhaps not be too quick to praise those working on the Watercourses topic for having made progress beyond that of their colleagues working on the International Liability topic. It, too, might still founder on the rocks of strict liability. Article 8 of the draft Watercourses convention provides that "Watercourse States shall utilize an international watercourse [system] in such a way as not to cause appreciable harm to other watercourse States." Professor McCaffrey, the Special Rapporteur for the Watercourses topic, has described Article 8 as "a specific application of the principle of the harmless use of territory, expressed in the maxim *sic utere tuo ut alienum non laedas*, itself a reflection of the sovereign equality of states."[63] He has reported that this Article, as drafted, has raised the issue of "whether states would be strictly liable for its violation, or liable only on the basis of fault."[64] He indicated that the majority seemed of the opinion that violation of Article 8 would "engage the international responsibility of the state in question — *i.e.*, that such a violation would constitute an 'internationally *wrongful* act,' "[65] but that there was also considerable opinion that violation of Article 8 would lead to strict liability for the violating State. Professor McCaffrey also revealed that he intended to resolve this issue, for his purposes, by leaving it to others, most particularly Ambassador Barboza:

> The Commission's commentary is silent on this point, chiefly because of what seemed to be tacit agreement that problems relating to the standard of liability should be resolved in connection with the Commission's work on other topics, notably state responsibility and, in particular, international liability for injurious consequences of non-prohibited acts. This same issue may well arise in relation to a later article on the obligation of watercourse states not to cause appreciable pollution harm.[66]

Moreover, the Watercourses Special Rapporteur has made no progress beyond that of the International Liability topic on the question of the consequences of violation of the duties to cooperate set forth in draft Articles 9 through 21. The question of settlement of disputes has yet to be addressed, and the Special Rapporteur has stated that he will not submit material to the Commission on that question until this year.[67]

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63. *83 AJIL*, *supra* note 48, at 164.

64. *Id.*

65. *Id.*

66. *Id.* at 164-65.

67. McCaffrey *Fourth Report*, *supra* note 52, at ¶ 8, and McCaffrey *Fifth Report*, *supra* note 52, at ¶ 1.

II. INTERNATIONAL LEGAL RESPONSES TO ENVIRONMENTAL HAZARDS

A. *Basic Principles*

The most elementary principle in the field of international environmental law is one that expresses the concept of sovereignty, the traditional bedrock of international law.[68] The Stockholm Declaration[69] gives sovereignty the primacy it enjoys in international law in general by including it in the first of its Principles on transboundary pollution: "States have . . . the sovereign right to exploit their own resources," is stated first; the principle that they also have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"[70] is only a modification of the basic principle, which remains paramount. Many assert that the *sic utere* principle[71] "reflects customary international law,"[72] but whether or not that is the case, the *sic utere*

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68. As Special Rapporteur Quentin-Baxter put it:

> In order to understand better the hesitancy of Governments to commit themselves to specific formulations of rules as to liability in new or changing areas of the law, it is necessary to have regard to history. Until the twentieth century, there were relatively few contexts in which conflict was likely between a State's freedom of action within its own borders and its duty towards other States. In the field of sovereign immunities, as State activity extended to areas of trade and commerce, there were some ingredients for a reassessment of legal policy. The law of the sea was still preponderantly concerned with ensuring freedom of navigation, and the right of innocent passage through the territorial sea did not yet give rise to any active question about the balance of the flag State's and coastal State's interest. Similarly, though the law relating to the treatment of aliens at all times gave rise to hard cases, it did not yet present an aspect that might be seen to restrict unduly the freedom of a sovereign State to govern its own affairs. The pressures of the twentieth century have brought these matters to the fore.

Quentin-Baxter *Preliminary Report*, *supra* note 42, at ¶ 32.

Indeed, it was not so long ago that the United States advocated a rule of absolute territorial sovereignty during a dispute with Mexico over the Rio Grande:

> Less than a century ago it was possible for US Attorney General Judson Harmon without embarrassment to assert that "[t]he fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory," and therefore to conclude that "the rules, principles, and precedents of international law impose no liability or obligation" which inhibits a state from using the resources within its territory as it chooses without regard to the impact upon others.

SCHNEIDER, WORLD PUBLIC ORDER OF THE ENVIRONMENT: TOWARDS AN INTERNATIONAL ECOLOGICAL LAW AND ORGANIZATION 142 (1979), *quoting* 21 Op. Att'y Gen. 274, 281 and 283 (1893-97).

69. *See* note 81 and accompanying text, *infra*.

70. *Id.*

71. *Sic utere tuo ut alienum non laedas* — "So exercise your right so as not to injure another."

72. *See, e.g.*, Weiss, *Environmental Disasters in International Law*, 1986 ANUARIO JURIDICO INTERAMERICANO (1988) [hereinafter Weiss]. *See also* discussion of the Montreal Rules and OECD Report at note 92-108 and accompanying text, *infra*. This is the position

principle provides the basic impetus for this topic:[73] Special Rapporteur Quentin-Baxter has called it "[t]he starting point for the construction" of a regime of compensation.[74]

The complementary, but subsidiary concept that also drives this topic is the principle that no victim should remain uncompensated.[75] The Stockholm Declaration did not endorse this *per se*, but does require States to "co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."[76] The policy involved here is one seemingly impervious to opposition: "Society will not allow the cost of injury to remain entirely on a victim's shoulders as if he were merely a legal object and not the subject of countervailing legal rights."[77] Professor Handl refers to "the establishment of an international legal framework

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the Restatement takes, announcing in its Introductory Note on the Law of the Environment, that "[t]he principles discussed in this Part are rooted in customary international law," and "originated in rules relating to the responsiblity of a state for injuries caused to another state or to its property, or to persons within another state's territory or their property." American Law Institute, 2 RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS 100 (1987) [hereinafter RESTATEMENT]. The Restatement refers to the *Corfu Channel Cases* (*see* note 165 and accompanying text, *infra*) and to the work of Judge Lauterpacht for support. Judge Lauterpacht, writing on "restrictions upon Territoral Supremacy," stated that:

> A State, in spite of its territoral supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural condition of the territory of a neighbouring State — for instance, to stop or to divert the flow of a river which runs from its own into neighbouring territory. A State is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighbouring State, *e.g.*, as the result of working of factories emitting deleterious fumes.

1 OPPENHEIM, INTERNATIONAL LAW 290-91 (8th ed. by H. Lauterpacht, 1955).

73. Special Rapporteur Quentin-Baxter states that despite the fact that the question of liability for harm as a result of wrongfulness or as a result of strict liability is the point where "doctrine falters and parts company with State practice," the principle of non-harm expressed in the *sic utere* maxim has great potency as the "principle governing legal development." Quentin-Baxter *Preliminary Report*, *supra* note 42, at ¶ 38.

74. *Id.* at ¶ 56.

75. This principle is certainly one recognized in municipal law systems. *See, e.g.*, Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 539 N.E.2d 1069, *cert. denied sub nom.* Rexall Drug Co. v. Tigue, 58 U.S.L.W. 3290 (1989). In this case where the fact that the injury the plaintiffs suffered remained dormant and undiscernable for such a long time that their cases, when they were finally filed, faced what would normally be insurmountable procedural and causation (identification of tortfeasor) problems, New York's highest Court stated that:

> [I]t would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that because of the insidious nature of an injury that long remains dormant . . . the cost of injury should be borne by the innocent and not the wrongdoers. . . . [T]he ever-evolving dictates of justice and fairness, which are the heart of our common-law system, require formation of a remedy for injuries. . . .

76. Stockholm Declaration, Principle 22. *See* note 81 and accompanying text, *infra*.

77. Goldie II, *infra* note 168, at 181.

that will assure effective compensation to victims of transnational pollution," as one of the key objectives of attempts to determine principles of liability in this area.[78] In his view, in addition to "the more obvious goal of restoring as closely as possible the victim's status quo ante," establishment of principles of liability would also internalize the costs of accidents associated with a particular activity, thus making "the choice among competing goods and services approximate a rational decision because the price of the items . . . will more truly reflect the costs of production."[79] Special Rapporteur Barboza echoed Professor Handl when he stated that absent a compensation regime

> these activities actually transfer the cost from the agent to the victim. Through the damage done to them, third parties would be paying the cost that should be charged to the enterprise. At the international level, other States would be paying for an activity beneficial to one particular State. It could be justifiably argued that reparation constitutes a veritable "internalization" of costs. Costs which appear to be unjustly dissociated from an enterprise or activity are absorbed by it, become internalized.[80]

B. *Formulations of International Organizations*

The principles dicussed above have been the starting point for pronouncements by several international organizations of principles designed to delimit or govern international environmental issues.

The United Conference on the Human Environment, after a 1972 meeting in Stockholm, issued a proclamation setting forth a series of principles that have guided all subsequent considerations of international environmental legal standards.[81] In stirring rhetoric, the Conference pronounced that "man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth."[82] The Conference also proclaimed that "[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the

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78. Handl I, *infra* note 182, at 560.

79. *Id.* at note 157. *See also* notes 169 and 214, *infra*.

80. *First Report*, *supra* note 6, at ¶ 54.

81. *Report of the United Nations Conference on the Human Environment: Final Documents Adopted June 16, 1972*, U.N. Doc. A/CONF. 48/14 and Corr. 1, *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter *Stockholm Declaration*]. This meeting has been described as "an event heralded by many commentators as the onset of a new level of global environmental consciousness among national governments." Wetstone & Rosencranz, *Transboundary Air Pollution in Europe: A Survey of National Responses*, 9 COL. J. ENVTL. L. 1, 4 (1983) [hereinafter Wetstone & Rosencranz]. In the view of these publicists, the Stockholm Declaration "still provides the single most important and persuasive multilateral commitment to the principle that nations have a responsibility to assure that their actions do not cause damage to foreign environments." *Id.*

82. *Id.*

peoples of the whole world and the duty of all Governments."[83] The Conference set forth twenty-six "Principles" and an "Action Plan for the Human Environment" consisting of 109 "Recommendations." The most important of the Principles, in terms of transboundary environmental harm, are as follows:

Principle 21

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 22

> States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

Principle 23

> Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.[84]

Special Rapporteur Quentin-Baxter, in his Second Report, stated that he saw in these Principles "the need for the orderly development of international law" in the areas in which he was convinced he had to cover. In one of the many references in his reports to the wrongfulness/strict liability and soft law/hard law dichotomies that strain the topic, his work, and the Commission's consideration of it, he stated that:

> The equipoise of the two halves of Stockholm Principle 21 evokes a balancing of interests that cannot be attained in terms of the simple dichotomy between right and wrong. The repeated references, in the text of the [then] draft Convention on the law of the sea and in other

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83. *Id.*

84. *Id.* The General Assembly reinforced Principle 21 in its December 15, 1972 Resolution 2995 (XXVII) on Co-operation Between States in the Field of the Environment, stating that "in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction." 115 States voted in favor of this Resolution, none opposed it, and only 10 States abstained.

> international instruments, to the "further development of international law relating to responsibility and liability" is a further indication that solutions are not expected within a two-dimensional frame.[85]

The year after the Stockholm Conference, the Council of the European Communities issued a statement of principles and objectives that endorsed the *sic utere* concept of Principle 21 of the Stockholm Declaration and adopted a "polluter-pays" principle,[86] declaring that

> the costs associated with environmental protection against pollution must be allocated according to uniform principles throughout the Community so as to avoid distortions in trade and competition which are incompatible with the harmonious functioning of the common market.[87]

The thought was obviously that imposing such liability would act as a deterrent: "Charging to polluters the costs of anti-pollution measures, according to uniform principles throughout the Community, should encourage them to avoid or reduce it."[88] While this seems to foreshadow the compensation regime now under consideration at the ILC and can be interpreted as involving a sort of strict liability principle,[89] there was also recognition that something more was required to bring difficult issues, especially those related to transboundary pollution under control:

> This recommendation is only an initial step in the environment programme and in due course the Commission will submit to the Council all the relevant proposals, with particular reference to the harmonization of instruments for administering the "polluter pays" principle and its application specifically to problems posed by cross-frontier pollution.[90]

The next development was the adoption by the International Law

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85. *Second Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur* ¶ 67, U.N. Doc. A/CN.41 346 and Add. 1 and 2, *reprinted in* [1981] II Y.B. INT'L L. COMM'N., U.N. Doc. A/CN.4/Ser.A/1981 (Part 1) [hereinafter Quentin-Baxter *Second Report*].

86. *Council of the European Communities, General Secretariat Press Release (1935/74, presse 87) of November 7, 1974, reprinted in* 14 I.L.M. 138 (1975) [hereinafter *EC Polluter-Pays*]. The EEC Council also issued a Directive, on June 27, 1985, on Environmental Impact Assessment, that mandates information exchange and consultation.

87. *Id.* In this there are, again, echoes of Professor Handl's theory of cost internalization and Professor Goldie's theory of expropriation. *See* notes 79, *supra*, and 169 and 214, and accompanying text *infra*.

88. *Id.* at 139.

89. It foreshadows the ILC work precisely because it is, at root, an expression of strict liability. The foremost commentary on torts in the United States states that:

> The "polluter pays" theory of the OECD is exactly the traditional theory of strict liability in tort, at least as it has developed in the common law systems, and which is rooted in "the general feeling in the community that 'he who breaks must pay.'"

PROSSER, *infra* note 214, at §75.

90. EC Polluter-Pays, *supra* note 86, at 139.

Association[91] of the Montreal Rules in 1982,[92] which were focused specifically on "transfrontier pollution,"[93] and which set forth rules of international law that it states are "applicable except as may be otherwise provided by convention, agreement or binding custom among the States concerned."[94] Article 3 (Prevention and abatement) of the Montreal Rules is a seemingly strong statement of the *sic utere* principle: "States are in their legitimate activities under an obligation to prevent, abate and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State."[95] Professor Quentin-Baxter, while recognizing the effort involved in formulating these rules and the beneficial results they do provide, nevertheless detailed the ways "the Montreal Rules and [his] topic are in sharp contrast and have complementary roles."[96] Special Rapporteur Quentin-Baxter also emphasized the technical difficulties involved in any assessment of "substantiality" of transfrontier pollution damage, and noted that these difficulties are "least likely to be resolved" in situations where the lawfulness of the conduct of a State is in question.[97] He also examined how the Rules, especially those embodied in article 3, would operate, and concludes that the "real effect" of that article "is to produce a very weak obligation indeed."[98]

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91. The International Law Association ("ILA"), "the oldest and largest international organization of lawyers," is a non-governmental group of publicists and practicioners of both public and private international law. It was organized in 1873 and is dedicated to, in the words of art. 2 of its Constitution, "the study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals for the solution of conflicts of law, and the furthering of international goodwill and understanding." Stodter, *International Law Association*, 9 ENCYCLOPEDIA PUB. INT'L L. 182, 182 (1986).

92. Resolution No. 21982 on Legal Aspects of the Conservation of the Environment, adopted by the International Law Association at its Sixtieth Conference, held in Montreal August 29-September 4, 1982, *reprinted in* ILA, *Report of the Sixtieth Conference*, Montreal, 1982, 1-3, (London, 1983) [hereinafter *Montreal Rules*].

93. *Id.* at art. 1.

94. *Id.* Special Rapporteur Quentin-Baxter said that the Montreal Rules are "at least in regard to pollution, a body of customary rules giving rise to state responsibility." Quentin-Baxter *Fourth Report*, *supra* note 50, at ¶ 24.

95. *Montreal Rules*, *supra* note 92, at art. 3.

96. Quentin-Baxter *Fourth Report*, *supra* note 50, at ¶ 26. Mr. Quentin-Baxter notes that the Montreal rules (1) eliminate "from their purview . . . the whole area of the globe not included within the territory of a State . . . "; (2) exclude "any form of long-range pollution"; and (3) are only concerned "with the chronic or cumulative effects of pollution, excluding the release of substances which are merely 'likely to' result in deterious effects" of the nature described in the definition of "pollution" included in art. 2 of the Rules. *Id.*

97. *Id.* at ¶ 27.

98. He notes that the comments on art. 3 state that "[f]rom the fact that causing substantial damages on the territory of the other State constitutes an internationally wrongful act results the duty for the polluting State to cut down transfrontier pollution to such an extent that the transfrontier damages cannot any more be termed substantial." He points out that this Rule is therefore

> an attempt . . . to combine the notion of avoiding a wrongful act or omission of the State with that of avoiding substantial transboundary loss or injury; but despite the apparently absolute nature of the obligation . . . the real effect of this amalgam is to produce a very weak obligation indeed. Under article 3 . . .

Another multinational effort to formulate rules on the environment and, specifically, responsibility and liability for transfrontier pollution, was published by the OECD[99] in 1984.[100] The OECD's Environment Committee reported that it "found that all Member countries recognize certain basic legal obligations, which are the counterpart of rights they enjoy in accordance with their territorial jurisdiction."[101] The Committee labeled this expression of the *sic utere* principle as a "customary rule" of "*due diligence*" imposed on all States in order that the "activities carried out in their jurisdiction do not cause damage to the environment of other States." (emphasis in original)[102] The sources of these legal obligations, according to the Committee, are the acknowledgment by States that "promotion of decent environment should be recognized as one of the fundamental human rights,"[103] and increasing recognition by States that

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> wrongfulness flows only from the fact of loss or injury. . . . It does not, however follow — as article 3 . . . and the commentary might seem to imply — that the actual occurrence of the transboundary loss or injury will always entail the responsibility of the source State for a wrongful act or omission; for the responsibility of the source State will not be engaged unless the State authorities had the means of foreseeing that loss or injury was likely to be caused, as well as the duty to prevent its occurrence.

Id. at ¶ 28.

Likewise, Special Rapporteur McCaffrey has noted that the art. 3 obligation of States to prevent, abate and control transfrontier pollution is qualified. Article 3, in its entirety reads:

> Without prejudice to the operation of the rules relating to the reasonable and equitable utilisation of shared natural resources States are in their legitimate activities under an obligation to prevent, abate and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State.

As Special Rapporteur McCaffrey put it, the effect of the subordination of the obligation to the rules relating to reasonable and equitable utilization "would seem to be that an activity that causes substantial transfrontier pollution injury may none the less be 'reasonable and equitable' and thus lawful." McCaffrey *Fourth Report*, *supra* note 52, at ¶ 70.

99. The Organisation for Economic Co-operation and Development ("OECD") is an inter-governmental entity of industrialized States headquartered in Paris. "Its overall aim is to promote sound economic growth in the member and non-member States, with particular emphasis on economic expansion in developing States, as well as an increase in world trade generally." Hahn, *Organisation for Economic Co-operation and Development*, 5 ENCYCLOPEDIA INT'L L. 214, 214 (1983).

100. OECD, *Responsibilities and Liability of States in Relation to Transfrontier Pollution*," *reprinted in* 13 ENVTL. POL'Y & L. 122 (1984) [hereinafter *OECD Report*]. This was not the OECD's first venture into the areas of international pollution control and environmental protection. In 1974, the OECD Council adopted a recommendation on principles of transfrontier pollution, including duties to inform, consult, exchange information and warn of dangers. In 1977, the Council "adopted a recommendation on implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution." *See, generally*, McCaffrey *Fourth Report*, *supra* note 50, at ¶¶ 57-58 and 62. *See also* OECD, Environmental Committee Group of Experts, *The 'Polluter Pays Principle' in Relation to Accidental Pollution*, Doc. No. Env/Eco/88.2 (1st rev.) (Oct. 17, 1988).

101. *OECD Report*, *supra* note 100, *First Report* at ¶ 6.

102. *Id. See also* note 72 and accompanying text, *supra*.

103. *OECD Report*, *supra* note 100, *First Report* at ¶ 7.

"the environment constitutes a common resource or heritage. . . ."[104] The Committee also discussed the "moral obligations" that guide protection and prevention efforts.[105]

The Committee, like many others who have explored the issue of which is the proper theory under which compensation for pollution damage can or should be imposed, foundered on the "rocky outcrop" of wrongfulness vs. strict liability. Despite a confident statement that "[i]nternational liability for transfrontier pollution derives from general legal principles," and "is engaged by a failure to comply with a customary or treaty obligation,"[106] it also states that "[n]evertheless, it should be noted that some Member countries consider that under international law, a State must ensure that *no* environmental damage is caused to other countries emanating from regions under its jurisdiction. In particular, some of these Member countries argue for the introduction of a system of strict liability." (emphasis in original)[107] It concluded its report by noting that it had outlined the practices needed for a "policy of protection against transfrontier pollution," but added the caveat that "[t]he question of whether or not any of these practices amount to an obligation under present international law is neither raised nor answered."[108]

Last year, twenty-four nations[109] agreed on the Declaration of the Hague on March 11, 1989.[110] Another non-binding statement of principles, the Declaration, like the OECD Report, nevertheless evidences increased international recognition of the urgency of environmental issues. It asserts that "[b]ecause the problem is planet-wide in scope, solutions can only be devised on a global level,"[111] and that solutions depend not only on "implementation of existing principles but also [on] a new approach, through the development of new principles of international law including new and more effective decision-making and enforcement mechanisms."[112]

The World Commission's[113] Brundtland Report,[114] like the OECD Report and the Declaration of the Hague, move to a wrongfulness analy-

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104. *Id.*

105. *Id.* at ¶ 8.

106. *Id.* at ¶ 13.

107. *Id.* at ¶ 16.

108. *Id. Second Report*, ¶ 11.

109. The signatories are the Federal Republic of Germany, Australia, Brazil, Canada, Ivory Coast, Egypt, Spain, France, Hungary, India, Indonesia, Italy, Japan, Jordan, Kenya, Malta, Norway, New Zealand, Netherlands, Senegal, Sweden, Tunisia, Venezuela and Zimbabwe. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L. J. 392, 395 n.6 (1989) [hereinafter Sands].

110. Sands, *supra* note 109, at 417 (Appendix).

111. *Id.* at 418.

112. *Id.*

113. *See* notes 30 and 58 and accompanying text, *supra*.

114. *See* note 59 and accompanying text, *supra*.

sis for issues of transboundary harm.[115] The assumption in these recent reports, that the only valid obligation in international law is one that, if violated, invokes liability because a State has committed a wrong, is at a great remove from the original assumptions of the ILC for its International Liability topic.[116] This will be discussed below in greater detail in Section V.

C. *International Agreements*

The principles as formulated by publicists and pronounced by international organizations have also been incorporated in various international agreements, many of which enunciate standards of "absolute" or "strict" liability and avoid regimes of fault or wrongfulness.

A body of treaties has come into effect over the last twenty years that emphasize, as Special Rapporteur Quentin-Baxter stressed he wanted to in this topic,[117] both prevention and reparation/compensation. These treaties regulate activities that the international community has decided it wants continued, but which it has also decided, in many cases because these activities involve risks and could possibly cause injuries or damage, can only be conducted under a liability regime.[118]

1. The Space Damage Convention

The most unusual of these treaties is the Convention on International Liability for Damage Caused by Space Objects.[119] This treaty acknowledges, in its preamble, the ultimate infallibility of all prevention efforts, noting that the Parties to the Convention had "take[n] into consideration that, notwithstanding the precautionary measures to be taken by States and international intergovernmental organizations involved in the launching of space objects, damage may on occasion be caused by such objects."[120] It takes the seemingly uncompromising position that "[a] launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight,"[121] but sets forth exculpatory standards in a subsequent article,[122] and establishes a one year limitation on claims for damages.[123]

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115. *See* note 226 and accompanying text, *infra*. *See also* art. 21 of the Brundtland Report's statement of General Principles and Recommendations, which delineates "State Responsibility."

116. *See* notes 32-46 and accompanying text, *supra*.

117. *See* note 246 and accompanying text, *infra*.

118. Many of them fall into the category of "ultra-hazardous" activities first discussed by Professor Jenks. *See* note 215 and accompanying text, *infra*.

119. Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762 [hereinafter Space Damage Convention].

120. *Id.* at preamble.

121. *Id.* at art. II.

122. *Id.* at art. VI.

123. *Id.* at art. X.

2. The Maritime Pollution Conventions

The first of another group of treaties, which pertain to liability for marine pollution from oil carrying vessels, the International Convention on Civil Liability for Oil Pollution Damages, was signed in 1969. It holds the owner of the ship involved in a spill "liable for any pollution damage caused by oil which has escaped or been discharged from the ship."[124] The treaty establishes a maximum amount of liability for the owner, unless the accident was the result of actual fault of the owner.[125] The strict liability rather than fault-based nature of the obligation is therefore well established. But like virtually all strict liability regimes, the treaty specifies circumstances that preclude imposition of liability,[126] and limits the obligation temporally.[127] It also requires that owners of ships carry insurance sufficient to satisfy their liability under the treaty.[128] It vests jurisdiction for actions based on its violation in the courts of the contracting States,[129] and includes a waiver of sovereign immunity for ships owned or operated by a State.[130]

A parallel series of treaties established an international fund to cover the costs of pollution damages not completely covered under the regime of owner liability established in the basic treaties. These Conventions state that their purpose is to prevent uncompensated damages.[131] Contributions to the fund are required from the consignees of oil shipments, who make the contributions on behalf of their States.[132] The contributions are "calculated on the basis of a fixed sum for each ton of oil received."[133]

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124. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. III, 973 U.N.T.S. 3, [hereinafter Oil Pollution Damage Convention]. Special Rapporteur Quentin-Baxter referred to this as an absolute liability standard. Quentin-Baxter *Fifth Report*, *supra* note 4, at ¶ 5.

125. Oil Pollution Damage Convention, *supra* note 124, at art V. 1-2. Protocols of 1976 and 1984 to this treaty increased the maximum amounts for which owners are liable. *See* Protocol to the International Convention on Civil Liability for Oil Pollution Damage, Nov. 19, 1976, art. II.1, IMCO No. 77.05.E; and Protocol to the International Convention on Civil Liability for Oil Pollution Damage, May 25, 1984, art. 6, *reprinted in* 6 BENEDICT ON ADMIRALTY 6-77 (7th ed. rev.).

126. Oil Pollution Damage Convention, *supra* note 124, at art. III.2.

127. *Id.* at art. VIII. This amounts, in effect, to a three year statute of limitations.

128. *Id.* at art. VII.

129. *Id.* at art. IX.

130. *Id.* at art. XI.

131. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, art 2.l, art. 4, 1110 U.N.T.S. 57. [hereinafter 1971 Fund Convention]. *See also* Protocol to the International Fund for Compensation for Oil Pollution Damage, Nov. 19, 1976, IMCO No. 77.05.E; and Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, May 25, 1984, *reprinted in* 6 BENEDICT ON ADMIRALTY 6-116 (7th ed. rev.).

132. 1971 Fund Convention, *supra* note 131, at art. 10.

133. *Id.* at art. 11.

Another treaty that deals with liability for maritime pollution in a manner similar to that employed by the Maritime Pollution treaties is the 1977 North Sea Convention on Exploration and Exploitation.[134]

3. The Nuclear Damage Conventions

A body of treaties on civil liability for nuclear damage, are, likewise, by their very titles, focused on "the desirability of establishing some minimum standards to provide financial protection against damage resulting from certain peaceful use of nuclear energy."[135] The 1963 Vienna Convention on Civil Liability for Nuclear Damage holds the operator of a nuclear installation liable upon proof of causation that the damage complained of is the result of a nuclear accident,[136] and specifies that this liability "shall be absolute."[137]

The 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy states, in its preamble, that its parties are "[d]esirous of ensuring adequate and equitable compensation for persons who suffer damage caused by nuclear incidents."[138] This treaty, too, holds operators liable for damage "caused by a nuclear incident,"[139] and creates a compensation regime comparable to that of the Vienna Convention although it does not use the word "absolute."[140]

The 1962 Brussels Convention on the Liability of Operators of Nuclear Ships[141] has a similar provision for compensation by an operator upon proof of causation with respect to damage incurred,[142] stating that the operator "shall be absolutely liable,"[143] and the same sort of exculpatory standards[144] and compensation regime[145] as the other treaties in the

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134. Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, May 1, 1977, *reprinted in* SELECTED MULTILATERAL TREATIES IN ENVIRONMENT 474 (Kiss, ed. 1983, United Nations Environment Programme).

135. Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, preamble, 1063 U.N.T.S. 265.

136. *Id.* at art. II.

137. *Id.* at art. IV. Despite the use of the term "absolute" in the first clause of this article, the remaining clauses set out the exemptions to liability, making it clear that "absolute" here does not mean without exception.

The treaty also sets forth, in art. VI, a "statute of limitations" of ten years on the right of compensation, and, in art. V, limits the liability of a nuclear installation operator to five million dollars for any one accident. Art. VII requires operators to maintain insurance sufficient to cover the liability they are subject to under the treaty.

Jurisdiction, under art. XI, is vested "only with the courts of the Contracting Party within whose territory the nuclear accident occurred."

138. Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251.

139. *Id.* at art. 3.

140. *See id.* at arts. 8, 9, 10 & 11.

141. Convention on the Liability of Operators of Nuclear Ships, May 25, 1962.

142. *Id.* at art. II.

143. *Id.*

144. *Id.* at arts. II.4, II.5 and II.6.

area.

The 1971 Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material states in its preamble that it was designed to parallel the earlier treaties and ensure "that the operator of a nuclear installation will be exclusively liable for damage caused by a nuclear incident occurring in the course of maritime carriage of nuclear material."[146]

4. Pollution Treaties

International agreements on pollution-related topics are less likely, if they deal with liability at all, to make it either strict or absolute.

The European Convention on Long-range Transboundary Air Pollution of 1979[147] states in its preamble that it aims "to promote relations and co-operation in the field of environmental regulation."[148] It establishes "Fundamental Principles,"[149] which commit States to "endeavor to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution."[150] States also commit themselves to developing policies and strategies "by means of exchanges of information, consultation, research and monitoring."[151] The emphasis is definitely on cooperation and interaction. The Convention includes no provisions whatsoever for liability for damages caused by the pollution it seeks to limit, reduce and prevent. Although it has been criticized as ineffective, it has also been emphasized that its "wide scope . . . must be welcomed."[152] The Convention also established a "cooperative program for the monitoring and evaluation of the long-range transmission of air pollutants in Europe."[153]

That liability is still an issue is demonstrated by the lack of an article defining or imposing it in the recently concluded Convention on Trans-

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145. *Id.* at arts. III, IV, V, VII and X.

146. Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255.

147. Convention on Long-range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. 10541, U.N. Doc. ECE/HLM.1/R.1 *reprinted in* 18 I.L.M. 1442 (1979) [hereinafter European Convention].

148. *Id.* at preamble.

149. *Id.* at arts. 2-5.

150. *Id.* at art. 2.

151. *Id.* at art. 3.

152. Rest, *Responsibility and Liability for Transboundary Air Pollution Damage*, in TRANSBOUNDARY AIR POLLUTION 299, 302 (Flinterman, Kwiatkowska & Lammers, eds. 1986) [hereinafter Rest]. *See also* Fraenkel, *The Convention on Long-Range Transboundary Air Pollution: Meeting the Challenge of International Cooperation*, 30 HARV. INT'L L.J. 447, 449, 475-76 (1989).

153. European Convention, *supra* note 147, at art. 9. This treaty "marked a major advance in the level of international attention given to transboundary pollution and resulted in the establishment of important joint research and monitor-efforts." Wetstone & Rosencranz, *supra* note 81, at 15-16. It nevertheless did *not* require abatement or even impose "standstill" standards. *Id.*

boundary Movements of Hazardous Wastes.[154] This suggests that perhaps the slow progress of the ILC on the topic of international liability over the last ten years is not the result of shortcomings of that organization, and is perhaps instead a function of the unwillingness of States to agree to limit their independence of action, and thereby, perhaps, their sovereignty, by agreeing to subject themselves to international liability to other States.

A treaty that employs an alternative to the liability route and that appears to have a good chance of success is the 1987 Vienna Convention for the Protection of the Ozone Layer.[155] The parties to the Convention, aware, as they stated in the preamble, "of the potentially harmful impact on human health and the environment through modification of the Ozone layer,"[156] established obligations for States "to take appropriate . . . measures . . . to protect human health and the environment against adverse effects."[157] The "shall" of this provision makes seem like those who drafted this Convention intended to move far beyond the hortatory provisions of the European Convention. Failure to comply with the requirement to take such appropriate measures, or to "conduct research and scientific assessments"[158] or cooperate in the legal, scientific and technical fields,[159] constitutes a breach of a treaty obligation.

D. *Cases*

The exemplar case for this area of law is the *Trail Smelter Arbitration*.[160] The Trail Smelter dispute "covered a period of thirteen years from 1928 to 1941."[161] A Canadian company, the Consolidated Mining

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154. Basel Convention the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/IG.80/3. The liability provision of this treaty, article 12, is captioned "Consultations on Liability," and provides that the "Parties shall co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes." *Id.* at art. 12.

155. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, *reprinted in* 26 I.L.M. 1516 (1987) [hereinafter The Ozone Convention].

156. *Id.*

157. *Id.* at art. 1.

158. *Id.* at art. 3.

159. The Ozone Convention, *supra* note 155, at art. 4. But even the ozone danger has failed to mobilize States completely: "Eighty nations signed a declaration May 2 to back tougher measures to reduce ozone-destroying chlorofluorocarbons released into the atmosphere, but backed away from a controversial plan for an international fund to help developing nations phase out use and production of the damaging chemicals." BNA, *Daily Report* A-25 (May 9, 1989). Moreover, "[t]he 80-nation declaration is not binding on governments of countries that signed the document, a point criticized by environmentalists." *Id.*

160. III RPT. INT'L ARB. AWARDS 1911 [hereinafter *Trail Smelter*]. Special Rapporteur McCaffrey refers to this as "undoubtedly the foremost international decision involving transfrontier pollution." McCaffrey *Fourth Report*, *supra* note 52, at ¶ 85.

161. Read, *The Trail Smelter Dispute*, [1963] CAN. Y.B. INT'L L. 213 (1963). The

and Smelting Company of Canada, Limited, operated a smelter in British Columbia, on the Columbia River about eleven miles from the international boundary. The smelter emitted sulphur dioxide that drifted down the Columbia River Valley and harmed crops, woodlands and fisheries in the State of Washington. Canada admitted liability and the United States and Canada established an arbitral tribunal to settle the question of damages, authorizing it "to apply the principles of both international law and of the jurisprudence developed by United States courts in disputes between states of the Union."[162] In 1941, when it announced its decision, the arbitral tribunal stated that its finding comported with both of these systems:

> [U]nder the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[163]

Like many others, Special Rapporteur Quentin-Baxter noted that the *Trail Smelter* tribunal, in announcing this limitation on sovereignty, echoed the International Court of Justice in the *Corfu Channel Case*.[164] The reference by the International Court of Justice to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States,"[165] was, according to Special Rapporteur Quentin-Baxter, an affirmation that "the security within their own borders which respect for international law can offer States is a charter of liberty, not of license."[166]

Although some insist that *Trail Smelter* stands for the proposition that transfrontier pollution is an international wrong that engages state responsibility,[167] others have declared that the decision of the tribunal turned not on the mere fact of pollution, nor on "the creation merely of a risk of injury, but on the causation of actual injury . . ."[168] and that it

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description of the facts of this case is generally drawn from this article.

162. Quentin-Baxter *Preliminary Report*, *supra* note 42, at ¶ 33.

163. *Trail Smelter*, *supra* note 160, at 1965.

164. According to Special Rapporteur McCaffrey, the language of the *Corfu Channel* decision, "which may be regarded as an expression of the maxim *sic utere tuo et alienum non laedas*, has been relied upon frequently by commentators and tribunals dealing with problems of transfrontier pollution." McCaffrey *Fourth Report*, *supra* note 52, at ¶ 83.

165. *Corfu Channel* [1949] I.C.J. Rep. 4, 22.

166. Quentin-Baxter *Preliminary Report*, *supra* note 42, at ¶ 36.

167. *See, e.g.*, Akehurst, *International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, XVI NETH. Y.B. INT'L L. 3, 5 (1985) [hereinafter Akehurst]: the *Trail Smelter* decision stands for the proposition that "there is a *duty* not to permit such use," and supports the view that "liability for environmental damage is liability *ex delicto*. . . ."

168. Goldie, *Concepts of Strict and Absolute Liability and the Ranking of Liability in Terms of Relative Exposure to Risk*, XVI NETH. Y.B. INT'L L. 175, 215 (1985) [hereinafter Goldie II].

depended "upon different standards from those usually associated with fault."[169]

Another case often cited is the *Lake Lanoux* arbitral decision of 1957,[170] which also points out limitations on sovereignty by emphasizing that States, in a world with an interdependent environment, must be aware of and take into account the interests of other sovereigns. In this decision, France, which "proposed to draw off, within its own territory, water that would have flowed to Spain, substituting water of equivalent quantity and quality, so that the flow reaching the Spanish border would not have been substantially affected,"[171] was held not to have violated the rights of Spain. Special Rapporteur Quentin-Baxter has described the tribunal's formulation of the *sic utere* principle as "so succinct that it has a faintly sibylline ring: 'France is entitled to exercise her rights; she cannot ignore Spanish interests. Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.' "[172]

E. *State Practice*

In what is known as the Cosmos 954 case, Canada claimed in excess of $6 million from the Soviet Union "for compensation for damage the result of the intrusion into Canadian air space of a Soviet space object, the Cosmos 954 satellite, and the deposition on Canadian territory of hazardous radioactive debris from the satellite."[173] Canada stated that its claim was based "jointly and separately on (a) the relevant international agreements and in particular the 1972 Convention on International Liability for Damage Caused by Space Objects,[174] to which both Canada and the Union of Soviet Socialist Republics are parties, and (b) general principles of international law."[175] Article II of the treaty provides that "[a] launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight."[176] Canada also relied on the 1967 Treaty on Principles Governing

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169. Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189, 1227 (1965) [hereinafter Goldie I]. In connection with his theory of international pollution as a form of unjust enrichment, Professor Goldie states that the *Trail Smelter* case teaches that, "in international law, unjust enrichment also comes out when the creation of a risk with a consequential infliction of injury becomes an act of unjust enrichment." Goldie II, *supra* note 168, at 247. He is hopeful that an international rule of absolute liability is now in "the borderland between *lex lata* and *lex ferenda*," and that even with such an "ambiguous, incipient status," it "may be perceived as offering a shielding regime for a party against unbridled risk-creation without, however, imposing positive rights and duties." *Id.*

170. XII RPT. INT'L ARB. AWARDS 281 (1957).

171. Quentin-Baxter *Fifth Report*, *supra* note 4, at ¶ 22.

172. Quentin-Baxter *Second Report*, supra note 85, at ¶ 61, *quoting* ¶ 23 of XII RPT. INT'L ARB. AWARDS, *supra* note 170.

173. 18 I.L.M., 899, 902 (1979).

174. Space Damage Convention, *supra* note 119.

175. 18 I.L.M., *supra* note 173, at 905

176. Space Damage Convention, *supra* note 119, at art. II.

the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,[177] to which again, both Canada and the U.S.S.R. were parties, and which provides, in article VII, that "[e]ach State Party to the Treaty that launches or procures the launching of an object into outer space . . . is internationally liable for damage to another State Party to the Treaty or to its natural or judicial persons by such object or its component parts on the Earth, in air space or in outer space. . . ."[178]

Canada also asserted that:

> The principle of absolute liability applies to fields of activities having in common a high degree of risk. It is repeated in numerous international agreements and is one of "the general principles of law recognized by civilized nations" (Article 38 of the Statute of The International Court of Justice). Accordingly, this principle has been accepted as a general principle of international law.[179]

F. *Ex Gratia Payments*

One of the ways that States have traditionally taken into consideration the interests of other States, especially when not to do so might potentially expose them to charges of wrongfulness and, perhaps, therefore, traditional state responsibility obligations, is by making *ex gratia* payments. One of the most famous examples of this practice was the *Fukuryu Maru* incident involving the United States and Japan. In 1954, when the United States exploded a test "hydrogen bomb on Eniwetok atoll in the Marshall Islands, some Japanese fishermen on the high seas were injured and a fishing resource customarily exploited by Japan was contaminated by radioactive fallout."[180] The U.S. Government expressed its concern and regret and paid $2 million in damages "on the understanding that the sum would be distributed in an equitable manner at the discretion of the Japanese Government."[181] Another case involving Japan

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177. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205, No. 8843.

178. *Id.* at art. VII.

179. 18 I.L.M., *supra* note 173, at 907.

180. Quentin-Baxter *Preliminary Report*, *supra* note 42, at ¶ 37.

181. Goldie I, *supra* note 169, at 1233. Other examples of *ex gratia* payments, as outlined by Professor Maier in a recent article include:

> [P]ayment [by the United States] to Switzerland after World War II of *ex gratia* compensation for the accidental bombing raid of Schaffhausen, [the *Fukuryu Maru* incident payment] and, most recently . . . payments . . . of $1.6 million to individuals whose person or property was injured during the invasion of Granada.
>
> Other nations have acted similarly in similar situations. The Iraqis, while denying legal liability, have offered to pay for the injuries and deaths that resulted from the missle attack on the U.S.S. *Stark*. Israel paid the United States some $7 million in what it designated *ex gratia* compensation for its attack on the intelligence ship U.S.S. *Liberty*. The Israelis also paid Libya *ex*

and marine damage arose when the Liberian tanker *Juliana* ran aground and split apart off Niigata, on Japan's west coast. The oil it spilled damaged local fisheries. The Liberian Government offered 200 million yen in compensation, which the Japanese accepted.[182]

Ex gratia payments were in the news again recently, in the wake of the downing, by the U.S.S. *Vincennes*, of Iran Air Flight 655 in the Persian Gulf on July 3, 1988. Although former President Reagan announced the regrets of the U.S. "within a few days" and "promised that the United States would make an *ex gratia* payment to the families of the victims,"[183] Iran has refused to agree and has asked the International Court of Justice to consider the case.[184]

One commentator has emphasized that *ex gratia* payments are useful because they carry no legal obligation, stating that, "[a]lthough, in the abstract, a legal rule requiring compensation might seem to make sense, in reality, given the current state of international fact-finding and adjudication, it does not."[185]

This same publicist also emphasizes that *ex gratia* payments are preferable when "acknowledging legal liability might be politically unacceptable to the nation involved." He also points out that they comport with the no-uncompensated-victim principle:

> If the problem of compensation is made to depend, in every instance, upon the outcome of legal argument about the current content of customary international law, it is likely that flexibility would be lost, and, at the same time, future victims might find themselves denied recompense until after years of international litigation.[186]

III. THE ISSUE OF STRICT LIABILITY AS TREATED BY THE SPECIAL RAPPORTEURS ON INTERNATIONAL LIABILITY

As we have seen, Special Rapporteur Barboza's last two reports are a study in contrasts, if not confusion. His approach in his Fourth Report seems to be from the beginning of a situation or an incident, focusing on liability for the creation of risk, rather than from the end, with considerations of liability for injuries suffered, which has been the traditional focus of this topic. With his Fifth Report he reinserted liability for injuries actually suffered and limited the topic, as Special Rapporteur Barboza had, to injuries that are caused or likely to be caused by the "physical conse-

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gratia for the downing of a Libyan passenger plane in 1973.
Maier, *Ex Gratia Payments and the Iranian Airline Tragedy* in *Agora: The Downing of Iran Air Flight 655*, 83 AM. J. INT'L L. 328-29 (1989) [hereinafter *Agora*].

182. Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AM. J. INT'L L. 525, 547 (1980) [hereinafter Handl I].

183. *Agora*, *supra* note 181, at 318 ("Introduction").

184. *Suit Dismissed in Iran Jet Case*, N.L.J. 3 (Nov. 27, 1989).

185. *Agora*, *supra* note 181, at 329.

186. *Id.*

quences" of the activities undertaken.[187] He nevertheless retained the elaborate but still vague liability-for-risk standard that caused so much controversy.

Special Rapporteur Barboza's revisions in his Fourth Report revived the debate over "strict liability"[188] on the international plane, but the revisions of his Fifth Report are, according to Ambassador Barboza, designed to avoid the spectre of "dreaded" absolute liability, making any and all discussions of it unnecessary. The approach of his Fourth Report provoked debate of the strict liability issue, and his retreat from that position in his Fifth Report, obviously designed to sweep that controversy under the rug, is inadequate to accomplish that goal. Even his readaptations of some of the approach and some of the language of his predecessor have failed to satisfy those critical of his liability-for-risk standard.

The issue of strict liability is too important to this topic for the Special Rapporteur to try to ignore it. He should embrace the debate on this issue and work to channel and guide it so that States are able to reach a consensus. Provocation of debate followed by denial simply won't do.

Strict liability has been at the heart of the debate on this topic since the beginning of the ILC's work. Special Rapporteur Quentin-Baxter worked long and hard to quell the controversy he encountered on the is-

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187. Use of the word "injury" here, and in all discussions of this topic, should, if Special Rapporteur Barboza has his way, be completely abolished. A corrigendum to his Fifth Report notes that "whenever the word 'injury' appears in the report, it should be replaced with 'harm.' " *Fifth Report*, *supra* note 14, Corr. 1. Ambassador Barboza seems to be slowly, but inexorably, redefining his topic by changing the words used to be describe it. *See* note 267 and accompanying text, *infra*, for discussion of his substitution of the word "activities" for "acts." *See also* notes 40-45 and accompanying text, *supra*, for discussion of the honor paid the title when work on this topic commenced.

188. In this paper, "strict liability" is used to cover what is usually understood to be encompassed by that term as well as what is usually referred to as "absolute liability." *See* discussion of strict liability at note 214 and accompanying text *infra*. On the difference between "strict liability" and "absolute liability," Professor Goldie has stated that:

> Some writers use the term "absolute liability" to indicate the form of liability imposed by the rule in *Rylands v. Fletcher*. . . .
>
> On the other hand, Professor Sir Percy Winfield's article, *The Myth of Absolute Liability*, has been generally influential in bringing about the selection of such terms as "strict liability" and "liability without fault" in preference to "absolute liability." Professor Winfield argues that the exculpating rules which courts have developed to mitigate the rigour of the defendant's liability under *Rylands v. Fletcher* render the adjective "absolute" something of a misnomer; hence the phrase "strict liability" has come to be preferred.

Goldie I, *supra* note 169, at 1215-16. Professor Goldie goes on, however, to state that he uses the terms "absolute liability," not because he disagrees with Professor Winfield, but so as to "indicate a more rigorous form of liability than that usually labelled 'strict.' " *Id.* 1216. *See also* Goldie II, *supra* note 168, at 194-95.

As we saw in section II, "strict," too, is somewhat of a misnomer. There is no regime that imposes liability absent proof of causation and, although some regimes may establish fewer rather than more exculpating or mitigating factors, such factors are never absent altogether.

sue,[189] and developed his elaborate "continuum" theory as part of that effort. Although Special Rapporteur Quentin-Baxter devoted a great deal of effort to avoiding adoption of a strict liability standard that Special Rapporteur Barboza has, with his most recent Report, declared it "dreaded," that is precisely the standard that has, as we have seen, been codified in many of the treaties and much of the state practice in this area. It was also the standard that those who initiated the work of the Commission on this topic assumed would apply in this area of the law. The Working Group on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law stated in its 1978 Report that

> [t]he most constant feature of [the conventional subject-by-subject] regimes [designed to regulate liability for 'damages inherent in certain major fields of activity made possible by modern technology'] is the adoption of a rule of absolute liability — that is, a liability that arises from the very fact that injurious consequences have occurred, without reference to the quality of the action that led to the occurrence.[190]

Once he assumed the role of Special Rapporteur, however, Mr. Quentin-Baxter began to emphasize the difficulties with a rule of strict liability[191] and to move the topic away from specifying such a standard. In his Second Report to the Commission, Mr. Quentin-Baxter used a "sweeping metaphor" to express the strict liability issue: "doctrine is a wave that breaks and scatters around the rocky outcrop of 'strict' or 'absolute' or 'no-fault liability' or 'liability for risk.' "[192] Mr. Quentin-Baxter made it clear that he sided with those who opposed including such a standard in his work because "strict liability regimes are always the product of convention, and . . . customary law obligations relevant to the avoidance and prevention of harm are always founded in responsibility for wrongfulness."[193] In non-conventional situations, in his view, "no very satisfactory

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189. One publicist has stated that some of Quentin-Baxter's "influential critics . . . seemed to suggest that the subject was founded on grave misconceptions, and ought not to exist," while others wanted to "enlarge the scope of 'international liability' in a manner that would endanger its continued study." Pinto, *supra* note 45, at 18.

190. 1978 ILC Report, *supra* note 33, at 151.

191. Mr. Quentin-Baxter stated, in his Preliminary Report, that "questions of liability are almost a forbidden subject." Quentin-Baxter *Preliminary Report*, *supra* note 42, at ¶ 5.

192. Quentin-Baxter *Second Report*, *supra* note 85, at ¶ 11.

193. *Id.* at ¶ 12. *See also* Bedjaoui, *Responsibility of States: Fault & Strict Liability*, 10 ENCYCLOPEDIA PUB. INT'L L., 358, 360 (1987) [hereinafter Bedjaoui]:

> However conscious States might be of the vital nature of the interests at stake, it is only on a conventional basis that it has been possible for them to feel bound by this new, more onerous and stringent form of liability. That is one of the distinctive characteristics of this form of liability as compared with the classic type, which has customary roots. The conventional endorsement of liability for ultra-hazardous activities shows how States are above all concerned with the reparation of loss or injury, and much less with what is in this context the secondary point as to whether the State causing the damage acted in a legitimate or a wrongful way, or exercised reasonable care in carrying on its

way has been found to demonstrate that this onerous principle is self-limiting."[194] Noting that he did not invoke a principle of liability without fault, and that this was a view shared by both the Commission and the Sixth Committee,[195] Mr. Quentin-Baxter clearly viewed getting this difficult issue under control as one of his most important tasks.[196] In his Second Report he also expressed the view that "regimes of strict liability . . . are only one, and not always the best method of discharging obligations towards those who may be adversely affected by an activity that is predominantly beneficial."[197]

By his Fourth Report, Mr. Quentin-Baxter was expressing the opinion that if the Commission were to identify "acts, not prohibited by international law with the strict liability of the State, it would outstrip the pace of the international community's advance and would run the risk of obscuring the genuine, underlying momentum of that advance."[198]

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activities.

> Thus, the basic of wrongfulness belonging to classic responsibility is here supplanted by the principle of causality, the most common feature of these conventional regimes is the adoption of a rule of absolute liability whereby liability results from the very fact of injurious consequences without there being any need to qualify the act that gave rise to them.

194. Quentin-Baxter *Second Report*, *supra* note 85, at ¶ 11. Commentators support this. One has criticized strict liability, because, "as its name implies, [it] is not sensitive to varying conditions, *i.e.*, it cannot be modulated to take account of differences in circumstances. In this respect, it is not ideally suited to dealing adequately with the wide variety of situations now envisaged under the topic." Magraw I, *supra* note 5, at 327. For support of the proposition that strict liability is a sort of genie that, once let out of the bottle, is quite difficult to control or limit, see Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989).

195. Quentin-Baxter *Second Report*, *supra*, note 85 at ¶ 11.

196. He believed that

> by maintaining the objectives of the present topic, it should be possible to relieve the extreme discomfort associated with each of the opposing doctrinal positions. . . . If strict liability ceases to have the apparent character of an ungovernable encroachment upon the orthodox doctrine of State responsibility, it will be freed to take an appropriate place among measures that may be required when a beneficial activity entails substantial transnational dangers which are not entirely preventable.

Id. at ¶ 14.

197. *Id.* at ¶ 46. By declaring that "[s]tates are, fortunately, leaning more towards prevention than a broader guarantee," *id.* at ¶ 82, Special Rapporteur Quentin-Baxter seemed to side with those who advocate control by means of agreed upon standards rather than prevention encouraged by imposition of penalties for its failure. Indeed he has denigrated strict liability by referring to it, "[i]n an [sic] conventional regime" as a "commutation of an obligation of prevention." *Id.* at ¶ 92.

198. Quentin-Baxter *Fourth Report*, *supra* note 50, at ¶ 57. *See also* ¶¶ 60-62. Professor Handl has made the point that Special Rapporteur Quentin-Baxter developed the continuum of obligations and relied on the shared expectations concept of his schematic outline in an attempt to achieve greater acceptance for the proposed articles and avoid the controversy engendered by proposals involving strict liability:

> [I]n Quentin-Baxter's scheme of things the principle of strict liability is relegated to a subsidiary role. Its strong moral and utilitarian appeal, quite apart from its foundation in international practice is acknowledged only indirectly

With Special Rapporteur Barboza there was a great change in the rhetoric employed, especially with respect to strict liability. As the Commission described its discussion of his Preliminary Report, Ambassador Barboza was not at all shy about raising the strict liability issue:

> In the view of the Special Rapporteur, it was also necessary to consider the operation of the obligation of reparation and its basis in international law. The investigation inevitably led to liability for risk, known in English as 'strict liability,' . . . in the view of the Special Rapporteur, it could not be denied that its main basis was simply 'strict liability.'[199]

In his first Report, Ambassador Barboza identified strict liability as "the very heart of the topic,"[200] again emphasizing that strict liability "is not monolithic" and that "there are various degrees of strictness."[201] He attacked head-on those Mr. Quentin-Baxter had worked so hard to placate:

> [T]he concept of liability for risk, or strict liability, has aroused some strong opposition in the Commission and in the Sixth Committee of the General Assembly, for it has been said, perhaps rightly so, that it is not based on any norm of general international law.[202]

Having stated this, he went on, however, to demonstrate that strict liability is an inevitable concomitant of territorial sovereignty, because sovereignty, in an interdependent world is never absolute:

> [W]e have all the elements that are needed to present [strict] liability almost as a consequence which derives from premises that can be borne out by pure logic. These premises are at the cornerstone of the international legal order . . . .
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> [S]overeignty is, like the god Janus, two-faced. This is so because of an inherent contradiction: there is no true sovereignty when there is coexistence with other equal entities. The idea of sovereignty is incompatible with the idea of multiplicity . . . . Thus, the concept of absolute freedom of action of a State in its own territory, based on the premise that any activity authorized by the source state is valid, and that if it causes damage, that damage cannot be compensated for under international law, is as far removed from reality as the opposite

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> and in a circuitous fashion. . . . But the prospect of acceptability comes at the cost of a significant dilution of the normative contents of liability.
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> . . . The final outcome might be less than desirable.

Handl II, *supra* note 45, at 72.

199. 1986 ILC Report, *supra* note 6, at ¶ 197. The Commission went on to paraphrase Ambassador Barboza thusly:

> Although there had been objections to strict liability, it had been stated in support of it, first, that it was not a monolithic concept, since it involved different degrees of strictness, and, when combined with mitigating factors, became a sufficiently flexible instrument; and, secondly, that it was not certain that it did not have a basis in international law.

Id. at ¶ 199.

200. *Second Report*, *supra* note 6, at ¶ 19. *See* also ¶¶ 26, 46.

201. *Id.* at ¶ 48. *See also* note 188, *supra*.

202. *Id.* at ¶ 52.

> assumption, namely that, since it is forbidden to cause damage because it would interfere with another state's use and enjoyment of its territory, any activity likely to create risk is in principle prohibited, and cannot be undertaken without the prior approval of the other States . . . .
>
> A legal norm, then cannot be based on an international "reality" which does not exist, since absolute independence or absolute sovereignty, does not exist. In contrast, interdependence has always existed and is becoming more and more prevalent; it is also the basis in international law for liability for risk . . . . It could justifiably be argued that reparation constitutes a veritable "internalization" of costs.[203]

The Commission debated strict liability at some length in connection with its review of Ambassador Barboza's Second Report.[204] The discussion at the Commission reflected the deep rifts considerations of strict liability seem to engender in the international community.[205] Special

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203. *Id.* at ¶¶ 52-54. Here, Ambassador Barboza seems to adopt Professor Goldie's theory that strict liability, on the international plane, provides a means of compensating those, who like victims of transboundary pollution, are victims of what amounts to expropriation. *See* Goldie II, *supra* note 168, at 212-17. *See also* 1986 ILC Report, *supra* note 6, at ¶ 199. Prosser and Keaton, too, say that one of the reasons that can be advanced for a theory of strict liability is the

> notion that the benefits derived from conduct produce an "enrichment" that is "unjust" unless the actor pays for the harms done. . . . Under this . . . principle . . ., the costs of conduct, including the costs of compensating for harms it causes, should be borne by the actor, who in turn will be able to pass those costs along to others who benefit from the actor's conduct. The net effect is that costs may be borne by those who benefit and, ideally, in proportion to their respective shares of the benefits.

PROSSER, *infra* note 214, at § 85.

Special Rapporteur Barboza's analysis of the current nature of sovereignty, while sure to be viewed as heretical by some, is not without its supporters. Writing in *Foreign Affairs*, Jessica Tuchman Mathews has said:

> The assumptions and institutions that have governed international relations in the postwar era are a poor fit with the new realities [of "resource environmental and demographic issues"]. Environmental strains that transcend national borders are already beginning to break down the sacred boundaries of national sovereignty, previously rendered porous by the information and communications revolutions and the instantaneous global movement of financial capital. The once sharp dividing line between foreign and domestic policy is blurred, forcing governments to grapple in international forums with issues that were contentious enough in the domestic arena.

Mathews, *Redefining Security*, 68 FOREIGN AFF. 162, 162 (1989).

204. *Report of the International Law Commission on the Work of its Thirty-ninth Session* ¶¶ 183-86, *reprinted in* [1987] II Y.B. INT'L L. COMM'N. 111-13, U.N. Doc. A/CN.4/SER.A 1987 (Part 1).

205. Some members took the position that the " 'strict liability' which was suggested by the Special Rapporteur as the main underlying concept of this topic did not exist in international law." *Id.* at ¶ 183. Others

> disagreed with the assertion that the concept of strict liability did not exist in international law. It was incorporated, as a concept if not as a term, in a number of multilateral treaties. The principle was incorporated in the *Trail Smelter* arbitration, the *Gut Dam* claims, and in many other forms of State

Rapporteur Barboza evidently took the negative comments to heart, because he made almost no mention of the topic in his Third Report except to point out that his liability regime provides for liberal exculpation,[206] and virtually no mention of strict liability *per se* appears in his Fourth Report.[207] But, as we have seen, the liability-for-risk regime proposed in Ambassador Barboza's Fourth Report engendered great controversy. Neither the Special Rapporteur nor his critics[208] used the term "strict liability," but that seems to be exactly what was once again the cause of the controversy and the unnamed topic of the debate on the liability-for-risk proposal.

Ambassador Barboza had long advocated including creation of risk within the scope of the topic, but, as we have seen, dropped all references to strict liability after the debate on his Second Report. If he intended the liability-for-risk regime he proposed in his Fourth Report to function as a strict liability regime, admitting that that was his intention probably could not have engendered more controversy than the "risk"-based theory did. Instead, Special Rapporteur Barboza has claimed that "the con-

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> practice. . . . Strict liability was the basis on which a solution to the fundamental problems under the present topic should be sought. The schematic outline conformed to a modified version of strict liability and that was a reasonable approach.

Id. at ¶ 185.

> Special Rapporteur Barboza
>
> stated that the concept of strict liability was known in most domestic legal systems, whether they belonged to the civil law or common law tradition. By using the expression 'strict liability,' he therefore was relying on a common legal concept holding that, for certain activities or under certain circumstances, if a causal relationship was established between an activity and an injury, there was liability. Nor was that principle entirely alien to international law.

Id. at ¶ 186. He also stated that he "saw no contradiction" between that principle and prevention. *Id.* But he also nevertheless began the process of backing away from a "strict" form of strict liability:

> Strict liability did not need to be incorporated in the present topic to the same degree as was known in domestic law or some conventional regimes of international law; but what was important in this topic was the notion that the establishment of a causal relationship between certain activities and certain injuries was sufficient to entail liability. Strict liability provided that basis. At the same time, it did not preclude modifications the Commission might wish to introduce, such as a number of factors which could be taken into account for determination of the extent of liability and amount of damages.

Id.

206. *Third Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law* ¶ 30, U.N. Doc. A/CN.4/405, *reprinted in* [1987] II Y.B. INT'L L. COMM'N. U.N. Doc. A/CN.4/SER.A/1987 (Part 1) [hereinafter *Third Report*). The bold assertions of his Preliminary Report obviously did not do much to persuade States concerned about protecting their sovereign prerogatives. Gone, too, is any acknowledgment, as there had been earlier, that this topic is one that properly encompasses development as well as codification of international law.

207. *Fourth Report*, *supra* note 8.

208. *See* discussion of the reaction to the *Fourth Report* at notes 8-13 and accompanying text, *supra*.

cept of 'activities involving risk,' " was introduced in his Fourth Report *so as to avoid* including strict or absolute liability within the scope of the topic,[209] and that "the concept of 'risk' could establish limits which would, in particular, prevent kinds of 'absolute' [or strict] liability from being incurred, in which any and all transboundary injury would have to be compensated."[210] Bowing to the criticism nevertheless leveled at the articles proposed with his Fourth Report, he added liability for actual harm caused to his liability for risk standard and declared that adhering to the concepts he had set forth would not "incur the dreaded 'absolute [or strict] liability.' "[211] This, however, as we have seen,[212] did not quiet the debate or resolve the disagreements over the liability-for-risk standard, and many still remain quite dissatisfied with it.

It seems that Special Rapporteur Barboza managed to raise the spectre of strict liability without even openly mentioning it, and that he has now extravagantly, and perhaps unnecessarily, renounced any interest in such an approach to liability. He provoked a spirited but misdirected debate and seeks to resolve it by abjuring any further consideration of a key concept that he has now tarred with the sobriquet "dreaded." He has denied the international community the opportunity to debate in any coherent fashion either the question of strict liability itself or the question of its proper relationship to the problem of transboundary pollution.

IV. STRICT LIABILITY THEORY AND ITS APPLICATION IN INTERNATIONAL LAW

Despite the great difficulty Special Rapporteur Quentin-Baxter had with the concept of strict liability, and the problems it continues to cause Special Rapporteur Barboza, the concept is certainly not unknown on the international plane, as we saw in section II above, and models for strict liability standards exist in numerous municipal law systems. The World Commission takes the position that the "increasing acceptance of strict liability for ultrahazardous activities at the national level is evidence of an emerging principle" of international law.[213] In addition to covering

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209. *Fifth Report*, *supra* note 14, at ¶ 7.

210. *Id.* at ¶ 4.

211. *Id.* at ¶ 12. One of the means of avoiding the spectre of strict liability is use of the "concept of 'activity' as opposed to 'act.' " *Id. See* discussion of this distinction at note 267 and accompanying text, *infra*.

212. *See* notes 8-13 and accompanying text, *supra*.

213. *Brundtland Report*, *supra* note 59. Despite the World Commission's assertion that there may well be a general principle of international law for strict liability, at least for ultra-hazardous materials, one publicist writing the same year the World Commission released its report has noted that "there may well not be any international law norm of any type for international accountability for lawful activities. The survey compiled by the Secretariat [*see* note 214, *infra*] contains an impressive compendium of relevant state practice that supports the [Quentin-Baxter] schematic outline in many respects. However, the bulk of that state practice, at least in its bilateral form, is European and North American. If the survey is accurate in this regard, the state practice may not be sufficiently representative to establish customary international law, irrespective of the requirement of *opinio juris*."

"ultrahazardous" activities, municipal laws and decisions also deal with products, including food and drugs as well as many manufactured goods, and extend, in some jurisdictions, to accidents at the workplace and on the highway.[214]

Magraw I, *supra* note 5, at 320.

214. The British case most frequently cited as the source of Anglo-Saxon strict liability law is Fletcher v. Rylands, 3 H. & C. 774, 159 Eng. Rep. 737 (1865) [hereinafter *Fletcher 1*], *rev'd*, L.R. 1 Ex. 265 (1866) [hereinafter *Fletcher 2*], *aff'd*, Rylands v. Fletcher, L.R. 3 H.L. 330 (1868) [hereinafter *Rylands*]. The finder of fact pronounced the defendants free from all personal blame. In a famous statement Justice Blackburn, in the Exchequer Chamber, formulated the rule of the case thusly:

> We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape.

Fletcher 2 at 279-80. The House of Lords limited the sweep of Justice Blackburn's formulation to extraordinary, non-natural, unusual uses of land, *Rylands* at 338. With this restriction, *Rylands* has been widely-followed in British courts, and to determine what is a non-natural use, "the English courts have looked not only to the character of the thing or activity in question, but also to the place and manner in which it is maintained and its relation to its surroundings." PROSSER & KEATON ON TORTS § 78, at 546.5c (5th ed. 1984) [hereinafter PROSSER]. In this we see the origin of the special scrutiny applied, on the international plane, to activities at or near a State's border.

The strict liability rule also applies in the large majority of U.S. jurisdictions, with its acceptance still expanding. "The conditions and activities to which the rule has been applied have followed the English pattern," PROSSER, *supra*, § 78 at 549, and "the American decisions, like the English ones, have applied the principle of *Rylands v. Fletcher* only to the thing out of place, the abnormally dangerous condition or activity which is not a 'natural' one where it is." *Id.* And in those jurisdictions where strict liability, *per se*, is still not accepted, the type of liability imposed in *Rylands v. Fletcher* is so often otherwise applied on nuisance theory, "that it is quite evident that . . . the principle is in reality universally accepted." *Id.* at 551.

American courts have also adopted strict products liability. As Prosser & Keaton put it:

> One of the most dramatic [events] in American law is the rapid spread of strict products liability throughout American states in the 1960's and 1970's. The theory has been applied, for example, to power machinery of all types (including cars), to food and drugs, and in a few cases to construction of buildings.

PROSSER, *supra*, § 85, at 611.

The leading U.S. products liability case, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), which rested on a theory of implied warranty, opened the proverbial judicial floodgates, and the period since that fall of the "citadel of privity," PROSSER, *supra*, § 97 at 690, has been marked by rapid development of liability not based on fault. These principles were included in the RESTATEMENT (SECOND) OF TORTS § 402A, (1964), shortly after the ruling in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963), the first case adopting strict products liability as an independent basis for tort liability. The cases that followed have expanded the scope of this liability significantly. Defendants have generally *not* been able to exculpate themselves from liability on a state of the art defense, *see* PROSSER, *supra*, at § 99. Plaintiffs' cases have been made easier when it is difficult to identify *the* defendant among many who potentially fit that role by the development of alternative liability theory (*see, e.g.*, Menne v. Celotex Corp., 641 F. Supp. 1429 (D. Kan. 1986), Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); and enterprise or market share liability theory (*see, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980)). In all of these cases, particular defendants have been able to exculpate themselves upon a sort of

It is in the area of liability for ultrahazardous activities, however, that there has been the most formal activity on the international law front. Professor Jenks foretold this in a pioneering article in 1966:

> Today, alongside classic responsibility with its rival theories, some new forms of liability have been emerging which not only ignore the concept of fault as a constituent factor of the internationally wrongful act but do not even inquire whether the act attributable to the State is wrongful. This is the outcome of scientific and technological advances which have obliged international law to adapt itself to new circumstances. Within a few decades, man's power over nature has increased in a spectacular and often frightening degree. More especially, the harnessing of nuclear energy, the conquest of space, the exploitation of the sea-bed, the transport and use of liquid or gaseous hydrocarbons, have drawn humanity into new activities which though they are for the most part not prohibited, are abnormally dangerous. . . .
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> The problem posed by these new activities does not derive from

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negative causation theory, *i.e.*, by showing that the product that harmed the plaintiff was not, or could not have been, theirs. But the theory of strict products liability seems to be on the move again, and a recent decision of the Court of Appeals of New York, Hymowitz v. Eli Lilly, 73 N.Y.2d 487, 539 N.E.2d 1069, *cert. denied sub nom.* Rexall Drug Co. v. Tigue, 58 U.S.L.W. 3290 (1989), denies the defendants that route of exculpation in certain circumstances.

The majority of the jurisdictions in the United States have also adopted statutory no fault compensation schemes with workers' compensation systems and mandated no-fault automobile insurance programs.

In at least the United States, therefore, the theory of strict liability has evolved to the extent that it provides significant opportunities to an injured plaintiff for recovery from even a defendant who has committed no wrong, who is, in a legal sense, without fault.

In other jurisdictions, strict liability for ultrahazardous activities also has wide acceptance. The World Commission has identified national legislation or judicial decisions in the following jurisdictions: France; the Federal Republic of Germany; the U.S.S.R.; Mexico; Venezula; Egypt; Libya; Senegal; Madagascar; Ethiopia; India; Thailand; Syria; Kuwait; Iran; Iraq; Jordan; Lebanon; Turkey; and Japan. Japan as well as the Federal Republic of Germany also have provisions for strict liability for various types of pollution damage. Brundtland Report, *supra* note 59, at 83-84. *See also Survey of State Practice Relevant to International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law: Study Prepared by the Secretariat*, 37 U.N. GAOR International Law Commission at 222-34, ¶¶ 362-86, U.N. Doc. A/CN.4/384, October 16, 1984 [hereinafter *Secretariat Study*].

Prosser & Keaton view strict liability theory as a natural evolution of legal thought:

> In Anglo-American law . . . the fault principle was clearly dominant between the mid-nineteenth and mid-twentieth centuries. By the end of that hundred-year period, however, a number of different developments foretold increased influence of the strict accountability principle. In the first half of the twentieth century, the system for compensating worker injuries shifted from a basis in fault to a basis in strict accountability. In the years since 1950, a second major shift has occurred—an almost universal acceptance of strict products liability—and application of the fault principle to highway injuries has been eroded in some states by no-fault legislation. The time may be near, if it has not already arrived, in which more compensation is paid on the basis of strict accountability than on the basis of fault.

PROSSER, *supra*, § 85 at 615.

> the question whether they are legitimate or wrongful, but from the fact that, even if they are essential or beneficial, they embody an inherent risk of transboundary harm. The new liability problem therefore presents itself in terms of loss or injury suffered in consequence of activities which, however useful, are ultrahazardous, irrespective of whether the State causing the harm did or did not take every desirable precaution. The new idea is that due diligence affords no exemption from reparation for damage caused.[215]

Professor Weiss has pointed out that at the time of Professor Jenks' article, the idea of "liability for ultrahazardous activity was still controversial," but that it has "since gained wide recognition."[216] Whether or not such strict or absolute liability can apply in situations other than those involving "ultrahazardous" activities is, it seems, at the heart of the Commission's work. To some, it does not seem at all radical:

> Activities making use of the latest scientific discoveries and concerned with modern forms of utilization or exploitation of the sea, of space or of nuclear energy are not the only ones to pose such problems. There are also more traditional activities or subject matters to which such absolute liability management appropriately apply: for example, the use and regulation of rivers that traverse or separate the territories of several States . . . the prevention of damage caused by floods or the melting of the snows; the exploitation of land in border areas; the propagation of fire or explosions across national frontiers; the contamination of human beings, animals or plants by diseases from other countries; the transfrontier pollution of fresh water.[217]

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215. Jenks, *Liability for Ultrahazardous Activities in International Law*, 117 RECUEIL DE COURS 99 (1966).

216. Weiss, *supra* note 72. Professor Weiss noted, however, that the evolution of tort law strict liability seems not to have extended beyond such ultra-hazardous activities, because her "recent review of more than 80 treaties dealing with international responsibility in the environmental field revealed that they primarily addressed ultrahazardous activities or massive oil pollution of the marine environment, rather than more general transfrontier environmental harm." *Id. See also* Gaines, *International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?* 30 HARV. INT'L L.J. 311, 316-17 (1989) [hereinafter Gaines]: "international law has accumulated a growing body of treaties, conventions, and other indicia of 'State practice' with respect to ultrahazardous activities and certain other narrowly defined problems. To this extent, the concept of transnational liability has already gained international acceptance."

217. Bedjaoui, *supra* note 193, at 361. Mr. Bedjaoui went on to express the opinion that "[t]o some minds, it is not inconceivable that one day such liability may even become applicable in the international economic and financial field, for example, in the case of transboundary losses sustained by foreign states or their nationals on account of a State's sovereign decision to devalue its own currency." *Id.* This precise question has been the source of considerable controversy in connection with this topic.

Although Special Rapporteur Quentin-Baxter, in his Preliminary Report, noted that "the specific context in which the topic is discussed has always been that of environmental hazard, caused by human activity and magnified by modern industrial and technological needs and capacities," Quentin-Baxter *Preliminary Report, supra* note 40, at ¶ 14, he also stated that even though most of the examples he used in his Preliminary Report were "drawn from the field of the environment . . . an attempt [was] made to show that the principle reflected in the title of the topic does not limit itself to the field of the environ-

Transboundary pollution in general certainly belongs on this list.

V. EFFECTS OF SPECIAL RAPPORTEUR BARBOZA'S APPROACH TO THE ISSUE OF STRICT LIABILITY

A. *The "Wrongfulness" Issue*

As we have seen, Special Rapporteur Barboza has tried to effect a major revision of the scope and perhaps the intent of the draft articles on state liability for injuries caused by acts or activities not contrary to international law. His "liability for risk" was arguably nothing more than the "strict liability" assumed to be the standard when this topic was launched. But even the indirect debate of strict liability this proposed standard provoked proved once again, as it has since the beginning of consideration of this topic, to be a source of contention in the Commission and in the Sixth Committee.

One of the by-products of Ambassador Barboza's focus on risk and struggle with the strict liability issue was a revival of the basic issue of wrongfulness versus acts not prohibited by international law and how liability/reparation schemes should properly be constructed.[218] He pointed out that in the 1987 Commission debates it was noted that "polluting

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ment." *Id.* at ¶ 62. The Draft Articles initially proposed did not limit the topic to the field of the environment, and the provision on the scope of the articles provided that they would apply when "activities undertaken within the territory or jurisdiction of a State give rise, beyond the territory of that State, to actual or potential loss of injury to another State or to its nationals. . . ." *Second Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur* ¶ 93, U.N. Doc. A/CN.4/346/Add. 1 and 2, *reprinted in* [1981] II Y.B. INT'L L. COMM'N. U.N. Doc. A/CN.4/SER. A/1981 (Part 1) [hereinafter Quentin-Baxter *First Report*].

By the time of his Fourth Report, Mr. Quentin-Baxter was referring to the "physical" limitation as one made as a matter of course: "there is a rather general expectation that the field of application will include all physical uses of territory giving rise to adverse physical transboundary effects." Quentin-Baxter *Fourth Report*, *supra* note 48, at ¶ 17. By the Fifth Report, the limitation was definite: "the activities and situations with which the present topic deals must themselves have a physical quality, and the consequences must flow from that quality. . . ." Quentin-Baxter *Fifth Report*, *supra* note 4, at ¶ 18. *See also id.* at ¶¶ 22-34.

There was an initial hint from Special Rapporteur Barboza that he would, as part of his special efforts to address the concerns of Third World nations in connection with this topic, consider expanding the topic once again. In the 1986 ILC Report on its consideration of the topic, it was noted that Special Rapporteur Barboza "had accepted, as a point of departure, that the topic related primarily to the duties of the source State to avoid, minimize or repair any appreciable or tangible physical transboundary loss or injury caused by an activity involving risk. However, the Special Rapporteur did not rule out the possibility of modifying this scope if the development of the topic made it desirable." *1986 ILC Report*, *supra* note 6, at ¶ 195. This, however, was completely precluded by the time of Ambassador Barboza's Fourth Report, in which he said that "in connection with international economic issues — especially those relating to the adumbration of the new international economic order," the topic had the potential to be "either a rogue elephant or a useful beast of burden," Fourth Report, *supra* note 8, at ¶ 46. *See also* Gaines, *supra* note 216, at 314-16, 322-26.

218. *See* notes 45 & 193 and accompanying text, *supra*.

activities which produced their effects gradually, cumulatively and continually, presented a problem as to their inclusion in our draft."[219] Raising an issue that has been raised on many occasions by publicists,[220] he stated that "[t]he first question is whether pollution that causes appreciable injury is prohibited by general international law."[221] Such pollution might be "prohibited by general international law," and would therefore "not fall within the purview of [the] topic because [it would involve] dealing with an unlawful act."[222] Nevertheless, after minimal consideration,

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219. *Fourth Report*, *supra* note 8, at ¶ 8.

220. Most notably, Professor Handl, who takes the view that "the debate within the Preparatory Committee charged with drafting the Stockholm Declaration clearly reveals strong opposition by several delegates to the idea that Principle 21 could be interpreted as imposing absolute or strict liability." Handl I, *supra* note 182, at 536. State practice, too, he believes, supports his "fault, not strict liability" theory: "clear confirmation of the fault principle as the international legal standard for transnational pollution in general emerges from an analysis of different instances when the issue of liability was pertinently raised." *Id.* at 536-37. He accepts strict liability only in situations involving accidents: "the distinctive criterion [is] continuous as against accidental transfrontier pollution[:] . . . the former engages the international liability of the controlling state only when the state incurs fault in failing to prevent the damage from occurring, while the latter involves strict liability." *Id.* at 541. He has labeled the ILC's work on the international liability issue an "awkward" situation because it indicates "prima facie . . . the existence in general international law of strict state liability." *Id.* at 551. *See also* Handl II, *supra* note 45, at 50-51.

221. *Fourth Report*, *supra* note 8, at ¶ 9.

222. *Id.* Although Special Rapporteur Barboza goes on to state that he believes that the Commission would not "unanimously accept" the idea that there is such a prohibition, *id.* at ¶ 10, he tips his hand by also stating that:

> Continuous pollution functions by accumulation. Pollutants which, in small quantities and for a limited period of time, would not cause appreciable transboundary injury, accumulate after a certain period of uninterrupted flow and cause such injury. An activity resulting in substantial transboundary injury cannot be allowed to continue *unpunished* and without the establishment of some form of regulation.

Id. at ¶ 12 (emphasis added). Punishment, of course, implies wrongfulness. Liability for injurious consequences of acts not prohibited by international law would involve compensation and restitution, if possible, to the condition that obtained before the injury. *See also Third Report*, *supra* note 206, at ¶ 60(b).

On the issue of the wrongfulness/strict liability distinction, it might be helpful to consider the views of domestic law experts in this area. Strict liability is generally thought of as liability without fault, but Prosser and Keaton question the traditional nomenclature thusly:

> [I]t may be questioned whether "fault," with its popular connotation of personal guilt and moral blame, and its more or less arbitrary legal meaning, which will vary with the requirements of social conduct imposed by the law, is of any real assistance in dealing with such questions, except perhaps as a descriptive term. It might be quite as easy to say that one who conducts blasting operations which may injure a neighbor is at "fault" in conducting them at all, and is privileged to do so only in so far as he insures that no harm shall result, as to say that he is not at fault, but is liable nevertheless. If he is not "at fault" because the social desirability of the blasting justifies the risk, his conduct is still so far socially questionable that it does not justify immunity. The basis of his liability in either case is the creation of an undue risk of harm to other members of the community. It has been said that there is "conditional fault," meaning that the defendant is not to be regarded as at fault unless or until his

Ambassador Barboza concluded that he did not think "the Commission would unanimously accept" the idea that there is "a prohibition at an operative level against acts which give rise to appreciable injury by means of transboundary pollution."[223]

> conduct causes some harm to others, but he is then at fault, and to be held responsible.
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> Once the legal concept of "fault" is divorced, as it has been, from the personal standard of moral wrongdoing, there is a sense in which liability with or without "fault" must beg its own conclusion. The term requires such extensive definition, that it seems better not to make use of it at all, and to refer instead to strict liability, apart from either wrongful intent or negligence.

PROSSER, *supra* note 214, § 75, at 537-38.

Despite the simple elegance of an approach that refuses to founder on the "rocky outcrop" of strict liability, there have been articulate formulations of why maintaining the distinction between liability for acts that are wrong and liability for acts that are not wrong is desirable:

> Since compensation is of course payable for wrongful acts, it may be wondered whether there is any real difference between a duty to pay compensation for a lawful act and a duty to pay compensation for a wrongful act. It is submitted, however, that the distinction is important for two reasons. First, the amount of compensation payable for a lawful act is probably less than the amount of compensation payable for a wrongful act. . . .
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> The second point is that a certain stigma attaches to the commission of an unlawful act. States may therefore be reluctant to pay compensation for wrongful acts because they are unwilling to admit they have done anything wrong. They may be more willing to pay compensation for lawful acts, because such payments do not imply a confession of wrong doing. A rule requiring payment of compensation for lawful acts "should make easier a just, effective and amicable settlement of any liability that may arise."

Akehurst, *supra* note 167, at 14-15.

> Although there is some logic to [the] argument, the prospect of disregarding the distinction between wrongful and nonwrongful acts under international law is troublesome. First, it would diminish the stigma attaching to States that engage in internationally wrongful activity. . . .
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> Second, a state cannot normally avoid the prohibition against engaging in internationally wrongful acts by making monetary reparations . . . whereas such reparations may fulfill a state's obligations for nonwrongful acts. . . .

Magraw I, *supra* note 5, at 318.

The unwillingness of States to admit they have done anything wrong is illustrated best in the examples of *ex gratia* payments examined above in notes 180-86 and accompanying text, *supra*. It also seems plausible that States, especially developing States with an appetite for more industry and technology as well as States of all types concerned about preservation of their sovereign prerogatives, might be more willing to submit to a regime that, rather than limiting their internal activities and giving other sovereigns the ability to require such limitations, requires them, upon occurrence of a certain event, and only under those circumstances, to make reparations or pay compensation on a no-fault, even vaguely *ex gratia*-type basis. *See* discussion in Magraw, *The International Law Commission's Study of International Liability for Non-Prohibited Acts as it Relates to Developing States*, 61 WASH. L. REV. 1041, 1053 (1986) [hereinafter Magraw II].

223. *Id.* at ¶ 10. Special Rapporteur McCaffrey, too, has reached the same conclusion: "it is doubtful that pollution, *per se*, of an international watercourse can be said to be proscribed by contemporary international law." McCaffrey *Fourth Report*, *supra* note 52, at ¶ 89 (Comment (4)). *But see* Sands, *supra* note 109, at 35, which discusses the movement, as exemplified by the Declaration of the Hague [*see* notes 109-112 and accompanying text,

Special Rapporteur Barboza thus skirted issues that special Rapporteur Quentin-Baxter had skirted as well:[224] whether all transboundary pollution, by definition, is wrong, and whether consideration of that type of injury within this topic is therefore more appropriately within the scope of the State Responsibility topic of the Commission.[225] The World Commission's Brundtland Report[226] supports the wrongfulness approach. It specifically states, in Article 21, that:

> 1. A State is responsible under international law for a breach of an international obligation relating to the use of a natural resources or the prevention or abatement of an environmental interference.

Reparation and/or compensation follow such an establishment of responsibility. Article 21 continues thusly:

> 2. In particular, it [the responsible State] shall: a. cease the internationally wrongful act; b. as far as possible re-establish the situation which would have existed if the internationally wrongful act had not taken place; c. provide compensation for the harm which results from the internationally wrongful act; d. where appropriate, give satisfaction for the internationally wrongful act.[227]

Entangled in this are various legal and policy concerns, which, if not considered and settled carefully, could do great harm to the establishment of standards for the regulation and prevention of such polluting activities and the compensation for harms they might cause. Considerations of sovereignty, social benefit, third world versus first world and complex technical issues are all in this mix.

Special Rapporteur Quentin-Baxter was concerned about strict liability being perceived as impinging upon state sovereignty by virtue of imposing a sort of state responsibility.[228] And there are those who interpret

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supra], toward recognition of "environmental degradation as a human rights issue affecting 'the right to live in dignity in a viable global environment.' [The Declaration] implicitly accepts the legal right of individuals to protection of the international enviroment."

224. Special Rapporteur Barboza, in his Fifth Report, links this discussion from his Fourth Report to his differention of liability for activities from liability for isolated acts, which, he claims, is tantamount to the "dreaded" concept of strict liability. *See* discussion of this distinction at note 267, *infra* and in his *Fifth Report*, *supra* note 14, at ¶¶ 4-15.

225. Among the most vociferous of those who object to special consideration of the liability that can be incurred as the result of lawful acts is Professor Brownlie:

> The Commission's decision to consider state responsibility and international liability separately, despite the latter topic's derivation from the former, has not met with universal approval. One commentator, Ian Brownlie, has objected to considering international liability at all on grounds that it is "fundamentally misconceived" in a manner that "may induce a general confusion in respect of the principle of state responsibility."

Magraw I, *supra* note 5, at 316, quoting BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (Part 1) 50 (1983).

226. Brundtland Report, *supra* note 59, at 32.

227. *Id.*

228. *See* note 196 and accompanying text, *supra*.

the *Trail Smelter* decision and the *sic utere* principle as focused on the act of polluting, rather than on the injury caused by pollution sufficient to cause harm transnationally. While environmentalists in particular might wish to classify all pollutants and set standards to regulate their discharge,[229] working all the time toward the goal of prohibiting *all* pollution, with the violation of those standards amounting to an international wrong; the better approach for the Commission is one that works to establish residual rules to apply in situations for which no such specific rules apply.[230] Moreover, aside from the technical problems involved in establishing such standards, this also would simply remove considerations of transboundary pollution from this topic. Admittedly, establishment of specific environmental standards to insure that pollution problems are avoided is the ideal, but that is not a solution that can be achieved soon or easily, or one that States will accept willingly. The best approach the ILC can take is to work diligently on developing interim rules that can provide some generally accepted international principles that will apply until the ideal can be reached.

In the past Ambassador Barboza gave at least lip service to this approach. He echoed the sentiments of Special Rapporteur Quentin-Baxter stating that the objective of his work was to "meet the fairly modest objectives of the draft, namely, to encourage States to work out agreements regulating activit[ies involving risk], and, in the interim, to establish certain basic general and minimally exigent duties."[231] But he is most recently on record as being uncomfortable with including in the scope of the topic the one type of risk-producing activity, transboundary pollution,

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229. This is the approach of environmental statutes and regulations in the United States. *See, e.g.*: the Clean Air Act, 42 U.S.C. §§ 7401-7626, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-91i, and the Toxic Substances Control Act, 15 U.S.C. §§ 2601-71, which regulate air quality; the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. §§ 1251-1387, and the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26, which regulate water quality; and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-91i, the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-31, and the Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C. §§ 9602-75("CERCLA" or "Superfund"), which regulate land disposal and clean-up of hazardous waste. Note, too, that CERCLA imposes a stringent strict liability regime. *See* Gaines, *supra* note 216, at 330-33. For European examples, *see* Protocol to the 1979 Convention on Long-Range Transboudnary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides or Their Transbroundary Fluxes, October 31, 1988 and Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulpher Emissions or Their Transboundary Fluxes by at least 30 Percent, July 1, 1985.

230. Special Rapporteur McCaffrey has demonstrated that outright bans of pollution were included in treaties of the nineteenth and very early twentieth centuries, but were replaced by treaty provisions designed to set standards, *e.g.*, to insure that the quality of the water would not be harmed. *See* McCaffrey Fourth Report, *supra* note 52, at ¶¶ 39-40. Some more modern agreements do set quality standards to be met or maintained, sometimes including annexes with 'black' lists of prohibited substances and 'grey' lists of substances to be regulated, while others establish joint commissions to deal with pollution issues. *Id.* at ¶¶ 43-48.

231. *Fourth Report*, *supra* note 8, at ¶ 4.

that is least likely to be the subject of a general international agreement because it lacks the hazardous crisis immediacy of many of the other activities that have been the subject of international agreements.[232] He had earlier, when he embraced strict liability, acknowledged this problem. In his view, perhaps it is a theory that can only properly be applied to dangers that are not preventable — so that "garden variety" transboundary pollution issues, which are really the only significant ones not yet subjected to a conventional regime, should not be governed by a strict-liability-for-harm-from-legal-activities standard. Implicit in this are the assumptions that (1) there should be no pollution; (2) that all pollution that affects another sovereign involves an international wrong; and (3) that this area should be excluded from the Commission's work on this topic, with perhaps the establishment of international standards, which, if met, would create a presumption of no wrongfulness.[233] But, despite the trouble Ambassador Barboza seems to have encountered on the issue of strict liability, even the General Assembly has recognized and endorsed the idea that environmental harms must be corrected or compensated for by those who cause them. There is no insistence on a finding of wrongfulness. Indeed, the General Assembly seems to endorse a prevention regime like that of Special Rapporteur Quentin-Baxter as the other half of a proper international environmental law regime: "[e]nvironmental degradation can be controlled and reversed only by ensuring that the parties causing the damage will be accountable for their action, and that they will participate, on the basis of full access to available knowledge, in improving environmental conditions."[234]

But it is precisely transboundary pollution, and issues like it, that States will not acknowledge are wrongful *per se* and that do not (unless and until they reach crisis proportions, like the U.S.-Canada acid rain dispute) attract the attention, mobilize the concern and engender the fears of impending doom that experience demonstrates are necessary for States to consider adopting conventional regimes.[235] That is precisely why

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232. Indeed, when he defined "activities involving risk," Ambassador Barboza set out a laundry list of activities most of which are already covered by international agreements. He referred to activities

> entailing the use of substances which are intrinsically dangerous, or potentially dangerous because of the place, environment or way in which they are used. Intrinsically dangerous substances would include, for example, explosives, radioactive, toxic or flammable materials, or materials which cause damage to the human organism or the environment as a result of contact or proximity. . . . One example of [substances that may be dangerous because they are used in large quantities] is crude oil when it is being transported. . . .

Fourth Report, *supra* note 8, at ¶ 22.

233. *See First Report*, *supra*, note 6, at ¶¶ 30-33.

234. *UNEP Report*, supra note 31, at ¶ 3(i).

235. In other words, it is only in the areas where there is no law already that it is difficult for the Commission to discern what the law is or should be:

> The problem arises, of course, only in those situations in which the conduct is not readily identifiable as violative of an international obligation, or in other

residual rules are necessary. Special Rapporteur McCaffrey, like Special Rapporteur Quentin-Baxter, has stated that he views his task for the Watercourses topic as one of drafting articles that "set forth residual rules,"[236] *i.e.*, to provide a general legal regime for situations in which special agreements do not apply and in which special joint commissions or other regulatory agencies are not in place. He specifically states that the standard setting "list" approach[237] is not "appropriate in a framework instrument of a general nature" such as the draft articles on the Watercourses and the International Liability topics.[238] If transboundary pollution and issues like it are not dealt with by the Commission, and if the concerted effort to codify or, if necessary, develop, general rules that govern such situations is abandoned, it will surely result in no international mechanism whatsoever. Victims of the polluting activities of foreign sovereigns or other foreign entities will thus be allowed to go uncompensated.

In his Fifth Report, Special Rapporteur Barboza acknowledges the persistence of difficulty with the wrongfulness issue. He predicts that the current developments, divided as they are, point toward emergence of, in effect, "two conventions, except that the two régimes (one of responsibility for wrongfulness and the other of causal liability) would coexist in the same instrument."[239] According to Ambassador Barboza, "[t]he result would be that, if injury occurred as a result of a breach of obligation of prevention, responsibility for wrongfulness, with all that this involves, would apply, while if those were fulfilled, causal liability, also with its attendant laws, would apply."[240] He acknowledges the logical inconsistency of the position he seemingly advocates, with his characteristic disregard for the established parameters or definitions of his topic and with his typical reliance on the new distinctions he has introduced to those parameters and definitions:

> It was pointed out that there was an inconsistency here with our mandate of dealing with liability for acts "not prohibited". Aside from the indifference shown by members to this apparent contradition, it can be argued that this reasoning is applicable to a topic which deals with "acts", not "activities": our mandate involves dealing with the consequences of certain wrongful acts which are inextricably linked to an activity which is not prohibited. The activity would continue to be

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words, does not contravene a specific conduct-related norm of international law. Where, for example, States fail to comply with specific international pollutant emission or discharge standards, there can be no doubt about State responsibility.

Handl II, *supra* note 45, at 57.

236. McCaffrey *Fourth Report*, *supra* note 52, at ¶ 27 (Comment (7)).

237. *See* note 230 and accompanying text, *supra*.

238. McCaffrey *Fourth Report*, *supra* note 50, at ¶ 89 (Comment (11)).

239. *Fifth Report*, *supra* note 14, at ¶ 48. *See generally* discussion at ¶¶ 40-54.

240. *Id.* at ¶ 48.

allowed and only the injurious "act" would have to cease.[241]

Finally, and astonishingly, he recommends as the best solution a combination of a "soft-law" approach to the obligation of prevention and imposition of a strict liability regime for reparation of harms actually caused, the precise regime he has labelled "dreaded" and worked assiduously to prevent being subjected to reasoned scrutiny and debate by the international community:

> Ironically, the least harsh solution for the State of origin would be the existence of a single régime: that of causal or strict liability. Such a régime would function as follows: prevention would not be required as a separate obligation but would simply arise from the deterrent effect of reparation under the régime of strict liability. [The prevention article] would simply be an appendix to the obligations to co-operate and would be without consequences in the event of a breach (except that, if injury ocurred, compliance with obligations of prevention would entitle the State of origin to pay reduced compensation). It would also offer the following advantages: (a) State conduct would not be qualified as wrongful; (b) an easy mechanism for assigning obligations would be established; (c) reparation would be required which sought only to restore the balance of interests, instead of being guided by the principle of total restitution; and (d) lastly, the act would not have to cease, although its effects would be the subject of reparation, and this could sometimes produce a more flexible solution.[242]

It seems that Special Rapporteur Barboza is perfectly capable of appreciating the "advantages" and "flexibility" of a strict liability approach even though he seems more than reluctant to open this approach to debate.

B. *The Prevention Issue*

With his Fifth Report, Ambassador Barboza, by modifying and expanding his draft articles on "Co-operation," "Prevention" and "Reparation,"[243] also seems to be moving back toward a Quentin-Baxter-type position on prevention and a recognition of the need for residual rules. Indeed, he states that "[i]n the absence of a specific régime for a specific activity, a general régime would be required which would be that contained in our articles, which establishes obligations to inform, notify, negotiate a régime and negotiate with a view to possible reparation, according to certain criteria, for the injury caused."[244]

The treatment of the prevention issue was one of the great failures of the draft articles presented in Ambassador Barboza's Fourth Report. Although he seemed to claim there that his risk-based liability would effec-

241. *Id.* at ¶ 49.
242. *Id.* at ¶ 50.
243. *Fifth Report*, *supra* note 14, at ¶ 16 (Articles 7, 8 and 9).
244. *Id.* at ¶ 15.

tuate prevention as well as reparation/compensation, the Fourth Report was not at all clear on that point. Indeed, Special Rapporteur Barboza admitted that he had no fundamental conceptual framework for prevention: "[i]n order to include prevention in the topic, as repeatedly called for in the Sixth Committee and the Commission, it would be useful to establish an underlying principle."[245]

Promoting prevention has, since the beginning of work on this topic, been one of the primary goals. Indeed, all efforts to codify and/or develop the law in this area have revolved around the twin poles of prevention and reparation/compensation. The Secretariat reviewed numerous issues in connection with prevention, noting that both the procedural and substantive aspects of prevention have been considered and provided for in both treaties and state practice.[246] Special Rapporteur Quentin-Baxter consistently recognized the importance of prevention, stating that it was his intention to emphasize prevention as well as reparation: "[t]he Special Rapporteur's second major concern was to ensure that the topic would give pride of place to the duty, wherever possible, to avoid causing injuries, rather than to the substituted duty of providing reparation for injury caused."[247]

Because Special Rapporteur Quentin-Baxter considered prevention to be one of the twin poles of his topic, he developed a "soft law" continuum of obligations — to prevent, to inform, to negotiate, and to repair — the operation of which would not require a finding of liability or responsibility based on wrongfulness.[248] The elements of the obligation-of-States regime constructed by Special Rapporteur Quentin-Baxter appear in Sections 2, 3, 4 and 5 of his Schematic Outline, which first appeared in his

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245. *Fourth Report*, *supra* note 8, at § 103. His Fourth Report draft article on prevention provided that "[s]ource States shall take all reasonable preventive measures to prevent or minimize injury that may result from an activity which presumably involves risk and for which no regime has been established." *Id.* at § 17. Aside from the redundancy, the use of "presumably" seemed inappropriate for an instrument that proposed to impose international obligations. It also seemed inconsistent with the "appreciable risk" standard established in his draft Article 1. *Id.* But Special Rapporteur Barboza seemed to intend that that, too, be controlled by his risk-based analysis.

246. *Secretariat Study*, *supra* note 214, at ¶ 253.

247. Quentin-Baxter *Third Report*, *supra* note 5, at § 9. *See also* Quentin-Baxter *Fourth Report*, *supra* note 50, at § 50 ("majority opinion in the Sixth Committee has each year given a strong endorsement to the proposal that prevention and reparation should both be treated in the context of this topic"); and Quentin-Baxter *Fifth Report*, *supra* note 4, at § 46 ("there is enormous strength in the theme of voluntarism. The compulsion to regulate dangers is provided by facts, not by law").

248. Professor Magraw refers to this as a "compound 'primary' obligation," Magraw I, *supra* note 5, at 311, "based in large part on the concepts of good faith, cooperation, and *bon voisinage* between the 'acting state' (also referred to as the 'source state') and the 'affected state' (*i.e.*, the state that is being or may be harmed). . . ." Magraw II, *supra* note 222, at 1043. Special Rapporteur Quentin-Baxter stated in his Third Report that "[p]erhaps the most important policy aim of the present topic is to promote agreements between States in order to reconcile, rather than inhibit, activities which are predominantly beneficial, despite some nasty side effects." Quentin-Baxter *Third Report*, *supra* note 5, at ¶ 39.

Third Report. They represent his attempt to work out the relationship between prevention and reparation that he considered at the heart of liability for acts not prohibited by international law. In his view "[o]ne great advantage of these proposals is that they place side by side, and on the same level, elements of prevention and of reparation for future loss or injury."[249] It is only when events move off this continuum, with a failure to make reparation, that state responsibility for a wrongful act comes into play, yet, as Special Rapporteur Quentin-Baxter put it:

> long before that point is reached, the acting State — if the risk of loss or injury was forseeable — will have had every encouragement to make proper provision, in consultation and negotiation with States likely to be affected, to minimize the risks and to arrange suitable coverage for any risks that are regarded as unavoidable and unacceptable.[250]

If the consultations and negotiations required fail to lead to "an agreed regime" for loss or injury, the "record of what transpired" during the process of consultation and negotiation "will provide the best evidence" of the affected State's right to reparation/compensation.[251] Moreover, in such a situation, "any failure of co-operation at an earlier stage may justify an inference in favour of an opposite party."[252]

Special Rapporteur Quentin-Baxter specified that the obligations of informing and negotiating contained in Section 2 and 3 did not, if violated, "give rise to any right of action."[253] Special Rapporteur Quentin-

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249. Quentin-Baxter *Third Report*, *supra* note 5, at ¶ 21. The Special Rapporteur stated that it was his view that "[p]rinciples 21 and 22 of the Stockholm Declaration exactly represent the relationship between the goals of prevention and reparation for which the Commission should strive." *Id.* at ¶ 17.

250. *Id.* at ¶ 18.

251. *Id.* at ¶ 26.

252. *Id.* at ¶ 28. Chernobyl made it clear that the notification and assistance provisions included on Mr. Quentin-Baxter's continuum are crucial. Within months, two new treaties had been drawn up under the aegis of the International Atomic Energy Agency ("IAEA"). The Convention on Early Notification of a Nuclear Accident, Sept. 26, 1986, 25 I.L.M. 1370 (1986), provides that "in the event of any accident involving facilities or activities of a State Party or of persons or legal entities under its jurisdiction or control," *id.*, art. 1, the State Party shall "forthwith notify, directly or through the International Atomic Energy Agency . . . those States which are or may be physically affected." *Id.*, art. II. The Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Sept. 26, 1986, 25 I.L.M. 1377 (1986), provides that a State Party that "needs assistance in the event of a nuclear accident or radiological emergency, whether or not such accident or emergency originates within its territory, jurisdiction or control . . . may call for such assistance from any other State party. . . ." *Id.* at 1378.

253. Quentin-Baxter *Third Report*, *supra* note 5, at ¶ 51; Quentin-Baxter *Fourth Report*, *supra* note 50, at Annex. On the Watercourses topic, although Special Rapporteur McCaffrey skates closer to a hard law obligation in the area of prevention, he, too, avoids establishing an absolute rule: "While there is authority supporting. . . . an obligation not to cause environmental harm, the Special Rapporteur believes that there is particular need for the progressive development of international law in this area." McCaffrey *Fourth Report*, *supra* note 52, at ¶ 89 (Comment (19)).

Baxter stated that he believed his approach "reduces the nightmare that a State may be absolutely liable for all physical transboundary loss or injury generated within its territory or under its control to the not so impossible dream that State's are never without the shadow of an obligation."[254] He emphasized this again later in the same Report:

> The strength of the proposed articles lies, first, in their affirmation that a source State is never without a legal responsibility in relation to things done, within its territory or under its control, which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas beyond the limits of that State's jurisdiction. Secondly, subject to any rules of prohibition of customary law — which lie outside the scope of the present articles — the normal way for the source State to discharge its responsibility is by reaching agreement with affected States upon measures to prevent, or minimize and repair, the actual or prospective adverse transboundary effects. Failing the possibility of such agreement, the source State remains accountable for the adequacy of its own efforts to take and implement the measures which pay due regard to the interests of other States. Thirdly, these rules are supported by the whole range of treaty and claims practice examined in the Secretariat's extremely valuable analytical study. . . . Finally, against the background of rules and precepts already mentioned, there is enormous strength in the theme of voluntarism. The compulsion to regulate is provided by facts, not by law. If law seeks to assert a compulsion of its own divorced from fact, the impetus to legal development is lost in empty disputation whether States act freely in their own domain, or are constrained by need for prior agreement.[255]

Well aware of the dangers of such "empty disputation," Special Rapporteur Quentin-Baxter, in his efforts to fulfill what he viewed as his task of "legal development," walked a fine line between the opposing doctrinal views at play here. Although his "soft law" continuum of obligations might seem, by virtue of its softness, unsatisfactory or inappropriate, it

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254. Quentin-Baxter *Fourth Report*, *supra* note 50, at ¶ 43.

255. *Id.* at ¶ 46. Professor Pinto has underscored Special Rapporteur Quentin-Baxter's point that it is the facts of pollution situations and other risks to man and the environment, rather than doctrinal concerns, that are the best motivation for the establishment of law in this area. In his view, the mechanism for the duty to cooperate set forth in the schematic outline, which he believes be the basis for "a multilateral 'umbrella' treaty," seems to

> contemplate two tiers of obligations: some that are contingent but arise directly from the treaty upon the occurrence of specified events, *e.g.*, the perception of one State that an activity within its territory or control may give rise to loss or injury to persons or things within the territory or control of another State; and others that are in the nature of *pacta de contrahendo* and amount to agreements to enter into more specific arrangements as situations of risk emerge. In either case, the proposal moves in the direction of making obligations into questions of fact, thereby maximizing the agreement's efficacy; for one of the most intractable difficulties connected with compelling co-operation must surely be to demonstrate the breach of an obligation by a State under a duty to cooperate where, in fact, it takes no action at all.

Pinto, *supra* note 45, at 38.

has the virtue of satisfying neither the "wrongfulness" nor the "strict liability" camp. Moreover, it has met with generally favorable comment by publicists.[256]

Despite the general approval, however, two aspects of Special Rapporteur Quentin-Baxter's schematic outline met with rather more criticism, and do indeed seem rather troublesome: the "shared expectations" standard for reparation and the "balancing of interests" that is to guide negotiations and reparations.[257] "Shared expectations" and "balancing of interests" are chancy propositions at best in an international system of States representing heterogeneous cultures and values.[258] Recalling that

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256. Professor Magraw speaks favorably of the "hybrid" regime, and states his opinion that "the fact that the 'compound 'primary' obligation' includes three duties (to prevent, inform and negotiate) whose 'breach' does not entail international wrongfulness . . . is not problematic as long as the other legal consequences of their 'breach' are sufficiently clear." Magraw I, *supra* note 5, at 317. He compares the obligations imposed under Special Rapporteur Quentin-Baxter's continuum to "the nonbinding international agreement frequently encountered in international relations, whose utility and acceptability are recognized." *Id.*

Professor McCaffrey calls the "entire set of procedures" set forth by Special Rapporteur Quentin-Baxter "a finely-tuned mechanism which takes into account, insofar as possible, the needs of the two countries concerned, and avoids pointing the finger of blame at either." McCaffrey, *An Update on the Contributions of the International Law Commission to International Environmental Law*, 15 ENVTL. L., 667, 678 (1985). Professor McCaffrey also expresses the opinion that

> there is clearly a need to complement liability rules regarding transboundary environmental problems with the kind of approach envisioned by Professor Quentin-Baxter — namely a system of procedural, dispute-avoidance mechanisms that factor in the needs and values of all concerned parties. This was a large part of Professor Quentin-Baxter's vision and it is to be hoped that it will become a reality within the near future.

Id.

Professor Pinto says that "[i]n essence, the Special Rapporteur suggests that the Commission move in the direction of recognizing a 'duty of co-operation.' " Pinto, *supra* note 45, at 36. He points out that Special Rapporteur Quentin-Baxter's route is one "travelled by some municipal law systems," where it has been determined that

> questions of liability for certain types of transboundary harm are of such complexity that they cannot be satisfactorily resolved by reference merely to such indicators as "fault" or "strict liability," but require examination in the light of a variety of factors which can be adequately revealed and significantly applied only through the positive co-operation of States concerned, procured through a regime built with principles of customary law derived from existing treaties and supported by an "obligation to cooperation."

Id. at 36-37.

Despite his approval of Special Rapporteur Quentin-Baxter's approach, which he terms "correct," Professor Pinto also warns that "it is important not to minimize the difficulties likely to emerge in the establishment and operation of a regime of cooperation, a notion the legal context of which is being examined closely for the first time." *Id.* at 37.

257. Quentin-Baxter *Third Report*, *supra* note 5, at ¶ 53; Quentin-Baxter *Fourth Report*, *supra* note 50, at Annex.

258. Professor Pinto has stated that "[d]isparities in value-systems among the States concerned could well render it extremely difficult to give effect to the Schematic Outline's requirement that "The reparation due to the affected State . . . shall be ascertained in accordance with the *shared expectation* of the States concerned. . . ." Pinto, supra note 45,

not all agree on the existence of customary international law with respect to environmental harm, it seems especially hard to imagine the existence of sufficient accord between developing and developed states for there to be any reason to discuss "shared expectations."[259]

Special Rapporteur Barboza, who, in his Preliminary Report, stated that the Commission and the General Assembly had reacted favorably to his predecessor's schematic outline,[260] initially accepted the idea that compensation/reparation for injury, prevention and the procedures outlined in the schematic outline were all to be included within the scope of the topic.[261] But by the next year he was questioning the appropriateness of having a violation of the obligation to inform not give rise to a cause of

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at 42.

Prosser and Keaton, writing in a domestic law context about strict liability norms were also sensitive to the cultural relevancies that make agreement on "shared expectations" difficult, if not impossible to achieve:

> The place where all this occurs, the customs of the community, and the natural fitness or adaptation of the premises for the purpose are all highly important in determining whether the rule [*i.e.*, the strict liability rule of *Rylands v. Fletcher*] applies. In Burma an elephant is not a non-natural creature, but a domestic animal, no more a subject of strict liability than a horse; but the same elephant, transported to England in a circus, becomes an abnormal danger to that community.

PROSSER, *supra* note 214 at § 78.

Professor Magraw, while criticizing strict liability for what he perceives to be its inflexibility and lack of sensitivity to varying conditions, nevertheless, when comparing it to the regime of the schematic outline, found that it has several merits:

> [S]trict liability is relatively straightforward to apply and avoids the need to try to balance such numerous and amorphous interests as those found in the schematic outline — a process whose uncertainty is increased by the need to consider the undefined "shared expectations" of the states involved. One response is that it may be useful to know which standard is to applied, regardless of how marshy that standard is. But that argument does not eliminate the defects of balancing tests — *i.e.*, they allow easy manipulation by decision makers and do not lead to predictability of outcome. The content of the balance-of-interests test — *i.e.*, the criteria to be considered and their order of priority, if any — will determine how workable the test is. That content is expected to be further developed (and, one hopes to become more certain) as the Commission continues its study.

Magraw I, *supra* note 5, at 327.

259. Professor Magraw has noted that shared expectations "may not exist between a developed state and a developing state in the same sense, or to the same degree, that such expectations exist between two developed states (or, possibly, two developing states)." Magraw II, *supra* note 222, at 1058. He also reports that he was not able, in any of Special Rapporteur Quentin-Baxter's Reports, to find any instance "of shared expectations or a lack thereof, between developed and developing states." *Id.* at note 109.

Professor Rest attributes the lack of effective international law on liability for environmental damage "to the inhomogeneity of national environmental policies that often lack the insight that they are tied together by particular environmental media, and fail to exercise solidarity." Rest, *supra* note 152, at 335.

260. *Preliminary Report*, *supra* note 3, at ¶ 8.

261. *Id.* at ¶ 9.

action,[262] and referring to the "soft-law" obligation to negotiate not as an "incomplete obligation" but rather as "one whose violation is not always easy to determine."[263] He proposed deleting Special Rapporteur Quentin-Baxter's specific pronouncements that violation of the duty to inform and negotiate do not "give rise to any right of action."[264] He stated that, in his opinion, "the obligations to inform and to negotiate are sufficiently well-established in international law, and any breach of these obligations thus gives rise to wrongfulness,"[265] but declared "that does not mean they cannot be included in our draft."[266] He finessed this apparent contradiction by referring to an earlier discussion of the scope of the topic in which he took the position that the French title of the topic, which refers to "activities," is more accurate than the English version, which speaks of "acts."[267] In Special Rapporteur Barboza's view

> [a]ctivities are shaped by complex and varied components which are so interrelated that they are almost indistinguishable from one another. Around a given activity there are countless individual acts which are intimately related to the activity. Some of these acts may well be wrongful, but that does not make the activity itself wrongful.[268]

In his Fourth Report, Special Rapporteur Barboza repeated his belief that these obligations are "autonomous precisely because they appear to have an established place in general international law."[269] He then proceeded to back away from this, and adopted virtually the same approach as Special Rapporteur Quentin-Baxter, by stating that the " 'pure' obligation of prevention . . . appears to be not autonomous, but directly linked with the injury."[270] He also acknowledged that allowing for a finding of wrongfulness based upon a violation of the obligations to inform and negotiate, raises fears about (1) "superimposing a regime of wrongfulness on a regime of causal responsibility," (2) attaching too much importance to

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262. *First Report*, *supra* note 6, at ¶ 39.

263. *Id.* at ¶ 40.

264. *Id.* at ¶ 41(c).

265. *Id.* at ¶ 67.

266. *Id.*

267. *Id.* at ¶ 68. Ambassador Barboza returns to this distinction in his Fifth Report, where he notes that use of "the concept of 'activity' as opposed to 'act' " . . . is important for limiting the scope of the draft because, in one of its meanings, liability refers to the consequences of certain conducts. According to this meaning

> "liability" refers only to acts, to which legal consequences can be attributed, and not to activities, because causality originates in specific acts, not activities. . . . In order for the régime of our articles to apply to certain acts, these acts must be inseperably linked to an activity which . . . has to involve risk or have harmful effects. . . . Injury caused by isolated acts is not covered . . . and so we avoid the dreaded absolute liability.

Fifth Report, *supra* note 14, at ¶¶ 12-14.

268. *Id.*

269. *Fourth Report*, *supra* note 8, at ¶ 107.

270. *Id.* at ¶ 108.

prevention rather than reparation, and (3) placing "unacceptable limits on freedom of initiative in the territory of the source State," to the extent that "the territorial sovereignty of the affected State would thus take precedence over that of the source State, with the establishment of a virtual veto against the conduct of useful activities of its territory."[271] He acknowledged that his draft, as it stood at that point, contained no safeguards against these possibilities. In his Fourth Report, he merely stated that the link of liability for violation of the obligation of prevention with occurrence of injury "should be expressed in a later article."[272]

With his Fifth Report, however, Ambassador Barboza again moves back toward the Quentin-Baxter position. As we have seen, he states that his approach is one of a continuum of residual obligations.[273] He has significantly expanded and refined the article on co-operation,[274] and has strengthened the prevention article.[275] Prevention seems to be in the process of being restored to its rightful place, even though that proper place might be hard to locate precisely under the absolute but poorly articu-

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271. *Id.* at ¶ 110. The problems with this approach are similar to those Professor Handl saw with a risk-based analysis in general: that they "open the door to injunctive relief"—for the "risk of future accidents or for the failure to inform or negotiate." Handl II, *supra* note 45, at 65.

272. *Fourth Report*, *supra* note 8, at ¶ 111.

273. *Fifth Report*, *supra* note 14, at ¶ 15.

274. *Compare*:

> States shall co-operate in good faith in preventing or minimizing the risk of transboundary injury or, if injury has occurred, in minimizing its effects both in affected States and in source States.
>
> In accordance with the above provision, the duty to co-operate applies to source States in relation to affected States, and vice versa.

Fourth Report, *supra* note 8, at ¶ 17, with:

> States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities referred to in article 1 carried out in their territory or in other places under their jurisdiction or control from causing transboundary injury. If such injury occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of injury caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places under its jurisdiction or control.

Fifth Report, *supra* note 14, at ¶ 16.

275. He has removed the limitation imposed by use of the word "presumably" in the prevention article proposed in his Fourth Report ("Source States shall take all reasonable preventive measures to prevent or minimize injury that may result from an activity which presumably involves risk and for which no regime has been established"), *Fourth Report*, *supra* note 8, at ¶ 17, and substituted the phrase "appropriate measures" for the unquantifiable "reasonable measures," and altered the language so as to indicate that tolerating risk of transboundary harm can be understood not be a readily acceptable alternative:

> States of origin shall take appropriate measures to prevent, or, where necessary, minimize the risk of transboundary injury. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

Fifth Report, *supra* note 14, at ¶ 16.

lated standards Ambassador Barboza set forth in his Fourth Report.

C. *The "Appreciable Risk" Issue*

Related to and intertwined with his modifications on the wrongfulness and prevention issues, Ambassador Barboza has also, with his Fifth Report, significantly modified his definition of the "appreciable risk" that must be present to bring activities within the scope of the draft articles.[276]

From the beginning of the Commission's work on this topic, the focus has been on injury or harm as the predicate for liability. In his Fourth Report Special Rapporteur Barboza stated that "[o]bviously, the basis of the obligation to make reparation in the matter before us is injury,"[277] but did not explore how that obligation might be effected by the change he had proposed for the scope of the topic, which, under the draft articles he was then proposing, dealt with activities that "create an appreciable risk . . . of transboundary injury" rather than activities that "give rise or may give rise to an adverse "physical consequence."[278]

The "appreciable risk" standard Special Rapporteur Barboza's proposed with draft article 1 of his Fourth Report could not be quantified.[279] His standard seemed to be risk "appreciable to any normal person." The complexity of existing technology and the constant advances in the ability of technology to define, detect and measure "risk" as well as the technologies for activities that will certainly, likely or possibly create new risks, are in constant flux.[280] How Special Rapporteur Barboza reached the con-

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276. *See Fourth Report*, *supra* note 8, at ¶ 17, art. 1.

277. *Id.* at ¶¶ 41, 44.

278. Special Rapporteur Barboza insisted on adding "adverse" to describe the consequences of the lawful acts in question in this topic. *See Third Report*, supra note 206, at ¶¶ 42-43. This seems to be as straightforward an improvement as the earlier modification that made it clear that only "physical" consequences were intended to be covered. *See* Quentin-Baxter *Fourth Report*, *supra* note 50, at ¶ 63. *See also* McCaffrey, *The Work of the International Law Commission Relating to the Environment*, 11 ECOLOGY L.Q. 189, 206-09 (1983).

279. *Fourth Report*, *supra* note 8, at ¶ 84.

280. The Association of the Bar of the City of New York has published a study detailing what is involved in "risk assessment," which it referred to as "the emerging core of the law of chemical regulation." According to the Association's Committee on Environmental Law:

> During the past two decades, toxicological research has begun to reveal the hidden costs of chemical dispersion in the general and workplace environments. In the difficult process of adapting to this new information, producers and regulators must identify and reduce the latent health and environmental costs of chemicals in the economy.
>
> Risk assessment is an interdisciplinary method of calculating the health risks of a particular activity, product, or waste dispersion. It draws on the expertise of engineers, meteorologists, hydrogeologists, demographers, and health scientists — such as toxicologists, epidemiologists, and medical doctors — to provide public policy makers with a means of estimating the risks of exposure to chemicals.

clusion that a panel of international law experts who meet once a year for only a few weeks could create a standard for such a complex issue with a simple formula of virtually undefined words is a mystery. An even greater mystery was how Special Rapporteur Barboza expected sovereign States with varying degrees of sophistication and expertise in the many and varied technological areas of the known (much less the unknown) potential sources of transboundary harm to agree to bind themselves internationally and accept international imposition of liability for such activities.

According to the explanation Special Rapporteur Barboza offered in his Fourth Report, "[a]ppreciable risk" is "risk which may be identified through a simple examination of the activity and the substances involved."[281] Ambassador Barboza alleged that this standard "does not exclude risks which are not easily seen but which, for one reason or another, are already known to exist; nor does it exclude from future consideration risks which are hidden and become evident at a later stage,"[282] but how

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> A risk estimate is essentially an equation. It incorporates a series of secondary estimates: the amount and type of pollutant that will be dispersed by the activity under study, the numbers of people who will be exposed, the length and dose of exposure, the chemical characteristics of the substance, any known human health effects of exposure to the substance, and the results of laboratory experiments in which animals have been subjected to high levels of exposure. The results of studies in each of these dimensions are combined into a composite risk estimate, a final range of numbers, or single number with an uncertainty factor.
>
> Although its use is not mandated or authorized by any particular law, risk assessment is becoming a central tool of public and private planners. Some courts have also allowed the introduction of risk assessments as evidence. Risk assessment is unfolding as a dominant approach to regulation of chemicals, perhaps because it seems to provide the law with some underlying consistency. In fact, the course of the evolution of the methodology has itself become a major controversy and an arena for debate over the future of chemical regulation.

Committee on Environmental Law, *Toxic Chemicals and Health Risk Assessments in Regulation and Litigation*, 44 THE RECORD OF THE ASSOCIATION OF THE BAR OF CITY OF NEW YORK, No. 4, 391, 391-92 (1989). For an environmentalist's point of view on the quantification of risk, *see* Mathews, *Is There More Risk in the World?* Washington Post, March 29, 1989 at A25. Another 'lay' discussion of risk assessment is contained in *Assessing Risk: A Risky Business*, Washington Post, Nov. 26, 1989, at C3. Balanced against these complex analyses is Special Rapporteur Barboza's statement that: "[t]he risk must be appreciable according to the normal criteria or standards for the use of the substances which are the object or the product of the activity, or the result of the situations." *Fourth Report*, *supra* note 8, at ¶ 26.

For additional assessments of the problems of risk management, *see, e.g.*, Starr, *Risk Management is the Goal*, RISK ASSESSMENT ABSTRACTS, 41 (1984); Wilson & Crouch, *Risk Assessment & Comparisons: An Introduction*, 236 SCIENCE 267 (1987); and Kasperson & Kasperson, *Priorities in Profile: Managing Risks in Developing Countries*, RISK ASSESSMENT ABSTRACTS 113 (1988).

281. *Fourth Report*, *supra* note 8, at ¶ 17, Article 2(a).

282. *Fourth Report*, *supra* note 8, at ¶ 24. It is for precisely this sort of defining by "legislative history" rather than competent drafting that Ambassador Barboza has bitterly criticized Special Rapporteur Quentin-Baxter. *See, e.g.*, *Third Report*, *supra* note 206, at ¶

liability that is applicable to, as he stated it later, risks that are "visible on first examination,"[283] could be said to encompass hidden risks was simply not understandable.[284] Moreover, Special Rapportuer Barboza, in another virtually meaningless phrase, announced that "the risk must be general."[285]

Another of Special Rapporteur Barboza's quiet changes in his Fifth Report seems to sweep away many of these problems, and to reintroduce the approach of Special Rapporteur Quentin-Baxter. Now he states that "in activities involving risk, the 'appreciable risk' mentioned must be that of causing 'appreciable injury' if prevention is to be demanded."[286]

41, where he discusses how Mr. Quentin-Baxter dealt with the issue of "adverse" consequences in Commission discussions, putting his views on the record in that fashion rather than including them in his article that defined the scope of the topic.

283. *Fourth Report*, *supra* note 8, at ¶ 30.

284. Ambassador Barboza's emphasis on *risk*, and immediately discernable risk, as the key to liability is apparent yet again when he states that the scope of the topic relates only to "liability for risk" and that "injury is not compensable merely because it has occurred, but because it corresponds to a certain general prediction that it was going to occur, since the activity which eventually caused it creates a risk, is dangerous." *Id.* at ¶ 45. Hidden risks, and those that develop or manifest themselves only after a long period are clearly not susceptible to a "general prediction" that they will occur.

285. *Fourth Report*, *supra* note 8, at ¶ 26. Equally confusing was Special Rapporteur Barboza's discussion, in his Third Report, of activities that do "not call for diagnosis of the risk involved," which would, it seems, involve situations where neither the source State nor the victim "created the general risk." He concluded that the topic would not encompass such activities, because to do so would involve "absolute risk." *Third Report*, *supra* note 206, at ¶ 16. He also stated that if such liability were to be imposed "no new activity would be lawful until such time as it had been monitored by an international agency which would declare that its lowest possible risks had been accepted by any States which might be affected." *Id.* This raised several questions: if this was how he intended the usual analysis for appreciable risk to proceed, how was this to relate to the "immediately discernable" risk standard; how can one ever be sure that all States that may be affected by an activity have been identified; and would a State be presumed to fall without the "appreciable risk" standard if all other States that might be affected by the activity in question accepted the risks involved as the "lowest possible." Special Rapporteur Barboza's articles as proposed in his Fourth Report actually anticipate uncompensated victims. Ambassador Barboza has himself stated that "not all injury is compensable under international law," because there is no "norm of international law" that so requires. *Fourth Report*, *supra* note 8, at ¶¶ 38-40. *See* discussion of wrongfulness vs. strict liability at notes 218-242 and accompanying text, *supra*. Where, in this, was there any consideration of Principle 22 of the Stockholm Declaration, of Special Rapporteur's Quentin-Baxter's principle, in his Schematic Outline, that "an innocent victim should not be left to bear his loss of injury," Quentin-Baxter *Third Report*, *supra* note 5, at ¶ 53 (Schematic Outline, Section 5, ¶ 3), and of "[t]he common thread of all the discourse" and perhaps the customary law on the topic that "in principle the innocent victims of an activity that entails some danger should not be left to bear their loss, even if the actor's conduct is without taint of wrongfulness." Quentin-Baxter *Preliminary Report*, *supra* note 42, at ¶ 28. Even if Ambassador Barboza was correct that these principles do not amount to a "norm" of international law, what was he allowing to happen to the Commission's commitment to developing international law in this area?

286. *Fifth Report*, *supra* note 14 at ¶ 24. Sounding more and more like an advocate of a soft-law continuum, he goes on to state that "[w]hile we cannot be overly strict in dealing with the question of 'appreciable' risk and injury, the limits of which are somewhat blurred,

In the three areas outlined above, Special Rapporteur Barboza's approaches to his work on the International Liability topic, have, in his most recent Report, been somewhat modified from the extreme and unworkable proposals he made earlier. These changes indicate that Special Rapporteur Barboza is, in a practical sense, moving the contours of the topic back closer to where they were with Special Rapporteur Quentin-Baxter's proposals. He is thus also probably, finally, moving the international community somewhat closer to a consensus on this important topic.

CONCLUSION

Strict liability has an ominous sound. It sounds automatic, absolute and final even though it is none of these. The legislatures and judicial bodies around the world that have adopted strict liability standards in various fields have done so as a matter of public policy, and have found it to be a flexible tool, one that provides compensation for injuries suffered and one that serves as a effective incentive for prevention. Despite the fact that States are, in many cases, resistant to the idea of strict liability, and might hesitate to agree to such a standard because they view it as a potential infringement on their sovereignty, it is the standard most likely to serve the purpose of the International Liability topic — creation of residual rules to apply in situations, especially those involving transboundary pollution, where States are not yet able to reach agreement on internationally enforcible standards.

On the issue of prevention, it is important to note that strict liability is only imposed upon the occurrence of injury that public policy has determined must be compensated and/or repaired. It does not attach merely for the creation of the risk of such injury. Reaction to Special Rapporteur Barboza's risk-based proposal as the standard for liability confirmed that such an approach is unworkable. Special Rapporteur Quentin-Baxter's work on prevention, and the continuum of duties and obligations he projected for States, while unconventional and innovative, was workable and would have created a regime to which States would be much more likely to agree. As Special Rapporteur Quentin-Baxter said (in commenting on the reputation of the *Trail Smelter* decision), an unjustified "eclipse . . .

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in principle this adjective must be applied to both concepts. . . . The word 'appreciable' is used to describe both the risk and the injury because it seems to denote an appropriate threshold of tolerance, although one obviously cannot be certain as to its exact limits." *Id.* at ¶¶ 24-25. He acknowledges he is conforming his approach to that of Special Rapporteur McCaffrey (*see* notes 236-38 and accompanying text, *supra*): "The word 'appreciable' is also used to qualify the term 'harm' in the draft on international watercourses and, while uniformity is not obligatory, we believe that the similarities between two topics justify the view that the terms used in both should be harmonized." *Id.* at ¶ 26. In his Fifth Report, he also modified the poorly expressed definitional article on "appreciable risk," elaborating on the simple examination of the activity" that is supposed to be determinative of the existence of appreciable risk. *Compare Fourth Report, supra* note 8, at ¶ 16 with *Fifth Report, supra* note 14, at ¶ 17.

attends the work of some artists of good reputation in the period after their deaths."[287] Special Rapporteur Quentin-Baxter's work needs to be rescued from its unjustified eclipse and reconsidered. Special Rapporteur Barboza seems to have begun this process of necessity, based on the negative reaction to his Fourth Report. He should acknowledge that this is what he has done and afford Special Rapporteur Quentin-Baxter's memory the credit due it by reincorporating even more of his work in the current proposals on this topic.

Special Rapporteur Barboza should also guide the Commission, the Sixth Committee and the international community as a whole in a reasoned consideration of the issue of strict liability for transnational environmental damage. To enable such a debate to take place, he should offer coherent explanations of the parameters and implications of strict liability. He should also encourage development of a workable (which almost certainly means a Quentin-Baxter-type "soft law" regime) framework for prevention of transboundary pollution. The obligation to do so is not just Special Rapporteur Barboza's — it is all of ours, and it is an obligation we owe to the environment itself as well as all those who live off its bounty now and all those who should have that bounty available to them in the future.

287. Quentin-Baxter *Second Report*, *supra* note 85, at ¶ 22.

Creating a Nuclear Free Zone Treaty That Is True to Its Name: The Nuclear Free Zone Concept and a Model Treaty*

ARTHUR M. RIEMAN**

August 6, 1985 was the fortieth anniversary of the bombing of Hiroshima. That date also hailed another milestone in nuclear history. It was then that the thirteen states of the South Pacific Forum[1] became the first nation-group to declare their region a "nuclear free zone"[2] as they concluded the South Pacific Nuclear Free Zone Treaty[3] (Treaty of Rarotonga). In so doing, these island states purported to create a "comprehensive prohibition on all nuclear explosive devices" in their region of the world.[4] Eighteen years earlier, the entire block of Latin America nations made history by creating a more limited "nuclear *weapon* free zone" of their continent with the Treaty for the Prohibition of Nuclear Weapons in Latin America[5] (Treaty of Tlatelolco), prohibiting nuclear weapons

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I would like to express my deep gratitude to the dozens of foreign service officers of several nations, as well as the other defense and nuclear affairs experts, who afforded me the opportunity to question them about an ofttimes very sensitive subject. Most of the ambassadors and other officers of embassies and United Nations missions spoke candidly about their countries' interests in return for a promise of confidentiality. Particular thanks must go to Washington attorney Eldon Greenberg and to Dr. Jiri Pulz, formerly of the United Nations Security Council. I would also like to acknowledge Greenpeace U.S.A. and its Pacific Campaign Director, Sebia Hawkins, for their support.

I dedicate this article to my parents, Arnold and Sylvia Rieman, who gave life to five children with the hope that they would live in a world of peace. May their hopes, and those of all parents, be realized.

1. The South Pacific Forum consists of the nations of Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

2. Fyfe & Beeby, *The South Pacific Nuclear Free Zone Treaty*, 17 VICT. U. WELLINGTON L. REV. 33, 40 (1987).

3. South Pacific Nuclear Free Zone Treaty, August 6, 1985, 24 I.L.M. 1440 [hereinafter "Treaty of Rarotonga"]. The treaty is also known by its initials, SPNFZ.

4. Fyfe & Beeby, *supra* note 2, at 40. *See infra* § II.B.

5. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281 [hereinafter "Treaty of Tlatelolco"].

The treaty contains a provision whereby it comes into force for a signatory upon its ratification if it waives unanimous ratification otherwise called for. Treaty of Tlatelolco, art. 28(2), at 354. All but two ratifiers (Chile and Brazil) have adopted the waiver, *see infra* note 279 and accompanying text. So although Cuba and Guyana have yet to ratify the treaty, *see infra* note 283 and accompanying text, it has entered into force for the remaining countries of Latin America. *See generally infra* notes 279-83 and accompanying text.

though not so-called peaceful nuclear explosions.

I. INTRODUCTION

The intent of this article is to analyze the concept of the nuclear free zone as a vehicle for enhancing the protection from the dangers of nuclear weapons, and radioactive contamination and pollution. Though no part of the world can be totally free from a plague released by a nuclear war, those statesmen who have crafted extant nuclear-free and nuclear-weapon-free zone treaties believe that their efforts provide a bit more distance between the threat and the reality of nuclear war, as well as add a shield for their countries from localized nuclear mishaps. The bench mark for this analysis is the South Pacific Forum's South Pacific Nuclear Free Zone Treaty, or Treaty of Rarotonga, due to its status as the most current example of a nuclear free zone, as well as the new ground it has forged compared to the Treaty of Tlatelolco and other proposed examples. Section II introduces the concept of the nuclear free zone through a brief discussion of the Treaty of Rarotonga as well as a history of the development of nuclear free zones, from the earliest proposals made at the United Nations to the present. The focus in Section III is an examination of the strengths and shortcomings of the Rarotonga model and an exploration of the additional protections future nuclear free zone drafters will have to deal with in order to negotiate a more effective and *truly* nuclear free treaty. Particular attention is given to the Law of the Sea as it may bear on such a regime.

The Appendix consists of this author's Model Nuclear Free Zone Treaty ("Model Treaty"). This document incorporates into a viable framework the issues generated by the shortcomings of extant treaties. The Model Treaty, admittedly, is idealistic. Some may view it as extremist. These views should not detract from the purpose of the Model Treaty: it has been created to contribute to the international dialogue, and possibly serve as a foundation for the negotiators of future nuclear free zone treaties.[6]

Section IV of the article escorts the reader through each article of the Model Treaty, directing attention to its key features and requirements. The article concludes with a comparison of the substantive articles of the Model Treaty with those of the Treaty of Rarotonga and, to a lesser extent, the Treaty of Tlatelolco.

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6. *See* Fry, *The South Pacific Nuclear-Free Zone*, BULL. OF CONCERNED ASIAN SCHOLARS 61 (Apr.- June 1986).

ASEAN member states (Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand) have been among the leaders in the effort to force the large naval powers to accept accommodation of the environmental and sovereign concerns of the smaller coastal states in the negotiations of the Third United Nations Convention on the Law of the Sea. *See infra* notes 20, 156-61, 168, 179, 187, 189 and accompanying text.

II. THE CONCEPT OF THE NUCLEAR FREE ZONE

A. *Early Nuclear Weapon Free Zone Proposals*

The concept of a nuclear free or nuclear weapon free zone has been with us for over thirty years. The first proposal for a nuclear weapon free zone, known as the "Rapacki Plan," came in 1957 in the form of a Polish statement to the United Nations General Assembly calling for the creation of a nuclear weapon free zone in Central Europe.[7] Since then dozens of similar resolutions covering Africa,[8] South Asia,[9] various regions of Europe,[10] the Indian Ocean,[11] the Middle East[12] and Latin America,[13] have been proposed and adopted by the General Assembly.

The primary objectives of the various nuclear weapon free zone proposals, of which the Treaty of Tlatelolco is an example, have been the "desire to secure the complete absence of nuclear weapons from various areas of the globe [and] . . . to spare nations concerned from the threat of nuclear attack or involvement in nuclear war."[14] These objectives theoretically are attainable through several alternative routes. A prohibition on

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7. *Comprehensive Study of the Question of a Nuclear Weapon Free Zone in All Its Aspects* 19, U.N. Doc. A/10027/Add. 1, U.N. Sales No. E.76.I.7 (1976) [hereinafter "*Comprehensive Study*"]. An even earlier proposal by the Soviet Union (in 1956) called for a ban on "the stationing of atomic military formations and the location of atomic and hydrogen weapons of any kind in" Central Europe. *Official Records of the Disarmament Commission, Supplement for January to December 1956*, U.N. Doc. DC/83 Annex 5 (DC/SC.1/41) (1957). In 1959, Ireland first proposed an area-by-area approach to nuclear non-proliferation. *Comprehensive Study*, at 19.

An attempt at a similar study was abandoned in the early 1980's, reportedly due to the failure of consulting countries to agree on the language of a final report.

8. *Comprehensive Study*, *supra* note 7, at 23-25; *A Synthesis of the Arguments Adduced For and Against Each of the Four Proposals For the Creation of Nuclear-Weapon-Free Zones That Have Been Included in the Agenda of the General Assembly (Africa, South Asia, the Middle East and the South Pacific) and For and Against the Proposal For the Establishment of a Zone of Peace in the Indian Ocean, Including a Subject and Country Index* 3, U.N. Doc. A/AC.206/7 (1981) [hereinafter "*Synthesis*"]. The first proposals for an African nuclear weapon free zone were in response to French nuclear testing in the Sahara in the 1960's. *Id.* at 23.

9. *See Comprehensive Study*, *supra* note 7, at 27-28; *Synthesis*, *supra* note 8, at 11; *A Comprehensive Study of the Origin, Development and Present Status of the Various Alternatives Proposed for the Prohibition of the Use of Nuclear Weapons* 19, U.N. Doc A/AC.2061/5 (1981) [hereinafter "*Comprehensive Study 2*"]; *supra* note 32.

The People's Republic of China, though not a member of the United Nations at the time, made the first calls for nuclear weapon free zones in both Asia and the South Pacific in the late 1950's and early 1960's. Peking Review, Aug. 2, 1963.

10. *See Comprehensive Study*, *supra* note 7, at 20-23; *Comprehensive Study 2*, *supra* note 9, at 17; *infra* note 32, *infra* note 104.

11. *See Comprehensive Study*, *supra* note 7, at 27-28; *Synthesis*, *supra* note 8, at 15; *infra* note 32. The proposals for the Indian Ocean area have often been presented as plans for an Indian Ocean "Zone of Peace." *See, e.g.*, *Synthesis*, *supra* note 8, at 15.

12. *Comprehensive Study*, *supra* note 7, at 26-27; *Synthesis*, *supra* note 8, at 7; *Comprehensive Study 2*, *supra* note 9, at 18; *infra* note 32.

13. *Comprehensive Study 2*, *supra* note 9, at 16; *infra* notes 33-37.

14. *Comprehensive Study*, *supra* note 7, at 29.

the possession or control of nuclear weapons by parties to a nuclear weapon free zone treaty relies on the mutual assurance that no treaty Party could launch a nuclear attack against another.[15] Protocols signed by the nuclear powers[16] located outside of the zone of application[17] of a proposed treaty provide that they will not use nuclear weapons against any party to the treaty, nor deploy nuclear weapons on territory within the zone which may be under their *de jure* or *de facto* jurisdiction.[18] However, each nuclear state has placed conditions on these declarations.[19]

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15. In banning the possession of nuclear weapons among all their number, the leaders of the various Latin American states, among other reasons, sought to prevent any one Latin American state from using nuclear weapons as a means to enforce their will among the others. Robinson, *The Treaty of Tlatelolco and the United States: A Latin American Nuclear Free Zone*, 64 AM. J. INT'L L. 282, 282-84 (1970).

16. For purposes herein, "nuclear power" means any nation which has nuclear weapons. Generally, this term refers to those states which acknowledge their nuclear capability, i.e., China, France, Great Britain, the Soviet Union and the United States. Other nations, commonly known as near-nuclear states, are believed to have nuclear weapons or the capability to produce them, but will not publicly acknowledge this even though some have exploded such weapons. Their inclusion in the discussion of nuclear powers is little more than academic. The near-nuclear states include Argentina, Brazil, India, Iran, Iraq, Israel, Libya, Pakistan and South Africa. L. SPECTOR, GOING NUCLEAR (1987). Most, if not all, of the near-nuclear states are not parties to the Non-Proliferation Treaty, *infra* note 47. Schwartz, *Controlling Nuclear Proliferation: Legal Strategies of the United States*, 20 LAW & POL'Y IN INT'L BUS. 1, 15 (1988).

The term "nuclear state" used herein should be distinguished from the term "nuclear-weapon state" as used in the Non-Proliferation Treaty, *infra* note 47, where it means those states having tested nuclear explosive devices prior to January 1, 1967. *Id.* art. IX, para. 3.

17. "Zone of application" means the geographic area comprised by the treaty in question.

18. The parties to both the Treaty of Rarotonga and the Treaty of Tlatelolco recognized that their efforts would have limited effect without the cooperation of the nuclear powers. This limitation was solved by the use of protocols to be signed by the nuclear powers whereby they would agree not to violate terms of the treaty (a so-called "negative declaration"), whether by: transporting or stationing (on territories controlled by the nuclear power within the zone of application of the treaty) nuclear weapons in the applicable zone of application, Treaty of Rarotonga, *supra* note 3, protocol 1, at 1459-60, Treaty of Tlatelolco, *supra* note 5, protocols I, II, at 360, 366; threatening use of nuclear weapons against party states, Treaty of Rarotonga, *supra* note 3, protocol 2, at 1461-62, Treaty of Tlatelolco, *supra* note 5, protocol II, art. 3, at 364; contributing to a party state's violation of the treaty, Treaty of Tlatelolco, *supra* note 5, protocol II, art. 2, at 364; or testing nuclear weapons within the zone of application, Treaty of Rarotonga, *supra* note 3, protocol 3, at 1463.

The United Nations General Assembly has also passed a number of resolutions calling for such negative assurances, including a call for an international convention providing such a guarantee. *Disarmament Resolutions Adopted by the General Assembly*, U.N. Doc. A/AC.206⅓, at 41-48. *See also infra* note 19.

19. For example, most nuclear powers acceded to the Tlatelolco protocols on the basis that their obligations would in no way hinder self-defense. *See* J. GOLDBLAT, AGREEMENTS FOR ARMS CONTROL 336-339 (1982). In the Rarotonga context, the U.S. and Soviet Union hold differing views regarding port visitation rights. Whereas the United States has decried New Zealand's ban on port visitations by nuclear warships and aircraft, *see* Glover, *Is a Nuclear-Free ANZUS Possible?*, 2 CANTA. L. REV. 324 (1986), *see also infra* note 99 and accompanying text, the U.S.S.R. has interpreted the Treaty of Rarotonga to hold that:

Assuming that such "negative assurances" are ironclad, non-nuclear states are not fully protected from nuclear attack. A nuclear power's military base on third party soil which either services nuclear capable ships or aircraft, or which stores, stations or deploys nuclear weapons, makes that base vulnerable to nuclear attack should a conflagration arise between another nuclear power and the one which maintains the base. The third party state itself may not be the actual target of the attack but the distinction is moot once a nuclear strike is made against a base located within its territory.[20] This irony lies at the heart of the present nuclear debate in Europe, and is articulated in the anti-nuclear thoughts of people in Australia,[21] New Zealand,[22] Melanesia and Micronesia,[23] the Philippines,[24] Latin America,[25] the Soviet Union[26] and elsewhere in the Pacific.

> [T]he admission of transit of nuclear weapons or other nuclear explosive devices by any means, as well as of visits by foreign military ships and aircraft within the nuclear free zone would . . . contradict the aims of the treaty and be inconsistent with the nuclear free states of the zone.

Statement of the Soviet Government on the occasion of signing Protocols 2 and 3 to the South Pacific Nuclear Free Zone, Dec. 18, 1986.

The official United States position on negative assurances was articulated in 1978 by President Carter:

> The United States will not use nuclear weapons against a non-nuclear weapons state party to the NPT or any comparable internationally binding commitment not to acquire nuclear explosive devices, except in the case of an attack on the United States, its territories or armed forces, or its allies, by such a state allied to a nuclear weapons state, or associated with a nuclear weapons state in carrying out or sustaining the attack.

United States Arms Control and Disarmament Agency, Arms Control and Disarmament Agreements 87 (1982).

20. The specter of such an event has not gone without concern. During the course of negotiations of the Third United Nations Convention on the Law of the Sea, "Indonesia and Malaysia were particularly worried about the risk of U.S. and Soviet submarines clashing in their waters." C. SANGER, ORDERING THE OCEANS: THE MAKING OF THE LAW OF THE SEA 88 (1987).

For a Philippine professor's study detailing the effects of a nuclear attack on the Subic and Clark bases leased to the United States, *see* Talisayon, *Consequences of a Nuclear Attack on the Military Bases*, 1 FOREIGN REL. J. 90, (Manila) (1986).

See infra notes 220-26.

21. *See infra* notes 54-57 and accompanying text.

22. *See infra* notes 54-57, 99 and accompanying text.

23. *See infra* notes 67, 100 and accompanying text.

24. *See infra* notes 94-97 and accompanying text.

25. *See infra* notes 33-41 and accompanying text.

26. Growing concern among Soviet citizens about radiation leakage and other nuclear dangers led to the recent banning of a nuclear-powered container ship from all major Soviet Pacific ports early in 1989. Local mayors refused to grant permission for a ship, the *Sevmorput*, to berth, and dockworkers said they would refuse to unload or handle the ship. The Soviet newspaper *Soviet Russia* reported that "[a] huge wave of public indignation has been set in motion by the lack of information, by [uncertainty about] the safety of the ship itself, by an invisible shadow of the Chernobyl tragedy and by the complex ecological situation in the Soviet Far East." The official press agency, *Novosti*, described the dockworkers' action as the "first ecologically inspired labor protest" in the Soviet Union. Parks, *Four Soviet Ports Bar Ship in Protest Over Nuclear Safety*, L.A. Times, Mar. 7, 1989, § 1, at 1,

With modern technology, ships and aircraft presumed to be carrying nuclear weapons are targets of attack by enemy states wherever they may be located. Thus, if a warship capable of carrying nuclear weapons cruising in the territorial sea of a third party state were attacked, the result would be the virtual equivalent of an attack on that state. This scenario isn't addressed in any of the many nuclear weapon free zone proposals proferred by the General Assembly.

The most likely reason for this omission is that the United Nations Convention on the Law of the Sea[27] (UNCLOS III) and customary international law[28] assure innocent passage through territorial seas. For a state or treaty to prohibit transit of warships with nuclear capability through territorial waters might appear to be in direct conflict with the Law of the Sea which seeks to assure that, among other things, no foreign ship be denied "innocent passage"[29] though a coastal state's territorial sea.[30] Indeed, a United Nations report expressed the view that parties to a nuclear free zone treaty "must respect international law, including those principles relating to the high seas, to straits used for international navigation and . . . the right of innocent passage through the territorial sea."[31]

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27. Third United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245 [hereinafter "UNCLOS III"].

28. "Customary international law" refers to the regime of international order which finds its source in custom and usage. It is generally considered binding on the entire international community. K. BOOTH, LAW, FORCE AND DIPLOMACY AT SEA (1985) [hereinafter "LAW, FORCE AND DIPLOMACY"]. *See infra* notes 140-44 and accompanying text.

29. The "right of innocent passage," as enunciated in UNCLOS III, is granted to all ships passing through the territorial sea. UNCLOS III, *supra* note 27, art. 17. The relevant articles of UNCLOS III state as follows:

> *Article 18*
> *Meaning of passage*
> 1. Passage means navigation through the territorial sea for the purpose of:
> (a)traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
> (b)proceeding to or from internal waters or a call at such roadstead or port facility.
> 2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger of distress.
> *Article 19*
> *Meaning of innocent passage*
> 1. Passage is innocent so long as it is *not prejudicial to the peace, good order or security of the coastal State*. Such passage shall take place in conformity with this Convention and other rules of international law. . . .

Id. (emphasis added). *See id.* arts. 19(2)-(3).

30. *See infra* § III.A.1.

31. *Comprehensive Study*, *supra* note 7, at 49. Interestingly, the same body of international law also holds that "[p]ollution of the marine environment is contrary to . . . freedom of the seas." N. Rusina, *International Legal Principles of Protection of the Marine Environment Against Pollution*, in THE LAW OF THE SEA AND INTERNATIONAL SHIPPING: ANGLO-

Though there have been several proposals for nuclear weapon free zones debated and approved by the General Assembly,[32] the first and only such proposal to grow out of the United Nations which has seen fruition is the Treaty of Tlatelolco.[33] Since the signing of the Treaty of Tlatelolco, not one of the many U.N. resolutions calling for a nuclear weapon free zone has come to fruition.[34]

The Treaty of Tlatelolco arose out of a 1963 Joint Declaration of five Latin American presidents calling for the denuclearization of Latin America.[35] Denuclearization was seen as a means to keep that region free from the economic and political pressure which would bear if their states became entangled in the cold war or the development of nuclear weapons, including the possibility that such weapons could be used against each other.[36] Mexico initiated a treaty preparatory commission the next year. Three years of discussions culminated in the treaty. It addressed most of the concerns raised in the General Assembly and, until the Treaty of Rarotonga, was considered the prototypical nuclear free zone treaty. It also served as a symbolic statement to the effect that a large region of the world can make a distinguished and valuable contribution to universal nuclear disarmament by declaring itself to be a nuclear weapon free

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SOVIET POST-UNCLOS PERSPECTIVES 261, 262 (W.E. Butler ed. 1985). Rusina goes on to argue that the anti-pollution regime found in the law of the sea is actually founded on basic human rights. Quoting Professor M. Lazarev, she allows that "the protecting of nature, flora, fauna, and man by international law is nothing other than the realisation [sic] of important human rights to life, health, normal conditions of existence, labor and leisure." *Id.* at 268-269.

32. For example, in 1985 there were votes at the United Nations General Assembly for denuclearization or nuclear weapon free zones in Africa, 40 U.N. GAOR Supp. (No. 53) (A/90/92), the Middle East, 40 U.N. GAOR at 82, South Asia (G.A. Res. 40/83), and a Zone of Peace in the Indian Ocean (G.A. Res. 40/153). In 1986, the General Assembly adopted resolutions calling for nuclear weapon free zones in the Middle East (G.A. Res. 41/48), and South Asia (G.A. Res. 41/49), and Zones of Peace in the Indian Ocean (G.A. Res. 41/87), and the South Atlantic Ocean (G.A. Res. 41/11). Such resolutions are not new, however. Between 1961 and 1981 the General Assembly adopted 17 resolutions on an African nuclear free zone and 14 on South Asia. Repeated proposals have also frequented the General Assembly for the Middle East since 1974 and various parts of Europe (since 1957), including the Nordic countries, the Balkans and Central Europe. *See* Delcoigne, *An Overview of Nuclear-Weapon-Free Zones*, 24 IAEA BULL. 50 (1982); *infra* note 104; *see, e.g.*, NUCLEAR DISENGAGEMENT IN EUROPE (S. Lodegaard & H. Thee eds. 1985); NUCLEAR WEAPONS AND NORTHERN EUROPE (1983) (proposals for a Nordic Nuclear Weapon Free Zone).

33. The earliest call for a nuclear weapon free zone in Latin America came from the United Nations delegate from Brazil shortly before the Cuban missile crisis. 17 U.N. GAOR at 19, para. 25, U.N. Doc. A/PV.1125, (1962). As Robinson points out, "[t]he danger of bringing the nuclear arms race between the super Powers [sic] into Latin America was no longer hypothetical." Robinson, *supra* note 15, at 283.

34. Though there have been U.N. resolutions calling for a South Pacific nuclear free zone, the Treaty of Rarotonga was negotiated by the South Pacific Forum in a mere seven months, completely apart from any United Nations entities.

35. 18 U.N. GAOR Annex (Agenda Item 74) U.N. Doc. A/5415/Rev.1 (1963). The five nations issuing the joint resolution were Bolivia, Brazil, Chile, Ecuador and Mexico.

36. *Joint Declaration of 29 April 1963 on the Denuclearization of Latin America*, G.A. Res. 1911 (xviii), 18 U.N. GAOR Supp. (No. 15) at 14, U.N. Doc. A/5618 (1963).

zone.[37]

That treaty's stated objective is to prohibit "[t]he testing, use, manufacture, production[,] acquisition . . . receipt, storage, installation, deployment and any form of possession of any nuclear weapons" by or on behalf of any party to the treaty.[38] Protocols to the treaty seek the assurances of the nuclear powers that they will comport with the treaty as it relates to their activities in Latin America[39] as well as not assist any contracting party in violating treaty provisions.[40] The Treaty of Tlatelolco does not ban the development, testing or explosion of nuclear devices for "peaceful purposes."[41]

In actuality, the Treaty of Tlatelolco was not the first international agreement to set aside a multinational region as a haven from nuclear weapons. Rather, it was the first such agreement to cover a populated region and the first to be imposed upon the territory of the treaty parties. The first treaty prohibiting nuclear emplacement was the Antarctic Treaty of 1959.[42] Among its provisions, the treaty prohibits the stationing of nuclear weapons, nuclear explosions and radioactive waste dumping south of Latitude 60° South and on the Antarctic continent.[43] The Antarctic Treaty arose out of the 1957/1958 International Geophysical Year, which had as one of its objectives the establishment of international cooperation for the scientific research and preservation of Antarctica.[44]

Two other treaties call for nuclear weapon prohibitions in outer and inner space. Signed in the same year as the Treaty of Tlatelolco, the Outer Space Treaty[45] prohibits the stationing or deployment of nuclear weapons or other weapons of mass destruction in space or on celestial bodies. The 1971 Seabed Treaty bans the emplacement of nuclear weapons on the seabed outside a coastal state's territorial sea.[46] Furthermore,

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37. Speech by Ambassador Alfonso Garcia Robles Delivered at the 133rd Meeting of the First Committee of the General Assembly of the United Nations (Nov. 11, 1963), *reprinted in* A. GARCIA ROBLES, THE DENUCLEARIZATION OF LATIN AMERICA 3-7 (1967).

38. Treaty of Tlatelolco, *supra* note 5, art. 1(1), at 330. The treaty also "undertake[s] to refrain [any contracting party] from engaging in, encouraging or authorizing . . . [or] participating in the testing, use, manufacture, production, possession or control of any nuclear weapon." *Id.* art. 1(2), at 330.

39. *Id.* protocol I, at 360, 362.

40. *Id.* protocol II, art. 2, at 364. A third provision of the protocols calls on the nuclear powers to agree to not use nuclear weapons against contracting parties to the treaty. *Id.* protocol II, art. 1, at 364.

41. *Id.* arts. 17, 18, at 346, 348.

42. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

43. *Id.* art. IV.

44. J. GOLDBLAT, *supra* note 19, at 60-63.

45. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

46. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337, 955 U.N.T.S. 115.

the Non-Proliferation Treaty[47] ("NPT") explicitly supports the formation of nuclear free zones: "Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories."[48]

B. *The Treaty of Rarotonga*

Eighteen years after Tlatelolco, the members of the South Pacific Forum surpassed the Treaty of Tlatelolco and extant United Nations proposals by creating the world's first *nuclear free* zone, as opposed to simply a nuclear *weapon* free zone.[49] The Treaty of Rarotonga sets forth a comprehensive ban on the manufacture, acquisition, possession, deployment, stationing, emplacement or testing of nuclear explosive devices.[50] It is also distinguishable in its prohibition on all nuclear explosive devices as well as the dumping of radioactive wastes,[51] and its support for the protection of the environment of the South Pacific.[52]

It is significant that the Rarotonga Treaty was not negotiated inside a United Nations-sponsored forum, nor was its development connected with any U.N. resolution.[53] The initial impetus for the South Pacific

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47. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.

48. *Id.* art. VII.

49. Indeed, because of its broader prohibitions, the states of the South Pacific Forum purposefully describe the region created by the treaty as a *nuclear free* zone as opposed to a nuclear *weapon* free zone. Fyfe & Beeby, *supra* note 2, at 40. From a slightly broadened perspective, New Zealand Deputy Secretary for Foreign Affairs, Christopher Beeby, expressed that:

> [I]f you add the two together, the South Pacific Nuclear Free Zone Treaty which deals principally with nuclear weapons — but makes some reference to dumping — and the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region [*see infra* note 52 and accompanying text], I think you can characterize the package as a nuclear free South Pacific.

Interview with Christopher Beeby in Radio New Zealand "Morning Report" (Nov. 28, 1986).

Some critics have been quick to point out that the Treaty of Rarotonga, despite its official title, does not create either a true nuclear weapon free or nuclear free zone. *See* Fry, *supra* note 6, at 61, 67-68.

It is of interest to note that there is now a call for a "nuclear free" zone in Central America. The proposal, recently announced by the University of Costa Rica, would, among other things, prohibit the transport of nuclear weapons and other weapons of mass destruction within 300 miles of the Central American coast. *Central American Nuclear-Free Zone Proposed*, Xinua General Overseas News Service, Feb. 13, 1990.

50. Treaty of Rarotonga, *supra* note 3, arts. 3-6, at 1444-46.

51. *Id.* art. 7 at 1447.

52. At the time the Treaty of Rarotonga was concluded, the nations of the South Pacific were negotiating the now-concluded Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, [hereinafter SPREP]. The Treaty of Rarotonga calls for "conclusion as soon as possible of the proposed Convention . . . ," *id.* art. 7(1)(d) at 1447, and holds for the supersession of the Convention over subsections of the Treaty dealing with radioactive dumping. *Id.* art. 7(2).

53. However, the United Nations recently adopted a resolution endorsing the Treaty of

treaty is found in the local reactions to American, British and, later, French nuclear weapons testing in the South Pacific.[54] The destruction inflicted upon many of the islands and peoples in that region and the continuing threat of nuclear poisoning due to the on-going French nuclear weapon testing program was part of the motivation to create the Treaty of Rarotonga,[55] and has since become a major rallying cry throughout the region.[56] Indeed, the first indigenous call for a nuclear free zone in the South Pacific sounded shortly after New Zealand and Australia sought condemnation before the International Court of Justice of France's nuclear weapons testing policy.[57]

The South Pacific Nuclear Free Zone Treaty is a major step in the non-nuclear states' struggle against the dangers of nuclear weapons and radioactivity. Of course, it breaks new ground in the arena of multilateral nuclear prohibitions. But, at a most powerful symbolic level, the Treaty of Rarotonga, along with the contiguous Treaty of Tlatelolco and the Antarctic Treaty, carves out a nuclear weapon free zone of more than one-third of the Earth's surface.[58]

Though it stands as a significant advancement over its predecessors, the Treaty of Rarotonga does not absolutely prohibit the presence of nuclear weapons nor radioactive substances other than those used for medical and non-military scientific purposes from within the zone of application of the treaty. Despite its comprehensive array of prohibitions, it does not prohibit the transit of nuclear devices through territorial seas, although it does allow any country to establish its own policy on whether to permit port visits by nuclear powered or nuclear capable warships or aircraft.[59] There are no provisions regarding nuclear transit through international straits,[60] exclusive economic zones[61] or other ocean areas encom-

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Rarotonga. *Australia Welcomes U.N. Resolution on Rarotonga Treaty*, Xinhua General Overseas News Service, Dec. 19, 1989.

54. *See* Lippman, *The SPNFZ Treaty: Regional Autonomy Versus International Law and Politics*, 10 LOY. L.A. INT'L & COMP. L.J. 110-115 (1987); R. Dalrymple (former Australian Ambassador to the United States), Australia and the South Pacific — The Treaty of Rarotonga, speech to The World Affairs Council (Nov. 12, 1986) [hereinafter "Dalrymple Speech"]; Fry, *supra* note 6; *see also infra* note 57 and accompanying text.

55. *See infra* notes 82-83 and accompanying text.

56. *Id.*

57. Nuclear Test Cases (Austl. v. Fr.; N.Z. v. Fr.), 1973 I.C.J. 99 (Interim Protection Order); 1973 I.C.J. 135 (Interim Protection Order); 1974 I.C.J. Judgement 253; 1974 I.C.J. Judgement 457.

58. The contiguous zone runs from Longitude 115° East to Longitude 20° West, and from the South Pole to the Equator and even as far north as Latitude 35° North in North America.

59. Treaty of Rarotonga, *supra* note 3, art. 5(2), at 1446.

60. "Strait transit" or "transit passage" is the UNCLOS III regime which supplies rules for transit through "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." UNCLOS III, *supra* note 27, art. 37. *See infra* § III.A.1(b). The right of transit passage is enjoyed by every ship or aircraft transitting a strait so long as it shall:

(a)proceed without delay through or over the strait;

passed within the treaty's zone of application. It does not prevent a treaty Party from contributing to a nuclear power's nuclear capability through such indirect means as taking part in nuclear research or participating in the control, operation or management of so-called "C³I"[62] installations which are designed, in part, to assist in the fighting of a nuclear war.[63] Although there is a ban on the dumping of radioactive wastes within the Treaty of Rarotonga,[64] there is no prohibition on nuclear activities which could produce such wastes, or any other non-essential uses of radioactive substances.

Such abolitions may be practically, politically or economically difficult. Indeed, these factors limited the treaty from being a more stridently nuclear-prohibitory document.[65] Still, some champions of an absolute abolition remain vocal.

In the wake of the Treaty of Rarotonga, local groups within (and without) the South Pacific Forum criticized the treaty as being insufficiently restrictive.[66] Though supportive of the concept during the Rarotonga Treaty negotiations, Vanuatu, a South Pacific nation, refused to sign the treaty because it does not ban port visits by nuclear ships.[67] Citing a history of anti-nuclear sentiment in the South Pacific, the Fiji Anti-Nuclear Group ("FANG") proposed a draft Treaty for a Comprehensive Nuclear Free Zone in the South Pacific with an aim toward eliminating the "deficiencies" of the Rarotonga Treaty and creating a complete and comprehensive, as opposed to "partial," nuclear free zone.[68]

(b)refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c)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. . . .

Id. art. 39(1).

61. *See infra* § III.A.1.(c).

62. *I.e.*, "Command, Control, Communication and Intelligence." *See generally infra* § III.B.

63. *See infra* § III.B.

64. Treaty of Rarotonga, *supra* note 3, art. 7, at 1447.

65. *See Report by the Chair of the Working Group on a South Pacific Nuclear Free Zone (SPNFZ)* 7-8 (1985) [hereinafter "*Working Group Report*"]; *see supra* note 9 and accompanying text. Despite its decision not to sign the protocols to the Treaty of Rarotonga, U.S. State Department spokesperson Charles Redman did acknowledge that "[t]he United States is appreciative of the role of the Government of Australia and other parties to the treaty in this matter, including their efforts to keep our and allied interests in mind as they managed the composition of the treaty and protocols." St. Dep't Statement, Feb. 5, 1987.

66. *See* M. Hamel-Green, Draft Treaty for a Comprehensive Nuclear Free Zone in the South Pacific (1986) (unpublished manuscript).

67. P. Powers, *Nuclear Free Zones: The South Pacific Case*, at 4, paper prepared for the Round Table on the South Pacific Nuclear-Weapon-Free Zone, Apr. 15-18, 1987.

68. M. Hamel-Green, *supra* note 66, at 1-2. The draft treaty proposed therein is hereinafter cited as "FANG Treaty."

Criticism of the Treaty of Rarotonga has not only come from those calling for stronger nuclear prohibitions. The United States, the United Kingdom and France have refused to sign protocols to the treaty[69] which would guarantee their acknowledgement of and respect for the zone. Despite an official U.S. policy supporting nuclear free zones which satisfy specific criteria[70] — criteria which the Rarotonga Treaty satisfies according to State Department officials[71] — the United States refuses to ratify the protocols.[72] The reason given by U.S. officials for this refusal is that

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69. Both the Treaties of Rarotonga and Tlatelolco contain protocols whereby the nuclear powers and states having international responsibility for territories within the zone would comply with the restrictions imposed by the respective treaty. All the nuclear powers have signed the latter protocol to the Tlatelolco Treaty (Protocol II), though France has refused to sign the protocol which would require it to apply the nuclear weapon restrictions of the treaty for which France is "*de jure* or *de facto* . . . internationally responsible." (Protocol I). Fyfe & Beeby, *supra* note 2, at 38.

France, the United Kingdom and the United States have refused to sign any of the two similar protocols of the Rarotonga Treaty, as well as a third protocol calling for the prohibition of the testing of nuclear explosive devices within the region. *See infra* notes 9-11 and accompanying text. These refusals came despite consultation with, and an attempt to reflect the concerns of these nuclear powers, in the negotiation of the protocols. *See infra* note 9. Nonetheless, Great Britain and the United States "have given assurances that they are not currently acting in a manner inconsistent with the protocols," according to New Zealand Disarmament and Arms Control Minister Fran Wilde. *Solomon Islands Ratifies Nuclear Free Zone Treaty*, Xinhua General Overseas News Service, Feb. 28, 1989. *See also, Australia Welcomes Solomons' Ratification of a Nuclear Free Zone Treaty*, Xinhua General Overseas News Service, Mar. 6, 1989; *House Urges Bush to Sign Pacific Nuclear Free Zone Treaty*, Reuter Library Report, Nov. 7, 1989 [hereinafter "*House Urges Bush*"]. France, however, continues to test nuclear wepons in the South Pacific. *See, e.g., France Resumes Nuclear Tests in Pacific Despite Opposition*, Reuter Library Report, May 12, 1989.

70. The United States has enunciated four criteria for accepting the validity of a nuclear weapon free zone: (1) the initiative must be taken by the states of the proposed zone and the zone should preferably include all states within the area whose participation is deemed important; (2) the creation of the zone should not disturb necessary security arrangements; (3) the zone agreement must allow a nuclear nation the opportunity to move through the zone with nuclear weapons (e.g., U.S. submarines carrying nuclear weapons moving through Panama Canal to another area); and (4) provisions for adequate verification are required.

71. Confidential interviews with officials of the United States Department of State and Arms Control and Disarmament Agency. Anonymity was promised all United States and foreign government and United Nations officials with whom the author spoke in preparing this article.

72. The official U.S. position was read to the news media by U.S. State Department spokesperson Charles Redman: "The United States . . . has decided that in view of our global security interests and responsibilities, we are not, under current circumstances, in a position to sign the protocols [to the South Pacific Nuclear Free Zone Treaty]." St. Dep't Statement, Feb. 5, 1987.

South Pacific Forum states were particularly upset with the decision by the Reagan Administration not to sign the Rarontonga protocols. The Forum

> had sent a mission to the nuclear club capitals to discuss the protocols before writing the final text. It had gone to great lengths to accommodate the views of the U.S., so much so that it included a section which allows signatories to withdraw from the protocols even though it raised criticism from those Forum members who wanted a stronger treaty.

the U.S. does not want to do anything to encourage other regions from creating their own nuclear free or nuclear weapon free zones.[73] Moreover, though President Reagan expressed his support for the non-proliferation of nuclear weapons,[74] officials of his administration felt proliferation of such regions would make it difficult for the U.S. to maintain its strategy of nuclear deterrence, and a treaty which permits treaty Parties to prohibit port visits would run contrary to U.S. strategic interests.[75] Unofficially, the Reagan administration felt that there was little danger of nuclear proliferation in the South Pacific, so little was lost in the battle against proliferation by not signing the protocols.[76]

The U.K. disfavors the Rarotonga Treaty for similar reasons.[77] Addi-

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> 'That decision was taken with some reservation but it was generally agreed that if such a provision would facilitate endorsement of the protocols by the major nuclear powers, it was worth doing,' [Fiji Prime Minister, Ratu Sir Kamisese Mara] said. The South Pacific countries had on several occasions supported the U.S. on matters that were important to it and had hoped there would be 'some measure of reciprocity.'

We Won't Sign, Says America, ISLANDS BUS. 21 (Feb. 1987) [hereinafter "*We Won't Sign*"].

In a press statement released the day of the U.S. announcement, New Zealand Prime Minister David Lange echoed Mara's comments: "The United States response is . . . disappointing in that intensive consultation took place with the United States authorities over the Treaty and the protocols and considerable efforts were made to heed U.S. concerns." Press Statement by the Prime Minister of New Zealand on Feb. 5, 1987.

The Reagan Administration's position was under fire within the Congress. As reported by the *Christian Science Monitor*, the "House of Representatives recently passed a resolution in support of the treaty, and a chief treaty opponent, former United States Secretary of Defense Caspar Weinberger, has retired." *Pacific Anti-Nuclear Movement: Growing Force for U.S. to Reckon With*, Christian Sci. Monitor, Nov. 30, 1987, Int'l §, at 8, col. 1. Adhering to his predecessor's position, President Bush has also refused to accede to the Treaty of Rarontonga's protocols, despite a resolution passed by the House of Representatives calling on the President to sign the treaty. *House Urges Bush*, *supra* note 69.

73. *House Urges Bush*, *supra* note 69.

74. During his first year in the White House, President Reagan stated that United States policy was to "seek to prevent the spread of nuclear explosives to additional countries as a fundamental national security and foreign policy objective . . . . " President's Statement on Nuclear Nonproliferation Policy, 17 WEEKLY COMP. PRES. DOC. 768, 769 (July 20, 1981).

75. *House Urges Bush*, *supra* note 69. The U.S. position was expressed by then-Secretary of State Geroge Shultz: "I would hate to see the New Zealand policy in place, because it would basically undermine the ability of the United States and its allies to defend the values that we and New Zealand and others share . . . . " Joint News Conference, Manila, June 27, 1986, DEP'T ST. BULL. 36, 37 (Sept. 1986). A contrary view has been expressed privately: that the real reason is the "need[] to counter public pressure in foreign countries to ban American vessels that carry nuclear weapons." Gordon, *Denmark Agrees on Nuclear Policy*, N.Y. Times, June 8, 1988, § A, at 14, col. 1.

The Treaty of Rarontonga does not require its ratifiers to ban port visits. Rather, this is an option reserved for each state to determine as it sees fit. Treaty of Rarontonga, *supra* note 3, art. 5(2). This provision seems to reserve a right which would exist regardless of its specification in the treaty.

76. Confidential interviews with officials of the United States Department of State, *see supra* note 71.

77. *Britain Rejects Pacific Nuclear-Free Treaty*, Reuters (London), Mar. 20, 1987 [hereinafter "Reuters"].

tionally, it believes that in this matter, support of its European Community economic partner, France, is of superior interest to those of its Commonwealth partners and former colonies in the South Pacific.[78] France, too, elected to not sign the Rarotonga accord.[79] France was also the lone nuclear power which refused to ratify all of the Tlatelolco Treaty protocols.[80] Despite loud and persistent protests by South Pacific nations including Australia and New Zealand,[81] France persisted in testing nuclear weapons in the atmosphere through 1974,[82] and still tests its nuclear devices underground in the South Pacific at Mururoa.[83] It is just such intransigence which helped give rise to the South Pacific Nuclear Free Zone Treaty.[84]

C. *Unilateral Nuclear Prohibitions*

Several nations[85] have taken unilateral steps toward protecting their citizens from nuclear dangers. In 1979, the west Pacific island state of Palau (Belau) adopted a constitution[86] which imposed a complete ban on nuclear substances and weapons.[87] That ban could only be overturned on the three-fourths vote of the electorate.[88] In 1986, Palau's President

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78. Confidential interview with official of the British Foreign Ministry, *see supra* note 71. In the words of a Reuters story, "Western diplomats said the decision would be seen as Britain falling in line with its fellow NATO nuclear powers rather than taking heed of the wishes of traditional allies Australia and New Zealand." Reuters, *supra* note 75.

79. *We Won't Sign*, *supra* note 72.

80. France is the only eligible party not to ratify Additional Protocol I of the Treaty of Tlatelolco. Fyfe & Beeby, *supra* note 2, at 38.

France long has maintained an independent nuclear policy in the era of nuclear history. Among the Western nuclear powers it is the only one not a party to the Nuclear Nonproliferation Treaty. Schwartz, *supra* note 16, at 16. (China, too, has not ratified the NPT, *id.*, though it has acceded to the Rarotonga protocols.)

81. *See supra* notes 54-57 and accompanying text.

82. Recent activities suggest France's willingness to resort to violations of international law to prevent activities it feels may interfere with its testing program. The French sinking of the Greenpeace ship *Rainbow Warrior* in Auckland harbor occurred just prior to its scheduled departure to lead a flotilla to Mururoa to protest French nuclear testing.

83. Describing France's recalcitrance, one nuclear affairs scholar has written that "[u]nlike the U.S. and Britain which have underground metropolitan sites in which to conduct nuclear explosions, France has been unwilling or unable to use its metropolitan territory to carry out its subsurface tests." The result of this policy is ironic: "The only military-related nuclear activity in the huge area [the South Pacific] other than the passage of nuclear-armed craft, French testing has enabled regional states to try to lift themselves onto the world nuclear disarmament stage by means of SPNFZ." P. Powers, *supra* note 67, at 4.

84. Lippman, *supra* note 54, at 113; K. Graham, Nuclear Weapon-Free Zones as an Arms Control Measure 201 (1983) (dissertation, Vict. U. of Wellington) [hereinafter "Graham"]; P. Powers, *supra* note 67, at 4; R. PURVER, ARMS CONTROL: THE REGIONAL APPROACH 24 (1981).

85. *See infra* notes 86-112 and accompanying text.

86. CONST. OF THE REPUB. OF PALAU, adopted Apr. 2, 1979.

87. *Id.* art. XIII, § 6.

88. The Palau Constitution requires that

> [h]armful substances such as nuclear, chemical, gas or biological weapons intended for use in warfare, nuclear power plants, and waste materials therefrom

signed a Compact of Free Association with the United States.[89] It provided Palau with greater autonomy while the U.S. was to provide for its defense. The Compact of Free Association, allowing the United States to bring into Palau nuclear weapons, nuclear propelled ships and other nuclear substances, was approved without the Constitutionally required three-fourths vote.[90] Litigation ensued[91] challenging the validity of the Compact. The conflict eventually reached the Supreme Court of Palau, which ruled that the Compact of Free Association was not lawfully approved and therefore was invalid.[92] Subsequent attempts to sidestep the Palau constitution have met strong opposition in the Palau legislature and courts.[93]

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shall not be used, tested, stored or disposed of within the territorial jurisdiction of Palau without express approval of not less than three-fourths the votes cast in a referendum of this specific question.

Id. art. XIII, § 6. Another provision stipulates that any "agreement which authorizes the use, testing, storage or disposal of nuclear, toxic, chemical, gas or biological weapons intended for use in warfare shall require the approval of not less than three-fourths the votes cast in such referendum." *Id.* art. II, § 3.

89. Palau was formerly part of the U.S.-administered Trust Territory of the Pacific Islands. For a discussion of the problems affecting the eventual completion of the Compacts of Free Association of the United States with several of its former Micronesian Trust Territories, *see* Comment, *Reconciling Independence and Security: The Long Term Status of the Trust Territory of the Pacific Islands*, 4 UCLA PAC. BASIN L.J. 210 (1985).

Some argue that the U.S. wants Palau as a "back-up" in case Clark Air Force Base and Subic Bay Naval Base in the Philippines are closed. Iveren, *Vote to End Pacific Islands' Atom-Arms Ban is Challenged*, N.Y. Times, Oct. 13, 1987, §A, at 19, col. 1; Dibblin, *Vote Again Until You Get It Right, U.S. Tells Islanders*, New Statesman, Mar. 14, 1986, at 86. *Cf.* note 94 and accompanying text. *See infra* notes 94-96.

90. Gibbons v. Salii, No. 8-86, slip op. at 2 n.1 (Palau 1986). The United States' other "vital" link to the Indian Ocean, its base on the island of Diego Garcia, is also under fire. The government of Mauritius is challenging the U.S. base there, claiming the island as part of its sovereign territory. *Mauritius: Angry Over U.S. Stand on Diego Garcia*, Inter Press Service, Nov. 14, 1989.

91. Gibbons v. Salii, Civ. No. 101-86 (Tr. Div., July 10, 1986).

92. Gibbons v. Salii, No. 8-86, slip op. (Palau 1986).

93. In spite of, or perhaps because of, the Palau Supreme Court's decision in Gibbons v. Salii, *supra* note 90, pro-Compact parties, including President Lazarus Salii, persisted, employing ever more pressure on the Constitutionalists. In June 1987, the fifth plebiscite to approve the Compact was held. But the week before the vote, President Salii laid off two-thirds of all government employees. Salii took the action "because [the] prospective Compact of Free Association with the United States, which would have brought in [$1 billion of U.S. aid over 40 years, $141 million in the first year] if approved, apparently was headed for defeat." *Palau Going Broke, Laying Off Workers*, L.A. Times, July 3, 1987, § 1, at 11, col. 1. The June 30 vote nonetheless was the same as the previous four, turning down the Compact. L.A. Times, July 6, 1987, § 1, at 2, col. 2.

A new tactic was employed early in August of that year, when a vote was held to amend the constitution to allow a modification of the its anti-nuclear provisions — and thus approval of the Compact — with a simple majority vote instead of three-quarters. It passed on August 4. Less than three weeks later, a sixth vote was held on the Compact. It received the same percentage of votes as in previous elections, but this time it was enough to pass. L.A. Times, Aug. 7, 1987, § 1, at 2, col. 1; *Palau Drops Nuclear Stand*, N.Y. Times, Aug. 7, 1987, § A, at 24, col. 1. The August votes were immediately challenged in a lawsuit and in the Palau legislature. However, a death threat against the Chief Justice of the Palau Supreme

The new Constitution of the Republic of the Philippines also provides for the possible prohibition of nuclear weapons. One provision reads: "[t]he Philippines, consistent with its national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory."[94] Legislation passed by the Philippine Senate "bars the development, manufacture, acquisition, testing, use, introduction, installation or storage" of nuclear arms and components. It bans nuclear-powered ships and planes unless their entry is authorized by a Philippine commission.[95] The bill awaits action by the Philippine House of Representatives in its next term.[96] Even prior to the drafting of the new constitution, the Aquino government permanently closed a recently completed nuclear power plant, prohibiting it from being fueled up, despite the billions of dollars (U.S.) poured into its construction cost by the former government.[97]

Some South Pacific Forum states have also taken actions which provide greater restrictions on nuclear weapons than those afforded by the Rarotonga Treaty. In addition to Vanuatu's strong stand,[98] New Zealand has a port visit policy which bans any warship or military aircraft containing nuclear weapons, as well as nuclear powered vessels, from visiting its ports and airfields. All military craft must provide sufficient information to allow the Prime Minister to determine that they are free from such weapons before being allowed permission to enter New Zealand facilities.[99] Fiji formerly had a similar policy, and a new government was

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Court caused him to halt hearings on the lawsuit. Iveren, *supra* note 89. Nearly a year later in May, 1988, the Palau Supreme Court ruled that the referendum suspending the constitution and the subsequent plebescite on the Compact were invalid, returning the situation to square one. Osmond, *Starting Over Again: Court Rules Referendums on Future Invalid*, FAR E. ECON. REV., May 18, 1988, at 38.

In August of 1988, President Lazarus Salii was found dead in his home. Osmond, *Death in the Afternoon: Salii May Be Gone, But Palau is the Likely Victim*, FAR E. ECON. REV., Sept. 1, 1988, at 26.

In the most recent election, pro-Compact forces again failed to muster the necessary votes to approve the Compact. In contrast to previous elections, which saw as much as 72% support for the Compact, February's vote only achieved a 60.5% showing for the Compact. *Roundup: Palau — Independence Remains Uncertain*, Xinhua General Overseas News Service, Mar. 18, 1990.

94. CONST. OF THE REPUB. OF THE PHIL., art. II, § 8 (1986).

95. *Philippine Senate OKs Bill Opposed by U.S. That Would Bar Nuclear Weapons*, L.A. Times, June 7, 1988, § 1, at 5, col. 1.

96. *Id.*

97. Senoren, *Philippine Nuclear Plant to Make Way for Coal Power*, Fin. Times, Sept. 25, 1986, at 4; *see also* Dumaine, *The $2.2 Billion Nuclear Fiasco*, FORTUNE, Sep. 1, 1986, at 38.

98. *See supra* note 67 and accompanying text.

99. New Zealand's anti-nuclear legislation contains the following provisions:

> When the Prime Minister is considering whether to grant approval to the entry of foreign warships into the internal waters of New Zealand, the Prime Minister shall have regard to all relevant information and advice that may be available to the Prime Minister including information and advice concerning the strategic and security interests of New Zealand.
>
> The Prime Minister may only grant approval for the entry into the inter-

voted into office in 1987 on a platform which included a pledge to reinstate the port visit ban.[100]

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nal waters of New Zealand by foreign warships if the Prime Minister is satisfied that the warships will not be carrying any nuclear explosive device upon their entry into the internal waters of New Zealand.

When the Prime Minister is considering whether to grant approval to the landing in New Zealand of foreign aircraft, the Prime Minister shall have regard to all relevant information and advice that may be available to the Prime Minister including information and advice concerning the strategic and security interests of New Zealand.

The Prime Minister may only grant approval to the landing in New Zealand by any foreign military aircraft if the Prime Minister is satisfied that the foreign military aircraft will not be carrying any nuclear explosive device when it lands in New Zealand.

. . . .

Entry into the internal waters of New Zealand by any ship whose propulsion is wholly or partly dependent on nuclear power is prohibited.

New Zealand Nuclear Free Zone, Disarmament, and Arms Control, Bill enacted June 4, 1987 by the New Zealand House of Representatives, Oct. 16, 1986, ¶¶ 9-11.

Prime Minister Lange's position is widely supported by the New Zealand people. Despite serious economic problems, Lange's party was overwhelmingly re-elected in August, 1987 elections. Even the conservative opposition has adopted an anti-nuclear platform. Barber, *New Zealand Premier Vows Anti-Nuclear Activity in 2nd Term*, Christian Sci. Monitor, Aug. 17, 1987, Int'l §, at 11, col. 1; *Lange Wins a 2nd Term in New Zealand*, L.A. Times, Aug. 16, 1987, § 1, at 6, col. 4; Evans, *Labor is Winner in New Zealand Vote*, N.Y. Times, Aug. 16, 1987, § 1, at 3, col. 1. A 1988 poll revealed 84% of New Zealand's population in support of Lange's anti-nuclear policy. *New Leader Says Nuke Ban 'Will Not Change'*, United Press Int'l, Aug. 8, 1989. David Lange's successor as Prime Minister, Geoffrey Palmer, vowed to uphold Lange's nuclear policy immediately upon being sworn in. *Id.*

Australia, New Zealand and the United States were partners in the ANZUS alliance, *Security Treaty Between Australia, New Zealand and the United States*, Sept. 1, 1951, 3 U.S.T. 3420, T.I.A.S. No. 2493, 131 U.N.T.S. 83 [hereinafter "ANZUS"], until the U.S. suspended its defense obligations to New Zealand following that country's decision to ban port visits by nuclear capable warships. DEP'T ST. BULL., Sept. 1986, at 86. *See* S. MCMILLAN, NEITHER CONFIRM NOR DENY: THE NUCLEAR SHIPS DISPUTE BETWEEN NEW ZEALAND AND THE UNITED STATES (1987). New Zealand claims that ANZUS is a conventional, not nuclear alliance. Glover, *supra* note 19. Nonetheless, New Zealand has called the alliance "dead." *New Zealand Leader Says Security Alliance with U.S. Dead*, Reuters, Apr. 24, 1989.

On one hand ANZUS has always been a loose confederation and was eventually concluded primarily over concerns about future Japanese aggression. *See generally* Glover, *id.*; 3 *Documents on New Zealand External Relations: The ANZUS Pact and the Treaty of Peace With Japan* (1985). On the other hand, the United States policy of defense for its allies (and, thus, meeting its treaty obligations) through deterrence depends upon using whatever capabilities it believes necessary. As former U.S. Secretary of State George Shultz expressed: "I would hate to see the New Zealand policy in place, because it would basically undermine the ability of the United States and its allies to defend the values that we and New Zealand and others share . . . ." Joint News Conference, Manila, June 27, 1986, DEP'T ST. BULL., Sept. 1986, at 36, 37. However, "American officials say privately that the rule [by which the U.S. refuses to confirm a nuclear presence and thus the incompatibility with the New Zealand policy] is needed to counter public pressure in foreign countries to ban American vessels that carry nuclear weapons." Gordon, *supra* note 75. *See* Note, *The Incompatibility of ANZUS and Nuclear Weapon Free Zones*, 45 VA. J. INT'L L. 455, 464-466 (1987).

100. On April 11, 1987 Fiji voters elected a coalition government on a platform which promised the banning of port visits by nuclear warships. The leaders of a coup the following

Concern over the dangers associated with nuclear weapons and radioactivity is not limited to the Pacific. Sweden, one of the most heavily nuclear dependent states in the world (forty-seven percent of the Scandinavian nation's power is nuclear[101]), voted in a 1980 referendum to phase out all nuclear power plants in operation or under construction by 2010 and to prohibit the construction of any new nuclear power plants.[102] In the wake of the near-total meltdown of a nuclear power plant at Chernobyl in the Soviet Union in 1986, the Swedes reaffirmed their 1980 vote and undertook to begin the phase-out process by 1995.[103]

Sweden's Nordic neighbors also have relatively tough anti-nuclear positions.[104] Though a member of NATO and strategically located along the Soviet Union's northwest flank, Norway prohibits the emplacement of nuclear weapons on its territory, except in case of an attack or threat of attack.[105] In addition, Norway bans nuclear power plants.[106] Norway is now leading the movement for a Nordic Nuclear Weapon Free Zone.[107] NATO member Iceland has an official policy[108] of not permitting nuclear weapons anywhere within its territory except at time of war, including its territorial sea. Denmark, also a NATO country, has a thirty year ban on nuclear powered ships and those carrying nuclear weapons[109] which has never been actively enforced. Last year Danish voters approved a referendum calling for Denmark to enforce this policy,[110] sending shock waves

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month and a subsequent coup later in the year vowed to not enforce a port visits ban. *Coup Plus Coup Makes Three*, TIME, Oct. 12, 1987, at 46; *No Medals: Fiji Gets a Government at Last*, THE ECONOMIST, Oct. 3, 1987, at 19.

101. Winder, *Letter from Sweden*, Christian Sci. Monitor, Sept. 18, 1986, at 9.

102. *Id.*

103. *Id.*

104. The Nordic countries have been leading proponents of the concept of a nuclear weapon free zone and have a relatively long and constant history of debating such for their region. The first inquiry was made by Sweden in 1961. *Comprehensive Study*, *supra* note 7, at 20, 25; *Nuclear Weapons and Northern Europe* (1983). Two years later the President of Finland proposed a Nordic nuclear-weapon-free zone. *Id.*, at 25. Several additional proposals have been made by the various Scandinavian countries and the Soviet Union. *Id.* Most recently, at the Nordic foreign ministers meeting in 1987, attending members decided to "investigate the conditions for a nuclear-weapon-free zone in the Nordic area as a part of the endeavours to lessen tensions and reduce armaments in Europe." Statement from The Nordic Foreign Ministers Meeting, Reykjavik, Mar. 25-26, 1987.

105. 20 CURRENT NOTES ON INT'L AFF. 441 (1949).

106. However, Norway does operate a small (20 megawatts) heavy water research reactor used by the Western scientific community.

107. In 1984 the Norwegian Stortinget (Parliament) voted to pursue a nuclear weapon free zone with its Nordic Pact allies. *See* KGL, Utenriksdepartement, *Sprsmalet om en Kjernevapenfri Sone i Norden* 7-10 (1985).

108. A. Carsten Damsgaard, *The Nordic Area As a Nuclear-Weapon Free Zone?* 9-10 (unpublished manuscript) (1985). It expects the superpowers, however, to respect this policy in good faith and does not ask foreign states if their vessels and aircraft deploy such weapons. *Id.*

109. *Slicing NATO Too Thin in Denmark*, N.Y. Times, May 9, 1988, § A, at 18, col. 1.

110. Raines, *Danish Voting Tuesday Centers on Military Issues*, N.Y. Times, May 9, 1988, § A, at 9, col. 1.

through the United States State Department.[111]

On a more localized level, communities and provinces throughout the world have declared themselves nuclear free zones.[112]

III. REDEFINING THE BREADTH OF NUCLEAR FREE ZONES

Bold as it may be, the Treaty of Rarotonga represents only one step toward complete "nuclear freedom" for treaty states and toward worldwide nuclear disarmament. There is a great deal that a nation or group of nations can do to achieve a truly "complete and comprehensive" nuclear free zone.

Just as the South Pacific Forum states enhanced and expanded upon the prohibitions contained in the Latin American treaty,[113] forthcoming treaties can and likely will further the nuclear proscriptions established by the 1985 accord. Such an undertaking will require careful scrutiny of the workability and effectiveness of the extant treaties from both theoretical and pragmatic viewpoints. The drafters and negotiators of future nuclear free zone treaties will want to look at what they hope to achieve, what the Tlatelolco and Rarotonga Treaties set out to achieve and what in fact those treaties have achieved.

Though a milestone at the time, from the perspective of the modern nuclear prohibitory movement, the intended scope of the Tlatelolco Treaty is decidedly limited. Compare, for example, the primary objectives of the Treaty of Tlatelolco with those of the Treaty of Rarotonga. The former, entitled a "treaty for the prohibition of nuclear weapons," only prohibits "[t]he testing, use, manufacture, production, acquisition . . . receipt, storage, installation, deployment and . . . possession of any nuclear weapons . . . ."[114] It expressly allows contracting states "to use . . . for peaceful purposes the nuclear material and facilities which are under

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111. *U.S. Concerns Over Danish Parliamentary Resolution*, DEP'T ST. BULL., June, 1988, at 31. American and NATO concern over the impact of the resolution was resolved by a Danish government assumption that foreign military ships will be "in compliance with the rules laid down by the Danish Government." Gordon, *supra* note 75, quoting Danish Prime Minister Poul Schluter.

112. For example, as of December, 1988, there were 4,407 nuclear free zones in 23 countries. *Nuclear Free Zones in the World*, THE NEW ABOLITIONIST, Mar. 1990, at 9, col. 3. One hundred and sixty-eight nuclear free zones with a total population of more than 16.8 million citizens have been declared by voters in the United States. *Nuclear Free Zones in the United States*, THE NEW ABOLITIONIST, Mar. 1990, at 12 , col. 1.

It has been argued that nuclear free zone ordinances in the United States may not be legally binding if the federal government invokes the supremacy clause or other powers granted by the U.S. Constitution. *See* Weaver, et al., *The Legality of the Chicago Nuclear Weapon Free Zone Ordinance*, 17 LOY. U. CHI. L.J. 553 (1986).

In a recent development, the Justice Department has brought suit to block a "second generation" nuclear free zone ordinance adopted by Oakland, California. Stein, *Effort to Derail Nuclear-Free Zones Reported*, L.A. Times, Mar. 22, 1990, § A, at 3, col. 1.

113. *See infra* notes 38-41, 50-52 and accompanying text.

114. Treaty of Tlatelolco, *supra* note 5, art. 1(1)(a)-(b), at 330.

their jurisdiction."[115] The later Rarotonga Treaty renounces *all* nuclear explosive devices,[116] much exploitation of fissionable material,[117] the dumping of radioactive wastes at sea,[118] as well as the manufacture, possession, control over,[119] stationing[120] and testing[121] of all nuclear explosive devices.

It is readily conceivable that any future nuclear free zone treaty will consider the principal provisions of the Treaty of Rarotonga as its minimum standard or starting point. The difficult issues for future negotiators will be those which expand the scope of such treaties beyond that of the South Pacific Nuclear Free Zone Treaty, including:

1) A ban on the transit of nuclear weapon carrying vessels through treaty Parties' territorial seas and exclusive economic zones;

2) Participation in intelligence systems designed to aid nuclear war fighting capabilities;

3) Military alliances with nuclear powers;

4) Civilian nuclear programs, including nuclear power plants, non-essential consumer and industrial uses of radioactive materials;

5) Radioactive waste disposal; and, last but not least,

6) How to effect compliance of the nuclear powers with a nuclear free zone treaty.

The remainder of this Section will explore these topics.

A. *Nuclear Transit*

One striking limitation of virtually all nuclear free and nuclear weapon free zone treaty proposals tendered by international bodies is their failure to prohibit the transit of nuclear weapons through territorial seas and exclusive economic zones ("EEZ") of treaty parties. As has already been demonstrated herein,[122] the presence of a warship or military aircraft which is believed to be carrying nuclear weapons exposes any land or sea territory within several or even dozens of kilometers of that vessel or plane to the potential effects of nuclear attack or explosion. Obviously, the most effective way to guarantee against this risk, absent a worldwide ban on nuclear weapons, is to enforce a ban of such craft from anywhere within the territorial sea, EEZ or the treaty's zone of application.

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115. *Id.* art. 1(1), at 330.
116. Treaty of Rarotonga, *supra* note 3, art. 3, at 1444-45.
117. *Id.* art. 4 at 1445.
118. *Id.* art. 7 at 1447.
119. *Id.* art. 3(a) at 1444-45.
120. *Id.* art. 5(1) at 1446.
121. *Id.* art. 6.
122. *See supra* notes 20-31 and accompanying text.

1. The Law of the Sea (UNCLOS III): An Overview

A prohibition on nuclear transit[123] is all but guaranteed to spark controversy. On the surface, such a ban would appear to violate the rule of the law of the sea[124] which provides for innocent passage of non-hostile ships within a coastal state's territorial sea and disavows any attempt to ban passage on the high seas.[125]

Similar objections would be raised if the ban also affected the newly created right of "transit passage."[126] Transit passage, or "strait transit" as it is called by UNCLOS III, purports to guarantee the right of passage through "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."[127] This provision operates much in the same way as those protecting the right of innocent passage, but without many of the rights afforded the strait state by the innocent passage regime,[128] including the proscription on passage which is "prejudicial to the peace, good order or security of the coastal State . . . ."[129] Additional concerns would be raised over any plan to ban nuclear transit through exclusive economic zones.

Historically,[130] the major naval powers[131] have asserted their "right" to unrestrained transit upon the high seas.[132] Similarly, the naval powers

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123. For purposes herein, "nuclear transit" means the transit or passage of any aircraft or seagoing vessel which either carries nuclear weapons (including nuclear explosive devices not classified as "weapons") or is capable of carrying nuclear weapons but which refuses to confirm whether or not it is carrying such weapons.

124. UNCLOS III, *supra* note 27, arts. 17-19, 21 I.L.M. 1245, at 1273-74. *See infra* § III.A.2.(a).

125. "High seas" is defined as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." UNCLOS III, *supra* note 27, art. 86, 21 I.L.M. 1245, at 1286. "Territorial sea" refers to that portion of coastal waters lying within a coastal state's sovereign jurisdiction. *Id.* art. 2, 21 I.L.M. 1245, at 1272. The currently accepted limit of a state's territorial sea is twelve miles. *Id.* art. 3, 21 I.L.M. 1245, at 1272.

126. UNCLOS III, *supra* note 27, arts. 37-39, 21 I.L.M. 1245, at 1276-77. *See infra* § III.A.2.(b) for a detailed discussion of transit passage as it relates to a ban on nuclear transit.

127. *Id.* art. 37, 21 I.L.M. 1245, at 1276. Another UNCLOS III article states that, "[s]tates bordering straits shall not hamper transit passage. . . . There shall be no suspension of transit passage." *Id.* art. 44, 21 I.L.M. 1245, at 1278.

See generally UNCLOS III, *supra* note 27, arts. 34-45, 21 I.L.M. 1245, at 1276-78.

128. *See id.* arts. 17-26, 21 I.L.M. 1245, at 1274.

129. *See id.* art. 19, 21 I.L.M. 1245, at 1274.

130. "Historically, naval mobility had been served by the doctrine of freedom of the seas . . . ." LAW, FORCE AND DIPLOMACY, *supra* note 28, at 63.

131. In turn, the Greeks and the Romans controlled the sea lanes. *Id.* at 14. In the 17th century, the British were the dominant naval power. *Id.* at 14. In the late 20th century, the U.S. and U.S.S.R. are the major naval powers. *See generally* J. SEBENIUS, NEGOTIATING THE LAW OF THE SEA 75 (1984).

132. In more recent times, an important "aspect of Britain's ability to use the sea was the doctrine of belligerent's rights . . . . The doctrine of freedom of the sea was merely a

have attempted to exercise ever greater sovereignty over the seas while denying this same "creeping jurisdiction" to lesser powers.[133] The modern invocation of the law of the sea, as reflected in the third United Nations Convention on the Law of the Sea,[134] reflects the will of the naval powers,[135] and includes certain rights[136] of coastal states over their territorial seas (*not* including the right to block innocent passage[137]). Though the Law of the Sea negotiation process has been resistant to attempts by the non-nuclear coastal states to extend their jurisdiction over the seas,[138] the zone of sovereignty (total or otherwise) exercised by coastal states has gradually expanded.[139]

As early as 1702, the limit of the territorial sea was agreed to be about three nautical miles — the maximum range of a cannon.[140] But there has been "an almost irresistible tendency for national jurisdiction to creep beyond the existing" limits.[141] In the years following World War II, many states claimed a twelve mile territorial sea.[142] Today the territorial sea is acknowledged by UNCLOS III to reach to twelve miles.[143] Similarly, some states claimed rights out to 200 miles. In addition, UNCLOS III recognizes a zone of economic dominion (the so-called "exclusive economic zone") of up to 200 miles.[144]

Although the cartographer's lines of claimed and universally recognized rights of sovereignty over the seas have expanded, the inviolability of these perimeters continues to evade universal acceptance. So too have the rules regarding the rights of transitting ships — or coastal states — been unevenly applied by all states. Many states, including the U.S. and the U.S.S.R., proclaim rights beyond those generally accepted by UN-

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symptom of the fact that nations attempt to further their interests by whatever instruments they have at their disposal, be they military or economic, diplomatic or legal." LAW, FORCE AND DIPLOMACY, *supra* note 28, at 13-14.

133. K. Booth, *The Military Implications of the Changing Law of the Sea*, in THE LAW OF THE SEA: NEGLECTED ISSUES 343-354 (1979) [hereinafter "K. Booth"].

134. *See generally* UNCLOS III, *supra* note 27.

135. *See generally* J. SEBENIUS, *supra* note 131.

136. UNCLOS III, *supra* note 27, arts. 19-22, 24-25, 21 I.L.M. 1245, at 1274-75.

137. *Id.* arts. 17-19, 21 I.L.M. 1245, at 1273-74.

138. J. SEBENIUS, *supra* note 131, at 71-109.

139. *See infra* notes 140-44 and accompanying text.

140. After a half century or so of early attempts to define the concept we now know as "territorial sea," Cornelius van Bynkersheim "suggested that a state's dominion over the sea should be restricted to the range over which its power extended from the adjacent land. This was taken to be the maximum range of a canon . . . the distance agreed was three miles." LAW, FORCE AND DIPLOMACY, *supra* note 28, at 15.

141. *Id.* at 38.

142. In 1945, the Truman Doctrine was announced whereby the United States claimed certain rights over its entire continental shelf. Following that initiative, many countries unilaterally claimed a territorial sea of anywhere from 12 to 200 miles. *Id.* at 16. By 1972, of 111 coastal states, only 25 still accepted the traditional three mile limit. *Id.* at 36.

143. UNCLOS III, *supra* note 27, art. 3, 21 I.L.M. 1245, at 1272.

144. *Id.* art. 57, 21 I.L.M. 1245, at 1280.

CLOS III.[145] At least ten states[146] invoke some regulation of foreign vessel transit through their exclusive economic zones. More than two dozen states require notification and/or approval before foreign warships may pass into their territorial sea.[147] Others claim special security zones.[148] Canada's claimed rights extend 600 miles north of its mainland coast, having "closed" the entire Northwest Passage and the Arctic Archipelago.[149] Among the nuclear powers, the Soviet Union claims full sovereignty over the Sea of Okhotsh,[150] having declared it closed to foreign vessels, and the United States has established over 100 danger zones, primarily used for test firing, within and without its territorial sea, often completely banning transit by all but U.S. naval ships.[151]

Many of the exceptions to full compliance with these provisions of the law of the sea are not based exclusively on military grounds. Prevention of pollution has been the justification for restrictions on unhindered transit. Canada has invoked some of the toughest regulation based on environmental concerns. "Under the Eastern Canadian Traffic Regulation System (ECAREG) all ships over 500 g.r.t. entering the ECAREG traffic zone are required to request clearance twenty-four hours in advance. The

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145. *See infra* notes 146-51 and accompanying text. The United States first claimed sovereignty beyond the three mile limit in 1945. The Truman Doctrine claimed a right over the continental shelf. LAW, FORCE AND DIPLOMACY, *supra* note 28, at 16. The U.S.S.R. claims complete sovereignty over the Sea of Okhotsh.

146. Guyana, India, Mauritius, Nigeria, Pakistan and the Seychelles regulate passage of foreign vessels in their EEZs, and the Maldives, Mauritania, Portugal and the U.S.S.R. regulate navigation in special zones of their EEZs. Alexander, *Geographical Perspectives on International Navigation*, Paper Presented at the East-West Center/ Law of the Sea Institute Conference on International Navigation (Jan. 1986). Additionally, Brazil exercises control over military maneuvers in its EEZ. CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 302-305 (J. Van Dyke ed. 1985).

147. TRANSIT OF NUCLEAR-WEAPON BEARING VESSELS AND AIRCRAFT: THE RAROTONGA TREATY AND THE LAW OF THE SEA 5 (1986) [hereinafter "TRANSIT OF NUCLEAR-WEAPON BEARING VESSELS"]. Among these states are China, Denmark, Egypt, Indonesia (except for passage in designated sea lanes), Norway, Papau New Guinea and Turkey.

148. *See* TRANSIT OF NUCLEAR-WEAPON BEARING VESSELS, *supra* note 147:

> Burma [sic], India and Vietnam prohibit alien warships and aircraft from military warning zones 24 kilometers wide while Cambodia and Indonesia have such zones 12 kilometers wide. China has a Military Warning Zone extending at some points to 50 miles, North Korea has one out to 50 miles, South Korea . . . one extending 150 miles in the Sea of Japan and 100 miles in the Yellow Sea, and Nicaragua one extending 25 miles requiring 15 days advance notice by foreign warships and planes. (citations ommitted).

Id. at 6.

149. Alexander, *supra* note 146, at 23.

150. *Id.* The Soviet Union doesn't recognize the principle of innocent passage for warships at all. Butler, *Soviet Concepts of Innocent Passage*, 7 HARV. INT'L L.J. 113, 127 (1965); Butler, *The USSR and the Limits to National Jurisdiction over the Sea 1970-72*, in LIMITS TO NATIONAL JURISDICTION OVER THE SEA 177, 179, 189 (G. Yates & J. Young eds. 1974).

151. Sohn, *International Navigation Interests Related to Security*, Paper Presented at the East-West Center/Law of the Sea Institute Conference on International Navigation (Jan. 1986).

stated objective of the regulations is to reduce the danger of pollution."[152] Canada's requirements are especially significant in that Canada's exertion of control could reach beyond the 200 mile EEZ limit. Canada also was successful in including an article in UNCLOS III that allows states with control over ice-covered territory to invoke special controls.[153]

Clearly the law of the sea is not a singular and static paradigm of law, either as customary international law or as codified in multilateral treaties or conventions. Rather, it is constantly changing. Some suggest the change may be dramatic. "We are living in a transitional period of maritime affairs,"[154] one commentator recently wrote. "We are seeing a shift from a regime entirely dominated by the traditional maritime powers to one in which all coastal states (and even non-coastal states) demand a bigger say in ocean affairs and claim greater rights . . . ."[155]

The fact that transit passage became a part of UNCLOS III, though not as the freedom of transit doctrine envisioned by its sponsors,[156] the United States and the Soviet Union, is evidence enough of that. Whereas the United States and Soviet Union were pushing for virtually complete freedom of navigation through international straits,[157] Indonesia, Malaysia and Singapore[158] were ready to "de-internationalize"[159] the Malacca

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152. LAW, FORCE AND DIPLOMACY, *supra* note 28, at 38-39 (citing E. Gold & D. Johnston, *Ship-generated Maritime Pollution: The Creator of Regulated Navigation*, Paper Presented at the 13th Annual Conference of the Law of the Sea Institute (Oct. 1979)).

153. UNCLOS III, *supra* note 27, art. 234, 21 I.L.M. 1245, at 1315. The full text of the article reads as follows:

> Coastal states have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, 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. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment on the best available scientific evidence.

154. LAW, FORCE AND DIPLOMACY, *supra* note 28, at 38.

155. *Id.*

156. P. TANGSUBKUL, ASEAN AND THE LAW OF THE SEA 29 (1982).

157. *Id.* China, on the other hand, took the position that

> straits lying within the territorial waters of a coastal state still come under the national sovereignty of that state, even if they are often used for international navigation . . . . China is of the view that the demand for freedom of transit and freedom of overflight would allow the superpowers to treat the territorial waters of other countries as the high seas purely because the aforesaid waters are straits used for international navigation.

Id.

158. Indonesia, Malaysia and Singapore border the Strait of Malacca and the nearby Strait of Singapore.

159. The position of the three governments was stated in the Joint Statement on "Straits of Malacca and Singapore," issued by the Ministry of Foreign Affairs of Malaysia on November 16, 1971. Among its provisions, it stated that:

> (i) the three governments agreed that the safety of navigation in the

Strait, a principle passage between the Pacific and Indian Oceans. The result is the compromise transit provisions now found in UNCLOS III,[160] which provide for strait transit while allowing limited control by the coastal state.[161]

Reliance on UNCLOS III as the definitive "restatement" of the law of the sea is troubling for another reason: it is not yet the law. The Convention has not been ratified by the requisite sixty nations for it to enter into force.[162] The validity of UNCLOS III as international law will be open to question so long as it has not yet formally entered into force, and perhaps even after that point if major players refuse to ratify. Several key nations have refused to sign or ratify the convention, most notably the United States and the United Kingdom. Still, these states claim UNCLOS III to be customary international law *except* for the provisions which they do not approve.[163] Further, they claim the right to enforce provisions of UNCLOS III against all other states, despite the fact that they do not feel themselves compelled to honor all of its provisions.[164] This posture may be seen as undermining the entire convention, at least so far as it was designed to be an "all or nothing" package.[165]

Straits of Malacca and Singapore is the responsibility of the coastal states concerned;

(ii) the three governments agreed on the need for tripartite co-operation on the safety of navigation in the two straits;

. . .

(iv) the three governments also agreed that the problem of the safety of navigation and the question of internationalization of the Straits are two separate issues;

(v) the governments of the Republic of Indonesia and of Malaysia agreed that the Straits of Malacca and Singapore are not international straits, while fully recognizing the principle of innocent passage. The Government of Singapore takes note of the position of the governments of the Republic of Indonesia and of Malaysia on this point . . . .

P. TANGSUBKUL, *supra* note 156, at 27.

The Philippines has also been a proponent of more restrictive rights of transit passage. *See e.g.*, Manansala, *The Philippines and the Law of the Sea*, 8 L. SEA INST. WORKSHOP 430, 430-41 (1987).

160. C. SANGER, *supra* note 20, at 88. Certain events had raised the level of concern over this important link between the Pacific and Indian Oceans. During the war leading to the formation of Bangladesh as a separate state, both the U.S. and Soviet Union sent warships through the strait without the required notification. *Id.* at 86. Indonesia and Malaysia were also very concerned about the possibility of a clash between nuclear submarines in the strait. They and Singapore were also distressed at the growing pollution problem in their waters, which was playing havoc with their fishing industries. *Id.* at 88.

161. *See id.*

162. As of July, 1988, only 35 states of the required 60 had ratified UNCLOS III, L. OF THE SEA BULL., July 1988. UNCLOS III, *supra* note 27, art. 308(1), 21 I.L.M. 1245, at 1327.

163. TRANSIT OF NUCLEAR-WEAPON BEARING VESSELS, supra *note* 147, at 10.

164. *Id.*

165. Article 309 does not permit a ratification with reservation or exceptions unless specifically provided for in the Convention. UNCLOS III, *supra* note 27, art. 309, 21 I.L.M. 1245, at 1327.

To date, most states have not seen it in their best interest to evade or spurn the provisions of UNCLOS III. In fact, many small coastal states[166] are heavily dependent on the seas and receive significant benefits from UNCLOS III. These states may feel a compulsion to adhere to all provisions of UNCLOS III as a matter of principle or practicality. As such, they would be adhering to the spirit and intent of the convention negotiations which took place under the premise that states would adopt the complete treaty as a single, packaged unit.

In theory the unwillingness of the U.S. and U.K. to ratify UNCLOS III provides signatory states with a basis to deny them and other non-signatories the rights guaranteed by UNCLOS III. It appears that a state is within its authority to prohibit "passage and overflight along sealanes [sic] in archipelagoes and transit passage through straits within territorial seas, arguing that these rights are not customary law and do not accrue to non-signatories of UNCLOS."[167] Indonesia has expressed the position that it has the right to "deny transit passage to those nations that have not signed and adhered to [UNCLOS III]."[168] Nonetheless, most states which have either ratified the convention or intend to honor it fully expect all other states to do similarly.

2. Specific Regimes of UNCLOS III and Nuclear Transit

Following the general discussion of the Law of the Sea above, it is important to note that we review three specific regimes of UNCLOS III which would be directly challenged by prohibition of nuclear transit. The regimes implicated are innocent passage, transit passage and exclusive economic zones. A subpart of this section will deal with each of these in turn. A fourth subpart of this section looks at the future of UNCLOS.

(a) Innocent Passage

UNCLOS III provides that:

> Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State . . . . Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in . . . any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State . . . .[169]

Though this language might at first indicate to the contrary, the definition itself provides the vehicle for a state to prevent nuclear transit

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166. J. SEBENIUS, *supra* note 131.

167. TRANSIT OF NUCLEAR-WEAPON BEARING VESSELS, *supra* note 145, at 3; *see* Surace-Smith, *United States Activity Outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage*, 84 COLUM. L. REV. 1032, 1058 (1984).

168. Wisnomoert, *Indonesia and the Law of the Sea*, 8 L. SEA INST. WORKSHOP 392, 406 (1987).

169. UNCLOS III, *supra* note 27, art. 19(1)-(2)(a), 21 I.L.M. 1245, at 1274.

within its territorial sea yet remain within the letter of the Law of the Sea. That vehicle would be to declare, *ipso facto*, that the transit of nuclear weapon carrying or nuclear powered ships is "prejudicial to the peace, good order or security" of the coastal state or parties to a nuclear free zone treaty. Such a declaration would constitute recognition that such transit could not be "innocent" by its very nature.[170] Any nuclear weapon carrying warship or aircraft (or, indeed, any warship or warplane capable of carrying nuclear weapons) is a nuclear target regardless of its locale. An attack on such a plane or ship would unleash the destructive potential of a nuclear weapon against the state within whose territory the ship or plane was transitting. Such an attack would obviously violate "the sovereignty, territorial integrity or political independence of the coastal State," even if the involved territory were not the intended target of the attack.

This argument is not foreign to the international arena. As two Law of the Sea chroniclers pointed out, "[s]ome states regard [nuclear powered] vessels as inherently threatening to their peace and good order."[171] As early as 1964 Spain passed legislation declaring "that the passage of nuclear ships through territorial waters was to be considered an exception to the right of innocent passage."[172] More recently, the New Zealand Foreign Ministry considered taking the position that the transit of nuclear vessels can be inimical to a coastal state's "sovereignty, territorial integrity or political independence" in its preparatory sessions for the South Pacific Nuclear Free Zone Treaty negotiations.[173]

Perhaps surprisingly, UNCLOS III does afford some recognition of the dangers posed by nuclear fueled ships and those with nuclear cargo. Such vessels are required to "observe special precautionary measures established for such ships by international agreements"[174] and may be asked, when "exercising the right of innocent passage through [a coastal state's] territorial sea[,] to use such sea lanes . . . as it may designate or prescribe for the regulation of the passage of such ships."[175] The question for those ultimately concerned with the illegality of nuclear transit under any condition is: Will future interpretations or revisions of the relevant provisions of the Law of the Sea encompass that broader viewpoint? The answer might be found in international fora that have convened in order to study the problem of large-scale pollution.

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170. *See supra* note 20 and accompanying text.

171. R. CHURCHILL & A. LOWE, THE LAW OF THE SEA 70 (1983) [hereinafter "CHURCHILL & LOWE"].

172. Act No. 25/64, 29 April 1964, art. 7, *UN Leg. Ser.* B/16, p. 45 (reported in CHURCHILL & LOWE, *supra* note 171, at 70).

173. The New Zealand Foreign Ministry ordered a legal study of this question prior to concluding negotiations on the Treaty of Rarotonga. It apparently decided against taking this position in order to conclude a treaty sufficiently favorable to the United States so as to gain U.S. ratification of treaty protocols. *See supra* note 72.

174. UNCLOS III, *supra* note 27, art. 23, 21 I.L.M. 1245, at 1274-75.

175. *Id.* art. 22(1). *See id.* art. 22(2), 21 I.L.M. 1245, at 1274.

One of six developments that the U.S. believes will be a near-future addition to a revised UNCLOS III is an anti-pollution measure calling for the "imposi[tion of] greater controls on navigation" within exclusive economic zones.[176] Such thinking is easily traced to the UNCLOS III negotiations. It was in that forum that Indonesia and Malaysia decried severe damage to the their fishing industries from massive oil tanker mishaps. Due to that experience they have taken the position that "passage of supertankers was non-innocent because the 'peace, good order and security of the coastal state' were being prejudiced by environmental risks . . . ."[177] The United States and other states considered the seriousness of this interpretation to be sufficient to warrant modifying their demand for unfettered strait transit.[178]

If states can effectively argue that the high risk to the environment by potential polluters is a breach of the "peace, good order or security" of a coastal state, as Malaysia, Indonesia and Singapore have contended, it is certainly valid for a state to take the position that the cataclysmal life and society-threatening risk posed by nuclear transit is such a breach. Indeed, this possibility was acknowledged in a United Nations study on nuclear weapon free zones, which posited that the "question of innocent passage" might be reconsidered "in light of the requirements necessary to the effectiveness of [a nuclear weapon free] zone."[179]

Restrictions upon the right of innocent passage are not without precedent. Over two dozen countries[180] require some sort of notification or approval of the passage of foreign warships within their territorial sea, including China and the Nordic countries. Despite the definition of innocent passage found in UNCLOS III, the actions of these states may make it "reasonable to concede to a State the right to enact regulations regarding the passage of foreign warships through its territorial waters, if considerations based on its safety and protection justify it,"[181] particularly

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176. Alexander, *The Ocean Enclosure Movement: Inventory and Prospect*, 20 SAN DIEGO L. REV. 561, 588-90 (1983).

177. C. SANGER, *supra* note 20, at 88. In statements made after the Joint Statement on "Straits of Malacca and Singapore" was issued, *supra* note 159, the governments of Indonesia and Malaysia expressed specific concern about the problem of pollution. Indonesia took the view that "[e]very nation has the right to protect the territorial waters from use by other countries which could endanger the interest of its people, as by causing water pollution and damaging off-shore exploration and fishing industries." Statement of the Chief of Staff of the Navy, May 19, 1972, *quoted in* P. TANGSUBKUL, *supra* note 156, at 27-28. The Malaysian Prime Minister expressed a similar sentiment: "Indonesia and Malaysia have to control the Straits of Malacca so that it will not be polluted by oil spills from tankers which can and will destroy the fish and the shore of both countries." Opening Statement of the 23d UMNO (Government Party) Conference, May 1972, in *id.* at 28.

178. C. SANGER, *supra* note 20, at 88.

179. *Comprehensive Study*, *supra* note 7, at 49.

180. *See supra* note 147 and accompanying text.

181. Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, 4 OCEAN DEV. & INT'L L. 51, 54 (1977), (quoting C.J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 223 (4th ed. 1961).

when that state takes the legal position that the presence of nuclear weapons cannot be "innocent."

(b) Transit Passage

The rationale for imposing restrictions on nuclear transit through the territorial sea are equally applicable to international straits. Whatever the potential dangers to a coastal state from an incident in its territorial sea, they are magnified in a strait. For example, a strait's narrowness and shallowness leave less room for error. These factors combined with the often heavy traffic passing through a strait[182] bring vessels closer to land and increase the chance for collision or grounding. Further, the importance of international straits to the nuclear powers[183] — and the frequent crossings their vessels make — presents a considerable risk of nuclear confrontation within straits.[184]

The concept of strait transit as a doctrine of international law was originally promoted as a regime of free passage through international straits.[185] Pressure by states bordering straits[186] ("straits states") such as Indonesia, Malaysia, Singapore and Spain resulted in some weakening of the free passage proposal. Still, the strait transit provisions of UNCLOS III, as enacted, served to prevent straits states from exercising complete sovereignty over what would otherwise be their territorial seas when that territorial sea comprised an international strait. Under UNCLOS III, any ship or aircraft is permitted unfettered passage when exercising continuous and expedient transit.[187] This is a weaker standard (from the point of view of straits states) than innocent passage.[188] Objecting to the severe restraints on their rights, several key straits states, among them Spain and Morocco (Strait of Gibraltar), Oman (Strait of Hormuz) and Indone-

182. *E.g.*, 5000 vessels per month through the Strait of Malacca. P. TANGSUBKUL, *supra* note 156, at 25 (citing P. TANGSUBKUL, AN ASIAN VIEWPOINT ON THE STATUS OF STRAITS IN EAST ASIA (1974)).

183. "The United States is especially dependent upon these archipelagic waters and international straits [of Indonesia and Malaysia] for the transit of its submarines to and from Guam and Subic Bay [the Philippines] to Diego Garcia [the U.S. naval base on an island in the central Indian Ocean]." Larson, *Innocent, Transit, and Archipelagic Sea Lanes Passage*, 18 OCEAN DEV. & INT'L L. 411, 417 (1987). *See infra* note 191.

184. *See supra* note 20 and accompanying text.

185. *See supra* note 156 and accompanying text. For detailed descriptions of the advance of the transit passage concept, many sources can be cited, including CHURCHILL & LOWE, *supra* note 171, at 81-89; LAW, FORCE AND DIPLOMACY, *supra* note 28, at 97-113; Kuribayashi, *The New Law of the Sea and the Straits of Malacca*, in INTERNATIONAL SYMPOSIUM ON THE NEW LAW OF THE SEA IN SOUTHEAST ASIA: DEVELOPMENTAL EFFECTS AND REGIONAL APPROACHES 146 (D.M. Johnson, E. Gold & P. Tangsubkul eds. 1983).

The journal Ocean Development and International Law recently published an entire issue devoted to the subject of transit passage. 18 OCEAN DEV. & INT'L L. 391-496 (1987).

186. *See supra* notes 158-61 and accompanying text.

187. *Id.* at 125-27. *See* UNCLOS III, *supra* note 27, art. 37-38.

188. *See infra* note 191 and accompanying text.

sia (Straits of Malacca and Lombok)[189] have declared that they will employ the innocent passage regime, not recognizing transit passage. This issue is of particular interest to an ASEAN nuclear free zone[190] where the straits providing the most expeditious and traveled access between the Pacific and Indian Oceans are located.[191]

The right of transit passage is similar to the right of innocent passage found in the territorial sea regime. Ships and aircraft exercising the right of transit passage are required to "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait . . . ."[192] However, the strait state is not reserved the express right to expel a ship whose passage is non-innocent (i.e., prejudices the "peace, good order or security" of the coastal state).[193]

The transit passage regime contains another provision which could be invoked against nuclear-powered vessels and those with nuclear cargoes. In cases in which the environment is threatened, Article 233 of UNCLOS III allows coastal states to "take appropriate enforcement measures" against vessels "causing or threatening major damage to the

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189. Surace-Smith, *supra* note 167, at 1033.

190. The ASEAN states may well be among the next nation groups to promulgate a nuclear free zone. *See* Fry, *supra* note 6, at 69-71. During the December 1987 ASEAN summit in Manila, Indonesian President Suharto called for an ASEAN nuclear free zone. In the end a paragraph in the final declaration of the summit stated that "ASEAN would intensify its efforts toward the early establishment of a Southeast Asian nuclear weapon free zone . . . ." Vatikiotis, *Zone of Discord: Nuclear-Free Proposal Likely to Split Allies*, FAR E. ECON. REV., Jan. 14, 1988, at 12.

More recently the ASEAN Inter-Parliamentary Organisation, while calling for its members to work for an Indian Ocean Zone of Peace, stressed the need to complete drafting of its own nuclear free zone treaty as soon as possible. *Other Reports: ASEAN Parliamentarians Call for Nuclear Free Zone*, Summary of World Broadcasts (BBC), Aug. 26, 1989. ASEAN leaders have also called upon the removal of all military bases and nuclear weapons from their region. *ASEAN Legislators Want Orderly Withdrawl of Foreign Bases*, Reuters, Aug. 25, 1989.

191. The United States perceives strait transit to be of critical strategic concern to its national defense:

> If straits states such as . . . Indonesia and Malaysia were able to restrict the movement of U.S. carrier forces for reasons of their own determinations of national security, the effectiveness of the U.S. nuclear commitment could be threatened especially in times of crisis, [at] precisely the time when straits states would be under the most pressure, internal and external, to limit passage.

Janis, *supra* note 181, at 58.

The sincerity of such claims by the U.S. is doubted by some. For example, it has been suggested that "the advent of the Ohio class SSBNs (submarines with ballistic missiles) and the Trident I/C4 SLBMs (submarine-launched ballistic missiles), with an estimated range from 4,500-6,500 nautical miles . . . 'would virtually eliminate the dependence of the U.S. underwater nuclear force on passage through international straits.' " Larson, *supra* note 183, at 424 (quoting R. OSGOOD, TOWARD A NATIONAL OCEAN POLICY, 1976 AND BEYOND 47-48 (1976)).

192. UNCLOS III, *supra* note 27, art. 39(1)(b).

193. *See* Wisnomoert, *supra* note 168, at 404.

marine environment of the straits . . . ."[194] This explicit recognition of the straits (and other coastal) states' valid environmental concerns[195] should provide straits states with the means to enforce the same kinds of anti-pollution/anti-nuclear mechanisms, and with at least the same justification, as with cases involving innocent passage.[196]

(c) Exclusive Economic Zones

On the surface, a solution to the question of how to prohibit nuclear transit through exclusive economic zones is not straightforward. Coastal states do not have any explicit rights over the movement of foreign ships and aircraft through the 200 mile exclusive economic zone which is declared[197] to be part of the high seas. Moreover, there is no obligation on the part of foreign vessels or aircraft to refrain from activities which might "prejudice the peace, good order or security" of the coastal state or to refrain from "causing or threatening major damage to the environment."[198] However, UNCLOS III does specify that the "coastal State has sovereign rights for the purpose of . . . conserving and managing the natural resources" in the exclusive economic zone[199] and has "jurisdiction . . . with regard to . . . the protection and preservation of the marine environment."[200] Furthermore, UNCLOS III calls for "compl[iance] with the laws and regulations adopted by the coastal State in accordance with" these provisions.[201] This set of rules provides a potentially effective means to prohibit nuclear transit through the EEZ while remaining within the framework of UNCLOS III.

The dangers to the environment of radioactive pollution are well known.[202] It is not an indefensible position that the transit of any radioactive materials through the exclusive economic zone creates an unacceptable risk to the conservation, management, protection and preservation of the marine environment. There are inherent dangers in the transportation of radioactive substances including the potential for accidents at sea[203] or in the air[204] that could result in the exposure to the marine envi-

194. UNCLOS III, *supra* note 27, art. 233

195. *See supra* notes 152-53, 160 and accompanying text.

196. *See infra* § III.A.

197. UNCLOS III, *supra* note 27, art. 135.

198. *See id.* art. 56.

199. UNCLOS III, *supra* note 27, art. 56(1)(a).

200. *Id.* art. 56(1)(b)(iii).

201. *Id.* art. 58(3).

202. *See, e.g.*, E. COLGLAZIER, JR., THE POLITICS OF NUCLEAR WASTE (1982).

203. To date seven nuclear-powered submarines have sunk, releasing radiation into the sea, and the crew of another nuclear submarine died of radiation poisoning following an accident. Broder & Healy, *Soviet Submarine Sinks Off Norway: Nuclear-Driven Craft Goes Down After Fire; 'Major Loss of Life' Reported*, L.A. Times, Apr. 8, 1989, § 1, at 1, col. 5. It has been argued that the radiation released from those sinkings was not enough to "produce a big effect." *Id.* quoting J. Holdren, professor of energy and resources at Univ. Calif. at Berkeley. But the sinking of an experimental Soviet nuclear submarine in April 1989 off Norway is "basically . . . big trouble," according to the same expert. Ybarra, *Experimental*

ronment of radioactive substances. The lax attitude of the maritime industry toward disposing of and illegally dumping radioactive wastes at sea[205] is an existing source of serious radioactive pollution.

The possibility of sealing off EEZs to nuclear transit is not an abstract vision. As the Law of the Sea now stands,

> [t]he coastal State has the right, within its EEZ, to adopt non-discriminatory rules and standards against vessel-source pollution and to enforce these when necessary . . . . [A] number of coastal States have already adopted domestic legislation with regard to vessel-source pollution which is more severe than the rules and regulations of the International Maritime Organization Convention. The passage of "potential polluters," such as nuclear-powered vessels, vessels carrying nuclear of other "hazardous" cargoes, and ammunition ships, through the EEZs of some coastal States, may in time be jeopardized, treaty or no treaty.[206]

System on Sunken Sub May Pose Radiation Threat, L.A. Times, Apr. 9, 1989, § 1, at 11, col. 1, quoting J. Holdren. The submarine's metallic sodium-cooler, which cools the reactors, is highly explosive when it comes into contact with water, an event which would lead to massive release of the reactors' radioactive fuel.

Altogether, over half of the worlds' nuclear reactors are aboard submarines and nuclear-powered surface craft, "which is the most dangerous place for them to be." Tuohy & Parks, *No Sub Radiation Peril Soviets Say: Gorbachev Reassures World Leaders; More than 60 Feared Lost in Sinking*, L.A. Times, Apr. 9, 1989, § 1, at 1, col. 5, quoting Damian Durrant of the environmental group Greenpeace. The other concern posed by these vessels are their nuclear weapons, which can also leach their radioactivity into the water following an accident at sea.

204. The dangers of a crash of a plane carrying nuclear weapons might be exemplified by the return to earth of nuclear-powered satellites. In 1979, Cosmos 924 crashed over a wide area of Canada, contaminating 40,000 square miles. When Cosmos 1900 was expected to burn up on re-entry in 1988, officials blithely admitted that "everyone in the world will be exposed to the radioactivity." Treen, *Nuclear Crash*, THE NATION, Oct. 3. 1988, at 261.

Of greater concern is the radioactivity which would be released if a space shuttle carrying a plutonium-powered satellite exploded, as did the Challenger in 1986. *Nuclear Debris Could Be Released in Shuttle/Centaur Explosion*, AVIATION WEEK AND SPACE TECHNOLOGY, Mar. 10, 1986, at 288. Plutonium is the deadliest substance known. *See infra* notes 239-40 and accompanying text.

205. *See, e.g.*, Boehmer-Christiansen, *An End to Radioactive Disposal at Sea?*, J. MARINE POL'Y 119 (Apr. 1986); Van Dyke, *Ocean Disposal of Nuclear Wastes*, J. MARINE POL'Y 82 (Apr. 1988).

206. Alexander, *supra* note 176, at 585-86 (quoting Burke, *National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea*, 9 OCEAN DEV. & INT'L L. 289, 289-322 (1981)). This United States government officer's argument relies, in part on two sections of art. 211 of UNCLOS III, *supra* note 27. Art. 211(4) allows that:

> Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.

Art. 211(5) provides that:

> Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to

As long as the law is evolving, maritime parties can expect coastal states to attempt to enforce new provisions to protect their resources. A Soviet participant in law of the sea negotiations has reasoned that

> the practical and legal evolution of the EEZ concept will not be without dispute . . . . It is likely, for example, that some coastal states will undertake actions and enact legislation which will interfere with the rights expected by naval powers in EEZs; they will claim that they are acting in the interests of good order at sea and in accordance with their developing rights in a zone which is unique in the law of the sea.[207]

(d) UNCLOS IV?

It is impossible to predict whether future Law of the Sea Conventions will incorporate any of the proposals suggested above and in the Model Nuclear Free Zone Treaty. What is evident, however, is that "[t]he system of norms and principles of international law is in constant movement. Some norms and principles are just being born, others have been formed, and yet others are dying out."[208] Like the recognition of the EEZ by the Third Convention on the Law of the Sea, those developing norms will eventually find their way into international acceptance.

The stage is being set for the expansion of environmental controls and protective rights by coastal states within their territorial seas,[209] international straits[210] and EEZs.[211] Even at this early date it has been posited that

> [t]he problem of ecological security is closely linked with the human right to a healthy environment and the respective obligations of states. The concept of ecological security has begun to be filled with real substance with the internationalization of the problem of the environment in international relations as an objective process, that is, the aspiration of every country to guard its natural environment and the health of its people against damage which might be caused as a result of the "anti-ecological" activities of other countries.[212]

Another development in this evolutionary process is the effort by anti-nuclear forces to advance the claim of the Spanish legislature "that the passage of nuclear ships through territorial waters [is] to be considered an exception to the right of innocent passage."[213] This approach can

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and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

207. N. Rusina, *supra* note 31, at 262.

208. LAW, FORCE AND DIPLOMACY, *supra* note 28, at 43.

209. *See supra* subpart (a) of this section.

210. *See supra* subpart (b) of this section.

211. *See supra* subpart (c) of this section.

212. N. RUSINA, *supra* note 31, at 269.

213. Act No. 25/64, Apr. 29, 1964, art. 7, *UN Leg. Ser.* B/16, p. 45, reported in *id.* at 70.

be most effective within the framework of the territorial sea, where innocent passage is the current regime.[214] It would also be easily workable among the several straits states which employ innocent passage instead of the regime of transit passage recently adopted by the yet-to-be activated UNCLOS III.[215] Some countries have already adopted such a stand, most notably New Zealand, which has banned port visits by nuclear capable vessels.[216]

The movement of norms and principles may play a large role in the strait transit area, as well. The transit passage regime, though weaker than they originally sought, favors the strongest naval powers.[217] As the strength and determination of the less powerful coastal states increases, the resistance to the nuclear powers' attempt to install a regime of freedom of the sea through international straits will grow. The advancement of the Law of the Sea may also, one day, affect the transit passage regime's requirement that shipping and aircraft passing through or over an international strait "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait . . . ."[218] Is it not conceivable that nuclear transit could be viewed as a violation of this provision?

3. Voluntary Compliance

In the final analysis, compliance with new Law of the Sea provisions, or nuclear prohibitory interpretations of the current Law of the Sea, will most likely be voluntary. Treaties are substantially honored through international pressure and self-interest.[219] Where a nuclear free zone treaty is the vehicle by which nuclear transit is prohibited, there is an institutional form of voluntary compliance: each nuclear power would be asked to sign a protocol. Such protocols attempt to assure that the nuclear powers would honor the respective nuclear free zone treaty's prohibition on nuclear transit throughout the zone, whether it included just the territorial sea, EEZ, or an entire region of the open ocean. This is the theory of the protocols to the Tlatelolco and Rarotonga Treaties.

See supra notes 172-73 and accompanying text.

214. UNCLOS III, *supra* note 27, arts. 17-32. One commentator posits that change will come as cultural norms change. "If States believe that nuclear weapons are illegal, and that NFZs (nuclear weapons free zones) present a hope for world peace, cultural norms will gradually develop into legal norms against nuclear armaments." McFadden, *Nuclear Weapon Free Zones: Toward an International Framework*, 16 CAL. W. INT'L L.J. 217, 249 (1986).

215. *See supra* note 189 and accompanying text.

216. *See infra* note 99 and accompanying text.

217. *See supra* notes 156-61 and accompanying text.

218. UNCLOS III, *supra* note 27, art. 39(1)(b).

219. The doctrine of *pacta sunt servanda* (treaties are to be observed) arose out of the Peace of Westphalia ending the Thirty Years' War in 1648. T. BUERGENTHAL & H. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 16 (1985). Despite machinery designed to enforce treaty obligations included in most treaties since then, no nation will honor a treaty if to do so would result in its own detriment.

In the case of a nuclear prohibitory treaty or protocol, compliance does not have to rely on good faith alone. Instead, it may well be assumed that the nuclear powers would monitor compliance by one another providing an indirect method of verification. A ban on port or airfield visits included in such a treaty or protocol would, if honored, create *de facto* compliance.

B. *Nuclear Weapons, Alliances with Nuclear Powers and C³I*

Assuming the Treaty of Rarotonga to be a minimum standard to which future nuclear free zone treaties will adhere, the manufacture, possession, testing, storage, deployment and use of nuclear explosive devices of any type will be prohibited by such treaties.[220] The Rarotonga prohibitions do not, however, apply to activities of assistance, cooperation and participation in support systems for nuclear weapons. Australia, a party to the South Pacific accord, cooperates and co-manages[221] with the United States several so-called C³I,[222] or Command, Control, Communication and Intelligence installations, which are part of the U.S. defense network, helping to monitor and manage the location and activities of American and other forces throughout the Indian Ocean, East Asia and South Pacific regions.[223] As Michael Hamel-Green points out in the commentary to his treaty for FANG, such facilities are "integral parts of nuclear-warfighting [sic] systems and are generally considered to be prime nuclear targets in any nuclear hostilities,"[224] an irony acknowledged by Australian officials.[225]

Such systems might also serve as part of the conventional defense of the "host" state.[226] Nonetheless, if an objective of a nuclear free zone is to

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220. Treaty of Rarotonga, *supra* note 3, arts. 3-6, at 1444-46.

221. *U.S. Reaffirms Military Role in Pacific*, Reuters, Nov. 4, 1989; R. BABBAGE, RETHINKING AUSTRALIA'S DEFENCE 40, 92-99, 241, 244 (1980); C. Bell, *ANZUS in Australia's Foreign and Security Policies*, in AUSTRALIA'S FOREIGN & SECURITY POLICIES 136 (J. Bercovith ed. 1988). America's major C³I installations in Australia are located at North-West Cape, Nurrungar and Pine Gap. *Id.* at 154.

222. M. Hamel-Green, *supra* note 66, at 3. *See Command, Control, Communications and Intelligence*, SCI. AM., January 1985, at 32 [hereinafter "SCI. AM."].

223. *See* R. BABBAGE, *supra* note 221; M. O'CONNOR, TO LIVE IN PEACE: AUSTRALIA'S DEFENCE POLICY (1985); SCI. AM., *supra* note 222.

224. M. Hamel-Green, *supra* note 66, at 3. Michael Hamel-Green is not the only commentator to suggest this irony. Coral Bell notes that "the most vital of all Australia's vital national interests is the preservation of peace between the central balance powers. And this is also the most *endangered* of Australia's vital interests . . . ." C. Bell, *supra* note 221, at 152 (emphasis in original). Thus, while Australia's greatest threat is from nuclear war, it believes it must also be a participant in that same risk in order to help preserve the balance of power.

225. Confidential interviews with officials of the Foreign Ministry of Australia, *see supra* note 71.

226. C. Bell, *supra* note 221, at 150. However, Bell asserts that "[t]he American connection is useful but not essential to Australia in low-level threats. It would be vital in coping with internal level threats, but the help required would be more in the field of diplomacy, backing, supplies and intelligence than in combat forces . . . ." *Id.*

insure that the region not be a nuclear target, then one must ask, How can the maintenance of such installations comport?

Of course, if Australia or any other state in a similar position were to disband C³I facilities, the U.S. (or any other nuclear power in a similar position) would almost certainly object,[227] claiming that it cannot maintain its nuclear deterrent or its defense obligations to the host nation if the installation were to be removed. Such a claim puts a state desirous of being non-nuclear in a dilemma of sorts as long as there is tension between nuclear powers. If it rids itself of the danger of attack to the C³I facilities located on its soil, it also risks losing the protections of its defense alliance with the Western or Soviet bloc.

A second question inseparable from the C³I issue must also be considered. Should a nuclear free zone treaty prohibit treaty Parties from joining alliances with nuclear powers?[228] There are several questions the non-nuclear state may want to attempt to answer. What protection is actually provided by that alliance? Is the danger of nuclear attack, if nuclear free provisions are not enforced, greater than the danger of external attack should that alliance disband? Is there a strong non-nuclear state within the nuclear free zone that can aid in the defense of the smaller or weaker states against outside conventional forces, and at what cost? Is this defensive aid desirable? Can the strength of the new alliance created by the nuclear free zone treaty serve as a deterrent from outside attack? Is a conventional deterrent more effective for defense purposes than reliance on a nuclear state for protection?

The treaty proposed by the Fiji Anti-Nuclear Group[229] would prohibit "entering into military alliance arrangements with nuclear weapon states under which nuclear weapons would be used in defense of or with the cooperation of any Contracting Party."[230] A more radical approach would be to ban all defense alliances with nuclear states. Such an approach might well be unnecessary if the parties to an alliance involving one or more nuclear powers made it explicit that nuclear weapons would not be used in the defense of the non-nuclear state. This agreement would presumably provide greater assurance of freedom from nuclear attack by the opposing nuclear state, due to the diminished threat of attack from that region, though such an agreement has speculative effect at best. The nearest thing to a precedent may be "negative assurances"[231]

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227. In an analogous situation, the United States suspended the ANZUS alliance as regards New Zealand following New Zealand's ban on port visits by nuclear capable vessels. *See infra* note 99 and accompanying text.

228. Michael Hamel-Green's Draft Treaty for a Comprehensive Nuclear Free Zone in the South Pacific, prepared for the Fiji Anti-Nuclear Group, calls for the prohibition of any "military arrangements with nuclear weapon states under which nuclear weapons would be used in defense of or with the cooperation of any Contracting Party." Art. 1(f). Text can be found in M. Hamel-Green, *supra* note 66.

229. FANG Treaty, *supra* note 68.

230. *Id.* art. 1(f).

231. Kennedy Graham, a disarmament ambassador for New Zealand, spells out three

whereby nuclear powers have declared not to use nuclear weapons against non-nuclear states, as is the case with a protocol to the Treaty of Tlatelolco.[232] However, the United States has made it clear that it could not abide by such a proviso,[233] thereby withdrawing its defense obligations to New Zealand following that country's nuclear port ban.[234]

For negotiators of future nuclear free zone treaties this may be one of the most difficult issues. The pragmatist might say that the nuclear powers cannot be ignored. Even truly neutral countries may feel threatened by one or the other of the nuclear states or their proxy. Defense alliances may at worst be a "necessary evil." But as New Zealand[235] and the drafters of Palau's Constitution[236] have asserted, there may be no need for such alliances to rely on nuclear weapons.

Still there exists the question of what should future negotiators do regarding C³I and similar facilities? Their use and value for non-nuclear, weapons-related defense and mobility purposes can be great, if not vital. Similarly, even the most basic of such systems, intended and normally used for non-nuclear purposes, could be utilized for monitoring and communicating with nuclear weapons.

Thus, any approach which did not completely ban electronic surveil-

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forms that negative assurances can take:

> 1. A 'total non-use' pledge never to use nuclear weapons against any state at any time or under any circumstances.
> 2. A 'non-first strike' and a 'non-first use' pledge between nuclear powers in which one undertakes never to be the first to use nuclear weapons against another. A non-first strike pledge excludes the use of nuclear weapons in the form of the first offensive move of war. A non-first use pledge excludes their initial employment in response to aggression by conventional forces. Either of these pledges can be of two kinds:
>
> (a) a total pledge, in which the nuclear power applies the pledge to all other nuclear powers; or
>
> (b) a partial pledge, in which the nuclear power extends the pledge to certain other nuclear powers but not to all.
>
> 3. The more general 'non-use' understanding extended to non-nuclear weapon states. This can similarly be of two kinds:
>
> (a) a total undertaking, in which the nuclear power forswears the use of nuclear weapons to all non-nuclear weapon states under any circumstances;
>
> (b) a partial (or conditional) undertaking, in which the nuclear power agrees not to use nuclear weapons against non-nuclear weapon states under certain circumstances, or on certain conditions. There are a number of variations of condition 'non-use' undertakings, depending on the circumstances and the conditions stipulated.

Graham, *supra* note 84, at 281. *See infra* note 19 and accompanying text.

232. Treaty of Tlatelolco, *supra* note 5, protocol II, art. 3, at 364. The Treaty of Rarotonga contains a similar protocol, Treaty of Rarotonga, *supra* note 3, protocol 2, art. 2, at 1461, but only China and the U.S.S.R have signed protocol instruments. *See supra* notes 69-82 and accompanying text.

233. *See supra* note 70 and accompanying text.

234. *See infra* note 99.

235. *See* Glover, *supra* note 19; *see also infra*, note 99.

236. *See supra* notes 86-93 and accompanying text.

lance, monitoring and command facilities would almost certainly be unenforceable. A better, though not completely satisfactory, approach would be to prevent such facilities located within the zone from being used for any activity in relation to nuclear weapons. Instead of banning such facilities altogether, it would rely on the good faith of the states to uphold the intent of the treaty. And it does, at least, acknowledge the dilemma posed by such facilities. In a nuclear episode the net result just might be the sparing of the facility — and the "host" state — from nuclear attack.

C. *Peaceful Nuclear Activities*

It is both impossible to assure that any nuclear explosive device will only be used for peaceful purposes and to guarantee that the use of such a device will not result in any risk to life or property. The Rarotonga Treaty simply bans all nuclear explosive devices.[237] But what of other allegedly peaceful nuclear purposes?

Virtually no one denies that the use of radioactive materials for medical and limited non-military research purposes is valid and acceptable. However, at what point does non-military scientific nuclear research cross the line to become military research? This is a distinction which authorities and watchdogs may want to watch closely, yet these may be beneficial uses even the most ardent foes of nuclear activity would not prohibit.[238]

Nuclear power plants present a possible problem for some states wishing to go nuclear free. Huge amounts of foreign exchange may have been invested in the reactors.[239] Yet many states which do have nuclear power plants have publicly acknowledged the extraordinarily heavy financial, environmental and social burden which they impose on their people. Such an acknowledgement may have led to the closing down of the brand new reactor in the Philippines[240] and the phase-out of nuclear power plants undertaken in Sweden as early as 1980.[241]

Nuclear power plants also pose nuclear proliferation dangers. Waste material from reactors contains weapons-usable plutonium which,[242] if reprocessed, could be utilized in nuclear weapons.[243] Moreover, fissionable wastes from nuclear power plants are known to be susceptible to diversion.[244] Nuclear power plants are also subject to terrorist attack and could

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237. Treaty of Rarotonga, *supra* note 3, art. 3, at 1444-45.

238. *See, e.g.*, M. Hamel-Green, *supra* note 66, at 3-4.

239. For example, the Philippine nuclear reactor which President Aquino shut down prior to its launching cost her country more than $2 billion in hard currency. Dumaine, *supra* note 97.

240. *Id.*

241. *See supra* note 101 and accompanying text.

242. R. NADER & J. ABBOTTS, THE MENACE OF ATOMIC ENERGY 78-81.

243. *Id.*

244. *E.g.*, Pakistan and India have avoided or bypassed international nuclear safeguards and supervision, resulting in both countries having the facilities and nuclear material to construct significant quantities of nuclear weapons. L. SPECTOR, *supra* note 16, at 73-124. Similar allegations involving Israel have been commonplace for several years. *Id.* at 130-45.

be held for political ransom.[245] In 1990 the justification for new nuclear power plant construction in most, if not all situations, and even the operation of many existing nuclear power plants, is nil.

Recent years have seen a growth in consumer and industrial uses of radioactive substances. Examples include smoke detectors, food irradiation and sterilization by irradiation.[246] Of course, there is a risk of radioactive contamination with these products, as with all nuclear products. That risk is magnified by the greater dissemination of radioactive materials which will necessarily occur as food irradiation plants are built and operated,[247] not to mention the radioactive waste materials produced by these irradiation facilities.[248] Furthermore, the material used by food irradiation plants, for example, is a direct by-product of weapons-grade nuclear fuel production.[249] A risk completely different in nature is intimated by medical research which links irradiated foods to increased incidence of cancer and other diseases in humans.[250] A truly comprehensive nuclear free zone should at least consider restrictions on the great many of these activities and products. A reasonable approach would be to ban all nuclear activities except those for which there is both a minimal societal benefit *and* no non-nuclear substitute.

D. *Radioactive Waste Disposal*

The London Convention[251] prohibits the disposal of high level radioactive wastes at sea,[252] and since 1983 there has been an international moratorium[253] on the dumping of all radioactive wastes at sea. In no way should this be seen as a permanent device for ocean protection. The 1983

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245. *See generally*, P. LEVENTHAL & Y. ALEXANDER, PREVENTING NUCLEAR TERRORISM (1987).

246. Among non-food items which are irradiated presumably for sterilization purposes are "blood agar and plasma, blankets and towels, bottles, cosmetics, needles, infant wear, peat moss, sanitary napkins and tampons, lubricating jelly, scalpel blades, and water . . . ." Gibbs, *Zap, Crackle, Pop*, THE PROGRESSIVE, Sept. 1987, at 22, 24. Labels are not required for any irradiated products. *Irradiation Business Gears Up*, UTNE READER, May - June 1987, at 29-30 [hereinafter "UTNE"]. A former federal law requiring labeling of unprocessed whole foods, Gibbs, *supra*, expired in 1988. *See also* UTNE, *supra*.

247. Terry, *Why Is D.O.E. for Food Irradiation?*, THE NATION, Feb. 7, 1987, at 142. Although irradiation is a young business, there have already been significant radioactive spills, sloppy record keeping and other willful violations of safety regulations. *Id.*; UTNE, *supra* note 246.

248. Terry, *supra* note 247, at 142.

249. *Id.*

250. One study found an 80% incidence of a white blood cell anomaly, polyploidy, related to immune system disorders among children who ate products made from irradiated wheat. Gibbs, *supra* note 246, at 22-23. Animal studies have demonstrated genetic mutations among flies and mice fed irradiated food. *Id.* at 23.

251. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *opened for signature* Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165.

252. *Id.*

253. Boehmer-Christiansen, *supra* note 205; Van Dyke, *supra* note 205.

moratorium is currently under review[254] in the hope (by the nuclear exporting and waste producing countries) that its protections will be weakened.

South Pacific Forum states have chosen not to permit such a slackening to occur in their seas. The Treaty of Rarotonga institutionalized the 1983 moratorium's ban for the South Pacific.[255] A year later it was enhanced with the conclusion of the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, signed in 1986.[256] The seas of the South Pacific may now be free from radioactive pollution, but what of the rest of the world? Certainly any nuclear free zone should incorporate similar prohibitions.

Likewise, the disposal or storage of nuclear wastes anywhere in the vicinity of a watershed, or proximate to an alluvial deposit, should be strictly prohibited. Currently there is no known safe method of radioactive disposal. Until a safe method of storage or disposal is discovered, such products should be kept to a minimum, and where they do exist, the surest and safest alternative is to require users of such materials to store them in a nearby facility affording the maximum possible containment, monitorability and retrievability. Ideally, such facilities would be located near the largest sources of high level radioactive wastes in order to minimize the chance of spillage or loss when wastes are transported to storage facilities.

The net result is that future nuclear free zone treaties would be best to ban all storage or disposal except in monitored, retrievable storage facilities until an acknowledged safe method of disposal is discovered and in use. In the meantime, the world (or a nuclear free zone) would do best to bring the production of such materials to absolutely minimal levels (i.e., necessary medical and scientific uses only).

E. *Nuclear State Compliance*

The extant nuclear free zone treaties have sought to obtain explicit nuclear powers accession to the relevant parts of these treaties through protocols. This device has been accepted by the nuclear powers, given the requirement that nuclear free zones be regional undertakings.[257] The first of the two common protocols to the two extant treaties calls for adherence to the relevant principles of the treaties by extra-regional states which have international responsibility for territory within the region.[258]

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254. *Id.*

255. Treaty of Rarotonga, *supra* note 3, art. 7, at 1447.

256. SPREP, *supra* note 52.

257. One of eight guidelines for the establishment of a nuclear weapon free zone, agreed upon by the parties to the United Nations study on the subject, is that "[t]he initiative for the creation of a nuclear-weapon-free zone should come from States within the region concerned, and participation must be voluntary." *Comprehensive Study*, *supra* note 7, at 31.

258. Treaty of Tlatelolco, *supra* note 5, protocols I, II, art. 2, at 360, 364; Treaty of Rarotonga, *supra* note 3, protocol 1, art. 1, at 1459, and protocol 2, art. 2, at 1461.

The second seeks assurance that the nuclear states will not assist any treaty party in violating a provision of the treaty as well a promise not to use nuclear weapons against treaty parties.[259] The Rarotonga Treaty includes a unique third protocol which asks nuclear states to refrain from testing nuclear explosive devices throughout the region.[260]

Additional protocols could be devised to obtain nuclear state accession to a broader range of treaty provisions. For example, being that the nuclear transit questions are likely to be among the most difficult to enforce, a pragmatic solution would be to attempt to secure a nuclear power agreement to honor any such provisions contained in the treaty, as proposed in Section III(A)(5) hereof.

Another possible protocol could seek nuclear power assurances that they would not test nuclear capable delivery vehicles anywhere within the zone. The working group to the SPNFZ expressed concern over the increasing frequency of missile tests throughout the Pacific.[261] Such a protocol, however, raises two difficulties. It could be validly argued that the same missiles which propel nuclear warheads can also be used to deliver conventional warheads and satellites. Thus, perhaps intention is the only way to distinguish acceptable versus unacceptable delivery systems. As to the *raison d'etre* of such a protocol, it is not beyond the ken for a nuclear free zone treaty to take whatever actions it can which may slow down the growth in the global nuclear arms race. Certainly such a goal might fall within the treaty's scope.

IV. THE MODEL NUCLEAR FREE ZONE TREATY

The Model Treaty (which appears in full in the Appendix to this article) is one possible ideal approach. Its individual provisions will appear to some as reasonable objectives and to others as anti-nuclear extremes. If considered by any given nation-group somewhere in the world, it may or may not find them pragmatic. Regardless, it is hoped the Model Treaty will promote discussion, both in a general (or even academic) sense and within the specific case or cases of regional groups contemplating the creation of nuclear free zone treaties.

The objective of this article is to contribute to and help foster dialogue, and in so doing and simultaneous thereto, expand the framework and possibilities for these dialogues. If the result is that this analysis and the Model Treaty provide nuclear free zone negotiators with just the smallest bit of fodder, then this effort will have been a resounding success.

What follows is an article-by-article discussion of the Model Treaty's provisions with an emphasis on the objectives each would attempt to ac-

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259. Treaty of Tlatelolco, *supra* note 5, protocol II, art. 3, at 364; Treaty of Rarotonga, *supra* note 3, protocol 2, arts. 1-2, at 1461.

260. Treaty of Rarotonga, *supra* note 3, protocol 3, at 1463.

261. *Working Group Report*, *supra* note 65, at 27.

complish should the Model Treaty be adopted. The discussion of the substantive articles of the Model Treaty will compare it to the Treaty of Rarotonga. The complete Model Treaty is found at the Appendix.

Article 1. Renunciation of Nuclear Explosive Devices.

Article 1 is similar to Article 3[262] of the Treaty of Rarotonga. Slightly more expansive in its breadth, it prohibits the presence and use, in any form, of nuclear explosive devices by anyone, anywhere within the zone. Its scope is intended to be all inclusive.

Article 2. Prohibition of Nuclear Transit.

This article incorporates a total ban on the transit of nuclear powered ships and of any warship or military aircraft containing nuclear explosive devices anywhere through, over or upon any territory in the zone, including that territory over which a treaty Party has jurisdiction, including its territorial sea and exclusive economic zone. It adopts the language suggested by the discussion in section III(A) above.

As well as prohibiting such transit, paragraph (c) of the article imposes a control system requirement on treaty parties in order to assure their compliance with these provisions. These requirements are designed to force foreign state compliance with the control system.

The South Pacific Nuclear Free Zone Treaty does not prohibit nuclear transit, though it does restrict the presence of nuclear explosive devices and similar items from the zone of application.[263] In addition, Article 5(2)[264] of the Treaty of Rarotonga allows each party to "decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, [and] . . . territorial sea," so long as it is "*in a manner not covered* by the rights of innocent passage . . . or transit passage of straits."[265]

Article 3. Prevention of Dumping of Radioactive Wastes.

Unfortunately, even with the 1983 moratorium[266] on the dumping of radioactive wastes at sea (now under review[267]), the question of such dumping is not academic. Article 3 treats the question of radioactive waste dumping at sea, and goes far beyond. It prohibits dumping or storage at any location which could contaminate water supplies or soil. It further requires that radioactive wastes be stored in monitored, retrievable and secure waste management facilities on or in land or structures built thereon or therein. This provision goes well beyond the language of the

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262. Treaty of Rarotonga, *supra* note 3, art. 3, at 1444-45, is entitled "Renunciation of Nuclear Explosive Devices."

263. *Id.* arts. 3-6 at 1444-46.

264. *Id.* art. 5(2) at 1446.

265. *Id.* (emphasis added).

266. *See supra* note 253 and accompanying text.

267. *Id.*

Treaty of Rarotonga limited solely to dumping.

One of the stickier questions confronting radioactive waste experts today is what constitutes a sufficiently safe and secure waste management facility. Some would defer to International Atomic Energy Agency (IAEA) standards, but these have proven relatively weak. One reason may be that Article II of the Charter of the IAEA states that a main interest and responsibility of the IAEA is the promotion of the expansion of the nuclear industry.[268] As long as this is one of the primary objectives of the IAEA, it will continue to incorporate considerations of nuclear expansion into its recommendations on waste disposal techniques. Thus, IAEA regulations and standards cannot be credible as effective tools for the enforcement of any effective nuclear free zone. Paragraph (d) of the article in fact calls upon party states to support the development of more responsible nuclear-safeguard standards on the part of the IAEA.

The Tlatelolco and Rarotonga Treaties require party states to conclude nuclear safeguard agreements with the IAEA.[269] The Model Nuclear Free Zone Treaty takes a more restrictive stand, calling on party states to provide for "maximum" containment, safety and security (which should be read to include a demonstration that sites selected for radioactive waste storage will be afforded sufficiently restrictive access to eliminate, as much as possible, the threat of terrorist attack or sabotage). Admittedly, the standards contained in Article 3 are non-specific. If specific, effective, workable standards existed, they would be included. As the state of the art of radioactive waste disposal (not to mention other toxic waste disposal) does not afford such standards, the best that can be hoped for at the present time is for party states to police themselves and one another in the spirit of the treaty in order to effectuate such maximum protections.

Nothing in this article would prevent any treaty party from availing itself of the complaint and investigation procedures of Article 12 (Complaints and Special Investigations) if it believed another treaty party to be employing standards so weak as to be inconsistent with the Treaty. This device would act as a further assurance of meaningful and maximal protections and safeguards.

The article avoids any distinction between high and low level wastes. Both present long-term and highly hazardous dangers. For practical purposes it is felt that all radioactive wastes must be stored in maximally safe conditions. To allow a lesser standard for low level wastes would tend to minimize their perceived danger and, perhaps, have the effect of encouraging processes and products which generate such wastes.

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268. Statute of the International Atomic Energy Agency, Oct. 26, 1956, 8 U.S.T. 1093, T.I.A.S. 3873.

269. Treaty of Tlatelolco, *supra* note 5, art. 13, at 340; Treaty of Rarotonga, *supra* note 3, art. 8(2)(c) at 1448, and annex 2 at 1455.

Article 4. Peaceful Nuclear Activities.

While acknowledging the necessity of medical and non-military uses of radioactive substances,[270] Article 4 disallows the necessity of other uses, including nuclear power. Its provisions would also prohibit the use of nuclear isotope irradiation plants as food irradiators. (On the other hand, hospital irradiators used exclusively for sterilizing food for medical and sanitation purposes would be permitted).[271] Protocol "A" takes a slightly different approach with regard to the banning of specific uses and products derived from or utilizing radioactive substances, such as fertilizers with high concentrations of phosphate, by providing a mechanism for recognizing socially beneficial uses of some radioactive materials. But unless the protocol is adopted, the language of Article 4 will prohibit all such uses.

This requirement goes far beyond that of the Rarotonga Treaty, which is limited to support of the Non-Proliferation Treaty and prevents the provisions of source fissionable materials to non-nuclear states except under IAEA safeguards.

Article 4 must be read in connection with the definition of radioactive substance found in Article 6.

Article 5. Nuclear Weapons Systems.

This is the last substantive article of the Model Treaty, and is a concept not included in the extant treaties. This article starts off with some general language proclaiming the parties' seriousness and intent to encourage the eventual denuclearization of the entire planet. Except for the last two paragraphs (h)-(i), the remaining paragraphs (d)-(g) explicitly address and prohibit indirect ways in which treaty parties might participate in nuclear weapon development.

Paragraph (h) prohibits the use by any state of electronic surveillance and command facilities (i.e., C^3I) if used in connection with the "performance, operation, targeting, testing, or efficiency of nuclear explosive devices." As discussed in section III(B), this paragraph relies on the good faith of the parties. As demonstrated in the cited section, seemingly tougher language would likely result in less compliance with the spirit of the Model Treaty than this more moderate wording.

Paragraph (i) essentially adopts the FANG Treaty[272] principle on military alliances, which prohibits defense alliances in which nuclear

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270. *See supra* note 238 and accompanying text.

271. Indeed, if it is determined that certain models or types of radioactive or scientific reactors are particularly prone to abuse of the terms of the treaty, it would not be beyond the scope of the treaty for the Parties to ban these reactors, either in the body of the treaty itself or in a protocol or amendment. Such a preclusion might include, for example, the Norwegian research reactor in Halden. *See supra* note 106.

272. FANG Treaty, *supra* note 68, art. 1(f). *See supra* notes 221-28 and accompanying text.

weapons would be employed.

Article 6. Definitions and Terms.

"Nuclear explosive device"[273] and "stationing"[274] are similar to those definitions in the Treaty of Rarotonga. "Nuclear explosive device" is designed to be all inclusive, banning all nuclear explosive devices of any type, anywhere within the zone. Likewise, "stationing" is defined so as to be equally inclusive of all methods of transporting or basing nuclear explosive devices. "Territory" is meant to be all inclusive of any land, sea, subterranean and airspace territory over which a treaty Party has any legal or juridical claims or right of claim. The nature of the whole treaty is intended to be all inclusive, so such a definition of territory is good shorthand if not a pragmatic necessity. "Radioactive substance" is likewise intended to be all inclusive. Its breadth includes any and all substances which are radioactive or contaminated with radioactivity.

Article 7. Zone of Application.

Paragraph (1) refers to Annex 1. Annex 1, which would be tailor-made for the nation group considering the treaty, would contain the geographic definition and boundary of the zone covered by any treaty adopted from this Model Treaty. Paragraph (2), along with Article 20, would allow the expansion of the treaty zone to include adjacent states not included in the original treaty boundary, when the conditions therein specified are met or the broadening of the treaty zone by mutual incorporation with an adjoining nuclear free zone. (Article 20(2) would ensure that the new treaty zone would have standards no less than those incorporated by the present treaty). This, of course, would further the goals of global nuclear disarmament or a global or near-global nuclear free zone. Recall that the two extant nuclear weapon free zones, plus the Antarctic Treaty, form a single contiguous nuclear free zone comprising two-thirds of the South Hemisphere as well as some territory in north-of-the-equator Central America.[275]

Articles 8-10. Consultative Committee; Organization; Annual Meeting.

Articles 8-10 establish the organization of the Model Treaty. The Consultative Committee is the main body of the treaty organization. It consists of a representative of each treaty party. It makes virtually all policy, investigative and remedial actions of the treaty organization. An annual meeting is called for (Article 10), as well as non-scheduled meetings as provided by Article 12.

The Organization (Article 9) is the housekeeping and central clearing house of the treaty organization. The article calls for a Director and nec-

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273. Treaty of Rarotonga, *supra* note 3, art. 1(c), at 1444.
274. *Id.* art. 1(d).
275. *See supra* note 58 and accompanying text.

essary (presumably small) staff. The Organization is responsible for coordination and communication among the treaty Parties.

Article 11. Reports, Exchanges of Information and Freedom of Information.

The concept of a nuclear free zone, as most international accords, relies on the good faith of the parties. In order to facilitate the trust required to ensure the compliance with and reverence for a treaty of this type, it is believed that maximal information sharing is essential. The sharing of various reports and information, as called for by the article as well as "ad hoc" documents, will also provide the confidence needed to assure that not only are treaty parties adhering to the letter of the law, but to its spirit as well, particularly in regard to their adherence to monitoring requirements of Article 2 (Transit). The article additionally calls for the disclosure of all reports to the public at large except for those documents explicitly made confidential under paragraph (5). An automatic "sunset" provision allows for continuance of the confidential status only on an annually renewable basis.

Article 12. Complaints and Special Investigations.

Another important element of the control system is a means of investigating alleged violations or breaches of the Model Treaty. Article 12 provides a mechanism to insure that complaints are heard and investigations carried out without interference and with the promise of the utmost integrity.

It is felt that these provisions should be part of the main body of the treaty, not an annex as they are in the Treaty of Rarotonga.[276] The South Pacific Forum exhibited great apparent harmony among its members,[277] probably accounting for the location of these provisions in the treaty's annex. Though desirable, it is doubtful that few other regions can make such a claim. Thus, positioning these provisions in the body of the treaty is appropriate.

Articles 13-14. Corrective Actions; Settlement of Disputes.

Article 13 is an adjunct to Article 12 in that it provides the device for corrective action to be taken should a complaint made under the provisions of Article 12 prove true. Sanctions of a group of states against another state are difficult to arrive at or enforce. Creativity may help those in the future to arrive at equitable solutions. Paragraph (3) allows for such solutions. It also lists as a possible action, which could be used should the circumstances warrant, economic sanctions. Such sanctions would likely be most effective where a trade relationship or mechanism is

276. Treaty of Rarotonga, *supra* note 3, annex 4, at 1456-59.
277. Fyfe & Beeby, *supra* note 2, at 35-37.

already in place which would allow concerted effort against the aggrieving party.

Article 14 provides for arbitration or, in the alternative, the adjudication of the International Court of Justice, should the aggrieving party fail to comply with decisions reached under the provisions of Article 13.

Article 15. Amendment.

A two-thirds vote is required for amendments. The Treaty of Rarotonga calls for a unanimous vote before an amendment can be adopted.[278] Such an approach prevents tyranny of the majority, but so does a two-thirds vote while still retaining some flexibility.

Article 16. Signature, Ratification and Deposit.

These are standard treaty provisions. Paragraph 1 holds the treaty open for signature indefinitely. Paragraph 2 requires the treaty be ratified by the treaty parties. Paragraph 3 specifies the Director of the Organization as the Depositary of the Model Treaty once the treaty enters into force. Until that time, the state archivist of the state in which the treaty is signed shall serve as the depository.

Articles 17-18. Reservations; Duration and Withdrawal.

Such a treaty as this cannot permit reservations, nor should it terminate after a period of time. It is hoped by the Model Treaty that such an instrument would not be needed at some time in the future. No one knows when or if that time will come. The permanency of this agreement demonstrates the commitment and determination of the treaty parties to a nuclear free world. To say that after so many years we will reconsider our decision to refrain from building or using nuclear weapons does little to build confidence in one's treaty partners.

Permitting reservations, or a provision allowing states to be free from formally being bound until all possible treaty parties have ratified the treaty as is the case with the Treaty of Tlatelolco,[279] leads to inconsistent results and the denigration of the treaty's credibility. Indeed, both Brazil and Argentina[280] are believed to have been undertaking substantial research and development in nuclear energy and nuclear explosions. However, the two Latin American states have been engaged in a confidence building dialogue to open each other's nuclear facilities to one another.[281]

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278. Treaty of Rarotonga, *supra* note 3, art. 11, at 1449.

279. Article 28(2) of the Treaty of Tlatelolco, *supra* note 5, at 354, provides that the treaty does not enter into force until all states eligible have ratified the treaty or its protocols. It also allows states to waive this requirement. *Id.* art. 28(2). Chile and Brazil are the only Latin American states to have not exercised this waiver. Martinez Cobo, *The Tlatelolco Treaty: An Update*, 26 INT'L ATOM. ENERGY AGENCY BULL. 25, 26 (Sept. 1984).

280. L. Spector, *supra* note 16, at 179-214.

281. *Id.* at 183-186.

Article 19. Entry Into Force.

The Treaty of Tlatelolco enters into force when all states within the region ratify the treaty.[282] This may never happen. In eighteen years Argentina has not ratified the treaty, Cuba and Guyana have not signed it,[283] and France has not ratified Protocol I. In order to facilitate entry into force, the Model Treaty requires ratification by only two-thirds of the signatories.

Article 20. Extension of the Nuclear Free Zone.

Article 20 contains unique provisions designed to accommodate the growth of nuclear free zones. At some future point it may be more appropriate for individual states to join with neighboring nuclear free zones. For example, a hypothetical, future independent New Caledonia (by whatever name it may be known if and when it obtains independence from France), which lies within the region encompassed by the SPNFZ, might want to join that treaty. The Treaty of Rarotonga allows for this possibility *if* that non-treaty state is a member of the South Pacific Forum.[284] Perhaps not even this kind of condition should be required of a state which seeks to join a nuclear free zone.

Similarly, it is conceivable that neighboring nuclear free zones would find it desirable to "join forces," as it were. Article 20(2) allows for that possibility while insuring the standards of the treaty are not diminished by such a union. For example, a single, truly nuclear free entity comprising the South Pacific and Latin America zones, spanning two-thirds of the Southern Hemisphere's oceans, would be an extraordinary political presence. Article 20 works in conjunction with Article 7.

Article 21. Authentic Text.

Here would be stated the language(s) of the authentic or official texts of the treaty.

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282. Treaty of Tlatelolco, *supra* note 5, art. 28, at 352, 356.

283. A territorial dispute between Venezuela, the United Kingdom and Guyana, coupled with Article 25(2) of the Treaty of Tlatelolco which prohibits a political entity from admission to treaty when its territory is subject to dispute involving and "extra-continental" entity, prevents Guyana's participation.

284. Treaty of Rarotonga, *supra* note 3, art. 12(3):

> If a member of the South Pacific Forum whose territory is outside the South Pacific Nuclear Free Zone becomes a Party to this Treaty, Annex 1 [describing the area encompassing the treaty] shall be deemed to be amended so far as required to enclose at least the territory of that Party within the boundaries of the South Pacific Nuclear Free Zone. The delineation of any area added pursuant to this paragraph shall be approved by the South Pacific Forum.

Id. at 1450.

Annex 1.

Here would be the geographical definition of the zone of application of the treaty.

Protocol A.

This protocol is a little unusual. First of all, unlike the numbered protocols which follow and those of the Tlatelolco and Rarotonga Treaties, it applies to states party to the main treaty. Second, it modifies a provision of the treaty: unless the protocol has entered into force, the more restrictive language of Article 4 will be in full force.

The hardened nuclear opponent would oppose any non-medical and non-scientific use of radioactive substances. But there are scores of products utilizing radioactive substances and the list is growing monthly. Some of those products may be of great value. A blanket prohibition is thus too restrictive for many. Protocol A provides for a case-by-case review, replacing the virtual prohibition of Article 4 if it stood by itself. The Protocol will require the parties to vote on every product to be permitted (or prohibited). (This in no way would prohibit an individual state from imposing stricter domestic rules.) Every non-approved item would thus be considered specifically excluded.

Protocols 1-3.

These protocols are essentially identical to those of the Treaty of Rarotonga with two exceptions. Whereas Protocol 2 of the extant treaties does not apply to all of the treaty's prohibitions and obligations (which could be applicable) to the Protocol, the Model Treaty does. If a nuclear power is asked to give its assurance of respect for the Treaty, it should be asked to do so for all treaty obligations. Otherwise there would be "loopholes" which would render the treaty less effective and the protocols less meaningful.

The Treaty of Rarotonga permits a protocol-ratifying party to withdraw from the protocol "if it decides that extraordinary events, related to the subject matter of [the] protocol, have jeopardised [sic] its supreme interests."[285] This language allows the nuclear powers a sizable loophole by giving them the ability to opt-out of protocol compliance virtually at will. It was included in the Rarotonga protocols in order to insure their ratification by the United States and the other Western nuclear powers. They refused to sign the protocols anyway.[286] If the intent of a nuclear free zone treaty is to maintain the nuclear freedom of the region, a nuclear power which ratifies the protocol should not be given the assurance that it can back out of compliance on the mere declaration that its "supreme interests" are jeopardized. The Model Treaty eliminates this loop-

285. Treaty of Rarotonga, *supra* note 3, protocol 1, art. 5, *passim.*

286. *See infra* notes 69-79 and accompanying text.

hole in each extra-zonal state protocol by simply stating that the ". . . Protocol is permanent in nature and shall remain in force indefinitely."

Protocols 2-5 would apply to all nuclear powers. While the Model Treaty specifies that the protocols are open to France, China, the Soviet Union, Great Britain and the United States, there is no reason they could include the near-nuclear and "unofficial" nuclear powers. Like the Rarotonga and Tlatelolco protocols, the Model Treaty calls for entry into force of the protocols for each nuclear power upon deposit of their instrument of ratification.[287]

The protocols do not require protocol parties to automatically accede to Amendments to the Model Treaty.

Protocols 4-5.

The Model Treaty contains the two additional protocols discussed in Section III(E). Being that the law of the sea-related proposals of Section III(A) most likely will be among the most difficult to enforce, it makes sense to attempt to secure nuclear power agreement to honor those provisions. Protocol 4 would accomplish this objective. To avoid perceived superpower imbalance and to facilitate their accession to the protocol it would not come into force for any nuclear power until all have deposited their instruments of ratification, unlike the other protocols which come into force for each state upon deposit of their instrument of ratification.

The last protocol, Protocol 5, seeks another nuclear power assurance: that they will not test nuclear capable delivery vehicles anywhere through or within the zone.

V. CONCLUSION

The Treaty for the Prohibition of Nuclear Weapons in Latin America and the South Pacific Nuclear Free Zone Treaty are courageous and powerful statements. Not only do they warrant to prohibit nuclear weapons (and more, in the case of the South Pacific treaty) from the regions in question, but they also sent — and continue to send — a message to the nuclear-weapon-states that their nuclear weapons policies are a threat to the security and existence of the treaty parties, as well as of the whole world.

Our planet is far from being nuclear-free. Even in this post-Cold War era, many feel that it is doubtful that Earth will ever see such a day again. But it is also certain that greater steps can be taken to reduce the dangers of nuclear war and radioactive poisoning from befalling those states so desiring. Many countries around the world have expressed this desire, including the parties to the Tlatelolco and Rarotonga Treaties.

The realities of international politics, of course, have prevented more

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287. *See, e.g.*, Treaty of Tlatelolco, *supra* note 5, protocol I, art. 3, at 362; Treaty of Rarotonga, *supra* note 3, protocol 1, art. 5, at 1460.

nations from forming nuclear-free zones, as well as unilaterally declaring themselves to be nuclear free. The history of debate in the United Nations attests to this.[288] Still, two such treaties are in force.

The debate over nuclear free zones is growing constantly stronger.[289] The ASEAN states are already considering the formation of a nuclear free zone.[290] Future nuclear free zones will surely provide greater protections than the Treaty of Rarotonga, just as that treaty provided significant protections not found in the Treaty of Tlatelolco. The new provisions that these new treaties will include are impossible to predict. But leaders in this movement have an obligation to propel the debate forward by analyzing the existing treaties in order to identify their strengths as well as areas where improved security can be had. That role involves suggesting goals which national leaders may aim for, including discussion to shape future treaties. It also requires helping to provide arguments for propelling these proposals forward. That is the province of this essay and the Model Treaty.

The Model Treaty was written with the objective of producing a workable framework, both for the principals in future negotiations, as well as other, more "distant" contributors to the discussion. That the proposals may seem extreme to some is, in part, due to idealism. It also demonstrates how far a group of states have to go to achieve comprehensive nuclear freedom.

The purpose here is not to suggest that such a result can be easily achieved. Or that the process will be relatively pain-free. Or that the end product will be readily accepted by the world political order. The contrary is the far more likely result, at least initially. We already know that some world powers have not smiled favorably upon the relatively mild Treaty of Rarotonga.[291] There will be fallout with regard to the Law of the Sea (UNCLOS III, IV, V or whatever). And some geographically distant allies may feel compelled to reconsider the status of alliances.

Whether consideration of or entry into a nuclear free zone treaty is the right course for a given state is beyond the scope of this article. For the state that does venture down that path, this article has attempted to make clear that, despite these concerns, such a course is fully justified and wholly defensible. In the context of international law, adopting and adhering to a nuclear free zone treaty, such as the Model Treaty herein, is legally supportable.

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288. *See infra* notes 7-13 and accompanying text.
289. *See, e.g., infra* notes 69-84, 99 and accompanying text.
290. *See supra* note 6.
291. *See infra* notes 69-82 and accompanying text.

APPENDIX

MODEL NUCLEAR FREE ZONE TREATY

PREAMBLE

In the name of their peoples and faithfully interpreting their desires and aspirations, the Governments of the States which sign this Model Nuclear Free Zone Treaty,

Recalling Article VII of the Non-Proliferation Treaty which holds that it is the "right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories,"

Recalling that the United Nations General Assembly, in its Resolution 808(ix), adopted unanimously, as one of the three points of a coordinated program of disarmament; "the total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type,"

Recalling that the United Nations First Special Session of the General Assembly on Disarmament, in its unanimously-adopted Final Document, declared that "the establishment of nuclear-weapon-free-zones on the basis of arrangements freely arrived at among the States of the region concerned constitutes an important disarmament measure," that "the process of establishing such zones in different parts of the world should be encouraged with the ultimate objective of achieving a world entirely free of nuclear weapons," that "the States participating in such zones should undertake to comply fully with all the objectives, purposes and principles of the agreements or arrangements establishing the zones, thus ensuring that they are genuinely free from nuclear weapons," and that "with respect to such zones, the nuclear-weapon States in turn are called upon to give undertakings, the modalities of which are to be negotiated with the competent authority of each zone, in particular: (a) to strictly respect the status of the nuclear-weapon-free-zone; (b) to refrain from the use or threat of use of nuclear weapons against the States of the zone,"

Recalling the Treaty for the Prohibition of Nuclear Weapons in Latin America, the first regional treaty creating a zone free from the dangers of nuclear weapons,

Recalling the South Pacific Nuclear Free Zone Treaty, declaring that region to be free of all nuclear explosive devices and radioactive waste dumping, and

Convinced that the mere existence of nuclear weapons is a threat to life and civilization as we know it and that the presence of such weapons on, in or near any sovereign territory, places that territory under direct risk of suffering a nuclear attack,

Convinced that the existence of any nuclear explosive device, or ships or aircraft carrying any nuclear explosive device, or support facilities for such weapons, ships or aircraft, within the territory, territorial sea or

ocean straits of any State, makes that State, and the region, a potential target for nuclear attack, and thus such devices, ships and aircraft are prejudicial to the peace, good order and security, and a threat to the sovereignty, territorial integrity and political independence of that state,

Convinced that any aircraft or ship containing any radioactive substance is fully capable of inadvertently leaking or otherwise discharging that material through some accident, design flaw, human carelessness or attack, and is thus an unnecessary and potentially life-threatening danger to all life through which it passes and transits, and is thus an unconscionable and an unacceptable risk to the protection and preservation of the marine environment,

Convinced that any aircraft or ship containing any radioactive substance is not immune from intentionally discharging that material, whether arising from an emergency situation or otherwise,

Convinced that there is no justifiable purpose for any kind of nuclear explosive device, that there is no acceptable basis for the continued testing of nuclear explosive devices and that they are a source of needless radioactive contamination,

Convinced that radioactive substances are extremely hazardous and pose a substantial danger to all life, that there is a grave, substantial risk of contamination associated with the storage of such materials and in particular radioactive wastes, and that the risks of exposure to such dangers must be minimized to the greatest extent practicable,

Convinced that nuclear power is an uneconomical and potentially dangerous source of electricity which rarely, if ever, provides benefits which are outweighed by the costs, risks and hardships nuclear power facilities create,

Convinced that a nuclear free zone is an appropriate and desirable way for non-nuclear States to prevent the deployment of nuclear weapons as well as protect their inhabitants from the scourge of nuclear weapons and nuclear pollution,

Convinced, as were the signers to the first Nuclear Free Zone Treaty in Tlatelolco that the proliferation of nuclear weapons is inevitable unless States, in the exercise of their sovereign rights, impose restrictions on themselves in order to prevent it,

Finally,

Determined to support the creation of nuclear free zones wherever in the world States come together to protect their interests and insure their survival and vitality,

Determined that it is in the interests of the people of this world, and of all mankind, that this region shall forever be free from armed conflict, and

Determined, in light of the risks detailed above, that the establishment of a nuclear free zone is the best way to reduce the risks associated with nuclear weapons, nuclear pollution and nuclear contamination, as

well as provide for the secure and healthy future of this people of this region,

Have agreed as follows:

ARTICLE 1

RENUNCIATION OF NUCLEAR EXPLOSIVE DEVICES

Each Party undertakes:

(a) not to manufacture, acquire, possess, test, use, or have any control whatsoever over any nuclear explosive device, directly or indirectly, anywhere in the world;

(b) not to seek or receive any assistance in the manufacture, acquisition, possession, testing, or use of any nuclear explosive device;

(c) to prevent the testing of any nuclear explosive device anywhere in its territory, territorial sea or Exclusive Economic Zone;

(d) not to encourage, authorize, or otherwise assist, directly or indirectly, in any way, in the manufacture, acquisition, possession, testing, use or control of any nuclear explosive device whatsoever by any State, whether or not a Party to this Treaty; and

(e) to prohibit and prevent the storage, use, installation, deployment, stationing or possession of any nuclear explosive device anywhere within their territory, as defined in Article 6, paragraph 3 of this Treaty, inside or outside the Nuclear Free Zone, by any State, whether or not a Party to this Treaty or its Protocols.

ARTICLE 2

PROHIBITION OF NUCLEAR TRANSIT

Each Party undertakes:

(a) to accept and abide by the principle here stated that the transit or passage through any waters or airspace of any ship or aircraft whose propulsion is wholly or partly dependent on nuclear power:

(i) is prejudicial to the peace, good order and security of the coastal State;

(ii) by virtue of its presence, is a threat against the sovereignty, territorial integrity and political independence of a coastal state or a State bordering a strait; and

(iii) is a direct and immediate threat to, and cannot comport and accord with, protection and preservation of the marine environment.

(b) to prevent and prohibit visits by foreign warships and military aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign warships in its territorial sea, archipelagic waters, straits and other seas claimed by it, inside or outside the Nuclear Free Zone, when such ships or aircraft carry nuclear explosive devices of any kind, whether activated or not;

(c) to require that, prior to granting transit or visitation privileges to its ports, airfields, airspace or sea territory, to a foreign warship or military aircraft, the foreign State of whose forces such warship or aircraft are a part must request permission to transit or visit the Party's ports, airfields, airspace or sea territory with adequate advance notice of such transit or visitation as to assure orderly processing of the request:

(i) failure to provide adequate notice to allowing orderly processing of such a request shall result in automatic denial of the transit or visitation rights requested;

(ii) each Party to this treaty shall develop a procedure for processing such requests, and that procedure shall be communicated to all other Parties to this Treaty, to the Secretary General of the United Nations, and to the Governments of all nations known to have nuclear capabilities; and

(iii) all such foreign warships and military aircraft transitting or visiting a Party's claimed seas, ports and airfield shall be open to inspection for the purposes of verifying the non-presence of nuclear explosive devices upon request of the Party or any other Party to this Treaty when any such party has reason to believe such foreign warship or military aircraft is in violation of this Treaty.

ARTICLE 3

PREVENTION OF DUMPING AND USE OF RADIOACTIVE SUBSTANCES AND FISSION PRODUCTS

Each Party undertakes:

(a) to prevent the storage, dumping or disposal of any radioactive wastes and any other radioactive substances by anyone in its sea territory, or on or in any other body of water, any alluvial lands, any riparian lands, any lands adjacent to a watershed or subterranean stream, river or lake, any lands possibly subject to flooding, or any land where, if exposed, radioactive substances could leach into the surrounding or nearby soil, strata or water;

(b) to prevent the storage or disposal of radioactive waste materials except in monitored retrievable and secure radioactive waste management facilities on or in the land or in structures built thereon or therein, and when stored in a manner which can be shown to the satisfaction of competent national bodies of all states party to afford the maximum in:

(i) containment of radioactive materials from the environment;

(ii) safety of workers and the public;

(iii) security from terrorism and theft;

(iv) accessibility to permit expert inspection and supervision;

(v) monitoribility to ensure the early detection of any failure to meet the above criteria; and

(vi) retrievability in the event of the detection of any such failure.

The onus of proof in demonstrating that these criteria be fulfilled for the duration of the design life of the facility shall lie with the prospective operators of the proposed facility.

(c) not to take any action to assist, encourage or support the dumping or disposal by anyone of radioactive wastes and any other radioactive substances, except as expressly permitted by this Treaty, anywhere within the Nuclear Free Zone or in any other place;

(d) to call upon the United Nations and the International Atomic Energy Agency to abandon, as one of its purposes, the promotion of the expansion of the nuclear industry and the development of standards affording maximal safeguards and protections as would be consistent with Article 3.

ARTICLE 4

PEACEFUL NUCLEAR ACTIVITIES

1.(a) The Parties undertake to prohibit the planning, construction and use of all nuclear reactors, whether on land or in ships, other than nuclear reactors required for medical or non-military scientific purposes, except those already in full service and used for the generation of electrical power at the date of the conclusion of this Treaty.

(b) Reactors required for medical or non-military scientific purposes, as permitted in Paragraph (a) of this Article 4, shall not be utilized for any other purpose.

(c) Each Party shall shut down and begin dismantling all other nuclear reactors within one year of that Party's ratification of this Treaty. Constructed but not yet fully operational nuclear reactors, other than those medical and non-scientific reactors permitted in Paragraph (a) of this Article 4, will not be placed into operation.

2. Except as provided in paragraph 1 of this Article and Protocol A of this Treaty, the Parties agree that there shall be no use of nuclear or radioactive substances within their territory or anywhere within the Nuclear Free Zone.

ARTICLE 5

NUCLEAR WEAPONS SYSTEMS

Each Party undertakes:

(a) to support and encourage the complete nuclear disarmament of this planet;

(b) to support the continued and enhanced effectiveness of the international non-proliferation and anti-nuclearization systems based on the Non-Proliferation Treaty, and the several Nuclear-Free and Nuclear-Weapon-Free-Zone Treaties;

(c) to support and encourage the formation of other nuclear free zone treaties, particular those proposed for regions contiguous to the Nuclear

Free Zone created and encompassed by this Treaty;

(d) to prevent the testing of any delivery vehicle or other device designed or intended to carry or deploy nuclear explosive devices through or over its territory;

(e) to discourage the testing of any delivery vehicle or device designed or intended to carry, guide or deploy nuclear explosive devices through or over any territory or seas anywhere within the Nuclear Free Zone;

(f) to prevent and prohibit the development, manufacture or production of any delivery vehicle or other device, in whole or in any part thereof, designed or intended to carry, guide or deploy nuclear explosive devices, by anyone within its territory;

(g) not to participate in any way in the testing, use, design, manufacture, production, possession or control of any nuclear explosive device by anyone or any State, directly or indirectly;

(h) to prohibit the use by any State of facilities carrying out command, control, communication, intelligence, surveillance, navigation, research or other functions, located anywhere on its territory, when employed for aiding the performance, operation, targeting, testing, or efficiency of nuclear explosive devices; and

(i) not to participate or enter into any military or defense alliance under which nuclear weapons would be used in defense of or with the cooperation of any Party.

ARTICLE 6

DEFINITIONS AND TERMS

For purposes of this Treaty:

1. "Nuclear explosive device" means any nuclear weapon or other device capable of releasing nuclear energy, irrespective of the purpose for which it could be or is intended to be used, and includes any such device in any stage of assembly or disassembly.

2. "Nuclear Free Zone" means zone of application of this treaty as defined in Annex 1 and Articles 7 and 20 of this Treaty.

3. "Territory" means the land territory, bodies of water thereon, territorial sea, exclusive economic zone, and any other land or sea territory claimed by a Party to this Treaty, as well as the airspace and subterranean and sub-ocean surface area demarcated by that territory. "Sea territory" means any part of a Party's territory other than land.

4. "Stationing" means emplacement, home porting, deployment, stockpiling, transportation on land, in the air or at sea, emplantation, storage, installation or other physical presence.

5. "Radioactive substance" means any fissionable material, fission products, fission by-products, spent radioactive or nuclear material, the waste products from any fission reaction or any radioactive substances,

raw and source materials which can be processed into such substances, items contaminated by such substances, and materials or products whose value is due either wholly or in part to their radioactivity or their inclusion of radioactive material.

6. "Nuclear reactor" is any device or structure capable of containing a controlled nuclear fission chain reaction.

7. "Party" means any State which has deposited its instrument of ratification to this Treaty with the Depository of this Treaty. "Associate Party" means any State which has deposited its instrument of ratification to any of the Protocols to this Treaty with the Depository.

ARTICLE 7

ZONE OF APPLICATION

1. This Treaty and its protocols shall apply to the whole of the territory within the Nuclear Free Zone as defined in Annex 1.

2. The zone of application of this Treaty may be extended to other contiguous areas by amendment of this Treaty, including but not limited to:

(a) Parties outside the Nuclear Free Zone as defined in Annex 1 which accede to this Treaty after its conclusion and signing, as provided in Article 20(1); and

(b) the consolidation of adjoining nuclear free zone and nuclear weapon free zone treaties with this Treaty, as provided in Article 20(2).

ARTICLE 8

CONSULTATIVE COMMITTEE

1. There is hereby established a Consultative Committee. The Consultative Committee shall be composed of one representative of each of the Parties. The Consultative Committee shall be chaired by the representative to the Consultative Committee of the Party which last hosted the annual meeting of the Consultative Committee as prescribed in Article 10 of this Treaty. Each representative to the Consultative Committee, at the Committee's annual meeting and other meetings as may be called, may be accompanied by advisors.

2. A quorum shall be constituted by representatives of one half the Parties. Except as otherwise provided by this Treaty, decisions of the Consultative Committee shall be taken by consensus or, if failing consensus, by a two-thirds majority vote of those present and voting. The Consultative Committee shall adopt such other rules of procedure as it sees fit.

3. All meetings of the Consultative Committee shall be open to each Party to the Treaty.

4. Without prejudice to the conduct of consultations among Parties by other means, at the written request of one-third of the Parties to this

Treaty requesting a meeting of the Consultative Committee for the same purpose, the Director of the Organization shall convene a meeting of the Consultative Committee as soon as possible.

ARTICLE 9

ORGANIZATION

1. The Parties hereby establish an organization to oversee and facilitate compliance with this Treaty. The organization shall be known as the Nuclear Free Zone Organization, hereinafter referred to as the "Organization."

2. The Organization shall consist of a Director and necessary staff to conduct its affairs. The Director shall be elected for a term of five years by a vote of the Consultative Committee.

3. The Organization shall maintain offices at the city where this Treaty was signed.

4. The Organization shall be responsible for:

(a) scheduling and holding annual meetings as provided under Article 10;

(b) coordinating consultations among Parties and investigations as provided for under Article 11;

(c) disseminating all communications, including reports and exchanges of information, between Parties, as provided under Articles 12 and 13, as well as to other international organizations and the world public at large, as provided elsewhere in this treaty.

ARTICLE 10

ANNUAL MEETING

1. An annual meeting of the Consultative Committee shall be held for the purpose of reviewing operations of the past and upcoming year, including budgeting and activities of the Director and of the Organization. The annual meeting shall be chaired by the representative to the Organization of each Party in rotation in successive years. The meeting shall take place at a location within the territory of, and at the choosing of, that Party.

2. The Director shall report to the annual meeting on the status of this Treaty and all matters arising under or in relation to it, including all matters and communications made under Articles 11 through 15.

ARTICLE 11

REPORTS, EXCHANGES OF INFORMATION, AND FREEDOM OF INFORMATION

1. Each Party and Associate Party shall submit to the Director annual reports stating that no activity prohibited under this Treaty or the

Protocols it has signed has occurred in their respective territories (in the case of Associate Parties, with respect to territory with the Nuclear Free Zone). The Director shall circulate such reports to all Parties and Associate Parties.

2. Each Party and Associate Party shall report to the Director as soon as possible, and prior to, an event occurring within its jurisdiction which may affect the implementation or efficacy of this Treaty. The Director shall circulate such reports to all Parties and Associate Parties as quickly as possible.

3. The Parties shall undertake to keep each other informed on matters arising under or in relation to this Treaty. They may exchange information by communicating it to the Director, who shall circulate it to all Parties.

4. The Parties shall report to the Director all suspected incidents of violations of the Nuclear Free Zone by ships and aircraft powered by or containing nuclear reactors, or which are capable of carrying nuclear explosive devices of any kind which have not provided unequivocal declarations that the they do not carry nuclear explosive devices, as provided in Article 2.

5. All reports prepared by the Director, the Consultative Committee, Parties, Associate Parties, other non-Parties, the IAEA, and by Special Investigation Teams, relating to any matter arising under or in relation to this Treaty or violations of its provisions, shall be made freely and promptly available to any citizen of any Party, as well as to the United Nations Secretary-General. The only exceptions shall be individual reports which the Consultative Committee votes explicitly not to make public. The Consultative Committee may vote on an annual basis to keep a given report from the public. Otherwise, such reports shall be made public after one year from the date of the last vote not to make the report public.

ARTICLE 12

COMPLAINTS AND SPECIAL INVESTIGATIONS

1. The Consultative Committee shall have the power to carry out special investigations anywhere within the Nuclear Free Zone when requested by any Party which reasonably suspects that:

(a) another Party has taken action or is about to take action inconsistent with this Treaty,

(b) an Associate Party has taken or is about to take action inconsistent with the Protocols to this Treaty to which it is a party, or

(c) a non-Party is engaging in some activity inconsistent with this Treaty while within the Nuclear Free Zone.

2. Any such complaint shall first be brought to the attention of the Director who shall then convene a meeting of the Consultative Committee as soon as practicable. Upon consideration of the claim and having al-

lowed the Party (or Associate Party) charged with a breach or potential brach of its obligation an opportunity to respond to the claim, the Consultative Committee may decide, by consensus or simple majority vote of all Parties present excluding the complained of Party, to commence an investigation of the claim. The Consultative Committee shall determine the scope of the investigation.

3. Such investigation shall commence forthwith and shall be conducted by a special investigation team of three to five suitably qualified special investigators appointed by the Consultative Committee in consultation with the complained of (if a Party to this treaty) and complaining Parties and the Director, provided that no national of either Party shall serve on the special investigation team. If so requested by the complained of Party, the investigation team may be accompanied by representatives of that Party. Neither the right of consultation on the appointment of special investigators, nor the right to accompany special investigators, shall delay or impede the expedient work of the special investigation team.

4. Each Party shall give to all special investigators full and free access to all places, persons, and information which it may deem relevant or necessary to enable it to conduct its investigation. Special investigators shall be the sole determiners of which places, persons, and information are relevant or necessary to their investigation, as well as all reasonable and humane methods, respectful of basic human rights to be employed in conducting their investigation.

5. The Party complained of shall take appropriate steps to facilitate the special investigation, and shall grant to special investigators, privileges and immunities necessary for the performance of their functions, including inviolability for all papers and documents, and immunity from arrest, detention and legal process for words spoken and written, and places visited, in connection with the special investigation.

6. The special investigation team shall report in writing as quickly as possible to the Consultative Committee, outlining its activities, setting out relevant facts and information, with supporting evidence and documentation as appropriate, and stating their conclusions and recommendations. The report shall be communicated to all Parties and Associate Parties to this Treaty, and to the Secretary-General of the United Nations, as provided under Article 11.

7. If a complainant declares to the Director that the complaint constitutes an emergency and provides sufficient grounds for that belief, the Director may appoint and dispatch a special investigation team, as otherwise provided in paragraph 3 above, within 24 hours of receipt of the complaint. A meeting of the Consultative Committee will be called and convened as soon as possible, at which time the Consultative Committee may review the scope of the special investigation team appointed by the Director and provide further delineation of the scope of the investigation.

ARTICLE 13

CORRECTIVE ACTIONS

1. Upon presentation of the investigation team's report, the Consultative Committee shall take whatever reasonable corrective action it deems necessary to bring the situation, if inconsistent with this Treaty, into compliance with the Treaty, or to prevent an action which would be inconsistent with this Treaty. The Consultative Committee may also take whatever reasonable action it deems necessary in order to insure peace, security and protection of the environment. If the complained of State is a non-Party or Associate Party to this Treaty, its compliance to the above procedures shall be sought.

2. If a Party determined to have acted in a way inconsistent with this Treaty by the Consultative Committee fails to adhere to the Consultative Committee's corrective actions or other recommendations regarding that violation, the Dispute Settlement Procedures, as provided for in Article 13, shall be called into force unless otherwise determined.

3. If any non-Party or Associate Party fails to comply with the Consultative Committee's corrective actions as provided for under Paragraph 1 of this Article, or if any Party to this Treaty fails to comply with any directives or correction actions provided for under Paragraph 2 of this Article, then all Parties to this Treaty will undertake to compel such compliance by such peaceful means as may be deemed necessary and appropriate, including but not limited to suspension of all economic privileges granted that State and products of national origin of that State, until that party complies with the above procedures, the complaint is found to be without grounds, or remedial or disciplinary action recommended by the Consultative Committee has been effectively carried out. Nothing in this paragraph shall be construed so as to directly violate provisions of any valid and binding multilateral treaty, the sole or primary subject of which is international trade.

ARTICLE 14

SETTLEMENT OF DISPUTES

1. In the case of a Party to this Treaty determined to have acted in a way inconsistent with this Treaty by the Consultative Committee which fails to adhere to the Consultative Committee's corrective actions or other recommendations regarding that violation, the Parties involved shall undertake to submit the decision to arbitration. An arbitration panel shall be selected as follows: The aggrieving Party and the Consultative Committee shall each appoint an arbitrator of their choosing, who shall then select a third arbitrator to complete the panel, which shall arbitrate the dispute.

2. If in the above situation an agreeable arbitration panel cannot be found and unless the Parties concerned agree on another mode of peaceful settlement, the Parties and the Consultative Committee shall submit

the matter to the adjudication of the International Court of Justice.

ARTICLE 15

AMENDMENT

The Consultative Committee shall consider proposals for amendment to this Treaty proposed by any Party as communicated to the Director. The Director shall circulate the proposed amendment to all Parties not less than three months prior to the convening of the Consultative Committee for this purpose. Any proposal agreed upon by a two-thirds vote of the present members of the Consultative Committee shall be communicated to the Director, who shall circulate it for acceptance to all Parties. Amendments adopted shall enter into force thirty days after receipt by the Depositary of acceptances from two-thirds of the Parties.

ARTICLE 16

SIGNATURE, RATIFICATION AND DEPOSIT

1. This Treaty shall be open indefinitely for signature by all States situated within the area defined by Annex 1 and Articles 7 and 20.

2. This Treaty shall be subject to ratification by signatory States.

3. The state archivist of the state in which this treaty is concluded and signed is hereby designated Depositary of this Treaty and its Protocols, and respective Instruments of Ratification until such time as the Treaty is entered into force as provided in Article 19 and the first Director of the Organization is appointed, at which time the Director will thereby be designated Depositary of this Treaty and its Protocols, and respective Instruments of Ratification.

4. The Depositary shall transmit certified copies of this Treaty and its Protocols to the Governments of all signatory States and all States eligible to become Parties to the Protocols to the Treaty, and shall notify them of signatures and ratifications of the Treaty and its Protocols.

ARTICLE 17

RESERVATIONS

This Treaty shall not be subject to reservations.

ARTICLE 18

DURATION AND WITHDRAWAL

This Treaty shall be of permanent nature and shall remain in force indefinitely.

ARTICLE 19

ENTRY INTO FORCE

1. This Treaty shall enter into force on the date of deposit of the

instrument of ratification amounting to two-thirds of the signatories to the Treaty.

2. For a signatory which ratifies this Treaty after the date this Treaty comes into force, the Treaty shall enter into force on the date of deposit of its instrument of ratification.

ARTICLE 20

EXTENSION OF THE NUCLEAR FREE ZONE

1. If a state whose territory is contiguous with the zone of application of this Treaty seeks to become a Party to this Treaty, that state shall make written application to the Director. The Director shall circulate the application to all Parties not less than three months prior to the convening of the Consultative Committee for this purpose. Upon a decision of the Consultative Committee to accept the application, that State shall be invited to become a Party to and sign the Treaty. Upon deposit of its instrument of ratification, the state shall become a Party to the Treaty as provided in Article 19(2).

2. Upon the two-thirds vote of the Consultative Committee and a similar vote by the appropriate decision-making body of a contiguous nuclear free zone or nuclear weapon free zone treaty organization, a broader nuclear free zone shall be declared by the Parties to those Treaties. The Consultative Committee will undertake consideration of such, if and only if the result of a positive vote and the joint effort:

(a) would serve the purposes of both treaties;

(b) that the rights and obligations prescribed by this Treaty will not in any way be diluted or their effectiveness in any way compromised, and that they, at minimum will apply to all Parties of both treaties anyplace within the zone of application of this Treaty or the other treaty;

(c) that the broader nuclear free zone will not obviate this Treaty; and

(d) that the Parties and organs of both treaties will work together to enforce the strongest nuclear prohibitory provisions of both treaties within the broader nuclear free zone.

ARTICLE 21

AUTHENTIC TEXT

This Treaty, of which the [insert appropriate languages] texts are equally authentic, shall be registered by the Depositary in accordance with Article 102 of the United Nations Charter. The Depositary shall notify the Secretary-General of the United Nations of the signatures, ratifications and amendments relating to this Treaty.

ANNEX 1

NUCLEAR FREE ZONE

The Nuclear Free Zone contains all of the land and water territories with the area bounded by a line —

[insert geographic bounds of zone of application].

ADDITIONAL PROTOCOLS TO THE MODEL NUCLEAR FREE ZONE TREATY

PROTOCOL A

The Parties to this Protocol,

Being Parties to the Model Nuclear Free Zone Treaty (the Treaty),

Have Agreed as follows:

Article 1

Each Party undertakes to prohibit the entry, development, manufacture, use, storage, sale and distribution within the Territory of each Party as that term is defined in Article 6 of the Treaty except those radioactive substances or items containing or made of, in whole or in part, of any radioactive substance,

(a) required for medical and non-military and scientific purposes; and

(b) other items of great value to society for which there are no suitable non-radioactive substitutes as determined by Article 4.

Article 2

The Consultative Committee shall be the sole organ capable of determining which items are of great value to society and for which there are no suitable non-radioactive substitutes. Such determination shall be made by a two-thirds majority vote of the Consultative Committee.

Article 3

This Protocol shall be open for signature to all signatories to the Treaty.

Article 4

This Protocol shall be subject to ratification.

Article 5

This Protocol shall remain in force until it is denounced by one-half of the signatories to this Protocol.

Article 6

This Protocol shall enter into force on the date of deposit of the instrument of ratification amounting to two-thirds of the signatories of the Treaty. For a signatory which ratifies this Protocol after the date this

Treaty comes into force, the Protocol shall enter into force on the date of deposit of its instrument of ratification.

PROTOCOL 1

The Parties to the this Protocol,

Noting the Model Nuclear Free Zone Treaty (the Treaty),

Have Agreed as follows:

Article 1

Each Party undertakes to apply, in respect of the territories for which it is internationally responsible and which are situated within the Nuclear Free Zone, the prohibitions contained in Articles 1 through 5, and the reporting, complaint and settlement procedures specified in Articles 11(1), 11(2), 11(5), (12), 13(1) and 13(3).

Article 2

Each Party may, by written notification to the Depositary, indicate its acceptance from the date of such notification of any alteration to its obligation under this Protocol brought about by the entry into force of an amendment to the Treaty pursuant to Article 15 of the Treaty.

Article 3

This Protocol shall be open for signature by [all States which are, *de jure* or *de facto*, internationally responsible for territories within the Nuclear Free Zone].

Article 4

This Protocol shall be subject to ratification.

Article 5

This Protocol is of a permanent nature and shall remain in force indefinitely.

Article 6

This Protocol shall enter into force for each State on the date of its deposit with the Depositary of its instrument of ratification.

PROTOCOL 2

The Parties to this Protocol,

Noting the Model Nuclear Free Zone Treaty (the Treaty),

Have Agreed as follows:

Article 1

Each Party undertakes not to use or threaten to use any nuclear explosive

device against:

a) Parties to the Treaty, or

b) any territory within the Nuclear Free Zone for which a State that has become a Party to Protocol 1 is internationally responsible.

Article 2

Each Party undertakes not to contribute to any act of a Party to the Treaty which constitutes a violation of the Treaty, or to any act of another Party to a Protocol which constitutes a violation of a Protocol.

Article 3

Each Party may, by written notification to the Depositary, indicate its acceptance from the date of such notification of any alteration to its obligation under this Protocol brought about by the entry into force of an amendment to the Treaty pursuant to Article 15 of the Treaty or by the extension of the Nuclear Free Zone pursuant to Article 20 of the Treaty.

Article 4

This Protocol shall be open for signature by the French Republic, the People's Republic of China, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

Article 5

This Protocol shall be subject to ratification.

Article 6

This Protocol is of a permanent nature and shall remain in force indefinitely.

Article 7

This Protocol shall enter into force for each State on the date of its deposit with the Depositary of its instrument of ratification.

PROTOCOL 3

The Parties to this Protocol,

Noting the Model Nuclear Free Zone Treaty (the Treaty),

Have Agreed as follows:

Article 1

Each Party undertakes not to test any nuclear explosive device anywhere within the Nuclear Free Zone.

Article 2

Each Party may, by written notification to the Depositary, indicate its

acceptance from the date of such notification of any alteration to its obligation under this Protocol brought about by the entry into force of an amendment to the Treaty pursuant to Article 15 of the Treaty or by the extension of the Nuclear Free Zone pursuant to Article 20 of the Treaty.

Article 3

This Protocol shall be open for signature by the French Republic, the People's Republic of China, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

Article 4

This Protocol shall be subject to ratification.

Article 5

This Protocol is of a permanent nature and shall remain in force indefinitely.

Article 6

This Protocol shall enter into force for each State on the date of its deposit with the Depositary of its instrument of ratification.

PROTOCOL 4

The Parties to this Protocol,

Noting the Model Nuclear Free Zone Treaty (the Treaty),

Have Agreed as follows:

Article 1

Each Party undertakes not to transit territory or airspace, or visit ports or airfields within the Nuclear Free Zone, with warships or military aircraft which are nuclear-powered or carry nuclear explosive devices of any kind.

Article 2

Each Party may, by written notification to the Depositary, indicate its acceptance from the date of such notification of any alteration to its obligation under this Protocol brought about by the entry into force of an amendment to the Treaty pursuant to Article 15 of the Treaty or by the extension of the Nuclear Free Zone pursuant to Article 20 of the Treaty.

Article 3

This Protocol shall be open for signature by the French Republic, the People's Republic of China, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

Article 4

This Protocol shall be subject to ratification.

Article 5

This Protocol is of a permanent nature and shall remain in force indefinitely.

Article 6

This Protocol shall enter into force for each State on the date of the deposit with the Depositary of the instrument of ratification of the last State eligible to sign this Protocol.

PROTOCOL 5

The Parties to this Protocol,

Noting the Model Nuclear Free Zone Treaty (the Treaty),

Have Agreed as follows:

Article 1

Each Party undertakes not to test any delivery vehicle or other device designed or intended for the carrying, guiding or deploying nuclear explosive devices through or over the Nuclear Free Zone.

Article 2

Each Party may, by written notification to the Depositary, indicate its acceptance from the date of such notification of any alteration to its obligation under this Protocol brought about by the entry into force of an amendment to the Treaty pursuant to Article 15 of the Treaty or by the extension of the Nuclear Free Zone pursuant to Article 20 of the Treaty.

Article 3

This Protocol shall be open for signature by the French Republic, the People's Republic of China, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

Article 4

This Protocol shall be subject to ratification.

Article 5

This Protocol is of a permanent nature and shall remain in force indefinitely.

Article 6

This Protocol shall enter into force for each State on the date of the deposit with the Depositary of the instrument of ratification of the last State eligible to sign this Protocol.

INTERNATIONAL CAPITAL MARKETS SECTION

Buyer Beware: The United States No Longer Wants Foreign Capital to Fund Corporate Acquisitions*

JOSEPH E. REECE**

INTRODUCTION

> Instead of being viewed as a rival, [foreign investment] ought to be considered as a most valuable auxiliary, conducing to put into motion a greater quantity of productive labor, and a greater portion of useful enterprise than could exist without it.[1]
>
> Alexander Hamilton

The boundary lines of the world's primary financial markets are becoming ever blurred. No longer can we concern ourselves with the activities in corporate America alone. Today, it is rare when a major corporation does not do business in all of the major financial centers throughout the world.

A good example of this increasing internationalization can be seen in the world-wide debt market. Today it is common to find IBM commercial paper[2] being traded and held in Tokyo, Exxon Eurodollar notes[3] being

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* The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues on the staff of the Commission.

** Special Counsel, U.S. Securities and Exchange Commission.

1. 3 ANNALS OF CONG. 994 (1791).

2. Stigum, *Money Market Instruments*, in THE HANDBOOK OF FIXED INCOME SECURITIES 217, 232 (1983). This essay contains the following discussion on commercial paper:

> *Commercial paper*, whoever the issuer and whatever the precise form it takes, is an unsecured promissory note with a fixed maturity. In plain English, the issuer of commercial paper (the borrower) promises to pay the buyer (the lender) some fixed amount on some future date. But issuers pledge no assets — only liquidity and established earning power — to guarantee that they will make good on their promises to pay. Traditionally, commercial paper resembled in form a Treasury bill; it was a negotiable, non-interest-bearing note is-

sold in London[4] and sovereign debt being placed with large money center banks in New York.

The international bond market has undergone an explosive increase in size.[5] For example, in 1980, the total amount of bonds issued internationally was $38.3 billion.[6] By 1986 this figure had increased to $225.4 billion.[7] It appears that the world financial markets are in an era of unprecedented internationalization and growth.

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sued at a discount from face value and redeemed at maturity for full face value. Today, however, a lot of paper is interest bearing. For the investor the major difference between bills and paper is that paper carries some small risk of default because the issuer is a private firm, whereas the risk of default on bills is zero for all intents and purposes.

Firms selling commercial paper frequently expect to roll over their paper as it matures; that is, they plan to get money to pay off maturing paper by issuing new paper. Since there is always the danger that an adverse turn in the paper market might make doing so difficult or inordinately expensive, most paper issuers back their outstanding paper with *bank lines of credit*; they get a promise from a bank or banks to lend them at any time an amount equal to their outstanding paper. Issuers normally pay for this service in one of several ways: by holding at their line banks compensating deposit balances equal to some percentage of their total credit lines; by paying an annual fee equal to some small percentage of their outstanding lines; or through some mix of balances and fees.

3. *See*, STAFF OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, REPORT TO THE SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS AND THE HOUSE COMMITTEE ON ENERGY AND COMMERCE ON THE INTERNATIONALIZATION OF THE SECURITIES MARKETS G-3 (hereinafter "INTERNATIONALIZATION STUDY"). A generally accepted definition of a Eurodollar Security is a debt security issued multinationally through an international syndicate of banks or securities firms in a currency other than that of the country in which the bond is issued. According to the staff of the Securities and Exchange Commission, the all inclusive term Eurobond has several derivatives and variations such as Eurodollar bond, Euroyen bond, Euro-DM bond, etc. These names serve to indicate the currency in which the offering is denominated. Compare this to a foreign bond which is a debt security issued in a country other than that of the issuer and sold through a syndicate of banks or securities firms with the instrument being denominated in the currency of the country in which such bond is being sold.

4. The Eurodollar market was originally established by London banks in the early 1960's. This market was developed primarily because major multinational corporations needed to match cash needs with the currency inflows and expenditures caused by overseas expansion. Major corporations could offer a higher rate of return in London than in the United States and still have a lower total debt cost because London had no requirements for central bank insurance or participation. This market is primarily a debt market. The transactions involved were generally paper swaps between issuing corporations and large London banks. This market was a bombshell to the health of United States financial markets. As a result of the growth of this market, the Kennedy administration created the Fowler Task Force to examine what actions the United States could undertake to counteract the outflow of United States dollars to foreign investments.

5. *See* INTERNATIONALIZATION STUDY, *supra* note 3, at G-5. The staff of the Securities and Exchange Commission has defined an international bond as a debt security originally issued outside the country of the borrower. These securities generally take the form of Eurobonds or Foreign bonds.

6. *Id.* at II-1.

7. *Id.* at II-2.

Nowhere is this trend more evident than in the area of international mergers and acquisitions. As in other areas of internationalization of the financial markets, the United States is at the forefront of this activity. For example, in 1980, United States companies were involved in 116 deals where foreign companies were acquired with a total dollar value of over $1 billion.[8] By 1987 these numbers had increased to 190 deals valued at approximately $7.1 billion.[9] Although this represents an increase of over seven-fold, these numbers pale in comparison with the recent activity of foreign entities acquiring United States corporations. Many of our country's major multinational corporations have recently been the target of acquisitions by foreign entities and individuals.[10] In 1980, foreign acquirers participated in 167 deals valued at $6.7 billion.[11] By 1988 these numbers had risen to 447 deals valued at over $60.8 billion.[12] As the statistics illustrate, foreign investment in the United States has achieved a significant presence in corporate America.[13]

As a result of this activity, political pressure mounted resulting in the passage of an obscure amendment, section 5021, to the Omnibus Trade and Competitiveness Act of 1988,[14] commonly referred to as the Exon-Florio Amendment ("Exon-Florio"). This trade act is an amendment to the Defense Production Act of 1950, and in essence, gives the President the power to suspend, prohibit or dismantle mergers, acquisitions and takeovers of United States companies by foreign investment which threaten "national security."[15] On its face, this law does not appear to be problematic for corporate acquisitions that do not involve national security. However, given the broad discretionary power that has been granted, it is possible that this law will have far reaching and potentially onerous effects on the United States capital markets.

This article will explore the ramifications for and application to foreign acquirers of Exon-Florio. First, a historical framework will provide

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8. *1988 Profile*, MERGERS & ACQUISITIONS, May/Jun. 1989, at 60 (hereinafter "M & A"). This represents an increase of over 488%.

9. *Id.*

10. For a list of the twenty-five largest acquisitions made by foreign entities in the United States in 1988, see M & A, *supra* note 8. Companies such as Firestone Tire & Rubber Co., Federated Department Stores, CBS Records Group, Tropicana Products Inc., Brooks Brothers Inc., and Kidde Inc., were all acquired by foreign entities in 1988. As the names illustrate, many of the companies involved are ones that the American consumers deal with on a daily basis. As such, the recent flurry of international acquisitions affect all of us. Given the high profile of these companies, the stage was set for United States legislative action.

11. *See* M & A, *supra* note 8, at 60.

12. *Id.*

13. *See supra* notes 8-12 and accompanying text.

14. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

15. *See supra* notes 73-87 and accompanying text. This term has not been defined. Therein lies what may be the largest potential problem for foreign acquirers of United States companies.

an overview of the factors that led to the passage of Exon-Florio.[16] This is followed by a discussion of the coverage, scope and application of Exon-Florio.[17] Finally, the article will discuss the problems inherent in Exon-Florio, the proposed regulations and the burdens that may be placed on foreign acquirers.[18]

HISTORICAL FRAMEWORK

Historically, the United States has encouraged foreign investment in this country.[19] In its earliest years, the United States not only encouraged direct foreign investment, our fledgling nation was extremely dependent upon such funds.[20] Indeed, as Alexander Hamilton noted in 1791, foreign investment was a valuable addition to our capital hungry nation.[21] Thus, during the eighteenth and nineteenth centuries, foreign capital was a major factor in the economic development of this country. For example, it was a loan from England, France and the Netherlands that permitted the United States to complete the Louisiana Purchase in 1803.[22] Throughout the early part of the nineteenth century, European investment was the driving force behind the creation of our nation's infrastructure.[23] Between 1820 and 1840, investment in United States factories rose from $50 million to $250 million.[24] As with our nation's infrastructure, the bulk of these funds were provided by foreign investors. During the 1880's, it is estimated that nearly two-thirds of all new investment in railroads was

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16. *See supra* notes 19-71 and accompanying text.

17. *See supra* notes 72-81 and accompanying text.

18. *See supra* notes 82-114 and accompanying text.

19. *See* Berger, *Applying Uniform Margin Requirements to Foreign Entities Attempting to Acquire U.S. Corporations*, 24 VA. J. INT'L L. 543 (1984).

20. For a complete discussion of the historical development of Trade law and tariffs see Note, *The Trade Act of 1971: A Fundamental Change in United States Foreign Trade Policy*, 80 YALE L.J. 1418 (1971). Early American investment policy focused on international trade and primarily consisted of high tariffs to protect our nation's youthful industry. In the middle to late 1700's, this paternalistic approach was necessary because foreign products were frequently better made at a cheaper price. *See also* F. ROOT, R. KRAMER & M. D'ARLIN, INTERNATIONAL TRADE AND FINANCE (1966).

21. *See* ANNALS OF CONG., *supra* note 1. Although Hamilton was a forceful advocate favoring direct foreign investment, he may have been promoting more than just national pride. In recent years, Hamilton's zealous support for foreign investment has been challenged as motivated by the potential for personal pecuniary gain as opposed to promoting the long term fiscal health of our nation. *See* K. CROWE, AMERICA FOR SALE 248 (1978).

22. *See* Boorstin, *Foreign Investments in America*, 2 EDITORIAL RES. REP. 571 (1974) (hereinafter "Boorstin"). An $11.25 million loan from England, France and the Netherlands provided Thomas Jefferson with the funds needed to complete the land purchase that was a dramatic step in the emergence of our young nation as a potential world power.

23. *Id.* at 572. Railroads, canals, bridges and roads were all financed primarily with European capital. For example, the Erie Canal was made possible by a sale of state bonds sold on the London Market. This was significant given that the Erie was the first American canal to be a commercial success. By proving a commercial success, the Erie was an excellent selling point for other infrastructure promoters.

24. *Id.*

being made by Europeans.[25]

This financing of America by the Europeans continued unabashedly until the beginning of World War I. The war was the primary cause of a dramatic change in capital flows into the United States. To pay for wartime needs, many of Europe's creditor countries liquidated a large portion of American investments that had been amassed in the prior century. Foreign investment in the United States went from $7.2 billion in 1914 to $4 billion at the end of 1919.[26]

Although America's growth for over two centuries had been made possible with the utilization of foreign investment, the infusion of this foreign capital was not always viewed as a welcome event. As early as 1791, legislation aimed at curbing foreign investment was enacted. In creating the first Bank of the United States, laws were enacted that prohibited the election of aliens as directors and also barred the giving of proxies by nonresidents of the United States.[27]

Again during the 1850's, attention was focused upon the large influx of foreign investment.[28] By 1887, public concern had again culminated in

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25. D. ADLER, BRITISH INVESTMENT IN AMERICAN RAILWAYS, 1834-1898 (1970); Boorstin, *supra* note 22, at 572. In discussing the importance of foreign investment to the development of our nation, Daniel Boorstin, librarian for the Library of Congress, noted:

> By 1854, foreign investors held approximately one-half of the federal and state and one-quarter of the municipal debts. Their interest in private enterprise was much smaller. The discovery of gold in California, however, sparked activity in trade, manufacturing, and railroad building which started a new flow of European capital to America. The regularity of such investment was sometimes interrupted by panics and the disclosures of the folly of American promoters; in 1869, for example, representatives of the Memphis, El Paso, and Pacific Railroad sold some $5 million worth of bonds on the Paris Bourse, having widely advertised their great transcontinental line which turned out to be just three miles long.
>
> After that fiasco French investments in American railroads were negligible, but the English and Dutch remained enthusiastic and for a long time held controlling interests in the Illinois Central, the New York and Erie, the Philadelphia and Reading, and others. For more than three-quarters of a century British investors were the principal buyers of American railway securities. By 1914, when securities and direct investments by Europeans in America totalled $7 billion, well over half of it was in railroads . . . .

See also North, *International Capital Flows and the Development of the American West*, 16 J. ECON. HIST. 493 (1956).

26. Boorstin, *supra* note 22, at 573.

27. Act of Feb. 25, 1791, Ch. X, §§ 7 (I), (III), 1 Stat. 193. This fear of foreign control was still present in 1816. In creating the second Bank of the United States, prohibitions similar to the ones attached to the first Bank were also included in the enacting legislation of the second Bank. Act of Apr. 10, 1816, Ch. XLIV, §§ 11(1), (16), 3 Stat. 271, 274. *But cf.* National Bank Act, Ch. CVI, §§ 9, 10, 13 Stat. 102 (1864). These prohibitions were not entirely successful. By 1841, 56% of the Bank of the United States was owned by foreign investors. For a better discussion of the foreign investment in the Bank of the United States during the 1800's see LEWIS, AMERICA'S STAKE IN INTERNATIONAL INVESTMENTS 14-15 (1938).

28. *See* Boorstin, *supra* note 22. The major investments in the railroads were the primary area of concern during this era. In response to this purchase of America by foreign

the passage of legislation that regulated foreign investment. The Alien Land Law of 1887 prohibited the purchase of land in federal territories by foreign investors.[29] Regulation of foreign investment was essentially ignored from the early 1900's through World War II. Legislation was enacted mainly in those industries the federal government considered important to national security.[30] After World War II, the United States again actively encouraged foreign investment. The United States policy during this era can best be understood by a review of the following excerpt from the Mutual Security Act of 1954:

> [This Act authorizes the President to] . . . accelerate a program of negotiating treaties for commerce and trade . . . which shall include provisions to encourage and facilitate the flow of private investment and its equitable treatment in nations participating in programs under this Act . . . .[31]

As a result of this encouragement, United States investors began making significant offshore investments. Although the United States was encouraging the inflow of foreign investment capital, we were experiencing a significant balance of payments deficit. Given this turn of events, additional legislation was promulgated to encourage investment in the United States by foreigners and by United States citizens and to limit the outflow of capital. The principal legislation at this time was the Interest Equalization Tax of 1964.[32] This tax imposed a penalty on the purchase

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investors, the Know-Nothing Party was supporting discriminatory taxation of foreign investment in the United States. Although unsuccessful in its efforts, the Know-Nothing Party nevertheless raised the general awareness of foreign investment in the United States. *See generally* ADLER, BRITISH INVESTMENT IN AMERICAN RAILWAYS: 1834-1898, 10-11 (1970).

29. Act of Mar. 3, 1887, Ch. 340, § 1, 24 Stat. 476. Other legislation during this period includes: Homestead Act of 1862, Ch. LXXV, § 1, 12 Stat. 392; Desert Land Act of 1877, Act of Mar. 3, 1877, Ch. 107, 19 Stat. 377, *amended by* 43 U.S.C. § 321 *et seq.* (1970); and Natural Resources Act of 1887, Act of Mar. 3, 1887, Ch. 340, § 1, 24 Stat. 476. Briefly, the Homestead Act allowed only citizens of the United States to enter public lands for the purpose of homesteading. The Desert Land Act was similar to the Homestead Act in that it authorized only United States citizens the right to reclaim public desert land. Finally, the Natural Resources Act was also directed to the prohibition of public land ownership and usage by non-citizens of the United States.

30. Industries where foreign investment was regulated, restricted or prohibited include: Atomic Energy, 42 U.S.C. § 2133(d) (1982); Air Transportation, 49 U.S.C. §§ 1301(13), 1302(13), 1378(a)(4), (f), 1401(b), 1508(b) (1982); Coastal Shipping and Trade Activities, 46 U.S.C. §§ 11, 252, 289, 8654, 883, 888 (1982); Ship Building, 49 U.S.C. §§ 808, 835 (1982); Leases on Federal Mineral Lands, 30 U.S.C. §§ 22, 24, 72, 181, 352 (1982); Radio and Television Industries, 47 U.S.C. § 310 (1982); and Military Aircraft Production, 10 U.S.C. § 2272(f) (1982). For a complete discussion of industries where foreign investment is regulated see FOREIGN INVESTMENT IN THE UNITED STATES 333-729 (Marans, Williams and Mirabito, eds. 1977). *See also* Andrews, *An Evaluation of the Need for Further Statutory Controls on Direct Foreign Investment in the United States*, 8 VAND. J. TRANSNAT'L L. 147 (1974).

31. Mutual Security Act of 1954, Pub. L. 665-937, 68 Stat. 832.

32. Act of Sept. 2, 1964, Pub. L. No. 88-563, 78 Stat. 809, *amended by* Pub. L. No. 90-59, 81 Stat. 145 (1967) (formerly codified at 26 U.S.C. §§ 4811 *et seq.*, *repealed by* Act of Oct. 4, 1976, Pub. L. No. 94-455, 90 Stat. 1814, Title XIX, § 1904(a)(21)(A)).

of foreign securities by United States citizens. Additionally, a Presidential Task Force was created to discuss and propose methods to increase foreign investment in the United States.[33]

In the early 1970's the amount of foreign investment in the United States increased tremendously. This increase was due to two key factors. First, the Organization of Petroleum Exporting Countries (OPEC) emerged during this period as a cohesive and dominant economic and political force. This event coupled with the implementation of a sustained oil embargo caused petroleum prices to soar. As a result, a significant pool of dollars became available for investment by the OPEC nations.[34] Second, the dollar suffered a significant devaluation compared to the currencies of our major trading partners.[35] Also, corporate securities prices were depressed in the early 1970's.[36]

Other factors making the United States an inviting target for foreign investment included attractive rates of return for foreign investors, a stable political climate and fair laws under which returns could be favorably achieved.[37] Overall, during the last twenty-five years, the United States has been a very inviting investment choice for well capitalized foreign investors.[38]

These international financial developments did not go unnoticed. By 1974, Congress began a major inquiry into the degree of foreign investment in the United States.[39] As a result of this attention, several pieces of

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33. *See* H.R. Doc. No. 141, 88th Cong., 1st Sess. 1 (1963) (Message from the President of the United States transmitting a special message on Balance of Payments).

34. *See Arab Banks Grow*, BUS. WK., Oct. 6, 1980, at 70, 72. This trend continued unabated through the late 1970's. For example, in 1978 the estimated dollar surpluses held by Arab oil exporters equaled $5.3 billion. However, by 1980, estimates for the surpluses had ballooned to $120 billion. As a result of this surplus, the Arab oil nations became a potent force in the international financial markets. By 1980, Arabic members of OPEC had invested $340 billion worldwide. This amount was three times greater than their cumulative worldwide investment in 1975.

35. *See* E. FRY, FINANCIAL INVASION OF THE U.S.A.: A THREAT TO AMERICAN SOCIETY 36 (1980). From 1971 to 1978, the dollar declined 81% against the German mark and 63% against the Japanese yen.

36. For a complete discussion of the economic factors that led to an increase of foreign investment in the early 1970's, see ZAGARIS, FOREIGN INVESTMENT IN THE UNITED STATES 8-10 (1980).

37. *See supra* notes 8-13 and accompanying text. Many of these same factors are present today in the United States. Currency valuations are presently in favor of the United States trading partners, we are presently suffering a huge trade and balance of payment deficit and many investors still view the United States markets as the deepest and most liquid. As such, we are again seeing a large influx of foreign funds into our financial markets.

38. *See* SECURITIES AND EXCHANGE COMMISSION, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess. 30 (1963). In 1963, the Securities and Exchange Commission noted in a study that foreign funds were an important source of capital for large, unregulated borrowers.

39. *See generally Foreign Investment in the United States: Hearings Before the Subcommittee on Foreign Economic Policy of the House Committee on Foreign Affairs*, 93d Cong., 2d Sess. (1974). Other major hearings and legislative proposals include: *Hearings on*

legislation were debated before Congress in 1974. Although not enacted, perhaps the most significant in terms of potential effect was the Foreign Investors Limitation Act of 1974.[40] This proposed Act would have been an amendment to the Securities and Exchange Act of 1934.[41] Briefly, this proposal would have prohibited foreign investors from acquiring more than five percent of any voting securities, or thirty-five percent of non-voting securities of any company whose securities were registered under the Securities Exchange Act of 1934.[42] Although it restricted the foreign acquisition of United States companies, the bill was silent on the ability of a foreign entity to create a wholly owned subsidiary in the United States. Thus, it appears as if the Foreign Investors Limitation Act of 1974 wanted to maintain the historical encouragement of foreign investment while at the same time protect established United States industries. In fact, the stated purpose of this bill was to encourage diversification of foreign investments in domestic industries and avoid the pitfalls that would occur with the foreign control of United States industries.[43]

The legislation that was enacted has subsequently had a profound effect. Not in immediate results, but in laying the groundwork for the application of the Exon-Florio Amendment. Given the lack of any useful information concerning foreign investment in the United States, Congress directed the Commerce Department to study such investment and prepare a complete report. The enacting legislation for this survey was the

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Foreign Investment in the United States Before the Subcommittee on Foreign Economic Policy of the House Committee on Foreign Affairs, 93d Cong., 2d Sess. (1974)(the "Culver Subcommittee"); *Hearings on S. 2840 Before the Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce*, 93d Cong., 2d Sess. (1974)(the "Inouye Subcommittee"); *Hearings on S. 3955 Before the Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce*, 93d Cong., 2d Sess. (1974)(the "Metzenbaum Subcommittee"); *Hearings on S. 425 Before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. (1975)(the "Williams Subcommittee"); *Hearings on S. 425, S. 953, S. 995 and S. 1303 Before the Subcommittee on Int'l Finance of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. (1975)(the "Stevenson Subcommittee"); *Hearings on S. 329, S. 995, S. 1303 and Amendment No. 393 Before the Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce*, 94th Cong., 1st Sess. (1975)(the "Inouye Subcommittee"). A review of the Congressional hearings will illustrate the frequently vocalized concern over the lack of any usable data concerning the extent and effects of direct foreign investment in the United States.

40. H.R. 8951, 93d Cong., 1st Sess., 119 CONG. REC. H21,425 (1973). The other major legislation proposed was the Energy and Defense Industry Production Act, H.R. 12040, 93d Cong., 1st Sess., 119 CONG. REC. H42655 (1973)(hereinafter Production Act). This bill was less restrictive than the Foreign Investors Limitation Act. The focus of the Production Act was to regulate foreign investment in the energy or defense industries. The Production Act stated that it would be illegal for a non-citizen of the United States or a foreign controlled entity to control a United States company (the Production Act defines control as ownership of 10% or greater of a company's voting securities).

41. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended in 15 U.S.C. §§ 78a-78kk (1989)).

42. *See supra* note 40 and accompanying text.

43. *Id.*

Foreign Investment Study Act of 1974 ("1974 Act").[44] As a result of this directive, the Commerce Department compiled a nine volume treatise on direct foreign investment that was released in 1976.[45] As a direct result of the information contained in the 1976 study, Congress enacted the International Investment Survey Act of 1976 ("1976 Act").[46] This law authorized the ongoing collection of comprehensive data concerning foreign direct investment in the United States. Specifically, this act vested the authority in the President to, "conduct a regular data collection program to secure current information on international capital flows and other information related to international investment . . . ."[47]

In an Executive Order, the President subsequently delegated his authority to the Department of Commerce for the promulgation and implementation of regulations concerning such information gathering tasks.[48] In addition to the legislative activity surrounding the 1974 and 1976 Acts was the 1975 Presidential creation of the Committee on Foreign Investment in the United States (CFIUS).[49] CFIUS was formed principally to be an advisory and information gathering entity.[50] With the passage of

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44. Foreign Investment Study Act of 1974, Pub. L. No. 93-479, §§ 1-11, 88 Stat. 1450-60 (1974). The principal purpose of this act was to authorize the Secretary of Commerce to prepare a report for Congress that would focus on direct foreign investment in the United States. However, as a review of the subsequent law and its application shows, the Foreign Investment Study Act of 1974 was to be the first in a long chain of far reaching laws concerning foreign investment in the United States.

45. DEPARTMENT OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE U.S. (1976) (report of the Secretary of Commerce to the Congress in Compliance with Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450).

46. Internal Investment Survey Act of 1976, Pub. L. No. 94-472, § 2, 90 Stat. 2059-64 (codified as amended at 22 U.S.C. §§ 3101-3108 (1979 & Supp. 1983)). The principal purpose of the Survey Act was to require benchmark surveys of direct and portfolio foreign investment in the United States and of United States direct investments abroad. These surveys were to be completed at least once every five years and provide for the collection of data on an on-going basis. *See* 22 U.S.C. § 3103 (1979 & Supp. 1983).

47. 22 U.S.C. § 3103(a)(1) (1979 & Supp. 1983). The stated purpose of this legislation was to provide,

> clear and unambiguous authority for the President to collect information on international investment and to provide analyses of such information to the Congress, the executive agencies, and the general public.

22 U.S.C. § 3101(b) (1979 & Supp. 1983).
The language in this Act expressly stated that its purpose was not to, "restrain or deter foreign investment in the United States or United States investment abroad." 22 U.S.C. § 3101(c) (1979 & Supp. 1983).

48. Exec. Order No. 11,961, 3 C.F.R. 86 (1978), *amended by* Exec. Order No. 12,013, 3 C.F.R. 147 (1978).

49. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (1975), *amended by* Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980).

50. *Id.* As originally created, CFIUS consisted of a representative, whose status shall not be below an Assistant Secretary, designated by the Secretaries of State, Treasury, Defense, Commerce, the Assistant to the President for Economic Affairs and the Executive Director of the Council on International Economic Policy. In 1980, the Assistant to the President for Economic Affairs and the Executive Director of the Council on International Economic Policy were replaced by the United States Trade Representative and the

the 1976 Act, Congress insured that there would be a steady flow of direct investment data to CFIUS. Thus, through the actions of Congress and President Ford, a permanent mechanism was created to monitor foreign investment in the United States.[51]

Although the events in the world oil and financial markets created a general increase in the concern about foreign investment in the United States, the historic support for foreign investment in the United States was left relatively unscathed. The Carter Administration in the late 1970's continued to espouse the international financial benefits of foreign investment. An indication of our country's policy during this era can be seen in the Declaration issued at the conclusion of the Bonn Economic Summit and signed by the President on July 17, 1978. The Declaration stated:

> We underline our willingness to increase our co-operation in the field of foreign private investment flows among industrialized countries and between them and developing countries. We will intensify work for further agreements in the OECD [Organization for Economic Co-operation and Development] and elsewhere.[52]

By 1980, the concern of the 1970's and the active governmental quest for more information about direct foreign investment in the United States had virtually evaporated.

With the onset of the Reagan era, corporate America had begun to reassert itself. In 1982, American financial markets began what was to be the longest bull market in history. With prosperous times, less of a threat was seen coming from foreign investment in the United States. In September of 1983, President Reagan released what he described as a "major statement on international investment."[53] This statement, developed by the Senior Interdepartmental Group on International Economic Policy, contained a direct welcome to foreign investment in the United States. In that statement, the following policy was set forth concerning foreign investment in this country:

> The United States has consistently welcomed foreign direct invest-

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Chairperson of the Council of Economic Advisers. *See* Exec. Order No. 12,188, § 1-105. Prior Executive Orders and Determination, §§ (f)(1) and (2) at 992.

51. Another law promulgated during this era was the Agricultural Foreign Investment Disclosure Act of 1978, Pub. L. No. 95-460, 92 Stat. 1263 (codified at 7 U.S.C. § 3501-3508 (1988)). *See* 124 CONG. REC. 31,673-682 (1979) (hereinafter "AFIDA"). This legislation was enacted in response to the concerns voiced by rural constituencies that an increase of the foreign investment in United States agricultural land was causing a dramatic escalation in land prices. Like the International Investment Survey Act of 1976, AFIDA was promulgated for the purpose of establishing a nationwide monitoring program. This program was to provide statistical data covering the extent and impact of foreign investment in United States agricultural land. *See also* 44 Fed. Reg. 29,029 (1979); 44 Fed. Reg. 47,526 (1979); 45 Fed. Reg. 61,15 (1980); 45 Fed. Reg. 77,75 (1980); 49 Fed. Reg. 35,073 (1984).

52. 14 WEEKLY COMP. PRES. DOC. 1314 (July 24, 1978). In addition to President Carter, this Declaration was also signed by the leaders of England, France and West Germany.

53. 19 WEEKLY COMP. PRES. DOC. 1214 (Sept. 9, 1983).

> ment in this country. Such investment provides substantial benefits to the United States. Therefore, the United States fosters a domestic economic climate which is conducive to investment. We provide foreign investors fair, equitable, and nondiscriminatory treatment under our laws and regulations. We maintain exceptions to such treatment only as are necessary to protect our security and related interests and which are consistent with our international legal obligations.[54]

Thus, during the Reagan years, foreign investment was vigorously encouraged. As the merger and acquisition figures for 1980-1988 illustrate, foreign investment flowed into the United States at unprecedented rates.[55] This growing foreign presence in American industry again served to fuel the fires of alarm.

During this era, increased attention was again focused upon the magnitude of foreign investment in the United States.[56] Although the Reagan administration hailed foreign investment as a welcome tool in our quest for expansion, other economic pundits warned that the United States was becoming addicted to foreign capital.[57] There were fears that overdependence on foreign investment would actually weaken our country's fiscal health. Further, there were suggestions that such dependence could also cause the United States to be the subject of undue foreign political pressure which could undermine our political independence.[58] Coupled with these concerns were the questions about national security.

Recently, two proposed transactions arose that sparked extensive debate about the desirability of direct foreign investment in the United States. First was the proposed acquisition of eighty percent of Fairchild Semiconductor Corp. ("Fairchild") by Fujitsu, Ltd. ("Fujitsu") of Japan. This acquisition was potentially very problematic because if consummated, the deal would have provided the Japanese with advanced technology in an area previously dominated by the United States. There was concern that the Japanese would use this information in an attempt to dominate an industrial market. On October 24, 1986, Fujitsu and Fairchild announced the proposed transaction.[59] There was an immediate increase in the number of commentaries on the effect of foreign invest-

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54. *Id.* at 1216.

55. *See supra* notes 8-13 and accompanying text.

56. MARTIN & SUSAN TOLCHIN, BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION 6 (1988) (hereinafter "Tolchin").

57. *Id.*

58. *Id.* An example of this potential problem was illustrated in April, 1987, when Paul Volcker disclosed that the Federal Reserve Board had decided to raise short-term interest rates. The rationale for this action was so the depreciation of the United States dollar would be slowed which would then make United States investments more attractive to foreign investors. In response to this action, Norman Robertson, Chief Economist at the Mellon Bank, stated: "Federal policy is increasingly influenced and even dictated by the needs of our foreign creditors." *See* Blustein, *Dollar Looms Bigger in Fed's Decision at Risk of Recession*, Wall St. J., May 19, 1987, at 1, col. 6.

59. Wash. Post, Oct. 25, 1986, at C1, col. 3.

ment in the United States. Most of the vocalized concerns were focused upon the potential effect the acquisition would have on our nation's national security.[60] Opponents of the Fujitsu purchase also noted that the proposed transaction would make Fujitsu the world leader in the production of semiconductors.[61] Finally, the fact that Fairchild's defense electronics subsidiary provided more than $100 million of high-speed circuitry annually to defense contractors spawned a wave of anti-foreign investment sentiment.[62]

Because Fairchild was in an industry where America held a perceived edge in technology over Japan, the proposed acquisition generated extensive debate and political attention. On November 8, 1986, the CFIUS Task Force announced that it would review the proposed merger.[63] Although many of the above-referenced factors were considered, the areas that were ultimately the primary focus of concern in the proposed Fujitsu transaction were trade and national policy. As attention was focused on the Fujitsu transaction, many commentators noted that America's traditional open door policy on foreign investment was seldom reciprocated.[64]

As a result of the negative publicity and political inquiry, Fujitsu ultimately decided to terminate negotiations and abort the acquisition of Fairchild.[65] Although this retreat by Fujitsu stemmed the flow of anti-Japanese investment sentiment, the problem was still on the front line of political agendas.

The second transaction was the proposed acquisition of the Goodyear Tire & Rubber Company by the British financier, Sir James Goldsmith. Goodyear is a well known industrial company headquartered in Akron, Ohio. Given Akron's and the entire midwest's quest for economic resurgence in the early to mid-1980's,[66] this proposed transaction was aggres-

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60. *See, e.g.*, Pollack, *Fujitsu Chip Deal Draws More Flak*, N.Y. Times, Jan. 3, 1987, at D1, col. 3.

61. Tolchin, *supra* note 57, at 10. At the time of the proposed acquisition, Fujitsu owned half of Amdahl, an American computer company.

62. *Id.* This concern is very interesting given that at the time of Fujitsu's proposed purchase, Fairchild was owned by the United States affiliate of Schlumberger, Ltd. (a large French oil services company.) Thus, it would appear as if foreign ownership of sensitive technology was not per se objectionable. Instead, the concerns were focused upon Japanese acquisition of sensitive technology. There were fears that if Fujitsu gained access to Fairchild's technological expertise, it would use such knowledge to eliminate United States competition in a key area of technology.

63. N.Y. Times, Nov. 8, 1986, at 39, col. 1.

64. Tolchin, *supra* note 57, at 12. Auerbach, *Cabinet to Weigh Sale of Chip Firm*, Wash. Post, March 12, 1987, at E1, col. 3. In announcing that the Department of Commerce would investigate the Fujitsu transaction and the public policy concerning America's open-door to foreign investment, Commerce Secretary Baldridge stated that Fujitsu's ownership of Fairchild would increase Japan's "ability to compete for United States supercomputer sales while blocking United States makers from a large share of Japan's market."

65. Daily Rep. for Executives (BNA) DER No. 67 (April 10, 1987).

66. The entire midwest was hit extremely hard by the recession of the early 1980's. Detroit was suffering due to its reliance on the automobile industry. Cleveland, Akron,

sively opposed by the residents of Akron, of Ohio, and by the federal government.[67]

In responding to this outpouring of public support for Goodyear, the House Subcommittee on Monopolies convened special public hearings to review the Goldsmith bid.[68] These meetings provided a public forum for the debate concerning the merits of an open door policy to direct foreign investment in the United States. Although the hearings were inconclusive, the proceedings were widely publicized and served to heighten America's awareness of the level of direct foreign investment and to fuel the fires of fear that foreigners were buying up America.[69]

Ultimately, Goldsmith withdrew his bid for Goodyear and sold his shares back to the company for a substantial profit. Thus, while Goldsmith was able to avoid public wrath and congressional action by selling out his Goodyear holdings, the public hearings spawned by his actions brought America's direct foreign investment policy to the forefront of legislative agendas.

The Fujitsu and Goodyear debates were important in several respects. First, it was the first time in recent memory that a major controversy erupted after a proposed foreign investment.[70] Second, before Fujitsu, foreign investment in the United States was essentially viewed as a welcome addition to our own sources of capital. Finally, the proposed Fujitsu and Goodyear transactions may have been the final events that led Congress to take action to assess and control the extent of direct foreign investment in the United States. In assessing what Congress faced in tackling this economic puzzle, one scholar noted:

> The challenge for American policy makers is to continue to reap the benefits of foreign investment while minimizing its risks. If they fail to meet this challenge, the threat of losing a measure of political and

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Pittsburgh, Youngstown, and other major cities in the great lakes region were also victimized due to their ancillary reliance on the automobile industry. Since the early 1980's, companies and cities located in this region have diversified themselves in order to lessen the short and long term effects of swings in the economic cycle. Goodyear was an example of this strategy. In addition to automobile tires, industry participation was extended to computer manufacturing, increased defense related production, natural gas exploration and production, and a myriad of other high technology areas where known technology could be utilized. All of this diversification was subsequently scrapped as a result of Goldsmith's bid. In order to finance the forced restructuring, Goodyear was required to sell off its non-tire subdivisions and concentrate on the rubber industry.

67. *See, e.g.*, L.A. Times, Nov. 19, 1986, at 1, col. 5.

68. *See* Wall St. J., Nov. 19, 1986, at 2, col. 3. Getting its fight to Capitol Hill appeared to be a last ditch effort on the part of Goodyear. Goodyear chairman Robert Mercer urged lawmakers to curtail the activities of corporate raiders and conceded that there is "very little we can do to stop [the British financier's threatened tender offer.] I haven't been optimistic since this started, I'm not sure where we go from here." *See, e.g.*, Wall St. J., Nov. 21, 1986, at 4, col. 1; L.A. Times, Nov. 19, 1986, at 1, col. 5.

69. *See supra* note 67 and accompanying text.

70. Tolchin, *supra* note 57, at 12.

economic sovereignty becomes a real possibility.[71]

In responding to this challenge, Congress passed the Exon-Florio Amendment.

EXON-FLORIO AMENDMENT

Essentially, Exon-Florio gives the President or his designee the ability to investigate any proposed merger, acquisition or takeover of a United States Company by foreign persons or entities that may have adverse effects on national security.[72] As allowed by Exon-Florio, the Presi-

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71. *Id.* at 13.

72. 50 U.S.C. App. 2158(a), *et seq.* Section 721 of the Defense Production Act of 1950, reads as follows:

> (a) Investigations. The President or the President's designee may make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers proposed or pending on or after the date of enactment of this section by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States. If it is determined that an investigation should be undertaken, it shall commence no later than 30 days after receipt by the President or the President's designee of written notification of the proposed or pending merger, acquisition, or takeover as prescribed by regulations promulgated pursuant to this section. Such investigation shall be completed no later than 45 days after such determination.
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> (b) Confidentiality of information. Any information or documentary material filed with the President or the President's designee pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this subsection shall be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress.
>
> (c) Action by the President. Subject to subsection (d), the President may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States proposed or pending on or after the date of enactment of this section by or with foreign persons so that such control will not threaten to impair the national security. The President shall announce the decision to take action pursuant to this subsection not later than 15 days after the investigation described in subsection (a) is completed. The President may direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United States in order to implement and enforce this section.
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> (d) Findings of the President. The President may exercise the authority conferred by subsection (c) only if the President finds that—
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> (1) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security, and
>
> (2) provisions of law, other than this section and the International Emergency Economic Powers Act (50 U.S.C. 1701-1706), do not in the President's judgment provide adequate and appropriate authority for the President to protect the national security in the matter before the President.
>
> The Provisions of subsection (d) of this section shall not be subject to judicial review.

dent has delegated his authority to administer the law to the Committee on Foreign Investment in the United States (the "Committee" or "CFIUS").[73] This Committee consists of the Secretaries of the Treasury (the Chairperson of the Committee), Commerce, Defense and State, as well as the Attorney General, the chairperson of the Council of Economic Advisers, the director of the Office of Management and Budget and the United States Trade Representative.

On July 14, 1989, the Department of the Treasury's office of international investment released proposed regulations to implement Exon-Florio.[74] Pursuant to such regulations, any party involved in a transaction subject to Exon-Florio may submit a "voluntary notice" to the Committee to initiate an investigation to determine whether Presidential action should be taken.[75] Also, any committee member who has reason to believe a transaction may fall within the purview of Exon-Florio may submit an "agency notice" to review a proposed transaction.[76] However, although voluntary in nature, if an acquirer does not submit to the application of Exon-Florio, the acquirer could face a divestment action or other relief that the President deems necessary to enforce Exon-Florio.[77] Given the potentially onerous post-acquisition consequences of a Presidential ruling, it is doubtful that merger and acquisition professionals will view this

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(e) Factors to be considered. For the purposes of this section, the President or the President's designee may, taking into account the requirements of national security, consider among other factors—

(1) domestic production needed for projected national defense requirements,

(2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services, and

(3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security.

(f) Report to the Congress. If the President determines to take action under subsection (c), the President shall immediately transmit to the Secretary of the Senate and the Clerk of the House of Representatives a written report of the action which the President intends to take, including a detailed explanation of the findings made under subsection (d).

(g) Regulations. The President shall direct the issuance of regulations to carry out this section. Such regulations shall, to the extent possible, minimize paperwork burdens and shall to the extent possible coordinate reporting requirements under this section with reporting requirements under any other provision of Federal law.

(h) Effect on other law. Nothing in this section shall be construed to alter or affect any existing power, process, regulation, investigation, enforcement measure, or review provided by any other provision of law.

73. Exec. Order No. 12,661, 3 C.F.R. 618 (1988).

74. Prop. Treas. Reg. § 800.103-800.702, 54 Fed. Reg. 29,744 (1989) (proposed July 14, 1989).

75. *Id.* at 29,753.

76. *Id.*

77. *Id.* at 29,755.

provision as voluntary.

Assuming notice is provided, any investigation subsequently undertaken must be commenced within thirty days of the notice[78] and must be completed within forty-five days.[79] Once the investigation is completed, the President has fifteen days to determine whether the transaction should be blocked.[80] Should the President decide to take action to enjoin the proposed transaction, he must submit a detailed written report of his findings to Congress.[81] It is interesting to note that the investigation and subsequent action by the President are not subject to judicial review.

POTENTIAL PROBLEMS

In addition to the "involuntary" nature in which Exon-Florio is applied,[82] one of the greatest potential problems in the application of the Exon-Florio Amendment is the determination of when a proposed transaction threatens national security.[83] A review of the statute illustrates that Presidential action will be predicated on a finding that a transaction will threaten national security.[84] The problem lies in the fact that the statute does not define national security. Moreover, Stephen J. Canner, the Staff Chairman of CFIUS, has stated: "[B]ecause each transaction is different, there can be no pre-determined comprehensive list of national security criteria."[85]

Therefore, it can be assumed that any final regulations promulgated to aid in the implementation of Exon-Florio will also be silent as to a definition of national security. However, a list of factors that should be

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78. Title VII of the Defense Production Act of 1950, 50 U.S.C. App. § 2170(a), *amended by* Omnibus Trade and Competitiveness Act of 1988, §5021, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

79. 50 U.S.C. App. § 2170(a).

80. *Id.* at § (c).

81. *Id.* at § (f).

82. *See supra* notes 73-77 and accompanying text.

83. The language in the statute that places the emphasis upon national security reads as follows:

> (a) Investigations. The President or the President's designee may make an investigation to determine the effects on *national security* of mergers, acquisitions, and takeovers proposed or pending on or after the date of enactment of this section by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States. [emphasis added].

Defense Production Act of 1950, 50 U.S.C. App. § 2170 (a), § 721.

84. *Id.* The following excerpt from the statute highlights when Presidential action would be appropriate:

> (c) Action by the President. Subject to subsection (d), the President may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States proposed or pending on or after the date of enactment of this section by or with foreign persons so that such control will not threaten to impair the national security.

85. Daily Rep. for Executives (BNA) DER No. 67 (April 10, 1989).

considered in determining whether a proposed acquisition could impact national security was provided. These factors are:

> 1. Domestic production needed for projected national defense requirements;
> 2. the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, material, and other supplies and services; and
> 3. the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security.[86]

Although helpful, the list will still allow the President or his designee unbridled discretion in applying Exon-Florio. Therein lies the potential for a major problem. Through February 1, 1990, CFIUS had received 243 written notices of transactions. Of these notices, the committee sent only six to the President for a determination as to whether an investigation should be commenced. Of this number, only four transactions were subsequently subjected to a review.

On February 7, 1989, Marlin Fitzwater, Assistant to the President and Press Secretary, announced that the President had decided against intervening in the proposed acquisition of Monsanto Electronic Material Company (MEMC) by Huels AG of West Germany.[87] The decision by the President not to intervene in this transaction was significant because the MEMC-Huels investigation was the first formal investigation by CFIUS under Exon-Florio.[88] MEMC is the largest United States producer of

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86. Defense Production Act, §§ 2170(e)(1-3).

87. Press Release, The White House, Office of the Press Secretary, Feb. 7, 1989.

88. *Id.* Although the Huels-MEMC transaction was the first to generate a formal investigation by CFIUS, Exon-Florio was first sought to be applied in the fall of 1988. Consolidated Gold Fields PLC was the target of a hostile takeover attempt by Minorco S.A. Gold Fields is a U.K. company and Minorco is headquartered in Luxembourg. Gold Fields owned a forty-nine percent interest in Newmont Mining Corp. Newmont, a Delaware corporation, owned a controlling interest in Peabody Coal and held other significant minority stakes in several United States mining and natural resource companies.

Gold Fields asserted that Minorco's takeover attempt was a threat to United States national security for three reasons:

> 1) Newmont and its affiliates were involved in the mining and production of minerals that were vital to national security.
> 2) Gold Field's other subsidiaries were involved in mining and processing minerals outside the United States that were of equal importance to national security.
> 3) Gold Fields was a major refiner of gold. The claimed importance of this was two-fold. First, gold was used in critical defense related electronic components. Second, maintaining stability in the international gold market was a primary consideration in maintaining the underlying value of western currencies, including the United States dollar.

Gold Fields alleged that Minorco was controlled by South African Harry Oppenheimer . Given the political tensions between South Africa and the United States, national security would be compromised if South African interests could gain influence over western currencies and trading relationships. The argument was made that if Oppenheimer gained this

silicon wafers. In December 1988, the Department of Defense, the Department of Commerce and the General Accounting Office all notified CFIUS that the proposed transaction should be investigated as the consummation of such transaction could impact the integrity of United States national security.[89] In addition, on February 2, 1989, twenty-nine members of Congress wrote to President Bush and urged him to prevent the proposed MEMC acquisition.[90]

Although the MEMC-Huels transaction was the subject of extensive public, administrative and legislative scrutiny, the President refused to block the transaction. In making the announcement that the President would not take any action, Mr. Fitzwater provided the following two criteria that must be met before the President would suspend or prohibit a transaction:

> 1. Credible evidence to believe that the foreign investor might take actions that threaten to impair the national security, and
> 2. that existing laws, other than the International Emergency Economic Powers Act and the Exon-Florio provision, are inadequate and inappropriate to deal with the national security threat.[91]

In making this pronouncement, Mr. Fitzwater disclosed that the President based his decision on the "reliability of supply, technology transfer, and the relationship of the transaction to the semiconductor industry research consortium SEMATECH."[92]

The second transaction that was the subject of a review was the acquisition of Westinghouse Electric Corporation's interest in a joint ven-

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control, the strength of the United States economy would be affected.

Ultimately, CFIUS determined that a full scale investigation was not warranted. On March 23, 1989, CFIUS announced that the proposed Gold Fields acquisition by Minorco posed no threat to United States national security. In a rare public statement, CFIUS stated that even in a worst case scenario, the Gold Fields acquisition by Minorco would pose no threat to mineral supplies to the United States.

As a general rule, CFIUS activity is confidential. As such, the basis for any CFIUS ruling under Exon-Florio is not made public and is in fact exempt from Freedom of Information Act requests. The release of a public statement by CFIUS was unexpected and is not likely to be frequently repeated.

89. Tolchin, *Monsanto Unit Sale Faces Inquiry*, N.Y. Times, Dec. 21, 1988, at D3, col. 1 (citing Defense News, Dec. 20, 1988). *See also* N.Y. Times, Jan. 18, 1989, at D5, col. 4.

90. *Congressmen Ask Bush to Block Sale of Wafer Maker to West German Firm*, Daily Rep. for Executives (BNA) DER No. 23 (Feb. 6, 1989). Concern was focused on the manufacture of silicon wafers. The assertion was made that if the proposed transaction were consummated, the United States share of the silicon wafer world-wide chip market would fall from fourteen percent to two percent. The congressmen stated this was unacceptable and noted that " . . . the United States is lagging severely behind its competitors in its ability to produce computer chips, the virtual sell-off of the wafer industry will help seal the fate of our weakening high-technology infrastructure . . . ."

91. Press Release, The White House, Office of the Press Secretary, Feb. 7, 1989.

92. *Id. See also* Farnsworth, *Bush Won't Block Chip Unit's Sale*, N.Y. Times, Feb. 8, 1989, at D1, col. 4. SEMATECH is an industry-government consortium that was formed to jump-start the United States semiconductor industry.

ture by its joint venture partner ASEA Brown Boveri Ltd. (ABB).[93] The ABB-Westinghouse joint venture was involved in the manufacture, distribution, sale and servicing of electrical transmission and distribution equipment in the United States. In an effort to decrease CFIUS concerns about the future of the United States' electrical transmission capabilities, ABB notified CFIUS that it intended to "continue the manufacture, servicing, repair, research and design in the United States of these high voltage transformers."[94] In asserting the same criteria for Presidential action as was outlined in the MEMC-Huels investigation, President Bush again refused to take action.

The third investigation was concluded on August 18, 1989. The transaction in question involved the acquisition of three Fairchild Industries divisions by Matra S.A., a French firm. The three Fairchild divisions were: Fairchild Communications & Electronics Company, Fairchild Control Systems Company, and Fairchild Space Company. All three of the Fairchild divisions and Matra were engaged in the manufacture of hardware and software for aerospace systems and spacecraft. This transaction did not involve an investigation as much as a negotiation. During the course of its "investigation," CFIUS sought concessions from Matra to prevent the export of sensitive computer technologies. Working in concert with the Department of Commerce, Matra developed and pledged to institute a comprehensive export control management system that was viewed as sufficient.[95] The President, in making his determination that intervention was unnecessary, determined that the safeguards developed by Matra and the Department of Commerce were sufficient to protect sensitive technologies from unauthorized transfer outside the United States.[96]

A quick review of the three above referenced transactions, and Presidential inaction, would seem to indicate that Exon-Florio is little more than a paper tiger.[97] However, this perception changed with the CFIUS investigation of the proposed acquisition of General Ceramics, Inc. by Tokuyama Soda Co. Ltd. of Japan. General Ceramics receives seven percent of its total sales from the sale of beryllium ceramics for military equipment. Although the proposed transaction was never referred to the President for official action, CFIUS intervention ultimately caused the

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93. Press Release, The White House, Office of the Press Secretary, May 17, 1989.

94. *Id.*

95. Press Release, The White House, Office of the Press Secretary, August 18, 1989.

96. *Id.* The President weighed the proposed safeguards against that criteria first outlined in the MEMC transaction and reiterated in the Westinghouse sale.

97. Tolchin, *supra* note 56. In assessing the impact of CFIUS on international capital flows into the United States:

> CFIUS is known around government circles as a "paper tiger": It rarely meets and has never to anyone's knowledge, blocked a foreign investment. Considering that CFIUS is the only foreign-investment review mechanism in the executive branch, its inactivity speaks volumes about government complacency toward foreign investment.

parties to shelve the deal.[98] CFIUS unofficially notified Tokuyama that it intended to recommend that President Bush block the proposed acquisition. As a result of this "unofficial" notice, Tokuyama withdrew its CFIUS notification and agreed to restructure the deal to exclude the General Ceramics division that produces military equipment.[99]

The CFIUS action with respect to the Tokuyama acquisition elicited praise from Congressmen Exon and Florio. In lauding the aggressive posture taken by CFIUS, Rep. Florio stated: "[Exon-Florio] is working almost exactly as we envisioned it would."[100] If Rep. Florio is accurately portraying the intent of Congress in passing Exon-Florio, the intended scope of government intervention is extreme. Such "unofficial" government intervention could become a sanctioned form of economic blackmail. Critics of the CFIUS action have noted that in reviewing proposed transactions, CFIUS has acted without regard for the potential effect on national security. In outlining the CFIUS posture on making investigation recommendations, one opponent noted: "In most cases, it comes down to a popularity contest . . . . The focus should be on the technology and whether we want to see it in foreign hands."[101] Thus, it appears as if the threat of intrusive action by CFIUS has already been realized.

The final investigation undertaken by CFIUS fully illustrates the scope of presidential power conferred by Exon-Florio. The parties involved in this investigation were MAMCO Manufacturing, Inc. ("MAMCO") and the China National Aero-Technology Import and Export Corporation ("CATIC"). MAMCO is a company incorporated in the State of Washington whose principal business is machining and fabricating metal parts for civilian aircraft. A large proportion of MAMCO's production is sold to a single manufacturer. Although MAMCO has no contracts with the U.S. government involving classified information, some of the machinery it uses during production is subject to U.S. export controls. CATIC is an export-import company operating under the direct control of the Ministry of Aerospace Industry of the People's Republic of China (the "Ministry"). The Ministry engages in research and development, design, and manufacture of military and commercial aircraft, missiles, and aircraft engines. CATIC has sectors, including commercial aircraft.

In accordance with the "voluntary" nature of CFIUS notification, MAMCO notified CFIUS of CATIC's intention to acquire MAMCO. On November 30, 1989, CATIC completed its purchase of all outstanding voting stock of MAMCO. CATIC completed this acquisition before

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98. Pine, *Security Factors Delay Sale of Ceramics Firm*, L.A. Times, April 19, 1989, at § 4, at 5, col. 1.

99. *Id.* The General Ceramics unit in question was involved in the manufacture of parts for nuclear weapons as part of a classified contract with the Department of Energy.

100. N.Y. Times, Apr. 24, 1989, at D6, col. 5.

101. *See supra* note 99 and accompanying text.

CFIUS had completed its review.[102] On December 4, 1989, CFIUS determined to undertake a formal investigation to determine MAMCO's present and potential production capabilities and technology. Specifically, the investigation focused upon the national security implications of CATIC's purchase. To gather information relevant to the CFIUS request, officials from the Departments of Commerce and Defense, representing CFIUS, visited MAMCO to conduct an on site investigation. In accordance with the statutory requirements imposed by Exon-Florio, the CFIUS representatives focused on the presence of any credible evidence that CATIC might take action which could impair national security. In addition, CFIUS also focused on the adequacy of any other laws that were appropriate to deal with the threat presented by CATIC's acquisition of MAMCO.

After a review of the CFIUS investigation and a consideration of its recommendations, President Bush ultimately chose to order CATIC to divest its acquisition of MAMCO. In ordering divestment, the President ordered and authorized three specific actions:

> 1. CATIC will have three months in which to divest itself of MAMCO.
> 2. During the pendency of CATIC's divestment, CFIUS will monitor the divestment process. The President also authorized CFIUS to take measures necessary to ensure protection of the national security.
> 3. This decision by the President will not have any impact on CATIC's other business arrangements in the United States.[103]

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102. Although completion of a proposed acquisition potentially subject to an Exon-Florio review is not politically astute, nothing in the statute prohibits such action. Further, nothing in the statute requires the participants in a transaction to notify CFIUS before consummating any deal. However, given the highly politicized nature of deal making with respect to CFIUS investigations, it appears that the prudent course would be complete disclosure of the change in status of any deal being reviewed by CFIUS.

103. Order Pursuant to § 721 of the Defense Production Act of 1950. Released by the White House, Office of the Press Secretary, February 2, 1990. The exact text of the order reads as follows:

> By the authority vested in me as President by the Constitution and statutes of the United States of America, including § 721 of the Defense Production Act of 1950 ("§ 721"), 50 U.S.C. App. 1270,
>
> *Section 1. Findings.* I hereby make the following findings:
>
> (1) There is credible evidence that leads me to believe that in exercising its control of MAMCO Manufacturing, Inc. ("MAMCO"), a corporation incorporated under the laws of the State of Washington, the China National Aero-Technology Import and Export Corporation ("CATIC") might take action that threatens to impair the national security of the United States of America; and
>
> (2) provisions of law, other than § 721 and the International Emergency Economic Powers Act (50 U.S.C. 1701-1706), do not in my judgment provide adequate and appropriate authority for me to protect the national security in this matter.
>
> *Section 2. Actions Ordered and Authorized.* On the basis of the findings set forth in § 1 of this Order, I hereby order that:
>
> (1) CATIC's acquisition of control of MAMCO and its assets, whether directly or through subsidiaries or affiliates, is prohibited.
>
> (2) CATIC and its subsidiaries and affiliates shall divest all of their inter-

Although the impact of Exon-Florio on CATIC was very burdensome and economically draconic, the President was effusive in distinguishing the CATIC acquisition from other direct foreign investment. In espousing the benefit to the United States of an open policy toward foreign investment, President Bush set forth the following position:

> The United States welcomes foreign direct investment in this country; it provides foreign investors fair, equitable, and nondiscriminatory treatment. This Administration is committed to maintaining that policy. There are circumstances in which the United States maintains limited exception to such treatment. Generally these exceptions are necessary to protect national security. Of those foreign mergers, acquisitions, and takeovers which have been reviewed under the Exon-Florio provision to determine effects on national security, this is the first time I have invoked § 721 authority. My action in this case is in response to circumstances of this particular transaction. It does not change our open investment policy and is not a precedent for the future with regard to direct investment in the United States from the People's Republic of China or any other country.[104]

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est in MAMCO and its assets by May 1, 1990, 3 months from the date of this Order, unless such date is extended for a period not to exceed 3 months, on such written conditions as the committee of Foreign Investment in the United States ("CFIUS") may require. Immediately upon divestment, CATIC shall certify in writing to CFIUS that such divestment has been effected in accordance with this Order.

(3) Without limitation on the exercise of authority by any agency under other provisions of law, and until such time as the divestment is completed, CFIUS is authorized to implement measures it deems necessary and appropriate to verify that operations of MAMCO are carried out in such manner as to ensure protection of the national security interests of the United States. Such measures may include but are not limited to the following: On reasonable notice to MAMCO, CATIC, or CATIC's subsidiaries or affiliates (collectively "the Parties"), employees of the United States Government, as designated by CFIUS, shall be permitted access to all facilities of the Parties located in the United States —

(a) to inspect and copy any books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the Parties that concern any matter relating to this Order;

(b) to inspect any equipment, containers, packages, and technical data (including software) in the possession or under the control of the Parties; and

(c) to interview officers, employees, or agents of the Parties concerning any matter relating to this Order.

(4) The Attorney General is authorized to take any steps he deems necessary to enforce this Order.

Section 3. Reservations. I hereby reserve my authority, until such time as the divestment required by this Order has been completed, to issue further orders with respect to the Parties as shall in my judgment be necessary to protect the national security.

Section 4. Publication. This Order shall be published in the *Federal Register.*

[signed and dated: George Bush, February 1, 1990]

104. Release to the Congress of the United States, The White House, Office of the Press Secretary, February 2, 1990. Although this was the first "official" action taken under

Summarizing the 243 transactions referred to CFIUS through February 2, 1990, only three, Tokuyama, MATRA and CATIC were required to restructure proposed transactions. As such, it would appear as if CFIUS has acted with restraint in determining the transactions that pose a threat to "national security."

Unfortunately, there are no assurances that future administrations will act with similar restraint. Because much of CFIUS activity is conducted under a shroud of secrecy, the potential for abuse appears boundless. As such, CFIUS could use its authority to insist that a proposed deal be restructured or face cancellation.[105] Further, concessions could be demanded from foreign investors that in the long run would hamper the economic viability of an entity. This is troublesome given the latitude in defining national security. A future administration may decide that national security is synonymous with economic security or that promotion of a national industrial policy is a tenant of national security. Given the breadth of the statute, the silence of the regulations, and the latitude given CFIUS in fashioning "unofficial" solution, such a scenario is well within the realm of possibilities. Further, after the recent action taken to thwart the CATIC acquisition of MAMCO, CFIUS has put foreign acquirers on notice that no one can ignore the potential impact of Exon-Florio when planning the acquisition of a United States company.

Another area of potential abuse is in the area of confidential and sensitive business information and trade secrets. Presently, under Exon-Florio, Congress and members of their staff have access to the confidential information filed in connection with a Presidential request.[106] Although the statute asserts that any information provided in connection with a request will remain confidential, the potential for disclosure is great. Congress must by its very nature serve its constituents. Frequently, members of Congress will be asked by their constituents to address and intervene in local corporate affairs.[107] As such, this situation presents a member of Congress with a dilemma. Should information given to the President or CFIUS remain confidential, or should we provide a target company that happens to be a "constituent" with the foreign company's

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the guise of Exon-Florio, as a review of previous cases reveals, CFIUS has been able to get concessions from foreign investors before consummating a transaction. *See supra* notes 99-102 and accompanying text. It is this unofficial inquiry and action which presents foreign acquirers with the greatest potential hurdle in consummating the acquisition of a United States company when members of CFIUS determine that such an acquisition may impact national security.

105. A review of the Tokuyama and MATRA proposals confirm this assertion. Given the pressure exerted by CFIUS in getting the two acquirers to restructure the proposed deals, it is probable that if concessions were not agreed upon, that CFIUS would have recommended to the President that the transactions be blocked.

106. *See* Title VII of the Defense Production Act of 1950, *supra* note 79 at § 2170(c).

107. An excellent example of this scenario was exhibited in the Goodyear offer by Goldsmith. As the text implies, Goldsmith may have abandoned his bid to avoid the specter of legislative intervention.

takeover plans for the target. It would seem beneficial for members of Congress to provide their constituents with such information.

Another problem is that any material provided in connection with an Exon-Florio request may be made available to parties in any "administrative or judicial action or proceeding."[108] Given this availability, any time a company is threatened with a takeover from a foreign investor, the target could file suit under a myriad of claims, send a notice to CFIUS, and subsequently make a request to have all information provided to CFIUS made public for purposes of trial preparation. Thus, it would seem that the veil of confidentiality is one that is extremely transparent. In practice, there is no guarantee whatsoever of confidentiality. This factor alone may be enough to drive well intentioned foreign investment out of the United States.

Confidentiality aside, disclosure of the information to Congress carries the threat that the entire review process will be politicized. In form, CFIUS should be a non-partisan review process that only addresses the merits of a transaction as they affect "national security." However, by giving Congress broad latitude in access to CFIUS data, Congress may be tempted to use such information as ammunition in attempts to derail a CFIUS decision. Certainly a member of Congress would have much to gain by publicly second-guessing an unpopular decision by CFIUS.

Exon-Florio may also be misused as an anti-takeover device.[109] Given the minimal scrutiny required for a member of CFIUS to call for an investigation, Exon-Florio could very possibly be used as a deal buster.[110] Should a United States company find itself facing a hostile tender offer, it will surely seek to invoke Exon-Florio. If defensive management is successful in getting CFIUS to initiate an investigation, they could buy themselves up to ninety days to plot their defensive strategy.[111] Given the speed and exactitude under which the majority of hostile tender offers

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108. Title VII of the Defense Production Act of 1950, *supra* note 79, at § (c).

109. Exon-Florio may also come into play in friendly transactions. It is clear that third parties cannot file notices under Exon-Florio. However, there is nothing in the law that prevents interested third parties from communicating with the members of CFIUS about any transaction involving a foreign investor. Further, these interested parties could also bring their political might to bear on the backs of their members of Congress who could ultimately influence CFIUS to commence an investigation. The potential list of "interested" third parties is virtually boundless. Shareholders, institutional investors, employees, major competitors, labor unions, state and local governments and many other individuals and interest groups possess significant political power. It is very easy to envision the situation where powerful local constituents of a member of Congress pressures that member to influence CFIUS to take action. As in the case of disclosing confidential information, it is certain that at some time, CFIUS and the application of Exon-Florio will become politicized.

110. It only requires the affirmative vote of one member of CFIUS to initiate the review process. As such, the potential for abuse is staggering. Target management will certainly seek to maintain close contact with a member of CFIUS during times of siege. By doing so, the target could provide the CFIUS member with sufficient ammunition to invoke Exon-Florio and indirectly derail a foreign hostile takeover bid.

111. *See generally supra* notes 79-82 and accompanying text.

commence, ninety days in plotting your takeover defense is tantamount to years of corporate strategy. Thus, it is almost assured that a target, given ninety days to formulate a defense, could easily find a white knight or big brother,[112] undertake a restructuring defense,[113] or complete some other action that would eliminate the threat of a hostile takeover.[114]

CONCLUSION

Direct foreign investment in the United States provides significant economic benefits. Frequently, foreign investment will serve as a stimulant to a depressed area or a company in financial hardship. A recent example of this impact is Bridgestone's purchase of Firestone Tire and Rubber Company. Prior to Bridgestone's acquisition, Firestone had con-

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112. *See* Gearhart Industries, Inc. v. Smith International, Inc., 741 F.2d 707 (5th Cir. 1984); *but see*, Unocal v. Mesa Petroleum Co., 493 A.2d 946 (Del. Super. Ct. 1985). In a typical white knight/big brother situation, a target's management has made the determination that the only way they can remain independent is to sell a large block of their stock to a friendly suitor. Frequently, to entice a friendly suitor, target management may enter into a "standstill" agreement that limits the white knight's ability to vote its shares and giving the knight the right to acquire additional shares. Although these agreements may not be in the best interests of shareholders, the target management can assert the business judgement rule and claim the takeover bid is not in the best interest of shareholders. Generally, if the standstill agreement does not consolidate voting power in the hands of management, courts will allow this defensive measure.

113. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. Super. Ct. 1986); *but see* AC Acquisition Corp. v. Anderson, Clayton & Co., 519 A.2d (Del. Ch. Ct. 1986); Robert M. Bass Group, Inc. v. Edward P. Evans, 552 A.2d 1227 (Del. Ch. Ct. 1988); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. Super. Ct. 1989). Restructuring defenses have in the past been very effective in deflecting junk bond and two-tier takeovers. In theory, a target company that undertakes a corporate restructuring should be able to provide its shareholders with a better value than is being offered by the suitor. Arguably, a suitor or raider is proposing the deal to enrich themselves where a restructuring should inure to the benefit of current shareholders. Further, in a restructuring, it is possible for current shareholders to maintain an ownership position in the company. As such, this is frequently viewed as a more palatable alternative than being cashed by a raider. However, as a practical matter, a restructuring defense may also be used by incumbent management to enrich themselves.

Another advantage to a restructuring is that a company does not necessarily open itself up to outside offers when implementing its plan. In this respect, a restructuring is superior to a white knight strategy. Should it be determined that the directors have offered to sell the company, and they receive (legitimate) unsolicited offers, the company may subsequently be thrust into an auction.

Restructuring defenses may include self tenders, crown jewel sales or sales of attractive assets, corporate divestitures, and recapitalizations.

114. A complete review of all the defensive measures and tactics available is beyond the scope of this article. This is an area of the law that undergoes daily permutations. Attempting to summarize such an area is virtually impossible. However, it is important to know that problems exist within the structure of Exon-Florio that may enhance the position of target management in hostile battles for corporate control.

Given this disclaimer, for a complete discussion of the law and strategies that impact corporate control battles see HOSTILE BATTLES FOR CORPORATE CONTROL 1989 (P.L.I. Nos. 632, 633) (prepared for distribution at the Hostile Battles for Corporate Control Program, Co-Chairmen Dennis J. Block and Harvey L. Pitt, Feb. 23-24, 1989).

sidered closing its truck radial tire plant located in La Vergne, Tennessee. Fortunately for the 1400 workers employed in this location, Bridgestone was able to keep the plant open. Additionally, the region was spared almost certain financial devastation.[115] Granted, foreign investment is not without its drawbacks.[116] However, Exon-Florio is not the proper mechanism in its present form to deal with the concerns being generated over foreign investment. As written, the law suffers from a severe case of overbreadth. The potential for abuse is great. The lack of clarity provides CFIUS with excessive discretion. Finally, there are too many questions that have been left unanswered by the proposed regulations.

To cure these problems, several solutions have been proposed. One such proposal was to provide a streamlined no-action procedure that would allow counsel for the interested parties to seek the equivalent of a Securities and Exchange Commission no-action position to the effect that the President would take no enforcement action under Exon-Florio.[117] Another workable proposal called for the inclusion of explicit regulatory exemptions for transactions involving specified types of industries.[118] The argument for this proposal is that the damage Exon-Florio could wreak on the economy would be minimized without compromising the integrity of national security.[119] Thus, it is clear there are solutions to the problems posed by Exon-Florio. Additionally, if action is not taken to eliminate the potential draconian impact of Exon-Florio, United States companies may see the international demand for their securities drastically reduced. Not only would this affect the long term market value of a company's securities, American shareholders would also suffer adverse economic consequences. As such, we should all think twice before jumping on the bandwagon in support of Exon-Florio.

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115. For a complete discussion of Bridgestone's efforts, see Tolchin, *supra* note 56, at 63, 81-93, 269.

116. *Id.* at 16-32, 259-274. *See also* Note, *An Evaluation of the Need for Further Statutory Controls on Foreign Direct Investment in the United States*, 8 VAND. J. TRANSNAT'L L. 147, 182-187; Little, *The Impact of Acquisition by Foreigners on the Financial Health of the U.S.*, NEW ENG. ECON. REV., Jul./Aug. 1982, at 40; Roberts, *A Minefield of Myths*, BUS. WK., Jan. 28, 1985, at 18; Reich & Mankin, *Joint Ventures with Japan Give Away our Future*, 64 HARV. BUS. REV., Mar./Apr. 1986, at 78.

117. *See* Wall St. J., August 30, 1989, at A10, col. 3. This suggestion was put forth by Susan W. Liebeler, former chairperson of the United States International Trade Commission, 1986-88.

118. *Id.*

119. *Id.*

BOOK REVIEW

Human Rights and Foreign Policy

REVIEWED BY DR. R.K.L. PANJABI*

HILL, DILYS M. (ED.), HUMAN RIGHTS AND FOREIGN POLICY: PRINCIPLES AND PRACTICE.** MacMillan Press, London (1989), ISBN 0333436547, 208 pp.

This book consists of a series of very interesting articles in the field of human rights. Most of the contributors are lawyers and political scientists working in England, Wales and Thailand. Their work will undoubtedly be a significant addition to an ongoing debate which has generated international interest and concern. This book will be useful both for international lawyers and for students who wish to acquire a variety of perspectives on the issue of human rights.

The significant international concern over the violations of human rights around the world has generated a spate of academic and legal writing on this issue in recent years. The attempt to promote the cause of human rights awareness has already yielded results, if events in Eastern Europe are any indication. Any book, article or pamphlet on this subject serves a useful purpose either in exposing violations or in analyzing the nature and scope of human rights and the serious implementational problems involved.

James Crawford in his book, *The Rights of People*,[1] explored the compatibility of the so-called third generation of human rights (including the right to development, right to peace and right to a healthy environment) with the first two generations which comprise civil and political rights and economic, social and cultural rights.

Dilys Hill and her contributors concentrate on another facet of this fundamental issue, the interconnections between human rights and foreign policy. They explore the link existing between a government's need

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** This book forms part of the series of *Southampton Studies in International Policy*. The University of Southampton hosted a Workshop Conference on Human Rights and Foreign Policy in 1986. Funding was provided by the Nuffield Foundation. The articles in the compilation were part of the proceedings of the Conference.

1. CRAWFORD, THE RIGHTS OF PEOPLE (1988).

to ensure the success of its foreign policy goals regardless of human rights considerations and growing world public opinion which demands that foreign policy makers recognize the significance of avowed commitments to human rights issues. The book emphasizes the international refugee crisis as a case study of the reluctance of governments in the developed world to come to terms with human rights issues within the context of long range planning. The existing system of largely ad hoc "bandaid" measures has failed to eradicate the fundamental causes of refugee flows and thousands of displaced persons have fallen victims to the restrictiveness of entry procedures into Europe and North America. These problems are inevitable when largely political solutions are proposed for a human dilemma, where the claims are also moral in nature.

In her introduction, Dilys Hill, drawing on the views of the participants in the Workshop Conference, examines the moral issues involved in human rights and explores the divide between universalism and particularism; between the idea of rights shared by all and the more precise concentration on specific matters relative to rights.

In a system based on nation states with sovereign authority, any implementation and action on human rights is largely in the hands of governments which have frequently shown considerable resistance to, and resentment of, external agencies and foreign states which seek to persuade or pressure them in the direction of improving their human rights record. Contributor Iain Elliot highlights this problem with reference to the U.S.S.R.'s record on human rights. While his article has a strong moral tone and is largely negative about the Soviet record, Elliot is careful to prove his conclusions with an analysis of the significance of the Conference on Security and Cooperation in Europe (C.S.C.E.) and the Final Act (1975). While the Government of U.S.S.R. averred its commitment to the Helsinki Final Act, Elliot points out that the same government has imprisoned sixty of the eighty Soviet citizens who joined unofficial human rights monitoring groups. Fifteen of the eighty were exiled, four died in prison and one was killed in a street accident.[2]

Examining the first years of Gorbachev's term in power, Elliot sees some improvement but feels that the human rights issue is not of primary concern in the minds of those who determine policy in the Soviet Union.[3] It would appear that attempts by the world's leading democracies to persuade the Soviet Union to improve its human rights record have had mixed results. Events in Europe since the writing of Elliot's article might encourage him. The loosening of Moscow's hold on Eastern Europe; the largely nonviolent democratic revolutions in Germany, Poland and Czechoslovakia, the tumultuous demands within U.S.S.R. for self-determination (specifically in Lithuania and Azerbaijan) all demonstrate a climate of greater freedom, even if it is accompanied by more political turmoil.

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2. D. HILL, HUMAN RIGHTS AND FOREIGN POLICY: PRINCIPLES AND PRACTICE 102 (1989).
3. *Id.* at 112.

Time will tell how far the Soviet political system will bend in implementing the human rights demands of its ethnic minorities.

To turn to the democratic states, Alex Cunliffe, in a lucid, very well-written article, discusses economic aid as an instrument for the promotion of human rights. Democracies like the United Kingdom and the United States have drawn criticism for neglecting the obvious connection between human rights and the grant or withdrawal of foreign aid. In the United States, the President most committed to human rights issues, Jimmy Carter, reduced aid to only three countries (Argentina, Uruguay and Ethiopia) out of fifty-seven serious violators of human rights.[4] Reasons of State obviously take precedence over human rights issues where American foreign policy is concerned. Cunliffe also believes that the British government's record is similar.

To encourage greater commitment by democratic governments to promoting human rights and increased receptivity by nations which are aid recipients to persuasion in this matter, Cunliffe supports the creation of reciprocal arrangements "whereby the donor's own political system may be subject to similar scrutiny."[5] The donor and recipient would then assess each other's human rights record on the basis of an equal footing. This might avoid the inevitable diplomatic crises generated by criticisms of a foreign government's domestic policies and actions by the donor country. Cunliffe also proposes that foreign aid be used to reward states with good human rights records, thereby lending encouragement to the continuation of such policies in the recipient state.[6]

The double standard whereby Western states do not practice as they preach is most evident in the international refugee crisis which is rapidly becoming a source of alarm for governments around the world. Estimates of refugee numbers vary. The United Nations believes that there are over thirteen million refugees.[7] These people have fled their homes because of political repression, economic deprivation and violations of their human rights. Most tragic are the cases of individuals kept indefinitely in "orbit,"[8] shuttled from country to country unable to find a home anywhere. The plight of the millions of international homeless has been seriously considered in this book and some extremely useful proposals have been suggested.

Recognizing the fact that states do not deal adequately with the causes of refugee flows and that the United Nations lacks the capacity to address this issue in any effective manner, the contributing authors have proposed that humanitarian institutions intervene before the commencement of refugee flows in order to avert a crisis.[9] Gil Loescher emphasizes

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4. *Id.* at 121.
5. *Id.* at 124.
6. *Id.* at 125.
7. *Id.* at 140.
8. *Id.* at 174.
9. *Id.* at 132.

the problems generated by the politicization of the refugee problem, an approach which might destabilize an enemy state but which can also reverberate on the receiving states which have to house, feed and clothe thousands of displaced persons. While the Western European and North American states were eager to accommodate European refugees from communist states, the reception given to Third World refugees has been quite different. Asian nations like Thailand have borne a heavy burden of refugee inflows and have grounds for feeling that there is indeed a double standard operating in this regard as far as Western states are concerned.

Recently, the National Film Board of Canada produced a film, "Who Gets In?," which explored the highly controversial nature of the Canadian Government's immigration and refugee policies. The film revealed that entry into Canada for those with wealth would be relatively simple on the basis of these policies. On the other hand, thousands of deserving candidates, many genuine refugees, were being denied entry. The film concluded by suggesting ironically that on the basis of such restrictive entry criteria, few of those who now enjoy Canadian citizenship would even qualify for entry into their country.

In his contribution to the book being reviewed, Johan Cels has explained the refugee policies of West European governments and he points out that "compassion-fatigue" has led to severe restrictions on acceptance of refugees and violation of the non-refoulement principles.[10] In Germany, courts have affirmed that fear of torture is not a sufficient ground for conferring refugee status unless the torture is "politically motivated."[11]

The proposals suggested by contributor Julia Häusermann (Director, Rights and Humanity) are practical and worthy of serious consideration. She suggests the strengthening of the "activities of the U.N. with respect to the underlying causes of flight"; a greater effort by states to implement humanitarian law, especially in wartime and thereby reduce the necessity for civilians to flee; consideration of problems of "potential displacement"; the further development of regional institutions to deal with the root causes of refugee flows and "the provision of relief assistance within the border of the victim's own country."[12] Häusermann also supports the recommendation by Prince Sadruddin Aga Khan (in his report on Human Rights and Massive Exodus prepared for the United Nations) for the creation of a "Corps of Humanitarian Observers" to monitor volatile situations. Prince Sadruddin also proposed the appointment of a Special Representative for Humanitarian Questions whose task would be to anticipate refugee flows and alert the international community.[13]

Vitit Muntarbhorn, a law professor in Thailand, adds to the concrete

10. *Id.* at 168.
11. *Id.* at 173.
12. *Id.* at 142-57.
13. *Id.* at 159-60.

suggestions in this book and considers the problem of self-determination and the State's claim to disallow secession. His recognition of the phenomenon of "internal colonialism"[14] leads him to propose that if the level of oppression of a minority approaches a point that resembles colonialism, then a right of self-determination arises which justifies secession.[15] Just how this point is to be gauged in unclear. Contributor Sally Morphet asserts that Third World countries have a variety of approaches to the idea of internal self-determination[16] and states that while a right of secession is not likely to become an implicit part of self-determination, the future might generate interest in a "cosmopolitan conception of international community in which state boundaries have a merely derivative significance . . . ."[17]

Finally, a review of this length can at best only distill the essence of a remarkable collection of essays, a number of them incisive in analysis and useful in the practicality of their suggestions for concrete action. From Moorhead Wright's plea for codification and implementation of human rights as having a moral claim in international society,[18] to R.J. Vincent's eloquent proposal that:

> A rational approach to human rights in foreign policy would recognize the reality of plural idealogies of the world of states, and seek a neutral language in which to express principles that ought to apply regardless of location in East or West, North or South.[19]

This book presents the reader not merely with a series of problems but also, with interesting solutions. As such, it forms a valuable contribution to the growing literature on this subject and one can only hope that those who formulate the policies of governments will read it.

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14. *Id.* at 190.
15. *Id.*
16. *Id.* at 83.
17. *Id.* at 86.
18. *Id.* at 52.
19. *Id.* at 63.